

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY 15TH OF

NOVEMBER, 2000, AT 10:30AM:

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CHAIRMAN: Good morning everyone.

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MR. O'NEILL: Mr. O'Donovan please.

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MS. EGAN: Chairman, I wonder if I might make a request before this witness commences giving evidence.

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CHAIRMAN: Certainly. What can I do for you, Miss Egan?

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MS. EGAN: I just wish to clarify a matter, Chairman. I understand that you made a procedural ruling that clients may not sit with legal advisors during the course of the Tribunal, Chairman. I was wondering in relation to Michael O'Keefe who is the present Chief Executive of the IRTC, and is not a witness today, although he is scheduled to give evidence tomorrow, if he may be permitted to sit perhaps in the chair over there so he has access to the documents at the same time as we have access to the documents. We have only one set of the 16 folders of documents, so that he can assist in locating a document when it is referred to by a member of the Tribunal team or, if we wish to refer to a document.

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CHAIRMAN: Well, in principle, the answer is no. For the simple reason that if I grant that, I will have literally a mountain of clients sitting in counsels' benches and it just becomes unworkable. There is no other reason for it.

I wonder if we can in any way assist you. Why can't you copy, I mean why can't you copy your files?

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MS. EGAN: I am sorry, Chairman?

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CHAIRMAN: Why can't you copy your files?

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MS. EGAN: That can be done. I don't think it could be done in advance today. It is not so much that he would sit beside us but that he would have access to the documents at the same time we would.

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CHAIRMAN: Is there any way as an exception we could facilitate this? Do we have a spare set of documents? As soon as --

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MR. O'NEILL: We do have a vast volume of documents of course, Sir. There is a relatively limited number of documents which are being used by the Tribunal in this particular module and with the series of witnesses who are IRTC witnesses. It does occur to me, Sir, that there is a screen available in the row behind My Friends and the documentation can, in fact, be put up on that screen which is accessible to him.

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CHAIRMAN: Miss Egan, that is the furthest I can assist you. I have every desire to facilitate your client, not your client, your witness and yourself that. Is as far as I can go.

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MS. EGAN: In that regard, just briefly to reply to Mr. O'Neill. It is not so much that we won't be able to locate the documents that the Tribunal team refer to, but that if we wish to refer to document or put documents to our witnesses from the bundle of documents, we would just like Mr. O'Keefe to have access to that bundle of documents.

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CHAIRMAN: That is a matter of logistics within your own solicitor's firm to furnish and make those available. In due course of time a little thing called a taxation of costs will possibly, probably reward him for his efforts. I won't vary my ruling. Thank you very much.

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MS. EGAN: Very good, Chairman.

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FRED DONOVAN, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY
MR. O'NEILL:

1 Q. MR. O'NEILL: Good morning, Mr. O'Donovan.

A. Morning.

2 Q. You were one of the first members of the IRTC which was
conceived as a body on the 17th of October, 1988; isn't
that correct?

A. Correct.

3 Q. I wonder could you just outline briefly, to your knowledge,
how you came to be appointed to that Board and what you
understood your qualifications or attributes were that lead
to your appointment?

A. Well, it is still a mystery to me why I was appointed. I
assume the Cabinet appointed me. And I assume that they
appointed me because of my knowledge of radio.

4 Q. And how extensive was your knowledge of radio, for the
record?

A. Well, I had been producing radio programmes as a freelance
since 1954 for quite a long time and in those years I had
worked as a freelance in RTE and then ended up as
Chairman. So I had a little knowledge of the broadcasting.

5 Q. You ended up as Chairman of RTE?

A. Yes.

6 Q. Yes. And undoubtedly you gained knowledge in that capacity
of broadcasting in general in RTE in particular, is that
right?

A. Yes, yes, and I hope I brought a little knowledge to them
as well.

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7 Q. Yes. You say that you are not aware of exactly who might have nominated your appointment, but you accepted the appointment which was made, isn't that right?

A. I did, yes.

8 Q. At that time Mr. Ray Burke was the minister responsible for communications, isn't that so?

A. Correct.

9 Q. Yes. Did you have any personnel dealings with Mr. Ray Burke in connection with your appointment?

A. When you say "personal", did I meet him?

10 Q. Did you meet him? Did you call to him?

A. I was called to his office, he informed me of the appointment and what was expected of me, and that was it.

11 Q. Right. Can you recollect at this point in time what he said was expected of you?

A. He mentioned that my expertise in radio, that I was being appointed on that basis.

12 Q. Right. Did he indicate to you in any way what the respective functions were that you would have to perform as a member of the IRTC?

A. No.

13 Q. No?

A. No.

14 Q. So I take it that it wasn't until you read the Act and the schedule to the Act that you understood exactly what your duties were?

A. Yes, exactly.

15 Q. And having done so, it became apparent to you that one of the tasks which the IRTC had was to select successful candidates or successful franchisees amongst the candidates

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for various local and one national radio broadcasting license; isn't that so?

A. Yes, we had over 100 applications, many of them from head cases, that, you know, they had no knowledge of radio, knew nothing about radio, were ex pirates, so we had to trawl through all of those and many of the applicants were, applications were put in by accountants who, in my opinion, had been trained in the Hans Christian Anderson school of economics, because they were crazy, so it was easy to narrow it down to about four or six.

16 Q. Yes. I think that the headings under which licenses were going to be granted could be categorised as the television network for a start, that was a separate and distinct entity; isn't that so?

A. Yes.

17 Q. A third television channel. Then a national broadcasting license for radio?

A. Yes.

18 Q. Then individual local radios and community radios on a town or county basis; isn't that so?

A. Correct.

19 Q. And can you recollect how it came to pass that the first issues to be dealt with dealt with the National Radio Franchise rather than television or local radio. Do you have a memory of that?

A. I haven't a memory of how the debate went on on that, but if I was doing this today, they would be first, because the lead-in to a national station was much greater than the lead-in to a local station so to get them on air as quickly as possible, they would have to be the first people, first

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to consider.

20 Q. Right. Now, do you remember the events of the first meeting of the IRTC which took place in Newbridge House in Donabate in County Dublin on the 17th of October of 1988?

A. Well, I remember it taking place, but that's - anything else I gleaned from the documents the Tribunal has sent me, because it is 12 years ago, it is very difficult to remember.

21 Q. Right. Right. I take it that one of the cardinal principles or functions of the IRTC which you could identify was the independence of the individual members and the independence of the unit itself from influence outside, isn't that right

A. Yes, well we had a very distinguished judge as Chairman. We had a first class professional group of people as members of the Commission, and the independence was the prime thought in all our minds.

22 Q. Did you become aware that the nomination of the bankers, accountants and lawyers to the Commission was done at the request of the then minister, Mr. Ray Burke?

A. No, I wasn't aware of that, no, not until yesterday.

23 Q. Mmm. Could you see and can you see now any reason why this function of the Commission was in fact usurped to the extent that the persons that took up these positions were nominated, in effect, by the Minister?

A. No, because I would have thought, maybe that was normal procedure, because the fact that we were independent, we were basing that on the decision to give licenses to various people. We didn't, I certainly wouldn't have thought about that, and I don't even remember who proposed

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these nominations.

24 Q. When the Commission set about its work, obviously it had a Secretariat which was in existence for some time before the IRTC was formed, and it had been carrying out certain preliminary work, both as regards establishing the type of system, technical systems that would be involved in broadcasting and other related matters, isn't that right?

A. Yes, that's correct.

25 Q. And I think a decision was made relatively early on that the Commission itself would meet every Thursday; is that right?

A. Yes, that's correct.

26 Q. And at those meetings can you remember being circulated with an agenda in advance of meetings, or was the agenda decided the week before?

A. I truthfully can't remember that, but the normal procedure, as ex Chairman of other companies, is that you would receive the agenda in advance.

27 Q. Right. Now, having attended at these meetings and having, I think, been aware recently of the minutes of those meetings, it would appear that as much as was recorded in the documentation of the IRTC, was the decision which was the ultimate result of a meeting, isn't that right?

A. That's correct.

28 Q. And matters which had been discussed but had not lead to decisions were not recorded, nor were the positions adopted by individual members recorded in any permanent format, isn't that right?

A. Yes, that is correct.

29 Q. So that there is a relatively brief or relatively short

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amount of documentation available to allow you to refresh your memory on what exactly took place isn't, isn't that right?

A. That's right.

30 Q. I think you do remember, however, that the procedure to be adopted in relation to the National Radio Franchise is that the candidates would have to submit a submission in accordance with the format which had been drafted and circulated by the IRTC to those who were deemed to be qualified to receive it, isn't that so?

A. Correct.

31 Q. And the submissions followed, in effect, the same numbering system and the same headings of subject matter as had been set out in the draft sent --

A. That's correct.

32 Q. And there was a short-list at the end of the day on the 16th of December which was the closing date for the receipt of submissions of four candidates who were going to be considered by you and your fellow members, isn't that right?

A. That's correct.

33 Q. And having received the submission on the 16th, I think there was a directive given by the Commission to the Secretariat that there should be an analysis carried out of the candidates whose candidature would have to be considered by you and this would be a comparative analysis of their various headings, isn't that right?

A. Correct.

34 Q. Now, I don't think that the Secretariat was asked to make any judgement or recommendation, but merely to analyse the

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various applications and to set out one after the other the varying responses of the applicants to particular subject matters in the application, is that right?

A. Correct.

35 Q. And that allowed you and your fellow members, I think, to see more or less, on a page by page basis, what the individual candidates had to offer on any particular subject, isn't that right?

A. Correct.

36 Q. Now, this analysis, as I understand it, was one which was carried out by Mr. O'Keeffe, or certainly was signed off by Mr. O'Keeffe and circulated on the 22nd of December of 1988?

A. Yes.

37 Q. We see that as document on page 3908 which will appear on the screen before you.

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Can you see that Mr. O'Donovan?

A. I can, yes.

38 Q. And it identified the four applicants whose applications were going to be scrutinised as firstly, Century Communications Limited; secondly, Radio 2000 Limited; thirdly, National Radio Franchise consortium and four, Radio Nova International. Do you see that?

A. Yes.

39 Q. The first three of those apparently were going to use terrestrial based system whereas the fourth was going to use a satellite system, if successful?

A. Correct.

40 Q. Right. Now, the comparisons that were carried out by Mr.

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O'Keeffe are then identified in the letter as analysis under "General aims: Current and news affairs; Music policy; Irish language and culture; new opportunities for talent; purchase and sale of material; education/religious affairs; programme schedule and readiness date."

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I think that the analysis which then proceeded analysed the first three applicants together and dealt separately with Nova because of its unique presentation, isn't that right?

A. Correct.

41 Q. To your knowledge and in your judgement at that particular time on review of the particular submissions, was there any one submission which could be realistically distinguished from the other as being superior in presentation or in content?

A. Well I felt, I think you may have my notes of that day, I felt that Century had a very good presentation, but there was very little between Century and 2000 until it came to the final conclusion of the people involved, and Century, from my mind, had the best grouping of people. Now, I had one reservation and that was finance, and I can't remember what the reservation was, but it was probably based on the fact that I got the feeling they hadn't cleared themselves with RTE regarding the transmitters, so that was the only reservation I had. Otherwise I felt they were ahead of the other three.

42 Q. Right. Was this a decision which you were capable of making after you had received the written submission of Century and the analysis which was performed by Mr. O'Keeffe and other members of the Secretariat, or was that

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a conclusion you reached after you had analysed those applications, all of those applications and heard the oral submission on the 12th?

A. It would have been after the 12th.

43 Q. I see. Well, if we can perhaps fix you in time at a point after the 22nd of December when you had received the applications and you had received the submission, the review and comparative analysis of that prepared by Mr. O'Keeffe, there was also a financial document which was prepared by Mr. Appleby, another member of the IRTC, do you remember that document?

A. No, I don't remember the detail.

44 Q. To refresh your memory on it, perhaps we will look to document 3919 which is a document headed "Financial Structure of the Applicants" and it is broken down under four headings, you can see there is no entry for Nova on the right, but in respect of the other three, there is an analysis of their presentations under the headings 'Paid Up', 'Shared Capital', 'Leasing Finance', 'Shareholders Loans' and 'Bank Overdrafts'; do you see that?

A. I do, yes.

45 Q. As you move across the line there, you will see that there was a fairly wide variation in the capitalisation of the three contenders who were analysed here, isn't that right?

A. Correct.

46 Q. Of the three of them, Century appeared to be the one with the smallest budget in terms of having a ú2 million total capital, do you see that?

A. Correct.

47 Q. The others, Radio 2000 had 4.41 million, and the NRFC

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National Radio Franchise consortium, 3.358 million, isn't that right?

A. Correct.

48 Q. And I think that on review of the financial figures, you identified that one of the issues was the wide variation in transmission charges that were going to be allowable for in these projections, isn't that right?

A. Correct.

49 Q. If we look at the next document which is 3920, this is a profit and loss projection for Year 1. You will see to the end of that "Transmission". Can you see that, about two lines up, or two columns up from the line across the page where the totals go?

A. Yes.

50 Q. This was an analysis carried out by Mr. Appleby of the contender's financial projections as they appeared for Year 1, under the heading "Transmission" you will see that the consortium allowed for ú686,000 as its annual transmission charge; Radio 2000, ú317,000; Century ú160,000, isn't that so?

A. Correct.

51 Q. Again here there was a pretty wide variation, a multiple of 4:1 between the lowest and the highest as regards the transmission charges, isn't that right?

A. Correct.

52 Q. And I think it was known, as soon as the submission had been received, that each of these contenders intended to avail of the existing RTE transmission facility as a means of broadcasting their signal nationwide, isn't that right?

A. Correct.

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53 Q. And consequentially since your function as a commission was to license somebody to do this, they would have to have reached a transmission agreement before you could license them, isn't that right?

A. Correct.

54 Q. So inherent in the whole exercise was that Century or Radio 2000 or the consortium would have to reach an amicable arrangement with RTE if it was to be something you could consider?

A. Correct.

55 Q. And I think you are aware that one of the criteria under which you had to judge intending applicants' applications, was their financial standing and security, isn't that right? At this particular time at the end of December 1988, the beginning of January, is it your recollection that you did have some concern in relation to Century and it centred on their financial standing?

A. Correct.

56 Q. More particularly in the context of their ability or willingness, whichever it may be, to pay what RTE was looking for its transmission charges?

A. Yes, this was pointed out to me, and we may have, we may have trouble in that area.

57 Q. The minutes record that the Chairman and secretary had delivered a report to the Commission of their meetings with RTE, and the chronology and history of events suggests that there was a meeting between the Director General of RTE and his staff and the Chairman of the IRTC and its secretary on the 7th of December, where The commission received a document which has been called in this Tribunal the 'RTE

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rate card'. That was a document which identified a number of options which would be available to intending users of the RTE system and costed the various options which were there. The figure of €1.2 million was what was on offer by RTE by for what was called the "all-in" service?

A. I quite -- I can remember the figure, I can't quite remember how it came to us. I remember being a little shocked at the figure of 1 million or over 1 million.

58 Q. Right. And obviously anybody is going to be shocked by figures of that enormity, but can you say what in particular, other than the amount, that shocked you about it?

A. Well, I knew where RTE, what direction they were coming from.

59 Q. Yes?

A. With my RTE hat I would say that was a fair figure, but with my IRTC hat I felt it was a most unfair figure.

60 Q. Right. Well if we can look at it wearing your RTE hat firstly.

A. Yes.

61 Q. The document which was produced was an analysis under various headings quantifying certain costings on an annual basis or a once-off basis if it involved the provision of equipment, isn't that so?

A. Correct.

62 Q. And from your experience in the broadcasting industry and your experience in RTE, you say that it seemed fair with an RTE hat on?

A. Yes.

63 Q. Does it follow from that that the document, as you saw it,

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seemed rationally to present the argument and quantify the cost of what RTE intended to present?

A. Well, when RTE put together figures by engineers, they are employed to make a profit somewhere along the line. I felt hidden in those figures was quite a large profit. Now, I am not an engineer, but I felt that the total amount was ridiculous.

64 Q. Yes. So now wearing your IRTC hat, you came to the conclusion that it was ridiculous; is that right?

A. I did, yes.

65 Q. On what basis did you reach that decision? Did you, for example, seek to have the figures examined by your financial advisors who at that time were Deloitte Haskins Sells, or --

A. I can't remember what happened. All I know is that it was suggested that by somebody, that myself and Sean Lackan and somebody else would go to the Minister and discuss the situation. Now, I have no recollection that we did that. But I felt that it was incumbent on the executive in Century and the executive in RTE to get together and sort the problem out. They were both coming from different directions. Century didn't want to pay anything, and RTE wanted everything. There was somewhere along the road they had to meet. It really wasn't the job of the Commission to force that. It was the job of the Commission to help in any way.

66 Q. Yes. Whilst you centre the argument as being one between Century and RTE, I think it is correct to say that before Century was selected, it, in effect, was an argument between all potential franchisees and RTE as to what the

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level of charge should be, isn't that right?

A. Yes, correct.

67 Q. And do you know of any reason therefore, why steps weren't taken to fix the price which all contenders would have to accept if they were to proceed their applications further, rather than waiting until there had been a selection of a particular candidate and then a negotiation process which may or may not be successful?

A. Well, in one way there was four possibles in this. And if the four went to RTE, RTE's situation would be that if they got the first one to agree to a large figure, then they would make that the figure they would negotiate with the other three. So in a way I can understand why they would wait until they had the license, because there was another point I made about Century, I don't think they had any Chairman at that stage, that is in my notes, and I felt that they were waiting until they had a license and they would put a heavyweight chairman in. There were many factors, and to my mind, the sensible thing would have been for everybody to know in advance from RTE that it was going to cost A or B, and this was it, and the same figure be presented. The fact that there was four different figures makes me wonder did some of them approach RTE in advance? Did they get an agreement for the figure?

68 Q. Certainly there would not appear to be any evidence to suggest that there was an agreement between anybody as to what the ultimate figure would be, but that the figures which were contained within the submissions were figures which the proponents or applicants for the job felt that they could incorporate in their business plan and still

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exist and still, in other words, conduct a successful business, and you will see from the analysis which was carried out by Mr. Appleby that the consortium was prepared to take it on the chin and pay RTE what RTE, in effect, was asking for. The Radio 2000 indicated that they hoped to negotiate a position downward, but they could live with 747,000. And then Century indicated that 375,000 was the figure above which the operation would not be viable.

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So certainly from the documentation which was produced to the IRTC, it would seem that the only person who indicated that the system or their project would not be viable above a certain figure was Century?

A. Right.

69 Q. Now, I think that particular sentiment expressed by Century lead to a question specifically being formulated by the Secretariat as appropriate to be asked of Century, and if we look to page 6086 of the documentation we will see at question number 10, that there was a question to be considered to be directed to Century at the oral hearing, as follows, on page 37 of your proposal you state "That the financial demands being made by RTE for the siting of the transmitters for the independent radio service will jeopardise the viability of the whole project. Are you saying here that if the Commission and the Minister find these costs to be justified, that Century will not proceed with the whole project?"

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So certainly Mr. Appleby who was analysing their application considered that a question was appropriate to

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determine whether Century were sticking with the 375 figure, because if they were and if there was no realistic prospect of negotiating above that figure, they obviously were not contenders, isn't that so?

A. That would be correct.

70 Q. Yes. Now, it equally seems from the correspondence that Century never, in fact, proposed any figure greater than the initial figure that was in their business plan, namely £375,000?

A. Not that I am aware of.

71 Q. Yes. So, in fact, they were not in negotiating mode, they had set out their stall, you take it or you leave it?

A. Yes.

72 Q. Isn't that right?

A. Yes.

73 Q. And that remained the position throughout

A. Correct.

74 Q. Now, at that particular time in January of 1989 where the IRTC had a figure, and that figure had started at 1.2 million and had come down, if it had known at that point in time that there was going to be no negotiation, would it --

A. I don't think they would have received the license, but I mean, bear in mind that we were looking at a sheet of paper which had three millionaires listed on it.

