

THE TRIBUNAL RESUMED ON THE 17Th OF NOVEMBER, 2000, AS

FOLLOWS:

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CHAIRMAN: Good morning everyone.

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MR. O'NEILL: Good morning, Sir. The next witness to be called will be Mr. Paul Appleby. Mr. Appleby please.

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PAUL APPLEBY, HAVING BEEN SWORN, WAS EXAMINED BY MR. O'NEILL AS FOLLOWS:

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

A. Morning.

2 Q. In 1988, Mr. Appleby, you were assigned as an assistant principal to assist with the work in the then recently formed IRTC; isn't that so?

A. That's correct.

3 Q. Before that time you had a lifetime of public service and you had had in the immediate period immediately before your appointment, you had been in the private sector, isn't that right?

A. That's correct.

4 Q. And if you could just outline briefly what areas you had covered, let's say for the five years or so immediately before your appointment?

A. From 1982 I was primarily dealing with air transport matters, it was the regulation of air carriers, at the time this would have dealt with applications from airlines for services to and from Ireland, changes in air fares, plus

some air transport negotiations in Brussels and on a bilateral basis with other States.

5 Q. Yes. And this period of absence then when you went into the private sector, I think you were working with an independent airline advising them and employed by them. You then returned to the public service and having done so, you were appointed to this new position, isn't that right?

A. That's correct.

6 Q. And in the hierarchy of the new organisation, from a secretarial point of view, I understand that the assistant principal who was working with you was Mr. Sean Connolly, and he had the top position in the Secretariat as Secretary, is that so?

A. That's correct, yes.

7 Q. And you ranked then immediately after him?

A. Yes.

8 Q. Is that so?

A. Yes.

9 Q. And immediately beneath you then was Mr. Michael O'Keeffe, is that so?

A. That's correct.

10 Q. And the three of you formed the professional staff of the Secretariat, and in addition to that, there was clerical and office assistance, is that so?

A. Correct.

11 Q. In addition?

A. Yes.

12 Q. Yes?

A. Yes.

13 Q. Now, after your appointment you had a range of matters, of

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course, which you would deal with in the course of your position but the first subject matter that was dealt with by the Commission and brought to fruition was the National Radio Franchise, isn't that so?

A. Yes, well I think one of the first areas of substantive work was actually in defining the areas in which, well defining the areas under which the local radio franchise would have been advertised.

14 Q. Yes. I appreciate that there were very many courses and tributaries of the stream of work that you carried out that involved a number of headings, the national television, the National Radio Franchise and the local radios. My question was whether it was the National Radio Franchise which came to fruition first as the first completed work in other words?

A. Indeed.

15 Q. Which the --

A. In terms of defining or selecting a particular franchisee, yes.

16 Q. Yes. And certainly that was one of the major areas of involvement of the Commission as a whole, as opposed to the Secretariat, in the initial six months or so after the formation of the Commission on the 17th of October, in other words, of their meetings seemed to have dealt with the National Radio Franchise, though I accept they dealt with other matters.

A. Yes, well I think one of the first substantive decisions would have been to actually define the areas for local radio. I mean I think that was one of the first substantive decisions of the Commission because it was

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subsequent to that that the national radio hearing was held and - well that decisions or applications were invited and decisions made.

17 Q. Right. There seems to have been a consensus view that the Commission would like to see the National Radio Franchise granted and operating in situ and broadcasting before local radio licenses were granted to operators?

A. Yes.

18 Q. Is that so?

A. Yes.

19 Q. And can you recollect what particular involvement you had in relation to the National Radio Franchise applications?

We understand the sequence of events was that the positions or the fact of there being a National Radio Franchise on offer was advertised, it was responded to by applicants, those applicants were vetted as to persons who should receive the appropriate application documentation, that documentation was sent out to those applicants and they in turn made applications by the closing date which was the 16th of December of 1988. And is that the sequence as far as you understand it?

A. Yes, yes.

20 Q. And in that sequence, what particular roles did you have as regards the consideration of the applications which were submitted by the four contenders that were subsequently considered by the Commission?

A. Well, I would have read the four applications involved. I believe that I assisted in preparing some, if you like, or drawing from the applications some financial figures for comparison purposes to assist the Commission. I also

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probably was primarily involved in preparing some sets of questions for possible use by the Commission at the subsequent national hearing.

21 Q. Right. Now, I think it was apparent from consideration of the four applications which were received and which subsequently went on to be reviewed in some detail by the Commission, that three of the intending contenders for the national franchise intended to use the IRTC, the RTE transmission network, isn't that so?

A. That's correct.

22 Q. And they had elected for what is called the "all-inclusive option", are you aware of that?

A. Yes, yes.

23 Q. Now, the IRTC Chairman and Secretary had attended a meeting with RTE on the 7th of December of 1988, and out of that meeting they were given a copy of a document which has been referred to in the course of the Tribunal here as the "rate card", and that rate card was a document which had been furnished in turn by RTE to each of the persons who had requested it and who had intended to use their facility in the event that they were successful in gaining the franchise, and we can have a look at that document on screen at page 3951.

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This is the index to the document itself, Mr. Appleby. It indicates the areas which it covered. There was firstly the national, nationwide FM system, the basic option, the all-inclusive option. Then the AM transmission system, which involved three sites, the basic option for that, the all-inclusive option, and then there were three appendices

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which set out various features of the system. Firstly it distinguishes between the all-inclusive and the basic option. Now, this was a document which was considered by the Chairman and the Secretary of the IRTC and they reported, on the day following receipt of this document, to the general body of the Commission and the Commission concluded as a result of that, that there were going to be difficulties with regard to the ability of individual contenders for the franchise to deal with these charges, and I will just refer you, if I may, to the minutes.

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It is the meeting of the 8th of December. It is on page 5568.

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Here under the heading of "RTE Charges" you will see the minutes of the report indicating, "Following a report from the Chairman and Secretary on the meeting with RTE regarding the costs of transmission facilities, etc., it was agreed that the sum being asked by RTE would be very detrimental to the interests of any group interested in setting up a National Radio Service. In the circumstances, it was agreed that the Chairman Mr. O'Donovan, the Secretary Mr. Lackan, should approach the Minister in the matter."

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Firstly, do you have any recollection of the document in question, that is the rate card or schedule of RTE charges being furnished to you after it had been received by the Secretary and the Chairman on the 7th or 8th of December?

A. I have no particular recollection of it, but I am sure I

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would have received it, yes.

24 Q. Yes. Right. Because this obviously would found the basis for a review or certainly would be material in your review of the subsequent applications which were to use the RTE transmission system, isn't that right?

A. Well, it would have been relevant, yes.

25 Q. Yes. And whilst quite a number of years have elapsed since you carried out your actual work in relation to the IRTC matters, you involved yourself in many other activities since that time, is it correct to say that it is your belief that if you were involved in the preparation of the financial analysis insofar as it amounted to an analysis of the submissions made by the rival contenders?

A. Yes, I believe I was involved, yes.

26 Q. Now, the financial documents appears firstly at page 3919, and on page 3919 we see the financial structure of the applicants. And looking at the way in which this is formatted, it may assist you in your recollection that you were the author of this particular document. It so followed, of course, that the individual applicants were segregated and the subjects under which they were analysed were set out at the side of the page and you went through the various figures and attached particular relevance or particular entries in sequence, isn't that right?

A. Yes.

27 Q. And having done that, you analysed the financial information under a number of headings. Firstly, there was the capitalisation or capital fund available for the projects which you set out in this document, isn't that right?

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A. That's correct.

28 Q. And then on the following document, 39120, you reviewed the projections, financial projections of each of the applicants on an annual basis, the figures you see on screen at present represent the analysis which was carried out for year one, isn't that so?

A. Yes.

29 Q. And whilst there are a number of headings under which the analysis was taking place, obviously you were transposing what was in the projections on to this sheet of your own, isn't that right?

A. Yes.

30 Q. One of them covered the heading of transmission charges, we see that towards the end of the page there.

A. That's correct, yes.

31 Q. Yes. Right. Now, the financial provision for transmission which was in the projections varied quite considerably, as we see, across the range of the applications here, isn't that so?

A. That is so, yes.

32 Q. We have, for example, the first contender, the Consortium was working its projections on the figure of ú686,000 per annum, whereas Century 2000 were figuring at 327,000 - sorry, Radio 2000 at ú317,000 and Century at ú160,000, isn't that so?

A. Yes, those figures relate to Year 1.

33 Q. To Year 1, yes, of course. If we turn to the next page, we will see that in Year 2 the figures increase, because there was going to be an increased coverage obviously, and we see that transmission charges are now 914 for the Consortium,

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702 and 240,000 for Century. And in Year 3, and the operations had advanced further, or were intended to, we see that the figures were still 914 for the Consortium, 747 for Radio 2000 and 320 for Century. So that there were and remained very wide differences between the individual contenders projections for transmission charges, isn't that right?

A. Yes.

34 Q. The range was considerable, I mean one was talking about a multiple really of three to four times between the lowest and the highest operator, isn't that right?

A. That is correct, yes.

35 Q. Yes. Right. And obviously one would have to view that against the background of what was being asked by RTE for the service itself, because only one of these contenders here seemed to have a figure that equated to the RTE asking price, if it could be called, that, isn't that so?

A. Well, I have forgotten precisely what the asking price was, but you are suggesting that it was the Consortium's figure, I would take that as read, yes.

36 Q. Yes. For the annual charges for transmission for the FM service RTE were looking for €940,000 -- sorry, €914,000 for the all-in service in respect of the FM service. As against that, in the projections which were advanced by Century, for example, they took the view that €375,000 would be the limit to which they were prepared to go. And this was a matter which, I suggest if you were the person who was carrying out the analysis here, you would have had a concern about the difference between the asking and the bid price, if I might call them, but certainly you had,

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whether you identified whether you were concerned or not is another matter?

A. Yes, I mean, I think if you look at any of those particular headings there, I mean you will see substantial variations in the provision made in each of the applications under each heading. For instance, under staff salaries, 2000 was, the figure that Radio 2000 had was almost a quarter of what the Consortium were projecting, and I think if you look at all of those particular provisions you will see substantial variations in what was in each of the projections.

37 Q. Yes. So, in effect, some of the contenders had very optimistic views about the level of turnover, for example, that they might generate. Others were more conservative?

A. Yes.

38 Q. And I think in the light of that, whilst there were obvious differences between their individual presentations, you examined their individual presentations on a stand-alone basis to see whether or not they would stand up to the test of a variation, for example, in their turnover and perhaps an increase in their costs, isn't that so?

A. Yes, that's correct, yes.

39 Q. And that was a financial analysis that was carried out which allowed for 10% increase in overheads and at the same time a 10% decrease in turnover, is that right?

A. Yes.

40 Q. I think applying that test, and I don't think it is necessary to analyse it in any great detail, your conclusion from it was that none of the contenders would pass that particular test, isn't that right?

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A. Yes, I can't - the phraseology I think was that, you know, none of the applications was robust enough to, if you like, have a profit or an accumulated profit at the end of three years.

41 Q. So that to some extent then, each individual application here depended on the accuracy both for projections for turnover and for projections of overheads, isn't that right?

A. Certainly for the first three years, yes.

42 Q. And unless one had endless pockets, three years would be the time when you would have expected to at least broken even in this type of business and to be in the beginnings of profit making, isn't that right?

A. Well, that would have depended on the principals involved, yes, and their willingness to support, if you like, the venture.

43 Q. Right. A variable, any particular variable of the amounts which had been projected for could have a significant effect on the bottom line, for example, if we were to look at Century's figures in Year 3 where they have a transmission cost allowable here of 320, and one goes to the bottom line and one sees that their profit in that particular year would be 330. Do you see that?

A. Yes.

44 Q. If, in fact, they were paying twice that amount, 640, for example, they would still, they would now be reduced to making a £10,000 profit, isn't that right?

A. Yes.

45 Q. If all other financial indicators were met, projections in every other respect were accurate?

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A. Yes.

46 Q. So that the accuracy, I suggest, for each one of the components in their projections was significant in view of the fact that none of them could get over the test of, the 10% test, if I might call it that, isn't that so?

A. Yes.

47 Q. Now, the Commission had decided that after the receipt of the submissions on the 16th of December, that the Secretariat would present to each of the Board members within the middle of the following week, a review of the applications and a financial analysis, if that was available. And from what we see on the 22nd of December, a document was prepared under the signature of Mr. Michael O'Keeffe which compared the various contenders' approaches to the individual headings which were set out in his analysis. They included the programming and the provisions for costs, finances, various matters of that nature. They included in that particular report these financial documents which we have on screen and they were circulated to all the members, probably on the 22nd of December. Does that - or a little after - does that accord with your memory?

A. I am not sure that they were circulated with the document prepared by Mr. Michael O'Keeffe. I mean, his covering minute does not record the projections as having been included with the document or with the documentation he was issuing. It is possible that they may have been circulated to the Commission members afterwards, perhaps simply at the following meeting.

48 Q. Mmm. Do you think then that the first occasion upon which

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the members may have seen this documentation, and by that I am referring to the financial documentation, might have been at the meeting of the 5th of January?

A. It might have been. I would think it is was certainly no later than that.

49 Q. I see. The questions then that were formulated as possible questions which might be asked at the public hearing and the public hearing, as we know, took place on the 12th of January, it was always intended to take place on that date, can you remember how those questions were formulated by the Secretariat? Were they divided up between you yourself and Mr. Connolly, Mr. O'Keeffe, or did you deal with the matters that might have a financial input and others dealing with other headings?

A. I have no specific recollection of the extent to which we, if you like, each contributed to the sets of questions. I expect that Mr. O'Keeffe who had analysed the programming contributed those questions. I would not be surprised if I contributed all of the rest of the questions.

50 Q. Yes. And the questions were broken down as between the various contenders, isn't that right?

A. Yes.

51 Q. There were questions for each of them. And there was a question for Century which related to the possibility of the Minister and RTE agreeing figures for transmission charges that were perhaps not in accord with the figures agreed or the figures proposed by others. Can you recollect that question?

A. I can, yes.

52 Q. Yes, I will just put that on the screen. At page 3927 in

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question 10, you will see one of the questions here, it is under the heading "Engineering", it is not a, strictly speaking, engineering matter. You see there it says, "On page 37 of your proposal you state that the financial demands being made by RTE for the siting of transmitters of the independent radio service will jeopardise the viability of the whole project. Are you saying here, 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 the question is framed in the context of the siting of transmitters, but I think that is the heading that was used in the original document under which people responded giving their estimates of transmission costs. So the author of this particular question, assuming it is yourself, was raising a question here as to whether, in the light of there being presumably a known dispute or uncertainty about the level of RTE charges and their acceptability to Century, whether Century would be prepared to go on with the project if the Minister and RTE, in fact, found the charges to be reasonable, isn't that so?

A. Yes.

53 Q. That would appear to tie-in, or certainly be, become relevant by reason of the fairly wide gap that existed between this particular Applicant's projections for transmission and the RTE figures, which was not as wide a gap for others, and they were not asked for - were not to be asked similar questions?

A. Well, I mean the question was proposed on simply because

Century itself, in its application, had signalled that the RTE transmission charges would not be for it, and it was in response to that particular comment that the question was framed as an issue, yes.

