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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 October 2012

Before:

VIVIEN ROSE
(Chairman)
TIM COHEN
DTKCP LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellants

– v –

DWR CYMRU CYFYNGEDIG

Respondent

*Transcribed using LiveNote by Opus 2 International
10 Fetter Lane, London, EC4A 1BR
Tel: +44 (0)20 3008 5900
info@opus2international.com*

HEARING (DAY 7)

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.

Tuesday, 23 October 2012

(10.00 am)

MS JANINE MELANIE WHITE (continued)

Cross-examination by MR SHARPE (continued)

THE CHAIRMAN: Good morning.

MR SHARPE: Good morning. I will now resume the cross-examination of Ms White, and I hope it will be of some comfort to you to know that I have been able to edit things overnight from your answers yesterday. So we should be brief.

We left off, I think, with my asking you that the long run marginal cost calculations you did were very uncertain, weren't they? I think you replied yes?

A. Yes, they are always are.

Q. Can I take you to bundle 5, tab 187?

A. Yes.

Q. Do you recognise this document?

A. Yes.

Q. What is it?

A. It's a letter to Philip Fletcher, who was the Director General of Ofwat, requesting a determination under section 40A.

Q. Of the Heronbridge Agreement?

A. Of the Heronbridge Agreement, yes.

Q. This is 13 February 2003, isn't it?

- 1 A. Yes.
- 2 Q. All right. The only point I'm going to take to you at
3 this moment is at page 1179. Just to round off the
4 pricing point, do you see the paragraph that begins "We
5 had discussed"?
- 6 A. Yes, I do.
- 7 Q. Yes. So here is your contemporary recognition of the
8 uncertainties surrounding long run marginal cost but
9 your argument here is it could be substantially higher.
10 Is that right?
- 11 A. Yes.
- 12 Q. It couldn't be lower?
- 13 A. No.
- 14 Q. But you tried to be reasonable and you advert to the
15 lack of solidarity in supply?
- 16 A. Lack of security. I know it's very difficult to read
17 this letter but it says "the lack of security in the
18 supply".
- 19 Q. The lack of security in the supply. Thank you. We can
20 put that to one side although we will be coming back to
21 bundle 5 later on, briefly.
22 We will pick up bundle 4, tab 165 at page 1032.
- 23 A. Yes.
- 24 Q. This is a letter from United Utilities to Welsh Water,
25 isn't it?

1 A. Yes.

2 Q. And here you are notifying Welsh Water that United was
3 applying for a re-determination of the Heronbridge
4 Agreement; is that right?

5 A. Well, that we intended to, yes.

6 Q. You intended to do that, yes. And the letter was
7 copied.

8 Now, let's just refresh our memory. At this time,
9 2002, and for a year later in the letter I have just
10 taken you to where you talked about the uncertainties
11 inherent in calculations of long run marginal cost, were
12 you comfortable that the calculations you had made for
13 LRMC were robust?

14 A. I think the calculation of LRMC at any point by anybody
15 is always something which, as the earlier letter says,
16 has inherent uncertainty, in that there are different
17 ways in which a long run marginal cost can be calculated
18 but I was confident that the calculation that I had done
19 would stand up to scrutiny by Ofwat and that it was
20 reasonable and justifiable. Ofwat themselves would have
21 recognised that there is -- it's not like two plus two,
22 there is more than one way to do the calculation. But
23 that I was confident that the way I had done it was
24 a reasonable calculation and that it would be accepted
25 as such by Ofwat.

1 Q. Can you think of any good reason then why Mr Lafon did
2 not respond to Dr Bryan's request for a sight of the
3 methodology you had used?

4 A. It was not and has not been our general method of
5 approach that we provide detailed calculations of prices
6 to parties other than Ofwat, so the usual path would be
7 for Ofwat to consider the methodology used and the
8 calculations used and to see if they agreed that they
9 were a robust approach.

10 Q. Ms White, that really won't do --

11 A. Well --

12 Q. May I ask my question?

13 A. You may.

14 Q. Thank you. It won't do because you are now dealing in
15 a world where you are negotiating with third parties for
16 bulk supply in this case. That was right, wasn't it?

17 A. We had always been dealing in a world where we were
18 dealing with bulk supply. Bulk supply wasn't
19 something that was new. The question, I think, is not
20 whether or not I should agree or disagree with that
21 approach but that is and was the approach that we take.
22 So that factually, that is the approach.

23 Q. I'm sure there is no necessity to take you back to the
24 requests -- the firm guidance, actually, of the
25 regulator I took you to yesterday, but you should be

1 prepared to justify the numbers that you created, that
2 you were requiring third parties to pay?

3 A. We were quite happy to justify the numbers to Ofwat.

4 Q. But you weren't told to justify them to Ofwat, you were
5 told to justify them with your contracting party, in
6 this case Albion and Dr Bryan knew about that. He
7 applied to exercise the rights that Ofwat had clearly
8 stated were his and Mr Lafon simply refused to do so.

9 Your explanation is that: oh, we didn't think we had
10 an obligation to do that. I put it to you, that is
11 plainly contrary to the language of the several
12 documents that I have taken you and the Tribunal though
13 in the course of your evidence.

14 Would you like to rethink your answer, please?

15 MR BEARD: I think if Mr Sharpe is going on press this
16 point, it may be appropriate for him to take the witness
17 back to those documents if this is the point he is
18 making. I think it's rather hard for the witness to deal
19 with this in abstract.

20 MR SHARPE: I'm not convinced it is appropriate but I think
21 I have got limited time and I think Ms White knows
22 perfectly well and can remember from MD163 and so can --

23 THE CHAIRMAN: Yes, we went to those documents yesterday.
24 Do you recall that they did say that the price would
25 need to be justified?

1 A. Yes. I don't think -- I would need to be taken back if
2 you are trying to argue that they say they need to be
3 justified to the applicant because that's the bit that
4 I don't recollect.

5 I would have been of the impression that they needed
6 to be justified and it doesn't say -- and I'm assuming
7 that is to Ofwat because ultimately it's Ofwat's
8 guidance and it's Ofwat who want to make sure that we
9 are applying their guidance.

10 MR SHARPE: So was your view at the time and you presume --
11 though we don't know -- it's Mr Lafon's view that you
12 had no obligation at all to Dr Bryan to justify the
13 numbers; is that right?

14 A. That's right.

15 Q. So whatever the guidance may say -- and it does say that
16 you must give the information, I don't think that's in
17 contention. I'm not going to clutter up the morning
18 scurrying around, if I simply refer you to MD163. It
19 was your view at that time, your reading of the
20 documentation that you had no obligation to Dr Bryan.
21 That's right, isn't it?

22 A. That's right.

23 Q. Well in any event, those negotiations came to a halt
24 because of the events off stage, as far as you were
25 concerned, with the first access price, didn't they, to

- 1 the best of your knowledge?
- 2 A. Yes, I think to the best of our knowledge at the time,
3 we simply didn't have a response and we weren't -- and,
4 as you say, that was because of the common carriage
5 but --
- 6 Q. I don't want to labour the point --
- 7 A. I don't know how much detail --
- 8 Q. I don't want to labour the point but the last thing we
9 see here, the last substantive piece of correspondence
10 is Dr Bryan's request for, "Please give me an idea about
11 the methodology you were adopting in relation to the
12 12.1" --
- 13 A. Sorry, I thought you were saying that they fell aside
14 for other reasons to do with the Welsh common carriage
15 and I'm just saying that we wouldn't have been closely
16 involved with that at the time.
- 17 Q. As far as you are concerned, the negotiations fell away.
18 We know off stage that that was probably due to the
19 first access price leading up to negotiations, but the
20 last communication you had from Dr Bryan, unanswered,
21 was a request for methodology, was it not?
- 22 A. The last correspondence that's on file is the request
23 for methodology.
- 24 Q. Thank you.
- 25 A. I have no other correspondence on file.

1 Q. Thank you. Let's go back to bundle 4, please, 165.

2 This is your cover letter. So you are acquainting

3 Mr Brooker that you were making this application.

4 That's right, isn't it?

5 A. Yes.

6 Q. We turn over the page. This is a copy of what went to

7 Ofwat, isn't it? As it says at page --

8 A. Yes.

9 Q. Did anything else go to Ofwat at that time?

10 A. No.

11 Q. No. This is the totality of the application. A formal

12 letter to Ofwat --

13 A. And an appendix.

14 Q. And an appendix. So that clip in bundle 4, tab 165 -- right.

15 It goes without saying you would never dream of
16 misleading Ofwat and this represents some considered
17 thinking?

18 A. Yes.

19 Q. This is a pretty formal application to make?

20 A. This isn't the formal application. The letter that you
21 took me to earlier, that was from Clive Elphick to
22 Philip Fletcher is the formal application. This is
23 a letter to Ofwat stating our intention and setting out
24 some information. Ofwat find it helpful to know that
25 these things are coming and to have discussion with the

1 parties prior to a formal application for
2 a determination.

3 Q. Thank you. So if I have understood it correctly, you
4 have a document here dated 18 January 2002?

5 A. Yes.

6 Q. Then there is a fairly lengthy process. The other
7 letter was dated --

8 A. 2003.

9 Q. 2003?

10 A. Yes.

11 Q. It was all part and parcel of the same application?

12 A. Yes.

13 Q. And it was obviously a very considered and rather long
14 drawn-out procedure, wasn't it?

15 A. Yes.

16 Q. And it consisted of a good deal of documentation we
17 haven't seen in the bundle, doesn't it?

18 A. I think there is documentation in the bundle regarding
19 a meeting that I went to at Ofwat about a month after
20 this letter, if memory serves.

21 Q. We haven't --

22 A. -- and then there is my note about that.

23 Q. Yes. We will come on to that. But I think there is
24 other documentation. I make no complaint about it in
25 particular but there is quite a lot of documentation

1 that would have gone to Ofwat supporting our
2 application. That's right, isn't it?

3 A. Ofwat indicated that the application didn't need to be
4 accompanied by -- I think I say that in one of the
5 emails as well --

6 Q. You do?

7 A. -- by that detailed information because if they wanted
8 that later on, then they would ask for it. They were
9 more concerned with the question of whether they had
10 jurisdiction.

11 Q. Jurisdiction meaning --

12 A. Well --

13 Q. This means something to me, I'm afraid --

14 A. Sorry, whether they, under section 40A -- under the
15 first two requirements in section 40A --

16 Q. Whether those requirements had been satisfied --

17 A. Whether they would actually -- and that therefore they
18 were permitted by law to make that determination.

19 Q. So they were statutory requirements and if they weren't
20 satisfied, they weren't going to bother you with
21 anything else?

22 A. Yes.

23 Q. All right. Let's go to page 1036 of tab 165, bundle 4 first. Do you
24 have

25 it?

26 A. Yes.

1 Q. A couple of quick paragraphs. You see what you told
2 Ofwat on 18 January 2002?

3 A. Yes.

4 Q. "Current price is significantly below LRMC and as such
5 may conflict with Ofwat's guidelines on the application
6 of the Competition Act 1988. UU would
7 intend to supply both DCC and Albion Water at the same
8 price in order to comply with Licence Condition E and
9 the Competition Act 1998."

10 Right. We have seen this. But this represented
11 your view?

12 A. Yes.

13 Q. Now, I accept that this was your intention at the time.
14 It certainly wasn't true at the time?

15 A. I'm sorry, I'm not sure what you are saying wasn't true.

16 Q. Well, you intend to supply but it wasn't a fact at that
17 time, that was your intention?

18 A. It was an intention. It's true that it was our
19 intention at the time.

20 Q. Yes. Thank you. If we turn over the page, a couple of
21 pages, you get to bundle 4, tab 168. This is an internal email to
22 your colleague John Farmer, who we mentioned yesterday.
23 That's right, isn't it?

24 A. Yes.

25 Q. That's right. Have a look at it. It reports a meeting

1 you had had at Ofwat with Mr Day and his colleagues?

2 A. Yes.

3 Q. Breaking new ground and hadn't determined anything under
4 section 40A. That's interesting, I suppose.

5 Then it says you had to explain: "... the first step was to convince
6 the

7 director that the conditions for Section 40A are satisfied."?

8 A. They had to explain.

9 Q. Yes.

10 A. Yes.

11 Q. Well, explain that the first step is for you to convince
12 the director, isn't it? That's how I read it.

13 A. I think I would need to convince them and they would
14 need to convince the director. I don't think they would
15 let me talk to Philip Fletcher.

16 Q. Good heavens. Let's call it you had to convince Ofwat?

17 A. Yes.

18 Q. And these are what you had --

19 "It's necessary and expedient for securing efficient
20 use of water resources or efficient water supply and the
21 companies are unable to agree."

22 Those were the two pre-conditions; right?

23 A. Yes.

24 Q. Was this him or you talking by the way:

25 "We need to focus ..."?

1 A. That's me "we", as in UU need to focus on this.

2 Q. So this is your note to Mr Farmer:

3 "We need to make our arguments on leakage, supply/demand balance
4 and alternative value."

5 By "alternative value" do you mean what you were
6 discussing yesterday? We could move away from
7 accounting cost and look at the opportunity cost?

8 A. Yes.

9 Q. Yes, thank you:

10 "As we are not proposing any change in the physical
11 arrangements, they will take some convincing."

12 That's a fairly frank statement again, isn't it?

13 A. Yes, which reflects the discussion I had with them at
14 the meeting, that they were very concerned -- George Day
15 in particular, who was the Head of Water Resource
16 Planning or some such similar title. At the time Ofwat
17 was very concerned that, because there would be no
18 change in the physical arrangements, that therefore
19 meant there was no change in the efficient use of water
20 resources or efficient water supply because there was no
21 change in the existing arrangements.

22 Q. Yes.

23 A. And our point was that the correct price might drive
24 a change in arrangements, that actually might lead to
25 changes.

1 Q. Right. Then you need to demonstrate that discussions
2 with Welsh have broken down?

3 A. Yes.

4 Q. Then in the parenthesis "difficult as RDA" -- RDA is?

5 A. Sorry, that's Bob Armstrong.

6 Q. Who is he?

7 A. I think we talked about him yesterday. He was the
8 Customer Services Director at the time.

9 Q. Right. An employee of United?

10 A. Yes.

11 Q. Difficult as United Utilities is meeting Brooker, the
12 managing director at the time?

13 A. Yes.

14 Q. Of Welsh Water, I'm so sorry.

15 So they haven't quite broken down yet and this is
16 something you recognise internally?

17 A. Yes.

18 Q. But even so, trying to knock your heads together and get
19 back to the table. That's right, isn't it?

20 A. Yes.

21 Q. Indeed that happens.

22 I'm not going to take you to it but there was
23 a meeting later as it happened?

24 A. Sorry, a meeting.

25 Q. Between you and Welsh Water?

- 1 A. Yes and the delay between this and the eventual
2 application was us trying to exhaust all avenues before
3 we actually went to Ofwat.
- 4 Q. You didn't get anywhere, did you?
- 5 A. No.
- 6 Q. And it was absolutely clear, wasn't it, that Welsh Water
7 weren't going to voluntarily increase the price or make
8 any other changes to the agreement other than fairly
9 minor, I'm sure there were important in relation to the
10 structure of the agreement --
- 11 A. None at all, really. Although in principle we had
12 talked about some changes which they didn't object to,
13 any reopening of the agreement was seen as being
14 a threat and therefore they weren't really -- I wouldn't
15 have expected them to do that at all because once you
16 say you will change one little thing, all of a sudden
17 it could kind of open things out.
- 18 Q. So the key thing is the price wasn't going to change,
19 was it?
- 20 A. The price wasn't going to change.
- 21 Q. No. To the extent that -- were you actually involved in
22 those negotiations which appear to have lasted quite
23 a while?
- 24 A. I have been -- I was at some of the meetings, yes.
- 25 Q. So you saw first-hand Welsh Water's attitude and view,

1 thank you.

2 Then you say -- I think this affects your earlier
3 evidence:

4 "On price, the DG needs to understand our case for
5 the price sought rather than detailed calculations. So
6 we are not expected to submit spreadsheets at this
7 stage."

8 A. Yes.

9 Q. Then the next step is for:

10 "Me to draft a letter from Clive Elphick to Philip Fletcher ..."
11 And so on. That's right, isn't it?

12 A. Yes.

13 Q. So that's where we start. I think we need to go back,
14 I'm afraid, to bundle 5.

15 A. Yes, appropriately this case is about water and I have
16 just spilt my water.

17 THE CHAIRMAN: This always happens at least once every trial
18 and we have provision for just this eventuality.

19 MR SHARPE: I expected nothing less. Thanks very much.

20 Let's go to MD163. I just want to take you to the
21 point that we were at previously. The reference is
22 bundle 3, tab 59 at page 610. Under "Principles" -- do
23 you see?

24 A. Yes.

25 Q. I'll take you quickly, if I may to (ii):

1 "Each company should charge entrants as it would
2 charge itself and should be able to demonstrate this
3 both to entrants and to the regulator, if asked to do
4 so."

5 A. Yes.

6 Q. Do you accept that there is this obligation to provide
7 evidence to parties?

8 A. Demonstrating that you are charging yourself and
9 entrants in the same way is not the same as providing
10 detailed spreadsheets as to how the charge has been
11 calculated and I would not have interpreted that in that
12 way. I would have expected to be able to show that --
13 and as we talked about yesterday, we were really
14 thinking about networks. I would have expected to be
15 able to show that the way in which United Utilities
16 charged itself full access to the network was the same
17 as the way in which it charged entrants.

18 THE CHAIRMAN: I thought we discussed yesterday that you
19 didn't make that calculation as to how you charged
20 yourself.

21 A. We didn't get any applications, so we didn't have any --
22 we didn't have any necessity to do that. So in a sense,
23 that question never arose. But that means the charge
24 needs to be calculated in a way that would comply with
25 that and then you would have to demonstrate it if

1 necessary. Because we don't really charge ourselves.
2 So it's kind of -- do you know what I mean? We don't
3 have an internal market where we charge ourselves --

4 THE CHAIRMAN: But we had this discussion yesterday about
5 whether you were able to say as regards your price to
6 your customers what component of that price related to
7 the water that you were supplying them.

8 A. Yes.

9 THE CHAIRMAN: I thought your answer was that no, you were
10 not able to say in relation to your supply to customers
11 what the water element was at least insofar as it came
12 from a particular source.

13 A. No, and that's why we would have considered it on
14 a broad geographical basis, because we -- we charge
15 customers on a geographical basis and therefore charging
16 entrants on a geographical -- a regional average basis
17 is consistent with principle (ii) here.

18 So charging an entrant for an individual -- charging
19 the costs for a specific treatment works or pumping
20 station or piece of pipe would have been inconsistent
21 with the way in which we charge customers, if you are
22 interpreting the way we charge ourselves as ultimately
23 being the way we charge our customers. So certainly in
24 terms of the way we charge customers, to say these are
25 the costs at Heronbridge, rather than these are the

1 costs for raw water abstraction for the region or for
2 the integrated zone would have been inconsistent.

3 THE CHAIRMAN: All right. That's not quite the point that
4 we are on to at this stage.

5 MR SHARPE: If we can go into this document, this is your
6 request for determination.

7 A. I'm sorry, when you say "this document"?

8 Q. I'm sorry, I beg your pardon, I thought I said.
9 Bundle 5, tab 187?

10 A. Sorry, we are returning to that?

11 Q. Yes. This is the Elphick/Fletcher letter. Did you
12 write this?

13 A. I would have -- I took part in its drafting, I think
14 I probably drafted the first copy and then there would
15 have been several people changing it.

16 Q. Yes. May I take you, then, to the second page. The
17 first page deals with the history with which I think we
18 are now familiar. We have a heading "Efficient Use of
19 Water Resources". Do you have it?

20 A. Yes.

21 Q. And the first and second paragraphs describe the
22 situation and then you go on in the second paragraph:

23 "The River Dee is a major source of supply... The
24 availability of abstraction capacity ... particularly for
25 secure capacity is severely limited. This supply is

1 therefore of potentially high value to UU
2 in avoiding the need for alternative source enhancements."

3 Is that right?

4 A. Yes.

5 Q. Now, I took you yesterday to significant quantities of
6 evidence to suggest that actually the integrated zone at
7 this time and for the foreseeable future was in surplus,
8 didn't I?

9 A. You took me to the Water Resource Plan 1999, yes. By --
10 at this time, if -- we talked about boreholes at
11 Prescott.

12 Q. You talked about boreholes at Prescot. I see nothing in
13 the evidence of boreholes at Prescot.

14 A. I'm sorry, I didn't realise it would be relevant.

15 Q. I'm sorry --

16 THE CHAIRMAN: Just answer the original question.

17 Just put the question again, Mr Sharpe.

18 MR SHARPE: Well, I took you to evidence of a surplus in the
19 integrated zone. I took you to your own plans to
20 enhance capacity by way of costless means of enhancing
21 water supply, did I not?

22 A. No, you didn't. You didn't take me to anything that
23 was -- that showed that we were planning to implement
24 means which were costless.

25 Q. I took you to a table. I think it was Fylde. Did you

1 not implement that procedure?

2 A. I think we agreed that we both don't know where Redscar
3 is, which was the costless one and that therefore it may
4 not be.

5 Q. I think it was Fylde, the costless one. I don't really
6 know where Fylde or Redscar is and I could reply I don't
7 need to but you do?

