

1 THE TRIBUNAL RESUMED AS FOLLOWS ON THE 8TH OF NOVEMBER,
2 2001, AT 10:30 A.M.:

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4 CHAIRMAN: Good morning everyone.

5 .

6 MR. QUINN: Good morning, Sir.

7 .

8 Sir, you recall that in November of 2000 you indicated
9 that, at the conclusion of the testimony, in what was
10 referred to as the "Century Module", you would allow
11 persons to provide submissions, written submissions in
12 the first instance, in relation to matters which
13 concerned them arising from that evidence.

14 .

15 I can tell you, Sir, that a number of written
16 submissions have been received. And we are sitting
17 this morning to provide those parties who have provided
18 written submissions with an opportunity of dealing
19 further in relation to those submissions, by way of
20 oral elaboration on what's contained in the written
21 submissions.

22 .

23 A number of parties have provided written submissions,
24 as I say, but some of those only are availing of the
25 opportunity this morning to elaborate orally on what
26 has been received.

27 .

28 I understand that at the moment Oliver Barry, the IRTC,
29 RTE and Mr. PJ Mara's legal teams wish to address you,
30 Sir, in relation to these submissions received.

1

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2

CHAIRMAN: Very good.

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4

In what order do you wish to proceed, ladies and

5

gentlemen of the Bar?

6

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7

MR. QUINN: I think it has been indicated that it might

8

proceed, subject to your views on the matter, Sir, with

9

Mr. Oliver Barry's legal team to go first, to be

10

followed by the IRTC, RTE and then PJ Mara.

11

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12

CHAIRMAN: Very good. I am quite happy with that.

13

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14

If that's - if you are happy that that's the order in

15

which you wish to proceed.

16

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17

Mr. Barry's team. Mr. O'Connor?

18

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19

MR. O'CONNOR: Sir, the key issues that arise in

20

relation to Mr. Barry are, firstly, whether or not the

21

ú35,000 political donation made to Mr. Burke in May

22

1999 was a genuine political donation, or was it

23

intended to influence his decision on key issues

24

related to Century Radio?

25

.

26

As Mr. Barry stated in his evidence to the Tribunal,

27

the donation of ú35,000 on the 26th of May, 1989, was

28

made at Mr. Burke's request. Mr. Burke requested the

29

donation in the context of an impending General

30

Election. And specifically the donation was made as a

1 political donation intended to help secure that second
2 seat in Dublin North for Fianna Fail.

3 .

4 The seat traditionally was a marginal one, having been
5 won by Fianna Fail in 1987. But as it happened, it was
6 lost again in 1989.

7 .

8 Mr. Barry was a constituent of Mr. Burke in Dublin
9 North, and had assisted in previous election campaigns
10 of Mr. Burke. While Mr. Barry was surprised at the
11 size of the requested donation, he assented to it
12 because he believed the securing of a second seat in
13 that constituency would be crucial to the return of
14 Fianna Fail to office.

15 .

16 As it happened, Fianna Fail lost four seats in that
17 election, one of them being in Dublin North, which
18 underlines how crucial the outcome was in Dublin North
19 for the overall result.

20 .

21 Mr. Barry was anxious to ensure that because he was a
22 Fianna Fail supporter generally, but also because, in
23 the context of his involvement in Century Radio, he
24 believed that a return of the Labour Party to power, in
25 coalition with Fine Gael, could complicate the
26 successful establishment and running of a viable
27 commercial radio sector, given the parties ideological
28 opposition to commercial radio.

29 .

30 The payment of ú35,000 was made in cash by Mr. Barry,

1 because Mr. Burke requested it be made in cash. This
2 evidence was disputed by Mr. Burke, but it was
3 Mr. Barry's categorical recollection that it was so,
4 and he, Mr. Barry, went along with the request,
5 believing that such - that a cash payment would assist
6 Mr. Burke in distributing the amount to various
7 organisational tasks during the campaign, which was
8 then just beginning. And also, to send on some of the
9 amount to Fianna Fail Headquarters.

10 .

11 The €35,000 donation was, as stated, a political
12 donation. It was not intended to influence any
13 decision of Mr. Burke's.

14 .

15 It is pointed out, that the donation was made two and a
16 half months after Mr. Burke made a directive concerning
17 transmission charges. And at the time of making the
18 donation, the subsequent financial crisis in Century
19 Radio that led to the other decisions, such as the
20 capping of RTE's advertising income, and the
21 intervention with Century Radio's bankers, clearly were
22 not anticipated at that time. Had such difficulties
23 been anticipated, the investors would not have
24 proceeded with the venture.

25 .

26 Therefore, it is respectfully submitted, the donation
27 was not, and could not have been intended to influence
28 Mr. Burke in the event of making any of these
29 decisions.

30 .

1 The second key issue, Sir, in relation to Mr. Barry, is
2 whether or not payments, other than the ú35,000, the
3 May 1989 donation, were made to Mr. Burke by Mr. Barry
4 on his own behalf or on behalf of Century Radio, or
5 otherwise?

6 .

7 While legitimate concerns arose in connection with
8 several other payments made from Mr. Barry's financial
9 accounts, and Century Radio's accounts, there was no
10 evidence of any kind, of any of these payments being
11 made to Mr. Burke, other than the ú35,000 May 1989
12 payment.

13 .

14 There was no such evidence because, as Mr. Barry
15 repeated on several occasions during the course of his
16 evidence, no other such payments were made. This was
17 accepted by the Tribunal's legal team, as per the
18 transcript on Day 234, question 477.

19 .

20 The third key issue in relation to Mr. Barry, Sir, is
21 did Mr. Barry attempt to obstruct the work of the
22 Tribunal in deliberately or knowingly concealing
23 information that the Tribunal regarded as relevant?

24 .

25 Mr. Barry was advised by his legal advisers that he
26 should not voluntarily provide the Tribunal with a
27 narrative statement, and should not make voluntary
28 Discovery of relevant documents. Mr. Barry accepted
29 this advice.

