

THE HEARING RESUMED ON THE 14TH OF NOVEMBER, 2000, AS
FOLLOWS:

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CHAIRMAN: Good morning everyone.

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MR. HANRATTY: Good morning Sir. Sir, with your
permission, I would like to call Mr. Branigan. He is the
last of the RTE witnesses? Mr. Peter Branigan please.

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PETER BRANIGAN, HAVING BEEN SWORN, WAS EXAMINED BY MR.
HANRATTY AS FOLLOWS:

1 Q. MR. HANRATTY: Mr. Branigan, can you tell us what position
did you hold in RTE in 1989?

A. I was Head of Engineering Design.

2 Q. Yes. And what were your responsibilities in that capacity?

A. I was responsible for project planning across RTE, both
studios and the transmission system.

3 Q. Yes. You know that a transmission contract was signed
between Century Communications Limited and RTE in July of
1989?

A. I do.

4 Q. And you know that in a schedule to that contract it set out
the progressive implementation of transmission facilities
for Century Communications by RTE?

A. Indeed.

5 Q. That doesn't, or didn't provide at least for any
transmission facilities in the latter half of 1989 and
started in 1990, I think; is that right?

A. Correct.

6 Q. But did Century require to be put on air earlier than the
contract provided for?

A. It did.

7 Q. Was this brought about by means of the installation of
temporary transmission facilities?

A. That's correct.

8 Q. Could you, just briefly, tell us the background to that
please?

A. Well, the contract was signed on the 28th of July, 1989.

And as you have already said, the milestones really were for 1990/1991, but even on the day that the contract was being signed Century were putting pressure on RTE to launch the service in September of 1989 because of the commercial pressures that they were under.

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There were a lot of local radio stations scheduled to come on air over the following six to nine months, and also Atlantic 252 was scheduled to come on air the 1st of September, 1989. Capital Radio was already on the air in Dublin, so they felt they were under huge commercial pressure to come on in 1989, particularly before the Christmas market.

9 Q. Yes. So what did they ask you to do?

A. They asked us to launch the service in three cities rather than on a nationwide basis.

10 Q. Was that Dublin, Cork and Limerick?

A. Correct.

11 Q. Am I correct in thinking that the contract itself in fact had no provision for any transmitter in Limerick?

A. That is correct.

12 Q. But in any event, by way of temporary transmission facilities, pending the implementation of the contract requirements, you were asked to provide transmission to three cities?

A. That's correct.

13 Q. Was that on the basis that the majority of the population would be covered if those three cities were covered, particularly Dublin, obviously?

A. It was the way of getting the maximum population coverage in the short time available.

14 Q. Yes. What did you do and how did you go about it?

A. Well, we had to see what equipment was available to us within the RTE system. For the transmitter at Three Rock we used the ex Millennium transmitter, a one kilowatt transmitter which was used for Millennium Radio in 1988. So we had to inquire around the organisation what equipment was available, what state it was in and how quickly it could be assembled and commissioned and be put on air.

15 Q. Yes.

A. In the case of Cork, we used a standby transmitter, and in the case of Limerick we used a low power radio B link, 50 watt.

16 Q. Yes. And the equipment you are speaking of, I understand was RTE's own equipment?

A. Oh absolutely, yes.

17 Q. It wasn't purchased by Century, it was provided to Century by RTE?

A. But Century were scheduled to be charged for these temporary installations, that was one of the provisions in the contract.

18 Q. Yes. We know that ultimately Century did in fact go on air on the 4th of September?

A. Correct.

19 Q. At that point in time, and up to that point in time, as far as you were aware was Century satisfied with the work that you were doing to get them on air temporarily from the 4th of September?

A. Well, Mr. Barry was in very frequent contact with both

myself and Mr. McGrath because he was on tender hooks because the contract was only signed on the 28th of July, yet they had made a very public announcement about launching on the 4th of September. This was an extremely tight schedule. He was on tender hooks all that time. He wanted to know, almost on a daily basis, how things were going.

20 Q. Yes. Ultimately when you got him on air on the 4th, was he satisfied with what had been done and what had been achieved?

A. On the weeks subsequent to the launch there was criticism of the coverage achieved in Limerick. There was little we could do about that, because the proper technical thing to do would be to put that transmitter on the hill overlooking Woodcock Hill. We had no programming for Century up there, all we could do is put the transmitter on Limerick City. I would accept that the coverage from the Limerick transmitter was less than satisfactory.

21 Q. Yes, you say in your statement:

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"As the deadline approached I assured him that I was confident that RTE crews would meet the deadline."

Did you in fact meet the deadline?

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"He was extremely pleased", he being Mr. Barry, "with progress and the cooperation Century was receiving from all of the RTE staff involved" Is that factually correct?

A. That's correct.

22 Q. You said: "He indicated to me and the Head of Network", was that Mr. McGrath?

A. Yes, correct.

23 Q. "That he wanted to show his appreciation to the staff concerned."

Did he, in the first instance, suggest that perhaps they might be paid some sort of a bonus payment?

A. He did.

24 Q. And was there some particular reason why that suggestion was not taken up?

A. Yes. Well, there was administrative difficulties that, at the time we didn't know exactly which members of which crews would be working on the Century installations, specifically, and there was also the issue of income tax payments; that if they got any form of cash payment, income tax would have to be deducted, that would have more than doubled the cost of any gesture from Century to the staff in RTE.

25 Q. Instead of that did you make a suggestion?

A. Well, I am not sure whether it was myself or Mr. McGrath; it was in the context of discussing this issue of how Century would show, in some small way, their appreciation for the cooperation of staff.

26 Q. And was it suggested, for example, that they might be invited to the launch of Century?

A. Yes, it was.

27 Q. But I think that wasn't possible either because there was a limited amount of availability and you were talking about - I think it was 35 or 40 people?

A. 20 to 30 was talked about at the time. It was a considerable number. Mr. Barry felt it wouldn't be possible, that they were full essentially.

28 Q. Was it then suggested that a separate function be held for the men?

A. Yes, it was.

29 Q. And was that possible?

A. Well that was, that was turned down because of the fact that some of the crews were based in the regions or were on shift, it would be difficult to get them all together. It was then, out of that emerged the suggestion that some form of entertainment budget would be established, and as each mile stone occurred that there would be some form of entertainment given to the staff involved.

30 Q. Yes. And did that in fact happen?

A. To the best --

31 Q. Were a series of functions organised for staff in various locations around the country, coinciding with the various milestones?

A. I understand from RTE that they have established that at least four of these functions did in fact take place.

32 Q. Yes. And did you receive any money from Mr. Barry in respect of this?

A. Yes, as I said in my statement, he gave me $\text{ú}1600$ to $\text{ú}1,700$. Of which I gave $\text{ú}1,000$ to Mr. McGrath and the balance to Mr. Law.

33 Q. Yes. Can I just ask you about the circumstances of that, you say in your statement sometime late in August of 1989, Mr. Barry invited you and the Head of Network, Mr. McGrath, to visit the new Century studios?

A. Correct.

34 Q. And would you just describe to us then what happened on that occasion?

A. After showing me around the studios he invited me for a drink in a local pub, and there was a number of Century people --

35 Q. Which pub was it?

A. Mother Redcap's.

36 Q. Yes?

A. Yes.

37 Q. And there were a number of Century people there, were there?

A. There was.

38 Q. Can you just describe, briefly, what happened?

A. After a couple of drinks other Century people left, and then Mr. Barry gave me the money.

39 Q. Yes.

A. Saying that it was for the entertainment of the staff.

40 Q. Yes. In what form did he give it to you?

A. In cash.

41 Q. Yes. Approximately how much was there when you counted it?

A. 1600 to ú1,700, I can't remember the exact figure, but I am sure it is not 1,500. It seemed to be 1600 or 1,700.

42 Q. Yes. Can you just tell us in what manner did you apply that money?

A. I gave Mr. McGrath ú1,000.

43 Q. Yes?

A. And a few days later Mr. Law came up to Dublin and I gave him the balance.

44 Q. Yes. And as far as you are aware, did Mr. McGrath organise a number of these functions around the country for the RTE transmission staff?

A. Yes.

45 Q. And did Mr. Law do so as well?

A. Yes.

46 Q. Now, Mr. Barry has told the Tribunal that he gave ú5,000 to, as he described it "RTE", and he was queried on that by the Tribunal, and as you are aware from a letter we received recently from his solicitor he says:

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"We confirm on or about the 25th of August, 1989, a sum of ú5,000 in cash was paid on behalf of Century Communications Limited. The monies were handed directly either to Mr. Branigan or Mr. John McGrath by Mr. Barry. Our client is not in a position to confirm which of these gentlemen actually received the monies."
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Now are you satisfied from your own part that your evidence in relation to how much you received at least was accurate?

A. Absolutely.

47 Q. And is it conceivable, or possible, that you may have received ú5,000 from Mr. Barry?

A. No, it is not possible.

48 Q. Are you satisfied that the amount that you received did not exceed ú1,700?

A. I am.

49 Q. Are you aware yourself whether Mr. Barry may have paid any other monies to anybody else in RTE?

A. I am not.

50 Q. Now, can I move on to some documents which you wrote? I think there are just three documents which I would like to ask you about, if I may.

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The first one is on page 5212, that is letter dated the 6th of February 1989, it was sent by you to Century Communications Limited, and under the heading of:

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"Re FM transmission facilities at RTE sites" you say:

"Dear Sirs, further to our meeting of the 23rd of January 1989, this note is to confirm that the equipment necessary to combine Century's transmissions with existing RTE transmission has a minimum delivery of four months after receipt of order. RTE cannot order any capital equipment until a formal contract has been agreed between Century and RTE. Installation of the new transmission equipment will take four to five weeks after delivery to site."

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Now, I think the equipment is that you are referring to there is what is known as "combiners"?

A. Correct.

51 Q. The idea was that Century's requirement, as I understand it, that they be effectively brought up to the same standard of transmission as RTE?

A. Correct.

52 Q. And that it was therefore necessary to combine their signal in the transmission mast; is that right?

A. Correct, into the FM antennas, yes.

53 Q. And is it the reason that these pieces of equipment have to be ordered and custom made is because the transmission frequencies vary so widely?

A. Correct.

54 Q. What was the context in which you came to write this letter?

A. The context was that at the time my understanding was that they were talking about a May launch for Century, and I was putting on the record that that was, even at that stage extremely tight because of the delivery of these items of equipment, the combiners. I wanted to put firmly on the record that this was a concern that I had, that we wouldn't be able to put them on at full power at their launch date unless orders were placed immediately at that time.

55 Q. Yes. Obviously the contract had not yet been signed at that time, although the franchise had by then been awarded to Century?

A. That's right.

56 Q. So you were flagging to them that there was going to be a lead-in time?

A. Correct.

57 Q. Page 5215 please? On the 13th of February 1989, did Mr. Stafford write to you in the following terms:

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"Dear Mr. Branigan, thank you for your letter of the 6th of February 1989, we were naturally disappointed in its contents, which do not seem to reflect the spirit of the legislation. Furthermore, your letter is not consistent with our understanding of the discussions between RTE and the Department of Communications and the IRTC.

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It has been well-known for some considerable time that the intention of government was to have the minimum delay between the closing down of the illegal stations and the commencement of broadcasting of the new independent stations. The expectation was that the latter would be on

air by the 1st of January, 1989. In the event that this did not occur but we believe it remains the stated objective of the Minister that the appointed franchisees should commence broadcasting at the earliest possible date.

Century has consistently made clear its wish to start on the 1st of May, 1989. This remains our intention. We should be ready for our part, and it would be unfortunate if we had to make it clear that our inability to broadcast was due to prevarication on the part of RTE. We would therefore wish to explore with you as a matter of urgency, possible approaches which could significantly shorten the lead-in times you have described in your letter. For instance, are there not alternative suppliers who can achieve faster delivery times? Is there not a significant amount of planning work which could be put in hand now not involve RTE in any commitment to outside suppliers? Is it not possible to take an option with suppliers in advance of a firm order. We look forward to your further proposals.

Yours sincerely, James Stafford, Director."

What was your reaction to that letter?

- A. Well, it was one of concern because of the implied threat to accuse RTE of delay and prevarication and deliberately trying to slow down the launch of Century. RTE was concerned about that because there had been previous sort of general policy discussions among civil servants in government about the separation of the network from RTE, and this would certainly have raised that specter very

large if Century had come around and accused RTE of deliberately trying to thwart a competitor.

58 Q. Yes. And did you respond to that, page 5 - sorry page 5216?

A. I did.

59 Q. By letter dated the 14th of February 1989, in the following terms.

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"Dear Mr. Stafford, thank you for your letter of yesterday. In reply RTE wishes to make it clear that its position regarding transmission facilities for national independent broadcaster has been entirely consistent over the last four months. Viz: That essential equipment required to combine Century's transmissions with RTE's three existing services has a quoted best delivery FOB" that is "freight on board" I take it?

A. Yes.

60 Q. "Of four months after receipt of order. This was clearly stated to the IRTC at a meeting in RTE on the 7th of September, 1988"; is that in fact the case?

A. I can't recall exactly, but that is what it says in my memo.

61 Q. Yes. "And restated to the Secretary of the Department of Communications and other senior officials during meetings on the 6th and 10th of January in Scotch House.

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Furthermore, far from being guilty of prevarication, RTE has consistently shown its readiness to cooperate fully with Century and to this end asked for a meeting with Century on the 23rd of January, only days after the franchise was granted, in order to impress the urgency of

finalising an agreement so that orders could be placed for this essential equipment.

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With respect to the specific queries at the end of your letter I reply as follows:

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(A) This combining equipment is always made to order as the design depends on the frequencies of the transmissions to be combined. The chances of any two customers using the same power and the same frequencies is minimal.

Accordingly, manufacturers do not have these items off the shelf.

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(B) RTE has already allocated considerably resources to planning work for the fourth national FM network with the result that we have now identified all of the equipment required and technical implications for three existing services. RTE engineering is now in a position to order all of the required equipment. All now required a legal contract between RTE and Century. To this end RTE already have a draft agreement drawn up by our solicitors, Eugene F Collins and Son.

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(C) RTE did indeed put options on some standard transmitter equipment, however these options are now nearing expiry.

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Hoping this note clarifies the position, we look forward to an early signing of an agreement."

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That was by way of explanation from you, as far as you were

aware, I take it, the correct position?

A. That's correct.

62 Q. That you had got the best lead in time possible from a variety of manufacturers, others having quoted even longer lead in times?

A. That's correct.

63 Q. That RTE could not commit itself to making an order until it had the contract signed, a contract signed with Century, and that it would, it had itself drafted the contract in anticipation of a signing with Century; is that right?

A. That's correct.

64 Q. Now, can I just go back to the question of the contract and the progressive implementation of the transmission? I take it that you are aware that Mr. Stafford in his evidence, criticised RTE and asserted that they, as it were, dragged their heels in the matter of implementing the contractual provisions. You have said in your statement to the Tribunal that RTE in fact surpassed each of the contractual mile stones?

A. That's correct.

65 Q. Mr. Curley has given evidence also to that effect, that when you examine each of the mile stones set out in the, I think it is the third schedule to the contract of July of 1989, each of those was actually up and running in advance of the contract date?

A. That is correct.

66 Q. And he also, as well as saying that he didn't have the transmission mile stones, as it were on time, criticised the level of coverage particularly in Limerick?

A. Yes.

67 Q. Now, you have already referred to that, but I notice that you refer to it in your statement as a "sticking plaster", the temporary installation in Limerick. We know it was a temporary installation. Why do you say it was a "sticking plaster operation"?

A. That was the term that was used in the media at the time, and it was again used, I think by Mr. Stafford in his accusations against RTE. I, as a technical person, I accept that the coverage was not as good as one would have wanted but we had no alternative. We hadn't got a programme feed for Century at Woodcock Hill, which overlooks Limerick City. That was all we could do in the six weeks that was available to us, between the signing of the contract and the launch of service.

68 Q. Yes. Was that the only way you could get them broadcasting in Limerick?

A. It was.

69 Q. Was that transmitter actually in Limerick City itself?

A. Yes, it was.

70 Q. Where about in the city was it installed?

A. It was in the RTE studios on O'Connell Street in Limerick, on the roof of the studios.

71 Q. Was that transmitter installed in Limerick particularly at the request of Century?

A. Yes, it was.

72 Q. As part of this idea of getting up and running as quickly as possible on the 4th of September?

A. That's right.

73 Q. And in circumstances where there was no contractual obligations to provide any transmitter in Limerick?

A. That's right.

74 Q. Thank you Mr. Branigan. If you would answer any questions that any of my colleagues may wish to put to you.

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CHAIRMAN: Before we go into that, could we ascertain (A) how many people want to and in what order, if it can be agreed, in what order? First of all, who is involved?

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MR. FOX: I have no questions, Mr. Chairman.

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MR. O'HIGGINS: I may or may not, but it really depends on whether Mr. O'Connor has any questions.

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MR. O'CONNOR: I have no questions.

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MR. O'HIGGINS: If Mr. O'Connor has no questions then I have no questions, Sir.

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CHAIRMAN: That solves the problem. Thank you very much. Thank you Mr. Branigan. You are free to go and thank you for coming down.

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THE WITNESS THEN WITHDREW.

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MR. O'NEILL: Good morning Sir. The next witness will be Mr. William Moody. Mr. Moody please?

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CHAIRMAN: Just one moment, I will be with you now.

