

THE HEARING RESUMED AS FOLLOWS ON THE 8TH NOVEMBER, 2000,

AT 10:30 AM:

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CHAIRMAN: Morning everyone.

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MR. HANRATTY: Morning Sir.

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MR. WALSH: Morning Sir. I have a few more questions for Mr. O'Brien.

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CHAIRMAN: Just before you actually start, I want to raise two matters with you.

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MR. WALSH: Yes, Sir.

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CHAIRMAN: Yesterday you were going to identify the location of some confusion on the part of one or other of the Department of Communications' witnesses as to the meaning of page 3 of the fax of January 1989. You know the document I am talking about?

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MR. WALSH: I do, yes; where I used the word "muddled". The three page - where there is a summary on page 3.

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CHAIRMAN: Well now, I want you to clarify - what problem do you see arose in that and where, in what instance? It is a matter of transcript, because this is evidence that has been given by this witness and other witnesses.

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MR. WALSH: Yes.

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CHAIRMAN: While I am not in anyway saying that it didn't occur, it certainly isn't manifest to me where the confusion arose. That's number one.

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More important still; in the course of your examination yesterday, you made reference to "on-going contact" or "discussions" between the Department and RTE after the 11th of January of 1989, and Mr. O'Brien here has fixed January the 11th, 1989, as the term "end of negotiation/discussions with the Department".

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MR. WALSH: Yes.

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CHAIRMAN: And again I want you to identify for me, precisely where those - when and where those - where is the evidence, more accurately? Where is the evidence of those contacts, because these are matters of importance as far as I am concerned?

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MR. WALSH: Yes, Sir. For cross-reference for the first point, Sir, I would refer you to the evidence of Mr. Grant on Thursday the 19th of October. I am not sure of which day it was, but the date was Thursday the 19th of October. And I haven't actually got the transcript here, but it will be here shortly, and I will give you the precise page and line number. The 19th of October.

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CHAIRMAN: 19th of October?  
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MR. WALSH: The evidence of Mr. Grant.

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CHAIRMAN: Evidence of Mr. Grant?

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MR. WALSH: Yes. My note of it at the time, in handwriting, was "FM and AM became muddled. AM became forgotten about, by accident maybe." That was my contemporaneous handwritten note.

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CHAIRMAN: Are we talking about the first matter, the location of some confusion on the part of --

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MR. WALSH: Yes.

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CHAIRMAN: Yes, I know what you are referring to.

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MR. WALSH: That's when the evidence was concerning, at that time, the three pages of a memorandum which was sent by fax. The first page dealt with --

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CHAIRMAN: Surely, Mr. Walsh, it wasn't anybody in RTE that - it wasn't in anything which RTE/the Department - wasn't it later that AM became abandoned or forgotten?

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MR. WALSH: Yes, but even at that time the evidence from Mr. Grant was that FM and AM seemed to become muddled. That's what his evidence was at that time.

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"They were concerning --"

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CHAIRMAN: We will check that.

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MR. WALSH: Your Lordship will recall there was a separate booklet, folder prepared of documentation for the Departmental witnesses, and we are dealing with page 66, where the FM charge at one stage was ú692. And then at page 64 of that booklet, RTE agreed to reduce the 692 to 614. And then the evidence was that there was no specific - I am not sure what the question was, but the answer was that "FM and AM became muddled. AM became forgotten about, by accident perhaps."

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CHAIRMAN: I note what you are saying. It is actually Day 191 I am told is the correct transcript.

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MR. WALSH: Yes.

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CHAIRMAN: To go on to the second aspect of the matter --

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I want you to identify specifically, and tell me where the evidence is of the contacts and what was said, or on the contact which you purport to say happened subsequent to the 11th of January between the Department and RTE?

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Now, I want a record of those discussions pointed out to me.

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MR. WALSH: I could stand to be corrected on that, Sir. I know for definite there was a meeting on the 5th, everybody agrees.

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CHAIRMAN: That's agreed. The end product is that Mr. O'Brien says very, very firmly - who was a witness of great clarity --

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MR. WALSH: Yes.

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CHAIRMAN: -- of recollection, that negotiations, call it discussions, call it negotiations --

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MR. WALSH: Whatever, yes.

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CHAIRMAN: -- ceased as between RTE and the Department as of the 11th.

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MR. WALSH: Yes.

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CHAIRMAN: That - that subsequent to the issue of the directive they neither heard nor saw anybody from the Department whatsoever, or talked to them.

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MR. WALSH: That's absolutely clear. Now where I - we know for definite, Sir, there was a meeting on the 5th of January. We know there was --

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CHAIRMAN: That's accepted. Now, what I want to know is, you went on to indicate that there were discussions, contacts and "on-going contact and discussions", I think that's the phrase you used yesterday, subsequent to the 11th. I want those identified. I want the precise

circumstances and the people involved and what was discussed.

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MR. WALSH: I don't think I intended on purpose to indicate that there were on-going discussions and contact. The contact context of my question, Sir, was that the evidence from the civil servants was that as far as they were concerned, the Department was concerned, they had consulted with RTE by reference to the meetings they had on the 5th and on the 11th of January, and the on-going contact and discussions between those two dates.

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Now, I may have inadvertently given the impression that some of those contacts and discussions went beyond the 11th of January, but I stand corrected in that, Sir.

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CHAIRMAN: No, I am quite happy for you to say no such discussions took place and there was a error, that can happen to anybody. But it must be clear, either they did or they didn't.

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MR. WALSH: No, no, the context I was putting it in - you will recall, Mr. Chairman, that both Mr. O'Morain and Mr. Grant and Mr. McDonagh, all three of them said that the Department had consulted with RTE in the month of January by the two meetings and the contacts inbetween the two meetings which lead to the RTE and the Departmental, ministerial agreement at ú692,000 for the matters in question there.

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They give clear evidence that as far as they were concerned that was sufficient consultation between the Department and RTE, because that was the bottom line figure of RTE at that time, until later on, on the 14th of February, or thereabouts, it was reduced to ú614,000. And that that was definitely the bottom line.

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CHAIRMAN: That was the bottom line as of the 11th.

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MR. WALSH: Yes, 692 as of the 11th, then amended later on by some maintenance figure of 44,000.

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CHAIRMAN: I will leave that for counsel because I don't have the exact documents.

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MR. HANRATTY: Sorry, Sir, that appears to deal with the second issue. But the first issue in terms of, from our point of view, if I might put it like that, and in terms of presentation, in particular whether it is necessary to recall Mr. Grant - the phrase that the "FM and AM became muddled", I can't recall from recollection whether he actually used that phrase or not?

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CHAIRMAN: I have a transcript.

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MR. WALSH: Page 4, page 191, Question 20.

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CHAIRMAN: Just a moment, everybody must get themselves a copy of the documents.

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MR. WALSH: Day 191, Thursday the 19th of October at page four, line 10, Question 20.

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"So it is your view then" - sorry, I will go to Question 19 to put it in context.

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"Question: Subsequent to the receipt of that letter the Minister writes on the 16th of February, 1989, to Mr. Justice Henchy setting out that the figure is now reduced from 692,000 to 614,000?

Answer: Yes.

Question: So it is your view then that what had been discussed there are the charges in relation to FM radio?"

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CHAIRMAN: Yes, there is no doubt about that.

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MR. WALSH: Yes.

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"Answer: Well, the figures refer to FM radio. As we go through this examination I am beginning to form the view that FM and AM were becoming muddled, and maybe AM was beginning to be forgotten about by accident, I don't know, but certainly the letter from the Minister to the Chairman of the IRTC does not distinguish between AM and FM, but the charge was the charge we had been talking about for FM only."

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CHAIRMAN: Isn't it clear from the letter to the Minister that the figures, the figures 692 and 614 only relate to FM? Isn't that clear at all times?



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MR. WALSH: If you read all the documents in totality that is one interpretation.

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CHAIRMAN: No, I suggest to you it is not a question of interpretation, that there is no doubt about it.

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MR. WALSH: Yes.

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CHAIRMAN: There are two specific sums being discussed. One is in relation to two separate, two separate matters, one AM, and I can't remember the exact figure, but a figure is given for bringing those two units into operation, and the second figure is 692 in the first instance, reduced to 614, and that relates only to FM. And there is no room for doubt about that.

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MR. WALSH: But Sir --

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CHAIRMAN: If necessary I will have him brought back.

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MR. WALSH: All I am saying, Sir, I wasn't party to - I am just listening to the evidence like you are, Sir.

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Let me just point out the fact, that is the evidence that Mr. Grant gave, it wasn't in cross-examination, it was in examination-in-chief.

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CHAIRMAN: No, the evidence that Mr. Grant gave is that it may have become confused in the Minister's letter.

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MR. WALSH: Well, he was referring to two letters.

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CHAIRMAN: Certainly the letter from the Minister to the Chairman of the IRTC does not distinguish between AM and FM. But the charge was the charge we were talking about for FM only.

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MR. WALSH: Yes.

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CHAIRMAN: That's the essence of that, and that section of evidence.

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MR. WALSH: Sorry, just for clarity, I am not making any major point.

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CHAIRMAN: I want to know, is the case being made that the two became confused in the mind of RTE? There is no doubt about that, that they didn't.

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MR. WALSH: The evidence now seems to be, as far as RTE are concerned, there is no doubt about it, but it didn't, Sir.

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CHAIRMAN: As far as Mr. Grant is concerned, so far as I know. However, if you can show me that I am wrong about that?

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MR. WALSH: No, I think what Mr. Grant was referring to there; there was two letters, Sir, a letter from Mr. Finn

on the 15th of February to Mr. Burke, and there was then Mr. Burke's letter of the 16th of February to Mr. Justice Henchy in the IRTC, and if you refer to the letter of the 15th of February, that's at page 31 in the general book of documentation, Mr. Lynn, it is:

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"Dear Minister, I refer to our discussions on the 14th of February in connection with points put to you by the IRTC in relation to charges proposed by us for the provision of various transmission services to Century Communications."

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Now, it doesn't distinguish at that point in time, and there was no heading saying, as there had been in previous documentation, "FM only" or "AM only".

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And then it goes on to talk about the IBA in the UK and so on. Then in the centre it says: "We have, however, as requested, reviewed very fully again our charges in relation to the final annual charge of ú692,000."

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Now again I take the point, Sir, that if at that moment in time one stopped and went back to the source documentation to see what the 692 was all about, it would obviously be for FM only. If you just relied on this letter, the two areas specifically examined are the maintenance charge and so on.

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Then they go on to deal with the allocation of the service charge, reduced from 10 percent to 5 percent. Then at the

bottom of the page: "Taking these two revisions into account it will reduce our earlier figure of 692 down to 614."

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Again if you refer to earlier documentation, Your Lordship's point is correct. If you didn't, you see the phasing-in, "On a point of detail I can confirm in all our figures there are no accelerated rates of depreciation." Then there is - that's the next figure.

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Now again, following on from that, the letter from Mr. Burke, which is at page 406, Mr. Lynn. Again there is no heading or "FM only" or "AM only" or "FM and AM", or whatever. It simply refers at the beginning: "Dear Chairman, I refer to our meeting in the documentation sent to me by the Secretary of the Commission regarding some aspects of the quote by RTE for the supply of transmission services."

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Now, that isn't saying it is FM only or AM only. And he deals with, he says that the annual charge of 692 goes down to 614.

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Now, I am not making any point, Sir; the only point I make on it is there was evidence there from the Department that at a specific point in time, between two short dates, if you look at those documents between those two short dates, it could be said that since there was no specific reference to FM only or AM only made, that's the only --

Now, a careful examination, going back to the source documentation and expanding the parameter dates for the purposes of examination, clearly shows the genesis of the 692 figure which came from this 914, which came from the 1.14 million and so on. And it is clear where it came from. But just on that point, where that evidence came from? That's where it came from.

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MR. HANRATTY: Can I respond to that, Sir?

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CHAIRMAN: Please.

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MR. HANRATTY: I think, Sir, it is an important point and it is a point that we have to get to the bottom of, because as My Friend has fairly pointed out, all of the sources of documentation clearly indicate that the ú692,000 related to FM only, that there was a separate page on the - for example, the January 11th fax for AM, and there was a third page showing the progressive implementation of the FM charges.

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Now, undoubtedly Mr. Grant did make this remark, which I would suggest is a sort of a throw-away remark for the reasons I think will become apparent in a moment.

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My recollection of Mr. Grant's evidence, I stand subject to correction on this; that he was absolutely clear, specific and unambiguous in his evidence, that there were separate figures for AM and FM. And that is borne out by the documentation to which he referred, and by the genesis of

all of these figures before they were even negotiated down by the Department.

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But insofar as My Friend is now seeking in some way to give some, or to attach some significance, that he used this phrase that the figures "appeared to be forgotten about" or "they were muddled", is it being suggested, and I think we have to be clear about this; is it being suggested that Mr. Burke requested Mr. Finn to reduce not only the FM figure but also the AM figure? And is it being suggested that when Mr. Burke wrote his letter of the 16th of February to the IRTC saying that "in Irish conditions the foregoing charges", that's the 614,000, which we all know is for FM, is it being suggested that Mr. Burke did not know when he wrote that letter, that it was in respect of FM only, or did he think that it included AM as well? Because with respect, Sir, in the context of all the evidence, both from the Department and the RTE witnesses, it is something which should be put to them, certainly not something which was put to the Departmental witnesses.

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CHAIRMAN: There is no doubt about that in the world. It is an important matter and it should be clarified.

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MR. HANRATTY: Perhaps My Friend could indicate to the Tribunal, is there any point being - I know he says he is making no point on it, but we do need to know what significance, if any, he is attaching to the phrase, the use of the word "muddled" in connection with AM and FM, and, in particular, whether any suggestion is being made to

this witness to the effect that Mr. Burke did not know when he wrote his letter of the 16th of February that he was talking about FM charges?

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MR. WALSH: No such point was being made or ever being made. I just pointed out the use of a word in the question, that's all.

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CHAIRMAN: Well then, I take it that you, you are not instructed to make the case that your client was confused in anyway that 614, which is the ultimate figure, related to anything but FM, and that the earlier figure was still agreed and unchallenged? Is that understood? Sorry, the earlier figure for FM.

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MR. WALSH: 692.

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CHAIRMAN: No, there is a figure for AM which I haven't got at the moment.

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MR. WALSH: Yes. This appears to be the case.

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CHAIRMAN: That appears to be the case?

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MR. WALSH: Yes.

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CHAIRMAN: Are you happy with that?

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MR. HANRATTY: Yes. Thank you, Sir.

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CHAIRMAN: Very good.

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MR. WALSH: Now am I allowed ask Mr. O'Brien a couple of questions, Sir?

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CHAIRMAN: Certainly. Carry on.

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MR. GERARD O'BRIEN CONTINUED TO BE CROSS-EXAMINED BY MR.  
WALSH AS FOLLOWS:

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1 Q. MR. WALSH: Mr. O'Brien, I know you have been here for more  
than a week and I don't want to detain you unnecessarily  
because you have RTE to run, and an application going  
through for an increase in the license fees, isn't that  
right?

A. Yes.

2 Q. Isn't it the statistic you gave about the increase in the  
license fees, was that every pound back in 1988/'89 terms,  
every pound of increase in those days was worth about  
ú800,000 to RTE?

A. Yeah, I am trying to recall the numbers of licensees, in  
terms of a pound, yes.

3 Q. We will move on so. Now, in relation to the 2 FM service,  
as such, in the annual accounts there doesn't appear to be  
any separate segregation of their income and expenditure?

A. No, there isn't.

4 Q. Right. And you indicated yesterday in cross-examination,  
that you thought that the income of 2 FM was approximately  
4 million pounds per annum gross, and that they had some  
overheads of 2 million pounds which left them with a profit  
of approximately 2 million pounds, is that right?

A. No, I don't think it, I know it. I checked it. In 1989  
the actual income was 4 million, and now speaking in detail  
from memory, 045; so 4.045 was the revenue of 2 FM in 1989.

5 Q. That's gross?

A. Yes. Their expenditure was just, it may have been just pounds short of 2 million, their direct expenditure.

6 Q. Yes. I see.

A. In the case of 1990 their revenue was just short of 4.1 million, and their income was just - sorry their expenditure was just marginally over the 2 million.

7 Q. Yes. I see. And then going into 1991 and 1992, was it more or less the same?

A. It would have improved because their income was growing.

8 Q. Yes.

A. And their expenditure wasn't expending very much, because as I said it is a music based station with very few employees and no change from one year to another.

9 Q. And its market share obviously must have increased?

A. It was increasing.

10 Q. Yes. In 1989 or 1990 what percentage of the radio market did it have, statistically?

A. You mean listenership?

11 Q. Yes, listenership?

A. I couldn't speak to that. Off the top of my head, I think somewhere like 30 percent or thereabouts, 28 or 29, I am not sure. I mean, there are several figures quoted in the JNLR and they quote Dublin, they quote, national, etc., I think the figure is around 30 percent.

12 Q. I see. And just to move on from 2 FM; would you say that there is - did I understand your evidence yesterday to be to the effect that there was no separate billing to 2 FM for access or for maintenance or for transmission charges or anything like that?

A. When we do internal management accounts, we allocate all these expenditures to the different services. We don't do this every single year but we do it regularly.

13 Q. Yes.

A. And all those allocations would be made in addition to financial services, etc..

14 Q. But you didn't actually allocate the amount for access?

A. Well, that would be allocated, I mean in our internal management accounts, when we are testing the premise, whether in fact the license fee, whether 2 FM is a burden on the license fee, which it isn't.

15 Q. I see. And going back to, September/October of 1988, when you were being asked to prepare some figures for the use of the management, say the Director General and Assistant Director General in relation to what figures should be charged for access and for maintenance and there --

A. Yes.

16 Q. -- a full service, you obviously did some research into the matter, isn't that correct?

A. Correct.

17 Q. And do you recall preparing the memo at page 5137 please?

That's the memo of the 24th of October, 1988?

A. Yes, I do.

18 Q. That's, I won't go through it all in detail, but it talked about the phasing-in of the coverage for a proposed national radio station up at the first paragraph?

A. Yes.

19 Q. Down at the, towards the bottom you have a heading there:

"Schedule 2 sets out the basis of a maintenance charge."

Then the very bottom line of that is "Charging Systems".

You go on to give the costs for the television and radio common infrastructure, and add in the common to radio only structures, and you come up with a capital cost of 10.5 million --

A. Yes.

20 Q. -- at the end. Now, that was looking forward into the future and what it would cost you to replace them; is that what this is about?