30 .

1 In retrospect, Mr. Barry believes that this resulted in
2 the Tribunal, not unreasonably, taking a view of
3 Mr. Barry, which was not warranted, either by
4 Mr. Barry's disposition or by the facts that underlay
5 the issues being inquired into by the Tribunal
6 concerning Mr. Barry.

7 .
8 Given the initial apparent lack of cooperation with the
9 Tribunal, it was perhaps inevitable that the Tribunal
10 took a view that Mr. Barry was deliberately concealing
11 relevant material from it. Notably, further payments
12 to Mr. Burke.

13 .
14 From the perspective of an acceptance that no payments
15 were made by Mr. Barry on his behalf, or on behalf of
16 Century Radio, or otherwise, other than the May 1989
17 payment to Mr. Burke, the Tribunal might be disposed to
18 take a very different view of Mr. Barry's dealings with
19 it.

20 .
21 Mr. Barry regrets the discourtesy shown to the Tribunal
22 by the failure to respond in a timely fashion to its
23 communications, but asserts it was never his intention
24 to disobey any Orders of the Tribunal, or any summons
25 to attend.

26 .
27 As you, Chairman, subsequently notice the - noted, it
28 was on the basis of legal advice that Mr. Barry failed
29 to attend at the Tribunal on the morning of February
30 the 3rd, 2000, for which failure he is deeply

1 regretful.

2 .

3 Nor, Sir, was it Mr. Barry's intention to act in a

4 cavalier manner towards the Tribunal. As it transpired

5 in the course of further hearing, Mr. Barry had nothing

6 to hide from the Tribunal, as the only payment he made

7 to Mr. Burke, on his behalf, or on behalf of Century

8 Radio, or otherwise, was the payment of May 1989.

9 .

10 It is respectfully submitted, that the Tribunal's

11 perspective on Mr. Barry's attitude to the Tribunal may

12 have been coloured by an initial and fully

13 understandable suspicion that further payments had been

14 made which Mr. Barry was concealing, and going to

15 considerable lengths to do so, including being

16 obstructive of the Tribunal's inquiries.

17 .

18 The final key issue that arises in relation to

19 Mr. Barry, Sir, is the question of costs.

20 .

21 Mr. Barry does not claim to be impecunious,

22 nevertheless he found that the burden of legal costs

23 incurred as a consequence of his involvement in the

24 Tribunal's inquiries was hugely burdensome, and

25 ultimately intolerably so.

26 .

27 Mr. Barry retained solicitors, together with Junior and

28 Senior Counsel. Mr. Barry was scheduled to give

29 evidence on the 18th of July, 2000, and from day to day

30 thereafter, as per the Witness Summons dated the 6th of

1 July, 2000.

2 .

3 Mr. Barry was called to give evidence on the 4th of
4 December, 2000, and concluded his evidence on the 21st
5 of February, 2001.

6 .

7 By October 2000, Mr. Barry was no longer able to afford
8 the daily presence of counsel at the Tribunal, while
9 other witnesses were giving evidence. He was,
10 therefore, obliged to discharge them.

11 .

12 Mr. Barry has discharged ú200,000 in legal costs to
13 date, and has outstanding further liabilities for costs
14 in the region of the same amount, incurred in answer to
15 the Tribunal's inquiry.

16 .

17 Mr. Barry's total liability, therefore, rests somewhere
18 in the region of ú400,000. These expenses have
19 exhausted and reduced Mr. Barry's personal resources,
20 and found him unable to secure the further advices and
21 services of counsel in the preparation and formulation
22 of these submissions.

23 .

24 That concludes Mr. Barry's oral submission, Sir.

25 .

26 CHAIRMAN: Thank you very much. For the IRTC.

27 .

28 MS. EGAN: Chairman, I appear on behalf of the IRTC.

29 .

30 Insofar as concerns the IRTC, Chairman, the Terms of

1 Reference require you to investigate whether or not
2 Mr. Burke procured or directed the IRTC to do any act,
3 or make any decision which was intended to confer
4 benefit on Century Communications Limited.
5 .

6 Insofar as concerns the IRTC, Sir, the three issues
7 which appear to have been canvassed before the Tribunal
8 were, firstly, the decision of the IRTC to award the
9 National Radio Franchise to Century. Secondly, the
10 approach of the IRTC to the issue of transmission
11 charges. And thirdly, the request of the Chairman of
12 the IRTC for a directive from the Minister for
13 Communications, Mr. Burke, pursuant to Section 16.2 of
14 the Radio and Television Act 1988.
15 .

16 I would like to address each of those briefly in turn,
17 Sir.
18 .

19 In respect of the decision to award the National Radio
20 Franchise to Century, this aspect of the Tribunal's
21 inquiries was initially afforded quite substantial
22 prominence. The source of the suggestions of
23 impropriety in this regard appear to be a statement of
24 Mr. James Stafford, that he was informed by Mr. Oliver
25 Barry that Mr. Burke and Mr. Mara expected a certain
26 price for television licences, and a certain price for
27 national and local licences.
28 .

29 It was accepted by Mr. Hanratty, the Tribunal's Senior
30 Counsel, in his opening statement, that these

1 statements and references to rumours by Mr. Stafford
2 had no probative value whatsoever.

3 .

4 It would appear, Sir, from the run of the evidence
5 before the Tribunal, that there has been no supportive
6 evidence of any kind in relation to these rumours.

7 .

8 Mr. Barry denies ever having made the statement, and
9 Mr. Stafford is now saying, in his recent legal
10 submissions to the Tribunal, that he, himself, is
11 unable to say if there is any substance to the rumour
12 whatsoever, and that the reporting of the rumour to
13 him, or alleged reporting of the rumour to him, is the
14 extent of his knowledge on the subject.

15 .

