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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1166/5/7/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

17 October 2012

Before:

VIVIEN ROSE  
(Chairman)  
TIM COHEN  
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**ALBION WATER LIMITED**

Appellants

– v –

**DWR CYMRU CYFYNGEDIG**

Respondent

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**HEARING (DAY 3)**

Note: Excisions in this transcript marked “[...][C]” relate to passages excluded.

## **APPEARANCES**

Mr Thomas Sharpe Q.C., Mr Matthew Cook and Mr Medhi Baiou (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Claimant.

Mr Daniel Beard Q.C., Mr Meredith Pickford and Ms Ligia Osepciu (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

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1 Wednesday, 17 October 2012

2 (10.30 am)

3 Housekeeping

4 THE CHAIRMAN: Yes, Mr Sharpe.

5 MR SHARPE: Madam Chairman, members of the Tribunal, the  
6 moment has come to call Dr Bryan to give evidence.  
7 Unfortunately, just moments before you came in a minor  
8 issue has arisen; let me explain. Dr Bryan has taken  
9 a copy of the bundle of documents with him into -- he  
10 intends to take it in, so he has an index of each  
11 document, and you appreciate in a case of this  
12 complexity and volume it's quite a useful aide memoire.

13 He proposes to take a copy of the index of each  
14 volume. Which you will have seen several times.

15 THE CHAIRMAN: The bundle's index?

16 MR SHARPE: Yes, and he proposes to do that in order to  
17 facilitate his answers and to remind himself of other  
18 documents in relation -- which may be relevant in  
19 relation to my learned friend's questioning. He has in  
20 the course of doing that annotated certain documents by  
21 the side, to indicate what they are, primarily. Very  
22 properly we showed this to my friends, who, on taking  
23 instructions -- it appears there is an objection to  
24 this. It's not clear to me what those objections are,  
25 and we are in the process of getting copies, so I can

1 show you, and perhaps my friend can justify his  
2 objection to what is, I think, perfectly standard  
3 procedure in the Commercial Court and elsewhere.

4 I am sorry to start off on this negative note, but  
5 it's nothing to do with me.

6 THE CHAIRMAN: Have you seen the annotations?

7 MR SHARPE: I have glanced at them, yes, and I saw nothing  
8 to give rise to any concern.

9 THE CHAIRMAN: Have you had a chance to see the annotations,  
10 Mr Beard.

11 MR BEARD: Not properly, no. We are concerned about --  
12 there are indices in the bundle, so, so far as going to  
13 an index is concerned, obviously no problem. Insofar as  
14 it's referring to annotations to an index, we are rather  
15 confused as to why it is that a witness should be taking  
16 any notes they have made into the witness box. The idea  
17 is that there is a set of bundles there that they could  
18 refer to. Insofar as you are cross-referring to  
19 documents or commenting on documents in the margins of  
20 an index, it doesn't matter whether it's in an index or  
21 elsewhere, you don't take notes into a witness box.

22 In those circumstances we are just a bit bemused why  
23 Dr Bryan is seeking to take into the witness box notes,  
24 which plainly is not the ordinary course. It's  
25 an unusual suggestion. If they do contain anything that

1           refers to points he would like to make in relation to  
2           documents and so on, that would plainly be a wholly  
3           inappropriate thing for him to have those notes with  
4           him. You don't take your notes in. We are not talking  
5           of a situation of a policeman being asked about what's  
6           happened.

7           THE CHAIRMAN: Of course it's not a contemporaneous note  
8           like that.

9           MR BEARD: No.

10          THE CHAIRMAN: Let's start without the notes. When you have  
11          had a chance to look at the notes, you will be able  
12          to -- we will all be able to see whether there is  
13          anything objectionable in them. Let's start with  
14          an unannotated index, if we need that, and get going  
15          with Dr Bryan's evidence.

16          MR SHARPE: Madam, you will appreciate it is not remotely  
17          unusual in the High Court, particularly in the  
18          Commercial Court, of which this is a comparable piece of  
19          litigation, for a witness to take notes, provided that  
20          they are revealed to the other side, and those notes  
21          themselves are anodyne. As you will see, we have  
22          managed to prepare three copies, may I suggest you  
23          glance at them?

24          THE CHAIRMAN: No, I'm not going to look at them.

25          MR SHARPE: We have shown them to the other side.

1 THE CHAIRMAN: Then they need to analyse what objections  
2 they take to them, and then we will take it from there.  
3 But let's get Dr Bryan in the witness box with a clean  
4 copy of the index if he wants to take that in.

5 MR SHARPE: We will need to perhaps then take a copy of the  
6 index out of one of the bundles and put it to one side.

7 THE CHAIRMAN: Yes.

8 MR SHARPE: I think the objection here is manifestly  
9 ill-founded and unfair. Nevertheless, can we get  
10 a copy, please? Now we will get down to business.

11 DR JEREMY BRYAN (sworn)

12 Examination-in-chief by MR SHARPE

13 MR SHARPE: Now, you are Dr Jeremy Bryan of  
14 71 Clarence Road, Teddington, Middlesex?

15 A. I am.

16 Q. Will you go to volume 1, please, of the bundle.

17 A. I have it.

18 Q. Pick it up at tab 4, page 35. This is your statement?

19 A. It is.

20 Q. Will you go to the last page of the statement at page 85  
21 of that tab. Is that your signature above your name?

22 A. It is.

23 Q. Are the contents of the statement true?

24 A. They are.

25 MR SHARPE: I'm not going to detain you any further, but

1 I understand that, contrary to usual practice, both  
2 Mr Pickford and Mr Beard will be cross-examining you, to  
3 which I take no objection, but at the end I may take the  
4 opportunity to take you back to some of the evidence for  
5 development in re-examination. So that's the situation  
6 as it stands.

7 MR BEARD: If it helps the Tribunal, for clarity,  
8 Mr Pickford will deal with cross-examination primarily  
9 in relation to compensatory matters, albeit that various  
10 issues will no doubt come up along the way. I will  
11 focus on certain issues that follow on from that, that  
12 may pertain to exemplary damages issues.

13 Cross-examination by MR PICKFORD

14 MR PICKFORD: Strictly for the avoidance of doubt, I won't  
15 be addressing questions to the issue of exemplary damages, which will  
16 be dealt with by Mr Beard.

17 THE CHAIRMAN: I am just looking: you seem to be a long way  
18 from the microphone, and it might be better to use that  
19 one.

20 MR PICKFORD: I am grateful.

21 Dr Bryan, you have obviously re-read your witness  
22 statements for the purposes of today's hearing?

23 A. I did, Mr Pickford.

24 Q. You have read your counsel's skeleton argument?

25 A. I have.

1 Q. You agree with everything in that skeleton, insofar as  
2 you are able to opine on it?

3 A. I do.

4 Q. You obviously appreciate the extreme importance of  
5 ensuring that everything you say is correct and properly  
6 reflects the evidence and is not misleading?

7 A. I do.

8 Q. Now, you have a PhD?

9 A. I have.

10 Q. That's in carbon capture and release in the aquatic  
11 environment, as I understand it?

12 A. That's correct, yes.

13 Q. You have obviously been involved in the water industry  
14 for many years?

15 A. Very many years, yes.

16 Q. Just to be clear, you don't have any formal  
17 qualifications as an expert economist or as an expert in  
18 finance, do you?

19 A. That's quite true, my qualifications are in research  
20 science, and since 1989 I have been a company director  
21 and bore the fiduciary responsibilities of those posts.

22 Q. You understand your role here today is as a witness of  
23 fact, you are not an independent economic expert?

24 A. I am not.

25 Q. Annex 1 to your particulars of claim set out various



- 1 damages calculations, there are eight alternatives;  
2 that's right?
- 3 A. There are.
- 4 Q. It's correct, isn't it, that annex 1 was produced by  
5 you?
- 6 A. It was, yes.
- 7 Q. Now, the options are labelled 1, 1(a) up to 4, 4(a)?
- 8 A. That's correct.
- 9 Q. And they embody varying assumptions about what would  
10 have happened in a counterfactual world where Albion had  
11 been offered a lawful first access price?
- 12 A. They do, they cover two different versions of the  
13 counterfactual, and one version, 1 to 4, ie the ones  
14 without the (a), do not reflect the counterfactual which  
15 is the prevailing Dwr Cymru retail tariff for  
16 non-potable.
- 17 Q. That's the benefit share point?
- 18 A. It is the benefit share point.
- 19 Q. The benefit share with Shotton Paper?
- 20 A. It is the principal factor that drives the tariff that  
21 we would have charged Shotton Paper, whereas  
22 methodologies 1 to 4 reflect the factual situation,  
23 namely the prices that we were receiving from Dwr Cymru  
24 under the orders of the Tribunal. So in that sense, 1  
25 to 4 could not be considered to be a true

1 counterfactual. Because obviously it's an artificial  
2 situation.

3 Q. Right, so you are saying that in fact your best case now  
4 is that your true counterfactual is the (a) series?

5 A. You asked me a question and I tried to give you  
6 a straight answer. I prepared these quantum  
7 calculations as best I could to give the Tribunal my  
8 best view of the range of calculations that were  
9 possible for calculating quantum. No more than that.

10 Q. Your skeleton argument at paragraph 54 says that the  
11 principal case is option 1, and the final alternative is  
12 option 4(a), it's in that descending order?

13 A. Yes.

14 Q. Do you still hold to that?

15 A. I recognise that argument, yes.

16 Q. But is that your case?

17 A. My case is that there are a number of variables in this  
18 calculation which are open to judgment, and the basis of  
19 that judgment will inform what the final calculation is.  
20 What I have tried to do is present the methodology,  
21 identify the variables as I saw them, and clearly you in  
22 your submissions have suggested more variables, and  
23 I think, as Madam Chairman said yesterday, it will be  
24 the Tribunal's task to work out what the value of those  
25 various variables should be in calculating the final

- 1 quantum.
- 2 Q. And the four variables that you have considered in your  
3 alternatives are as follows, aren't they: there is the  
4 price that UU would have charged for bulk supply; that's  
5 one of them?
- 6 A. That's correct.
- 7 Q. Another one is indexation arrangements that would have  
8 applied to that bulk supply price?
- 9 A. That's right.
- 10 Q. Another one is the indexation arrangements that would  
11 have applied to a lawful common carriage price?
- 12 A. Correct.
- 13 Q. And the final one is the extent of any benefit sharing  
14 that there would have been under the terms of the  
15 agreement between yourself and Shotton Paper?
- 16 A. That's not a variable, that is set out in the agreement.  
17 I've simply applied the agreement in the various  
18 calculations that I have undertaken.
- 19 Q. But you have applied it in the ones with the (a), not in  
20 the ones without the (a)?
- 21 A. That is correct, yes, because the ones without the (a)  
22 are simply the situation as was, with the prices that we  
23 were charged, further to the orders of the Tribunal, and  
24 the price we actually charged Shotton Paper at that time  
25 under those circumstances.

1 Q. Now, I understand that, from your evidence and from the  
2 points made in your skeleton and particulars of claim,  
3 that what you say is most likely to have occurred, as  
4 regards supply with UU, is that there would have been  
5 a deal between yourself and UU; that's right?

6 A. I think so, yes.

7 Q. You say the price that would have been agreed under that  
8 deal was the same as the price that Welsh Water was  
9 paying UU under its bulk supply agreement?

10 A. I believe that, on the balance of probabilities, that  
11 would have been the final outcome.

12 Q. You say that there would have been no indexation?

13 A. That calculation, that figure is indexed, it's indexed  
14 in that it reflects the real increase in costs paid by  
15 Dwr Cymru for that supply to United Utilities.

16 Q. There would have been no explicit external indexation  
17 (inaudible) it would have been implicit --

18 A. Yes.

19 Q. -- because of the fact that it reflected costs?

20 A. Indeed.

21 Q. Now, if you could turn, please, to the bundle folder 2  
22 and tab 34. I am afraid that may have changed again.  
23 It may be folder 3. That has now moved to folder 3. So  
24 this is a managing directors' report, so this is your  
25 report from January 2000?

- 1 A. That's correct.
- 2 Q. If we look at page 441, please, you say:
- 3 "North West Water has confirmed its willingness to  
4 provide a bulk supply to enable common carriage at  
5 Shotton Paper, a price formula will be negotiated this  
6 month."
- 7 A. That's correct, yes.
- 8 Q. That's in fairly unequivocal terms, "will"?
- 9 A. Yes.
- 10 Q. It turns out you were overly optimistic at that stage?
- 11 A. I was, yes, very optimistic.
- 12 Q. If we then go on, please, to tab 57, the same bundle,  
13 and this is another managing directors' report, and then  
14 page 584, we see draft heads of agreement. Do you have  
15 that?
- 16 A. I do.
- 17 Q. You had produced these draft heads of agreement, hadn't  
18 you?
- 19 A. I had.
- 20 Q. If we could look, please, at clause 6 concerning the  
21 financial relationship. This was the financial  
22 relationship between yourself and North West Water that  
23 you were proposing in these draft heads?
- 24 A. It was -- I am glad you took me to this part of the  
25 bundle, because the relationship that I was proposing

1           there, the financial relationship, was a reflection of  
2           the discussions that we had had with North West Water,  
3           as it was then in 1999, and this was my attempt to  
4           reflect the essence of those discussions in a managing  
5           directors' report to my own board.

6           It encapsulates the basic concept within the  
7           discussions with North West Water, which was that -- and  
8           this can be seen independently from the 1999 reports  
9           that are in the bundle, both the Oxera report, but more  
10          importantly, I think, the internal report; the Boulton  
11          report that followed it. I'm afraid I can't get to the  
12          references easily. That reflected North West's view  
13          that Dwr Cymru were making a huge profit on the supply  
14          to Shotton Paper, and that if some way could be found  
15          for redistributing that profit, then it should be  
16          divided so that there was a benefit to customer, because  
17          that was our driving force, ie Shotton Paper, and  
18          a division of the remaining benefit to North West and to  
19          Albion. And that's what I have tried to reflect in this  
20          wording.

21        Q. Now, what you said in relation to the bulk supply unit  
22        price, this is the third paragraph down:

23                "... [it] should be set at a level which  
24                significantly increases NWW's income compared to the  
25                current bulk supply agreement with Welsh Water."

1 A. That's correct.

2 Q. You also were proposing, second paragraph up from the  
3 bottom, that:

4 "The bulk supply price will be indexed to RPI and  
5 will be reviewed five years after the signing of the  
6 agreement."

7 A. That's correct.

8 Q. So what was being contemplated was a unit price  
9 necessarily that would have been significantly above the  
10 3p or thereabouts that Welsh Water were paying at the  
11 time?

12 A. Yes, that's right. When we -- I think it's important to  
13 get this in context. In 1999 when we approached  
14 North West Water, we realised that we were making  
15 absolutely no headway with Ofwat with regard to any  
16 challenge to the bulk supply price, and the evidence is  
17 very clear in the bundle on that point. Common carriage  
18 was on the on the horizon, a very real prospect of that  
19 coming about as a result of the enactment of the 1998  
20 Competition Act, and we recognised that North West Water  
21 was at that time selling water to Welsh Water, as we  
22 know, very cheaply.

23 Our view was that we had two approaches to  
24 North West Water, one of which was to demand the same  
25 price, so that we could pursue common carriage; not

1 an approach that in a commercial sense would be designed  
2 to get a positive reaction from the target customer. Or  
3 we could approach them as we did to say in effect, "Yes,  
4 we have, at that time, the option of a section 40 route  
5 under the Water Industry Act to get a price determined."

6 But it would be better, in our mind, if we could  
7 agree on a benefit sharing approach which would split  
8 what we saw as the excessive profits of Welsh between  
9 those who were perhaps a little more deserving,  
10 Shotton Paper primarily, followed by North West Water  
11 and Albion.

12 Q. So you recognise that there would be no real commercial  
13 incentive for North West Water to enter into a new  
14 agreement at or close to the existing price --

15 A. None whatsoever.

16 Q. Yes, and indeed you knew that North West Water really  
17 didn't like that price?

18 A. That was -- no, no, that was never -- that never came  
19 out in the evidence. There was never any statement that  
20 they didn't like the price. What they disliked  
21 intensely was the thought that they were selling water  
22 to Welsh and Welsh were making a huge profit on it.  
23 There was never any sense, then or subsequently, until  
24 about 2004, that they were somehow failing to recover  
25 their costs for the supply that they made.



1 Q. Now, North West Water never offered you a price set on  
2 the basis of the price that Welsh Water were paying, did  
3 they?

4 A. No, they didn't, we didn't ask for one. Our approach,  
5 as I have described, was to go at this on an agreed  
6 basis on the benefit share.

7 Q. You have just referred to the fact that you later  
8 discovered -- and you describe this in your witness  
9 statement at paragraph 164, which you are welcome to go  
10 to, to remind yourself, if you like.

11 A. Thank you.

12 Q. You say:

13 "What was striking about discussions with United  
14 Utilities, at this time and subsequently, was the  
15 resentment they felt at the 'confiscation' of their  
16 assets and customers by Dwr Cymru and of the very  
17 significant profit stream that Dwr Cymru had exploited  
18 since that asset transfer."

19 A. That's right, and I think if you talk to some old hands  
20 at United Utilities, they still feel that way.

21 Q. You say:

22 "They felt that they knew exactly how little  
23 Dwr Cymru was spending on operating and maintaining the  
24 system and wanted to share in the resulting profits."

25 A. Yes, they had run the system themselves, they knew

1 exactly what was involved there.

2 Q. But this, Dr Bryan, was back in 1999?

3 A. Yes.

4 Q. Well, I understood you to say a few moments ago that it  
5 was not until 2004 that you understood that United  
6 Utilities were resenting of what they felt was the  
7 confiscation of their assets because they wanted a share  
8 in the resulting profits.

9 A. No, no, no. I apologise if you misunderstood me. It  
10 was not until 2004, I think that date is correct but  
11 I can certainly check, that United Utilities raised the  
12 argument that there was somehow a loss of revenue --  
13 sorry, that they weren't recovering their full costs  
14 under the terms of the 1994 Heronbridge Agreement. That  
15 claim had been absent throughout my early negotiations  
16 with North West Water, as it was then, and indeed absent  
17 from the two section 40A applications that they made to  
18 Ofwat and that Ofwat rejected.

19 Q. But what had not been absent, what was clear to you in  
20 1999 and onwards, was, as you say, the resentment they  
21 felt at the confiscation of their assets?

22 A. Yes.

23 Q. The fact that they wanted to share in the profits?

24 A. Yes. And I would elaborate on that, if I may. And they  
25 would rather that Albion won the hard yards by making

1 the application and driving the thing forward, so that  
2 they could, if you like, stand in the background but  
3 reap the benefits. And that was what we were there for,  
4 to stimulate the market to try and create change.

5 Q. Now, you referred to the fact that you believed that you  
6 would be able to compel United Utilities to offer you  
7 the same price as they were offering to Welsh Water, but  
8 when you approached United Utilities in 1999, we saw  
9 your record of the negotiations in the draft heads of  
10 agreement, you were being totally genuine there, weren't  
11 you, to United Utilities; that was not disingenuous in  
12 that you were leading them down the garden path, but you  
13 ultimately you were proposing to do something totally  
14 different?

15 A. We are talking about two companies, well experienced in  
16 the ways of the water industry, well acquainted with  
17 water industry law. United Utilities knew full well  
18 that the section 40 route was open to us, indeed that  
19 was precisely the route that we had used in 1996 that  
20 led to the "minded to" determination, and I think you or  
21 Mr Sharpe took the Tribunal to that previously.

22 So there was no mystery about the fact that the  
23 section 40 route for the determination of a bulk supply  
24 price existed. But our view was that commercially we  
25 might get a quicker and better deal in terms of the

1 assuredness of outcome if we could negotiate  
2 satisfactory terms with North West Water. And in 1999  
3 and for the most part of 2000 those views appeared to be  
4 reciprocated by North West Water.

5 Q. To come back to my question, your approach to United  
6 Utilities was a perfectly genuine one was it not?

7 A. It was a genuine approach.

8 Q. Yes. If we could return, please, to folder 3.

9 THE CHAIRMAN: Can I just ask a quick question? You put  
10 "confiscation" in quotation marks in your paragraph 164.  
11 Are those -- is that indicating that somebody used  
12 that -- somebody from UU used that word, or is that just  
13 you put it in quotes because it's not really  
14 a confiscation, those are your quotes?

15 A. That was very strongly the sense I got, I can't  
16 remember, Madam Chairman, whether those precise words  
17 were used, but the circumstances surrounding the  
18 transfer of those assets was that these customers and  
19 the assets had always been within United Utilities or  
20 indeed its predecessor organisations. With the  
21 reshaping of the water industry and the boundary  
22 changes, there was a requirement for United Utilities to  
23 formally seek Welsh Water's approval for serving  
24 customers who were outside their appointed area. And  
25 that process was ongoing, and I am pretty confident that

1 the, one of the first documents in the bundle, the 1986  
2 report, which is a Welsh Water internal report, then  
3 explained that there was a management change in  
4 Welsh Water and the new management decided that, rather  
5 than allow North West to continue to extract profits  
6 from these rather attractive customers, two largest in  
7 Wales, that they would instead seek the transfer of both  
8 assets and customers, which, as we heard yesterday, they  
9 did for the price of £165,000, I think.

10 Q. Now, if you could keep your witness statement open as  
11 well as bundle 3, because we will be potentially going  
12 between the two.

13 A. Yes, of course.

14 Q. In paragraph 166 of your witness statement, you refer to  
15 an August 2000 board minute, and we have that board  
16 minute at page 618 of the bundle, tab 60, folder 3.

17 A. Yes.

18 Q. You are referring to it at paragraph 166 and then  
19 you conclude in relation to it at 167, you say:

20 "It is therefore clear from this contemporaneous  
21 documentary evidence that United Utilities had indicated  
22 that it was willing to offer a price of 8p per cubic  
23 metre for the bulk supply", and then you go along with  
24 a benefit share arrangement?

25 A. Yes.

1 Q. If we then could please turn to the note itself, and we  
2 are considering here Shotton Paper on page 618, it's the  
3 relevant part of the note that you have quoted.

4 A. Yes.

5 Q. What you say there is:

6 "Negotiations with North West Water regarding  
7 alternative bulk supply arrangements have proceeded  
8 well, albeit slowly. We have now reached agreement on  
9 the sharing of benefits that they will obtain from  
10 a higher bulk supply price of 8p per cubic metre (c.f.  
11 3p currently)."

12 Now, that doesn't actually say that UU have offered  
13 you 8p per cubic metre, does it?

14 A. No, it doesn't actually say that.

15 Q. What it's actually talking about there precisely is that  
16 essentially if the bulk supply were 8p per cubic metre,  
17 you have agreed on how that type of price would be  
18 shared between you, it's the benefit share that you were  
19 principally focusing on there?

20 A. You are suggesting that I was trying to mislead my  
21 board, or ...?

22 Q. No, not at all.

23 A. To be honest, Mr Pickford, I can't remember the precise  
24 chain of events, the precise conversations with United  
25 Utilities that gave rise to that 8p figure, but what

1 I am clear about is that, in informing my board of the  
2 progress of those negotiations, I would have been as  
3 accurate as possible.

4 Q. Indeed.

5 A. I would also, I think, have reflected what is now  
6 apparent from that 1999 Boulton report, where it's now  
7 clear that North West Water's ambitions with regard to  
8 extra profitability from the sale of water were  
9 a minimum, I think I am right in saying, of £250,000  
10 a year. Now, a minimum of £250,000 a year extra profit,  
11 with the volumes that we were then buying, translates  
12 into an additional price, an increase in price of about  
13 3.7p. So you will see that 8p and 3 plus 3.7, 6.7p, are  
14 in the same sort of ballpark.

15 What I also ought to remind you is that the basis of  
16 the agreement with North West was that we would  
17 understand what the access price was, because that  
18 drives everything. If the access price is very low, the  
19 benefits savings are correspondingly larger. If the  
20 access price is very high, then we may have problems, as  
21 indeed we did.

22 So it's very much what was anticipated and what was  
23 reflected in that draft you took me to, draft heads of  
24 terms you took me to earlier, was an iterative process  
25 that would reflect the access price that was offered,

1           and you will also note from that earlier Oxera and  
2           Boulton reports that UU's view of what the access price  
3           should be was about 6p and ours, I admit, was 7p.

