

THE HEARING RESUMED AS FOLLOWS ON THE 21ST NOVEMBER, 2000,

AT 10 AM:

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MR. WALSH: Morning Sir. Morning, Mr. Chairman.

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Before you continue with Mr. Connolly, there is a matter of serious concern that has arisen which I would like to draw to your attention. It concerns the witness, Michael O'Keeffe.

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Mr. O'Neill has indicated, Sir, as you know, that his latest statement did not become available until sometime on Wednesday the 5th, that's just one of those administrative things that happens. It was then circulated to the parties, and unfortunately it seems through an administrative oversight was not circulated to Mr. Burke's team, nor was the questionnaire, and the cross-examination had in fact been completed and everybody was finished with Mr. O'Keeffe in cross-examination by the time we got the statement.

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Now, there are some matters which are materially different in the statement, and the questionnaire is something we did not have sight of when we were preparing for the cross-examination.

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Sir, you have always run this Tribunal in due deference to the principles of fairness and the rights of the parties.

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Just to be absolutely fair to Mr. Burke, I would ask that

at some convenient stage in the future, convenient to you and to the Tribunal, and to everybody else concerned, if Mr. O'Keeffe could be recalled shortly, so that we can continue the cross-examination?

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As you know, Sir, you have set out in your position papers, your interpretation of the Terms of Reference, and the opening statement, that it is essential that all the parties who are concerned would be circulated with evidence which, or statements of evidence which might affect them. Now, this statement does affect us and it wasn't circulated to us.

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Now, I am not casting aspersions or alleging anything sinister, it was just something that happened. You may recall when this module started last June we were told there would be two folders of papers, no more than a thousand, that has vastly exploded, is the proper word since then. Again I am not casting any blame on anybody for that, these things happen.

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In fairness to Mr. Burke, you have indicated at all times that you will abide by the legal rights. All the case law you have quoted in your opening statement and in your position papers as to how you will conduct this Tribunal fairly throughout its modules have, to date, allowed people a fair opportunity of presenting their case.

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Now, in the cross-examination of a witness, Sir, as you know, the legal position is a cross-examination can be used

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for two purposes.

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MR. O'NEILL: Sir, I feel at this point in time, Sir,
firstly --

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CHAIRMAN: Just a moment.

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MR. WALSH: Sorry, Sir --

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CHAIRMAN: Please. Let - all I can say, Mr. Walsh, is
this: I think that you are, you have made your point. I
understand your point, but I do want to hear Mr. O'Neill on
it.

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MR. WALSH: Just one other point.

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CHAIRMAN: All right, let him complete his point.

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MR. WALSH: I will be very short. I won't interrupt Mr.
O'Neill.

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MR. O'NEILL: This is a matter, Sir, dealt with in
correspondence already. I am not on notice of My Friend's
application.

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A letter was written to My Friend's instructing solicitor
on Friday last, noting the content of a letter which seemed
to contain the complaint that he is now making. It was
brought to your attention, Sir, and communications have
passed by letter with My Friend's solicitor, in which he

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was asked specifically to set out in detail, where there were an appreciable difference in the statements of the two witnesses, where he felt cross-examination of the witness on recall would assist the Tribunal, and to make a submission in writing to you in respect of that.

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Instead of so doing, without notice to the Tribunal, we are now hearing an application which I am not in a position fairly to deal with, without notice having been given to me, and at a time when there is outstanding correspondence which requires to be answered in the first instance to allow you, Sir, to determine whether you will hear an application on this point.

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It is for that reason, Sir, that I interpose and interject in the course of this submission, because it has already been dealt with in correspondence, and in the first instance should be replied to in correspondence before you determine that it is a matter which requires to be aired in public.

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MR. WALSH: Sorry.

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CHAIRMAN: Mr. Walsh, that's what I was going to say, it encapsulates what I was going to say; simply that I would require to talk to Mr. O'Neill in the context of this. I think the simplest basis, I can assure you I will not shut you out unfairly in anyway, but I do want to know, I want to determine the matter in the light of what has happened, fairly determine it. So will you be kind enough to get

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your, through your solicitor, to make brief submissions as to what you say is the major concern, I will clear them and I will entertain in the context of that submission, if it arises, another application from you, and I can assure you, that there will be no question of anybody being unfairly shut out.

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But likewise, we must try and keep a degree of discipline on the progress of this Tribunal. I am not in anyway to be understood to be refusing you at this point in time.

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So leave it so. If you come to us in correspondence, continue the correspondence, I will look at the correspondence, and if in the light of what you say in the correspondence it is manifest that you should be heard in public, then I will do so. And I will certainly not in anyway shut you out from what you may claim to be your right.

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MR. WALSH: Just, the reason we adopted this course, Sir, was that the correspondence could go on ad nauseam, and it will be lengthy.

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CHAIRMAN: It won't go on ad nauseam, there is a letter and response. In the context of those two documents I will look at the matter and determine if, in the first instance, as to whether there is a concern. If I think there is any concern, I will invite you to come in and make your, hear you on the text which you put in the correspondence.

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Now, please, I am under pressure this morning to get this witness completed as we have another witness waiting, a man of mature years and I am trying to facilitate him. Thank you very much.

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MR. WALSH: Very good, Sir. I will mention it again at an appropriate time.

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CHAIRMAN: Certainly. Now - I beg your pardon.

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MR. O'NEILL: Mr. Connolly is under examination, I believe, by other parties.

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CHAIRMAN: We haven't actually elected as to who was going to go first. You are going to go first?

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MR. FOX: I have a number of questions.

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CHAIRMAN: Very good. Carry on, Mr. Fox.

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MR. SEAN CONNOLLY RETURNS TO THE WITNESS-BOX AND IS
CROSS-EXAMINED BY MR. FOX AS FOLLOWS:

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1 Q. MR. FOX: Morning, Mr. Connolly. I also act for Mr.

Burke. I want to deal with the matter of the Ministerial
directive which was raised in your evidence by Mr. O'Neill
yesterday. I want to, if I can, have a letter put on
screen. It is a letter of the 20th of February, 1989.

This is a letter from Century Communications Limited, Mr.
Laurence Crowley, to the Chairman of the IRTC, and just for
the purpose of identification, if you can just illustrate
the first page of the letter please?

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You will see that letter there, that's not the letter I
want - it is the other letter, the letter from Century
Communications - yes, that's the one there. Just for the
purpose of identification, do you see the first page of
that letter there, Mr. Connolly?

A. Yes.

2 Q. Dated the 20th of February, 1989. This is a letter from
Mr. Laurence Crowley, Chairman of Century Communications
Limited, to the Chairman of the IRTC. Now, if you can
scroll down to the final page of that letter please?

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And you will see there, the second last paragraph there,
Mr. Connolly. Now, this letter has already been dealt with
in evidence, and I don't propose to go into it fuller in
detail. The relevant part I want is that paragraph. It
states there:

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"It appears therefore that we are unable further to progress the negotiations with RTE, and accordingly we respectfully request the Commission to seek a Ministerial directive in accordance with the Commission's powers under Section 16 of the Radio and Television Act 1988."

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Do you see that section?

A. Yes indeed, yeah.

3 Q. Isn't it apparent from that letter, Mr. Connolly, that Mr. Crowley as Chairman of Century is calling on the IRTC to invoke the relevant section?

A. Yes, that's correct.

4 Q. In the Act?

A. That's correct.

5 Q. Section 16, isn't that correct?

A. That's correct.

6 Q. Now, could I - I want to refer you now to the letter from the Chairman of the IRTC to Mr. Burke, the Minister for Communications. This is the letter you had up earlier on the screen. It is a one page letter.

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Now, you will see there, this is the letter in which the Chairman of the IRTC is writing to the Minister concerning, requesting a Section 16 directive. And he says there:

"Re: Transmission charges for national independent radio.

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Dear Minister, please see the enclosed copy of letter received today from Century Communications concerning the

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charge being sought by RTE for the provision of transmission facilities for the new independent national radio station.

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Please note, Century Communications are seeking a Ministerial directive under Section 16 of the Radio and Television Act, 1988. It would appear that the contract from Century Communications cannot be entered into until this matter is cleared up.

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I look forward to hearing from you at your earliest convenience."

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Now, arising out of that correspondence, both of those letters and the relevant paragraph which I have read into the record, the Minister was entitled to treat the letter as a request for a directive under Section 16?

A. Are you asking me to comment on that?

7 Q. I am putting to you, he was entitled to treat that --

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MR. O'NEILL: I don't believe, Sir, that this witness' views as to whether or not the Minister should treat it in a particular way can assist you in your determination on the issue. It is comment only, and a comment on the actions of another party.

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MR. FOX: Chairman, in response to Mr. O'Neill I wish to say, yesterday when Mr. O'Neill was dealing with this matter he put interpretations of this letter, and in fact he put an interpretation on the Minister's response to this

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witness in the same vein as I am now putting matters to deal with this correspondence to this witness. I see no difference in the way that I am now progressing this matter, Chairman, and in the way Mr. O'Neill dealt with it yesterday.

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CHAIRMAN: What part of yesterday's transcript do you say this took place?

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MR. FOX: Mr. - I have only in the last few moments had access to the transcript of yesterday's evidence, Chairman. I distinctly recall Mr. O'Neill taking us through the letter which the Chairman of the IRTC sent to Mr. Burke as Minister for Communications, and indeed the Minister's response, and in fact, put it to the witness that the Minister was not entitled to treat this letter as a request for a Section 16 directive. That's my precise recollection of yesterday's evidence. If Mr. O'Neill wants to correct me in that regard I am sure he will have an opportunity now, but that is the way he put this matter to the witness on yesterday, in yesterday's evidence.

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MR. O'NEILL: Even if I had, and I don't remember so doing, Sir, it doesn't justify the same sin, if one was committed, being repeated today. Nor is there any - the document speaks for itself, Sir, and if My Friend is seeking to advance the proposition that this document constituted a request by the Commission to the Minister to invoke his powers under Section 16, that is a matter which this witness has already dealt with.

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He has stated that this letter was a letter enclosing a request of Century that the Commission would do so. On its face it is not a document which indicates that the Commission did in fact do so.

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MR. FOX: If I could shorten matters, I will put the question to the witness in this format, Chairman --

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CHAIRMAN: All right. Yes.

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8 Q. MR. FOX: Mr. Connolly, do you regard the letter as a request for a Section 16 --

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CHAIRMAN: Certainly that is not an acceptable question. I am the only person here who has regard to what is the ultimate result of a particular document. There is no doubt about that.

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MR. O'HIGGINS: Sir, if it is of any assistance, I think the passage is on page 103 of the transcript of yesterday.

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CHAIRMAN: Yes, I have just actually picked it up.

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MR. FOX: It starts at page 97.

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CHAIRMAN: That's correct, it starts at page 97, the letter was put. Just a moment.

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The question that was asked by Mr. O'Neill would appear to

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be: "So whilst the request was made of the Commission, the Commission itself did not make the request but merely forwarded it on for the Minister's attention, isn't that right?" That was the question that was put by Mr. O'Neill. Yes.

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"Question: The Minister appears to have treated that as a request under the Act, and we will see in his letter containing the directive, which is at page 3984, that on the 14th of March he wrote to the Chairman as follows: 'Dear Chairman, I refer to your letter dated the 20th of February, 1989, regarding transmission charges for the national independent radio service. Following consultation with the Commission through you and with RTE I have now decided to direct under Section 16 of the Radio and Television Act 1988 that the following payments be made to RTE by the sound broadcasting contractor.'"

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That's the sequence of events as related yesterday.

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It is on page - it starts at page 97 and goes through to page 103, and that's a factual statement of fact, as I see it. It certainly doesn't give rise to this question.

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MR. FOX: Sorry Chairman.

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CHAIRMAN: Do you want to ask any other questions?

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9 Q. MR. FOX: Mr. Connolly, can you tell me or can you inform the Chairman of the Tribunal what was the prevailing mood

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in the IRTC at that time as regards this matter? You would have been aware of that, I think?

A. Yes. I think I dealt with this yesterday as well. I think the Commission, its total anxiety - incidentally may I clarify something? Are you asking in relation to transmission charges or this particular letter? What are you asking about - the letter, the prevailing mood about --

10 Q. About the issue of the transmission charges?

A. Yeah. I think I was pointing out yesterday the Commission was, its main anxiety was to get Century Radio on air. That was the main concern. Obviously the stumbling block at this point was the transmission charges. It wasn't something the Commission was dealing with. They didn't get involved with transmission charges at any stage at all, but knew it needed to be resolved in some shape or form before the stations, before Century were going to go on air. They would certainly have been worried about it at that point. Does that answer your question?

11 Q. Yes. In the context of your concerns that, the IRTC's concerns that Century was not on air, and I think you said in evidence yesterday that there were local stations coming on stream as well at that time, is that correct?

A. Yes, certainly before Century came on air one or two had gone on air.

12 Q. So is it correct to say the Commission would have been anxious to have the matter resolved in order to get Century on air?

A. I think that's, that would be reasonable. The Commission wanted Century on air, certainly, yes.

13 Q. So the Commission would have sought the appropriate

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intervention by the Minister in that regard?

A. I - I don't know how to answer that particular question.

I think that as I mentioned yesterday, the Commission took the stance that the matter was literally one for Century and for RTE to hammer the details between themselves. At some point, and this is probably very close to the point, it was clear that Century had reached the end of the line, in terms of negotiations with RTE. It now fell to the Commission to refer the matter. I would see this letter from Seamus Henchy to Ray Burke as being that, a referral of the current position of Century to the Minister. I wouldn't have seen it as a direct request for a directive under Section 16 of the Act. It was certainly a referral of a very serious position.

14 Q. Yes. It is now apparent, isn't it, that the Minister and the Department of Communications treated this as a request for a Ministerial directive?

A. Yes, it is.

15 Q. It is now apparent that that actually happened?

A. Yes, yes.

16 Q. And that the civil servants in the Department of Communications likewise, under the Minister, would have treated it as a request for a Ministerial directive?

A. I am not too sure what exactly happened within the Department, the Minister's office, as to how it was treated, but patently the directive at the end of it would indicate that somebody decided it was a request and to move on that basis.

17 Q. Yes. But are you aware that the civil servants in the Department, namely Mr. O'Morain and Mr. Grant, have not

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been challenged by the Tribunal in that regard? Are you aware of that?

A. I am not aware of that.

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MR. O'NEILL: Sir, the Tribunal is not challenging any witnesses of the Department.

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CHAIRMAN: I want that - I want that question entirely rephrased.

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18 Q. MR. FOX: Yes, Chairman. I apologise for the use of the word "challenged".

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Are you aware that that matter was not put to Mr. O'Morain and Mr. Grant, the civil servants, the relevant civil servants in the Department?

A. No, I have quite deliberately not followed the detail of the case pending my own arrival. If that is the case I accept your word.

19 Q. I can tell you now this matter was not put to Mr. O'Morain and Mr. Grant, that is that that letter did not amount to a request for a Ministerial directive?

A. I accept that, yes.

20 Q. Just a few other matters I want to address with you, Mr. Connolly. Are you aware of any unwarranted interventions or inducements in connection with the awarding of a license to Century Communications Limited or regarding the matter of transmission costs?

A. Inducements in relation to Century, absolutely not. I certainly was aware of nothing either at the time or

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since. I think, no more than a lot of people, I have heard the rumours in relatively recent times, but I have absolutely no evidence whatsoever. I certainly wasn't approached with any inducements by anybody and I am not aware of any Commission member who was either.

21 Q. Can I take it you are not aware of any unwarranted interventions in that regard, that was part of the question?

A. I am not aware of any interventions at all. I think if you are asking me what degree of involvement did the Minister have in the IRTC's affairs, put it that way, I think it would certainly be one of deep interest, that would be correct, he was the man who brought the legislation forward quickly, and from a political viewpoint would have seen himself as doing something the previous governments had failed to do, which is get the legislation in the statute books. As such he went ahead and pushed through his legislation, and then obviously required or asked the IRTC to carry out its affairs quickly. I would be surprised if he wasn't deeply interested in the progress being made.

22 Q. Do you know whether there was considerable business acumen in the membership of the Commission to consider proposals from applicants for licenses?

A. Yes, there was, yes. I think we dealt with that yesterday as well. There was considerable acumen, some were top business people in their own right, many had set up companies not necessarily directly in relation to broadcasting, that type of thing, but in terms of business plans or whatever, yes there was.

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23 Q. In that regard is it correct to say some members had direct knowledge of RTE?

A. Yes, there were.

24 Q. In regard to this analysis or lack of analysis on transmission costs or the lack of the use of the appropriate accountants I think which had been retained by the IRTC in other matters, was there anything to suggest that it was not in the capability of Deloitte Haskins Sells to conduct an exercise on transmission costs? Was there anything to suggest that?

A. There is nothing to suggest that they couldn't have done it effectively, no doubt at all about that.

25 Q. Am I correct in saying this was a new departure, I mean, it was as new to them as it was to the IRTC, can I put it that way?

A. I would presume so, except perhaps in the broader context of their world connections they may have known other people involved in broadcasting, certainly in the Irish context.

26 Q. It would be unlikely they had carried out such an exercise?

A. Most unlikely.

27 Q. Now, from your knowledge and experience, was there a degree of anxiety in RTE about independent broadcasters coming on stream?

A. Yes, there was. I would be surprised if it weren't very strong, given the dominant position for many years, I imagine it was now coming on stream.

28 Q. Do you know how RTE reacted in those circumstances, from your own knowledge?

A. At the time or subsequent to the awards?

29 Q. At the time?

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A. At the time. I think RTE, this is only my personal viewpoints on it, took a stance early on; certainly whilst they cooperated in work with the IRTC on the, if you like the official level, I think at another level, their own pure commercial level, own programming levels, I think it wouldn't be too unfair to say at times they were quite scathing in their comments about what independent radio would do for the country and the challenge that it would pose.

Quite a number of their programmes, particularly the chat programmes would have made noises of that kind. I think they took a certain amount of understandable pleasure at ultimately Century's inability to attract some of RTE's own top stars to broadcast for itself.

30 Q. Is it correct to say, Mr. Connolly, that the determination of the transmission charge was for Century and RTE to negotiate, and that the IRTC had a watching brief so-to-speak?

A. Yes, that would be correct.

31 Q. Right. So in other words it was not for the IRTC to become embroiled in the nuts and bolts of transmission costs between Century and RTE?

A. That's the viewpoint the Commission took. This was not their affair, it was a matter between the broadcaster and RTE.

32 Q. Very briefly, what do you regard as the function of the IRTC in that regard?

A. In relation to the transmission charges?

33 Q. The function of the IRTC in relation to that matter, what

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do you regard it?

A. Their function mainly was to ensure that the broadcaster first of all achieved the coverage demanded under their particular proposed contract, in this case coverage of the entire country, that they would do it at a technical level that was acceptable under normal broadcasting conditions, and also acceptable to the Department of Communications who are the final arbiters in that regard, and they put equipment in place which was capable of doing that. That was the Commission's function.

34 Q. Mr. Connolly, is it correct to say that you would have been central to the processing of applications for broadcasting licenses?

A. Me personally?

35 Q. Yes.

A. Yes.

36 Q. You were central to all of this?

A. Yes.

37 Q. So you would have a fairly detailed knowledge about what transpired over license applications, is that correct?

A. Yes.

38 Q. Right. Were you ever aware of an allocation that broadcasting licenses could be obtained by paying an amount of money to named individuals?

A. I was not aware at all, never heard of this at any stage during my time with the IRTC. I heard it some years subsequently as rumour going about. It has certainly come to the forefront in the last maybe six or nine months, particularly since this module of the Tribunal started off.

39 Q. I take it you have heard the allegation raised from the

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Tribunal?

A. Yes, indeed, I heard it raised, I know nothing of it certainly. As I mentioned before, I am not aware of, myself, any member of the staff of the IRTC or any Commission member having received any inducement whatsoever in this regard.

40 Q. Considering, Mr. Connolly, your deep involvement you were enmeshed in these procedures for license applications, would there be any element of truth at all in that allegation as far as you are aware, considering that you would have had to have know about it, isn't that correct?

A. I wouldn't necessarily have had to know about it, but I would be surprised if I didn't hear something about it at the time, and I cannot see that a function - just watching how the Commission members went about their business and meetings and everything else, it was a fairly robust, hard-hitting kind of meetings they had from time to time, people made their comments clearly and everything else and eventually moved on to make their decision, I certainly wouldn't have been aware that anybody was swayed in a particular way by inducement.