8 A. Yes.

9 Q. Because these were costless or very low cost means of
10 enhancing capacity and just maintained what was already
11 a significant surplus in the integrated zone, weren't
12 they?

13 A. Whether or not they would be able to support the
14 integrated zone depends upon where they are.

15 Q. Well, yesterday we heard from you that the integrated
16 zone -- and I think I equipped -- the integrated zone
17 was integrated?

18 A. It is.

19 Q. And therefore any enhancement of water supply within the
20 integrated zone would be of benefit to the integrated
21 zone. Do you wish to refresh your evidence on that or
22 do you agree with your evidence yesterday?

23 A. If you imagine that the integrated zone is like the M25
24 or something, there may still be cul-de-sacs off it,
25 where water can be sent out along the cul-de-sac but it

1 can't come back. So there is not -- so -- what I'm
2 saying is it's a more complicated position and those
3 source enhancements were not in your 25-year plan.

4 Q. It's a somewhat more complicated story than the story
5 you told us yesterday, isn't it?

6 A. If so, I apologise.

7 Q. Yesterday you gave us a story of the integrated zone
8 where water that wasn't taken at Heronbridge could find
9 itself -- I think you drew the line at Penrith, but it
10 might find itself elsewhere --

11 A. You drew the line at Penrith.

12 Q. The evidence will show that you said you didn't know
13 whether it went to Penrith?

14 A. That was about the integrated zone, that wasn't about
15 water at Heronbridge. The water at Heronbridge can find
16 its way via the River Dee via Huntington to Prescott and
17 from Prescott across to Manchester and into the
18 Manchester ring main. That's not Penrith.

19 Q. It isn't, as you said yesterday. But you painted
20 a picture of integration. Now we are getting a picture
21 of semi-integration and I'm happy to accept that,
22 Ms White, I'm happy to accept that we are moving away
23 now from an integrated zone to a zone which --

24 A. I just don't want to comment on a source enhancement
25 which I'm not familiar with at all and I don't know

1 where it is. So I don't want to tell you something
2 that's wrong. I don't know where that is and I don't
3 know how that source enhancement would affect supplies
4 within the zone.

5 THE CHAIRMAN: The basic question, it seems to me is that in
6 this letter it says -- it's implying in that paragraph
7 that there are limits on the water availability and
8 therefore the value of the water to UU from the River
9 Dee at Heronbridge could be very high. What Mr Sharpe
10 is putting to you is that that -- what is that based on
11 because it doesn't seem to be based on anything in the
12 Water Resource Plan, which seems to show that you are in
13 surplus and that there were plenty of other ways of
14 increasing the amount of water available that you
15 planned to do or that you could do if you needed water.

16 So why is it that this letter says that the water
17 from Heronbridge has potentially high value in avoiding
18 the need for alternative source enhancements.

19 A. This letter is three and a half years after that Water
20 Resource Plan and we were in the process of producing
21 the next five year plan. It is my recollection that
22 there was suggestions -- there were negotiations with
23 the Environment Agency over whether in times of drought
24 and low flow, the amount that we were allowed to
25 abstract from the River Dee would be reduced further.

1 There is -- we talked about there being a cap about what
2 we can take from the river but when the river -- when
3 it's dry, the cap is brought down. So we can actually
4 take less. So there was discussions with the
5 Environment Agency as to whether this was going -- and
6 I think it was under the Habitats Directive, the
7 European Habitats Directive. That would mean that we
8 would be able to take -- given that this supply
9 wouldn't, therefore -- if everything came down by
10 10 per cent, we wouldn't give 10 per cent less water to
11 Welsh Water because they have no alternative to
12 provide -- to that water. So the amount by which it
13 came down would come from what's taken out at Huntington
14 Water Treatment Works, which is one of our large water
15 treatment works. It's relatively inexpensive to
16 operate, supplies Cheshire, Warrington and up to
17 Liverpool.

18 As it says here, this is talking about the River Dee
19 and it's about capacity on the Dee. We actually take
20 water from the River Dee at four different places and
21 all of them are important to us but the use of
22 Huntington Water Treatment Works is particularly
23 important to us because it is one of our major works.

24 Q. Well, Ms White, I think we can't take it too much
25 further because you have introduced most helpfully new

1 evidence that is subsequent to the 1999 Water Resources
2 Plan and I'm afraid I have to rely upon the Water
3 Resources Plan. I had thought this was an industry of
4 long-term planning horizons. That's what we are always
5 told. You seem to be suggesting that three years after
6 that the situation may have changed fairly
7 significantly?

8 A. Water Resources Plans have to be revised every five
9 years. The situation does change quite quickly if there
10 is new legislation being introduced which affects the
11 amount of water that you are allowed to take from the
12 environment.

13 Q. That's causing this to be high value water.

14 May we just go on to the next paragraph of page 1178, tab 187,
15 bundle 5 which if I may put it this way, has your watermark in it,
16 hasn't it? The current basis the charging doesn't allow UU to
17 reflect the value of this supply and you agree with
18 Ofwat that:

19 "LRMC is an appropriate basis for determining bulk
20 supply charges"?

21 A. Yes.

22 Q. "This would provide the correct economic signal."

23 As you say, this is Economics 101, isn't it,
24 resources priced at marginal cost leads to efficient
25 allocation of resources. That's the theory, isn't it?

1 Then you say:

2 "At an efficient price, DCC would be incentivised to
3 seek these alternative" sources of supply.

4 You are positing here the negotiation that
5 Welsh Water can go for a cheaper source of supply for
6 its contract with Corus and potentially with Shotton if
7 ever it should win the contract back. That's your point
8 here, isn't it?

9 A. Yes.

10 Q. And at an efficient price they would be incentivised to
11 seek those alternatives thus allowing you to use and
12 place these high value resources elsewhere within the
13 integrated zone. That's the evidence. This is your
14 case, isn't it?

15 A. Yes.

16 Q. So you are putting the argument to them in long run
17 marginal cost terms that whatever Dr Bryan's view about
18 the quality of Ofwat personnel and their technical
19 skills, you presumably took a different view; they are
20 people who are capable of assessing economic efficiency
21 arguments and could understand the language of
22 commission. That would be correct, wouldn't it?

23 A. Yes.

24 Q. Yes. So you are putting forward arguments in the next
25 paragraph:

1 "No economic incentive ... to control leakage."

2 After all, the raw water is so cheap, why control
3 leakage. That's the argument, isn't it?

4 A. That's the argument, yes.

5 Q. And so on. Then you discuss the negotiations which
6 I don't think concern us and then I think that's all we
7 need to do in relation to this document.

8 Let's skip over to bundle 5 tab 210. This is a document
9 dated 12 August 2003, five months or six months later.
10 To Mr Elphick from Philip --

11 A. From Bill Emery.

12 Q. From Bill Emery, sorry. Not Mr Fletcher. It doesn't
13 matter. And this is a rejection of your request, isn't
14 it?

15 A. Yes.

16 Q. We will go on to the annex in a moment but the summary
17 in the middle paragraph:

18 "The director proposes not to make a determination
19 under section 40A WIA91. On the basis of the material United
20 Utilities have presented, it does not appear to the director that
21 it is "necessary or expedient for the purposes of
22 securing the efficient use of water resources or the
23 efficient supply of water to vary the agreement or to
24 terminate it".

25 That's right, isn't it?

1 A. Yes.

2 Q. And just note parenthetically, as it were, the first
3 paragraph. He refers to:

4 "We considered the material ... UU has sent us over
5 the past few months connected with its request."

6 So in fact you did send material in addition to the
7 letter that we have seen. That's right, isn't it?

8 A. I would have to go and look through the files to confirm
9 that. It sounds like it from this letter, doesn't it?

10 Q. It also sounds from your answer that you weren't engaged
11 in that process; is that right?

12 A. No, but if they had asked me to send something and I had
13 sent it, that doesn't mean I would remember now.

14 Q. There is no reason to doubt Ofwat's letter, is there?

15 A. No. Yes, that's fine.

16 Q. I make no point but what we are seeing here is the end
17 result?

18 A. Yes.

19 Q. If we go over to page 1305 -- I'm not going to take you
20 to this in detail because I don't think it warrants it
21 but let's start off under "Reasoning". This is
22 a reasoning to reject, I think:

23 It "has been driven by the tests set out in
24 section 40A" and "For the director to be able to exercise
25 his discretion to make a determination, it must appear

1 to him that it's necessary or expedient for the purpose
2 of securing the efficient use of water resources or
3 efficient supply of water to vary the agreement."

4 So that's just setting down the ground rules.

5 Then in the following paragraph, after "Approach":

6 "For this test to be met, it must appear that
7 a variation of the agreement would result in some form
8 of efficiency."

9 Do you see that?

10 A. Yes.

11 Q. Of course, you would agree with that heartily, wouldn't
12 you?

13 A. That appears to be what the test says, yes.

14 Q. No, no, but you would agree with the substance of it,
15 wouldn't you?

16 THE CHAIRMAN: I don't understand that question, Mr Sharpe.

17 A. Nor do I.

18 MR SHARPE: Let me rephrase it, sorry. Your advocacy of
19 long run marginal cost as leading to a more efficient
20 allocation of resources is the way you deployed your
21 case with Ofwat, isn't it?

22 A. Yes, but that's not to do with the test particularly.

23 Q. Efficiency isn't to do with what test?

24 A. The test on securing the efficient use of water
25 resources or the efficient supply of water isn't

1 necessarily about the efficient -- isn't necessarily
2 about long run marginal cost.

3 Q. You puzzle me there, you see.

4 A. Which wouldn't have been a consideration, I don't think,
5 for Parliament at the time.

6 Q. Sorry, what wouldn't have been a consideration --

7 A. Long run marginal cost, when they wrote this.

8 Q. I'm perfectly sure that when Parliament used the word
9 "efficiency" they left it to the discretion of Ofwat to
10 determine what an efficient outcome would look like.

11 That seems reasonable, doesn't it?

12 A. Yes.

13 Q. And an efficient outcome, according to you, would be one
14 in which the prices for water resources would reflect
15 their opportunity cost. That's right, isn't it?

16 A. No.

17 Q. No?

18 A. The test is about efficient use or efficient supply and
19 efficient outcome according to Ofwat in their guidance
20 was that bulk supply shock charged under long run
21 marginal cost. What I was trying to do was to reflect
22 Ofwat's guidance.

23 Q. Yes and why should it reflect long run marginal cost?
24 For the very reasons you have earlier explained to Ofwat
25 and at some length to us, that it would result in the

1 efficient use of water insofar as Welsh Water would not
2 waste water, would not leak water, it would take
3 precautions to avoid leakage and you in turn would use
4 that water for a more efficient, higher value outcome?

5 A. Yes.

6 Q. So I can't see any difference at all, I'm afraid between
7 your view of efficiency and Ofwat's view of efficiency
8 here, can you?

9 A. I think we are talking about two slightly different
10 things. Ofwat are talking about charging being
11 efficient and this is -- when this talks about the
12 efficient use of water resources and efficient water
13 supply of water. Yes, okay, I'm not -- I think if that
14 were the case, then Ofwat would not have been concerned
15 about -- whether or not there were changes in the
16 physical circumstances.

17 Q. It doesn't refer to changes at this point?

18 A. At the meeting I had with them.

19 Q. Miss White, the simple point I'm trying to question you
20 about is this: your notion of efficiency and the use of
21 long run marginal cost is identical to the view taken of
22 the role of long run marginal cost and efficient
23 allocation of resources at Ofwat, isn't it, right? That
24 is to say its test to be met would result in some form
25 of efficiency?

1 A. Yes.

2 Q. Yes. What we have got here, in the rejection of your
3 application, is a rejection of the view that the cost
4 reflective price of Heronbridge was an inefficient price
5 insofar as that price would lead to the misallocation of
6 resources?

7 A. Ofwat didn't have information about the costs, so
8 I don't see how they could have made an assessment of
9 the costs or whether the costs --

10 Q. Respectfully, they knew in terms what the Heronbridge
11 Agreement meant. I presume that you gave it to them and
12 you described it at some length actually in the earlier
13 application: its genesis, its history and how costs were
14 charged.

15 What you have got here is an attempt on your part to
16 increase the price from that cost reflective price to
17 that price that you think accords with an economically
18 efficient price that would enable all the resources to
19 be allocated, not only by you but by Welsh Water. That
20 would be right, wouldn't it?

21 A. That it would enable -- yes.

22 Q. And their refusal to do so indicates that in their
23 judgment it was not necessary to increase the price in
24 order to arrive at an efficient price for the water
25 resources concerned because in their judgment it must

1 follow that the existing price met that test. That's
2 right, isn't it?

3 A. I'm just checking -- sorry --

4 Q. Please.

5 A. You are telling me that Ofwat are saying that.

6 Q. I'm not telling you --

7 A. If you could point out where, that would help me.

8 Q. Well, I'm asking to you consider this rejection. You
9 put forward an argument based upon long run marginal
10 cost, based upon underlying efficiencies, all right? To
11 support that argument, you gave evidence in relation
12 to -- we will take it at the bottom of page 1306:

13 "A higher volumetric price is likely to increase the
14 incentive ... to reduce leakage".

15 Do you see that?

16 A. Yes.

17 Q. "But we found that leakage from the system under current conditions
18 did not appear to be out of line with the industry
19 norms."

20 So in that respect the price performed what prices
21 should do, that is to say it allocated resources
22 optimally, and there was no undue incidents of leakage.
23 That was Ofwat's finding, wasn't it?

24 A. Given the evidence we have heard from Dr Bryan about his
25 view of the level of industry leakage at the time, just

1 because it's not out of line --

2 THE CHAIRMAN: You are not being asked about Dr Bryan's

3 evidence; you are being directed to consider what Ofwat

4 were saying here --

5 A. So Ofwat found --

6 THE CHAIRMAN: -- and what you believed from that.

7 A. So Ofwat is saying that leakage is not out of line with

8 industry norms. They are not saying it was efficient.

9 It clearly wasn't considered efficient at the time

10 with --

11 THE CHAIRMAN: They are saying that they don't think that an

12 increase in price is likely to prompt a significant

13 reduction in the amounts of leakage and hence the

14 increase in price will not have any effect on the

15 efficient use of water. Isn't that what --

16 A. They are saying they don't think that it would change

17 the leakage.

18 MR BEARD: I'm sorry, the witness is being asked for

19 opinions on an Ofwat document. I think if those

20 questions are to be asked, she should be given an

21 opportunity to read right the way through it.

22 MR SHARPE: I had rather hoped --

23 THE CHAIRMAN: Yes, I think she can be expected to be

24 familiar with this. Are you not familiar with this --

25 A. I would have been familiar with it at the time.

1 I confess I have not read all 18 bundles.

2 MR SHARPE: I'm happy to accede to my friend's request.

3 A. That's fine, you were going to take me to the points.

4 Q. Allow me, sorry --

5 THE CHAIRMAN: Is what you are asking this witness,

6 Mr Sharpe, did UU conclude at the time that this was

7 rejected, the application was rejected, that Ofwat did

8 not consider that the current Heronbridge price was

9 inefficient in terms of the signals it gave for the use

10 of --

11 MR SHARPE: I don't think I can go that far. I can ask that

12 question and I would wish it to be answered. I think my

13 case is more direct: what does this rejection letter

14 actually mean? I could ask what they thought it means

15 and we were getting the glimmers of an answer but I'm

16 asking Ms White that this letter indicates that the

17 pre-conditions for renegotiation or redetermination,

18 rather, were not satisfied, which is self-evident, and

19 the grounds for refusing to do that, the existing

20 arrangements are perfectly satisfactory. Why are they

21 satisfactory? Because the case that had been made in

22 favour of a tripling of the charge -- that is to say one

23 was a low and -- an inefficiently low price -- had not

24 been made out, and therefore they refused to increase

25 the price and Ofwat gave evidence on that effect in

1 relation to leakage and in the two bullet points which
2 appear at the top of 1307 and that is really the simple
3 change.

4 That's my explanation to the Tribunal.

5 You heard what I just said?

6 A. Yes.

7 Q. Does it not stand to reason that if Ofwat had refused
8 your request to triple the charge and they dismiss it
9 really, don't they, at the top of page 1307, the effect
10 of a price increase would be to increase the operating
11 costs of Welsh Water and to increase the revenue base of
12 United Utilities?

13 "We felt that this effect is not relevant to
14 efficiency in using water resources and would be much
15 more significant than any possible efficiency effect."

16 In other words, they were focusing, weren't they, on
17 the issues that you put before them, leakage and then,
18 the third point, that this would result in a substantial
19 change in current supply arrangements -- in the third
20 point. Those were the arguments you put forward,
21 weren't they, that leakage would be reduced and that the
22 use of an efficient price would change the pattern of
23 water usage over time. That's right, isn't it?

24 A. That the use of an efficient price would ensure that the
25 pattern of water usage itself was efficient.

1 Q. Now, in very simple terms, when Ofwat was presented with
2 this over several months, with evidence presented
3 supplementing what we have seen, we now see here, very,
4 very clearly that Ofwat rejected those submissions; they
5 just didn't think they had any value at all?

6 A. I don't think that's true at all. If you read the
7 conclusion, they say it's arguable that some efficiency
8 benefits might result but these benefits are not
9 certain.

10 Q. They would result in "greater incentives ... to reduce
11 leakage in its Ashgrove System but on the basis of the
12 evidence provided by United Utilities ..."

13 And what else could they base their judgment on:

14 "... these benefits are not certain and if there
15 were any, we don't consider that they could be
16 sufficiently material to convince the director to use
17 his discretion to make a determination varying the terms
18 of the bulk supply agreement."

19 So your case was rejected. You are not denying
20 that?

21 A. I'm not denying that the case was rejected.

22 Q. So your attempt to triple the charge from 3 to 9 fell
23 away.

24 Have you attempted to renew your contact since then?
25 It's not in the evidence but I just wondered if you made

1 another application?

2 A. It all -- I think there was some more letters later on.

3 Q. May I ask where you are?

4 A. Sorry, I'm in tab 5 because there was some confusion
5 about quite which of these letters constituted an
6 application. But, no, that's fine.

7 Q. It's not relevant to us.

8 A. No.

9 Q. Well then, Ms White, so we have a situation where this
10 story ends with Ofwat rejecting your application to
11 triple the charge to 9p, which of course is the price
12 that you had offered to Welsh Water and had been
13 rejected and was the source of the disagreement. It was
14 the price that you had offered to Dr Bryan and that drew
15 away.

16 Perhaps one last point. The impression I have
17 had -- and forgive me -- I don't know to overstate this,
18 but you played a very important role within
19 United Utilities and I called it yesterday you had your
20 clients, and that's the sort of language that an
21 in-house lawyer would use, a good in-house lawyer, to
22 preserve that degree of detachment from the company.
23 There is no point giving advice people want to hear, is
24 there? But the other side of the coin you were, would
25 you admit, somewhat detached from the commercial side of

1 this and it's possible, isn't it, that you might not
2 have seen the full story. Is that --

3 A. I'm not --

4 THE CHAIRMAN: The full story about what?

5 MR SHARPE: The full story of the negotiations and in
6 particular the full story of what your business
7 colleagues would ultimately have agreed once the
8 negotiating position had been finally exhausted. That
9 would be fair, wouldn't it?

10 A. If you are referring to the price, if it had been
11 a negotiation that was taking place about some
12 non-regulated activity that was being carried out, then
13 they would have been -- they would have had flexibility
14 to go and agree a price that they considered to provide
15 whatever return they were being asked to provide but
16 with a regulated price, they wouldn't have had that
17 flexibility and so they would not -- they would have
18 been required to come back to me or to the team with
19 which I worked in order to ensure that the price was in
20 line with Ofwat's guidelines on bulk supply pricing at
21 the time.

22 THE CHAIRMAN: We are looking at a very specific price here;
23 we are looking at the price that was being negotiated
24 between UU and Albion for the bulk supply of water in
25 the event that Albion managed to agree a common carriage

1 price with Dwr Cymru. So into which category do you say
2 that price would have fallen?

3 A. A bulk supply of water is a regulated activity. So the
4 price is a regulated price. There are guidelines from
5 Ofwat and we wouldn't have allowed -- the commercial
6 team wouldn't have been allowed to just go and agree
7 a price that was not -- that was different from the
8 price that we had advised them and that -- you know --
9 well, they had already come back to us once and I said
10 "you cannot go any lower than that". So they would --
11 they couldn't have just gone off on their own and agreed
12 something different because it is a regulated activity.

13 THE CHAIRMAN: But at what point in the negotiation process
14 does that checking with you take place?

15 A. It should have taken place a lot earlier than it did and
16 they should not have been talking about prices earlier
17 than that. This is -- I think it was -- it's an unusual
18 circumstance in the way in which it was being dealt
19 with. They were talking to Shotton Paper directly.
20 They were talking to Albion Water, they were talking
21 about things that would potentially be non-regulated
22 activities, like the development of new water supplies.

23 Under normal circumstances -- bulk supplies are
24 quite rare and it would never be the commercial team who
25 would normally deal with a bulk supply. Bulk supplies

1 are normally identified as part of the Water Resource
2 Planning process and the Water Resource Planning manager
3 would then come to the charges team, which was part of
4 the team that I worked for.