75 Q. Yes?

A. So we wouldn't have assumed that they were going to run short of money at the very first hurdle.

76 Q. Whilst that is certainly a correct assumption which could be made, equally you had to judge that against a background where they had said we are not going to advance our offer

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over and above ú375,000 --

A. Well, we assumed this was a bargaining stance.

77 Q. Yes?

A. As far as I am aware, this was our attitude, it is a bargaining stance between Century and RTE.

78 Q. Yes?

A. Because RTE quite obviously would have said the same.

79 Q. Well certainly other members of the IRTC have shared the same opinion as yourself, that there was a belief that the Century figure was a bargaining position, that ú1 million plus was being asked by RTE, that they were offering something less, and that a middle ground would be reached?

A. Right.

80 Q. Do you know what the basis for that was?

A. Normal huckster shop negotiations that we get in Ireland, while nobody believes either price, they are fairy tales that they are dealing with here, one is taking a price out of the air and the other is taking it from somewhere else. They are negotiating.

81 Q. Yes. In the middle or certainly as an entity, aside from the applicant Century and RTE was the provider, was the Department of Communications and the Minister, isn't that right?

A. Correct.

82 Q. Were you aware that the Act itself in Section 16 had a provision under which the Minister could direct RTE to provide certain specified services to the alternative transmitting agency?

A. Yes, I was aware of that.

83 Q. Right. So that the minutes indicate that communication

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passed between the IRTC and the Department with a view, I presume, to reaching a resolution as to what the appropriate charges should be?

A. Correct.

84 Q. And to your knowledge, were you kept aware or was the Commission kept aware of the negotiating stances or the positions adopted by the Department and RTE through this process?

A. I don't recall whether we were or we weren't, to be quite honest with you.

85 Q. The documentation which is before the Tribunal would suggest that as of the 11th of January, the day before the oral hearings or public submissions made by the applicants, the Minister and RTE had, in fact, agreed an annual charge of ú692,000 for transmission.

A. Correct.

86 Q. Can you recall whether that was known to the Commission before it granted the license?

A. I truthfully can't remember. But I think it would have been one area where I would have asked the question, because I was conscious of the fact that RTE were asking --

87 Q. There had been a figure of 1.2 million, as we know, for the initial figure disclosed in the rate card, and then there were revisions of that figure involving the Minister and his Department, isn't that right?

A. Correct.

88 Q. If you had known that ú692,000 as the annual charge, and that was only a component of the total charge, had been agreed with the Minister and RTE, and you were aware that the Century figure was ú375,000, what would you have done

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to see whether or not that position could be improved by negotiation or otherwise?

A. Well, I think I would have asked for a definite figure, and a definite agreement between Century and RTE and on that we would base our decision.

89 Q. Well, had you any reason to believe that the Minister hadn't reached the appropriate amount after his negotiations with RTE?

A. No, I had no reason.

90 Q. Mmm?

A. No.

91 Q. Now, I think that the oral submissions were made on the 12th and at the conclusion of that day of oral submissions -- each one took 45 minutes or so, isn't that right?

A. Correct.

92 Q. There was some discussion regarding the respective merits of the presentations and the current status of the applicants as regards their likelihood of success, isn't that right?

A. Yes.

93 Q. Do you have a recollection as to who the likely winner of the contest was at that point in time, or was it still open?

A. No, as far as I am aware, we veered towards Century on the presentation, they were quite good in the presentation and we were inclined to think in terms of them as being possible winners, but we didn't, as far I am also aware, we didn't make a decision because it would be wrong, we had to discuss it in much more detail than just immediately after the hearing.

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94 Q. Right. Do you remember after the hearing or at any stage in the course of that day either publicly or privately any concern being expressed about Century's ability to reach a final arrangement with RTE?

A. No, I don't.

95 Q. Right. Do you know that there was a meeting on the day after the oral submission attended by the Chairman of the IRTC and the Secretary, Mr. Connolly and Mr. Stafford, and possibly Mr. Barry at the offices of the --

A. 12 years later I can't remember.

96 Q. Right.

A. I definitely didn't hear about that.

97 Q. Put it this way, Mr. O'Donovan, did you believe that there was any unfinished business after the presentation by Century which required to be ironed out or further investigated and reported on back to the Commission before it would make its decision?

A. No, I can't remember that we had any doubt at the time. My notes, those notes I made, I am not sure whether I made them at the oral hearing. If I did, you will note my reservations.

98 Q. Yes.

A. Which you have there in front of you.

99 Q. Yes.

A. And I think I was worried about two things, still the financial and the second thing was the, they had no chairman.

100 Q. Yes. Why was the absence of a chairman so important?

A. Well, he would spearhead the whole thing. Now they had a very good line-up. They had an RTE, an ex RTE controller

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as their advisor, that would have swayed my vote, because he was a first class man, and with Terry Wogan and Chris De Burgh and Oliver Barry, all people that made a big impression on show business. I would have been inclined to say this is a very strong group of people. Naturally I would have concern about who is going to be Chairman, who is going to lead this.

101 Q. I don't think that is a matter that was resolved before their selection ultimately, isn't that right.

A. I really can't remember.

102 Q. I think Mr. Crowley became the Chairman at a later stage but that was after the appointment?

A. Yes.

103 Q. Well, if we could move then to the 18th of January, on the 18th of January the decision was made and the minutes for that day record solely the fact of the successful applicant, subject to contract, being Century Communications Limited, but can you indicate to the Tribunal the recollection you have of how the meeting progressed and how the decision was finally reached to appoint them? Were, all contenders still live for a start on the 18th?

A. I think there was one other contender still live, I can't remember which one. I think it was 2000. But the base, the way the judge carried out, to my mind, was the same as the Act asked - a vote and consensus. He based it on the two. Now, when I say a "vote" we didn't put our hands up and say we are for it. What he did was he went around the table and each of us voiced our own opinions. When we finished that, he then made a consensus of all our opinions

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and if, say there was eight of us wanted Century, two didn't, he would discuss with the two their reservations and then finally a decision would be made.

104 Q. Well do you remember what the split was after this initial going around the table?

A. No idea. But I know it was pretty much 80 or 90 percent for Century.

105 Q. Right. And that was at the first call, if I might --

A. Yes, the first one for us to decide.

106 Q. So it was unlikely then to be a very lengthy meeting after that, was it?

A. Well I can't remember. If there was two people that weren't happy, I am only guessing, there probably was a long, long debate about their reservations, but I mean, it couldn't have been fairer than the way the judge carried it out. He gave everybody a chance to air their grievances and whatever they felt about the whole thing. And we had ten very individual people.

107 Q. Can you recall whether all parties spoke on the issue or otherwise?

A. Oh, yes, yes. We would all speak.

108 Q. Have you any memory of who the proponents were for Century. Was there a lead figure?

A. Not really, it was just around the table. Nobody, there was nobody pushing it as very good, because we sort of felt that they were the best, it wasn't a troublesome or too many arguments, but there was, as far as I am aware, one or two that had reservations and that had to be discussed.

109 Q. When it came to their selection, can you remember what discussion, if any, took place about the RTE transmission

charges and Century's distance from the figures which had been agreed by the Minister, if that were the case?

A. I can't remember that. I can't remember - I can't even remember what discussion took place after we had decided they would get the license.

110 Q. Right. It does appear, Mr. O'Donovan, from looking at the paperwork which followed the events and was generated at the time, that there was, in fact, no independent advice given to the Commission by any broadcasting authority engaged by the Commission to advise on the adequacy or otherwise of the provision of £375,000 by Century for the transmission service?

A. Well you see, there was one very important point: Century had an advisor from London.

111 Q. Yes?

A. And he would have been in a position to tell them exactly how much the BBC were paying, ITV were paying.

112 Q. Is this Mr. Hills?

A. Yes.

113 Q. Professor Hills?

A. Yes.

114 Q. Yes?

A. Now he was a very competent man. I assumed that they were working from his figures.

115 Q. Yes, mm-hmm.

A. Because I think the BBC were paying something like £150,000 or something like that, I can't remember, but I assumed, I am only speaking for myself, that having that expertise at hand, that is where they made, they made the decisions on the basis of his input.

116 Q. Yes. Is that possibly a reason why the Chairman and Secretary sought details from Century to stand up the figures of 300 and 375,000?

A. I would imagine so.

117 Q. Right. Were you ever shown the faxed response from the Independent Broadcasting Authority's consultancy services report?

A. No, no.

118 Q. Well certainly it was received by the Commission Secretariat, it is a document which we have considered on screen before, and it certainly doesn't attempt to stand up the figures of 375,000?

A. Yes. Well I accept that.

119 Q. So was it a leap on the part of the Commission to say at the end of the day that the parties would have to negotiate the figure, we are not going to decide the candidature of Century on the question of whether they are capable or incapable of meeting the RTE charges?

A. Well, I would imagine that was the thinking at the time, but I mean, it basically, basically the transmission - you see there is one important thing about transmitting and that is that RTE got, received all the transmission facilities for free, they got them from the government. It is like building a road. They have that road to themselves. Suddenly somebody else is being put on that road and then they are, they want to gain a tremendous sum of money for the second party. Now, as far as I was concerned, it wouldn't have been wrong for RTE to turn around and say okay we charge so much for the facility, and we allow for the fact that this is already been paid for.

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120 Q. Did you ever inquire into what exactly the basis of charge would be and in particular, particularly whether or not these were pro rata charges which were being allocated and had been allocated not only in respect of the National Radio Service, but also in respect of local radio, that there would be a division, in other words, appropriate to the input or requirement of the independent broadcaster and that would be costed as a proportion?

A. Well, did I inquire, did you say?

121 Q. Yes.

A. Well I would have brought it up at the meeting and it would have been discussed. Because they also had the figures for Downtown Radio which would have been four transmitters in the North of Ireland and there was already a price on record somewhere, in amongst the minutes, and like we would have known at that stage what price other people were paying.

122 Q. Yes?

A. We had an engineer, Sean Lackan, who was an ex RTE engineer and he would have would also know where RTE were coming from in their presentation of their requirements.

123 Q. Yes, but there certainly doesn't appear to be any written report prepared either by Mr. Lackan by way of analysis of the RTE figures, or by anybody else in the Secretariat, to analyse the RTE figures?

A. I think that is probably because they felt it was the job of the Department of Communications, RTE and Century.

124 Q. Right. Okay. The Department of Communications had done its particular work and had come up with a figure of 692 on the 10th and 11th of January.

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A. Yes.

125 Q. And was there any reason to believe that that wasn't the correct figure and --

A. No, I would have still thought that was a figure for negotiations.

126 Q. On what basis? I mean, obviously one would like to get something for nothing, but on what basis would you consider that that would be negotiated downwards yet again?

A. Well on the basis that the BBC were getting their transmission facilities very cheaply. Downtown Radio were getting them for much less. On the basis of that you would assume that RTE would reach a rock bottom figure. I mean, basically RTE isn't in the business of setting out to lose money. They are in the business of making a profit. So there must be a stage where there is a bottom line and this is what it is going to cost us plus a profit, 10 percent or whatever.

127 Q. Yes. Was the IRTC ever aware in January of 1989 that Downtown Radio's executive, Mr. Tinman, would have felt that ú800,000 a year was an appropriate figure in Ireland, notwithstanding what they were paying in Northern Ireland?

A. No, that is the first I have heard of that, so I don't think anybody - I don't know if they were aware of it.

128 Q. Right.

A. We certainly weren't.

129 Q. So certainly they hadn't embarked on an inquiry of Downtown, for example, to see if this was appropriate to make an immediate comparison between their figure in the North of Ireland for their four transmitters and the position applicable in Ireland, isn't that right?

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A. Well, I would assume Barry would have done that, that would have been his job, to find out --

130 Q. Barry who?

A. Oliver Barry, that it would have been his job to find these competitive prices, because the precedent, the only precedent you have is Downtown Radio, BBC, ITV, so it would have been his job to see that that was carried out.

131 Q. I mean we are talking about now the commercial world. He certainly had no obligation to inform you of the, of whatever the down side of his argument might be, isn't that right?

A. Yes, except that he still had to inform, he still had to negotiate with RTE.

132 Q. Well, the evidence would suggest that, in fact, there was never negotiation with RTE, there were requests made of the IRTC. There were requests made of the Minister, and ultimately the Minister negotiated -- well firstly he negotiated a figure of 692, he reduced that to 614, then he made an order under Section 16 so there was no negotiation at all on the part of Century, and does that surprise you?

A. It does, yes.

133 Q. I mean an assumption that the IRTC made was that as between the three candidates who were live at the mid-stage, if I might call it that, of the application, each of them would go on to negotiate with RTE, and commercial realities would dictate their prices, that is the basis upon which they were working?

A. I would assume that if Century were putting together the figures and they decided on 300 odd, that they would have allowed at least 15 percent either way so that we won't get

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it for this, but we will add 15 percent, 20 percent. I would assume that. Now a lot of the accountants that did these figures were not -- this was the first time in their lives they had ever put forward any projections for radio, so a lot of them were not one hundred percent competent in that area.

134 Q. Well, once the decision was made and the successful franchisee informed of the result, did you become aware that the dispute continued as between RTE and Century as to what the charge should be?

A. Well, there was friction. I knew there was friction.

135 Q. Were you kept advised of the fact that letters were being written by Century to the Chairman of the IRTC expressing the view that 375 was what they considered to be the reasonable fee for the transmission charges and that they considered that it was not a viable proposition beyond that figure?

A. Well truthfully I can't remember whether it was accepted, I would have a clear recollection myself that I think the other figure arrived at 600. If I had been in their position, I would have accepted that figure.

136 Q. Yes. Well, the Minister, on the 16th of February, wrote to the Chairman of the IRTC informing him that he had looked at the figures again, he had discussed the matters with RTE, and he had indicated that after negotiation with them, that €614,000 was not an unreasonable sum in the context of Irish conditions, isn't that right?

A. Yes, correct.

137 Q. And at that point in time could you see any reason why the IRTC should disagree with that position, or did they, in

fact, disagree with that position?

A. Well, I don't remember if they did. And I would see no reason - I would see that they should agree at that stage or we should agree at that stage to that figure.

138 Q. Yes. Right. Now, seemingly that sum was not acceptable to Century as evidenced in their correspondence of the 20th of February, where they, in effect, were asking the IRTC to make an application to the Minister under the provisions of Section 16 of the Act to have the Minister fix a charge.

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This is something now which is not recorded in the minutes of the IRTC as being the subject matter of a particular meeting after the 16th of February and before the Minister made his decision on the 14th of March. Can you - do you have a recollection of the Board of the IRTC reaching a decision that the Minister should be approached pursuant to Section 16 so that he might make a direction as to costs?

A. No, the dates mean nothing to me. The only time there was discussion on the Minister being approached was when it was suggested that myself and the engineer and one other person would approach the Minister, but I don't think that ever happened, because I don't remember it happening.

139 Q. That was at a very early meeting on the 3rd of November, 1988, where at page 5554 of the minutes, under the heading 'Cost of RTE Services' there is a note that it was agreed that the Commission should request the Minister for Communications to seek from RTE the scale of costs - sorry it is a little later than that. That was the first step, that the Commission was to seek the RTE scale of costs. I think if we move then to the 8th of December. On the 8th

of December, that's page 5568, under "RTE Charges" it says, "Following a report from the Chairman and Secretary on the meeting with RTE regarding the costs of transmission facilities, etc. it was agreed that the sum being asked by RTE would be very detrimental to the interests of any group interested in setting up a national radio service. In the circumstances, it was agreed that the Chairman, Mr. O'Donovan, the Secretary and Mr. Lackan, should approach the Minister."

I think that is the minute you are referring to?

A. That's it.

140 Q. But in fact that meeting didn't take place?

A. Not that I can remember.

141 Q. Insofar as you are aware, you were not part of a delegated body that went to the Minister?

A. No.

142 Q. Isn't that right?

A. No.

143 Q. So there were, of course, queries between the grant of the franchise on the 18th of January and the Minister's order on the 14th of March, from the IRTC to the Minister and the Department regarding the level of charge?

A. Mmm.

144 Q. But what I would like to establish from you, if I can, is that there was in fact no meetings specifically called by the Commission which adopted the procedure of implementing Section 16 of the Act and referring the matter specifically to the Minister, isn't that so?

A. Well, not that I am aware of.

145 Q. Right. Well, were you surprised when the Minister then came back with yet a third figure, and this now being what is embodied in the Ministerial Directive of the 24th of March 1989.

A. Well, I wasn't surprised in as much as I knew there was a little friction and there was a sort of four-way situation; you had the Minister, the Minister and the Department and you had RTE and Century, and on the sideline you had us. I knew things were happening but I wasn't, I can't remember the detail of how it went about. I mean, it is news to me that it was the Minister who brought this about.

146 Q. Right. So that the ultimate resolution of the charges was a Ministerial Directive rather than negotiation?

A. Yeah, so I believe.

147 Q. And the involvement of the IRTC throughout was to adopt the arguments which had been advanced by Century and to transmit those onward to the Minister?

A. Yes.

148 Q. Yes.

A. It was very important to us that whoever got the license had a fair break and that they would get off the ground quickly and friction like that we felt was unhealthy at the very beginning.

149 Q. Yes. After that I think once the costs of the transmission service had been agreed, there remained a large number of contractual issues which had to be determined with Century, both in its contract with the IRTC and also in its contract with RTE, isn't that right?

A. That's correct.

150 Q. And I think this took quite some considerable time?

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A. It did. Now the detail of that, we wouldn't, as a board, be aware of it whilst it was happening. Basically the Chairman and the Chief Executive were very competent people, they dealt with all the nitty-gritty and the day-to-day. We were only there for Board meetings.

151 Q. Fine. Did you, Mr. O'Donovan, and to your knowledge did any of the members of the IRTC, other than the Chairman that is, have meetings with Mr. Burke?

A. Well, I didn't.

152 Q. No?

A. I don't know about any other members.

153 Q. Was any contact made with you by Mr. Burke at any time after your appointment and prior to --

A. No, never.

154 Q. -- prior to the selection of Century?

A. No, he made no contact with me.

155 Q. No representations were made to you by anybody in relation to this other than at meetings, is that correct?

A. No.

156 Q. I think it is correct to say that you knew Mr. Barry over some years because of a joint association on the Board of RTE?

A. Yes.

157 Q. Isn't that right?

A. That's correct.

158 Q. And this is a matter which was publicly known to the other members of the Commission?

A. He was a friend. I made that very clear at the very beginning of my appointment to the judge. I wrote to him and pointed out that a lot of these people would be friends

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of mine and that I felt I was between a rock and a hard place. Like if I did vote for them, I was all right. If I didn't, I was bad news, and vice versa. So I made that clear to the judge. I was in that situation.

159 Q. Yes?

A. And I wrote to him twice. I wrote to him in October and I wrote to him in January. And the judge, I asked for his wisdom, and he said, well, as each thing comes along, if you clearly state - we will ask for your expertise, not necessarily to vote for them, that is the way it worked.

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CHAIRMAN: I wonder at this point as it is coming up to the mid-morning break could we break now. Before we do that, Mr. O'Donovan, I made a note, I hope I have got it reasonably right, if necessary I can turn it up on the actual transcript. What you said was that you felt that an amicable relationship with RTE would have to exist before you could grant them a license? Now, I may not be giving you absolutely verbatim what you said, it is a my note of what you said.

A. That we would wish for that, that there would be a good relationship.

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CHAIRMAN: Tell me this, did that represent or does that sentiment that is encapsulated in that phrase represent what I might call the consensus around the table at the time?

A. Yes, yes.

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CHAIRMAN: Did you ever see any fruition or did you ever

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see any fruit of that thought emerging?