A. No, that was actually the current value of the infrastructure as it stood at that time, and that was purely the equipment, it excluded installation costs.

21 Q. How does that marry with the evidence you gave me yesterday, that the written down value of this stuff was 5 million?

A. I was speaking from memory yesterday, and I said we had two schedules and one was for replacement costs and one was for current written down values.

22 Q. I see.

A. Current values.

23 Q. But anyway, on the next page, the last page of that two page memo the very last sentence you have?

A. Yes.

24 Q. Sorry, if you scroll down again please, Mr. Lynn. The very last sentence is: "Essentially there is plenty of room for RTE to make a reasonable surplus on this service and we need to debate further the basis for the quote." Isn't that right?

A. Yes.

25 Q. Now isn't that, that's - that was where when you were giving evidence before, evidence-in-chief, you were talking

about leaving headroom and padding and room for uplift?

A. Well, we expected to go into negotiation on these figures.

26 Q. Yes.

A. And we did have some flexibility.

27 Q. Yes. And then the, there is a memo prepared by you on the

10th of November of 1988, that begins on page 5153. And

if I go to page 2 of that memorandum for the moment? At

the very top there you say that "the only figure likely to

be queried is the rigging service."?

A. Yes.

28 Q. "And the costings of - the gross cost seem to be 525,000,

and we are charging one-sixth of this. Perhaps we could

reduce this and increase something else? However, we could

say the rigging service costs 650,000 on the basis of

adding overheads to the cast centre of 20 percent, and then

the 86,000 would be 13 percent, or one-eighth of the cost.

Could we discuss this before Tuesday?" And so on.

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I suggest what you were doing there is, numbers are all

relative, and you are massaging and playing with the

numbers so when you apply a certain factor to them you end

up with the desired component result, in other words the

86,000 for rigging, and then justify that by saying that

represents 12 and a half or 13 percent, or approximately

one-eighth of the cost and you can stand over that cost.

But you are artificially inflating the rigging by saying

"Let's call it 650 and apply a reducing factor."

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It is clear from that, that you are massaging these

figures?

A. Just to explain that again - we were preparing internally for heavy negotiation on these figures. We knew that we would have to negotiate them. I was prompting my colleagues in engineering to look clearly and carefully at all of the figures. I picked out the rigging figure, or the transmission services figure as the - because it was the single largest figure left after the payroll figure. It was the only large figure on that whole schedule, and I wanted everybody going into this negotiation to be clear on what it was, to be happy with it, and in fact, far from reducing it, they increased it to 94,000 to allow for the additional work that would be involved in maintaining the additional infrastructure on for Century.

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So, far from listening to me, the engineers have their own mind and own view of these things, and that is the way it should be. And this is the purpose of all this correspondence, was to test the figures, to be satisfied with them and to be sure that when we went to negotiate them, that we actually knew and that everybody was happy that the basis of them was correct.

29 Q. Yes. But if the rigging figures were 525,000, why didn't you leave them at that and argue for a higher percentage if you wanted to increase the percentage from 12 and a half to 15 or 20 percent? Why didn't you leave the actual figures of 525, if they are the correct figures? Why do you turn around and say "Let's call 525, 650", that's what you are doing?

A. The 64,000 is based on 525,200.

30 Q. Yes, but why change the gross amount, so you can apply a

different factor which is more acceptable or standable over to end up with the same result?

A. It was a suggestion that it should be looked at and perhaps that was the way to present it.

31 Q. But do you see that some of the applicants, but particularly Century when they met you in November, they had a different philosophical approach altogether for the basis of the costs being charged for access and maintenance; isn't that correct?

A. Which was?

32 Q. That they should get access for free because they were going on it being a national asset. Do you remember that point?

A. I do.

33 Q. And may not, that was their point, it was should be a marginal cost charge?

A. Yes, which we rejected on both counts.

34 Q. You and your engineers or RTE collectively, or as a corporate-type body, rejected that philosophical approach?

A. We did for very good reason.

35 Q. Yes.

A. That we had, the Authority had agreed that each user should pay proportionately for the services they were consuming and on the marginal cost issue. No business could survive that type of policy, because it would mean that - I am not even sure what "marginal cost" meant, what it was meant to be. Nobody gave us a figure for it and it was probably unascertainable anyway.

36 Q. Yes. But you see, I suggest to you that if you take an analogy of a company such as, not saying this is a true

analogy, say a company such as Roadstone which once upon a time had a fleet of lorries and a fleet of company cars and had its own in-house mechanics to do maintenance and service work. Now, if you are a friend of the Financial Director of Roadstone and you wanted your car to be serviced by him but you didn't want it to be done for free, you just wanted to pay a reasonable cost for it being serviced by the Roadstone mechanics already on the payroll, do you understand me?

A. I do.

37 Q. The marginal cost argument, as I understand for that scenario would be, you look at how many mechanics worked on the car to do the service or the engine repairs and charge approximately the hourly cost with a little for general overheads, and you come out with a fee of ú200 or ú300 for a service. Do you understand that type of cost approach?

A. I hear you. Yes.

38 Q. Now, the other way which I say is analogous with the RTE approach is to add up the cost of all the lorries, the cost of all the equipment for the lorries and plant and big diggers they service, the cost of all the company cars and stocks they have to carry, the oil filters, oil, every single worker in the canteen, sweeping up the garage floor, the works, the insurance and everything, add the whole lot up and then "Oh, the roof might need replacing in 20 years time, you better add in something for the roof, what we think the cost will be in 20 years time." Then say two cars equals one lorry and apply a factor and come out with a billing of, for a service of 14 or ú15,000. When you do that, add all the costs in and divide by one day to service



a car, that's effectively the type of approach you adopted here to Century's maintenance?

A. No, I wouldn't agree at all.

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The correct analogy if you want to use Roadstone is, that if I am a friend of the Finance Director of Roadstone, I say to him "I am building an office block down the road and I am going to rent this at a fairly decent rent, etc., etc. By the way I see you are delivering cement to that crowd next door, the Corpo, they must have paid a big bill, why don't you just give me the cement for the price of the cement in the truck?" Wouldn't that be marginal costing?

39 Q. No, maybe you could argue that?

A. That is marginal costing, and does it make sense and would Roadstone be in business today if they did that?

40 Q. Maybe they do it, maybe we can have an inquiry to see?

A. I doubt it.

41 Q. But the point is, your engineering people were telling you, and you know that the general figures used by the IBA were to the effect that television is at least twice as costly in maintenance terms to radio, isn't that right?

A. There was an argument put forward in connection with maintenance, and we actually adopted that at the end of the day, because the maintenance figure came down to, by 20,000 when we applied that. And we actually also applied it, just for your information, in the figure included in the 692, which included the infrastructure. That was doing it exactly on the basis too, i.e. the one-eight.

42 Q. There was a point yesterday, I was talking to you about channels of communication in RTE; you wouldn't necessarily

know every note or memo that's going into the Director General or Assistant Director General or somebody in engineering, or you wouldn't necessarily know every contact people in engineering had with other applicants, if there were other applicants?

A. No.

43 Q. That's why you didn't know that 375,000 had apparently been offered by Century to somebody in RTE?

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MR. O'HIGGINS: I don't think this has ever been put to any Century witness by Mr. Walsh. I just wonder from where he purports to get that information?

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MR. WALSH: Thank you, Mr. O'Higgins. Mr. Stafford said they offered him --

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MR. O'HIGGINS: Sorry, I challenge Mr. Walsh. I would say emphatically Mr. Stafford said the figure was concealed from RTE and concealed for a reason. I don't want to interrupt Mr. Walsh, but I would submit, Sir, he shouldn't be putting matters to the witness on a false premise.

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MR. WALSH: As far as I understood --

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CHAIRMAN: I am sure Mr. Walsh is not doing it deliberately on a false premise. Perhaps you will take on board the submission, because it appears to have substance to me anyway. Mr. Stafford did not actually tell RTE the 375 --

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44 Q. MR. WALSH: Well, all I can go on, Sir, is the internal RTE document at page 5489, which is the 24th of February of 1989, and, Mr. Lynn, if you scroll down to the third paragraph there, which begins: "Ms. O'Byrne felt a decision should be taken that RTE should not back down any further." I think this is in relation to the 614 figure. "Mr. McAuley asked if there was no provision made in legislation or arbitration? The Chairman said "The Minister is the one with such power." Again Mr. Flannery asked what the gap was between the two parties? Mr. Gahan said Century were offering ú375,000." That was on the 24th of February of 1989.

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Certainly at that stage or some day, date before then ú375,000 had been offered by Century, at least that's what Mr. Gahan was telling the meeting. So that's the source of the fact that an offer had been made by somebody. That's why I prefaced it "somebody" had made the offer to "somebody" in RTE.

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You don't know who made it to who in RTE?

A. Mr. Walsh, the discussions with Century were in November '88. The discussions with the Department were between the 5th and the 11th of January of 1989. The Director General wrote to the Minister on the 15th, I think it is, of February 1989, and the Minister actually wrote to the IRTC --

45 Q. We know those dates.

A. Yeah, but it is important. And while I can't say where Mr. Gahan got this particular figure, I can assure you that

I certainly had no knowledge of 375 being an offer. I suspect, and it is open to you to ask Mr. Gahan when he appears here, that that was a figure that was being rumoured in the rumour machine somewhere along the line. And it appeared subsequently in a press report, there was an argument about what date it was, and it was the 7th of March it appears, okay?

46 Q. Yes, but if you look further down to the end of that same paragraph I started to open to you, you will see there, "Mr. Flannery thought this was going to become major. RTE was open to a charge unless it got its message across. A very careful PR strategy was needed on this one. So far RTE was not getting its message across about the cost. He felt it highly likely that the Minister would instruct the Authority to give it to Century at a lower rate. ADG Gahan said RTE gave the newspapers a response pointing out the exact figure."

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Now, doesn't that very clearly suggest that RTE were giving information to the newspapers so that it could be published by the newspapers, showing what the RTE side of the case is?

A. I would read that as meaning the newspapers contacted Mr. Gahan and suggested a figure of 375 was being offered, and this was being discussed at the Authority meeting on the 24th of February, but by then and from the 11th of February onwards there was no contact whatsoever with RTE. RTE had no opportunity at Ministerial level or Department level to make any points it wished to have made, and notwithstanding all the correspondence taking place with the IRTC

unbeknownst to RTE.

47 Q. Isn't that paragraph very, written in very clear and concise English? It says that "Mr. Gahan said that RTE gave the newspapers a response, pointing out the exact figure"?

A. Correct.

48 Q. Which means --

A. 614.

49 Q. RTE told the newspapers 614 was their figure?

A. Yes.

50 Q. Before that there was discussion in the Authority on the same day talking about getting the media on their side, the newspapers on their side, it is a PR campaign you are talking about?

A. And --

51 Q. Isn't that right?

A. If they are talking about a PR campaign, that's fine.

52 Q. Isn't that what - let's call a spade a spade, isn't that a PR campaign that's being discussed?

A. That's --

53 Q. I am not saying there is anything wrong with it.

A. I am not either, I am simply saying - I am not disagreeing with you. There was an issue being discussed about PR, yes.

54 Q. So that, you are getting the newspapers to run stories and to discuss this in the newspapers, trying to generate a bit of public controversy by putting your side of the story, maybe putting Century's side of the story?

A. I think there was a lot of controversy without us adding to it.

55 Q. Yes. And there was controversy, because the government had passed a legislation, the IRTC had come into being, the IRTC had awarded a franchise, Century won the franchise and yet there was no service and no sign of a service getting up and running as of the end of February or early March 1989, isn't that right?

A. Yes, but that wasn't RTE's fault, as we pointed out. RTE were the only people working on getting it on air.

56 Q. Yes. And I think then, that you referred to some newspaper articles that Ms. O'Raw showed to you, I think they were page - I have a page number for that so just bear with me for one moment. Yes, page 695 please, Mr. Lynn. If you can just - I wonder if I can have a hard copy of page 695? Perhaps - (Document handed to Mr. Walsh.)

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If you look at the top of page 695 there was a newspaper heading there "No Barry fee cut: RTE" ?

A. Mm-hmm.

57 Q. And then that refers to, "RTE chiefs were last night bracing themselves for an expected ministerial directive" - this is the 13th of March, 1989?

A. Yes.

58 Q. And if you go to the second column? It is referring to an RTE spokesman: "RTE cut the cost to a minimum and was not in a position to bear any losses if the figure was reduced. Effectively we are going to be put into a position where RTE are subsidising their our rival on the national airwaves."

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It goes on to say: "The row also took a new twist when it

emerged that Fine Gael leader, Alan Dukes, wrote to the Taoiseach indicating his party would not object if the Minister for Communications, Ray Burke, directed RTE to agree a reasonable price with Century."

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And then it went on to say: "A decision from Mr. Burke is imminent."

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So doesn't that appear to suggest that there was cross party support for Minister Burke acting to resolve the impasse, if you can call it that, between Century and RTE?

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MR. O'HIGGINS: Maybe Mr. Burke could call Mr. Dukes to indicate that, Sir?

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MR. WALSH: This newspaper was put in evidence by - I am just reading what's in it. If it is evidence for one side it should be evidence for everybody.

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CHAIRMAN: It certainly doesn't bear out the proposition that RTE was told 375.

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59 Q. MR. WALSH: No, I am not introducing it as that.

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If you go to the article, Mr. Lynn, on the left-hand side of that page, "No Cut in Fee to Barry - RTE", it seems to be continued from page 1. I don't seem to have page 1. And the second paragraph there says that, "At present Century is offering ú375,000 annual fee for transmitting its signals but RTE is insisting on an initial fee of

€200,000 in the first year, rising to €614,000 by the fourth year of operation."

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That's a correct summary of the RTE position anyway, isn't that right, Mr. O'Brien?

A. Yes, that appears to be, yes. But the 375 was, let's say, a media figure.

60 Q. Yes, but that figure is, the 200 to 614 is clearly accurate information furnished by somebody to the journalist writing that article?

A. Well, I would suggest that perhaps Mr. Gahan in responding to the 375, provided the figure for FM to the papers, perhaps. I don't know, I can't answer that.

61 Q. Yes. Just wondering, Mr. Lynn, could you go to the next page. There were some other articles on the next page, maybe, from the Irish Times? The Irish Times article there on the right of the page, the next page, "RTE Cannot Reduce Service Costs to Century." Again on the 13th of March. Do you see that article?

A. I do, yes, I do.

62 Q. And again in the article itself it indicates, "RTE cannot reduce the cost to Century Communications: A spokeswoman for the organisation insisted last night as Fine Gael urged the Minister for Communications, Mr. Burke, to unlock the logjam that now existed. The two organisations have been deadlocked since last month as RTE demanded €614,000 for the facilities, while Century offers just €375,000."

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I mean, again this appears, I suggest to you, on one view,



that, to be dealing with information that the spokesperson from RTE is giving to the journalist.

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Then the next paragraph goes on to say:

"The Fine Gael leader, Alan Dukes, said the Minister has a responsibility to take action in the dispute because he did not like the idea of the new radio station being held up because of a rearguard action by RTE. A spokesman for the party called on the Minister to set up a form of arbitration between the disagreeing parties." And so on and so forth.

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So doesn't that indicate a degree of support for Century going on air and for the logjam between the parties to be resolved?

A. I am not a political commentator, but Mr. Bruton didn't define "reasonable".

63 Q. No, Mr. Dukes at the time?

A. Mr. Dukes. And I don't think a form of arbitration, there was no arbitration, and there was certainly no opportunity for RTE to respond to correspondence that was taking place in private without its knowledge.

64 Q. Yes. And - but you know from the Minister's point of view, and from the Department's point of view, right from the very first meeting on the 5th of January it was indicated, and you took a note of it, that there was no question as far as the Department were concerned, of RTE being asked to subsidise the new station, whoever that might be. Isn't that right? Wasn't that clear?

A. That statement was made, yes.

65 Q. That was made on the 5th of January, and at that meeting on the 5th of January, it was called to discuss a charges form for the potential successful franchisee, whoever that might be. It wasn't know who it would be at the time, isn't that right?

A. Yes, that's correct.

66 Q. And I think, again after the directive was made, it was RTE were again reassured that there was, there was no question of a subsidy being involved, and that's why there was a review provision within 18 months?

A. Mr. Walsh, are you asking me a question about that?

67 Q. Yes. Isn't that what was stated?

A. I think the evidence here showed that the Authority's view wasn't, was that there was a subsidy, although it wasn't said clearly. And the view in RTE, at all levels, was that there was a subsidy, and in fact the Chairman's letter, I think to the Minister, subsequently after the press statement, pointed out the reservations.

68 Q. It was, yes, but he welcomed the review of 18 months, and said that "time alone will tell". Isn't that what he said in the last line?

A. That's correct, and a review didn't take place because --

69 Q. The review never took place. That's a fact?

A. Because Century was in dire financial trouble, that we weren't even paid for the small amounts we were invoicing them.

70 Q. I have no more questions.

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CHAIRMAN: Anybody else want to ask any questions?

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THE WITNESS WAS EXAMINED BY MR. O'HIGGINS AS FOLLOWS:

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71 Q. MR. O'HIGGINS: Very briefly a few matters, Sir.

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If I might just clarify, Mr. O'Brien; I think this was already said, just to take the ball on the hop so, Mr. Walsh dealt with it; I think the review after 18 months related only to the maintenance figure in any event, is that right?

A. That's correct, yes.

72 Q. Yes. Now, if I can just take you back a little bit,

because we broke at lunchtime yesterday on the basis that the Chairman had wished you to have an opportunity to look at accounts, because Mr. Walsh had raised an issue in relation to surpluses for the years 1991 and 1992, which it appeared founded the basis of a claim that the cap had no significant adverse effect on RTE, and I think you had said, though you didn't have it in front of you, that there was a note to the accounts and everyone looked at the figures afterwards, but the matter was never returned to by Mr. Walsh. So perhaps you can just explain what the position was vis a vis the surpluses which appeared on the accounts for 1991 or 1992?

A. Yes, Mr. Higgins. The surplus for 1991 was 8.7 million.

It was 8.774 and three zeros. And the cap excess was 8,500,000, that is 8,500 and three zeros, leaving a net surplus of ú274,000 for 1991, that was the effect of the cap in 1991.

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In 1992 there was a surplus of ú11,374,000. And the cap

excess was 9.4 million, leaving a net surplus of 1,974,000.