5 THE CHAIRMAN: So why was this dealt with in this rather
6 unusual way then?

7 A. I think -- I don't know why the approach was made to
8 that team. I think it wasn't normally -- it wasn't
9 done -- as I say, normally a bulk supply, which are
10 quite rare anyway, but normally they would be part of
11 the water resource management planning process. This
12 wasn't Albion Water coming in as part of the water
13 resources management planning process and saying, "We
14 are producing our Water Resources Plan, can we discuss
15 with you --

16 THE CHAIRMAN: You don't really know why --

17 A. No, I don't really know why because it got identified
18 and picked up at quite a late stage.

19 MR SHARPE: Just a couple more questions. You said "here is
20 the price you mustn't go any lower." Did you say that
21 in relation to the 12.1 price?

22 A. No, I gave the 12.1p price and as we have discussed,
23 a price -- a non-abusive price can be -- is in a range.
24 There isn't a point price -- only one point that is
25 a non-abusive price. And when they came back very

1 forcefully with these arguments that said, "But we have
2 already told them this much" and, "It's not a secure
3 supply, so it's not like the rest of the system, you
4 need to split out the two activities of providing
5 a supply and providing security", then I agreed that the
6 9p that they had previously quoted that they
7 could go back to but that that was it, no lower than
8 that. So ...

9 MR SHARPE: Yes. Perhaps one last question. This still
10 doesn't get us over the fundamental competition,
11 non-discrimination maybe condition E issue that we have
12 discussed at length. Heronbridge was an agreement where
13 the price was, let's say, 3p. Welsh Water weren't going
14 to give up that and were not obliged to when Ofwat
15 looked at it. So in offering your advice to your
16 colleagues, how could you have said to them, if it had
17 gone that far, "You can not go beyond or beneath 9
18 pence" and that would have immediately resulted in very
19 blatant discrimination.

20 A. I think that Mr Sharpe is crediting me with more
21 foresight than I would have had in the year 2000 about
22 Ofwat rejecting something in the year 2003. However,
23 it's not correct to say that the Heronbridge Agreement
24 is an agreement for 3p. We all refer to it colloquially
25 as that. It's an agreement for the recovery of costs.

1 I think at the moment it's running at more than twice
2 that and also for the recovery of capital costs. It
3 wouldn't have been possible for us to provide
4 Albion Water with an identical agreement to the
5 Welsh Water agreement because that really would have
6 been anti-competitive because we would have been
7 charging both of them for the same thing. We would both
8 have had to pay for all the electricity. We would both
9 have had to pay for the building costs, for the pump
10 costs. We would both have had to pay for a share of the
11 same capital work and that, I think, probably would be
12 considered to be anti-competitive.

13 So -- and it was an agreement which has, you know --
14 as we have talked about, suffers from various defects
15 and had no way of measuring how much water had gone to
16 one party or another party. So in a number of respects
17 there wouldn't have been a way in which we could have
18 provided an identical agreement --

19 Q. Ms White, I don't think I was asking you about providing
20 an identical agreement and I think by now we are all
21 very much aware of the terms of the Heronbridge
22 Agreement. It would not of course be the case that two
23 sets of electricity would be paid because the agreement
24 provides for electricity only to be paid in respect of
25 water actually taken. It's not calculated in respect of

1 the total rights over that water. I think we know that.

2 But I really do repeat my point: you would have
3 potentially here a significant difference between,
4 however it's calculated, the price, 9p, even more the
5 12.1p, which was your original attempt, and any price
6 that Welsh Water would actually or potentially pay for
7 the same water.

8 You must recognise that that situation would have
9 resulted in gross discrimination, wouldn't it?

10 A. Are you asking me about now or at the time?

11 Q. I think --

12 A. I thought the question was about at the time.

13 Q. I'm happy at the time. I'm not asking now. It's not an
14 issue.

15 A. At the time, when we were commencing negotiations with
16 Welsh Water and when we were a long way off from the
17 point of asking Ofwat for a determination, much less
18 receiving a response from Ofwat about a determination,
19 we considered that the appropriate price for a new
20 agreement would be an agreement that was in line with
21 Ofwat's guidelines, which was the use of long run
22 marginal cost and that the answer to the question of
23 supplying the two parties under the same terms was for
24 Welsh Water to be supplied under a proper, modern
25 agreement, which was appropriately worded and which had

1 the same prices in it.

2 Q. I understand that perfectly. That was your aspiration.
3 That's what you hoped to do, that's what you told Ofwat
4 you aspired to do, but you didn't.

5 Now, we have a massive difference in price and given
6 Dr Bryan's attempt to get the supply from you and the
7 price at which you were charging Welsh Water, there
8 would have been discrimination, breach of chapter 2 and
9 project in your own perception at the time, a breach of
10 condition E. That's right, isn't it?

11 A. At the time I, with my legal colleagues and with advice,
12 considered the risks under the Competition Act.

13 MR SHARPE: We now know the final story.

14 I don't think I have any further questions for
15 Ms White.

16 Questions by THE TRIBUNAL

17 MR LANDERS: Just following up on what the Chairman asked
18 you earlier, I don't fully understand when you say the
19 salespeople would have had to refer back to you in this
20 situation, did you have the authority to say to them,
21 "You may not charge less than 9p," or would that have
22 been your advice to them?

23 A. My manager at the time, who was John Farmer, who we saw
24 that email to, would have had the authority to say, "No,
25 you can't charge. You must charge at this price," or,

1 "You can't charge below this price." It wouldn't have
2 been me.

3 THE CHAIRMAN: You say that you were insisting, so far as
4 you could, on the 9p because although you realised that
5 that would create an apparent discriminatory position
6 between Albion on 9p and Dwr Cymru on -- we have called
7 it 3p, but a lower price under Heronbridge.

8 A. Just a different arrangement.

9 THE CHAIRMAN: A different arrangement. If what had
10 happened was that you had agreed 9p with Albion, on the
11 basis that you say, "Well, this is going to be the price
12 because we are going to go to Ofwat and get them to
13 agree that 9p is the correct price and then we will have
14 some leverage with Dwr Cymru to bring their price up to
15 9p." Suppose that had been what you agreed with Albion
16 in 2001. Then, as we know, things didn't work out like
17 that. Dwr Cymru refused to negotiate an increase in
18 price and a couple of years later Ofwat rejected your
19 application. At that stage, if Albion had been paying
20 that 9p all along, couldn't they have come to
21 United Utilities and said, "Well, now it appears that
22 was discriminatory and we want our 6p back."

23 A. That would have been a possibility if things had --
24 I don't know whether the presence of an existing
25 agreement might have changed Ofwat's views. In actual

1 fact, because of the fact that Welsh Water pay a lot of
2 the costs are, as Mr Sharpe has said, fixed costs, by
3 the time Welsh was paying the same fixed costs and only
4 taking about 6 megalitres instead of 26 megalitres, they
5 would probably have been paying -- well, they would have
6 been paying for per cubic metre than Albion were paying
7 anyway. So the prices would have equalised in that
8 sense.

9 So in that sense the concern falls away because the
10 fixed cost is over a much smaller volume and actually
11 would mean they would have been paying at least as much,
12 if not more, and therefore the contracts -- plus paying
13 any capital expenditure that came along and any
14 complaint we were likely to get might have been from
15 Welsh Water because they were paying more than Albion,
16 rather than the other way round. So the ...

17 THE CHAIRMAN: During the period that we are concerned with,
18 which ended in November 2008, do you know whether that
19 clause in the Heronbridge Agreement which required
20 Dwr Cymru to contribute to any upgrading of the pumps or
21 whatever, or other capital cost, was that triggered at
22 all?

23 A. It was not at the time period that we are talking about
24 and one of the problems that we have had in the past
25 with the contract is, it's quite difficult to keep track

1 of those -- of that kind of -- somebody has to -- who
2 is, like engineers, out in the field have to keep track
3 of it and remember: oh, we charged this to Welsh and you
4 have got to remind them and then a year later they
5 forget. So there was expenditure which was incurred but
6 which was not charged and also when we did try to charge
7 expenditure, we found that it wasn't always paid. So --
8 and -- I did ask if we could cut them off but, as
9 Dr Bryan has pointed out, there would be no newsprint in
10 Manchester or wherever and therefore I wasn't allowed to
11 do that.

12 THE CHAIRMAN: Just one final question from me. I wasn't
13 entirely clear from your witness statement: do you have
14 a professional qualification as an accountant?

15 A. Yes, I am. Yes, I'm qualified in the Chartered
16 Institute of Public Finance and Accountancy, which is
17 kind of a -- generally more of a public sector
18 qualification but when I joined North West Water, it was
19 public sector.

20 MR LANDERS: Just go back to the previous point. If
21 a lawful price had been offered and a common carriage
22 agreement had been made between Albion and Dwr Cymru,
23 Albion would then have needed to buy water.

24 A. Yes.

25 Q. Presumably they could have gone to you or they could

1 have gone to Dwr Cymru, who were paying you 3p. So if
2 they had gone to Dwr Cymru and Dwr Cymru had said, "We
3 will supply water for whatever price", 4, 5, or
4 something and then they have they had come back to your
5 sales people and said, "What would you offer?" You are
6 saying they would not have offered anything less than
7 9p, they would have foregone that profit -- or that your
8 manager would have said to them, "You may not go below
9 9p", even though Dwr Cymru were may maybe offering 5p,
10 say, you wouldn't have let them go down and matched that
11 price?

12 A. No, we need to comply with the regulatory guidelines.
13 So we do -- you know, it's important that we do comply
14 with the Ofwat guidelines about -- and this was a new
15 bulk supply. So we had to comply with the guidelines
16 that were -- and that does sometimes mean that complying
17 with guidelines might mean, well, actually, yes, well,
18 maybe we could charge 4.5p and get more money than we
19 are getting now but if it doesn't comply with the
20 guidelines, then that's much more of a risk to
21 a regulated business than losing a few hundred thousand
22 pounds.

23 MR LANDERS: Okay.

24 MR SHARPE: Madam, I know I have said I have finished but
25 would you permit me one question that arose from that

1 exchange?

2 THE CHAIRMAN: Yes, of course.

3 Further cross-examination by MR SHARPE

4 MR SHARPE: Ms White, sorry to come back to you. But you
5 said that if Welsh Water were supplanted and they were
6 left with 6 megalitres a day, then their average cost
7 would increase because their obligation is determined by
8 their 22 per cent of the cost as agreed; that's right,
9 isn't it?

10 A. Yes.

11 Q. I think you have always known that, but I put to you
12 this: this reflects a misunderstanding of the nature of
13 the contract. As I understand the contract, the
14 contract is for the right to obtain up to 36 megalitres
15 a day and maybe 50 megalitres under certain
16 circumstances. That's right, isn't it?

17 A. Yes.

18 Q. So it's right to the total sum for which they pay
19 22 per cent of the total costs as agreed?

20 A. Yes.

21 Q. If they should choose to take less than that, under that
22 agreement, they are accepting a slightly higher average?

23 A. A higher average.

24 Q. Per litre, per megalitre per se?

25 A. Yes.

1 Q. Simply on the basis of their offtake. But it doesn't
2 affect the primary obligation which is the right to take
3 up to 36 megalitres a day. That's right, isn't it?

4 A. Yes.

5 Q. So it's not -- whereas that may be expressed in terms of
6 the cost per cubic metre, the fact is that under the
7 terms of that contract, they are buying that right and
8 if they choose to exercise that right, it's one thing
9 and if they chooses not to exercise that right, they
10 bear the consequences. That's true, isn't it?

11 A. It's not expressed in terms of pence per cubic metre or
12 megalitres.

13 Q. However it's expressed?

14 A. It's expressed if terms of a proportion of the cost.

15 Q. Let me put it like this: They are not buying certain
16 quantities of water, they are buying the right --

17 A. The right to take water.

18 MR SHARPE: Thank you.

19 THE CHAIRMAN: Is there re-examination, Mr Beard?

20 MR BEARD: Yes, there is.

21 THE CHAIRMAN: Let's take a break.

22 MR BEARD: I don't think it will be that long, but, yes,
23 certainly.

24 THE CHAIRMAN: We will come back at 11.25 am.

25 (11.19 am)

1 (Short break)

2 (11.25 am)

3 Re-examination by MR BEARD

4 MR BEARD: Ms White, I have a few miscellaneous questions.

5 They are not in any perfect order, I'm sorry.

6 I'll start at the back end, if I may. Just
7 referring to an answer you gave this morning, you were
8 taken to the section 40A decision by Ofwat and in
9 response to certain questions in relation to that, you
10 were also referred to additional letters. My learned
11 friend didn't take you to any other subsequent
12 correspondence. Could you take bundle 7, tab 253,
13 please. Was this one of the letters you were referring
14 to?

15 A. Sorry, I think I may have the wrong tab.

16 Q. 253? It appears to be a letter from United Utilities
17 from you. That's the reason.

18 A. To Dr Bryan?

19 Q. Yes.

20 A. Yes.

21 Q. Was that one of the additional letters you were
22 referring to?

23 A. I don't think so. Weren't we -- I'm sorry, when --
24 I thought --

25 Q. There was a discussion about the application you made in

1 relation to section 40A?

2 A. Yes. But this letter is much later than that.

3 Q. Right. So you were talking about earlier letters than
4 that?

5 A. Yes, because we were talking about a comment that's made
6 in Ofwat's letter. But that -- about material that had
7 been provided but that pre-dates this letter.

8 Q. Right. And this letter is about bulk supply but that
9 wasn't to do with the section 40A?

10 A. No.

11 Q. Just to be clear, you were taken to that Ofwat decision.
12 Did you consider that the Ofwat 40A determination had
13 precluded you from offering bulk supply prices of 9p or
14 12p or higher?

15 A. No, we would have still considered any new bulk supply
16 to be governed by the Ofwat bulk supply guidance and we
17 would have applied that accordingly and the view
18 internally was that Ofwat's main concern was that any
19 changes that they made wouldn't affect the physical use
20 of the water. So they didn't want to do something which
21 was purely -- and given that they would then have had
22 the choice to determine any price they liked, they
23 didn't want to do something that was purely a transfer
24 of money from Welsh Water to United Utilities without
25 actually affecting any change in the way in which the

1 water was used. They clearly must have thought that
2 a determined price would have to be higher because they
3 say that the effect of this would just be to transfer
4 money from Welsh Water to United Utilities.

5 Q. I understand this because in this letter you were
6 offering a higher price but it confirmed the position.

7 THE CHAIRMAN: Wait a minute, but you didn't read the Ofwat
8 rejection as indicating that water supplied through the
9 Ashgrove System should be dealt with on a different
10 basis than long run marginal cost?

11 A. No, I read the Ofwat letter as saying that they didn't
12 think that if they made a determination, which had
13 a higher price in it, it would change Welsh Water's use
14 of the water or the way in which they dealt with leakage
15 on the system or the way in which they considered other
16 alternative supplies that were available for the system
17 and therefore they weren't -- they were not intervening
18 under the -- the -- it wouldn't affect the efficient use
19 of water resources or the efficient supply of water.

20 But I didn't see that as making any difference to
21 any new bulk supply agreement. A new bulk supply
22 agreement would fall under the -- Ofwat's guidance on
23 bulk supply agreements.

24 MR BEARD: Another question following on from that. As far
25 as you are aware, has there been any further

1 consideration of the value of water at Heronbridge by
2 Ofwat since the section 40A decision you were taken to?

3 A. Yes, Ofwat have issued a section 40 determination
4 between Welsh Water and Albion Water. I'm not familiar
5 with all the exact details of it but I think the price
6 that it determines for the water resources aspect is
7 about 15p per cubic metre.

8 Q. Sorry, could you just explain: why is that -- it's
9 a determination, you said between Welsh Water and
10 Albion Water. Can you just explain why that is relevant
11 for the purposes of United Utilities?

12 A. Yes. So it's an Ofwat determination of the supply of
13 water at the Shotton Paper point but in calculating
14 their prices -- and Ofwat provide information about how
15 they have calculated their prices -- they considered the
16 system to have two components in, one of which was the
17 water resources, and the other of which was the raw
18 water distribution and treatment, so they looked at
19 those separately. And they then said they believe the
20 water resources to be part of the integrated zone and
21 they no longer fall back on -- they no longer
22 necessarily consider long run marginal cost and they
23 didn't use long run marginal cost but they used an
24 average cost for water resources, a regional average
25 cost for water resources and came up with 15p per cubic

1 metre.

2 THE CHAIRMAN: So is that what Dwr Cymru currently or at
3 that time was paying United Utilities for the water?

4 A. No, they are currently paying between 6p and 7p per
5 cubic metre for the water because of the way in which
6 the costs have changed and also we have got a bit better
7 at picking up the costs under the agreement.

8 THE CHAIRMAN: That, as I understand it, is the point that's
9 being judicially reviewed?

10 A. It is.

11 THE CHAIRMAN: The question as to whether that water
12 component should have reflected what Dwr Cymru is
13 actually paying United Utilities for the water, as
14 opposed to some regional averages. Am I right?

15 MR SHARPE: It's correct, but there is scope for an
16 intermediate solution as well, as indeed
17 Mr Justice Edwards-Stuart said.

18 MR BEARD: I just wanted to clarify, just to be clear --
19 I don't think I need to take Ms White to you it but the
20 determination you are referring to is October 2011.
21 Does that sound right?

22 A. That's correct, yes.

23 THE CHAIRMAN: But that's not based on long run marginal
24 cost; that's based on an average of the price that
25 Dwr Cymru is paying for water in the region?

1 A. I think it's an average of -- yes, their costs -- most
2 of the water that they have they are probably not paying
3 somebody else for, they are actually abstracting it
4 themselves but they will have costs relating to dams
5 and pumping stations and so on.

6 THE CHAIRMAN: But it's not based on the long run marginal
7 cost of the supplier of the water --

8 A. Not as I understand it, no.

9 THE CHAIRMAN: Okay.

10 MR BEARD: I'm sure we can go to that in due course so far
11 as it's necessary but I wasn't going to take the witness
12 to that further now.

13 There was some discussion yesterday about water at
14 Heronbridge if Albion were to be supplying
15 Shotton Paper. I just wanted to understand: did you
16 assume that Dwr Cymru's existing rights at Heronbridge
17 would be retained by Dwr Cymru?

18 A. We would have preferred that not be the case but, as
19 I think I say in my witness statement, we had assumed
20 that the worst case would be that they would retain that
21 right, but we felt that the risk of them actually using
22 that right was low.

23 Q. But if Dwr Cymru had retained their rights, would
24 United Utilities have ensured that those rights could be
25 exercised?

- 1 A. Yes.
- 2 Q. Did you know how Dwr Cymru would think about using any
3 surplus water it had rights to at Heronbridge?
- 4 A. I did some investigations into the possibility of other
5 customers arising in the area and that was the -- the
6 consideration that we gave was would there be other
7 large customers who didn't currently exist, who would
8 be -- who would have a requirement for non potable
9 water? There had been a suggestion that there might be
10 a development of a new sort of business park and I asked
11 our national sales manager to go and find out, you know,
12 dig around and get some information and talk to the
13 local council and things like that and he said that that
14 had fallen through and there didn't appear to be any
15 other customers in the area who would be looking to pick
16 up large quantities of water.
- 17 Q. Did you discuss with Dwr Cymru itself what they might
18 want to do with any surplus water at Heronbridge?
- 19 A. No.
- 20 Q. If Dwr Cymru had, say -- I think Mr Sharpe put it
21 at 30 megalitres a day surplus, rather than, say,
22 10 megalitres a day headroom, would that change the
23 economical analysis of investment to enable the use of
24 that supply elsewhere?
- 25 A. Of them investing?

- 1 Q. Yes.
- 2 A. Yes, Dwr Cymru would have -- yes, clearly that would
3 change the -- if they had a customer or if they had
4 a use for the water, that would change the -- if you
5 have to do the capital investment, it's better to do it
6 for something that's a bigger supply rather than
7 a smaller supply.
- 8 Q. Just a couple of question on abstraction licences. Does
9 having an abstraction licence at a particular level mean
10 that that level of offtake is effectively guaranteed at
11 the point of abstraction?
- 12 A. It does generally but, as I have mentioned, there is
13 a difference in the River Dee in that the level in a dry
14 year, in a drought year, the levels are reduced for
15 users across the river. That's probably not true. For
16 water companies that abstract -- and there are three
17 that abstract, ourselves and Welsh and Dee valley --
18 I don't think they reduced the abstraction licences for
19 industrial users, who are also abstracting water from
20 the river but I think they do just for the water
21 companies.
- 22 Q. Does an abstraction licence mean you are always able to
23 meet peak demand at a particular point?
- 24 A. I suppose that depends on how high the abstraction --
25 I don't understand that. It depends how much the

1 abstraction licence is for and how much the demand is
2 going to be.

3 Q. One general question: Wendy Johnson has been mentioned
4 by Mr Sharpe and referred to in documents. Was she
5 particularly knowledgeable about water resource
6 management?

7 A. No. Wendy worked in the customer department. She was
8 responsible for a team of key customer managers. She
9 set up the whole process of key customer management
10 where we actually -- large users have an account manager
11 who goes out and visits them and helps them to
12 understand their bill, make any changes, talks to them
13 about other services they might want and Wendy was
14 responsible for that team of people. So she would have
15 understood a lot about customer requirements and what
16 they need.

17 Q. Thank you. Could you take up bundle 2, tab 21, please?

18 A. Yes.

19 Q. This is the Water Resource Plan that Mr Sharpe has taken
20 you to on a number of occasions?

21 A. Yes.

22 Q. I'm sorry, it's just behind. It starts on 382A. There
23 is an MD138 just before it. 382A, Water Resource Plan.
24 If you could turn on through to 382JJJ, headed
25 "Chapter 7"?