16 There has been no suggestion, whatsoever, that there
17 was any demand or request for a payment of ú30,000, or
18 any other monies in respect of this specific licence to
19 Century.

20 .

21 Sir, every single member of the Secretariat and the
22 Commission denied that there was any procurement or
23 direction by Mr. Burke to award the licence to Century.
24 Indeed, every single of the Commission witnesses, both
25 from the Secretariat and from the Board, denied that
26 any representations whatsoever were made by Mr. Burke
27 to the Commission in the context of the awarding of the
28 National Radio Franchise. Each of them stated that
29 they had no knowledge, whatsoever, of any rumour or
30 suggestion of cash in return for licences, either in

1 the context of Century or generally.

2 .

3 Each of them gave evidence as to the absolute integrity
4 of the system of awarding licences, and Mr. Henchy, the
5 Chairman of the Commission, in particular, gave
6 evidence that the Commission guarded very jealously its
7 independence, and was minded to be influenced in no way
8 by any person, including Mr. Burke, in the independent
9 exercise of its function.

10 .

11 It was the clear and uncontradicted evidence of every
12 credible witness before the Tribunal, that Mr. Burke
13 had no involvement, hand, act or part in the IRTC's
14 independent decision to award the licence to Century,
15 Sir. Notwithstanding that, Sir, each member of the
16 Commission was subjected to very rigorous questioning
17 on the underlying merits of the decision to award the
18 licence to Century, such questioning as would not
19 usually occur in the courts.

20 .

21 It's my submission, Chairman, that the questions were
22 answered very fully and very openly by each of the
23 Commission members, and by the Secretariat, and that
24 they have revealed no evidence, whatsoever, of any
25 impropriety.

26 .

27 The second issue I'd like to briefly address, Chairman,
28 is in the context of the IRTC's approach to
29 transmission charges.

30 .

1 I would suggest, Chairman, that a disproportionate
2 amount of time was spent in examining the Commission
3 members on their approach to transmission charges, in
4 view of the fact that transmission charges is only one
5 constituent element of the financial loss and profit
6 projections of the applicants for the licence. And in
7 view of the fact that that element of finance is only
8 one of some ten elements which the Commission had to
9 consider, and was required to consider, by Section 6 of
10 the Act, in determining to which applicant to award the
11 National Radio Franchise.

12 .

13 It was the repeated evidence of the members of the
14 Commission, that they did not view that it was the duty
15 of the Commission to enter into a detailed assessment
16 of transmission charges. I would submit to you,
17 Chairman, that that approach of the Commission, and
18 that conviction, that it is not the function of the
19 Commission to enter into such a detailed assessment,
20 receives support from the language of the relevant
21 statutory provisions in the Radio and Television Act.

22 .

23 Chairman, the three provisions to which I would wish to
24 refer you in this regard, briefly, are Sections 4,
25 Section 6 and Section 16 of the Act.

26 .

27 In respect of Section 4 of the Act, Chairman, the
28 members of the Commission gave evidence that it was
29 generally not their practice to look behind figures
30 which were placed in the financial loss and profit

1 projections of applicants for licences, and generally
2 it was the practice of the Commission to accept in good
3 faith figures that were put to them by the relevant
4 applicants for licences.

5 .

6 In this regard, Sir, I would submit that the
7 Commission's evidence is supported by the language of
8 Section 14.4 (a) - I apologise, Chairman, I stated
9 Section 4 earlier, it's Section 14.4 (a) of the Act:

10 .

11 "Every broadcasting contract shall provide that the
12 Commission may, at its discretion, suspend or terminate
13 the contract if any false or misleading information was
14 given to the Commission by, or on behalf of the sound
15 broadcasting contractor prior to the making of the
16 contract."

17 .

18 So in this regard, Chairman, it was pointed out by
19 Judge Henchy, in his evidence to the Commission, that
20 it is open to, and indeed acceptable for the Commission
21 to accept in good faith information that is contained
22 in the application for the licence, and information
23 surrounding the application for the licence, insofar as
24 the Commission has a remedy should it later transpire
25 that that information was false or misleading.

26 .

27 I would say that this applies all the more strongly
28 when an applicant in the position, as Century
29 represented that it had the full backing and support of
30 the IBA, which was the main independent authority in

1 this regard.

2 .

3 Chairman, the second statutory provision I would like
4 to refer to is Section 6, to which I've already made
5 some reference, merely to reiterate, Chairman, that the
6 issue of transmission charges is only one constituent
7 element of financial projections and resources, which
8 itself is only one constituent element of ten elements
9 which the Commission must consider in a decision to
10 award the licence.

11 .

12 I would submit, Chairman, that were the Commission to
13 be expected to enter into a detailed assessment of
14 transmission charges, one would have expected that that
15 aspect would be mentioned specifically in Section 6 of
16 the Act, or that it would be mentioned specifically in
17 the other functions of the Commission.

18 .

19 Further, the Commission members gave evidence that the
20 Commission did not have the staff, expertise or
21 resources to enter into such a detailed assessment as
22 was suggested to them. And I think again, Chairman,
23 one would have expected that there would be an
24 allocation of such staff, expertise and resources to
25 the Commission, were the Commission to be required to
26 enter into this kind of detailed assessment.

27 .

28 The third statutory provision, Chairman, to which I
29 would like to refer you, is Section 16 of the 1988 Act,
30 and in particular Section 16.2.

1 .
2 I would submit to you, Chairman, that Section 16 quite
3 unequivocally places the issue of transmission charges
4 within the scope and function and duty of the Minister,
5 and of the Department for Communications, as opposed to
6 the Commission.

7 .
8 It is quite clear from Section 16.2 that the Minister
9 sets transmission charges and decides on the level of
10 transmission charges, and that is a function exercised
11 by the Minister, and not by the IRTC.