54 Q. Yes. And I take it that was to try and establish whether in putting in its projected figure for transmission, that Century was sticking on that figure as its final figure, because if they did so and if the Minister and RTE agreed a higher figure, one need not consider their application further and you would move on to consider the applications of the other three remaining contenders without the necessity of having to deal with this one because they would not have got passed the first hurdle?

A. Well, indeed, I mean that might have been the result if the question had been asked, but I think the fact of the matter, as you indicated earlier, is that the Commission itself had decided in December that the transmission charges being demanded by RTE were not realistic, so perhaps they felt that the question was redundant in one sense, given that the Commission itself was of the view that the transmission charges were too high.

55 Q. Well, of course, the Commission's view on the 8th of December would have been formed without having had the benefit of knowing whether the Department of Communications had engaged in any negotiations with RTE to perhaps reduce their figure down to a more acceptable level, isn't that right?

A. Yes, I think that is correct, yes.

56 Q. And it is the case, as we know from the correspondence which passed between the IRTC and the Department, that the

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IRTC was in communication with the Department and the Department was considering the views of the IRTC in its negotiations with RTE?

A. Yes, I believe that to be the case, yes.

57 Q. There were in early January two meetings between the RTE personnel and the representatives of the Department, and these culminated in their being an agreement on the 11th of January whereby certain reductions on the initial asking price proposed by RTE were achieved, so that prior to the public hearing on the 12th, there had been some movement from RTE's initial position in a downward direction. Were you aware of that?

A. I mean, I was - well, I am aware of it. Whether I was aware of it sort of by the 12th of January or not, I just don't know.

58 Q. Right. Insofar as anybody was dealing with the financial aspects of this National Radio Franchise application within the Secretariat, was it yourself and Mr. Connolly? Was it Mr. Connolly exclusively or did you share that burden?

A. Well, in terms of the evaluation of the applications and the preparation of questions, I believe that I did, if you like, the financial evaluation of the applications. I think it is fair to say that Mr. Connolly was more directly involved in sort of meetings with RTE on transmission charges and would have been, if you like, more intimately involved with the negotiations which were going on.

59 Q. Right. But I take it you would expect that you would be kept abreast of any milestones which had been achieved in the course of negotiation, for example?

A. Yes.

60 Q. Yes. Now, on that basis, the probability then seems to be that you would have been informed shortly after the agreement having been reached between the Department and RTE as to their figures?

A. Yes.

61 Q. Isn't that so? Do you have a recollection of the RTE figures being known to the Commission prior to the 12th of January, that's the significant date, because it is the date of the public hearings which were held in the Concert Hall?

A. These are the figures which have come out of the negotiations with the Department --

62 Q. Yes.

A. -- the preceding day?

63 Q. We can put them on screen at page 5608.

A. I mean, I have no recollection of those figures being available to the Commission at the time of the hearing, no.

64 Q. Right. Just, we can just perhaps firstly have a look at these figures. You can see this is a three-paged document. The first page deals with national FM radio. As we move down towards the end of the page there, you will see that under the heading "Annual Charges" ú692,000 was a figure which was contained within this document. Do you see that?

A. Yes.

65 Q. The evidence has been from Mr. O'Morain of the Department, that this was a figure which was agreed with the Minister and RTE on the 11th of January?

A. Right.

66 Q. And if we turn to the next page then, it is page 5609, this

document then dealt with the national AM radio charges, and you will see towards the bottom of that for Dublin and Cork there was a charge of ú111,000 and for Athlone ú124,000. So that between these two transmission capacities, both AM and FM, it would appear that the Minister had agreed certain figures with RTE and in the normal course then you would expect that a question like the one you had framed would be very helpful in determining the ultimate success of any applicant who was intending to use this service, because both the Minister and RTE had agreed a particular figure. The Commission itself had no alternative figure to propose, isn't that right?

A. Yes, that is the case, yes.

67 Q. So it either then accepted the Applicant's figures without qualification or it accepted the Minister's figures as agreed, isn't that so?

A. Well, I don't think it was a matter really for the Commission to determine what the transmission charges provision should be. It was simply, it was a matter for the Commission to examine the prospective financial viability and, you know, the issue of transmission charges was not, if you like, directly relevant to the criteria in the Radio and Television Act which was required to be taken into account by the Commission in making their decision.

68 Q. No, but whilst the transmission charges were not themselves isolated and inserted in the Act as a particular point of reference, the criteria did, however, require the Commission to examine the financial status of the individual applicants, isn't that right?

A. Yes.

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69 Q. And it required them to reach their decision on sound economic principles, isn't that right?

A. That's correct, yes.

70 Q. Right. And obviously if a contender was putting forward an application which pitched a particular overhead at a certain cost, when the Commission knew that that was only a fraction of the actual cost that would be necessary, it would follow that the application was not grounded on sound economic principles, isn't that so?

A. Well, to the extent that there could be fluctuations in any of the cost items involved, I mean the Commission was not in a position to restrict or let any of the cost items - we did, as you have indicated, did some analysis of the extent to which each of the applications would, if you like, resist or be resistant to cost and revenue changes. It was in an overall context that that exercise was done. I think the Commission would have been, would have looked at it on an overall level rather than on an individual cost item basis.

71 Q. Yes. I take it equally that there would be no reason for the Commission or the Secretariat to close its eyes to new information which had come to hand in the shape of an agreement between RTE and the Minister that this was a reasonable level of charge?

A. Absolutely not. If that information was available, yes.

72 Q. And if that information was available, you expect that it is information that would have come to you in the normal course?

A. Yes. I mean, I did receive it certainly, certainly I was conscious of it subsequent to the hearing.

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73 Q. Yes. Of course.

A. Yes.

74 Q. Events then progressed, the hearings took place. You learned of the decision which had been made, that decision was made on the 18th of January, granting the franchise subject to contract to Century, isn't that so?

A. That's correct.

75 Q. Were you aware of there having been any further meetings between the Commission or the Commission Chairman and Secretary and any of the applicants after the presentation of their oral submission and prior to the decision being announced?

A. I do not recall any such meetings and certainly I have no record of any such meeting, but I understand that there is other documentary evidence which suggests that there may have been a meeting, yes.

76 Q. Yes. The documentation available to the Tribunal suggests that there was a meeting on the 17th of - sorry, on the 13th of January, which is the morning after the oral presentation. If we look to the document at page 5600, you will see that this is a faxed communication from Century Communications Limited, the sender is James Stafford. It is being sent to Mr. Ray Hills, of Ray Hills Associates in the UK.

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You may know that Mr. Hills was a technical consultant to Century Radio in respect of this application, isn't that so?

A. Yes.

77 Q. And in this faxed document it firstly records the fact that

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Oliver Barry's office are faxing him details of the RTE charges, and those charges are the documents which were last on screen in respect of the figures of 692 for FM and 112 for Dublin and Cork AM.

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Now, after that he indicates that "he had returned from a very satisfactory meeting with the Chairman and Secretary of the Commission. Decision will be announced next week. The Chairman and Secretary require, with greatest possible urgency, as much information as possible before close on Monday to challenge the RTE figures and justify ú300,000 as the correct charge."

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Now, had you yourself, reached any conclusion as to what the correct charge was from your analysis of the figures which were contained within the applicants' submissions,, that is the three applicants who were relevant or indeed the RTE schedule or any other document?

- A. Certainly from - at that point, no. I mean, we wouldn't, or at least I wouldn't have formed an opinion as to what the correct charge was. Just to point, I mean you indicate that or the document indicates that Oliver Barry's office are faxing him details of the RTE charges, I mean I don't know what charges they are, whether they were the original RTE charges or the subsequent charges that were agreed between RTE and the Department of Communications.

78 Q. Yes.

- A. It isn't clear to me which --

79 Q. It may not be from this document.

- A. Yes.

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80 Q. But the history of events and the evidence which has been given to date would indicate that the original figures, the original RTE figures called the "rate card" or "schedule of charges" was provided in the previous year to Mr. Hills?

A. Right.

81 Q. And the only other documentation generated from RTE was this particular new set of figures and Professor Hills, in later faxes, confirms that RTE have changed their position from the initial presentation and the original figures and they now are taking a different approach.

A. Sure.

82 Q. So we may take it that they are one and the same document?

A. Yes.

83 Q. So what is being referred to in this particular fax of the 13th is the agreement, or rather the documents which formed the agreement between the Minister and RTE on the 11th, two days later, and which Professor Hills had sought from Century on the 12th, and in his fax he indicates that he requires a copy of the latest RTE figures which had been provided by the IRTC to Mr. Barry, so we may take it that the logical sequence seems to be that the documents found themselves going from the Department to the IRTC, and from the IRTC to Mr. Barry, and from Mr. Barry to Professor Hills, he receiving them on the 13th?

A. Okay.

84 Q. If this record is accurate, it would appear to suggest that the Chairman and Secretary had adopted a position where, or were conveying a position that the RTE figures were to be challenged by the report which was to be produced as a result of this request. Do you remember any discussion

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which you participated which concerned itself with endeavoring to put up an alternative set of figures to the RTE figures?

A. Not at that time, no, I don't recall, no.

85 Q. Now, it transpires that a relatively brief report was prepared as a result of this faxed request of Century Communications to Professor Hills and that report was faxed on the 17th of January by Mr. Stafford to the IRTC and it enclosed documents from IBACS which was the Independent Broadcasting Authority's consultancy service in the UK?

A. Yes.

86 Q. And dealt with certain aspects of costing. Do you remember considering that document before the 18th of January decision appointing Century?

A. No, I don't remember considering it, no.

87 Q. After the decision had been made to grant the franchise, there appears to have been an identifiable dispute and one perhaps that the IRTC was asked to involve itself in regarding the level of charges which were actually going to be paid by the new franchisee to RTE, isn't that right?

A. Yes.

88 Q. And we know that on the 6th of February a letter was written to the Minister by Mr. Connolly, and he enclosed a number of documents with that identifying a dispute.

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Now, if we look at document 5606. This is a document headed "RTE transmission charges". It appears to be one of the documents enclosed with the letter to the Minister.

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It says firstly "Please see the attached copy of RTE quote

for transmission for new independent national radio station and the copy of the letter from Century Communications." That was their letter of the 17th of January which Mr. Stafford set out his concerns. "There is substance in the Century argument about double payment for the transmitter network. The network which was developed over a long number of years is State property, the control of which is vested in RTE. It has always been paid for and continues to be paid for by license fees of the citizens of the country. That RTE should have control of it seems an historical accident. It is likely that RTE took it over that the possibility of other users was not envisaged." Etc..

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So there was an argument being advanced here, and do you remember having any input in the drawing up of this particular document?

A. No, I don't remember having an input, but there are one or two elements in the document which suggest that I might have been involved, yes.

89 Q. Yes. And is that because of your previous airline involvement?

A. Yes.

90 Q. Seeing a comparison being drawn here with Aer Lingus or Aer Rianta, isn't that right?

A. Yes.

91 Q. Now, on the following page of that, we see towards the end of it that the author of this document says, "In the circumstances, fees of say ú400,000 for transmission charges and ú100,000 for hardware and installation project

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management seem appropriate."

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Did you have any input in formulating these particular figures as being appropriate figures or do you know how anybody within the Secretariat or Commission reached such a conclusion as is contained here?

A. I don't recall specifically being involved, but I think the earlier paragraphs do explain, I think to some extent, how those figures were arrived at. I may well have been involved, yes.

92 Q. Right. Now, the figures that are earlier on that particular document, in effect, are the figures that were proposed by Mr. Stafford, the ú375,000 figure?

A. Yes, but I think there is also reference to the comparison vis-a-vis Downtown Radio in Northern Ireland were based on their costs for four transmitters, they are being charged ú350,000.

93 Q. That information --

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MS. EGAN: Chairman I am sorry to interrupt, I don't wish to be difficult, but I don't know if Mr. Appleby has had any direct knowledge of or direct involvement in the preparation of this document that is being put to him or indeed in the negotiation on transmission fees at this stage. I would just like that matter to be clarified.

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MR. O'NEILL: Well certainly I had understood, Sir, that I had established the boundaries of this witness's evidence. He adopted this document to the extent that he had some input in it and he drew that from the comparison or the

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references that are contained within it to airline comparisons between Aer Rianta and Aer Lingus charges, and his evidence is that he believes that he has an input in it. I am exploring exactly what that input is. He has been asked in relation to the €400,000 figure, whether he had any input in that particular figure and his responses, I think, deal with matters which were within his own knowledge at that particular time and subject, of course, to the passage of time, that his recollection mightn't be entirely absolutely correct, I think I am entitled to proceed to question --

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CHAIRMAN: I think you are entitled.

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94 Q. MR. O'NEILL: This was the financial aspect of this particular projection, isn't that right?

A. Yes.

95 Q. And it was the review which was being carried out by you who, as much as anybody and more than persons below you in the hierarchy were concerned with the analysis of the financing documentation which had been provided, isn't that so?

A. Yes, yes.

96 Q. Now, it is the case, as we know, that the IRTC did not engage its own accountants and financial advisors, Deloitte Haskins and Sells, to carry out any review of either of the applications themselves or of any of the other financial matters which came before the Commission and we have heard that that was for cost reasons.

A. Yes, yes. I mean, that is my recollection as well.

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97 Q. Yes. So that the Commission, in effect, was thrown back to its own resources in order to analyse the financial information which was available to it, isn't that so?

A. True. I mean, the Commission had not only, if you like, the staff of the Commission, but obviously --

98 Q. The members?

A. The members, many of whom were expert in business and in financial matters, yes.

99 Q. As regards analysing or offering a view on these particular figures from the Secretariat's points of view firstly, as opposed to the Secretariat in conjunction with the members themselves, the Secretariat had available to it accountants who were, in effect, limited to audit purposes, so they did not have any input into the analysis, isn't that right?

A. Yes.

100 Q. You then had the body of members, but there was no sub-committee formed of members which produced any financial analysis or report, isn't that right?

A. On transmission, on this particular issue?

101 Q. Yes, exactly.

A. No, no, at that time I don't think so, no.

102 Q. So whilst the members may well use their financial expertise in debate at their meetings, as much as the Secretariat could learn of that was the conclusion which had been drawn and the resolutions made by the IRTC, isn't that so?

A. Yes, I mean, the Commission had earlier decided that the charges being proposed by RTE were excessive and, you know, that, if you like, was, so-to-speak, a policy decision of the Commission.

103 Q. Right.

A. And insofar as I or others were involved in the preparation of this document, we were, if you like, following on from that policy guideline which had been given.

104 Q. Right. You weren't being asked for an opinion. You were implementing a policy.

A. Yes.

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CHAIRMAN: Can I interrupt it at that point, because it is just about - or do you want to continue and complete this particular section? I don't want to break your train of thought.

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MR. O'NEILL: I am happy to break at this point.

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CHAIRMAN: We will break now.

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MR. O'NEILL: We will be ten minutes, I think, Mr. Appleby.

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

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105 Q. MR. O'NEILL: Mr. Appleby, one of the matters which seemed to have been considered by the authors of the memorandum which we have just referred to as the RTE transmission memorandum which was forwarded to the Minister on the 6th of February with the documentation, was a comparison between the Downtown Radio charges in Northern Ireland and a comparison between that and what might take place in the

South, isn't that right?