41 Q. You didn't see any favoritism?

A. I can't talk of any favoritism whatsoever, no, not at all.

42 Q. Thank you very much, Mr. Connolly.

A. Thank you.

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CHAIRMAN: RTE?

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

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43 Q. MR. O'HIGGINS: Sir, yes I have a number of questions.

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Mr. Connolly, you said a moment ago that RTE were at times
quiet scathing about the independent sector, that they
were, they too had undeniable pleasure in Century's
inability to contract their top staff and so on. I don't
essentially take complete issue with that, RTE obviously
did at the time express reservations about the independent
sector, and they were undoubtedly pleased that people like
Mr. Byrne didn't join them for Century, or didn't leave
them for Century.

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What I want to find out from you is this though; does the
thinking behind the comments which you have just made in
some way permeate the way in which the IRTC at the time
seems to have dealt with RTE?

A. Obviously, I think if people are thinking that way it must
have some influence on how you are dealing with people. I
think the IRTC would have taken the viewpoint that,
correctly from their own perspective, RTE would have tried
to justify their particular stance or their particular
existence and try to resist any competition to them, that's
a justifiable way of looking at it from a purely
commercially competitive situation. But I don't think it
influenced them, influenced the Commission's thinking
directly in how it dealt with RTE, to the best of my

knowledge.

Certainly I would have had contacts with various people from RTE on their technical side. I always found relationships very cordial and no great difficulties in that regard. In fact, if truth be known, the amount of direct involvement between the IRTC and RTE was relatively limited.

44 Q. Can I ask you this in the context of what you said, apart from the fact that you know that at various times RTE communicated schedules of fees to the Minister and to Century and to the IRTC, or agreed fees with the Minister, do you know and did you ever know anything whatever about what actually transpired between RTE and Century?

A. Not in any detail, I obviously got sort of end product, end results, but I wouldn't have been aware of any of the on-going discussions or negotiations that happened.

45 Q. Where would you say you got the end result information from?

A. Some of it I was getting from, directly from the Department itself, because we were in fairly regular contact with them. I had very little from the Century people about how the negotiations were going on, other than just, as I said, the types of correspondence that flowed between Century and the IRTC.

46 Q. Well, it does seem that a certain amount of the IRTC's correspondence reflected almost in terms the correspondence which had been sent to it by Century, isn't that correct?

A. That's correct.

47 Q. I refer in particular to the memo which was sent under

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cover of your letter of the 6th of February, 1989?

A. Yes.

48 Q. Isn't that so?

A. Yes, yes.

49 Q. Are you in a position to substantiate or stand up any matter which is contained in the memo which was enclosed by you with your letter?

A. I am not too sure what the exact import of that question is?

50 Q. Maybe you would like to look at the memo?

A. Yes.

51 Q. It is page 177. Could I just digress for one moment, Mr. Connolly, I don't want to bring you off on a totally separate track. You are aware of the provisions of Section 6 of the Radio and Television Act, 1988, isn't that right?

A. Yes.

52 Q. And they have been talked about at some length, isn't that so?

A. Yes.

53 Q. I take it you are also aware of the absolutely basic provisions of Section 4 of that Act?

A. Yes.

54 Q. Is that correct?

A. Yes.

55 Q. I take it you would agree that under Section 4 the Commission shall enter into contracts under which sound broadcasting contractors have - I am leaving out some irrelevant parts - I think have the right and the duty to establish, maintain and operate sound broadcasting transmitters serving the area specified in the sound

broadcasting contract, isn't that so?

A. That's correct.

56 Q. So if they couldn't establish, maintain and operate those transmitters there was very little point in the IRTC dealing with them at all, isn't that correct?

A. That would be correct, yes.

57 Q. Because that was the fundamental thing, that they had to put out a service, and they had to do so perhaps with the cooperation of someone else, but it was their fundamental obligation, isn't that so?

A. Yes, that's correct.

58 Q. Looked at in that context we - can we just look at this?

There is a philosophical debate in relation to access charges, and I don't want to dwell on that, except I do wish to put this to you: That in suggesting that Century should have the use of what had been held by RTE in terms of transmission capital, so-to-speak, it was in effect to suggest that Century was to get a subsidy out of historical and on-going license fees?

A. I suppose we can discuss this one for half the day. I think I have dealt with this at some length yesterday. I think the Commission, as you have just pointed out yourself, under the terms of the acts would rely upon whether the broadcaster is going to be able to provide the service and left the negotiations for that broadcaster or potential broadcaster to produce, it did not involve itself directly in any of the detail arrangements as to how it was going to do that or to arrange for it, it was --

59 Q. To be perfectly clear, in proposing that free access should be had to the sites, which you earlier in your evidence

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described as commandeered, I don't know quite what you meant by that, by RTE, that they should have the means, that they should have access, subvented by current and former license fees?

A. I must admit I don't recollect using the word "commandeered", if I did I apologise, it wasn't meant in that sense.

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This was an argument current at the time, not just in the IRTC but also in the newspapers and by media correspondence and lectures in universities and everything else, is that the network of transmission equipment, if you like for Century, that RTE had established was done using State funding to produce an over, a long period of time. It had long since been paid for and therefore should be made accessible to other broadcasters who are going to broadcast on a national level.

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You are right, it is quite a philosophical argument. It was one Century was making forcibly, and the Commission felt it was correct for it to relay that strong feeling to the Minister in its letter.

60 Q. Can we leave the realm of philosophy for a moment and discuss one comment you have just made, and that is that "it had long since been paid for". Is that correct?

A. I am not - I don't know whether it is or not, I am not an expert in the whole business of transmission networks or anything like that, but this is the argument. The point I was making is this is the argument that was being trotted out in newspapers, trotted out by university lecturers and

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so on who comment upon media stuff. That was the context within which the Commission was focussing.

61 Q. Can I suggest to you, within the course of the short dialogue between yourselves and RTE, that RTE informed you that the network was constantly being paid for by RTE and in part being paid for by repayment of 12 percent Exchequer borrowings, and in no sense was it something which was a sunk cost which cost RTE nothing at any given time?

A. I don't recollect the detail. If you tell me that's what was said, I will be quite happy to accept that, yeah.

62 Q. You see, I just want to ask you this, because it takes up some of the things you talked about yesterday. And again I am not really criticising you for this, except in the sense that we had a strong feeling that there is a continuing criticism of the manner in which RTE approached the question of transmission charges. But can I suggest to you that there was nobody in the IRTC who was really or is now in a position to comment on the transmission charges in any expert or significant way at all?

A. I think I made that quite clear yesterday. I always said that there was nobody within the IRTC, either on its staff or in its membership who was competent to talk about the cost of broadcasting, cost of transmission. This was a matter that the Commission deliberately didn't involve itself for that very reason. If there was to be any decisions made or negotiations carried out, first of all they were a matter between the broadcaster and the, and RTE, and subsequently if there was arbitration needed, it was a matter for the Minister and his Department to arbitrate.

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63 Q. Do you recall yesterday saying that while that may have been true, I think you said at Answer 88 on page 26 of the transcript, vis-a-vis the meeting with RTE of the 8th of December, 1988, you said: "There wasn't a detailed analysis available or done at that meeting, I am quite certain of that." And then you said: "Just about everyone sitting around there was quite aware of the cost of a transmitter to put --"?

A. Yes.

64 Q. Now, it was obvious, quite obvious that was within reason, the cost of a transmitter itself. Well, was everyone aware of that and if so, of what were they aware?

A. Well, my knowledge, listening to the members of the Commission's own board talking, they certainly spoke in terms of an individual transmitter, how much it cost, for example for Station A to broadcast on a pirate basis or anything else. They were aware of the transmission facilities there.

65 Q. Is that so? If so, is there any note of any kind of that fact being recorded as having been established at the meeting?

A. I am not aware of any notice, it certainly doesn't appear in the minutes. I think you note that quite well, it doesn't appear in the minutes, but it was discussed by the members, they were quite aware of the approximate charges, okay? They vary from transmitter to transmitter, I accept that, but within ballpark figures they were reasonably aware. Don't forget on the Commission, you mentioned yourself people who had had some knowledge of how RTE worked. We had people who were involved in broadcasting

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themselves, it is not outside the bounds of possibility that they would have some knowledge at least of what it costs to put a transmitter up.

66 Q. Can I suggest maybe again, you are not in a position to comment on it, that really RTE themselves did a careful audit so-to-speak of what things were actually costing them. When an issue arose as to whether they were to charge one thing or another to independent broadcasters they would say that they would have been in no position to give significantly detailed accurate figures about what these costs were about, what share outs should be, and I am suggesting it follows that people who had been in areas which perhaps had very little to do with that years before in RTE wouldn't have known either?

A. No, I am not arguing that the Commission members or indeed myself or staff in the place knew the detailed costings for the place, in fact I am at pains to point out the complete opposite, we simply did not know. Within the bounds of reason, if you are talking about the initial figures RTE proposed to charge. The Commission members felt strongly they were an opening gambit by a rival to Century, that was where they took it from. They didn't do detailed analyses or attempt to do so, nor indeed were they asked to do by, whether by the Minister, Department or by Century, this was a matter purely for Century and RTE to thrash out between themselves.

67 Q. To talk by way of example, I think we mentioned Professor Hills or Mr. Hills, isn't that so?

A. Yes.

68 Q. On the 4th of November he commented on the RTE charges

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which had shortly before that been put to them. RTE had quoted a figure of ú660,000 for transmitters and combiners, and Mr. Hills, employing your logic that they must be adding something, said "Very good, maybe a figure of 420,000 might be more realistic." Are you aware of that or not?

A. Yes, I am aware of that, yes.

69 Q. Yes. Are you aware of what the figure actually was, notwithstanding Professor Hills?

A. Not at all, I am not, no.

70 Q. Would you be interested to know that the figure was ultimately 1.1 million, nearly twice what RTE had suggested and almost three times what Professor Hills had suggested, and what I am suggesting to you is that what RTE did at all times, despite suspicions to the contrary, was to exercise a bona fide effort to put forward an accurate and authoritative charge capable of substantiation because they knew they would have to do that, and because they knew that there was a possibility inter alia of a Ministerial directive under Section 16 if they didn't.

A. I have no argument on that at all. As I say to you, I don't think the Commission at any point took the stance that it knew enough about transmission charges to do anything, it didn't know enough. This was purely a matter between Century and RTE. In the sense that Century, if you like, was the Commission's own baby it would have tended to support whatever broadcaster was in the business and relay its messages to the appropriate authority. At the end of the day the only arbitrator that the Commission had available to it was the then Minister for Communications,

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that was where the final decision would be made, not by the Commission.

71 Q. In fact as it turned out, a great deal of what you were told by Century or certainly, certain significant parts of it weren't true anyway, is that correct?

A. Can you give me some examples? I am not too sure what you mean.

72 Q. I will give you one example. I think your attention was drawn to the second last paragraph of the letters that, the letter of Mr. Crowley on the 20th of November to Mr. Justice Henchy, the Chairman of the IRTC, and the second last paragraph I think is page 37, among others, page 37. Just the second last paragraph on that page. That stated: "It appears, therefore, we are unable to further progress the negotiations with RTE, and accordingly we respectfully request the Commission to seek a Ministerial directive in accordance with the Commission's powers under Section 16 of the Radio and Television Act, 1988."

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Now, doubtless the Commission wasn't aware when it received that, that in fact Century had never negotiated or sought to negotiate with RTE at all?

A. Mmm.

73 Q. Even to the extent of never putting to RTE its figure of 375,000, I don't mean indicating a willingness to negotiate away from that, but never putting any figure of any kind to RTE. And yet it was happy to give the impression to the Commission that it had done so?

A. I think hindsight is a wonderful thing. At that time when that letter arrived in the Commission it was taken at face

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value from a company that we were doing business with and trying to finalise contract arrangements with them. The letter states what it states, they couldn't complete the negotiations with RTE and they were requesting a directive. That's what the Commission read, that's what the Commission interpreted.

74 Q. Can I suggest to you, that after Century had got the franchise, that it was your experience over the succeeding months that there was great difficulty in getting Century to enter into a broadcasting contract on the terms which Century had implicitly agreed to accept when they received the franchise on the 18th of January?

A. Yes, I said that yesterday, it was very difficult, the period of negotiation, very difficult.

75 Q. In particular, they were insisting on matters which, I think it is fair to say, if I am right in saying this, that the Commission couldn't give, such as a 14 year franchise in effect, because that then trenched on the rights of other competitors and potential competitors who would have a right again to apply at the end of that period, of the seven year period, is that so?

A. Yes, that was one of the arguments, yes.

76 Q. Yes. Does it surprise you that RTE had similar extreme difficulties once Century got into the ring, including offering and then withdrawing offers of any bonding to guarantee expenditure which RTE would have to make on capital equipment?

A. With the benefit of hindsight it doesn't surprise me. As I said, at the time the Commission would not have been aware of the detailed goings-on between Century and RTE.

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77 Q. Yes. Thanks very much.

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THE WITNESS WAS THEN EXAMINED BY MS. EGAN AS FOLLOWS:
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78 Q. MS. EGAN: Mr. Connolly, if I could first direct your attention please to the document, I believe it is 3919? It is the financial structure document, together with profit and loss projections and sensitivity analysis. This is the document which I believe was prepared by Paul Appleby with a view to submitting it to the Commission so that the Commission would have, if you like, a thumbnail sketch at a glance of the different financial structures and profit and loss accounts of the various applicants.

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If I can direct your attention then to the second page of that document which relates to the profit and loss projections for Year 1 of the various applicants?

A. Yes.

79 Q. Can I ask you first of, Mr. Connolly, in general terms, when the Commission received figures in the applications from various potential licensees, was it the practice of the Commission to look behind the figures submitted by the licensees or the potential licensees?

A. No, I think I was pointing this out yesterday as well. The Commission didn't delve behind them, they took the figures as being the correct figures as prepared by the accountants and the companies themselves. In all cases they took them at face value.

80 Q. In general terms was it the practice of the Commission to seek outside expertise in order to second-guess or confirm

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or deny those figures?

A. No, it was not the practice of the Commission to do so.

81 Q. In your opinion, was it the duty of the Commission to request such outside expertise or to look behind those figures in its assessment of the applications?

A. There was no requirement on the Commission to look outside its own resources at all. It chose not to do so, particularly bearing in mind the level of expertise that existed on its own membership.

82 Q. If I can direct your attention please, Mr. Connolly, to page 5578, which is Section 6 of the Radio and Television Act, 1988. This sets out the matters to which the Commission shall have regard in considering applications. There is 12 different matters, numbers A through J with subsection i having two subsections to it. I wouldn't propose to deal with all of them, but I think the one that has been stated by the Tribunal team to concern transmission charges in particular or finance matters in general, is subsection B of those, which state:

"That the Commission shall have regard to the adequacy of the expertise and experience, and of the financial resources that will be available to each applicant, and the extent to which the application accords with good economic principles."

A. Yes.

83 Q. The first matter to explore with you in that regard, Mr. Connelly, is that the section says that the Commission shall have regard to those matters, and indeed it is only one of 12 separate matters which are listed under the Section 6 criteria. Is there any suggestion from your

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interpretation of Section 6 or the Commission's functions, whilst you were a member of that body, that in having regard to, for example the "adequacy of financial resources", that the Commission had to carry out an independent financial assessment and look behind the figures submitted by the applicant?

A. No, I think the Commission was quite rigorous in how it examined all the items in relation to all applications for franchises, both national and local. I don't think it felt, I know it didn't feel at the time it needed outside expertise to help it analyse them.

84 Q. Is there any suggestion equally, Mr. Connolly, in relation to Section 6, that the Commission has to engage outside expertise in an exercise to go behind those figures?

A. There is no such suggestion, no.

85 Q. And can I suggest, Mr. Connolly, from your experience on the IRTC, was it ever the practice of the IRTC to go behind the figures submitted in the applications by various potential licensees?

A. Not to my knowledge. It certainly wasn't. One case I think in Tipperary where there was a single applicant coming looking for effectively community broadcasting, they were dealt with in a slightly different way because of the nature of the consortium putting together, it wasn't a delve behind the figures, it was merely an anxiety of the Commission to make sure they had everything from the technical expertise to programming to financial resources that would allow the station to go and stay on air.

86 Q. If I can direct your attention back then to 3920, please, Mr. Connolly? That's the profit and loss projection from

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which I strayed for a moment. Looking at those figures, if you were concerned about any particular figure not coming to fruition, what would be the biggest concern having a look at those figures?

- A. The figure that was going - not just me but the Commission as a whole, the figure that was going to make or break any radio station was the advertising income they hoped to achieve. And looking at these ones here, there are three of them which specify the figures, they are very variable and range all the way from 3462 down to Century's 1910, they were the figures that were going to dictate whether the station was successful or not, that was the one the Commission was acutely interested in.

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Had they got the programming and everything else in place that would enable them to achieve that level, if they didn't they were going to fail, that's what the Commission was worried about. Other things like transmission charges are relatively speaking small beer by comparison with that particular bit, and I have no doubt that was the key one.

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Other things too that are important, like staffing and staff salaries and so on. More importantly even, the type of theme that they are going to be broadcasting because the people who gain the audiences --

- 87 Q. I think you stated yesterday in your direct evidence to Mr. O'Neill, it wasn't the transmission charges that were going to bring down the station, and then you proceeded to say if anything was going to bring down a station it would be the inability to draw in the advertising income which they

projected?

A. Yes.

88 Q. In relation then to that advertising income, and in relation to one or two of the other heads: The advertising income, did the Commission carry out any independent assessment as to whether or not those figures were realistic, any independent financial assessment?

A. Not in perhaps the detail that you are talking about, but certainly I think it is actually on record in the Commission's own reports of its meetings. It did ask that some analysis be done of what the market was for advertising within the country, was it growing or depreciating? What realistic income the stations hoped to achieve? And I think the Commission took the viewpoint that certainly in the initial years that was going to be a difficult chore, to achieve the levels of income. I suppose I can't judge exactly what the Commission members would have felt, but figures that were seen as being too high or outlandish or outrageous wouldn't have met with favour within the Commission because everything was predicated on that particular figure, if it didn't wash the station was going to fail.

89 Q. How did the Commission go about assessing whether or not the advertising income figures were reasonable?

A. It - I can't recall myself, and people like Paul Appleby talking about the advertising agency people and all that type of things, looking at the spend that was there in existence already, it had also on its own membership a man who at the time was, I don't recall his title either, Secretary or Chief Executive of The National Newspapers of

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Ireland, and would have had access to a lot of advertising figures. There was quite an amount of expertise say available within the Commission itself to carry out that analysis.

90 Q. In relation to some of the other figures listed, for example staff salaries, I see there is quite a large differential between the Consortium on the one hand and Radio 2000 and Century on the other. In relation to staff salaries, the Consortium had projected that something over a million pounds would be spent on staff salaries in Year 1, whereas the other two were in the region of approximately half that. Again in that regard, Mr. Connolly, did the Commission request outside expertise with a view to second-guessing or confirming those figures?

A. No, it didn't seek that expertise at all.

91 Q. I think it was the Commission's view that Century were in general, conservative across the board in relation to both the projected income and the projected expenses of the Century station in particular?

A. That's correct.

92 Q. And if I can call-up in that regard document 6087 which is, I believe, a list of questions that were, that the Commission was proposing to put to Century at the oral hearings, and in particular Question 15 which states that: "Relative to other candidates Century's financial projections appear conservative. Firstly with respect to revenue, it appears that Century only envisages obtaining about 25 percent of the total radio advertising revenue pool by Year 3. A similar conservatism is evident in relation to costs. Would you comment on the conservatism

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please?"

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I draw that to your attention simply to point out that the Commission was aware that Century was being conservative, possibly in relation to its advertising income but also presumably in relation to all of its costs, possibly including transmission fees as well?

A. Yes, that's correct. Everything about Century's application was conservative.

93 Q. And in relation to the area of transmission fees, in particular; having regard to Century's financial projections are you in a position to say whether or not the Commission felt it would really threaten the financial viability of Century if the transmission fees didn't come in at the precise level that they were anticipating or projecting?

A. I don't think the Commission took that viewpoint. As you mentioned, they were conservative, the figures for transmission in Century, relative to the other ones. At the end of the day the point I was making was, that wasn't going to be what would wreck or ruin the station, those particular figures. The Commission also took the viewpoint in relation to Century that it had the type of shareholding and access to additional subventions, if you like, from the shareholders that would enable it to continue on. So I don't think the question of transmission charges was an issue at all for the Commission.