4           Q. Given your stated desire to be as accurate as possible  
5           to the board --

6           A. Yes.

7           Q. -- if United Utilities had been saying to you, or  
8           North West Water as they then were, "We are prepared to  
9           offer you 8p per cubic metre", that would be quite  
10          interesting information that you would have spelt out  
11          more clearly in this board minute, wouldn't you?

12          A. I don't recall anyone at the time or subsequently  
13          suggesting that this report was anything but clear. But  
14          I would also remind you that what we are talking about  
15          here is an ongoing negotiation with United Utilities  
16          that couldn't possibly be finalised until we got the  
17          access price, because the access price determines all.  
18          It determines what the magnitude of the benefits is  
19          going to be, and then we need to sit down and decide how  
20          that is divided to the benefit of the three parties.

21          Q. But it's reciprocal, isn't it, because the ultimate  
22          price, on your approach, is the bulk supply plus the  
23          access price? So if the bulk supply price doesn't work,  
24          equally that can have ramifications for the access  
25          price?



- 1 A. Of course.
- 2 Q. They're two aspects, you need both in place; if one goes  
3 up, the other can go down?
- 4 A. That was never the understanding with North West Water  
5 at that time, as I think the evidence shows. Until that  
6 time, the discussions with North West Water were  
7 predicated on the common sense commercial reality which  
8 was that until we had an access price, a fair access  
9 price, a reasonable access price, we could not then  
10 consider what additional benefit might accrue to United  
11 Utilities through the sharing of the difference in our  
12 input prices, effectively.
- 13 Q. If we could go, please, back to your diary entry for  
14 25 February, which is at again --
- 15 THE CHAIRMAN: Mr Pickford, I am sorry to interrupt, is this  
16 moving to a different point?
- 17 MR PICKFORD: No, it's the same point.
- 18 A. I am sorry, Mr Pickford, which tab?
- 19 Q. It's tab 33, we are in the same folder, page 429, and  
20 this is your diary entry for February, Friday the 25th.
- 21 A. I appear to have a bundle without a tab 33. If someone  
22 could provide me with a copy?
- 23 (Handed)
- 24 Thank you very much.
- 25 Q. So this is your diary --

- 1 A. January the 6th. Sorry?
- 2 Q. Sorry, page 429, it should be February 25, and it's  
3 a Friday.
- 4 A. 25 February, year 2000, yes, I have it.
- 5 Q. That's correct. We see here "11.30, NWW, Wendy and  
6 Ken". They are the people that you were negotiating  
7 with at North West Water, weren't they?
- 8 A. They were.
- 9 Q. "Discussing alternative proposition for SP."  
10 That would be Shotton Paper; that's correct, isn't  
11 it?
- 12 A. Yes.
- 13 Q. "Noted DC paying NWW on cost recovery basis. ELL  
14 estimates 2 to 3p per metre cubed. KH suggests 4p. NWW  
15 interested in a deal which cuts out DC and gives them  
16 additional profit."
- 17 So what's being considered here is Dwr Cymru falls  
18 out of the picture --
- 19 A. Yes.
- 20 Q. -- in relation to Shotton, not that they continue to  
21 stay there and the water gets sold twice?
- 22 A. That's true, yes. You will note "additional profit"  
23 there.
- 24 Q. It then goes on to say:  
25 "Indicated that 8p per cubic metre may be possible

1 subject to DC access price for common carriage through  
2 their system."

3 A. Yes.

4 Q. Then you talk about:

5 "No hydraulic, quality or liability issues ..."

6 I can't read your final word there.

7 A. "Foreseen".

8 Q. "... foreseen."

9 Thank you. Now, the person who indicated 8p per  
10 cubic metre was you, wasn't it?

11 A. Yes.

12 Q. What we see thereafter is that:

13 "North West Water very interested at this price."

14 A. Yes.

15 Q. So it was your suggestion, and what you inferred was  
16 that they were interested?

17 A. Yes. What I was doing was looking at the reality. Here  
18 we have the reality of 26p being the current price. If,  
19 as they believed, the access price should be no more  
20 than 6p, then there is a 20p benefit to be shared, and  
21 in that sense 8p out of that 20p benefit, given that  
22 their costs were 3 -- not 4 as Mr Hickman suggested  
23 there -- did not strike me as being unreasonable or  
24 commercially unsound, and I think this note goes to show  
25 that North West were of a similar view.

1 Q. Now, if you could go, please, to tab 98. I hope you  
2 have a 98 in your folder 3?

3 A. I hope so.

4 Q. Do you have tab 98?

5 A. I do.

6 Q. This is a letter of 12 December 2000, from your  
7 colleague Malcolm Jeffery to Julie Griffiths at Ofwat?

8 A. Yes.

9 Q. You and Mr Jeffery would have been in very regular  
10 contact over this period, wouldn't you?

11 A. We would indeed, yes.

12 Q. Mr Jeffery would never have written a letter which you  
13 materially disagreed with?

14 A. I would hope not.

15 Q. We see in the first bullet this is Albion's account to  
16 Ofwat of what they think has been agreed in principle  
17 with North West, and it says "up to 9p per cubic metre";  
18 do you see that?

19 A. Yes.

20 Q. It doesn't say 8p?

21 A. No.

22 Q. So that suggests that Albion didn't think that UU had  
23 actually given it an offer of 8p?

24 A. I think I said to you before that 8p was an illustrative  
25 figure that represented what might be possible, given

- 1 a fair or a low access price.
- 2 Q. So again we can probably go through the next letter  
3 fairly briefly, given your answer. If we could go,  
4 please, to folder 3, tab 106, this is a letter from  
5 North West Water giving their account to Ofwat of what  
6 had been going on?
- 7 A. Mm.
- 8 Q. It's from Janine White, who we will obviously be hearing  
9 from later on.
- 10 A. Indeed.
- 11 Q. If you could please read her description at paragraphs 1  
12 to 6 of the negotiations with yourself.
- 13 (Pause)
- 14 A. Yes, I have read 1 to 6.
- 15 Q. There are some bullet points over the page --
- 16 A. Indeed, yes.
- 17 Q. Have you read those as well? Now, Ms White's  
18 description here of the negotiations between you and  
19 North West Water is a fair one, isn't it?
- 20 A. It's her view. I don't know the extent to which it's  
21 fair. She had only recently become involved, so she had  
22 no understanding of the history of those negotiations.  
23 So it is the view of someone at the time writing to  
24 Ofwat.
- 25 Q. There is certainly nothing in this that suggests to you

- 1           that she was lying?
- 2       A. I have never suggested that she was lying.
- 3       Q. And there is no aspect of this description at 1 to 6
- 4           that you could identify as materially inaccurate, is
- 5           there?
- 6       A. There is clearly a difference of views about agreed in
- 7           principle and an advisory figure of up to 9p, and it's
- 8           clear that she recognises the importance of section 40
- 9           of the Water Industry Act.
- 10      Q. You would accept that this is a fair representation of
- 11         North West Water's view of where it was in negotiations?
- 12      A. It's certainly a fair representation of Ms White's view.
- 13         I don't know what her responsibilities were at that
- 14         time, what authority she had to negotiate.
- 15      Q. Okay. If we could go, please, to folder 4 -- and I hope
- 16         that this is the correct folder, given documents are
- 17         moving around -- tab 111. Do you have tab 111?
- 18      A. I do.
- 19      Q. So this is a letter from North West Water to Dave Holton
- 20         at Dwr Cymru. Obviously, to be fair to you, it was not
- 21         to you or from you, so there are obviously some limits
- 22         as to what you can say about it. It's part of the
- 23         story, it's relevant to some of the subsequent letters,
- 24         so I would like briefly to go through some of it with
- 25         you. Have you read this letter before?

1 A. Yes. I will have done, in disclosure, but I would -- if  
2 you -- is it all of the letter you are interested in?  
3 You want me to read it through again?

4 Q. If you just have a very brief skim. The essence of the  
5 first question I'm simply going to put to you is that  
6 this is the other side of the coin from  
7 North West Water's perspective, where it's trying to get  
8 the price up to Welsh Water. So it's been negotiating  
9 with you, and now it turns to Welsh Water symmetrically  
10 and says "Okay, here is what we would like to do in  
11 relation to the Heronbridge Agreement as regards our  
12 relationship with you"?

13 A. "Symmetrically" is your word, I'm not sure the evidence  
14 suggests there was much symmetry.

15 Q. It's what North West Water was hoping to achieve.  
16 Obviously you are in a different position from  
17 North West Water so it's not perfectly symmetrical, but  
18 it's perhaps another way of phrasing it, it's the other  
19 side of the coin?

20 A. No, I don't accept that characterisation. I fully  
21 accept the undisputed fact that North West Water were  
22 trying to use Albion as leverage to get a better deal on  
23 the bulk supply that they were providing to Dwr Cymru.  
24 That is beyond doubt. It's certainly not symmetrical in  
25 the sense that some two or three years later they were

1 still trying to get Welsh Water to agree to a price of  
2 up to 9p. So there are some clear asymmetries.

3 Q. Now, Mr Lees says at the bottom of the first page that  
4 he is attaching a first draft of what he feels  
5 an agreement should look like, and he says:

6 "This is the same first draft as submitted to  
7 Albion Water, suitably amended."

8 If we then look at the draft that he attaches --  
9 sorry, before going on to the draft, if we could look at  
10 the second page of the letter. He deals with the issue  
11 of price, and he refers to a meeting on 15 November. He  
12 says:

13 "You raised the question of the price NWW will  
14 charge under the terms of any bulk supply agreement.  
15 North West Water are still in the process of reviewing  
16 our LRMC (LRAIC) for resources, and the split of  
17 resources between abstraction and conveyance of raw  
18 water. I am not yet in a position to 'quote a firm  
19 price', but I am able to inform you that  
20 North West Water do not expect this price to exceed 9p  
21 per cubic metre. I will confirm the price to you as  
22 soon as I am able."

23 So that's what we see that they are saying to  
24 Dwr Cymru, and that's consistent, isn't it, with the  
25 position that you were in with North West Water at this



1 time, namely 15 January?

2 A. With the very obvious caveat that we had asked  
3 North West Water for a price in March 2000, some  
4 ten months earlier than this, and they were clearly  
5 still struggling to justify a price.

6 Q. There is no sense in which North West Water would have  
7 been expecting to have got better terms from Welsh Water  
8 than from you, is there, commercially?

9 A. Better terms, to charge Welsh Water more than they were  
10 prepared to charge us?

11 Q. Yes.

12 A. I think that's unlikely.

13 Q. Yes. Okay, if we could look, please, at page 806 of the  
14 attached draft contract. In common with the draft heads  
15 of terms that you produced, we see here under "Clause 9  
16 price" that the price will be adjusted by RPI?

17 A. We do see that, yes.

18 Q. Again reflecting what United Utilities were proposing to  
19 you at the same time?

20 A. I think with the -- and I don't know whether it's  
21 elsewhere in here, if you remember there was also  
22 a five-year review built into the suggestion with  
23 Albion.

24 Q. Yes.

25 A. That is an important consideration because I think, as

1           we all know in the industry, RPI is not a reliable  
2           long-term guide and has to be adjusted.

3       Q.   We will come back to the issue of RPI in due course.

4       A.   Good.

5       Q.   Just to complete the story as regards the other aspect  
6           of the negotiations going on at the same time from  
7           North West Water's point of view, if we could please go  
8           to tab 126, and we see here a letter again from Mr Lees,  
9           this time to Mr Paul Edwards?

10      A.   Yes.

11      Q.   On page 867, he is attaching a draft bulk supply  
12           agreement again.

13      A.   I am afraid my -- oh, 867, sorry, yes.

14      Q.   867, the first page.

15      A.   Yes.

16      Q.   Then over the page, 868, he says:

17                 "I will arrange that this letter is copied to both  
18           Albion Water and Ofwat so both parties are aware of the  
19           content."

20      A.   Yes.

21      Q.   Did you ever receive that letter?

22      A.   (Pause). I don't recall it.

23      Q.   What we see here, in any event, is again  
24           North West Water trying to take forward negotiations  
25           both with you and Dwr Cymru at the same time,

1 consistently with what we have seen already. Now,  
2 again, I understand subject to your caveats that you say  
3 you were in very different positions, but this is again  
4 consistent with that general approach that you  
5 understood North West Water were taking at the time?

6 A. I am not entirely clear, Mr Pickford, what is the  
7 question you want me to answer?

8 Q. You were aware, around this period, that  
9 North West Water was pursuing negotiations both with  
10 Dwr Cymru and with you?

11 A. At this stage, yes. This is --

12 Q. February 2001.

13 A. -- February. We certainly weren't aware that they had  
14 made the approach as early as November. We were very  
15 well aware that at that time North West Water were  
16 trying very hard to win the operational contract for the  
17 whole of Welsh Water's operations, and I can remember  
18 being somewhat concerned that there might be conflicts  
19 of interest within North West Water between their desire  
20 to win a very lucrative operational contract and the  
21 risk of upsetting Welsh Water by pressing them for more  
22 money from Heronbridge.

23 Q. Now, we have had a slight detour looking at what  
24 I described as the negotiations that were going on at  
25 the same time with North West Water; if we can go back



1           seeing before? Because during the break, this is  
2           tab 126, during the break, I have noticed a comment in  
3           there which I think is of particular importance, given  
4           my understanding of Dwr Cymru's arguments.

5           The second paragraph, which is headed -- page 1,  
6           second point attributed to me, on page 1 at 867, the  
7           very last sentence of that is, I think, an important  
8           one. The comments about pipe capacity were actually  
9           regarding downstream of the delivery point, which is not  
10          North West Water's concern. I think the point that  
11          needs to be made there is that we heard Mr Pickford  
12          yesterday eloquently talking about the need for  
13          reinforcement, and specifically reinforcement to the  
14          delivery point, the point at which the water passes from  
15          United Utilities' ownership into Dwr Cymru's  
16          Ashgrove System.

17          What North West Water are saying here, and I think  
18          there are two points that are important, is first of all  
19          the pipe has adequate capacity from United Utilities'  
20          point of view, and that's understandable, because it's  
21          a large pipe, and it would be very easy to pump more  
22          water through it.

23          The concern he expresses is about pipe capacity  
24          downstream of the delivery point, in other words the  
25          remainder of the Ashgrove System that's in Welsh Water's

1 ownership. It's something that startled me a little  
2 when Welsh Water introduced this argument that there  
3 would need to be reinforcement of the system to  
4 accommodate the full 36 megalitres plus 22 megalitres,  
5 if you remember that argument.

6 There was little doubt that with a little bit more  
7 pumping we could get the water out of Heronbridge, but  
8 of course the rest of the Ashgrove System cannot cope  
9 with that amount of water, and that begs a peculiar  
10 question because --

11 THE CHAIRMAN: You are drawing our attention to that  
12 sentence, which you say is relevant to a different  
13 point, which is the point about the augmentation of the  
14 system, which is another aspect of the counterfactual.

15 A. I am grateful.

16 THE CHAIRMAN: No doubt someone will take us back to that in  
17 due course in its proper place.

18 MR PICKFORD: Madam, we will come back to it. My intention  
19 is to go issue by issue, because there are so many  
20 issues in this case, if I try to do it chronologically,  
21 I think everyone would effectively have to give up.

22 A. I apologise, Mr Pickford.

23 THE CHAIRMAN: Let's carry on with where you were.

24 MR PICKFORD: So we are back considering the issue of your  
25 negotiations with United Utilities.

1 A. Yes.

2 Q. Issues of price.

3 A. Yes.

4 Q. If we could go, please, to tab 115 in bundle 4. We have  
5 here a document entitled "Heads of Agreement". Do you  
6 see that?

7 A. Yes, I do.

8 Q. It's dated on the bottom right-hand corner,  
9 19 January 2001; you see that?

10 A. Yes, I do.

11 Q. Are you aware that this is a document that Albion  
12 disclosed?

13 A. To be honest, I had forgotten who disclosed it.

14 Q. Now, you see on the bottom left-hand corner it says  
15 "Version"; do you see that?

16 A. Yes, I do.

17 Q. And the version is "Enviro-Logic Heads of Agreement"; do  
18 you see that?

19 A. Yes, I do.

20 Q. So this is likely to be your draft?

21 A. No, not at all, no. If we are filing a document, we  
22 wouldn't call it Enviro-Logic, all our documents would  
23 be called that and it would lead to confusion. We would  
24 use logically North West Water or something like that.  
25 This is definitely a North West Water draft.

1 Q. Okay. Let's go to clause 9, please, which covers the  
2 financial relationship. You will recall we went to  
3 clause 6 previously of your version and things have now  
4 moved on, and we are in clause 9 --

5 A. Yes.

6 Q. -- of the version of 19 January.

7 Now, if you could read, please, clause 9. I imagine  
8 you are fairly familiar with this already, but just  
9 refresh your memory.

10 A. Yes, I am.

11 (Pause)

12 Q. So we see in relation to clause 9.2 that the unit price  
13 at this stage is still yet to be agreed?

14 A. We do.

15 Q. In clause 9.3 what we see is that it has been agreed,  
16 however, that the price would be based on  
17 North West Water's long run marginal costs.

18 A. I see that that's what is written here, but this isn't  
19 an agreed document, it's a draft document.

20 Q. We will come on to that. The price is indicated to be  
21 indexed in line with RPI?

22 A. Yes, I see that.

23 Q. This is the document that you rely upon in clause 9.1 as  
24 evidencing the benefit share between yourselves and  
25 North West Water; that's correct, isn't it?



- 1 A. That is correct, yes.
- 2 Q. Now, the next series of --
- 3 A. I am sorry to interrupt you, Mr Pickford, but I think it  
4 also harks back to an earlier document that you took me  
5 to, which has a similar formula in, unless I am  
6 confusing the issue.
- 7 Q. I took you to an earlier document which was your  
8 version, where we saw clause 6 of an earlier agreement  
9 that you provided, that you accepted was your version of  
10 the heads of terms.
- 11 A. Then maybe I am confused. Sorry, carry on.
- 12 Q. Okay, so the next series of events we have is when  
13 John Lafon comes back to you with the promised output of  
14 the LRMC work, and that starts with a chain of emails  
15 that we can find at tab 136.
- 16 In common with many email chains, we have to go to  
17 the end and work backwards, moving up through the  
18 document.
- 19 A. Yes.
- 20 Q. So what we see first is something from you to  
21 John Lafon, it's addressed as if it is a letter, but  
22 it's actually sent by email.
- 23 A. Yes.
- 24 Q. It's 7 February 2001. What you are saying to Mr Lafon  
25 is that you:

1            "... wrote ... on 8th March 2000 formally seeking  
2            an alternative supply arrangement for our customer  
3            Shotton Paper. The price range discussed and agreed by  
4            both parties at subsequent meetings reflected a            significant  
5            increase in the equivalent price charged to Dwr Cymru.

6            On a number of occasions over the last 11 months I have  
7            sought and received confirmation that North West Water  
8            were negotiating in good faith. I am concerned to learn  
9            that you may be considering a unilateral increase in the  
10           bulk supply price offered. Our views are such that  
11           a move would run counter to competition law and  
12           regulatory guidance ..."

13           That's a correct -- you are offering a correct  
14           assessment of your view of the negotiations at that  
15           point, aren't you?

16           A. I am, yes. Yes, I was clearly unhappy.

17           Q. You go on to say you will:

18           "... seek clarification of North West Water's  
19           position in this matter."

20           And you also say that:

21           "If you are prepared to stand by the agreement  
22           freely entered into, I would like to receive  
23           a countersigned heads of agreement plus a cheque in  
24           settlement of the agreed initial payment as a sign of  
25           that continuing good faith."



1 A. Yes.

2 Q. Now, you are not contesting the accuracy of anything  
3 that he said in his email to you of 8 February, are you?

4 A. I am not contesting the accuracy? I am saying to him,  
5 in no uncertain terms, that we need to understand how  
6 those figures have been derived.

7 Q. What you are, subject to that point, not suggesting to  
8 him is that he is being misleading about things that you  
9 already know about; so obviously there are things that  
10 you don't know about, you want to find out about, what  
11 goes into his price, but in terms of the negotiations  
12 that have been going on between you at this point, there  
13 is no suggestion in your response that he is being  
14 misleading? As an example, you don't turn around and  
15 say, "I thought we had a deal at 8p", for example.  
16 I think you would agree with that?

17 A. I did not say that, at that time. I would have  
18 expected, and indeed it's a very clear and specific  
19 requirement of section 40 of the Water Industry Act, and  
20 of all the various Ofwat's guidance notes that you and  
21 Mr Sharpe helpfully took us to in the last couple of  
22 days; that these pricing signals are well documented and  
23 capable of robust challenge, and that's what I was  
24 seeking. I was seeking an understanding of how this 3p  
25 figure, in an area that we and North West knew had

1 plenty of spare resources, could suddenly turn into  
2 a 12.1 long run marginal cost. Not an unreasonable  
3 position for us to take, I would suggest.

4 Q. Now, as regards your reaction to the offer that Mr Lafon  
5 was making to you in this email, you were not prepared  
6 to accept either alternative, were you, either the  
7 conditional offer at 9p or the unconditional offer at  
8 12.1p?

9 A. The use of conditionality in an offer like that runs  
10 entirely counter to prevailing sectoral legislation, and  
11 of course counter to -- and I notice the email chain  
12 finishes on 1 March 2001, first anniversary of the  
13 coming into effect of the Competition Act.

14 So I failed to see then, and fail to see now, how  
15 an entity in a dominant position could make it  
16 a condition, of what was potentially an abusive price,  
17 that we weren't allowed to challenge the abusive nature  
18 of that price.

19 So the short answer is: no, we would not have  
20 accepted that sort of conditionality.

21 Q. Likewise, you would not have accepted and you did not  
22 accept the 12.1p price?

23 A. No, we did not. We neither accepted nor rejected any  
24 price, but we made it very clear -- and we were not in  
25 a position to do so, because, as you are all too well

1           aware, we did not, at that point, have an access price.  
2           We had an indicative access price of about 20p, which  
3           would have made the whole exercise somewhat academic  
4           anyway, given that we were currently paying 26p, and we  
5           needed to understand the genesis of these figures that  
6           had suddenly materialised and were being represented as  
7           detailed long run marginal cost calculations of the  
8           Heronbridge source.

9       Q.    You have just been explaining, and you explained  
10           earlier, how you say that common carriage was key, and  
11           that was what prohibited you from accepting anything in  
12           relation to bulk supply?

13       A.   The access price of course is key, and it was -- goes  
14           back to the very origins of our discussions with  
15           North West Water. We need the access price before we  
16           can identify the benefits, before we can identify what's  
17           available to share with Shotton Paper and with  
18           North West Water.

19       Q.    Now, I put it to you previously that in fact there was  
20           a reciprocity in that, or rather a circularity, that the  
21           access was conditional upon the bulk supply and vice  
22           versa. You disagree with that?

23       A.    I did disagree with it, and I continue to disagree with  
24           it.

25       Q.    If we could go, please, to folder 4, tab 116. You see

1 here a meeting note from Dave Holton sent to  
2 Julie Griffiths at Ofwat and copied to various others.  
3 The subject matter is, "The tripartite meeting between  
4 Enviro-Logic and North West Water".

5 You have seen this meeting note, haven't you?

6 A. Yes, and Welsh Water and Dwr Cymru, yes.

7 Q. Yes, and if you could go, please, to the first page,  
8 where it's recorded where the meeting was and who was  
9 there, you see it was 16 January 2001, and on your  
10 behalf we had Malcolm Jeffery and Roddy Monroe?

11 A. Yes.

12 Q. Now, JL, that's John~Lees, is recorded as saying:

13 "The meeting is to raise the issues surrounding the  
14 common carriage application by ELL to DCC and the bulk  
15 supply application by ELL to North West Water."

16 He goes on to say:

17 "Particularly as there is a circularity with the CC  
18 being conditional on the BS and the BS being conditional  
19 on the CC. However, if we all worked together these obstacles should  
20 be overcome. All parties echoed this."

21 So this is recording that Albion's position at this  
22 time, at least in the view of Malcolm Jeffery and  
23 Roddy Monroe, was that there was a circularity as  
24 described.

25 A. I wasn't at that meeting, as you will see. What I have

1 explained to you is my involvement in the negotiations  
2 up to that point, and the very clear understanding --  
3 and it makes sense from a commercial point of view --  
4 that given that we had two limbs of this exercise, the  
5 first and the critical limb, and it was recognised by  
6 North West Water as well in those early negotiations,  
7 was we had to get the access price. Only then would we  
8 be in a position to know whether we were wasting our  
9 time or what sort of bulk supply price was viable.