A. That's right, yes.

106 Q. And the author, certainly of the report, seemed to have accepted that because there was a charge of ú100,000 in the North, that there should be some immediately referable comparison between that and what was to take place in the South?

A. Yes, that was an indicator, yes.

107 Q. To an extent that they were like with like?

A. Yes.

108 Q. Though, of course, the figure allowed for in the South was four times that of the North, in that the authors were talking about ú400,000 charges being appropriate in the south of Ireland, isn't that right?

A. Yes, but I mean, there were three and a half times as many transmitters, I mean, that was the basis.

109 Q. Of course there were, yes. The basis for that comparison would not appear to have been from any documentation which was internally generated by the IRTC's Secretariat, in other words, there is no indication that they contacted their Northern Ireland equivalent, or whatever, to establish what the actual charges were. Would you accept that to be the case?

A. I am not aware of any documents, yes.

110 Q. And as far as we can see, the source of this particular contention is the letter of Mr. Stafford which is that of the 17th of January, 1989 which appears at page 6078. This was the letter of the 17th of January which was the response to the request made of Century, in effect, to stand up the Century figures of 300 and to challenge the

RTE figures. That report was accompanied by this particular letter. If you look to the end of it, at the very last numbered paragraph 3 it reads: "I would also draw your attention to the Sunday Tribune press report 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 of ú375,000 as a transmission charge is consistent with the Downtown transmission cost."

So that seems to be the only documented evidence that was available to the Commission at that time to allow a comparison to be drawn between the figures that RTE were asking for and the Downtown figures in Northern Ireland?

A. Well, as I indicated, I mean, it seems to be an indicator of - it, shall we say, supported the view of the Commission that the RTE charges are excessive, yes.

111 Q. Was that the view in the Secretariat that they accepted this particular paragraph as being accurate in all respects and that a comparison could, in fact, be drawn?

A. Well, I can't recall if there was an absolute understanding that it was accurate, but it was simply, if you like, an indicator, you know, by reference to its own assessment in terms of what the figures should be.

112 Q. Very good. You see the Department, on receipt of this information, made contact with their Northern Ireland equivalents and made contact, in particular, with Downtown Radio. They spoke to the personnel in Downtown Radio, at that time a Mr. Tinman, and Mr. Tinman said that it was not comparing like with like at all in comparing the Northern Ireland situation with the south of Ireland situation, not

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just because of the number of transmitters involved but because of the nationwide service that was being offered and the wattage stage and transmission capacity of various transmitters and equipment, that they, in fact, were, in fact, operating with four low sized transmitters I think of ten kilowatts each, whereas the Irish situation, by that I mean the southern Ireland situation, was quite different. And he indicated that as far as he was concerned ú800,000 per annum would have been a reasonable charge to make in a southern Irish situation. So that it would appear that the conclusion that one could draw, that merely because in Northern Ireland you have four transmitters which cost ú100,000, that one should multiply that by four to cover 16 in the south, was not one which was soundly based because one was, in fact, in the considering like with like?

A. I think I am right in saying that it was 14 transmitters so it wasn't quite a multiple of four.

113 Q. I accept that.

A. But I think of the, if you like, the elements of the transmission charge, I mean, there were many elements of the full cost of the transmission charges which were accepted by both the Department and Century, well largely, I think, there were only two elements of the transmission charge that were felt to be excessive, and it was those two elements which contributed to the difference between, if you like, the proposed RTE charge and what Century was proposing.

114 Q. And --

A. And the Department - sorry, the Commission, I think, felt that on those two particular elements, that there was

justification for the Century position.

115 Q. Right. Well certainly the IRTC position was, could I suggest, relatively indistinguishable to that of Century's position in this communication which went to the Minister on the 6th of February?

A. Well, the Commission agreed that Century had a case in relation to the issue of transmission charges, yes.

116 Q. Yes. Well, could I suggest that this particular letter and the enclosures were not the Commission's, rather the Secretariat's. The Commission had made the policy decision that you have already referred to earlier in December, but they hadn't drafted this particular memorandum, isn't that so?

A. Well, I presume so. I can't obviously recall what meetings the Commission had between the 18th of January, I think, when they made the decision and the 6th of February when this letter issued. I imagine, in any event, that the substance of it would have been cleared with Judge Henchy who was Executive Chairman at the time.

117 Q. Accepting that as so, I just merely wanted to indicate that it does not appear from the documentation that there was a meeting at which this particular letter or submission was considered and that the particular response in this format was to go to the Department?

A. Well, I am not aware that there was such, no.

118 Q. In any event, there was a response within a relatively short period of time of this letter having been sent on the 6th of February from the Minister, and that was a letter of the 16th of February, 1989 which is at page 3974.

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In this letter you will see that it is to the Chairman of the Commission, and he says, "I refer to our meeting and the documentation sent to me by the Secretary of the Commission regarding some aspects of the quote by RTE for the supply of transmission services to Century Communications.

"I have had the matter examined by my department and discussed the issues again with RTE. At my strong urging they have now agreed to reduce their annual charge from ú692,000 to ú614,000, and" - I can interpose at this point to say that that is the FM figure for annual charges is 692. It is that figure being reduced to 614.

"...depending on actual physical implementation of the project they would expect a build-up to this final figure in the following approximate manner, all at October 1988 prices. 1989: ú200,000; 1990: 430,000; 1991: 530,000; 1992: 614,000.

"I am satisfied in Irish conditions the foregoing charges were not unreasonable."

Now, as you are aware, the Department did have technical expertise, isn't that right, in this area of transmission and costing and it had available to it, if required, outside consultancy services, if necessary, isn't that so?

A. Well, the Department certainly had technical expertise available, yes. Whether or not that went to including, if you like, financial expertise, I am not clear.

119 Q. Right. Well certainly the IRTC had distanced itself from

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any negotiation and it didn't engage in the negotiation process overtly. It merely conveyed the concern of the franchisee and its own concern that there might not be finality to the Minister, but didn't make a particular pitch other than the one document we have referred to there which suggested 400,000 and 100,000, isn't that so?

A. Yes, as I understand it, the Commission were not directly involved in negotiations. I mean, I think the Act stipulated this, that the Commission could request the matter to be addressed by the Minister and that it did, but, you know, the evaluation or assessment was a matter for the Minister, yes.

120 Q. Have you a recollection of learning of this particular letter or of its message, namely that the Minister had further reduced the figure which was being sought by RTE and had agreed that this was now a reasonable charge in Irish conditions?

A. I mean, I have no recollection of or specific recollection of the letter, no.

121 Q. But were you aware of the fact that the Minister had further reviewed the 692 figure, perhaps amongst others and had reduced it to 614 in response to the concerns of Century which were transmitted through the IRTC at the meeting of the Chairman?

A. Yes, I am sure I was, yes.

122 Q. Yes. There certainly didn't appear to be anything else following upon this letter that the IRTC should be doing to inform the Minister of the views of Century or encouraging them to revise this figure, isn't that right?

A. Yes, I think the - well I think the Chairman did take an

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initiative subsequent to this request asking for the Minister to use his powers under the relevant provision of the Radio and Television Act.

123 Q. Right. Now, I think you were involved in the contractual negotiations with Century in an effort to try and reach a satisfactory agreement with them?

A. This is in relation to the sound broadcasting contract, yes.

124 Q. Yes. I appreciate that it didn't specifically deal with the amounts of the RTE figures or that, they would have to come to you with a capacity to transmit and you would conclude your contract with them if they were capable of so doing, isn't that right?

A. Yes, yes.

125 Q. Right. But, of course, your ability to complete a contract was dependant upon their completing their contract with RTE, isn't that right?

A. Yes, the issue of transmission charges really was almost a precondition to serious negotiations taking place on the sound broadcasting contract.

126 Q. Were you able to get into that serious business of negotiating your contract with them until they had, in fact, concluded their contract or certainly agreed their transmission charges with RTE?

A. Well, I don't think there was any serious interaction between ourselves and Century at this particular time in relation to the sound broadcasting contract.

127 Q. Right.

A. You know, once this issue was resolved, then the level of contact became much more intense.

128 Q. Right. Now, the resolution of this issue was one which was achieved by the Chairman forwarding to the Minister the concerns of Century and its Chairman regarding the level of charges at the price which was being sought and which had, in fact, been agreed by the Minister, isn't that right?

A. Yes.

129 Q. And there was an indication that as far as Century were concerned, the project was not viable above ú375,000 which they considered to be, in all the circumstances, reasonable, isn't that right?

A. Yes.

130 Q. And they indicated in their letter to the Chairman of the IRTC that this was a matter upon which an application could be brought under Section 16 of the Radio and Television Act of 1988, isn't that so?

A. That is so, yes.

131 Q. The Chairman certainly seems to have treated that letter as a request for a reference to the Minister for a Section 16 decision, isn't that correct?

A. Yes.

132 Q. And forwarded the letter which had been given to him on to the Minister for his consideration, isn't that correct?

A. That's correct.

133 Q. And the Minister then reached a decision and communicated that decision to the Chairman on the 14th of March, in which he set out certain financial considerations which would, in effect, dictate the financial terms on which RTE and Century should interrelate, isn't that so?

A. Yes.

134 Q. The input of the IRTC in those actual figures is not

apparent and I take it that they did not offer to the Minister that particular quantification of any one of the items upon which he ultimately reached his decision, isn't that so?

A. Well, I am not aware of any further contact or interaction with the Minister and the Commission on that particular issue, no.

135 Q. Right. So that the sequence from the financial point of view, as far as Century is concerned, was that it put in a business project plan in which €375,000 was its figure for the ultimate charges to be paid for transmission to RTE on an annual basis, isn't that right?

A. Yes, and that was the Century figure, yes.

136 Q. Yes. And it maintained that position throughout its initial dealings with the IRTC and in relation to its dealings with the Minister?

A. Yes, I believe so.

137 Q. And ultimately it translated into the financial package which is contained within the letter of the 14th, isn't that right?

A. Yes.

138 Q. Throughout that period of time, it would appear that the Commission's view was that RTE's figures were too high, isn't that right?

A. Yes, well two elements of the quote were too high, yes.

139 Q. What were the two elements that you identified as being too high?

A. Well, I think one related to, if you like, access charges, so-called access charges which in part, I think, were a contribution to the historic costs of the transmission

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network. And the second item then was, I think, in general, on the issue of on-going maintenance of the transmission equipment. They were the two elements, I think.

140 Q. They were the two elements that concerned you personally?

A. Yes, yes.

141 Q. But in any event, once this was concluded, it was concluded

on the basis of the ministerial directive rather than as a result of any negotiation or coming together of the RTE position and the Century position through negotiation, isn't that so?

A. Yes, yes. That is correct.

142 Q. And certainly the documentation which we can see in the

Century or in the IRTC documents wouldn't appear to indicate that the IRTC established what the negotiating position of Century was at any time throughout that sequence of events. In other words, they did not ask whether Century had moved from their initial figure of ú375,000, isn't that right?

A. Well, I think the Commission sought, at various times, to obtain clarification of Century's figures, and, you know, as I have indicated previously other than on two of those, two of the elements, you know, we were - well sorry, other than two of the elements which were in dispute, you know, we were happy to side with Century in relation to those two elements.

143 Q. Mm-hmm. But you had never checked with Century to see

whether or not they were going to move from their initial position or whether they were going to stay where they were and await a ministerial directive, which is what, in fact,

took place?

A. Well, I mean, it was clear that the Century figure was the figure they were sticking to. I mean, they had indicated to the Commission that was what their consultants believed to be fair and certainly as far as the Commission was concerned, you know, there was no real question of horse-trading on that figure. You know, Century had set out its stall, supported by its technical people, and we, if you like, within the Secretariat, you know, assessed the component parts of those figures and came to our own view.

144 Q. Right. I gather from that, that you believed that the figures were supported by Century's technical people?

A. Well, certainly, you know, they had, as I understand it, you know, their consultants had in a general sense, indicated that those figures were figures that were appropriate, yes.

145 Q. Mmm. And do you think that was the reason why they were asked to produce the technical report which showed that their figures were the correct figures?

A. This is the request of the 13th of January?

146 Q. Yes. Mmm.

A. Yes. I mean, I imagine the Commission, you know, made that request to evaluate to what extent the Century figure of 375 was valid.

147 Q. Right.

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MS. EGAN: Chairman in, that regard, I would request that it be recorded that Mr. Appleby has said that he has no knowledge as to whether or not any such request was made on the 13th of January, 1989. He is simply being asked to

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speculate as to why, if such a request were indeed made, it might have been made. I think that is precisely the kind of questions and speculation which you outruled yesterday, Chairman, in my own cross-examination or examination of Michael O'Keeffe. Mr. Appleby doesn't know whether such a request was made and I think --

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CHAIRMAN: I note what you are saying. The examination of Mr. Appleby is not concluded yet.

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148 Q. MR. O'NEILL: In any event, Mr. Appleby, it would appear, certainly from the documentation which was provided to the IRTC, that no independent confirmation of ú375,000 as being the appropriate charge was ever received by the IRTC?

A. Well, the issue of transmission charges was not something which the Commission had to make a decision on. It was we - this was a matter for resolution under the Act by the Minister in the event of dispute. And, you know, there was no reason why we should seek to obtain independent confirmation of the particular figures.

149 Q. Right. And therefore you don't know why such confirmation was sought?

A. Well, I imagine - well, no, I don't. But I imagine that it was to simply evaluate the extent to which that Century figure, you know, it had a sound basis --

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MS. EGAN: Again, Chairman, in that regard...

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MR. O'NEILL: I am leaving that point in any event.

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CHAIRMAN: I noted --

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MR. O'NEILL: I was leaving the point, I don't know if My Friend's objection, if she still wishes to persist with it, but we are moving from that point.

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MS. EGAN: Chairman, I would simply like it noted that Mr. O'Neill has again asked Mr. Appleby does he know why that confirmation was requested? This, in the context of Mr. Appleby's previous evidence, that he doesn't even know if that confirmation was requested. All he knows is that Mr. Stafford stated in the fax that that confirmation was requested. He has no knowledge that any such confirmation was requested, Chairman.

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MR. O'NEILL: For accuracy, what I indicated to the witness was that he did not know why it was requested to which he agreed, no he didn't. He then went on to offer a view. It was not a view that was requested of him, but he was asked by me whether or not he did not ask, know and he answered that and went on to elaborate.

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In any event, I am moving from that now, Mr. Appleby, to your own involvement then in the contractual negotiations which took place with Century. They were lengthy, isn't that so?

A. And difficult.

150 Q. And difficult?

A. And difficult.

151 Q. And your concerns in the course of the negotiations

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extended to the extent to which the party with which you were contracting had access to persons other than yourself in those negotiations, isn't that right?

A. Sorry, I don't quite understand your question.

152 Q. Was there a concern on your part that there was no real negotiation taking place, if I might call it that, that decisions were made in other quarters on disputed issues?

A. I mean, insofar as the contract negotiations were concerned, that would not be the case, no.

153 Q. Right. Well, what was your overall view from your knowledge of your work in the Commission of the interface between the promoters of this scheme and the Department, and in particular, the Minister?

A. Well, my knowledge is that on the transmission charges issue, you know, there seemed to have been regular contact between Century and the Minister and his Department, but I certainly am not aware of any contact between the Century promoters and the Minister and his Department on other matters other than transmission charges.