1 A. Yes.

2 Q. Just over the page at 382LLL is table 18 and my question
3 is simply: what is table 18 showing? You may want to
4 familiarise yourself with the preceding text but if you
5 could just explain what in your mind table 18 is
6 showing, I would be grateful. But, as I say, read
7 whatever you want to before.

8 A. Yes. So table 18 shows at the top the -- what we
9 consider will be the supply/demand balance, so either
10 excess water -- surplus water or a deficit of water in
11 the period up to 2024/2025. So it's clear that there
12 was an existing deficit in 1997/1998, which is when they
13 would have started preparing this plan but there must be
14 investment in progress because then by 2004/2005 there
15 is a surplus and then there is a predicted deficit going
16 forward.

17 It then shows investment which will be used -- well,
18 it doesn't show investment; it shows types of things
19 that will be done in order to provide more water. So
20 first of all from demand management, leak reduction and
21 meters, which we have talked about previously, and then
22 what that then means the water available for use will be
23 and then whether the amount that is -- then becomes
24 available as headroom, that is sort of an excess and
25 then the target for headroom, which is this thing that's

1 based on risk going forward and gets bigger as you go
2 further forward. And so then after all of those
3 interventions in leakage and in source enhancements
4 during the latter part of the period, then what will the
5 position be. So the position will be in surplus after
6 those interventions have taken place.

7 Q. So the second row is setting out what interventions it
8 is intended that United Utilities will take in order to
9 get the surpluses at the end?

10 A. Yes.

11 Q. And those are the matters that United Utilities choose
12 to take in order to achieve those surpluses; is that
13 correct?

14 A. Yes, and we did discuss the fact that there is some --
15 that there are leakage targets and there is some --
16 there was political pressure around metering, as there
17 still is. And so some of that --

18 THE CHAIRMAN: Could you explain why the actual planned
19 investment didn't result in you being in balance but
20 actually resulted in quite substantial surpluses above
21 the headroom? I'm not quite sure why you planned to
22 invest so much --

23 A. Yes, we are in balance at the end but it seems to
24 have -- a lot of it takes place quite early on.

25 THE CHAIRMAN: I see.

1 A. So we are in balance by 2024/2025 but I understand your
2 comment that quite a lot of it takes place quite early
3 on. So ...

4 MR BEARD: If we could just go back in this document,
5 chapter 4 is entitled "Appraisal of Total Water
6 Management Options". It's on 382CC and then if we turn
7 through this section, we get to, on page 382II, table 6,
8 which is a table to which Mr Sharpe took you. Could you
9 just tell us what that table is setting out and what the
10 purpose of it is?

11 A. So the table is setting out the -- the different options
12 that were considered that could have -- so these are
13 different interventions that could have taken place in
14 the integrated resource zone in order to get more water.
15 So I think I may have got Redscar and Fylde confused
16 earlier, for which I apologise. So it shows how many
17 megalitres a day each intervention would deliver and
18 then the average incremental and social cost without the
19 environmental and social cost bit. So that's just the
20 kind of pound notes cost, and then with the
21 environmental and social costs.

22 Q. Does it have any relationship with table 18?

23 A. It should do because the interventions will have --
24 should have come from this. So if you look at option
25 D2, "Leakage Reduction in the Integrated Zone", from 485

1 at 1998/1999 to 418 at 2004/2005, it says 67 megalitres
2 a day. And if you go to the leakage reduction up to
3 2004/2005, it shows 67 megalitres a day. So you can see
4 that that intervention there for that 67 megalitres is
5 option D2, which is five rows down on table 6.

6 Q. And you mentioned leakage reduction and Ofwat
7 potentially giving guidance and so on on it and indeed
8 Mr Sharpe referred to targets. Did United Utilities
9 provide information to Ofwat about leakage and measures
10 it could take to reduce leakage that Ofwat would use in
11 setting guidelines on targets?

12 A. I wasn't involved but it is my understanding that we did
13 provide information.

14 Q. And just one other question in relation to the water
15 resource report. A number of questions were put on the
16 basis that there was a surplus of water in the
17 integrated zone. Could you read the penultimate
18 paragraph on 382HH, the opposite page from table 6?

19 A. 382HH?

20 Q. Yes. Just the opposite page in my bundle from 382II:
21 it's two paragraphs before table 6. Just read to
22 yourself.

23 A. Yes. (Pause) Yes.

24 Q. Was that your understanding at the time?

25 A. Yes.

1 Q. Thank you. You can put that bundle away, thank you very
2 much. Yesterday in the course of cross-examination you
3 referred to the West/East Link. A trunk main, I think
4 you referred to it as. Is that correct?

5 A. Yes, I suppose it might be a large -- you might consider
6 it to be an aqueduct, it's a very, very large main.

7 Q. Is that in the integrated zone?

8 A. Yes, it is.

9 Q. Do you know when it was completed?

10 A. There was a small link, which was able to transport
11 a relatively small amount of water pre-existing and then
12 the West/East Link was completed in the last couple of
13 years.

14 Q. Do you know when it was decided to build it?

15 A. No, I'm afraid I don't know that.

16 Q. No, thank you. I think it's a matter for submission as
17 to lead time in relation to these sorts of construction
18 projects.

19 Could we take up bundle 9A, please? First of all,
20 what would you identify as a normal rate of return on
21 capital in the water industry? Is there such a thing?

22 A. Ofwat determine -- or decide a weighted average cost of
23 capital, which is based on an assumed level of debt and
24 equity and then based on assumptions about what the debt
25 rates will be and what the equity return will be in

1 a relatively stable industry, and I would say at the
2 last review we were somewhere about 5.5 per cent.

3 MR SHARPE: Madam, my friend knows the rules on
4 re-examination. I didn't take --

5 THE CHAIRMAN: Yes, I don't see --

6 MR BEARD: I'm going to go to a document that my learned
7 friend referred to. There was something I wanted to
8 pick up in it. Could you turn to tab 357 in bundle 9A?

9 A. Yes.

10 Q. This was a document that Mr Sharpe took you through.
11 I think it was referred to as an invoice?

12 A. Yes.

13 Q. He referred to various figures on the page but I was
14 just wondering if you could explain what you understand,
15 if anything, about the figures under the heading,
16 "Financing Charges".

17 A. So the calculation on the left-hand side is
18 a calculation of financing charges for the -- for the
19 whole site, so not just for the bit that supplies
20 Ashgrove. So it takes the current cost depreciation,
21 which would have been in our accounts. We are required
22 to produce current cost accounts. Then it takes a net
23 book value --

24 THE CHAIRMAN: Sorry, that figure there would be for the
25 whole site?

1 A. Yes, that would be for the whole site. And then it
2 takes a net book value figure of about 1.5 million and
3 it applies a 2 per cent return on that net book value
4 and that comes to 31,725. The reason there are two
5 columns is because sometimes -- the bill is sort of --
6 the normal -- normally the invoice is paid half-yearly
7 but then trued up at the end of the year. So sometimes
8 it would be for half a year but this is for the full
9 year. So the two amounts are the same.

10 So it adds up that total and then on the right-hand
11 side it applies the 22 per cent from the contract and
12 that comes to £34,283.87.

13 MR BEARD: So the 2 per cent, what does that represent?

14 A. I think it's intended to represent a return, although
15 clearly it's a low return.

16 Q. Thank you. I have finished with that file. Could we
17 turn to bundle 4, please. Take up bundle 4. I'm not
18 going to take you to the document immediately. Could
19 you go to tab 134?

20 A. Yes.

21 Q. I think it was put to you by Mr Sharpe that the last
22 word, I think as he put it, in the 2001 negotiations
23 with Albion was a request for "justification" which UU
24 never responded to and you agree. I think probably,
25 unless Mr Sharpe corrects me, he is referring to this

1 email on the first page of tab 134. Do you know, was
2 there another letter or email in this chain?

3 A. I'm not sure.

4 Q. I think that will have to be a matter for submission in
5 due course.

6 MR SHARPE: If I can help my friend speed up things, I did
7 in fact take the witness to tab 136 in the same bundle
8 and I recognise that as being the subsequent exchange.
9 So we don't need to clutter up the submissions with
10 that.

11 MR BEARD: I'm most grateful to Mr Sharpe for that. That
12 was in fact the document I was wondering if Ms White
13 recalled at tab 136.

14 Just a couple more questions. One just relates to
15 an answer or a degree of clarity of something that just
16 came out on the [draft] transcript. I think there was
17 a degree of overspeaking. I have a clean copy of
18 yesterday's transcript that I was going to pass to the
19 witness just so that she could see the answer she was
20 given and just clarify this. (Handed) Do the tribunal
21 have copies the transcripts?

22 THE CHAIRMAN: Yes.

23 MR BEARD: Where I wanted to just go to was a question from
24 Mr Sharpe on page 132 at line 10. Unless Mr Sharpe
25 wants me to, I'm not going to go back to the documents

1 he was cross-examining on but it was just for your notes
2 folder 3, tab 60. It was the August 2000 managing
3 director's report prepared by Dr Bryan that was being
4 asked about here. And Mr Sharpe says -- and this was
5 a document in which Dr Bryan referred to:

6 "Question: We have now reached agreement on the
7 sharing of benefits that they will obtain from a higher
8 bulk supply price at 8 p per meter cubed."

9 And Mr Sharpe says:

10 "Question: From the record would you agree with me
11 that it indicates the kind of figure that was going
12 between Albion and United Utilities at the time?

13 "Answer: I'm sorry, it indicates the kind?

14 "Question: This document."

15 Then you give a partial answer, but then it's not
16 completed. I wonder if you could just answer
17 Mr Sharpe's question just so that it's properly down?

18 A. Yes, I think we had established in earlier on in
19 Dr Bryan's cross-examination that the 8p wasn't a figure
20 that had been offered by United Utilities but that the
21 8p was a figure that had been proposed by Albion and the
22 figure that we had offered was 9p. Because the 8p is
23 referred to in -- at some point in one of the pieces of
24 paper, I had gone back to try to find to see if there
25 was any record of any -- of 8p and I couldn't find

1 anything in the admittedly partial records that I have
2 that were of the commercial team's internal files and
3 negotiations and internal documents. I couldn't find
4 anything that recorded us ever mentioning 8p. So I have
5 no -- it's not there and it seemed, I think Dr Bryan
6 agreed in cross-examination --

7 THE CHAIRMAN: Well, it's for us to interpret Dr Bryan's
8 cross-examination. I think you are being asked --

9 A. I didn't feel that I was being asked to -- I was being
10 asked if that 8p indicated the kind of figure that was
11 going between us and I don't feel that it did.

12 THE CHAIRMAN: You do not know what was going on, I think we
13 have already established, in those negotiations?

14 A. No, but the reported only ever shows -- the paper record
15 that I have only ever shows the 9p.

16 MR BEARD: The next question may sound like a silly question
17 but in the 2001 negotiations, were you discussing with
18 Albion common carriage or bulk supply or some other
19 service?

20 THE CHAIRMAN: Was who discussing?

21 MR BEARD: I'm sorry, United Utilities. It's directed to
22 Ms White.

23 A. We were discussing a bulk supply of water.

24 Q. Could you just turn up bundle 3, tab 59? This is MD163.
25 Do you have it? Strictly speaking, did you consider

1 that MD163 applied in relation to bulk supply
2 arrangements?

3 A. No, I wouldn't have considered it applied to bulk supply
4 arrangements.

5 Q. Just two more brief questions. If both Albion and
6 Dwr Cymru had been paying 3p for water from you, would
7 that have been okay from your point of view, from
8 a regulatory perspective?

9 A. By regulatory, do you purely mean water industry
10 regulation, or more generally?

11 Q. Generally.

12 A. Right. So I think that if it had been acceptable to
13 Ofwat under -- a new bulk supply, which they would have
14 locked at, then that would have been okay from
15 a regulatory perspective and as I explained, the
16 concerns that we would were a Competition Act predation
17 perspective.

18 Q. Just one final question: would United Utilities ever
19 have offered water at less than 9p to Albion in 2001?

20 A. No.

21 MR BEARD: Thank you. I don't have any further questions
22 for the witness.

23 Housekeeping

24 MR SHARPE: Madam, before we go on to Mr Williams and my
25 friend calls him, may I just deal with some housekeeping

1 matters, timetable again?

2 MR BEARD: Sorry, could Ms White just be released first.

3 THE CHAIRMAN: Yes, thank you very much, Ms White, that
4 concludes your evidence. You are free to leave the
5 witness box.

6 MR BEARD: I have no wish to detain you further.

7 MR SHARPE: I am likely to take about a day with
8 Mr Williams, so starting now and finishing broadly
9 tomorrow late morning. It depends of course on his
10 answers and other imponderables. I'm likely to take
11 somewhat longer with Mr Edwards, I think understandably.
12 And that takes us through into Thursday, possibly even
13 Thursday afternoon. Now, Madam, I am happy to, if you
14 wish but I do not relish the possibility of sitting down
15 on Thursday and then spending all night preparing
16 closing submissions and I'm happy to do that and I have
17 done it before but an alternative presents itself: we
18 adjourn and come back on Monday to start what would be
19 two days, one of my closing. Less than ideal and
20 unsatisfactory, but the alternative might be a little
21 bit -- and possibly less use to you as well.

22 THE CHAIRMAN: So is your suggestion then that we conclude
23 the evidence this week and then come back and have all
24 closing submissions --

25 MR SHARPE: We always thought there was utility and I think

1 this is common ground that having a day's break to
2 marshall the evidence is a good one. That's point one.

3 Point two: I will finish the evidence in the course
4 of Thursday, possibly in the afternoon. There is the
5 prospect then of no break and me making my closing
6 submissions on Friday and then my friend having two days
7 of his leisure, if that's the word, to prepare his reply
8 for Monday. I can certainly see the attraction of that
9 to the Tribunal but I think it would be somewhat onerous
10 on our side.

11 THE CHAIRMAN: The difficulty is with the availability of
12 the Tribunal next week.

13 I don't think we can deal with this on the hoof, as
14 it were. My sense is that given what has happened so
15 far, it may be optimistic to think that we will finish
16 the evidence by Thursday afternoon and that we may need
17 some of Friday in order to complete Mr Edwards'
18 evidence, in which case we are then looking at having
19 submissions at some later date. I think we will then
20 need to work out when the Tribunal can reconvene for two
21 days and then consider counsel's availability.

22 I appreciate, of course, neither side wants to
23 contemplate any further delay in a resolution of this
24 but that's where we are.

25 MR BEARD: If it assists the Tribunal, we took away the

1 observations from yesterday and confirmed that, if the
2 situation were to be closing on Friday, closing on
3 Monday, although in particular Mr Pickford might have
4 difficulty with availability on Monday, that is a matter
5 that, from our point of view, we could pursue and I have
6 checked that. In relation to alternatives, I would have
7 to take instructions, particularly in relation to moving
8 to Monday and Tuesday rather than Friday and Monday
9 because unfortunately that's the first I heard about
10 a further extension.

11 MR SHARPE: Well, Madam, that's why I have brought it to
12 your attention now. It's a delicate matter but it's
13 a complex case and things have moved on.

14 THE CHAIRMAN: Yes. Is it convenient now, before we call
15 Mr Williams, for the Tribunal to indicate where we are
16 in relation to the issues raised about the unpleaded
17 matters?

18 MR SHARPE: Madam, it's your choice. My friend and
19 I have -- I should have raised this earlier.
20 I intimated to him that in relation to my
21 cross-examination of Mr Williams, none of the issues in
22 the so-called unpleaded matter arise and there is a sort
23 of mutual sense that perhaps we could defer this until
24 Edwards.

25 THE CHAIRMAN: I would have thought that you would want some

1 advance notice of what questions you are going to be
2 allowed to ask Mr Edwards.

3 Well, we have looked through the skeletons and the
4 pleadings and we have had the advantage of Dwr Cymru's
5 speaking note and this is our views in relation to the
6 five matters that are raised.

7 The first relates to the Ofwat letter in 1996,
8 prompted by Albion's inset application, in which Ofwat
9 says that it was minded to set a bulk supply price for
10 supply by Dwr Cymru to Albion of 26p. In fact, this was
11 then the bulk supply price relating to that inset
12 application. The Ofwat letter indicated that it had
13 settled on that price because it was in line with
14 prevailing bulk supply prices to other Dwr Cymru
15 customers.

16 Albion want to question Mr Edwards along the lines
17 that given the public information shows that price to
18 what Albion considers to be comparable customers is
19 considerably lower, Ofwat can only have come to that
20 conclusion as a result of misleading or false
21 information provided to it by Dwr Cymru, and the
22 question arises whether Mr Sharpe should be allowed to
23 pursue that line of cross-examination.

24 We consider this has little apparent relevance to
25 the issues in the case. The bulk supply price was set

1 in 1996 about five years before the first access price
2 was arrived at. There is no finding, of course, that
3 the bulk supply price was abusive. We do not regard it
4 as particularly significant in relation to the question
5 whether the first access price was devised in a way
6 which justifies an award of exempt damages, which is the
7 part of the case to which this may or may not be
8 relevant. The "minded to" price indicated in 1996 has
9 not hitherto been the focus of attention in this case
10 and we note that Dwr Cymru have indicated that their
11 disclosure went back to 2000 only and Albion didn't
12 apparently object to this.

13 So we do not know, as I understand it, precisely
14 what information was provided in 1996 by Dwr Cymru to
15 Ofwat. That information has not been requested thus far
16 and we consider it would be taking us down an
17 unnecessary track to start pursuing that now.

18 So we are not minded to allow questions or
19 submissions aimed at showing that Dwr Cymru misled Ofwat
20 in 1996.

21 The second point is the allegation that Dwr Cymru
22 has deliberately destroyed or rewritten relevant
23 documents. It's said that this has not been pleaded.
24 Clearly, it would not have been proper for the matter to
25 be pleaded in the absence of some evidence that there

1 had been conduct of this kind. We have already looked
2 at documents made available on disclosure that do
3 contain comments pointing to that kind of conduct and we
4 consider it's right and fair that those documents be put
5 to Dwr Cymru witnesses for explanation if Albion is
6 going to ask us to draw an inference about the
7 documentary record in relation to the computation of the
8 first access price.

9 There have been all along complaints about the
10 absence of board minutes from Dwr Cymru. That has been
11 a feature of this case from the early stages and
12 therefore we do think it's right that those documents
13 and those comments be put to Dwr Cymru witnesses to see
14 if they have anything to say about them.

15 The third issue relates to cost of sludge tankering.
16 This relates to the question of sludge removal at the
17 partial treatment stage of the Ashgrove water system.
18 There is evidence that at a meeting Mr Holton for
19 Dwr Cymru is recorded as referring to the high cost of
20 carrying sludge away as part of the justification for
21 the proposed common carriage price.

22 In fact it's now common ground that at the time in
23 2001 sludge was simply disposed off into the River Dee
24 at minimal cost and even when later this practice was
25 stopped and the intervention of the Environment Agency,

1 the sludge was not tankered away but rather discharged
2 into the sewer, again at insignificant cost.

3 What was said at the meeting about the cost of
4 tankering we don't regard as particularly significant,
5 given that it was in the context of early stage of
6 negotiations on price between the parties, when they
7 were both establishing their positions.

8 Mr Holton is not a witness in this case and we don't
9 see that it's useful to pursue this and certainly not to
10 devote the time and expense that would be involved in
11 allowing Mr Holton to respond.

12 The fourth point is a question of Dwr Cymru's legal
13 advice. We understand this is not being pursued by
14 Albion and we regard that as quite right; this is not
15 a case in which it's appropriate to have
16 cross-examination about whether legal advice was taken
17 or if it was, what was and what was not said in that
18 advice.

19 The fifth point is the absence of local cost
20 information. Again this is a matter which arises from
21 the disclosure of documents. As I understand it, Albion
22 says that the response made in June 2001 by Dwr Cymru to
23 a section 26 notice requesting information issued by
24 Ofwat was misleading and that Dwr Cymru were asked for
25 a breakdown of local costs of the Ashgrove System and

1 responded that it did not collect information about
2 those costs. Albion say in fact the documents disclosed
3 show that Dwr Cymru did have a breakdown of the costs at
4 that time.

5 As we understand it, Dwr Cymru's defence to the
6 exemplary damages claim rests in part on the approach
7 that Ofwat took to the computation of the costs of
8 common carriage. We doubt that it can be suggested that
9 the absence of the information on local costs was what
10 was caused Ofwat to compute the costs by regional
11 average approach rather than by looking at local costs
12 of specific assets, since it seems that that was
13 a matter of principle in Ofwat's calculations rather
14 than just because of the alleged absence of information.

15 But it's clearly an important issue in this case and
16 these questions, we consider, should be allowed,
17 recognising that there may be little that Mr Edwards can
18 say on the point and it may therefore be difficult for
19 us to draw any inferences from what he does or does not
20 say but we don't see any reason why they should not be
21 asked if they can shed any light on what Albion says is
22 an inconsistency between the disclosed documents and
23 section 26 notice responses if such an inconsistency in
24 fact exists.

25 So that is where we currently are. Our preference

1 would be to leave it at that and for the parties to
2 adapt their questioning as follows. We have raised it
3 at this point rather than just before Mr Edwards in
4 order to give the parties a chance to consider that and
5 tonight see the transcript of what I have just said. So
6 we don't necessarily want to take the matter forward at
7 this stage.