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MS. EGAN: Chairman, before you go into the next witness, I

appear on behalf of the Independent Radio and Television Commission, instructed by Ivor Fitzpatrick and Co. Solicitors, and I am seeking legal representation on a limited basis.

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CHAIRMAN: Well, I don't actually know your name.

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MS. EGAN: Emily Egan.

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CHAIRMAN: Miss Egan, I am naturally loath to increase the representation before this Tribunal. That is, as it were, a general principle. In the circumstances it is possible, I am not saying that it will, that perhaps there could be a difference between RTE, you are looking for IRTC, as a body?

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MS. EGAN: Yes, I am looking for limited representation for the State body known as Independent the Radio and Television Commission.

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CHAIRMAN: I am certainly granting you limited, I want to say this at this stage, when the occasion arises you are going to have justify the relevance of your intervention at any stage. I am just purely trying to discipline the length of this inquiry, as far as it is possible. You are very welcome. Thank you.

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MS. EGAN: Thank you Chairman.

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MR. O'NEILL: Thank you Mr. Moody.

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LIAM MOODY, HAVING BEEN SWORN WAS EXAMINED, BY MR. O'NEILL
AS FOLLOWS:

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CHAIRMAN: Good morning Mr. Moody.

A. Morning.

75 Q. MR. O'NEILL: Good morning Mr. Moody. I understand you
are an employee of Ulster Bank Limited; is that correct?

A. That is correct.

76 Q. And for how long have you been in that occupation?

A. Since 1959.

77 Q. And what is your current status with the bank?

A. I am Senior manager of business banking, based at
Swords/Dublin Airport.

78 Q. Yes. Is that commonly known in the bank as the Dublin
Airport branch of Ulster Bank?

A. It would be, yes.

79 Q. And for how long have you been with the airport branch?

A. Since 1971, on a straight run.

80 Q. And were you the manager from 1971 onwards?

A. No, I was assistant manager in 71, I became manager around
73/74.

81 Q. Right. Is Mr. Ray Burke a customer of the bank at that
particular location?

A. He is, yes.

82 Q. And when did he first become a customer of the bank at that
location?

A. 1974.

83 Q. I see. Have you had extensive dealings with him over the
years in your capacity as manager and he as customer?

A. I suppose I would have seen him six, maybe ten times a year.

84 Q. Yes.

A. Which would be extensive in comparison to other customers.

85 Q. Right. And he maintained, obviously, accounts in your bank from 1974, presumably up-to-date?

A. That is correct.

86 Q. Now, in October 1988, did your bank at the airport branch, become the bank to the IRTC; that is the Independent Radio and Television Commission?

A. Yes.

87 Q. And can you outline to the Tribunal the circumstances in which that arose?

A. I received a phone call from Mr. Burke on the 17th of October, who informed me that the members of the Independent Radio and Television Commission had held a meeting at Newbridge House, in Donabate on that day and had appointed the Ulster Bank Limited, Dublin Airport Branch as banker to the Commission.

88 Q. Yes. Right. How can you date this as being the 17th?

A. Because the mandate opening the account was the next day.

89 Q. Yes. I think it was the 19th, in fact?

A. Well, the mandate went out on the 18th I think and was probably signed on the 19th.

90 Q. But why does it follow that that would necessarily be one day later?

A. I think if we go back to the mandate, it states that they held a meeting on the 17th in Newbridge House.

91 Q. Yes.

A. I would have known that at that time, I would have received

a phone call after that meeting stating that we had been appointed bankers.

92 Q. I see. You have a certain memory of there being a telephone call and the telephone call indicating that the meeting had already taken place; is that so?

A. Yes, that's correct.

93 Q. You were not aware, in other words, prior to the 16th that the bank was going to be appointed to the Commission?

A. No.

94 Q. Is that so?

A. No.

95 Q. In this telephone conversation between yourself and Mr. Burke, did he indicate the circumstances in which it came to be that the IRTC had passed a resolution appointing your bank to be the bank to the IRTC?

A. No, he just told me that we had been appointed.

96 Q. What function or role did you understand the Minister to have in relation to the affairs of the IRTC?

A. I would have seen it simply as an introduction of an account to me.

97 Q. Yes. Well the question was, did you understand there to be some relationship between the Minister for Communications, as he then was, and the Independent Radio and Television Commission, and if so what did you understand that relationship to be?

A. I suppose I would have seen that he had some power in introducing that business to me.

98 Q. I see. The documentation from the bank includes the publication, which was a publication in the press as I understand it, of the 17th of October, setting out the

nature of the Independent Radio and Television Commission;
isn't that right?

A. That's right.

99 Q. And that is attached to the documentation which was in the
possession of the bank; isn't that right?

A. That is correct.

100 Q. It may appear obvious, I take it, that there is a clear
distinction between the Commission and the Minister. They
weren't one and the same, in fact they were separate
entities; isn't that right?

A. That's correct.

101 Q. The documentation which opens this account notes I think,
that the reference was a reference of Mr. Burke, Mr. Ray
Burke; isn't that right?

A. Yes.

102 Q. What connection did you make between the two, from a
banking point of view?

A. I just saw it as business introduced to me. I didn't see
it as a connection.

103 Q. This was business introduced to you by the Minister?

A. Mm-hmm.

104 Q. In which this authority was now going to use your banking
facilities?

A. That's right.

105 Q. Did you know whether your branch had any particular
attraction, or any particular benefit to the IRTC, given
for example, its location at Dublin Airport branch?

A. No, it wouldn't have. But we would have had an office
close to where the Commission were, who could give them the
full banking service, which would have been quite normal at

that time, or even indeed now.

106 Q. Yes. So it involved your bank making a connection with, I think, both the Ulster Bank branch at College Green and also making arrangements for the Ulster Bank at Baggot Street --

A. Baggot Street would have been the main office that gave them the services.

107 Q. Right. Is there any reason why the account of the IRTC, therefore, was not an account convenient to its location, namely Baggot Street, if that be the case, or College Green for a period? Why was the airport branch chosen, do you know?

A. Because I was there, the introduction of the business came to me.

108 Q. I see.

A. And it would have been coming to me personally.

109 Q. I see. And I take it that this was to be a relatively attractive account, from a banking point of view?

A. Oh, yes.

110 Q. It was a Semi-State organisation, there was unlikely to be any default on the account; isn't that right?

A. Yes, that's correct, and it is an account that you would want.

111 Q. Exactly.

A. It is an account that you would want in your own office.

112 Q. Right. And equally one which would be generating relatively large sums of money insofar as there was going to be a levy imposed on independent radio stations, whereby something in the region of three percent of their gross income would find itself being paid to the IRTC as a levy;

isn't that right?

A. Yes. The turn over would have been substantial at the time.

113 Q. And all of that would, hopefully, find itself passing through Ulster Bank?

A. That's correct.

114 Q. In the light of that, did you think that there was some quid pro quo which could be given to the person who introduced the account to you?

A. No.

115 Q. No?

A. No, definitely not. I mean we have accounts introduced to us everyday.

116 Q. Does that not facilitate your approach perhaps to a particular customer? That he is a person who has introduced significant accounts to you, that you take a certain view in dealing with his own personal affairs?

A. You might, you might be quicker to reply to phone calls etc., day-to-day stuff, but I mean you would not, you would not be in a position in the bank to give any favours because you got business from that customer.

117 Q. Well, could I suggest that a manager always has a discretion with regard to accounts. He is not duty bound to, let's say, dishonour a cheque, for example, if it happened to be in excess of an overdraft facility; isn't that right?

A. That's correct.

118 Q. And that's just one example of the discretion which a manager may have?

A. Yes.

119 Q. In dealing with accounts of --

A. But a manager could use that discretion without getting any accounts, or any business introduced.

120 Q. Of course. But the better the customer, from the point of view of generating business for the bank, the greater the leniency, I suggest that would be afforded to that customer in the event that it would be required to be exercised?

A. Not necessarily.

121 Q. Perhaps not necessarily, but is there any other reason why business would be introduced to you by an individual which was not the business of the customer himself? Particularly attractive business?

A. You gain business because you actually give a good service to a client. And it would be known as a "warm introduction", so the more people we look after, the more you would hope to gain. It is looking after the client, it is giving them the normal service.

122 Q. Thank you Mr. Moody.

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CHAIRMAN: Does anybody want to ask any questions?

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MR. FOX: I have one question for this witness Chairman.

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MR. O'HIGGINS: I have no questions for the witness.

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MS. EGAN: No questions.

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MR. FOX: Sorry, I have one question.

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CHAIRMAN: Thank you very much.

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MR. FOX: Sorry, I have one question.

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CHAIRMAN: Sorry, I didn't see you put your hand up, if
you know what I mean.

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

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123 Q. MR. FOX: Mr. Moody, isn't it true to say that Mr. Burke
got no personnel benefit out of the introduction of the
IRTC business to your bank?

A. Mr. Burke got no benefit, none whatsoever.

124 Q. MR. FOX: Thank you very much Mr. Moody.

A. Thank you.

.
CHAIRMAN: Thank you very much Mr. Moody.

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THE WITNESS THEN WITHDREW

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MR. O'NEILL: Mr. Vivian Murray will be the next witness
please.

.
CHAIRMAN: Thank you.
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VIVIAN MURRAY, HAVING BEEN SWORN, WAS EXAMINED BY MR.
O'NEILL AS FOLLOWS:

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MR. McGRATH: Mr. Chairman, just as a matter of courtesy.

My name is Declan McGrath, I appear for Mr. Murray,
instructed by O'Donnell Sweeney Solicitors. I am applying
to you for limited representation for the purpose of Mr.
Murray's evidence.

.
CHAIRMAN: Again upon principle, excuse me, witnesses of
fact to the Tribunal are not normally given
representation. It only arises if in someway an aspect of
the Tribunal's inquiry could, I want to be very careful
using the word "could", in someway adversely affect the
particular witness. I don't know anything about this
gentlemen or in anyway what his connection with the
Tribunal is, and I certainly won't just off-the-cuff give
representation.

.
Now, that in no way reflects upon Mr. Murray, I want to
make that quite clear. I have actually no knowledge of the
gentleman at all. Nor do I know his relationship with Mr.
O'Neill, do you have any --

.
MR. O'NEILL: The witness is a member of the IRTC, and
perhaps at some later stage if it transpired that there
were some circumstances in which My Friend felt the
evidence justified an application for representation, he
could make it at that time; but certainly to my knowledge

we were merely going to be dealing with the factual detail of the role played by this gentleman as one of a body of persons who carried out certain acts in the 1980's, and I don't see, at this point in time, a need for individual representation to be granted to this witness, or indeed to any of the other witnesses who are, who were then, I should say, members of the IRTC.

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CHAIRMAN: That is the position Mr. O'Brien. As I say you are welcome to renew your application, but the principle, and it is no reflection on your good self, nor on the witness, it is a principle that I don't want to encourage representations for everybody. It is only a question if there is some adverse effect. If you feel there is some time, you are very welcome to intervene, but do so please before any damage be done.

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MR. McGRATH: May it please you Chairman, just if you would note the application.

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CHAIRMAN: I will of course. Thank you very much.

125 Q. MR. O'NEILL: Good morning Mr. Murray. Mr. Murray, I think that you were at one point in time the Chief Executive of the Irish Goods Council; is that so?

A. That's correct.

126 Q. And that is a position which you held from 1974 having initially been appointed by Mr. Justin Keating, who was then the Minister of the Labour government to that position; is that correct?

A. Yes, that's correct.

127 Q. Over the course of time I think you had occasion to meet with successive ministers of other government persuasions or other political persuasions as time passed; is that right?

A. That's correct.

128 Q. And in the course of time, I think you found yourself being invited to join the IRTC in 1988, you were one of the inaugural members of that body; isn't that so?

A. That is so, yes.

129 Q. And can you recollect the terms or the circumstances in which you become to be appointed, who made the approach to you for example?

A. My recollection is that I had met Minister Burke some time before the Commission was established, I don't know, weeks or months, this would have been at a business function or whatever, and it was there, I suppose it was very much in the public domain at the time, the onset of an independent radio network. And I believe that Mr. Burke asked me on that occasion, if I would be interested if serving. I know that a considerable period of time elapsed, excuse me, between that event and the actual appointment of the Commission. So I don't know and I can't recall the process after that, I presumably got a letter of appointment, or was asked if I was prepared to be appointed, closer to the date.

130 Q. Very good. It may assist in the chronology of events, if I was to tell you that the Act was passed on the 3rd of July of 1988, and that the inaugural meeting of the IRTC took place on the 17th of October of 1988 at Newbridge House in Donabate?

A. Yes, I am familiar with the October meeting.

131 Q. Is that the sort of delay that you are discussing here?

That it might have been some time after the passing of the Act and obviously before the 17th of October, 1988?

A. I think so, yes.

132 Q. Right. Can you remember any discussion with the Minister at that time and prior to your appointment, in which he had gone into the detail of what would be required of you if you accepted a position as a member of the IRTC?

A. No.

133 Q. Now, if I might just refresh you perhaps, on the content of the Act under which you were to provide your services as a member of the IRTC. Firstly I think the record would show that your appointment started on the 17th of October, when your letters of appointment were distributed as I understand it, at the inaugural meeting, and just before you sat for the first time as a Commission. Would that accord with your memory, that you received your letter at that particular time?

A. I wouldn't be --

134 Q. In any event, it was clear to you that the functions which you were to perform were functions which had been created under a certain statutory provision and that was the Radio and Television Act of 1988; isn't that so?

A. Yes.

135 Q. Right. And in that Act firstly it identified the nature of the Commission "as being a body corporate with perpetual succession or power to sue or to be sued in its corporate name and to acquire, hold and dispose of lands".
So you were a member of an independent legal body, from a

legal point of view; isn't that right?

A. Yes.

136 Q. And amongst the functions that you assumed on becoming a member, was that you would be a participant in the selection of applications for the award of sound broadcasting licenses?

A. That's correct.

137 Q. That was a provision which was contained in Section 6 of the Act, and if we could see that on screen at page 5578?

You will see that the Act provided for certain criteria which you would have regard to when it came to the selection process, and you will see under subparagraph 2A, or rather subparagraph 2 it says:

.

"That in consideration of applications received by it, and in determining the most suitable applicant to be awarded a sound broadcasting contract, the Commission shall have regard to:

.

(A) The character of the applicant or if the applicant is a body cooperate the character of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares.

.

(B) The adequacy of the expertise and experience and of the financial resources that would be available to each applicant and the extent to which the application accords with good economic principles.

.

(C). The quality, range and type of programmes proposed to be provided by each applicant or if there was only one applicant by that applicant.

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(D) The quantity, quality and range and type of programmes in the Irish language and the extent of programmes relating to Irish culture proposed to be provided.

.

(E) The extent to which the applicant will create within the proposed sound broadcasting service, new opportunities for Irish talent in music, drama and entertainment.

.

(F) The desirability of having a diversity of services in the area specified in the notice under Section 5(5) catering for a wide range of tastes including those of minority interests.

.

(G) The desirability of allowing any person or group of persons to have control of or substantial interests in an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under the Act.

.

(H) The desirability of allowing any person or group of persons to have control of or substantial interests in an undue amount of the communication media in the area specified in the notice under Section 5(5).

.

(I) The extent to which the service proposed -

(i) Serves recognisably local communities and is supported

by the various interests in the community or,

(ii) Serves communities of interest, and:

.

(J) Any other matters which the Commission considers to be necessary to secure the orderly development of sound broadcasting services."

.

So it gave you a fairly wide range, but it targeted a number of individual criteria which should be borne in mind by the Commission and its members when making its selection; isn't that right?

A. Yes.

138 Q. Were you aware incidentally of the fact that the Independent Radio Commission had been introduced into the Act as an amendment in the later stages of its progress through the Houses of the Oireachtas and that initially there had not been provision for an independent Commission, but rather for an advisory board whose views would not have been binding upon the Minister. Did you know of that?

A. I can't recall right now, but I think there was a difference between, I think, between the government and the opposition on this, on the nature of the Commission, but I can't recall the detail of that now.

139 Q. I see. In any event, is it the case that you were quite clear in your own mind that the activities of the Commission were to be quite separate and distinct from both the Minister and from his Department?

A. Yes, I think so. That's what I would be, have been used to.

140 Q. The Act itself provided that the Commission would act in

accordance with the provisions of the schedule to the Act, and the schedule to the Act set out a number of matters of, I suppose housekeeping and procedure which would be followed by the Commission in order to comply with its statutory obligations; and if we can turn to page 5588?

You will see that the meetings and procedures of the Commission were a matter that were regulated by Clause 7 of schedule - and that states:

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"1. That the Commission shall hold such and so many meetings as may be necessary for the due fulfillment of its functions.

.
2. The Minister may fix the time and place of the first meeting of the Commission" - sorry "the date, time and place of the first meeting of the Commission" and that was fixed as the 17th. Then it goes on, if we move down to 5: "To provide the procedure which should apply at meetings". It says "that every question at a meeting of the Commission shall be determined by a majority of the votes of the members present and voting on the question, and in the case of an equal division of votes, the Chairman of the meeting shall have a second or casting vote."

.
That is a fairly standard provision in this type of Commission; isn't that right?

A. Yes, I think that is probably part and parcel of most company formation regulations.

141 Q. Now if we move to the first of the meetings then which was to take place, it was the inaugural meeting which took

place at Newbridge House, which is out in Donabate; isn't that right?