154 Q. I see. I take it that throughout your work in the Commission, you made both the Chairman and the Secretary aware of exactly how you were progressing with particular areas that you are involved in and any concerns that you had in relation to those areas?

A. Yes. I mean, insofar as the contract negotiations were concerned, I was probably more reporting to the Chairman insofar as the detail was concerned.

155 Q. I see.

A. But I would obviously have kept Mr. Connolly and Mr. O'Keefe up-to-date with developments as they were going

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on, yes.

156 Q. Thanks, Mr. Appleby.

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MR. FOX: Chairman, I have a question for Mr. Appleby

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CHAIRMAN: Very good.

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

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157 Q. MR. FOX: It was put to you by Mr. O'Neill that Deloitte Haskins and Sells did not carry out any analysis of the transmission costs. I think that is the position?

A. Yes.

158 Q. Now, but you are aware that the IRTC's view was that the transmission costs put forward by RTE was excessive in any event. You are aware of that?

A. Yes, that was the Commission's view, yes.

159 Q. And I think that we heard strong evidence from Mr. Fred O'Donovan and Judge Devally earlier in the week in this regard?

A. Well, I wasn't here.

160 Q. Yes, but you can take it that there was evidence. And of course both of those individuals, I think, you would also be aware of, as a matter of fact in any event, both of those gentlemen are very familiar with everything to do with RTE, from their direct experience, isn't that correct?

A. Yes.

161 Q. And also, we know also that one of the advisors, one of the principal advisors to the Century Consortium was a man by the name of Mr. Maurice MacNeill?

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A. Yes.

162 Q. I think you would have been aware of that?

A. Yes.

163 Q. Is that correct?

A. Yes.

164 Q. He also has experience of RTE?

A. That is true.

165 Q. Thank you very much, Mr. Appleby.

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CHAIRMAN: Anybody else?

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MS. EGAN: Yes, I would have some questions for this witness, Chairman.

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CHAIRMAN: I think RTE want to --

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MR. KEANE: Yes, Chairman, I didn't wish to interject or interrupt My Friend. I think I have a significant number of questions, Chairman.

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CHAIRMAN: Carry on.

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MR. KEANE: I am obliged, Chairman.

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

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166 Q. MR. KEANE: I wonder could I begin simply for the sake of clarity, Mr. Appleby, by referring you to a document which I think appears at page 6078 on the database of documents. That's the letter written to the Secretary, then Secretary

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of the IRTC, Mr. Connolly, on behalf, I believe, of Century Radio, by Mr. Stafford and if I could direct your attention, in particular, to paragraph 3 of that correspondence. It has already been referred to you by My Friend Mr. O'Neill.

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You will see there, I think as I say Mr. O'Neill has already canvassed this with you, that in that correspondence at paragraph 3 Mr. Stafford draws the attention of Mr. Connolly to a Sunday Tribune press report that the Downtown transmission charges for the whole of Northern Ireland is ú100,000.

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Now, I think you said in your own evidence-in-chief that in making representations to the Minister in the context of a memorandum in the preparation of which you were concerned, a figure of ú100,000 for the transmission charges for Downtown Radio in the North of Ireland was cited, is that the position, Mr. Appleby?

A. Yes, it was. I think it was cited in that document, yes.

167 Q. It is, and I will be referring you to that document in due course. I was asking you to confirm that I think you had some role in the preparation of that document you indicated in your evidence-in-chief?

A. I did. To what extent - there is one particular paragraph I felt certainly, I probably contributed to it.

168 Q. Yes?

A. But whether or not I prepared the whole document, I just don't know.

169 Q. I understand. I think the paragraph in question may have

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been the one that refers to Aer Rianta?

A. That's right.

170 Q. And landing charges, as I understand it?

A. Yes.

171 Q. I think that you described the ú100,000 figure as an indicator?

A. Yes.

172 Q. And I think you gave it that description, I think in the content of indicating that you understood that the Commission had adopted a policy decision that the RTE charges were excessive?

A. Yes.

173 Q. Is that the position? I wonder could I begin my line of questioning, in effect, by asking you if you are aware of any other indicators that might have operated on the mind - of your own knowledge, if you are aware of any other indicators that might have operated on the minds of the Commission in reaching a determination that the RTE charges were excessive or the charges sought by RTE were excessive?

A. Well, I think, the Commission's general view was that the transmission network was a network that had been established with taxpayers' money and that the fact that a new independent broadcaster was anxious to use those facilities, it felt that it, that the, that Century should be permitted to do so without being unduly penalised and I think effectively the Commission's view was that RTE were seeking to perhaps tax Century for use of that network.

174 Q. Yes. I think the issue you are addressing there is effectively the issue of access, is that the position?

A. Yes.

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175 Q. And whether or not in principle, from perhaps a philosophical point of view, that there ought to be a charge for access to RTE's transmission equipment or RTE's broadcasting equipment on the part of Century, is that so?

A. Yes.

176 Q. I think My Friend mentioned, that is Mr. Fox, who appears on behalf of Mr. Burke, mentioned the involvement on the, or rather in the application of Century Radio, of Mr. MacNeill who formerly worked for RTE, and you confirmed that you understood that he would have been involved, isn't that so?

A. He was certainly an advisor to Century, yes.

177 Q. Can I ask you to confirm from your own knowledge that Mr. MacNeill's work in RTE would have been entirely on the programming side and that his involvement in the Century application, and indeed I think in the functioning of Century Radio after its application would have been entirely on the programming side also?

A. Well, I have no knowledge precisely as to what Mr. MacNeill's expert - well experience would have been. He may, I understand he was certainly on the programming side. He perhaps had other knowledge which he was in a position to share with the Century promoters.

178 Q. Yes. And in relation to My Friend's reference to the evidence of His Honour Judge Devally in relation to his involvement in RTE, can I ask you to confirm from your own knowledge if you can that his Honour Judge Devally's involvement in RTE would have been entirely on the broadcasting side and not on the transmission side?

A. Well, certainly Judge Devally was a broadcaster. Again I

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have no knowledge as to what expertise he may have had in respect of transmission issues.

179 Q. Yes. Can I just ask you to comment, if you can, from your own knowledge, in relation to the involvement of Mr. Lackan with the work of the IRTC, whether it is true to say, if you can confirm this, that Mr. Lackan's involvement in RTE when he was employed by RTE would have been in relation to the technical aspects of studio transmission and not in relation to the broadcasting infrastructure maintained by RTE throughout the State. Can you comment on that proposition?

A. I can't actually. I had always understood that Mr. Lackan was expert in the area, he had been recommended to us by, I think, a person in RTE and I had always understood that he was competent on issues of transmission.

180 Q. Yes, but when you refer to the area, just perhaps in preface to the answer you have just given me, when you talk about Mr. Lackan's competence in the area, are you distinguishing between the technical aspects of broadcasting that relate to studio, the technical arrangements in the studio as opposed to the technical aspects of transmission throughout a broadcast network? Are you drawing that distinction?

A. No. What I am saying is that I understood that Mr. Lackan, Mr. Lackan to be expert and competent in the area of the transmission network.

181 Q. I see. And can I suggest to you that it is evident from evidence that the Tribunal has already heard and the documents before this Tribunal, that are before the Tribunal team through Discovery, obtained through Discovery

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that Mr. Hills, the Century consultant, indicated that his experience was limited to broadcasting and that he had no expertise in the, no particular expertise in the area of studio arrangements and I think he referred Century to a separate and independent expert in that regard so that Mr. Hills, for example, was drawing a distinction in that regard. You would draw no distinction. Is that so?

A. I am aware that the Century, from the Century application, that Century had an additional consultant specifically, or perhaps it was cash - well at least there is an Appendix to the Century application which indicates a separate firm as providing, if you like, either studio instruments, plant, as you know, to distinguish it from Mr. Hills' competence, but I mean I am not quite clear what particular piece of information you are seeking to obtain from me here.

182 Q. Well, I am simply seeking to establish that whatever advice Mr. Lackan would have been able to give to the IRTC to assist it in assessing the reality or unreality of the transmission charges proposed in the transmission and the transmission fees offered, would have related to the studio aspect of matters and would not have enlightened the Commission in respect of transmission charges. That is not a proposition that you agree with, is that correct?

A. That is correct. As far as I was concerned, Mr. Lackan assisted us on a continuing basis in relation to the siting of transmitters and assisted us generally in relation to the whole area of transmission equipment and masts.

183 Q. Yes. Certainly I think you have confirmed that the IRTC obtained no independent financial advice concerning the

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reasonableness or unreasonableness of transmission costs,
neither from Deloitte Haskins Sells or any other source, is
that so?

A. That is correct. We did our own assessment of the
situation, yes.

184 Q. And would you accept that Mr. Lackan --

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CHAIRMAN: Might I just intervene there?

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MR. KEANE: Yes.

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CHAIRMAN: You say you did your own assessment. What
assessment did you do? What were the steps of the
assessment that the Secretariat did, number one? And
number two, the Commission? Would you detail the steps
please?

A. Chairman, I have mentioned earlier that, you know, on the
issue of transmission charges, there were a number of
component elements.

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CHAIRMAN: Yes?

A. The Commission understood that Century were satisfied in
general terms with a number of the charges --

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CHAIRMAN: Let's deal with the two that they weren't
satisfied.

A. The two that they weren't satisfied dealt with the issue of
access to the transmission network and on-going
maintenance, and I think the document which was appended to
the letter of 6th of February, which Sean Connolly sent to

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the Minister for Communications --

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CHAIRMAN: That's the letter from Mr. Stafford, is it?

A. No. This is a letter from Sean Connolly --

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CHAIRMAN: No. The document that was annexed to, what was that?

A. This is a two-paged document prepared within the Commission which indicated precisely the Commission's views in relation to those two particular issues, and --

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MR. KEANE: It may be of assistance, Chairman, that I believe that appears on page 5606.

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CHAIRMAN: Just a moment until we get it up on the screen. That would appear to be a historical statement as to what the history of the situation was. It is hardly the substance on which you would - it is hardly the substance, is it, or the component part of why they should or should not pay for the access? That is what I want to know, what were the component parts? Because actually the note I made at the time as "within the Secretariat, you know, we assessed the component parts which should go to make up the cost." Unfortunately Miss Egan just happened at that moment to rise and I stopped my note. What I want to know is what component parts did you, as the Secretariat, in your own right assess, or the Commission, in the course of its deliberations, assess what was the component parts and what was the basis of those component parts?

A. I mean, the first three paragraphs, Chairman, that are

indicated are by way of introduction, I think, to the discussion of the substantive issues. I think if you, if we scroll down, the subsequent paragraphs deal or comment on the two particular issues and indicate what the Commission's view was of those particular issues.

CHAIRMAN: Well, putting it very simply, how did you - did you ever seek to assess what, how the €375,000 which was being advanced by Century as the appropriate cost, how that, how that was made up? What was the base figures in which that was made up?

- A. Well, we had at the time of this document, that this document was prepared, we had the figures available from RTE and I think the substantial element of those figures or a substantial, one of the substantial or two of the substantial cost items were the issue of access and were the issue of on-going maintenance and the, I think the - it indicates, for instance, the document here indicates that the RTE proposal is to charge 364,000 for full maintenance and it - the Commission took the view that modern equipment requires very little on-going maintenance. On the RTE figures, this perhaps would work out at €13,000 per visit to each transmitter for the year. You know, this seemed to the Commission to be excessive, and it, from the Commission's perspective, given that the Century transmission equipment could be serviced at the same time as the RTE transmission equipment was being serviced, it seemed appropriate that all that should be charged to Century is the marginal cost of charging, of maintaining that additional piece of equipment. The RTE

staff would be there doing their own servicing and the additional, the small increment of additional time required for maintaining the Century equipment was all, in the Commission's view, that should be charged. The government and the Oireachtas had decided that there should be an independent radio station as well as local radio stations established and in implementing that decision, we were very anxious obviously that it should be facilitated and that RTE, in their charging structure, would not effectively subvert that decision.

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CHAIRMAN: And I once again asked you, I will once again ask you how did you or did you make any effort or find any source of expertise to indicate what would be a fair charge, not merely just in principle but in pounds, shillings and pence for access? And you have already gone through the question of access, to find out, to find anybody to tell you or to give you, as a Secretariat, and pass it to the Commission as to what in pounds, shillings and pence is the alternative to the RTE figure. You had one alternative, 375. Did you know at that stage or did you find out at that stage the component parts of that? Did you find out what independently, independently what would be in somebody else's view a fair figure?

A. Chairman, we didn't engage an outside expert to undertake that work, no. We did it our - our assessment was done within the resources of the Commission itself.

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CHAIRMAN: What did that assessment comprise? Was it just a scratch your head and say "Oh, it sounds a bit expensive

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but sure divide it in two or take one third or do some such mathematical"? Or did you find out a source, because RTE had been in the business for 30 years doing this, had the knowledge and the costings available to you alone as one source.

A. Chairman, as I say, we did not hire someone outside the resources of the Commission to undertake this task. The issue, the issue of transmission charges was one under the Act which was a matter ultimately to be determined by the Minister, and from our examination, our internal examination of the figures and indeed the Commission's own assessment, having regard to their experience, we were satisfied that two elements of the charges structure were excessive.

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CHAIRMAN: Isn't the basis on which the Commission, the Minister interacts is at the request of the Commission under Section 16 after consultation with RTE? So if you are unhappy with a figure, before you can ask the Minister to interact, surely you must have a basis, a factual basis to put to the Minister to say why he should intervene under Section 16? You see, what I want to know is what basis did the Secretariat, presumably as the source from which the Commission would get its assistance, what basis did you agree with or commend to the Commission, having assessed, as I took you down, "the component parts", that it was too great? That is what I want to know. Or is it the fact that you did not have any external opinion and no expertise? You just took a view and the Commission, just as a group of individuals, took a view?

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A. Well, we, I mean, the Commission's position was that it was anxious to facilitate the establishment of the national radio service, that was one of the reasons why it was established,. We certainly considered, internally admittedly, but we certainly considered that the transmission charges needed to be reduced. Insofar as the particular, shall we say, the formal intervention vis-a-vis Section 16, I think that followed this particular set of correspondence. I think the formal request under Section 16 was made subsequently by Judge Henchy in a letter to Minister Burke.

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CHAIRMAN: So we will leave that there until after lunch.

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MR. KEANE: May it please you, Sir.

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CHAIRMAN: We will sit again at 2:15.

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THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

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THE TRIBUNAL RESUMED AS FOLLOWS AT 2.15PM:
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CHAIRMAN: Mr. Appleby, before lunch I was talking to you about an answer you gave. I have now got the exact text of the answer. The question was: "You had never checked with Century to see whether or not they were going to move from their initial position or whether they were going to stay where they were and await a ministerial directive?" Which is in fact what took place.

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The answer you gave was: "Well, I mean, it was clear it was a Century figure was the figure they were sticking to. I mean, they had indicated to the Commission that that's what their consultants believed to be fair and certainly, as far as the Commission was concerned, you know, there was no real question of horse-trading on that figure. You know Century had set out its stall, supported by its technical people and we, if you like, within the Secretariat, you know, assessed the component parts of those figures and came to our own view.

Question: Right. I gather from that that you believe that the figures were supported by Century's technical people?

Answer: Well, certainly you know they had, as I understand, you know, their consultants had in a general sense indicated that those figures were figures that were appropriate."