8 MR BEARD: I'm most grateful. I think the best course is
9 for instructions to be taken on both sides.

10 MR SHARPE: Well, yes. I'm much obliged. Can I just simply
11 point out as a sort of factual matter in relation to the
12 first consideration you have identified, and that's the
13 decision in 1996. It is perfectly true that we are not
14 here to challenge -- and nobody has ever challenged the
15 "minded to" decision, I have no wish at all to reopen
16 that and it was never our intention.

17 What I was seeking to do was to look and see what
18 Ofwat was told at that time and compare it with what
19 Ofwat was subsequently told and to do so exclusively
20 from asking the witnesses to comment upon the
21 documentary record. Madam, it's not the case that no
22 disclosure has been given on this. We do know what was
23 given to Ofwat in 1996. It is in the bundle and I had
24 intended to point to various discrepancies between the
25 story in 1996 and the story in 1999/2000, which cannot

1 have been explained by changes in the facts, as opposed
2 to what --

3 THE CHAIRMAN: What we are saying, Mr Sharpe, is that Albion
4 seem to be relying on this, as far as I can understand
5 it, to say that Dwr Cymru gave misleading information in
6 1996 and that has two consequences. First it shows that
7 they have a tendency to give misleading information and
8 as I have said, we regard that as too remote from what
9 happened in 2001 to be useful.

10 Second, the point about confirmation bias, which
11 again seems to us to be an issue related to the later
12 Ofwat investigation into the first access price, which
13 we know was flawed and was overturned by the Tribunal.

14 MR SHARPE: Indeed. I think I'm less concerned with
15 confirmation bias, I am concerned when we have
16 a documentary record that says: we calculated X by
17 reference to Y and then two years later, we see from
18 internal documents they did nothing of the sort and
19 respectfully I think that's useful information for you
20 to understand how this company operates and of course,
21 especially when Welsh Water itself points to the same
22 numbers, the same documentation and prays in aid Ofwat's
23 approval of the earlier number as justification for its
24 use subsequently.

25 Madam, I can understand real concern. I share with

1 my friend. No one wants to broaden this case any more
2 than it is but I would feel somewhat inhibited from
3 asking a very small number of questions to Mr Edwards,
4 asking him to explain in his calculation of the FAP the
5 derivation of certain numbers and I anticipate his
6 answer is going to be what it was in the documentary
7 records: this is what Ofwat approved in 1996.

8 If I can then take the Tribunal to the fact that the
9 Ofwat may have got the wrong end of the stick as
10 a result of the submissions made by Welsh Water at that
11 time. I think the Tribunal would be materially assisted
12 and that is the limit of my request to be able to engage
13 in that cross-examination. And I will not overstay my
14 welcome on it.

15 THE CHAIRMAN: We will consider that point further.

16 MR BEARD: If you are, I think it is important to recognise
17 that the assertion that the documentary record is
18 complete is not right.

19 THE CHAIRMAN: As I said, I don't want to get into this now.

20 Let's crack on with Mr Williams.

21 MR SHARPE: Thank you very much.

22 MR BEARD: I'm grateful, I'm sorry.

23 Dwr Cymru would call Mr Jeffery Williams.

24 MR JEFFERY DAVID WILLIAMS (sworn)

25 Examination-in-chief by MR BEARD

1 THE CHAIRMAN: Please sit down, Mr Williams.

2 A. Thank you.

3 MR BEARD: Could you please give the Tribunal your name?

4 A. Yes, my name is Jeffery David Williams.

5 Q. Thank you. Could you find behind you in the shelf
6 folder 1, please, Mr Williams, the relatively thin
7 ringbinder. I'm sorry, it's already open.

8 Mr Williams, if you could turn to tab 3 in that
9 bundle 1, and then turn to the last page of that tab,
10 which is marked page 32 --

11 A. Yes.

12 Q. -- is that your signature?

13 A. It is.

14 Q. Is this your witness statement?

15 A. It is.

16 Q. Is it true, to the best of your knowledge and belief?

17 A. It is.

18 Q. Thank you. I don't have any questions for you,
19 Mr Williams. Mr Sharpe will have questions for you,
20 I think you understand, and the Tribunal may have
21 questions along the way and I may ask some at the end.

22 A. Okay, thank you.

23 MR BEARD: Thank you very much.

24 Cross-examination by MR SHARPE

25 MR SHARPE: Good morning, Mr Williams.

- 1 A. Good morning.
- 2 Q. Can we start with you telling us something about your
3 background and training?
- 4 A. Indeed.
- 5 Q. What professional qualifications do you have?
- 6 A. I have a Postgraduate Diploma in Personnel Management,
7 as it was called when I did it back in 1970/1971 and I'm
8 a member of the institute of -- Chartered Institute of
9 Personnel and Development.
- 10 Q. It's now called human resources, isn't it?
- 11 A. Well, yes.
- 12 Q. Yes. So that's your --
- 13 THE CHAIRMAN: Can you try and speak a little bit more into
14 the microphones, Mr Williams. We are having a little
15 built of difficulty hearing.
- 16 A. Okay, I'm sorry.
- 17 MR SHARPE: So that's your background, but of course you are
18 here not to deploy that expertise. When did your
19 responsibilities move over to pricing and customers?
- 20 A. I set up the customer policy in an income director role
21 in around early 1999. Frankly I was struggling to
22 remember the exact date, but that is as best as I can
23 do.
- 24 Q. Did that mark the first movement out of personnel into
25 the wider area?

1 A. Yes. I had had some minimal involvement a couple of
2 years before, whilst being a personnel director for
3 Welsh Water. There were some customer issues I was
4 involved with but the customer changed substantially and
5 all that went away. So yes, my main involvement,
6 certainly from early 1999 ...

7 Q. Right. As I understand your statement, it was
8 Mike Brooker, the managing director, who asked you to
9 perform that role, take on that role?

10 A. That's correct.

11 Q. That's right, yes. Do you and Mr Brooker go back a long
12 way?

13 A. Quite a way. Mike Brooker came to the division I worked
14 in, one of the three operating divisions. He came there
15 as the divisional director. So I did work with
16 Mike Brooker for quite a long time in that capacity.

17 Q. Would that be from the 1980s, perhaps?

18 A. It could be. I wouldn't like to say absolutely, but it
19 could be.

20 Q. So you knew each other pretty well?

21 A. (Witness nods)

22 Q. Okay. Just help us a little bit about your position on
23 the board. It may come as a shock to you but we have
24 done some corporate searches. Tell us how long were you
25 on the board of Welsh Water DC?

1 A. I'm going to have to tell a bit of a story, a bit of
2 a chronology really to explain this because
3 unfortunately it is a little bit complicated but I need
4 to go there to answer the question.

5 THE CHAIRMAN: Can you not just say what years you were on
6 the board?

7 MR SHARPE: I wonder if I could help you and then we can
8 move on. You appear to have been listed as a director
9 for the financial years ending 1995, but you resigned on
10 31 December 1995. Is that correct?

11 A. That's correct, yes.

12 Q. Then you appear on the board again in 1997 and then you
13 resigned on 12 March 1998. Is that correct?

14 A. No, actually I don't recollect that.

15 Q. All right. Then you appear on the board in 1999 and
16 2000 but resigned from the board according to our data
17 on 11 May 2001. Is that correct?

18 A. That would be right, yes.

19 Q. On the face of it, that seems a slightly coming and
20 going sort of position?

21 A. What happened, I was appointed as personnel director,
22 having done an acting role for about 14 months. I was
23 a personnel director for about two months and the Hyder
24 Group consolidated three of its businesses into
25 a combined utility company and I didn't get the

1 personnel director's role in that company. I became
2 head of employee relations, reporting to the director.
3 So in effect I was the number two, if you will, in the
4 HR function in a much bigger entity. So on that basis
5 I had to come -- I came off the board simply because
6 I lost the directorship.

7 Q. All right. It doesn't really concern us too much but
8 you left the board on or about 11 May 2001. That's
9 shortly after the first access price --

10 A. Absolutely.

11 Q. Right. Since then what have you been doing?

12 A. Since?

13 Q. Since 11 May 2001.

14 A. I worked for Welsh Water through until May 2005 and
15 I was actually made redundant technically but it enabled
16 me to be able to retire. So at that point I retired.

17 Q. Okay. And that was in May 2005?

18 A. Yes.

19 Q. Okay. Insofar as you retired then, what were you doing
20 after you left the board on 11 May 2001 and to the date
21 of your retirement?

22 A. Right. I carried on in the customer policy and income
23 director role. I still had the title, so to speak, and
24 I remained on the Dwr Cymru executive but I wasn't
25 technically a board director. But I also, within that

1 company, because we had lost the sort of group
2 connection, where the HR function was then coming from,
3 I gradually began to pick up the HR issues as well. So
4 I carried a double brief for a while and I actually
5 gradually moved out of the customer policies and income
6 role in that period.

7 Q. For the period we are considering, the years 1999, 2000,
8 2001, you were exclusively engaged in the
9 customer-facing --

10 A. There might have been a bit of early overlap, but
11 essentially the answer to that is yes.

12 Q. In discharging that function, I understand from your
13 statement, you reported directly to Mr Brooker?

14 A. That's correct.

15 Q. How often?

16 A. Well, in a sort of formal sense we used to meet monthly
17 to go through the work progress essentially, but it
18 could well be every day even that we could meet and talk
19 about issues as and when they required to be discussed.

20 Q. Yes, thank you. And were there -- I'll call them terms
21 of reference. I don't necessarily mean of that
22 formality. What was your brief when he asked you to
23 take on the job?

24 A. It was effectively to create a new directorate
25 a customer policy and income directorate and that was

1 the brief essentially and it was basically get on and do
2 it.

3 Q. Get on and do what?

4 A. Create the directorate.

5 Q. I know, but for what purpose?

6 A. So that we could properly manage the income dimension of
7 Welsh Water and the customer relations dimension of it,
8 as descriptive as that.

9 Q. I don't mean this in a confrontational way: Does that
10 mean that prior to your appointment, nobody cared about
11 customers?

12 A. No, I think people certainly did care about customers.
13 Again, it's a development of the organisation. What
14 happened when in fact Hyder bought SWALEC, they
15 effectively took the customer elements out of both those
16 businesses to create a middle business called
17 Hyder Services, who then provided services back to those
18 companies. So the customer services almost become
19 a little bit divorced and effectively Welsh Water
20 recognised that it therefore had to set up properly its
21 customer service and income dimension and that's what
22 the brief was.

23 Q. When we refer to customers here, do we mean domestic
24 customers of electricity and water?

25 A. Just to clarify on the electricity side, the SWALEC

1 business was the distribution business, so we had only
2 had a few customers in a sense, you know the big
3 suppliers, whereas Welsh Water with its million
4 customers was somewhat different in that regard.

5 Q. But, of course, as events showed, you were not dealing
6 simply with end consumers, were you, you were dealing
7 with other water companies such as Albion?

8 A. Yes, indeed.

9 Q. And they were both customers but they were also
10 competitors, weren't they?

11 A. Potentially, yes.

12 Q. So at the time did you have any anything to do with
13 competition compliance?

14 A. Well, not as such, I guess, although we obviously
15 recognised the competition was a developing issue in the
16 water industry. That's partly why we create the
17 Dave Holton role as key customer and competition manager
18 and that role was a reflection of two things in effect;
19 it was actually providing a more direct service to key
20 customers, so that we could determine their requirements
21 and better suit their needs but also the other leg of
22 that was the recognition that competition was coming in.
23 It was beginning to happen quite quickly in 2000.
24 Statement of principles, network access code. Those
25 sorts of things. Clearly having recognised that, we

1 obviously needed to organise ourselves so that we could
2 probably manage those --

3 Q. And Mr Holton was the person who really assumed that
4 responsibility?

5 A. That was his role, yes, reporting to Dr Boarer.

6 Q. At the time but I think you flattened the pyramid on
7 your appointment, didn't you?

8 A. I did, but I'm pretty sure that was after the Albion
9 event.

10 Q. I see, I see.

11 A. Yes.

12 Q. I don't know if you were in the Tribunal when Ms White
13 gave evidence?

14 A. I was.

15 Q. She described her role as something of a compliance
16 officer within the organisation to make sure if I can
17 perhaps put it flippantly, everyone kept on the straight
18 and narrow. Did Mr Holton perform that function?

19 A. Certainly, as part of wishing to create that role, we
20 obviously didn't want to fall foul of any competition
21 regulation, we want to properly manage that, ironically
22 we happen to be here today but that's another issue.

23 Q. True but Mr Holton was, as he put it, actually dealing
24 with competitors, ie negotiating with them, as events
25 showed, assisting in the process of pricing and entry

1 conditions and so on. But was anybody looking at his
2 conduct to see whether or not it was in conformity with
3 the competition laws in the way that Ms White described
4 her own reel re you?

5 A. Not as such.

6 Q. Okay. We know a little bit about the board of
7 directors, your colleagues in 2000 and 2001. And
8 I think we know -- and it's not necessarily relevant --
9 who actually served on the board, but there was
10 a company secretary, wasn't there --

11 A. Yes.

12 Q. -- who attended the board meetings?

13 A. Yes.

14 Q. And was he a member of the board?

15 A. Richard Curtis is company secretary for the board, yes.

16 Q. One of his responsibilities would be to keep an accurate
17 record of what took place at the board meetings?

18 A. Indeed.

19 Q. You do that for good corporate governance purposes like
20 any major company, all companies perhaps, but also
21 because you had special responsibilities to Ofwat,
22 haven't you?

23 A. Indeed, yes.

24 Q. How did you understand those responsibilities? What did
25 they consist of?

- 1 A. Sorry, I'm not clear on what you mean.
- 2 Q. What records did you have to keep in order to satisfy
3 Ofwat?
- 4 A. I don't think I can answer that question.
- 5 Q. Thank you. But it would be his job to keep the minutes
6 and records and how often would the board meet, the DC
7 board?
- 8 A. It might have been every two months. This is where
9 distance and time has sort of weakened my memory. I'm
10 not absolutely sure on that point, to be honest.
- 11 Q. Have you taken the opportunity to refresh your memory by
12 looking at some of the papers in this case?
- 13 A. Some, but not all.
- 14 Q. They seem to point to a regular cycle of monthly
15 meetings, at least in the period with which we are
16 concerned. Would it --
- 17 A. That could be the case. I couldn't challenge that.
- 18 Q. Right. The evidence does suggest monthly meetings. I'm
19 not going it take to you them but we have record of
20 a meeting on 6 November 2000, the minutes of a meeting
21 on 15 January 2001. And, of course, there is
22 a reference to a meeting in December but there is no
23 reference to a meeting in February.
- 24 We see a number of mentions in the papers to
25 something called the LCE. What was that?

- 1 A. The Licence Company Executive.
- 2 Q. Was this in existence when you took over your
3 responsibilities in 1999?
- 4 A. It must have been. The Licence Company came into being
5 when the combined utility business was created. The
6 operations elements of both SWALEC and Welsh Water were
7 put into an operations business and obviously the
8 regulatory dimension was in there as well, and those --
9 that in effect -- that operations business, plus the
10 regulatory dimension, became known as the licence
11 company because that's where the licences resided for
12 SWALEC and Welsh Water. So, yes, I think it may have
13 been --
- 14 Q. It's really quite an important committee, isn't it?
- 15 A. Yes, indeed.
- 16 Q. Yes, indeed?
- 17 A. And I sat on that committee in my HR role before joining
18 in the customer role.
- 19 Q. So just to get it right, it had been established before
20 you took up your responsibilities in 1999, but you had
21 served in it prior to that wearing your HR hat?
- 22 A. Yes.
- 23 Q. And it had responsibility for the management of the
24 licensed part of the business --
- 25 A. In effect.

1 Q. In effect?

2 A. Yes.

3 Q. Thank you. What was its relationship with the DC board
4 then? Could it make decisions binding the board, for
5 example?

6 A. Absolutely not, no.

7 Q. No. So it would make -- I don't want to put words in
8 your mouth but it would make recommendations to the
9 board and the board would then pick them up and consider
10 them?

11 A. Representations, observations, reports and they would go
12 on for discussion and determination where appropriate.

13 Q. Thank you. How often did the LC meet?

14 A. Again I hate to say it but my memory has been dimmed by
15 time on that, but I would imagine that would have been
16 monthly, to be honest.

17 Q. Was there a sort of cycle where it would meet before the
18 next board meeting? Often this was the case?

19 A. Probably.

20 Q. Yes, that would be reasonable. So the cycle, just so
21 I understood it correctly: LC would discuss issues
22 relating to the licensed part of the business, which is
23 an awful lot of the business and would put forward, when
24 it was inclined to, recommendations to the board or at
25 the very least would report to the board?

- 1 A. That's right.
- 2 Q. And you served on both, didn't you. You served on the
3 LCE and on the board?
- 4 A. Hm-mm.
- 5 Q. Did Mr Holton serve on the board?
- 6 A. No.
- 7 Q. So you were the link man?
- 8 A. I was.
- 9 Q. You were. I'm being requested to make it absolutely
10 clear, and I think it was clear, that Mr Holton did not
11 serve on the DC board?
- 12 A. He did not.
- 13 Q. But he served on the LCE board?
- 14 A. No, he did not.
- 15 Q. Either?
- 16 A. No.
- 17 Q. So he was on neither board?
- 18 A. No.
- 19 Q. Were you the only person who served on both boards?
- 20 A. Within my directorate.
- 21 Q. Yes. Thank you. So you were truly the link man in relation to these
22 matters?
- 23 A. Indeed, I was.

1 Q. Thank you. We have established this is an important
2 committee. Was it good practice to take minutes of its
3 deliberations and recommendations?

4 A. I'm not sure if there are actually detailed minutes
5 again because of the time issue. If there weren't
6 detailed minutes -- and I can't be certain -- there
7 certainly would have been action points, I would
8 imagine, coming out of that.

9 Q. So your memory would be jogged as to what you would be
10 taking to the board and what it had decided at the last
11 meeting?

12 A. Yes.

13 Q. Yes. I simply observe, would you be surprised if we
14 hadn't seen any minutes of that, other than various
15 papers which had been prepared specifically to deal with
16 the FAP?

17 A. I don't know how those -- whatever form the notes on
18 minutes were kept, assuming there were any. They
19 weren't kept certainly with the same rigour of board
20 meetings.

21 Q. No.

22 A. So I can't really comment on it, to be honest.

23 Q. Very good.

24 Now, in the documentation we quite frequently see
25 "Jeff Williams, sponsor". What does the word "sponsor"

1 mean?

2 A. Basically because the work fell within my directorate.
3 I was the person responsible for making sure that
4 whatever we needed to do was properly being done and on
5 that basis the term "sponsor" was used. In terms of
6 people working in the customer policy and income
7 directorate, Dr Boarer was responsible for -- she was
8 Head of Income and Tariffs. Mr Holton reported to her.
9 So working through Jackie Boarer, that's how the work
10 was progressed in effect.

11 Q. Right. So you very helpfully anticipated my next
12 question. Shall we go to the first access price. Let's
13 look at the key individuals who were involved in that
14 process and their relationships. Shall we start at the
15 bottom. Mr Henderson is mentioned. He is called
16 a tariff manager?

17 A. That's right.

18 Q. What did he do?

19 A. He did exactly that. He worked on our tariffs and
20 pricing methodology and in terms of the first access
21 price, Paul Edwards wasn't available initially because
22 of other workloads. He came in effectively and took
23 over work that Paul -- the other Paul had been doing,
24 Paul Henderson, took that on to completion, so that's
25 what he did.

1 Q. And they were probably the same sort of level financial
2 analyst, I think Mr Edwards was called, and the tariff
3 manager, Mr Henderson, but they were both doing
4 effectively the same job in relation to the FAP?

5 A. I imagine they were, yes.

6 Q. Then we have Jackie Boarer and she is called Head of
7 Income and Tariffs. What did she do?

8 A. The work my directorate did was split into two in
9 effect.

10 Q. What did she do in relations to the FAP?

11 A. She probably would not have got involved in the detail
12 of it. She would have been more clearly on the
13 management side of it and probably in conjunction with
14 Mr Holton more outward facing, I guess, facing --
15 talking with people from Albion and indeed Ofwat.

16 Q. Then we have Mr Holton. He is described as Commercial
17 Key Customer and Competition Manager?

18 A. Hm-mm.

19 Q. How did he interrelate with Jackie Boarer and Henderson
20 and Edwards?

21 A. Well, he actually reported to Dr Boarer and because the
22 work -- there is obviously a regulatory dimension to
23 this as well as a competitive dimension and because of
24 Paul Edward's expertise in this area.

25 Q. Sorry what area?

- 1 A. In terms of pricing, you know, for --
- 2 Q. Pricing for access appointment, common carriage?
- 3 A. He was involved in the statement of principles.
- 4 THE CHAIRMAN: Who was? Edwards was?
- 5 A. Mr Edwards was and also network access code and he did
- 6 a lot of work earlier on on Welsh Water on Large
- 7 Industrial Tariffs, the people who were involved there.
- 8 So he had that background. So it was right and proper
- 9 to bring him in to use that expertise.
- 10 MR SHARPE: I understand, thank you. Then there is you
- 11 supervising this group, you were answerable for them and
- 12 presumably relaying their views to the LCE; is that
- 13 fair?
- 14 A. Yes, that would -- yes, that is fair. What I can't
- 15 remember is whether either Paul Edwards or Mr Holton may
- 16 or may not have attended just to report at LCE meetings
- 17 on -- you know, how things were progressing et cetera
- 18 and that also may have been the case at a board level.
- 19 But again at that distance in time I really cannot
- 20 remember that. But it is possible.
- 21 Q. Is it likely that Mr Holton, Mr Edwards and
- 22 Ms Jackie Boarer would have attended a DC board meeting?
- 23 A. Possibly, yes, but I can't recall it.
- 24 Q. You can't remember. Okay. And then you reported to
- 25 Mr Brooker, the managing director, didn't you?