94 Q. And with that reply in mind, Mr. Connolly, are you able to express any view as to why a meeting may have been convene

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with Century on the 13th of January, the day after the oral hearings, at which it appears that the matter of transmission charges was discussed?

A. Mm-hmm. I think, as I have been trying to point out for the last day or so, obviously the Commission's total anxiety was to get whatever group won the franchise on air as quickly as they could. This was an endeavor to find out if Century would be in that position to move ahead. The key bit I think about the meeting the following day, as opposed to raising it in public, is that and I think I pointed this out yesterday as well, that there is not a doubt in my mind that the Commission took the stance that it would not try to impinge upon the commercial negotiations, the commercial reality of any of the applicants for the stations. In this particular case this was a matter which was already a matter for discussion between Century and RTE, and would continue to be so, and no matter what way it was handled in public it was likely to damage Century's negotiating position, so it was followed through to the following day.

95 Q. What do you think was of concern to the Commission that required to be clarified with Century on the following day?

A. I think the clarification first of all was that Century were confident that they could conclude arrangement with RTE, that was the first. If they couldn't, they couldn't go on air, that was a matter of importance for the IRTC. And the second thing was to get some feel from them as to whether or not they felt their figures were realistic, and what was the basis for that feel that they had.

96 Q. I see. When you requested the Minister to make it - when

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the Commission requested the Minister to make a direction pursuant to Section 16 of the 1988 act, did the Commission automatically assume that the Minister would accept Century's figure?

A. Not at all. No, I think again this goes back to the point I was making before, the Commission didn't have the expertise to analyse these figures in detail, no matter who they were presented by. The Commission took the view that expertise resided or should have resided within the Department of Communications, and it would have assumed the Department would carry out its own analysis of the figures before making any decision in the matter.

97 Q. And did the IRTC have the resources or expertise to carry out an independent assessment of the amount of the transmission fees requested?

A. On both counts the answer is "no", it certainly didn't have the resources, it was quite a small body, and secondly didn't have the expertise.

98 Q. And when the IRTC requested the Minister to issue a direction, did the IRTC view it as essential for the survival of Century that the transmission fees be set at exactly the level that Century had requested, or did the Commission view that there was some room for manoeuvre, having regard to Century's figures?

A. I don't think the Commission took a direct stance as to exactly what should emerge, I don't think it felt competent to make that particular decision at the end of the day. What it did do was say "This is the situation which we have arrived at, it is over to you now at this point for you to decide where do we go from here, because if this doesn't

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move Century will not go on air." That's effectively what was said.

99 Q. Did the Commission view the Department as being the appropriate body in Ireland who possessed the necessary expertise and experience in relation to the charges?

A. Yes.

100 Q. And once the issue of transmission charges began to become a hot topic, as it were, was the IRTC in constant communication with the Department in that regard?

A. This is subsequent to this letter or prior to it or where are you talking about now?

101 Q. After the award of the license, I believe when the issue of transmission charges became a very, very hot topic?

A. I wouldn't say the Commission was in constant contact with the Department. Obviously we were talking to them about other matters in relation to other franchisees and everything else, there was regular contact, so certainly things in relation to where the negotiations were at were raised but not an on-going thing. I don't think the Commission at any point, either through me or to the best of my knowledge through the Chairperson, raised the issue very frequently, if at all, with the Department.

102 Q. Did the Department ever request the IRTC to seek or obtain any independent assessment of the transmission charges being requested?

A. No, the Department never asked for that.

103 Q. And are you satisfied from your dealings with the Department, that the Department didn't perceive it as the IRTC's role to make any independent assessment or analysis of the transmission charges?

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A. I don't think the Department at all felt that. The Commission had a particular role to achieve, it wasn't to analyse the transmission charges. I think they would have viewed that for the Department itself.

104 Q. If the Department had requested that the Commission obtain such an independent analysis, would you have facilitated the Commission in that regard?

A. Again it obviously goes back to the Commission, I feel the answer is "yes", the IRTC would have facilitated. Where we would have got the expertise to do so I am not too sure. Certainly we would have done that.

105 Q. And in relation then to looking outside of the specifically Irish situation, who did the IRTC view as being an independent body who could perhaps provide expertise on transmission levels?

A. I think people like the IBA were the only immediate one that we had contact with.

106 Q. And I think it is fair to say that Century represented to the IRTC that it had the support of the IBA in relation to the transmission charge figures that it was putting forward at all times?

A. That's correct.

107 Q. And I think it is also fair to say that it wouldn't be the practice of the IRTC to look behind such representations made by applicants?

A. That's correct.

108 Q. I don't think the IRTC viewed itself as having a role of being a bloodhound in that regard?

A. Not at all.

109 Q. In relation to those representations, I think most of them

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have already been mentioned and discussed by Mr. O'Neill, but I think they arise specifically from several communications, one of which is a communication from Century in the, under the persons of Oliver Barry and James Stafford to the Chairman of the IRTC, Mr. Seamus Henchy, Justice Seamus Henchy, dated the 17th of February, 1989. Document 3975. The second paragraph of that document states:

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"The Board meeting reviewed the question of transmission charges. They were of the unanimous opinion that the 375 offered to RTE for a full transmission charge was, given the advice that they had received from the IBA, fair and reasonable."

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I wouldn't propose to necessarily go through the other documents with you, Mr. Connolly, in relation to which the same representations are made, but I think it is fair to state that Century represented that they had the support of the IBA for its figures, is that correct?

A. Yes, this they did, and the Commission had no reason to doubt what they were saying.

110 Q. Fine. In relation to your questioning by counsel for Ray Burke; Mr. Connolly, when you were questioned as to whether or not there was any pressure or intervention from the Minister, from Mr. Burke in relation to the awarding of the license to Century as such, I think your statement was that there was no such pressure or intervention.

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I think, however, it is fair to say that after the license

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was awarded to Century there may have been a certain amount of involvement by the Minister in, perhaps in the contract negotiations?

- A. Yes. I think it is - the Minister, if you like, as the author of the Act which brought the Commission into being, and ultimately the radio stations under its aegis into being, was very keen that they should succeed and get on air. In that context he certainly was anxious we should push ahead fairly quickly. In terms of the actual contract negotiations, he didn't involve himself on a day-by-day basis or whatever in relation to any of them.

The only contacts I would have had with him were in relation to the Century contract which was, as I mentioned yesterday, subject to fairly protracted negotiations across the summer. At that point I think he was anxious that the Commission should attempt to, if you like, short circuit some of the things he was trying to do, such as the Irish language content and the news content, and I think the Chairman of the IRTC, on behalf of the IRTC, left him in no doubt that the Commission wasn't prepared to do that, it was going to insist on those regulations being brought into place before Century were given a contract. And the basis of that, as I mentioned yesterday, was that once the chicken had flown the coop by way of a franchise contract that was the end of it, there was no guarantee to get them back on line again.

- 111 Q. And in relation then to, such involvement as the Minister may have had at that stage; did the IRTC view that involvement having regard to the comments that I will

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call-up, this is Document 4549? This is the document that was opened to you yesterday, Mr. Connolly?

A. Yes.

112 Q. If I can go to the fifth page of that document, which is 4543? And in particular the second page of that document, and the penultimate, and the second paragraph of that document and the penultimate paragraph of that document. Both these paragraphs I believe were opened to you yesterday, Mr. Connolly, and they reflect Century's perception at any rate of the Commission's response to any attempted involvement by the Minister in the contract negotiations. And I think it is fair to say that the Commission felt that any such involvement was inappropriate?

A. Not inappropriate in the sense anybody may approach a Minister about anything, not to that extent, certainly in as much as the Commission first of all saw itself as being the body who was authorised to deal with radio stations, and felt strongly that it was being second-guessed or bypassed or whatever, and the information was making its way back to it not directly from Century in this case but from another source, in this case the Minister or his Department. That, in my viewpoint, and in the Commission's viewpoint, was incorrect, it shouldn't have happened that particular way.

113 Q. And I think it is fair to say that the IRTC refused to bow to any involvement, whether perceived pressure from the Minister in regard to the contract negotiations?

A. The Commission was extremely conscientious in ensuring the Act was adhered to right down the line, and in case, as you

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mentioned, didn't bow to pressure from the Minister, or indeed anybody else.

114 Q. In relation to the general task which the IRTC carried out in its first couple of months after appointment, I think virtually all of the independent local radio stations were licensed and on air between the time of the Century, the time of the IRTC's appointment and mid-to late 1989, is that correct?

A. That's correct.

115 Q. That's a considerable achievement I think for anybody immediately after its appointment, Mr. Connolly?

A. I think it is one of the areas that the Commission can feel extremely proud of, that it moved with such speed to get stations up, most of which have succeeded and continue to this very day, against all the odds perhaps, but have succeeded. It is a tremendous tribute to them, and certainly one I personally feel very proud of.

116 Q. And in your opinion, Mr. Connolly, was the Minister, Minister Burke, helpful to the IRTC in approaching this task?

A. Yes, I have nothing to say about Mr. Burke's involvement or helpfulness. He was helpful, he pushed ahead as quickly as he could. He was helpful to the Commission in terms of providing it with subvention at the beginning of its existence. He helped in terms of getting office accommodation, and indeed getting staff and everything else. I have nothing to say in that regard other than he was helpful.

117 Q. Mr. Connolly, you mentioned in your direct evidence, that the Commission adopted a practice of bringing, I think you

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used the phrase a "roadshow" around the country, in respect of the various oral hearings on the application process.

In that regard, Mr. Connolly, if I could briefly direct your attention to page 5577, again it is an extract from the Radio and Television Act 1988. It sets out in broad and general terms at Section 5 the procedure to be followed by the IRTC in determining license applications.

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The reason I put that on the screen, Mr. Connolly, is because there is quite clearly no requirement in Section 5 in particular, or in the Act in general, that the IRTC hold oral hearings in public in respect of any licensing application. Can I ask you in that regard why the IRTC took a decision to hold these hearings in public?

A. I think at the time it was quite a unique thing for any deciding body within the State sector, if you like, to work in this particular way. There were a number of reasons for it, one was to ensure, if you like, some degree of openness and transparency in everything the Commission was doing, that people through the first instance, through journalists from the RTE and the various media had a chance to see the applicants and hear them being asked questions. Transparency was important for the IRTC.

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The other thing I was trying to point out, the Commission took the viewpoint, a very practical and pragmatic way, that it shouldn't simply be a regulatory authority simply lashing out franchises left right and centre, it took the viewpoint that it should do everything to help its franchisees to become successful, and one of the things it

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had to do was ensure that independent radio made its mark even before it began to broadcast.

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If you can recall back to that time, I would say there was hardly a week went by that independent radio wasn't mentioned for six or eight months during hearings and everything else, that kept in a vacuum period where other radio had disappeared off the map, that kept independent radio to the forefront and dare I say it, even RTE were giving it fair coverage.

118 Q. And, Mr. Connolly, in relation to the Century application process, can I just ask you whether you personally are aware of any approach or inducements offered from Century to the Executive or any member of the IRTC?

A. I am not aware of any at all.

119 Q. And finally, Mr. Connolly; in your opinion, in approaching the Century license in particular and its licensing function in general, did the Commission act properly and fairly at all times?

A. Undoubtedly.

120 Q. Thank you, Mr. Connolly.

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MR. O'NEILL: I have no questions arising out of the cross-examination of Mr. Connolly and that concludes --

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MR. O'HIGGINS: Sir, there was one matter of fact which I neglected to put to the witness. It is a very brief and simple --

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CHAIRMAN: All right. Very brief please.

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

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121 Q. MR. O'HIGGINS: Yes, Mr. Connolly, there was a memo done
by Mr. O'Morain of the Department of Communications shortly
before the meeting of the 5th of January 1989, I think the
meeting of which you are aware?

A. Yes.

122 Q. And he records at the beginning, "That from a discussion
with the Commission Secretariat it would appear that the
major contenders for the franchise want to go the road of
taking the all-in RTE charge", and goes on to make several
observations about the matters.

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When he records "discussion with the Commission
Secretariat", do you know who he would have been talking
to?

A. More than likely to myself and perhaps Paul Appleby,
perhaps even to Michael O'Keefe, would be the obvious
people.

123 Q. Yes. Just one other matter associated that he records in
the course of that memo, "Certain figures which were being
offered by at least some of the contenders", I think he is
wrong in some respects, but he says that the contenders are
offering approximately 350,000. I take it that is
information, in relation to these matters, which is likely
to have come from the Commission?

A. Likely to yes, but not exclusively so. It is quite
possible that some of the applicants may have been talking

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directly to the Department officials as well.

124 Q. Yes. Would it be correct to say that the Commission would never have informed RTE about any such details or figures?

A. Yes, that would be true, yes.

125 Q. Thanks very much

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CHAIRMAN: Thank you very much for coming down. You have been of very considerable assistance. Thank you.

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MR. O'NEILL: Thank you, Mr. Connolly. The next witness, Sir, will be Mr. Justice Henchy. Judge Henchy please.

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THE WITNESS THEN WITHDREW.

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JUDGE SEAMUS HENCHY, HAVING BEEN SWORN, WAS EXAMINED AS
FOLLOWS BY MR. O'NEILL:

CHAIRMAN: Good morning.

126 Q. MR. O'NEILL: Good morning Judge Henchy.

In 1988 you were a serving member of the Supreme Court,
isn't that so?

A. Yes.

127 Q. And you may be aware of the fact that in the early part of
that year a Bill was progressing its way through the Houses
of the Oireachtas which was called the Broadcasting Bill of
1987, which ultimately translated itself into being the
Radio and Television Act of 1988, isn't that so?

A. Yes.

128 Q. And that Act or that Bill rather, in its progress through
the Houses of the Oireachtas was amended so as to provide
for the existence of an independent body which would carry
out certain of the functions, including that of the
selection of candidates under the Act itself, isn't that
so?

A. Yes.

129 Q. Yes. The creation of the Independent Radio and Television
Commission was one which came by way of amendment of the
original Bill, rather than being part of the original
Bill. Does that accord with your recollection of its
legislative history?

A. Yes.

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130 Q. And I think that whilst you were a serving member of the Supreme Court at that time, you were invited to chair this new entity, the IRTC, isn't that so?

A. Yes.

131 Q. The terms of your appointment were such that you would hold office for a five year term from the date of the establishment of this new body, isn't that so?

A. That's right.

132 Q. The effect of that was that you would be in the position of Chairman until the 16th of October of 1981, isn't that correct? '91, I beg your pardon. The 16th of October, 1991, was going to be the date when your position would cease, isn't that so, being a five year term from the --

A. No, it was five years from 1988.

133 Q. '91?

A. '93.

134 Q. Of course it should be, yes. The terms upon which you were engaged for this position were that you would be, in effect, a full time Chairman of this body, isn't that right?

A. Yes.

135 Q. And whereas the other members of the Board would be on a part-time basis, in the sense that they would attend at the board meetings of the IRTC. Your function was considerably more onerous, isn't that so?

A. Yes.

136 Q. That was reflected, I think in the fact that you continued to be paid a sum the equivalent of your stipend or salary as a judge of the Supreme Court, that being made up of your pension and it was topped up by the IRTC, isn't that so?

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A. Yes.

137 Q. Can you remember how it was you came to be invited to take up this position?

A. No, I can't.

138 Q. No. Do you remember being given, having given any indication that you would find such a position, one you would be prepared to take up?

A. I can't remember.

139 Q. In the normal course when would your retirement from the Supreme Court have become operative had you not taken up this position?

A. Oh, I can't remember.

140 Q. I see. In any event --

A. Whenever I reached 72.

141 Q. When would that be?

A. I can't remember.

142 Q. Well, endeavoring to do so now, by a process of subtraction from your current age, can you assist us?

A. I find this autobiographical detail quite interesting, but I would be anxious to know what relevance it has?

143 Q. The Sole Member, judge, will decide what the relevance is.

A. May I ask the Sole Member the following: When I learned that I was to give evidence here, I wrote to the Tribunal and asked what were the Terms of Reference? I got a letter back telling me that the Terms of Reference were two, they are E1 and E2.

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This Tribunal, may I point out, is not a court of law, it has no inherent jurisdiction, it is no - it has no jurisdiction except what was given to it by the Dail.

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144 Q. That is so, judge. And that is why you were sent the Terms of Reference which indicate clearly under the References E1 and E2 that the Tribunal will inquire into certain payments made to Mr. Burke and their connection with any decision that he may have made.

A. Yes.

145 Q. The Tribunal has determined --

A. First of all, the Tribunal has to consider whether such payments were made or not. On that issue I would like to give my evidence as follows: I know nothing whatsoever about any payment made to Mr. Burke.

146 Q. Well, Sir, the Tribunal on the other hand is aware of such payments having been made, the sum of ú35,000 --

A. But I am speaking about my evidence.

147 Q. I accept that, Sir, but you are here in the capacity of a witness to give evidence on matters of fact upon which you will be questioned. The biographical detail which you have been asked so far, has been to establish for the purpose of the record of the Tribunal, the position which you held as of the date of inception of this statutory body, and the questioning will proceed to establish what decisions you made with the aid of, providing you with minutes of the meetings of which you were Chairman. I don't mean to second-guess what your answers will be, but it is hoped that you will be able to assist the Tribunal in the responses which the Tribunal expects you to give on relevant matters.

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I hope that addresses the concerns which you have so far expressed?

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A. No, it doesn't.

148 Q. Fine. In any event, we must proceed to question you on matters which we consider to be material.

A. Very good.

149 Q. You took office on the 17th of October of 1988, isn't that so?

A. Yes.

150 Q. And having taken office you attended at the first meeting of the IRTC which took place at Newbridge House in Donabate in County Dublin, a location where the Minister made an inaugural speech to the body of the members, and I think the press were also there for the public session of that speech, isn't that so?

A. Yes.

151 Q. And in the course of the business of the day the Board met for the first time under your chairmanship, isn't that correct?

A. (Witness nods.)

152 Q. And on that occasion we have heard evidence that certain appointments were made of bankers, financial advisers, accountants and lawyers to serve the interests of this body, isn't that so?

A. Yes.

153 Q. And we know from consideration of the Act that this was an Independent Radio and Television Commission, isn't that so?

A. Yes.

154 Q. And you as its Chairman, I take it, were conscious of the requirement not only that the Commission would act independently but it would also be seen to act independently in all its dealings, isn't that so?

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A. Yes.

155 Q. We have heard evidence last week from a Mr. Donal O'Sullivan, who you may recall was one of the members of the Commission at that particular time. Do you remember firstly Mr. O'Sullivan having that position?

A. Yes.

156 Q. And Mr. O'Sullivan indicated that he proposed the three motions which addressed the question of the appointment of bankers, financial advisers, and also solicitors to the Commission. Can you recollect that having taken place?

A. Yes.

157 Q. Did you have any questions of Mr. O'Sullivan as to firstly why he chose to propose all three of the candidates for these positions?

A. No.

158 Q. It was obviously evident to you that in relation to the bankers it was intended that the Dublin Airport branch of the Ulster Bank was to be appointed the bankers to the Commission, isn't that so?

A. That may have been what was intended, it is not what happened.

159 Q. Yes.

A. The Ulster Bank Limited was appointed the banker to the Commission.

160 Q. That is your recollection?

A. No, it is the record.

161 Q. Right. The evidence of the Secretariat witnesses to date has been that the account of the Commission was held in the Dublin Airport branch of Ulster Bank, is that something you have - you can agree with?

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A. No, if you look, if you look at the minutes of the meeting of the Commission, of the IRTC --

162 Q. Yes.

A. -- for the 17th of October, 1988, you will find it recorded that it is the Ulster Bank Limited that was appointed banker.

163 Q. Yes.

A. And there was no reference to the airport branch. And in fact, the IRTC did its banking activities either in College Green or in Baggot Street.

164 Q. Yes. I appreciate, Judge Henchy, you might not have been in attendance throughout the recent evidence of the witnesses from the Secretariat of the IRTC at the time. Their evidence firstly has been that the manager who dealt with the affairs of the IRTC on Ulster Bank's behalf was a Mr. Moody, who was the manager of the bank at its Dublin Airport branch. Can you recollect that as being the case, that Mr. Moody --

A. Yes, I have seen a memo from him --

165 Q. Right.

A. -- recording --

166 Q. And the extent to which any of the city branches dealt with affairs of the Commission was at the application of the Dublin Airport branch and in order to facilitate the day-to-day activities of the Commission?