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Now, what I was inquiring from you, now that I have got the text, is the section of that answer, "We note that Century

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had set out their stall and supported by their technical people and, we, if you like, within the Secretariat assessed component parts of those figures and came to our own view."

Now, the first thing I want to know, if you are going to assess something, you have to look at the - look at what is stated and the basis of it. What assessment did you carry out? When I say "you", the Secretariat, of the component parts of those figures to come to "our own view", which is apparently to support the Century view? What were the steps which you took independently to assess - in that assessment?

A. Chairman, I mean, we had our own technical expertise within the Commission. We did not hire outside experts to assist us with that assessment. It would have been a source of comfort to us that the Century, if you like, figure was supported by their consultants who were, if you like, the Independent Broadcasting Authority, the foremost, I suppose, independent broadcasters or at least broadcasting authority in the UK. So I think essentially we, as I say, were happy to take on board the IBA support for the Century figures. We looked at the RTE figures and you know, as I say, came to a view that two of the elements merited reconsideration and that is, you know, what ultimately happened in the sense that the Minister was asked to act under Section 16, I think it was, of the 1988 act, and it was for the Minister to determine what the appropriate level of fee was in this area.

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CHAIRMAN: When you say that you had experts within the Commission, what experts had you in the Secretariat or available to you in the Secretariat with whom you consulted in relation to the component parts of the figures furnished by Century? Would you name them please?

- A. Well specifically, Chairman, Mr. Sean Lackan, a retired member of RTE staff was the technical expert who provided assistance to the Commission in relation to matters dealing with transmission issues.

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CHAIRMAN: Did Mr. Lackan record his view anywhere, that we can see it?

- A. Not that I can recall. But I imagine he would have been involved in the preparation or would have been consulted in the preparation of the documents which the Tribunal has before us.

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CHAIRMAN: What assessment of the figures furnished by Century did you carry out for the purposes of reaching an independent judgement? You were an independent Commission.

- A. Well, Chairman, I mean, we examined or compared the respective merits of the RTE and Century figures, and I mean, at this point in time, you know, our output, shall we say, is indicated in the documents which the Tribunal has. I am not aware that there are any other documents.

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CHAIRMAN: Would it be fairer to say that you took on board the Century version without any inquiry as to whether it was valid or invalid, it simply appealed on its face to

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you? Is that a fair assessment of what you did?

- A. Chairman, it would be my opinion that we undertook an independent assessment and came to a view which was not substantially different from that indicated by Century, but we did indicate to the Department that - as I think the document indicates - that a figure somewhere of the order of 500,000 would have been appropriate. That is a different figure from the 375,000 which Century were promoting.

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CHAIRMAN: Where is that assessment or that statement to be found in any communication to the Department, or to anybody in fact?

- A. Chairman, it's in the letter - it's in the attachment with the letter of the 6th February, 1989, signed by Sean Connolly to Minister Burke. The final sentence, I think, in the attachment speaks of 400,000 plus 100,000.

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MR. O'NEILL: The document reference to which the witness is referring, Sir, is number 5607. It's the second page, Sir, of the document which we have referred to just before lunch under the heading "RTE Transmission Charges."

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CHAIRMAN: And that was based upon your assessment without the assistance of any technologies, other than the members of your staff who were actually members of the Commission, were they? No, they were an adviser to the Commission, isn't that so?

- A. Yes - well, including the late Mr. Lackan who was an expert in the transmission area.

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CHAIRMAN: Thank you.

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MR. KEANE: Chairman, I wonder if I may ask a number of additional questions to Mr. Appleby?

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CHAIRMAN: I beg your pardon, I interrupted your cross-examination, my apologies.

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THE WITNESS CONTINUED IN CROSS-EXAMINATION BY MR. KEANE AS FOLLOWS:

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185 Q. MR. KEANE: I wonder if we could stay for a moment, Mr.

Appleby, on page 5607, and in particular that part of the page you have just quoted. You will see there in the final paragraph it states: "That in the circumstances fees of say €400,000 for transmission charges and €100,000 for hardware installation/project management seems appropriate."

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You'll agree, will you not, that we must distinguish between the transmission charges at €400,000 and the hardware installation project management charges which had at all times been dealt with separately, save in RTE's initial offer of 1.14 million?

A. Well, I think it is fair to say that insofar as the issues or the matters were in dispute, the matters I think at issue would have been probably part of the €400,000 figure. The €100,000 figure essentially was a financing cost, and I don't think there was any major dispute in

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relation to what the overall amount of the capital cost of the equipment was.

186 Q. At this stage, Century had essentially arranged to make its own capital outlay arrangements, and in consequence only the transmission charges were in issue, I would suggest to you?

A. At this remove, I just can't confirm whether that is correct.

187 Q. What I have to suggest to you in that regard is that therefore the appropriate comparison is a comparison between ú400,000, in terms of the suggestion made by the IRTC in this document, and that of ú375,000 which was Century's unconditional and unqualified offer for the transmission service. Would you accept that that is so?

A. Again, I would have to indicate that unless I was in a position to look at perhaps both the Century application again and perhaps the Minister's letter, I wouldn't be in a position to say that that was so.

188 Q. Yes. Well, I have to suggest to you that that is so and I believe, from the answer you have just given, that you are not in a position to disagree. Would that be the position?

A. Well, at this remove - at this moment, no I am not.

189 Q. I wonder if we could scroll up on page 5607 for one moment to the paragraph that begins "Downtown Radio", it's on the screen now. I think you indicated in one of your answers to the Chairman a few moments ago that as far as you were concerned the IRTC had come to an independent view in relation to the charges being proposed by Century Radio, isn't that so?

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A. Yes.

190 Q. And in the aide memoir from which I am now quoting, you see, it's recited: "Downtown Radio in Northern Ireland pays the BBC $\text{ú}100,000$ for the use of four mountain-top transmitter sites. Pro rata this suggests a figure of about 350,000 for RTE. Century suggest 375,000."

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That was the view of the Commission at the time, is that the position?

A. Well, I don't think it expresses a view as such. It simply indicates that if it was - if the figure was applied or the cost was applied mathematically it would suggest a figure of 350,000. Yes, it's an indicator of what the cost might be.

191 Q. You see, I have to suggest to you, the Chairman sought to elicit and has anticipated me. I have to suggest to you that in seeking the basis for the IRTC's view, the only basis that has been put forward, save that the Commission received some independent advice from Mr. Lackan, whom I have already suggested to you would be expert on the studio side only, the only other evidence on which it's suggested that the Commission would have reached a determination is this Downtown, this figure in relation to Downtown of $\text{ú}100,000$? Do you accept that that is so?

A. As I have indicated previously, it was an indication, a supporting indication that the figures, if you like, which were indicated by RTE and those which were provided by - the figures that were being indicated by RTE were too high, and it tended to support the Century view.

192 Q. It tended to support the Century view in the IRTC's view.

The IRTC's view, as far as we can ascertain, was based only upon what information it had from Mr. Lackan, because I suggest you have identified no other source to suggest that RTE's fees were excessive and RTE's were unreasonable, isn't that the position?

A. I mean the Commission had available to it what the breakdown of RTE charges were. As I have indicated and as that document indicates, we were unhappy with the component - with two of the components for those costs, and our reasons are indicated in that document.

193 Q. The two components that you were unhappy with were those of access charges and maintenance charges?

A. That is correct.

194 Q. You say you indicated why that unhappiness with those two charges in the document, is that so?

A. I think it is indicated in that document, yes.

195 Q. And again when we seek the basis of your criticism of those two charges, we are relying either, it would appear, on the expertise of Mr. Lackan or on the comparison with the Downtown charge of \$100,000 that was posited, isn't that so?

A. Well, we are relying also, I think, on our own assessment. I mean, in terms of the access issue, I mean, the whole - RTE's transmission network had been established over some considerable period of time with taxpayers' money, and we felt that in circumstances where the government had decided that there should be an independent broadcaster on a national basis, that you know, there should not be, if you like, a significant element of cost levied on the independent broadcaster solely by virtue of

using facilities which had already been provided using taxpayers' money.

196 Q. And you were indicating that that was the Commission's independent view?

A. Yes, we reached - we considered that it would be unfair for RTE to levy a charge for use of the transmission network which had been provided at the taxpayers' expense, and the charge effectively would be a charge levied for RTE's benefit.

197 Q. You see, I have to suggest to you that that, while it may or may not have been the Commission's view, was clearly the view put forward by Mr. Stafford on behalf of Century Communications in earlier correspondence with the Commission. Is that not so?

A. It is indeed, yes. I mean, just to elaborate slightly. I mean it is fair to say that the independent broadcaster, namely Century, was itself going to be levied by the Commission for, if you like, effectively the use of the facility of broadcasting. I think it would have been unfair on Century also to have effectively, being double taxed by virtue of also having to charge RTE excessively perhaps for facilities which had been previously provided at taxpayers' expense.

198 Q. Just turning back again for a moment to the paragraph that I have already cited to you concerning Downtown Radio's charges that was contained in the memo or document that the IRTC submitted to the Minister. Could I ask you to refer for one moment to the document at page 4078, which is Century's letter to the Secretary of the IRTC or the letter, rather, written by Mr. Stafford on behalf of

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Century Communications to Mr. Connolly as Secretary of the IRTC, and paragraph 3 of that letter. Would you not agree that there is an almost absolute coincidence in phraseology, and certainly in content, leaving aside the reference to the Sunday Tribune newspaper, between paragraph 3 on that page and the relevant paragraph in the memorandum prepared on behalf of the IRTC?

A. I would accept that the IRTC memorandum took account of what Mr. Stafford had indicated in paragraph 3, yes.

199 Q. Did the IRTC attempt to independently verify what Mr. Stafford was contending in that correspondence?

A. No. Well, to my knowledge, no, but as I indicated previously, the fact that the IBA were associated with the Century application was, I think, a source of comfort to the Commission.

200 Q. So is it fair to say that the Commission took the view that because Mr. Hills at one point represented the Independent Broadcasting Authority Consultancy Services that, accordingly Mr. Stafford's assertion concerning IBA charges in Northern Ireland had to be accepted at face value and without any independent verification? Would that have been the Commission's position? Is that a fair summary of the situation?

A. I think - I mean, we were, shall we say, happy to accept what had been indicated as, if you like, an indicator of what the level of charge might be for transmission charges, yes.

201 Q. So the Commission was actively, as it were, endorsing the concept of an indicator, a charge of ú100,000 levied by the IBA in Northern Ireland in respect of two transmitters, and

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was seeking to apply such a charge pro rata to broadcasting in Ireland generally, on the part of RTE, is that correct?

A. No. As I understood it, the - sorry, the Downtown figures were in respect of four transmitters, not two.

202 Q. I beg your pardon, yes, I am sorry, four transmitters.

A. And as I have indicated, the charges represented, if you like, some, you know, element of comfort or endorsement of the Commission's view that the charges which RTE were proposing to levy on Century were excessive.

203 Q. I wonder if we could have page 1769 on the screen, if that's possible? I ought to introduce you to this document, Mr. Appleby. I don't know whether you have had an opportunity to consider a hard copy of this document. It has certainly been referred to in questions that were put to you on behalf of the Tribunal, by Tribunal counsel earlier on.

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It is a memo written by Mr. Michael Grant, whom you may be familiar with, in the Department of Communications. It concerns a conversation that he had. The memo is dated 14th February, as I understand it, 1989, and it relates to the contents of a conversation he had with Mr. Ivan Tinman, the Managing Director of Downtown Radio. It's perhaps appropriate that I should read you the relevant part of that document. Would you care for an opportunity to read the document in full yourself?

A. Well, I mean, I haven't seen this document before, but if you want to point me in a particular direction, I'd be happy to have an opportunity to have a look at that paragraph.

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204 Q. I think there is some difficulty, because the document on screen doesn't accord with my own pagination I am afraid. I think I might be referring you to another memorandum. I would be grateful to Counsel for the Tribunal, if they could identify the location or the pagination for Mr. Grant's memo of his conversation with Mr. Tinman, dated 15th February, 1989? I am sorry, the wrong document appears to be on the screen or certainly not the document I was seeking to identify.

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MR. O'NEILL: I believe that is the correct document, Sir, but it may be somewhat further down in the text that the reference My Friend is seeking is to be found.

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MR. KEANE: I am afraid I have to disagree with Mr. O' Neill. I believe it is another document in fact, because I have the text of the document I am seeking to rely upon in front of me. I can furnish you with my copy of that document.

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CHAIRMAN: Perhaps if we scanned it into the screen and see what it is.

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MR. KEANE: It appears with some annotation on my part, but I think it is quite slight.

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MS. EGAN: Chairman, if a document is going to be put to the witness that he hasn't seen before at any stage, I think it may be appropriate to give him an opportunity to take a few moments to read the document, perhaps other than

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on the screen in hard copy.

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CHAIRMAN: The first occasion, let's get the document --

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MR. KEANE: I believe it's now on the screen.

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CHAIRMAN: Before you cook your egg, get it laid.

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MR. KEANE: I think the document is now on the screen but I have no objection to Mr. Appleby having an opportunity to read the document before I put any questions to him concerning it.

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CHAIRMAN: We will print a hard copy off for the witness.

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MR. KEANE: I am obliged, Sir.

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MR. O'NEILL: This is page 33, I should say, Sir, of the circulated documents to the parties.

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MR. KEANE: I am sorry, that might be the correct pagination. I have identified the wrong document, Sir, and I apologise.

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CHAIRMAN: That's all right.

(Document handed to witness.)

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MR. KEANE: I don't know whether My Friend had an opportunity to scan in the second of the two documents I handed her. I know the pagination isn't consecutive, so

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there may be some difficulty in locating the second of the two documents which I handed in. It's a list of transmitter sites and the kilowattage of various transmitters operated by RTE.

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It might be appropriate while the other document is being prepared, if I began by asking Mr. Appleby a number of questions concerning the Michael Grant document?

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MS. EGAN: I wonder if I could just request information as to who the author of these documents is? It's not apparent.

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CHAIRMAN: Michael Grant is the author of the one of the 15th February, 1989. He is an official who has given evidence here. He is the Assistant Secretary of the Department of Communications, is my recollection. And the other document - he was a Principal Officer, I am told at the time. And annexed to, I am not quite sure where it comes from.

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MR. KEANE: I have to say, Sir, that I am not entirely certain where it comes from. I don't know what the annotation on the top of the document discloses to Tribunal Counsel, but it certainly derives from the discovery of one of the parties.

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MR. O'NEILL: It was a memorandum which was attached immediately to the immediately previously referred to document, again Mr. Grant's, so it formed part of his

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presentation on that issue.

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MR. KEANE: I was reluctant to advance that proposition,
but that's my recollection.

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CHAIRMAN: Can we get on now with whatever questions you
want to ask?

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205 Q. MR. KEANE: Perhaps, Mr. Appleby, you'd look at that
document. Initially I ought to direct your attention to
the first paragraph, that's the first numbered paragraph in
brackets, where in describing his conversation, the
contents of his conversation with Mr. Tinman Mr. Grant
confirms that "I spoke to Mr. I. Tinman, Managing Director
of Downtown Radio, Northern Ireland, about IBA charges for
radio transmission facilities. He explained that the IBA
arrangements are complex and economics and in course of
change, but that the following position obtains:

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1. Downtown Radio had 1 MF" - that's a medium wave
transmitter - "and 1 x Kw FM radio transmitter for coverage
of their original franchise area. The primary rental
charged by the IBA for those facilities was ú113,000
Sterling. (ú135,000 approximately in Irish Punts.)"