A. Yes.

142 Q. And I think the Minister delivered an opening speech in which he expressed his wishes and good wishes for the Commission in the future; isn't that right? You can't specifically remember the contents of the speech?

A. I presume it was a political event.

143 Q. Yes.

A. Yes.

144 Q. And after that had been done, some of the business of the day took place; isn't that right?

A. There was a meeting.

145 Q. There was a formal meeting. And you were in attendance as were all of the fellow members of the Commission; isn't that right?

A. That's right.

146 Q. And for you, I think, as with many of the other members, this was the first occasion upon which you had actually met with your fellow Commission members; isn't that so?

A. Largely.

147 Q. Yes. It certainly was the first time in which you had all met together?

A. Certainly, yes.

148 Q. But you may have known one or two of them from business or social contact in the years before that; isn't that right?

A. That's right.

149 Q. Now, if we turn to the minutes themselves, we will see at page 2097, the minutes which were taken of that meeting, in the inaugural meeting, being the inaugural meeting, and it

commences with the report as follows:

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"During the course of his inaugural address the Minister for Communications formally requested the Commission to take the steps necessary to ensure the establishment of a national independent television service.

.

2. The Minister signed the establishment day orders and distributed letters of appointment to Commission members."

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It then deals with the business of the day. The first item being standard orders, standing orders rather, you will see here it says: "It was decided to defer final consideration of standing orders until the next meeting. It was agreed however, that minutes of a meeting should be with the Commission three days before the following meeting and that the minutes should be a record of decisions only."

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Can you remember what debate, if any, took place as to the fact that minutes which were going to be taken should be a record of the decisions only, rather than a record of the positions taken by any individual member of the Commission or the positions to be advanced, or which had been advanced by such a member at such a meeting?

- A. I am not aware that there was a discussion. In fact when I read that for the first time in the recent days, it struck me as being just a normal provision that would go, that would get through on a nod. This isn't to say that there wasn't some reservation expressed or objection to it, but I have no recollection of that at all. I would have said

that went through on the nod, as I said as a normal - there are, as you know there are two ways you can approach it.

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You can have a verbatim stenographer, taking a report of a meeting at which everything that is said is recorded, or you can go, I think the more normal route which is to say that we will only record decisions taken, and you know, I would have considered that very normal, if you like.

150 Q. Yes. This however, is a statutory body, it was considering very sensitive issues, and presumably would like to see itself being perfectly transparent in all its dealings and accountable for everything which it had done; isn't that right?

A. We didn't know that then.

151 Q. No. In the light of that onerous obligation, I take it you would agree, that it would be of assistance if your actions were being subsequently reviewed, that there would be a full note of the meeting recorded in the minutes rather than the conclusions which were drawn at particular meetings; isn't that so?

A. Well, it might have helped our present deliberations more, but I still would be satisfied - if you go back to the date of that inaugural meeting, when that motion was put, it seemed to me, and I presume to other members of the Commission, to be the normal way. We weren't, in the sense that we weren't a policy making body, we weren't receiving submissions, oral submissions from outside. We were a decision-making group, whose job it was to listen, to consider applications and make a judgement. And I don't think that any of us anticipated today's events.

152 Q. The collective wisdom obviously, the diverse interests that were represented on this Commission, would lead to the ultimate selection; isn't that right?

A. Yes.

153 Q. Yes?

A. Yes.

154 Q. And each individual would be, presumably, obliged to do his best to offer his particular input in the decision-making process; isn't that right?

A. That's right.

155 Q. But the exact role that any one of the members of the Commission played is something which is lost to time, other than perhaps the individual recollection of one or other of the members who can still recall a particular issue being discussed; isn't that right?

A. Well that is so. But I suppose there would have been occasions when a member or more than one member mightn't have a view to offer in relation to a particular applicant, and would probably feel badly done by if that person wasn't recorded somewhere as having made a contribution. So it is a very difficult balancing, or if you like, tight line to walk between one procedure of one extreme and the other, record everything or just record decisions; and I don't think there is ever a satisfactory in between dimension.

156 Q. Yes. But as regards the first of the standing orders or rather the reference to standing orders here, your recollection at this point in time is, you don't know who proposed this as a procedure, or whether it was discussed at all, or merely adopted by the body then present; is that right?

A. I have no recollection, to be honest.

157 Q. I see. The next item on the minutes here, and it presumably follows the agenda of the first meeting, was the resolution to appoint bankers to the Commission, and you will see that it states that:

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"It was resolved that Ulster Bank Limited be, and is hereby appointed, the bankers of the Commission. The said bank be, and is hereby instructed and authorised, to honour the signatories" or signatures rather, "of certain of the named members".

Do you remember any discussion on that issue?

A. No. I would have, I would imagine that that was prepared beforehand, ready to be tabled at the meeting as part of the background work.

158 Q. Yes.

A. And again I don't think there was any issue raised. I certainly can't recall any discussion on it.

159 Q. Do you know even at this point in time, why it was that the airport branch of the Ulster Bank was appointed to be the bankers to the Commission?

A. I was listening to the previous witness here. It occurred to me that the airport bank was actually, probably the nearest bank to where we were meeting that day. I don't know whether that crossed anybody's mind, but it was just a thought that occurred to me as I was sitting there.

160 Q. I take it that it wasn't intended that the future meetings of the Commission --

A. Would take place --

161 Q. -- would take place in Newbridge House?

A. No.

162 Q. But insofar as there were offices available to the IRTC, it was on a temporary basis in various government offices throughout the city; isn't that right?

A. That's right.

163 Q. So it was highly unlikely that the selection of a suburban, at best, bank would suit the needs of the Commission; isn't that right?

A. Quite.

164 Q. Did that result in any comment or any question being raised by any of the members present at the time of appointment of

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A. I don't recall. But I would say not.

165 Q. The next item on the agenda was the appointment of a firm of accountants, Deloitte Haskins and Sells, to be accountants and financial advisors to the Commission?

A. Yes.

166 Q. Do you know who it was who proposed Deloitte Haskins and Sells and why it was that they were selected to be the persons who would be the accountants and financial advisors to the Commission?

A. No, I don't. But I would be satisfied that the homework had been done, if you like, by the management of the executive and this was brought to the Board for formal approval, but in terms of - I wouldn't see the Commission per se as having any role in sorting out applicants.

167 Q. Presumably the Commission would wish, at the same time, to be independently advised by its financial advisors; isn't that right?

A. I don't think we foresaw it that, at that particular point,

I am not sure - we were into something very new, everything was new. Everything was breaking new ground. You know, I don't think we had the hindsight that we have now, for instance. You know, that would be my sort of impression, that this thing, this was part of the necessary housekeeping, to get on with it and see where it takes us.

168 Q. Obviously the Commission would need professional advisors to give it independent advice, both as regards the financial matters and also as regards legal issues, because you were going to be engaged, really in a quasi judicial role, isn't that right, in your selection processes and other decision-making; isn't that right?

A. Yes, I am not sure at what stage we recognised that need, but it was there, certainly.

169 Q. Yes. The next item on the agenda was the appointment of Mr. Michael O'Connor of John S. O'Connor and Co. of 4 Ormond Quay Upper, Dublin 1, as solicitor to the Commission. Again, in respect of that appointment, can you indicate to the Tribunal how it was that Mr. O'Connor came, in the first instance to be nominated for the role? Whether there was any discussion as to his qualifications or abilities in the areas that the Tribunal, the Commission, might be seeking legal advice?

A. No, but I mean, my own feeling in the matter would be that these would all be matters that would be taken care of by the executive, and that they would make the necessary provisions, and just seek the formal approval of the Commission. It is the old question of a dividing line between where the board stops from becoming involved in the day-to-day administrative detail; and I think there is a

clear dividing line here. I would say it would, the Commission, or in this case the board, would need Commission approval in the actual selection process. I don't think it ever came on to our desks.

170 Q. The Tribunal has been informed by one of your fellow members, a Mr. Donal O'Sullivan, that he was the person who proposed each of the parties who I have mentioned to date, for the positions of advisors and bankers to the Commission. In other words, he proposed the motion for the Ulster Bank at Clochrane to be the bankers of the Commission; he proposed that Deloitte Haskins and Sells would be appointed as accountants and financial advisors to the Commission; and he proposed that Mr. Michael O'Connor of John S O'Connor would be solicitor to the Commission. Do you remember Mr. O'Sullivan? He is a Cork member of your --

A. Yes, yes. Well, does he mean by "proposing", that he proposed a recommendation put forward by the management, and formally as a member of the Commission proposed and somebody else seconded these appointments? Or is he saying that he came to the meeting fresh with Mr. O'Connor's name?

171 Q. Yes.

A. And said "I propose", I find --

172 Q. The second of those alternatives. He will say that he came to the meeting with the name of the bank and with the name of the accountants, and with the name of the solicitors, and then proposed them at the meeting. Does that accord with your recollection of events?

A. I have no precise recollection of how these arose at all.

I would have assumed that these were all prepared prior to the meeting and that it was necessary for the Commission to formally propose/second arrangements which had, as I said, had already been in train.

173 Q. Yes. He will say that the reason why he proposed these two entities and one individual is that he was approached by Mr. Ray Burke, who was the Minister of Communications, who telephoned him and arranged to meet him in Fermoy, County Cork, for the purpose of a meeting. That he attended that meeting and at that meeting the Minister identified the bank and the accountants and the solicitors who should be proposed as the bankers, accountants and solicitor to the Commission. Does that come, firstly as a surprise to you, to learn that?

A. A total surprise.

174 Q. Right. I take it that your wish, as a member of the Commission was that anybody who was appointed in any role as advisor or confidant, or consultant, or person providing services, would do so wholly independently?

A. Yes, of course.

175 Q. Do you have a view on the fact that the persons who we have just mentioned were in fact nominated by the Minister through one of your board members for these positions?

A. I don't, it has come as, somewhat as a surprise.

176 Q. I see. The original intention in the Act, Mr. Murray, was that questions which were before meetings of the Commission, would be voted upon, and that the Chairman of the Commission would have the casting vote. We saw that as we went through Clause 7(5) of the schedule to the Act; isn't that so?

A. That's right.

177 Q. Can you recall that when it came to the selection process, a decision was taken that the decision would be made on the basis of a consensus, rather than a vote?

A. Sorry, would you mind repeating that? Are you saying that we changed --

178 Q. Yes.

A. Yes, this is the minuted reference.

179 Q. This is what we see at the minutes on page 5561?

A. Okay.

180 Q. At item 8 of the minutes, following upon the meeting which had taken place on the 24th of November, 1988.

A. I am sorry, the reason I queried that - I thought you said that it should be made by consensus, rather than by vote.

181 Q. Yes.

A. It doesn't say, it says that "the applications and decisions should be by consensus" --

182 Q. "On deciding on applications it was agreed that decisions regarding the successful application should be made by consensus of the Commission members."

.

Now, there is clearly a schedule to the Act which provides for a procedure, which provides for a voting procedure which provides for the Chairman to have the casting vote.

We have read it. This particular decision here on applications, obviously, is an addition to or qualifies the existing statutory mechanism which was there, otherwise it would be surplus to it, it wouldn't be necessary to have passed a resolution unless what was intended here was to substitute, alter or qualify the voting procedures set out

in the Act, and to substitute it by what is described here as "consensus"?

A. I am not certain that there is a lot of difference between "consensus" and "vote" in the sense of the way we went about our business. I also think that, again it is conjecture because at this remove of time I am not aware that there was any discussion about it or what was the substance, if there was a discussion, what the substance was; but it could also be a protective mechanism for individuals rather than have them identified as being pro or anti a particular application, I don't know; but the consensus - the consensus to me is a vote, because people have to indicate verbally what side of the motion they are expressing. So the job of the Chairman would be, therefore, to mentally convert these into votes, these expressions into votes for and against. And that is how I would understand the consensus.

183 Q. Well, of course it is always --

A. That is how we operated.

184 Q. Yes. Well, if we can perhaps go back insofar as we can, to November of 1988, there was, as we see an established procedure under the Act which would have involved a head count on each question which is before the Commission. The decision would be put, there would be a count at the table, five against, five for, casting vote to the Chairman, majority carries it, and that is how the business of the Commission could be done; isn't that so?

A. That is more or less a standard provision in the Articles of Association.

185 Q. That is the provision which was implemented by Section 7(5)

provision in the schedule, that is precisely what it says should happen, where there is a question before the Commission; isn't that right?

A. Does it? I am not sure that it does bind the Commission in terms of how it orders its own business?

186 Q. Well, we can look at that and I think you will be satisfied that it, that the Commission is bound to follow the procedure set forth in the Act. If we look again at page 5588, Section 4? Sorry, Section 7(3) firstly? "Subject to the provisions of the Act the Commission shall regulate its procedure by rules made under this subparagraph" so it is subject to the provisions of the Act. Then it provides at (4).

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"At the meeting of the Commission,

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

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

.

(5) Every question at the meeting of the Commission should be determined by a majority of the votes of the members present and voting on the question. In the case of an equal division of votes the Chairman of the meeting shall have a second or casting vote."

.

Now, undoubtedly the selection of an individual or company for the grant of the franchise would be a question before

the Commission which would have to be determined; isn't that right?

A. Yes.

187 Q. And prima facie reading the provisions of the schedule there, it is something that is done on the basis of there being a vote of all members present and their votes being cast; isn't that right?

A. I am satisfied that this is written down in the Act, but I am just wondering does, you know, is it possible to say that, to re interpret that by saying that "we will have consensus and the Chairman will decide", and the Chairman in the situation also would be deciding; after all we did have an eminent legal gentleman as our Chairman, he would be able to decide whether the expressions "for" or "against" a particular application were close enough to call for a vote, and/or the use of his casting vote, or that the expressions of opinion around the table were such that a vote wasn't necessary.

.
Having said that, I mean we would be voting, because you would have, by definition you would have to express your position on application during your contribution to the discussion. So, I don't want to get into a sort of a discussion on the merits of the sort of thesaurus definition of what a vote is, but I mean to come back to what I said at the beginning, I didn't have any difficulty, I don't think the Commission had any difficulty in deciding that that is the good way to proceed. I think if there had been a kind of a razor edge situation, in any of the matters that we discussed and decided upon, I feel sure we

probably would have come down to a vote in the formal showing of hands sense, but --

188 Q. The decision, as we see reflected in the minutes on page 5561, was that decisions regarding a successful application should be made by consensus of the Commission members. Firstly, that seemed to confine the application of the consensus requirement to decisions with regard to the application of the successful members, rather than the broad spectrum of the activities of the Commission itself; isn't that so?

A. Yes, but I suppose that is the main business we were in, the picking of successful applicants, applications.

189 Q. And at the time that this particular motion was passed, or considered, no consideration had taken place as to any particular applicant in regard to the National Radio Franchise because they had not received the submissions yet; isn't that right --

A. This was?

190 Q. In November of 1988?

A. Yes.

191 Q. And the decision-making process was not embarked upon until at least the submissions had been received by the applicants and then there was a consideration before ultimate pronouncement; isn't that right?

A. That sounds like it, yes. Certainly there were no applications in at that stage.

192 Q. Yes. Do you know of any reason why this procedure was then decided to be the procedure that should be followed before one would even considered an application and before one had either established whether votes would be polarised or

whether or not it would be by general consensus or otherwise?

A. Well, I am only guessing that it was, you know, I would be quite happy with that today, if somebody came along to me and said "look, we have a meeting, we have a group, this is the way we are going to do it". I would be very happy with that process.

193 Q. Well --

A. I think that at the time that it would have been adopted, which is, as you say, in November.

194 Q. Yes?

A. Yes.

195 Q. The 25th of November?

A. I would have said --

196 Q. The 24th?

A. I would say that the Commission would be, wouldn't give that a thought, it would have been perfectly comfortable with it. That is an impression.

197 Q. I see.

A. I don't - I can't imagine it having been the subject of a dynamic debate for and against.

198 Q. Do you know why it was done at all? Was it in exception of some particular circumstance arising in the future or otherwise? Why was there this specific decision taken or proposed by, obviously one member and discussed and agreed by the body of members, that they would follow this particular course, do you know?

A. I have no idea.

199 Q. Yes?

A. No.

200 Q. When the Commission started its business, it decided I think that it would sit every Thursday for meetings on a weekly basis; isn't that right?

A. I didn't realise that until recently, that we had actually sat as frequently as that, yes.

201 Q. Yes, right. I think you might remember that your remuneration on an annual basis for this, it was ú800 a year; isn't that right? Do you remember that as being the remuneration?

A. No, by the time the tax was finished, it probably disappeared.

202 Q. Yes. So there were very many meetings; isn't that right?

A. There were, yes. There were.

203 Q. Your remit covered the television license, the national radio franchise, various local stations; isn't that right?

A. Yes.

204 Q. But the first matter that was dealt with was the National Radio Franchise. Do you know why it was that the Commission sat to determine that matter in advance of, let's say, the local radio issues?

A. I don't. Looking back on it, it seems like the natural way to progress, but I mean --

205 Q. Why do you think it was the natural way to progress?

A. Looking at it from this perspective, it seems, you know, you have national, then the big Dublin/Cork, you work your way down through the network.

206 Q. One of the matters, as I understand it, that concerned both the Minister and the Commission, was the fact that there had been a proliferation of pirate radio stations over a number of years before the passing of this Act; and one of

the purposes and intentions of the legislation was to regulate broadcasting and to eliminate these pirate operators; isn't that right?