A. No, but the appointment was not as, as suggested, of the airport branch. It was the appointment of the Ulster Bank Limited.

167 Q. The documentation which opened this account was documentation which was sent to the Ulster Bank airport

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branch?

A. Yes, I am sure.

168 Q. And not to Head Office or to any city branch, isn't that so?

A. But that didn't make that branch bankers to the Commission.

169 Q. You don't believe so?

A. No.

170 Q. Where did you think the bank branch was that was dealing with you, with the affairs of --

A. In my time the IRTC's banking of, was conducted almost exclusively in Baggot Street.

171 Q. There was at some point in time, for example, an overdraft facility extended to the Commission, I take it that was a matter which was arranged by or dealt with and implemented by the branch at Dublin Airport and not by either of the branches in --

A. I can't say, I don't know.

172 Q. Well certainly, your former secretary, Mr. Connolly, indicated that Mr. Moody was particularly helpful in this regard, that he organised that facility. So you may take it that that is the situation.

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Are you saying that you were unaware on the 17th of October when Ulster Bank Limited was appointed, that it was intended that the branch at Dublin Airport would have any involvement in the affairs of --

A. No, I am not saying that. All I am saying is that the Ulster Bank Limited were the bankers to the Commission, not any particular branch.

173 Q. Mmm. You were aware then, were you, of the fact that it

was intended to use the airport branch?

A. No.

174 Q. You weren't aware of that?

A. No.

175 Q. I see. Did you become aware of it at some point in time?

A. I was never aware of the fact that the bank, the Commission had any dealings with the airport branch.

176 Q. I see. Though you were aware of dealings with Mr. Moody, were you?

A. No.

177 Q. You weren't. I see. Did you distance yourself from the banking side of the activities of the IRTC?

A. I had no dealings with the banking side of the IRTC.

178 Q. Did it occur to you at any point to inquire of Mr. O'Sullivan as to why it was he who nominated these three entities?

A. No.

179 Q. No. And we have learned in the course of the inquiry that these three entities, in two instances corporate entities or a corporate entity and a partnership and another firm, that they were bodies and entities who had been indicated by the Minister to Mr. O'Sullivan as the persons whom he should propose at this meeting?

A. I am not aware of that.

180 Q. You are not aware of that. I take it that as Chairman you would have been concerned to know at that point in time, the nominees for these positions to serve the IRTC, if at that time were nominees of the Minister?

A. I wasn't concerned.

181 Q. You didn't know of it, so obviously you couldn't be

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concerned, but I was asking you whether at this point in time, knowing that the three entities with which the Commission would have dealings were persons who had been nominated not by the Commission members themselves, in the sense of having made the selection, but rather by the Minister himself, would this not be of concern to you?

A. No.

182 Q. It would not, or would you not consider that the affairs of the IRTC should not only be wholly independent but be seen to the independent of the Minister?

A. No, they were reputable independent entities, the solicitors, the bankers, and the auditors.

183 Q. Irrespective of whether or not they were --

A. They were known to me to be reputable and reliable.

184 Q. Yes. Irrespective of that, and accepting that to be the case, and there has been no challenge to the status or qualifications of each and every one of these entities. Are you saying it does not concern you as the Chairman of the entity that these people found themselves serving the Commission as nominees of the Minister?

A. No, I don't accept they were, they acted in anyway as nominees of the Minister.

185 Q. The way that they acted is separate, of course, from their appointment. Isn't that right?

A. Yes.

186 Q. You were not to know and did not know the circumstances which lead to their appointment?

A. No.

187 Q. Do I understand that it is, as far as you are concerned, a matter of no import?

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A. Of no import.

188 Q. Of no import. I see. Mmm. When it came to addressing the tasks which fell to be dealt with by the IRTC itself, I take it, it became apparent to you, having gone through the list of your Board that some had skills in certain areas and others skills in other areas, and that you would have to take into account their various skills and levels of skill and knowledge in the tasks they would perform, isn't that right?

A. I don't quite follow you.

189 Q. Did you make yourself aware of the particular talents of the membership of the Board with which you were to be the Chairman?

A. Oh, yes.

190 Q. And I take it, that looking through the list there was certainly one member of the bar who was there, isn't that right?

A. Yes.

191 Q. Other than that, there was no lawyer as such, isn't that right?

A. That's right.

192 Q. Right. And you were going to be dealing with matters on the basis of a statutory framework which was contained within the Act itself, isn't that right?

A. Yes.

193 Q. And that framework included a number of criteria which would be applied in the consideration of applications, isn't that so?

A. Yes.

194 Q. So that can you remember specifically at any point in time

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going through the statutory criteria with the Board members to indicate to them what their statutory function was as a board?

A. No, I can't remember.

195 Q. Right. We know from the Act itself, that amongst the criteria which applied in the selection process was one which obliged the Board to have regard to the adequacy of the expertise and experience of the financial resources that would be available to each applicant and the extent to which the application accords with good economic principles.

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If you wish to view the Act we can put it on the screen in front of you?

A. No, it is all right.

196 Q. I am quoting the Act, and presumably you remember that particular criteria? And I take it that that is one of the criteria which would be applied throughout the selection process, by the Board, isn't that so?

A. What do you mean by the "selection process"?

197 Q. The selection process being one which commenced with advertisement?

A. Oh, yes.

198 Q. It then resulted in the form of application being drafted by the Commission Secretariat which came before the Board for approval, and after amendment which was approved it was circulated to those parties who were deemed to be qualified to receive it. It was then completed by those parties and it returned as a submission or application by the applicants, and that was in turn considered by the Board

together with other documentation, isn't that right?

A. Yes.

199 Q. Now, in the consideration of the documentation, obviously the Board would have to have regard to each of these statutory criteria which were listed at Section 6 of the Act, isn't that so? And we know that the Secretariat at the request of the Board itself, carried out a comparative study or analysis between the rival contenders for the national radio franchise, isn't that so?

A. Yes.

200 Q. And this was a document which was referred to in the minutes and was intended to be circulated to all the Board members in the midweek following the receipt of the applications, which was the 16th of December of 1988. And I take it that you presumably received this, as all other members did, isn't that so?

A. Yes.

201 Q. You probably might have received it somewhat earlier than they did, in view of your more frequent attendance at the Commission.

Included in the documentation which fell for consideration by the Board at its first meeting after the receipt of applications, which was on the 5th of January of 1989, was a financial analysis which we understand was carried out by Mr. Paul Appleby, who was second in command in effect to Mr. Connolly, the last witness, isn't that so?

A. Yes.

202 Q. Yes. And I take it that the purpose of this financial analysis was to establish or to satisfy the requirement

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that was imposed on the Commission, to ensure that applicants met the financial criteria which were set out in the Act itself, isn't that so?

A. Yes, but I fail to see what this has to do with the purpose for which I have come here today.

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May I point out that the jurisdiction of this Tribunal is entirely based on what is given to it by the Dail. The Dail commissioned the Tribunal to inquire and report on specified matters.

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One thing it did not commit to this Tribunal is power to inquire into the activities of the IRTC.

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The IRTC is an independent Commission. And I understand that any time, for example a Deputy put down a question about it, the Ceann Comhairle disallowed it. It is an independent body, and if the Dail removed its independence then a lot of these matters would become relevant, but they are not relevant in my view under either heading for which I have come here today.

203 Q. I can appreciate that you may have expressed such a view, and you do express such a view as your opinion, Judge Henchy, but the Sole Member has determined that this is a matter of importance which merits inquiry, he has determined to inquire into these matters and is inquiring into this matter, as already stated, pursuant to his Terms of Reference under References E1 and E2, and intends to proceed to deal with these matters, and that includes, amongst other matters, an inquiry as to whether or not and

to what extent, if at all, the Minister himself approached, dealt with, or made submissions or directions to the IRTC?

A. That I can understand and I respectfully accept, but what you are proceeding with is going way outside that.

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CHAIRMAN: Well, I don't wish to be in anyway discourteous to you, but at the moment I have the opinion that Mr. O'Neill is proceeding in an appropriate manner in relation to the subject matter of my current inquiry, and that being so, Mr. O'Neill will continue to proceed, and I can assure you totally, being courteous to you and in no way disrespectful of a former colleague, and indeed a former professor of mine, it goes back that far.

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204 Q. MR. O'NEILL: The question I was asking you, Judge Henchy, was in relation to the examination which was being carried out of the financial figures proposed by the individual applicants in their applications to the IRTC, and the analysis which was carried out by the IRTC Secretariat of those figures. I was asking you whether or not it was carried out in the context of their being an obligation under the Act to have regard to a criterion which included the adequacy of the financial resources and the extent to which any application might accord with good economic principles, isn't that so?

A. Yes.

205 Q. And I think that it is clear from the section itself, obviously, that the IRTC could not embark upon a decision-making process using criteria of which were not the appropriate criteria under the Act. They couldn't

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choose, for example, to ignore any particular criteria in reaching their decision, but had to have regard to all of them, isn't that so?

A. (Witness nods.)

206 Q. Now --

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CHAIRMAN: Mr. O'Neill, might I interrupt you? We have been running for approximately two hours and the stenographers do need a break, so can we take a quarter of an hour and sit again shortly after 12 o'clock, just to give the stenographer a rest.

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MR. O'NEILL: So-be-it.

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

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207 Q. MR. O'NEILL: The consideration, Judge Henchy, of the financial analysis which was carried out by the Secretariat, by the IRTC, was with the intention of establishing whether or not the individual candidates met the financial criteria which were contained in the Act, isn't that so?

A. Yeah.

208 Q. And the analysis itself was one which was carried out by Mr. Appleby who was a member of the Secretariat, but was not himself a trained accountant, isn't that right?

A. (Witness nods.)

209 Q. So that his figures in the main represented an extrapolation of the financial details contained in each of

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the applications, and setting one against the other so that they could be viewed comparatively by the general body of membership, isn't that right?

A. Yes.

210 Q. Now, at an early stage in the proceedings of the IRTC, indeed at the first meeting, it was decided that the minutes which were going to be recorded of meetings of the IRTC would record decisions only, isn't that right?

A. Yes.

211 Q. So that we do not have the facility at this point in time of seeing exactly what matters were discussed and by whom at meetings. We do, however, have the result of particular meetings as recorded in the minutes, but I think in the main you signed the minutes as Chairman, except for the rare occasion you were not there at a meeting, isn't that so?

A. That's right.

212 Q. The Commission decided at its second meeting, to adopt a form of standing orders, isn't that so?

A. Yes.

213 Q. And those standing orders mirrored the procedure which was envisaged in the schedule to the Act itself, isn't that so?

A. (Witness nods.)

214 Q. And if we look to that document, we can put it on screen for you. It is a document at page 6129. Here we see the "Standing Orders for Regulation of Meetings of the Commission."

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It provides at:

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"1. That the quorum for a meeting of the Commission shall be five.

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2. At a meeting of the Commission:

(A) The Chairman shall, if he is present, be the Chairman of the meeting.

(B) If, and so long as the Chairman is not present or the office of the Chairman is vacant, the members of the Commission who are present shall choose one of their number to be the Chairman of the meeting.

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3. (i) The minutes of the proceedings of each meeting of the Commission shall be entered in a book kept for that purpose and shall be signed by the Chairman of the next meeting.

(ii) The minutes shall not be a verbatim report of the meetings, but a record of decisions taken.

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3. Minutes shall be circulated in draft form to each member of the Commission at least three clear days before the date of the following meeting.

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4. (i) Any act of the Commission and any question arising or coming before the Commission may be done and decided by a simple majority of such members of the Commission as are present and vote on such act or question at a meeting of the Commission.

(ii) In the case of equality of votes on any question arising at a meeting of the Commission, the Chairman of the meeting shall have a second, or casting vote.

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5. Standing orders may be amended on notice by two-thirds of the members of the Commission."

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That in fact has, as you say, adopted the schedule to the Act which provided for issues or questions coming before the Commission to be decided upon a vote of the members present, isn't that right?

A. Yes.

215 Q. Now, as we move through the minutes, we will see that at the meeting of the 8th of December - sorry, at the meeting of the 24th of November, at page 5561. Amongst the decisions of the Commission which are recorded on that date under the heading "8. Deciding on Applications" is the following: "It was agreed that decisions regarding the successful application should be made by consensus of the Commission members."

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Do you see that?

A. (Witness nods.)

216 Q. That appears, on its face, to indicate that in respect of certain decisions which fell to be decided by the Commission, and in particular ones where a decision as to a successful application or presumably grant of franchise, that that is a decision which should be made by consensus of the Commission members, isn't that so?

A. Yes. But in actual fact no decision was ever made except by majority.

217 Q. Yes. Well, I was just wondering firstly, why it was felt necessary at this meeting on the 24th of November, some

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five weeks or so after the adoption of the initial standing orders, why it was felt that one should elaborate or go further than the standing orders already extant at that time, what was the need in other words to introduce --

A. I don't know.

218 Q. You don't know. Does it infer that there was to be a change from the voting pattern --

A. No.

219 Q. Or voting procedure?

A. As far as I know there was never any change. All decisions were either majority or unanimous.

220 Q. Yes. But the requirement under the Act, if one was to adopt the procedure set forth in the Act, was that there would be a vote on each issue, isn't that right?

A. Yes.

221 Q. And I take it that by deciding that decisions should be made by consensus, that it followed that there need not necessarily be a vote?

A. No, if it was plain there was at least a majority it would be a waste of time counting hands.

222 Q. Yes. The procedure of a meeting where a vote is taken might not necessarily follow the same procedure where consensus driven decisions are made, isn't that right?

A. Well I don't know, but all I know is, as I pointed out, all the decisions were either majority decisions or unanimous.

223 Q. Yes. Well, was the - what was the approach taken in order to achieve a consensus view in the knowledge that there wasn't going to be a vote at the end of it?

A. Everybody was given an opportunity of expressing their opinions. One added up the opinions, and if the opinion

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amounted to a majority I would announce that and give people an opportunity of asking for a vote.

224 Q. You, yourself, I take it, were chairing the meeting?

A. Yes.

225 Q. And in the main would that follow then that you would express your view and then you would canvass others?

A. No, usually I ask people their views. I normally didn't express my own view.

226 Q. Did you express it at all at these meetings?

A. Yes, at certain meetings.

227 Q. Did you have a policy to express it at the end of all other views or otherwise?

A. No.

228 Q. So there may be circumstances in which you would express your own view on some instances and they would then contribute their input, is that right?

A. Yes.

229 Q. I see. As we see from the review of the minutes of the IRTC, it became apparent at a point in time that the RTE transmission charges to independent radio franchisees was a matter which was of interest to the Commission as a whole, isn't that right?

A. Yes.

230 Q. And with that in mind, there was a resolution passed whereby it was intended that the Minister would be asking for a schedule of the RTE charges that would be appropriate for transmission. Now, there wouldn't appear to be any document which suggests that the Minister did provide such a scale of charges, and I am wondering whether you as Chairman have any recollection of approaching the Minister

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in the early stages, that is in November, with regard to his providing such a scale of charges?

A. No, I have no such - no recollection.

231 Q. Very good. We do know that the question of RTE transmission charges was addressed directly on the 7th of December of 1988, when at your request a meeting took place which was attended by representatives of RTE and representatives of the IRTC. Those representatives from the IRTC's point of view being yourself, Mr. Connolly and Mr. Lackan, now deceased, who had been engaged to advise the Commission on its technical aspects, isn't that so?

A. Yes.

232 Q. And it would appear that at that meeting, the RTE members present outlined firstly their philosophy and thinking behind the basis upon which they would make their transmission facilities available to independent broadcasters, isn't that right?

A. Yes.

233 Q. And in addition, they furnished to the Commission members there present, a schedule of the charges which they intended to charge in respect of the facilities they would make available to the successful applicants under the IRTC application procedures, isn't that right?

A. Yes.

234 Q. At that meeting - do you remember the meeting by the way?

A. No.

235 Q. No, you don't. After that meeting, there was convened a meeting of the IRTC, where we see from the minutes at page 5568, on the 8th of December of 1988, it reads as follows:

"Following a report from the Chairman and Secretary on

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meeting with RTE regarding the costs of the transmission facility, 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 in the matter."

Now, firstly we may take it that this is an accurate record of what took place, and it follows that there was therefore, a report from yourself and the Secretary to the general body of members on your meeting with RTE the day beforehand, and presumably that included either yourself or the Secretary, or possibly both of you, expressing some views as to the adequacy or perhaps the excessive demands being made by RTE for its services, is that right?

A. (Witness nods.)

236 Q. Did you have a view, do you remember at that time, as to whether or not the RTE figures which were being asked were figures which stood up on their own economic basis or whether they were deliberately inflated or otherwise?

A. I don't know. I can't remember what view I had.

237 Q. I see. The Commission had at that time the services of financial advisers in the form of Deloitte Haskin and Sells, isn't that right? And they were a firm, Sells, which from the date of appointment were appointed to serve as financial advisers and also as accountants to the IRTC, isn't that right?

A. Yes.

238 Q. And if we look to page 556, which is the earlier part of

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the same meeting, at which the RTE charges were decided we will see - 5567 - we will see under the heading "Accountants": "It was agreed to retain our existing accountants for the purpose of carrying out the annual audit, but we should not use them in future for consultancy purposes. The Secretary should meet with them to inform them accordingly."

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So that insofar as they had originally a function as consultants, that function no longer existed as of this meeting, isn't that right?

A. That's right.

239 Q. So, have you any recollection of the basis upon which the body of the IRTC agreed that the sum being asked by RTE would be detrimental to the interests of --

A. I can't say.

240 Q. You can't say. That position, it would appear, was adopted by the members there present, obviously without the benefit of the consultants' views, isn't that right?

A. Yes.

241 Q. And you might just confirm to me that in delivering your report and that of the Secretary to the body of members, you didn't have any additional information over and above the schedule or rate card which had been provided by RTE the day previously, isn't that right?

A. Right. Yes.

242 Q. Now, the question of the RTE charges obviously was going to be of crucial importance, particularly when the applications from the applicants for the franchise were received on the 16th of December, because without exception

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the terrestrial users all intended to opt for the RTE all-inclusive charge, and that was apparent from considering their applications, isn't that right?

A. Yes.

243 Q. So that whichever application it was, was successful, assuming one did not elect for the satellite contender, transmission could not begin until such time as RTE's charges had been worked out to the satisfaction of the parties --

A. Yes.

244 Q. -- in question? And we see from the financial analysis which was carried out by Mr. Appleby that there was a wide range of differences in the figures which were proposed by the contenders, the three who were analysed, that is on the land basis, as between their provision for RTE transmission charges, isn't that so?

A. Yes.

245 Q. And that was something which, though it was not the only difference in their financial projections, was an area which dealt with the, what I might call the "fixed costs", in other words whilst they might project advertising revenue and other matters which were variable once the RTE transmission charge was fixed, it would have to be paid throughout the period of the franchise, irrespective of whether their financial expectations or turnover were realised, is that right?

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MS. EGAN: Chairman, in fairness to Judge Henchy, the relevant document should be put on screen so he can have a opportunity to look at it.

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MR. O'NEILL: Certainly, if the witness wants to look at it

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CHAIRMAN: I don't think it is going to go very much further. We are just going through, but if the judge would like it, there is no problem whatsoever?

A. No.

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CHAIRMAN: Do you want it?

A. No.

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CHAIRMAN: Thank you.

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246 Q. MR. O'NEILL: The figures therefore, showed a variation on a wide number of headings, including the heading of transmission charges and as we know, this is a matter which would have to be resolved one way or the other in order for transmission to begin, isn't that right? And is it the case that the Commission felt that it should endeavor to establish exactly what the position was with regard to the agreement between Century and RTE taking place?

A. Yes.

247 Q. And we know that there was an amount of correspondence then, this is starting in December and leading into early January, from the Secretariat to the Department of Communications on the issue of RTE charges, isn't that so?

A. Yes.

248 Q. The Department was informed by the IRTC, that the three major contenders, certainly the three land based contenders

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all intended to use the RTE system and all felt that the charges being sought were excessive, isn't that so?

A. (Witness nods.)

249 Q. And that, I take it, was with the intention that the Department would carry out some form of a review in the first instance to establish the merit or otherwise of the figures being proposed by RTE and hopefully, that it would achieve a satisfactory level of charge from the point of view of any applicant, isn't that right?