- A. No, because to my mind there seemed to be unnecessary confrontation between RTE and Century. Bearing in mind, Chairman, that RTE, as far as RTE were concerned here, was a, the enemy from coming at them and they were looking for all sorts of things, so naturally they would put up some sort of resistance to this. Okay maybe by, in the Act they are not supposed to, but it would be human --

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CHAIRMAN: -- human nature?

- A. Exactly. That was the way I felt that what was happening, we were sliding into a position which was confrontational, and, you know, at one stage we thought everything was okay, and only when I read back the notes did I realise that it was far from okay.

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CHAIRMAN: Thank you very much. We will sit again shortly after 12 o'clock.

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

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MR. O'NEILL: Thank you Mr. O'Donovan. I have no further questions of Mr. O'Donovan Sir.

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CHAIRMAN: Does anybody wish to ask Mr. O'Donovan any other questions?

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MR. FOX: I have a few short matters to address to Mr. O'Donovan, Chairman.

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CHAIRMAN: Is there anybody else? I just want to find out who else might be involved.

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MS. EGAN: I wouldn't propose to ask any questions, Chairman, unless something arises out of the questions put by Mr. Burke's counsel and/or RTE's counsel.

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CHAIRMAN: Is RTE here today?

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MS. COSTELLO: Chairman, I don't have any questions to ask of Mr. O'Donovan but I would ask for limited representation on behalf of Miss Gillian Bowler in due course who is a witness later today. I am instructed by Messrs. Gore and Grimes Solicitors.

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CHAIRMAN: As far as witnesses to the Tribunal are concerned, it is not the practice of the Tribunal to grant representation unless there is a potential for adverse relationship in some regard. As far as I know, Miss Gillian Bowler is merely a witness of fact. As such, I would not be at this moment in time willing to grant representation.

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MS. COSTELLO: Certainly I wouldn't be asking you to depart from your particular practice, Chairman.

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CHAIRMAN: As I understand it, at any time of course you are welcome to make, renew the application.

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MS. COSTELLO: I am perfectly happy with that, Chairman.

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MR. KEANE: I ought to indicate, my name is David Keane, I represent RTE I want to indicate that I have one or two questions to ask Mr. O'Donovan. I shouldn't expect that they would take any more than ten minutes.

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CHAIRMAN: I think we will get Mr. Burke's counsel to go first and RTE to go second.

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

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160 Q. MR. FOX: Mr. O'Donovan, I am John Fox, I appear for Mr.

Burke before this Tribunal. My solicitor Mr. Shannon is going to hand you a document, it is an extract from the statement of Mr. Vivian Murray who has already provided a statement to the Tribunal. There is a matter which Mr. Murray addressed in his statement which I want to put to you. You will see under the heading 'RTE Transmission Costs', do you see that passage there in Mr. Murray's statement. He says, "The matter of transmission fees was a concern. The Commission was of the view that the RTE's price was seriously excessive and amounted to an abuse of a dominant position." You will note there, Mr. O'Donovan, the use of the phrase "The Commission" which is how Mr. Murray described it. Would you agree with the content of that statement?

A. No, I wouldn't agree that it was an abuse. I think it was a normal marketing ploy. If I had been there, if I had been the employer of the engineers I would have done the

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same thing.

161 Q. Yes. But in the context of your own phraseology, I think you used the word, a word in your direct evidence when Mr. O'Neill was examining you this morning, you described the transmission quotation as "ridiculous" you used that word. I think you also used a phrase, you said you were "shocked by it."

A. Yes, I was at the time.

162 Q. But that is as far as you would put it yourself?

A. Yes.

163 Q. I accept that. Now, there is another matter which I just want to address with you, it is a very short matter. In relation to evidence which was given by Mr. Justice Devally yesterday. I am finished with that document now, Mr. O'Donovan. In relation to Mr. Justice Devally's evidence yesterday, in the transcript at page 127, line 23 - now Mr. Justice Devally was also speaking at length here about the matter of the RTE transmission charge, right, and what he said was as follows: "What I thought was in terms of a business enterprise, a brutal charge." Now that was the phraseology used by Mr. Justice Devally to describe the quotation, the initial quotation from RTE of €1.14 million. Now where do you stand in relation to that description used by Mr. Justice Devally who was also a colleague of yours, as you can recall, in the IRTC at the time?

A. Well, that is a Dublin colloquial thing, "a brutal", I assume he was using that in that form.

164 Q. Yes, and you any reason to derogate from that or would you agree with that type of description?

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A. I have told you I felt that it was ridiculous, the price, but assumed that RTE were coming from a marketing situation and had decided well somewhere along the way we will get what we want, but we will try out this.

165 Q. So is it fair enough to summarise your evidence then by saying that this figure was excessive?

A. Oh, yes.

166 Q. Right. And in that context, of course you have vast experience of RTE yourself; isn't that correct?

A. Yes.

167 Q. I think you outlined that earlier in your evidence. So you know, you know precisely, pardon me, you know precisely what you are talking about here, you are in a better position than most, with regard to these affairs concerning RTE, isn't that right?

A. Correct.

168 Q. Thank you very much, Mr. O'Donovan.

A. Thank you.

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

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MR. KEANE: Yes, Chairman. Thank you very much.

169 Q. Mr. O'Donovan, I will introduce myself. I am David Keane, I represent RTE. There are just one or two matters arising out of the evidence that you gave this morning that I would like to clarify. I think it has already been put to you by counsel in cross cross-examination that you said that you thought the figure initially quoted by RTE was ridiculous. As I understood your evidence-in-chief earlier on this morning, you talked about wearing different hats. You

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talked about your experience in RTE and you talked about in the context of your experience in RTE wearing your RTE hat when you thought the figure initially was fair, which was the figure of 1.14 million, was that a correct summary of the evidence you gave?

A. Yes, but that is with my RTE hat on.

170 Q. Yes. I think you indicated that you - here I am seeking to summarise your evidence - that as you saw matters at the time, as a member of the Commission, you envisaged this as a situation in which negotiation would naturally take place, isn't that so?

A. Exactly.

171 Q. You indicated, Mr. O'Donovan, that you have had considerable experience in RTE and that is unquestionably the fact. Could I ask you in that capacity whether you are aware that under the Broadcasting Act 1960, that the RTE authority owns its own transmission equipment and owns its own transmission sites?

A. Yes, I am fully aware of that.

172 Q. Yes?

A. I am also aware that they were given for nothing.

173 Q. Yes. Just in relation to the maintenance of those sites and the maintenance of the capital equipment in relation to those sites, are you aware that the maintenance of those sites is funded out of Exchequer borrowing on the part of RTE and the RTE authority paid that Exchequer borrowing to the Exchequer over time at an interest rate of approximately 12 percent?

A. Yes, correct.

174 Q. Could I ask you in the context of the information that you

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had as a member of the Commission at the time the Commission made its decision concerning the award of the national independent radio franchise, the extent to which you were aware of the breakdown of RTE's initial quotation of 1.14 million?

A. Was I aware of the breakdown at the very beginning?

175 Q. Yes.

A. No, I wasn't until it was asked for.

176 Q. Yes.

A. And then when it arrived - I have a feeling -- it is 12 years, I find it difficult to remember.

177 Q. I appreciate that.

A. I imagine that I was shown a list of the details.

178 Q. Yes. And you would have been aware that that initial figure included a figure for the purchase, the lease purchase of the transmission equipment?

A. Correct.

179 Q. And would you have been aware that when that figure was subsequently reduced as we have heard in evidence, and as I think was put to you by counsel for the Tribunal earlier on this morning, when that figure was reduced to ú692,000 and subsequently to ú614,000, that those lesser figures excluded the element that represented the purchase, the capital purchase of the transmission equipment?

A. I don't know why, because RTE amortised it over five years. That sort of equipment would last 20 years. So if they amortised the purchase over five years, over 20 years, they would have brought down their costs considerably.

180 Q. Perhaps this is a matter that you wouldn't have been aware of, of course considerable evidence has been heard. I

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appreciate, Mr. O'Donovan, you wouldn't have been present and would not, as a result, have heard that evidence, but could I ask you to comment on the suggestion or the evidence that has been given that the amortisation period of five years represented a period referable to lease purchase, and that there were significant capital depreciation benefits to be obtained by purchasing the equipment by way of lease purchase?

A. Well, if they were, they were doing a lease purchase commercially, of course you will have to pay over five years, but RTE didn't need to do a lease on a business basis with any company. RTE could have obtained the money the same way they got the money for the, looking after the transmitters.

181 Q. Well, again, Mr. O'Donovan, and of course this is a matter that you wouldn't be aware of, not perhaps being privy to the evidence that has already been given, I think the clear suggestion has been that statutory, and also by reference to the Minister's view in relation to the matter that Century were, in fact, to purchase this equipment and it was not to be the responsibility of RTE to purchase it, is that something you would have been aware of?

A. No, I wasn't aware of that.

182 Q. I see. I might then to go on to ask you very briefly in relation to the evidence you gave concerning a comparison with Downtown Radio and the transmissions costs that apply in the North of Ireland. I think Mr. O'Neill on behalf of the Tribunal has already put it to you that you do not appear to have been aware at the time that Mr. Tinman of Downtown Radio had expressed a view in or about this time

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that €800,000 would not have been an unreasonable figure for transmission fees in respect of the National Independent Radio Franchise in Ireland?

A. No, I wasn't aware of that.

183 Q. And would you have had the benefit of any expert or technical advice sufficient to indicate to you that Downtown Radio operates a number of transmitters at a lower power level than those that would be necessary to operate the Independent Radio Franchise?

A. No.

184 Q. That although obviously there would have been fewer transmitters?

A. Correct.

185 Q. Downtown Radio would not have had the same obligation that the national franchise had to transmit to 95% of the population?

A. Correct.

186 Q. Just finally turning to the issue of a negotiation in relation to fixing the relevant amount for transmission fees. This is a matter that I think Mr. O'Neill has already canvassed with you. I am just anxious to clarify one aspect of it. Were you aware at the time you made your decision that it appears that there was no source by reference to the IBA for the Century offer of €300,000 or €375,000?

A. No, I wasn't aware, but they had an expert like Hills, Professor Hills, I would assume that he would know the costs of every company that was purchasing a transmitter.

187 Q. Yes. So that when you, when you say in evidence, and I understood your evidence essentially to say that what

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Century was offering was a reasonable commercial rate, would have effectively represented a reasonable offer in the context of a commercial negotiation, that you would be basing that proposition on the belief that this is a figure that Mr. Hills would have provided?

A. I would - I wouldn't, you are putting words into my mouth when you say I considered that a reasonable rate? I didn't say that. What I did say was that Professor Hills would have briefed Century on a reasonable rate. Whether that was the rate, I don't know.

188 Q. Yes. And in relation to the figure that RTE provided, you have no reason to disbelieve, I take it, that the figures that RTE provided were figures that were justifiable by reference to their own books of account, their own annual published report or the accounts contained in their own annual published report and their ledger books, you have no reason to doubt that RTE's figures were based on sums derived from their own accounts?

A. The €1 million?

189 Q. Yes.

A. Well, I don't know, I don't know. That figure, immediately when I saw it -- I mean, I don't know, I don't know how they came about. I assumed they allowed a profit for RTE, which is natural, it is normal business.

190 Q. Yes. But you have no reason to doubt, I think you said that you thought the figure was very considerable, and here I am seeking to summarise your evidence, you have no reason to doubt that the constituent elements of that figure represented figures derived from RTE's own book of accounts and an apportionment that RTE contended was reasonable

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based on their own books of accounts?

A. Yes, I would imagine so.

191 Q. Thank you very much, Mr. O'Donovan.

A. Thank you.

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CHAIRMAN: Anyone else?

A. Mr. O'Donovan, thank you very much for coming down. You have been of very considerable assistance and I appreciate your courtesy.

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CHAIRMAN: Thank you, Chairman.

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MR. O'NEILL: The next witness will be Mr. Donal O'Sullivan, Sir. Mr. O'Sullivan.

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MR. O'NEILL: He may have stepped out. I had assumed him to be here Sir.

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MS. EGAN: Chairman, the next witness on the list is Ciaran Mulvey and I haven't had an opportunity to consult with Mr. Donal O'Sullivan in any matter whatsoever --

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MR. O'NEILL: The listing is a daily listing rather than intending to list a particular sequence.

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CHAIRMAN: It looks as if --

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MR. O'NEILL: I have no objection to calling Mr. Mulvey.

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CHAIRMAN: It looks as though you might get an opportunity

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at lunchtime if Mr. O'Sullivan has got in from Cork.

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MR. O'NEILL: Mr. Mulvey please.

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CIARAN MULVEY, HAVING BEEN SWORN, WAS EXAMINED BY MR.
O'NEILL AS FOLLOWS:

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MR. O'NEILL: Good morning, Mr. Mulvey.

A. Good morning.

192 Q. I think in 1988 you held the position of General Secretary
of the ASTI, is that right?

A. That's right, rather ironic in the light of yesterday's
events.

193 Q. And you are free to be here today because you no longer
hold that position.

A. Indeed.

194 Q. You were also a member of the executive of the ICTU, isn't
that right?

A. Correct.

195 Q. And I take it over time you found yourself as a member of
various boards and semi-state organisations, isn't that
right?

A. That's correct, yes.

196 Q. Can you outline the circumstances in which you came to be
appointed as one of the first members of the IRTC in 1988?

A. My recollection is that I got a telephone call from the
then Department of Communications on behalf of the Minister
and the Minister then took the phone call to me and
indicated to me that the government had made the decision
to invite me to become a member of the Independent Radio
and Television Commission and I dually accepted.

197 Q. Did you have any meeting with the Minister face-to-face
other than this telephone conversation?

A. No, I did subsequently. The Minister asked me, as part of that conversation, to come in and see him, as he had not met me before. So I did come down to the Department. I had met the then Secretary of the Department, Bernard McDonagh before in his position as a member of the Department of Public Service. I used to negotiate across the table with him. So he was familiar to me. I met the Minister then and had a short meeting with him.

198 Q. Were you familiar prior to that meeting with the terms of the Act under which you were going to be appointed or was that something you acquainted yourself with after?

A. No, I wasn't familiar with the terms of the Act. I actually went to the Government Publications Office to get a copy of the Act on my way down to meet the Minister.

199 Q. Right. So when you went the Minister, you knew, I take it, the broad parameters of what your function would be or the function rather, of the IRTC would be, of which you would be a member, is that right?

A. That's right. I also recall there was considerable controversy prior to that regarding the Act. I would be familiar with comment in RTE and the media about that.

200 Q. You may not have followed its legislative processes through the Houses of the Oireachtas, and had been aware of the fact that the existence of an independent commission was an amendment to the Bill as originally proposed?

A. Well, I didn't know that detail to be quite frank with you.

201 Q. In any event, as appears from the title to the body that you were to be a member, it was clearly intended to be independent, isn't that right?

A. Yes.

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202 Q. Could I suggest more particularly independent of the Minister and any political influence which might possibly be exerted on the functions which were adopted by the Commission both in the selection of successful candidates with the award of licenses, and as regards the regulatory function which was vested in the IRTC by the fact, isn't that right?

A. Yes, I assume that automatically, yes.

203 Q. Having been appointed to this Board, we know that the first meeting of the Board took place on the 17th of October of 1988 in Newbridge House in Donabate, isn't that so?

A. That's correct.

204 Q. And there was there an opening inaugural speech by the Minister in which he set out, I think, his aspirations and the Board went on then to consider some of the perhaps more routine business of any commission, that was the setting up of machinery in the form of banking facilities, legal advice and commercial accounting and financial advice, isn't that right?

A. That is correct, yes.

205 Q. And we know that Mr. Donal O'Sullivan is a gentleman who proposed a number of individuals and institutions to fill those particular roles, isn't that so?

A. Yes, I have confirmed that in my oral submission.

206 Q. Yes, is that in accordance with your recollection and what will be his evidence later in the day?

A. Yes.

207 Q. Were you aware at the time of the appointment of these individuals and bodies to these position, that they in fact had been names and the only names nominated by the Minister

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to Mr. O'Sullivan as being the persons whom he should advance for those positions at the first hearing of the Commission?

A. I would not formally have been aware of that, but I deal very much in a world of political reality, I would have assumed a minister would have indicated either to the Chairman or to the Chief Executive a certain preference.

208 Q. Mmm. Is that something that you, in the knowledge that this was perhaps what took place in the real world at that time, did you think to inquire into why it was that these particular individuals were being so nominated, given the independent nature of the tasks which faced you in the future if you were to apply your --

A. Well I wasn't, I didn't think about it at the time, but certainly I would have felt over the -- I have been on the Independent Radio and Television Commission for ten years, I have served two terms, I wouldn't have felt at any stage, even with hindsight that any of those bodies would have influenced any decision of any member of the committee in any shape manner or form.

209 Q. I take it you wouldn't be happy to know that persons who were there to offer financial advice, for example, to the Commission perhaps on very sensitive issues, determining one candidate as opposed to another, might have been persons who were nominated to that position by the Minister of the government of the day?

A. Well --

210 Q. How would you establish their independence?

A. Well I would, well I would have to say and my own assumption that any decision I would have made would be on

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the basis of my assessment of whatever was available. I would also have had the view that these were reputable professional organisations that are bound by codes of their own profession.

211 Q. Yes.

A. We are talking about the legal profession, we are talking about the accountancy profession. Maybe in recent times that might have been problematic but certainly at the time there would have been no question-mark over that.

212 Q. So you would have unquestionably referred matters to them for their professional advices which you would have received from them, albeit that you knew that they had been nominated by the Minister, you would not have looked into the rationale of their decisions?

A. I wasn't aware they were nominated by the Minister specifically. I said I assumed. I would have felt that any decisions or any information, certainly any professional information coming from a firm of solicitors or a legal advisor, or indeed a member of the accountancy profession would be given in the full light of the facts presented before them, that there wouldn't be, that they wouldn't be politically influenced by anybody external to the Commission prior to that. You are also talking about a commission of, I would have considered, maybe excluding myself, very eminent people who were capable of making sound judgement in relation to matters referred to them. I don't wish to be argumentative, but that would have been my view on it.

213 Q. Even at this remove in time in the knowledge that these three bodies who we have mentioned already were nominated

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by the Minister, you would have not have had any disquiet but that he might not have made a similar selection process as regards your fellow members?

A. Well, my - the fellow members of the Commission were all nominated by the government of the day. I don't know if they were nominated by particular ministers or indeed the particular minister in question, but they were nominated by the government, as are all bodies at the moment nominated by the government. I don't think it cast any specific reflection upon them, unless there is evidence to the contrary, but --

214 Q. Well clearly if a minister is setting up an independent body, he must do so in a way in which they are transparently independent, isn't that right?

A. True.

215 Q. And there are functions which are vested in the body itself and for whatever reason the Minister, I suggest, should not involve himself in the affairs of that particular body by appointing persons to any position within that body which are the functions of the body itself, isn't that so?

A. True.

216 Q. It is indicative of a level of --

A. I accept what you are saying, yes.

217 Q. And one which I suggest to you, had you known it at the time, was one that you would have to address at the time and see whether there were any other aspects of the affairs of the Commission's work in which the Minister may have interfered to an extent, isn't that so?

A. True.

218 Q. But in any event, I think over the period of time in which

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you served on the Commission and that was for two terms in total I think for ten years, isn't that right, through a succession of governments and ministers?

A. That's true.

219 Q. You did not find any approach being made to you by any minister to adopt a particular course, isn't that so?

A. That is true.

220 Q. Right.

A. Yes.

221 Q. Now, as regards the activities of this particular initial Commission, it had the functions of, amongst other things, determining who the appropriate body to appoint for the National Radio License would be, isn't that right?

A. That's correct, yes.

222 Q. And like every Commission I suppose there was a learning curve for all the Commission members, isn't that right?

A. Yes, I mean, I don't know how many individuals of the Commission knew one another prior to that, but certainly most of us were new to one another.