73 Q. So is the net effect, that although the accounts for the two years showed surpluses of approximately eight and three quarter million, and almost eleven and a half million, that the accounts showed, as it were, income which could not adhere in the long run to RTE because of the cap, and that in fact those surpluses, although adhere in the accounts, were not in fact surpluses that stood to RTE at all?

A. That's correct, Mr. O'Higgins. In fact in the accounts of 1993, 31st of December of 1993, in Note 11, there was actually - when the act was repealed, it was actually stated here that the cumulative revenue earned in excess of the statutory level during the operative period of Section 3 of the Act, was 17.9 million.

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Based on consultations with the government the Authority has dealt with this excess as follows: 13 million was provided at the 31st of December, 1992, following enactment of the Finance Act of 1993. 13.4 million was paid to the Exchequer at the end of the year December 1993. The balance of four and a half million has been provided for the year ended 31st of December, '93, in respect of the establishment of Teilifis na Gaeilge, effectively that money was all paid to the Exchequer.

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There is a further part of that note that goes on to deal with the interest and the interest portion, which amounted in total to 1.1 million at that stage. It was also in fact put to the credit of the Teilifis na Gaeilge venture.

74 Q. Yes. Now, if I can just go on to another, unrelated

matter; I think there was some question that Mr. O'Morain recalled that he had talked to you in relation to RTE matters prior to his producing his memo in preparation for the meeting with the Minister of the 5th of January of 1989.

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Did you have any communication with him?

A. No, my clear recollection of - the first I heard of that meeting of the 5th of January of 1989 was from Mr. Finn, Director General, either the previous day or the day before that. He asked me to a meeting in his office, saying that we were to go down to the Department to meet the Minister, to discuss what was euphemistically called the "Century charges".

75 Q. Yes. Now, there was also some reference made in that memo to a figure which was being offered by Century, I can't recall offhand whether it was 350,000 or 375,000; had you any knowledge of any such figure?

A. No, not at all, of any such figure, and no offer like that had ever been made.

76 Q. Yes. Where could you have gained knowledge of any such figure?

A. Well, I couldn't have because I didn't have it. The only place I could have gained that knowledge would have been Century who actually in fact - Mr. Stafford, as you pointed out earlier, had specifically noted that he didn't have RTE's figures, because he felt it would be a "bad commercial decision", I think is what he said.

77 Q. In relation to meetings generally, do you have any system in relation to the noting of the contents of meetings or

what takes place at them?

A. Yes. Well, I have to say either formally or informally, of course notes are kept, but I can assure you that if anybody had suggested that somebody was expecting to receive the FM service for 375,000 I would have written very extensively about the matter. I have no doubt whatsoever about it.

78 Q. If you have any idea about the figures, would you be likely to have raised those with the Department to inquire as to their basis?

A. There is no question about it whatsoever. We would have certainly written about it. We would have been fully aired and discussed any details sought.

79 Q. Yes. Now, just to deal with another matter; it is suggested that a combination of RTE's oppressive conduct and the running of RTE 2, on a subsidy from RTE 1, combined to undo Century financially, and it emerges from meetings, a meeting I think in January or February 1990, between Mr. Stafford and Century's bankers, that the departure of Mr. Laffan would save Century 120 million, sorry ú120,000 per annum, and the departure of Mr. O'Neill, their Head of Marketing or advertising would save them ú90,000 per annum. Have you, for the sake of comparison, got equivalent figures for the salaries of the Director General of RTE and their Head of Marketing in 1989/1990, at that time?

A. Yes, Mr. Higgins I have. The salary of the Director General, which is a matter of public record, was ú56,844. And the divisional heads, that is the Head of Marketing, and indeed myself, would be on a salary range of ú40,308

pounds to €42,375 at max.

80 Q. Yes. Just lastly, I think it was put to you by Mr. Walsh yesterday, that the effect of what happened was not particularly destructive from RTE's point of view.

I would just like to ask you one thing in passing: when you referred to the surplus generated by RTE in a nonprofit making organisation, what's the point of making a surplus or the purpose of having one?

A. Well, the main purpose of having one is to be able to reinvest in the capital, because from the accounting cashflow point of view, obviously the surplus generates cash which then is spent on fixed assets and recovered later on through the income expenditure account by way of depreciation in the accounts.

81 Q. If RTE did not make a surplus, and reasonably significant surplus each year, what would the effect on its service be?

A. It would be unable to maintain its capital and it would be unable also to renew and to buy equipment that is needed if one is to compete with say the main competition in television which comes from Britain.

82 Q. Yes. Now, on the suggestion which appeared to be implicit in Mr. Walsh's questions yesterday, that there was no harm done, so-to-speak by virtue of the cap, have you been in a position to calculate what the position would have been in succeeding years were it not for the removal of the cap by the 1993 Act?

A. Yes, I have. In fact, I have - I have calculated the figure of what the excess or the cap would have been in the years 1993 through 1999 because it is, just to remind

everybody, the cap was really the previous year's license fee revenue plus inflation, that is CPI. As I did these figures this morning, I didn't have accurate CPI figures, so I actually adopted 3.5 percent --

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MR. WALSH: Sorry Sir - excuse me, Sir - I was just wondering since this is a speculative mathematical --

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MR. O'HIGGINS: Sorry, this is not a speculative mathematical exercise.

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MR. WALSH: He says he hasn't got the accurate figures, that's the first point. The second point is dealing with a situation that might have been but wasn't, it is not taking any account of a very important factor; one, the decisions actually taken by RTE as to running the business post 1993 when the cap was no longer there, and you can't ask for an analysis of figures knowing what RTE did spend, knowing what the results actually were, that's one side of the equation, and then applying to them another set of facts which are completely artificial, because if the cap had been there all along, obviously RTE would have progressed its business differently. You can't take half an apple and marry it to half a banana and come with up a certain mathematical result.

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Because Mr. O'Brien has already given financial evidence, because he was there, that RTE trimmed its adjusted, its business practices, financial practice when the cap was there between 1990 and 1993. Now, it is not fair then to



try and extrapolate from the 1993 to the '99 position, as six years, and look at what the actual figures were; then based on what the actual business practices were for that six year period, and then take a different mathematical basis for the capping and try and superimpose that capping on top of a different base plan and see what the result would be. I mean that's what you call playing with figures, in my respectful submission.

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MR. O'HIGGINS: Sir, with respect to My Friend, these are not speculative figures, nor do they relate to cost, they relate to actual advertising income and how much would have been allowed to be kept by RTE if that income were, if the cap still remained.

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Mr. Burke, both in a statement, and Mr. Walsh through his cross-examination, have indicated that in effect, nothing particularly contrary to RTE interests resulted from anything he did. Since he has raised that issue and his client has, then in my respectful submission, Sir, I should be entitled to give what the incontestable figures are. The only assumption Mr. O'Brien said he has made, because he didn't have the precise figures to hand was that the Consumer Price Index for each of the years he is talking arose at approximately 3.5 percent, it may have been higher in some years and lower in others, but that is certainly something which can be dealt with by way of clarification, if there is any significant departure. But he certainly can give us figures which manifestly illustrate what the cap effects would, without question, have been.

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CHAIRMAN: I am satisfied that the evidence is relevant and is admissible. Thank you.

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83 Q. MR. O'HIGGINS: Yes. Just to indicate from the year 1993 onwards, Mr. O'Brien; if the cap had remained what would the effect have been on RTE's income?

A. Do you want me to call the excess for each year?

84 Q. Yes.

A. Excess for 1993 --

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MR. WALSH: Perhaps we can be provided with a summary of the finance details Mr. O'Brien is reading from?

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MR. O'HIGGINS: I have no objection to supplying My Friend

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CHAIRMAN: I will rise for the mid-morning break and in the interval we can supply it to you. Thank you.

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MR. O'HIGGINS: Yes, yes.

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CHAIRMAN: We will sit again about five past twelve.

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THE HEARING THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AGAIN AS FOLLOWS:

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MR. HANRATTY: If you just bear with us for a moment, Sir, there are one or two people missing, apparently.

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CHAIRMAN: Certainly. I came back a little bit early.

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MR. HANRATTY: You did say five to twelve.

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CHAIRMAN: I think I did say five past twelve, I think that's the problem. It is just three minutes past 12 at the moment.

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MR. WALSH: I apologise, Mr. Chairman, my watch is slow.

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CHAIRMAN: No, no, my fault. I actually did say five past twelve. There is no question of anybody being at fault, except myself.

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MR. O'HIGGINS: Sorry, Sir, I was about to apologise to yourself.

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CHAIRMAN: No, that's what happened. I simply looked at my watch, said 12 o'clock, it is time to go back in. I did actually say five past twelve.

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MR. O'HIGGINS: Mr. O'Brien --

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MR. WALSH: Sorry, Mr. O'Higgins has kindly supplied me with a copy of handwritten numbers, Sir. They deal with some mathematical figures from apparently RTE accounts, and the only point I would say, Sir, is that what is before me appears to take the position of actual license fee income over a period of six years, from 1993 to 1999, and it also takes into account what the actual advertising income from

all sources was, in that same six year period.

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And then it seeks to extrapolate from the license fee income what the capped advertising fee would be for the same six year period. So what they are trying to do or what the suggestion is, is if government policy had not changed between 1993 and 1999 what would the position have been?

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Now, in my submission, that's irrelevant and speculative evidence, because it would be like saying when the government decided in 1956 and 1957 to close down the Dublin Harcourt, the Harcourt Street/Bray railway line, if they changed their mind after three years, then we come and look at it ten or 20 or 30 years later, what would the cost of that decision, the original decision have been if they hadn't changed their minds three years later? In other words, how much would it then cost to put in a DART and LUAS?

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So it is speculative evidence, Sir, and it doesn't bear any relationship to reality, which is the - the reality is the government brought in the 1990 Act, the government of the day brought in an amending act of 1993 and that's the beginning and end of it. We shouldn't be listening to speculation on what might have been if the government didn't change their mind in 1993.

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We may well then go on to say what might have been if RTE was abolished altogether in 1995, what might have been if

digital terrestrial televisions had been brought in, in 1997? What might have been if something else happened in the year 2,000, for example, no account is taken at all of new people in the market, Teilifis na Gaeltachta.

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So I don't think it advances your inquiry, Sir, into what happened in the period 1988/'87 to 1990/'91, I don't think it advances that in anyway.

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MR. O'HIGGINS: Sir, I submit there is no speculation about the figures. They are hand figures which can be looked at in the light of specific legislation which was eventually removed but might not have been. What I am trying to explore is what would as a matter of hard fact have been the effect on RTE's income were the Act to continue unrepealed. I would seek to be allowed call evidence as to the figures, what the Tribunal considers to be relevant or not, as a matter of due --

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CHAIRMAN: I am prepared to accept the evidence de bene esse, but I do not necessarily take it as relevant in one sense and, if one approaches the situation in a particular manner. I am certainly not going to decide now whether I approach the matter in that way.

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MR. O'HIGGINS: No, plainly a matter for yourself, Sir, of course.

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CHAIRMAN: As a matter of further consideration.

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THE WITNESS CONTINUED TO BE EXAMINED BY MR. O'HIGGINS AS  
FOLLOWS:

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85 Q. MR. O'HIGGINS: Mr. O'Brien, as I think we all know, there was two elements to the advertising changes made in the 1990 act, one was to reduce the minuteage, which was allowed for advertising, and I think that remained unchanged, isn't that so?

A. For radio it has, but television was restored.

86 Q. Yes. Assuming that the financial cap, the second element, the maximum amount which RTE was allowed to earn, had not been removed in 1993, is it possible to say what effect that would have had in each of the subsequent years on RTE's income?

A. Yes, because in fact it was very easily calculated; it was the previous year's license fee, increased by the CPI, for that year.

87 Q. Yes. So in each of the years since 1993 what would the effect have been?

A. Well, the excess in 1993 would have been 15.3 million. In the year 1994, it would have been 20.1 million. In 1995 it would have been 25.2 million. In 1996 it would have been 28.9 million. In 1997 it would have been 29.5 million. In 1998 it would have been 30.6 million. And in 1999 it would have been 36.3 million, or in total 186.2 million pounds.

88 Q. Yes. What are RTE's entire capital assets valued at present?

A. At the 31st of December of 1999 the net assets and the reserves indeed of RTE were 169.4 million.

89 Q. As compared with a loss cumulatively if the cap had remained in place?

A. If this had applied RTE would have a negative worth of minus 16.8 million.

90 Q. Yes. What would the implications over those years for RTE's capacity to provide television and radio service be?

A. Well, obviously it couldn't really have remained providing the services at anything remotely like its current level, nor competed with the competition, particularly from the UK.

91 Q. Thank you very much, Mr. O'Brien.

A. Thank you.

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MR. WALSH: Just two questions I forgot to ask. I just want to ask a couple of questions arising out of this evidence, if I might, Sir?

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CHAIRMAN: Well, I don't want to make it a rule of re-examination.

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MR. WALSH: Yes.

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CHAIRMAN: But if you confine yourself to five questions, I will happily allow them.

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THE WITNESS WAS RE-CROSS-EXAMINED BY MR. WALSH AS FOLLOWS:

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92 Q. MR. WALSH: Yes. Very good. The result of the cap legislation, that did in fact exist historically, was that in 1993 RTE paid to the Exchequer some 13.4 million pounds,

isn't that right?

A. Paid to the Exchequer 13.4 million pounds and it also --

93 Q. It kept back about 4 million which it used for Teilifis na Gaeltachta?

A. And interest of 1.5 million.

94 Q. Did it keep it for Teilifis na Gaeltachta?

A. This was the seed capital for Teilifis na Gaeltachta.

95 Q. I see. If we just assume that that system, the capping legislation stayed in until 1999 and assume that RTE applied the same manner of managing its fund as it did up to 1993, it would mean that in 1999 you would be in a position to pay over to the Exchequer 186.293 million, that's what you are saying?

A. No, I would think, Mr. Walsh, the effect of it would be that the losses are so large and the capping amounts so large that RTE just couldn't remain in business.

96 Q. Yes. No, no, but if you kept the money on deposit in the bank account you would have the 186.293 million and accumulated interest on it?

A. You - if you remained in business; to remain in business you have to spend money to provide programmes to be on air, to provide all the services. The outcome would have been in that case, if that money was kept in a bank and RTE had to borrow a similar amount, they would have had a loan from a bank for which they would have paid a huge amount of interest, plus this money would be on deposit.

97 Q. Then you have a back-to-back that we have heard so much about, isn't that right?

A. I don't think you would be in business, Mr. Walsh.

98 Q. Now, the next question, I just want to ask you a very



specific question. In the middle of it you have this handwritten sheet for 1993, you say the license fees are ú48,929; is that right?

A. The license fee for 1992, the cap was based on the previous year.

99 Q. So that's 1992's license fee?

A. It is.

100 Q. I see. It's all right. Two other questions that I forgot to ask, and with your permission, Sir?

CHAIRMAN: Two short ones.

101 Q. MR. WALSH: I can combine - there is two items I want to ask you a question on, not on this list at all, on the general bill that was given to the national radios, and then specifically Century after they were awarded the franchise. The once-off charges, there were two items on the once-off charges both for AM and FM, a project management charge and an installation charge?

A. Yes.

102 Q. I am not going into the figures, but in a sense, would you agree with me that the sum charged for both the project management and for the installation would represent some amount of profit for RTE on the basis that it already had the staff, which was on its payroll so-to-speak?

A. That staff would be already working on projects for RTE, and RTE needed to be remaining competitive, to remain competitive it had to have its equipment up-to-date and its equipment in place.

103 Q. Yes.

A. And if they were working on Century they do that,

consequently RTE would probably have subcontracted part of it, and I think that is actually what happened.

104 Q. I see. Thank you very much.

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MS. O'RAW: Just a couple of very short matters, Sir.

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CHAIRMAN: Yes.

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THE WITNESS WAS THEN RE-EXAMINED BY MS. O'RAW AS FOLLOWS:

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105 Q. MS. O'RAW: Mr. O'Brien.

A. Ms. O'Raw.

106 Q. Good morning again.

A. Good morning again.

107 Q. Mr. Gavigan raised a couple of issues. I would just like to deal with them in order very briefly with you.

A. Certainly.

108 Q. One of the matters he raised, and he said "RTE didn't", and the word he used was "bother": "RTE didn't bother to produce a contract or Heads of Agreement until June of 1989." Can I ask you, did Century bother to produce a contract or any Heads of Agreement during that period?

A. None.

109 Q. Thank you. In relation to the promotion of 2 FM and the spending of 2 million pounds, has RTE any obligation not to adjust to alterations in the competitive environment in which it operates?

A. No. First of all, Ms. O'Raw, I didn't say that we spent 2

million, I very much doubt that we did.

110 Q. I am aware of that?

A. Maybe it was 200,000, more like the figure. But RTE has an obligation, if you like, as a public service broadcaster to ensure it has as wide as possible an audience for its services. So therefore it must remain competitive and keep its audience, so it has that obligation, if you like. So it must actually in fact, there is an obligation on it, nothing in the Act anywhere that says it should not promote itself at all.

111 Q. I see. And then, one of the other issues that Mr. Gavigan raised was, "Did you make any effort to acquire 14 year money at that particular time?" When you said "We did", "Do you have any documents to substantiate that?"

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Could I refer you please to the documents at page, starting at page 5280, and this is a letter from yourself, dated the 20th of April of 1989. This is to Mr. Peter Morris of Bank of Ireland Corporate Services Limited, and it says:

"RTE is acquiring broadcasting transmission equipment to the value of about 1.5 million pounds on behalf of Century Communications Limited and is seeking quotations for the financing of it. The finance period quoted should be based on options of 7, 10 and 14 years."

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There is a similar letter then at page 5281 to Woodchester Leasing, to Allied Irish Banks Limited on 5282, and we have a response on page 5243 from the Woodchester Bank, but those first three letters, are they your attempts to acquire 14 year money?

A. Yes, they were. Indeed, in fact this was discussed with Mr. Stafford, and I wrote those letters in fact after consultation with him, and I copied him on them, there are actually a lot more letters.

112 Q. Yes, yes, this is just a sample?

A. There is a sample, yes. I also sent him, indeed Ms. O'Raw, at the end when I got all the figures, that may have gone to Mr. Laffan and indeed Mr. Stafford, a summary of all the replies that came in.

113 Q. Yes. I think at page 5243 we have a letter coming back from Woodchester, addressed to yourself, and they have said: "As Century Communications Limited have a seven year franchise, payments have been calculated over this period."