12 .
13 I think the language of Section 16 quite unequivocally
14 demarcates the respective roles of the Minister, and of
15 the IRTC. And I think the Minister is quite
16 unequivocally given control of technological matters
17 such as broadcasting, frequency management,
18 transmission and transmission charges, and that the
19 Commission, on the other hand, is given control and is
20 entrusted with the function of determining matters such
21 as broadcasters and programming.

22 .
23 I would suggest to you, Chairman, that as a
24 well-recognised canon of statutory interpretation, the
25 areas of overlap, as between the functions of the
26 Minister on the one hand, and the functions of the
27 Commission on the other, ought to be interpreted such
28 that the overlap is as minimal as possible, and that
29 insofar as the issue of transmission charges is placed
30 within the purview of the Minister, that would suggest

1 that it is not a role of the Commission to enter into a
2 detailed assessment of transmission charges.

3 .

4 Finally, Chairman, in respect of the decision of the
5 Commission to request the Minister to issue a directive
6 pursuant to Section 16 of the Act:

7 .

8 It appears that the Chairman and the Commission have
9 been criticised, whether implicitly or explicitly, for
10 accepting the Century position, or acting on the
11 Century request to the Minister to make a directive
12 without entering into an independent assessment of the
13 appropriate level of transmission charges.

14 .

15 Insofar as the propriety of entering into an
16 independent assessment is concerned, Chairman, I have
17 already dealt with that issue, and I don't believe it
18 is the function of the Commission.

19 .

20 Insofar as advancing the Century position is concerned,
21 Chairman, I would submit to you that it was at all
22 times the expectation of the legislature that the
23 Commission would, as it were, row in behind the
24 contractor in any issue as to transmission charges.

25 And I think, Chairman, that that is supported by the
26 Dail debates, one more extract which is set out in the
27 legal submissions. And I would like to just briefly
28 refer you to that extract.

29 .

30 It states, and this is a direct quotation from the Dail

1 debates:

2 .

3 "The expectation would be that an operator who seeks
4 the facility would work out directly with RTE the terms
5 to be made available. If agreement on terms cannot be
6 reached, the Minister, after consultation with RTE and
7 the Commission, who will be acting on behalf of the
8 contractor, determines the appropriate amount to be
9 paid."

10 .

11 So I would submit to you, Chairman, that in discussing
12 the genesis and purpose of Section 16, and in
13 particular Section 16.2 of the 1988 Act, it was the
14 expectation and the contemplation of the legislature,
15 that the Commission would advance the contractor's
16 position.

17 .

18 Equally, I would submit to you, Chairman, that the
19 precise language of Section 16.2 of the 1988 Act
20 supports this contention.

21 .

22 Section 16.2 provides:

23 .

24 "A sound broadcasting contractor shall make to RTE such
25 periodical or other payments in respect of any
26 facilities provided in pursuance of subsection 1 as the
27 Minister, after consultation with Radio Telefis na
28 Eireann and the Commission directs."

29 .

30 So Section 16.2 provides for the Minister to make a

1 directive as to the level of transmission charges,
2 after consultation with two bodies only, RTE and the
3 Commission.
4 .
5 And I would suggest to you, Sir, that were it not for
6 the expectation that the Commission would advance the
7 contractor's position, it would have been a specific
8 provision in Section 16.2 of the Act that the
9 contractor also would be consulted, otherwise I would
10 submit to you, Chairman, that Section 16.2 would not
11 respect the natural justice rights of the contractor in
12 a situation where only RTE, which would naturally be
13 adopting an opposing attitude, would be consulted, and
14 in which the Commission was intended to be neutral.
15 .
16 I think the wording of Section 16.2 quite clearly
17 suggests that the Commission is not intended, or
18 expected to be wholly neutral in this particular
19 exercise, and that it is perfectly acceptable for the
20 Commission to advance the contractor's position in
21 regard to the setting of transmission levels.
22 .
23 Chairman, I would finally submit to you, that at the
24 time that the Chairman of the Commission requested
25 Mr. Burke to issue a directive in respect of
26 transmission levels, there was a very adequate factual
27 basis for that request.
28 .
29 At that time, Century had specifically requested the
30 IRTC to make such a request. Century had indicated

1 that its position would simply not be viable, and that
2 it would not be able to go on the air if the
3 transmission charges remained at the level at which
4 they were set. Century represented to the Commission
5 that they had the support of the IBA in respect of the
6 level of transmission charges which they advanced. And
7 Century also represented to the Commission, albeit, it
8 appears, falsely, that they had put their figures to
9 RTE, and that RTE had rejected their figures.

10 .

11 At this particular point in time, the pirate radio
12 stations were due to be taken off the air, under sister
13 legislation, and there was a very restricted timetable
14 to which the Commission was operating. And it was the
15 clear Government policy that the independent sector be
16 given all assistance in an attempt to commence its
17 operations.

18 .

19 In this regard also, Chairman, I would submit to you
20 that the Chairman of the Commission, Mr. Henchy, had
21 the full authority of the Commission when requesting
22 the directive, and acted at all times in accordance
23 with Commission policy.

24 .

25 In requesting the directive, Chairman, there is no
26 evidence whatsoever that Mr. Burke procured or
27 requested, or directed the Commission to make this
28 request of him for a directive. There is no evidence,
29 whatsoever, that the directive was requested to benefit
30 Century specifically, as opposed to the independent

1 radio sector generally.

2 .

3 In conclusion, Chairman, I would say that the honour of
4 the Commission has been impugned by some of the
5 statements which have been made to the Tribunal, and I
6 would say to you, Chairman, and request of you,
7 respectfully, that any suggestion of impropriety on
8 behalf of the Commission should be now rejected in the
9 most clear and unequivocal terms.

10 .

11 Thank you, Chairman.

12 .

13 CHAIRMAN: Thank you very much, Ms. Egan.

14 .

15 Who is appearing for RTE?

16 .

17 MR. O'HIGGINS: Sir, I have some brief submissions to
18 make, in conjunction with a lengthy written submission
19 which has been submitted by RTE, and which constitutes
20 the main submission.