223 Q. Right. And the initial decision-making process was going to be implemented in relation to the National Radio Franchise, and there was, as I understand it, considerable urgency expressed from the Minister to have this concluded as soon as was reasonably possible, isn't that right?

A. Yes, I think in the context of the time period we are talking about, there was, I think, a decision made by the government to cut off pirate stations by a certain date, that they had to - they were always trying to cut them off rather unsuccessfully I might add. There was a decision made at that stage that any pirate radio that still

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operated beyond a certain date would obviously be in a very difficult position then applying for a license either nationally or locally.

224 Q. Right. Or indeed criminal sanctions would be imposed against them, amongst other things?

A. Well pirate radio is an illegal activity.

225 Q. Yes. And the process started, as we know, with advertisements followed by applications by interested parties, followed by an initial sieving of those applications and sending out of application forms to those that qualified, the receipt of those applications by the closing date the 16th of December 1988, isn't that right?

A. That's right, that's correct.

226 Q. And in anticipation of there being more than one application received by that date, in November it had been decided by the Commission that they would be circularised with the, with copies of the original applications and also with the Secretariat's analysis of those applications in the middle of the week following the receipt of the applications by the Commission, isn't that right?

A. That's correct, I think we made a number of decisions to ensure as major a transparency as possible, including public hearings of the applications.

227 Q. So the sequence of date order then, the applications came in on the 16th of December, they were reviewed by the Secretariat and comparative analysis was produced by the 22nd of December, that then went out, as far as I understand, with the original applications to each Commission member, in anticipation of a meeting that was to take place on the 5th of January of 1989?

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A. That's right, yes.

228 Q. And on the 5th of January, there then was - that was the first opportunity which the Commission as a whole sat down to examine together the respective applications and the analysis which had been carried out on them by the Secretariat, is that right?

A. Yes, that is my recollection, yes.

229 Q. The minutes for that particular meeting record that there was a detailed examination of the candidates but that no decision was going to be taken until after the oral presentation which was to take place one week later on the 12th?

A. Correct.

230 Q. Yes. Do you remember how long that meeting took on the 5th? Was it a long and detailed meeting?

A. I don't really recall. All I remember of the period is that we seemed to be meeting quite constantly. I know there was quite a heavy schedule of meetings taking place. I think most meetings lasted throughout the day. I think you would begin, I am not quite sure about this, but maybe half eleven, twelve o'clock and continue right through until about half four or five o'clock in the afternoon.

231 Q. I think whilst there may have been very many meetings in the course of the life of the Commission, and the subsequent Commission which followed upon it, there were, in fact, only three meetings involved in the selection process, that is the meeting of the 12th of the 5th where the written submissions were considered, the oral presentation on the 12th, and the issue of the decision on the 18th, all of that took place within three weeks in

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January of 1989, isn't that right?

A. Yes, that's right.

232 Q. And in the record-keeping procedures of the Commission it had been determined at the first meeting that the minutes would be in the form of the record of decisions only rather than perhaps the longer form of minutes which is an alternative, isn't that right?

A. Yes, I think the general consensus was that we should record our decisions, I think, I don't know whether people would have had experience, the longer the minutes the greater the difficulty at the subsequent meeting to getting them agreed. People like to rewrite what they think they said.

233 Q. Exactly. The procedures which were adopted initially were standing orders which incorporated, in effect, what had been provided for in the Act, isn't that right?

A. Yes, I believe so, yes.

234 Q. And whether it changes the Act or doesn't change the Act, there was the specific motion advanced at a point in time where it was decided that in respect of the selection process, it would be on the basis of a consensus approach, do you remember that?

A. I do indeed.

235 Q. Do you remember why it was necessary to introduce such a motion or make such a decision in the light of the procedure which was already available?

A. I think, my recollection of the situation at the time was there was considerable media comment regarding the new broadcasting commission and then obviously there was widespread speculation regarding the likely applications or

the actual applications for the national license. And I think perhaps the Commission itself, I can't be sure of this, but recollecting what I can of the discussion at the time, individuals started being mentioned as being likely or having voting either way or that or potentially voting or certainly it was after the national license hearing, the oral hearing in the Concert Hall, I think there was a general feeling that if the Commission was to function effectively, and we were able to deliberate confidentially on the discussions at board meeting, it was important that insofar as it was possible, that a consensus be arrived at and that everybody would have the opportunity to express their opinion and give their conclusions. I think we were somewhat worried that there would be leaks to the newspapers, to the media, that individuals would be identified as having voted in a particular way, and that would restrict the level of discussion and the confidentiality of our proceedings.

236 Q. Yes.

A. I think that was a genuine concern.

237 Q. Yes.

A. That is my recollection of one of the primary reasons for taking that decision.

238 Q. Yes. Obviously it was envisaged then by you that the statutory facility which was provided in the schedule to the Act did not allow for that particular approach and it would require an actual decision of the Commission to substitute or add this particular methodology of decision-making to the available opportunities for decision?

A. I couldn't recollect but honestly it is only recently when I re-read the Act that I found out that there was that particular provision. It wouldn't have occurred to me at that time. I didn't see anything necessarily wrong, because most public bodies that I have been a member of operate on the consensus basis.

239 Q. Yes, right. So having adopted that as the methodology which was going to be used for a selection process, that was applied equally to all of the candidates whose applications were considered, is that correct?

A. Yes, and that continued right through into the local license situation as well to my recollection.

240 Q. Right. Now it was obvious I think at a very early stage, certainly in print from the 16th of December onward, that each of the three applicants who were going to go for the land base system, were going to be using RTE's transmission facilities in order to present a programme to their audience, isn't that right?

A. Well, I recollect that now on the basis of having re-read some of the documentation, I had forgotten Nova were looking for a satellite station.

241 Q. Yes. So it follows that whoever the successful candidate was, was going to be using the RTE transmission service to broadcast their signal, isn't that right?

A. Yes, I think that was largely the conclusion, yes.

242 Q. And this was something which the Commission had addressed at an early stage initially by endeavoring to establish from the Minister what the rate of charge for RTE's services would be?

A. Yes, I think so, yes.

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243 Q. Yes. In fact, that doesn't seem to have produced anything from the Minister in the form of a rate, but there was a subsequent decision of the Commission that it should meet directly with RTE through its Chairman and Secretary, Mr. Justice Henchy, Mr. Connolly, meeting with RTE and such a meeting took place, isn't that so?

A. Yes, I think our view largely was that we should try to establish as amicable a relationship with RTE as possible from an early stage.

244 Q. The meeting which took place on the 7th of December, 1988 is one which RTE recorded as being a very cordial meeting with the Chairman and the Secretary and I take it that you, as a Commission member, didn't learn of there being any particular concerns or let's say anything other than a perfect relationship taking place at that meeting on the 7th, isn't that so?

A. As I said, we wanted an amicable relationship. You heard the RTE Chairman, Judge Devally had been an employee of RTE, I had appeared myself in RTE quite often, I knew quite a lot of the broadcasters and personnel there. I mean, it was a small family in terms of broadcasting business, so there would have been no reason for us to think that there would be anything other than an amicable relationship.

245 Q. Such a meeting took place and as a result of that meeting, the Secretary and the Chairman reported back to the Board on the 8th of December as is recorded in the minutes for the 8th of December and they indicated a concern about the level of the RTE charges, isn't that so?

A. Yes, I believe so, yes.

246 Q. If we look to document 5568 and 5568 under the headings

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"RTE Charges" you will see that it says, "Following a report from the Chairman and Secretary regarding costs of transmission facilities etc., it was agreed that the sum being asked by RTE would be very detrimental to the interests of any group interested in setting up a National Radio Service."

Now, have you a recollection of exactly what was discussed at that meeting, because certainly whilst this conclusion was that the charges were very detrimental, it doesn't say that they were either wrongly computed, that they were excessive of themselves or anything of that nature, but rather that because of their size, that they would be detrimental to the interests of any alternative transmission crew?

A. I think largely my recollection of the reporting back was there was two concerns I think from the Commission's point of view, would be that any successful applicant for the national would be able to get off the ground at an early stage and would have had the maximum coverage, and in the transmission and as subsequently developed, there were two concerns I think of the Commission; one is that it would be for a reasonable charge, and secondly, that it would be national coverage, because even today even transmission and coverage is still particular difficulty. I also felt also, we felt that down the road we would re-enter this debate time and time again, regarding local coverage of local radio stations, and also in terms of the Dublin franchise and access to Three Rock mountain for transmission purposes. So I can't recollect there was a particular

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figure mentioned but certainly while it was mentioned subsequently or I became aware of it, I must say I was somewhat taken aback myself about that. Millions were being thrown around like confetti at a wedding between applications and transmission costs.

247 Q. When you say "applications", do you mean that the applicants themselves were talking in millions?

A. Well in terms of their own applications, they were in terms of what cost, and then the spread sheets in regard to what their financial losses were likely to be for the initial periods before they came into profitability, it was going to be a high cost endeavour.

248 Q. Yes. Whilst that was a surprise to you, to see the level of money that was being discussed here, do you think that it was a surprise to other members of the Commission as well, that big money was involved in the projections and in what was being asked?

A. Yes, I think we were taken aback by the million plus pounds suggestion. I would have maybe had a different view from some other members of the Commission, insofar as I had a very strong ideological view at the time, which I still hold, that the transmission services to the country are by international agreement and that they are held in trust for the State and for the citizens of the State. It so happens that the RTE authority are the people who had it at the time. Of course now we are proposing to change that as a country, that there will be a separate independent transmission authority, that is mooted at the moment. But I would have had that view, that the Commission itself now was the second Independent Broadcasting Authority, and we

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had an equal par with RTE with regard to that matter. And I would have had a view that we had equal access to transmission sites. Now, that mightn't have been based on any firm legal reality. I felt in constitutional reality it had a basis.

249 Q. But as regards the actual holder of the transmission facilities at that time, being RTE, obviously to express your ideological wish it would involve an element of appropriation of what they already had, isn't that right?

A. Yes, that is true.

250 Q. And in the normal course one would expect that that would be compensated for, if one was talking about a purely commercial relationship existing between the recipient of the service of transmission and the holder of that service, isn't that right?

A. Yes, yes.

251 Q. There was certainly, Mr. Mulvey, a view expressed by the Minister as at a point in time when he had made his decision under Section 16, that there was no element of subsidisation in his figures, in fixing the charges that were levied on Century. Do you remember that being reported at the time?

A. I don't remember the particular statement, there was no element of subsidisation.

252 Q. But in fact could I suggest, certainly if you were to make a decision that one should have unfettered access to the airways on a basis other than a purely commercial one, it would involve, of necessity, subsidisation of the newcomer, isn't that right?

A. Yes, yes, but --

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253 Q. That was not alien to you, in concept anyway?

A. No, it is not. I mean a considerable number of State services are subsidised to commercial holders.

254 Q. But if one was to look at the terms of the criteria applied in the Act, there is certainly nothing in the Act which conferred on the IRTC an ability to approach the matter other than on purely commercial terms, isn't that right?

A. Yes, without specifically saying it, I mean obviously under Section 16(2) of the Act we had the facility and the authority to request the Minister to do it, but I think there was a strong view in the Commission, that having been charged with licensing certain broadcast, broadcast operations, that we also will a role of advocate on their behalf, that we would have to get the best facilities for them at a reasonable charge, I would assume.

255 Q. Mm-hmm. Now, in relation to that charge, obviously consideration of the applications of two of the four applicants would indicate that they in effect were prepared to accept the RTE figures, isn't that right?

A. Well, that was on the basis of their applications. I would assume that they stated that on the basis of putting the best foot forward in terms of their application. I thought, I always presumed there would have been horse trading afterwards, as Mr. O'Donovan said earlier.

256 Q. I am sure there would have been, but did the fact that two of the parties were willing to pay the money, albeit perhaps with the reservation that it seemed excessive; did that not indicate to you as a member of the Commission, that what was being sought by RTE was not terribly off-the-wall, if I might put it that way? It wasn't an

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outrageous figure if two of the persons who were submitting their applications were prepared to pay it, albeit perhaps --

A. Well, I think a - I formed no firm view of it. Obviously that was going to be a ballpark figure in any negotiations. They had obviously done their homework in terms, I assumed, of what they could commercially afford. I think the subsequent history of all applications, both at national and at local level, what people said on paper wasn't necessarily what they agreed to later, as we well know.

257 Q. True. Did it occur to you in that circumstance, given that there was such a wide variation in the figures which were being proposed by the applicants, to seek independent financial or technical advice as to the probable and likely cost of transmission?

A. I suppose in retrospect we should have done, in the context of what is happening, and I would assume the Commission does that now in terms of its applications, but we were at a very fledgling stage at that stage, the area we were entering was new territory, the only organisation that had broadcasting capability on a national level at that stage was RTE, so they had built up a high level - an excellent broadcaster, an excellent public service broadcaster. It had the license fee, therefore it could go for hi-tech, high-spec provision. Remember, the only other comparison we had was pirate radio, domestically which in a lot of cases operated out of back sheds and continues to do so.

258 Q. Yes.

A. The other ones were in the context of ITV, BBC, or other

facilities available within the United Kingdom, and in the case of some of the applications they had already engaged the expertise of individuals who had been involved in those facilities abroad. Some of the applications I think had ex RTE people already giving them technical or broadcasting advice.

The Commission also had available to it then an ex employee of RTE as its own advisor, the late Sean Lackan, and Sean at meetings of the Commission would inform the Commission about transmission. He used to visit the sites for us, and would give us technical advice in terms of what was, what were the capabilities and what was needed. I think it was Sean's view at the time that the proposals from RTE, that a lot of the equipment was high spec, state-of-the-art, and it was really up to Century as to whether they wanted to take that level and what it required, the maintenance contract, the provisions contract, the broad - the level of technical transmission, and the 98 to 100 percent coverage that we were expecting of the national broadcasting at that stage.

259 Q. These were all matters, these were all matters that were discussed at meetings but apparently were never reduced to a costed analysis of what was required, isn't that so?

A. That's largely true. I think only in the case of one application, I think Century Radio through Professor Hills, whom we have heard about earlier, he had presented costings in terms of what they were doing and intended to do. I think they had brought in that expertise. I don't think any of the other three national applications actually had

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gone forward. Nova had a totally different, maybe more innovative concept, but very hard to cost in terms of satellite provision. And the other two applications had accepted the RTE figure.

260 Q. Professor Hills has given evidence to the Tribunal over a period of days, and certainly his evidence would indicate that the £375,000 was not a figure which he had generated out of his researches, but rather was a figure on which, upon which he had been asked at various points of time to either comment on or have reported on by others, and in particular it seems that he was asked on the 13th of January, of 1989, by Mr. Stafford following a meeting with the Chairman and Secretary of the IRTC, to in effect stand up these figures. Do you remember whether there was any expressed concern on the 12th which required the Secretary and the Chairman to seek further information to try and stand up these figures?

A. I don't recollect that, but I mean I wouldn't be surprised anyway. If I may elaborate?

261 Q. Yes.

A. Because on occasion, and subsequently we did ask the Chairman and the Chief Executive and other members of the Secretariat to check back on certain matters that we would have been confused on or uncertain about.

262 Q. Do you have any recollection at the meeting of the 18th, of receiving a response to such a query, that is a query to check out the 375 or the £300,000 figure?

A. Not specifically, no. I have no specific recollection of that.

263 Q. Certainly in the documentation there would not appear to be

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any documents which stand up the figure which Century was proposing as being the appropriate charge, though it is a figure which is referred to throughout correspondence by Century, as being a reasonable figure in their opinion, and a figure upon which they base their opinion on information received from the IBA. That IBA information does not appear to have been furnished to the IRTC, the IBA information, if there was any, I don't think there was?

A. I don't know, I don't recall. Certainly I suppose if it was higher it wasn't anyway. I don't recall it specifically.

264 Q. So the IRTC appears in principle to have adopted a view that because of the size of the RTE bill for transmission, they should endeavour to reduce that, because it would be in the commercial interests of the contenders that they would pay the least sum possible, is that right?

A. Yes. Well, I would have had an expectation, I mean my professional life has always been in the business of negotiation and conciliation, that is just my current post as well, but between - what people start off with and what people may finish at, usually are two entirely different figures. So I would have expected the normal commercial trading. I do recollect, and I think I did give it in my affidavit to the Commission; I think the Commission at one stage, or it was at least suggested that given the disparity between both parties, that would not both parties go to commercial arbitration.

265 Q. Yes.

A. I would have then thought one would get in to a "split the difference" situation in those circumstances.

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266 Q. Right. In fact that never took place. As we know from the correspondence, the route adopted by Century was to write to the IRTC and to indicate to the IRTC that they, Century, felt appropriate that an application under Section 16 (1) of the Act should be made to the Minister?

A. Yes, I think they wrote to us on, certainly they wrote to us on that, and I think also members of the Commission were becoming increasingly frustrated at the lack of progress on this matter. It wasn't something we could determine.

267 Q. Right.

A. And at the same time the flagship potential of getting the national station on the airways, etc., we were losing time over that. I think there was a certain degree of frustration coming into it. I think that would have lead to a general, I think expectation, that this matter would be "look", sent to the Minister to determine finally.

268 Q. There certainly wouldn't appear to be anything in the records or minutes of the Tribunal to, of the Commission, to indicate that it was advised by Century that it was negotiating above the figure that it had entered in its business plan of 375, isn't that right?

A. That's right, but then of course there is a lot of things we know now that we didn't know, that Century was operating.

269 Q. Century never moved its position from the day of its written submission to the IRTC, it never came up on the 375. At the end of the day the Minister made an order which quantified the various charges under different headings, but this was not as a result of negotiation with RTE?

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A. Well, obviously the, they decided that that was the limit to which they were going and that was it.

270 Q. Well, at the end of the day Century accepted the directive of the Minister, isn't that right?

A. Well, obviously if it was in their favour they accepted it, yes.

271 Q. Yes. But I take it that that was not what you had envisaged when the, when you were considering the question of granting the license to Century?

A. Well - sorry?

272 Q. Did you envisage that there would be on-going negotiation between RTE and Century to reach a middle road between the figure which was being asked at that time, which was 692, on the 11th of January, and the figure which was being propounded in the business projections of Century, which was 375?

A. Yes, I think it would be reasonable to say that I would have been of the view that somewhere between those figures settlement could have been reached.

273 Q. Yes. Did you know or did you learn that the Minister wrote to the Chairman of the IRTC and advised that 614 was, in his view, a reasonable charge in "Irish conditions"? He did that on the 16th of February?

A. I don't recollect specifically that, the Chairman of the Commission may have mentioned it or referred to correspondence, I don't have a specific recollect of it. I would assumed that he mentioned it to us.

274 Q. Well, would there have been any reason to recommend then that there would be a Section 16 application if you had known that the Minister in fact believed that 614,000 was

the appropriate charge or a reasonable charge in "Irish conditions"?

A. Well, I suppose if the Minister held that view, but you have to also, I mean there were three parties to this matter. I would have assumed an agreement reached between two, if the third isn't in agreement to it, then again I am quoting - in the job I do at the moment, there is no point having an agreement between two, if there is three parties to a dispute.

275 Q. True. If that were the situation then, where you knew that two parties had agreed at 614 and the third, Century, had not, would that not bring into sharp focus the mind of the Commission as to whether or not Century were justified in not agreeing to that figure?

A. No, but I think it would have probably lead to the conclusion by the Commission that further pressure may have been put by us on Century to move their position somewhat. I mean we were in a very difficult situation, we did not have the power to determine transmission charges. At the same time we were advocates for the franchisee we had given the license to. At the same time also we have to recollect that the Department of Communications, the Minister, all their dealings prior to this would have been with RTE. It was not, even though I make an assumption in this regard, I have no hard evidence, but we would have always seen the Department of Communications as being an advocate on behalf of RTE, in terms of ensuring that it had available to it the best expertise and transmission sites and equipment.