A. (Witness nods.)

250 Q. Now, at that point in time, and we are talking prior to the 18th of January, which was the date upon which the decision to grant the franchise to Century, subject to contract, was made, any one of the three land based services might be the person who would actually be dealing with RTE, isn't that right?

A. Yes.

251 Q. We know from the documentation which has been furnished that there were meetings between the Department and RTE in the first week of January and in the second week of January, and that in the second week of January, on the 11th of January, agreement was reached as between RTE and the Minister regarding the level of charge which was considered appropriate by the Department of Communications and the Minister on the one hand and RTE on the other, isn't that so?

A. Yes.

252 Q. On the 5th of January there had been the first meeting of the IRTC convened after the receipt of the applications of the various applicants and after the preparation by the

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Secretariat of the documentation which it analysed those applications under. And we see from the minutes of that date, that there was detailed examination of each of the applicants, isn't that so?

A. Yes.

253 Q. And in the course of the consideration of the documents, the body of the Commission had with it a proposed list of questions which had been drafted by the Secretariat in respect of each of the three applicants, and these were possible questions or expressed to be possible questions to be put to the applicants at a public, semi-public session of the IRTC which was to take place at the National Concert Hall the following week, the 12th of January?

A. Yes.

254 Q. And at that meeting, I think it was decided that any questions which were to be put in the course of the public submission would be questions which would be channelled through you, the Chairman, and asked by you of the applicant, isn't that so?

A. Yes.

255 Q. And the documentation would suggest that one of the questions which was intended to be asked of, perhaps I will rephrase that - one of the possible questions to be asked of Century appears at page 6086, at No. 10 where it states as follows: "On page 37 of your proposal, you state that the financial demands being made by RTE for the siting of the transmitters of 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

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with the whole project?" That was one of the questions which it was considered as a possible question of the applicant at the oral hearing on the 12th.

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Now, we know that this was a question which was not in fact asked of them, and I am wondering firstly, whether or not you can recall why it was that it was decided not to ask this question?

A. I thought it was an unfair question to ask Century, would they throw in the sponge if they didn't get their financial arrangement right?

256 Q. Right. They, in fact, unlike the other two contenders, had stated that the project was not viable, isn't that right?

A. All three said.

257 Q. Well, all three indicated that the amount that was being sought was excessive?

A. Yeah.

258 Q. But only Century indicated that the project was not viable, and this question appears to have been framed with a view to addressing what might happen in the event that the Minister and the IRTC agreed that the RTE costs would be justified.

.

Now, that makes an assumption on the part of the questioner here, that the Commission would know a particular figure was being asked by RTE. Secondly, that it would have entered into some form of arrangement or some form of communication with the Minister, and that it would have agreed with the Minister the reasonableness of a particular

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fee. And then in the knowledge that it knew that figure, that it would then ask Century whether or not Century would be prepared to proceed if the figure was agreed by the Minister and by the IRTC, but did not match their figure. Isn't that a fair summation of what is intended, the scenario that was intended to be addressed here?

A. Yes.

259 Q. And I take it, that that was on the basis that at the time that this question was framed, there was in fact an on-going process between the Minister and RTE, which was hoped would result in agreement between those two bodies and that that agreement would be communicated to the IRTC, and presumably it would consider whether or not to adopt those figures itself, isn't that right?

A. Yes.

260 Q. So that if it had transpired that both the IRTC and the Minister were agreed as to the proper level of charge, it would really have been superfluous to have analysed or considered in any detail the Century charge, if Century were maintaining a position that they had stated in writing, that it was not viable above their figure, isn't that so?

A. Perhaps, yes.

261 Q. Because we see that on the 12th, which was the day of the oral submissions, the RTE figures had in fact been agreed in a downward fashion from the original request by the Minister and by RTE, and it would appear that this was communicated to the IRTC. Can you recollect being informed by your Secretariat that the Minister and RTE had now agreed a figure?

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A. No.

262 Q. No?

A. I don't remember.

263 Q. You don't remember?

A. No.

264 Q. The contemporaneous documentation which has come to the

Tribunal would indicate that the IRTC had provided on the
12th of January to Century Radio, the latest RTE figures.

Have you any reason to dispute that that is the position?

A. No.

265 Q. No. And what I am wondering is whether or not you have a

recollection that either in the course of, or perhaps
before or in the course of or subsequent to the submission
being made by Century on the 12th, that new figures came
from the Department with an indication that the Minister
and RTE had now agreed these figures?

A. I don't, I don't recollect.

266 Q. You don't recollect. Obviously it is something which

would be very material because it would now remove from the
IRTC's concern the question of what the appropriate level
of charge would be, isn't that right?

A. Yes.

267 Q. Because they could then consider each one of the three

applicants in the light of a definite finding that the
likely level of charge was going to be 692,000 for the FM
service, isn't that so?

A. Yes.

268 Q. If they had so considered the situation, it would be

apparent to them that one of the contenders, namely
Century, was seriously short of the amount that the

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Minister had agreed with RTE as being appropriate, isn't that correct?

A. I don't know.

269 Q. Well, there would appear from the documentation to have been a meeting convened by yourself and your Secretary with one of the applicants, that is Century, on the 13th of January of 1989, this is on the morning following the oral submissions having been made?

A. Yes.

270 Q. And I - do you have any recollection of why it is that such a meeting was set up?

A. No, I haven't.

271 Q. No. As an aid it may be helpful for you to see the content of a faxed communication from Mr. Stafford to his technical advisor in the UK, Mr. Ray Hills, which appears at page 5600. This is a fax which was apparently sent or typed at 12:15 hours on the morning of the 13th of January of 1989. It was from Mr. James Stafford to Mr. Ray Hills, who was his technical advisor who was formally of the Independent Broadcasting Authority's consultancy service in the UK, but who had been providing services on a personal consultancy basis from November onward to the Century applicants.

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And in this fax Mr. Stafford deals firstly with the question of the RTE charges, and he says:

"Oliver Barry's office are faxing you details of the RTE charges." Those RTE charges are the RTE charges which were agreed with the Minister on the 11th and which, as I say, revised the initial RTE figures downward to a figure of

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692,000 on an annual basis for the FM service.

.
And he goes on to say: "I have just returned from a very satisfactory meeting with the Chairman and Secretary of the Commission. Decision will be announced next week."

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Do you have any recollection of discussing in anyway with Mr. Stafford, the fact that a decision would be made at any particular time?

A. No, I have no recollection.

272 Q. No. Do you have any recollection of any circumstances which would lead Mr. Stafford to believe that this had been a very satisfactory --

A. No.

273 Q. The message goes on to read: "The Chairman and Secretary require with greatest possible urgency as much information as possible before close Monday to challenge the RTE figures and justify ú300,000 as the correct charge."

.
Now, if this is an accurate account of what took place at the meeting referred to in this fax, which took place earlier that morning, it would appear to indicate that yourself and Mr., and the Secretary required further information from the promoters of the Century scheme?

A. I have no recollection of the occasion.

274 Q. You don't recollect it. Have you any recollection at that time, that is after the public sitting, of the body of the IRTC expressing at the conclusion of the oral submission a requirement for further information dealing with transmission charges or that that should be something which

should be sought by yourself?

A. I don't, I don't recollect.

275 Q. You don't recollect it. In any event, the request which was contained in this document by Mr. Stafford resulted in a document being furnished to the Commission on the 17th of January of 1989, and if we can look to page 6078 we will see a letter from Mr. James Stafford to Mr. Sean Connolly, the Secretary, and this was the response to the requirement that Century would provide information to challenge the RTE figures and to justify the ú300,000 Century figures.

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In it Mr. Stafford says: "Dear Mr. Connolly, I enclose copy of the IBA fax just received here this morning. In addition I would like to make the following observations." And he makes three observations here in relation to matters which are not specifically dealt with in the enclosure, which was the document from the IBA.

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The IBA document, if we can turn to that for the moment, is at page 6080, and unfortunately it is a rather poor copy because it is a photocopy of a fax, but to give the origins of this document; this is a document which contains the text of a memorandum which was prepared by Professor Hills and given to the IBA with a view to assisting them in delivering a report, the report to be delivered on the basis of a brief which had been given to them by Professor Hills which set out a number of parameters within which they were to work.

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But we will see from this document here, Judge Henchy, that

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it does not in fact set out a breakdown of a €300,000 figure. It contains references to specific charges, one in relation to additional maintenance which is estimated at €30,000, and the other cash figure is €55,000 for distribution of programmes, and that latter figure was one which was an RTE figure with which the IBA was in agreement.

.
So that as regards the resolution of any dispute between the RTE figures and the Century figures, this particular enclosure did not address that issue. And it accompanied the letter from Mr. Stafford of the 17th of January where in his address to Mr. Connolly other than referring to this document, that is the enclosure, Mr. Stafford goes on to make points of his own, three points which are set out there.

.
Now, those three points, Judge Henchy, were not points which were addressed by the IBA, but seemed to have had as their origin Mr. Stafford's own philosophy on the whole idea of public service broadcasting on the one hand and his view as to long-term financing, and his comparison drawn between Downtown Radio's transmission charges and his application of their charge to the southern Irish situation, isn't that so?

A. (Witness nods.)

276 Q. In that documentation, I think it is clear that the document does not provide a justification of €300,000 as being the correct charge for the service, isn't that so?

A. I can't comment. I don't remember the document at all.

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277 Q. You don't remember it at all?

A. No.

278 Q. I see. This document having been received on the 17th, presumably was a document which was considered by yourself and your Secretariat prior to the decision-making process taking place on the following day, the 18th, isn't that so?

A. I can't say because I don't remember.

279 Q. I see. Do you remember whether or not this documentation was brought to the meeting of the 18th so as to enable --

A. No, I can't remember.

280 Q. You don't remember that either. Do you remember anything about the decision-making process which took place on that date? Do you know how it was advanced? Do you know how the consensus was achieved, for example?

A. No, I don't remember.

281 Q. Do you know whether on this --

A. Eventually it was unanimous.

282 Q. Yes. We are told that it was a relatively short meeting?

A. Yes.

283 Q. Yes. Was this a meeting at which you expressed your views ahead of others or can you recollect your views being --

A. I can't recollect.

284 Q. You don't recollect. There was a meeting between yourself and the Minister on that date at about 2 o'clock or 2:30 that afternoon?

A. Yes.

285 Q. Do you remember the detail of that meeting at all?

A. No, I remember nothing of that meeting.

286 Q. Right.

A. It is the only occasion on which I ever met the Minister on

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my own.

287 Q. On your own. I take it that was a meeting which took place after the decision had been taken?

A. Yes.

288 Q. And presumably therefore was to communicate to him as Minister --

A. I think so.

289 Q. -- what the result was?

A. And I don't think any record was kept, merely communicating the result to the Minister.

290 Q. Yes. The result having been communicated to the Minister, you would have expected and the IRTC I think expected, that the signing of the formal contracts both as regards the transmission contract with RTE and Century, and the licensing contract or franchise contract between the IRTC and Century, would be concluded within a relatively short period of time?

A. I wouldn't have thought so.

291 Q. You wouldn't have thought so?

A. (Witness nods.)

292 Q. You were to be proved right in that regard certainly?

A. (Witness nods.)

293 Q. And at a relatively early stage immediately after the decision had been made to grant them the franchise, the Secretariat was writing to the Minister to indicate that there were difficulties in relation to the agreement to provide transmission charges through RTE, isn't that right?

A. (Witness nods.)

294 Q. We know from the correspondence that on the 6th of February of 1989 a document, 176 - Mr. Connolly, your Secretary, was

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writing to the Minister in the following terms - 176.

"Dear Minister, I enclose copies of documentation in connection with the charges being sought by RTE for providing transmission services to Century Communications for the independent national radio station. The matter is now extremely urgent, as contracts for the provision of the new transmission equipment must be signed in the next few days if the new station is to make the proposed start-up date of May 1st.

.

In the circumstances I would appreciate your urgent observations/decision on the charges being sought."

.

Now, it would appear that the Minister had agreed with RTE on the 11th of January what the appropriate charges would be. Do you know of any circumstances which caused the IRTC, if they were aware of that knowledge, to bring the matter back to the Minister for further review?

A. I can't say. I can't say.

295 Q. Did you understand that the IRTC identified its position with that of Century in the issue as to the reasonableness or otherwise of costs?

A. Oh, I think the general opinion in the IRTC was that RTE's charges were too high.

296 Q. Yes. Now, do you know the basis for that?

A. Well, one of the basis was that they weren't given full coverage of the country.

297 Q. Mmm. But the plan was, of course, that there would be an incremental level of charge which would vary in accordance with the degree of coverage which was available, and that

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the ultimate charge which was being quoted for would only become payable when the 98.5 percent coverage had been achieved over the four-year period, isn't that right?

A. Yes.

298 Q. So certainly the RTE figures would appear to have taken into account a gradual increase in charge over what was called the "start-up period", isn't that right?

A. Yes.

299 Q. So the complaint was essentially that the charge that was being asked for was too much, but against what comparison can you recollect was it too much, or was it merely the --

A. There was no comparison.

300 Q. Yes.

A. There was nothing to compare with at the time. This was new territory, but the general impression among the members of the IRTC was that the charges were too high and that was proved to be correct.

301 Q. Well, if we look to the meetings then of the IRTC, and in particular their meeting on the 9th of February of 1989, which is at page 5570. The question of RTE charges is dealt with as follows: "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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This seems to recognise that at that time representations had been made to the Department by the IRTC on the subject

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of RTE charges, isn't that right?

A. Yes.

302 Q. And equally there must have been some indication back from the Department that lead the body of the meeting to believe that despite those representations the desired result would not be produced, isn't that so?

A. (Witness nods.)

303 Q. Can you indicate to the Tribunal what your memory of what the desired result was?

A. No.

304 Q. What was desired to be achieved?

A. I can't recollect.

305 Q. You can't recollect. It would appear that, if this record of the meeting is accurate, that the IRTC had determined that notwithstanding that their submission to the Department was likely perhaps to produce a result which was undesirable from their point of view, that an alternative means of advancing the cause of Century should be adopted, and that was that you, the Chairman, should contact the Minister with a view to obtaining an early decision.

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Now, that decision on the 9th of February was followed by a meeting which you attended with the Minister on the following day at 9:30 in the morning of the 10th of February, 1989.

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Do you have any - when I say that, I am working off the diary of the Minister, who has pencilled in, pencilled in

--

A. I have no diary and I have no recollection.

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306 Q. You have no recollection of proceeding on the basis of this direction from the Secretariat, or rather from the Commission, and meeting the Minister?

A. No, I have no recollection.

307 Q. I take it you had relatively infrequent meetings with the Minister?

A. Relatively.

308 Q. Relatively infrequent meetings with the Minister?

A. Very rare.

309 Q. You didn't have many?

A. Very rare.

310 Q. Very rare. Is it that you can't remember this specific one?

A. I can't remember it.

311 Q. You can't. I see. Presumably however, since there had been a very recent determination by the Board you were there to convey the wishes of the Board to the Minister and to address the issue of RTE transmission charges at that point in time, isn't that so?

A. Yes.

312 Q. It would appear to follow that that was the likely subject matter of that meeting. Do you know whether you were accompanied by any member of the Secretariat to that meeting or whether --

A. No, I don't remember.

313 Q. No. Is it the case that there were meetings between the Minister and yourself which were not meetings attended by any member of your Secretariat?

A. I can't remember anything.

314 Q. You can't remember. Do you have a memory of having a

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member of your Secretariat present at each meeting that did in fact take place?

A. I think so.

315 Q. You think so. Now, certainly there is no minute available in the records of the IRTC as to what transpired at this particular meeting on the 10th, nor is there any minute in the Department at which what transpired from the Minister's point of view at that meeting took place, so we are at a loss at this point, until such time as Mr. Burke gives evidence, as to what exactly took place at that meeting.

.
But if we look to the correspondence which was contemporaneous to that event, we will see that immediately before the meeting itself, there had been a letter that we have already had on screen from Mr. Connolly, with a number of enclosures to the Minister.

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That was the letter of the 6th of February, and it contained, amongst other documentation, a review or submission drafted by some members of the IRTC Secretariat. We see that at page 177.

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This document is headed "RTE Transmission Charges." It is a two page document, and it commences by reference to a copy of the RTE quote. The RTE quote that is referred to here is the RTE agreement of the 11th of January, 1989, with the Minister and RTE, which provided for an FM service at an annual charge of 692,000.

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The author of this particular report indicates in the

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second paragraph here, that "there is substance in the Century argument about double payment for the transmission network."

I am wondering whether or not you, as Chairman of the Commission, would have approved this draft or submission to the Minister before it was sent by --

A. I can't say.

316 Q. -- your Secretary? You can't say. Could I take it that it would be improper that the Secretariat would have itself expressed a view and sent it to the Minister without having cleared it with the Chairman, isn't that right?

A. Yes, yes.

317 Q. So insofar as this view was expressed, I take it on balance, it is a view with which you had knowledge and which you agreed was appropriate to be sent to the Minister?

A. I can't agree because I have no memory of it. It is 12 years ago, I don't remember any of this.

318 Q. Did you - you were firstly a very active Chairman in this particular regard, and you pursued each of the tasks which was given to the Commission with considerable vigor in an effort to bring this matter to a head, isn't that right?

A. (Witness nods.)

319 Q. And to a licensed system of broadcasting, in addition to the RTE service available, in the shortest possible time, isn't that right?

A. Yes.

320 Q. You do remember, I take it, meeting all sorts of deadlines which were imposed, and trying to meet other deadlines

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which were not in fact reached, isn't that right?

A. (Witness nods.)

321 Q. There was an urgency about this work, isn't that so?

A. Yes, it was one of many other tasks.

322 Q. Of course, but we understand from the Commission members

that it had been the intention of the Commission that the national radio franchise would receive a priority, in a sense that it would be the first one to be licensed, isn't that right?

A. Yes, yes.

323 Q. Now, I would suggest to you that it is unlikely that a view

on the adequacy or otherwise of RTE charges could have emanated out of the Commission under your chairmanship unless it had received your sanction and approval?

A. I can't say because I don't remember the document.

324 Q. Very good. When the Minister met with you, could I

suggest that it was likely that he had before him this submission which had been posted to his Department on the 6th, and you were meeting him on the 10th?

A. Again I can't say.

325 Q. Yes. Can you remember anything at all of any discussion

at any time in February of 1989 where you and the Minister discussed the question of the RTE transmission charges?

A. No, I have no memory of any --

326 Q. You have no memory. The documentation then which was sent

to the Minister was apparently considered by him, as was the content of the meeting that you took, that you attended with him, because he wrote to you on the 16th of February, 1989, at document 3974, where he states:

"Dear Chairman, I refer to our meeting and the

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documentation sent to me by the Secretary of the Commission regarding some aspects of the quote by RTE for the supply of transmission services to Century Communications.

.

I have had the matter examined by my Department and discussed the issues again with RTE.

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At my strong urging they have now agreed to reduce their annual charge from 692,000 to 614,000. Depending on actual physical implementation of the project they would expect to build-up to this final figure in the following approximate manner: (All at October 1988 prices.)

1989 - 200,000.

1990 - 430,000.

1991 - 530,000.

1992 - 614,000.

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I am satisfied that, in Irish conditions, the foregoing charges are not unreasonable."

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Now, obviously whatever discussion you had with him on the 10th was one where you had advanced, insofar as you could from the knowledge available to you at that time, the IRTC's position with regard to the level of charge intended to be applied by RTE, and we may take it from this response here, that that was a matter which had been considered and had the effect, certainly, of a reduction in the figures which were being asked by RTE?

A. Yes.

327 Q. An analysis of those figures would indicate that over the

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period of the franchise of seven years, the application of these revised figures to the figures which had been agreed on the 11th of January of 1989 effected a reduction in those fees over that period of time of some ú636,000.

I take it that having received this document, you were hopeful that the matter was now capable of resolution as between the parties, given that the Minister had further reduced the figures?

A. Mmm.

328 Q. And we see from an undated letter, which follows immediately upon that last letter, at page 3948, that you wrote to the Minister thanking him for his letter of the 16th of February of 1989 outlining the position regarding the transmission charges, and you raised a number of points, the first of which was a request that you might transmit a copy of his letter to Century Communications. That was in effect to inform them of the reduction which had been achieved and of which you had been advised on the 16th. It is the last document we saw. And that document apparently was furnished by the Commission to Century Communications.

CHAIRMAN: Just pause there and have lunch.

MR. O'NEILL: Very good, Sir, yes.

CHAIRMAN: Thank you.