10 Q. Now, UU's unconditional price to you was 12.1p per metre  
11 cubed?

12 A. It was.

13 Q. That's around 9p higher than your view; what you have  
14 advanced in these proceedings as, you say, the price  
15 that you should in fact have been getting?

16 A. That was -- 9.1 is higher -- 0.1p higher, more or less,  
17 than the prevailing price to Dwr Cymru.

18 Q. Yes.

19 Now, at 23.2p, which was the first access price --

20 A. Yes.

21 Q. -- that is in fact less than 9p above the 14.4p that  
22 you say you would have accepted?

23 A. Yes, it is.

24 Q. So we can actually see that the, in terms of the  
25 difference between what was being offered and where you



1 thought you should go, the bulk supply was at least as  
2 important as the common carriage?

3 A. I think you are trying to draw conclusions where none  
4 can safely be drawn. Could you rephrase that question  
5 so that I can understand a little bit better what you  
6 are trying to ask me? There is a point of fact, which  
7 is that the difference between 14.4 and 26p, which is  
8 the prevailing price, leaves --

9 Q. Just under 9, it's 8.8.

10 A. No, the difference between 14.4, as a non-abusive access  
11 price, and the prevailing retail price to Shotton Paper,  
12 which is 26p, gives us, what, 11-point -- my mind has  
13 gone blank, 11.8. Whatever it is. You are then  
14 subtracting the 3p from that, are you?

15 Q. No, I am saying: let's look at what you say in these  
16 proceedings is what ultimately would have been agreed  
17 with UU, which is a price around 3p per metre cubed,  
18 it's whatever Dwr Cymru were paying; yes?

19 A. Right, yes.

20 Q. Let's look at the difference between that and what, on  
21 an unconditional basis, UU actually offered you, which  
22 was 12.1p.

23 A. Right.

24 Q. So we see that, in terms of their unconditional offer,  
25 they were out by a factor of -- by 9p as far as you are

1           concerned in terms of the price that --

2       A.   Yes.

3       Q.   -- you are now telling us that you feel it should have

4           been getting?

5       A.   It was 9p more than the prevailing price.

6       Q.   Way out?

7       A.   Yes.

8       Q.   Okay, so that's the first sum.  The next sum is: let's

9           look at the price that Dwr Cymru ultimately offered you,

10          which was 23.2p.

11       A.   Yes.

12       Q.   And compare that to a price which your counsel advances

13          as a lawful price, which is 14.4p, and that's the price

14          on which your calculations --

15       A.   This was the offer price that Dwr Cymru made to us in

16          November 2008?

17       Q.   Yes.

18       A.   Yes.

19       Q.   Insofar, again, as we are comparing reality to what was

20          actually happening at the time with what you now say is

21          the price which should have been ultimately agreed, that

22          was actually less than 9p out, it was close, it was just

23          a little less than 9p too much?

24       THE CHAIRMAN:  I don't follow that question.  You are saying

25          that what, the difference between 14.4p and 23.2p --

1 MR PICKFORD: Is just under 9p.

2 THE CHAIRMAN: Yes.

3 MR PICKFORD: And that's the difference between -- again,  
4 it's the same two variables -- what was actually being  
5 offered in actuality in 2001 and what Dr Bryan says  
6 should have been offered, had everything proceeded  
7 lawfully.

8 A. I am not sure of the point you are trying to make,  
9 Mr Pickford, on this.

10 THE CHAIRMAN: What's the question?

11 MR PICKFORD: I am saying that in both cases they were about  
12 9p out; that the price that was being offered to him was  
13 9p more than the price that he now says he should have  
14 been getting.

15 THE CHAIRMAN: Oh, I see, so you are just -- so you are not  
16 looking -- in your second sum comparing the 23.2p with  
17 the 14.4p, you are not looking at a UU price, you are  
18 just looking at two Dŵr Cymruprices.

19 MR PICKFORD: We are analysing a statement from Dr Bryan  
20 where Dr Bryan says -- I'll put the question.

21 You have said that the common carriage element was  
22 the critical bit here, and that was always the number  
23 one priority and then bulk supply comes afterwards.  
24 What I am putting to you --

25 A. Can I correct that? I'm not saying that bulk supply

1           isn't critical, of course it is, but I am saying that in  
2           terms of the inescapable logic of the commercial  
3           processes with which we were engaged, we had to have the  
4           bulk supply price. Sorry, I will correct that. We had  
5           to have the common carriage price first, before we were  
6           in any position to judge what was workable as a bulk  
7           supply price, given our starting point, which was  
8           an implicit assumption that if we could reach  
9           a negotiated agreement with North West, it would give  
10          them and us a commercial benefit from that agreement,  
11          from that arrangement.

12        Q. The point that I am putting to you is: when one compares  
13          what was actually on the table in 2001, from each of  
14          those respective parties --

15        A. Yes.

16        Q. -- it was, in each case, about 9p away from what you  
17          are now telling the Tribunal is the price that you  
18          should have received.

19        A. Well, you are making a statement of fact with which I am  
20          bound to agree, because the maths is there.

21        Q. Yes. So both, in practical terms, are equally important  
22          to the price, to the ultimate deal?

23        A. I am more than content to agree that both elements are  
24          equally important to the final result, but that does not  
25          detract from my point, which was: we had to have the

1           bulk supply price before --

2       THE CHAIRMAN: You had to have a common carriage --

3       A. Sorry, I do apologise, Madam Chairman.

4       THE CHAIRMAN: It's going to be even more confusing,

5           Dr Bryan.

6       A. I do apologise. We had to have a common carriage price,

7           we had to have an access price. Only then, and I think

8           this is an important point, only then could we

9           constructively re-engage with United Utilities -- but

10          I would suggest to you a very much higher level than

11          those who were involved since my early discussions at

12          deputy managing director level -- to see whether a deal

13          could be struck.

14       MR PICKFORD: Okay, let's look back at folder 4, tab 115.

15          This is the heads of agreement we were look at a little

16          while previously.

17                If you go back, please, to clause 9, which is the

18          financial relationship. Do you have that again?

19       A. I do.

20       Q. You had nothing to lose from signing up with

21          North West Water under the terms of this financial

22          relationship, even ahead of knowing what the common

23          carriage price was, because what happened under clause 1

24          is you got £25,000, but thereafter, if there was no deal

25          put in place for you to supply Shotton via common

1 carriage, there were no financial obligations on you  
2 under this agreement?

3 A. £25,000, if I can remind you, is three days' bulk supply  
4 price from Dwr Cymru. That was the cost -- that was how  
5 much we were paying out every three days. It needs to  
6 be seen in that context.

7 Q. What I am saying is there was no downside to you from  
8 signing this agreement, because on the plus side you get  
9 £25,000, and if you don't manage to sign a common  
10 carriage agreement with Dwr Cymru, you just walk away  
11 with £25,000?

12 A. £25,000 was wholly inadequate for the venture on which  
13 we were embarked. This was about overturning what we  
14 saw as excessive profits and recovering some of those  
15 profits for the benefit of our customer, Shotton Paper,  
16 and some for the benefit of Albion. And £25,000 was not  
17 a sufficient incentive to compromise our position, as  
18 I suggest to you we would have done, particularly if the  
19 price for that £25,000 was to waive any rights to  
20 criticise or to subject that price to remedy under  
21 either the water industry legislation or the  
22 Competition Act.

23 Q. Turn to --

24 THE CHAIRMAN: Sorry, I hadn't really understood that from  
25 this heads of agreement before. Are you saying,

1 Mr Pickford, and are you agreeing, Dr Bryan, that this  
2 agreement does not oblige Albion Water to buy any water  
3 from North West Water unless and until the common  
4 carriage arrangement is operational, but it does oblige  
5 them to pay --

6 MR PICKFORD: Sorry, "them" being?

7 THE CHAIRMAN: That once the agreement does come into life,  
8 the payment for that water is at whatever figure is put  
9 in here?

10 MR PICKFORD: That's correct. For the Tribunal's benefit,  
11 I'm very happy to put the point again so it's clear on  
12 the transcript what I am saying and what I understand  
13 Dr Bryan to be saying.

14 THE CHAIRMAN: In this --

15 MR PICKFORD: Clause 9.2.

16 THE CHAIRMAN: Yes, but where does it actually say what the  
17 price of the water is?

18 MR PICKFORD: It doesn't. At this stage the price has yet  
19 to be agreed. So in clause 9.2, one of the key bits  
20 that is missing is what the actual number is going to  
21 be.

22 THE CHAIRMAN: Yes.

23 MR PICKFORD: What it does say is:

24 "The unit price to be agreed between the parties..."

25 THE CHAIRMAN: Yes.

1 MR PICKFORD: You are following that, Dr Bryan?

2 A. Yes.

3 Q. "... in respect of water supplied by NWW to Albion under  
4 this agreement."

5 Then there is a requirement to pay. So what's clear  
6 from this is that if no water was supplied to you, then  
7 there would be no obligation on you to pay?

8 A. Yes.

9 Q. What is equally clear, and I hear what you have said  
10 about £25,000 being in your view totally inadequate  
11 given what you were hoping to achieve in this market,  
12 but just so we are clear about the operation of the  
13 agreement, the strict factual point, what you did get on  
14 signing the agreement was £25,000, and that was payable  
15 to you from North West Water?

16 A. That is the intent, yes.

17 MR LANDERS: Can I just clarify: does it also mean that you  
18 were committed to buying water at the long run marginal  
19 cost in 9.3? Have I read the contract properly, that if  
20 you sign it you are committing to buying at 9.2, a unit  
21 price to be agreed, and then 9.3 that unit price to be  
22 based on long range?

23 A. That is the implications of this. I think, though, that  
24 it was -- it's certainly clear to me right from the  
25 start that long run marginal cost was a wonderful



1           construct that could be used to justify prices that were  
2           significantly in excess of accounting costs, and here we  
3           have the situation where the accounting costs appear to  
4           be agreed as 3p. To justify -- and that is the --  
5           certainly in my view -- proper interpretation of  
6           section 40A, particularly subsection (vii), of the  
7           Water Industry Act, which talks about the provider of  
8           the bulk supply recovering the costs entailed in the  
9           provision of that supply. That points me towards  
10          accounting costs.

11           I think if you are going to try and justify a higher  
12          price, then you have to find a way of leaving accounting  
13          costs behind, and long run marginal costs are a very  
14          useful way of doing that. Unfortunately, and it's  
15          noticeable that over the decade long run marginal costs  
16          have, I won't say disappeared, that's not true because  
17          they are important where resource zones are genuinely  
18          constrained, and it would be foolhardy not to send the  
19          right price signals in such circumstances.

20           However, price signals cannot possibly work if there  
21          is an excess of water in a particular zone, and I think  
22          we were -- I know from my point of view I viewed the  
23          long run marginal cost figure, the quotation of long run  
24          marginal cost, as a bit of a figleaf that would be  
25          useful to justify a price agreed by parties that

1           actually felt -- was higher than the accounting cost.

2       MR PICKFORD: We will come back to this point, but just so  
3           I am clear and whilst we are here, there is no sense in  
4           which the 3p per cubic metre price was an LRMC price,  
5           was there?

6       A. Yes, very much so. I suspect, in strict -- and  
7           I started by saying I am not an economist, but I have  
8           read John Kay's paper on the LRMC that's quoted in,  
9           I think, MD 123. And it's very clear from that that, in  
10          situations where there is an excess of supply, then the  
11          LRMC tends to zero, strictly speaking tends to marginal  
12          cost, and we already know from the evidence that  
13          Mr Sharpe took us to on the first day that the marginal  
14          cost of the Heronbridge supply was the pumping cost, the  
15          electricity cost that was consumed. All other costs  
16          were fixed. So a true LRMC for Heronbridge would be  
17          0.7p on that basis.

18       Q. We will come back to that. I picked up on that because  
19          I thought it was relevant, but it's another topic, so  
20          thank you.

21       A. I hope that's helpful.

22       Q. Just to complete the picture here, so that everyone is  
23          clear about the operation of the agreement, I think we  
24          were actually in agreement, but so it's clear for the  
25          transcript as well. In addition to £25,000 that you

1           were being paid on signing, even if you hadn't taken any  
2           water yourself to pass on to Shotton, you could  
3           potentially also have earned a further reward if the  
4           agreement that North West Water had with Dwr Cymru had  
5           been renegotiated. That's under the next part of 9.1,  
6           that's 9.1(b) and 9.1(c).

7           A. Yes.

8           Q. So again, just to come back to the point I put to you  
9           before, you have explained why you say that the rewards  
10          that you get under this agreement, if you didn't  
11          actually make the supply, were entirely inadequate given  
12          what you were hoping to make out of the supply, and  
13          I understand that. My point is a very simple one, which  
14          is that nonetheless there was nothing to lose by signing  
15          up, as long as you weren't prejudicing your rights to be  
16          able to challenge the price that you had agreed.

17          A. There was a great deal to be lost, Mr Pickford, in  
18          commercial terms. If we sign up to an agreement saying  
19          we will pay 9p and recognise it as the long run marginal  
20          cost, then our hope of going to Ofwat and asking them to  
21          do a section 40A determination vanishes.

22          Q. If you didn't recognise it as LRMC you signed up at  
23          12.1p --

24          A. That's not what the agreement says.

25          Q. Sorry --

1 A. The agreement --

2 THE CHAIRMAN: What is it that you are positing; that he  
3 would sign up to this at 12.1p?

4 MR PICKFORD: No, what I am positing is that there was  
5 nothing to lose in terms of -- I think we have gone  
6 there, I think I can move on. We have the answer.

7 THE CHAIRMAN: Yes. Nothing to lose if he signed up to this  
8 agreement with what price as the long run marginal cost?

9 MR PICKFORD: We have Dr Bryan's answer, which is that he  
10 says he would not have signed up, because he would be  
11 accepting whatever the price was was LRMC, and that's  
12 sufficient for my purposes. So I think there is nothing  
13 further that I need to put in relation to it.

14 THE CHAIRMAN: Okay.

15 MR PICKFORD: If we could go, please, to folder 9A, and it  
16 may be just worth keeping folder 4 open at tab 115,  
17 these are some of the added documents so they are not  
18 strictly in chronological order. If we go to tab 358,  
19 please, page 3294BBB.

20 A. Did you say BBB?

21 Q. It should be the last page in that tab, right at the end  
22 of the, bundle, assuming our bundles are the same.  
23 Bundle 9A.

24 A. I have it.

25 Q. It's a letter on the Albion headed notepaper.

- 1 A. It is.
- 2 Q. It's date stamped, it's quite difficult to read,  
3 30 January 2001?
- 4 A. 2001.
- 5 Q. What you say is -- sorry, what Malcolm Jeffery says is:  
6 "As arranged, please find enclosed two copies of the  
7 heads of agreement duly signed. If you are content with  
8 the document, please return a countersigned copy to me.  
9 If you need to make any further modifications or need  
10 any clarification, please let me know."
- 11 Now, we saw the heads of agreement dated  
12 19 January 2001, so that would have been 11 days  
13 earlier, and there is no later version of the heads of  
14 agreement that you have disclosed, is there, in these  
15 proceedings?
- 16 A. No. Not that I am aware of.
- 17 Q. So we can infer that the document Mr Jeffery was  
18 enclosing was likely to be materially the same as the  
19 heads of agreement that we have just been looking at?
- 20 A. I honestly can't remember. We have not been able to  
21 find any such document, and it's not been disclosed by  
22 Dwr Cymru. I genuinely don't know.
- 23 MR SHARPE: Madam Chairman, forgive me for interrupting, but  
24 I heard my friend say the heads of agreement dated  
25 19 January.

1 MR PICKFORD: We have already gone over that issue.

2 MR SHARPE: No, I think on a point of information, if we are  
3 talking here about bundle 4, tab 115, which I think we  
4 are, and I think I alluded to this in my opening, there  
5 are two dates at the bottom. One date is  
6 19 January 2001, which I think I said in opening was the  
7 date at which the document had been printed. But you  
8 see on the left "Date produced: 8 November 2000".

9 MR PICKFORD: Madam, we have had Dr Bryan's evidence on  
10 this. If there are questions to be put in  
11 re-examination ...

12 MR SHARPE: Of course it can, but ...

13 THE CHAIRMAN: What you are saying is, you are putting to  
14 him that this letter seems to have been sent, it  
15 enclosed two copies of the heads of agreement, and you  
16 are saying that the likelihood is that what was attached  
17 to this document was the heads of agreement that we were  
18 just looking at?

19 MR PICKFORD: I am saying that obviously we don't know,  
20 because there are gaps in the evidential record. What  
21 we don't have is what was actually attached to this  
22 letter, so yes, I am suggesting that, given all that we  
23 know, the most likely thing is that the heads of  
24 agreement were attached, or rather these heads of  
25 agreement or ones that were in materially the same

1 terms, because we haven't seen any other requirements,  
2 or in different terms. Sorry, when I say "these heads  
3 of agreement", I mean the ones we were looking at at  
4 tab 115.

5 A. I am trying to be helpful. The honest answer is I don't  
6 know. This was a very difficult time for us, we were  
7 pressing Welsh Water for an access price, we had been  
8 given one, as you know, an indicative one of 20 by this  
9 time. I can't remember. What I can say, very clearly,  
10 is the process of negotiation with UU was not complete,  
11 and it would have been our intention -- and you can see  
12 that from all that we have done before and since -- to  
13 press for the information that we clearly sought. And  
14 those emails are either contemporaneous or postdate  
15 this, I can't remember now, and we would have argued  
16 very strongly for either a agreed price, a negotiated  
17 price that worked in the light of a non-abusive access  
18 price or, in the absence of a satisfactory negotiated  
19 price, a decision to pursue the matter either under  
20 section 40A or as a potential Competition Act complaint  
21 under chapter 2.

22 That's the reality of the commercial position that  
23 we were in at that time.

24 Q. What we can infer from the letter that's date stamped  
25 13 January 2001 is that as regards the matters that were

1           addressed in the heads of agreement -- and obviously  
2           that excluded critical issues such as price, but as  
3           regards those matters, you believed that you had come to  
4           an agreement with North West Water at that stage,  
5           because you had signed something and sent it back to  
6           them?

7           A. We signed something and sent it back, and indeed that  
8           email trail you took me to before -- the one where  
9           I think it's reasonable to infer that there was  
10          a certain amount of high dudgeon in my tone -- put it to  
11          UU that they should sign up and pay up as an indication  
12          of their good faith.

13          Q. So you agree with the point that I just put to you?

14          A. That is what that email said. What I do not know is  
15          what was in that document. What I do know for sure is  
16          that, whatever we signed, we would not have given away  
17          or weakened our rights to determination of a price under  
18          section 40 or the Competition Act. We had not at that  
19          time, and have still not seen any justification for any  
20          of the prices that have been put forward, and UU never  
21          responded, never signed the agreement that is indicated  
22          in that letter date stamped the 30th, and certainly  
23          never paid any money.

24          THE CHAIRMAN: But did you expect that if they signed this  
25          heads of agreement that you were sending, then the first



1           £25,000 would become payable, even if you hadn't agreed  
2           the unit price?

3       A. Yes, Madam. If you go back to that email chain that  
4       Mr Pickford took me to earlier, you will see I say,  
5       "Sign the agreement and pay us the money as  
6       an indication of your good faith", and neither of those  
7       things happened.

8       MR PICKFORD: Now, both the heads of agreement we have just  
9       been discussing and the earlier draft that I took you to  
10       this morning, you recall they both had indexation at  
11       RPI, didn't they?

12      A. They did.

13      Q. Had you done a deal with United Utilities, it would have  
14       contained indexation at RPI?

15      A. That is the likelihood. There are other formulations  
16       that we might have employed, not least direct cost  
17       recovery of the sort that applied to Dwr Cymru, but yes.  
18       One way or another, we would have agreed terms and, as  
19       I showed you before, within that indexation provision  
20       was a five yearly review, and parallel to what happens  
21       with Ofwat.

22      Q. In the folder 4, tab 115 version, which is the second  
23       version of the heads of agreement we have, if you would  
24       like to look at that, there is no five yearly review of  
25       the indexation arrangements, is there?

1 A. No.

2 Q. This was superceding the earlier draft terms?

3 A. It's a later one, yes.

4 Q. So we can assume that if there was an agreement that was  
5 sent back, it was more likely to contain terms akin to  
6 those in 9.3 of this agreement rather than clause 6 of  
7 the early agreement?

8 A. I don't think we can rely on that. I think because five  
9 yearly reviews are, have been a feature of the water  
10 industry ever since privatisation in 1989, it is  
11 a sensible period with which to review matters which are  
12 essentially uncertain, for example long run marginal  
13 cost issues. If a new water resource is needed, it's  
14 not something which is necessarily going to be captured  
15 by something as crude as RPI, and it's interesting to  
16 note that recently Ofwat has indicated that it's likely  
17 to move away from RPI because it is a domestic index,  
18 not an industrial one.

19 Q. Okay. If we could go, please, to your witness  
20 statement, which is in folder 1, tab 4, and if you could  
21 go, please, to page 62, you say here in paragraph 161  
22 that in June 1999 you were having:

23 "... discussions with United Utilities about their  
24 willingness to provide a bulk supply of raw water from  
25 Heronbridge directly to Albion and about the value they

1 placed upon that water. They confirmed, as I reported  
2 to Albion's board, that they were interested in making  
3 a bulk supply to us directly and that they did not value  
4 the water since they had surplus resources in that  
5 supply area for the foreseeable future."

6 Then you refer to an exhibit which we are going to  
7 come on to in a moment, which has moved place.

8 A. Mm.

9 Q. You go on to say:

10 "From my discussions with United Utilities over the  
11 last ten years including in the last few months, it has  
12 remained the position throughout that United Utilities  
13 has surplus water resources in the relevant area and  
14 expects to have in the foreseeable future."

15 So that's your understanding? That's in the second  
16 half of paragraph 162.

17 A. Yes. Yes, that is true.

18 Q. So the document, and the only document which is  
19 emanating from United Utilities that you rely on in  
20 support of that proposition that it doesn't place any  
21 value on the water, is a meeting note which we find now  
22 at tab 25 of bundle 2. So we see under the "Purpose of  
23 meeting":

24 "... to discuss the possibility of North West Water  
25 supplying Enviro-Logic direct with Dee water to supply

1 Shotton Paper or [as the alternative] for  
2 North West Water to provide finance in some way to  
3 assist EL in developing an alternative source."

4 That correctly records the purpose of the meeting,  
5 as far as you were concerned?

6 A. Yes.

7 Q. Then we see, in the first bullet point under 2, that:

8 "WJ [that would be Wendy Johnson] stated that NWW  
9 have no requirement for additional supplies from the Dee  
10 catchment and there was unlikely to be any financial  
11 benefit which NWW could share if the Dee source were  
12 replaced as the supply to Shotton Paper by  
13 an alternative source."

14 This is the point you rely upon for the point that  
15 you make in your witness statement, isn't it?

16 A. Not solely, but that's certainly the admission that  
17 drove our early thinking.

18 Q. It's the only document emanating from United Utilities,  
19 North West Water as it then was, that you rely upon for  
20 that proposition?

21 A. Well, let me -- it's certainly a useful proposition. We  
22 didn't see this document until it was disclosed, and  
23 I don't know when it was disclosed. We certainly relied  
24 upon my contemporaneous notes or memory of that, which  
25 I reported to the board, as you have already taken us

1 to, but we didn't see this until later. So that's two  
2 sources of information, and then of course there are the  
3 water resource management plans and various other  
4 documents that are in the public domain.

5 Q. So what's going on in this meeting is, one of the issues  
6 on the table is the idea of North West Water providing  
7 finance to help Enviro-Logic develop an alternative  
8 source of supply to Shotton. That's the "or", that's  
9 the second part of what was under discussion?

10 A. Yes.

11 Q. So to justify, to try and persuade United Utilities to  
12 help you out in this regard, to provide the finance --

13 A. Yes.

14 Q. -- you are asking them whether there would be any  
15 financial benefit for them in which you could share if  
16 you managed to achieve an alternative source?

17 A. Yes.

18 Q. What North West Water are telling you in relation to  
19 that part of the debate is that there is no such benefit  
20 for them in achieving an alternative source because they  
21 don't have that requirement for additional supplies in  
22 the Dee catchment area. That's what Wendy Johnson was  
23 saying?