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And on 5244 there is a breakdown of the calculations there. Mercantile Credit write back on the 16th of May, 1989, page 5241 please, and they give figures for five years and seven years. Woodchester, we have that one. Allied Irish Banks then at 5245, they come back with a seven years and ten years?

A. Yes, I think they say they weren't prepared to go beyond ten years.

114 Q. Yes. And Capital Leasing Limited on 5247, again they come back with five years and seven years?

A. Yes.

115 Q. And Bank of Ireland Corporate Services on 5248, they come back with a lease period of seven years?

A. Yes.

116 Q. And I think on the second last paragraph it says:

"I should add that it would be outside our norms to extend leases for 10 to 14 years as mentioned in your letter."?

A. Yes.

117 Q. And then at 5249 we have a letter from yourself to Mr. Laffan?

A. That's correct.

118 Q. And is this where you indicate the various periods that are --

A. These were the results of the inquiries I had made, and indeed many of those people quoting those leases would only have done so because I had to, as it were, put a bit of pressure on them to do it, because they were satisfied to quote figures provided RTE was the lessor.

119 Q. Yes.

A. But not otherwise.

120 Q. So, they were attempts by RTE then to acquire 14 year money?

A. They were, but they were actually in fact, as you can see there, they are - 14 year money simply wasn't available. And by and large, Allied Irish Bank were quoting 10 years, they were put under quite a bit of pressure to do so.

121 Q. Yes. Did anyone at all come back to say 14 years was available?

A. From my recollection, no.

122 Q. Yes, there doesn't seem to be any documentation that would seem to indicate that?

A. It wouldn't have been normal, because in fact seven years was stretching it.

123 Q. Indeed carry on issues raised by Mr. Walsh, in relation to the issue of Exchequer borrowings?

A. Yes.

124 Q. I think you said that RTE were, had paid back all of the Exchequer borrowings?

A. They did, in 1990.

125 Q. Out of what funds?

A. Out of the sale of CableLink.

126 Q. Out of the sale of CableLink?

A. 40 percent of CableLink was sold in 1990, and RTE repaid out of that fund the full amount of Exchequer advances, including interest outstanding. I think the figure was 16 million.

127 Q. Did it use any of its current income to pay any of the Exchequer borrowings?

A. No, it didn't, no.

128 Q. It was all out of the sale of CableLink?

A. It was, yes.

129 Q. I see. And then in relation to the issue of whether RTE had calculated the marginal cost, had the issue of marginal cost been discussed with the Department?

A. I think it was referred to in our meetings during the period 5th of the 11th, but it wasn't discussed in any great detail because they could see how inapplicable it was.

130 Q. The Department saw that marginal cost was inapplicable?

A. They couldn't sustain any argument for it.

131 Q. I see. Did you discuss replacement values?

A. Yes, this was clearly stated on the schedule that they received.

132 Q. What was their attitude in relation to replacement values?

A. They wanted to see the book values. When they got the book

values we had a discussion and we decided what they were doing was the correct approach.

133 Q. They decided replacement value was the correct approach?

A. They agreed with the point - we were trying to replicate a market value. Looking at a value of 30 years before or 20 years before was not a way to do it.

134 Q. Yes. In relation to the 1990 Act then, and representations made in relation to that 1990 Act, are you aware of other entities other than RTE making representations about the 1990 Act? Did anyone else voice concerns, any --

A. I know that the advertising industry were very annoyed about it, I am not sure whether they actually wrote to the Minister or not. I don't think the newspapers were exactly delighted, but certainly the advertising industry was actually in fact very annoyed about it and they made - I believe, from my recollection, there were a lot of meetings and they sought meetings about it. They didn't agree with it.

135 Q. If we have a look at a document on page 5540 please? This is a document entitled "RTE News", and it deals with the Broadcasting Bill of 1990. This is an RTE publication?

A. Okay.

136 Q. We don't have a copy of it there. If I can go through it rather briefly with you?

A. Sure.

137 Q. There are a couple of extracts --

A. What date was it please, Ms. O'Raw?

138 Q. 5540, it was circulated yesterday to the parties. It appears to be some sort of RTE publication. I don't know if you can see it from this distance?

A. I can see it, yes.

139 Q. Is this an internal document or a press release or do you know the nature of this document?

A. I really don't - it could be an internal document or it could be some paper we were getting out, I am not really sure.

140 Q. Yes. Well, just at page 5541 of that, we have various different representations made by various parties. There is the film base, the Centre for Film and Video. The Board of Directors there wrote in the letters to the editor of the Irish Press, and there appear to be discussions and representations there on their behalf in relation to the 1990 Act. Do you recall that?

A. Yes, there were. They were very upset because of the cutbacks made in 19 - RTE in 1990 following - 1991 the, as it were, FMI - the Film Makers of Ireland were very dissatisfied with the result of that because what were commissioned were cut backs.

141 Q. Yes.

A. And I should have remembered that, sorry.

142 Q. This was at the time when it was still the Broadcasting Bill, so - when it was still the Broadcasting Bill, so at this stage it hadn't been enacted at that stage?

A. Yes.

143 Q. There is also an excerpt from an article by Mr. Frank Young, Managing Director of Wilson Hartnell Advertising from the Irish Independent, and he says: "Government, the advertisers and indeed the momentum of international trends all are in favour of the maintenance and further development of a mixed economy in TV, radio and broadcast.



What will make that come about in practice is advertising money, investing by agencies using objective audience/value criteria. This money will not simply flow to a medium, be it radio, TV or press, simply because the medium exists. The medium must earn its revenue by delivering cost effective audiences, and in a way that is creatively appropriate to the message. This money is not an instrument of government policy. It is not the government's policy to assign, treating it as a kind of blunt edged instrument to effect a sudden change in the media market-place is simply invalid. The application of the current approach has the capacity only to weaken the strong, without in anyway ensuring the strengthening of the weak. Along side this it generates a myriad of serious and immediate problems for the company's, marketing companies, and has considerable employment implications."

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Do you recall that type of comment being made?

- A. I do, and it is the point I was making myself, indeed, Ms. O'Raw, to you I think earlier this week, that is that advertising money relates to audience, and it is on a cost per thousand, as I said. The cost to the producer of the medium is not an issue, the advertising follows audience and the rates paid are based on audiences achieved.

144 Q. Mm-hmm. That article was by Mr. Frank Young?

A. That's right.

145 Q. Of Wilson Hartnell?

A. A very big advertising agency, probably one of the biggest at the time in the country.

146 Q. Yes. I think Wilson Hartnell were actually Century's PR

company. Do you recall that?

A. Yes, I think they may have been, yes.

147 Q. Yes. And then there is an extract from the Sunday Business Post and also from the Institute of Advertising Practitioners in Ireland?

A. Yes.

148 Q. And from the Association of Advertisers in Ireland, and they are all along the same vein, do you recall?

A. I do, there was an awful lot of controversy about it and a not lot of submissions made, and the industry generally was not pleased.

149 Q. Yes. Mr. Walsh also raised yesterday, the issue of the number of people who were made redundant as a result of the

--

A. Yes.

150 Q. -- 1990 Act?

A. Yes.

151 Q. And the changes being made there, and he said something to the effect of, well the number, the decrease in numbers employed, could that not have occurred just in the normal course of things and as a result of the SKC Report?

A. The SKC Report had come out in 1996, from my memory, and it had been really dealt with in the subsequent two years, I would think, and then here was a new dilemma for RTE occurring in 1990, that was dealt with in 1990 and subsequent years.

152 Q. I think the figures Mr. Walsh showed yesterday were something in the region of 160 being shed?

A. Thereabouts.

153 Q. If I can refer you to a document at page 5388 please, and

this is a note to the RTE Authority, it is by Mr. Vincent Finn, and it is dated the 5th of July, 1990?

A. Yes.

154 Q. And in the third paragraph, almost halfway down, "A major element in any such cutbacks would have to be immediate reductions in payroll numbers of the order of 200 to 250. RTE to date has been prohibited from introducing compulsory redundancies due to the fact that staff have no PRSI entitlements."

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Was RTE curtailed in such a manner from bringing about compulsory retirements, do you recall, or were there restrictions?

A. Permanent and pensionable staff of RTE pay Class D PRSI which is distinct from Class A, and Class D only has, very low rate, I think maybe one or two percent now or two percent and that doesn't give any entitlement at all to State benefits in any form. And RTE had actually in fact at one stage, I can't remember, it may have been around this time, sought indeed Senior Counsel opinion on whether in fact it could have, shall we say involuntary redundancy. The opinion was that it couldn't because in fact the staff conditions were based on the civil service, if you like.

155 Q. I see.

A. Yeah.

156 Q. So it was somewhat of a restriction?

A. It was a restriction and is a restriction.

157 Q. I see.

A. Yes.

158 Q. Then, just in relation to the issue of this, the subsidy.

Is a subsidy a matter of opinion or philosophy or is it a matter of fact?

A. A subsidy?

159 Q. No, I am not referring to that. On a separate issue, we

were talking about the matter of the subsidy, and I just want to make it - if you could clarify - you spoke previously about the subsidy, and Mr. Burke having said that he was of the opinion that it wouldn't involve a subsidy. Is a subsidy a matter of opinion or philosophy or is it a matter of fact?

A. It is clearly a matter of fact. I mean subsidy means if you are providing a service at below cost, you are subsidising somebody else, or the person who is benefitting from that service and that's clear, I mean that is a fact. That is not an opinion. And that was the case here. I mean the figures for access, and indeed for maintenance, that were decreed, if you like, in the directive. Clearly they didn't represent the cost of providing the service, underlining them. Obviously then the conclusion has to be there was a subsidy. And there was.

160 Q. Mr. Walsh also mentioned there, I think his final issue, in relation to the programme management and installation costs, the profit that RTE was --

A. Project management.

161 Q. Sorry, project management and installation cost. The profit opportunities for RTE. Could you tell me is there any opportunity, cost involved in RTE staff dealing with such a project?

A. I mean, people in RTE will complain endlessly about the fact that they can't get up-to-date equipment installed, and very often will complain about it lying around in boxes and not installed, as it were, and that is a constant complaint. And therefore, if people who are working on equipment for a third party, Century or anybody else, RTE's own development and its own necessary capital infrastructure was actually suffering, so there was an opportunity cost and a real cost. My recollection is that we subcontracted some of this work and we actually had that work done for ourselves and we paid for it, I can't recall the detail now, but my recollection was that we were in - a lot of people were working for Century in RTE and therefore, in fact RTE's own work was falling behind.

162 Q. Well, in relation to the amount of project management and installation costs, the 250,000 that was allowed for, plus the 5 percent overdraft, in the directive, what proportion of that would constitute profit to RTE?

A. Well, I would say there was none, no profit at all. I mean, we had a figure for FM of 250,000 for project management. As I said, there were engineers working on this equipment and these plans and all of the drawings and details had to be gone through, and that was real work. The installation charges which we had proposed were not charged at all, at all, which meant actually in fact that RTE wasn't compensated at all for the installation, so there was  $\text{ú}125,000$ . I would say that RTE lost heavily. As I said here last week, I think on Friday, at a rough estimate RTE did, I would say, upwards of 4 to  $\text{ú}500,000$  worth of work in modifications for which it never got paid.

163 Q. I see. Thank you. Thank you, Mr. O'Brien. I have no more questions. The Sole Member may.

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CHAIRMAN: Thank you very much, Mr. O'Brien. Just one thing, maybe you can clarify this for me?

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As I understand it, the cap was a dual purpose operation, it reduced the time element --

A. Yes, correct.

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CHAIRMAN: -- for advertising? Therefore, it introduced a scarcity factor for RTE's time, time on RTE?

A. It did, Sir. Yes.

.  
CHAIRMAN: It also capped RTE's earning capacity insofar as it could retain to the, retain funds earned to the sum equivalent to the previous year's license fee?

A. Yes, Sir, yes.

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CHAIRMAN: That's what created the surplus, it was that, that intention that - that obligation not to earn more, that created the surplus in succeeding years?

A. It did, it created the excess.

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CHAIRMAN: Created the excess?

A. Yes.

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CHAIRMAN: Am I correct in drawing the inference, that by virtue of its scarcity --

A. Absolutely, Sir.

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CHAIRMAN: -- RTE earned for a smaller period of production or productivity a larger sum of money?

A. Yes, Sir. The irony was that in fact, well it is a fairly basic principle of economics, that if you reduce supply, in a time of increasing demand the price goes up. So, in this case here there is no question that the supply was reduced. Demand had been growing for advertising time on RTE, suddenly it is reduced, so people actually who really want to get on, especially on television, have to pay a higher rate. I say "especially television", we have what is known as a pre-empt rate card, that is, the people bidding the highest amount of money for the slots actually get them.

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CHAIRMAN: The proposition then that the mere existence of - sorry, the reverse of the premise that is being advanced by Century, that RTE were conducting a price war, which reduced - it is the opposite of that?

A. Yes.

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CHAIRMAN: It has the opposite effect?

A. It has indeed. In fact if they had had an audience, we had raised the price so high, they would have really got a lot of money, or could have or might have.

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CHAIRMAN: Thank you. Thank you very much, and thank you very much for your assistance.

A. Okay Sir.  
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CHAIRMAN: Thank you.

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THE WITNESS THEN WITHDREW.

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MR. HANRATTY: Mr. Vincent Finn please.

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MR. VINCENT FINN, HAVING BEEN SWORN, WAS EXAMINED AS  
FOLLOWS BY MR. HANRATTY:

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CHAIRMAN: Good morning Mr. Finn. Mr. Finn, I understand  
you are, you have had a period of ill health in the not too  
distant past. If per chance you feel yourself under  
strain at any time, please let me know and I will rise to  
give you a rest.

A. Thank you Sir, I appreciate that very much.

164 Q. MR. HANRATTY: Mr. Finn, I think you were the Director  
General of RTE from the 20th of November, 1985, to the 19th  
of November, 1992?

A. Yes, that's correct.

165 Q. Could I ask you to briefly explain to the Tribunal the  
position and functions of the Director General within the  
RTE organisation?

A. Well, the Director General is the Chief Executive of the  
organisation as a whole. So as such, is ultimately  
responsible to the Authority, to the Board, for all the  
operations of the organisation.



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As well, the Director General is Editor-in-Chief, which means that on matters of great importance or great sensitivity, in relation to broadcast output, that he is the final referral point as well.

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Now, this latter function as Editor-in-Chief, didn't usually arise on a day-to-day basis. It arose on occasion. But it was a responsibility which was very apparent during important times such as elections, referenda, other occasions such as that.

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So that really was the span of responsibilities of the Director General; to run the organisation in accordance with the broadcasting legislation and in accordance with the Authority policy, and on occasion, as the circumstances required, to be very directly involved in our broadcast output.

166 Q. Yes. And I take it that in his capacity, as the analogy you drew was the Chief Executive, the heads of the various departments would be reporting to the Director General?

A. Yes, that's correct. During my time, the senior management structure was that there were two Assistant Directors General, and my recollection is that there were ten or so divisional heads, senior executives as well who would directly report to me.

167 Q. And would the Director General, as a matter of course, attend at the meetings of the Authority?

A. Oh, every one. Yes, I don't - in my time, I don't believe I missed one. It was, in RTE in the whole history of the

place, it was very, very, very unusual for a Director General not to be present at an Authority meeting.

168 Q. Yes. I take it the Director General was the point of contact and point of communication between the Authority and the administrative and executive staff?

A. Yes. That was broadly the arrangement, but at times, depending on the matter under discussion, senior executives would be called into an Authority meeting.

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Now, the two Assistant Director Generals, they were always present with me, well provided they were available, sometimes they might be away on business or something. But if they were available, they would be present for the whole meeting as well as myself. And at times, other senior executives, more usually in fact from the output areas, from the programmes or news areas, more usually from there, than from the financial or personnel or commercial, but they would attend, on request, for sessions from time to time as well.

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So the Authority of the day, they would be very familiar with the senior management of the organisation.

169 Q. Yes. And presumably the Director General would be the instrument for the implementation of any policy decisions that the Authority might make?

A. Absolutely.

170 Q. Now, in 1998 the question arose of the possible necessity which would arise for RTE to provide transmission services to one or other of the successful applicants for various types of franchises in accordance with legislation which

was then being, going through the Dail, isn't that right?

A. That's correct.

171 Q. And I think in the earlier part of 1988 RTE had certain meetings in relation to this, and in the latter part of 1988 you were aware that there were certain meetings, in particular between members of staff of RTE and Century Communications Limited?

A. Yes, there were. As you say, during 1988 it became increasingly obvious that the broadcasting landscape was going to change and there would be new legislation, and in the latter part - well, I can recall that certainly from August of 1988 onwards, our Engineering Division were in discussion, I think principally with Century, but they were in discussion with potential bidders for the license, but things began to firm up in late October and early November, and it was around that time that following discussion, I think, at Authority meetings where we established a general policy with regard to charging to the commercial contractors, and the policy generally was that we would adopt a commercial approach, that would be the basis of doing business with them.

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But in doing business, that we would provide as professional a service as possible. The quality of the work was, the policy was that it would be first class and that the charge would be a commercial one.

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So, following that discussion at the Authority and so on, it was possible for the Finance Division in conjunction with the Engineering Division to begin to put together what

Mr. O'Brien describes just in brief as the "rate card".

This is to say, a proposed package of services and the costs that would attach to those.

172 Q. Yes. You have been present, I think, for the duration of Mr. O'Brien's very detailed evidence, and you are familiar, I take it, with the detail of all of the issues that he discussed with us?

A. Not in as much detail as Mr. O'Brien is familiar.

173 Q. Indeed.

A. His grasp, I must say, of the figures, and I am talking about this time now, back with Century, I felt was quite remarkable.

174 Q. Yes.

A. I thought - I, as Director General in the organisation, generally was very fortunate to have a Director of Finance of that caliber.

175 Q. Well, you will be pleased to hear that I have no intention of going over that ground again with you in such detail, except perhaps on a slightly more global basis on a policy context, and also in context of specific instances in which you, yourself, were personally involved.

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But in general you have told us that the policy of the Board was, they would approach the matter on a commercial basis. Could I just ask you to very briefly explain what is meant by that?

A. Well, it means that in the provision of any services, that all the costs associated with the provision of such a service, and that costing would be done on a commercial basis, that is to say it takes full account of all the

costs of the organisation and applies a reasonable proportion of those to the particular activity being costed.

176 Q. Yes.

A. The marginal costing concept is one that we have heard here, something about. But that is an approach that from the suppliers point of view, is not an economic one, because one has to bear in mind that RTE wasn't just envisaging a situation where we were providing services to Century, we - in fact we did provide services to other independent contractors as well.