A. That's right.

207 Q. And I think it is correct to say that none of the pirate operators could be called "national broadcasters", they were all broadcasting in local areas serving perhaps a city at best, but generally even more sectional interests than that; isn't that so?

A. Yes.

208 Q. And could I suggest to you that it would be unlikely that would eliminate those stations by a national system, but rather by effective licensed local systems?

A. Yes, but I think the - I think the timescale between the beginning and the end of the whole process was, wasn't going to be considerable anyway. I think in fact it was all done within the year. But to answer your question, I don't know in what circumstances the decision was made to start with the national --

209 Q. You don't know whether that was something that started from a germ planted in the Commission by one of the its members or whether the Secretariat had been working to its own programme, or what the position was?

A. I think we were very much in the hands of a Secretariat in terms of the process and the order and the sequence, and so on. I think, you know, I can't remember the Commission, but I mean my memory wouldn't be absolutely sharp on that period of time; but I don't think the Commission had a major say in what order the applications should be.

210 Q. So you dealt with the matters that were on the agenda for

the meetings, and what was put on the agenda was, in the main, something that came through the Secretariat and the Chairman, presumably?

A. I risk being contradicted, but that is my impression, I can only give you an answer --

211 Q. If we can turn to look at the National Radio Franchise. The process started by the Commission inviting interest letters from individuals or bodies; isn't that right?

A. That's right.

212 Q. And then it sent out, in effect, a prospectus indicating what an applicant would have to furnish to the Tribunal, to the Commission, for its consideration; isn't that right?

A. That's right.

213 Q. And each of the parties who ultimately was considered for the National Radio Franchise delivered its submission in the format which followed strictly what had been sent to them from the Commission; isn't that so?

A. Yes, I think that was the way it was done.

214 Q. And the chronology of events was that the closing date for receipt of these submissions was the 16th of December of 1988, the parties had to have their submissions before the Commission by that date.

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CHAIRMAN: I wonder, Mr. O'Neill, as you appear to be on what I might describe as a "watershed" of a topic, you might take a short break?

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MR. O'NEILL: Certainly Sir.

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CHAIRMAN: We will sit again just before 12.

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THE HEARING THEN ADJOURNED FOR A SHORT BREAK AND RESUMED
AGAIN AS FOLLOWS:
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215 Q. MR. O'NEILL: Before the break we were discussing, Mr.

Murray, the progress of the National Radio Franchise applications; and it would appear that the closing date for submissions was going to be the 16th of December of 1988.

That does that accord with your memory of events?

A. Well, I now understand that to be the date, yes.

216 Q. And between October and that date, obviously a number of meetings were taking place on a weekly basis, and you were familiarising yourself with the work of the Commission and meeting with your fellow Commission members on matters of mutual interest arising out of the agenda for these meetings; isn't that right?

A. Yes.

217 Q. One of the matters which was dealt with at a meeting on the 3rd of November 1988, and which appears in the minutes signed on the 10th of November 1988, at page 5544 of the documentation before us, dealt with the cost of the RTE services; and apparently at the meeting it was agreed that the Commission should request the Minister for Communications to seek, from RTE, the scale of costs for the use of transmission and other facilities by stations broadcasting under the aegis of the Commission. Can you remember that subject matter being raised or discussed at a meeting of the Commission in November of 1988?

A. Well, I can't be precise about the date, but I do know that this question of transmission costs was, it loomed large in

a lot of our discussions at that time.

218 Q. Yes. I think this is the first reference that we find in the minutes to it, and it is limited to the four lines that I have read out to you there - and I am just wondering whether you have any specific recollection of exactly what was discussed at this meeting which lead to this presse, as we see it here "cost of RTE services", appearing in the minutes signed on the 10th of November?

A. No, but maybe it is just conjecture. But it could have been as a result of feedback from the applicants, in terms of their seeking some guidance or advice from us. That is just a guess. It would sound reasonable that was where the origin of that particular item came from.

219 Q. Well, obviously everybody knew that there was an existing transmission network?

A. Yes.

220 Q. Available in the country at that time; isn't that right?

A. Yes.

221 Q. That RTE were the company which was providing that particular service and that some, or perhaps all of the applicants for the national service, might well wish to use it in addition to local operators perhaps wishing to use local services; isn't that right?

A. Yes.

222 Q. This note seems to suggest that the Commission felt that there was a scale of costs which could be produced by RTE to the Commission, through the Minister, for those services?

A. Yes, I gather that would be the sense of that paragraph.

223 Q. Yes. Right; had the Commission itself, to that point,

commissioned any report from any independent financial advisors or indeed Deloitte Haskins Sells or anybody else, as it what the likely cost would be of the provision of such a service by RTE?

A. I've no recollection of that at all, I am sorry.

224 Q. The minutes record that at a meeting of the 8th of December, which appears on page 5567, in relation to the accountants: "It was agreed to retain our existing accountants for the purposes of carrying out the annual audit but that we should not use them in future for consultancy purposes. The Secretary should meet with them to inform them accordingly."

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Do you know why it was that the Commission decided not to avail of the consultancy services which were to be provided or were certainly available for provision by Deloitte Haskins and Sells?

A. I am sorry, I have no idea. When you brought it to my attention previously, I thought maybe it had to do with the possible conflict of interests. There are some situations where auditors are precluded from becoming consultants to the same organisations; but that is purely a guess. I can't recall the origin of that decision.

225 Q. Yes. Whatever the reason for the decision, it would appear that from that day forward, the 8th of December 1988, the Commission did not in fact have independent financial advice available to it; isn't that so?

A. The Commission, I am making a distinction here between the Commission and the management.

226 Q. Yes.

A. The Commission, as far as I can recollect, didn't have input from independent financial advisors.

227 Q. Right. Certainly there is nothing in the paperwork which has been disclosed to the Tribunal which would indicate that the Secretariat moved to seek independent advice on the financial aspects of any application?

A. I see.

228 Q. So that on the 8th of December you are eight days short of the receipt of the submissions by the various applicants, and there are, on the 16th, four applications received that passed through the screening process; and it had been agreed that the Secretariat would carry out a comparative analysis and make that available to the Commission members within the following week after receipt of the documentation, so that we would see from the chronology of events that the submissions were received on the 16th; and the Secretariat prepared a report dated the 22nd of December; and it was then circularised on the 22nd of December to the members of the Commission. Does that accord with your memory of events?

A. I have to take your word for that. It sounds right, yes.

229 Q. Yes. At the meeting on the 8th, the question of RTE's transmission charges had been considered, and if you look to page 5568, under the heading "RTE charges" "you will see that it reads as follows:

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"Following a report from the Chairman and Secretary, of the meeting with RTE regarding the costs of transmission facilities etc., it was agreed that the sum being asked by RTE would be very detrimental to the interests of any group

interested in setting up a National Radio Service.

.

In the circumstances it was agreed that the Chairman, Mr. O'Donovan, the Secretary and Mr. Lackan, should approach the Minister in the matter."

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Now, firstly Mr. Lackan was a technical advisor, formerly an employee of RTE, who was advising the Commission on the technical aspects of transmission; isn't that right?

A. That's right.

230 Q. Yes. He was not an accountant nor a financial advisor?

A. That's right.

231 Q. Or a person capable of costing the service, as such.

Mr. O'Donovan was a member of the Commission; isn't that right; that is Mr. Fred O'Donovan?

A. Mr. Fred O'Donovan.

232 Q. And the Secretary was Mr. Connolly at that point in time?

A. Yes.

233 Q. Mr. Sean Connolly?

A. Yes.

234 Q. Now, do you remember the report from the Chairman and the

Secretary which was given to the meeting at that time?

Because it would not appear to be a written report available to the Tribunal, and I am curious as to whether or not the report referred to in this minute, was a discourse delivered by the Secretary or the Chairman, or whether it was a written report which was circulated either at the meeting, or in advance of the meeting?

A. I have no recollection at all. I accept that it was probably arising from that, that the whole figure of one

million pounds plus came into the discussion. I don't know if it was, if the million pounds plus gave rise to the appointment of the deputation or whether it was subsequent to that; but around that time the whole transmission fee thing became the big issue.

235 Q. Right.

A. But I can't recall; to answer your question, I can't recall a report back from this group.

236 Q. Right. Okay. The sequence of events was that on the day before this meeting, that is the 7th of December, the Chairman and Secretary had met with Mr. Vincent Finn and other representatives of RTE, and they had discussed the transmission charges, and they had been provided with a document which has been referred to in the Tribunal here as the "rate card".

In other words, it was the break down of the service charges for transmission which would be paid in the event that any one of the successful applicants wished to deal with RTE, and it had a number of alternative matters on offer; but the total service, if I might call it that, was being offered for 1.12 million at that particular time.

Does that figure --

A. That figure is very much imprinted in my mind.

237 Q. Yes. Do you know what matters were considered which lead the Commission to conclude that the sum being asked was detrimental to the interests of any group and that in the circumstances an approach should be made to the Minister?

A. Well, it would seem to me that there is a certain amount of hindsight in it. I am reflecting on what might have been

considered at the time. That figures like that, if they were to be sustained in the case of the national franchise, were to trickle down, pro rata through the network; would leave the Commission, I think, in a situation where it should pack its bags and go away and do something else. Because it didn't seem, I think, to the Commission at that time, that an independent network was viable against that background.

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And I think also the Commission would have been very surprised, because I think at no stage in our pre existence to this, these dates, was there the slightest notion that this was going to be such a huge element in the equation, amounting - if you look at it - it would have amounted to about 30 percent of the annual costs of the national station, just that one item alone.

.
This didn't, I don't think the economics added up, therefore, in terms of a viable independent network.

I, and the Commission, was very concerned at that stage.

238 Q. Well, what the Commission was considering, of course, was a business venture; isn't that right?

A. Yes.

239 Q. It was not ever contemplated, or certainly not embodied in their Terms of Reference in the Act that they should be either adjudicating on a public, a public service benefit to independent radio or a subsidised service or anything of that nature; isn't that right?

A. That's true.

240 Q. There is nothing to suggest, in other words, that the

Tribunal was being set up to effectively acquire a benefit for a broadcaster over and above what market forces could dictate as appropriate?

A. The Commission, yes.

241 Q. Yes.

A. Yes, that's true.

242 Q. So how is the Commission to determine what the market value of what was being offered by RTE was in the absence of there being any independent financial analysis carried out on behalf of the Commission to establish exactly what the commercial value of what was being offered by RTE was?

A. I think the view of the Commission would have been that it didn't have any function in this, that the government had decided to set up the national radio network. The government, de facto, owned the network, and if there was, if you like, a "clash" between the setting up of the network, and the prices being talked about for access to the network, this was something really that had to be resolved ex the Commission. I don't think the Commission felt that it had any power in this.

243 Q. Yes. Could I suggest that if the effect of making a decision on criteria other than purely commercial criteria was made, that that of itself would be the conferring of a benefit on one party and the visiting of a deficit on another party, which was no function of the IRTC, obviously?

A. Well, I suppose in assessing any of the applicants, there would be a whole lot of criteria. I mean this one has been the focus of attention for obvious reasons. But I mean from where I sat looking at it, you know, you looked at the

applicants in terms of the promoters; their caliber; the financial backing; management structure; their ability to stick in there for the long haul; because we were never under any illusions that setting up a national broadcasting operation was not going to be difficult. Not because of any unfair practices, but because of the fact that there was a loyalty to the sole operator, which would be very hard to dislodge. So the evaluations of applicants would be over a wide range of issues, including of course their provision for transmission costs.

244 Q. I mean one of the criteria that is specifically dealt with in the Act is the financial ability of the particular applicant to deliver the service; isn't that right?

A. That's right.

245 Q. I mean it is one of the statutory criteria that would have to be met by an applicant, that they would have the financial wherewithal to carry through their commercial venture; isn't that right?

A. That's right.

246 Q. And we know that there were other, at least one other commercial radio station set up; I think it is Radio Tara; at a cost of millions; isn't that right?

A. I am not --

247 Q. You weren't aware of the detail of that entity?

A. No.

248 Q. But certainly this would be a large and expensive commercial venture; isn't that right?

A. Mm-hmm.

249 Q. It was never envisaged that this would be subsidised through the efforts of the IRTC at this point?

A. Oh no. In fact the Commission was going to exist on payment from the franchisers.

250 Q. Yes. So it would have to be a stand-alone commercial venture?

A. Yes.

251 Q. If it were to succeed?

A. Yes.

252 Q. And one of the criteria that the Tribunal, that the Commission would consider, was whether or not it could in fact pay the costs necessary to get itself up and running by way of transmission, and pay staff, and do whatever else a radio station has to do?

A. Yes.

253 Q. On the one hand, if money was no object, they could have built their own transmission system throughout the country for upwards of eight million, I think?

A. Yes.

254 Q. But in commercial realities it soon become apparent, I take it, to you and to the other members, that the RTE transmission route was the only way to go, if one was going with the terrestrial service; isn't that correct?

A. Yes, I think, yes.

255 Q. So when it came to the 16th of December, and the consideration of those applications on the 22nd of December by the Secretariat, it was no surprise to you to learn that the three terrestrial applicants were going to opt for the RTE system of transmission; isn't that right?

A. That's correct, yes.

256 Q. Right. So it was then a matter of evaluating the respective merits of each of these applicants, one against

the other; isn't that right?

A. That's right.

257 Q. And there was a helpful analysis carried out by the Secretariat, which was circularised to all of the parties and all of the Commission - all of the Commission members, I should say - and that was a report which appears at page 3908, under the heading "National Radio Station Application", and it is dated the 22nd of December 1988, and it is addressed to the "Chairman/Commission members". It is signed by Mr. Michael O'Keeffe, who was one of the Secretariat.

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"Comparison of points in relation to the programme service on offer from each applicant is attached, full details are available in the application documentation on the page numbers referred. Applicants are:

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1. Century Communications Limited, page numbers 19 to 31.

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2. Radio 2000 Limited, page numbers 35 to 54 and Appendix Section 6.

.

3. National Radio Franchise Consortium, page numbers 17 to 31.

.

4. Radio Nova International, page numbers 1 to 2 and 20 to 21.

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Comparisons are done under a number of headings. These are:

General aims

news and current affairs

music policy

Irish language and culture

new opportunities for talent

purchase and sale of material

typical programme schedule

and readiness date.

.

Comparison is done for numbers 1, 2 and 3 only."

.

That is the first three radio applicants.

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"Applicant number 4 used a different approach and their

programme service is summarised separately.

Michael O'Keefe."

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Do you remember receiving that letter and its enclosures?

A. I can't say I do, I am sorry.

258 Q. In any event --

A. I have no doubt that it was sent to us.

259 Q. Yes. It was something covered in the minutes, as being something that would be sent and the records appear to show that it was prepared and it was presumably sent.

.

If we look at the comparisons under the headings here, they follow in a general way, the criteria which would be applied under the Act to any particular application; isn't that right?

A. Yes.

260 Q. And they are in synopsis forms. Take for example

"general aims" which is at page 3909, we are really talking about four lines by the author in respect of each individual applicant. He is dealing with the three individual applicants here, and we see that he refers to them as number 1, number 2, and number 3.

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Number 1 is Century; and the general aims and intentions:

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"Number 1 proposes a radio service which will be distinguished by being entertaining, authoritative, National Irish and targeted. They propose to open up the broadcasting day creating new audience segments in addition to legitimate competition with RTE.

.

2. Is Radio 2000. Proposes a pioneering schedule of exciting new programmes with a good balance of music and talk. They see a widening of the range of audiences with the new station responding to new EC arrangements of 1992. Strong bilingual, multi lingual aspect to new service.

.

3. The National Radio Franchise consortium. Proposes a vibrant national service which will be distinctly different from current stations and will, therefore, provide a viable alternative broadcasting ethic. It will aim specifically at an audience in the 25 to 45 age bracket; urban and semi rural; diverse in tastes but keen on quality."

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Now, really that doesn't tell you terribly much, as regards the distinction between any one of those applicants; isn't

that right?

A. I would call it a sort of a mission statement, I suppose.

261 Q. Yes, exactly. I think more or less the same approach can be seen at any one of the headings that are covered here. If one looks for example to new opportunities for talent at page 3913?

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"Number 1 proposes that sponsored programming will form a key element of their schedules and they will put a particular emphasis on the recruitment of new broadcasting talent in this area.

.

No. 2 proposes magazine-type programmes with emphasis on youth interests, demo tapes from new groups in music, etc.. They will also plan to run a programme on drama and entertainment, generally highlighting new talent in these areas.

.

No. 3 proposes to employ new people in the music, news, current affairs and making of commercials. In the drama area they would work in tandem with minority theatre groups, amateur groups, art groups, etc."

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From your point of view, Mr. Murray, as I take it a businessman, or a business focused person, these particular analyses didn't particularly assist you in your consideration of the applicants as to which was more likely to be a successful applicant than another; is that a fair comment?

A. They were generalised, and, I suppose, aspirational. They

were making the kind of noises that was probably being made in the public domain at the time about what was needed.

So, there is a certain amount, I suppose, of PR in that.

262 Q. Yes. So was it possible for you, in fact, to distinguish between one and another of the applicants as regards either the content of their programming or the ethos of the new service that they intended to offer?

A. Well, not on the basis of those generalities. But I mean they might colour the overall - but as stand-alone issues, I don't think that they would be very influential.

263 Q. The financial information might, on the other hand, have been of more importance to you in your evaluation; is that so?