24 A. Yes.

25 Q. So she is trying to steer you away from the second

1 proposition --

2 A. Can I say she doesn't say "currently", she doesn't time  
3 limit that observation.

4 Q. She doesn't actually say in this note we don't -- it's  
5 neither time limited nor clear what period it is in  
6 relation to.

7 A. No, she doesn't but she certainly doesn't say currently;  
8 she doesn't imply that there may be a future need.

9 Q. Now, what she is doing here is she is steering you  
10 towards the alternative option which is on the table  
11 here, which is rather than you developing an alternative  
12 source and then helping you out with that, you taking  
13 the water that they themselves extract from the Dee,  
14 which is the first part of what was on the table.

15 A. Yes, I think the direct bulk supply from North West was  
16 our preferred option. No-one voluntarily sets about  
17 a huge civil engineering project or a substantial civil  
18 engineering project when there are a perfectly  
19 serviceable assets already there. That would be  
20 wasteful, inefficient and environmentally unsound, and  
21 we don't support any of those -- any actions which lead  
22 to that.

23 So very much the emphasis was on the bulk supply.

24 Q. That's right, and of course we have already discussed  
25 and we have gone over the fact that from

1 North West Water's perspective what it was most keen on  
2 was getting a better supply price at Heronbridge?

3 A. That would appear to be -- yes, that confirms my own  
4 view.

5 Q. So they would have lost that opportunity to get a better  
6 supply price at Heronbridge if they went down the  
7 alternative route of developing a source and subsidising  
8 you to do it?

9 A. Yes, they would have had pretty much a stranded asset or  
10 at least partially stranded asset, yes.

11 Q. You were negotiating here with salespeople; that's  
12 correct, isn't it? Wendy Johnson, John Lees and  
13 Ken Hickman are part of the North West Water sales team?

14 A. I can't remember who the -- what their designations  
15 were, but I think to call anyone in the water company at  
16 that time "sales" was stretching the point. We are  
17 talking about monopoly providers who, they don't have to  
18 sell anything. Customers have little option but to  
19 purchase. What their designations were at the time, if  
20 I ever knew, I can't remember.

21 Q. As far as you are aware they were certainly not part of  
22 the water resource management team?

23 A. I don't know. I don't believe so. I think Ken Hickman  
24 was certainly an engineer, and people move around in  
25 water companies, and many engineers, certainly with

1 Ken Hickman's great experience, will have had  
2 significant water resources experience, I imagine, but  
3 I cannot confirm that for the Tribunal, I am afraid.

4 Q. I understand the qualification that you have just given,  
5 you don't know, but if they were not part of the water  
6 resources management team, they wouldn't necessarily be  
7 thinking about the most efficient means of dealing with  
8 managing UU's water resource strategy?

9 A. You are taking this out of the factual context, I am  
10 afraid. Our first meeting, as my witness statement  
11 makes clear, was with North West Water's deputy managing  
12 director. As a consequence of that meeting, he  
13 commissioned what I suspect was a very expensive report  
14 by Oxera, which is in the bundle. There was then  
15 a report by Tina Boulton to the North West Water board.  
16 This was a matter that was taken very seriously, and  
17 this discussion dated, it would appear, 7 July 1999 was  
18 part of a positioning exercise by North West that led to  
19 the Tina Boulton report, which if my memory is correct,  
20 was dated 2 September 1999.

21 So it needs to be seen in that context. These are  
22 people who were presumably told by very senior  
23 management in North West Water to develop the idea  
24 further.

25 Q. Now, if we could go, please, to tab 21 of bundle 2, and



1 to page 382A.

2 A. Yes.

3 Q. This is North West Water's water resource plan for  
4 March 1999.

5 A. It is, yes.

6 Q. Now, there are obviously some limits as to what I can  
7 ask you in relation to this document. However, you have  
8 obviously given some evidence, both today orally and  
9 also in your witness statement, touching on your views  
10 about whether there was excess capacity within United  
11 Utilities, and also your evidence about things like  
12 LRMC.

13 A. Yes.

14 Q. So it would be helpful for us to see what  
15 North West Water were saying about some of these times  
16 of issues.

17 A. Yes.

18 Q. If we could go, please, to firstly page 382L, I think it  
19 should be labelled, which is chapter 1, "Introduction".  
20 Do you have that?

21 A. Yes.

22 Q. We see the background there to this document is:

23 "The water resources plan provides a comprehensive  
24 statement of our available water supplies and demand for  
25 water, assesses the potential options available to

1 balance supply and demand to the year 2025, and  
2 indicates the company's strategy to achieve the required  
3 level of water supply security for our customers."

4 A. Mm.

5 Q. It's true, isn't it, that the water industry is one of  
6 the industries with the very longest planning horizons?

7 THE CHAIRMAN: Well, I don't see how he can answer that  
8 question. Does it have a long planning --

9 A. It has a schizophrenic approach to planning, Madam  
10 Chairman. It is required through documents like this to  
11 plan up to 25 years ahead. In reality it's constrained  
12 by a five-year cycle of reviews, and it's those  
13 five-year cycles which determine what it can actually  
14 invest in. So there are certain tensions which the  
15 industry, and Ofwat in particular, are well aware of.

16 MR PICKFORD: One of the planning issues that a large water  
17 company will have is that getting planning permission to  
18 build reservoirs and aqueducts and then carrying out  
19 those works can take a very long time.

20 A. It can.

21 Q. You have to plan many, many years in advance, beyond the  
22 five-year period?

23 A. That is true, for a major scheme that is absolutely  
24 right.

25 Q. Now, if you could please turn to page M, which is on the

1 facing side, what is said about the integrated zone  
2 there under "The integrated zone" is correct, isn't it?

3 A. It's not actually correct. I am being slightly  
4 pedantic, but it talks about "operated in a fully  
5 integrated manner"; that's not strictly true. There are  
6 significant limitations in the ability to transfer water  
7 from point A to point B, but it is true that as a zone  
8 there are connections within that zone that make it less  
9 vulnerable to water resource shortages than if those  
10 connections didn't exist. Yorkshire Water has taken  
11 similar actions following the drought in 1996.

12 Q. If we go back, please, to H, we see a description under  
13 "Initial supply/demand balance"?

14 A. Yes.

15 Q. "If leakage were to be maintained at the 1998/1999 level  
16 and no additional demand management measures were  
17 introduced, dry year demand for water, referred to as  
18 'baseline demand' would increase by 5 per cent across  
19 the region by 2025 with some significant local  
20 variations."

21 It goes on, skipping one paragraph, in relation to  
22 the integrated zone:

23 "Supplies to the integrated resource zone will be  
24 adequate in the short-term, but a deficiency would arise  
25 by 2010. Some distribution reinforcements to the supply

1 system would be necessary in the short-term."

2 So what North West Water are saying here is in  
3 relation to the integrated zone, of which the River Dee  
4 is part; that's correct?

5 A. It is, yes.

6 Q. They would in fact have a deficiency that would arise by  
7 2010 without certain measures being taken -- investment  
8 measures being taken.

9 A. Those were projections at the time, but you cannot  
10 lightly gloss over the caveat, "If leakage were to be  
11 maintained", because leakage was, by all accounts, very  
12 great. One of the characteristics of water resource  
13 planning, particularly over a 25-year period, is that  
14 the further out you go, the less certain you are. And  
15 that's particularly with the impact of climate change or  
16 climate uncertainty.

17 So what tends to happen, there are broadly three  
18 components in water resource planning. There is the  
19 amount of water that you are going to get out of your  
20 system, be it rivers or reservoirs, and certainly in the  
21 integrated zone three key resources, the Dee, which is  
22 about a third, the Lakes, which is about a third, and  
23 then Pennine sources which makes up the remaining third.  
24 So how, over 25 years, are those resources going to hold  
25 up?

1           Secondly, what's going to happen to demand?

2           Thirdly, how much uncertainty do we need to build  
3 into this? How much so-called headroom do we need to  
4 build in to make sure that the errors that are inherent  
5 in our first two estimates don't trip us up?

6           What you will tend to find, and I haven't checked  
7 with this, is that -- and the Oxera comments on this --  
8 demand was falling and had been falling for some  
9 appreciable time in the integrated zone. The assumption  
10 was that within this plan, if I am right, if my memory  
11 serves me right, and I am sure that I will be taken to  
12 it if I am wrong, but the presumption was that demand  
13 would continue to fall but then kick up.

14           It was also assumed that the water resource  
15 availability would fall, and correspondingly there was  
16 a significant increase in headroom, the safety measure,  
17 margin, towards the end of that plan.

18           So the reality that you speak about is that, yes, if  
19 all else equal there may have been some deficiency in  
20 the integrated zone, it was projected by 2010. Now,  
21 these plans, although they are dated 1999, are actually  
22 based on 1997/98 data, so they are already a little bit  
23 out of date. Of course the reality, if we look at what  
24 actually happened, is that demand has continued to fall,  
25 continued to fall, until the current day. Water

1 resource availability has not fallen as far as was  
2 expected, and leakage performance has improved  
3 dramatically, as well it should have done because it was  
4 appalling.

5 So today, the integrated zone has 300 megalitres  
6 a day more water available than it did using the this  
7 1999 report as a baseline. That's the reality, based on  
8 United Utilities' own figures.

9 You were struggling with megalitres right at the  
10 start of this; an Olympic swimming pool contains  
11 a megalitre. So Shotton Paper's average demand --  
12 18 megalitres is 18 Olympic swimming pools' worth of  
13 water every day to produce the newsprint that they  
14 produce.

15 Q. Now, if we could turn, please, to Ms White's statement,  
16 it is at tab 5 of bundle 1.

17 MR LANDERS: Sorry, just before you do, what conclusion are  
18 you drawing from this, that we have just been looking  
19 at, that there would be a water shortage if there was no  
20 leakage?

21 MR PICKFORD: If there was no investment undertaken.

22 MR LANDERS: But later on in this there is a whole great  
23 section 5 on all the stuff they are going to do on  
24 leakage and demand management and so on and so forth.

25 MR PICKFORD: I am very happy to, if it would assist, sir,

1           develop the point a little further to make it clear what  
2           the implications are. Obviously there is a limit to  
3           what Dr Bryan can ultimately say in relation to  
4           a document which is North West Water's document, and  
5           it's ultimately for Mr Sharpe to cross-examine  
6           North West Water's witness in relation to these matters.

7           MR SHARPE: Or re-examine Dr Bryan on that part of the  
8           documents near to hand.

9           THE CHAIRMAN: But your point generally is that, insofar as  
10          Wendy Johnson or Ken Hickman said at that meeting that  
11          they had enough water and so were not prepared to  
12          contribute to building another offtake from the  
13          River Dee, you are saying that was inconsistent with  
14          this water plan which indicates there may, by 2010, have  
15          been a water shortage in the integrated zone?

16          MR PICKFORD: That's right, Madam, because what -- it might  
17          be helpful, in view of the question from Mr Landers --

18          THE CHAIRMAN: I think we will move on. That's the point  
19          that comes out of that, you say.

20          MR PICKFORD: That's the point that comes out of that, we  
21          say, yes. Mr Landers is quite correct, there is then  
22          further discussion in this document of what is necessary  
23          to do to meet that water deficit, and they talk about  
24          all the investment strategies that they would put in  
25          place, and they obviously all cost money, which suggests

1           that there is an opportunity cost in relation to water.

2       THE CHAIRMAN: We have heard Dr Bryan's description of what  
3           in fact happened. Do you accept that as being true, or  
4           do you challenge that, that in fact leakage was brought  
5           down and there was not this upkick in demand that they  
6           were thinking that there would be?

7       MR PICKFORD: What we say is that the correct position, as  
8           regards what UU believed at the time to be its water  
9           resource management needs and challenges, is as set out  
10          in this document, which is the contemporaneous document  
11          from 1999, and that that is what would have guided  
12          United Utilities' approach to whether it believed that  
13          there was a potential water shortage in the future and  
14          its approach to LRMC and associated issues.

15       THE CHAIRMAN: Well, presumably Ms White will be able to  
16          tell us what she assumed about water availability in her  
17          LRMC calculations.

18       MR PICKFORD: Indeed. Just to be clear, Madam, there are  
19          further points on which we will be relying in this  
20          document that I haven't taken Dr Bryan to. That is for  
21          the reason that ultimately this is North West Water's  
22          document, and he can only offer opinion about it; he  
23          can't offer factual response to something that is not  
24          his document.

25                 Now, I am happy to take him through the points on



1           which we will be relying so that he can have a chance to  
2           respond to them, if the Tribunal would like me to do so.  
3           In my submission, it shouldn't actually be strictly  
4           necessary because ultimately these aren't issues on  
5           which Dr Bryan is properly placed to respond. But I am  
6           very happy to go through the document, so that he has at  
7           least a chance, and there is obviously a fine line  
8           between his opinion and --

9       THE CHAIRMAN: These are documents that are in evidence, to  
10       which one or more of your witnesses speak, and therefore  
11       can be cross-examined, and presumably Dr Bryan's view on  
12       the document can be fed into the questions that  
13       Mr Sharpe asks that witness. If you are saying: are we  
14       likely to get to a position at the end of the day where  
15       you seek to draw some -- you take us to some document in  
16       closing submissions and ask us to make some finding of  
17       fact on it which has not been apparent from the face of  
18       the document, so it comes as a surprise to the other  
19       side that that's how you are relying on it, and Dr Bryan  
20       has not been given a chance to consider that, that may  
21       be problematic.

22           Perhaps one way to deal with that would be for you  
23       to discuss this with Mr Sharpe and see whether, if he  
24       regards it as important, that those further documents be  
25       put to Dr Bryan?

1 MR PICKFORD: I am happy to do that. We are obviously  
2 coming up to 1 o'clock. There is probably, if I am  
3 going to put those further issues, perhaps five or ten  
4 minutes' worth of questioning which we can either avoid  
5 if we (inaudible) and we are content simply to proceed  
6 on the basis of the document (inaudible) Mr Sharpe is  
7 likely to go through those points, then we can  
8 potentially do that.

9 MR SHARPE: Mr Pickford can go about his cross-examination  
10 in his own way, I have the right to re-examine, these  
11 matters have been raised, and I may or may not take  
12 Dr Bryan to these issues and ask him to develop them.  
13 I think I should have the freedom to do it and not put  
14 my friend to the difficulty of moving on to unplanned  
15 territory, and I am conscious also we have a limited  
16 amount of time, even two days. So, thank you.

17 MR PICKFORD: I take it from that that there is no objection  
18 at this stage being taken to the proposition that I put  
19 to you, that we will be able to rely on aspects of this  
20 document, even though we have not put them directly to  
21 Dr Bryan during his cross-examination. Is that correct?

22 MR SHARPE: It's not what I said. He can cross-examine as  
23 he likes. If he wants to pursue it, he may. I may well  
24 re-examine Dr Bryan on those matters. But I don't think  
25 there is any particular compulsion, I'm not compelling

1 my friend to go to it. If he wants to, he can; if he  
2 doesn't want to, he needn't. But he shouldn't assume  
3 from that that anyone should be entitled to draw any  
4 assumptions. He has either made his points or he  
5 hasn't. I don't think I can assist you at all on it.

6 MR PICKFORD: Madam, I'm very happy to play it either way.

7 I know what the essential points we are going to rely  
8 upon are going to be, and I'm very happy to put them to  
9 Dr Bryan, or --

10 THE CHAIRMAN: I think probably you had better.

11 Now, Dr Bryan, you are going to be asked some  
12 questions about a document which is not your document.  
13 There is no particular reason why you should be able to  
14 say anything useful about it, but just so that you do  
15 have the opportunity to comment, if you want to, on  
16 points that the other side seek to derive from this  
17 document, you are being given that opportunity. But  
18 don't feel you have to speculate about --

19 A. I will do what I can to help.

20 THE CHAIRMAN: -- what the answers might be.

21 A. Thank you.

22 MR PICKFORD: I am very grateful, Madam. In which case

23 I will proceed. Probably the discussion we have had has  
24 taken about as long as the questions would take.

25 THE CHAIRMAN: It's the way of the world, Mr Pickford.

1 MR PICKFORD: So if we can move on, we were just discussing  
2 the initial supply/demand point and what it said about  
3 the integrated zone. We can see it represented  
4 graphically if we go to GGG.

5 A. I have it.

6 Q. Figure 13, this is the supply/demand balance for the  
7 integrated zone; do you see that?

8 A. Yes.

9 Q. We are still in the same document, folder 2, tab 21.

10 (Pause)

11 THE CHAIRMAN: Does it look like that (indicated)?

12 MR PICKFORD: It does, thank you, Madam. Do the members of  
13 the Tribunal have that document? I can see in fact that  
14 not everyone does, so I'll pause for a moment.

15 (Pause)

16 THE CHAIRMAN: Yes, we are all there.

17 MR PICKFORD: We are at figure 13, and this is a graphical  
18 representation of what has been discussed that you were  
19 commenting on, on page H.

20 A. Yes.

21 Q. It shows water available for use, which is the straight  
22 line?

23 A. Horizontal line, yes.

24 Q. The horizontal line, yes, and then the baseline demand  
25 plus target headroom before any demand management.

- 1 A. Yes.
- 2 Q. That's the dotted line.
- 3 A. Yes.
- 4 Q. Then what they think will happen if they, according to  
5 their final planning demand, with target headroom, and  
6 that pushes the line out, so that rather than going into  
7 deficit in 2005 they don't go into deficit until 2015?
- 8 A. Yes.
- 9 Q. So that's demonstrating, if they do what they are  
10 planning to do --
- 11 A. Yes.
- 12 Q. -- how they can get another ten years before they go  
13 into deficit; that's right?
- 14 A. No, no, it's another 20 years. I think the graph  
15 illustrates the table that I've found, table 13 on  
16 page -- I apologise to the Tribunal -- 382BBB, which is  
17 a few pages before the graph that Mr Pickford took us  
18 to, and which I think is more helpful by way of  
19 explanation, and I would be happy to talk to that as far  
20 as I can.
- 21 Q. I don't think that will be necessary, because we are  
22 just here on some very discrete points.
- 23 A. Yes. I think there is a point to draw from 382BBB, if  
24 the Tribunal has it --
- 25 THE CHAIRMAN: Just answer the questions first.

- 1 A. I am sorry, yes. The question is?
- 2 MR PICKFORD: So what we see happening here, what UU is
- 3 describing, is that if they don't take any measures --
- 4 A. Yes.
- 5 Q. -- then at a certain point they are predicting at this
- 6 point in time that there will be a deficit at a certain
- 7 date? Here it's around 2005, on this graph.
- 8 A. Yes.
- 9 Q. And then they are saying also that if they do take some
- 10 measures that they're planning to do, they can push the
- 11 date of that deficit out further into the future; it's
- 12 a very straightforward common sense point?
- 13 A. That is true, yes.
- 14 Q. And there are a number of different measures that they
- 15 might take; they could include producing leakage?
- 16 A. Yes.
- 17 Q. They could include promoting more efficient use of water
- 18 at the demand management?
- 19 A. Yes.
- 20 Q. It might be a combination of a number of different ways
- 21 of achieving the balance at a later date in time;
- 22 there's all sorts of things that would be available for
- 23 them to do?
- 24 A. They actually stipulate what they propose to do.
- 25 Q. Let's have a look at that, then. So table 5, if you

1 look at table 5 first, please, which is on page HH --  
2 I'll make this the last question before we pause for  
3 lunch -- table 5.5 is entitled "Comparison of options  
4 according to AISC". AISC is Average Incremental Social  
5 Cost, isn't it?

6 A. I believe it is, yes.

7 Q. What we see in table 5 is a comparison of the options  
8 that are available, it's not saying that these were  
9 necessarily carried out, but are available, and it sets  
10 out what the range of AISCs would be, both excluding and  
11 including environmental and social costs?

12 A. Mm.

13 Q. We see from that that the price, the types of figures  
14 that are in that table are generally well above 12p per  
15 metre cubed?

16 A. Yes.

17 Q. We see demand management measures are estimated there to  
18 cost between 48p and 453p per metre cubed?

19 A. Yes.

20 MR PICKFORD: Thank you. I think that would be a convenient  
21 moment. There are more questions on this topic, but  
22 obviously we have just gone past 1 o'clock.

23 THE CHAIRMAN: Very well. We will come back at 2 o'clock.

24 (1.03 pm)

25 (The short adjournment)

- 1 (2.00 pm)
- 2 MR PICKFORD: Dr Bryan, before the short adjournment we were
- 3 in the North West Water water resources plan for 1999.
- 4 We have just looked at table 5, and if we can now please
- 5 look at table 6, which is at folder 2, tab 21,
- 6 page 382II. Do you have that, Dr Bryan?
- 7 A. I do, yes.
- 8 Q. What we have here is a comparison of the AISCs for the
- 9 integrated resource zone; you see that?
- 10 A. I do, yes.
- 11 Q. Again it sets out a range of prices, in price per cubic
- 12 metres, which range from option R9, which is 0p per
- 13 cubic metre, all the way up to option C7, which is 453p
- 14 per cubic metre.
- 15 A. I see that.
- 16 Q. Again, a lot of those are in excess of 12p per metre
- 17 cubed?
- 18 A. Some of those are capital project, and some of those are
- 19 OPEX operational cost projects. My observation is that
- 20 water companies in general are under very tight
- 21 operational cost control, and manage their operating
- 22 costs down, and are incentivised to maximise their
- 23 capital expenditure because that's what drives their
- 24 profits, their return on capital.
- 25 So I do see those figures, but the reality is that



1 the projects which actually took place, or are projected  
2 to take place in the integrated zone to meet the  
3 analysis that you took us through before lunch, were all  
4 operational cost projects, operating cost projects.

5 Q. Okay, let's go on to that, that's helpful. If we please  
6 move to page JJJ, this is chapter 7, "Water resources  
7 strategy 1999 to 2025".

8 A. Yes.

9 Q. We see on the facing page, KKK, the strategy that's the  
10 conclusion of the preceding work for the integrated  
11 resources zone; you see that?

12 A. Yes.

13 Q. And it says:

14 "Our demand management strategy is not required to  
15 maintain the supply/demand balance in the integrated  
16 resource zone until after 2005. The strategy will be  
17 implemented earlier in recognition of the expectations  
18 of the agency."

19 A. Yes.

20 Q. Then it goes on to explain that, "We will need to make  
21 some early reinforcements before 2005", in the following  
22 paragraph?

23 A. Mm.

24 Q. It goes on in the next paragraph:

25 "Our strategy relies on the continuation of the

- 1 effective management of the River Dee regulation  
2 scheme."
- 3 A. Yes.
- 4 Q. Then they go on to explain what they are going to be  
5 doing from 2015.
- 6 A. Yes.
- 7 Q. That includes water source enhancement schemes to  
8 maintain their preferred level of water supply security  
9 up to 2025. Then they tabulate what they are proposing  
10 to do in table 18.
- 11 A. Yes.
- 12 Q. Very obviously, all of the measures that they need to --  
13 they are proposing at least to implement, they cost  
14 money. They cost different amounts of money.
- 15 A. They do cost money, they are all OPEX items, those.
- 16 Q. If North West Water had been able to save a further 22  
17 megalitres per day by not supplying at Shotton, or not  
18 supplying the water to Shotton, it would have had to do  
19 less of the measures that it's talking about here in  
20 order to maintain balance, wouldn't it? Because it  
21 would have had an extra 22 megalitres per day that it  
22 could put on the right side of the measure, as it were?
- 23 A. So that 22 megalitres a day would have value, that is  
24 what you are saying to me?
- 25 Q. Yes.

1 A. That's not what North West Water told us, they said they  
2 would have no value.

3 Q. Whether or not that's the case, that's what the  
4 implication of this document is; that it would have  
5 value?

6 A. That's one of the contradictions, one of the many  
7 contradictions --

8 THE CHAIRMAN: Just answer the question, Dr Bryan.

9 A. That is what this implies.

10 MR PICKFORD: So if we could go, please, to Ms White's  
11 witness statement at paragraph 20, so that's in  
12 bundle 1, tab 5.

13 A. Did you say paragraph 20?

14 Q. Yes, bundle 1, tab 5, paragraph 20. So in paragraph 19  
15 she has been discussing the water resources management  
16 issue, and then she goes on in paragraph 20 -- this is  
17 a further point she makes -- and says:

18 "In any event I don't accept, as Dr Bryan appears to  
19 imply, that the existence of an overall surplus at  
20 a particular point means that the resource can be  
21 regarded as essentially valueless. Even if there were  
22 an overall surplus in the zone, the use of more water by  
23 third parties at Heronbridge could mean drawing water  
24 from other higher cost sources to meet our own  
25 customers' needs, altering our least-cost strategy for

1 balancing supply and demand in the future. Therefore,  
2 in my view, we would have maintained the position that  
3 is the appropriate price at resource on an LRMC basis,  
4 notwithstanding there being a surplus."