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So it was a general policy issue, it wasn't just that we were looking at the Century case. We had to be evenhanded and to be seen to be evenhanded with everybody.

177 Q. Yes. And indeed at that point in time, were already making various parts of the transmission system available to various types of users at a local level?

A. Oh indeed. I can remember around that time that, I don't know, there were at least 30 users of our sites, very small installations, we never heard much from them or about them, except that they paid, well in total as I recall, around that time, from about the 30 or so users, and this would be for access to the sites, they were paying sums which varied from a couple of hundred pounds to a few thousand pounds.

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But in total, it added up to, well it was - I thought it was quite a worthwhile sum, it was at least 70,000, if not more. But, if necessary, I am sure people from the Engineering Division would give you more precise details,

but I do recall that figure, that there were quite a number of users, and the approach that we used in charging for this service was the kind of one that I mentioned, a commercial approach. So that some of them, for a very small amount of space at a site, would pay about ú3,000 or maybe a little more.

178 Q. And is it correct to say that all of them, to a greater or lesser extent, paid an element of access?

A. That's what it was. Access. Yes.

179 Q. Yes.

A. That, they would have their - that's my recollection anyway, that it was solely access. And they would provide their own equipment there.

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These locations, particularly the mountain tops, the higher ones, they had to be very carefully selected over the years, they were extremely suitable, they were very difficult and costly to develop because of their location, but once you developed them, they were of value not only to us, but as we saw, to many others as well, and they were prepared to pay the kind of rates that I have mentioned.

180 Q. Yes. And apart from Century Communications, did any of those operators, or indeed any of the other local radio franchise operators, or indeed subsequently television franchise operators, ever make the case that they should have access to the transmission system or whatever proportion of it they required, free of charge?

A. Well, certainly not to me or I never heard of such a case being made. I am quite sure that there was the normal kind of commercial negotiation with them, that - I am not

saying that we declared a figure to be such, and that they just accepted it. They would, as one does in a commercial situation, they probably said "That's much too high and we are prepared to pay X", and so on and so on. And eventually the situation would be arrived at which was mutually acceptable.

But I have never known - and, as I say, it would be quite contrary to our state of policy, because if one uses this marginal costing approach on a wide spread scale, it is - well from a financial point of view, to put it mildly, it is not to be commended, because if you keep doing business on that basis you will quickly go broke, because you are not covering your full cost, you are not covering overheads, you are not covering depreciation, no profit element for re-investment in facilities and so on.

No provider can - it is just not possible financially over a period of time to provide a service on a marginal costing basis because you will go broke doing it.

181 Q. Yes. You have heard Mr. O'Brien's evidence of the genesis of his figures, and the basis on which the figures which were originally put to Century by way of a quotation were calculated, and essentially his evidence was to the effect that it was designed so that the various users of the system would prepare, would - sorry, would pay their proportionate share of the costs of the system?

A. Yes.

182 Q. And is that an approach which was in line first of all with the policy of the Authority?

A. Yes, it would have been, yes. Yes.

183 Q. And did that accurately reflect their policy, that they would adopt a commercial approach to the various operators of the, users of the system?

A. Oh, yes, it would have, yes.

184 Q. Now, you know that there were in particular three meetings between personnel in RTE and Century Communications Limited in November of 1988?

A. Right.

185 Q. And I think you were aware at the time in a general way, that figures had been put by Mr. O'Brien and that there were discussions in relation to these figures?

A. Yes.

186 Q. Did anybody at any stage in 1988 ever suggest to you that Century had ever put any figure on the table?

A. No, they didn't, quite the reverse. And I know that Mr. O'Brien, as will have been evidence, put an enormous amount of work into getting these figures together and he was surprised that there was no feedback, as it were, in terms of a counter offer from Century, and this is why he eventually sent out, I think on the 29th of November or some such date near the end of November, the rate card asking for, "Have you any comments on this?" Something to that effect.

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He was, he had put his figures together, and he had meetings with Century. And he expected, as one normally would, some kind of toing and froing to arrive at hopefully a mutually agreed position, but that didn't occur.

187 Q. Yes. And of course, at that time I think, RTE were



discussing the matter not just with Century but with other potential applicants for various types of radio franchise?

A. That's right, yes.

188 Q. In various locations around the country?

A. Yes.

189 Q. Was it your expectation that in due course RTE would engage itself in negotiation, as it were, with the various successful franchisees with a view to achieving consensus to the reasonable or appropriate price that they should be charged?

A. Yes, it was, and this came up at a meeting which we had with the IRTC early in December. This is a meeting which the IRTC sought and we met them early in December. And amongst the things --

190 Q. Was that on the 7th? There has been a reference to a meeting between RTE and the IRTC on the 7th of December, I infer that that's the meeting to which you are referring?

A. That would be the one.

191 Q. Yes.

A. And one of the points that we discussed at that meeting, was how in an orderly way, to process inquiries/applications and so on, because some people might come to us directly, and really they should have gone to the Commission. It was how to work out an orderly method of processing inquiries/applications and so on.

.

I can't say that I can recall that it was resolved, but at least we touched on that issue of how to deal with inquiries in a way that would be orderly and manageable from both organisations' point of view.

192 Q. Yes. Were you yourself at the meeting?

A. I was.

193 Q. Yes. You heard Mr. O'Brien's description of the nature of the meeting?

A. Yes.

194 Q. It was a meeting which in the first instance was requested or took place at the request of the IRTC?

A. That's so.

195 Q. And Mr. O'Brien says, essentially it was an information providing meeting, where he explained the RTE figures and the basis on which they were calculated to the members present from the IRTC, including the Chairman and Secretary?

A. He did, yes. We circulated the rate card, as it was described, we circulated it at the meeting. My recollection is that there wasn't a lot of discussion about it. In fact, as Mr. O'Brien has said, it was, this was the first meeting between us, and obviously the IRTC was a new organisation in the broadcasting landscape, and in the nature of things, I suppose, such a first meeting would be general and just to touch on a variety of points in a general kind of way.

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But we did avail of the opportunity to, of the opportunity to provide each of the representatives there with a copy of the rate card. But it was a very general meeting, and I wouldn't have expected it to be such, a first meeting between a new broadcasting organisation and ourselves, I wouldn't have expected it to be much different. But it was a friendly meeting, no great problems emerged as a

result of the meeting, it was informational.

196 Q. Yes. Well in particular, did anybody from the IRTC at that meeting express any concern about the figures disclosed in the rate card or any view that they were in anyway excessive, or even any surprise at the figures in the rate card?

A. No, there was no reaction at all, none.

197 Q. Yes. We know that the applicants for the national franchise had to have their applications in, and did have their applications in on the 16th with the IRTC, of December, and we also know subsequently on the, between the 3rd and 11th of January there were a series of meetings between personnel in RTE, including Mr. O'Brien and personnel from the Department of Communications, and you were aware at the time, I take it, that those meetings were taking place and the purpose of those meetings?

A. Yes, oh, yes, absolutely.

198 Q. And the Tribunal has been told that RTE were, as it were, put through their paces with their figures and required to explain their figures and back them up?

A. Oh, yes. Well, I am not at all surprised at that because over the years, we are well accustomed, particularly with the Department of Communications, to being, to our figures and activities and so on being scrutinized in great detail, so that was not a surprise. One has to be prepared for that and I believe we were. But that's the process.

199 Q. Yes. Just in general terms, looking at the relationship between I suppose any semi-State body, but particularly RTE and the Department; did they exercise a certain amount of, I don't know if it is too strong a word, "control" over the

activities of RTE?

A. "Control" is probably a bit strong. But, certainly their role, I think as they saw it, was (A) to be sure that we observed fully all the provisions in the legislation, and also to implement the Minister of the day's wishes, provided it was within broadcasting legislation.

200 Q. Yes. And we know that at the end of this exercise, agreement was reached between RTE and the Department for AM charges, for FM charges, and for progressive implementation of the FM charges, isn't that right?

A. Yes, I must - yes. I remember that because I was particularly pleased that a resolution had been reached on that day, this was before the IRTC had decided on who was to be the successful applicants for the national - I felt it was a particular advantage that now, after a lot of discussion and examination and so on, with the Department, that we had an agreed figure, and so far as I knew at the time, the Minister himself agreed with this figure, this was the 694,000, so to have such a range of agreement in relation to that figure before a final decision was made by the IRTC, I felt that was particularly significant in the whole scheme of things, that an important area of cost in which we were involved, majorly involved, had been resolved. At least I found it had been settled and resolved.

201 Q. Would that be an appropriate --

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CHAIRMAN: It would. Quarter past two?

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MR. HANRATTY: Yes, Sir.

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CHAIRMAN: Quarter past two.

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THE HEARING THEN ADJOURNED FOR LUNCH.

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THE HEARING RESUMED AFTER LUNCH AS FOLLOWS:.

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MR. HANRATTY: Mr. Finn, we were discussing the discussions between the Department of Communications, personnel and RTE personnel between the 5th and 11th of January of 1989.

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Now of course, I am correct in thinking, am I not, that these discussions related to what was the appropriate level of transmission charges for whoever won the franchise, it wasn't in the context of Century Communications as such, it was for whoever won the national franchise, isn't that right?

A. Absolutely. That was the case.

202 Q. And when these figures were agreed between the Department and RTE, at that point was it the view of yourself and the other interested parties that the matter was then settled?

A. Oh absolutely. It was "a done deal".

203 Q. Yes. And you are familiar with the three-page document which has been, we have been taken through in considerable detail by Mr. O'Brien, which came from the Department, which are set out the figures which were agreed first sheet in respect of FM charges, the second sheet in respect of AM charges and the third sheet in respect of progressive implementation of the FM charges?

A. I am yes, I am familiar with that.

204 Q. I don't think there is any need to revisit that.

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But, did you then prepare a memorandum for the authority-

if we can have page 5484- entitled " Provision of facilities: Independent radio contractors".

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I think that's dated 19th of January of 1989. And if we can just read through it, it says,

"Since the last Authority meeting there have been a number of developments in relation to the provision by RTE of transmission facilities to independent radios, national and local contractor.

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Some of the applicants for the national radio channel had objected to the costs being proposed by RTE and the Minister for Communications asked to meet with the Chairman and myself to help resolve the impasse. A very successful meeting followed by a number of meetings have resulted in agreement being reached on the level of charges to be made. The Minister for Communications has endorsed the agreement and the Independent Radio and Television Commission has expressed satisfaction with the outcome.

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The agreement is very satisfactory from RTE's viewpoint in that we will be guaranteed an annual income of ú692,000 instead of ú794,000 originally sought from the provision of transmission facilities to the new national independent radio franchisee RTE will provide access to its facilities at transmitter, transposer sites, provide a full maintenance service for this sum. The franchisee will have to bear the capital cost of the transmitters involved and the cost of power and spares.

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Agreement has also been reached on charges to be made to local radio operators for facilities in relation to the appropriate transmitter site. These charges will be a lot less, of the order of ú15,000 to ú20,000 per site.

Vincent Finn, Director General 19th of January 1989" .

That seems to be a sort of a briefing document or a memorandum to the Authority to inform them of the position?

A. That's correct, yes.

205 Q. Just a couple of points I would like to ask you about arising from that document, Mr. Finn. First of all, if we look at the second paragraph. It says "Some of the applicants for national radio channel had objected to the costs being proposed by RTE and the Minister for Communications asked to meet with the Chairman and my accept to help resolve the impasse" . Is it the position that this initial meeting and the meetings which flowed from it originated, in the first instance, as a result of a request from the Minister?

A. Yes, that would be the case, yes.

206 Q. And that meeting to which you refer, I take it, was the first meeting which I believe was on its 5th of January, is that right?

A. That's right, on the 5th of January '89.

207 Q. Yes. Were you yourself in attendance at that meeting?

A. Yes, I was.

208 Q. And did the Minister, in fact, at that meeting indicate that he had a policy that there would be no subsidisation of any of the independent operators by RTE?

A. That was my recollection, yes.



209 Q. It says, "The Minister for Communications has endorsed the agreement and the Independent Radio and Television Commission has expressed satisfaction with the outcome" . We have already heard the evidence that the Minister had, in fact, endorsed the agreement and was privy to it, but in relation to the second part, the Independent Radio and Television Commission had expressed satisfaction with the outcome, can you recall in what form they had done that?

A. No, actually. I can't had recall specifically what form that expression took. But, just to say, as you have noted, that there was a document for the board for the RTE authority, and these were always prepared with care. This was not just some informal kind of internal memos. This was the board papers, and I just can't recall now how I knew that they had expressed satisfaction. It could have been, I don't know, I don't think it was directly from the IRTC. I am trying to remember now, it could have been somebody outside who knew someone on the Commission and said, "they are happy", it could have been some journalist, one of our own or some place else. But I would stand over that, because as I say, it is a board paper, and unless I had some reason to, some reason to say that they expressed satisfaction I wouldn't have said anything.

210 Q. I understand. We do know that after the initial meeting which you yourself attended on the 5th of January, there was a series of the meetings culminating in the last meeting on the 11th of January, at which agreement was reached and pursuant to which this fax, the previous document to which I referred, was sent.

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Is it possible, this the information which you record in that memo, and on the basis of which you inform the authority that the IRTC had expressed satisfaction with the outcome, may have come from the Department of Communications?

A. Yes, that's likely, because we would have been in touch with senior civil servants there, very very frequently. And I can't say I can recall them saying it, but it is a likely source that they might have said, just casually, almost that those figures, they are o.k. With the IRTC as well. It is quite a likely - it is the most likely source.

211 Q. Yes?

A. Come to think of it. But I cannot say, I cannot say that that was the source, but - it must have been reasonably reliable otherwise I wouldn't have put it in a board paper.

212 Q. Yeah. So that's as much as you can assist us with. I appreciate it is a long time ago. The position is you can't recall where it came from?

A. No, not precisely, no.

213 Q. And the best you can do is say that you believe that the most likely source would have been the Department, is that fair?

A. That's so, but most of all I would believe that if I put it down there that the IRTC, that they would have in some way or other, indirectly conveyed that the charges were o.k. with them.

214 Q. Yes. And in saying that you believe that the most likely source is the Department you acknowledge, I take it, that it is entirely possible that it may have come to RTE at

least from some other source?

A. Totally outside source, yes.

215 Q. And may I take it that's as much as you can say about the subject at this remove in time?

A. Sorry, but it is.

216 Q. That's entirely understandable.

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Well then, I think, you say in your statement to the Tribunal, that there was no further communication of which you were aware with the Department until the letter of the 14th of March of 1989 from Minister Burke?

A. Yeah.

217 Q. In other words, between the last meeting, as we understand it, on the 11th of January of 1989 and the 14th of February, there was no further communication of any kind between anybody in RTE and the Department in relation to transmission charges?

A. No. There was no reason to.

218 Q. Yes?

A. To have any communication. The matter was settled so far as we knew.

219 Q. Yes. You received a letter from the Minister of the 14th of March inviting you to attend a meeting to discuss the matter, isn't that right?

A. That's right, yes.

220 Q. And I think you did, in fact, pursuant to that meet him on the 14th of March?

A. We had a meeting with him, yes, yeah.

221 Q. Can you just describe to us as best you can, your recollection of that meeting. First of all, we understand

that it was in connection with the transmission charges?

A. Yes. I don't have a very strong recollection, I must say, of the meeting. My general recollection was that it was quite short and that the topic for discussion was the transmission charges and that he asked us to look at these again and see what could be done in terms of reducing them.

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But, it wasn't particularly long or a particularly difficult meeting and we undertook to do that, that we would go away and review them.

222 Q. Yes. At this stage of course the position was that as far as RTE was concerned, the figures had already been settled for or AM and FM?

A. Oh, yes, absolutely. So, the latitude that we had in reviewing the charges was quite limited. But, we took the view that we could do something on the maintenance charge, but that's on the labour end, by anticipating slightly some savings that we expected in that area in the future and giving Century the benefit of those now.

223 Q. Yes?

A. And that had a consequential knock-on effect on the overheads. But the add-on for overheads, if you reduce a constituent element, the overheads would come down a bit as well. We reduced the percentage applicable for overheads which had been 10 percent, we reduced that to 5 percent, which was quite a big concession.

224 Q. Yes?

A. So, this brought the charges down from 692, I think to 614.

225 Q. Yes?

A. And that was - the 614 was very much a rock bottom situation, from our point of view.

226 Q. Yes. And as far as you can recall it, did you indicate to the Minister at the meeting that you would go back and revisit your figures, as it were?

A. Oh, yes. We said we would. But, I can't remember the exact wording we used, but I am sure we would have indicated to him that the latitude that we had was not great and in fact, the reduction that we made was, in my view,, quite a substantial one. It was about 10 percent.

227 Q. Yes?

A. Which at that stage of the negotiations, which was sort of the final stage and was, I felt, really quite a major concession and this should absolutely, absolutely settle the matter.

228 Q. Yes. It was, of course, a reduction in a figure which had already been reduced in the course of these meetings between the 5th and 11th of January?

A. Correct.

229 Q. Just if I can refer to you page 208? I think you briefed the Authority, the RTE Authority, in relation to your meeting with the Minister. If you look there under the 14th of February of 1989?

A. Oh yeah.

230 Q. Under "IRTC" it stated: "The Chairman and Director General were this morning meeting with the Minister to discuss again charges for transmitter facilities for independent national radio which are being challenged by Century Communications. It was noted that the IRTC will hear submissions for the provision of local radio in Dublin".

Under the heading "meeting with the Minister" is:

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"Director General joined the meeting at this point and reported on his meeting earlier in the morning with the Minister. The Minister had received a letter from the IRTC in which the Commission quoted charges which Downtown radio paid to the IBA for transmission services and the letter suggested that RTE should reduce its charges to Century Communications. The Minister indicated he would wish Century to be on air with the independent service on the 1st of May next. There was general discussion by the board on the question of charges, during which it was pointed out the Commission was not comparing like with like. For example, number of transmitters involved, geographical area, and Sterling and Punt differential etc. Assistant Director General John Sorohan obtained some information in the course of the meeting on IBA charges to various stations and will have further details for Director General before the Minister contacts him again later in the day" .

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That's actually a note of what transpired at this meeting, isn't that right?

A. That's so, yes.

231 Q. It appears from that note, that the context in which this request was made by the Minister or, at least, part of the discussion related to comparisons with charges being levied by Downtown Radio in Northern Ireland?