276 Q. But perhaps devil's advocate when it came to costs and review of their financial demands. They would not have

been working in tandem with regard to increasing their budget, for example, or endeavoring to obtain higher license fees, or those matters, they would be in opposition, some of them, on those matters?

A. Some of the time, but I don't think, certainly at the time I hadn't the impression that they were in opposition most of the time. But secondly, I come back to the statement I made earlier, I think some of us did suggest that the, at the Commission, that the matter should have gone to commercial arbitration, but it would appear that neither RTE nor Century wished this, neither party appeared to have agreed to that suggestion. I think that was certainly, I would have thought it had been made by the Commission, certainly it was discussed by us.

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CHAIRMAN: Well, on that note, might we just adjourn for a little rest for a little food. A quarter past two.

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THE HEARING THEN ADJOURNED FOR LUNCH

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THE TRIBUNAL RESUMED AS FOLLOWS AT 2PM:

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THE WITNESS CONTINUES TO BE EXAMINED BY MR. O' NEILL AS
FOLLOWS:

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277 Q. MR. O'NEILL: Mr. Mulvey, before lunch we were dealing with
the relationship between, as you saw it, the Department and
RTE, and I think you were indicating the belief that there
was a perception that they were one and the same to an
extent, is that right?

A. No, I don't - if I gave that impression, I wish to withdraw
it certainly. I felt the Department of Communications had
solely dealt with RTE up to then as the only broadcasting
entity in the country.

278 Q. But the perception, as I understood it from the IRTC, was
that perhaps the Department was favouring RTE's interests
or supporting their interests against a newcomer, perhaps?
Is that a wrong impression that was drawn?

A. Yes, I wouldn't like that impression to be conveyed.

279 Q. It was in fact the case that the Department was committed
to implementing the government's policy at that point in
time, isn't that right?

A. True.

280 Q. It was the government policy that there should be an
effective national radio network independent of RTE, isn't
that right?

A. Yes.

281 Q. So to that extent, both the Department and the IRTC shared
the same expectation, that if possible, a viable

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alternative to, or perhaps a viable competitor and concurrent radio station service would be operated over and above the RTE system, isn't that right?

A. It would, yes.

282 Q. So that when it came to negotiation between the Department and RTE on charges, you would expect that RTE would be - or that the Department would be mindful of the end game, and that was that there had to be a viable alternative radio station operating within commercial parameters, if that were possible, isn't that right?

A. Yes, I think they would also have to be concerned about the other issues we were dealing with, that it had proper programming, it met the requirements of the Act, it had certain, obviously consciousness of the national culture, it had the 20 percent radio - sorry, the news content. It also had provision for the Irish language. I think it was important, I'd say from their point of view that the totality of the broadcasting provision would meet the highest standards.

283 Q. So that certainly the Department didn't make representations to you as the IRTC on the quality of the submissions which had been made, that was by the applicants, that was essentially a matter between the applicants and the IRTC, isn't that right?

A. Yes.

284 Q. You were the body that was to make the decision as to the adequacy of programming and the identity of the individuals engaged, their suitability and all those other matters, isn't that right?

A. Yes, that would be the case.

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285 Q. But the Department, in a sense that the Minister had an interest in RTE as such, the Department ultimately would have a very important role to play when it came to fixing appropriate charges for RTE's services to others, isn't that right?

A. Yes, it would, because they were the people who actually also ensured - gave the frequencies, also the franchise areas, they were largely at that developmental stage, they would have indicated the areas in which local licences would also operate.

286 Q. Right. So if the Department came to a final figure in consultation with the Minister, there would have to be very strong reasons for you to disagree with that figure as being the appropriate figure to be applied for third parties accessing the RTE system, isn't that right?

A. Yes, I mean there would have to be very substantive reasons as to why any other figure would be more viable than the one they were suggesting.

287 Q. Right. And the mere fact that Century mightn't have been happy with the figure would not of itself have caused you to require the Minister to revisit the situation under his powers under Section 16?

A. Not necessarily so. Because we weren't getting anywhere between RTE and Century in resolving the issue. Technically we had nowhere to turn. If both of them were not agreeable to the suggestion, I believe we made to them about commercial arbitration, then we were in real fear that the franchisee we had licensed would actually not get on air. There were other deadlines to meet. Contract stipulations had to be met before they could go on air. I

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think our concern was that they would resolve this between them, and if they didn't resolve it, then the Minister should use his authority to resolve it.

288 Q. You didn't consider that you might revisit the other applicants who had initially tendered or applied for the position?

A. No, I don't think that ever arose, that consideration.

289 Q. So to an extent, there was a perceived commitment to Century, notwithstanding that there was no contractual arrangement reached at that point in time?

A. There was. There would have been a clear indication given to Century they had been successful on the basis of their presentation, and I think if we had departed from that, that we would have had some difficulty, as was subsequently proved in the case of TV 3, when the Commission ended up in the Supreme Court.

290 Q. But, the decision which was made on the 18th of January was one to grant the franchise to Century Communications subject to contract?

A. Yes.

291 Q. And in the event that they were not in a position to contract with the IRTC, for example, on the basis that they had no transmission service to offer, they could hardly complain if they were passed over and the whole process was reengaged in with other applicants, isn't that so?

A. Yeah. I don't know if that arose for us actually, that consideration. I think to a large degree, we felt the transmission charge dispute could be resolved and could be resolved either amicably, as I said by commercial arbitration or by utilisation of the Minister as power

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under the 1988 Act. In that sense, I mean, the margins between them, we felt, could be resolved.

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Also, I think one of the major issues in our minds at that stage was the deadlines we were imposing for the implementation of a new service, and there was no way an alternative transmission system could be in place, because you had to get access to sites, you had to buy the equipment, you had to ensure the frequency could be heard. RTE, by dint of circumstances, had the best sites. They had picked the best sites over the last 40 or 50 years, and I think even the other applications would at the date, I think - it can only be surmised that whatever figure they agreed, they would probably have come back to the bargaining table if they had been a successful franchisee, but that's only a supposition on my part.

292 Q. But, in effect, having made the decision to grant the franchise to an entity which did not have a transmission facility at that particular point in time, carried with it uncertainties as to when the broadcasting could start, in view of the fact that there were no premises, for example, there was no transmission agreement reached, and the exact terms of any contract with the IRTC had not been thrashed out, isn't that right?

A. Yeah, had not been finalised, yeah.

293 Q. Did you feel that the IRTC felt itself wedded and committed to bringing Century's application to fruition?

A. Yes. I would have believed, having had the hearings, having considered the presentations made and having decided that Century was the successful applicant, I think there

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was a certain obligation on us to facilitate, insofar as it was possible and within the terms of the Act, the successful presentation of a new national radio station.

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I would have to say that our relationships with Century weren't always of the best, and certainly when difficulties arose, they definitely weren't of the best. But given the timescale we are talking about and the particular segment of time you are talking about, having granted the franchisee the licence, in effect subject to contract, I think we felt this was our decision and we should do everything possible and within reason to bring that decision to fruition.

294 Q. I see. Thank you Mr. Mulvey.

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CHAIRMAN: Does anybody wish to ask Mr. Mulvey any questions?

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MR. FOX: I have some questions for Mr. Mulvey, Chairman.

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MR. KEANE: I anticipate that I will have one or two questions.

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MS. EGAN: I would also have some questions. It would perhaps be appropriate to go after my two colleagues, subject to yourself?

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CHAIRMAN: We will organise it on that basis. Who is going to go first? Mr. Fox.

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

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295 Q. MR. FOX: Mr. Mulvey, I think you are well familiar with the individuals involved in the Century applications at this stage?

A. I am familiar now with all of them.

296 Q. You are familiar now with the individuals involved. Can you confirm that you were not canvassed by any member of the government to vote in favour of the Century application?

A. No, I was not canvassed by any member of government, or indeed any individual.

297 Q. Very well. Now, in relation to your own statement which you forwarded to the Tribunal. At page 2, you say as follows - it's a three line paragraph.

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"I would have indicated a preference for Century Radio and voted accordingly. I do not recall any particular member of the Commission driving the application of Century Radio or influencing others to vote for it."

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So is it fair to say in the light of that statement, that there was no outside influence as far as you were aware?

A. Well, all I can say in relation to that is that every member of the Commission had an opportunity to express their preference, to ask questions, to give their opinion, and the Chairman, Supreme Court Justice Henchy at the time, allowed every facility to do that. I am aware of no, nobody being influenced.

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298 Q. And there was nobody driving the application, as such, within the Commission?

A. No. That didn't happen. I mean, members of the Commission were pretty strong minded people as far as I recall.

299 Q. Right. In relation to the transmission charges, transmission costs itself, at page 4 of your statement you state: "That I believe the Commission took the view" - I am reading from your own statement - "that the RTE price-tag was excessive, and that it was using its dominant position to ensure Century did not succeed as a second national broadcaster."

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Now, that statement is more or less quite close to the position adopted by Mr. Murray. I am not sure if you were here for his evidence yesterday?

A. I wasn't.

300 Q. And not too distant from the position adopted likewise from Mr. O' Donovan who gave evidence this morning. Could you expand on that view?

A. Again, I am trying to recollect - you have to remember, the history of the introduction of broadcasting legislation in the late eighties was quite fraught with some difficulty, and every time proposals were made in regard to new independent broadcasting, RTE corporately made its view quite clear, and I think anybody who listened to the airwaves at the time would be familiar with the views of, not alone RTE as an authority, but with its individual employees within RTE. I remember and recollect quite a lot of the talkshows going over the top about what was being proposed in legislation. So the supposition I would

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have come to in regard to my statement would have been borne out by any evidence, if we revisited the archives of RTE in regard to that.

301 Q. Your supposition being, I take it from your statement, that the RTE price-tag was excessive and that it was using its dominant position?

A. Well, I considered at the time a charge of over €1 million to be excessive in commercial terms. I did indicate earlier that I felt that the facilities it had were there at the express wish of the taxpayer, if not paid by the citizens of the State through its licence fees, and the facility to RTE to generate commercial earnings. And secondly, it had exclusive rights to the best transmission sites with their equipment in place, so anybody coming into the situation was going to have to argue it at a commercial disadvantage.

302 Q. That was your position back then, and I take it nothing has happened to change your opinion in the meantime? That is still your position?

A. Well, I consider twelve years later the government are now proposing to introduce legislation to establish an independent transmission authority. I think that bears out what I am saying.

303 Q. And you would have no difficulty with that, I take it?

A. I think it's an excellent idea.

304 Q. Now, in relation to - there is just one other matter I want to canvass with you. In relation to evidence which was given by Mr. Justice Devally yesterday, and I take it you weren't here yesterday for --

A. No, but I read the newspaper reports this morning.

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305 Q. There is a short passage from - it's a question and answer - it's a question by Mr. O' Neill, page 128 of yesterday's transcript, Chairman. And the detail of this - it's the question in relation to transmission charges itself. Now the detail you need not be too concerned about. It's really Mr. Justice Devally's answer, but I have to put the question in as well to put it in context. It's question 453, and Mr. O' Neill says as follows: "There was, in fact, what was called in this Tribunal a "rate card", but it was a schedule of charges prepared by RTE which was given to the Secretariat on the 17th December, and that set out under various categories and headings the quantity case of a sum at that point that was being asked for at ú1.12 million, and I take it that that document ultimately found itself back with the Commission who considered and looked at it in some detail?"

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Now, the answer given to that question by Justice Devally is as follows: "Well, it must have done because I think in fact if I wasn't to the fore, I was certainly one of the people to the fore in saying, "Look, this doesn't make sense to me." I am just going to very briefly repeat my original statement, wherever, whatever the rights and wrongs of the situation, I felt that this was an albatross around the neck."

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Now, my question to you, Mr. Mulvey, is this; I take it from your evidence you consider the transmission charges excessive at that time, from the evidence that you have given from the witness-box and from your statement? Would

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you have any reason to disagree with that description by

Mr. Justice Devally?

- A. I wouldn't have expressed it necessarily in the same terms,
but you know the fundamental premise, no.

306 Q. Right. Thank you very much Mr. Mulvey.

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MR. KEANE: I am perfectly content to let Ms. Egan proceed,
if she wishes?

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CHAIRMAN: No, go on.

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

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307 Q. MR. KEANE: Mr. Mulvey, David Keane is my name. There are
just one or two questions I want to put to you on behalf of
RTE. The first of those questions relates to the
proposition you put forward in your evidence, that your
recollection is that the question had been made emanating I
think, according to your evidence, from the IRTC, that
Century and RTE submit to independent commercial
arbitration. Is that a fair summary of your
evidence-in-chief in relation to that matter?

- A. Yes. That would - certainly I recollect myself making
such a suggestion at a Commission meeting.

308 Q. Yes. I appreciate that you may well have made such a
suggestion at a Commission meeting, but what I am anxious
to address is the proposition that the proposal went
further, and that the IRTC put that proposal to RTE or to
Century, because I have to suggest to you from the
perspective of RTE certainly, and the evidence of the

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various witnesses who have given evidence on behalf of RTE, there was never any proposition put to RTE that the question of the transmission charges be submitted to independent commercial arbitration. Would you accept that that is so?

A. Well, if you say that that's their recollection, I can't --

309 Q. I have to suggest to you that - nor is there anything in the documentation discovered by the Tribunal, by any of the parties with an interest in the issues that the Tribunal is considering, to the effect that there was ever a suggestion actually put to RTE that the matter of the transmission charges be submitted to independent commercial arbitration?

A. I accept that.

310 Q. You have no reason --

A. No reason --

311 Q. -- to dispute that?

A. No.

312 Q. The other matter that I wish to deal with very briefly is the question of the transmission charges themselves. I think you accept that the Commission did not have the benefit of any independent advice, either technical or financial advice, concerning the reality or unreality of the charges being proposed by RTE?

A. I'd have a slight difference with that suggestion. I believe we had available to the Commission the evidence, or sorry, the expertise of the late Sean Lackan, a former engineer with RTE, who would have advised us in regard to the particular pieces of equipment and as to whether they were necessary or not. I think his general view at the time was, this was ultra state-of-the-art, and that it

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would have been - whereas it would have been of benefit to Century, it would also have been of benefit to RTE as well, but again, you know, I mean, I am not an expert in engineering transmission.

313 Q. I have to suggest to you, my understanding of the evidence so far has been that the Commission did not have before it a breakdown of the charges that were being proposed by RTE at the time of their original decision, is that so?

A. I understand there was a ballpark figure, yes.

314 Q. And in those circumstances, I have to suggest that Mr. Lackan's expertise would have been of limited assistance to the Commission, in that there was no hard data before the Commission to which he could address his mind. Would you accept that that was the position?

A. No, I wouldn't.

315 Q. You believe that there was a breakdown of the transmission charges being proposed by RTE that Mr. Lackan would have been in a position to comment upon?

A. Well, I would have understood that the Secretariat of the Commission, including Mr. Lackan, had discussions with RTE, and that he knew what he was talking about when the discussion on what charges RTE were being made and for what. I do have some recollections of certain discussions taking place to that effect.

316 Q. I think it's common case, and you do accept that you weren't in possession of a breakdown of the charges proposed by, or the payment proposed to be made in respect of transmission charges on behalf of Century, isn't that so?

A. Not item-by-item, that's true, yeah.

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317 Q. And that in that context Mr. Lackan would equally have been hampered in offering a view of the reasonableness or unreasonableness of those suggested fees?

A. Well, he is a former senior engineer. Regretfully Mr. Lackan is dead, but he was a former senior engineer with RTE. I can only assume that he knew what he was talking about.

318 Q. Well nobody is questioning for a moment Mr. Lackan's qualifications. What I am suggesting is that he would not have had in front of him the material on which he could make a reasonable assessment of the charges being proposed for and on behalf of Century. Would you accept that that's so?

A. Well, I don't know.

319 Q. Just, if I might perhaps finally address with you one aspect of your evidence-in-chief, and that's the suggestion you made, I think, that you take an ideological position to the effect that the transmission equipment and the transmission sites in the possession of RTE are in fact effectively in the possession of the State and ought to be openly accessible by all the citizens in the State. Is that a fair view of the, what you were stating in your evidence-in-chief?

A. Yeah, within reasonable regulations, and in accordance with the laws of the country.

320 Q. And again, this is a matter I put to the preceding witness. I am just anxious to elicit your views in relation to the provisions of the Broadcasting Act 1960 that vest property, specifically transmission equipment and sites in RTE, and the convention that is applied since

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then, that capital expenditure by RTE in respect of transmission sites and transmission equipment has been funded out of Exchequer borrowings which were repaid by RTE at an interest rate of 12 percent. Are you aware of that aspect of the ownership of the transmission equipment and the transmission sites?

A. I was not aware of it until I heard it this morning, but I always assumed my licence fee goes towards paying some of that as well and will in the future.

321 Q. And in relation to the Commission's requirements concerning the Independent National Radio Franchise, you were quite clear as a member of the Commission, and I think the Commission was quite clear that what was required was 98.5 percent coverage of the State in relation to the Independent National Radio Franchise?

A. Yes.

322 Q. And could you distinguish between that and the arrangement which would pertain, for example in the United Kingdom by reference to the Independent Broadcasting Authority? You appreciate that there is a distinction between the arrangement in the State in that regard, where 98.5 percent coverage is mandated, and the position which pertains in the United Kingdom, where local franchises are given and local franchisees broadcasting in considerably densely populated urban areas. Are you familiar with that practice?

A. No, Sir, specifically, but I mean, the requirement was for Century to get 98.5 percent national coverage. The only people that they could get that from was RTE.

323 Q. But you would accept on a proportionate basis, that where

total national geographical coverage or effectively total national geographical coverage is required, the costs associated with that cost of transmission structure are going to be much better than those appertaining, that is those contemplated for broadcasting in a densely populated urban area? Would you accept that is so, would you not?

A. But also we were too far to recall in the context of transmission costs for Century Radio, the installations were already there, I mean they weren't going to have to be refrequenced.

324 Q. Perhaps in that regard I might simply put to you the fact, and I appreciate that you would not have been present for the evidence that has been given earlier on that, it was necessary to purchase new transmission equipment for Century Radio, because they were of course apportioned by the Department of Communications a specific frequency, and RTE would not have had existing equipment capable of broadcasting on the specific frequency that would have been designated for the use of Century Radio. Do you accept that that was so?

A. Well, if the experts say so, I'd have to accept that. I am not a broadcasting engineer.

325 Q. We are also, of course, dealing with equipment that depreciates over time and you may - I have no doubt you would not have heard the evidence in RTE's books, they depreciate broadcasting equipment over a period of 13 years. So this is equipment that requires replacement on a regular basis. Would you accept that that is so? You have no reason to disbelieve that that is so?

A. If that's what their accountants approve --

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326 Q. I see. I am obliged Mr. Mulvey. I have no other questions.

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THE WITNESS WAS EXAMINED BY MS. EGAN AS FOLLOWS:
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327 Q. MS. EGAN: Mr. Mulvey, I have got a couple of questions for you. Firstly in relation to the choice of solicitors, financial advisers and bankers. I think it will be the evidence of Mr. O' Sullivan that he was requested by Mr. Burke to nominate these persons as solicitors, financial advisers and bankers respectively. Were you aware, Mr. Mulvey, that that was on the recommendation of Mr. Burke?

A. No, I was unaware of that.

328 Q. So you would have felt no pressure in that regard from Mr. Burke in relation to those nominations?

A. No, the Minister never rang me about it, thankfully.

329 Q. And if you had any objection to those nominations, would you have felt a reservation against voting against the nominations?

A. I would have, yes.

330 Q. If you had --

A. A reservation, I would have --

331 Q. If you had had an objection or a reservation to the nominations, would you have exercised your vote against those nominations?