5 I take it that you may disagree with what Ms White  
6 says here, but what you can't say is that that is not  
7 the approach that UU would have adopted?

8 A. We don't know what approach UU adopted because we have  
9 had no information on how they derived the figures that  
10 they gave us. So I am completely in the dark about how  
11 UU arrived at the figures that they have given us, and  
12 despite requesting that information for now 11 years we  
13 have still seen no calculations and no evidence on which  
14 those calculations are based.

15 Q. Okay. If we could move, please, to bundle 2, tab 9.

16 You referred earlier on this morning to a paper by  
17 John Kay of London Economics. Do you recall that?

18 A. I do.

19 Q. You talked about his paper on long run marginal costs?

20 A. Yes.

21 Q. Now, whether or not John Kay was specifically  
22 responsible for this paper, if we turn to page 185,  
23 please, of the bundle, so that's a couple of pages in to  
24 tab 9, this is the paper you were talking about?

25 A. It is, yes.

1 Q. We see this is a document that I took the Tribunal to  
2 yesterday, it's attached to a letter from Sir Ian Byatt  
3 and it was one of the many letters we saw from him  
4 urging the companies he was writing to, to price  
5 according to LRMC --

6 A. Yes.

7 Q. -- for bulk supplies.

8 Now, I am going to look very briefly, relatively  
9 briefly, at this London Economics paper, because you  
10 raised some points about what you thought it said in  
11 relation to LRMC. So if we could go, please, firstly to  
12 paragraph 2.1.1, which deals with accounting versus  
13 economic profits, that should be on page 193. Do you  
14 see that?

15 A. I do.

16 Q. If you could please read to yourself those two  
17 paragraphs, 2.1.1.

18 (Pause)

19 A. Yes.

20 Q. You are in no position to say that what's said in this  
21 report here on that issue is wrong, are you?

22 A. No.

23 Q. If we could please go to paragraph 2.3, and if you could  
24 please read for me the first two paragraphs under,  
25 "Marginal costs", and I will be asking you the same

1 question.

2 (Pause)

3 A. Yes.

4 Q. In particular, what is being distinguished here is  
5 between short run marginal costs, which might be very  
6 low, and long run marginal costs, which take account of  
7 the long run resource planning implications that we have  
8 seen previously, that are generally likely to be  
9 considerably higher?

10 A. Depending on the nature of the zone, yes, and the demand  
11 on that zone.

12 Q. If we could go, please, to section 4, which is on  
13 page 219, this section is drawing together the  
14 implications for charges from the discussion that has  
15 preceded it; do you see that at the top?

16 A. Yes, yes.

17 Q. And right at the bottom, final paragraph, we see:

18 "An outline breakdown of the calculation of marginal  
19 costs might be as follows ..."

20 And then it sets out how that might be done for  
21 resources on the following page. If you could please  
22 read the description for resources.

23 (Pause)

24 A. Yes.

25 Q. Again, you are in no position to state that that's wrong

1           either, are you?

2       A. No. In fact, when Ofwat launched this report I was at  
3       the launch and spoke to the author, and made the point  
4       specifically about situations where there were  
5       surpluses, and I think it's reflected in this passage  
6       that you have taken me to, the second paragraph:

7           "Lower marginal resource cost to be applied if there  
8       are any companies with significant excess resources."

9           That seems to be consistent with what I have been  
10       saying and what I understand the theory of long run  
11       marginal cost to represent.

12      Q. Now, you were here yesterday, weren't you, in court?

13      A. I was.

14      Q. You recall, I would imagine, that I went to a number of  
15       documents that demonstrated the importance attached by  
16       Ofwat to LRMC pricing for bulk supplies; you recall  
17       that?

18      A. I do recall that.

19      Q. You would accept, I think, without me having to go over  
20       those documents again, that they do demonstrate the  
21       considerable importance that was attached by Ofwat to  
22       LRMC pricing for bulk supplies over that period?

23      A. I recall that they are -- they attached significance to  
24       the LRMC for the appropriate resource to which access  
25       was sought.

1 Q. Yes. Right. If we could move on, please, to the next  
2 topic, which concerns Dwr Cymru and its common carriage  
3 price.

4 A. Right.

5 Q. Had Dwr Cymru offered you a 16.5p per metres cubed  
6 price, you would have turned that down, wouldn't you?

7 A. We would have complained to Ofwat, as we did in the  
8 first instance, and in the counterfactual that you put  
9 to me, what has to be remembered is that Dwr Cymru was  
10 under a duty, which it discharged in the case of the  
11 abusive first access price, to explain how it achieved  
12 that price. So if you are suggesting that they offered  
13 an access price of 16.5, then before we did anything we  
14 would look at their justification, the data on which  
15 that justification was based, and try and form a view as  
16 to whether we felt it was justified or not. Only at  
17 that point would we decide whether to complain to Ofwat  
18 that it was, in our view, abusive.

19 Q. Given what you knew, assuming that you received a letter  
20 that was very like the letter that was ultimately  
21 forwarded to you with the first access price, but rather  
22 than with 23.2p there, it said 16.5p there; nothing  
23 would have been different about what subsequently  
24 happened?

25 A. That would not have constituted an offer. It wouldn't



1 a constituted an offer, it wasn't a firm price, and  
2 neither did it contain any of the justification, that  
3 Ofwat required such prices to contain, that would give  
4 the recipient, the entrant -- Albion in this case -- the  
5 opportunity to robustly challenge that price if it felt  
6 that such challenge was warranted.

7 Q. If you had received a letter which, in your view, was  
8 sufficiently firm -- you just said that you didn't think  
9 that a letter in the style of that which was received  
10 from Ofwat was sufficiently firm -- let's suppose that  
11 there was one that was sufficiently firm, so we get rid  
12 of that issue.

13 A. Okay.

14 Q. It was for 16.5p, and let's also suppose that there was  
15 no further explanation of that price that you were  
16 satisfied with.

17 A. Yes.

18 THE CHAIRMAN: What time are you talking about?

19 MR PICKFORD: On 2 March 2001. So what I'm doing is  
20 hypothesising that instead of the first access price  
21 that was provided on 2 March 2001, 23.2p per metres  
22 cubed, a different price had been provided by Dwr Cymru,  
23 and I am supposing that instead of that it was in fact  
24 16.5p, and what I'm doing is asking the witness what his  
25 reaction would have been to that type of price.

1           Let's assume that, given that you have rarely been  
2           satisfied with what Dwr Cymru has been able to say to  
3           you in support of the prices, let's assume you were not  
4           satisfied with whatever information they provided. On  
5           those assumptions you would have turned down that price  
6           of 16.5p, you wouldn't have accepted it, in just the  
7           same way as you didn't accept the 23 --

8       THE CHAIRMAN: Can you clarify what you mean by "accepted",  
9           then, because you might be asking a different question  
10          from what Dr Bryan is answering. Or it may be the same  
11          question, but I just want to be clear about entering  
12          into a contract at that price, and then challenging it,  
13          because they don't think it's a fair price, or accepting  
14          it in the sense of not then challenging it --

15       MR PICKFORD: I understand the distinction, thank you Madam,  
16          for making sure that we are clear about what point I am  
17          putting.

18                The point I am putting is whether you would have  
19                been willing to enter into a contract. So we are  
20                putting aside the second issue that Madam Chairman has  
21                referred to about whether you would have subsequently  
22                sought to have challenged it, but whether you would have  
23                even entered into a contract for supply of common  
24                carriage services at that price.

25                The point I am putting to you is that I am saying

1           you wouldn't have done so.

2       A. At that point, and without justification, is what you  
3       are -- is what is implicit in your question, the -- no  
4       working, no explanation of how that figure was arrived?  
5       Is that ...?

6       Q. Well, certainly without an explanation that enabled you  
7       to feel that that was the correct price.

8       A. Then in that case, we would have first of all sought  
9       more information. The parallels are there with United  
10      Utilities, they have given us a price without any  
11      particularisation or justification, certainly no  
12      evidence, and we have asked them for what it is that  
13      they are required to provide to us under Ofwat's  
14      guidelines that you -- with which you are very familiar.

15           And the situation would have been no different with  
16      Dwr Cymru. If you are offering us a price, we need to  
17      understand how that price has been derived, and on the  
18      basis of that understanding, we would then determine  
19      what was the most appropriate course of action. If the  
20      price seemed good, if the justification was sound, then  
21      again we have to be realistic. We may have said: if  
22      16.5p was sound, if the justification was rock solid, we  
23      might have thought -- probably would have thought:  
24      crikey the only way we can make this work is to ensure  
25      that we get the same bulk supply price from United

1 Utilities as Welsh Water were benefitting from.

2 But the position you are putting to me is  
3 hypothetical, and I don't know how much further I can go  
4 in speculating.

5 Q. No, that's very helpful, Dr Bryan, I appreciate,  
6 obviously the Tribunal appreciates, these are  
7 hypothetical questions because necessarily we are trying  
8 to ascertain what would happen in a world that didn't  
9 happen. So unfortunately we have to tread into  
10 hypotheses, even though we try to do so in a fairly  
11 structured fashion.

12 Given the points that you have just made, let's  
13 substitute, instead of 16.5p, 14.4p --

14 A. Yes.

15 Q. -- but again without what you would have felt to be  
16 sufficient justification. If they had offered you 14.4p  
17 but they had not provided all of the back-up to explain  
18 to your satisfaction why they got there --

19 A. Okay.

20 Q. -- what would you have done?

21 A. In that situation, I think we would have done two  
22 things: we would have said to Dwr Cymru, "That's  
23 interesting, you are now offering us a price which is  
24 implicitly significantly lower than the resource and  
25 treatment cost embraced in the prevailing bulk supply

1 price. Can we please have more information on that?"

2 But it is an interesting price and --

3 Q. Okay, that's --

4 THE CHAIRMAN: Have you finished that?

5 A. -- the other side of the coin was we would have turned  
6 to United Utilities and said, "There is some clear water  
7 emerging, can we get round the table and understand what  
8 that benefit means to the three interested parties,  
9 Shotton Paper, Albion and United Utilities?"

10 We are not yet finished with Dwr Cymru, we haven't  
11 got a satisfactory explanation on all the points, which  
12 I think is the case that you are putting to me, but it's  
13 part of a process, but it's part of a very long  
14 drawn-out process, as you will fully understand. We  
15 have been at this since 1995, even at that stage.

16 MR PICKFORD: So without sufficient justification, you  
17 wouldn't have accepted 14.4p at that time? When I say  
18 "accepted", that is in the contractual sense you  
19 wouldn't have then moved on to a contract?

20 A. We would have been foolish to have accepted any figure  
21 without being satisfied that it was sound and, for that  
22 matter, likely to withstand any subsequent scrutiny by  
23 Ofwat.

24 Q. Thank you. I would like to now look at some of the  
25 documentary evidence in relation to what was going on at

1           this time in relation to this issue. So if we go,  
2           please, to folder 3, at tab 66. This is a letter from  
3           yourself, on behalf of Enviro-Logic, to Mr Holton at  
4           Dwr Cymru. You see that? 20 October 2000.

5           A. Yes.

6           Q. If we see five paragraphs down, we see a paragraph  
7           beginning "Access charges", and then the second  
8           paragraph says:

9                     "Our assessment, following extensive analysis  
10           indicates that 7p per cubic metre is a fair cost  
11           reflective price for water delivered."

12          A. Yes.

13          Q. You weren't seeking to mislead Mr Holton here, were you?

14          A. No.

15          Q. So that was your genuine belief?

16          A. Yes.

17          Q. Okay, if we could please go to tab 79, this is a note of  
18           a meeting between Enviro-Logic and Dwr Cymru on  
19           10 November 2000. Do you have that?

20          A. I do.

21          Q. If we turn over the page, we see it's recorded at the  
22           end of the first paragraph at the top there:

23                     "... stated that ELL's assessment for a fair and  
24           cost reflective charge for this unique system was 7p per  
25           cubic metre."

1           Again, that confirms the position you adopted in  
2           your previous letter, doesn't it?

3           A. Yes.

4           Q. If we go, please, to 81 in the same bundle, we see the  
5           briefing paper which you prepared, or at least was  
6           prepared by your company, for a meeting with Dwr Cymru.

7           A. Yes.

8           Q. Do you see that? 10 November 2000.

9           A. Yes.

10          Q. Did, in fact, you prepare this briefing note?

11          A. I don't believe so.

12          Q. Now --

13          A. But I honestly don't remember.

14          Q. If we read, please, in the first box, the primary  
15          objectives, they are:

16                 "To present robust arguments that the common  
17                 carriage price for Shotton should be de-averaged;  
18                 convince DCC that ELL's case is sound and winnable; make  
19                 explicit ELL's commitment to this and conviction to  
20                 pursue all available options to achieve this settlement;  
21                 and make clear that ELL will not tolerate unnecessary  
22                 delays."

23                 That correctly records what your primary objectives  
24                 were, doesn't it, at this time?

25          A. As far as I can remember, it does, yes.

- 1 Q. Then secondary objectives it says are:
- 2 "To convince DCC that 7p per cubic metre is a fair  
3 and just price for access; identify issues for  
4 resolution and actions required to enable agreement sign  
5 off by end of November."
- 6 A. Yes.
- 7 Q. Again, that's a fair representation?
- 8 A. I believe that is, yes.
- 9 Q. Then the bottom line we see the first point:
- 10 "No compromise on de-average basis for pricing."
- 11 A. Yes.
- 12 Q. That's also a fair assessment of your position?
- 13 A. Yes, it was at that time, yes.
- 14 Q. Now, if we could go, please, to the next document, which  
15 is 107, tab 107. This is a letter from yourself, dated  
16 20 December 2000, to Julie Griffiths at Ofwat.
- 17 A. Yes.
- 18 Q. You say on the second page underneath, "Cost analysis in  
19 support of Enviro-Logic's offered price" -- you see  
20 that?
- 21 A. Yes, I do.
- 22 Q. About six lines down there is a sentence beginning:
- 23 "Our legal advice is that the Competition Act  
24 requires that charges should properly reflect the costs  
25 of making the supply. Our view is that only locally



1 de-averaged charges comply with this requirement, and  
2 a set of charges based on a regional average is not  
3 sufficiently representative of costs to be appropriate  
4 for the Ashgrove System."

5 A. Yes.

6 Q. Again that reflected your true view?

7 A. Yes, it did.

8 Q. If in 2001, at this time, you had been offered a price  
9 which made use of whole company average costs; okay,  
10 rather than being based on local Ashgrove-specific  
11 costs, then you would have rejected such a price,  
12 wouldn't you?

13 A. If the price was workable, why would we?

14 Q. Okay, I'll rephrase the question. Let's suppose that  
15 you had a price that was higher than it otherwise would  
16 have been because of the fact that it included -- that  
17 it was based on in part whole company average costs?

18 A. Yes.

19 Q. So let's assume that you knew that if the price was  
20 based on Ashgrove specific costs you get a lower price,  
21 and if the price had some element of whole company  
22 average costs fed into it in terms of the methodology,  
23 that produced a higher price. So that's the assumption  
24 for the question, okay? You follow me so far?

25 A. I understand your assumption.

1 Q. If that were the situation and you were offered the  
2 higher price, that was higher by virtue of making use of  
3 whole company average costs, you wouldn't have been  
4 happy with that price, would you?

5 A. That wasn't the question you first asked me, you asked  
6 me whether I would accept it.

7 Q. Okay, I will put it that way: you wouldn't have accepted  
8 it in contractual terms?

9 A. If it meant a significant incremental gain in our  
10 position, the short answer is yes, as long as it would  
11 not have prevented us from continuing to challenge what  
12 we then felt was a -- was still too high a price.  
13 Remember that the position we were in at the time that  
14 you posit this 14.4p offer, the position is that we were  
15 paying 26p, of which Dwr Cymru's MD, Mike Brooker, made  
16 very clear was 23p for treatment and -- effectively 23p  
17 for treatment and distribution, 3p for the water  
18 resource element. If we get an offer of 14.4p for water  
19 resources and distribution, that is a huge improvement  
20 on the status quo, and we would want to cement that  
21 gain, we would not want to lose it. We could then use  
22 it as a ratchet, if justified, to seek yet further  
23 gains. This is not -- I notice in Dwr Cymru's skeleton  
24 the idea that we would --

25 THE CHAIRMAN: Well, you don't need to make submissions,

1           Dr Bryan, just answer the question.

2           A. I apologise.

3           THE CHAIRMAN: So he asked you: would you have accepted

4           that? And you said --

5           A. Yes.

6           THE CHAIRMAN: We have had your answer, yes.

7           MR PICKFORD: If I could take you back to the document

8           I showed you a few moments ago, you recall that the

9           bottom line in the briefing paper was no compromise on

10          the de-averaged basis for pricing, no compromise?

11          A. Yes.

12          Q. That was expressed to be the bottom line.

13          A. Yes.

14          Q. So what you just told me is inconsistent with what you

15          previously said was your bottom line.

16          A. It's inconsistent with a briefing note prepared for

17          a negotiation. In the real world of business you do set

18          high goals for negotiation, but in practice you go for

19          the pragmatic --

20          Q. You also said --

21          A. What's the point of starving for wanting to hold out for

22          an extra reduction in price?

23          Q. You said "bottom lines", which is below which you won't

24          go?

25          A. I don't read that into the briefing notes for

1 a negotiation meeting. Negotiations are about tactics,  
2 it's about being firm in your position. If you go into  
3 a negotiation in a weak position, you will come out  
4 inevitably far weaker, and we were a small, weak  
5 entrant, we were not -- we were going to have to play to  
6 our strengths.

7 Q. I put the question, I have put my position, I think we  
8 can move on from that.

9 A. Thank you.

10 Q. If we could go, please, to tab 119 of folder 4. I do  
11 apologise, one further point has been drawn to my  
12 attention before we move on. If you could keep that  
13 document and we will come back to it in a moment. I do  
14 apologise.

15 THE CHAIRMAN: That's all right.

16 A. Do you want me to go back to the previous --

17 MR PICKFORD: If we could briefly go back to tab 79 of  
18 folder 3 before we move on to the further document. So  
19 this is the notes of the meeting between Enviro-Logic  
20 and Dwr Cymru on 10 November.

21 We see there at the top of the second page that any  
22 charge based on regional average would run counter to  
23 your stance and would be challenged to the full.

24 A. Yes.

25 Q. So again, that's not consistent, is it, with what you

1           have just said, which is in fact you would have  
2           contracted on such a basis?

3       A.   That doesn't preclude challenge.  The question is not,  
4           in contracting at 14.4, certainly don't rule out the  
5           ability to use Competition Act or Water Industry Act to  
6           challenge a price that we felt was still excessive.

7       Q.   So your position is that if you had accepted 14.4p in  
8           terms of contractual acceptance, you would have gone on  
9           to pursue a regulatory challenge in relation to that?

10      A.   No, I did not say that.  I said that what we would do is  
11           we would very carefully study the price justification  
12           within that offer, and only after concluding that study  
13           would we judge whether there was scope for some form of  
14           regulatory challenge.  We have few enough resources as  
15           it is.  It doesn't make sense to pursue long, complex  
16           and potentially very expensive challenges with Ofwat, be  
17           it under the Competition Act or the Water Industry Act,  
18           if there isn't a firm case to be made, and with Ofwat it  
19           would have to be very firm, very obvious.

20      Q.   Thank you.  We can now move on to the document at  
21           folder 4, tab 119.  Now, in this document, this is your  
22           managing directors' report from February 2001 --

23      A.   Yes.

24      Q.   -- and if one looks on page 841, that's dealing with  
25           Shotton Paper.

1 A. Yes.

2 Q. You say about halfway down:

3 "With the Shotton Paper complaint, we have Ofwat's  
4 opinion that there is sufficient merit to our case to  
5 warrant further investigation and there is no doubt that  
6 Dwr Cymru had delayed proceedings by at least four  
7 months. If we were to proceed with our claim that  
8 access charges should be 7p per cubic metre, we would  
9 have the basis for a claim worth £75,000 per month, or  
10 £900,000 in a full year."

11 Then you go on to deal with that:

12 "30 per cent of the benefit plus our outstanding  
13 costs would be recoverable from any award."

14 So you are looking there to pursue a legal challenge  
15 against Dwr Cymru, aren't you, because you then go on to  
16 say in the following paragraph:

17 "I would welcome the board's advice about elevating  
18 our challenge to this level."

19 A. Yes, at that point, remember, we had had the indicative  
20 access price of 20p.

21 Q. But you hadn't had any firm price, had you?

22 A. We hadn't had a firm price. We took the view that it  
23 was unlikely that the firm price would be less than the  
24 indicative price.

25 Q. If we go, please, to tab 164 in this same folder, this

1 is a paper prepared for a workshop to consider the  
2 current position on options for progress. This was  
3 a workshop briefing paper prepared by yourself, and the  
4 workshop included Enviro-Logic and South West Water, and  
5 it was on water competition.

6 A. Yes. My copy starts at 1024, yes. It looks as if it's  
7 missing the front page.

8 Q. Do you not have 1023?

9 A. 1023 is I think in the previous -- it has been wrongly  
10 tabbed. I do have it.

11 Q. Please do take your time to re-assemble the bundle.

12 (Pause). So we see at the header on 1023 what I was  
13 just describing to you?

14 A. Yes, it's a position paper January 2002.

15 Q. Yes, prepared by you?

16 A. Yes.

17 Q. If one goes, please, to page 1025, so that's another two  
18 pages on, you are dealing with a case study, as it's  
19 described here; Shotton Paper?

20 A. Yes.

21 Q. Do you see that?

22 A. I can.

23 Q. You wouldn't have been trying to mislead South West  
24 Water at all in this workshop, would you; you would have  
25 been trying to be as accurate as possible?

1 A. Yes.

2 Q. We see you referring here, in the third sentence of the  
3 paragraph under 3.1, you say:

4 "Despite overwhelming evidence to demonstrate that  
5 the incumbent's [Dwr Cymru] cost to supply was less than  
6 11p per cubic metre, Ofwat set a bulk supply price at  
7 the prevailing retail price of 26p per cubic metre,  
8 allowing no profit."

9 A. Yes.

10 Q. Now, you are referring here to the 11p, that is the bulk  
11 supply?

12 A. Yes.

13 Q. So if we take away water resource costs at somewhere  
14 between 3 and 4p, let's assume, that leaves --

15 A. We didn't have at that figure at the time. The figure  
16 of 11p that you are referring to here related to the  
17 bulk supply application that was part of our inset  
18 application in 1996, the application was finally granted  
19 and became live on 1 May 1999, and at that time, as part  
20 of that application, we had to ask Ofwat to make what  
21 was its first ever section 40A determination of a bulk  
22 supply price, and in support of that application we used  
23 what data was available in the public domain to justify  
24 what we considered to be a fair price, which I think  
25 from memory was 11.26p, but it is actually in the bundle



1 as part of the inset application.

2 Q. We have seen, back in October 2000 through into the  
3 period up to the offer of the first access price, that  
4 you believed, as you described it, a fair and just price  
5 for access was 7p per cubic metre?

6 A. That's right.

7 Q. That was a maximum?

8 A. That was in November 2000, yes.

9 Q. Yes.

10 A. Yes.

11 Q. So if we take that starting point, 7p for the access --

12 A. Yes.

13 Q. -- implicit in this 11p is, assuming it's consistent  
14 with your 7p, a bulk supply price of somewhere between  
15 3p and 4p?

16 A. No. You cannot presume consistency. One was  
17 a figure -- they are reasonably consistent, but I think  
18 you are stretching the analysis further than it will go.  
19 The 11.26p figure was a figure based on our knowledge in  
20 1996, the 7p was a figure based on our knowledge in  
21 November 2000, this is a paper of January 2002, a great  
22 deal has happened since then, and what I am trying to do  
23 in this paper is explain to a water company that knows  
24 very little about competition but has been our joint  
25 venture partner at that time, for five years, since

1           1997, what is going on and what the implications are for  
2           Albion, for water industry competition more widely.

3           Q. You didn't have, at this point in time, any information  
4           that enabled you to believe that the bulk supply price  
5           was less than 3p, did you? There was nothing that led  
6           you to believe it was going to be lower than 3p?