A. Being levied on Downtown.

232 Q. Sorry, on Downtown by the IBA?

A. Correct.

233 Q. In Northern Ireland?

A. Yes.

234 Q. And we have had evidence of correspondence to which you are not privy and I don't propose to open with you, in relation to communication between the IRTC and Department concerning Downtown Radio. But as far as you are aware, would that note there accurately record who was stated to the Authority by you on that occasion?

A. Yeah, sorry, I think I think that was a Board of Management meeting, but -.

235 Q. You may be right. Do you think it was?

A. I think it was a Board of Management.

236 Q. Yes?

A. But, still, this was all the senior management.

237 Q. Yes?

A. Yes but that account of what the meeting was about with the Minister and what was to happen and so on, that's all accurate, yes.

238 Q. Yes. And it does record the fact that there was a discussion in which a distinction was drawn between the services being provided by Downtown and the service proposed to be provided by RTE?

A. Oh, yes, absolutely. I mean, to us anyone who knew much about broadcasting transmission one wasn't comparing like with like at all with the IBA charges to Downtown in Northern Ireland. I suppose there was a superficial kind of similarity, but if you really wanted to produce accurate figures, there was no point in really looking to the kind of charges that Downtown paid to the IBA.

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In fact, I think it came up in evidence here, that the Managing Director of Downtown volunteered the information to, I think it was to the Secretary of the Department, that the kind of charge he, the Managing Director, would foresee as applicable to a national transmission network was about 800,000 pounds.

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We didn't know that at the time.

239 Q. I understand that. I think, in fact, his evidence, it was in fact the evidence of Mr., sorry the conversation was with Mr. Grant the Assistant Secretary of the Department and it was to the effect that 800,000 pounds for national transmission service was good value or words to that effect?

A. Yes. So that -.

240 Q. I think he was talking- am I not right in saying- simply about maintenance?

A. I couldn't be sure on that point. But, what interested

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241 Q. Perhaps leave that for another witness, we will revisit the that particular document, in any event?

A. Right.

242 Q. Just in relation to this note of what you now tell us is a management committee meeting, "The Minister had received a letter from the IRTC in which the Commission quoted charges which Downtown radio paid to the IBA for transmission services and a letter suggested RTE should reduce its charges to Century". Would that suggest that the catalyst, as it were, for the Minister, contacted you and having this



discussion with you on the 14th, was as a result of this communication he had received the IRTC in reference to what Downtown Radio were being charged?

A. Absolutely. That's the way I read it. That the probability was that Century had made representations to the IRTC, the IRTC, in turn, had made representations to the Minister, that RTE should review its charges again.

243 Q. Yes. Under the - while we are just on that document at page 208, under the 17th of February of 1989 and under the heading IRTC there is a statement, "The Director General reported that following the meeting with the Minister the previous Tuesday the transmission charges to Century Communications had been reduced in two areas. These revised figures have been forwarded to the Minister". I think that is, in fact, a reference to your letter to the Minister of the 15th of February of 1989, which is on page 31, which we have already had and which we have been through in detail and which I don't propose to take you through again.

But, in essence this refers to the meeting which you had with the Minister and it sets out the basis on which RTE have, in fact, looked at their figures, reduced the maintenance charge - this is on FM- reduced the maintenance charge from 364 to 320 and reduced the overhead from 10 to 5, culminating in 614,000 from 692?

A. Yes. 614 would be the full annual- in 1992.

244 Q. Yes?

A. Yeah.

245 Q. And you do make the point in the second paragraph that:

"The Commission referred to various levels of charge by the IBA in the UK. It is our strongly held view that comparison between such charges and our proposals are invalid for a number of reasons, eg. area covered, accessibility of site, cost of equipment, lower VAT rates in UK, Irish pound to Sterling exchange differentials etc." isn't that so?

A. Yes. We felt it necessary, I felt it necessary to refer to the IBA charges because this seemed to be the basis on which the IRTC was raising again this issue with the Minister.

246 Q. Yeah. And in fact we have had evidence that in relation to the IBA/Downtown situation in Northern Ireland, Downtown had a very limited number of transmitters and that the transmitters which they did have were very low power relatively speaking to some of the transmitters that RTE had in the south?

A. Yes, one wasn't comparing like with like at all. You couldn't directly extrapolate from the Downtown transmission charges made by the IBA, you couldn't directly extrapolate those at all to what was being proposed for Century, by Century.

247 Q. Now, we know then that the Minister issued his directive on the 14th of March of 1989, and can you say from the date of your meeting with the Minister and indeed the letter which you wrote to him the following day, indicating the further reduction which RTE was prepared to make, there was any form of communication, of any kind whatsoever, between the Minister or anybody in his Department and RTE, in relation to transmission charges?

A. Yeah. Yes, I am just trying to recall the dates.

248 Q. The --

A. There was an Authority meeting on Friday the 24th of February.

249 Q. Yes.

A. Which would have been some days after my letter.

250 Q. Yes.

A. At that meeting, it is - it is part of the documentation, at that meeting on Friday the 24th, when this matter of transmission charges was being discussed, the Chairman said that he had met the Minister in the Concert Hall on the previous Monday evening, Monday the 20th.

251 Q. Yes.

A. And they had spoken briefly about transmission charges. The Minister had said to the Chairman, that he, the Minister, had written the previous week to the IRTC saying that 614 was the figure.

252 Q. Yes.

A. He also said that the IRTC had come back to him very promptly since then and he said, apparently, that he had given that letter to his civil servants to have a look at. So, that was, that was the only communication that I knew of, and it tended, in my mind, strongly to reinforce the fact that 614 was now the final final figure because it was - the Minister was saying to the Chairman, apparently, that the IRTC have come back, and his civil servants were looking at it.

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But these were the same civil servants who agreed, you

know, the 692,000, I am sure they would have been quite happy with the 614,000. So, in my mind, the chances of any change, given that the Minister had now written to the IRTC, that's what he said, given that he had written to the IRTC saying 614,000 is all right and that the civil servants would have accepted that figure and we accepted that figure, I assumed, until the 14th of March that the agreed figure of 614,000 would stand.

253 Q. Yes. In fact, in a document at page 5487 we have actually already had a portion of this this morning. It is a record of Authority meeting on 24th of February, I think this is the one to which you have just referred?

A. Yes.

254 Q. If we go to the second paragraph of that, the second sentence? It says:

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"Following that John Soroohan did an excellent job with Gerry O'Brien and convinced the civil servants that the charges were fair and reasonable, about ú680,000. Century leaned hard on the Commission about the charges. The Director General and himself were called in at short notice to see the Minister and the Director General did a very good letter and pared it down further. When the Chairman met the Minister in the Concert Hall on the previous Monday he asked the Minister was he satisfied and he said yes he was and he had written to the Commission but they still came back during the week to the Minister and he handed it over to the civil servants" .

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So that's the reference to which you are referring, is that

right?

A. That's it. That's the only further communication between RTE and the Minister, or anything about transmission charges.

255 Q. Yes?

A. For Century.

256 Q. Is it your understanding that the letter to which the Minister was referring to the Chairman was the letter which we now know he wrote, in which he expressed the view that the sum of ú614,000 was, in Irish circumstances, not unreasonable?

A. Now I know that, yeah, but at the time that's what we had to go on, a kind of that sort of, I suppose, informal discussion that the two had at the Concert Hall. But it was quite clear in my mind that the Minister, this was a major advance from our point of view. He had now written back to the IRTC, saying "Look, these charges are o.k."

257 Q. Yes.

A. Now they came back again.

258 Q. We now know that. We will come to that in due course. But apart from that brief conversation in the Concert Hall, is it the position or was there any form of contact, to your knowledge, between the Minister or anybody in RTE or anybody in the Department and RTE, between the 14th of February and the date of the directive on the 14th of March of 1989?

A. No, none at all, apart from that short informal meeting, nothing.

259 Q. In other words, am I correct in thinking that between the 11th of January 1989 and the date of the directive on the

14th of March 1989, the only communications between the Minister or his Department and anybody in RTE were, firstly, your meeting with the Minister and your subsequent letter on the 14th and this meeting in the Concert Hall between the Minister and the Chairman of the Authority?

A. That's correct.

260 Q. Did anybody at any stage come to you or anybody else in RTE, as far as you were aware, informing you that on the 20th of February of 1989 a letter had been sent to Century to the IRTC, and forwarded by the IRTC to the Minister, requesting a directive under Section 16 of the Act?

A. No, nothing, never heard anything about that.

261 Q. Was RTE provided with any opportunity to make any kind of observations or submissions on any such application?

A. No.

262 Q. Was RTE ever informed that this application was made on the basis of a suggestion by Century Communications Limited, that the appropriate and correct and proper figure was ú375,000?

A. No. No.

263 Q. Did anybody ever provide to you or anybody else in RTE, any breakdown of any figure of ú375,000 or indeed of any other figure coming from Century Communications.

A. No, the first and only time before that I had heard of this figure of 375,000, was it is referred to briefly in that report of the proceedings of the Authority meeting of the 24th of February. But, I didn't - quite honestly I didn't pay much attention to that figure. It was just mentioned in passing, as that there was some speculation that that's what Century were looking for. That was the first time I

even heard of the figure 375,000. But it was so far away from 614,000, a figure which the Chairman of the meeting had said at that meeting, the Minister accepts that figure, that I said o.k. They want 375 but, sorry, the figure is going to be - I mean I said it to myself - they would like to have a figure of 375 but it is going to be 614.

264 Q. Yes. Well, had you been told that an application had been made to the Minister for a directive under Section 16, would you have done anything about it?

A. Oh, yes. I certainly would, yes. Because Section 16 refers to "consultation". Now it doesn't define "consultation" but it says that, " The Minister after consultation" - and I think we would certainly have availed of that statutory provision to ask, at least, to be consulted further about the possibility of a directive.

265 Q. Could we have 5528 please? You have it up. Yeah. It says "The Minister may, at the request of the Commission and after consultation with Radio Teilifis Eireann, require the latter to cooperate with sound broadcasting contractors in the use of any mast tower site and so on" . Do you confirm no such consultation had, in fact, taken place?

A. Well as I say, "consultation" really isn't defined in the Act. And the only consultations that we had with the Minister were the ones in mid-February, but there were some consultations in early January and mid-February, but they were with regard to the level of charges that we proposed making. They weren't with regard to the Section 16 directive.

266 Q. Yes. And can you tell us, was there any consultation with the Minister or between the Minister and Radio Teilifis

Eireann in connection with the proposed directive or application for a directive?

A. Not to my knowledge.

267 Q. First of all, what was your own reaction when you saw the text of the directive when he issued it on the 14th of March of 1989?

A. Mmm, absolute shock and disbelief. I mean, we had, this was "a done deal". It was 614,000 and now there were figures coming up that even were much less than this figure of 375,000 that I became sort of peripherally aware of at the Authority meeting of the 24th of February. These figures were much less than that.

268 Q. Yes. He allowed, for example, 35,000 for access. What was your view on that?

A. Well, this was for 16 sites, 14 FM and 2 AM sites. And I knew we were getting, as I mentioned in the earlier session, I knew that we were getting figures of up to a few thousand for very very minor facilities at a single site. So, to pay 35,000 - to set a figure of 35,000 for access to 16 sites, didn't at all accord with the kind of prices that we charged and were getting. I mean, many of the people who were being charged they were government departments. I mean, this was, and local authorities- people that one would imagine would be careful about spending money.

269 Q. Yes. And before you actually received the Minister's letter containing his directive, did you have any prior warning or indication that something like this was going to happen?

A. None at all.

270 Q. Did you have any reason to think that it might happen?



A. No. Well, I mean this Section 16, I mean from the time that we began discussing that legislation way back in the previous year, 1988, we knew of it, that this is a section of this legislation that perhaps could come back to us at some future time, but apart from noting what was in the section, we had no reason whatever, none whatever.

Certainly I had no reason to believe that a direction would be issued to us under that section. No reason at all. I mean, as I say we were aware that it was there and it could, it could possibly be utilised by a Minister. But we had no prior warning, no.

271 Q. Yes. At page 696 there is an article in, is it the - the "Irish Times". It says under the headline, "RTE say it cannot reduce cost to Century" dated 13th of March 1989 and it says, in the second last paragraph on the second column, "It is understood no discussions have taken place between Century and RTE but if the new station is to go ahead the Minister must direct RTE to agree a price". Do you have any idea where they might have got that information from?

A. No. If the new station is to go ahead the Minister - no, I couldn't - I just don't know where that would have come from. Certainly not from RTE.

272 Q. Yes. And on the 13th of March, page 697 in The "Independent", on an article by Brian Dowling under the heading "Century row, RTE facing Burke order on fees deal" it says in the second column, second paragraph "A final four-year figure may be set in the region of 450 thousand pounds". Further down, "Last night RTE Chairman Jim Culleton said they stood by their charges which have been

presented and detailed to officials from the Minister's Department. We have nothing at all to hide, the charges are fair for the standard of service they offer, he said".

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So it seems clear there was some information finding its way into the media or printed media at least, suggesting the possibility that the Minister was about to do something?

A. Oh, yes. It could have been some PR company or something such as that. I don't know. But, somebody was hinting to the print media anyway that something was on the way.

273 Q. Yes. But you for your part you were otherwise unaware of it?

A. Absolutely. Absolutely.

274 Q. I am going back to the directive itself. You were present when Mr. O'Brien went in detail through the analysis, the comparative analysis of the directive figures and the agreed figures. And the bottom line, if I just go directly to that, was the difference between what was agreed between the Department and the Minister and RTE and what the Minister subsequently directed, was €598,000 odd in respect of annual charges and €222,500 in respect of once-off charges, isn't that right?

A. That's so, yes.

275 Q. You have told us about your own reaction. What was the reaction within the company?

A. There was a very strong reaction. Very, very strong reaction because the belief was that we had settled this matter at 614,000 because that would have been discussed at

the Board of Management and noted and, in turn, the senior people there would have conveyed it down the line. There was a general understanding that 614,000 was the figure, and when the reality of the financial implications of the directive were understood, there was absolute - it was a mixture of shock and rage, to tell you the truth.

276 Q. Yes. And on the question of the Minister's stated policy, stated you have told us at the meeting of the 5th of January of 1989, that there would be no element of subsidy of the independent operator by RTE; how did that sit with the figures which he actually fixed, in your view, when you received the directive?

A. Well, the two sets of figures just couldn't be reconciled with that underlying objective of there being no subsidy. Because, I don't know how a national transmission, radio transmission system for 14 FM and 2 AM sites, just, I mean it couldn't be provided, you know. Just to refer back, the Downtown Managing Director thought it should be 800,000. We had agreed with the civil servants in the Department and indeed with the Minister in January, that 694 was the figure. Under further urging from the Minister as a kind of final final settlement figure, it came down to 614. But I think Mr. O'Brien mentioned in his evidence, that we had a kind of target figure for this at somewhere around 750,000. So 694 was tolerable. 614 was getting a little bit uncomfortable, but these kind of figures just - I don't know how they could have been reconciled with the objective of no subsidy.

277 Q. Well, from your perspective did they, in fact, involve a subsidy?

A. They did. They did. But, at the meeting the Authority meeting with the Minister on March the 30th or 31st, this issue came up and that's why the Authority were very insistent that there be a review, because while we said- the Authority said at that meeting to the Minister after discussion, "o.k. we accept the contents of the direction, because it is a direction, we accept the contents. But, we believe that there is a subsidy involved and that's why we want a review in 18 months time".

278 Q. Yes. You have heard Mr. O'Brien's evidence and the detail of his evidence in relation to the subsidy where he said that there was, in fact, a significant element of subsidy. Do you agree with the evidence he gave in that regard?

A. Oh, yes, I would. Yes.

279 Q. Now, before we come to the meeting at the end of March, did you, in fact, decide to take counsel's opinion on the legality of what the Minister had done?

A. I did. I decided to do that as a kind of precautionary measure, if you wish. There was an Authority meeting coming up at the end of the month, I think the 30th perhaps and I felt it quite likely that some of the Authority would say in the midst of all the discussion about this, "Have we got a legal opinion?" So I thought as a precautionary measure that I should get one. So we did get one.

280 Q. Did you, in fact, take legal opinion from as he then was Hugh Geoghegan, Senior Counsel?

A. Yes. It was from Mr. Geoghegan.

281 Q. If we look at page 5309

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MR. WALSH: Sorry, I would like to see the case to counsel. The opinion has been furnished, yes, but not the case to counsel. Mr. Geoghegan does mention certain matters of fact. I don't think it is fair to put in the opinion as legal opinion on something we don't know what he was asked to actually advise on.

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MR. HANRATTY: It is apparent from the opinion itself what the questions that were put were.

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CHAIRMAN: I should expect that counsel would address the matters he was asked to advise on.

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MR. WALSH: I agree, Sir. But if there was a letter of instruction to Mr. Geoghegan I think it should be there as well.

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CHAIRMAN: Just hold on. I am going to read the opinion.

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MR. HANRATTY: Perhaps if we just read through the opinion first and I will ask you to comment on two aspects of it.

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MR. WALSH: Firstly, I want to know is there a letter of instruction or is this an oral instruction or what. I think I am entitled to know.

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MR. HANRATTY: I don't believe we have it. If we have it, I will find it and give to Mr. Walsh. If we don't have it, we will find out if it still exists.

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CHAIRMAN: Just give us a moment. .

I would think that opinion is perfectly admissible in its text. Sorry, first of all, may I say it is relevant number one. Number two, once relevant it is admissible. If counsel for Mr. Burke want to make any comment on it, they can deal with the three conclusions that are reached from it. So there you are, and tender evidence themselves that it was, on an economic basis, that it was something which he had power to do. I see no reason why that opinion should not come to this Tribunal in its present form.

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MR. WALSH: My objection is to the relevance Sir and it is very brief and that is if there is any criticism of what Mr. Burke did and it is within the ambit of your Terms of Reference Sir, it is for you to decide and if you are being asked to defer to the opinion of Mr. Geoghegan--

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CHAIRMAN: I am not deferring to the opinion. I am merely noting the opinion for what it is, as opinion of counsel and it doesn't necessarily bind me.

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MR. WALSH: I know it wouldn't bind you.

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CHAIRMAN: I will make my own conclusions in relation to it. Essentially to deal with facts, I don't really want to go into inferences of law, the fact that it -

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MR. WALSH: There is facts. I accept that.

CHAIRMAN: The fact that an opinion was expressed in this regard.