MR. O'NEILL: What time will we resume?

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CHAIRMAN: 1:15, is that reasonable? Sorry, 2:15, is that reasonable?

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MR. O'NEILL: Very good, Sir.

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THE HEARING THEN ADJOURNED FOR LUNCH.

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THE HEARING RESUMED AFTER LUNCH AS FOLLOWS:

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JUDGE SEAMUS HENCHY RETURNED TO THE WITNESS-BOX AND
CONTINUED TO BE EXAMINED BY MR. O'NEILL AS FOLLOWS:

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329 Q. MR. O'NEILL: Before lunch, Judge Henchy, we were dealing
with a letter which had been sent by you to the Minister,
in which you were requesting permission to convey the
contents of his letter, of the 16th of February 1989, to
Century Communications; and I think you obviously received
permission to do so, and it would appear that you did so,
probably by handing a copy of that letter to the
representatives for Century at a meeting which took place
on the 20th of February.

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And if we look to the document at page 3973, we will see
that that's the faxed letter which was received from
Century Communications to yourself, it commences:
"Dear Chairman, thank you for seeing us at such short
notice today, when you were kind enough to give us a copy
of the Minister's letter dated the 16th of February."

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That is a fax, if you look to the top left-hand corner,
which was sent on the 20th of February, 1989.

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Now, immediately before that, in the days between the
receipt by you of the Minister's letter of the 16th, and
this meeting with Century, a letter had been sent by Mr.
Barry and Mr. Stafford to you, on the 17th of February,

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1989, and its reference is 3975.

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This was a letter which followed upon a board meeting having taken place of Century Communications, on Tuesday the 14th of February, and you are advised in this letter of the appointment of Mr. Laurence Crowley as Chairman, the addition of Mr. Terry Wogan and Mr. Chris de Burgh.

.
If we move to the second paragraph of that letter, you will see that they address the RTE transmission charges issue as follows: "The board meeting reviewed the question of transmission charges. They were of the unanimous opinion that the ú375,000 offered to RTE for a full transmission service was, given the advice that they had from the IBA, fair and reasonable. Furthermore, they were of the unanimous view that they were not prepared to negotiate or increase that offer as it would affect the viability of the service. They expressed their concern that RTE, as custodian of the national transmission network, had an obvious conflict of interest with their role as providers of transmission services to the independent broadcasters, and that in the circumstances they could not understand why, given that the Minister has power under the Act, a directive has not been given to RTE."

.
So, we can see from this letter, firstly that the position was now made clear to the IRTC that Century would not negotiate, that they were sticking with their original figure; isn't that the clear import of that message to you?

A. (Witness nods).

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330 Q. And secondly, if we view this in context, this was a letter which was written following a board meeting of the 14th of February. It would not appear that the Board members were aware of the Minister's decision to further reduce the RTE figures from the January figure to a figure of ú614,000 on an annual charge for FM, which is what he communicated to you on the 16th, isn't that right?

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They were writing this letter without knowledge of that, because you see from their letter of the 20th, that they received the letter of the 16th when it was handed to them by you at your meeting on the 20th, isn't that so?

.
So the position at that point in time then was when you received the letter from Century, which was a letter which thanked you for meeting them on that date and thanked you for a copy of the Minister's letter, you enclosed that letter to Mr. Burke, a letter of the same date, the 20th of February 1989; and we see that at page 3980.

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That letter reads: "Dear Minister, please see the enclosed copy of a letter received today from Century Communications concerning the charges being sought by RTE for the provisions of the transmission facilities for the new independent national radio station. Please note that Century Communications are seeking a Ministerial Directive under Section 16 of the Radio and Television Act, 1988. It will appear that a contract with Century Communications cannot be entered into until this matter is cleared up.
I look forward to hearing from you at your earliest

convenience."

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Now, you are aware of the provisions of Section 16 of the Act in question, and if we put that on screen please? It is at page 5585? This states in subparagraph 1:

"The Minister may, at the request of the Commission, and after consultation with Radio Telefis Eireann, require the latter to cooperate with sound broadcasting contractors in the use of any mast, tower, site or any other installation or facility, needed in connection with the provision of transmission facilities for sound broadcasting services to be established under the Act."

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Now clearly what is envisaged in that section is firstly that the Minister may exercise this power at the request of the Commission, isn't that so? Is that what you understand the section to mean?

A. Yes, yes.

331 Q. Yes. And that, I take it, was at the request of the Commission rather than any individual member of the Commission, albeit the Chairman or anybody else, isn't that correct?

A. Yes.

332 Q. It would require the Commission's decision to make such a request of the Minister, is that correct?

A. Yes.

333 Q. And we will see that the minutes of the Commission meetings indicate that there was a meeting of the Commission on the 9th of February of 1989, and that the next meeting to follow upon that was the meeting of the 21st of February

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1989, which took place at Jury's Hotel in Cork where the Dublin Radio Franchise decision was reached. So that there was no decision of the Commission, I beg your pardon, there was no meeting of the Commission between the 9th of February 1989, and the 21st of February 1989. Does that accord with your memory of it?

A. Yes.

334 Q. So that when we look to the letter of the 20th of February, 1989, obviously the reference here to the enclosure was that you, as the author of this particular letter, were enclosing for the attention of the Minister, at page 3980 please? You were enclosing for his attention a communication which you had received, in which Century Communications were seeking the Ministerial Directive, isn't that so?

A. Yes.

335 Q. And I think it seems to follow from that, that this letter was not, of itself, a request by the Commission to the Minister for him to exercise his powers under that section, isn't that correct?

A. (Witness nods).

336 Q. Do you agree with that?

A. Yes.

337 Q. Right. So that the matter proceeded then with the next contact from the Minister to you, being a letter of the 14th of March 1989, which is at page 3984. This is the letter which indicates that the Minister is directing under the Section 16, that certain steps take place. It reads:

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"Dear Chairman I refer to your letter dated the 20th of

February 1989, regarding transmission charges for the national independent radio service. Following consultation with the Commission through you and with RTE, I have now decided to direct under Section 16 of the Radio and Television Act 1988, that the following payments be made to RTE by the sound broadcasting contractor for the national independent radio service, Century Communications" and he goes on then to detail the specific directions that he made in financial terms.

.
Now, am I correct, from my review of the documentation there so far, to reach the conclusion that the Commission itself did not request of the Minister that he intervene, pursuant to Section 16 of the Act and direct RTE to fix its --

A. I can't say. I never heard it suggested that the Commission didn't request.

338 Q. Well, have you any evidence to assist the Tribunal in this regard? Because the correspondence that we have opened to date, if this is the only correspondence --

A. I can't help you at this stage, 12 years after the event. All I know is that nobody ever questioned the fact that the Commission had requested.

339 Q. I see. Who would you have expected to question it other than somebody who is reviewing the entire history?

A. Well, I don't know. I haven't heard any suggestion to the contrary.

340 Q. Very good. Well, are you in a position to comment one way or the other on whether or not there was any communication to the Minister from you, or from the Secretariat, over and

above the letter of the 20th of February 1989, where you enclosed the copy of the Century Communications letter to you of the same date, and asked him to note the Century Communications, that Century Communications are seeking a Ministerial Directive?

A. I can't say. I haven't seen any of the documentation since I left the Commission in 1993.

341 Q. Yes. In relation to that, I think that the Tribunal furnished you with all of the copy documentation that it considered might be relevant to this phase, in advance of this hearing, isn't that so?

A. Yes.

342 Q. If I might move now, Judge Henchy, to the question of the ministerial, the Minister's involvement with you after the direction had been given by him, and leading up to the conclusion of the contract between the IRTC and Century Communications. We hear from Mr. Connolly that these were difficult negotiations, in fact he described them as "the most difficult contract negotiations that the IRTC experienced in the granting of franchises to any other independent operator", isn't that so?

A. Yes.

343 Q. And he has also indicated to the Tribunal that there was a considerable degree of frustration building up within the Commission at the delay which was perceived by the Commission to be the delay of Century, isn't that so?

A. Yes.

344 Q. Do you recall that being the position?

A. I do.

345 Q. And at one point in time I think that Century were blaming

the Secretary of the Commission for being in delay with regard to the production of a contract for them to sign on the transmission issue, isn't that so? Do you remember that?

A. No.

346 Q. You can't remember. In any event, these matters were evidently resolved, to the extent that an agreement was in fact signed between Century and the IRTC, isn't that so?

A. (Witness nods).

347 Q. Can you recollect that before that took place, there were difficulties arising from the fact that Century were initially unwilling to provide the news service in Irish, which the Commission felt was appropriate and was a requirement of their franchise?

A. (Witness nods). Yes.

348 Q. You remember, I think equally, there were a number of other related issues, firstly as regards the proportion of news bulletins which would be contained within their programming schedule. They were seeking, I think, to start up on a less than complete basis and build up to the position that they had envisaged in the programme furnished to the Commission at their application date, isn't that right?

A. (Witness nods).

349 Q. And is it the case that these were found by the Commission to be unacceptable derogations from the obligations which had been assumed in their application?

A. Yes.

350 Q. And they were so informed that they would not be granted the franchise unless they complied with these particular requirements, isn't that so?

A. That's right.

351 Q. Mr. Connolly tells us that prior to that decision being taken, that there were meetings between the Minister and yourself and Mr. Connolly on these issues. Can you recollect that there were such meetings?

A. No, I don't recollect, but I do recollect that the Minister suggested that we were being unduly severe.

352 Q. Yes. And I take it your memory extends to the reasons why the Minister thought you were being severe? He thought they should be allowed to get up and running on a partial basis, isn't that right?

A. Yes.

353 Q. And obviously that would have been what was asked by Century and what was being refused by yourself?

A. Yes.

354 Q. So to that extent the Minister adopted the position of Century, whether as a result of their --

A. Yes.

355 Q. -- their request or otherwise, isn't that so?

A. Yes.

356 Q. And ultimately that was something which you and the Commission rejected, isn't that so?

A. That's right.

357 Q. Was there - do you remember those meetings at which the Minister sought to --

A. No, I think there was only one meeting.

358 Q. I see.

A. In which the Minister suggested that we were being entrenched.

359 Q. Very good. Now, once Century came on air it was evident

that the wounds, if I might call them that, of the contractual negotiations which had taken quite some toll on the Secretariat, would have to be healed; and a meeting was arranged by the Secretariat of the IRTC with the management of Century, and that meeting took place on the 15th of September of 1989, at the Grey Door Restaurant.

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It was attended on behalf of the Commission by Mr. Connolly and by Mr. Appleby. It was attended on behalf of Century by Mr. Laffan and Mr. Story; and we heard evidence yesterday from Mr. Connolly in relation to a minute of that meeting which was kept by either Mr. Story or Mr. Laffan, in which concerns are recorded as having been expressed by Mr. Connolly to the representatives of Century then present at that meeting. I might refer to that, to the document in question, it is at page 2993.

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This is one page of a lengthy note which was prepared following this meeting, and it records, from the point of view of the author, certain statements which were made by Mr. Connolly and which Mr. Connolly has adopted in his evidence, given yesterday.

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If I could refer you to paragraph two, it states:

"At this stage Mr. Connolly stated that the promoters of Century Radio were too highly politicized. He stated there was a high degree of suspicion with regard to the motives behind the actions of the promoters of Century Radio. He stated specifically that this was evident in respect of the manner in which the negotiations with RTE were handled and

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subsequently the very obvious way in which Century attempted to hijack the signing of the broadcast contract on the day of signing."

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If we can move then to the penultimate paragraph on that page: "He again" this is attributed to Mr. Connolly "he stated that Century felt empowered to enlist the support of ministers wherever and whenever they chose. As evidence he pointed to the issue of the Ministerial Directive and the almost daily consultation with the Minister on matters which rightly belonged to discussion and negotiations between Century, the IRTC and RTE."

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Now, in adopting these statements, or this record as being an accurate statement of what he said at the time, Mr. Connolly indicated that he was expressing here not only his own personal view, though he apparently shared that view, but that he was expressing the view of the Commission on these issues; and those views being, firstly that the promoters of this enterprise, Century, were too highly politicized; and secondly, that they seemed to have power to call in a Minister whenever and wherever they chose, and this was evident in their negotiations on the matters referred to here in.

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Do you share that view? Did you have that view at the time?

A. No.

360 Q. You didn't share that view?

A. No.

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361 Q. You have a firm memory of that, do you?

A. Not a firm memory, but --

362 Q. I see.

A. I didn't ever form those views.

363 Q. I see. So Mr. Connolly must then be in error?

A. No, no. He may be quite correct, he knew more about it than I did.

364 Q. But in error in stating that when he indicated this, he was expressing the view of the Commission and not necessarily, or solely, his own view?

A. Well, I can't express an opinion on that.

365 Q. MR. O'NEILL: I see. That concludes my questioning.

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CHAIRMAN: Does anybody wish to ask Judge Henchy any questions?

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MR. FOX: I have one matter to raise with Judge Henchy.

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CHAIRMAN: Anybody else?

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MR. O'HIGGINS: I have one very short matter as well Sir.

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MS. EGAN: I have a couple of questions Chairman.

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CHAIRMAN: Right. We will take it in the usual order. Mr. Fox?

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

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366 Q. MR. FOX: Judge Henchy, I appear for Mr. Burke before the

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Tribunal. You said in your direct evidence to Mr. Neil, Mr. O'Neill, I beg your pardon, as follows: "I never heard it suggested" this was regarding the Section 16 directive I should say, you said:

"I never heard it suggested that the Commission did not request the Minister for a directive."

Now, you said that in your direct evidence, so can I take it then that it wasn't an issue?

A. No, it never was.

367 Q. It never was an issue. But can I take it then with the benefit of hindsight, that the Commission was in agreement on the request for a directive?

A. Oh, I am quite sure of that.

368 Q. Thank you very much, Judge Henchy.

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

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369 Q. MR. O'HIGGINS: Judge Henchy, you said that the general opinion on the Commission was that the RTE charges were too high. Is that so?

A. Yes.

370 Q. Yes. Can you recall on what basis was that assessment made?

A. It was the general opinion of the members of the Commission.

371 Q. Was it based on any expert view or information canvassed by the Commission?

A. I can't say, but it was the general opinion.

372 Q. Sorry, you can't say what?

A. I can't say what that opinion was based on, but the

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original figure suggested by RTE was high and it was accepted by RTE as having been too high.

373 Q. In what sense are you suggesting that it was accepted by RTE as being too high?

A. They reduced it.

374 Q. Of course, they reduced it at the Minister's request against the background of the possibility of a Section 16 directive. But have you examined any of the figures in order to substantiate a suggestion that it was, in any sense, too high?

A. Well, Century had got opinions from England to the effect, to show that it was too high.

375 Q. If I could suggest to you that the evidence suggests that the opinions which Century suggested, which I think had been got from England, didn't emanate from the sources from which they emanated, would you then be - would you be in a position to comment on that?

A. No, I am not in a position, I don't know where the opinions came from.

376 Q. You did meet, it appears, with Century on the 13th of January 1989, as a result of which meeting they recorded that they had been asked to get material to substantiate the validity of their proposed charges. And it appears no material substantiating them was got. Can you make any comment on that?

A. No, I can't.

377 Q. You said that the RTE charges then were proved to be too high, or at least that the opinion that they were too high was proved to be correct. What do you maintain establishes that proposition?

A. I think the fact that it wasn't viable for Century to pay the original figure and be successful as a broadcaster.

378 Q. Well, with respect, surely what was plain, ultimately, was that Century wasn't viable, but one might as well put that down to the price of electricity or cars or petrol or cameras, possibly as to transmission charge?

A. Possibly, but I was of the other opinion.

379 Q. Well, was there any substantial expert basis for allowing you to form that view?

A. I can't say now, at this stage.

380 Q. You are not in a position to say whether there was or there was not an expert basis for so doing?

A. No.

381 Q. And therefore, can I suggest that you are not in a position to say now whether the view taken was correct or not correct?

A. No, it is a matter of opinion.

382 Q. Thanks very much.

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CHAIRMAN: Miss Egan?

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THE WITNESS WAS EXAMINED AS FOLLOWS BY MS. EGAN:

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383 Q. MS. EGAN: Judge Henchy, you have already referred to the Terms of Reference of the Tribunal here today, and you have pointed out that insofar as your evidence is concerned and the evidence of other persons, the Sole Member is inquiring into whether any substantial payments were made to Mr. Burke on the one hand, or whether Mr. Burke conferred any benefit on any party in return for those payments, or

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presumably insofar as the Commission is concerned, whether or not Mr. Burke may have procured, or directed any person, in our case the Commission, to do an act that conferred a benefit on such person.

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You have already stated in your direct evidence that you are not aware of any information in relation to any payments made to Mr. Burke?

A. That's right.

384 Q. In relation then to the second matter, which is whether or not, in your opinion, the Minister procured or directed any benefit to be conferred upon Century, I would have some questions for you.

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In your opinion, did Mr. Burke procure or direct the Commission to confer any benefit on Century?

A. Well, he made the order in regard to the transmission charges.

385 Q. But did he procure the Commission?

A. No.

386 Q. Did he direct the Commission to confer any benefit?

A. No, no.

387 Q. Upon Century? And in relation to the licensing process, Judge Henchy, did the Minister influence or attempt to influence --

A. He did not.

388 Q. -- the Commission in any way in relation to the licensing process?

A. No, in no part, no part.

389 Q. And again, to the licensing process, did the Minister

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influence or attempt to influence you personally?

A. No. No he didn't.

390 Q. In relation to the licensing process?

A. No, no.

391 Q. In relation then to the matter of transmission fees, did the Minister influence or attempt to influence you in relation to supporting Century or not supporting Century in the issue of transmission fees?

A. No, not in the least.

392 Q. And so far as you are aware, did the Minister influence or attempt to influence any other member of the Commission in relation to the matter of transmission fees?

A. I am sure he didn't.

393 Q. It appears, Judge Henchy, that the only evidence of involvement of the Minister with the affairs of the IRTC in relation to Century specifically, may have occurred after the award of the license to Century. In the sense that you said in your direct evidence that Mr. Burke made some representations to the Commission in relation to the Irish language requirement in particular?

A. (Witness nods).

394 Q. I think Sean Connolly, in his evidence yesterday, stated that Mr. Burke had represented that Century should be allowed to grow in to the Irish, to full compliance with the Irish language requirement?

A. (Witness nods).

395 Q. When that suggestion, or representation, was made by Mr. Burke to yourself, or to the Commission, what was the reaction of the Commission?

A. This - excuse me, this gesture made by him to me, and my

00115

reaction was that it wasn't possible to do that. It was neither good for the station nor good for anything else, that the statute was clear on the point, and I felt that we would suffer judicial review if we had given that dispensation.

396 Q. And did Mr. Burke attempt to influence either yourself or the Commission in any other manner?

A. No.

397 Q. In relation to Century?

A. No.

398 Q. I think it would be fair to say, Judge Henchy, that the Commission guarded its independence quite jealously?

A. Very much so.

399 Q. In relation to the license process and in relation to the performance of its functions?

A. Yes.

400 Q. In relation then to the issue of transmission fees, Judge Henchy, I just have a few --

A. Can I say one thing? I dealt with, excuse me, four ministers during my time. Four Ministers of Communications, Mr. Burke; Mr. Brennan; Mrs. Geoghegan-Smith (SIC), and Mr. Higgins; none of them influenced the Commission, and as you say, the Commission was very jealous of its independence.

401 Q. Judge Henchy, in relation to the issue of transmission charges, I had one or two questions for you as well.

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In general terms, when applicants put in applications, indicating certain projected figures for income or other matters, was it the duty or function of the Commission to

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look behind those figures?

A. No, we never did it.

402 Q. And did the Commission look behind the figures of any applicant in any licensing process?

A. No, no. We licensed upwards of 26 local radio stations, and we never went behind the figures, because if the figures were false the license would have been removed.

403 Q. And I think of those 26 stations, I think approximately 25 of them were licensed in the first nine months of the Commission's tenure, I think?

A. Yes.

404 Q. And in relation to all of those licensing processes, was it the practice of the Commission to accept the applicants figures on good faith?

A. Yes.

405 Q. In relation to transmission charges again then, Judge Henchy, did the Commission have the necessary expertise to look behind those transmission charges?

A. No, we didn't, we had no expertise. At that stage we didn't have the finances to provide the expertise.

406 Q. And did the Commission have the resources necessary to look behind those --

A. No, no.

407 Q. -- transmission charges?

A. No, we hadn't the personnel, nor the resources.

408 Q. And is it true to say that the Commission would have viewed the appropriate body for assessing these charges as being the Department?