A. Yes.

264 Q. And there was a comparison carried out on the financial aspects of the three applications, four applications, indeed, and you will see that at page 3919, headed: "Financial Structure Of The Applicants."

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Here you see at the top of the page there are initials for the "NRFC", that was the National Radio Franchise Consortium, page 42. For "2000" which was Radio 2000. For "Century", and for "Nova". The first document which we have here is really a statement of the capital that would have been available to each of these, with the exception of Nova, which was dealt with separately.

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As we see in looking firstly to the paid up shared capital, the NRFC was down for two million; Radio 2,000 for one million; and Century for two million?

A. Yes.

265 Q. Leasing finance: The NRFC was going to raise 1.58 million;

Radio 2000 - 2.557 million. And there would not appear to be any leasing finance projection contained in the Century document. And when we go to bottom line we see total capital - 3.58 million for NRFC. 4.419 million for Radio 2000; and two million for Century.

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So from the capital front it certainly wouldn't appear from this document that the most capital listed of the applicants was Century; isn't that so?

A. Yes. In terms of the bottom total, yes.

266 Q. Bottom total, yes. If we move then to the next page, which

is page 3921, this is a profit and loss projection for year one, and you will find that there are in the following pages, similar projections for the two following years.

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Sorry, it is 3920. And in these projections which I should say are extracts from the individual applications of the four contenders, and they have been extracted by the Secretariat and put one beside the other, obviously for comparative purposes. We see that the expenditure of NRFC in year one is estimated at 3.47 million. For Radio 2000 at 4.058 million and for Century at 2.488 million.

Isn't that right?

A. Yes.

267 Q. So the expectations certainly of the other two contenders

as regards their expenditure was that there would be greater expenditure by the other two contenders, by a considerable margin over and above Century's expenditure;

isn't that right?

A. Yes.

268 Q. If we look to transmission which is the two lines up above, the line over expenditure; you will see that the National Franchise Consortium estimated that it would be paying ú686,000 per annum for transmission. As we know all of them in their projection were building in RTE as the transmission provider. So we can assume that this is the RTE transmission charge at ú686,000.

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Radio 2000 has ú317,000; and Century is down for ú160,000. This is in the first year of operation, which obviously would have start-up involvement; isn't that right?

A. Yes.

269 Q. Again this would appear to indicate that the other two contenders were talking about significantly higher budgets than Century was; isn't that right?

A. Yes.

270 Q. In year two, which is the following document, number 3921, the Consortium had come up to 914, as its transmission charges for Year 2. Radio 2000 was up at 702, and Century was at ú240,000; isn't that so?

A. Yes.

271 Q. So as regards the expenditure totals then for that year, we see that the expenditure for the Consortium was at 5.95, sorry 5.985 million. The expenditure for Radio 2000 - 5.131 million. And Century 3.045 million.

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And on those figures they translated for the first two applicants into profit, but for Century into a loss, as

follows:

The profit for the consortium - 1.5 million.

The profit for Century, sorry for Radio 2,000-.28 million;
and for Century a loss of 105,000.

So that on those figures the projections of those parties
were such that in the second year, two of them felt that
they would be in a profit situation, although Century was
still showing a loss; isn't that so?

A. That's right.

272 Q. And in the third year then, which is at page 3922, we see
that the transmission again for the National Franchise
Consortium is 914. The transmission charges for Radio 2000
is 747,000, and the transmission charges for Century at
320,000.

In Year 3, all of the parties are now in profit. The
expenditure of the Consortium is 6.83 million.

The expenditure of Radio 2000 is 5.474 million.

The expenditure of Century is 3.5 million.

And these were returning respective profits of 1.172
million; 607,000; and 330,000 respectively; isn't that
correct?

A. That's correct.

273 Q. So of those figures as between the rival contenders, what
conclusions did you draw as regards the financial strengths
or weaknesses, or qualities of the individual applicants?

A. Well, just as you throw the figures back at me today, I
would have said I don't recall precisely, but I would have

said that certainly in the case of one, and to some extent in the case of the second applicant, these are the two unsuccessful ones, that the advertising income expectations would have been optimistic in the extreme.

274 Q. Yes.

A. Because I think that we were aware very much of the entrenched position of the dominant broadcaster at the time in terms of loyalty. To hack into that, I think the more modest your expectations were on that side the more realistic they would be. In fact, I think that is what proved to be the case.

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But the other, I think the other aspect of it is and it is, it comes back to this question of the transmission costs again. I think that the Commission, to a certain extent was prepared to see all other things being favourable, was prepared to see somebody like Century take up the cudgels in that area of transmission fees, which would have had a knock-on, as I said earlier, knock-on implication down the road. I think this would have been certainly marks in their favour, and it is interesting now looking at it from this position, that two of the, the other two applicants were offering, if you like, more to RTE than RTE was subsequently prepared to agree on.

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So, I think and I am again sort of conjecturing, that the transmission and the attitude to transmission, plus the fact that the Century people were seen to be tough, experienced, highly experienced business people with a broad range of talent, both in and out of the entertainment

business, they were going to have to take on RTE head to head, not just on transmission costs but on the whole fight for listeners/revenue, which were both, if you like coterminous, they were directly related.

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And as I say, I think that the Commission look at the people involved at the end of the day, and say on balance they are the better of the, the best of the applicants.

And as I said, the expectations certainly in the case of one of those, would have been seen, I imagine at the time, the expectations in terms of advertising revenue, would have been seen to be over optimistic.

275 Q. Did it occur to you, looking at these figures and particularly having regard to the fact that two of the applicants were prepared to deal with RTE on the basis of the RTE figures, there or thereabouts; that perhaps the commercial value of what RTE was offering was in fact in and around these figures, as opposed to the figure which was being proposed by Century, which was a third of, in the region of a third of the highest of those two figures at the end of the third year, and was certainly a good deal less than half of the middle of the road figure, which was advanced by Radio 2000?

A. Yeah; but I think, I think the Commission would have had a concern, as I say earlier, about the knock-on effect. They wanted the transmission in at the lowest possible cost, because this was going to dictate what the rest of the stations were going to pay.

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Certainly at ú900,000, which was the opening offer, if you

like, of one of the applicants, and even at ú750,000, in the case of another applicant, you were talking now about a bid figure against an asking figure of 1.1 million and the likelihood of the figure being resolved somewhere in between, this would have had horrific implications down the road.

276 Q. Well, what was the yardstick to be?

A. Well, I mean the yardstick was to be what, I think what the Commission would have thought at the time was what is, what kind of sum; which is only one item of a list of expenditure items; would enable a viable network of independent broadcasters to get up and going. You know, that is my, that is my sense of what went on at the time. But as I say, it was taken in conjunction with other considerations. We were very impressed, the Commission were very impressed by the front line of the successful applicants.

277 Q. We will deal with that in a little more detail, just a little later. If we can move through the sequence of the document?

A. Sure.

278 Q. The documents which were considered by the Commission. Obviously this documentation came in some time around the 22nd of December. It was considered at a meeting of the 5th of January of 1989, where the minutes record that the respective applications were considered in detail by the Commission. Have you any particular memory of what aspects were focused on in that meeting of the 5th of January? That is one week before the oral submission, or oral presentation is to take place?

A. I can't really. I am sorry, I can't say that one issue before another was discussed with any, in any detail. I presume that we went through all aspects of it fairly thoroughly.

279 Q. Yes.

A. But I have no recollection of the format.

280 Q. The minutes, unfortunately, don't help us too much, they merely record that: "The four applications for the National Radio Franchise were considered in detail. No decision would be made pending the hearing of the applicants in the National Concert Hall on the 12th of January."

That is at page 2103.

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So can you take, can we take it that as of that date certainly there was nothing in the nature of a short-list or anything of that nature following upon the deliberations, the matter would require the oral submissions to be made by the various parties?

A. Sorry, yes. Yes.

281 Q. Yes. Okay. Now, at this point in time, I take it that the RTE transmission charges issue had crystallised and you had, you had known that the 1.12 million was the figure which had been circulated to the Chairman of the Commission by RTE on the 7th of December. You had received the submissions from the various parties which set out their particular wishes.

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I think all of the parties complained that the amount which was being sought by RTE was excessive, but that two of them were prepared to live with it, one wasn't, effectively;

isn't that right?

A. I accept that.

282 Q. Yes. There were, in addition to the circularised analyses prepared by the Secretariat, there was also a series of questions which were prepared, again as I understand it, by the Secretariat, and circularised to the Commission as being possible questions that would be asked of the individual applicants at the time of their public submission. And the public submission of each party was intended to take place in the National Concert Hall, taking 45 minutes each; isn't that right?

A. Yes.

283 Q. And if we look to document 6086, we will see that this was one of the series of questions that were to be asked of Century. And under the heading "engineering" at number 10, you will see on page 37 of your proposal; "your proposal" here being Century's proposal.

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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 with the whole project?"

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Now, firstly have you any specific recollection of that question? It is at 6086. Well, perhaps you might find it under the IRTC.CENT, would that assist you? It is IRTC.CENT - C-E-N-T 7.01 - 352.

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Whilst this document is being formatted, Mr. Murray, the position was, I think, that the Secretariat looked at each of the applicants and then reviewed their presentation and drafted a number of questions under various headings.

In respect of Century, one of the questions dealt with their engineering/transmission submission. And if we look to number 10 there, it says:

"On page 37 of your proposal you state that the financial demands being made by RTE in 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 with the whole project?"

Now, firstly I think you were aware that the Commission, through its Secretariat, was in discussion with the Department of Communications about the level of charges that might be made by RTE for the provision of transmission facilities; isn't that so?

A. Yes.

284 Q. And meetings in fact were taking place in early January before the date of this oral presentation on the 12th. Where the RTE staff were meeting with the Department staff with a view to seeing if an accommodation could be arrived at as to what the appropriate level of charge would be. Were you aware of that, in a general way, without specifically --

A. I am certainly aware of it now from the documentation, I

presume that I was aware of it going on parallel at the time.

285 Q. Yes, right. And in the course of that exchange with the Department by the Secretariat, the Secretariat was in effect mirroring the concern of the Commission, that the amount which was being sought by RTE was exorbitant and that it would not allow for an independent radio service to be on, in service within the year; isn't that right?

A. Yes.

286 Q. The Department of course, had considerable expertise in communications, being the Department of Communications, and had been reviewing RTE, I take it, from the commencement of RTE's early history as a radio station; isn't that right?

A. Yes.

287 Q. And the Department's view, as expressed in some of the memoranda, was that the promoters of Century certainly had grossly underestimated the true costs of the provision of the service. You mightn't have been aware of that, but were you aware of the fact that the Minister and his Department had agreed with RTE that the appropriate level of charge would be ú692,000 per annum? And that was a decision which was made on the 11th of January of 1989?

A. Yes. I have seen reference to that in recent documents.

That would have been the day before the hearing.

288 Q. It was the day before the public hearing?

A. Yes.

289 Q. It was eight days before the award of the franchise?

A. Yes.

290 Q. Well, you would expect, I take it, that if the Secretariat had been in communication with the Department on this

issue, and if the Department had resolved the issue with RTE, that that fact would be communicated to the Secretariat?

A. Yes, even though it was only, as I say, a day, I am not sure about the documentation, whether that was an agreed figure.

291 Q. Well, it was - the annotation on the minute of that meeting notes that it was "as agreed by the Minister" and certainly RTE considered that an agreement had been reached. And that is the evidence of all of the Department witnesses?

A. Okay.

292 Q. So that there was an agreement on the 11th, which removed, I suggest, the mystery as to what the ultimate figure would be?

A. Right.

293 Q. And also removed from the equation the necessity of having a heavy hitter to negotiate with RTE, because the negotiation had taken place already between the Minister and his Department and RTE, and had resulted in a figure of 692.

.

This question at number 10 here seems to address exactly that situation, as to what would happen in the event that there was agreement. "Are you saying here that if the Commission and the Minister find these costs to be justified, that Century will not proceed with the whole project?"

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Obviously if Century was to maintain its position as demonstrated in the business plan, the scheme that they

envisaged was not viable if they had to pay more than 375,000 per annum for transmission. That was their submission; isn't that so?

A. Yes.

294 Q. If they were going to stick with that position there was very little point in considering, as considering them as an applicant for the franchise if the Minister had in fact deemed 692 to be the appropriate figure; isn't that right?

A. Yes. It is reasonable.

295 Q. So if they were to answer this particular query with "no, we will not proceed if the figure of 375 is - if a figure greater than 375 is agreed with the Minister."

You could then go on to consider the respective merits of the three remaining contenders, two of whom were going for the land system and one who was going by satellite; isn't that right?

A. Yes.

296 Q. In fact Century never moved from their business plan figure of 375. They never in fact got into the area of negotiation or persuasion or anything of that nature, with RTE; were you aware of that?

A. I am aware of it now, from recent submissions.

297 Q. Yes.

A. But, you know it was, again, a situation where RTE's rate asking price had gone from, as I say, 1.1 something million down to virtually half that. So we were winning, and I mean who was to say that that couldn't be whittled down further, despite the intervention. The Department, I am sure, were very professional and very up front about these things, but the Department is not, possibly, the best

regulator in that situation, because it has RTE's interests in mind as well as the interests of the other, and RTE are there, and the independent sector isn't there.

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I am not certain that there wasn't a feeling around at the time that that figure could be, could be whittled down again. As I said earlier, it did have implications for the other stations that we were going to license.

298 Q. Well, just on that point, obviously there is a cake, if I might describe it as that?

A. Yes.

299 Q. Which is the cost of running the system; and obviously the more that is being contributed by individuals, the lighter the burden for all of them, surely? If RTE said that the costs were, let's say a million; they could hardly then go out and charge sizable amounts to local stations because the actual million coming in from the main player would be meeting a substantial portion of the costs; isn't that so?

A. Well, it depends on whether RTE would take that view. They might take it that every new licensee is a customer for their product and charge them on a pro rata basis. That would be a very likely outcome.

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The other scenario would suggest that one station would virtually pay the costs of providing the network for all the others. I can't see RTE buying that one.

300 Q. Yes. Do you think that it would have been appropriate in the circumstances to have established exactly what the actual charge to the intending successful franchisee would be, before making the decision to grant the franchise to

any one of them?

A. I think that, as I say, the view was that clearly that there was a stay gap between the new RTE price and Century, but given that Century, for a whole lot of other reasons was the preferred applicant, they were not going to walk away - from the Commission's perspective, they weren't going to walk away over a consideration of the full difference, or let's say they reached a figure which they ultimately did, which was halfway between one and the other, and which was about a 100,000 and 150,000; they were hardly going to walk away from their responsibility, or from the franchise for that sort of money, which was about five percent of the first year's costs.

301 Q. Well, that certainly was presumably the basis upon which this question was to be asked, to see whether or not they were going to stick with their 375 figure?

A. They were, they were.

302 Q. And walk away?

A. They were traders, they were tough traders.

303 Q. But they did in fact stick with their 375 figure, they never proposed a figure more than that?

A. That's right. Which --

304 Q. If you had learned that, if you had learned that?

A. -- which would have earned them some kudos from the Commission, I feel.

305 Q. If you had learned that on the 11th, that they were not going, that they were not prepared to go above 375, in the knowledge that the Minister had agreed the figure at 692; could you have considered them as a possible successor for this franchise in those circumstances?

A. Well, at the end of the day the deal, the signing up of the contract, to award them the contract, was if you like the beginning of another process. The contract would then, a contract would then have to be put in place between the Commission and the franchisee, which would have had to include, by definition, a solution to the outstanding differences between themselves and RTE.

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In other words, they couldn't start at all if they didn't have access to transmission. So you know, if you pursue that sort of process to the point where the Commission is now ready to sign a contract with Century, by implication that says that the transmission fee issue has been resolved.

306 Q. Yes. But clearly it would not be in the interests of the Commission to have selected somebody for the grant of the franchise if they had no real expectation that they would be successful in their negotiation with RTE; isn't that right?

A. I wouldn't have said that was ever, that ever crossed our minds. I don't recall that as ever being an issue --

307 Q. But there seems certainly to have been, on paper in any event, an immediately identifiable risk that if one was to engage with Century as the successful franchisee at the time when the gap between their asking, their bid price and the agreed ministerial price, was over one hundred percent, or almost a hundred percent; that there was a real risk that it would never come to fruition?

A. I suppose in, I don't know if we articulated it like this, but in that scenario we would have had to go back to the

drawing board and either re-hear or look at the next best applicant.

308 Q. But at that point in time you would have firstly committed where yourself to this particular franchisee; you would have embarked on a process of endeavoring to reach a contract with them; there would have been a delay running to months at least; isn't that so? All of which, I suggest, would have been unnecessary and irrelevant, if you had elicited from this particular applicant, whether or not it was prepared to come up on its bid price, or its business plan price of 375?

A. I mean - again I am conjecturing, that I imagine that the Commission would feel that there was a certain amount of bluff going on, on both sides on this issue in relation to the position in which RTE now found themselves and the position that Century was in. And it suited the Commission that that battle should be fought and fought hard for the other reasons I mentioned, but as well as that, if the Commission; and this is my view; if the Commission was solidly of the view that Century were the favored and most potentially successful applicant, in terms of down the road successful, then I would say: "Well fair play to them. Let them get on with RTE and sort this one out". At the end of the day nothing happens until the contract is signed.

309 Q. Do you know why it was, Mr. Murray, that this question was never asked of Century, though it had been proposed to be asked of them?