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MR. WALSH: But if it was expressed or wasn't acted on. Assume for the moment, why is it in any way relevant to what you have to decide, Mr. Chairman? In fact, it could prejudicially influence you against Mr. Burke. That's one context of it. You have always stressed Sir, and in your conduct of the Tribunal you have always acted fairly, I think this would be straying into the realms of unfairness to be producing an eminent opinion in a matter which is not relied on and which could then be used by you in interpreting the matter and we are not given an opportunity to provide an alternative opinion or alternative interpretation.

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MR. HANRATTY: If I might respond to that, Sir?

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CHAIRMAN: Please? .

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MR. HANRATTY: All this evidence proves is (A) that RTE took counsel's opinion. (B) What the opinion was and (C) I was going to proceed to ask him what, if anything, he did as a result of obtaining that opinion. You are not in anyway bound by this opinion.

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CHAIRMAN: It is a factor - it is a factor which I will have to take into account, as to whether or not the Minister is acting in a rational way, when he makes a decision, he must act as a rational man.

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MR. WALSH: That's the danger. Mr. Hanratty said it is only being adduced in evidence to ascertain whether or not in fact the RTE organisation, through Mr. Finn, took counsel's opinion. Secondly, to prove what in fact they did with it. Whether they acted on it. He is not seeking to introduce the opinion as proof positive of the legal opinions expressed there in.

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And the danger is once it is introduced in evidence it will filter through to the minds of you, Mr. Chairman, as proof positive of what the law definitely was in the particular set of facts. We don't even know what set of facts were put before Mr. Geoghegan. That's the danger. I have no difficulty with the general proposition that, and I can agree to the general proposition that Mr. Finn sought counsel's opinion, got counsel's opinion may or may not have discussed it with the Authority and then he can tell us what they did. But what the contents of the opinion were and what the opinion itself expressed shouldn't be in evidence before you because it is prejudicial and it is in a way, usurping your duty insofar as you have any interpretation to apply to this section of the Act.

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CHAIRMAN: Do we have the actual

MR. HANRATTY: We have made inquiries and we have been told there isn't any document. The previous director of legal affairs, as was his habit, consulted counsel verbally for a quick opinion and this is what he got. And that was



what we inferred by the absence of any formal case to counsel. It seems to me, Sir, that this is evidence which may or may not be probative at least the evidence should be put on the forward, what if anything you do with it is entirely a matter for you, it seems to me to exclude it is quite absurd because it is undoubtedly part of the sequence.

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CHAIRMAN: I take it Mr. Burke's legal advisers have been circulated this document?

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MR. HANRATTY: They have. It has been circulated with all the other documents.

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CHAIRMAN: Then they know the background and circumstances and the content.

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MR. WALSH: It seems there is no case to counsel and it was an oral opinion that was sought off the cuff, so to speak and in the circumstances I object to the contents of the opinion being in evidence. I have no objection to Mr. Finn giving evidence --

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CHAIRMAN: I'll take it de bene esse and I will consider it in due course.

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MR. WALSH: Thank you, Sir.

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MR. HANRATTY: It is entitled,  
" Counsel's opinion on Ministerial direction of the 14th of

March of 1989 and it is actually dated the 15th of March 1989"; isn't that correct?

A. That's correct, it was something that we wanted to get a legal opinion on very quickly because things seem to move rapidly around this time.

282 Q. Yes. It is, I think numbered paragraphs and paragraph one says:

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"The first point to be made is the Minister does not have an unfettered power under Section 16 (2) of the Act. In imposing the charges which RTE is to make he must have regard to the obligations of RTE under section 24 of the 1960 Act. In my view, the Minister is not empowered under Section 16 to force RTE to make uneconomic charges. If the 1988 Act were to empower the Minister to do so there would have been an express provision to that effect. In the absence of such an express provision it must be implied that the Minister will have regard to the obligations of RTE under the Broadcasting Act 1960.

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If, therefore, the charges which the Minister has purported to impose are widely uneconomic, he is, in my view, acting ultra vires but a proviso must be made in this regard. If the Minister acted on expert advice in imposing the charges then they would not be capable of legal challenge. It would only be open to legal challenge if the Minister had acted irrationally in imposing the charges and not relied on any expert advice given to him.

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2. There is another respect in which, in my view, the

Minister was acting ultra vires in making the direction. Paragraph six of that direction requires RTE to incur capital expenditure but there does not appear to be anything in Section 16 which empowers the Minister to make such a direction. That section merely empowers the Minister to require cooperation by RTE in certain respects. The word cooperation would not seem to me to embrace the incurring of capital expenditure for the benefit of a third party and with no benefit to RTE and the possibility that the third party itself might at some future date, fall into financial difficulties and might collapse. Paragraph 6 of the Minister's letter would seem therefore to be beyond his powers. I do not think that the different paragraphs in the Ministerial direction can be severed from one another. If one is ultra vires, the entire direction is ultra vires. It would seem to me the letter contains a combined package which cannot be severed.

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3. Obviously the question of whether the Minister is acting beyond his powers or not is the important question which has arisen. It must also be pointed out the Minister may not, in fact, have adopted the correct statutory machinery before imposing the charges he did. As I read Section 16 subsection 1 and 2 thereof it must be read conjunctively and not disjunctively. Subsection two can only come into play in respect of facilities required to be provided under Ministerial requisition in section 16 under subsection 1.

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It is not clear to me that any specific requisition was ever made by the Minister to RTE to cooperate in any specified way in subsection 1. In the absence of any requisition it would not seem that charges can be imposed under subsection 2.

Of course there were discussions with RTE and I do not have minutes of those discussions. It could be argued on behalf of the Minister that a requisition was informally made in the course of those discussions and that therefore subsection 1 was complied with. This will depend on the facts. I certainly think there should be a specific requisition of some kind under subsection 1 before the charges can be imposed under subsection 2, but it may not be necessary that such a requisition be made in a written form" .

Now you have already told us in your evidence that there wasn't, in fact, any consultation of any kind between 20th of February and the date of the directive on the 14th of March, isn't that right?

A. That's so, yes.

283 Q. That was obviously something to which Mr. Geoghegan wasn't privy when he gave his opinion?

A. No.

284 Q. But in any event, his opinion was it seems to be to the effect that there were two grounds in which the directive from the Minister was ultra vires. As a result of this opinion what, if anything, did you or the Authority decide to do?

A. Well I brought the legal opinion to the notice of the Authority at a meeting on the 13th of 30th of March. On general, not just legal grounds, but on general grounds there was a reluctance to go down what I will call the legal route on this issue.

285 Q. Could you just explain why was that reluctance?

A. Well, the position was that a license had been issued to a new independent radio contractor in January and licenses were going to be issued to other local radio stations as well. The whole broadcasting landscape was changing and changing rapidly. RTE strategically was in quite a difficult position because while we knew that this change would come about, was coming about and while we took whatever steps we could, generally, in programming matters and financial affairs and so on to ready ourselves for this competition, at the same time the public perception was that there was going to be a lot of new radio stations coming on air soon for the public. They are not going to cost us anything, because they are all being funded by advertising. And at the level, from the public's point of view, there was an expectation that very very soon there would be new radio stations to be heard. They didn't understand and why would they, about the complexities of transmission and contracts and all sorts of things, they expected things to happen soon. And against that kind of background for the Authority to say "Hold on, hold on," on a specific point here about some money matters, "We are going to have to take this a lot further legally" it just - from as it were from a PR point of view, I mean from the point of view of the public perception of the changes that

were going to happen in broadcasting, and the public perception of RTE, on balance, it would not have been a very wise thing to do.

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It didn't seem so at the time. The best course seemed to be to go along with the directive, get a review in 18 months of its financial provisions and get this whole business with Century out of the way. It had absorbed an enormous amount of executive, an enormous amount of executive time. And of course, this whole matter was of central importance to Century. But to us, we had a lot of other developmental projects in the pipeline in this year. There were an awful lot of other matters that we wanted to get going with and to have to deal with this Century issue through the courts and so on, at that time, it just didn't seem like strategically, a good move to make.

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The public would have seen us as doing in the main injury, the big monopolist, doing everything they can to prevent competition coming in. It would have taken up a lot of time and didn't seem like strategically a good move it make.

286 Q. Yes. You refer to the review, if we can perhaps deal with that. There was a meeting was it on the 30th of March of the Authority?

A. Of the Authority. Yes.

287 Q. And was the Minister invited to attend that meeting, or to a lunch after the meeting?

A. I think it was to a lunch.

288 Q. Yes. And in the course of the meeting with the Minister

on the 30th of March, did the Authority make its views clear to him?

A. Oh, yes, I believe they did, yeah.

289 Q. And did they inform him, for example, that there was in fact, an element of subsidy involved in the figures in his directive?

A. Well, I believe they did. But, he took the view that there wasn't. It was just a situation where we had to agreed to differ. He took the view that there wasn't and that was his position on the matter.

290 Q. Well, did he provide any explanation of the basis on which he was saying at that there wasn't a subsidy, particularly in the light of the fact that he and his own Department had agreed substantially higher figures both in January and in February?

A. No. My recollection is that there wasn't a lot of detailed discussion about - there wasn't a lots of detailed discussion about figures and so on. It was simply the Authority stating their policy, that the independent contractors should be paid, should pay a commercial rate. There should be no subsidy and the Minister said he agreed, and in this case there was no subsidy, it was just an assertion to that effect, but it wasn't debated in detail because at this stage the direction had issued. The matter had been discussed at the Authority meeting on the 30th of March and the general feeling was that, however reluctantly, we should go along with the provisions of the directive and have this review in 18 months time.

291 Q. Did he, at that meeting, agree to such a review?

A. Yes. He did.

292 Q. This was not something provided for in the directive, isn't that right?

A. No, it was not.

293 Q. And was it as a result of representations that were made to him at this meeting that he agreed that there would be a review of the maintenance charges in 18 months time?

A. That's my recollection, yes.

294 Q. The maintenance charges was of course the biggest element of the agreed charges and also the biggest reduction?

A. That's right.

295 Q. Was there any discussion about the fact that he had only allowed ú35,000 in respect of access?

A. Not really. The occasion, as I recall it, didn't seem to be one where one would get into fine detail about particular figures. It wasn't like that.

296 Q. Well, was the Minister disposed to discussing his figures or negotiating them at that meeting?

A. No, no. There was no question of that. It was a fairly straightforward expression of position from both sides, that was it. It wasn't, it certainly wasn't a negotiating meeting.

297 Q. Well, what was the atmosphere of the meeting?

A. A bit tense I would say.

298 Q. Did the Minister give any indication that he had any flexibility on the any of the figures contained in the directive?

A. Quite the reverse. His mind was made up. No flexibility that I could discern.

299 Q. And did anybody try to rationalise with him or to explain the basis of their figures or to say, "Look this has been



agreed at 614. Why are you now reducing it by such a huge amount?" Was there any discussion of that kind?

A. Not a great deal, to my recollection. No. It was very - it was a very short luncheon.

300 Q. Yes.

A. Yes.

301 Q. Well, you had at least I suppose the Authority had a choice at that stage between taking the legal route which, presumably, would have involved launching a challenge to the validity of his directive in the court or putting up with it?

A. That's right.

302 Q. They decided- obviously- to put up with it?

A. For the reasons that I mentioned, they took a wider more strategic view of things than just the legal opinion.

303 Q. Yes. If we could just have page 5489? I think this meeting, in fact, was on the 31st of March of 1989. This appears to be an extract from the minutes of that meeting, but it says at the end of the first paragraph on the page:

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"It remained for the Authority to consider its position vis a vis the difference of opinion between the Minister and the Authority in relation to charges to be made for access to RTE transmitter sites and full maintenance service. At the outset the Authority placed on record its deploration of the recent newspaper controversy in relation to the matter and agreed that the question of taking legal action against the Minister never came into account" .

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And then moving down the page, under the heading "luncheon

meeting with Minister for Communications". "Mr. Burke was accompanied by Secretary Mr. McDonagh. A full and frank exchange of views took place between the Authority and Minister in relation to his direction on charges to be levied by RTE for the provision of services to Century Communications. RTE's particular difficulty vis a vis the structures of charges for the maintenance service was dealt with in detail but the Minister reiterated there was no question of any deviation from the laid down charges" .

Is that, in fact, correct that he made it clear there was no question of any variation of his directive?

A. Absolutely, yes.

304 Q. "He did agree, however, that the question of subsidisation of Century Communications by RTE should never come into account and that a review of the operation of the maintenance charges would take place after 18 months to ensure that no such subsidisation arose. The Minister and the Authority agreed the text of a joint press statement in relation to the outcome of their discussions" and is that, in fact, the case?

A. That's so, yes.

305 Q. Now, we know that press statements did, in fact, emanate from somewhere in which the Minister was reported as having said that RTE agreed that there was no subsidisation, isn't that right?

A. That was reported in some newspapers that the Minister had said that.

306 Q. Yes. And as a result of those reports was a letter sent by the Chairman, Mr. Culleton, to Mr. Burke to clarify the position on the --

A. Yes, that was seen by us as very important, that the record be put straight as to what the reality was. I don't know what Mr. Burke actually said to the newspapers, whether he was quoted correctly or not, but if he said what he was reported as saying, it was at variance with what was agreed with us.

307 Q. If you just look at page 699? If we take the upright one first? This is in the "Independent" of the 1st April of 1989 and under the headline, "Century RTE deal sealed". Brian Dowling is the author.

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"The bitter row between RTE and Century Radio was finally settled yesterday following direct talks between Minister Burke and the RTE Authority which cleared the way for a contract to be signed, possibly next week.

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In what is seen as a major climb down RTE has accepted that the charges put forward by the Minister as fair and reasonable and will now proceed to buy equipment and set up transmission facilities for Century. It is thought that the country's first commercial station will go on air in late May or early June".

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Did you or anybody in RTE ever accept from the Minister that the charges in the directive were fair or reasonable?

A. No, definitely not. It is just impossible that anyone in RTE would have been of that view.

308 Q. And then if we could turn it around to read the horizontal article? This is again the "Irish Independent" on Saturday, the 1st of April, and if we can go to the third

column, last paragraph perhaps it could be enlarged:

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 "Mr. Burke was emphatic, the final deal hammered out by him would not involve any question of RTE subsidising a private contractor like Century. The figures I put forward have been accepted as" - this is in quotation marks "The figures I have put forward have been accepted as fair and reasonable and the RTE Authority agree they do not involve any subsidy" he stressed" .

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 Did you or anybody in RTE say to the Minister or agree with the Minister that the figures were fair and reasonable or that they did not involve any subsidy?

A. No. Absolutely not.

309 Q. And as a result of these articles, did Mr. Culleton write on page 52, on the third of April of 1989 to the Minister in the following terms:

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 "Dear Minister,  
 I was very pleased with your assurance last Friday that the maintenance charges you instructed us to operate would not involve the Authority in any subsidy whatsoever and to ensure this was so you would carry out a review in 18 months. For our part, we will try to finalise an agreement with Century quickly and then develop a good working relationship with them I am concerned about a quotation attributed to you in the Irish Independent, dated 1st April of 1989 . The figures I put forward have been accepted as fair and reasonable and the RTE Authority agree that they do not involve any subsidy" .

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We accept completely that you have structured these charges in good faith and indeed time will tell if your figures are adequate. However, the Authority does not accept that "They do not involve any subsidy" and this is the reason why we asked to you review them again in 18 months time. In fact, our experience of maintaining similar equipment leads us to believe that there is a strong possibility of the maintenance charges proving to be inadequate to cover costs. Time alone will tell" .

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Were you aware at the time that Mr. Culleton considered it necessary to write such a letter to the Minister?

A. Oh absolutely. Yes. It was very important that that be put on the record.

310 Q. You, presumably, became aware of the newspaper reports when they were published?

A. Yeah.

311 Q. And what was your reaction and the reaction of the members of the Authority?

A. Well they didn't take- they didn't accept that their position or my position on this issue was being accurately represented, saying that we - suggesting that we accepted the figures in the directive as being "fair and reasonable".

312 Q. Yes.

A. That certainly wasn't our view.

313 Q. Yes. Going back just a little bit now, if we may Mr. Finn, I think as a result of the directive, there were a few immediate problems that presented themselves, so far as

RTE were concerned, is that so?

A. Yes, there were.

314 Q. And did you address these in a letter to Mr. Burke on the 16th of March of 1989?

A. I did.

315 Q. Page 48. And we have had this letter again in detail, but essentially is this a letter which was designed to address the most obvious and immediate problems that you saw with this directive?

A. Yes. This letter, I wrote this letter on the 16th of March. As I have said, on receiving the directive of the 14th of March, my own reaction was one of shock and disbelief. So I felt we should do a few things immediately. One was to seek urgently some legal opinion and secondly because there were a number of matters in the directive which did require just clarification, and as I said in the letter, aspects of it would be in conflict with Authority policy which it was my job to implement.

316 Q. Yes?

A. So, I sought clarification on the things that I thought were unclear. So that that the ground could be as clear as ever possible by the time of the Authority meeting on the 31st of March.

317 Q. Yes. Well, if we take the third paragraph first of all:

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"You should also be aware that the Authority took a policy decision last November about the basis of charging out for transmission services to licensed contractors. I have to say that the basis of charge in paragraphs one and two of your letter are quite at variance with their decision

then.

Clearly this is a matter which I have to discuss further with them at the earliest opportunity and also the wider implication for us in dealing with all other licensed contractors throughout the country. I do believe that an on the spot visit to some of our major transmitter sites, either on you own or your officials would put the reality of our figures for these items in perspective against those in your letter. I hope you see merit in this suggestion. Arrangements can be put in hand at short notice. Actually members of the IRTC would be welcome also" .

Was that offer ever taken up?

A. Yes. It was. Not immediately, but I do recall that the engineering division, I guess it was a couple of months later, they organised a visit to some of the more difficult sites with Mr. McDonagh, who was Secretary. Just Mr. McDonagh.

318 Q. Yes.

A. And I think that was, from our point of view, was a beneficial arrangement. Because a lot of the people talking about transmitters and transmission and access and maintenance, they had never been next nor near any transmitter. Now I do know that Mr. Barry, in 1988, I think he visited, I think it was Athlone and Tullamore, but they are very easily accessible. They are just sites in the middle of a field and to get the real feel for the totality of what's involved in a national transmission network, one would need to visit some of these mountain

tops.

Actually ideally if they visited them in the middle of winter, as I have done, you would get a real idea of just some of the factors that Mr. O'Brien was referring to.