21 .

22 It's the purpose of RTE, in making its submissions, not
23 to stray outside the area of the Committee's inquiries
24 which concerns allegations, in effect, which have been
25 made against RTE by one or another person, really
26 arising collaterally from the main inquiry which has
27 been made by the Tribunal.

28 .

29 And while it may well be that some of the evidence
30 which has been given by RTE may have a bearing on other

1 aspects of the Tribunal's inquiries, it's not part of
2 RTE's function, in making its submission, to address
3 any matter stemming from RTE's evidence, other than
4 those which concern the culpability, or alleged
5 culpability of RTE in respect of certain measures with
6 which the Tribunal has been concerned.

7 .

8 In particular, the two matters which RTE identifies as
9 having been the subject matter of criticism, less
10 evident in evidence than it had been in submissions to
11 the Tribunal, before the Tribunal began to take
12 evidence. The first, broadly of the two, was that RTE
13 was in general behaving in an oppressive and improper
14 way in devising transmission charges, which made it, in
15 effect, impossible for Century Radio, as it turned out,
16 to operate, effectively, as a broadcaster.

17 .

18 And secondly, that it later stymied the coming on air
19 of Century. And, perhaps thirdly, or as a subset of
20 the second, devised its advertising rates and
21 advertising schedules in such a way as made it
22 impossible for Century to survive in the long run.

23 .

24 It's RTE's submission that absolutely no credibility
25 attaches in the light of the evidence to any such
26 allegation. It's not the intention of RTE, in oral
27 submissions, to go through the figures which are set
28 out extensively in the written submission, and which
29 have been dealt with at great lengths by RTE, and
30 others, in the course of the evidence during this

1 module.

2 .

3 Suffice it to say, that it's RTE's submission that in
4 every single instance RTE's figures, as put to Century
5 in the course of attempted negotiations to arrive at an
6 understanding in relation to transmission fees, were
7 transparent, were worked out on an provable basis.
8 That basis was made known to those who were to deal
9 with RTE, was made known to the IRTC at every relevant
10 time, and was made known to the Department of
11 Communications at every relevant time.

12 .

13 The business of arriving at figures for transmission
14 charges in the context of anticipated negotiations with
15 a variety of potential bidders for the franchise wasn't
16 in every respect - as the evidence of Mr. O'Brien, from
17 RTE, in particular submitted - demonstrates a
18 scientific measure, capable of precise measurement,
19 because this exercise had never been done before, and
20 involved extensive measurement of general overheads in
21 RTE, which would, when analysed and shared out between
22 various parties, lead to given results so far as the
23 transmission charges were concerned.

24 .

25 Those amounts have been given to the Tribunal in
26 evidence.

27 .

28 Central to the differences between Century and RTE,
29 though by no means the only difference, was that it was
30 RTE's committed view that it was obliged to charge for

1 access to the broadcasting facility, which it had over
2 the years paid for and maintained, and that Century
3 seemed to take the view that such charge was
4 incompatible with anything which RTE should be entitled
5 to do.

6 .

7 It remains central to RTE's contention, that such a
8 charge is proper, and indeed even by the time the
9 directive was given, though at a very low and
10 inadequate rate, as the principle of the charge for
11 access to the system was conceded.

12 .

13 It is notable that throughout RTE's efforts to
14 negotiate with Century, in fact quite extraordinary,
15 that insofar as RTE repeatedly attempted to persuade
16 Century of the validity of its figures, that although
17 Mr. Stafford was somewhat ambiguous at the beginning of
18 his evidence on this topic, it's perfectly clear that
19 Century never negotiated with RTE at any time in
20 relation to its transmission figure.

21 .

22 There are various conclusions which might be drawn from
23 that, some of which are of concern to RTE, others of
24 which aren't.

25 .

26 The only one which I propose to argue on behalf of RTE,
27 is that if Century felt that it had a convincing and
28 well-founded figure to put to RTE, in relation to these
29 matters, then one assumes that they would have had a
30 positive anticipation of benefit by doing so, but yet

1 never did so, never referred the figure to RTE at any
2 time. So that the first time, according to
3 Mr. O'Brien's evidence, that he actually became aware
4 of the figure which Century were prepared to bid for
5 transmission services, was when he saw papers in
6 anticipation of this Tribunal, many years after the
7 event.

8 .

9 It is true that newspaper reports had come to the
10 attention of the RTE Authority in March of 1989, which
11 indicated what charges might be. But that's so far as
12 that went.

13 .

14 CHAIRMAN: Mr. O'Higgins, may I just intervene. I
15 think you are going a little bit fast for the
16 stenographer. Could you just slow down, because she is
17 having some difficulty in keeping up with you.

18 .

19 My apologies for interrupting.

20 .

21 MR. O'HIGGINS: My concern is not to take more of the
22 Tribunal's time.

23 .

24 CHAIRMAN: Take whatever time you require, but I don't
25 want to interrupt you in any way.

26 .

27 MR. O'HIGGINS: Not only were the RTE figures worked
28 out and made manifest and transparent and demonstrable
29 in the manner in which they were presented to Century,
30 but they were also analysed by the Department of

1 Communications in an effort to deduce whether they were
2 fair or reasonable. And undoubtedly, as RTE concede,
3 there was an element of subjectivity about the charges,
4 and in anticipation that negotiations would have to
5 take place with potential purchasers, so-to-speak, of
6 the RTE transmission project.

7 .

8 But it is, in RTE's submission, undoubted, that at
9 every stage the charges were considered to be rational,
10 to be based in ascertainable and testable logic, and
11 were franked by the Department, and indeed by the
12 Minister for Communications as late as the 14th of
13 February, 1989, when the Minister for Communications
14 specifically found that the charges were not
15 unreasonable in Irish circumstances.

16 .