A. I would have, yes. If I had any reservation I would have, yes.

332 Q. Do you think the same would go for any other member of the Commission?

A. Well, I can't speak for them, but knowing the members, I served with them for five years, some of them for longer periods, they are all people with public repute. I am sure if they had a reservation they would have expressed it.

333 Q. In relation to Section 7.5 of the schedule to the Radio and Television Act, this matter has been discussed already and it provides that: "Every question at a meeting of the Commission shall be determined by a majority of the votes of members present."

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I think some comment has already been made in relation to the fact that votes by the Commission were in fact done on a consensus basis rather than on an individual show of hands on a voting basis. Are you able to comment on whether there is any difference in practice between the voting system and the, for want of a better phrase, the "consensus system" that actually operated under the Chairmanship of Judge Henchy?

A. Well, in all of the public bodies I have had the pleasure to be acquainted with, including not an inconsiderable number of union executives I have worked with, there is always an attempt to get a consensus, people do not wish to try to go to a majority vote, to split organisations or opinions. There is always a good share will always try to get a consensus equipment. Again, they will not allow the lack of a consensus to stop a decision being made. I never felt any compulsion, and I doubt if any of my colleagues on the Commission did, not to express a strong opinion against, but there was never really a requirement

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for a show of hands or a secret ballot, and when we say decisions, as I understand it, were reached by consensus, it did not mean on occasion, particularly when it came to local licences, and again Dublin licences, people had different opinions.

334 Q. And if you had wanted to vote against a particular proposal, would you have felt any reservation about so doing?

A. No. The Chairman was very clear on that. A member who wished to have their opinion recorded was free to do so.

335 Q. Judge Devally gave evidence yesterday in relation to this particular practice, and I'd also like to refer to a statement that he gave in answer to the question of the Tribunal to see if you agree with it or not. He is talking again about the consensus system, and he is saying: "The voting was always scrupulously carried out on a round table basis. Any decision made while I was there was a clear majority decision. Nothing went through on the nod. Each member of the Commission made his or her feelings and preferences clear. In my recollection, as I have indicated, there was no slinking violet on the Commission. Nothing was decided unless there was a clear identifiable majority."

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Would you be in agreement with those sentiments, Mr. Mulvey?

A. Yes, I think Justice Devally would have encapsulated the process quite clearly.

336 Q. If I could just draw your attention briefly, Mr. Mulvey, to Section 6 of the Radio and Television Act. I don't know

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if it's possible to put it on the system?

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MR. O'NEILL: If My friend would refer me to the section again?

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337 Q. MS. EGAN: Section 6 of the Radio and Television Act 1988, page 5578. This sets out the criteria which the Commission must take into account in deciding to whom to award a sound broadcasting licence, or indeed a television licence, and it's at Section 6.2 it sets out several factors which would have to be taken into account.

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Broadly they are, the character of the applicant at "A". At "B", the adequacy of expertise and experience and the financial resources that will be available. At "C", the quality, range and type of programmes. At "D", the quantity, quality, range and type of programme in the Irish language. "E", the extent to which the sound broadcasting contract would create new opportunities for Irish talent in music. "F", there is the desirability of having a diversity of services in the area. "G", there is the desirability or lack of, that one person would control a large portion of the media, and the same is dealt with at "H". Then at "I", there is the extent to which the services would serve a community need. And then at "J", there is "Any other matters which the Commission considers necessary to secure the orderly development of sound broadcasting services."

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So those broadly are the criteria, Mr. Mulvey, which the

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Commission was required to have regard to in deciding to whom to award a sound broadcasting contract.

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I have opened that section to you because the Tribunal team has asked on several occasions why the issue of RTE transmission charges was not raised with the applicants, specifically wasn't raised with the applicants at the oral hearings on the 12th January, and I am wondering, having regard to the criteria set out at Section 6, if you can make any comment on that?

- A. I think any member of the Tribunal, Chairman, that has seen the level of applications we received and the scope of depth of those would realise that the Commission spent hours, literally hours and days over those applications, because not alone was the issue of transmission a consideration, but we spent probably far more time on who the applicants were, what their programming policy was, what their target audience was, what their finances were, what their financial obligations would be? We spent more time at that, to be frank about it, than on the issue of transmission.

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I think we were of the view, rather naively as it transpired, that transmission would probably be the simplest of our problems; that the applicant would get access to the RTE masts and for a reasonable charge. But I think also, Mr. O'Keefe, might in his evidence give, we still have - the Commission I understand still has problems regarding transmission with local licensee holders, where they feel they are being unfairly dealt with, they are not

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getting the frequency they wish to have or the scope and scale of it, or that their signal is not being heard or there are overlapping signal areas. There is a constant problem regarding Dublin. So I mean, the point being that - I might make the point that transmission was a very minor level of our concern, maybe now we should have spent more time on it.

338 Q. In fact, Mr. Mulvey, in the criteria mentioned under Section 6 of the Act, transmission charges doesn't figure as one of the criteria to be taken into account by the Commission in deciding to whom to award a licence. It's not expressly mentioned in Section 6 of the Radio and Television Act 1988?

A. What I do recall a few days before Century did go on air, we almost stopped them going on air because they wouldn't meet one of the provisions of the Act, namely the provision for the Irish language.

339 Q. I'll come to that. You stated in your evidence to Mr. O' Neill that, "Relations with Century weren't always the best." And I had intended to question you on that issue relating to the Irish language requirement. Can you outline for the Chairman please, how that issue arose?

A. Well, quite astonishing, Century had made no provision for the Irish language in their programming in terms of broadcast, despite having given commitments to do so and it having been pointed out to them.

340 Q. And it's one of the requirements of the Act?

A. And their contract, and it was made quite clear to them a few days before the commencement - probably the day before they commenced broadcasting, that the Commission would

refuse them the right to go on air if that provision had not been acted upon. All I can say in regard to relations with Century, I suppose, from the day we gave them the licence, relationships gradually went downhill, but I better not say any more.

341 Q. In relation to the Irish language criteria in particular, Mr. Mulvey, there is two board meetings of the board which we have the minutes of, both of them mention this matter. The first is the 15th August, 1989, that's at page 458 of the documents. I think at the bottom of the page at Heading No. 4, "It is agreed that Century Radio should be informed that it must carry adequate news in Irish from day one." And then similarly at page 468, which refers to a second meeting of the board of the IRTC, this was reaffirmed. This is at page 468, it's a meeting of the 31st August.

A. I think my own view of it was shared by some members of the Commission. We weren't going to be the first public authority to be criticised over the demise of the Irish language.

342 Q. Perhaps, Mr. Mulvey, I could just get that on screen. Page 468.

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MR. O'NEILL: The reference is 463.

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343 Q. MS. EGAN: This is the relevant extract from the minutes of the meeting on the 31st August, 1989?

A. Yes.

344 Q. And at Clause 6 there, it's again reaffirming, the Commission reaffirming its previous decision that Century

was to be required to fulfill the Irish language criteria before being allowed on the air. In fact at the bottom of that page, there is a comment that the "Commission would not attend the launch of Century if this was not done and was not obeyed prior to its going on air."?

A. Yes.

345 Q. There has also been some comment raised in relation to the approach and request by the Commission to the Minister pursuant to Section 16 of the Act, that he make a direction in relation to the transmission fees. And there has been a comment that it appears that this request was not specifically authorised by any meeting of the Commission. In that regard, Mr. Mulvey, could I draw your attention to page 5570, which is minutes of a meeting of the 9th February, 1989, and at the first indent there, under the heading "RTE Charges", it's stated: "As it seemed unlikely that representations to the Department of Communications about the cost of the RTE transmission facilities for the national radio service would produce the desired result, it was agreed that the Chairman should contact the Minister with a view to obtaining an early decision. This should be followed by a letter of confirmation."

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Mr. Mulvey, can you recollect whether or not that authorisation to the Chairman to contact the Minister would have included an authorisation that the Chairman ask the Minister for a direction pursuant to Section 16 of the Act?

A. Yes. That's what I would have assumed. I mean, we were giving the Chairman the discretion of the Commission to act in accordance with the Act.

346 Q. And, Mr. Mulvey, in relation to your statement that you felt some obligation to Century Radio, to help it get off the ground having awarded the licence to that body, would the same hold true for any station to whom you had awarded a licence?

A. In regard to the particular Section 16.2?

347 Q. In regard to your statement that you felt an obligation that it was in a sense, your baby?

A. Yeah. The Commission, as I would have understood it, and I think the policy continues to the present day, that within reasonable bounds and within the requirements of the contracts, that the Commission acts as an advocate on behalf of those stations it has licensed, and it continues, as I understand, in its public policy statement to do so. That is obviously within reason, because some radio stations have a habit of attracting some prima donnas who think they are above certain regulations and above the law in certain regards, so they have to be reminded from time to time, and have been by the Commission, that they are only authorised to carry out certain matters and not others.

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I think the history of the Commission has been, not to say littered with them, but there have been some incidences where certain radio stations have been called to book, but we would have generally seen the Commission's role of advocacy on their behalf. They are instrumental in assisting them in establishing their own representative association and facilitating them with meetings, etc., etc., so yes.

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348 Q. Thank you.

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THE WITNESS WAS THEN RE-EXAMINED BY MR. O'NEILL AS FOLLOWS:
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349 Q. MR. O'NEILL: Just two matters arising from the examination
of other parties.

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Mr. Mulvey, firstly, you made reference, in response to
Mr. Fox, to the fact that there is an intention in new
legislation to introduce an independent broadcasting
authority which would be responsible for transmission, is
that the position?

A. Yeah, I think there is an intention to establish an
independent transmission authority, yes.

350 Q. Have you established whether or not it's the intention of
that body to levy on all parties who would be using the
transmission service, a pro rata charge in respect of
overheads, transmission costs, etc.?

A. I am not familiar with the detail of that as yet. As I am
no longer on the Broadcasting Commission, my mind has moved
to other matters.

351 Q. Right. In relation to your belief that the meeting of the
7th - sorry, the 9th February, 1989, was in effect, an
application under Section 16.1; in coming to that
conclusion, could I suggest to you that in fact, it was
never debated as an application to be made to the Minister
under Section 16.1, which is a very specific section in the
Act and triggers a mechanism where the Minister must then
go into the consultation with RTE under the terms of the
Act and reach a determination. That is something which, I

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suggest, would not have happened unless all the parties to the Commission had decided that this was a route which should be followed, rather than what is expressed in this minute as a direction that the Minister should - the Chairman should contact the Minister with a view to obtaining an early decision?

A. I cannot recall, counsel, as to whether the specific Section 16.1 was mentioned, but it was in the context of transmission charges. I mean, it would be untruthful of me to say otherwise, but I mean even reading the minute now, the reasonable person would have to hold, I would assume, that an early decision, the only decision a Minister could make in regard to what we were asking him to do was under a specific section of the Broadcasting Act.

352 Q. Well, the Minister had made a number of decisions to that point in time, including a decision which had reduced the RTE charge to a sum of ú692,000 and in fact, following upon letters which were sent to him around this time, he further reduced the figure to ú614,000 the week after this particular meeting?

A. The only answer I would have to that is, it's my recollection that this was the only time we asked him to make a decision in regard to it.

353 Q. No. In fact what happened after this was on the 16th February, the Minister made an order - sorry, the Minister wrote to the Chairman indicating that he considered that ú614,000 was the appropriate charge, "not unreasonable in Irish circumstances". That was after further negotiation with RTE. The Chairman of the IRTC then communicated that to the Chairman of Century and Century responded on

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the 20th, through their solicitors, indicating that
ú375,000 was as far as they were prepared to go, that the
matter was not viable at any figure above that. They then
requested the IRTC to apply to the Minister under Section
16.1. So that at the time of this minute, on the 9th
February, there had in fact been no request by Century to
the IRTC to implement the provisions of Section 16.1.
Accordingly, I would suggest to you that it was not the
subject matter of the meeting which led to this particular
minute of the 9th February being prepared, it was not
prepared in the context of a Section 16 application being
forwarded to the Minister?

A. I think I said that earlier, I wasn't specifically sure
regarding the particular section of the Act which had been
talked about. My general recollection is in regard to the
ongoing disputation between Century and RTE in regard to
what should be paid.

354 Q. And that was something which had been the subject matter
between the Department and RTE since January of 1989, and
was something which had, to that point, apparently
concluded on the 11th January with a decision that ú692,000
was the figure that the Minister agreed with RTE?

A. Yes.

355 Q. Thanks Mr. Mulvey.

A. Thank you.

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MR. O'NEILL: Unless anybody has something arising out of
the examination, my next witness would be Mr. Donal
O'Sullivan. Thank you Mr. Mulvey.

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CHAIRMAN: Thank you very much, Mr. Mulvey, for coming
down. Your attendance is appreciated.

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THE WITNESS THEN WITHDREW.

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MR. O'NEILL: Mr. O' Sullivan please.

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DONAL O'SULLIVAN, HAVING BEEN SWORN, WAS EXAMINED AS
FOLLOWS BY MR. O' NEILL:

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356 Q. MR. O'NEILL: Good afternoon Mr. O' Sullivan.

A. Good afternoon.

357 Q. You have come here from Cork, as I understand it today, and
thank you very much for your attendance. I hope to be
relatively brief in dealing with your evidence, if I can.

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You were one of the original members of the IRTC, isn't
that right?

A. I was, yes.

358 Q. And prior to your appointment, I think that you had been
contacted by the then Minister, Mr. Ray Burke, isn't that
so?

A. No, not prior.

359 Q. Not prior to your appointment. You were appointed on the
17th October, 1988?

A. Yes. I think the first intimation I got was Sean Connolly
phoning me for my CV. He informed me that I was being
appointed.

360 Q. I see. Whilst he informed you that you were going to be
appointed, your formal appointment did not in fact take
place --

A. That came from Bernard McDonagh.

361 Q. That came from?

A. The Secretary of the Department, Bernard McDonagh some days
later.

362 Q. Bernard McDonagh. Right. You received your appointment

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at the inaugural meeting of the Commission, which took place in Dublin on the 17th October?

A. Yes, there was a parchment type thing, but I had got a written letter before that from Mr. McDonagh.

363 Q. Right. Well, you may take it that what you received from Mr. McDonagh was probably a statement of the intention to appoint you, but nobody was appointed until the appointment day under the Act, and that was the 17th?

A. Yes. I have a copy of that, yes.

364 Q. You have a copy of that, yeah. Now, did you receive a telephone contact from the Minister, Mr. Burke, at some stage after the Secretary, Mr. McDonagh, was in touched with you?

A. Yes, I did.

365 Q. And can you outline what the circumstances of that telephone contact was?

A. Well, the circumstances were he asked me would I meet him, I think on the following Thursday or something, I think. He was going to Cork on business and he wanted a short conversation with me, and I met him in Fermoy for about ten minutes I suppose.

366 Q. Did he indicate to you that he was going to Mallow in a few days for a Fianna Fail meeting?

A. No. That night, that very evening.

367 Q. Sorry?

A. He was going to Mallow that very evening.

368 Q. He was going to Mallow that very evening, I see.

A. Yes.

369 Q. In any event, did he ask to meet with you when he was going down to Cork?

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A. Yes, and we agreed to meet in Fermoy, and we met there.

370 Q. And when in Fermoy, what did he ask you to do?

A. He asked me to propose certain persons for positions that would appear on the agenda.

371 Q. Now, were the positions that were going to appear on the agenda the position of bankers to the Commission, the position of solicitor to the Commission?

A. Yes.

372 Q. And the position of accountants and financial advisers to the Commission?

A. That's correct, yes. I did ask him by the way, in passing, I said - he said that the Ulster Bank would be the one that he would propose as bankers, and I said that the airport branch, I did make the comment that that would be a bit out of town, it would be more appropriate to have it somewhere in the city, and he said, "Well that's my own bank, I do my own business there", so --

373 Q. So that was the reason why he chose that particular branch and he indicated that to you?

A. Yes.

374 Q. Did he indicate to you why he had chosen Deloitte Haskins and Sells?

A. No, in fact I had to write down on a bit of paper, to write down accurately because I had never heard of them. I have now heard of them, they have been merged and so on. They are quite a substantial firm now.

375 Q. Did you ask him why it was that he wanted you to propose that particular firm?

A. No, no.

376 Q. You were happy to propose it if he asked you to do so?

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A. I was. Well, he was the Minister and he appointed me, through the government I presume. I had known him casually over the years, as I think on a shake hands basis, that was about it.

377 Q. I think you had some family connection, had you?

A. My father had been in the Dail with his father and my father was in the Oireachtas for 32 years, so I was frequently in Leinster House for a free lunch with my father and others when I was there on business, and he would have known me in that way then too, you know? Well, he was a friendly man and I would like him, you know, although he never had much of a conversation with anybody, he was always in a hurry somewhere else.

378 Q. The next party he then appointed or asked you to nominate was a firm of solicitors. Did you know anybody in that firm yourself?

A. No, I didn't, I didn't. On thinking about it when I went home, I said I probably - a North County Dublin family who would be constituents of his I presumed. They were involved at one time or another in a very public way in a voting issue. It was the same family. By the way they were acquitted, you know.

379 Q. Now, when you concluded the taking of the note as to who was to be proposed, did you have any other discussion with him about what the Commission was about or what its aspirations, what the Minister's aspirations were?

A. No, he was already late for his meeting in Mallow and he asked me would - I said I would, I'd see no reason why not. On thinking about it of course, in the next subsequent few days, I said of course I might, but he may

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not be pleased with me because there may be several others proposed as well. It was the privilege of anybody at the meeting to propose somebody and I was one of ten members and there were eight from Dublin and district. So I said to them, I said they probably would know a lot of people that would fit that job just as well, but in the event that did not transpire, nobody else was proposed at the meeting.

380 Q. Did you indicate to any of the members present that you had been asked to propose these individuals or this bank by the Minister?

A. No. We were meeting for the first time, first time ever in some cases, and we met in, is it Brookfield House in Donabate? And there was absolutely no conversation. We had a cup of tea and then the Minister gave his speech and then we had a lunch and then we had the business, you know, of the day. I think the agenda was in fact a draft agenda. I presumed, as you said earlier, we weren't a Commission until we met. So the Chairman couldn't probably issue an agenda as such until we were in existence.

381 Q. Exactly. The Minister, however, was aware of the agenda when he spoke to you in Mallow or Fermoy, I should say, isn't that right?

A. He seemed to be, because I saw a submission which was forwarded to me by the Commissioner of the Tribunal, of a statement being made by Sean Connolly that he had discussed it with him beforehand, certainly about the bank and some other one. So you know, that's just in passing.

382 Q. You don't know of any reason why the Minister didn't ask

you at the inaugural meeting itself to propose these individuals, do you?

A. No, no. Well, I presume by the way, when I got the question about the Ulster Bank, or the answer about the Ulster Bank being in his constituency and he banking there, yes. The others were largely living near or supporters of his in some way.

383 Q. Did you in any way consider that it might be less than independent of you to be proposing somebody who was the Minister's nominee for these positions?

A. Well I didn't really, because that's the way government works normally, you know? They appoint - in my county they appointed two sheriffs out of the blue, as it were, from their own party, of course. Then we had a change of government and there was a sheriff appointed by the other party. I assume this was the way governments worked.

384 Q. Did you think you were selected for the Commission on that basis?

A. I think he was probably the person that would have known me through the Fianna Fail party. I was with him at the Ard Fheis there and again on a hello/good-bye basis. He would know me, he would know my parents, my father was in the Dail, that was the only reason I would think. I didn't go into it in any great detail anyway.

385 Q. Now, it came to pass, of course, in the course of considering the applications for the various franchises, that one of the applicants before you was Century Radio. I think you learned of the involvement of Mr. Oliver Barry in that, isn't that right?

A. Oh yes, he told me he was applying.

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386 Q. He told you. When and where did he tell you that, do you remember?