A. I was taken aback when I heard this, when you, it was you that mentioned it to me first. I am just wondering whether

it was asked of any of them in that situation? Because it was a very volatile - it was a very, it was a very, what I would call "moveable feast", this question of transmission fees, at that stage.

310 Q. Well, this question was not in fact directed, as we see, to establishing exactly how much Century would be prepared to pay. It merely was inquiring as to whether or not, if the Minister and RTE agreed a figure which was not acceptable to Century, whether Century would not proceed; it was not in other words, endeavoring to seek any commercially sensitive information from them, or to air their bid position. It merely would have established, the answer to this question, whether they were prepared to move on the 375 or not?

A. I don't know really.

311 Q. No.

A. That is the answer.

312 Q. I see.

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CHAIRMAN: I might break there for a moment; but might I ask one question before we do? It is this:

You said there in the course of your evidence that the matter would probably have to be resolved by some form of arbitration, or some form of arbitrary approach, in the course of your discussion, that is what you said actually.

May I take it that you would have, you would assume that the arbitrator, whoever he might be, would have to be acting upon logical advice by an expert?

A. Chairman, I think what I meant there was that we have had - I was basing it on the experience that we have had recently

in the area of, say Telecom, of an independent assessor,
regulator --

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CHAIRMAN: A regulator?

- A. A regulator. There are other implications too for that,
because if that had been set up, then possibly the
government at the time, in its wish to establish an
independent network, might have come to the aid of RTE/the
independent network by finding, possibly a subsidised form
of making the network available.

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CHAIRMAN: The principle of this was working on, as far as
I understand it, that there was no subsidy for the
independent, that was the principle that the Minister was
working on, and certainly expressing?

- A. Yes, certainly was no question of a subsidy in terms of
their operation. But their access to, what we perceived to
be a public resource, was a different matter, was a
different matter.

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Now, again I am talking from hindsight, I am talking about
an arbitrator or a regulator or anything else, it would
have probably made life an awful lot easier for everybody
concerned.

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CHAIRMAN: Okay, thank you very much for the moment. We
will resume, I would like to resume, if we could do so, at
about five past two, because I am raising somewhat earlier
than usual.

THE HEARING THEN ADJOURNED FOR LUNCH.

THE HEARING RESUMED AS FOLLOWS AFTER LUNCH:

313 Q. MR. O'NEILL: Before lunch, Mr. Murray, we were discussing the question of the Minister's agreement of the charges with RTE on the 11th of January, of 1989, in the sum of 692,000, and as far as I understand your answer, you were aware that such a figure had been perhaps proposed by RTE, but you were not aware that it in fact had been agreed with the Minister. Is that the position or am I taking it too far?

A. Mmm, I think what I meant to convey was that I am aware of it now.

314 Q. Yes.

A. I don't recall having been precisely aware of it at the time.

315 Q. Right. Well, do you think that before the oral hearing on the 12th that you had been made aware of the results of the negotiations between RTE and the Department, in anyway?

A. Well, it's certainly possible. I just don't recall it. It would seem to me that if it had happened I should be aware of it because it represented a very significant turnabout.

316 Q. So, do you conclude from that, that the probabilities are that you weren't aware of it or that you were in fact aware of it?

A. I couldn't really come down on one side or the other, but just looking at it from this remove, I think that if we had become aware of it then it would be a good reason for not raising the issue publicly, given the variances between the

different provisions, and also the fact that, again this is hindsight, that if RTE were prepared to comment on, to come one huge jump from 1.1 to 600 and something thousand pounds, that there was room for further, for further bargaining, and this of course would have been very much in the Commission's interest, to see the lowest possible --

317 Q. So when the submission was made at the oral hearing, it is common case that there was no reference to the RTE charges in specific form, and indeed there were no questions directed towards Century's transmission charges.

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Would you have been aware as early as the 5th of January that there would in fact be no such questions asked of them, do you think?

A. I would say that a decision like that would stick in my mind. I would come down on the side of saying, "no", that there was no formal decision taken as early as that, but I don't know, again I am guessing.

318 Q. On the 12th, I take it you were impressed with the presentation which was made on behalf of Century?

A. They were all good presentations.

319 Q. Does that include the Radio 2000 and also the National Consortium?

A. Yes, I mean they were, they would - I think wouldn't have got to first base unless they responded or answered the issues raised, that we raised in the form of the application.

320 Q. And at this remove are you able to say what the likely ranking order of the three candidates was at the conclusion of their oral presentations on the 12th?

A. My impression is that there were only always two in contention.

321 Q. Right.

A. And indeed some, that view is strengthened by having looked at the figures projected there, where income expectations were, to put it mildly, unrealistic, in the case of one of the applicants.

322 Q. Well, in relation to Radio 2000 then and Century, as between the two of them, at the conclusion of the oral hearing, were you in a position to plump for one as opposed to the other, or did it require further information and consideration by you in order to reach a decision?

A. Mmm, my overriding impression is that Century was the front runner from the beginning.

323 Q. Right.

A. And that this was, this view was shared by a significant number of my colleagues.

324 Q. When you talk of the "beginning", do you mean from the time that their submission was first received and considered by the Commission, sometime after the 16th of December of 1988, or do you mean after the conclusion of the oral presentation, or some date between the two of those?

A. I don't mean to be, any disrespect to the people who made the oral presentations, but I think, in a sense the oral presentations were the end of a process, rather than a process in themselves. You, it enabled you to put flesh on the faces.

325 Q. Right.

A. To see people, and unless some rabbit was pulled out of the hat, I don't think that there was, that the oral hearings

in any case, per se, created a surprise, that the - you know, that the facts were already, the Commission members would have, as you said earlier, would have received the documentation individually, there would have been a meeting in the interim, and then, if you like, the hearing was the end of the process.

326 Q. Right. So obviously if we take it that the Commission as a whole, did not meet between the 16th of December and the 5th of January, which was the first meeting scheduled after Christmas, your view of other members' appreciation of the status or success rate of any one applicant would have stemmed from the meeting of the 5th of January, is that right?

A. I think that was a pattern right through the process, I can't pick out that particular one instance.

327 Q. The process seems to have been somewhat truncated, and I don't say this in any pejorative sense, but it was first presented in written form at, on the 16th, it didn't come directly, as far as I know, to the individual Commission members until the Secretariat had analysed it, which was the following week, which is the 22nd of December of 1988.

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There was no meeting from the 22nd of December, 1988, until the 5th of January of 1989, and that was one week before the oral presentation on the 12th?

A. Right.

328 Q. So, in that chronology of events it seems to me the only opportunity for an exchange of views between Commission members would have been at the meeting on the 5th of

January of 1989, when they would have had about ten-days or so to have considered the written submissions over Christmas, isn't that so?

A. Yes, yes.

329 Q. So, given that they, I take it then didn't meet between the 5th and the 12th, your opinion that Century was more or less a leader from the beginning, is something you gleaned from the meeting of the 5th of January of 1989, is that right?

A. Well I would be, you know, of that mind now. I can't precisely put my finger on what happened at the meeting of the 5th. But I could, you know, I could go back comfortably and say my recollection, it was Century in the forefront from the outset, of whatever form the discussion took. Now, I don't think that there was a formal consensus established at the meeting of the 5th, I doubt it. I have no memory of it, but I doubt it had got to that stage; just waited for the hearing, is there going to be a surprise? Going to be something that emerges in the questioning that throws the whole thing back on its feet, back on its heels?

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The hearing itself was more or less just a confirmation in some cases, in many cases that I have sort of any memory of, confirmation of a decision virtually arrived at beforehand.

330 Q. So from your point of view, Century was the likely successful candidate from the very beginning, from the time you read the papers and deliberated on it yourself?

A. Well, I don't know from the time of reading the papers, but

certainly in that process, during that period, yes.

331 Q. Right. That didn't alter, didn't alter at any time until the final decision was made on the 18th, is that right?

A. No, yes.

332 Q. Now, at the conclusion of the oral presentation on the 12th, I think as was the norm, the members of the Commission retired and waited for the audience to dissipate, and had coffee and discussed the matter in some detail, but not with the intention of reaching a final conclusion then, is that right?

A. I would say that a conclusion was reached then, I mean again based on the experience of the previous meeting, nothing new had emerged at the public hearing, so I, I am saying that there was a sort of seamless process. I can't recall if an actual head-count or whatever was taken on the day, but I mean I am pretty sure that I came away from that meeting in Dublin after the hearing, of the view that Century was the significantly favoured --

333 Q. Certainly --

A. I would have said "unanimous" until recent events.

334 Q. Yes. Certainly at least one of the other members of that Commission felt that it was even money at that point in time, as between Radio 2000 and Century, that wouldn't have been your view at the conclusion of it, is that right?

A. No, no.

335 Q. No. Now, was there anything, as far as you were concerned, left outstanding that required resolution before the Commission was to sit again on the 18th and deliver its decision? What matters, if any, required either further examination and consideration, in your mind?

A. I don't recall any specific matter, but I would be satisfied that in nearly all cases in the interim period between the formal public hearing and the, if you like, the signing-off of the application, would have involved the Commission, and by the "Commission" I mean the Executive of the Commission, in sitting down with the applicant and saying "Look", you know, again obviously with a view to drawing up a contract, "this and this and this needs to be tidied up or whatever", nothing - I would say that there wouldn't be anything that would change in any significant way the data or the information put in front of us.

336 Q. Now, obviously the Secretariat would have a role in implementing the wish of the Commission once a decision had been made to grant a particular license to an applicant, isn't that right?

A. Yes.

337 Q. But until such time as that decision had been made, there would be no reason for the Secretariat to go back to one of those who had made an oral presentation which had been considered by the general body of the Commission, isn't that right, or do you know of any?

A. No, but my sense is that there would be no circumstances in which the Executive would go back in a sort of, if you like a "Dutch auction" sort of situation as between one applicant and another.

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I think the only circumstances that I can visualise in which they would go back, would be where there was agreement on an applicant, and that before the actual signing, I can't imagine what kind of detail it might be,

but that before the actual signing of the, if you like the official stamp was affixed, that some details may have had to be worked out. I have a feeling that that did happen in a number of - I can't particularise in relation to Century, but I have a feeling that that did happen through the sequence of hearings.

338 Q. At the conclusion of the oral submissions in respect of the three applicants, or four applicants for the national radio franchise on the 12th, have you any recollection of their being an agreement that the Secretariat or Chairman would go back to Century and seek further information from them?

A. Not specifically - I don't have a specific memory of that, but as I say in relation, I think probably the un - if you like - unresolved issue had to do with transmission costs, and that may well have been an on-going --

339 Q. Well, insofar as the Commission had listened to submissions and had informed itself of the position, it was satisfied on the 12th that it had all the information necessary to allow it to reach a decision, is that so?

A. Yes, that is my belief.

340 Q. Now, some of the documentation which has been considered before the Tribunal includes a communication from Century Communications Limited to Mr. Hills, and Mr. Hills, I am not sure if you can remember his involvement, but he was a technical consultant engaged by Century. He was an English expert who had formally been the chief of the IBACS, which was the Independent Broadcasting Authority's Consultancy Service in the UK, and he was advising Century from August onwards in 1988.

Do you remember that gentleman?

A. No, but I have, in recent documents I have come across it.

341 Q. You have seen the recent documentation?

A. Yes.

342 Q. I ask you to look at a document, page 5600? Which is a fax from Century Communications to Mr. Hills, and it is dated the - 12:15 hours on the 13th of January, which, as we know, is the day following the oral presentation having been made by Century, and the message only, that starts: "Oliver Barry's office are faxing you details of the RTE charges."

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We will see from an associated document to this, that those were the RTE charges which were drawn up following the agreement with the Minister on the 11th, so that Century had those documents and were in a position to fax those documents to the UK.

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The message reads: "I have just returned from a very satisfactory meeting with the Chairman and Secretary of the Commission. A decision will be announced next week."

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Firstly, on that point, do you know that a decision had been taken by the Commission that it would be announcing its decision on the following week?

A. Well, I would assume from that, from that I would assume so, but I can't say to you that I know that on the day after the - what's this? It would be, I take it, the Monday, is it, or --

343 Q. Yes.

A. The first day after the hearing.

344 Q. This was the Friday, the 13th.

A. No, as I say, except that - I would assume that the Chairman and Secretary went, that it was on the back of a firm decision that "Here is one we want to run with."

345 Q. Yes.

A. But again, I can't recall a particular incident.

346 Q. Very good. Your best recall is that you think that effectively a decision --

A. Not so much even recall, but I would have known how the Commission operated, notwithstanding some of the things I learned this morning, I would have said that the Commission operated with absolute fairness and equity and - so when I look at that I say that's the only basis on which they would have done.

347 Q. Yes. The letter or fax continues: "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."

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Now, do you have any recollection at this point in time of the Commission requiring either the Secretary or Chairman to obtain information which would challenge the RTE figures, and to produce those as a matter of urgency?

A. No, but it makes sense in the context of events, that here was the one outstanding issue that hadn't been resolved, and it was also going to be prior, was also going to happen and obviously - I take it that Century would have been told, there would be no - I presume if they weren't told,

it was implied --

348 Q. Yes.

A. -- that "the stamp has not yet been applied to your application."

349 Q. And what would be required to apply it would be a satisfactory response standing up the ú300,000 figure in contra distinction to the only other figures which were before the Tribunal, before the Commission at that point in time, namely the RTE figures of 692?

A. Given that as I say, given that Century scored across a whole lot of criteria, the implication or maybe explicit instruction sort of, you know, "you have a few days to sort that out", that's the only construction I can put on that. But I cannot say at this stage, I am aware of that particular procedure.

350 Q. Now, the requirement there was the information would be received before close of business on the following Monday. And in fact Mr. Hills was unable to deal with the matter fully himself because he was going to Hong Kong the following day, the 14th, but he prepared a memorandum for IBACS following upon the information received, and if we look to the next document, it is No. 6092, which is a fax of the 13th to Mr. Stafford at Century Communications. It says: "Figures received from Oliver. RTE have made it difficult to compare with earlier ones by changing their approach to certain items, for example funding of the capital purchases, direct payment of electricity.

.

2. Had long meeting with IBACS this afternoon and briefed them as fully as I was able. I left them copies of your

fax, the latest figures, all the earlier ones tabled at our several meetings and other relevant information. Mr. Thomas is" --

A. Excuse me - I am not getting --

351 Q. It should be 6072. It is the 13th, and starts at "message" there.

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It indicates that the figures have been received from Oliver, that is the latest RTE figures, these are the figures for 692 as proposed.

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Professor Hills here says that: "RTE have made it difficult to compare with earlier ones by changing their approach to certain items. For example, funding of capital purchases and direct payment of electricity.

.
2. Had long meeting with IBACS this afternoon and briefed them as fully as I was able. I left them copies of your fax, the latest figures, all the earlier ones, tabled at our several meetings and all our other relevant information. Mr. Thomas is coordinating the preparation of the document. His home telephone number is" - and it is given.

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"3. The brief they are working on is
(A) Are the capital costs about right? They will not address the issue of how and what span of years they are repaid. I confirm a working life of 20-years for the new plant.

(B) Ignore any aspect of historic costs since your argument is one of principle.

.

(C) Assess operating and maintenance costs on a marginal basis, i.e. what are the additional costs that RTE will have to meet because of the service?

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(D) Ensure that the bottom line is of the order of 375,000, which is the figure in the business plan.

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4. Please talk to John if we have misinterpreted your brief."

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He then deals with frequencies, which I don't believe is relevant.

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So, in response to this particular fax IBACS forwarded a document to Mr. Stafford on the 17th. And if you look to document 6079? It is a cover sheet stating: "Herewith our memorandum commenting on the costs of the transmitter service given in your fax message of the 13th of January. Best regards J A Thomas." And he is of the IBA Consultancy Services.

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The next document then is at page 6080. And the evidence has been that this really is Mr. Thomas parroting what had been given to him by Mr. Hills, Professor Hills in his memorandum. And whilst it sets out certain figures, it certainly does not stand up the 375,000 or the ú300,000 figure, details of which were sought by the Chairman and

Secretary by the 17th.

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Now, this document is then forwarded to the Secretary on the 17th of January, and that is at Document 6078, which reads: "Dear Mr. Connolly, I enclose copy of the IBA fax just received here this morning, and in addition I would like to make the following observations.

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1. The transmission system for public service broadcasting is an investment that has already been paid for by license fees. It is maintained by the license fees. It is not the property of RTE, you are merely the custodian of a national asset.

.
The additional costs associated with public service broadcasting, as opposed to commercial broadcasting, the difference of delivering a signal to 63 percent of the country or 98.5 percent of the country is what license fees have been traditionally about, and I feel that this argument is irrefutable.

.
2. In our discussions with RTE they told us they could finance the capital investment and equipment at a cost of 7 percent per annum. However, they sought to amortise the equipment over the five year period, whereas it has a life of 20-years. The cost of amortising €100 of investment at 7 percent over 20-years is 9.44 per annum.

.
3. I would also draw your attention to the Sunday Tribune press statement, that the Downtown transmission charges for

the whole of Northern Ireland is ú100,000. The IBA advise me that this involves four transmitters. Our proposal is ú375,000 as a transmission charge is consistent with the Downtown transmission cost.

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Yours faithfully James Stafford."

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Now, do you remember considering any of this documentation as a member of the Commission prior to the decision on the 18th?