A. Yes.

409 Q. Judge Henchy, I have one or two questions in relation to

00117

the process that you and the other Commission members used when awarding licenses.

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I think the Radio and Television Act 1988, at Section 5, sets out in very loose terms, and general terms, the procedure to be followed by the Commission in deciding upon sound broadcasting licenses.

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Section 5 of the Act doesn't specifically mention that the Commission has to hold oral hearings, or indeed that such oral hearings be held in public. But in fact I think the Commission voluntarily --

A. That's right.

410 Q. -- embarked upon a procedure whereby oral hearings were held in public?

A. Yes.

411 Q. Can you tell me why that was? That the Commission decided --

A. Well, we felt that it would lend openness and frankness to the procedure. We also felt that it would reduce criticism of our choices if people were able to come. And we made a point of issuing invitations to the press, radio, television, and other people, to attend the meetings. It was felt that this frankness would help the process, it would improve on the quality of the applicants.

412 Q. Also, Judge Henchy, in relation to the issue of Section 16 of the Radio and Television Act, and the power of the Commission to request the Minister to issue a direction in relation to transmission fees; so far as you are concerned, did the Commission make such a request for a direction from

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the Minister?

A. Yes, they did.

413 Q. And so far as you are concerned, did you have authority to make that request?

A. I am certain that I had.

414 Q. In that regard, Judge Henchy, I would like to just briefly draw your attention to a minute of the Commission of the 9th of February, 1989. Perhaps it could be put on screen, thank you Mr. O'Neill?

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MR. O'NEILL: The 9th of February.

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MS. EGAN: The 9th of February, 1989.

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MR. O'NEILL: It is number 5570.

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415 Q. MS. EGAN: Thank you. Judge Henchy, the first substantive paragraph of that sets out a discussion by the IRTC board in relation to the issue of transmission charges. And it says: "As it seemed unlikely that representations to the Department of Communications about the cost of 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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Judge Henchy, in your view, did this provide you with the necessary authority to make a Section 16 request?

A. Oh, yes.

00119

416 Q. From the Minister?

A. I had discussions with the members, I was certain in my mind that the Commission authorised the request for a directive.

417 Q. And in relation to the issue of transmission charges in particular, did you, at all times, keep the board informed of the developments in relation to transmission charges and in relation to the position of the Department at any one time or of --

A. I think so.

418 Q. -- of relevant parties?

A. Yes.

419 Q. I have two final questions, Judge Henchy. In all of your involvement with the Commission, have you ever heard any rumour or suggestion of fees being given in return for licenses?

A. Never heard of it.

420 Q. And so far as you are concerned, Judge Henchy, did the Commission, at all times, act independently of the Minister in relation to the award of licenses and its other functions?

A. Yes.

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MS. EGAN: Thank you Judge Henchy.

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MR. O'NEILL: I have no questions.

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CHAIRMAN: Thank you very much for coming down. I much appreciate your courtesy and kindness in attending.

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THE WITNESS THEN WITHDREW.

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MR. O'NEILL: The next witness will be Mr. Frank Cullen
please. Mr. Cullen?

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FRANK CULLEN HAVING BEEN SWORN, WAS EXAMINED MR. O'NEILL AS
FOLLOWS:

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421 Q. MR. O'NEILL: Good afternoon Mr. Cullen. You were one of
the founding members of the IRTC, isn't that so?

A. That's correct.

422 Q. And I think that you had a history of being involved in the
National Newspapers of Ireland; an entity known under the
abbreviation NNI, isn't that so?

A. That is correct. It was founded in 1985, the beginning of
'85.

423 Q. What were the purposes, or functions, or intentions of that
particular body? What was it formed for?

A. Well, it was officially formed to promote newspaper
advertising.

424 Q. Yes.

A. And that is when I became involved. And it later extended
to be the representative body for daily and Sunday
newspapers in Ireland.

425 Q. Yes. Right.

A. Effectively as a trade association.

426 Q. I see. And that trade association, I think, was always
conscious of its relationship with other media and their
advertising take, isn't that right?

A. Certainly.

427 Q. Right. And we know, I think, that certainly at that time
the only legitimate and authorised broadcaster within the
state was RTE, isn't that right?

A. Correct.

00122

428 Q. All right. There were a number of pirate radio stations which were also carrying advertising material, isn't that right?

A. Yes, that's right.

429 Q. And I think you became aware of, and were conscious of steps which were taken to control that illegal activity, isn't that so?

A. Yes.

430 Q. And you had, for some time, been campaigning or lobbying, insofar as you could, with appropriate ministers, government departments and others, to advance the cause of newspaper advertising wherever possible, isn't that right?

A. That would be correct.

431 Q. Yes. Did you, yourself, have a view on the position of RTE, as a competitor to the newspaper industry?

A. Yes.

432 Q. What was that view?

A. Well, the view would have been that it was a State monopoly. It was dual funded by both license fee and commercial income. Irish newspapers would have simply looked at the fact that they compete with British newspapers in this market for circulation, and when they look at the British market they see that the BBC is a public service like RTE, but was funded solely by license fee, and that independent television in Britain was funded solely by commercial income and had no license fee, and they would have seen an anomaly in that RTE had both license fee and advertising.

433 Q. Right. When it came to the formation of the entity which was to be the IRTC, you came to it, I think, with a certain

knowledge of Mr. Burke, having met him on occasions in the course of your work, isn't that right? And socially perhaps as well, although I am not sure --

A. Well, only in the case of my work. In this case he, along with many other government ministers from different governments and different parties, would have been aware of our views, which were matters of competition, and as we would have seen, were balanced in fair competition in relation to the advertising market.

434 Q. Right. And names were proposed to government, and adopted by them as persons qualified within the criteria of the Act to be members of the Board, and you were one of the persons nominated in that process, isn't that right?

A. Yes. Well I received the call to visit the Minister. I went along to his office, which was near the Mount Clare Hotel. He said that the, I was aware of the Act obviously, that the Commission was being established, that it would be chaired by a Supreme Court judge, although he didn't name any names at all, and he asked would I join the Commission. He emphasised that I was being invited, out of the role I was playing with the professional body in the NNI, but that I was invited in a personal capacity and not as the representative of the newspaper industry.

435 Q. I think you checked with your own body and employers to establish whether or not they would, in any way, object to your being a member of this body, and they cleared you for the position, and accordingly you took it up; isn't that right?

A. That's correct.

436 Q. And we know that it was a position which initially involved

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the members being engaged for one afternoon or one day a week, generally a Thursday, and there were meetings all over the country, isn't that right?

A. Yes, it was quite demanding I have to say.

437 Q. It was quite demanding, not a particularly remunerative activity insofar as the annual charge, I think, was ú800 per member?

A. That's correct.

438 Q. Despite all of that, you managed to attend very many, if not all of the meetings, and you are fully familiar with the progress of the IRTC's business from the time of its inception certainly through its initial phases, isn't that right?

A. Well, I was a member for five years. I contributed fully for that period.

439 Q. You were coming into a new situation here, because there wasn't a precedent for it either as regards the interrelationship which should exist between independent broadcasters and the existing broadcaster, or the sharing of facilities, or the terms upon which that should be done in principle, isn't that right?

A. That's correct.

440 Q. And these were to be issues and problems which presented themselves from time to time before the Commission and it made its appropriate determination, isn't that so?

A. Yes.

441 Q. And if we look to the issue of RTE transmission charges, which is one which is currently under review by the Tribunal; we will see that the initial references to this was that the Commission expressed a desire that the

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Minister would inform the Board as to what the likely rate of charge from RTE would be for services it might provide to any independent service broadcaster, isn't that right?

A. Sorry, could you say that again?

442 Q. The initial involvement of the IRTC with regard to transmission and RTE transmission charges, was to determine at a meeting of the IRTC, that the Minister should be approached with a view to his providing to the Commission details of what RTE charges would be likely to be?

A. Well, first of all, in relation to transmission, I would have so say that I didn't see myself as having any experience in transmission and didn't involve myself to too great an extent on some of the detail. But I would say that there was a strong feeling within the broad membership of the Commission, that RTE should provide transmission to Century, and that it was, an agreement would have to be negotiated, that a reasonable price should be paid for such services. And my view, certainly, would have been that Century was independent and commercial, and therefore should pay a reasonable market price. As to what that price would be, I am not qualified, and was never qualified to determine.

443 Q. Of course, but as regards the philosophy of payment, you certainly, from what you say, were one of the parties who felt that it should be on a stand-alone commercial basis, that they either could afford the taxi fair or they shouldn't take the taxi?

A. But there was a feeling that the Oireachtas had decided to set up independent commercial broadcasting as an alternative to RTE. There was also a feeling that the

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State owned the transmission network, and therefore the charge should be reasonable. Now, what reasonable was I left it to other people to negotiate.

444 Q. Yes. Well, you then were in a position where you were mindful of the criteria that had to be applied by you in order to comply with your statutory function; that was that you were to apply the various tests which we have set out, or were set out in the Act under Section 2. And they involved the Tribunal having, sorry, the Commission having a function to examine the financial status of the proponents, in the sense that they had to ensure the adequacy of their financial backing, and they had to ensure that the application met with economic criteria, isn't that correct?

A. That's correct. But they were entering into a commercial independent market and they had to take their risks as well.

445 Q. Exactly. From your point of view, did you see there being any requirement in the Act, or otherwise, to the IRTC in reaching its decision to effect a subsidy in favour of the broadcaster intending to use the existing system?

A. Well, I certainly, from my view, would have been anxious that there wouldn't be a subsidy, and in no case did I feel that there was.

446 Q. We know that the Commission, as a whole, sat on the 8th of December of 1988, to receive from the Chairman and Secretary a report from them on the question of the RTE transmission charges. And we can put that on screen for you in just one moment.

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It is at page 5568. This would appear to be the first reference in documentation made available by the IRTC to the Tribunal, which indicates that any specific consideration was given to specific information received from RTE, and we know that on the day prior to this meeting, that is the 7th of December, the Chairman and Mr. Connolly attended with Mr. Lackan, your technical expert, at a meeting attended by the RTE Director's and there was an interchange of views, and as a result of that, a document was furnished to the Commission representatives which contained the RTE costings for the provision of service to independent radio.

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Now, this was a document which had already been furnished to each of the applicants who had required it from RTE, so it is a document which we have referred to as the "rate card" in the Tribunal so far.

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That document was a document which carried information broken down into options, it indicated what the option for the FM service would be, what the option for the AM service would be. Whether an all-inclusive option would be partaken of, or a lesser option. These were all set out in detail in this document.

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If we look to the report or the minutes rather, of the meeting of the 8th of December, it would appear that following that meeting and the receipt of that document, there was a report made to the general body of the IRTC, and an agreement was reached by the body, having consider

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that report. That agreement is stated as being: "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."

Do you see that?

A. Well, that seems to be the general view at the time.

447 Q. That was the view, and I just want to establish, if I can, from you, the basis of the IRTC membership reaching this particular decision. We know, for example, that they did not seek outside opinion, they did not avail of the services of their own in-house financial advisors for cost reasons, and the only documentation which would appear to have been considered at this meeting was the document provided by RTE, there had been no alternative figures to that point as far as we know, advanced by either of the applicants. Do you understand the background?

A. I understand.

448 Q. The background leading to this decision. What I would like to know, if you have a memory of it, is what information do you know was considered at this meeting which allowed for the IRTC to conclude that the figure would be very detrimental to the interests of any group interested in setting up the national radio franchise? Was it merely the totality of the sums mentioned in the context of the business that was intended to be carried out, or was it as a result of some critical analysis which was performed by somebody at this meeting?

A. First of all, I can't recall precisely. Secondly, I had no experience of transmission and it was something I deferred to other people on. And I really can't recall a

satisfactory answer.

449 Q. So it was a decision reached, in any event, this certainly expressed a view?

A. There was a broad view within the Commission that the prices that were being asked for by RTE were too high, but it was also seeing that this was a matter between Century and RTE, fundamentally. It was up to the franchise holder to get his transmission up and running.

450 Q. Well, firstly if we look at this particular resolution, it does not conclude that RTE's figures are excessive. It merely indicates that they are "detrimental to the interests" of somebody hoping to set up the business, isn't that right?

A. That's right. But I don't recall us being overly preoccupied by this issue.

451 Q. Right. It was one of the occasions, however, where it was decided that a particular course would be followed, which involved an approach to the Minister, Mr. Burke, and I am trying to establish from you, if I can, why it was felt that in the light of the finding that the sum was detrimental, that there necessarily would have been an approach or intended to be an approach by the Chairman and a representative reflection of the body itself to the Minister? What function did you feel at that point in time the Minister would have, in relation to these figures?

A. Well, as I said, I think the matter of transmission was a matter between RTE and Century. I would have seen the IRTC as having a facilitator role rather than a responsibility in the matter.

452 Q. Mmm?

A. And I mean, I didn't have any, as a member of the Commission, I didn't have any day-to-day contact with either the Minister or RTE or Century. So, unfortunately, I would have to defer to the staff of the Commission on that point.

453 Q. Is it your evidence that in general you would attend at the meetings of the Board, at those board meetings the agenda, presumably that were raised by the Chairman, would be discussed, but that there wasn't a sort of a general trawl by the Commission members on matters which did not appear on the agenda before them for the day?

A. Well, the agenda was always circulated well in advance. There were always notes to the agenda, and I think that developed, as time went on, because in the very early days everything was new.

454 Q. Yes, right. So the RTE transmission charges issue was considered at times when it appeared on the agenda, and presumably, therefore, is reflected in the minutes where we see references to transmission charges?

A. Yeah.

455 Q. Is that fair?

A. I am sorry, but I wouldn't have got - because I wasn't qualified to become involved in precisely what costs would have been.

456 Q. Yes.

A. And you know, franchises were awarded subject to contract, and I would have seen that as a technical issue in the context of tying up the contract rather than in something that was an on-going concern of the members of the board.

457 Q. Obviously, from your evidence, you never considered it an

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obligation of the IRTC to ensure that there was a coming together between RTE and any contracting party, isn't that so? It wasn't the responsibility of the IRTC?

A. Well, it was always going to be difficult. It is something that was new. It was difficult for both sides.

458 Q. Equally, it was a matter which was vital, in the sense that if this agreement could not be reached, there could be no alternatives, no alternative transmission system in being; because if RTE's figures were unacceptable to all of the contenders, there obviously could not be any alternative to RTE's system, isn't that right?

A. Yeah, and perhaps that is the weakness of the 1988 Act, transmission should have been dealt with legislatively before hand, but that is easy to say with hindsight.

459 Q. We have heard the evidence of the IBA system. The IBA would, for example, establish what the rate for access to transmission for a particular area was, before it would seek the contenders for that position, so that they were competing against a known figure, whereas in this case it was an unresolved issue?

A. Yes.

460 Q. Isn't that right?

A. Yes. That's --

461 Q. And it transpired then that the Commission, I assume you are aware of this, through its Secretariat, expressed its concern to the Department of Communications, over time about the differential which existed between the asking price and what might be on offer from the independent broadcasters for the RTE transmission service, isn't that right?

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A. Well, views were being expressed.

462 Q. Yes. But did you know that - did you as a member of the Commission, know that the Secretariat was in touch with the department on a - in correspondence and urging the Department to endeavour to intervene to seek agreement on charges?

A. Well, I was aware of on-going, yes, protracted difficult negotiations.

463 Q. Were you kept aware of the stages of that negotiation, to the extent - were you aware that the Minister and RTE had apparently agreed figures on the 11th of January of 1989? Is that a matter which was brought to your attention as a member of the Board?

A. Well, I don't recall very specific details, but I know at that time, because Century was the first franchise that was awarded, and the major priority of the board members at this stage was continuing with the awarding of all the other franchises, and there was very hectic activity. So this is a matter that I would have seen as technical detail to be resolved prior to the signing of the contract, and largely that was a matter for the staff of the Commission to resolve; but specifically here it was up to, also up to Century to get its transmission in place and to agree an arrangement with RTE. What means they used was not, you know, not my concern.

464 Q. Accepting that it was a concern which was properly vested in Century, and also in RTE, it is nonetheless the case that we can see from the correspondence and the minutes of the IRTC, that the IRTC did in fact engage in the process, insofar as it endeavoured to encourage the Minister;

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firstly the Department to reach agreement with RTE, it made its own submission as to whether Century's argument rather than RTE's argument should be adopted; and it returned to the Department and the Minister on occasions after the Minister seemingly had agreed a figure as being fair and reasonable?

A. Well, there was an anxiety to get Century up and running.

465 Q. And that anxiety, I am curious to establish what your personal view, as a member of the Commission was, as to what role you saw the Commission having in these contractual negotiations between the parties, and to what extent you felt that the Commission should adopt the franchisee's position in these dealings with the Minister?

A. What my role was?

466 Q. You were there, you were an observer, you were a participant, you were a member with a joint responsibility with others to review the application of Century in the first instance, to see whether or not it met the appropriate criteria. You did so and obviously you came to a conclusion that they were the persons who should be granted the franchise. They were in fact granted the franchise, though it equally seems that the Commission as a whole, addressed the question of RTE transmission charges both before and after the grant of the franchise, isn't that so?

A. But any disagreement that existed between RTE and Century, I would have seen as fundamentally not for the IRTC, but for the Minister to resolve.

467 Q. Yes. Whilst you may have seen that, the Commission did in fact involve itself in this --

A. Well, I presume that it was facilitating the establishment of and the launch of the first franchise.

468 Q. Well, I am wondering, for example, to what extent at the conclusion of the oral presentation by Century, did you as a member of the IRTC, feel that further information which had not been offered to that point in time, should be sought from Century as opposed to any of the other contenders?

A. Well, it wasn't unusual throughout the various awarding of franchises to seek additional information at the close of the oral hearing. Often these related to technical type issues, but they didn't affect the overall presentation or decision.

469 Q. Do you remember at the conclusion of the oral submission on the 12th, the board either as a whole or as a substantial body or a substantial body of the members present, indicating that this would be necessary to seek further information from Century regarding the apparent disparity between RTE's charges and the Century charges; because as we see from the correspondence, there would appear to have been a meeting on the morning after that presentation; and the Tribunal would like to establish on what basis such a meeting took place, and for what purpose?

A. It doesn't stand out in my memory.

470 Q. Yes.

A. I don't recall, you know, something that was overwhelmingly important, that would affect the decision-making process.

471 Q. Do you remember the results? The result of the meeting of the 13th being brought to the attention of the body of members as a whole?

A. Again, I can't recall transmission being an overriding central issue at the decision-making meeting. It was a factor, but I don't remember it being, you know, particularly contentious or a major issue.

472 Q. Well, perhaps when we see that the franchise was granted on the 18th of January and we see that by the 6th of February the Secretary was writing to the Minister saying "things are going nowhere because of this impasse" I take it that must have brought it into sharp focus for the Commission? That here they had granted their license and - sorry franchise, subject to contract, to a body which was already finding itself in an impasse, as far as we can see, with RTE? That must have been a concern, can you remember that?

A. I remember a concern over transmission, but frankly I don't remember too much of that detail.

473 Q. I see. Have you any memory of the Commission deciding on the 9th of February, that it was, since it was unlikely that one would obtain the desired result from the Department, that it would, that is the Chairman, should approach the Minister directly.

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Do you remember that particular meeting and the reason why it was firstly that a distinction was drawn between the chances of a satisfactory or a desirable result being obtained from the Department as opposed, being obtained from the Minister, as opposed to the Department?

A. I really don't remember that.

474 Q. Yes.

A. I don't remember that distinction being made.

475 Q. Yes.

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A. Between the Department and the Minister.

476 Q. Yes. Well, certainly if we look at the minute, it seems to indicate that that was their conclusion. It was structured in that fashion. If we look to page 5570? It says: "As it seems unlikely that representations to the Department of Communications about the cost of the RTE transmission facilities for a National Radio Service would produce the desired result, it was agreed that the Chairman should contact the Minister."

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Now that, I suggest to you, seems to infer that the body of the Commission had distinguished in its own mind between the Department and the Minister, and had equally distinguished that the Department was unlikely to accept the representations such as they were being advanced by the IRTC; thereby requiring the Chairman to meet the Minister. Do you see that?