- 1 A. Hm-mm.
- 2 Q. As you said earlier, that's not just in the context of
3 the board but on a daily basis or as and when?
- 4 A. As and when, yes.
- 5 Q. Yes. Okay. I want to ask you some questions about
6 Welsh Water's pricing structure in 2000/2001. You
7 didn't simply charge all of your customers the same
8 price for water, did you?
- 9 A. I don't believe so.
- 10 Q. No. But in relation to potable water, you had
11 a standard tariff for your potable business, didn't you?
- 12 A. At this point in time, distanced from it in the way
13 I am, I really cannot remember. I'm not sure how much
14 detail I was involved with at the time. So I really
15 cannot answer the question.
- 16 Q. All right. Would it surprise you there was a standard
17 tariff for small retail customers and a lower tariff for
18 customers taking large volumes of potable water?
- 19 A. Again I can't comment because I don't know.
- 20 Q. And the large volume purchasers would probably be
21 industrial customers. Is that reasonable?
- 22 A. It can be reasonable but I don't know. I wasn't
23 involved in that level of detail. My background, which
24 I have already covered, is mainly HR. As far as work
25 within my directorate was concerned, I had people who

1 knew all these issues and all I needed to do was manage
2 it. I didn't need to know the fine detail and I didn't.

3 Q. Is it fine detail to know that there is a standard
4 potable charge based upon volume?

5 A. I don't know. I don't know what the definition is.
6 I just cannot answer the question. I don't have that
7 level of knowledge.

8 Q. But this would have been well within your area of
9 responsibility, wouldn't it: in fact, right at the
10 centre of, I would have thought?

11 A. Yes, it would have been actually and that's why I had
12 probably people who knew all the detail, who were
13 experts in those areas and they did the necessary work.

14 Q. You didn't feel the need to understand what they were
15 doing?

16 A. I couldn't possibly get involved in the detail of
17 everybody who worked for me. It would have been quite
18 impossible.

19 Q. All right. Well then. Do you recall Welsh Water
20 introducing an updated potable Large Industrial Tariff.
21 You mentioned it a moment ago -- LIT -- in 1999?

22 A. No, I don't remember it.

23 Q. You do not remember?

24 A. I don't remember it, no.

25 Q. But you referred to Mr Edwards in having had experience

1 in generating that tariff. You must have remembered
2 something about it?

3 A. I certainly know of his background. And one of the
4 reasons I was confident and comfortable with our ability
5 to manage these things was having people like Mr Edwards
6 and Mr Henderson and Mr Holton available to do that
7 work.

8 Q. Yes. Can I jog your memory a little bit and go to
9 bundle 2? If we go to tab 15, this is a letter from
10 Jackie Boarer, who I guess was -- the way I have
11 understood it, she was a pretty senior part the team
12 because as I understood it --

13 A. She reported directly to me.

14 Q. She reported directly to you, yes.

15 I appreciate it is a long time
16 ago and I'm not going to labour the point but do you by
17 any chance remember this letter?

18 A. No, I don't.

19 Q. Would you like to just read it through -- it's quite
20 short. Would you mind?

21 A. Not at all. (Pause).

22 Q. The introduction of a new Large Industrial Tariff, I would
23 have thought, would have been rather an important matter
24 for Welsh Water in its relationship with its customers
25 and also in relation to Ofwat. That would be

- 1 reasonable, wouldn't it?
- 2 A. That would be reasonable.
- 3 Q. But you have no recollection of the company doing so?
- 4 A. No, I don't.
- 5 Q. Go over the page, entitled "Justification Document for
6 Ofwat". Do you see? It's dated November 1998 and this
7 is somewhat before your role?
- 8 A. Could I ask you if this letter is dated correctly: 1998?
- 9 Q. I have no reason to think otherwise.
- 10 A. Because I wasn't involved in --
- 11 Q. I know, you have told us when you came on the scene.
12 I just wondered whether you had briefed yourself on
13 taking the job and possibly, Mr Williams, in order to
14 give evidence on behalf of Welsh Water in this Tribunal.
15 Is it the first time you have seen the document?
- 16 A. I can't remember seeing it before.
- 17 THE CHAIRMAN: The year 1999/2000, what was the actual
18 period? Was that the April to March year or a June
19 to May year? When it refers to 1999 to 2000 year, what
20 would have been the start date of that year?
- 21 A. I don't know.
- 22 MR SHARPE: I think the years in question here are the
23 financial years 1 April to 30 March. Does that ring any
24 bells?
- 25 A. No.

1 Q. No. So over the page we have the justification
2 document. Do you see at the bottom -- 2 "The proposed
3 tariff structure". You might care to read those up to
4 2.5. (Pause)

5 Can you see what was intended, that price should
6 bear some relationship to volume?

7 A. Hm-mm.

8 Q. If you go over the page -- you are on it now --
9 page 283, you see a table, don't you?

10 A. Indeed.

11 Q. These are consumption bands, megalitres per annum.
12 That's right, isn't it? You can see that from the top
13 left-hand box.

14 A. Indeed.

15 Q. And you will see that if, for example, you are taking up
16 to 49 megalitres in the left-hand column -- do you see
17 that?

18 A. Yes.

19 Q. -- the tariffs that your company was charging for
20 potable water for that relatively small quantity would
21 be 84.08p per cubic metre.

22 A. Yes.

23 Q. Got it?

24 A. Yes.

25 Q. And then, as you see, going to the right, the more

1 customers consumed of potable water, the less they would
2 pay. In fact, what would happen is -- do you see the
3 fixed charge line?

4 A. Yes.

5 Q. Yes. It increases, doesn't it, as volumes increase, but
6 if you look at the next line, the volumetric price
7 falls? It falls with consumption. So you pay a higher
8 fixed charge but a lower unit charge.

9 A. Okay.

10 Q. Do you recognise that as a volumetric tariff for potable
11 water?

12 A. I don't have any recollection of this. I wasn't close
13 to this sort of detail, doing that role. So whilst
14 I would like to be able to answer the question,
15 I honestly can't.

16 Q. Well, if I may put this delicately, I didn't invite you
17 here to give evidence and you were invited here to give
18 evidence on the case. So ...

19 Let me now take you to page 292. What this table
20 does is to see the effect of the mixture of increasing
21 the fixed charge and reducing the volume charge has on
22 the average cost per cubic metre. Do you see that?

23 A. Yes.

24 Q. Yes. And it's a simple point. Taking account of the
25 fixed charge and the volumetric charge, the end result

1 is that large users increasingly pay a much lower price
2 for their water, don't they? And you can find that on
3 the last line?

4 A. Yes.

5 Q. Can you see? Do you agree with that?

6 A. Yes.

7 Q. So up to 50 megalitres, the average charge taking into
8 account the fixed and volume charges, 84p per cubic
9 metre but when you get up to the 1,000 megalitres on the
10 right, it's in the order of 0.46. It's not quite half
11 but near enough. Do you see that?

12 A. 0.41.

13 THE CHAIRMAN: The average cost.

14 A. I'm sorry, yes.

15 MR SHARPE: Yes, good.

16 At the risk of asking a silly question, why was
17 that? Why should large customers be favoured over
18 smaller customers?

19 A. That's the way we did things, I guess. I'm not --

20 Q. I'm not asking you why you did it?

21 A. As I have tried to explain, I'm not close to this
22 detail.

23 Q. Could I make a suggestion, that it might be because the
24 costs of supplying a large volume purchase might be much
25 lower than the costs of supplying a smaller purchaser?

1 Would that seem reasonable?

2 A. Yes, it could, yes.

3 Q. So different classes of customer would be charged

4 different prices, based upon the costs involved in

5 supplying them?

6 A. Again, as I have been trying to explain, I wasn't close

7 to this level of detail. So I began, as you probably

8 guessed, struggling to answer your questions.

9 Q. Perhaps the final question. Just to reaffirm, the Large

10 Industrial Tariff only applied to potable water, didn't

11 it?

12 A. I can't remember.

13 Q. That's what it says.

14 A. Okay. But I can't remember.

15 Q. You can't remember what it says or you can't remember

16 what it said at the time?

17 A. I can't remember -- I can't remember what it said at the

18 time, to be honest.

19 Q. I don't think there is any doubt that the documentation

20 here reveals it applies only to potable customers --

21 customers of potable water.

22 I wonder if that might be a convenient moment.

23 THE CHAIRMAN: Yes. Mr Cowen has a question.

24 MR COWEN: Thank you very much. One question I was trying

25 to get to is how many people in total did you have

1 working for you in this period? Not precise numbers but
2 some sort of idea of the scale of the role that was
3 involved.

4 A. At one time -- but I think it actually included
5 a scientific element -- there was about 99 people in
6 total within, you know, the wider team.

7 MR COWEN: In terms of your responsibilities, did you have
8 output measures? How did you measure what they were
9 doing and what they were being asked to do?

10 A. It was -- basically working through the two functional
11 heads, one being Dr Boarer that we have already
12 mentioned. There was the ongoing understanding of the
13 workload of that department and how it was being
14 progressed and that's why we used to meet on a monthly
15 basis, to keep abreast of how those things were
16 developing.

17 MR COWEN: What was their mission, then? What were their
18 targets? What were you asking them to achieve as part
19 of your role?

20 A. In terms of this competitive element, it was the
21 management of that and meeting whatever the outstanding
22 obligations were in terms of producing a statement of
23 press principles, for example, in this context, the
24 access code, managing the Albion application, by way of
25 example, progressing that through.

1 That's the way I was dealing with it. I'm not sure
2 if that answers your question.

3 MR COWEN: What I'm trying to get at is what would be good
4 and what wouldn't be good from a management point of
5 view because you have defined your role as being in the
6 management sense. So if the application was dealt with
7 more quickly or less quickly than something, you could
8 assess whether or not it was being done well or not.
9 I was just wondering what the metric system, the
10 management system that you put in place to judge the
11 quality of the work that was being done.

12 A. Righted. In terms of specific metrics, I don't think
13 there were any other than, you know, meeting when we had
14 to produce the access code, for example, the principles,
15 clearly those things needed to be done by then. So of
16 themselves they set their own sort of standards by way
17 of when they needed to be completed.

18 In terms of -- I think you asked me about it -- the
19 quality dimension of that. It was actually working with
20 those colleagues I mentioned. Clearly at the time I had
21 a better understanding of the contents and on advice
22 from those individuals in terms of when we met, I was
23 obviously being very reliant on them.

24 MR COWEN: One final point from me. So if there was
25 a matter that was of considerable detail that you need

1 to get involved in, you would have got involved in that
2 if it mattered more than, perhaps other things?

3 A. I wouldn't have gone into the detail of the sort of
4 pricing issues.

5 MR COWEN: But if the other 99 people that were working
6 with you on the other issues in your responsibility, you
7 could have got involved in more details in other areas,
8 if they mattered more.

9 A. Yes, I could be flexible, I suppose.

10 MR COWEN: Thank you.

11 MR LANDERS: Just to clarify, you said you were the only
12 member of the LCE in your division who was also on the
13 board. Does that imply that there were other members of
14 the LCE who were also on the board?

15 A. Yes, within the Licence Company Executive, if my memory
16 is right, there is a chap called Graham Edwards, Jim
17 Illidge. One was the asset director, Graham Edwards
18 was the ops director, they also served on the Dwr Cymru
19 board, for example.

20 MR LANDERS: So there would have been a number of directors
21 who were involved in the LCE's consideration of the
22 matters that we have been discussing this morning?

23 A. Yes, indeed.

24 MR LANDERS: Would that have included a finance director?

25 A. I'm not sure how often -- Gedwin Miles came along as

1 a finance director. I couldn't say to you in all
2 honesty --

3 MR LANDERS: Was there a standard agenda for the LCE?

4 A. It was just an ongoing business agenda, yes.

5 MR LANDERS: So you would start at whatever came one at the
6 last meeting?

7 A. Came up, indeed.

8 THE CHAIRMAN: We will come back at ten past two.

9 MR BEARD: I'm sorry, Madam, would it be appropriate to give
10 the witness the ordinary warning? I'm sorry.

11 THE CHAIRMAN: Yes. You have been in court, I think, when
12 I have given the witness warning, which is to say that
13 you mustn't have any discussions with anybody on your
14 team or anybody on the opposing team for that matter,
15 about the case, whilst you are in the course of giving
16 your evidence --

17 A. I understand, thank you.

18 MR BEARD: Thank you very much, Madam.

19 THE CHAIRMAN: We will come back at ten past two.

20 (1.08 pm)

21 (The short adjournment)

22 (2.10 pm)

23 MR SHARPE: Mr Williams, I was showing you the Large
24 Industrial Tariff document that Welsh Water provided to
25 Ofwat and they provide it had gone to Ofwat for approval.

- 1 That's right, isn't it?
- 2 A. I imagine so, yes. I'm not familiar with the document
3 so it's very difficult for me to respond to it.
- 4 Q. Yes. This of course was the basis on which all large
5 industrial customers were taking away potable water and
6 as we will develop, and as I think you must know, it
7 formed the basis, an important element, in the
8 calculation of the FAP. So if you are looking for the
9 method in my madness of taking you to this, I'm, as it
10 were, turning up my cards and showing you why I'm taking
11 you to it.
- 12 A. Hm-mm.
- 13 Q. Just if I can take you back quickly to paragraph 2.5 on
14 page 283?
- 15 A. Which folder, please?
- 16 Q. Page -- sorry, bundle 2, tab 15. Just let me put
17 a prior proposition. This was seeking Ofwat's approval.
18 There are other instances, I think, where you sought
19 Ofwat's approval and therefore there is quite a high
20 premium on accuracy. So I'm entitled to assume that is
21 pretty accurate -- accurate. It's not pretty accurate.
22 That's right, isn't it?
- 23 A. Yes.
- 24 Q. Look at 2.5 again. I took you to it earlier but this is
25 for a different purpose:

1 "The tariff will only apply to potable water users."

2 So we have resolved that:

3 "The tariff structure for non-potable users already
4 reflects the reduction in price per cubic metre due to
5 lower treatment and distribution costs. However, in the
6 light of the proposed new LIT, the current standard,
7 non-potable price is under review."

8 Do you see that?

9 A. Yes.

10 Q. Do you recall ever seeing this before?

11 A. I don't.

12 Q. You don't?

13 A. No.

14 Q. And you weren't aware that the current standard
15 non-potable price was under review at the date of this
16 letter, 2 December 1998?

17 A. No.

18 Q. And you took over your responsibilities in, what, the
19 early course of 1999?

20 A. Yes.

21 Q. Just a few weeks or months before. That's fine. Okay.

22 The reason I'm drawing that to your attention is
23 Welsh Water's recognition that non-potable water would
24 have lower costs than potable water. Do you agree with
25 that?

1 A. Yes.

2 Q. That's after all what your document says.

3 A. Hm-mm.

4 Q. Within the category of costs, broadly there are two
5 elements, aren't there? There is one for treatment and
6 we are finding here that non-potable treatment costs are
7 lower than the treatment for potable water. That's
8 a fairly intuitive proposition, given you drink one and
9 you wouldn't go anywhere near the other, would you?

10 A. Indeed.

11 Q. No. Similarly for distribution. So the distribution of
12 potable water through pipes conveying that potable water
13 would be at a higher price than the costs of
14 distributing non-potable water. That's what it says as
15 well, isn't it?

16 A. Yes.

17 Q. Yes. And the reason for that would be what? Why?

18 A. Because of the treatment.

19 Q. The treatment side, I think, is self-evident. But
20 distribution?

21 A. You know, I explained earlier, I wasn't close to the
22 detail of these things. So I find it very difficult to
23 comment. I can't remember it over this length of time.

24 THE CHAIRMAN: It is from your general knowledge of the
25 water industry, which you have been working in, do you know

1 whether it is cheaper to transport, distribute,
2 non-potable water than potable water and if so, why?

3 A. It isn't clear to me, to be honest. I don't remember
4 it. I really don't. I'm not trying to avoid any
5 question. It's actually my memory isn't dealing with
6 it. So I really cannot answer it.

7 MR SHARPE: I think I have taken you about as far as I can
8 except merely to remind you what you were telling Ofwat
9 and what you agreed must be accurate that, the prices,
10 the tariff structure, for non-potable is lower due to
11 lower treatment and lower distribution costs.

12 A. Right.

13 Q. You make reference here to a tariff structure for
14 non-potable users, doesn't Welsh Water, at
15 paragraph 2.5? Do you see it?

16 A. 2.5, yes.

17 Q. Go back again to page 283.

18 A. Yes, I'm there.

19 Q. Now, I associate a tariff with a price list, like your
20 tariff for potable large industrial users. So I know,
21 if I'm taking X megalitres per day, what it's going to
22 cost?

23 A. Yes.

24 Q. And of course there wasn't a non-potable tariff at that
25 time, was there?

1 A. I really don't remember.

2 Q. Let me show you what I had in mind. Let's go to tab 17,
3 please, of the same bundle. The page is obscured,
4 I have to say on my copy. Tab 17, the first document.
5 Have you got it? It's not the easiest document to read.
6 I'm waiting for my friend to say it's elsewhere in the
7 bundle in a clean copy?

8 THE CHAIRMAN: What does WSH stand for?

9 MR BEARD: It's Welsh non-potable. WSHNONPOT is just an
10 abbreviation.

11 THE CHAIRMAN: I see, of Welsh.

12 MR BEARD: I'm sorry, I'm giving evidence.

13 THE CHAIRMAN: Presumably it's not contentious.

14 MR BEARD: I assume not. I hope that is of assistance. My
15 copy is relatively clear.

16 MR SHARPE: I understand that all water companies have
17 a three-line abbreviation, don't ask me what the others
18 are. So every time we WSH, it's Welsh.

19 THE CHAIRMAN: Welsh Water, okay.

20 MR SHARPE: Have you seen this before?

21 A. I don't recall it.

22 Q. Have you ever seen a special agreement register before?

23 A. I don't recall seeing one, no.

24 Q. Do you know what it is?

25 A. Yes.

1 Q. Tell us?

2 A. A special agreement with particular customers. There we
3 are.

4 Q. As I understand it, it's a special agreement register
5 which is supplied to Ofwat? And I believe it's a public
6 document. Yes? So will you agree with that? More
7 accurately, do you dissent from that?

8 A. I'm happy take your word for it.

9 Q. Thank you. It's the special agreements register to
10 1999. My copy at least isn't particularly easy to read
11 and I hope yours is easier but I think the first few
12 lines, if you can see them, WSHPOT 1 and so on.
13 I believe that relates to potable water and is not what
14 I'm going to ask you about.

15 A. Right.

16 Q. Then we have got a line which I can just read as
17 "non-potable water"?

18 A. Yes, the shaded line.

19 Q. It's four or five lines down and it begins WSHNONPOT 1.
20 Do you see that?

21 A. Yes.

22 Q. And there then follows 18 agreements described in
23 respect of Welsh Water and I am instructed, though
24 I don't see it in the document, these are the agreements
25 which existed in 1997 to 1998?

1 MR BEARD: If it helps, I think that you can see that across
2 the top it says "customer name" and then "volume" and it
3 says "1997/1998 volumetric charge 1997/1998". It's not
4 super clear but if that assists.

5 MR SHARPE: It's super unclear on my document. I'm much
6 obliged. That's what I took it to mean.

7 In the column immediately to the right of the
8 WSHNONPOT 1, can you see?

9 A. Yes.

10 Q. I think it says 6242. I think from the top that means
11 that the volume of water being purchased; yes?

12 A. Could you take me back again? I can't find the figure.

13 Q. If you go into the second column from the left, the
14 left-hand column has the WSHNONPOT 1. Do you see?

15 A. Yes.

16 Q. And then the column adjoining it has a number 6242. Do
17 you see that?

18 A. At the top of the page?

19 Q. No, WSHNONPOT 1?

20 A. 6242.

21 Q. That's it. Got it?

22 A. Yes, thank you.

23 Q. I take that to be the volume of water purchased and
24 that's what it says at the top. Then we look at the
25 column next door to it on the right, we have the

1 volumetric price, which should read 23.2p. Do you see
2 that?

3 A. Yes.

4 Q. What I'm going to do is ask you just to sort of scan
5 down that column and you see you have prices at 19.78,
6 7.7, 21.29, 28.63, 27.73, 27. Then we have got an
7 extraordinary one of 1.21, which I'm instructed is the
8 Elan Valley's supply and I'm not going on dwell on that
9 and then another 1 at 3.8. It's the same one, yes.
10 Let's not worry too much about it but it is remarkably
11 lower than the others. Then we have 23.2. Are you
12 still with me?

13 A. Yes, indeed.

14 Q. 26.13, 13.07, 13.38, 26.43 and there is one at the
15 bottom, 59 for non-potable water. Do you see that?

16 A. Yes.

17 Q. Looking at those prices, isn't it clear that there is
18 quite a range of different prices being charged to
19 industrial customers. Would that be right?