7           A. We are now talking about the Heronbridge price?

8           Q. Yes.

9           A. No, we didn't.

10          THE CHAIRMAN: Did you know the Heronbridge price at that  
11          time? When did you first find out the Heronbridge ...?

12          A. We had been given an indication of it because  
13          Mr Brooker, the MD of Dwr Cymru at the time, had  
14          indicated that the 23.2p figure for the first access  
15          price was consistent with the 26p retail tariff that we  
16          were paying for the bulk supply, the difference being  
17          the water resource cost. So we had got a pretty good  
18          idea that that 3p figure was either the figure for  
19          Heronbridge or the more general figure for the whole of  
20          Dwr Cymru. It was unlikely to be the more general  
21          figure, simply because not all their water systems are  
22          as simple and straightforward as Heronbridge's.

23          MR PICKFORD: Right, so you knew the water -- you had a fair  
24          idea, a good idea that the water resources element was  
25          around 3p? The water resources element of this --

- 1 A. Yes, I think that's fair to say.
- 2 Q. Yes. So, by implication the common carriage element of  
3 the price was around 7p, 7, perhaps 8p, just as the  
4 water resource might have been 3 or 4p?
- 5 A. That was our view in 2000, I don't think our view had  
6 changed much in the intervening year and a half.
- 7 Q. You say, in relation to that, that there is overwhelming  
8 evidence, overwhelming evidence to demonstrate that the  
9 incumbent's, Dwr Cymru's, cost to supply was less than  
10 11p per metre cubed; that was your view?
- 11 A. That's the view that I've expressed here, yes.
- 12 Q. That was your view at the time?
- 13 A. Yes.
- 14 Q. So you evidently thought, therefore, that the evidence  
15 in favour of the common carriage price upper band being  
16 around 7p, 7 or 8p, was overwhelming?
- 17 A. I still thought it was, that was a sound estimate on the  
18 basis of the information that we had.
- 19 Q. The word you used here was "overwhelming"?
- 20 A. Yes, I judged it --
- 21 THE CHAIRMAN: Was it based on 7p? What broadly was the  
22 information?
- 23 A. Dwr Cymru's regulatory accounts, all water companies'  
24 regulatory accounts at that time were somewhat difficult  
25 to read in the sense that the costs of the water service

1           were lumped, were aggregated. They were presented at  
2           a very high level, although the individual cost  
3           collection was at a very low level, as we have seen from  
4           the accounting information that's now been released to  
5           us. So from the public information available to us,  
6           water resource and treatment costs were all of a piece,  
7           and water, potable water distribution was separately  
8           identified, and then there was a very significant other  
9           group of costs that represented common shared overhead  
10          costs, rates, bad debt, scientific services, and so on.  
11          And trying to apportion those costs has been the theme  
12          that's run through the last decade.

13                 However, at that time and subsequently, there was  
14          a very clear rule in the Ofwat regulatory accounting  
15          guidelines that covered all companies that non-potable  
16          supplies and bulk supplies were to be separately  
17          accounted for under a heading called, "Third party  
18          services". You will see in regulatory accounts a line  
19          for third party services operating costs, third party  
20          services capital costs, and on the corresponding sheet  
21          for income you will see third party services income. It  
22          was that data, the data that specifically included  
23          non-potable and bulk supplies, that we used to derive  
24          our figure of 7p.

25          MR PICKFORD: If you can move on, please, Dr Bryan, to

1 events in 2004.

2 A. Yes.

3 Q. And turn to folder 5, tab 217.

4 A. You will have to bear with me, Mr Pickford, I have  
5 a file malfunction.

6 Q. I beg your pardon, Dr Bryan.

7 A. No, no, it's not your fault, it's the technology.

8 Q. If it's any consolation, my file did the same thing.

9 A. Sorry, remind me which ...

10 Q. Folder 5, tab 217.

11 A. (Pause). Yes.

12 Q. This is the letter from Dwr Cymru of 16 January 2004  
13 containing a second access price that they sent to  
14 Ofwat.

15 A. Yes.

16 Q. The price it contained was the 17.74 aggregating the two  
17 figures in it. If one looks down --

18 A. Yes, that is the sum of the two figures in that letter.

19 Q. Yes, and Ofwat forwarded this letter straight on to you,  
20 didn't they?

21 A. No, they did not, no. They waited two months. I think  
22 that Ofwat finally forwarded it on to us, and I was  
23 checking the bundle -- I do apologise -- the Ofwat  
24 covering letter and my response to Ofwat, for  
25 an unaccountable reason, isn't in the bundle, or at

1           least if it is I can't find it, and I hope someone will  
2           shout if it is there.

3           Ofwat forwarded it to us on 17 March, some two  
4           months after receipt, with a -- the covering letter, and  
5           I'll be quite happy to hand it up tomorrow, to the  
6           effect: here it is, this is what we asked for.  
7           I immediately phoned the principal lawyer at Ofwat, the  
8           author of the letter, Hugh Brooker, and asked him what  
9           significance they attached to this, and he said none  
10          whatsoever.

11          Now, that should be in the bundle, and I do  
12          apologise to the Tribunal that it isn't.

13        Q. I apologise, Dr Bryan, I actually added an extra word in  
14          when I said, "straight on to you"; I appreciate that it  
15          was sent a little while later.

16        A. Yes.

17        Q. You didn't contract at that price, did you, when it  
18          was --

19        A. We were never given a price by Dwr Cymru.

20        Q. You didn't seek to go back to Dwr Cymru and say, "Well,  
21          we have seen you are now talking about a 17.74 price, so  
22          let's talk"?

23        A. On the contrary, we went back to Dwr Cymru, immediately  
24          we realised that the new potable tariff -- new  
25          non-potable tariff, I do apologise, which was issued

1 with effect 1 April 2003, so almost a year prior to the  
2 issue of this letter, that new non-potable tariff...

3 For the first time Dwr Cymru had published tariffs  
4 for non-potable water, and they had two tariffs, broadly  
5 speaking: one for raw water and one for partially  
6 treated water.

7 Q. Dr Bryan, I hesitate to interrupt, but I may not have  
8 been very clear in my question. What I meant to say --  
9 and you started to talk before I had entirely  
10 finished -- was you didn't go back to them to say,  
11 "Let's talk about common carriage"?

12 A. No, we asked them to revise their prices to us to  
13 reflect the fact that the treatment component, which was  
14 the --

15 THE CHAIRMAN: That was the previous year.

16 A. But it's the same figures.

17 THE CHAIRMAN: Yes, but what you are being asked is whether,  
18 in March 2004, when this letter was forwarded to you by  
19 Ofwat, did that trigger you going back to Dwr Cymru and  
20 picking up on this 17.74 figure?

21 A. We did -- there is -- there should be a letter in there.

22 MR PICKFORD: We will come on to that in a moment.

23 A. I did respond to Dwr Cymru following that.

24 Q. Just before doing so, there is obviously an issue here  
25 that, in 2004, prices -- 2004 prices are potentially

1 different from 2001 prices, certainly as adjusted by the  
2 RPI. Now, there are debates to be had about what the  
3 right deflator is, but assuming that it's RPI, 17.74p  
4 per metres cubed, and this is not intended to be a maths  
5 test, but are you willing to accept from me that if one  
6 deflates that back into 2000 and 2001 figures using RPI,  
7 that would be about 16.6p, roughly 1p lower in the  
8 prices of three years previously?

9 A. I haven't done the sums but I am prepared to accept your  
10 word for it.

11 Q. We can actually go through the sums, and indeed I have  
12 a calculator --

13 THE CHAIRMAN: Well, he has just accepted it.

14 MR PICKFORD: Yes.

15 If we then go on to the letter you were talking  
16 about and anticipating in your answer. If we go to  
17 tab 221, we see this is your response of 30 March 2004  
18 to Mike Brooker, and this is what you write to him,  
19 having seen the letter that we just saw that had been  
20 forwarded to you by Ofwat; that's correct, isn't it?

21 A. Yes, it's a follow-up from an earlier letter before  
22 I had seen the Ofwat letter. Yes.

23 Q. What you say is that you, belatedly, are in receipt of  
24 the letter of 16 January, and it's clear to you now that  
25 the treatment and transport costs are 5.4p per cubic



1           metre less than claimed, and you want an immediate  
2           reduction in your bulk supply price and a re-issue of  
3           the February invoice?

4           A. Yes.

5           Q. Now, there is no sense in this letter that you are  
6           suggesting that you would like to re-open a dialogue  
7           about the prospect of common carriage?

8           A. The most important consideration for us was to see  
9           whether Dwr Cymru would correct an obvious error in the  
10          pricing that we were paying at that time and had been  
11          since 1999 in the bulk supply. That was our first and  
12          foremost consideration. I think you must also bear in  
13          mind that 30 March 2004 also happened to be -- and there  
14          is another letter in the bundle to show it -- the  
15          drop dead date for the director to issue his long  
16          awaited Competition Act decision on the complaint that  
17          we had issued in 2001. And we were just about to go to  
18          the CAT, first time round, because we had been told by  
19          Ofwat that they would not now be issuing that  
20          determination.

21          Q. Let's look at what happened when you went to the CAT the  
22          second time round, the Tribunal the second time round.  
23          So after the original appeal you then had an appeal  
24          which is at tab 230, and this is the substantive appeal?

25          A. Yes.

- 1 Q. Obviously it goes without saying that you weren't  
2 seeking to mislead the Tribunal in any way in this  
3 document, were you?
- 4 A. I sincerely hope not.
- 5 Q. Absolutely. So if we go, please, to paragraph 19 -- do  
6 you have that?
- 7 A. 19?
- 8 Q. Yes, on page 1538.
- 9 A. I have, yes.
- 10 Q. There is a bullet point at the bottom of that page.  
11 This is in the summary of conclusions, you see?
- 12 A. Yes.
- 13 Q. It says:
- 14 "Analysis of Ofwat audited data demonstrates that  
15 a cost reflective access price lies in the range 0.8 to  
16 2.1p per metres cubed."
- 17 A. Yes.
- 18 Q. So at this point in time, by this point in 2004, you  
19 believed that the correct approach to common carriage  
20 should lead you to a price between 0.8 and 2.1p per  
21 metre cubed?
- 22 A. That was what I wrote there, yes.
- 23 Q. And you believed it?
- 24 A. I did at the time. I have since -- and I think what --  
25 you talk about misleading, I think what marks out our

1 approach throughout these proceedings is our willingness  
2 to explain how we arrive at figures. And I think you  
3 will see that in paragraphs 150 to 183, as I have  
4 indicated in that summary. With the benefit of  
5 hindsight, I look at that analysis, and again you will  
6 see that it's based on third party costs, that  
7 "Accounting" heading which, in my mind, is a very clear  
8 indication of where the costs, the real costs actually  
9 sit in the Dwr Cymru account.

10 Having gone through that more recently, I think I am  
11 all right up to a point, and I think that where I go  
12 wrong is in 162 and 163, where I am subtracting customer  
13 costs, and I am subtracting far too high a figure for  
14 the reality of a single site with a very large volume of  
15 water.

16 Up to that point, I think that the approach that we  
17 put forward -- bear in mind that we had been at that  
18 point denied any information, any evidence from either  
19 Dwr Cymru or indeed Ofwat -- was our genuine attempt to  
20 try and understand how the costs that we could see under  
21 third party services could possibly justify the price  
22 that we had been offered.

23 Q. Just going back to a point you made a couple of  
24 questions ago, you said in relation to the debate we  
25 were having about events in March 2004, when you

1 received the letter from Dwr Cymru about pricing --

2 A. Yes.

3 Q. -- that you were just about to go to the CAT at that  
4 stage?

5 A. That's right.

6 Q. Just to pick up on that, if you go to tab 227, just so  
7 everyone is clear, this is the substantive decision that  
8 was ultimately taken, and that was taken on 26 May 2004?

9 A. Yes.

10 Q. So what you were talking about was going to the CAT in  
11 relation to a -- not the substantive matter but saying  
12 that they had not taken a decision?

13 A. That's correct, yes. We went to the CAT very early in  
14 April 2004, and it was at those early hearings that  
15 Ofwat was, gave an undertaking to produce the decision,  
16 following which we re-formed and re-submitted our  
17 appeal.

18 Q. If we could go, please, to tab 8, so we are moving yet  
19 further on in time now to November 2008, and if you  
20 could turn --

21 THE CHAIRMAN: Folder 8?

22 MR PICKFORD: I do apologise, folder 8, tab 282.

23 So this is the letter that the Tribunal has seen  
24 already, taken to by Mr Sharpe on Day 1, where you were  
25 offered a price of 14.4p per metres cubed, in 2000 to

- 1           2001 prices, by Dwr Cymru.
- 2       A. Yes.
- 3       Q. What happened thereafter is initially you didn't accept  
4           that as an appropriate compromise, but then immediately  
5           afterwards you then changed your mind and you did accept  
6           it?
- 7       A. Yes. We initially reacted and said The Excessive  
8           Pricing Judgment [The Unfair Pricing Judgment] gave  
9           effectively the minimum amount of the excess, and  
10           therefore we felt that there was at least an argument  
11           that the price should be lower.
- 12      Q. Just pausing there, so the Tribunal gets the picture,  
13           that's the next document at page 283, isn't it? That  
14           was your initial response?
- 15      A. Yes, it is, I think.
- 16      Q. Then your subsequent response --
- 17      A. Yes.
- 18      Q. -- the next day, is when you changed your mind and  
19           decided that you would accept 14.4p as a price looking  
20           forwards?
- 21      A. As a way of moving forwards whilst reserving our ability  
22           to drive that price down if we felt that it was  
23           appropriate.
- 24      Q. You have never actually contracted at that price, have  
25           you?

1 A. No, we have not. We have yet to receive from Dwr Cymru  
2 a current price. We did respond in January 2005 with  
3 a suggested indexed price that would have brought the  
4 price up to date, and --

5 THE CHAIRMAN: Wait a minute, 2005? This is --

6 A. Sorry, I do apologise, Madam Chairman. 2009. You will  
7 find that at tab 286.

8 In terms of trying to move the process on, we have  
9 explained our approach and on page 2567 of that document  
10 you will see that we have provided what we considered to  
11 be the appropriate indexed price, ie a price that we  
12 would be prepared to enter into contract on at that  
13 time. And inviting Dwr Cymru to enter into negotiations  
14 in good faith on the basis of that, and I have looked  
15 but I can find no evidence of any response to that.  
16 That may be because our filing is defective in some way,  
17 but I have no record of any response.

18 MR PICKFORD: We will come back to that in a moment. We  
19 have moved on to the topic of indexation. I would just  
20 like to step back a bit and again chronologically take  
21 the question of indexation and what's been said about it  
22 over time.

23 A. Yes.

24 MR PICKFORD: Madam Chairman, I can see you are looking  
25 puzzled.

1 (Pause)

2 THE CHAIRMAN: I would say if there is something that you  
3 want to put to Dr Bryan about some inference you are  
4 going to draw from their non-acceptance of the 2008  
5 price -- are you moving off that point now?

6 MR PICKFORD: Madam, I felt that I put sufficiently what our  
7 position was on that. The inference obviously that  
8 we -- I've put the facts.

9 THE CHAIRMAN: Right, okay. So we are going to indexation  
10 generally?

11 MR PICKFORD: Yes. There are inferences of law that one  
12 draws from the various facts. Sorry, inferences about  
13 the facts. But I have put the primary facts in terms  
14 of --

15 THE CHAIRMAN: Yes, he gave an answer as to why that was not  
16 accepted, and you have not challenged that.

17 MR PICKFORD: Well, the answer he gave was to do with  
18 indexation, and that's the topic we are coming on to.

19 So there are some dot dot dots there, as it were, he  
20 has given part of his answer and I am going to come on  
21 to it, but I would like to actually approach that  
22 question of indexation going back and starting at the  
23 beginning, rather than dotting around through the  
24 documents.

25 I can see --

1 MR LANDERS: Can I just ask one point on that letter,  
2 because I have not had time to read it all. Are we  
3 saying that this was a counter-offer from Dr Bryan to --  
4 they made -- that you received the offer and you regard  
5 this letter of 16 January 2009 as a counter-offer?

6 A. Effectively we saw it as part of a negotiating process  
7 that we hoped would lead to a settled outcome, but  
8 didn't.

9 MR PICKFORD: Madam, given that we are about to move on,  
10 maybe that would be a good point for a break?

11 THE CHAIRMAN: A short break, yes. We will come back at  
12 3.15.

13 (3.10 pm)

14 (A short break)

15 (3.15 pm)

16 MR PICKFORD: Now, because you complained about Dwr Cymru's  
17 "minded to" price immediately upon receiving it, you  
18 never got into details of other issues such as  
19 indexation, did you?

20 A. Which price are we talking about?

21 Q. This is the "minded to" price in 2001, the first access  
22 price.

23 A. That wasn't "minded to".

24 Q. Sorry, the first access price was a "minded to" price.

25 THE CHAIRMAN: Previously, the first "minded to" price has



1           hitherto been the 26p in the bulk supply price. Let's  
2           not get our tags mixed up, Mr Pickford. If you mean the  
3           first access price --

4       MR PICKFORD: I mean the first access price. We can see  
5           what words are attached to it, we have already seen  
6           them. The first access price --

7       A. The first --

8       Q. The first access price is the easiest and least  
9           contentious way of referring to it.

10      A. Yes.

11      Q. You never got into details in relation to other issues  
12         such as indexation in relation to that, did you?

13      A. We did not, no.

14      Q. Because you had fired off that --

15      A. As far as I can remember, no.

16      Q. Now, let's suppose that Dwr Cymru had offered you what  
17         was otherwise a lawful access price that you were  
18         content with and that you saw justification for, but  
19         they had insisted on indexation at RPI.

20             So price isn't in issue, we are now just focused on  
21             the indexation point. Would you have accepted, in the  
22             sense of moving forward to contracting, such an offer?

23      A. We may have done. I caveat that because Ofwat's price  
24         determination in 1999, which covered the period 2000 to  
25         2005, set decreasing prices over that five-year period

1 for Dwr Cymru's water supply. So to -- ie a RPI minus  
2 settlement. So to have accepted a plain vanilla RPI  
3 would have eroded our margins assuredly over the five  
4 years -- the ensuing five years, or four years if we  
5 start in 2001.

6 So the likelihood is that even had we accepted RPI,  
7 and that would have been very much a reflection on how  
8 good the price was, and in negotiating terms whether it  
9 was worth trading RPI for PPI, which was the prevailing  
10 indexation provision, we would probably also have  
11 insisted on the other component of the prevailing  
12 indexation provision which was: or the increase in price  
13 of Dwr Cymru's standard potable tariff, whichever is the  
14 lower.

15 Q. Let's break it down and be even more precise. Let's  
16 suppose that the price being offered to you was 14.4p,  
17 that's what you say is the basis of your case on the  
18 price that you should have received in the  
19 counterfactual, you understand that. So let's suppose  
20 it was 14.4p, and let's suppose again that,  
21 notwithstanding that you go back and say, "We would like  
22 an either/or, we would some alternative", Dwr Cymru say  
23 to you, "No, I am sorry, our bottom line is 14.4p, but  
24 it's RPI, take it or leave it".

25 Now, I appreciate this is a difficult question for

1           you to answer, because we are going back in time, and  
2           it's also a hypothetical. But notwithstanding that,  
3           it's an important issue in this case, and therefore  
4           I would like you, if you can, to say is it more likely  
5           or less likely that you would have accepted that offer?

6           A. It is more likely that we would have pressed for  
7           a continuation of the existing terms, terms that still  
8           had three years to run, two years to run, which was PPI  
9           plus -- or PPI or the change in the domestic tariff,  
10          whichever was the lower, which was the price set --  
11          which were the terms agreed in 1999, less than two years  
12          previously, and were the terms that also applied to  
13          Shotton Paper and, at that time, Corus at Llanwern, so  
14          we believe.

15         THE CHAIRMAN: Did you know that at the time?

16         A. We had been in discussion with Corus at Llanwern,  
17         I cannot say for sure what my knowledge was at that time  
18         on indexation in particular. We knew what the prices  
19         were for Corus at Llanwern because they were published  
20         by Ofwat from Dwr Cymru's figures on an annual basis  
21         since 1999.

22         MR PICKFORD: So on balance, you wouldn't have accepted RPI,  
23         you would have said, "No, we are not happy with that, we  
24         want these alternative indexation terms"?

25         A. I think we would certainly have pressed for PPI.

1 Q. What I am after is: where would you have got to at the  
2 end of the day?

3 A. I am not sure in the counterfactual. I think our  
4 position is that we would have stuck with PPI as the  
5 prevailing index. How got the deal was, because again  
6 14.4 is the upper limit, in our view, reflecting the  
7 true sense of the Tribunal's judgment on excessive  
8 pricing.

9 Q. Okay, if we could go, please, to bundle 17, and tab 52.  
10 Refreshingly, once we make it up into bundle 17 I think  
11 we have started the numbering again, so we are down to  
12 sensible tab numbers.

13 Now, this is a document from Ofwat:

14 "PR99 Information Requirement E, Supply/Demand  
15 Balance Submission, Reporting Requirements."

16 Do you see that on the title page?

17 A. I do.

18 Q. If we could go, please, to page 6698. If you look at  
19 the bottom, toward the bottom of that page, we see  
20 a section dealing with tariff switching and large users,  
21 and there is a description there, by the director, as to  
22 how he is going to treat revenues from large users for  
23 the purpose of setting price limits.

24 Where it talks about price limits here, this is part  
25 of the regulatory process, isn't it, that water

1           undertakers go through; having a number of their prices  
2           set by the Regulator?

3       A.   Yes.

4       Q.   He says in the bottom bullet:

5            "In respect of revenues from large users and for the  
6            purposes of setting price limits ...

7            "The director will assume that the revenues from  
8            excluded large users (and other sources of non-tariff  
9            basket revenue), reported in table E6 at 1997/98 prices,  
10           are scaled to nominal values by the assumed year on year  
11           change in basket year RPI."

12           So what he is saying here is he is going to assume,  
13           against the companies that he is regulating, that their  
14           income from the revenues from excluded group of large  
15           users -- and just pausing there, large users would have  
16           included the agreement with you, wouldn't it?

17       A.   No.   No.   It wouldn't.   Completely separate.   We are  
18           an undertaker in our own right in receipt of a bulk  
19           supply.   We are not a large user.   We are not governed  
20           by the price setting mechanism.

21       Q.   Your income is not taken into account, just as large  
22           user excluded, the income that would have been received  
23           by Dwr Cymru in respect of its agreement with you would  
24           have fallen outside the regulatory basket as well,  
25           wouldn't it, in the same way?

1 A. It certainly should have done, because it should have  
2 formed part of those third party services that I spoke  
3 of before.

4 Q. You can see that there could have been a concern by  
5 Dwr Cymru that if the director was saying that in  
6 relation to excluded large users, even if that wasn't  
7 you, that he was going to adopt an RPI assumption, that  
8 they had managed to get RPI in their contracts, that  
9 there was a risk for them that he was going to do it in  
10 relation to other agreements such as the agreement with  
11 you?

12 A. No, not at all, because the large users, although they  
13 fall outside the tariff basket, are still represented  
14 within regulatory accounts.

15 What appears in the third party, which has no  
16 bearing on this at all, are the special agreements,  
17 what's left of the special agreements, and situations  
18 like Albion where there is a bulk supply between  
19 undertakers. So, no, I think you are wrong on that  
20 point, but I stand to be corrected.

21 I think I would also say your suggestion doesn't  
22 stack up with the fact that Ofwat insisted on PPI at  
23 a date that was a year later than the date of this  
24 document. This is dated 27 February 1998, the  
25 insistence on PPI in the bulk supply agreement from

1 Dwr Cymru to Albion was, I think, about a year later,  
2 following Ofwat's intervention.

3 Q. We understand what you say about large users, but if one  
4 just goes back again to this bullet, it's not just large  
5 users, he is saying that:

6 "... assume the revenues from excluded large users  
7 and other sources of non-tariff basket revenue."

8 So that is you, isn't it, "other sources of  
9 non-tariff basket revenue"?

10 A. I don't know. Maybe. I honestly don't know, because  
11 this document is not familiar to me.

12 Q. You have just explained that you were outside the tariff  
13 basket, that was your evidence?

14 A. Oh, we are certainly outside the tariff basket, yes.

15 THE CHAIRMAN: No, well, if he is out -- well, does it mean  
16 basket revenue which is non-tariff, or does it mean  
17 revenue which is not basket revenue?