A. No, I'm afraid I don't, no.

352 Q. But certainly if this document was intended to offer a breakdown and justification of the ú375,000 from an independent source, namely the IBA, it does not do so, isn't that so? There is nothing in the fax document here which sets out how a figure of ú375,000 or 300 is appropriate, isn't that right?

A. Yes, that's true.

353 Q. Now, I am wondering whether, when the Commission resumed its deliberations on the 18th what the discussion centred on, vis a vis Century or any outstanding issues that may have been left unresolved from the 12th? Were there any to your knowledge?

A. I feel that if there was any mention of it, it should, would have been minuted, so there is no record that I can see in the recent --

354 Q. No, the minutes merely record the decision?

A. Yes.

355 Q. Was there any --

A. I suppose there were decisions made to sort of pull the rug

from under Century or something like that, because they hadn't - I certainly presume that would have been minuted, nothing like that. I don't think anything arose in respect of Century after the formal granting of the license. There were other issues afterwards when they were up and running, but in that time sequence, I think we had, that was - we were onto the next issue, which was the licensing of the Dublin and provisional stations.

356 Q. I am trying to establish at present just what decision-making process took place on the 18th to your recollection?

A. I have no idea, sorry.

357 Q. Do you remember whether or not it was a lengthy process or otherwise, or how it was conducted? Firstly, was there a vote or was it a consensual accord that was reached? Was there any formal vote I should ask?

A. I don't think there was a vote in the sense of people raising their hands or, you know - I think the way we operated, now taking the - I can't pick out one particular situation as opposed to others, but the way we tended to operate was to have contributions from around the table and a summing up by the Chairman, and a decision which I have never known to have been questioned.

358 Q. Do you remember whether every member of the Commission spoke on this issue or not?

A. It is likely, but I can't remember. Certainly the Chairman encouraged contribution, encouraged participation and gave everybody an opportunity to contribute.

359 Q. Was the intention and wish that there would be a unanimous decision in each instance?

A. I think that we were sort of, I have a sense that the Chairman was in a, in the mood to say "Look, let's not have dissention and tease out the issues and come to an agreed decision." It was done in a very - I thought as somebody who had been a member of groups involving Chairmen over a number of years, I thought his chairmanship was very fair and very, what I would call, equable in terms of assessing the results of the subject matter of discussion around the table. And I would have had, you know, faith in his judgement at the end of the, whatever discussion was taking place, and I don't think anybody - I think - nobody would rise up and say "That's not what we are saying to you", you know, we weren't dummies --

360 Q. How was it in fact done as between the last two contenders, Century on one hand and there was Radio 2000? Did the Chairman say, "Well, who is going to propose the Century application?", and then take a proposer and develop that?

A. I don't think it was done in that kind of formal way, and propose another one as an amendment and vote on the amendment. No, I don't think it was - I think people - my general impression, generally, I can't break it down as between the Century/Radio 2000 national one and the over ones, but my sense was that when people contributed, it was "Look, we have seen really two applications here. 1 has this and this and that going for it. 2 has this and this going for it. 1 has this and this against it. 2 has this and this against it. On balance I favour 1 or 2", which ever was the case.

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And I think that would be the, the sort of procedure, and

then the Chairman, presumably, whilst not asking for votes, presumably counting heads as it went around, would say, "Well, the consensus is that, it is whatever" - that's, that's my best recollection of, my feeling for the way it went, as opposed to precise, you know, experience that I can recall, but since that was the way we did, I think all of them, it was certainly, I don't remember that it was any different than the Century case.

361 Q. Now, once the decision had been made, obviously it was communicated to the successful applicant, and indeed the unsuccessful applicants, and the business of sitting down to reach contracting with the franchisee took place, and there were contracts which were to take place between Century and RTE, and also Century and the IRTC, isn't that right?

A. That's right.

362 Q. And one certainly couldn't have one without the other, and the transmission agreement had to be reached first, isn't that right, because IRTC could not give a contract to a person who did not have the ability to transmit, isn't that so?

A. That's so, yes.

363 Q. And I think you became aware of difficulties which arose with regard to reaching agreement between RTE and Century, isn't that so?

A. That was subsequent too, yes.

364 Q. After the license had been granted?

A. Yes.

365 Q. Did you learn that the Minister agreed in February, on the 16th of February, that having further considered the

application and the RTE charges, that a sum of €614,000 would be a reasonable charge to make, in "Irish circumstances", and he so communicated that fact to the Chairman of the Commission?

A. Well, I am aware of it now, I couldn't recall it happening at the time.

366 Q. Yes. Do you know why it was that notwithstanding that the Minister had given that indication, that there was further negotiations or further application I should say, for a review of that figure by the IRTC?

A. I don't recall, sorry.

367 Q. Do you remember any specific agreement being reached by the Commission as a whole, to seek from the Minister a direction under Section 16 of the Act?

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I will remind you what Section 16 was, it was the one which allowed the Minister to intervene and to set a charge in respect of the facility being provided by RTE to the successful broadcaster.

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It is at page 5585.

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Section 16 reads: "The Minister may, at the request of the Commission, and after consultation with RTE, require the latter to cooperate with sound broadcasting contractors in the use of any mast, tower, site, or 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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That's the operative section which the Minister implemented in order to direct that RTE would provide its services at a certain cost.

Now, that involves firstly a request being made of the Minister by the Commission, and the minutes of the Commission report, certainly are silent about any resolution by the Commission that an application under Section 16 should be made.

I am just wondering if you have a recollection of this issue being debated by the Commission as a whole, and deciding that in the circumstances it was, it would be appropriate to seek a direction, specifically under Section 16?

A. No, I can't say I do recall in relation to that specific article, but there is something that I, in the minutes sent to me by the Tribunal recently, there is a reference - it is not the 15th, it was signed the 15th of March, but it is some weeks earlier, in which the Commission I think decided, am I right in saying this, decided to approach the Minister to get this matter resolved?

368 Q. Yes. On the 9th of February, 1989?

A. Yes, yes.

369 Q. At page 5570 the question of the RTE charges was discussed, and under the heading "RTE Charges" it says: "As it seems unlikely that representations to the Department of Communications about the cost of RTE transmission facilities for 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."

Now, whilst that addresses the question of communications with the Department of Communications and refers to a desired result, it is unclear as to what the desired result was there in money terms. What do you think the impasse was that could not be resolved by the Department of Communications?

A. Well I can only say, again bearing in mind the Commission's overall view of, on transmission costs, that we wanted just to hammer down that price, and again and again and with, not just in Century's interests, but in the interests of the whole network.

370 Q. Now, it is probable that the result of this particular minute was that contact was made with the Minister, and that resulted in the letter of the 16th of February from the Minister to the Chairman of the IRTC, in which he said that ú614,000 was the appropriate, sorry was a charge which was reasonable under the circumstances.

So this particular minute resulted in the reduction, the reduction of 614, sorry to 614?

A. From?

371 Q. From 692, which had been the figure agreed by the Minister on the 11th of January?

A. Yeah, so it was - it was still, it was still negotiable.

372 Q. It was still being worked on, yes. There would not appear to be any further reference to a further application being

made under Section 16 in the minutes, though apparently such an application was made, or certainly the Minister treated the letter as one which allowed him to make a decision under Section 16. So I am asking you whether you have any recollection yourself of there being a decision of the Commission that they should formally, or otherwise, implement the provisions of Section 16 (1) by requesting the Minister to fix a charge in respect of these particular facilities?

A. No, I am - I can't say I do, but I would have, I would have - in a sense at that stage a decision had been made. We were, if you like, we were up and running with Century it and better, you know, it better work. And so I would say possibly that the Executive in the Commission was beavering away and saying, "How can we get these two polarised positions to meet?" And I would say that was the general tenor of what was going on at the time, but I don't think that the Commission was being brought up to speed on it, in any kind of a detailed way on it.

373 Q. Right. So, finally, when the Minister made his assessment of what the appropriate charge would be, and issued a letter on the 14th of March advising the parties of his decision, that terminated, as far as the Commission was concerned, the question of RTE charges and the reasonableness or otherwise, isn't that so?

A. Well, I would assume so. I would assume then that the ball was back in Century's court.

374 Q. Right.

A. And we still had the ultimate sanction at the end of the day, that if they couldn't cut it on that issue we just had

to go back to the drawing board. I don't know if that was ever articulated.

375 Q. Well, I think that once the Minister's decision had been communicated to the applicants, they accepted it and the Commission wrote back indicating that they had been informed that it was an acceptable amount to the franchisee and matters proceeded from that point onwards.

Just in the overview then, is it the case that whilst the members of the Commission felt that the amount which was being sought by RTE was one which would make a commercial operation non-viable, they did so on the basis of their own assessment of the figures which had been reproduced by the three applicants, and not as a result of any independent investigation or report provided to the Commission by any qualified body?

A. Well I, you know, I think probably the assessment was more than just a comparison, I think you have to look across the initial asking price of RTE in relation to what the Commission felt was the likely revenue in the early years. And felt, you know, that the kind of money we talked about was tantamount to making the thing unviable, and even also taking account of the fact that at least one of the other applications, and to a certain extent the other one, the income expectations which were optimistic to put it in its most modest form.

376 Q. Finally then, Mr. Murray, the - you might just confirm that the Minister at no stage made any personal contact with you after you had been appointed to the Commission, is that so?

A. No, that's right.

377 Q. Nor did any other person make contact with you on behalf of Century, other than through the channel of the written submission which was forwarded to you by the Secretary?

A. That's correct.

378 Q. I see. Thank you very much.

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MR. O'NEILL: I am not sure if anybody else wishes to question Mr. Murray, Sir?

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MR. FOX: I have some questions for Mr. Murray.

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CHAIRMAN: Anybody else?

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MS. EGAN: No questions, Chairman.

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CHAIRMAN: You have no questions?

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MS. EGAN: No, I don't.

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CHAIRMAN: Right, Mr. Fox.

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

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379 Q. MR. FOX: Mr. Murray, you recall the initial meeting of the IRTC, in Newbridge House, I think you referred to it earlier, on the 17th of October, 1988?

A. Yes.

380 Q. And that meeting, I think the Minister made an opening speech, he made a speech to the assembled members, isn't that correct?

A. That's right.

381 Q. And he wished you well in your work, in the work that faced you as members of the IRTC, isn't that correct?

A. Well, I am not --

382 Q. And can you recall --

A. It would be that kind of event, yes.

383 Q. And he then departed the meeting?

A. That's right.

384 Q. Right. So he left the meeting, he wasn't at the meeting, and I think at a later point in the day he hosted a lunch for the IRTC members, is that correct or can you recall?

A. I would have thought it was the lunch --

385 Q. Yes?

A. His speech followed by the meeting, I don't know --

386 Q. You - the main point I wish to establish was, he wasn't actually at the meeting, isn't that right?

A. No.

387 Q. That's correct. Is it true to say in fact Mr. Burke never attended any IRTC meetings, is that correct?

A. Yes, yes.

388 Q. That's correct?

A. Yes.

389 Q. Now, in relation to the point which Mr. O'Neill dealt with, regarding the appointment of a firm of solicitors and bankers to the IRTC; and as regards the appointment of a firm of accountants also, Mr. Burke in fact will say that Mr. Moody, this is the man who gave evidence this morning, the man from Ulster Bank, he was in fact a constituent of Mr. Burke, and he was glad to be able to recommend to the IRTC an individual who was manager in the branch, a fellow

constituent. Now, you wouldn't have been aware of that of course?

A. No.

390 Q. Right. And similarly, as regards the appointment of John S O'Connor & Company, Solicitors, you remember Mr. O'Neill raised that issue with you as well?

A. Yes.

391 Q. And in relation to that, Mr. Burke will say they were actually, John S O'Connor & Company, Solicitors, you wouldn't have been aware of this either, they were solicitors to Fianna Fail for many years and in fact they were solicitors to Mr. De Valera in his time, and Mr. Burke was glad to recommend a well-known and highly regarded firm of solicitors, of which the principal, Mr. Pat O'Connor, was actually a constituent of Mr. Burke as well, but you wouldn't have been aware of that either, is that correct?

A. That's correct.

392 Q. That's correct. So would you, so as regards the appointment of the firm of solicitors and Ulster Bank, to deal with matters on behalf of the IRTC, there is no great mystery as such in relation to these matters, it was straightforward as regards it?

A. Yes, at the time I thought it was straightforward.

393 Q. There is no mystery about it, isn't that correct?

A. I didn't draw any conclusions.

394 Q. Yes. Now, as regards the other issue Mr. O'Neill raised with you, this is the appointment of a firm of accountants to the IRTC. Mr. Burke will actually say he had no involvement whatsoever in the appointment of a firm of accountants, but I take it you wouldn't have been aware of

that either?

A. I assume he hadn't any connection with any of the appointments.

395 Q. I can say for the record, his position will be he had no involvement in the appointment of the firm of accountants to the IRTC?

A. Fine.

396 Q. And furthermore, for the record, Chairman, I wish to say on behalf of Mr. Burke, that Mr. Burke never actually engaged the firm of John S O'Connor & Company to work on his behalf at any time.

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CHAIRMAN: Just a moment, Mr. Fox, you are examining a witness, not giving evidence to me, and I don't want statements by you. You will deal with the evidence you are dealing with in the house.

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In due course of time if you wish to make submissions, when submissions are being made, by all means or if you wish to lead evidence, by all means do so, but I don't take ex parte statements from counsel under any circumstances.

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MR. FOX: I appreciate that, but I accept your view on that. I wish to say it was Mr. O'Neill who introduced those matters.

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CHAIRMAN: Look, I have already ruled on this matter and that's it.

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397 Q. MR. FOX: Just one other issue then, Mr. Murray, and it is

this; as far as you are aware or are you aware that John S O'Connor, solicitor, and in fact the Ulster Bank still act for the IRTC and have through successive governments through the years?

A. Naturally I haven't had any association with the Commission since 1992.

398 Q. Very well, Mr. Murray. One other matter I wish to raise with you and it is this; you recall your statement that you furnished to the Tribunal, and now I want to refer you to a paragraph of your statement, this is page two of your statement, and it is a very short paragraph, and I want to refer, I don't think there is any need for it to be in front of you.

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On the issue of RTE transmission cost you said as follows:
"The matter of transmission fees was a concern. The Commission was of the view that RTE's price was seriously excessive and amounted to an abuse of a dominant position. This was particularly so given that the radio network would have been originally provided almost exclusively at public expense, i.e. when Radio Eireann did not have a significant commercial revenue."

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Now, you recall putting into your statement - that is your own statement I am after reading out to you?

A. I do.

399 Q. You agree, obviously, and that's the position?

A. That's - yeah, much better than I could say it.

400 Q. Very well. That's fine. Thank you very much, Mr. Murray.

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CHAIRMAN: Thank you very much.

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

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401 Q. MR. O'HIGGINS: Sir, I wonder if I could say a word in
light of the last questions? We might just give you a
chance, Mr. Murray, to say that again, if you wish to stand
over it; you felt that the RTE charges were at all times
excessive and an abuse of a dominant position, is that
correct?

A. I think I was reflecting a view, I think widely held by the
Commission.

402 Q. Well, good. Let's give you a chance to tease that out, in
that case. Maybe you would like to address yourself to
the charges then and explain what element of the charges
you took that view of and why?

A. I am not a technical expert or do I have any particular
background training in assessing this, but I think what I
am trying to convey here was that here was a cost that
literally fell out of the sky, in terms of the structures
needed to set up an independent network.

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And we had not, we weren't prepared for this. I would say
that there was probably an element of shock. I mean, I am
expressing a personal opinion when I say that it was, that
it was exorbitant, and I understand that RTE generally, at
the time that RTE didn't exactly welcome the onset of
independent radio. But it seemed to us in terms of what

we were trying to do, that a million pounds a year for, in
 - as you saw, in the projections put up on the screen
 earlier, where a company was anticipating a revenue, a
 gross revenue from advertising of 2 million, or even on the
 more optimistic scenarios it was still going to be a huge
 unforeseen cost in the whole area of local broadcasting.

403 Q. Mr. Murray, I would like to give you, have as much
 opportunity as you require to stand over the position you
 have put forward. But, as I gather what you have just
 said, what you seem to have said is that no matter what the
 cost to RTE, of providing the transmission system, that
 somehow it would be unacceptable to you if it was more than
 Century was able to pay. Is that what I am --

A. I don't - there were some people, members of the Commission
 who thought that the whole transmission thing should be
 free. That's the other side. But, no, I would say we
 weren't tailoring the transmission fees to fit any
 particular scenario, I am saying to you that the initial
 figure that came down to us of 1.1 million pounds wasn't,
 it didn't seem to us at the time - we weren't prepared for
 it, but it wasn't justified to us on any rational basis.

404 Q. Well now, is that right? Take your time now, Mr. Murray, I
 do want to give you time to think about your answer.

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 Was it justified to you or wasn't it justified to you? If
 you can't remember say so?

A. No, I can't, but my impression was that we couldn't be
 satisfied that it was realistic, perhaps that's the way I
 should put it.

405 Q. Very good. Are you aware that the Secretariat met RTE on

the 7th of December of 1988 to discuss the issue of transmission charges, and it was given a full run-down of what the costs then were? Are you aware of that?

A. I do seem to recollect something about that in receipt documents, but I mean, if you asked me to recall that particular event in, at that time, no.

406 Q. Well, can you remember at any subsequent stage looking at those or any other documents which were produced by RTE, in an effort to inform yourself whether the costs were reasonable or otherwise?