20 A. It would be.

21 Q. They are all non-potable customers. I ask you to infer
22 that those prices must have been calculated by reference
23 to factors relative to the individual's supplies because
24 they don't constitute a tariff, do they?

25 A. Not looking at that, no.

1 Q. Right. So it's reasonable to assume, isn't it, that
2 they have been calculated by factors which are specific
3 to the customers concerned. That's my interpretation.

4 Do you think that's right?

5 A. It could be, yes.

6 Q. Thank you.

7 THE CHAIRMAN: Do you know, can you assist us at all as to
8 whether it is right or not?

9 A. It's not an area I'm familiar with. I don't recall
10 seeing this. It's not something I ever got involved
11 with personally, so I can't help on it.

12 MR SHARPE: In fact before we move on, I have just been
13 given instructions that the price that is remarkably low
14 and I said was Elan Valley and I thought it was -- I'll
15 just take you back to it very quickly and I won't keep
16 you long -- have an absolutely huge offtake of water.
17 Do you see the 27 megalitres?

18 THE CHAIRMAN: Million megalitres. That is million
19 megalitres.

20 MR SHARPE: Really?

21 THE CHAIRMAN: I think so.

22 MR BEARD: It's metres cubed.

23 THE CHAIRMAN: At the top it says.

24 MR BEARD: It just says metres cubed at the top.

25 MR SHARPE: 27 million cubic metres and remember, this is

1 the annual consumption, not a daily consumption.

2 THE CHAIRMAN: 26 megalitres is a tiny amount.

3 MR SHARPE: One cubic metre is equivalent to 1,000 litres;
4 right? A thousand cubic metres is one megalitre; right?
5 And here we have got 26 million cubic metres annual
6 consumption. This is a very, very large -- yes, it's
7 26,000 megalitres. If you compare that with the figures
8 we have been using before of 22 megalitres,
9 18 megalitres, 6 megalitres at Ashgrove per day.
10 Multiply that.

11 So this is not Elan, this is actually Llanwern, the
12 other Corus purchaser at that time. I simply do that
13 partly in the interests of fact, partly also to isolate
14 a very large customer at that time.

15 All right. Using the same bundle, let me take you
16 to page 351A, just a couple of pages over. I'm sure you
17 have seen this, Mr Williams. Do you recognise it?

18 A. I don't actually. I may well have seen it but I don't
19 recollect it.

20 Q. Let me tell you, this is Ofwat's final determinations
21 for future water and sewerage charges for the years 2000
22 to 2005. I think as I understand the way the system
23 works, every five years there is a perennial review.
24 The companies put in their bids on the basis the assumed
25 capex and opex, a rate of return broadly equivalent to

1 the cost of capital is calculated. The regulatory
2 capital value of the company is identified, net of new
3 investment and depreciation -- depreciated assets which
4 will drop out and the cost of capital is apply to that
5 regulatory asset base and that's right, isn't it?

6 A. I think so, yes.

7 Q. This was the basis of your revenue, the bulk of your
8 revenue.

9 If we turn over its page, at page 351B, we see
10 Ofwat's determination of charges for Welsh Water for the
11 five years going on from 19999 up to 2005. Is that
12 right?

13 A. It is.

14 Q. And you will see that they have analysed Welsh Water's
15 expected costs for that perennial period and Ofwat has
16 then mandated the following changes in Welsh Water's
17 basket of prices. Do you see that? It's the top line,
18 actually?

19 A. The average annual household value. Are you referring
20 to that?

21 Q. At the very top line we have price limits and expected
22 effect on household bills. We see in the year 2000/2001
23 there is going to be a reduction in price of
24 10.5 per cent. Do you see that?

25 A. Yes.

1 Q. Then in subsequent years the changes in price are much
2 more modest, there is a reduction, stable, a modest
3 increase, a modest increase. Do you see that?

4 A. Yes.

5 Q. That's called the K adjustment value?

6 A. Yes.

7 Q. Is it all coming back to you a bit now slowly?

8 A. I certainly remember the K determination.

9 Q. Yes, and this is the K determination. The particular
10 point I want to draw your attention to is this: go down
11 the page. At the very bottom we have a heading
12 "Director's assessment of what is driving the change in
13 bills." This is essentially a summary of what the
14 director was expecting Welsh Water to do. So it starts
15 with average household bills and in the first year of
16 the review period. Do you see that?

17 A. Yes.

18 Q. That's a figure of £302. Got that?

19 A. Yes.

20 Q. What the director was asking Welsh Water to do -- well,
21 telling you, there was no ifs and buts about this, was
22 there? You had to pass on past efficiency savings in
23 performance. That 32 is broadly equivalent to minus
24 10.5 at the top. So that's the first one?

25 A. Okay.

- 1 Q. I think in the trade that's called the P0 adjustment.
- 2 A. Right.
- 3 Q. Down at the bottom of the page -- so we have got P0
4 adjustment minus 32, then we have assumptions on future
5 efficiency improvement. That's going to knock off
6 another £44. Then we have got improvements in drinking
7 water and environmental quality. That's going on add
8 £37, isn't it?
- 9 A. Yes.
- 10 Q. And then we have got improvements in service
11 performance, neither here nor there. Maintaining the
12 balance between supply and demand, neither here nor
13 there, crudely. The household bill at the end of the
14 period will be £264. So there will be a reduction in
15 the price. Do you see that?
- 16 A. Yes.
- 17 Q. Right. The point to draw your attention to is this: of
18 these features, improvements in drinking water and
19 environmental quality account for £37, okay?
- 20 A 10 per cent increase. So that factor would be
21 applicable only to potable water, wouldn't it, drinking
22 water?
- 23 A. Yes.
- 24 Q. Yes. So effectively what the director is saying is that
25 other than the costs involved in improving potable

1 water, he expects Welsh Water's costs to fall in real
2 terms -- all this is in real money -- by 25 per cent
3 over the five year period?

4 A. Right.

5 Q. That's right, isn't it?

6 A. Well, the maths, yes.

7 Q. Owing to essentially increased efficiency.

8 As I think you know, Mr Williams, if you had taken
9 issue with this, you would have been within your rights
10 to challenge it before the Competition Commission,
11 wouldn't you?

12 A. Yes, we could have challenged it.

13 Q. Yes, under section 12 of the Water Industry Act. Now,
14 did you do so?

15 A. No.

16 Q. You accepted this. You accepted the challenge of quite
17 a demanding cost reduction target, focused, it would
18 seem, mainly on potable water issues.

19 Thank you. When did you become aware of the
20 Competition Act 1998?

21 A. Well, I certainly wasn't aware of it in 1998.

22 Q. Really?

23 A. No.

24 Q. Were you aware there was a two-year period before it
25 came into force?

1 A. Yes.

2 Q. You knew, did you, that Ofwat viewed this as a catalyst
3 for change in the water industry. You knew that?

4 A. Yes.

5 Q. And you recall that, good?

6 A. Yes, it came into force --

7 Q. 1 March 2000?

8 A. 2000.

9 Q. And it served really to open up competition in an
10 effective way for the first time, didn't it?

11 A. That was its purpose, yes.

12 Q. Thank. Let's go to bundle 3. Put away 2. Go straight
13 to tab 52, page 561.

14 A. Yes.

15 Q. Do you have it?

16 A. Yes.

17 Q. Do you recognise this paper?

18 A. I do.

19 Q. Do you remember it? Good.

20 A. I have actually been reminded of it because it was made
21 available to me. I wouldn't have remembered it
22 otherwise.

23 Q. No, no, I understand. We know perfectly well that
24 witnesses have every right to remind themselves of the
25 papers in the cases and it's a terrific advantage when

1 they choose to do so. So tell us what it is?

2 A. Well, as the title suggests, it's about competition in
3 water, what this means in practice.

4 Q. Yes.

5 A. It talks about the statement of principle, the network
6 access code et cetera.

7 Q. I think this might have been the paper to the
8 Welsh Water board?

9 A. It would have been, headed DCC, yes. That means
10 Dwr Cymru Cyf.

11 Q. Thank you. Just help us with the code here. DCC is the
12 DC board?

13 A. That's right.

14 Q. 00 is what?

15 A. I presume that was the year but I can't remember, to be
16 honest.

17 Q. No, I think that's probably right. And 026 would be the
18 sequence of papers given to the board in that year?

19 A. Quite likely, yes.

20 Q. We think this was a document that was created in
21 April 2000.

22 A. It's not dated to --

23 Q. So no, it isn't dated. Let's just glance at it. You
24 see the issues. This is Mr Holton, who is your
25 commission man, wasn't he? He was the one to deal with

- 1 the competition?
- 2 A. Yes.
- 3 Q. New customer and competition manager and here you are
4 styled to be the sponsor?
- 5 A. Yes.
- 6 Q. So Mr Holton is writing to inform the board about the
7 Competition Act, Welsh Water's intentions with regard to
8 the network access code need to be published. Do you
9 see that?
- 10 A. Yes, indeed.
- 11 Q. Yes. And then developing the network access code and
12 then he goes on:
- 13 "Competition is emerging in several ways."
14 We will go on to that at paragraph 5.2 in a minute.
15 Then he goes on to say:
- 16 "Competition has the potential to place some or all
17 of the following large user customer income at risk."
18 Do you see that?
- 19 A. Yes.
- 20 Q. And you see the total, £23.4 million?
- 21 A. Yes.
- 22 Q. So you have no reason to doubt the accuracy of his
23 figures at the time?
- 24 A. Not at all.
- 25 Q. No. Go over the page. And then he goes on, makes

1 a recommendation:

2 "Approval is sought now for the already published
3 statement of principles."

4 Do you have that?

5 A. Yes.

6 Q. And then:

7 "Delegated powers are sought for Mike Brooker and
8 Jeff Williams to allow publication of the network access
9 code prior, if necessary, to the next meeting."

10 That's right?

11 A. Yes.

12 Q. Was that common, incidentally for the board -- because
13 you were the response on the here and you and
14 Mr Brooker, to whom you reported, would be told to go
15 away and do things?

16 A. There were occasions when delegated powers were agreed,
17 yes.

18 Q. £23.8 million is a non-trivial sum of money, isn't it?

19 A. A very large sum of money.

20 Q. Yes, thank you very much. So the board was quite right
21 to have this drawn to their attention and no doubt took
22 it very seriously?

23 A. Absolutely.

24 Q. Thank you. Over the page at 5.2 we have the details of
25 competition, inset appointments. Do you see that?

1 A. Yes.

2 Q. Abstraction licence trading. Then common carriage?

3 A. Yes.

4 Q. "Common carriage, competition between producers across
5 trunk networks that link the resources in one area to
6 customers in another."

7 I appreciate this is Mr Holton explaining to people
8 who may not have been particularly aware of all the
9 details. So he is explaining these things.

10 And then it goes on about possible outcome of
11 competition, few opportunities may be available; but
12 over the page in this document a more likely outcome --
13 564, more likely outcome is that:

14 "... more competitive activity takes place, more
15 large customers will seek opportunities to change
16 supplier and stimulate more water companies to become
17 active in the market."

18 So it's a pretty serious issue. You have a lot of
19 money at stake. And I would presume -- I think I'm
20 right, aren't I -- this would be very important, not to
21 lose this business?

22 A. Absolutely, like any business, you wouldn't want to lose
23 business.

24 Q. Thank you very much. We know that the principal
25 competitor in the market to Welsh Water is Albion -- or

1 was Albion as at that date. And we know that, if I take
2 you back briefly to bundle 2, tab 14. This isn't
3 a document you would have seen in the ordinary course of
4 events but it's an internal Albion document. Do you
5 have it at 259?

6 A. Yes.

7 Q. If you take it over, the only thing I want to take you
8 to is at 265. Do you have it?

9 A. Yes.

10 Q. This is the position as at 1 May 1998. So it's a little
11 earlier than your April board paper but it nevertheless
12 represents what I presume Mr Holton would have known,
13 being your competition expert, do you see?

14 A. Yes.

15 Q. As of 1 May 1998 Ofwat had received 32 inset
16 applications, of which two had been submitted by Anglia
17 and the remainder by Enviro-Logic and that then becomes
18 Albion and the first application was made in
19 August 1995. And then it gives a list of those
20 applications. My understanding is this was a public
21 document and that's why Dr Bryan drew the information:
22 had anyone ever shown you documentation in relation to
23 inset applications?

24 A. I don't recall seeing that.

25 Q. But nevertheless -- I don't want -- you can't speak for

1 Mr Holton but it is reasonable to assume that when he
2 was analysing the state of competition, he could not
3 fail to have noticed that 30 out of 32 applications were
4 made by Albion. Would that seem reasonable?

5 A. Yes, that would seem reasonable.

6 Q. If he had done his job properly and there is no reason
7 to believe he didn't, he would have analysed the
8 situation and seen this publicly available information
9 arrive and seen the extent of Albion's ambitions.

10 THE CHAIRMAN: So you are saying that at the time Dwr Cymru
11 would have known not just that there were these two
12 applications for them but there were inset
13 applications --

14 MR SHARPE: Madam, this register of inset applications was
15 and remains a public document and that was the source
16 for Dr Bryan.

17 But also seeing actually if one looks at it quickly,
18 while we have got it open in front of you, inset
19 applications received by Ofwat, and of course Ofwat will
20 inevitably have known -- sorry, Welsh Water will
21 inevitably have known about number 7, Shotton Paper,
22 which of course we are here for, but then in addition to
23 that, we see at number 31 another inset application in
24 relation to Kimberly-Clark. Do you see that?

25 A. I do.

1 Q. Were you aware of the Shotton Paper application and the
2 inset determination when you assumed your
3 responsibilities?

4 A. I certainly knew of the activity and then obviously
5 became more familiar with it when I took over that role.

6 Q. Yes. Were you aware of the application in respect of
7 Kimberly-Clark?

8 A. I don't recall that one, to be honest.

9 Q. Of course, Shotton was the inset appointment in being,
10 actually it had been executed. Do you recall how
11 important a customer Shotton was to Welsh Water?

12 A. Yes, we certainly didn't want to lose any custom.

13 Q. It's one thing saying you don't want to lose any
14 customer as a sort of slogan of aspiration, I know that
15 but I think I'm right in saying it was, if not your
16 largest customer, maybe your second largest customer,
17 after Llanwern. Would that be right?

18 A. I don't know. I can't remember to be honest. I really
19 can't.

20 THE CHAIRMAN: Mr Williams, were you aware at the time that
21 they were an important customer?

22 A. Absolutely, yes.

23 MR COWEN: Can I just ask a supplementary question? If we
24 go back to tab 52, in the table of water companies and
25 income at risk, Albion is given -- I was just wondering

1 what the number of 1.5 million relates to.

2 MR SHARPE: May I ask what bundle are we in?

3 MR COWEN: You just took us to tab 52, which is folder 3.

4 MR SHARPE: Yes, I have put it away that's all.

5 MR COWEN: Which is the large user customer income at risk.

6 MR SHARPE: Yes.

7 MR COWEN: And in that list there is an inset appointment

8 number given against Albion of 1.5 million.

9 MR SHARPE: Oh, yes. May I just take very brief

10 instructions? I think I know the answer. (Pause).

11 It says "income at risk" and the inset appointment

12 gives a value of 1.5 million. Dr Bryan has instructed

13 me that actually at that time he was paying 1.8 million

14 but I don't know if much hangs on that.

15 THE CHAIRMAN: Is it saying that the current bulk supply

16 arrangement with Albion is at risk because it might be

17 replaced by common carriage and IA is presumably "inset

18 appointment", is it?

19 MR SHARPE: It bears that interpretation, yes.

20 MR COWEN: I was wondering what Mr Williams' view was, given

21 that it's the Dwr Cymru board paper.

22 MR SHARPE: I'm sorry, yes, would you answer Mr Cowen's

23 question?

24 A. Could you repeat that?

25 MR COWEN: Yes. At tab 52, page 564 there is a table. This

1 relates to the total amount of money that is at risk,
2 which was given at 23.8 million.

3 A. Yes.

4 MR COWEN: There is then a series of further entries which
5 you can see on page 564 and you know, what do these
6 relate to? When it says "income at risk", is this the
7 amount that Welsh Water would lose or what?

8 A. I think that's how it was styled, yes. An amount of
9 money which was at risk.

10 MR COWEN: One follow-up question: is that at risk of
11 competition in each individual instance or at risk of
12 competition generally?

13 A. In each instance, I think.

14 MR COWEN: Since we are still on it, what does "CC" and
15 "IA" mean in the "Threat" column?

16 MR SHARPE: If I may, might it be "common carriage" and
17 "inset appointment", from the nature of the threat
18 that's how I interpret it. That might then provide
19 a fuller answer to Mr Cowen's question. The threat --
20 you see, at that time Albion had an inset appointment
21 but Mr Holton has added "common carriage".

22 A. Right.

23 Q. He has identified correctly that common carriage might
24 constitute a threat in addition to the inset
25 appointment. Would that be a reasonable interpretation

- 1 of the document?
- 2 A. I actually do remember this document. I'm struggling
3 with the detail because the time again.
- 4 Q. Is that how you think you might have read it at the
5 board meeting?
- 6 A. Quite possibly.
- 7 Q. It's reasonable though, isn't it?
- 8 A. Yes.
- 9 Q. Water customers are identified and income at risk and
10 that's identified. Then we have "threat" and I took
11 that to be the nature of the threat?
- 12 A. That's reasonable.
- 13 Q. Hereford for example, potable is common carriage but the
14 others are common carriage and inset appointment?
- 15 THE CHAIRMAN: So is this right, that the flavour of the
16 discussion at the meeting was that the reason why this
17 income was at risk was because of possible common
18 carriage --
- 19 A. That's my understanding of it but, as I have said, it's
20 a long time ago, so some of the detail has gone from my
21 mind but I think that's probably it. So what the paper
22 was trying to do was to get the board to understand that
23 in a competitive context, this is the sort of area --
24 the sort of volumes of money then potentially that are
25 at risk. So it's just for everybody to be aware and

1 that was -- in fact, part of the appointment of
2 Dave Holton was to look into this area so that we could
3 properly manage it.

4 MR SHARPE: Could you speak up slightly?

5 THE CHAIRMAN: The microphone doesn't actually amplify the
6 sound. It just records the sound.

7 MR SHARPE: Perfect. If I have a problem, may I come back
8 to you?

9 A. Please.

10 Q. Obviously the paper had a purpose, didn't it; it was to
11 alert the board that the world was changing and you
12 faced, as you said earlier, a pretty serious challenge
13 to substantial revenue?

14 A. Yes, as everybody knows at the time, with Ofwat wanting
15 to introduce competition, you know, companies had to
16 become very -- aware of and be able to manage any
17 application, for example, or respond to Ofwat. It was
18 an environment that needed proper attention. Obviously
19 we needed to alert the board as to potential scale.
20 That was the nature of the paper.

21 Q. Yes, I presume it had a broader function than just adult
22 education. It was there to warn as well?

23 A. I wouldn't use the word "warn", to be honest. We could
24 argue over a word. There is not a lot of point. The
25 point was so that the board was properly informed.

1 Q. That seems very sensible. Do you recall any discussion
2 about it? Was it just tabled and nobody bothered to
3 talk about it or was there some discussion?

4 A. I really do not remember. I think I suggested earlier
5 on, it may well have been that Mr Holton would have
6 attended to talk through the paper. It was one of the
7 things I encouraged people to do because they did the
8 work.

9 Q. He is the expert --

10 A. He would come along and talk to it but in terms of the
11 detail of the time, I don't recall.

12 Q. You can't recall whether he attended and you can't
13 recall whether there was any board discussion?

14 A. Obviously there would have been discussion and certainly
15 the board members would have gone through the paper but
16 in terms of being able to recount to you on
17 a blow-by-blow of the day, I really could not.

18 Q. No, it's a long time ago and that's why, of course,
19 companies take minutes of the meetings, to remind them
20 what has been going on. I'm afraid -- and I observe
21 neutrally it doesn't surprise you that here we have a
22 board meeting of a major company, an important utility,
23 and no board minute has been forthcoming because you are
24 sure that Mr Curtis would have kept a minute, aren't
25 you?

1 A. Mr Curtis was a very good company secretary. So I'm
2 absolutely surprised --

3 Q. I am sure you are. I don't think we can take it any
4 further --

5 THE CHAIRMAN: Can you remember anything about did they just
6 say, oh, well, that's a new world or you must do
7 whatever you can to stop losing this money or you can't
8 remember even the flavour of the board's reaction. You
9 say this is a very large sum of money that we are
10 talking about being at risk.

11 A. I think I have already alluded to the fact that
12 obviously this was new to the water industry. It wasn't
13 just new to Welsh Water and in fact Ofwat were finding
14 their way as well in many respects. The Welsh Water
15 attitude to dealing with competition was that the only
16 sensible way forward was actually to properly engage
17 with Ofwat, to understand what they required, what the
18 implications of Competition Act et cetera. So actually
19 our stance was just to engage constructively with Ofwat
20 and similarly to anyone who was making applications. We
21 frankly couldn't do anything else. It would have been
22 a sort of Canute-like stance to try and stand in front
23 of the introduction of competition. It would have been
24 an absolute nonsense.