A. I don't really remember. I had a long connection with Mr. Barry over the years in Cork where we ran the Siamsa Cois Lee Councils in the seventies and eighties.

387 Q. Was this in Pairc Ui Caoimh?

A. It was. It was a novel idea which was proposed by Oliver Barry in fact, and he was the main impresario in the whole thing. He was the executive head of it, who sought out these people, who had some skill of the world and got them to come to Cork. So the debt in Pairc Ui Caoimh was eradicated virtually by a series of major concerts. So I had known - I was the Chairman of the County Board at that stage in Cork and the - I notice the Phoenix Magazine lately ran a rundown on the members and why we were there, and they just gave me as being in that scene and that maybe suited me, maybe it didn't. They appointed me - that was the background anyway.

388 Q. Was the concert promotion activity which took place in Pairc Ui Caoimh, was that a substantial fundraiser for the GAA in Cork throughout that period in fact --

A. It was. Hundreds of thousands, and it was a business arrangement with Mr. Barry of course. We had an arrangement about it following expenses, of course, which were enormous too.

389 Q. And this was a successful business relationship with him that existed for some years, is that right?

A. Yes, yes. Well not just with me personally --

390 Q. I appreciate that.

A. -- with the whole board, you know?

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391 Q. Do you know if Mr. Burke was aware of that relationship between yourself and Mr. Barry?

A. I don't know. I never saw him at the concerts anyway, or anywhere near them. He never mentioned it.

392 Q. Did you know Mr. Barry to be a friend of Mr. Burke's?

A. I did, but I couldn't say at what stage I knew that, you know, because these friendships would be made maybe in the Ard Comhairle, at the All-Ireland in Croke Park. Mr. Barry would always be invited by Cork, and Mr. Burke would be invited as a member of government. I couldn't say where they met or what the relationship was between them.

393 Q. When it came to the various applications being considered for the national radio franchise, one of them being Century's, you had the benefit of a financial analysis which was carried out by the Secretariat of the IRTC, isn't that right?

A. I had.

394 Q. And you also had a comparative study carried out by, again Mr. O'Keeffe of the IRTC, which showed highlights of the applicants' presentations, isn't that right?

A. Well, the Commission had adopted a set of guidelines. I think there is a copy which came to the Tribunal lately, which I happen to have, it was thrown out with everything else, a big portion in the house for a while, all the applications from all the stations and Mr. Barry's one was put in with it as well, or Century's one I mean.

395 Q. They all followed essentially the same format of response, isn't that right?

A. Yes.

396 Q. Though some perhaps were bulkier than others, but they

dealt with individual headings?

A. Yes.

397 Q. And they were analysed, and having considered the analysis and the original documents over Christmas, or perhaps coming into the new year, did you yourself form any particular view as to the quality or otherwise of the presentations?

A. I did. Century's one was by far the biggest book, and certainly had a great collection of expertise advice in it from various people that he obviously had paid a lot of money to put together, and it was the general view of the Commission, when they all received it, that it was a well presented document, that it addressed all the issues better than anybody else, and that it would be interesting to hear them on the hearing day perform on what they had written.

398 Q. Right. So to your mind, the leader on paper certainly was the Century application, isn't that right?

A. It was mine certainly, and there was a consensus to that effect as well, unofficial consensus, you know, making comments.

399 Q. And then you heard the oral presentation on the 12th. Did that reinforce your belief?

A. It did really. They all performed well on the day, you know? At that stage I suppose they had been over several practice runs, by the look of it. It was well rehearsed, you know. They had to give themselves times for facts and questions, one I could observe, and we all made notes of various kinds, but things - you usually find that the answer was further on in the book because it was a big book, you see, and then we had the facility where we could

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ask questions through the Chairman, if anybody had any questions to ask.

400 Q. I think that the Commission Secretariat had drafted questions which had been circulated to the members as possible questions that maybe asked at the presentation?

A. Yes.

401 Q. And one of them dealt specifically with what the attitude of Century would be in the event that the Minister and RTE agreed an appropriate level for transmission charges which was not a sum acceptable to Century. Do you remember that question?

A. Well I do, I remember the start of it, but I heard figures there this morning when you were interviewing Fred O'Donovan and others and, who was on next?

402 Q. Mr. Mulvey.

A. Mr. Mulvey next, that I wouldn't have any recollection of you know, at this stage.

403 Q. You don't specifically have a recollection of it now. I was just wondering whether or not you have any recollection of there being a decision of the Commission that they would not in fact ask these questions in particular, this question relating to the attitude of Century should they not be prepared to agree with the Minister's figure?

A. I don't remember that at this stage, no.

404 Q. Do you remember the fact of there being substantial issue regarding the transmission charges which RTE were asking for and which the respective applicants were considering --

A. The battle commenced immediately. That's all I can say about that. The disparity between the two amounts was always great, and no matter what concessions were made, as

I mentioned today now, there was always one thing, and in fact they existed beyond Mr. Burke's term of office, because I remember meeting Maire Geoghegan-Quinn, she met the Commission and she asked us, following - her first meeting with the Commission was in Jurys, and she asked us, and she told us "Instead of I giving a speech to you, you are going to give a speech to me", and I remember it specially because it was a Friday and I was hoping to get the train to Cork in the afternoon and I asked the Chairman to speak first because I had to be excused. I knew her rather well anyway, and I remember at that stage the main theme of what I said was that Century were still alleging that they were being screwed by Radio Eireann, or by RTE, and that if they didn't get some relief soon, they'd be in serious trouble. That's the way it was being presented to us, of course, and she just listened and I am sure she heard it all before she came to the meeting, but --

405 Q. At the time it was decided to award the franchise to Century Radio, were you mindful of the fact that there was a very substantial gap between the figures for RTE and the figures for Century?

A. I was. But I wasn't awfully worried about the financial end of it, because we were dealing with at least 2 millionaires and I said, "Well they will be negotiating for the next two years and they will agree eventually." That's the way horse-trading goes on, and that I discovered, of course, there was a third millionaire secretly involved. So I wasn't awfully concerned about it.

406 Q. Well, you had the belief that because they had personal wealth, that they were going to invest this in the business

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venture and in particular, in paying RTE?

A. Not specially that, but that they could stay in business for a considerable time before it would hurt seriously and by that time, I felt that something would be worked out and there would be some kind of settlement of the issue. Well they had power in the Act anyway to get the Minister to adjudicate on it.

407 Q. Did it occur to you in the course of your sitting on this particular commission that the applicants, Century, seemed to have great access to the Minister with regard to their complaints?

A. No, that wouldn't have been apparent that the - that the Commission --

408 Q. You did learn, did you, that on the 11th January that the Minister had intervened and there had been a negotiation with RTE which reduced the figures to ú692,000? Were you aware of that?

A. I don't think so. I can't say I remember it.

409 Q. I see. And do you recollect the Minister indicating that ú614,000 as a reasonable charge in Irish circumstances?

A. I don't, no.

410 Q. Are you surprised to learn that Century in fact did not ever commence a process of negotiation with RTE, but merely communicated their displeasure with the figures asked to the IRTC and indeed to the Minister?

A. Well, I never heard these really, about negotiations with it for a good while, you see they were complaining about it constantly and writing letters to the Commission to intervene on their behalf and so on. By and large the Commission was loath to intervene, and then I think they'd

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be writing to the Chairman and he and the Executive did - made some arrangements, which I am not privy to now, nor if I ever was, I can't recall them anyhow.

411 Q. You mentioned the fact that you are aware of the Minister's powers under the Act, that was the power under Section 16.1 and 2 of the Act. Do you ever remember that matter being raised at a meeting of the Board or the Commission itself, or a decision being taken that the Commission should apply pursuant to that Act to the Minister --

A. No.

412 Q. -- to intervene?

A. No, I don't think they did, I can't recall it anyway. The Commission were caught in the middle, you see. They were defensive of their own creation which was Century, they were anxious that it would survive too, but there was only so far they were prepared to go on it, as far as I could see, in fighting Century's case for them.

413 Q. In fact, as we see, Century was to fight with them about the terms of various aspects of the contract thereafter?

A. Yes, I remember, it was said today. The Irish language one was a particularly 11th hour crisis, where there hadn't been any provision for that, and the Chairman personally intervened in that and phoned them and told them that they were being - the broadcast could not commence, that he was disallowing it, and I agreed with that because I believe there should be some content of Irishness.

414 Q. Thank you very much.

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MS. EGAN: I have got one or two very brief questions.

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MR. FOX: I have one or two brief questions.

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MR. KEANE: I should indicate that unless anything arises out of questions, I don't anticipate that I will have any questions of this witness.

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CHAIRMAN: All right Mr. Fox.

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THE WITNESS WAS THEN CROSS-EXAMINED BY MR. FOX AS FOLLOWS:

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415 Q. MR. FOX: Mr. Sullivan, I am John Fox and I act for Mr. Burke. There is a matter I want to address to you and it's this: That in relation to the appointment of the - remember this matter raised by Mr. O' Neill, the appointment of the firm of solicitors and the Ulster Bank and a firm of accountants. You remember this issue that Mr. O' Neill raised with you? He asked you about this a few moments ago?

A. What was it again?

416 Q. It was that these entities had been nominated by Mr. Burke to you. He had mentioned these entities to you?

A. Yeah.

417 Q. That's your evidence, right?

A. Yes.

418 Q. Now, Mr. Burke acknowledges the position vis-a-vis the Ulster Bank, the branch manager of the Ulster Bank, a man called Mr. Moody, is actually a constituent or was a constituent of Mr. Burke at the time, and likewise the firm of solicitors, the principal involved there in the firm of solicitors was a constituent of Mr. Burke, but in relation

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to the firm of accountants, Mr. Burke will say that he had no involvement whatsoever with the firm of accountants, and I have to put it to you, and I am not making a huge issue of this with you. I have to put it to you that Mr. Burke will say that he did not nominate the firm of accountants simply because - he didn't mention them to you, because he had no connection with them whatsoever, and there was no question of them being a constituent or anything like. That that's as strong as I am putting it to you. In that regard I am just saying to you, perhaps your memory is a bit faulty?

A. I had never heard of them even up to that point. And they were, I can't remember them now either, because they were Haskins I think, or Hopkins, Deloitte Haskins Sells, and I in fact wrote them down on the night because I didn't know any of them, you know?

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CHAIRMAN: Mr. Fox, I don't think you should proceed with that any further. If you have no accurate instructions on that, just leave it.

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MR. FOX: Yes, Chairman. It's just I have to put Mr. Burke's position in relation to that particular issue. As you know he has acknowledged matters, Chairman.

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Thank you very much Mr. O' Sullivan.

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THE WITNESS WAS THEN EXAMINED BY MS. EGAN AS FOLLOWS:

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419 Q. MS. EGAN: Mr. O' Sullivan, I have just got three short questions for you. After Mr. Burke asked you to nominate the bankers, solicitors and financial advisers, that was your evidence, did Mr. Burke ever ask you to do anything else again in your capacity as a board member of the IRTC?

A. No.

420 Q. And did he ask you to do anything in relation to Century Radio?

A. No.

421 Q. And were you approached by anybody on behalf of Century Radio during that licensing process?

A. I wasn't.

422 Q. And then one very brief matter, simply to draw to your attention, Chairman. Mr. O' Neill was questioning you, Mr. O'Sullivan, as to whether you remembered any decision by the Board to ask the Minister to use his powers under Section 16 of the Act and you said, as far as you knew, no such decision had been made. I would simply like to draw your attention to the minutes of the meeting of the 9th February, 1989, and to state - this was the minute I opened to you earlier, Chairman - that apologies were in fact received from yourself, Mr. O' Sullivan, and that you weren't actually at this meeting and I just wish to bring --

A. That would be a good reason for not knowing. I wasn't there even.

423 Q. At the meeting which - at which you nominated the solicitors, bankers and financial advisers, you stated that you expected or you thought it was likely that other persons would nominate other potential candidates and it

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was open to any person to nominate anybody that they wished at that meeting?

A. It was, yes.

424 Q. But in fact no such other nominations were received?

A. I was surprised because they were all people in Dublin who knew much more about the legal affairs and the banking affairs and accountancy affairs than I did, and I only met them - Judge Devally, he was there too. He could have in fact proposed somebody, so there was no reason to be regretful now about it.

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CHAIRMAN: Thank you very much, Mr. O' Sullivan, for coming up. Thank you very much for coming along. You were of much assistance.

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MR. O'NEILL: Ms. Gillian Bowler will be the next witness.

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THE WITNESS THEN WITHDREW.

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MS. GILLIAN BOWLER, HAVING BEEN SWORN, WAS EXAMINED BY MR.
O'NEILL AS FOLLOWS:
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425 Q. MR. O'NEILL: Good afternoon Ms. Bowler.

A. Hello.

426 Q. You, as with Mr. Mulvey, were one of the two members who
served two terms on the IRTC?

A. Yes.

427 Q. You are quite familiar with its procedures, though I take
it they took time to develop, isn't that right?

A. Yes. I suppose in short.

428 Q. You didn't have a broadcasting history prior to joining the
IRTC, and I think it's fair to say that you came to the
Commission as, because of your business expertise, isn't
that right?

A. Yes. Very briefly, I was appointed to the Irish Goods
Council where I met Vivian Murray who has testified, that
was by a Fine Gael/Labour coalition, and then subsequently
I sold my company so I think my profile was raised in
business, and then the next appointment was the Tourism
Task Force which was successful, I believe, and six
appointments roughly followed in a short space thereafter.

429 Q. Right. Can you remember who it was who you met in
connection with being appointed to this particular
commission?

A. No, I have really tried to remember that. I don't - it
seems to me likely that I would have been called in and
appointed by either the Minister or his Secretary. But I
really don't remember that.

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430 Q. Fine. In due course in any event, you attended at the inaugural meeting of the Commission which took place at Newbridge House?

A. Yes, I do remember that.

431 Q. That took place on the 17th October?

A. Mm-hmm.

432 Q. And I take it that you familiarised yourself with the various tasks which faced you as a member of this commission, and in particular, with the requirements and criteria that would be applied in the selection of the successful candidates for the various franchises?

A. I believe I did my best.

433 Q. If we look to documents at page 5578, which is the Act under which you were to perform your functions, and in particular to Section 6 (2)(B) thereof, you will see that one of the matters that was to be considered by the Commission in deciding the suitability of an applicant was "The adequacy of the expertise and experience and of the financial resources that would be available to each applicant, and to the extent to which the application accords with good economic principles." Do you see that?

A. Yes.

434 Q. I take it that that was one of the matters that you would have had regard to, particularly in view of your business background?

A. Yes.

435 Q. And your interpretation of that, I take it, would extend to concluding that whoever was going to apply for a particular franchise would have to be able to require - comply with the financial requirement that they could stand-alone in

the transaction and perform the functions, isn't that right?

A. Correct, yes, absolutely.

436 Q. So that if there was somebody who had the best of intentions and the greatest of programming but the absence of any financial wherewithal, they would not meet this particular criterion, and with regret, perhaps might have to be rejected?

A. That would be my view.

437 Q. When it came then to reviewing the individual applications, they had been limited to four in number, and three of them were, as we know, for the land base system. One contemplated a satellite scheme, and we can leave the satellite scheme out of it for the moment, but all of the three that were going to be with the land base system were going to use RTE, isn't that correct?

A. Correct.

438 Q. That involved I suppose, shoe-horning themselves into an existing system, perhaps adding to it with their own equipment to allow them to broadcast their own signal, isn't that right?

A. Yes.

439 Q. And on that basis, obviously, RTE would have to be compensated in some manner, to some extent for the facilities they were going to make available to the newcomer, isn't that right?

A. Yes.

440 Q. If we look to the application analysis which was performed by the Tribunal, rather the Commission staff for you, at page 3919, you'll see that there was an analysis of the

financial structure of the applicants.

A. Yes.

441 Q. This showed the capital make up of the three contenders covered in this particular note, isn't that right?

A. Mmm.

442 Q. And we see that Century had capital available to it of 2 million, the others 3 and a half-ish, and 4 and a half million respectively, isn't that right?

A. Yes.

443 Q. So that to no extent was Century the most financially structured or the largest of the enterprises that was before you, if one accepted these projections?

A. Well, I just draw your attention to the paid up shared capital which would certainly have influenced me, that Century and NRFC both had £2 million of paid up share capital. The others, both the NRFC and 2000 were heavily reliant on leasing finance and shareholders' loans and a bank overdraft. I mean, you know, I would point out to you - I mean, in a perfect world, you would like to see all the money in paid up share capital.

444 Q. Of course.

A. So the amount of money that was paid in wasn't leasing finance, which can readily be pulled out, was fairly crucial I would think.

445 Q. So the National Radio Franchise Consortium and Century had equal paid up capital at 2 million each?

A. Yes.

446 Q. Whereas Century 2000 was at 1 million, is that right?

A. Exactly.

447 Q. And when we come to look then at the recurring charges that

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would have been incurred by the new business, you see at page 3920 the profit and loss projections of the various candidates set one against the other, and if we look to the end there, you will see at the cursor where transmission charges are, and running from left to right they run from 684,000 per annum in the first year to 317 to 160?

A. Mmm.

448 Q. These were the figures envisaged in the projections for the first year of operation as the transmission charges. In the next document at 3921 you see Year 2's projections, and at this point we see transmission of 914 for the Consortium, 702 for 2000, and 240 for Century. And going onto the next page, which is 3922; 914, 747, and 320?

A. Yes.

449 Q. Indicating certainly that there was a very substantial difference between the levels of charge which the individual candidates found acceptable in their projections to RTE as transmission charges, isn't that right?

A. Yes. I mean, I don't want to take up too much of your time, just to make a couple of points I think which would be relevant on that. The IRTC was required by the Act to look mainly at three things, which was the financial, the character of the applicants and the programming. Energies in the financial side, if you were, would have been applied to things, particularly the advertising revenue projections, which Century had the lowest expectations of advertising revenues.

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I think if we went back a page, I think you will see in the first year, there is a huge difference. Century was just

under 2 million, advertising income projected. NRFC, 2 and a half, and Radio 2000 was high, in my opinion, at 3 and a half. And those revenue projections would have been extremely important to the Commission, and the other thing that we would have considered extremely important was the marketing costs devoted to the enterprise which would have been important to its success. Again, you will see that Century had 250, the NRFC were 2308, there was much of a muchness in Year 1. Radio 2000 was 113. It was actually excluded from the remit of the IRTC to get involved in the cost of transmission, as far as I am aware.

450 Q. Well, why do you say that? What do you understand firstly by getting involved in as --

A. I should clarify. That I think that the Act required us not to have knowledge or to be involved in the negotiations to do with transmission and the costs of transmission.

451 Q. Well, certainly the Act is silent about you having any role, direct role in negotiation, but there is nothing to prevent the IRTC from considering that item of cost, just as it would consider any other item of cost. It was not precluded --

A. What I believed at the time was that that was not our area of responsibility. I would have to say, however, it would have been unwise for us not to have kept a watching brief on that, because clearly it was crucial to the future, not of a national radio licensing itself, but of all the subsequent licences. So my understanding of the Commission's role, and I think it was borne out at meetings, that there were discussions about transmission costs, but it was not our direct responsibility.

452 Q. Yes, of course. You couldn't be responsible for the success or otherwise of any one individual application.

You were there --

A. Or to do with any of the - I mean my understanding of it was that they were excluded from involvement in transmission cost negotiations.

453 Q. Well, certainly the Act is silent as regards that, and certainly I wouldn't see the IRTC having a direct role as negotiator as between the parties, but could I suggest to you that one of the matters that the Commission would have to be mindful of, was the ability of any particular candidate to deliver a transmission service, and since they could only do that with the assistance of RTE, it was vital in the deliberations of the Commission that they would know that the person to whom they were going to give the franchise had the ability to conclude a deal with RTE?