18 MR PICKFORD: It means revenue that is not in the tariff  
19 basket, because the other meaning, in my respectful  
20 submission, doesn't make any sense in this context.  
21 There is no such thing as non-tariff basket revenue.  
22 I know that won't come out very well on the transcript,  
23 but there is no such thing as non-tariff, pause, basket  
24 revenue, putting those bits together.

25 What there is is revenue which is out --

1 THE CHAIRMAN: It means other sources of revenue which are  
2 not in the tariff basket?

3 MR PICKFORD: That's correct, Madam, that's certainly the  
4 interpretation that we put on it, and that's the  
5 interpretation that I am putting to Dr Bryan.

6 THE CHAIRMAN: Do you know whether that's the correct  
7 interpretation or not, Dr Bryan?

8 A. I am afraid I don't, Madam.

9 (Pause)

10 MR PICKFORD: There is obviously an issue of interpretation  
11 about this document, so what I would put, and again it's  
12 necessarily a hypothetical, is assuming that I am  
13 correct about the interpretation of this document, and  
14 that's obviously a matter that can be debated, but if  
15 I am right, one can see that there was a problem for  
16 Dwr Cymru if it didn't secure indexation RPI because it  
17 was going to be assumed against it in a price control  
18 that it had done in any event?

19 A. That would actually have been a benefit to it, because  
20 the tariff was required to reduce over that period --  
21 I think that's right.

22 Q. Let's put it this way, we will try and make it simpler,  
23 if their prices moved in a way that was worse than RPI,  
24 ie if RPI went up at say, just for the sake of argument,  
25 5 per cent, and that's what the director was assuming in



1 terms of their revenues that they would get 5 per cent  
2 year on year by assumption, but in fact they only  
3 managed to secure 1 per cent year on year, because they  
4 only secured something less than RPI, then what would  
5 have happened is that, notwithstanding that their  
6 revenues were only going up by 1 per cent year on  
7 year -- notwithstanding that the director is going to  
8 assume that their revenues were going up by 5 per cent  
9 year on year. You understand the point I put to you?

10 A. I am not sure that I do, Mr Pickford. I am trying hard,  
11 but I am --

12 THE CHAIRMAN: Well, if we go to table E6, does that  
13 indicate to us what is -- whether this "other sources"  
14 includes common carriage?

15 MR PICKFORD: I beg your pardon, Madam?

16 THE CHAIRMAN: It says, "The director will assume that  
17 revenues" --

18 MR PICKFORD: Which page are you on?

19 THE CHAIRMAN: I am looking at 6698. It says that:

20 "... revenues from excluded large users and other  
21 sources of non-tariff basket revenue reported in table  
22 E6 at 1997 to 1998 prices are scaled to nominal values  
23 ..."

24 So it seems to be saying that the revenues about  
25 which that assumption is made are those reported at

1 table E6. Is that wrong?

2 MR PICKFORD: We don't have E6 here, we can certainly bring  
3 it tomorrow. There is an issue on the construction of  
4 that sentence, whether, given that the other bit is in  
5 parentheses, whether E6 would necessarily include the  
6 other sources of non-tariff revenue, or whether the  
7 following section refers to large users. But the  
8 sensible thing to do would be probably to see E6 and  
9 that may assist us.

10 A. I don't know if it helps, Mr Pickford, but I can't help  
11 but look at the previous page of the objective of all  
12 this exercise, which under E5.1, the purpose of the  
13 tariff action plan, and the second sentence of that:

14 "To understand how companies propose to levy charges  
15 in a way that ensures expenditure associated with growth  
16 in demand is, as far as practicable, met by those whose  
17 demand is increasing."

18 I think that it is a truism of the industry since  
19 1989 that the increase in prices has been driven by the  
20 need to invest. I don't think many people would dispute  
21 that. It's also a truism that there has been no  
22 investment -- I shouldn't use "no". There has been  
23 a very small, a vanishingly small amount of investment  
24 in the non-potable assets within Dwr Cymru. And  
25 therefore I think it is reasonable to assume that the

1           need for RPI or some form of indexation is particularly  
2           important for potable customers because that's the focus  
3           of investment, both in keeping the mains secure and free  
4           from contamination and making sure that treatment works  
5           meet ever increasing standards.

6           Those investment drivers just do not exist in the  
7           raw water or partially treated non-potable sphere, and  
8           so it really goes back to the argument of: what is the  
9           indexation intended to do? Is it intended to reward  
10          Dwr Cymru for investment which isn't taking place or  
11          what? And I think that helps you.

12         MR PICKFORD: Right, I think that's going somewhat outside  
13          the question that I asked you at the beginning of that.

14         A. I apologise.

15         THE CHAIRMAN: Mr Pickford, if you are making a point, or  
16          you want to make a point, the effect of which is that  
17          when we come to consider what, on the balance of  
18          probabilities, would have been done in relation to  
19          indexation, as I understand it you are saying: well,  
20          Dwr Cymru would never have agreed to anything less than  
21          RPI because at the time they knew that, in relation to  
22          this contract, an assumption was being made by the  
23          director that it included RPI indexation --

24         MR PICKFORD: That's correct.

25         THE CHAIRMAN: -- you need to be able to establish first

1           that that was what Dwr Cymru thought at the time --

2       MR PICKFORD:   Which I am going to come on to.

3       THE CHAIRMAN:   Yes, and it may or may not be relevant  
4           whether or not they were mistaken, and therefore we need  
5           to know whether in fact what this little bullet point  
6           means is that it was included.

7           Now, I don't know if someone can write to Ofwat and  
8           ask them, or how we can establish that, but it doesn't  
9           seem that Dr Bryan is able to establish that, so you  
10          need to think what evidence do you have to put to  
11          the Tribunal to establish that this contract was the  
12          subject -- was subject to that assumption, and then that  
13          that had some effect on the likely bargaining stance of  
14          Dwr Cymru at the time.

15       MR PICKFORD:   Of course, Madam, and we will endeavour to do  
16          what we can in relation to that.

17       THE CHAIRMAN:   I am not sure you can take it much further  
18          with this witness.

19       MR PICKFORD:   Exactly, that was my ...

20       THE CHAIRMAN:   Where you had got to as well?

21       MR PICKFORD:   Yes.

22           The best way I think of proceeding is if you go,  
23          please, to the second Edwards, it actually gives  
24          Dwr Cymru's views.  That's at folder 1, tab 6.  He  
25          explains there that:

1            "RPI is generally accepted to be the readily  
2            available index that best tracks the movements of ..."

3            A. Could you give me a paragraph reference, please?

4            Q. Sorry, paragraph 11, page 97D. If you read the first  
5            sentence, please.

6            A. Yes.

7            Q. What he says there is correct, isn't it?

8            A. No.

9            Q. Could you read the second sentence, please. (Pause).  
10           What he says there is correct?

11           A. That is correct, that has been the case since 1989.

12           Q. It's also the case that K has been both positive and  
13           negative over time, as he says in footnote 1?

14           A. Indeed, and K is effectively used by the Regulator as  
15           the tuning mechanism to iron out the problems inherent  
16           in RPI, and to reflect the real world situation of  
17           investment.

18           Q. He goes on, further down paragraph 11, to say he is:

19                  "... only aware of two respects in which Ofwat has  
20           made an explicit adjustment of what are termed 'real  
21           price effects' where input prices are expected to change  
22           at a different rate from RPI."

23                  Then he deals with capital investment:

24                  "... forms a significant portion of the water  
25           company expenditure, Ofwat considers whether to allow

1 for movements in the Government's construction price  
2 output index ('COPI') relative to RPI when it carries  
3 out price reviews, and when it resets the regulatory  
4 capital value ... of a water company at the price review  
5 it takes account deviations in COPI from what it had  
6 assumed in the last review."

7 So that's one respect and that's correct, what he  
8 says there?

9 A. I have no personal knowledge of that.

10 Q. You have no personal knowledge?

11 A. No, I don't.

12 Q. So you can't say that he is wrong --

13 A. No, I can't say that he is wrong.

14 Q. -- about what he is saying at the end of paragraph 11  
15 here at (a) and (b)?

16 A. I haven't got on to (b).

17 Q. If you could read (b), please.

18 (Pause)

19 A. Yes, I have no reason to believe he is wrong in (b).

20 Q. If we could go on, please, to paragraph 16, this is  
21 where Mr Edwards is dealing with special pricing  
22 agreements that have been entered into by Dwr Cymru  
23 post-privatisation.

24 A. Mm.

25 Q. He explains there, and in the following paragraphs, his

1 understanding of the occasions on which RPI has been  
2 used as compared to PPI. You have obviously read this  
3 and you understand what he is doing here?

4 A. Yes, yes.

5 Q. Now, he goes on in the sentence beginning, "One of those  
6 three" -- he says, and I'll come on in a moment to  
7 deconstruct this, and we can understand your views on  
8 it, he says that there are three agreements that use  
9 PPI, only three. Now, since writing this witness  
10 statement, there has been a letter provided by  
11 Dwr Cymru's solicitors to the Tribunal. Have you seen  
12 the letter where he deals with this paragraph, where he  
13 explains that, since writing the statement he is now  
14 aware that there are four rather than three such  
15 agreements that he should be referring to?

16 A. I may have seen it, but I can't recall it at present.

17 Was this the original Shotton Paper agreement?

18 Q. This is a -- no, it's a further agreement that he  
19 describes in his letter.

20 THE CHAIRMAN: It's a fairly short running one.

21 MR PICKFORD: It's a short running agreement from 1996  
22 until 2000, and he explains how he had forgotten the  
23 short running agreement, it was some time ago and he had  
24 forgotten about that. It's not an agreement that's any  
25 longer in effect. Do you recall that letter?

1 A. I do recall that letter now, yes. Yes.

2 MR SHARPE: Is this letter in the bundle?

3 MR PICKFORD: I am just going and try and get the reference  
4 for it.

5 MR SHARPE: I wonder if Dr Bryan could have a sight of it  
6 first, and me.

7 MR PICKFORD: Of course. The slight difficulty I have is we  
8 were going through this paragraph and it's been  
9 slightly ...

10 THE CHAIRMAN: I don't think it's material in the slightest  
11 to your point. Perhaps it can be dealt with later.

12 MR PICKFORD: I am very happy to do that.

13 So what he says is that, "There are only three  
14 non-potable" -- subject to that point we have just been  
15 discussing, so let's put that aside, subject to that he  
16 says:

17 "There are only three non-potable water supply  
18 agreements that use PPI indexation."

19 And he goes on:

20 "One of those three agreements containing PPI  
21 indexation provisions is the special agreement that we  
22 entered into with Shotton Paper in 1997 which  
23 subsequently formed the basis of the second bulk supply  
24 agreement with Albion in 1999."

25 So he is counting as one the supply to



- 1           Shotton Paper, first it was obviously direct to  
2           Shotton Paper, then it was taken over by you as broker.
- 3       A. They are two very separate legal agreements.
- 4       Q. Yes, well --
- 5       A. Yes.
- 6       Q. -- we can obviously debate that point. So we are clear  
7       about what he is saying, he is counting those as one,  
8       you see what he is saying there in the statement?
- 9       A. One was a special agreement and the other was a bulk  
10       supply between undertakers, and the first example of  
11       an entrant into the industry. I am not quite sure how  
12       you can class those as one and the same. They are very  
13       different.
- 14       Q. Dr Bryan, my point is not to debate that with you. It's  
15       simply so that we can see -- there is a point between  
16       him and you, and he classes that as one agreement, you  
17       class it as two agreements?
- 18       A. Yes.
- 19       Q. Subject to that difference of view between him and  
20       you -- and it's not really very productive for me to put  
21       it that it's one or put it that it's two, that's a point  
22       that we can debate in legal submissions -- what he says  
23       here in paragraph 16 and 17, if you would like to take  
24       your time to read it, is correct, isn't it?
- 25       A. (Pause). No. No. I don't believe it is correct.

1 I think that it is a misleading statement. First of  
2 all, it would have been useful if Mr Edwards had  
3 provided the actual register of special agreements at  
4 the relevant time, which would have given us and given  
5 the Tribunal written description of each of the  
6 agreements, when they were entered into, their duration,  
7 and it doesn't give a great deal of detail, but it does  
8 indicate in some cases, not all, the nature of the  
9 indexation.

10 Q. You see what he says at footnote 2, don't you, about  
11 what he has been able to do in the time in terms of  
12 providing redacted agreements? What you were just  
13 talking about is not the (inaudible), you are talking  
14 about something called a special agreement register,  
15 aren't you?

16 A. Yes, I'm not suggesting that Mr Edwards should have  
17 provided the agreements themselves. I would have been  
18 content to look at the special agreements register,  
19 which was the public record that Ofwat required the  
20 water companies to publish from 1999 that shone light on  
21 what had hitherto been rather secretive one-to-one  
22 agreements within the industry. I think that that would  
23 have been a much more transparent approach to  
24 identifying it, and I think if you had also included  
25 that part of the register which shows the volumes and

1 the values, then I think you would have seen that PPI  
2 indexation in terms of its importance, both of volume  
3 and value of revenues to Dwr Cymru, was by far the  
4 dominant form of indexation post-privatisation.

5 Q. We are going to come on to that issue about the  
6 agreements register in just a moment. Before doing  
7 that, just go back briefly, so that you can have seen  
8 them and given your reaction to them, if you could  
9 please look at paragraphs 12 and 13, and I am going to  
10 put to you that what he says at paragraphs 12 and 13 is  
11 correct.

12 (Pause)

13 A. Yes, I think that probably is true.

14 Q. Then again, before moving on to the register that you  
15 were talking about, if you could look please at the  
16 graph that he produces below paragraph 20. It's  
17 correct, isn't it, one sees in that graph that between  
18 1999 and 1996 PPI and RPI were moving very closely  
19 together?

20 A. Yes and.

21 Q. And from 1996 onwards through 2000, which is as far as  
22 we get on this graph, they were diverging?

23 A. Indeed.

24 Q. So it was becoming clearer, by the end of 2000, 2001, to  
25 everyone that RPI was obviously going to be more

1           advantageous to Dwr Cymru and PPI was going to be more  
2           advantageous to you, and that's why the debate took the  
3           form that it did? Sorry, I beg your pardon. In 2001 it  
4           didn't take any form, but later on?

5           A. I think that what that graph omits, which I think is  
6           relevant to the Tribunal's consideration, is that of  
7           course in 2000 there was a huge price reduction across  
8           the industry to reflect Ofwat's view that RPI had given  
9           the water companies too much profit and the P0  
10          correction that we see referred to in the various  
11          methodologies was a major price reduction to correct  
12          what Ofwat saw as an imbalance in the way that prices  
13          had moved ahead.

14          Q. To be clear, in relation to my question it was becoming  
15          clearer to everyone by 2001 that RPI would have been  
16          more advantageous to Dwr Cymru and PPI would have been  
17          likely to be more advantageous to Albion?

18          A. I don't recall making that mental calculation. What  
19          I do recall very clearly is the knowledge that our  
20          customer, Shotton, had previously benefitted from PPI  
21          indexation, it was a more relevant indexation for  
22          an industrial input and output, and that in dealing with  
23          an industrial customer with a system which was receiving  
24          and likely to receive no investment, that to the extent  
25          that indexation was at all necessary, we still felt that

1 PPI was the most appropriate index, and I don't think my  
2 views have fundamentally changed since that day.

3 Q. You would agree, surely, that RPI was a better index  
4 from Dwr Cymru's point of view?

5 A. That is certainly the case, yes. Certainly on this  
6 evidence.

7 Q. If we could go, please, to bundle 5, tab 214, and if you  
8 go to 1340A, we see that there has been inserted into  
9 the bundle here the 2003/4 special agreement register,  
10 and this is the document you were just referring to.

11 A. Yes, I am sorry, it's not made its way into my bundle.

12 THE CHAIRMAN: Nor mine.

13 MR PICKFORD: Oh dear. We may have to come back to that  
14 tomorrow, I think, having remedied the bundles.

15 A. Which year were you referring to, Mr Pickford?

16 Q. The 2003/2004 special agreement register.

17 A. Might I suggest that the appropriate one for the time  
18 would have been the 2000 special agreements register.

19 Q. I'll explain the reason why the document that we have  
20 here is 2003/2004: this is what you -- it may be that we  
21 are able to proceed. (Handed).

22 THE CHAIRMAN: Well, only I have a copy, so I think we had  
23 better take this point when we have all got a copy of  
24 this.

25 MR PICKFORD: Of course, Madam, we will ensure for tomorrow

1 morning that we have the full record and we can come  
2 back to it.

3 I am being told that we have enough to supply  
4 the Tribunal with, so whilst we are on this subject, if  
5 the Tribunal is willing to temporarily accept our  
6 spares?

7 THE CHAIRMAN: Okay.

8 MR PICKFORD: (Handed). We can hand up one A4 spare, and  
9 I am afraid there is a short straw initially for A5  
10 spares, but we can obviously have that supplemented in  
11 due course with a proper version for the bundles.

12 So what we have here is a special agreement register  
13 for Dwr Cymru 2003/2004; you see that?

14 A. I do.

15 Q. This was in fact an exhibit to your second witness  
16 statement --

17 A. Yes.

18 Q. -- which was disallowed. Your solicitors asked for this  
19 document nonetheless to be put into the bundle, and  
20 Dwr Cymru didn't object.

21 A. Okay.

22 Q. So this is in fact, this document originated from you,  
23 in the sense that it was you who wanted it presented  
24 before the Tribunal. Do you understand that?

25 A. I do.

- 1 Q. And you accept it?
- 2 A. I certainly accept it for what it is, yes.
- 3 Q. Now, for potable water, on page 1340A, we have
- 4 a description of various WSHPOTs, and none of those have
- 5 any information about their indexation?
- 6 THE CHAIRMAN: I am looking at the transcript. It's
- 7 actually WSHPOT.
- 8 MR PICKFORD: WSHPOT from 1 to 6.
- 9 Do you see that, Dr Bryan?
- 10 A. Indeed, I do, yes.
- 11 Q. None of them contain any information about indexation
- 12 for potable water?
- 13 A. They don't. I think we can assume that the ones where
- 14 it's free of charge are not indexed.
- 15 Q. That's probably a fair assumption. If we move on to
- 16 non-potable water -- one final question, other than the
- 17 ones that are free of charge, for all we know, the ones
- 18 which aren't, they could be indexed at RPI, we simply
- 19 don't know?
- 20 A. We don't. I think the point to make is that, as far as
- 21 I am aware from looking at the actual published figures,
- 22 the volumes, these are tiny supplies, really very --
- 23 typically parts of old estates where the householders
- 24 have traditionally had water for free, and no-one has
- 25 ever got round to changing those circumstances.

- 1 Q. If we go on to the next page, that's where we deal with  
2 the non-potable supplies, and they are given the  
3 abbreviation WSHNONPOT; do you see that?
- 4 A. I do, yes.
- 5 Q. If we could go through each of them, the first one which  
6 is WSHNONPOT 1, which -- actually the heading for it is  
7 on the previous page.
- 8 A. Yes, it is, yes.
- 9 Q. If you turn over we see that the indexation that's used  
10 there is RPI?
- 11 A. Yes. Could I also point out that it's for £7.81 p per  
12 month, to give you a view of the relevance of this.  
13 Sorry.
- 14 Q. If we move on to the next one, that is also RPI?
- 15 A. Yes.
- 16 Q. The next one is an abstraction charge, so we don't  
17 actually -- there would be no need for indexation one  
18 way or the other, because presumably it would move  
19 implicitly with cost?
- 20 A. The abstraction charge, I assume this refers to the  
21 abstraction charge levied by the Environment Agency, and  
22 that changes year on year, in relation to the  
23 Environment Agency's costs.
- 24 Q. Now, the next one, which is number 4, is retail price  
25 index?



- 1 A. I see that, yes.
- 2 Q. Then we have Producer Price Index, so that's PPI, we  
3 then, from 6, 7 and 8, have three agreements that were  
4 all agreed prior to privatisation in 1989; do you see  
5 that?
- 6 A. Yes.
- 7 Q. 78, 66 and 82. Both -- well, in Mr Edwards' analysis he  
8 has not looked at pre-privatisation agreements, has he?
- 9 A. I believe not.
- 10 Q. On the next page, 9, that's a PPI. You see "Charge moves  
11 by the November PPI"; yes?
- 12 A. Yes, yes.
- 13 Q. And 10, we don't know, it says that it was initially  
14 agreed for ten years, and the previous take and  
15 reservation arrangement was replaced in April 2001  
16 with a new five-year agreement based on the volume  
17 supplied, so it could be RPI for all we know. That is  
18 correct?
- 19 A. We don't know.
- 20 Q. But it could be RPI, yes. The next one, number 11, is  
21 RPI, you see that at the end?
- 22 A. Yes.
- 23 Q. The next one, number 12, is the standard potable water  
24 charge; you see that at the end?
- 25 A. Yes.

1 Q. Number 13 is also standard potable water charge; do you  
2 see that?

3 A. Yes, I do.

4 Q. So what we see, just pausing there, we see the next  
5 category is bulk supply exports, which I will come on to  
6 in a moment.

7 Just pausing in relation to the non-potable supply  
8 agreements, what we have seen from that is that on this  
9 list we have identified two that are explicitly PPI,  
10 they were numbers 5 and 9; yes.

11 A. Yes.

12 Q. There are six that are either -- this is the  
13 post-privatisation agreements?

14 A. Yes.

15 Q. There are six that are either RPI or tied to the  
16 standard potable charge?

17 A. I don't think -- you should split those out, I believe.

18 Q. There are four then that are explicitly RPI?

19 A. Yes.

20 Q. And two that are charged to the standard potable charge?

21 A. Okay.

22 Q. Then there was one that was abstraction, and there was  
23 one that we couldn't tell from the information that we  
24 had here?

25 A. Yes.

1 Q. Now, the potable standard charge is a volumetric charge  
2 which is based on RPI plus K, isn't it?

3 A. Potable charge is, yes.

4 Q. So --

5 A. Can I just adjust your maths a little on your analysis?  
6 Because the two agreements that aren't in here, one is  
7 the Shotton agreement that last from 1997 to 1999, which  
8 was PPI indexed, and the other of course is the bulk  
9 supply agreement which is below somewhere, on  
10 page 1340D -- no, that's the potable one. Yes, 1340D at  
11 the top of the page, and that of course is PPI as well.

12 So by my reckoning that is four PPI, four RPI and two --

13 Q. We are just going to come on to it next, I am just going  
14 in stages so we are clear about the different  
15 categories.

16 A. Yes, yes, of course.

17 Q. So a point that you are picking up, that you just read  
18 with me, relates to the next category, doesn't it?

19 A. It does, it's bulk supplies, yes.

20 Q. So you agree with me in terms of what I have said in  
21 relation to the special agreements which aren't bulk  
22 supplies which we have just gone through on these two  
23 pages? I haven't heard you demur from any of the points  
24 that we have been making when we have been counting up  
25 how these various --

1 A. No, I haven't. I am just a bit conscious that there may  
2 be a gap and it may be what the letter that I am missing  
3 addresses, because WSHNONPOT 13, if you look back  
4 through the records, that we believe is the Corus site  
5 at Shotton where the previous agreement ended in 1996,  
6 I think I am right in saying 1996. There was then  
7 a hiatus of four years during which the agreement was  
8 continued by Dwr Cymru, and that, our understanding is,  
9 was expressly PPI linked.

10 Q. The reason of course why an agreement like that might be  
11 missing is this is a snapshot in time, it's taken in  
12 2003/2004, so if an agreement has existed in the past  
13 and then no longer exists, then you wouldn't expect to  
14 find it here, because this is agreements that are  
15 continuing today as of 2003/4?

16 A. Agreed. Yes, I agree.

17 Q. That potentially explains some absences from the list?

18 A. It does.

19 Q. Likewise, just as there may be absences of PPI  
20 agreements, by the same reasoning there might also be  
21 absences of RPI agreements. RPI agreements which don't  
22 appear in the register because again those agreements  
23 had stopped, been aborted, moved on to different  
24 tariffs, et cetera.

25 A. I think you will find, Mr Pickford, that if you look at

1 the records for 1999, 2000, 2001 and onwards, you will  
2 find there are no such agreements, but there are  
3 certainly the Shotton agreement and the Corus agreement  
4 at Shotton -- Shotton Paper agreement and the Corus  
5 agreement at Shotton, which did feature in earlier  
6 entries and which confused the very clear picture that  
7 Mr Edwards gave. He talked about the vast proportion,  
8 I can't remember his exact words, and I don't want to  
9 put words into his mouth. I do not think the picture is  
10 at all as clear as that.