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I have to suggest to you that that's at variance with the
information contained in Mr. Stafford's letter and
contained in the subsequent memorandum prepared by the
Commission. Would you accept that that's --

A. Yes, that seems to be the case.

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206 Q. And it might be a useful exercise in that context, since we are talking in this context about two transmitters and a pro rata indicator adopted by the Commission, to multiply the figure of 135,000 Irish Punts by 7 to represent transmission across the existing network operated by RTE, in order to come to an appropriate rental figure. Would you accept that that's so?

A. Not necessarily. If you look at paragraph 2 it talks of the primary rental being increased when an additional three transmitters were added, and the primary rental went up to €144,000 which is equivalent to five transmitters. So I don't think that it is valid to select, shall we say, the €135,000 figure you have indicated.

207 Q. Well, I suggest to you that two propositions follow from that analysis. The first is that the indicator exercise engaged upon by the Commission was necessarily misleading on the basis of the paradox that you have identified. Or secondly, that there were different indicators that the Commission could have adopted had it sought to independently verify the figures sought by Century Radio. Do you not accept that that must follow?

A. Would I accept that there are certainly differing indicators that could have been used? Yes.

208 Q. And in this instance we are talking about an indicator obtained directly from Downtown Radio concerning the charges that were levied directly upon it by the independent broadcasting authority, isn't that so?

A. Yes.

209 Q. Save with the adoption, whether we adopt the approach by reference - well, if we adopt the Commission's approach by

reference either to the figures set out at paragraph 1 or paragraph 2 in the first instance, of multiplying the figure of 135,000 by 7 or if we adopt the figures contained in the second paragraph, we have the option of multiplying the figure of 144,000 Irish Punts by three and a half, isn't that so?

A. No, I don't think so. I mean, if you take the second paragraph, for five transmitters you would be talking about multiplying 144,000 I think by 2.8 to get the equivalent figure for 14 transmitters.

210 Q. I beg your pardon, that is correct. There are three additional, not two additional transmitters. So you are talking about a multiple of two and a half, isn't that so?

A. Approximately, 2.8 I think, yes.

211 Q. Would you not accept that had the Commission been in possession of this information at the time it was compiling the memorandum in question, that the contents of the memorandum would necessarily have been substantially different?

A. I wouldn't necessarily accept that. I mean, I don't know the exact figure, but I mean if you multiply 144,000 by 2.8, you would come out somewhere around the 400,000 which was indicated in our memorandum.

212 Q. Yes, but we were talking about transmission charges in your memorandum, is that no so, and that brings us to a combined total, combining the total of whatever figure we reach applying either paragraph 1 or paragraph 2, a combined total between that figure and the figure set out at paragraph 3, is that not so? If we take a look at paragraph 3, for the future Downtown Radio is buying back

the five transmitters from the IBA. The station has negotiated a maintenance contract with the IBA for three years at ú98,000 Sterling per annum, 117,000 Irish Punts.

Isn't that so?

- A. Well, my reading of paragraph 3 is that it is an entirely different issue to what is dealt with in paragraphs 1 and 2. Paragraph 3 deals with maintenance.

213 Q. Precisely.

- A. And not an issue in paragraphs 1 and 2. So I don't see a comparison can be made.

214 Q. Well, in your evidence-in-chief you said that the Commission had indicated two RTE figures which it wished to dispute which were identified as excessive. One was an access figure or, I suggest to you, a rental figure and the other was a maintenance figure. So it's appropriate therefore, in considering the appropriate total, I would suggest to you that, we must necessarily add a maintenance figure to an access or rental figure. Would you not accept that that is so?

- A. Oh yes, if we are dealing with it as a separate issue, yes.

215 Q. And of course Century's offer was designed to encompass both access charges and maintenance charges, isn't that so?

- A. That is correct, yes.

216 Q. And RTE's, the fee that was struck by RTE was equally designed to encompass maintenance charges and access charges. So I suggest to you that we find ourselves necessarily in a position where we are adding 117,000 Punts to a figure of either seven times 135,000 Punts or 2.8 times ú144,000. Would you not accept that that is so?

- A. Yes.

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217 Q. I have to suggest to you if we then turn briefly, if we could, to look at the RTE figures, which I believe was set out at page 3951, although my pagination may be in error again, but I hope they are set out at page 3951. Perhaps if we could - again it may be necessary for me to refer directly to the appropriate document. Perhaps it's page 38, I beg your pardon, in the Tribunal's pagination.

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MS. EGAN: Chairman --

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MR. O'NEILL: This is the rate card that My Friend is seeking to put up. I can give the appropriate reference of that.

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MR. KEANE: I'd be obliged.

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MS. EGAN: Chairman, I would have some objection to this line of questioning, insofar as I think it is bringing the witness outside his sphere of competence and outside his sphere of expertise. It's not the function of the IRTC to act as adjudicator or assessor on transmission fees, and yet the witness is being asked at great length to comment upon that matter, and I don't believe it was ever part of this witness' particular function, or indeed the function of the body of which he was a member or of which he was on the Executive. It's not one of the functions mentioned by the - in relation to the IRTC in the Act, in the 1988 act.

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The IRTC does not have a function in relation to

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transmission fees, and it's not part of the IRTC's powers so designated under the 1988 act.

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MR. O'NEILL: Firstly, Sir, the page reference to which My Friend was seeking is 3952. And secondly, in relation to Ms. Egan's submission, it's quite evident from the evidence of this witness to date, that he specifically was examining the financial aspect of the individual applicants in the context of their ability to reach an agreement on transmission charges with RTE and of necessity, that would have involved him considering the nature, the breakdown, the content of the RTE figures and the manner of their computation, and to date in his evidence, he has been able to deal with these matters and to indicate to you that he was available to compartmentalise the various headings under which sums were being claimed, and reach his own conclusion which was shared with the Secretariat, and presumably passed onto the Commission, as to what the appropriate level of charge would be, and this found itself translated into the document which was forwarded in due course by the IRTC to the Minister and therefore, I believe that it's within the competence of this witness to give evidence as to his view or analysis of these RTE figures.

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MS. EGAN: Perhaps in that regard, Chairman, the witness could state what he viewed his own competence and the competence of the Commission in relation to transmission fees was, because I don't believe it was part of the IRTC's functions to go into this matter in the detail in which it is being done here today.

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MR. O'NEILL: I am quite sure that's a matter for cross-examination of this witness in due course by Ms. Egan, but the ground work has been established --

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CHAIRMAN: I agree with Mr. O' Neill: Now, could we get on please?

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MR. KEANE: I am obliged, Sir. I understand the appropriate page is now on the screen.

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MR. O'NEILL: This is what is known as the "rate card", Sir; the RTE figures which were provided in November of 1988 to all intending applicants, and which was provided in this format to the Commission on the 7th December of 1988.

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MR. KEANE: It's not in fact the document that I had in front of me. I am wondering if the appropriate figures I am seeking to identify actually appear on the page which is on the screen? I am looking for the figures quoted by RTE for access to facilities at fourteen sites and for full maintenance. And I am clearly looking at a page of a different document.

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MR. O'NEILL: It's the next page of the same document. At the very end of this document it refers to the "All-inclusive Option", and if we pass to the next page it's broken down, at 914, a figure which was, as we know, modified subsequently on two occasions.

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MR. KEANE: I wonder if I could ask could page 15 be put on the screen? I am sorry for trying the patience of the Tribunal, but I am anxious to identify the document I have in front of me.

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Yes, this is in fact the page that I was seeking to identify. It's a document discovered by the Department of Communications which you will see from - if we can scroll to the top of the page, I believe that evidence was given concerning this aspect of the matter by Mr. O' Morain and by Mr. Grant.

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You will see there is a handwritten annotation which indicates: "It was agreed with RTE and the Minister", I think that's Mr. O'Morain's initials - and the date appears to be the 10/1, but I think we established in evidence it is in fact the 10th February, and that "1" is in fact a "2".

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MR. O'NEILL: It's in fact the 11th January --

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MR. KEANE: It's the zero that is in fact a "1", and not a zero.

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CHAIRMAN: All right. Let's go on.

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MR. O'NEILL: The origin of this document, Sir, is that this is the first revision of the original figures which were proposed by RTE in November. The matter was revisited

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with the department, the Minister and RTE on the 11th January of 1989, and as a result of that meeting, these figures were produced which are the first revision, and they were subsequently revised subsequently --

CHAIRMAN: To the ones on the last page?

MR. O'NEILL: On the 16th February. These are figures that were current as of the 11th January, 1989.

218 Q. MR. KEANE: I am obliged to Mr. O'Neill, Sir. If we can scroll down to the bottom of that page, the paragraph headed "Paragraph 2", in which is set out the annual charges. We will see the first of those is "access to facilities at fourteen sites", and it records a figure of 185,000 Punts. And directly beneath that is a figure for full maintenance at 364,000 Punts. Those are the figures that I was anxious to draw your attention to.

I have to suggest to you that those were the relevant RTE figures at the time. Would you accept that that is so, Mr. Appleby?

A. Yes.

219 Q. And so it would appear to follow that when you indicate in your evidence that the Commission took the view that those charges were excessive, that these are the figures you are seeking to suggest that the Commission took the view were excessive, is that not so?

A. Yes.

220 Q. And if we then adopt the formulaic approach which the

Commission adopted not by reference to the figures put forward by Mr. Stafford and attributed to the IBA, but rather those recorded by Mr. Grant in the memorandum we have just been looking at, attributed to Mr. Tinman, the Managing Director of Downtown Radio, I have to suggest to you that the figures we arrive at, applying the relevant mathematical formula, even the 2.8 identified by you by reference to the second paragraph, accord far more closely to the RTE estimates than they do with the Century offer? Would you accept that that is not so?

A. Sorry, are we talking specifically about access or maintenance or both?

221 Q. Both. Either individually or communatively. We can take the figures individually and look again at the Michael Grant memorandum of his conversation with Mr. Tinman or we can look at the position cumulatively.

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MS. EGAN: Chairman, I am sorry to be difficult, but again the witness is being asked to tender opinion evidence on an area that has not been established to be within his area of expertise or competence, and Mr. O' Neill stated that he felt that that was a matter for cross-examination.

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I would submit to you, Chairman, that that is not the case. If somebody wishes to ask of a witness, opinion evidence, I think it's incumbent on the person wishing to put up that witness, to first establish their competence and that they are in fact an expert in the area. And I don't think that any particular attempt has been done to do that, Chairman, today.

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CHAIRMAN: My view of the matter is contained in his answer. "We, if you like, within the Secretariat, you know, assessed the component parts of those figures and came to our own view." You can't avoid the component parts, you know, over all, in coming to the view. It may be right, it may be wrong, I don't know. I want to know what the basis of the component parts were. That's what I started off to find out, what were the component parts underlying his view and underlying effectively the view of the Secretariat to the Commission? Now, could we carry on, Mr. Keane?

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222 Q. MR. KEANE: My question to you, Mr. Appleby, and we can go back perhaps on the screen, if you like, to the page that sets out the memorandum of Mr. Grant's conversation with Mr. Tinman. One, we have noted that the relevant RTE figures were £185,000 for access and £364,000 for maintenance. And we know that the Commission applied an indicator, and we know that you have said in your own of your own knowledge, that such an indicator or such a formula was applied by the Commission as an indicator, and I am asking you to apply the same indicator to the figures established in evidence by Mr. Grant as the figures actually furnished by Downtown Radio concerning the appropriate IBA levy.

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So if we could return to Mr. Grant's memorandum of his conversation with Mr. Tinman. And if we go to paragraph 2 rather than paragraph 1 because we will adopt the

smaller - it's at page 33, I beg your pardon - we find ourselves multiplying, I suggest to you, a figure of 144,000 Punts by 2.5, or 2.8 - I beg your pardon - and similarly, if we look at the maintenance figure for five transmitters at 117,000 Punts, we find ourselves multiplying that figure by, similarly 2.8. And I am suggesting to you that when we finish that mathematical exercise we come up with figures that are much closer, which may, I believe, exceed the estimates provided by RTE, and which certainly do not accord with the offer made by Century Radio, isn't that so?

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

223 Q. That was all that I was anxious to establish in that regard, Mr. Appleby. But I'd like to turn to the document which appears at the next page, the document appended to Mr. Grant's memorandum of his conversation with Mr. Tinman. We might first note from the contents of Mr. Grant's memorandum that Downtown was initially operating a one 1 kilowatt FM transmitter and a medium wave transmitter, and it then obtained three subsequent transmitters, one 2 kilowatt, and two 10 kilowatt transmitters, do you accept that that's so on the face of Michael Grant's memorandum of his conversation with Mr. Tinman?

A. Yes. Sorry, did you indicate one 2 kilowatt and two 10 kilowatt?

224 Q. Isn't that so?

A. That's it.

225 Q. So I think we find ourselves in agreement that no transmitter operated by Downtown Radio exceeded 10

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kilowatts in wattage, isn't that so?

A. That would appear to be the case.

226 Q. If we now turn very briefly to the fourteen transmitters operated by RTE as part of its FM transmitter network.

The first of those is 100, ten times the most powerful

Downtown transmitters, isn't that so?

A. Yes.

227 Q. The next after that is 400 kilowatts. 40 times the most powerful of Downtown?

A. Yes.

228 Q. We can go on through the list on that basis. Can I invite you to apply an indicator on that figure in seeking to arrive at an appropriate maintenance or access figure in relation to the levies to go charged on Century in relation to the transmission network in Ireland?

A. I wouldn't be competent to make that judgement. I would have relied on Mr. Lackan to give his advice on that.

229 Q. There is one final matter, I won't detain you any further, Mr. Appleby. There is one final matter. Do you accept that as part of the appropriate legislation in the United Kingdom, that there is no public service requirement to broadcast to the entire province, or indeed the entire six counties in relation to Downtown Radio?

A. I am not familiar with what the requirement is in relation or was at that time in relation to broadcasting in Northern Ireland.

230 Q. I see. Well, I have to suggest to you that that is the position. I do think you would concede, however, on the other, that there was a public service requirement that RTE broadcast to 98.5 percent of the population in Ireland and

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a considerable proportion of the population in the North, and that that public service obligation was extended to Century Radio or to all of the national independent radio franchise applicants by the IRTC, would you accept that that's so?

A. Yes, that is the case.

231 Q. Thank you Mr. Appleby. I have no further questions.

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THE WITNESS WAS EXAMINED AS FOLLOWS BY MS EGAN.

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232 Q. MS. EGAN: Mr. Appleby, if I could ask you firstly to turn to the document, "Financial Structure of the Applicant", which was prepared and submitted to the Commission, we believe, with Mr. O'Keeffe's document of the 22nd December, or perhaps at some stage but at any time, by the 5th January, 1989. I believe it's document 39119, is that - 3919.

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Now, Mr. Appleby, that sets out the financial structure of the applicants for the sound broadcasting contract, mainly I think in terms of capitalisation.