A. Oh, I absolutely agree with you on that, yes, I mean, clearly.

454 Q. Could I suggest to you that the further apart the parties were on their projections from agreement, the less likely it was that they actually would reach agreement; for example, if RTE are looking initially for 1.1 million and one of the candidates, Century, is considering 375 as being the appropriate figure, whereas others are much closer to the RTE figure, on balance, one would think it unlikely that the candidate who is prepared to bid the least is likely to be the person to conclude a deal, isn't that so?

A. I think that would be putting words in my mouth. The way I would express it would be that whatever sum any of the applicants put into their licence applications would be the

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starting position for a negotiation with RTE. I would have to say commercially, if I was an applicant, I wouldn't want to be dishonest about it, but I would certainly start with putting the lowest figure in.

455 Q. But equally inherent in that logic is that you would also have to be in a position to pay somewhat more than you actually put in as your initial figure, isn't that right? You'd have to firstly, the financial wherewithal to do it and secondly, the will to do it, isn't that right?

A. Yes. The cost of transmission was unsatisfactory, I mean, in a perfect world, there would have been - that would have been dealt with before the legislation that enabled licences, so I mean in a sense, we felt we were dealing with an imperfect act. But it would have been a very difficult commercial decision for any of the applicants to have made, to have decided what figure to put in, because whatever figure, and you know, I am not making the case for any one of them, it was clear that that negotiation was only going to go upwards.

456 Q. Right. You may know that in the English experience, where possible, the Independent Broadcasting Authority would fix the charge once it fixed the area that was going to be served by the broadcaster, and potential candidates would all know before they started what the levy would be for the broadcasting charge and they would --

A. Which is much fairer. Well I think it is sensible anyway.

457 Q. So in this instance, you had three wildly diverging figures in the projections in any event. There was a very large figure being sought by RTE and there was, I take it, a concern therefore, that this was a problem which would have

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to be resolved by the success - the successful applicant would have to resolve this problem, isn't that right?

A. Yes. I mean, it's very difficult at this remove, and my area of expertise would never have been in the area of transmission costs, but my recollections were that the IRTC was fairly gloomy from the beginning about the prospect of an easy accommodation being reached on the cost of transmission, and I think Ciaran Mulvey mentioned in his evidence that he thought there was a case for arbitration, and although I don't think that was ever formalised, I think it was a view very early on in the Commission, that it could take outside intervention to resolve the cost of transmission.

458 Q. You were aware, of course, that Deloitte Haskins Sells were the financial advisers and accountants to the Commission?

A. Mm-hmm.

459 Q. Their role was limited ultimately by the decision of the Board to being one where they would no longer have the consultancy function but they would be used for audit purposes only. That was a decision which was taken on the 8th December of 1988, about a week before the applications were received in from the various candidates and therefore, it was not open to use their services and skill to evaluate the particular applications. Do you know why that was?

A. I believe so. It's my recollection, I mean I am not a hundred percent, but I am pretty sure that at that stage, and I think you would have that in your papers, we had formed a finance subcommittee which was Vivian Murray, Frank Cullen and Donna O'Donoghue, and we had looked at the IRTC's own position financially going forward, which was

not, I wouldn't want to over advocate, but the IRTC wasn't particularly well-funded as a government body, and would have had its own concerns about its income streams going forward, and my understanding was that the finance subcommittee had looked at the costs of Deloitte - whichever Deloitte they were at the time, and had felt simply that they were extremely expensive and that we couldn't afford them. That within the Secretariat, Paul Appleby, and particularly Michael O'Keefe, had skills which would be useful to us, and their own finance sub-committee had the necessary skills that would be evaluated and we simply couldn't afford the fees of Deloitte.

460 Q. So when it came to the exercise of a consideration of the RTE costs, it wasn't open to the Commission at that point in time to see whether or not those costs could be justified on an accountancy or economic basis, is that right, other than the views of the members themselves?

A. I mean, I have some difficulty with the haziness at this remove, but what I had thought had happened was that the Chairman had travelled to London with the Secretary to meet the IBA, that we had taken on technical advice which ultimately became Sean Lackan who is now dead, sadly. I do think that Sean Lackan's expertise was probably more to do with technical and studio location, but I am aware that - well, of two things from that time that stuck in my mind. One was the Chairman was travelling to England with the Secretariat to get relevant experience from other authorities, that we, I believe, and this is actually from refreshing my memory looking at the papers, knew the costs

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of transmission in the North and that - Century were the only applicants who had actually bolstered in their application, whether it was accurate or not, the fact this, they had put a lot of work into researching the cost of transmissions which we discussed at the table. They seemed to have a consultant who was ex IBA, I mean I have subsequently read some varying comments on it, but of all the applicants, Century would have got some Brownie points, I believe, from the Commission for having put in the work on the research of those costs.

461 Q. Right. Certainly they had engaged the right people. It was a question of whether they had asked them the right questions?

A. Yes. And frankly I don't think I'd be qualified to know that.

462 Q. Were you of the opinion that because they had, for example, engaged Mr. Hills, now Professor Hills, formerly the Head of the Consultancy Service of the IBA, that where figures were mentioned in the projections, that they were the result of work which had been carried out by Professor Hills or his team to reach those figures?

A. At the time, what I thought was that they had engaged the services of consultants who were connected to the IBA. I mean I wouldn't have - and to me, they had a lot of experience and a lot of knowledge of ground work and they had been through the process earlier, so...

463 Q. Right. But in fact in the documentation which was provided with the submission to the IRTC, whilst it refers to these people being on board as their team, it did not in fact contain a report from that board confirming that

transmission costs of 375 were the appropriate level of charge?

A. No. I mean, I am accepting your word on that, I can't remember the document in full at this stage.

464 Q. So that obviously unless something serious was to happen, if the position was to remain that Century promoters would stick with their €375,000 figure, it seemed unlikely that they could conclude a deal, didn't that follow?

A. No. I really can't - I mean, it was - it's still normal in business life and was more normal than that people put a figure in and hope to negotiate on an outcome --

465 Q. Of course, but my question was predicated on the Century people sticking with their figure and not moving from it. In that circumstance, was it clear that there would not be a conclusion between themselves and RTE?

A. Well, my own view was always, and I think it was shared by some other members of the Commission, that the likely result was going to be an independent arbitration of some kind.

466 Q. And this obviously could only come about if both parties were agreeable to an arbitration procedure, if that were to take place?

A. Yes.

467 Q. And certainly neither of the contenders indicated to the Commission that they wished to arbitrate the issue, isn't that right?

A. No. But at the time of the awarding of the licence, transmission was not a factor that was affecting our deliberations. It was the character of the applicants, the financial projections and the programming, as far as I

am aware.

468 Q. Well, did the Commission then, having selected the particular candidate, and Century as the successful candidate, did it not find itself in a position then that it had committed itself to the success of that particular project without knowing that they would ever in fact conclude a deal with RTE, in as much as that was not a risk that was assumed in the exercise of that selection?

A. I don't think so. My own view on this is that we awarded the contract to Century subject to contract. As you have already heard, relations became more difficult after the contract with the IRTC, it was a difficult contract. But in the event of a contract being awarded to an applicant who chose not to take it up for a reason or who delayed unduly, I think what would simply have happened is that the licence would have been withdrawn and handed to the second applicant.

469 Q. So when it came to the month of February, that is about a month after the franchise had been granted, and there was still an unresolved issue as regards the level of charge which should be paid, I take it that was a concern to the Commission?

A. It was an ongoing concern, because the future of independent broadcasting was going to be largely dependent on the costs, and this was the first licence.

470 Q. We know that on the 7th - sorry, it's 6th February rather, Mr. Connolly wrote to the Minister enclosing certain documentation which had been provided by Century to the IRTC, and asking the Minister to advance matters, and the Minister in response to that, wrote on the 16th February

indicating that he had discussed the matter further with RTE, and he now felt that ú614,000 was the appropriate sum in Irish conditions. Can you recollect whether or not, when that information was received by the Commission, that it felt that the necessary negotiation had in fact now taken place insofar as the RTE initial figures had been reduced on two occasions to a figure which the Minister indicated was reasonable in the circumstances?

A. I don't remember receiving that information.

471 Q. I see.

A. I was - actually I was getting married at that time, but I was in Dublin for Friday the 16th February which was an all-day hearing at the Concert Hall, but I was then absent, but I do not recall ever hearing the 614,000 was agreed.

472 Q. In fact, there were two amounts agreed by the Minister. The first was 692,000 which he agreed with RTE on the 10th January and which was apparently communicated to the IRTC on, sometime prior to the 12th of January, and then there was a further reduction of that to 614,000 which was agreed prior to the 16th of February and communicated to the IRTC on the 16th February?

A. Mmm.

473 Q. On the 16th of February, or rather on receipt of information from the Minister on the 16th of February, the Chairman of the IRTC sought the permission of the Minister to communicate this directly to Century Radio, which he did, and that prompted a response, and the response was a reiteration of the contention that ú375,000 was the appropriate charge, and beyond that figure, it was not a viable proposition?

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A. I see.

474 Q. Now, that was a re-statement of the position which appeared in the initial written presentation received on the 16th December, so it would appear that certainly on analysis of Century's position, they had not altered their stance from the day they delivered the submission to the IRTC until the day that they wrote after the Minister's interventions. Were you aware of that?

A. Well, I was absent from deliberations of the Commission from the 16th February to the 15th March effectively, so I am not conscious of being aware of it.

475 Q. Right. The Minister, the day before you returned, made a directive under Section 16 of the Act in which he set out charges which he directed should be paid for transmission to RTE and those figures were adopted by Century, and certainly that aspect of the dispute in contractual terms between RTE and Century ceased as of that point on. Do you remember any other involvement between yourself and the Minister after that time in connection with the IRTC business, in particular we have circulated you with two diary entries, I am just wondering whether they accurately record meetings which took place between yourself, Mr. Connolly, the Secretary and the Minister?

A. And Mr. Henchy.

476 Q. And Judge Henchy, yeah.

A. No, you gave those to me this morning and I must say I have no recollection of those meetings whatsoever. Did they take place? Do we know? I mean, because having checked - what I have checked is the IRTC files at that time, it would seem that in mid-June a complete impasse had

been reached in negotiations with Century, and as you have heard, negotiations with the IRTC and Century were not running smoothly, and certainly at that time, and this is a benefit of today reflecting on the files, that the Century demands were that they should have freedom of distribution of the shareholding other than the 51 percent which they owned which the IRTC were opposed to, because the IRTC wanted to always be able to approve the shareholders. So on the face of it, it seems reasonable that if the Chairman and I mean, I was geographically called on several occasions for various things because I was in Baggot Street close to both the IRTC offices, and presumably if that meeting did take place, the Minister's office, it would be reasonable that they would have asked for another board member to go along, but I have to say that I would find it slightly unlikely that I wouldn't remember it, because I think I'd have been probably mildly flattered to have been included in a negotiating team, if you like, from the IRTC or whatever, and I am not aware of it.

477 Q. So insofar as there are diary entries for Tuesday, 20th of June and for Tuesday, 27th of June of 1989 in the Minister's diary, they don't accord with any recollection you have of meeting on that date?

A. I do feel that if I had gone to a meeting with Justice Henchy, Sean Connolly and the Minister, I would have remembered it. You know, I stand to be corrected by future evidence, but I don't remember it at all.

478 Q. I'll be just a little while longer with the witness, Sir, if you felt you could sit until a quarter past four and if there were to be no --

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CHAIRMAN: I will sit on to 20 or 25 past four. I have another commitment after that.

479 Q. MR. O'NEILL: I am aware of that, so we will try and move as fast as we can on that.

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The next matter that I wish to deal with, Ms. Bowler, is the question of communications between yourself and Mr. Barry. I understand that Mr. Barry was a person who wasn't particularly known to you before your involvement in the IRTC?

A. I certainly never talked to him before the contract was awarded.

480 Q. Right. And after the contract had been awarded, did you have any dealings with him?

A. Well, I didn't have any dealings with him and he is not a friend of mine. I mean I would have had a general rule in business that - well on two levels, one is that it's difficult in a small town, you are friendly and approachable but I never breach sensitive information to people. I think that what actually probably happened with the note that you referred to from Mr. Barry, is that late in '91 before Century were collapsing, or summer of '91, I was at a dinner party - I mean what I remember is this, I am not saying the two events were directly connected. I do remember being at a dinner party and Oliver Barry was at it. There were about 20 people at it, and he came and sat next to me at about eleven o'clock at night, it was still night at that stage, so it must have been summer. And he

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was complaining about his treatment by the IRTC, and I suggested he might want to write to me, that it wasn't the time or the place and what I do recall - what I do know is that any time that I had representations of that type, I would have sent it onto the IRTC either verbally or in written form.

481 Q. If we just look then at the document at page 5669. It's a letter from Oliver Barry, Artistes Management, of the 12th January, 1991. And the letter is to Gillian Bowler, Managing Director, Budget Travel.

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"Dear Gillian, I was most grateful for our recent meeting with you, and as promised I am forwarding you some points which I think are relevant to the future of the independent broadcasting sector, and also to Century Radio as Ireland's national independent radio service.

.
I would like to thank you for your interest, and if you have any further queries, I would be contactable all day through my office. Kind regards. Yours sincerely, Oliver Barry."

A. Mmm.

482 Q. He seems to be referring to perhaps a more formal meeting than a dinner party conversation?

A. Well I don't know, because I don't remember. What I do know is that that was - when did Century collapse? I think it was later on that year, wasn't it?

483 Q. In December of the same year.

A. Yeah. I am aware of the fact I think that he was lobbying IRTC members and generally trying to get his points across

at that stage. I think clearly Mr. Burke had left at that stage, I think, hadn't he, government? I am not quite sure. And anyway, that I would have passed it onto the IRTC, which was an agreement with the judge, that if we did get, which was inevitable, any approaches - I would have had no difficulty, I have to make the distinction from getting an approach from somebody who had been awarded a licence because I would have regarded the IRTC's job to be sympathetic to licence holders within the bounds of reason. But I would have passed it on or made it known.

484 Q. Well, the next document then we will look at is page 5670, which was the enclosure to the last letter?

A. Mm-hmm.

485 Q. And it covers three headings, RTE transmission and the IRTC, and in effect, could I suggest, was a "wish list" of sort of the best possible scenarios from a Century Radio point of view in relation to these individual entities, in other words, it highlighted the complaints which Century had in respect of most of these entities, and by inference or directly suggested the remedy that they were looking for. So it was quite, quite detailed in the range of issues which are being covered, isn't that right?

A. I think that Century were, at that time, floating their case publicly on all these issues. I see they were, made reference to Aer Lingus enjoying similar advantages over Ryan Air. I don't mean to be dismissive of this letter in any way, but I would have felt that it wasn't, at that stage - I mean, it wasn't something that I would have got directly involved in. It's a matter for the IRTC to deal with. Century knew the score, and it was a business

proposition for them that was going wrong at that stage.

I think it was the dying last gasp to try and get sympathetic audiences in both the press, the IRTC and other outlets.

486 Q. At this particular time, I think they were trying to interest others in acquiring an interest in the company as well, or certainly they were endeavouring to stay alive financially, isn't that right?

A. Mmm. They were publicly --

487 Q. Do you know why it was that Mr. Barry selected you as opposed to each one of the members of the Commission to be circularised with this document?

A. As I say, I know I met him at a dinner party and he certainly complained vociferously about the treatment of the IRTC of him. When somebody says that I say "put it in writing and I can forward it on."

488 Q. Do you remember retaining a copy of this or the original for your own records and forwarding on a copy to the Commission?

A. I don't remember specifically. It would have been my style at the time to have either lifted up the phone or forwarded it on.

489 Q. Did you ever acknowledge this to Mr. Barry or have any further meeting with him at which you discussed in any detail the issues which were covered in the enclosure here?

A. Not to my knowledge. I mean I don't think any of those things on that list, which as you have correctly pointed out, is a "wish list", came to any fruition or reality.

490 Q. Whilst Mr. Barry in his letter, addresses these matters as queries, insofar as he says he'd like to thank you for your

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interest and if you have any further queries, he'd be contactable in his office, it's not the case that you ever made a query of him which resulted in this document being produced?

A. No. I mean, I wouldn't have walked myself into that willingly.

491 Q. Right. He certainly seemed, in his letter, to suggest that you certainly had a great interest in this particular issue from his point of view?

A. I think that was Mr. Barry's style of writing. I mean, I didn't have a particular interest in Century Radio. I would have had an attitude to business that differed slightly from some members of the IRTC, in that I felt that we could expect some failures along the way and at that stage, clearly Century were close to the end.

492 Q. I see. Thank you Ms. Bowler.

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MR. FOX: I have just one matter to raise, Chairman, very briefly.

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

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493 Q. MR. FOX: In relation to the diary entries of these alleged meetings which are alleged to have taken place on the 20th of June to the 27th of June, '89, Mr. Burke will say Ms. Bowler categorically that these meetings, certainly they never took place?

A. Oh, that would explain why I don't remember them.

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THE WITNESS WAS THEN EXAMINED BY MS. COSTELLO AS FOLLOWS:

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494 Q. MS. COSTELLO: I had one question to put to Ms Bowler.

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Ms. Bowler, I think you said you had an agreement with the judge to pass on any representations that might have been made to any member of the Commission personally. I think in fact if one turns to the minutes of the meeting of the 24th of November, it's Tribunal document number 423, No. 7, which is headed "Representations" and it reads as follows:

"It was agreed that persons making representations to individual board members should be requested to put them in writing. They will then be referred to the Secretary."

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Do you believe that this letter that you received from Mr. Barry would have been forwarded by you to the Secretary in compliance with this decision of the Commission.

A. What I believe, I think I would have forwarded it or at the very least phoned up and said "This is what I have got", you know, "Please note that I have got it." I think for people generally, and the IRTC were under some pressures because in a small town it's important to retain an affability in business without actually breaching any confidentiality. I would have regarded Oliver Barry's letter as yet another, if he got an opportunity to plead his cause with anybody, he would have jumped at it and I think - I don't mean to be unfair to him because clearly he had a very difficult time at the failure of his business, but it was just not something that I would have taken terribly seriously or put an awful lot of attention to.

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THE WITNESS WAS EXAMINED BY MS. EGAN AS FOLLOWS:

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495 Q. MS. EGAN: I have got two or three very short questions,
Ms. Bowler.

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Just in relation to the nomination of the solicitors,
financial advisers and bankers of the Commission at the
meeting on the 17th of October, 1988, if you had had a
difficulty with the particular people that were nominated,
would you have felt in a position to so express it, to vote
against them or to nominate alternative people?

A. Yes.

496 Q. In relation to the manner in which the Commission made its
decisions, and in relation to Section 7.5 of the schedule
to the Act in particular, I think you are familiar with the
requirement that has been canvassed today, that questions
of the Commission would be decided by a majority of the
votes of the Commission members?

A. Mm-hmm.

497 Q. And in default by the Chairman. And that in fact the
Commission operated by consensus. Are you in a position
to say whether there is any practical difference between
those two concepts?

A. In my mind I thought frankly they were one and the same
thing. If you develop a consensus, by extension, you
develop a majority consensus of views. And whether you
call it a formal vote or a consensus. I think if there
had ever been any decision that was particularly
contentious, I would certainly have felt free to request
that my voice be heard or recorded separately.

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498 Q. And finally, Ms. Bowler, in your opinion, did the Commission act properly in relation to the award of the licence to Century?

A. Yes, I would be shocked to hear otherwise.

499 Q. Thank you.

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MR. O'NEILL: I have no further questions.

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CHAIRMAN: Very good. Thank you very much, Ms. Bowler, for coming down.

A. Thank you Chairman.

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CHAIRMAN: Tomorrow morning at half past ten.

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THE WITNESS THEN WITHDREW.

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THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, THURSDAY, 16TH NOVEMBER, 2000, AT 10.30 AM..