17 And so far as the RTE charge, that is charges are
18 concerned, that is what RTE says on the positive side.

19 .

20 While RTE has no particular independent bone to pick
21 with Century's offers, although there were no offers,
22 it does say that there was no reality at any time to
23 the Century offer. And it is notable that in examining
24 the basis on which the Century offer was made, the
25 situation is far from clear as to how the figure
26 concerned ever came to exist.

27 .

28 The best that can be put forward, it appears, on behalf
29 of Century, is a quotation in Mr. Stafford's written
30 submission of various aspects of Mr. Hills evidence,

1 which indicate that, on a document dated, I think, the
2 18th of November, 1988, some form of casual
3 interlineations and middle figures were written down by
4 Mr. Hills, high and low figures, in an informal
5 commentary on RTE's figures, which came out with an
6 average, or a low figure for transmission, of ú271,000,
7 and a middle figure of ú376,500; that they are
8 virtually no more than scribblings on a piece of paper.
9 And so far as can be ascertained, as I say, that piece
10 of paper emanates from the 18th of November, it is not
11 plain when the scribblings themselves took place.
12 .
13 But it is notable that on the 4th of December - I
14 didn't know whether that was myself on the microphones
15 or something happening outside the room - it's notable,
16 that on the 4th of December, Mr. Hills wrote to
17 Century, to Mr. Stafford, it's page 816 of the
18 Tribunal's documentation, and as of some two weeks
19 after the 18th of November, when these figures were put
20 down, Mr. Hills wrote:
21 .
22 "I have not done any more work to try and identify the
23 likely levels of additional cost that RTE will incur
24 from our presence, since a lot of that would have to be
25 guesswork based on the UK experience, which might not
26 be valid in the Irish context."
27 .
28 That's two weeks after the scribblings which allegedly
29 formed the basis of the Century figure.
30 .

1 That Century figure subsequently re-emerges in January
2 1989, in circumstances in which Mr. Hills is asked by
3 Mr. Stafford to provide a rationale or a basis for the
4 IRTC for the transmission charge, which has been
5 proposed by Century to the IRTC at ú375,000.

6 .

7 It begs the question as to whether, if Mr. Stafford had
8 a rationale, or Century had a rationale before that
9 time for that figure, there would have been any need
10 for Mr. Hills to have done so. And indeed, Mr. Hills
11 passed on, as the Tribunal would be aware, that request
12 to IBACS, Independent Broadcasting Authority
13 Constancies, or consultants, asking them to provide a
14 rationale or a breakdown for that figure for the IRTC,
15 observing that the figure should come out at ú375,000,
16 because that was the figure in Century's business plan.

17 .

18 And RTE does no more than submit that the evidence in
19 relation to the origin and provenance of the Century
20 figure is, at very, very best, highly dubious and
21 unsatisfactory, and in no way compares with the well
22 worked out, and at all times transparent presentation
23 of the RTE figure to all parties concerned.

24 .

25 That figure was then, as the Tribunal is aware, broadly
26 speaking, put by Century to the IRTC, and in turn by
27 the IRTC to Century, although the rationalisations for
28 that figure were not at all times the same. That
29 happened in February of 1989.

30 .

1 And on the 14th of March, 1989, the Minister, who had
2 been on the 14th of February, 1989, satisfied that the
3 RTE figure of 614,000 was an adequate one, gave his
4 direction, which, in effect, was beneficial to Century
5 and detrimental to RTE in a very major way on the
6 transmission charges.

7 .

8 I note that, as part of Mr. Burke's submission,
9 Mr. Burke speculates that one of the allegations
10 against him may be that Section 16 of the Act of 1988
11 was included in the Act by Mr. Burke, so that he could
12 benefit Century Radio in return for the payment of the
13 political donation of ú35,000.

14 .

15 That seems, perhaps, to be somewhat farfetched, and
16 doesn't fall within RTE's remit to comment on.

17 .

18 RTE would comment that if it was included in that way,
19 that it was certainly included in a way which didn't
20 suit Mr. Burke in March of 1989, because although
21 Section 16 required that RTE, echoing what Ms. Egan
22 said on behalf of the IRTC, might be entitled in
23 natural justice to comment on proposals which had been
24 made vis-a-vis a directive in relation to transmission
25 charges, of course Section 16, though it required that,
26 did not result in Mr. Burke referring to RTE at any
27 time in relation to those transmission charges. So
28 that the directive which came to RTE, came out of the
29 blue and without any forewarning, notwithstanding the
30 provisions of Section 16.

1 .
2 After that directive was made, a press statement was
3 issued, and RTE would simply like to comment that
4 insofar as that press statement has ever been presented
5 as indicating that the RTE Authority accepted that no
6 subsidy was involved in the directive figures to
7 Century, that it did not do so; that the directive
8 stated that the Minister had told the RTE Authority
9 that that was so, and that is so far as the statement
10 ever went.

11 .
12 I mentioned that's not a major thing, but since it has
13 been mentioned by a variety of persons, I think it
14 should be averted to.

15 .
16 After that, RTE say that the whole energy and thrust
17 behind getting Century on the air came primarily from
18 RTE, and that is clearly evidenced in Mr. O'Brien's
19 correspondence to Century in April and May 1989, where
20 he is making the running and pressing that the station
21 get on air.

22 .
23 The Tribunal will be aware that at one stage, in an
24 effort to get matters moving, Mr. O'Brien persuaded
25 Century to get a bond for ú250,000. I think a letter
26 was sent saying this would be done by Mr. Michael
27 Laffan, Chairman, the Managing Director, or Chief
28 Executive of Century, at that time, to RTE, 12th of
29 May, 1989, saying it would be done. And it appeared
30 things might get moving.