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It would appear to show in regards to the bottom line, as it were, that Century had a capitalization of 2 million as against 4.4 odd million and 3.5 odd million which capitalization were the appropriate figures for Radio 2000 and for the Consortium. Are you able to comment on what figure for paid up share capital is indicated in respect of each of those three stations, applicants?

A. Well, in respect of figures, 2 million for the National

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Radio Consortium, 1 million for Radio 2000 and 2 million for Century.

233 Q. So whilst Century is perhaps the lowest over all in terms of the bottom line of capitalization figures, it is true to say that Century was on a par with the Consortium, which is the other most largest capitalised entity in terms of paid up share capital?

A. That's correct.

234 Q. Would the amounts of the projected capital in respect of leasing finance shareholder loans and bank overdrafts in respect of the Consortium and Radio 2000 have been of any concern to you in particular?

A. Not to me in particular. I think it would have been of interest to the Commission members as a whole to see how they - each of the applicants proposed to finance their service. I think it would have been probably more convincing, shall we say, for the Commission members, that the promoters of - you know, if the promoters put up, you know, their share capital on a paid up basis.

235 Q. And would that have been something that you were aware of when you prepared this particular document?

A. Yes, I would have noted that in passing, yes. I mean, the document was prepared for the information and convenience of Commission members, simply to pull out of each of the applications, figures that could be readily comparable.

236 Q. And why did you not draw the attention of the Commission to the fact that two of the applicants were heavily reliant on leasing finance shareholder loans and bank overdrafts?

A. Well, I didn't feel that that was my function. As I have indicated previously, many of the Commission members were

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very experienced in business, and I would have allowed them to draw their own conclusions.

237 Q. Thank you. If I could turn then to the next page, Mr. Appleby, which relates to the profit and loss projections in respect of Year 1 for the three applicants. I think the single biggest figure both in respect of income and in respect of outgoings are the figures in respect of advertising incomes. And I think it will be apparent when one looks at those, that the Consortium had projected advertising income in the amount of 2.5 million approximately; Radio 2000 in the amount of 3.4 million approximately; and Century in the amount of 1.9 million approximately?

A. Yes.

238 Q. Mr. O' Neill has already pointed out to you that when you conducted your sensitivity analysis, you were able to draw the conclusion that any variations in the amounts projected would have a significant effect on the viability of the particular applicant. And in this regard, and having regard to these figures, were the revenue projections important in relation to your sensitivity analysis?

A. Yes, they were. I mean obviously if a particular applicant was projecting a large amount of advertising income and failed to meet those projections, it would obviously have major implications for the viability of the service.

239 Q. I ask you that, Mr. Appleby, because great stress has been placed upon the fact that Century identified an amount of £160,000 in respect of transmission fees in Year 1 as against an amount of £317,000 for Radio 2000 or an amount

of £686,000 for the Consortium. And that a very large amount of time has been spent discussing whether or not that was of concern to the Commission, and when one compares those figures, one can see that the difference between Century, on the one hand, and Radio 2000 and the Consortium on the other in respect of transmission costs, is something in the region of £150,000 in respect of Radio 2000 and half a million odd, £500,000 odd in respect of the Consortium; and then, Mr. Appleby, if one then compares that with the comparative figures in respect of advertising income, one sees that the difference between Century and Radio 2000 in respect of advertising income is something in the region of 1.5 million pounds?

A. Yes. I mean, basically in Year 1 Radio 2000 was almost projecting twice as much advertising income as Century.

240 Q. And if one were to worry about any variation in these amounts for the purposes of assessing the future likely viability of the applicants, which would be the figure which one would obviously wish to ensure was as close to the projected amounts as possible?

A. Well, I think in the questions that I had prepared, I think I made the comment that both the cost and revenue projections of Century seemed to be on the conservative side.

241 Q. Yes. In fact, I think that a question was prepared for the oral hearings dealing with that particular matter. It's Question No. 15. I don't know if it's possible to call that up? . It is document IR 701-351. It's the list of written questions that were to be put to the applicants at the oral hearing.

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MR. O'NEILL: Sorry, if Ms. Egan could identify to whom the question was directed, I should be able to identify it?

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MS. EGAN: To Century. Question No. 15.

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MR. O'NEILL: Page 6087.

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242 Q. MS. EGAN: I think Question 15 there reflects the comment that you just made, Mr. Appleby. It states: "Relative to other candidates, Century's financial projections appear conservative. For instance, with respect to revenue, it appears that Century only envisages obtaining about 25 percent of the total national radio advertising revenue pool by Year 3. A similar conservatism is evident in relation to costs. Would you comment on these observations please?"

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So I think from that, Mr. Appleby, one can conclude that in as much as you were of the view that perhaps transmission costs, among other costs, were on the conservative side, the same conclusion can obviously be reached in relation to income and in particular, advertising income?

A. Yes. I mean, the transmission costs were only a small portion of the overall costs which any of the applicants was going to bear.

243 Q. And in relation to the projected advertising income of Radio 2000 in Year 1, ú3.4 million, are you able to comment as to whether or not in your opinion, that was a realistic projection?

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A. Well, it seemed a little high. Certainly from my perspective, I would have been more comfortable with the lower projections as being more attainable.

244 Q. Again, was that a matter that you specifically drew to the attention of the Commission?

A. Well, as I indicated - as is indicated in that question for the Commission, that is implicit, what I was doing there, yes.

245 Q. And then if one turns to the profit and loss projections for Year 2, Mr. Appleby. It's apparent that the Consortium's projected advertising income has risen substantially from 2.5 odd million to 7.3 million?

A. Yes.

246 Q. Are you able to comment on that, Mr. Appleby?

A. Other than to indicate that it seemed a very large increase one year over another.

247 Q. If I could turn then, Mr. Appleby, to your sensitivity analysis which is carried out two pages after the page which we were looking.

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MR. O'NEILL: 3923, Sir.

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248 Q. MS. EGAN: Are you able to comment, Mr. Appleby, on the differential in respect of the bottom line on the sensitivity analysis which you carried out, that is the differential between Century on the one hand, Radio 2000 or the Consortium on the other?

A. I think, if I can perhaps explain? I mean, essentially Century, at the end of Year 3 were predicting a cumulative loss of almost £1 million, whereas each of the other two

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consortia at the time were projecting that they would have profits. I did an exercise which attempted to assess the extent to which each of the applications would be affected by a 10% decline in projected revenue in each case over each of those years, and a 10% increase in expenditure, projected expenditure by each of the consortia in each of those years. The result was to indicate that none of the three consortia would be in profit at the end of the third year.

I think perhaps the significant point is that the figures for Century, the difference between their actual projections and the exercise is a difference of 1.1 million. In respect of each of the other two consortia, the difference is a figure of a minimum of 2.9 million. So I think in a general sense, it could be said that, you know, the Century application was less likely to be blown off course by shortfalls in projected revenues or increases in projected expenditure.

249 Q. And do those figures arise in general, from the very high figures projected for advertising income by the other two applicants?

A. Yes, in part, it was one side of the equation, yes.

250 Q. Presumably given the size of those figures, it was probably the major contributing factor to the bottom line in your sensitivity analysis?

A. Yes. I mean, it would have been a significant feature. Obviously if they failed to meet the, you know, the large amounts of advertising revenue, yes.

251 Q. I'd like to question you for a moment or two on the issue

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of transmission costs, Mr. Appleby.

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I think the vast majority of your cross-examination and examination-in-chief today has focused on the issue of transmission costs. Can I ask you to please outline what function you view the Independent Radio and Television Commission having in relation to transmission costs?

A. I think the IRTC's role was very limited. The only reference to transmission costs insofar as the IRTC is concerned, was that we would request the Minister to act or consider issuing a directive in relation to that issue vis-a-vis RTE. In terms of the criteria for assessing and awarding a contract, basically transmission charges are not mentioned in, I think Section 6 of the act --

252 Q. Perhaps if I could put Section 6 on the screen? Section 6 of the 1988 act.

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CHAIRMAN: It's page 5578.

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253 Q. MS. EGAN: Thank you, Sir. Page 5578. That sets out the criteria to which the Commission must have regard in deciding to award a sound broadcasting contract.

Particularly at Section 6, subsection 2, broadly those criteria relate to the character of the applicant.

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At "A", the expertise and experience and financial resources of the applicant. At "B", the quality, range and type of programming. At "C", programming in Irish. At "D", the creation of new opportunities for Irish music talent. At E, F and G, they deal essentially with the

desire to avoid any one entity having an undue control over a large portion of the Irish media, as with H. "I", then relates to serving a community need. And "J" then relates to any other matter which the Commission considered to be necessary.

In that regard, Mr. Appleby, can you outline, what if any, relevance transmission fees had in the decision on who to award a licence to, as opposed to on subsequent contract negotiations to a successful applicant?

A. The only relevance was in the extent to which the costs formed part of the overall financial projections for each of the applicants. And I think I have indicated that those costs were only a minor portion of those overall projections. As I indicated, and as the sensitivity analysis indicates, we, in the Secretariat, looked at the overall projections for both costs and revenue, for the purpose essentially of complying with the particular provision in Section 6 which, I think, though it's not on screen now, which deals generally with, if you like, the, you know, capacity or financial capacity of each of the applicants concerned.

254 Q. So when preparing documentation for the consideration of the Commission on the awarding of the licence, was it the practice of the Secretariat to prepare documentation relating specifically to transmission fees?

A. No, it was not.

255 Q. And in relation to the decision by the Secretariat or by the Commission to seek or not to seek outside expertise on transmission fees, in general, in relation to the financial

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projections; did the Commission seek outside expertise in relation to any of the projected figures, be that advertising, staff salaries, operating charges, royalties, etc.?

A. No, we did not.

256 Q. And in general, when the Commission makes a decision to award a particular licence, if I could draw your attention, Mr. Appleby, to your own statement to the Tribunal counsel, it's dated 9th November, 2000. I am afraid I'll have to seek assistance again on the page number for that statement. It's the second page of that statement that I would wish to refer to.

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MR. O'NEILL: We don't in fact screen statements as such, Sir, in the sense that we don't screen them through our computer system. The reason for that is from statements that are provided by witnesses, relevant areas are isolated for the purpose of examination, so that if My Friend wished to put a matter to the witness on the basis of his evidence to date or any factual basis that he may have for a particular point, of course she may do so, but it certainly does not gain its status by reason of having been contained in a statement furnished to the Tribunal.

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CHAIRMAN: I agree with that.

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257 Q. MS. EGAN: Very good. In that particular portion of your statement you were asked for details of what particulars would have been given to the Commission before they make their decision, in other words, what paperwork would have

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been before the members of the Commission when they made their decision on the award of the licence, and you list the particular documents which you believe would have been before or would have been forwarded to the members of the Commission for the purposes of making that decision and they are as follows:

A copy of each of the four applications.

Secondly, the memorandum of Michael O'Keefe dated 22nd December, 1998.

Thirdly, the financial comparisons of each of the applications, insofar as that wasn't already included in the memorandum of Michael O'Keefe.

The comparison of the applicants' market perception and strategy.

The comparison of the applicants's pricing strategy and the set of possible questions which were going to be put to the applicants at the oral hearing, and presumably then, at the final decision one would also have put before the Commission, the list of questions actually put and the record of the answers to those questions.

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The question I have for you, Mr. Appleby, is in relation to the first of those. You state that a copy of each of the four applications would have been before the Commission when they made their decision on the licence. In general, Mr. Appleby, was it the practice of the Commission to go behind the applications to double-check statements made in the applications, to double-check figures or to second-guess figures that were put in the applications?

A. No, it would not have been, no.

258 Q. So then in relation to the figures listed in the profit and loss projections, and particularly in relation to transmission figures it wouldn't, in general, have been the practice of the Commission to seek to second-guess those figures or to go behind those figures?

A. No, no, it would not. I mean, the purpose of that documentation was to provide a convenient, or to provide information to the Commission from the applicants in a convenient form which would allow them to undertake their assessment and evaluation of the applications. The work was done totally in an independent and unbiased manner, to assist the Commission in undertaking and making its decision.

259 Q. And likewise in relation to the other matters of figures mentioned, particularly the highest figures mentioned in this list which are the figures for advertising income. Again, it wouldn't have been - would it have been the function or in your opinion, the duty of the Commission to seek to go behind those figures and to second-guess them in an attempt to ascertain whether they were reasonable?

A. No, it would not. I mean, the Commission would have presumably have made its own evaluation looking at the figures, of the extent to which the projections were likely to be realised.

260 Q. And generally, in reaching that conclusion as to whether or not the projections for advertising income were likely to be realised, or presumably in relation to the other items, both of income and cost that are mentioned, was it the practice of the Commission to seek outside expertise in reaching that conclusion?

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A. No, it was not.

261 Q. And was outside expertise sought in relation to any other of the applicants in relation to any of those heads?

A. No.

262 Q. In relation to Mr. Lackan, Mr. Appleby, a suggestion has been made by counsel for RTE, David Keane, that Mr. Lackan was only experienced in studio broadcasting as opposed to in national transmission broadcasting. Is that your understanding of Mr. Lackan's expertise?

A. No, it is not.

263 Q. What was your understanding of Mr. Lackan's expertise?

A. My understanding was that he was fully familiar and expert in the whole area of transmission, the transmission network.

264 Q. And in relation to the seeking of outside expertise, was there any other body, so far as you were aware, from which you could have got independent confirmation of the figures contained in the Century bid?

A. No. I mean, I don't think it would have been - you know, it wouldn't have been something that we would have looked for at the time a decision was being made. It was not an issue. The issue of transmission costs was not an issue that was going to sort of make or break a particular application. It was only a minor element of the overall projections that were indicated in the applications.

265 Q. So far as you were aware, Mr. Appleby, did any of the other applicants obtain the advice or assistance of independent consultants in relation to transmission fees?

A. I am afraid I can't recall to what extent any of the other applicants did provide verification with their

applications, I can't recall that at this stage.

266 Q. In general terms, Mr. Appleby, did you view it as necessary in debating the award of the licence for the Commission to seek outside expertise in relation to transmission fees or in relation to any of the other heads mentioned?

A. No, I did not see that as necessary, no.

267 Q. If I can move now, Mr. Appleby, briefly to Section 16 of the Radio and Television Act 1988?

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MR. O'NEILL: Page number is 5585.

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268 Q. MS. EGAN: This is the section which we have already discussed several times, stating that, "The Minister may, at the request of the Commission, and after consultation with RTE, require RTE to cooperate with the sound broadcasting contractor in the use of any transmission facilities."

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That appears to be the main reference to transmission facilities in the Act?

A. Yes.

269 Q. And that section quite clearly places the duty on the Minister rather than on the Commission to become involved in the precise negotiation or precise calculation of transmission fees.

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MR. O'NEILL: That certainly seems to be a conclusion firstly, Sir, the witness is being asked to accept, and there is a very large issue on that, because it seems perfectly clear from the wording of the section itself that

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the Minister cannot be the initiator of this process, but rather, he can only act in certain circumstances, the first of which is that there must be a request of him by the Commission and the second, that he must make his decision only after consultation with RTE. So it does not involve a proposition that the Minister, of his own will, can come into the situation unless this procedural step, and important one, has been taken. So I do qualify --

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CHAIRMAN: I have said it a number of times.