A. I think, you know, I am coming from the position where the amount involved, whether justified or not by RTE, simply put the establishment of local radio beyond reach.

407 Q. Well, you see now we are back to the other proposition, and if that's your proposition, then I just want to know that that's so. That if an amount seemed beyond the reach of a competitor, that it didn't matter whether it was in itself reasonable as a representation of the real cost to offer in transmission, it was still something which you considered on that basis excessive. It is a matter for you, Mr. Murray, you may have it either way, but I will be asking you in relation to the route which you pursue?

A. Well, I was expressing a personal view and it didn't - it wasn't based on any technical knowledge, but it did seem - it seemed, because we hadn't, it hadn't emerged, if you like, in our thinking as a major cost, and we were fairly, I would say, taken aback by the amount.

408 Q. Well, do you or don't you stand over what was expressed in your statement to the Tribunal, and what you apparently stood over when it was put to you by Mr. Fox, and that is,

that the Commission was of the view that RTE's price was seriously excessive and amounted to abuse of a dominant position? If you don't stand over it that's one matter, if you do then I feel we will just have to look into that in slightly more depth?

A. I am not sure how to respond to that, except to say that as a result of negotiation, the price moved very significantly down to 600 and I think 90, then to 614.

409 Q. Yes --

A. So there was, if I may say so, there was obviously a bit of fat around.

410 Q. Do you know on what basis that moved?

A. Offhand, no.

411 Q. Did you ever know on what basis that moved?

A. Well, I presume that there was a bit of hard, bargaining exerted on RTE.

412 Q. By whom?

A. The Minister, presumably.

413 Q. And have you any idea on what basis RTE reduced the cost or whether the reduced cost represented the full of what RTE could or could not reasonably have charged?

A. No.

414 Q. None?

A. No.

415 Q. Thanks very much.

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MR. McGRATH: No questions, Chairman.

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CHAIRMAN: Thank you very much, Mr. Murray, for coming down. We much appreciate your courtesy and kindness.

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MR. O'NEILL: The next witness is Judge Liam Devally,

Sir. Judge Devally please.

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

416 Q. MR. O'NEILL: Judge Devally, I think you were one of the
founding members of the Commission, that is the IRTC, is
that so?

A. Yes, it is.

417 Q. And at the time of your appointment you were a practicing
barrister?

A. I was.

418 Q. I think you had had a long broadcasting history before your
call to the bar?

A. Quite a lengthy one, yes that's true.

419 Q. And that was with the national broadcaster, RTE?

A. That's true, and indeed for some time after I was called to
the bar I freelanced in broadcasting, which was allowable
in the circumstances.

420 Q. Now, when you were appointed on the 17th of October of
1988, you attended the inaugural meeting or the majority of
the inaugural meeting which was held at Newbridge House in
Donabate, is that so?

A. Yes.

421 Q. And we know that Minister Burke was there, and we know that
certain business of the Tribunal was conducted, of the
Commission was conducted firstly with regard to standing
orders; secondly as regards the appointment of the various
persons who would operate in either advising the Tribunal
or in providing facilities to the Tribunal, namely their
bankers, their lawyers and their accountants.

Now, were you aware at the time of the appointment of the bankers, the accountants and the lawyers, that the nominee or the person who was advancing those persons for appointment to the general body of the Commission, had been requested to do so by the Minister?

A. I knew nothing about that aspect of things. In fact, on that day I recall now, why I was in some state of confusion, I was late I think for most of the event, because it is my birthday and I think there were birthday plans being made, and I over-shot the correct turn around when I got in, I was in confusion because it was the first meeting and I was somewhat concerned that I was late for a good deal of it, so - sorry for being so long-winded about it, but I didn't know, as you say. The answer is "no", to your question.

422 Q. You were aware that the Commission which you were a member of, was set up under the Radio and Television Act of 1988?

A. Yes.

423 Q. And that one of your functions involved the selection of successful applicants for various franchises, be they local, national, radio or television, isn't that right?

A. Yes, yes.

424 Q. I think in the course of the deliberations of the Tribunal, or of the Commission which took place on a weekly basis, you came to know of the fact that there were four proponents or persons seeking the national radio franchise, isn't that right?

A. Yes, yes.

425 Q. And the franchisees had to follow, or prospective

franchisees had to follow a particular procedure which was set out by the Commission, and it involved them producing a submission which conformed to specific requirements fixed by the Commission itself, isn't that right?

A. Yes, yes.

426 Q. And I think they covered the broad range of criteria which had been set out in the Act?

A. Yes.

427 Q. And the answers to those would hopefully allow the Commission to make an informed decision on the respective merits of each applicant, isn't that so?

A. Yes.

428 Q. Now, we see from the documentation that these submissions were received on the 16th of December, and that a period was allowed for by the Commission to its Secretariat to compare a comparative analysis of the respective applications and to have that circulated to the body of the Commission by the 22nd of December, isn't that so?

A. Well, I have no great recollection of those dates, but I am sure it is.

429 Q. Right. I take it you do remember receiving not only copies of the original applications themselves, which were in response to the submission, sorry in response to the application form drafted by the Commission, but also the analysis which had been carried out by the Secretariat of the Commission on the respective applications?

A. I have only a vague memory of that.

430 Q. I see. Well, do you have any memory as to what the individual qualities of any particular applicant were at this point in time?

A. Yes, I do.

431 Q. And who did you think, from your initial deliberations, was the lead contender for the franchise?

A. Well, until the actual decision day came I regarded only one entry as not being worthy of consideration.

432 Q. Right.

A. There were three others, and my recollection of the others is that one of them would have had a strong business appeal, and two of them would not be as strong perhaps on the business side of things, but would probably, in my estimation, this is my recollection at the time, that two of them would have probably had the show business touch that might make up for perhaps a deficiency that they might have in the handling of finance, initially.

433 Q. Well - which was the business driven one then?

A. Sorry?

434 Q. Which was the business application?

A. My recollection is that the one that was mostly a business driven one was the Esat one I think, was that the --

435 Q. Radio 2000?

A. Mr. O'Brien --

436 Q. Yes, Mr. O'Brien --

A. Names I remember, Mr. O'Brien's.

437 Q. That was Radio 2000?

A. In fact he has since become a very, very prominent man in finance worldwide. At that time he was very prominent Irish wise, and as a man who had great potential and had already reached considerable status.

438 Q. Right. So the other two then I take it are Century and the National Radio Franchise Consortium, they were the

other two --

A. Yes.

439 Q. -- terrestrial contenders for this application?

A. Yes. I think one of them was headed more or less by Oliver Barry.

440 Q. Yes, that's Century?

A. And the other was headed, I think by - his name will come to me in a moment, Aiken, was it Jim Aiken? Was he involved in the other one? I am not sure about that.

441 Q. I think he may have been involved in another license?

A. Not in that one, yeah, anyway that's - I left the Commission quite soon after all of these events because I was appointed to the Circuit Court bench, and I was very pleased to get the appointment, and immediately I was immersed in criminal appeals from the District Courts, so I can explain that my recollection is not helped by thinking much about the radio situation at that time.

442 Q. Do you remember when it was you left the Commission?

A. I don't, but I asked Mr. O'Keeffe, and he thinks I wasn't much more than a year in the Commission.

443 Q. Yes. I know we have the date on record?

A. Yes.

444 Q. In any event, when you considered the applications you tell us that one went out immediately, that left three. One had a business bent, but you didn't think they had the flare necessary to --

A. No, I didn't discount them as not having the flare, it was a question of balancing.

445 Q. Right.

A. And the only one that I recall that was not in the race was

one, and I am not going to name it, because I don't even remember the names of the other ones, except Century for other obvious reasons I now remember clearly, but until the actual decision was made there was no decision made.

446 Q. Right.

A. Nor was there, in my recollection, I don't believe that there was any deep discussion about reaching a decision. There might have been discussion about aspects of various parts of their submissions, but I don't think there was any thrust towards a decision until the decision day.

447 Q. Fine. The decision day we know to be the 18th of January, and the oral presentation had been made on the 6th of January, sorry the 12th of January, beg your pardon. There was six days between those two. Is it your recollection that there was not a consensus view at the end of the oral presentation day, but rather that the whole decision-making process took place on the final day, that is the 18th?

A. I know that there was a meeting in the National Concert Hall shortly after, perhaps the final day, shortly after the submissions were heard. But I don't think - now I am not sure about this, but this is my distant recollection, I don't think that there was any - I certainly didn't emerge from that, I think there was a meal afterwards as distinct from a meeting, that's my recollection of it. And there was a lot of chat, but I don't think there was an agenda about, you know, thinking along certain lines.

448 Q. I see.

A. Because my recollection is that as far as I was concerned I was thinking about, you know, there is only one of them

gone out, and I am going to have to do an awful lot of work at home, burning the midnight oil, reading through things in detail, I remember that.

449 Q. So, you think you did all that before the resumed meeting on the 18th, which was the day on which the decision --

A. I believe that I did.

450 Q. Were you aware of any outstanding matters that required resolution by meeting with any of the applicants after they had made their oral presentation on the 12th?

A. I don't recall. I could perhaps speculate that maybe clarification might be needed, but I don't recall that, because if clarification were needed then it would have to be about a small point, you wouldn't make a decision if there was any necessity to clarify something of significance, but that's purely a speculation on my part.

451 Q. Were you aware of the fact that there was a considerable amount of concern about the RTE charges for the transmission facility that it would make available to whoever the successful applicant was to the franchise?

A. Yes, yes, I was. In fact, I heard some of the, Mr. Murray's evidence, and having had a great deal of loyalty, as I still have, to RTE, I still felt that the transmission charge, whatever it was, a million pounds etc., etc., it didn't seem to me to be right. And I will tell you why, No. 1, I was in Radio Eireann at the end of the old days, it had changed very little from 1926 when I first went into it, I spent a long time in Radio Eireann and I saw - I became quite senior in old Radio Eireann when there was a haemorrhage, as I said in my statement to you before, there was a haemorrhage from radio when people of talent went to

television which was like moths to the flame, and perfectly logical; I had no interest in doing that, at that time, and I became Personal Assistant to the Controller of Programmes, so I got to know many of the things that were around at the time.

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I know that the old Radio Eireann, some of it whose original staff I actually knew, started off with transmitters put in place, Radio Teilifis Eireann started off with transmitters put in place, and I felt that if a large cost were levied for the use of transmitters, I felt that the project which I'll call in a colloquial fashion, for the sake of just telling you, in short words what I mean, it was our baby, whoever got the license was our baby, and however loyal I might feel to RTE and RE, they both had a free send-off, a free ride of the hurdy gurdy before it became active, and I didn't see much hope, not much hope for any broadcasting station that had to pay that kind of money in starting off, particularly as the coverage areas of the transmitters are already there, and transmission in Ireland is a much bigger problem than transmission in Britain. It is a very complicated affair.

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So I felt - now, I am looking at it from the negative point of view, I felt that whatever happened, for instance with regard to transmission costs, RTE got their transmitters for nothing. Radio Eireann, Teilifis Eireann got their transmitters for nothing, certainly at the beginning. I felt here we were starting off on a new national radio

station, I had strong reservations about its chance of success at all, but given the transmission aspect of it, I felt it was in dire peril, perhaps not dire peril, but I felt it was a, a very formidable kind of thing.

Now, I have heard cross-examination of Mr. Murray about the cost of a million pounds and why should, why shouldn't RTE be paid this and paid that and paid the other, and I would agree with that too. But the fact is, that this was our baby, and if this baby wasn't going to get its bottle in the form of transmission, either free or with deferred rates, we were in dire difficulty, and it was not a very practical prospect. It could succeed, but would have problems.

452 Q. In effect, I think what you are saying, Judge Devally, is that it would require either an element of direct subsidisation to the newcomer coming on board, or a waiver of charges that might otherwise be due on a purely commercial basis, is that so?

A. Well, actually, you could phrase it an awful lot better than that, than I can at the moment, but I felt that some way of avoiding what I thought was in terms of a business enterprise, a brutal charge, and I am not being pejorative against RTE, to whom I owe a great deal, and of which I am very proud, because I contributed a lot to what RTE is, but the idea of paying a million pounds a year, for instance - could I give you an example? It occurred to me to be perhaps aggressive about this at meetings, I knew my place, but the million pounds - I don't believe it was ever quantified in Pirelli general plant costing ú150,000 to be

erected somewhere, 25 maintenance people to be sent out every month to knock the ice off the transmitters in the winter months. What the plant was? Were there new transmitter to be built? Were there new houses with machinery? I think I am probably talking a bit too much now, but that is just the way --

453 Q. There was in fact what is called in this Tribunal a "rate card", but it was a schedule of charges prepared by RTE which was given to the Secretariat on the 7th of December, and that set out under various categories and headings the quantity case of a sum which at that point was being asked for at 1.12 million, and I take it that that document ultimately found itself back with the Commission who considered and looked at it in some detail?

A. Well, it must have done because I think in fact, that - if I wasn't to the fore I was certainly one of the people to the fore in saying, "Look, this doesn't make sense to me." I am just going to very briefly repeat my original statement; wherever, whatever the rights and wrongs of the situation, I felt that this was an albatross around the neck.

454 Q. Right. So your judgement at the end of the day on the commercial, on the transmission charges issue was that since it was not viable commercially, you would leave that out of the equation in deciding the merits or otherwise of the candidates who were before you?

A. Nothing preceded anything else. I was looking - you see I was there more as a programme person than anything else, but I was very much aware of the transmission system, because we had an expert from the BBC, a Mr. Littman,

L-I-T-T-M-A-N, and he was an expert on audience research. As the controller of programmes at the time, the late Priomh-aide O'Farachain (?) was winding down, but still was doing his work of course, but I handled quite a bit of the foreign affairs stuff and that kind of thing for radio, and Mr. Littman looked at the transmitters and looked at the map and said "This is very difficult terrain for transmission", because he stuck pins in BBC transmitters, and apart from the North of Scotland, anywhere in Britain you stick a transmitter down and get a couple of million people, no problem. That wasn't the case in Ireland.

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So I perhaps pushed that away from me because it was a programme matter.

455 Q. Well, if we can just stay with the financial for a moment?

Is it the case that the Commission itself didn't consider that it should have the RTE figures professionally analysed to see what a commercial rate of return for the facility being offered was, but that it merely decided that it was not commercially viable to the prospective franchisees to go with the RTE figures?

A. Well, I am not sure that I was there for any decision of the committee.

456 Q. Yes.

A. Of the Commission. I just remember feeling, having been through half a century of broadcasting in an area as difficult as Ireland, with the mountain ranges we have and the shadows, even in radio; in the 60s we had people going around trying to adjust listenership in Connemara and parts of Connemara, and parts of Donegal, and even Wexford in the

40s and 50s. I felt it was just a very difficult situation, and everybody else started off with transmitters, and whatever the rights and wrongs of it, I felt, I felt personally, but I only spoke out against it a few times, but I spoke strongly. I felt that the, this Commission and their nominee shouldn't have to pay for transmitters now or immediately, there should be some look at that.

457 Q. Thank you.

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CHAIRMAN: Anybody else want to ask any questions? I am going to rise early now.

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MS. EGAN: I would have a couple of questions for the witness on behalf of the IRTC, if possible?

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CHAIRMAN: All right, if you can get them in between five and ten minutes.

A. My answers, I promise you, Chairman, will be very short.

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MR. FOX: Chairman, I have one question just.

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CHAIRMAN: Come on quickly.

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

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458 Q. MR. FOX: Judge Devally, can you confirm Mr. Burke never attended any meetings of the IRTC?

A. I don't remember him attending any meeting of the IRTC.

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CHAIRMAN: He already told that you. Now.

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

459 Q. MS. EGAN: Judge, you may have been here when Mr. O'Neill

opened the provision of Section 7 (5) of the Television Act 1988. Perhaps Mr. O'Neill can assist me in indicating what document that is. It just related, judge, to a provision in the Act, that every question at a meeting of the Commission would be determined by a majority of the votes?

A. Yes, spoken - he has spoken to me about that. In fact, the manner in which Judge Henchy presided over the Commission, the manner in which he did it, you didn't write things on a slip of paper, you didn't lift hands or anything like that. But, what he did, I believe, completely complied with that, in the spirit and indeed in the essence, that's my honest opinion about that.

460 Q. And would you be able to comment on whether there is any

difference in practice then, between the system as operated under the Chairman's direction and between the system that was possibly contemplated under Section 7 (5)?

A. I have already answered that, I think it fully complied, that's my belief having been there. Nobody, I think I said to the lawyers, that there was no shrinking violet. In fact I was the nearest of them all to being a shrinking violet, that will show you how assertive they all were. Chairman, may I leave now?

CHAIRMAN: Certainly.

461 Q. MS. EGAN: Sorry, one more question.

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CHAIRMAN: The young lady wants to ask you more.

462 Q. MS. EGAN: Sorry, judge. In your opinion did the Commission act at all times properly in the decision-making process, in relation to Century Radio?

A. If I may be facetious, they acted at all times properly, especially when I was in the minority of the decision-making process.

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CHAIRMAN: Confession is good for the soul.

A. I didn't mean to be flippant, Chairman.

463 Q. MS. EGAN: Thank you.

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CHAIRMAN: Thank you very much.

A. Thank you, Mr. Chairman.

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CHAIRMAN: Thank you. Tomorrow morning half past ten.

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THE HEARING THEN ADJOURNED TO WEDNESDAY THE 15TH NOVEMBER, 2000, AT 10:30 AM.