1 .
2 The following week, on the 19th, a lengthy letter, it
3 appears drafted in Mr. Stafford's office, came not only
4 withdrawing the offer of the bond, but raising a whole
5 series of difficulties which, in effect, had to be
6 arbitrated on by the Department of Communications, who
7 performed that exercise. And a memo from Mr. McDonagh,
8 the then Secretary of the Department of Communications
9 of the 8th of June, 1989, was prepared, which
10 vindicated RTE's stance in every respect in that area
11 as reasonable.

12 .
13 Subsequently, further delays were met by Century on
14 getting on the air, part of which were occasioned again
15 by Century demanding the impossible and seeking, in
16 effect, a 14 year licence from the IRTC, when the IRTC
17 was not statutorily in a position to give them one,
18 leading to delays in the granting of a broadcasting
19 contract, and therefore delays in the signing of a
20 transmission agreement with RTE.

21 .
22 Notwithstanding this, it's RTE's submission that the
23 evidence was entirely clear that RTE got Century on the
24 air at a rate months in advance of that demanded by any
25 contract which RTE had with Century. And an issue has
26 arisen as to whether RTE had promised Century that they
27 would have 63 percent coverage of the country by
28 opening day.

29 .
30 It's RTE's submissions that a perusal of the evidence,

1 and the documentary evidence, makes it crystal clear
2 that whatever Century may, perhaps with honest
3 optimism, perhaps not, told their potential
4 advertisers, that there was never any agreement to that
5 effect, and that indeed RTE went well outside what it
6 was - what it was required to do, and well beyond what
7 it was required to do, in an effort to get Century up
8 and running on the air as early as possible.

9 .

10 That involved, in some areas, transmission of a lower
11 quality than might have been ideal, but that was at
12 Century's request, as a stop-gap measure, and was
13 cooperated with by RTE at every turn.

14 .

15 Again, a suggestion was made that RTE in some way
16 bad-mouthed Century in the - in the eyes of potential
17 advertisers, by way of indicating that Century's
18 coverage was poor. Mr. Colm Molloy, who gave evidence
19 on behalf of RTE, made it abundantly clear that insofar
20 as anything was said about that, it occurred only on
21 the basis that requests would be made by advertising
22 agencies who knew what the facts were, anyway, for
23 confirmation from RTE of matters which had been already
24 studied by, and were known to advertisers, and to whom
25 RTE would not lie if there is this issue, but that they
26 at no time went out actively to Dermot, Century in that
27 way.

28 .

29 Again, wholly unsubstantiated allegations were made by
30 Mr. Stafford and other witnesses at various times, in

1 statements and in evidence, in relation to the
2 allegation that RTE subsequently sought to undercut
3 Century, or to advertise in such a way as made it
4 impossible for Century to survive.
5 .
6 That really involved, again I would submit, Sir, of an
7 evidential pass the parcel, so that when a witness said
8 that such had happened, they invariably referred to
9 another witness as the witness who would give the
10 evidence of how it had, and that witness would suggest
11 that some other witness might be able to say it. But
12 at the end of the day, in my submission, it is patent
13 that, looked at through Mr. Stafford's evidence,
14 Mr. Barry's evidence, Mr. Crowley's evidence,
15 Mr. Laffan's evidence, the Department's evidence, or
16 any other evidence which has been given, there has been
17 no substance produced to found that allegation. And
18 that insofar as any such allegation may have been the
19 foundation for the introduction of the advertising cap,
20 that it is plain on the evidence that that never
21 happened at all.
22 .
23 I don't wish to delay the Tribunal to any significantly
24 greater extent. I do want to say two things: That on
25 occasion there has been an effort to pick apart
26 internal RTE discussion as to how it should formulate
27 and present charges, and to suggest that in some way
28 that sits ill with the manner in which they were
29 presented.
30 .

1 It is manifest not only that RTE discussed how it
2 should and how it would formulate and present charges
3 as a proper exercise in working out what the charges
4 should be, but also that a degree of retrospect has at
5 times been thought to be applied to such discussions as
6 justifying one ministerial decision or another, which
7 could not possibly justify a ministerial decision,
8 since no such discussions were made known to the
9 minister at any time when any ministerial decision was
10 made.

11 .
12 Mr. McLoughlin has given graphic evidence of what the
13 effect of the cap on advertising on RTE would have been
14 if unreversed over the years. The figures - I'm sorry,
15 Mr. Molloy has done so. The figures are truly striking
16 and are contained at the end of RTE's written
17 submission, and it is true to say that the cumulative
18 loss between 1993 and 1999, had the cap remained in
19 place, would have been 186.2 million.

20 .
21 That figure has not been challenged, and that, in fact,
22 exceeds RTE's entire net assets and reserves as they
23 existed at the date on which Mr. Molloy - at the 31st
24 of December 1999. I think this was a calculation done
25 between Mr. O'Brien and Mr. Molloy, but primarily, I
26 think, stemming from Mr. O'Brien's, not Mr. Molloy's
27 evidence. And I may be incorrect in relation to that,
28 but I think that's so.

29 .
30 It's certainly the evidence which was given and hasn't

1 been challenged by any party. It is not directly
2 pertinent to RTE's submissions to the Tribunal, but it
3 is an indication of the difficulties with which RTE was
4 faced in dealing with the whole broadcasting
5 environment at that time.

6 .

7 In sum, RTE submits that the evidence has entirely
8 vindicated RTE's position, so far as the representation
9 by RTE was that it dealt in a straight, transparent and
10 dutiful way with requirements made of it under Statute
11 and in commercial dealings with bodies, who for reasons
12 which had nothing to do with RTE's dealings with those
13 bodies, eventually found that the commercial pace was
14 at the time too hot for them. In particular, of course
15 I refer to Century Radio.

16 .

17 Ms. Egan has referred, on behalf of the IRTC, to the
18 proposition that, in fact, the transmission costs were
19 a very small part of the whole Century financial
20 package. And with that, RTE agrees it is manifest that
21 insofar as Century found life difficult, that it did so
22 for a variety of reasons, which had nothing to do with
23 transmission charges, and perhaps which has as much to
24 do with the public's desire to accept the package which
25 Century put to it, or its lack of interest in doing so.