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MS. EGAN: I am not trying to advance the proposition that the Minister could of his own volition issue a directive in relation to transmission fees. I am simply stating that one can conclude from Section 16.1 of the Act that if the Commission began to find that the issue of transmission fees required some adjudication, it was the power, duty and function of the Commission to request the Minister to issue a direction in that regard. That quite clearly this section --

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CHAIRMAN: The point is being made, and correctly made by Counsel for the Tribunal was that double requirement, a request from the Commission and consultation with Teilifís Eireann, and only after those two functions have been exhausted or functions or elements have been carried out, does the Minister have any power at all. Then he has a power to do X, Y and Z, but only after that, presumably having been satisfied or dissatisfied with the advice he gets from either the Commission or Radio Teilifís

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Eireann.

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MS. EGAN: The consultation function would appear to be a function of the Minister to consult with Radio Teilifis Eireann as opposed to the Commission.

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CHAIRMAN: Yes, that's correct. But first of all at the request of the Commission. The Commission initiates - the Minister then talks to RTE, and having looked at both presumably makes a decision as to what he is going to do. I don't think it arises in this instance, at the moment anyway.

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MS. EGAN: Of course, Chairman. The only point I am seeking to make is that clearly if it were the Commission's power, duty or function to set transmission fees, it wouldn't be necessary for this section to be in the Act, whereby the Commission requests the Minister to set the appropriate fee.

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CHAIRMAN: We won't go into that because it's not in the Act, and we are not going to say what should be in the Act. We take the Act as it is.

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270 Q. MS. EGAN: Section 16.2 states that the Minister will, in fact, give the direction in respect of the transmission fee.

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Mr. Appleby, in that regard, is it the function of the Independent Radio and Television Commission to act as an

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arbitrator, or assessor of transmission fees, in your opinion?

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CHAIRMAN: That's not a matter of opinion for the witness. It's a matter of fact for me, if it arises at all. It's a matter of law for me, rather.

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271 Q. MS. EGAN: From your own knowledge, Mr. Appleby, and as a matter of fact, has the Commission ever acted as arbitrator or assessor of transmission fees?

A. No. I mean, it doesn't have any legal duty or legal power to do so.

272 Q. If I could turn then briefly, just as a matter of clarification, to this suggestion of the meeting, the alleged meeting between the Chairman of the IRTC, the Secretary, Mr. Connolly, and James Stafford referred to in the fax from Mr. Stafford to Mr. Hills on the 13th January, 1989. I don't think it's necessary to call up that fax again. It's been referred to several times.

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What I just wanted to ask you, Mr. Appleby, was were you aware that any such meeting took place?

A. Well, I have no record or recollection of that meeting taking place, no.

273 Q. And were you aware of a proposal for such a meeting to take place?

A. No.

274 Q. And are you aware of any request by the Chairman or the Secretary of the IRTC to Century that Century seek to "justify" the figures in the Century bid in respect of

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transmission fees?

A. No. I mean, I have no recollection of that, no.

275 Q. If I could turn now, briefly, Mr. Appleby, to the documents on the contract negotiation between the IRTC and Century. In particular, I believe, that there is a document which records a meeting of the 15th September, '89. It appears to be page - commencing on page 4549.

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Mr. Appleby, this sets out the content of a meeting at which you attended, 15th September, 1989, a lunch meeting at which you attended with Mr. Sean Connolly, yourself, Michael Laffan and Mark Story from Century?

A. Yes.

276 Q. I think at that stage it's fair to say that the negotiation of the contract between Century and the IRTC was causing quite a lot of difficulty and concern?

A. Well, at this point the contract negotiations had been concluded. The contract had been signed, I think on the 21st of July, and Century had gone on air, I think it was the 4th September, so although I mean, this file note is a file note prepared by Century, it was intended to be an informal meeting, with object of, shall we say, restoring good relations between the IRTC and Century. The meeting or luncheon took place at our invitation.

277 Q. And can you briefly outline for the Chairman the issues that caused particular concern to the IRTC in relation to the contract with Century?

A. Well, there were a number of issues. There was an issue, I suppose, of ownership and control. There was a number of proposals put forward by Century, Century's legal

advisers during the course of negotiations which effectively would have abrogated the commitments which they were making or had made in their application. There were various proposals, you know, submitted, the effect of which would have been the sidelining of the Commission in terms of approvals of shareholding structures or changes in shareholding structures.

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There were other issues such as so-called opt-outs, where Century sought to have the freedom, again with little or no Commission involvement, to, shall we say, target particular sections of the population with particular programming relevant to that area. They sought to, shall we say, extend the term of the contract --

278 Q. Yes, the issue of renewal was I think quite - one of the difficult issues. It's fair to say, Mr. Appleby, the contract negotiations were difficult as between yourself and Century?

A. Yes, yes.

279 Q. Another question which I wish to put to you, Mr. Appleby, was whether in implementing a specific task of trying to, as it were, launch independent radio in the months between July and November 1989, the Commission had been under a certain amount of pressure in so doing?

A. Yes. Well, I mean, essentially there was certainly a number of months where, leading up to the launch of Century where there was extensive contact between Century's solicitors and the Commission. As you indicate, those negotiations were very difficult, but at the end of the day, a contract was signed. I am satisfied that the

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Commission discharged its role in a manner consistent with the provisions of the Act. If it had conceded on a number of the points which were being demanded by Century, it would have amounted, I believe, to a dereliction of duty on the part of the Commission. I am satisfied that that did not happen and that the particular negotiations were conducted properly by the Commission, certainly there was no evidence from my perspective that, you know, any effort was made to try to dilute or limit the Commission's stance in respect of those negotiations. We certainly received the wholehearted support of the Commission members in our dealings with Century.

280 Q. And, Mr. Appleby, during your time in the Commission, were you aware of any suggestion that money was being advanced in return for licences?

A. No.

281 Q. Did you hear any rumour to that effect?

A. No.

282 Q. And finally, Mr. Appleby, did the Chairman of the Commission or any other member of the Commission ever express any dissatisfaction with the support which they received from the Secretariat?

A. No. In fact, on leaving the Commission in February 1990, I personally received an excellent reference from the Chairman on my return to the Department.

283 Q. Thank you Mr. Appleby.

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CHAIRMAN: Any other questions anybody else?

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THE WITNESS WAS THEN REEXAMINED BY MR. O'NEILL AS FOLLOWS:

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284 Q. MR. O'NEILL: Mr. Appleby, just one or two matters that I want to clarify.

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Firstly, there were, as we know, certain statutory criteria that had to be adhered to and applied by the IRTC in its adjudication as to the selection process for any one licence, isn't that right?

A. Yes.

285 Q. And if we look to document 5578, which is Section 6 of the Act, where the criteria are set out and in particular, to Clause 6.2 (B). I will quote it .

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"In the 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 the adequacy of the expertise and experience and of the financial resources that will be available to each applicant."

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If we stop at that point. That imposed on the Commission, the obligation to test or to inquire into the adequacy of the financial resources available to the applicant, isn't that right?

A. Yes.

286 Q. It wasn't merely a matter of looking at their prospectus and saying, "This is what they say they have." One had to establish the adequacy rather than merely accept necessarily, what was in print, isn't that right?

A. Well, I mean, the Commission certainly had the task of

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selecting what it believed to be the best candidate. The fact that, in this particular case, you know, a number of very substantial and successful businessmen were supporting or fronting the application was obviously an issue which the Commission must have taken into account. Also, in terms of expertise and experience, I think the fact that the Independent Broadcasting Authority was advising Century would also have been a positive factor.

287 Q. Of course. But the adequacy of a particular aspect was a matter which had to be inquired into, I know in this instance was satisfied by the personalities of Mr. Stafford and Mr. Barry, and also by the backup documentation which was included in the application itself which indicated that they would be able to finance this project, isn't that right?

A. Yes.

288 Q. And if we move on then in Section 2, the next matter that had to be dealt with was the extent to which the application accords with good economic principles. Do you see that?

A. Yes.

289 Q. So that it wasn't a matter of the Commission being able to hand out the licence without satisfying itself that proper economic principles were applied to the application itself, isn't that so?

A. Yes.

290 Q. And in practical terms, that meant that these applications had to be able to stand on their financial feet, isn't that right --

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MS. EGAN: Chairman, this is putting a conclusion to the witness.

CHAIRMAN: It is not. Carry on Mr. O' Neill.

A. Well I mean, the essential thing was that the licence was for a seven year period. Certainly it was always expected that the initial years would, if you like, be loss making, but certainly over the seven year term, it was envisaged that the application and the - sorry, the franchise would prove to be profitable after seven years.

291 Q. MR. O'NEILL: I mean, there is nothing wrong in economic principle with accepting an initial loss in start-up of a business, provided the reward at the end of the day is going to be able to cover the initial losses and return a profit?

A. Sure.

292 Q. In other words, what was being looked at here was an economic relationship between the licence holder, the broadcaster that is. It would have to be able to continue on an economic basis?

A. Yes.

293 Q. If a purely charitable organisation, for example, wanted to set up a broadcasting system and didn't have the financial backup or alternatively didn't apply good economic principles, they wouldn't qualify, isn't that right?

A. That's correct, yes.

294 Q. So it was never a case of the Commission being able to favour subsidy, be it directly or indirectly, of an

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applicant in any aspect of their projection or application, isn't that right?

A. Yeah. I am not quite clear what you mean by the term "subsidy", but if you are suggesting that - I mean, you know, that the supporters or promoters of the application would have been in a position to, shall we say, invest further in the event of perhaps difficulty after a year or two, well, I think that would have certainly been a matter of comfort to the Commission if projections were falling short or actual performance was actually falling a little short of projections, yes.

295 Q. The circumstance I was envisaging in my question was one where, for example, an intending applicant for the licence would decide to make the application on other than good economic principles and decide, for example, that they wanted to run the basis on a charitable non-profit basis, for example. That is not something which would be allowed for within this scheme?

A. No, no.

296 Q. So that could I suggest that each element of the application would have to be analysed to see whether or not it did meet with good economic principles. The first of them being, I suggest, that the applicant would have to be in a position to afford to conclude a contract with its suppliers, for example, and to conclude contracts specifically with the entity which was to provide its transmission facility?

A. Yes, it would have been in a - it would have required to do that, but I think the first step was for the Commission to determine who its favoured applicant was --

297 Q. Of course --

A. And subsequently for the appropriate negotiations to take place between the applicant and RTE, and obviously agreement or at least that was - an arrangement was made following intervention by the Minister, and it subsequently became the case that Century and the Commission signed a broadcasting contract. We indicated throughout that we would not have been obviously able to negotiate or agree a sound broadcasting contract with Century in the absence of their having, if you like, a transmission contract with RTE.

298 Q. For example, Mr. Appleby, if the applicant was to say to the submission, "I am prepared to transmit through the facility of Radio Teilifis Eireann, but I am not prepared to pay the market rate for their transmission facility", it would not have been open to the Commission to say "Very well, we will consider your application in the hope and expectation that you might get some subsidy or otherwise from RTE to allow you to transmit."?

A. Well, I mean you use the term "market rate", I don't think that term is appropriate in the circumstances. RTE essentially was in a monopoly position, vis-a-vis the transmission network and I don't think they were effectively in a position, in the absence of intervention from the Minister to, effectively, determine or seek to determine what rate would apply.

299 Q. Well, could I suggest that under the Act the only rate that was to apply was the act which accorded with good economic principles rather than good socioeconomic or political principles or philosophies that might have been in the mind

of the members of the IRTC at the time? Where, in other words, would the Commission substitute for "good economic principles" its own wish or desire that there should be access to the airwaves at a cost that was other than the economic rate for that service at the time?

A. Well, I mean, I think at the time the Commission was making its decision, the Commission was satisfied that the application, as a whole, accorded with good economic principles. As indicated previously, transmission charges were only a minor element of the cost structure of the application. The Commission, Secretariat, principally myself, undertook an assessment to establish the extent to which each of the applications could bear increases in cost or reductions in projected revenue. Obviously the Commission, on the basis of that exercise, satisfied itself that the Century application accorded with good economic principles.

300 Q. Thanks Mr. Appleby.

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CHAIRMAN: Thank you Mr. Appleby. Thank you for coming down. You have been of great assistance.

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MR. O'NEILL: The next witness is Mr. Michael O'Connor, who will be quite short.

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THE WITNESS THEN WITHDREW

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MS. DILLON: I wonder before Mr. O' Neill takes up that witness,. Mr. Pascal Taggart was also scheduled to give evidence this afternoon. It will take approximately an

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hour. I wonder would it be possible to reschedule
Mr. Taggart for Wednesday morning at ten o'clock?

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CHAIRMAN: Certainly, if that's agreeable to everybody
involved? I certainly will facilitate that.

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MS. DILLON: It's unlikely we will get to Mr. Taggart this
evening so. I am obliged, Sir.

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MICHAEL O'CONNOR, HAVING BEEN SWORN, WAS EXAMINED AS
FOLLOWS BY MR. O' NEILL:

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301 Q. MR. O'NEILL: Good afternoon Mr. O'Connor. Mr. O'Connor,
I think that you were admitted to the roll of solicitors in
Easter term of 1981, is that so?

A. That's correct, yes.

302 Q. And in 1988 you were in practice in the firm of John S
O'Connor & Company, Solicitors, is that correct?

A. That's correct, yes.

303 Q. Mr. Donal O'Sullivan has given evidence before the Tribunal
that he proposed you as the solicitor to the IRTC at its
inaugural meeting which took place at Newbridge House in
Donabate on the 17th October of 1988. And equally, that
he did not know you before he did so. Does that accord
with your own recollection? Did you know Mr. O' Sullivan?

A. No, I don't, I have never met the man in my life.

304 Q. And I think you subsequently learned of the fact that you
had been appointed as solicitor to the IRTC, having been so
informed by your father who was also a solicitor, isn't
that right?

A. That's right. He was the principal in the firm.

305 Q. And the evidence of Mr. O' Sullivan was that he was asked
to nominate you to that position by Mr. Ray Burke at a
meeting which took place in Fermoy in County Cork. Prior
to your appointment, had you had any discussion with
Mr. Burke regarding your possible appointment to this
position?

A. None whatsoever.

00111

306 Q. Had you discussed any aspect of broadcasting legislation or any other aspect of what might potentially be IRTC business with Mr. Burke at any time before this?

A. Never, I never had any discussion.

307 Q. Having been appointed as solicitor, I think that you carried out certain work on behalf of the Commission initially with regard to the acquisition of a leasehold premises in Clanwilliam Court for the Commission, is that right?

A. That's correct, that was the first file.

308 Q. I think you subsequently instructed counsel on behalf of the Commission on the issue of the contract which should be drawn up by the IRTC for agreement with subsequent franchisees for licences, is that right?

A. That's correct, yes.

309 Q. At any time after your appointment, were you approached by Mr. Ray Burke in connection with the work of the IRTC or with any advice that you might have occasion to give to the IRTC?

A. At no stage, no.

310 Q. I see. Thanks Mr. O'Connell.

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CHAIRMAN: Does anybody want to ask any questions? Thank you very much Mr. O'Connell for coming down.

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MR. O'NEILL: Monday morning, Sir, 10:30.

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CHAIRMAN: Monday morning, so, 10:30.

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THE TRIBUNAL THEN ADJOURNED UNTIL MONDAY, 20TH NOVEMBER,

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2000, AT 10.30 A.M..