A. I see that. But I just don't know the answer.

477 Q. You can't remember what arguments or what --

A. No.

478 Q. -- what discussion lead to this situation?

A. No, and I didn't have views myself as to, as regards to costs. I had no experience of transmission.

479 Q. But this is a principle issue here rather than a costs issue, in the sense that no figures are mentioned in this particular resolution. It merely records a state of affairs applying at that particular time, namely that some person had concluded and it had been adopted by the Board as a whole that the representations made were unlikely to produce the desired result.

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A. Well, somebody had to resolve it, so I presume if we did see that the Minister was the person to resolve it, but I genuinely don't recall the detail of that discussion.

480 Q. Have you any memory as to why the IRTC should feel that if the Department presumably reached its own conclusion, that that was not a conclusion which would be acceptable to the IRTC, on the basis that it wouldn't satisfy their desired result? Why, in other words, was the Commission taking the view here that the Department may well resolve matters in a way which doesn't suit our particular result, our desired result?

A. Well, I presume - I mean you would have to maybe refer this to the staff of the Commission.

481 Q. Mmm?

A. Who would deal with and would attend the various meetings. As a board member coming, you know, to the, be it weekly or at that stage of monthly meetings, I would have thought that that was a matter of detail for the Commission staff. I genuinely can't help you in that. I can't recall the detail of that board meeting and why that point of view was taken.

482 Q. I see. Well, it would appear in the sequence of events that follows immediately after this, that on the day after this decision being taken, the Chairman met with the Minister, that is on the 10th of February - and if we move forward to the 16th of February - the Minister responded to the Chairman, saying that: "I have now reviewed the figures again with RTE and RTE have reduced them now to 614,000 at the end of the four-year period", and that effectively was a substantial saving on the figures which

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had been propounded in January and had been agreed by the Minister in January.

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Had there had been an alteration following the request which was contained, or implied in this particular minute here? The Chairman went off, spoke with the Minister, the Minister spoke with RTE and the effect of that was a substantial reduction.

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Now, were you made aware of that in the Commission, on the 16th of January or immediately thereafter, because we see from the minutes of the IRTC, that no meeting of the Commission took place between the 9th of February and the 21st of February?

A. I genuinely can't remember.

483 Q. On the 16th the Minister determined that the €614,000 was not unreasonable in an Irish context. At the same time and contemporaneously with that decision by the Minister, the Board of Century had itself independently resolved that it wasn't going to come above the €375,000 figure. Now, we have heard from some of the members of the Commission, that they felt at all times that these were negotiating stances adopted by the respective parties, that the RTE figure initially proposed would have to come down, and that the Century figure officially proposed would equally have to come up, and that was one of the bases upon which they decided to allow the grant of the franchise to an applicant for the National Radio Franchise, without there having been a prior resolution of what the RTE charges would be. Do you understand what I am advancing?

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A. Yes.

484 Q. Now, it would appear certainly, that as and from the 16th of February nobody could have been in any doubt but that Century were not negotiating. They were putting forward a figure which they deemed appropriate and it was a "take it or leave it" as of that time, isn't that so?

A. Well, that is what it seemed.

485 Q. That is what it would seem. I am wondering whether you have any recollection at that point in time of that information being conveyed to you as a member, as I say there would not appear to be a meeting of the Commission until the 21st, which is five days after that letter was written?

A. I have no recollection of, and I have no, it didn't preoccupy me at the time, so --

486 Q. Yes.

A. So I really just can't remember that.

487 Q. Mm-hmm.

A. It is possible that we were made aware of it? Most probably.

488 Q. Yes. How do you think that you might have been made aware of it?

A. Well, if there was a meeting, if there was no meeting we wouldn't have been unless the notes came for the following meeting.

489 Q. There wasn't a meeting, that is the first, there was no meeting until the 21st, and at the meeting of the 21st, this issue did not appear on the agenda?

A. Well, that is --

490 Q. That is the issue of RTE charges?

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A. Well, I would have seen, with respect, the issue of negotiating a settlement on this issue as a matter primarily between, for Century to be satisfied with, and RTE obviously, as the provider, to be satisfied.

491 Q. Fine. Of course that was the position?

A. Who banged their heads together was not a matter for me.

492 Q. Right. But the extent to which the IRTC did in fact involve itself should be a matter of which you would be aware, having been a member of it, isn't that so?

A. Being a member, as I said, I would have seen the staff as having a facilitator role.

493 Q. Right. On the 17th we learn from Century that there they are not prepared to negotiate any further, and on the 20th they are given the Minister's letter which affects a further reduction from the figures agreed in January, and that provokes a response from them to the Chairman of the IRTC by letter, where they set out their stall as to why €375,000 should be the figure that is fixed, and they ask the Chairman to refer the matter to the Minister for a direction.

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Now, the letter which refers the matter to the Minister is a letter which encloses a copy of this letter, and it is a letter of the 20th of March, sorry the 20th of February.

We can put that on screen. It is the letter at page 3980.

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You will see in the middle paragraph here, that it says "please note that Century Communications are seeking a Ministerial Directive under Section 16 of the Radio and Television Act 1988."

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The function of the Commission in relation to Section 16 is apparent from the section itself which says that the "Minister may, at the request of the Commission, and after consultation with RTE, take certain steps", we needn't analyse exactly what the steps are, but it involves a request by the Commission, rather than the Secretariat, or its Chairman, to the Minister to require him to invoke his power under Section 16.

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Do you have any memory of there being any meeting of the IRTC where this section was specifically referred to firstly, and where the request of Century as contained within the letter of the 20th of February 1989, was brought to the attention of the body of the members of the IRTC, and debated by them as to what course should be adopted?

A. I have no memory, but it is not to say it didn't take place, but I genuinely have no memory.

494 Q. If it did take place, presumably it would have been at a meeting of the Commission rather than an individual meeting with you and --

A. Oh, yes, absolutely.

495 Q. Right. Do you know of any incidents in which meetings of the Commission were not minuted and the minutes signed?

A. No, none.

496 Q. If there had been a step taken to invoke a statutory facility available to the Commission, I take it you would expect that this would be the subject matter of resolution by the Board members themselves?

A. Yeah, that would be obvious - if there was anything

otherwise, you know, the Chairman always cautioned us on the Act and why we were there and so forth.

497 Q. Yes. Were you kept advised by the Secretariat of the difficulties that were arising in relation to its contractual negotiations, that is its own contractual negotiations with Century?

A. Yes, I mean it was the first contract, and it also was the most difficult franchise insofar as they had to set up a national franchise, which was something totally new, and understandably it was protracted, but some of the difficulties we would have - again it was a matter that was delegated to the staff of the Commission.

498 Q. Did the staff of the Commission ever indicate to you that they were finding that whenever and wherever it seemed necessary to do so, that the Minister, that there was ministerial involvement at the request of Century in circumstances where they, the Secretariat, felt it appropriate that the matters would have been for discussion between the IRTC and Century, without the ministerial involvement?

A. Nothing too much stands out in my mind. There were issues in the earlier days as mentioned earlier about Irish language and news bulletins and issues like that. But I didn't, I don't recall anything very dramatic outside of the transmission area.

499 Q. Do you remember any concern expressed by the Secretariat to the effect that they considered that Century were too highly politicised in their applications and their dealings with the IRTC?

A. Not really.

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500 Q. You can't remember?

A. Not at any great significance, it didn't have any great significance that I can remember.

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MR. O'NEILL: Thank you very much.

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CHAIRMAN: Does anybody want to ask this witness any questions?

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MR. FOX: I have a few questions for the witness, Chairman.

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CHAIRMAN: Very good.

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MS. EGAN: I would have one or two brief questions Chairman.

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MR. O'HIGGINS: I would anticipate I would have very little to ask, but there would probably be one or two.

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CHAIRMAN: Right Mr. Fox?

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

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501 Q. MR. FOX: Mr. Cullen, Mr. John Fox is my name. I appear for Mr. Burke. I think your appointment to the IRTC arose perhaps out of your experience and expertise in advertising and media generally; is that correct?

A. That would be the case, yes.

502 Q. So therefore you would be very experienced in the area of

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advertising, am I right in saying that?

A. "Very" I don't like, but "experienced", yes.

503 Q. I think that you would have had contact with the government on matters to do with the newspaper industry and advertising and such matters?

A. Correct.

504 Q. Can you tell me did the NNI, this is the organisation of which you represent, did they lobby the government on capping RTE advertising?

A. Well, we made representations to successive governments on the need to regulate --

505 Q. Yes.

A. -- RTE's advertising revenue to take account of its income from license fee.

506 Q. Right. And did you have any other concerns about RTE advertising?

A. Well that was the, there were three main issues. One was that RTE had a, this is prior to the establishment of the independent radio and television - that RTE had a monopoly of all legal broadcasting, there was illegal broadcasting outside the system, but RTE had an monopoly and we were opposed to the monopoly.

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Secondly, that RTE, unlike the situation in Britain, where the BBC only had license fees, RTE had dual income, and whilst maybe that was the pragmatic solution required for Ireland, there was a need nonetheless to regulate its commercial activity to take account of its public service status.

507 Q. Yes.

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A. And thirdly, that there were regulations already in existence and they were being breached at the time. They were our three positions at that point.

508 Q. Yes. Did you and the NNI consider that there was, for example, cut price advertising in RTE?

A. Well, I mean speaking personally I believe with the benefit of the license fee there was the ability to undercut prices, and I suppose speaking from the point of view of broadcasting and the independent broadcasters were only going to be in receipt of license fee, whereas RTE had both, so the ability to undercut broadcasting was clearly there.

509 Q. Right. Would you have considered would the NNI have considered that RTE, one or other of the channels advertising its schedule on the other channel type of thing, or the type of advertising that went on on The Late Late Show, "one for every one in the audience" type of advertising, would you have considered, or the NNI have considered it, or had concerns that that was a cheap form of advertising?

A. Yes, we would have. I certainly would have considered that a breach of the regulations did exist at the time. Cross media promotion.

510 Q. Yes.

A. It was a significant benefit.

511 Q. When did the, the cap legislation was introduced, would you have had, would the NNI have had a position on that, were you in favour of the cap on RTE?

A. Well, I mean NNI's views is clearly on the record. There is many published documents prior to 1988 which pointed to

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the deficiencies, if you like, of the system, and the need for the government to act on that matter.

512 Q. Yes. So broadly speaking could I interpret that to mean that the NNI would be in favour of a cap or some legislation?

A. Yes, in favour - well, I should speak personally because I came here as a member of the IRTC to speak in that capacity, I didn't prepare myself to speak in and defend --

513 Q. This is within the terms --

A. I would personally have supported regulations of RTE's commercial activity to take account of its dual funded status. I would have also advocated regulation for RTE as a public service broadcaster which should be somewhat different than maybe a commercial operator, so yes.

514 Q. Now regarding your appointment on the IRTC, what were your reasons for voting in favour of the Century application in the IRTC?

A. Well, on the, I would have come to a conclusion following the oral hearing, my own view would have been formed at that point. I would have seen it as being a very difficult task. There was a market established for local radio through the pirates, and I think many of the local franchises had a better chance of success. I would have seen the national franchise as a very difficult task. It was something new. It had to be established. It had to take on the might of RTE. Whilst I speak for regulation about RTE I have a very healthy respect for RTE, a very established organisation. It would have had the benefit of being able to cross media promote itself. Century on the other hand coming in with, to satisfy a national audience

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using an FM frequency only, had a very difficult challenge. And not having the benefit of any license fee and so forth, it was one daunting task, in my opinion.

515 Q. Just get to back to the question, what were your reasons specifically, it was on technical and commercial --

A. Best chance of success, I would say.

516 Q. Best chance of success?

A. It seemed to have what it took, it had some drawing names.

517 Q. Just finally, Mr. Cullen, were you ever consulted in any improper way over the Century application?

A. Absolutely not.

518 Q. Thank you very much Mr. Cullen.

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CHAIRMAN: Thank you.

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

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519 Q. MR. O'HIGGINS: Just very briefly, Mr. Cullen. Is it fair to say that you didn't consider yourself qualified to form a view as to the correct fee for transmission at the time and you don't put yourself forward as being in a position to comment now?

A. Agreed.

520 Q. Just in relation to the advertising matter which I am no more prepared in one sense to go into, than you are; I appreciate that you are here as a member of RTE (SIC) obviously it is fair to say that National Newspapers of Ireland would prefer not to have to compete in the advertising market with a part subsidised body, isn't that so?

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A. Correct.

521 Q. Equally I take it you would recognise that a part of the subsidy, and I don't think either of us can go into it now, goes into the public service element of RTE's obligations, which means that in part at least, of the argument about this, they are not subsidised so far as their competition with you is concerned, because they have to deal with uneconomic obligations, isn't that so?

A. Yes.

522 Q. And we could argue about that from now until Kingdom Come and I expect that would you wish to see that RTE was less subsidised as a competitor of the newspapers and RTE would probably not share that view, is that correct?

A. Correct.

523 Q. Yes. I think that BBC undoubtedly runs itself wholly on licensing fees, would you agree that the, there is certainly a case to be made for the fact that in a country the size of Ireland, it is hardly realistic to expect a television service to be able to do that, or necessarily to do is that, if it is allowed a service public obligation?

A. Put it this way; I think if you put, this is a personal view, I think if you are a public service you should be fundamentally funded through license fee, and therefore that means you should accept regulation on your advertising income.

524 Q. It would suggest if that were done, that the license fee would have to be a great deal higher than the license fee is, isn't that right?

A. Well, I think if you cap one you must allow the other one to grow

525 Q. These are matters of policy that might change from time to time, is that so?

A. Yes, well I think it is up to the government to regulate these matters. I am just concerned with the competition issues.

526 Q. I know. I can understand that you want, from the national newspapers point of view, prefer not to be competing in the advertising market against a body which enjoyed a license fee, isn't that so?

A. Yes, unless there is some form of regulation to balance it.

527 Q. There was of course, regulation at all times, and even at the point of the introduction of the 1988 Act, a longer advertising time was allowed to independent stations than to RTE, even from then?

A. Correct.

528 Q. Yes. Thank you very much Mr. Cullen.

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MS. EGAN: Mr. Cullen --.

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CHAIRMAN: Now, you are appearing for the IRTC so I can see nothing that this witness has said which in anyway impinges on your situation, so please stay relevant.

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MS. EGAN: Absolutely Chairman. I intend to do so.

I only have five or so questions for the witness Chairman.

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THE WITNESS WAS EXAMINED AS FOLLOWS BY MS. EGAN:

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529 Q. MS. EGAN: Mr. Cullen, in relation to the issue of the requests for direction from the Minister, pursuant to

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Section 16 of the Radio and Television Act, are you satisfied that the Commission gave the Chairman the authority to request that direction?

A. Yes. As I said earlier I don't recall precisely the conversations that lead up to that decision, but I don't have a difficulty.

530 Q. In that regard, perhaps I could briefly draw your attention to two minutes which I have already opened on previous occasions, and one of which was opened by Mr. O'Neill. The first is a minute of the 8th of December of 1988, of a Commission meeting on that date. I believe it was already opened Mr. O'Neill.

A. Yes.

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MR. O'NEILL: If My Friend requires it put on screen Sir, I will just require one moment --

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MS. EGAN: I can read it to you for the sake of speed. At Clause 4 it is headed up "RTE charges". It states that: "Following a report from the Chairman and Secretary on the meeting with RTE regarding the cost 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 in the matter."

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MR. O'NEILL: The page reference, Sir, on that is 5568. But I would object to the question in the way it is

00151

framed. If it is intended in this question to suggest that this involved a consideration by the IRTC of the implications of Section 16 in the context of negotiations with RTE, it clearly cannot be so because the position which was extant at this particular point in time was a totally different position from that which is extant three months, two and a half months later, at which point there had been two negotiations of the RTE charges and we are talking about entirely separate figures which were under consideration. So it cannot be that this is the basis for a section, the Section 16 application, if it is contended that one was authorised by the Commission.

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MS. EGAN: I am not suggesting that this is the basis Chairman.

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CHAIRMAN: What is the relevance of the question?

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MS. EGAN: The relevance of this question, of my opening this minute to this witness is to show that on not one but two occasions the Commission authorised the Chairman and members of the Secretariat to approach the Minister in relation to the issue of transmission charges.

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MR. O'NEILL: With respect Sir, that is, with respect Sir, quite a different thing from requiring the Commission to sit as a body to consider whether it should implement a statutory function. It is quite distinct and --

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CHAIRMAN: That has no relevance in this context.

531 Q. MS. EGAN: The second minute which I wish to open is the minute I have already opened with several witnesses. It is the minute of the 9th of February, 1989.

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MR. O'NEILL: 5570. Sir, again --

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MS. EGAN: The relevant portion --

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CHAIRMAN: Again the same objection applies to that. You see the premises, you see the premises is, the set up of Section 16 - the Section 6(2) is that you have a sequence of events; this is an attempt to say that that sequence took place, it didn't take place. That is the beginning and end of that. I mean, it may well be that the end product was no different, but the sequence was not - there is no doubt about that.

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MS. EGAN: Well, I am seeking to inquire of this particular witness, maybe he has no memory of this particular issue being discussed, as to whether or not on foot of this meeting, the power to approach the Minister and request a direction was effectively delegated to the Chairman.

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CHAIRMAN: This is something that if you are going to delegate it, you have to delegate it specifically. In fact it is not basically capable of delegation. It has to be decided by the Commission. It is a direction that the Commission may ask. It is not the Chairman, it is the Commission, it is the body.

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MS. EGAN: Well, my point --

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CHAIRMAN: It may make no difference in the end. I quite see the point, that the effect - it is just truncating the exercise. It certainly was not an exercise of Section 6 --

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MR. O'NEILL: Section 16.

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CHAIRMAN: Section 16. There is to doubt about that.

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532 Q. MS. EGAN: My point in opening this was to inquire of the witness whether or not this authorised the Chairman, this meeting may have authorised the Chairman, and the previous meeting as well, well in advance of money, may have authorised the Chairman to go the Section 16 route. But I won't pursue that, pursue that question, Chairman.

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Are you satisfied, Mr. Cullen, that the Chairman kept the Board of the Commission informed of all relevant developments at all times during your tenure on the Board?

A. Yes.

533 Q. You mentioned in your evidence that you were concerned to facilitate the launch of the franchisee after having awarded the license to Century. I just want to clarify that that would be the position of you, in particular, and the Board in general, in relation to any franchisee as opposed to merely Century in particular?

A. Yes. We were anxious get it up and running and particularly to replace the pirates which had been in

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existence.

534 Q. And then two final questions, Mr. Cullen. Had you, have you become aware, or did you become aware of any rumour or suggestion of fees in return for licenses during your tenure on the IRTC, or at any time up until recent publicity surrounding the allegations?

A. No, never.

535 Q. And are you satisfied that the Commission acted independently of any influence from Minister Burke during your tenure and in relation to the Century matter in particular?

A. Yes absolutely.

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MS. EGAN: Thank you Mr. Cullen.

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CHAIRMAN: Mr. O'Neill?

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MR. O'NEILL: That concludes the evidence, Sir.

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CHAIRMAN: Thank you very much for coming down and it is much appreciated, and your assistance.

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THE WITNESS THEN WITHDREW.

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CHAIRMAN: Tomorrow morning at 10:30. Wait now - sorry, we have a special arrangement for a particular witness.

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MR. O'NEILL: I understood that there might be one, Sir, at 10 o'clock, a Mr. Taggart.

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CHAIRMAN: Now that you remind me, that is correct. 10
o'clock then tomorrow morning.

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MS. EGAN: Chairman, just before you rise, just a request
to make; if it be the case that Mr. O'Keeffe is to be
recalled on foot of an application by Mr. Burke's legal
team, I wonder would it be possible for that recall to take
place on Thursday when the final Commission member is to
give his evidence at any rate, if that doesn't
inconvenience any of the other parties?

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MR. O'NEILL: Well, we first have to hear his submission
as to why he should be recalled Sir. Then you have to
adjudicate on it. I think, certainly, we should try to
bear in mind that we do not wish to unnecessarily bring
Miss Egan back on a day where there is no other witness
that might be relevant to her issue?

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CHAIRMAN: If it can be done on Thursday, we will do it.
If not, what we will do is we will advise you well in
advance. We will step it back a reasonable period so that
you can make your other commitments fit, in those
circumstances.

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MS. EGAN: Thank you Chairman.

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CHAIRMAN: That is the best I can do for you, dear.

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MS. EGAN: Thank you.

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THE HEARING WAS THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY THE 22ND OF NOVEMBER, 2000, AT 10 A.M.