26 .

27 RTE submits that none of the allegations of oppression,
28 of abuse of a dominant position, or of failure to
29 comply in a proper spirit with RTE's statutory and
30 other obligations emerges from the evidence at the

1 Tribunal, and will in due course, but I don't think
2 this matter arises now, make whatever appropriate
3 applications for costs that seem to arise from the
4 cooperation which its given.

5 .

6 Thank you, Sir.

7 .

8 CHAIRMAN: Thank you.

9 .

10 MR. QUINN: There is only one remaining submission to
11 be made, Sir, and that's on behalf of Mr. Mara.

12 .

13 CHAIRMAN: Carry on, then.

14 .

15 MR. McMENAMIN: Chairman, I'll only be ten minutes.

16 .

17 The only reason we were here at all, Chairman, as of
18 course you are aware, was as a result of certain
19 statements which were made by Mr. Stafford to the
20 Tribunal team.

21 .

22 And Mr. Stafford's statements rested on two
23 cornerstones, and both of those, as can now be seen
24 from his closing submission, have collapsed.

25 .

26 The first was in relation to the alleged shopping list.
27 And I don't think it's necessary for me to rehash,
28 Chairman, what was said in the opening of this module,
29 apart from saying that Mr. Stafford was going to say at
30 some point that he could not precisely identify that

1 Mr. Barry came to him and said that, "If you want to
2 get a broadcasting licence, it is going to cost you
3 money. You are going to have to pay money to Mr. Burke
4 and Mr. Mara." And he mentioned three figures to him
5 in this conversation.

6 .

7 Now, if we contrast that to what Mr. Stafford is now
8 saying in his closing submission, he says he is - he is
9 unable to say what, if any, substance there was to the
10 rumours, and he confirmed at all stages this was a
11 rumour which he alleged he was told about by Mr. Barry.

12 .

13 That's what Mr. Stafford says in his closing
14 submissions.

15 .

16 And we don't blame the Tribunal for this, but we do
17 draw attention to the extraordinary contrast between
18 what Mr. Stafford said at the outset, and as is stated
19 in the opening of the Module, as compared to now.

20 .

21 There has been an extraordinary, an extraordinary
22 change of mind on Mr. Stafford's part.

23 .

24 The second cornerstone of Mr. Stafford's testimony, and
25 he was the only person who gave any evidence relating
26 to Mr. Mara, was in relation to the meeting in Mr.
27 Desmond's office. And again I don't need to rehash at
28 any greater length what Mr. Stafford said in the course
29 of his testimony, and what was relayed in the course of
30 the opening. But I now draw attention to what is said

1 now in his closing submission about this meeting, where
2 so much time of the Tribunal was taken up. He says, as
3 far as he was concerned, the meeting was not in the
4 context of Mr. Mara being engaged as a consultant by
5 Century Radio, however, it may be that Mr. Stafford
6 presumed the worst and left the meeting before any
7 proper explanation of the events of the meeting could
8 be imparted to him.
9 .
10 And I merely say - I merely question, Chairman, and I
11 am sure it's a question in your mind too, why couldn't
12 Mr. Stafford have said that at the very beginning? And
13 if he had, I doubt very much whether we would have been
14 before this Tribunal.
15 .
16 Again, the second cornerstone of Mr. Stafford's
17 testimony has collapsed.
18 .
19 Everything that we've seen about Mr. Stafford - I don't
20 mean to personalise an attack on him, but the Tribunal
21 itself has had occasion to question his credibility,
22 and we draw attention to that in the course of our
23 submissions. And it's also noteworthy, as you
24 recollect, Chairman, that Mr. Stafford sought to
25 support his own evidence by saying that he had told
26 other people about these alleged events. I emphasis
27 again "alleged events." He said that he'd mentioned
28 them to Mr. Mulhearn, Mr. Moore and Mr. Crowley.
29 .
30 Not one, not one of those people, not one of them

1 corroborated what Mr. Stafford had to say. And if you
2 add to that the damaging cross-examination of Mr.
3 Stafford by Mr. Hanratty himself, where his - where Mr.
4 Stafford's credibility was impugned, it does, in my
5 respectful submission, raise extraordinary questions
6 about Mr. Stafford's credibility.

7 .
8 His evidence, effectively, is solitary, uncorroborated,
9 and directly contradicted by those persons he has
10 named.

11 .
12 Now, I think that all of this is perfectly clear, not
13 only from Mr. Mara's submission, Chairman, but also as
14 would be evident from Mr. Stafford's own submission.

15 And it's for that reason that we are here today.

16 .
17 He made allegations. He sought to impugn my client's
18 integrity. He was willing to wound, yet afraid to
19 strike, and yet now, at the very end, in the closing
20 submissions, he effectively withdraws the allegations
21 which he made against Mr. Mara.

22 .
23 It's an extraordinary situation. And we submit it's
24 not for the Tribunal, having considered these issues,
25 to find that there is no evidence of wrongdoing by
26 Mr. Mara. There never was any. But we also submit
27 that Mr. Mara is entitled to vindication of its good
28 name, and that the prominence given to the seriousness
29 of the allegations entitle him to equal vindication,
30 and to the restoration of his good name in clear and

1 unequivocal terms.

2 .

3 Apart from that, Chairman, I would like to thank you

4 for your courtesy and tolerance.

5 .

6 CHAIRMAN: Thank you very much, Mr. McMenemy.

7 .

8 Does anybody else wish to address me? Very good. In

9 those circumstances, I close the session, and we'll sit

10 again tomorrow morning at half past ten.

11 .

12 Thank you.

13

14 THE TRIBUNAL THEN ADJOURNED TO THE FOLLOWING DAY,

15 FRIDAY THE 9TH OF NOVEMBER, 2001, AT 10:30 A.M.

16

17

18

19

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