But anyway, Mr. McDonagh was the person who took up that suggestion, but I am sure Mr. Curley, if he is called, he would recall it more accurately than I can. But it was availed of that in, I think in the next couple of months after March and I think it was valuable.

319 Q. But it didn't result in any reduction or any increase in the transmission charges?

A. Unfortunately no.

320 Q. But that, I infer from the tenor of the letter, was the original intention; that this was written in the hope that by accepting this invitation and by you being provided to demonstrate what was involved, that it might evoke some change of attitude?

A. Absolutely. That there would be a much better appreciation of really what was involved in this because a lot of discussion and so on about these matters was being conducted by people who had never been to any of particularly the more difficult sites and you really have to see it to understand.

321 Q. Yes. But so by the time Mr. McDonagh did, in fact, make his visits there was really no question of any change in the directive?

A. Oh no. No, it was much later than that.

322 Q. Yes.

A. But I think, I think it was a value that he did it because



he was centrally involved later on down the line in finalising the contract and I think it was useful that he had, that he had that series of visits, but it was one day's visit with a helicopter.

323 Q. Yes. Now, you went on to deal with a couple of particularly urgent matters as you saw them. You say:

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"The most urgent matter now relates however to paragraph 6 because of the time element involved five immediate considerations arise:

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1. The equipment acquired would be RTE property and presumably RTE would bear the ultimate financial responsibility to the suppliers for payment. If Century Communications lose their license for one reason or another or fail financially to whom can RTE turn then for recoupment of any outlay not reimbursed by Century Communications, the same applies to links, power and spares, charges."

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Essentially, you were drawing attention to the fact that this particular important matter simply wasn't dealt with in the directive?

A. That's so. Yes.

324 Q. "2. Will the amounts involved in equipment acquisition be regarded as additional to our approved capital programme?"

Again, from RTE's point of view that's a particularly important point?

A. Absolutely. Because if the equipment being acquired for Century was included in our approved capital programme, it

would mean that much less that we could spend.

325 Q. Yes?

A. Which wouldn't have suited our development plans at all.

326 Q. Yes. Just to put it in context, is it the position that on an annual basis RTE has to come up with a capital programme which has to be approved by the Department?

A. Yeah, that's so. Yes.

327 Q. And if, as turned out to be the case, that this additional capital expenditure was to be in addition or over and above the RTE capital programme, that would have to be approved by the Department?

A. Exactly. Just, one needed to be quite clear about this, that if we incurred or if we spent money on this equipment, just how was that to be regarded in relation to the approved overall figure for capital expenditure.

328 Q. Just to move it along a position before we deal with the letter, is the position that the Department of Communications did, in fact, approve an addition to RTE's capital programme to facilitate the purchase of equipment for Century?

A. Yeah, they did.

329 Q. On the basis provided for in the directive?

A. Yes.

330 Q. "3. Will the borrowings involve be guaranteed or supported in anyway by Ministerial or other government guarantee?" Again that was some element of security that you were seeking in the event that something happened to Century?

A. Right.

331 Q. I think in the event the Department declined to permit such

security, is that right, as a result of which RTE ultimately carried the €600,000 odd losses, isn't that right?

A. That was the final loss, yes.

332 Q. Yes.

"4. What is the basis of the residual valuation at the end of the 14 year period".

You queried whether there would be a residual valuation at that stage, is that right?

A. Yeah.

333 Q. "5. RTE did not appear to us to be licensed to operate services other than those licensed in the Broadcasting Authority Acts" can you just explain what was meant by that?

A. Well, my own interpretation of the broadcasting legislation was that if RTE owns transmitters under the license we operate under, if RTE owns transmitters those transmitters can be used only to provide RTE services. We are not empowered or licensed to broadcast for somebody else and that was the point. That was the point that I was making there.

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I mean if -.

334 Q. That you were getting into a sphere of activity that was not specifically provided for under the existing legislation?

A. Yeah, how - exactly that was the point. That, it was a point of broadcasting legislation that I thought should be addressed.

335 Q. Yes. Now, you then say "Early clarification of these

points is necessary if Century Communications are to get on air at a date suitable to them" . Then you go on to deal with the FM situation.

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You say in the last paragraph of that letter:

"Finally, I would reiterate our willingness to meet fully the provisions of Section 16 of the Act 1988 insofar as Century Communications are concerned. But there is a need for early discussion if we are to meet both our statutory and contract responsibility in the matter".

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You are drawing to their attention the need to have early discussions?

A. Right.

336 Q. The response to that letter is at 268 and is dated and under the hand of Mr. McDonagh?

A. That's correct.

337 Q. In answer to point one:

"Ultimately responsibility for payment will rest with Century or their successors. The Minister is considering how best to copper fasten this matter and it may be necessary for Century to enter into a bonding arrangement" .

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Perhaps we will come back to the bonding arrangement in a moment.

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2 "As the equipment being acquired for RTE services the amounts involved will be additional to RTE approved capital programme.

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3. The borrowings will not be supported in any way by Ministerial or Government guarantee.

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4. At the end of the 14 year period, the equipment involved will become the property of Century Communications and

.

5. The license to be issued to the IRTC will be drafted so as to ensure that the provision of a transmitting service by RTE to the sound broadcasting contractors concerned is legal. The matter has already been discussed with the Attorney General's office.

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I hope that the foregoing will finally clear the way for full cooperation by RTE in ensuring that the new service gets under way at the earliest possible date" .

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So that was the response of the Department, in any event. They did deal with some of your concerns but not with others, isn't that so?

A. That's it, yes. They addressed some of the issues but not all of them.

338 Q. Yes. Just to go back to the bonding question, I think in fact, Century did procure a bond or guarantee from Bank of Ireland in favour of RTE up to a certain limit of money, isn't that right?

A. That's correct, up to a certain limit, for certain specified items in the contract.

339 Q. That's correct. And I think it was limited in time as

well to, I think, the end of February of 1991?

A. That's correct.

340 Q. And it was in the sum of I think ú282,00, is that so?

A. That's right, yes.

341 Q. And virtually from the outset I think, RTE started encountering difficulties, as we have heard, in collecting monies due to them?

A. Yes, right from the very beginning.

342 Q. Yes. And the indebtedness of Century increased progressively as time went on?

A. Yes, that's so.

343 Q. And the question of what steps were available to RTE I understand were discussed at a number of management meetings and I think occasionally at Authority level as well?

A. That's so.

344 Q. And various options were considered as to what could be done to deal with this situation, isn't that so?

A. Yes.

345 Q. One of the options, of course, was to put Century into receivership?

A. Yeah.

346 Q. One of the options was to call in the bond?

A. That's right.

347 Q. And there were, in fact, discussions in relation to the possibility of calling in the bond, coming in particular towards the period of maturity of the bond, which was I think in February of 1991?

A. That's right.

348 Q. But in the end, the bond was not, in fact, called in. Can

you inform us as to why that was the case?

A. Yes. In certain respects the decision taken about the bond bears some similarity to the question of should there be the legal opinion, should one act on it. Just to put that time in context, by early February 1991 it was quite clear, very clear, that Century were in very very serious trouble, in trouble financially. We had seen the signs of that on a number, in the usual way. They had cut back, they in fact cancelled the capital programme. They had paid us on account rather than paying specifically. They had been very very slow in making payments and generally from our side they seemed to be an organisation who were in really deep financial trouble.

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In terms of listenership and audience, they weren't doing well on that side either. I suppose because they weren't doing well, they weren't getting the advertising, therefore they didn't have the cashflow.

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So, --

349 Q. Of course we are now talking at a point in time after their initial difficulties, after they got their capping, after Capital had come in with the rescue package, they were again in serious?

A. In very, very serious trouble.

350 Q. Yes.

A. We could have activated the bond, but certainly my own reading of the situation was that if we did, the bond was with the Bank of Ireland. My reading of the situation was if we did that it would probably exacerbate Century's

position with the bank. Just a feeling I had. And our general strategy at that time was that the last thing RTE wanted was to be seen publicly to be the people who, as it were, pulled the trigger on Century and sent them over the edge.

351 Q. Yes?

A. It was very, very important strategically for us, that if Century failed, they would be seen to have failed because of mistakes that they had made themselves, not because of any perceived hostile act on our part. We were quite entitled to activate the bond. So again it was a wider question here. And given their very difficult state financially, in terms of audience figures, I was strongly of the view that at that stage Century really was no longer major competition to RTE. The local stations were beginning to be big competition but Century had missed the boat. There were so many up and coming local stations between the competition they were providing in Dublin and around the country and the competition we were providing through Radio 1 and 2 FM they were in very very serious situation, in terms of ever really getting a worthwhile audience.

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Perhaps they could do it. One never knows, but their situation to me seemed really powerless.

352 Q. It was your judgement, to be completely frank about it, at the time that they had no future?

A. Yes. Well, they might chug along for a few years but in terms of being a real competitor to us, I couldn't see it.

353 Q. Yes. Just to be clear about the bond, as I understand the



bond was from the Bank of Ireland. It was for approximately ú280,000 including VAT. It was for a limited period, expiring on the 28th of February of 1991?

A. Right.

354 Q. It required 48-hours in to activate it. In other words, the last occasion it could be activated was the 26th of February 1991. It was for certain amount but not all of the indebtedness of Century, but at the point in time when a decision had to be made to activate it or not, Century were indebted to the full extent of what was covered under the bond?

A. Their indebtedness was more.

355 Q. But in respect of the items in the bond if you were calling in the bond you were calling in the full ú280,000?

A. That's right.

356 Q. As I understand the terms of the bond were such in the event it was called in, that would give rise to an immediate indebtedness by Century to the Bank of Ireland?

A. Right.

357 Q. It was your decision or Authority decision therefore not to call in the bond?

A. Ultimately it was an Authority decision. It was an important decision, but I would have been recommending that, that we don't - .

358 Q. Yes?

A. That it was a difficult situation for RTE, because all along we had to keep pressing Century through 1990 to pay and indeed through 1991. We had to show that we wanted to get our money, but equally I felt we had to show that we weren't going to be the ones to push them over the edge.

So there was a difficult kind of role there but Mr. O'Brien has explained that, the constant pressing of them for payment of accounts. The pressure was kept up all the time. But, for the reasons I have described, it was felt strategically not advisable to activate the bond.

359 Q. Yes. And so a decision was made, when was the decision made in fact not to activate the bond?

A. I think it was February 1991.

360 Q. Yes.

A. Close to the- because we wanted to, as I say, we wanted to keep as much pressure as possible on Century all the time. And it was quite late-in-the-day before we let it be known that we were not going to activate the bond.

361 Q. Yes. I think I am correct in saying, am I not, it was under active consideration from about August, September of the previous year?

A. It was something that had to be addressed because there was a dead line to it. This was an issue that had to be considered and addressed one way or another in time.

362 Q. During that period were constant attempts made to put pressure on Century to obtain payment of the monies that were due?

A. Yes, continuously, very strong pressure at times.

363 Q. In the context of the possible implementation of the bond were assurances, in fact, obtained from Mr. Barry on behalf of Century in regard to payment of RTE's indebtedness?

A. Yes, there were. Yes. I met him, I didn't meet him much in 1990, but in from early 1991 onwards, I was in regular, or he was in regular contact with me about the their account.

364 Q. Yes. And did he give you any assurances in January/February of 1991?

A. Well, yes. But they also sought some reduction in the amount due, which again was discussed by the Authority and which we agreed on as part of this general strategy or objective of not being the ones who would push Century over the edge.

365 Q. Yes.

A. At a point around then they owed us I think 388,000 and we made an ex gratia allowance to them of the 88,000, but as a quid pro quo there was an undertaking from them that no legal actions would be taken by them against RTE, because on a number of issues on and off in an informal kind of way, they had threatened legal action on a variety of grounds. So that was the quid pro quo.

366 Q. Yes. Going back to 1989 we have already heard about the three meetings that took place in November. You have already told us about the contacts between RTE and the Department between the 11th of January and the date of the directive. But, as far as you were aware, were there any negotiations between Century Communications and RTE during that entire period after the three meetings in November?

A. No. None at all. None whatever.

367 Q. And as far as you were aware, did Century at any time put any figure on the table to RTE or suggest any figure as an appropriate figure or as a negotiating figure on any basis?

A. They did not. And I think at the Authority meeting of the 24th of February, this will be, this was evidence because in all the exchanges, one member of the Authority asked a few times what are Century offering and none of us could

answer because none of us knew. Because there had been no offer and then it was mentioned that there is this figure of 375,000 being mentioned, but the record of that Authority meeting is interesting in that regard. None of the senior executives was able to answer that question put by the Authority member, what are they offering and we couldn't answer it because there was no offer.

368 Q. Yes, apart from that reference which we have had this morning from Mr. Gahan where he used the word "offer" in respect of the 375, as far as you were aware was any figure put by way of offer from Century directly to RTE?

A. No, never. Never.

369 Q. Whether 375 or any other figure?

A. Or any other anything. Their line generally was whatever we were looking for it was too much. That's as far as it would go. They never told us what, in their view, was enough or a fair figure.

370 Q. Did you find it surprising that there was no attempt on behalf of Century to negotiate or to, as it were, engage in relation to the RTE figures?

A. I did, yes. I did find it strange, but during all these months, November and up to the time of the directive, it was a strange kind of relationship, if you wish. There were these meetings in November with Century, and then from then on, nothing, nothing at all. And I found that puzzling, particularly after the decision was made by the IRTC to grant them the national license, that I thought they would be dealing with us urgently and so on. But I can't recall any meetings at all. As we have noted, there were meetings with the Minister and so on. But nothing

with Century, it was strange but to be honest at the time there were so many other things that certainly I had to deal with them, many senior people had to deal with, that we just felt that, well, we have done what we can. It is a "done deal" with the Department, the 692,000. It was finished. That business is finished so if they are not anxious about contacting us, well it is not up to us to initiate anything. They are the ones who want to get on air.

371 Q. Yes. You have heard Mr. O'Brien's evidence about the efforts on the part of RTE to move things along after the directive was implemented?

A. Yeah, on a couple of fronts. The engineers division had a number of meetings with Century and simultaneously Mr. O'Brien was very active in relation to seeking funding for the acquisition of the equipment that they needed.

372 Q. Yes?

A. There was a lot of time spent in RTE in April and May on these areas.

373 Q. You say in your statement that thereafter, that is after the directive "Lengthy and complicated negotiations took place to finalise the contract between RTE and Century." Could you just give us a slight expansion on that, if you would?

A. On the actual - on the negotiation and completion of the actual contract?

374 Q. We have been given to understand by previous evidence that there were certain difficulties, shall we say, in the matter of negotiating the terms of the contract?

A. I don't think I have ever experienced a more difficult

negotiation and I have done a lot of them with some very difficult organisations and people. They were extraordinarily difficult. Now the subject matter was complex as well, trying to reduce this transmission agreement where Century were having access to our premises, sharing some of our facilities and all. It was extraordinarily difficult to reduce to manageable and practical legal language, but my recollection is that our solicitors prepared the first draft after discussion with us on the 19th of June and in a way unfortunately, Century produced their draft from their solicitors on the 19th of June. And that didn't help matters, the fact that there were two documents in existence.

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So it took from the 19th of June to, we'll say about the middle of July, it was all finally sealed and so on, towards the end of July. But it took, in practical terms, about two months of extensive meetings, the Department, at times the Secretary was brought in to act as a mediator if you wish, between the two sides, but they were complex and difficult. That's approximately the length of time they took.

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Mind you, Century's contract with the IRTC, their broadcasting contract, I don't know anything about the difficulties with that but that was finally signed on the 21st of July, ours on the 28th.

375 Q. Were you aware that there were also difficulties between Century and the IRTC as well as between Century and RTE in relation to their respective contracts?

A. Quite honestly, no. Because the difficulties that we were encountering in the negotiations were so extensive that I really didn't give a thought to what they were doing with the IRTC or vice versa. Those negotiations occupied not only my time but a lot of other senior peoples' time. A huge amount of time in those two months of 19th of June to 28th of July.

376 Q. Yes. Making due allowance to the complexity of the subject matter, what was the essential nature of the difficulties and extent of the difficulties that you were having in these negotiations?

A. Well, all I can do is speak from RTE's point of view. But I had a strong feeling that anything that RTE wanted was objected to by Century on the basis that it was unreasonable, irrational. That we were abusing our dominant position and so on and that anything that Century wanted, no matter how outlandish, no matter how illogical, was presented as absolute common sense and "why can't you agree, RTE, to this right now? You are only stalling and delaying". It was quite - they weren't really - I know we did negotiate a contract in the end and it was signed by both, signed under seal by both parties, but that for me is one of the reasons why the thing was so difficult. I have never experienced anything like it before and as I said, I have conducted and been personally involved in lots of difficult negotiations over the years.

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Anything we wanted was, as I say, presented by them, as being irrational, illogical, so on and anything they wanted was presented as fair and obviously fair and reasonable,

when, very often, it wasn't. By no stretch of the imagination could it be seen as fair and reasonable.

377 Q. Well, can you instance any demands that were being made or any positions being taken that, in your view, were unfair and/or unreasonable?

A. I can't really at this stage. This is whatever it is, eleven years ago, but all I can say is that it left a lasting impression on me. I really can't at this stage think of - there were so many sticking points, so many crises. Without thinking deeply about it I can't itemise one but they were extraordinarily difficult.

378 Q. Did these difficulties give rise to ultimately a delay in the ultimate conclusion and exclusion of the contract between RTE and Century?

A. I suppose it did. But I mean we were anxious get this business concluded because as was said already, there were a lot of other things we had to do apart from finalising the Century contract. We wanted to get it tied down quickly and urgently, but you can only conclude an agreement when both parties, however reluctantly, are in agreement. And that proved difficult in this case.

379 Q. Yes. Well, we know, for example, that Mr. Laffan wrote this letter to you, this very long letter to you on the 19th of May of 1989?

A. I remember -.

380 Q. I am about to deal, not in the same detail, with this letter as Mr. -

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CHAIRMAN: I know the letter you are referring to.

381 Q. Would you like me to deal with it now, Sir?



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CHAIRMAN: It depends on what further you are going to deal with. If that's concludes the matter, certainly. If you are going to go on to something else the answer is no, I would prefer to tomorrow morning.

MR. HANRATTY: Yes. I will be spending some little time on it.

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CHAIRMAN: I think we will defer it to tomorrow morning. It is tiring on the witness, as well as everything else. Half past ten tomorrow morning.

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THE HEARING THEN ADJOURNED TO THE FOLLOWING DAY, THURSDAY THE 9TH NOVEMBER, 2000 AT 10:30AM.