11 Q. We don't have those other documents in front of us, so  
12 we can't actually check and know. Mr Sharpe is saying  
13 that we do. I am not aware that were they are in the  
14 bundle. In any event, we can deal with that in due  
15 course.

16 I said we come on to the next three, so to be good  
17 to my word, we have a further three agreements which are  
18 the bulk supply exports. We have no information for  
19 numbers 1, 2, 4 and 7. You see that on page 1340C?

20 A. Yes, I do.

21 Q. Then we have numbers 3, 5 and 6, and finally we have  
22 got to number 3, this is the bulk supply non-potable  
23 water to yourself, agreed in 1999 to run for four years,  
24 so that's one of the ones that you were previously  
25 looking for, you were trying to find yourself.

- 1 A. I was ahead of myself, I am sorry.
- 2 Q. So that one is PPI, we are agreed on that?
- 3 A. Yes.
- 4 Q. The next one is standard potable volumetric charge; you  
5 see that in the last four words of that?
- 6 A. Yes.
- 7 Q. So that's RPI plus K?
- 8 A. Yes.
- 9 Q. The final one is average cost of water?
- 10 A. Yes.
- 11 Q. We know that water regulation in the United Kingdom is  
12 based on an RPI plus K formula?
- 13 A. Plus or minus K, yes.
- 14 Q. Well, it's plus K and obviously K can be plus or minus,  
15 and the reason for that is because that's the index  
16 which the water regulator considers is appropriate to  
17 use.
- 18 A. The last bulk supply is the Elan Valley, it's the huge  
19 scheme that supplies Birmingham, and it really is vast,  
20 and the terms of that agreement are bound up in complex  
21 Acts of Parliament and various trusts, and it's far from  
22 clear how the price mechanism works and what is referred  
23 to by cost of water, because I think you have been  
24 talking to me about the movement in tariffs with RPI,  
25 that's not necessarily the same as the cost of water.

1 I don't know how the Elan Valley scheme works, I don't  
2 believe that it tracks RPI or it would say so. But  
3 I simply add that, because it's a bit of an outlier.

4 Q. But regulation in this country is intended to be cost  
5 fenced(?), isn't it, in the water industry?

6 A. The Elan Valley agreement was arrived at well before  
7 privatisation, and I just have no idea what the precise  
8 nature of the price movements are within it.

9 Q. That's a very helpful point which I indeed hadn't  
10 spotted, Dr Bryan, so if we adopted the same approach as  
11 we had in relation to the previous page, we should  
12 ignore Elan Valley because we are only focusing on the  
13 post-privatisation agreement, so it's just the first  
14 two.

15 Do you agree with that?

16 A. Yes, and I am not sure the relevance of the potable  
17 agreements because we are talking here specifically  
18 about non-potable out of tariff basket, our bulk supply  
19 on the potable side is -- shadows the standard potable  
20 tariff. It's a tiny volume, 15,000 metres cubed  
21 per year, compared to nearer 7 million, and I don't  
22 think in the overall scheme of things it has any  
23 influence on our non-potable pricing.

24 Q. I have taken you to the document that you wanted to be  
25 included in the bundle. Could we go, please, to tab 9

1 of folder 2.

2 THE CHAIRMAN: Do we know how many of these supplies would  
3 be included in the category of excluded large users or  
4 other sources of non-tariff based, whatever that phrase  
5 was, in relation to which the assumption is made by the  
6 director that they move with RPI?

7 MR PICKFORD: All of them, Madam.

8 THE CHAIRMAN: Right, so they would all -- that assumption  
9 would be made about all of these contracts?

10 MR PICKFORD: That's correct.

11 MR LANDERS: Even the one that has a fee of £7.81? It  
12 doesn't sound like a large user.

13 Is the conclusion from this, just looking at these  
14 numbers on volumes that if the volume is high, then you  
15 charge PPI, and if the volume is low you charge RPI?

16 MR PICKFORD: That's not the conclusion that we draw.

17 A. It is a very strong correlation.

18 MR LANDERS: But the ones that are just measured in a few  
19 hundred a year all seem to be RPI, and the ones that are  
20 measured in large numbers per day are PPI, or is that  
21 just a coincidence?

22 A. The biggest, Llanwern, for the Tribunal's assistance is  
23 WSHNONPOT 5. At that time, and certainly at the time we  
24 are interested in, in 2000, that was the biggest, and  
25 both the last two, 12 and 13, were the other Corus



1 sites, and if memory serves me well, they were both, at  
2 that time, about 2, 2.5 million cubic metres a year.  
3 Albion at that time was approaching 7 million cubic metres  
4 a year.

5 MR LANDERS: WSH POT 11 is 8 mill a day, which seems to be  
6 the highest for any with a retail price, whereas the PPI  
7 ones are all at least ten times -- well, far more than  
8 that.

9 MR PICKFORD: I hesitate whether to answer your question,  
10 sir, or put the question to Dr Bryan. I think I will  
11 put it to Dr Bryan as he is giving evidence.

12 12 and 13, the Corus sites you have just identified,  
13 they are very large suppliers, aren't they? They are  
14 not as big as Shotton Paper, but they are very  
15 substantial suppliers?

16 A. They are substantial suppliers, yes.

17 Q. So the point that was being put to you by Mr Landers,  
18 with obviously appropriate respect from my point of  
19 view, isn't strictly correct?

20 A. I am sorry, what was not strictly correct?

21 Q. It's being suggested to you that there was  
22 a relationship so that it was only where small amounts  
23 of water involved, that there was any relationship with  
24 RPI and for large amounts of water it was PPI.

25 What I am saying is, for instance, numbers 12 and

1           13, which are tied to the standard potable charge of RPI  
2           plus K, they are very large amounts of water provided  
3           under those agreements?

4           A. They are substantial users. I think that the simple  
5           picture you are trying to paint for the Tribunal is  
6           somewhat clouded by the fact that these are all Corus  
7           sites where there is still an ongoing dispute with  
8           Dwr Cymru about the price they should or shouldn't  
9           charge, and certainly our understanding is that from  
10          1996 to 2000 Dwr Cymru maintained preferential terms for  
11          Corus at Shotton because it was concerned about our  
12          predatory behaviour -- I shouldn't use that term in this  
13          court.

14         THE CHAIRMAN: No.

15          A. Competitive, we can't be predatory, if we are only  
16          small, I hope. Our competitive behaviour on literally  
17          the neighbouring site. They share a fence.

18         MR PICKFORD: If we could move on, please, having I think  
19          squeezed as much as we can out of these particular  
20          documents, to tab 9, folder 2. That tab 9 has a number  
21          of insertions made into it, so we are actually after  
22          a letter that's quite some way through at page 224A.  
23          You see this is a letter from Dwr Cymru of 30 May 1997?

24          A. Yes, I do see that, yes.

25          Q. This is in relation to water supply contracts?

- 1 A. Yes, I see that.
- 2 Q. It's a letter from Mr Taylor to the finance director of  
3 Shotton?
- 4 A. Yes.
- 5 Q. So this is what Dwr Cymru was trying to achieve in  
6 relation to its renegotiation of the contract which you  
7 say went into abeyance with Shotton. If we go on to  
8 224E, we will see in clause 4.4 that what was being  
9 sought by Dwr Cymru here was, 1 April 1998, for  
10 non-potable water, adjustments according to RPI?
- 11 A. Yes. I do see that.
- 12 Q. If we then go to tab 14, 279A, we don't have a totally  
13 complete documentary record, but by this stage you have  
14 stepped into the picture because it had been  
15 contemplated that, rather than renegotiating directly  
16 with Shotton, you are now going to play the brokerage  
17 role?
- 18 A. I don't recognise your characterisation.
- 19 THE CHAIRMAN: You are getting your inset appointment?
- 20 A. Yes, we applied in 1996. This is two years later. The  
21 Ofwat process ground exceeding fine and slow.
- 22 MR PICKFORD: So we see now that by this stage Dwr Cymru is  
23 writing to you. Sorry, I beg your pardon, it's writing  
24 to Albion --
- 25 A. To Malcolm Jeffery, yes.

1 Q. He is discussing -- this is a letter again from  
2 Mr Taylor -- now a bulk supply agreement in respect of  
3 Shotton Paper, but now he is considering obviously  
4 directly with you. We see at clause E, or rather letter  
5 E of the letter, his response to your, or rather  
6 Malcolm Jeffery's earlier letters. He says that:

7 "The Director General has said that he will assume  
8 that income from large users will increase by RPI (and  
9 not K) when setting prices from 1 April 2000 and we have  
10 redrafted the indexation clause to reflect that policy."

11 So we can see, at this snapshot in time, that  
12 Dwr Cymru had taken some agreement proposed by you and  
13 said: we don't like your indexation, we want RPI.  
14 That's very clear from this letter?

15 A. No, the genesis of our agreement was actually the  
16 Shotton Paper agreement. So what had actually been  
17 taken were the existing terms of supply to  
18 Shotton Paper, which was indexed by PPI.

19 Q. What they are saying in response is, "We see what you  
20 are proposing, we don't like it, we want RPI"?

21 A. Yes, that's what Dennis Taylor is saying, yes.

22 Q. Then if we go over the page to the next letter that we  
23 have from this period, in the bundle at least, we see  
24 a letter of 23 -- I beg your pardon, it's not over the  
25 page, it's in the next tab, a couple of pages on, if you

1 go please to page 293C.

2 A. Yes, I'm there eventually.

3 Q. We have a letter of 23 December here, 1998, and this is  
4 from Ofwat.

5 A. Yes.

6 Q. Effectively this is Ofwat stepping into the arena, and  
7 they say, this is to Mr Taylor, who has been dealing  
8 with these negotiations:

9 "Dear Dennis, Beryl Brown wrote to you on  
10 7 December 1998 with our view that the bulk supply  
11 agreement between Dwr Cymru and Albion Water should  
12 contain the same indexation for charges for non-potable  
13 water as in the current agreement between Shotton and  
14 Dwr Cymru."

15 So there was a debate between you and Dwr Cymru at  
16 this time, and it was resolved by Ofwat stepping in and  
17 saying, well, Dwr Cymru, that's what we are going to do?

18 A. Yes, I think that's a fair summary of a rather  
19 protracted process, from memory.

20 Q. The agreement that was negotiated at this point in time  
21 was for four years, wasn't it?

22 A. Yes, it was.

23 Q. So insofar as Dwr Cymru had a concern about RPI and PPI  
24 moving out of sync with one another, it was only going  
25 to have to live with that concern for four years?

1 A. Yes. That wasn't our choice for four years, but that  
2 was a fait accompli, I am afraid, we were only given  
3 four years.

4 Q. It may be that I can do this fairly briefly without  
5 going to the document, because I think we are both  
6 familiar with what happened some while later. In the  
7 context of the bulk supply agreement that was determined  
8 by Ofwat in October 2011 --

9 A. Yes.

10 Q. -- by that point in time, and that's the only time in  
11 fact when Ofwat has stepped in and determined a bulk  
12 supply agreement between yourselves and Dwr Cymru after  
13 this point?

14 A. That's correct.

15 Q. The indexation provisions there are RPI, aren't they?

16 A. They are.

17 Q. For the Tribunal's note, that's the document at folder  
18 9, tab 304. When Mr Edwards in his evidence says that  
19 Dwr Cymru will have held out for RPI indexation, you are  
20 obviously in no position to say that what he is saying  
21 is untrue, are you?

22 A. No, I think in negotiations we all hold out up to  
23 a point, but if the deal is there to be done, you try  
24 and strike the deal on the best possible terms.

25 Q. To complete the picture, if we could come back to the

1 point that you were making about subsequent negotiations  
2 between yourselves and Dwr Cymru in around 2008/9, so  
3 this is at the conclusion of the main proceedings, this  
4 is the point I promised we would come back to, and  
5 I think it would be appropriate if I could come back to  
6 it now. It may take me slightly over, but I hope not  
7 very much over half past, and I think it would be  
8 sensible to tie these threads together and we can move  
9 on to other topics if that is okay with the witness and  
10 the Tribunal.

11 THE CHAIRMAN: Yes.

12 MR PICKFORD: Sorry, and of course the stenographer.

13 So if we could go, please, to folder 8, tab 284, so  
14 this is the second letter after your initial refusal of  
15 14.4p per metres cubed. You then on 19 November 2008,  
16 tab 284 of folder 8, this is the one that we went to  
17 very briefly before where you have then changed your  
18 mind, and you are saying, "Okay, as regards the future,  
19 we will agree that 14.4p per cubic metre, we can  
20 describe as a fair and reasonable price"?

21 A. No, you are putting words into my mouth, that's not at  
22 all what I said. I said it was a basis for further  
23 negotiations for moving the process on, but that we, as  
24 you will see from the second part of bullet point 1 in  
25 that letter, "Such agreement is without prejudice to the

1 rights of Albion to maintain that the costs are in fact  
2 substantially lower". So I think there again it's  
3 a repeat of what I have said before, we will take  
4 something and we will move on, try and achieve some  
5 benefit, if we feel that there is still a basis for  
6 challenge, we will maintain that challenge, if it makes  
7 sense to us.

8 Q. The indexation provisions that you are proposing here  
9 are set out in paragraph 2, and you see you say that:

10 "Indexation provisions since 1986 have used the  
11 Producer Price Index and we have heard no argument that  
12 this indexation is inappropriate and we will propose  
13 that this be used to calculate the current and future  
14 cost adjustments."

15 So that's what you are saying?

16 A. It is, yes.

17 Q. Our response, and if you could keep folder 8 open,  
18 please, because we are going to come back to it in  
19 a moment, but we have to go unfortunately to folder 17  
20 for our response, because this was a document that was  
21 not originally in the bundle. We are going to tab 68,  
22 I believe, of this document -- of this bundle. Do you  
23 have the letter of 24 November 2008 --

24 A. I do.

25 Q. -- which is Dwr Cymru's response? We see over the page



1 under paragraph 5, first bullet, Dwr Cymru's response on  
2 indexation. Do you see that?

3 A. Yes.

4 Q. They are saying, again it's a familiar debate now, "No,  
5 we want RPI not PPI"?

6 A. Yes, I see that.

7 Q. Your counsel suggested yesterday that we never responded  
8 to your letter of 19 November, but you would accept now  
9 that in fact we did respond?

10 A. Yes. I think that that wasn't in the bundle, I think  
11 that was the reason for our oversight. I think I put  
12 the record straight earlier on, because we responded in  
13 January, and I think it's that letter to which we have  
14 had no substantive response.

15 Q. We will come to that in a moment. It was actually your  
16 disclosure, wasn't it, this particular letter? There is  
17 no criticism intended of you. It's just it was a letter  
18 that you provided.

19 Now, if we could then move to 286, this is the  
20 letter that you were referring to --

21 THE CHAIRMAN: Are we back in bundle 8 now?

22 MR PICKFORD: Yes, so that was a brief excursion to 17 to  
23 complete that bit of the picture. I think we can put 17  
24 away now. So this is a letter of 16 January 2009. This  
25 is the letter to which you say you didn't receive any

1 response.

2 A. No, what I actually said or should have said was I can  
3 recall no response and can find no response.

4 Q. This may seem a slightly odd question to put to you, but  
5 you will understand why I am putting it in a moment.

6 You don't know that this letter which you are now  
7 referring to saying that you are not aware of  
8 a response, you don't actually know that it was ever  
9 received by Dwr Cymru, do you?

10 A. I have no record of receipt, no.

11 Q. Because, on the basis of what you said this afternoon --  
12 just to explain the reason for that, but it's not  
13 a question I need to put to the witness because you  
14 can't actually answer it -- my instructions are that  
15 this letter wasn't received by my client. So that's why  
16 I have put that particular question. Obviously Dr Bryan  
17 can't really say anything further about it than that.

18 Now, after this time --

19 THE CHAIRMAN: Do we know whether Matt Halden at Ofwat got  
20 his copy?

21 MR PICKFORD: I don't, Madam. Obviously enquiries can be  
22 made by my solicitors of Mr Halden to see whether or not  
23 he did.

24 A. I have no record of any letter from Dwr Cymru chasing  
25 the absence of a response to the earlier letter that you

1           just took us to in bundle 17.

2       MR PICKFORD: Madam, it's my submission that I doubt very  
3           much a lot is going to turn on this particular point,  
4           but I thought it was important that at least you  
5           understood the reason for that question.

6       THE CHAIRMAN: As I understand it, you are not putting it to  
7           Dr Bryan that it was never sent, you are just saying  
8           that it was not received.

9       MR PICKFORD: No, because obviously we are in no position to  
10          say it was never sent. All that we know is that, to the  
11          best of our knowledge, our records, we never got it.,  
12          which is why I framed the question in the way that  
13          I did.

14          We then move on to the remedies hearing, which  
15          happened in February 2009, so 13 February, so just under  
16          a month later, and the judgment for that is in  
17          bundle 13, tab 22. It may be that you recall what  
18          I said to the Tribunal about this yesterday. If you  
19          don't, it doesn't matter, we can go to it.

20          What I explained yesterday was that you were  
21          contending to the Tribunal that the Tribunal should set  
22          PPI, and the Tribunal noted there was a debate between  
23          the parties and it said "We are not going to set one  
24          thing or another, the indexation arrangements can be  
25          dealt with commercially".

- 1 A. Yes.
- 2 Q. You recall it?
- 3 A. I do recall that. Can you remind me of the tab you are  
4 referring to?
- 5 Q. Yes, it's tab 22.
- 6 A. Thank you.
- 7 Q. And it's paragraph 22. What we see there is that  
8 the Tribunal says it declines to make any findings as to  
9 the appropriate index by which common carriage price  
10 should be justified:
- 11 "In our judgment, this is a matter which properly  
12 falls to be addressed by commercial negotiation between  
13 the parties and is no part of these proceedings."
- 14 So that was the situation as it stood by the time of  
15 the Tribunal's judgment in April 2009 [The Remedies  
16 Judgment].
- 17 A. Yes.
- 18 Q. So there had obviously been some further open debate  
19 about these issues in the course of coming to that  
20 conclusion by the Tribunal?
- 21 A. Well, certainly in the confines of this court but not,  
22 I regret to say, as part of a dialogue between the  
23 parties.
- 24 Q. There was more correspondence between you, between  
25 yourselves and Dwr Cymru, after the remedies hearing

1 about a potential agreement, wasn't there?

2 A. There was a huge amount of correspondence because of  
3 what happened after The Remedies Judgment, primarily the  
4 imposition of very large increase -- or attempted  
5 imposition of a very large increase in non-potable  
6 costs, an existing attempt which pre-dated The Remedies  
7 Judgment to increase potable costs, and a £1 million  
8 a year standing charge for back-up potable. So those  
9 were all issues with which we were having to contend in  
10 the immediate aftermath of The Remedies Judgment.

11 Q. Prior to today there hadn't been any suggestion that  
12 there was a fault on Dwr Cymru's part in terms of not  
13 responding to Dr Bryan at this stage, and so -- we do  
14 not have the full set of correspondence in the bundle,  
15 and I can potentially complete the picture by reference  
16 to any further correspondence that we may be able to add  
17 overnight.

18 The final question that I can put -- and  
19 unfortunately I don't have the correspondence here yet  
20 to take you to it directly -- is that Dwr Cymru did  
21 offer a further price, and their price was indexed using  
22 RPI arrangements, wasn't it?

23 A. I don't recall.

24 THE CHAIRMAN: A further common carriage price?

25 MR PICKFORD: Sorry, yes. Dwr Cymru, after The Remedies

1 Judgment -- I will be clearer -- offered a further  
2 common carriage access price, and the basis for their  
3 price was that they indexed and took the 14.4p and  
4 indexed it up by RPI?

5 A. I don't recall.

6 MR PICKFORD: Madam, I think that's as far as we can go in  
7 relation to that today.

8 I have one further point, or rather something to  
9 hand up for tomorrow. Dr Bryan has provided some  
10 annexes to his particulars of claim that contain various  
11 numbers in them that explain how he got to his damages  
12 calculations. I took you to some of those yesterday.  
13 One of them, in order to try to assist the debate,  
14 I have substituted some new numbers into to bring out  
15 a point in argument. I don't want to take Dr Bryan by  
16 surprise in relation to these. There shouldn't be any  
17 concerns in relation to it. I have explained where all  
18 the numbers come from, but so that he can have some time  
19 to familiarise himself with what I have done to this  
20 spreadsheet, I was proposing to hand it up overnight so  
21 that he can at least have a look at it and we discuss it  
22 tomorrow. It's simply a tool.

23 THE CHAIRMAN: The only reason why I am hesitating slightly  
24 is, of course, overnight he is in purdah as regards his  
25 legal team. Is that going to disadvantage him in

1           preparing for any questions?

2       MR PICKFORD:  What I could have done, and indeed advocates  
3           commonly do this, it's just a tool for dealing with it.  
4           I could have simply handed it up to him as we took the  
5           questions, but I thought it would be fairer to him, at  
6           least so that he could see the numbers that I'm  
7           proposing to take him to, so he can at least see it  
8           overnight.  There shouldn't be -- it's about his  
9           calculations.  His evidence this morning was that he  
10          actually calculated those accurately(?) so there  
11          shouldn't be a disadvantage, and I am trying to be  
12          fairer to the witness.

13       MR SHARPE:  I take it we will get a copy of this as well.

14       MR PICKFORD:  Of course.

15       MR SHARPE:  Is my friend saying these are drawn exactly from  
16          Dr Bryan's statements, or are these new numbers?

17       MR PICKFORD:  The table should be self-explanatory.  I have  
18          substituted in his page 3344 of the particulars of claim  
19          some new numbers in red, so that you can see what's new,  
20          and then the rest of the table is what flows out of  
21          those new numbers, and I have explained in the document  
22          where the new numbers come from.  They come from his  
23          documents.  It's simply in order to make things  
24          hopefully a bit smoother tomorrow and again to be fair  
25          to the witness so that he has at least had

1           an opportunity to see. (Handed).

2   MR SHARPE: Madam, can we, as they say, reserve our position  
3           on this until we have seen it? I certainly don't want  
4           to be obstructive, but we have not had a chance to see  
5           where these numbers have come from.

6   MR PICKFORD: If objection is going to be taken to it,  
7           I would ask that the witness doesn't see it until  
8           Mr Sharpe has made his position clear.

9   THE CHAIRMAN: Well, let him see it, we will deal with any  
10           objection that arises as and when. We need to have some  
11           way of referring -- is this going to go into the bundle?

12   MR PICKFORD: This will need to go into bundle 17, which  
13           I think is our overflow bundle, our second overflow  
14           bundle, and fast becoming full in its own right. We  
15           will update the index.

16   THE CHAIRMAN: Someone tomorrow can give us a tab number or  
17           a page number to add to it so we know what we are  
18           talking about in due course.

19   MR SHARPE: It would help if we knew precisely where the  
20           numbers came from.

21   THE CHAIRMAN: Why don't you discuss it amongst yourselves?  
22           We will start, then, at 10.30 tomorrow.

23   MR PICKFORD: If it were possible to start at 10, I think  
24           that would be of assistance. We have had a good day  
25           today, but there have been obviously been a number of



1 points that have, to some extent, slowed us down, and  
2 Dr Bryan gives very full answers in relation to certain  
3 issues -- that's obviously entirely appropriate -- but  
4 that would be our request.

5 MR SHARPE: One has to be slightly concerned about the  
6 burden on any witness. Counsel can go on until  
7 midnight.

8 THE CHAIRMAN: We might take a slightly longer break  
9 mid-morning, if we start early.

10 MR PICKFORD: The alternative, if there are concerns about  
11 going on too long for the witness, is that we can --  
12 given that we do have some leeway in the timetable --  
13 if -- and it's an if, hopefully we won't, but if -- we  
14 do overrun tomorrow, we have an eventual buffer we can  
15 use up. So we are happy with either approach.

16 THE CHAIRMAN: How do you feel about it, Dr Bryan?

17 A. I am at your disposal, Madam.

18 THE CHAIRMAN: Let's start at 10.30 and try and make good  
19 progress. I think it is a long day for the witness to  
20 start at 10.

21 MR PICKFORD: I understand.

22 A. I am most grateful.

23 (4.45 pm)

24 (The court adjourned until 10.30 am  
25 on Thursday, 18 October 2012)

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