25 MR SHARPE: We know what you did. You imposed an abusive

- 1 access charge. That's what you did.
- 2 A. Someone has decided that?
- 3 Q. Yes. It's called the Competition Appeal Tribunal.
- 4 A. It's new to me.
- 5 Q. We know exactly what you did and you did it in the
6 manner described in the various Competition Appeal
7 Tribunal decisions. You are here to see what the
8 consequences of that should be to your former employer.
- 9 All right. We will leave that there for the moment,
10 shall we?
- 11 A. If you like.
- 12 Q. And we will go on to bundle 16. Bundle 16, tab 1. Do
13 you have it?
- 14 A. Yes.
- 15 Q. It doesn't look very helpful, does it, because --
- 16 A. It's redacted, yes.
- 17 Q. Just try and put Shotton in context. Shotton was in the
18 order -- it was a very large customer. I believe the
19 documentary evidence shows it was your second largest
20 customer at the time. Right? Would you dispute that?
- 21 A. I wouldn't.
- 22 Q. There was Llanwern and Shotton. This relates to Corus.
23 You are aware of the Corus plant at Sealand, which is
24 adjoining through Shotton Paper?
- 25 A. Yes.

1 Q. You were aware they were basically supplied by Ashgrove
2 Treatment Works and you are aware there was a separated
3 contract between Welsh Water and Corus?

4 A. I believe so, yes.

5 Q. This document in front of you is evidence of what Corus
6 was paying. Do you see?

7 A. Yes.

8 Q. We know this is an internal Corus document, which Corus
9 was content to give Albion --

10 A. Right.

11 Q. -- subject to these redactions and I can assure my
12 friends we had some correspondence. None of the
13 redactions are innately irrelevant to these proceedings.
14 I have seen them and I will make no use of them. they
15 are irrelevant. Here we have the FWD -- the 50 year
16 agreement, the 50 year contract, which expired two and
17 a half years ago approximately. We think this document
18 was created in about 1999.

19 A. 25 May.

20 Q. 25 May 1999 at 1 o'clock. Which expired approximately
21 two and a half years ago. We, Corus, pay 14p per cubic
22 mere. However Shotton Paper Mill also takes and pays
23 26 per cent per cubic metre. Shotton Paper do not know
24 what we are paying, do you see that?

25 A. Yes.

1 Q. We have no reason to doubt the accuracy of this. In
2 fact it has not been contested and Welsh Water would
3 know precisely what they were getting from Corus and we
4 have to draw a distinction between what they were paying
5 then because irrelevantly for most of these proceedings,
6 the Corus price went up as a result of Dr Bryan
7 protesting that there was discrimination present. He
8 did rather hope he would get a price at 14p but he
9 didn't.

10 So that's the background to the Corus document and
11 we see it's 14p per cubic metre. In your judgment it
12 would be unlikely, would it, that Welsh Water would have
13 sold that water at a loss. Is that right?

14 A. It would have been unlikely but I couldn't confirm it
15 either.

16 Q. No. As you saw, the contract expired two and a half
17 years before, hadn't it?

18 A. That's what it says, yes.

19 Q. So if it had been a loss-making contract, it would have
20 been open to Welsh Water to renegotiate it at that time,
21 wouldn't it?

22 A. Not an unreasonable conclusion.

23 Q. But instead they carried on paying the same price,
24 charging the same price and Corus paying the same price.
25 It's reasonable to assume for one reason or another that

1 we can't enquire, both sides were happy with the
2 arrangement?

3 A. It would be a reasonable assumption. Whether it's an
4 accurate one, I don't know.

5 Q. I'm going to put it to you that that 14p per cubic metre
6 was a commercially viable price, otherwise it would have
7 been changed?

8 A. I really don't know.

9 Q. If you compare that with the 26p per cubic metre that
10 Shotton Paper was being charged. So you were charging
11 Shotton at that time prior to the bulk supply agreement
12 with Albion -- you were charging Shotton Paper nearly
13 twice as much as Corus, weren't you?

14 A. Yes, on that basis, yes.

15 Q. And were you aware of that at the time?

16 A. I don't recall it.

17 Q. You don't recall it?

18 A. I really don't know.

19 Q. I see. But you were aware, weren't you, that Shotton
20 was your second largest customer within the order of 18,
21 20, 22 megalitres a day?

22 A. I became aware of that during the process of the
23 application.

24 Q. And at the time Corus were taking somewhere in the order
25 of 6 megalitres, somewhere between a third and a quarter

- 1 of Shotton Paper's take. That's right, isn't it?
- 2 A. Yes, that would be the maths, yes.
- 3 Q. So on the basis of what -- we might have been led to
4 believe from your -- there doesn't appear then to be any
5 relationship between a smaller volume and a higher price
6 and a higher volume and a lower price for non-potable
7 partially treated water, isn't it?
- 8 A. I'm not familiar with the Corus one. So it's difficult
9 for me to make an assessment, to be honest.
- 10 Q. Well, let me --
- 11 A. I can understand the mathematics of what you are saying
12 but I would need to understand what the agreement -- the
13 other company said --
- 14 Q. Up to 6 megalitres for Corus gets charged 14p per cubic
15 metre. 22 megalitres for Shotton Paper is charged at
16 26p and I'm putting to you that that seems to fly in the
17 face of what you would expect to see in volume-based
18 prices?
- 19 A. On volume-based prices, yes, I would understand that
20 point.
- 21 Q. So you would accept then that the prices charged to
22 Shotton and to Corus reflected the local circumstances
23 pertaining at the time. There cannot really be any
24 other explanation, can there?
- 25 A. I can't fault your logic but I really don't know because

1 I don't know the particular circumstances. It's
2 something I wasn't familiar with.

3 Q. Were you also aware that until Albion applied to take
4 Shotton Paper away by way of the inset appointment,
5 Welsh Water was charging Shotton 27.4p per cubic metre?

6 A. No.

7 Q. Were you aware that once Ofwat had made its "minded to"
8 decision in 1996 at that point some two years or more
9 before Albion supplied Shotton Paper, Welsh Water
10 reduced its price from 27.4p per cubic metre to 26p per
11 cubic metre?

12 A. I don't recall that.

13 Q. You don't recall?

14 A. But I don't deny it either.

15 Q. Does it then follow you don't remember that matched the
16 26p minded price, matched now by Welsh Water to Shotton
17 would mean essentially that Albion would have no profit
18 margin in which to go forward to supply Shotton?

19 A. Can you repeat that, please?

20 Q. I'm simply asking, do you have any recollection that
21 that price reduction would have led to no profit margin
22 for Albion?

23 A. I have to say it didn't strike me at the time.

24 Q. It didn't strike you at the time but I find that
25 a little strange because if you knew about it and there

1 was no profit margin to be made by Albion, you could
2 reasonably assume that they wouldn't go ahead with the
3 inset appointment because why should they? There was no
4 money in it. That's reasonable, isn't it?

5 A. It is reasonable.

6 Q. Thank you. Anyway, what we can say, looking at this
7 historically that Albion's entry into the market led to
8 an immediate price reduction to Shotton Paper on the one
9 hand and a loss of profit to Welsh Water, represented by
10 the penny reduction, penny and a bit.

11 That reduction in price, if we have a -- if we have
12 a volume of something like 6,800 megalitres, a reduction
13 of 1.4p on an annual basis, that would amount to quite
14 a tidy sum of money, wouldn't it?

15 A. Yes, I'm sure you are going to tell me.

16 Q. Yes, I am, but I'm not going to ask you to calculate it
17 either. But it amounts to about £100,000 a year. It's
18 an easy calculation. 6,800 megalitres, multiplied by
19 1.4p, comes to 100,000. But that was the immediate
20 impact of Albion's intended entry into the market,
21 wasn't it, at that time?

22 A. Based on those mathematics, yes.

23 Q. Thank you. Were you aware of any of this when you
24 assumed your responsibilities or before?

25 A. I don't recall it.

1 Q. Nobody had told you that Albion had come into the
2 market? I thought you said --

3 A. I knew of that element, but in terms -- I have no
4 recollection about the sort of financial elements of it.

5 Q. Since Welsh were happy to supply Corus at 14p per cubic
6 metre --

7 THE CHAIRMAN: Can we just ...

8 MR SHARPE: Sorry.

9 THE CHAIRMAN: You were being asked whether, when you took
10 up your post, you were aware that Dwr Cymru had decided
11 to drop the price being charged to Shotton Paper
12 unilaterally, as it were, and thereby foregoing about
13 £100,000 a year in response to the inset appointment of
14 Albion.

15 Are you saying that you don't remember being aware
16 of that at the time or you were not aware of it at the
17 time or --

18 A. I just don't recollect it.

19 THE CHAIRMAN: Is it something which you think was relevant
20 to your responsibilities that you were taking on in
21 your --

22 A. Well, yes, it's certainly within my area of
23 responsibility but I don't have any recollection of
24 being briefed on it or having any discussion with
25 anybody on it. Part of the problem for me is clearly

1 the time involved. I just don't remember. If I was
2 briefed on it, I don't remember it.

3 THE CHAIRMAN: But it's not a sufficiently striking thing
4 that would have stayed in your mind then?

5 A. It hasn't.

6 MR SHARPE: Yet your responsibilities, at least you were
7 entitled, were "customer policy and income director".

8 A. Hm-mm.

9 Q. So somebody coming in even two or three years before
10 they are actually supplying their customer, not any old
11 customer, but your second largest customer, you have no
12 recollection at all of ever being briefed that here is
13 Albion coming in and they have already cost us 100,000
14 a year even before they have set up shop and delivered?

15 A. I don't recollect.

16 Q. You don't recollect?

17 A. No.

18 Q. I have to tell you, Mr Williams ...

19 Let's go back to Corus. You were supplying Corus at
20 14 pence. You have no reason to believe that
21 Welsh Water would have made a loss on that. It had been
22 making a loss and you renegotiated the agreement.

23 I think you agree with me on that?

24 A. It seems a reasonable thing to say, yes.

25 Q. If you are making a profit at 14 pence per cubic metre

1 you are making a thumping great profit at 26 pence per
2 cubic metre, aren't you?

3 A. The maths would suggest that, yes, as I said I don't
4 know.

5 Q. You know nothing at all?

6 A. I don't know the details of those agreements.

7 Q. Even though you were income director, you weren't
8 interested in income?

9 A. Not at all. I was relatively new to the job. It wasn't
10 the only thing I was dealing with.

11 Q. No, I understand that.

12 A. You have asked me a very simple and straightforward
13 question on it, I would rather just tell you the truth
14 as I understand it. I don't have a recollection of it.
15 I can't do any more than that.

16 Q. But a threat to Shotton Paper if Albion was able to get
17 a cost based price, which I assume would be, if not
18 equal to, in the same ballpark as Corus. So there may
19 well have been differences in the Corus supply and we
20 have learned a little bit about some of them but whether
21 they were material or not don't worry about that but
22 just taking it as its gross level, 12p -- just under
23 12pn, you do the maths -- it's something in the order of
24 800,000 a year. That's a lot of money, isn't it?

25 A. It is a lot of money.

1 Q. And you say you weren't really concerned about it?

2 A. Obviously we didn't want to lose the income. But we had
3 to process the application, which is what we did. In
4 terms of using the word "threat", yes, I suppose you
5 could describe it like that but it was something to be
6 managed and the outcome would be what it would be.

7 THE CHAIRMAN: What was your role in determining what that
8 outcome would be? Did you have any responsibility for
9 influencing what the outcome for Dwr Cymru would be of
10 that exercise of processing Albion's application?

11 A. In terms of just discussing the application, basically,
12 as I mentioned, we sort of engaged constructively. That
13 was a sort of -- the mental sort of position adopted and
14 then in respect of establishing a price was carry on
15 applying our normal methodology, which, as I understand
16 it, was the regional average pricing and that's how we
17 approached doing the calculations et cetera. But in
18 terms of my involvement within the calculations,
19 I didn't go there because --

20 THE CHAIRMAN: I'm not talking about your involvement in the
21 calculations. We are trying to work out what your role
22 was in deciding how Dwr Cymru would respond to the
23 application.

24 A. Just by applying our normal methodology. There was no
25 deviation in terms of what we did.

1 THE CHAIRMAN: How did you come up with that policy of
2 applying your normal methodology?

3 A. Just that's how we arrived at the prices; it was
4 included in the --

5 THE CHAIRMAN: Did somebody say to you, "We are just going
6 to apply our normal methodologies"? Is that something
7 you decided yourself? What was the process of arriving
8 at that as the way to respond to the Albion application.

9 A. We -- I don't recall any discussions, say, at the exec
10 or board level that says how are we going to deal with
11 this application? I think our understanding was we
12 would deal with it as we would normally deal with
13 pricing issues, which is around the regional average.
14 So I never, in speaking to Jackie Boarer, for example,
15 by way of starting the process off in terms of managing
16 it, I certainly never said to Dr Boarer, you know,
17 deviate from a regional average approach, I just
18 accepted that it was understood that's how we would deal
19 with it. So I don't know if that helps.

20 THE CHAIRMAN: Did you tell her not to deviate?

21 A. Absolutely not. I didn't tell her to deviate from the
22 normal practice.

23 THE CHAIRMAN: Did you ...

24 MR LANDERS: Are you saying then that this wasn't regarded
25 as anything new or unusual; this was just a normal sales

1 application that you could have received from anybody?

2 A. Because the approach, as I understand it, looking back,
3 I was embodied to think in the access code. I think it
4 said in there about regional averages and I'm not sure
5 if it did in the statement of principles. I can't
6 remember, but I'm pretty sure it was in the access code.
7 So that in effect set out our approach and dealing with
8 it the approach is, you know, written in that document.

9 So I don't think there was any doubt ever through
10 the process of the application of how it would be
11 addressed in terms of the methodology. And I'm pretty
12 sure -- I think I have referred to it in my statement or
13 I may have read it in Mr Edwards' statement, I can't
14 remember, probably in Mr Edwards' statement, in the
15 meeting with Albion, when Dave Holton was speaking in
16 terms of how we would address the application,
17 I think -- I'm pretty sure that Dave Holton said
18 regional average pricing. I'm also pretty sure Dr Bryan
19 made it clear at that meeting that he wasn't happy with
20 that approach.

21 So immediately there is obviously a very clear
22 difference in how it should be addressed. We were doing
23 it as per our access code, Albion were unhappy with
24 that, presumably because they know it would result in an
25 answer they wouldn't like but the outcome was the

1 outcome of applying an established methodology. It
2 wasn't to --

3 THE CHAIRMAN: Did you ever say to anyone in advance, "If we
4 apply our normal methodology to this application, are we
5 likely to lose all this business or retain all this
6 business" or, "What's the price going to be and what's
7 the effect on our business of that price?"

8 A. To be honest I don't recall getting involved in that
9 sort of debate because we had already set out our
10 approach. I'm sure at a point in time I would have
11 understood that in applying that approach, this was the
12 result, but I can't remember if we did have any
13 conversation about that, to be perfectly candid, but,
14 you know, the approach we were going to take was not
15 a surprise; it was clearly stated in the access codes as
16 I have already said. I can't remember whether it's in
17 the statement of principles, as I have already said.
18 But the price was a product of that methodology. And
19 that's a methodology which hadn't been new to
20 Welsh Water. It was built into -- all that we had done
21 in terms of establishing a scheme of charges for
22 example, it had gone through Ofwat. So arguably that
23 methodology -- I'm not suggesting Ofwat had ever put
24 a stamp of approval that said this is absolutely the way
25 you have got to do it. I don't remember anything like

1 that. But in accepting that's what we had done and
2 that's what had been included in the access code, and
3 bearing in mind there was dialogue with Ofwat going on
4 throughout that period of time in terms of how the thing
5 was going to evolve and develop, they clearly understood
6 regional averages were going to apply and they never
7 said to us we couldn't do it. So we carried on applying
8 that methodology. So we weren't doing anything new. It
9 didn't require instruction from me. It wasn't that we
10 were doing something that was a deviation from anything;
11 it was a continuation of regional averaging.

12 MR COWEN: Can I just ask a slightly different question?

13 I don't know whether or not you cost each individual
14 employee or have a full-time equivalent type measure.
15 Do you do that in Welsh Water?

16 A. We didn't.

17 MR COWEN: So asking the question, then, how many people --
18 when you are looking at things from an appointment point
19 of view, as an HR director, what does £100,000 represent
20 to you?

21 A. I think I used to use a figure of about 25,000 per
22 person. So even I can do the maths there, kind of four
23 people.

24 MR COWEN: The reason I'm asking the question is that you
25 have got this new event, if you like, which is the

1 efficiency challenge from the regulator and that,
2 perhaps in your terms, might have been thought of in
3 terms of the number of people that it would cost. So
4 if -- you know, you do not have the income, does that
5 not have therefore a direct relevance to the people that
6 you can employ because that effectively becomes your
7 efficiency challenge, doesn't it?

8 A. Well, because of my HR background, for example, I would
9 never have transferred that straight into, you know,
10 therefore X number of people have to leave the business.
11 I think that's a pretty shabby way to be honest, if you
12 have any regard for your people, for me, it is
13 a principle, I think that's actually the last approach
14 one should take and furthermore we actually worked very
15 well with our trade unions who were a big asset to us.
16 Quite uniquely I guess, we actually had with our
17 employees, a guarantee of no compulsory redundancy. So
18 if we did identify ways and means of reducing numbers,
19 we dealt with it on a voluntary basis and another
20 dimension of the same issue was our -- obviously, you
21 know, I use the word "threat" in terms of loss of
22 income.

23 There are also other ways of sort of compensating
24 for that. One of the issues for me in my customer role,
25 for example, was the water industry wasn't particularly

1 good on collecting income and in Wales, for particular
2 reasons, social reasons, et cetera, low average pay, we
3 had quite an unacceptable level of debt.

4 Applying more attention to properly managing your
5 business, which I think -- I would say this, wouldn't I,
6 as the new customer director -- that we can actually
7 apply ourselves to actually bringing income into the
8 business and okay, if there was an outcome from
9 competition, that resulted us in losing business, that
10 was a product of the process and not because we were,
11 you know, pulling, you know, any levers to get the
12 answer we want; it was an application of a methodology.
13 The other way for us to come at was compensating for any
14 potential loss through, for example, better management
15 and income.

16 THE CHAIRMAN: Better debt collection?

17 A. And we also --

18 MR COWEN: I am very interested in what you just said
19 because the better management of income then becomes
20 what I was asking earlier, what's your objective, what's
21 your target? And it seems that what you are saying is
22 that it was really about balancing the books in terms of
23 income.

24 A. Actually to be perfectly candid, I think we set our
25 aspirations a little more -- well a little higher than

1 that. Forgive me if I get these figures wrong but to
2 give you an idea of the sort of focus -- the change
3 in -- you know, establishing the directorate, for
4 example, there was a very good team on looking at income
5 and within that team there was a subteam which dealt
6 with metering for, you know, industrial customers, where
7 there had been really bad investment over numbers of
8 years and the chap in charge of the metering team is
9 quite a zealot. Anyway, he convinced us that we really
10 should begin to invest and get a better fix on our
11 income through investment in metering and this is the
12 bit I'm asking if your forgiveness on, but I'm pretty
13 sure the figure we set ourselves I think it was from
14 2000 to 2005 that we were going to go after -- we felt
15 there was £30 million worth of income out there that we
16 should be getting in. That's not 30 million every year,
17 by the way. That's accumulative over the five years.

18 I wasn't in the customer job at the end of that
19 period but I think I'm right in saying we actually did
20 achieve that target. So, you know, whilst some people
21 are describing it as a threat, it was a business issue
22 for us. You can take any business issue and regard it
23 as a threat. We had to manage the business and that's
24 what we did.

25 MR COWEN: Thank you very much.

1 MR SHARPE: Perhaps just one or two questions, a discrete
2 issue I'll going only and if I may, it might be
3 convenient to break then. I won't keep you very long,
4 Mr Williams. I listened to your answers with great
5 interest. You did nothing you hadn't done before,
6 everything was as normal; is that fair?

7 A. Yes, we applied the methodology that was in the access
8 code. That produced a result.

9 Q. You told Dr Boarer: do it as normal?

10 A. Well --

11 Q. Earlier on this afternoon I took you to the special
12 register of, in this case, non-potable industrial
13 customers. I can't quite recall whether you had seen it
14 before. You had seen it before or not? I don't think
15 so?

16 A. I probably hadn't, no.

17 Q. You haven't, no. I tell you what it was. This was your
18 large customers, special register, public document and
19 I took you in particular to the variation in prices as
20 between different customers, some with large volumes,
21 some with small volumes. It did not appear to be except
22 for the outlander of Llanwern to be any obvious
23 relationship between volume and price. Yes? Yet you
24 say those prices must have been based upon normal
25 average regional tariffs, average regional calculations.

- 1 Is that right?
- 2 A. I don't know how they were calculated.
- 3 Q. I'm putting it to you when you see such a variation in
4 price they were obviously calculated by reference to
5 different criteria?
- 6 A. Yes, I would have to be silly to argue anything other
7 than that and I'm not arguing anything other than that
8 but I don't understand the background to it. So I can't
9 explain it.
- 10 Q. You see, my problem with that -- and I appreciate your
11 answer and the candour of it but it's hopelessly
12 inconsistent with the notion that here we have some sort
13 of constant methodology of average regional prices which
14 you can refer to, as it were historically and then roll
15 forward. All you did with Albion was simply take the
16 previous methodology and roll it forward. I'm putting
17 it to you that that is not consistent with the evidence
18 and frankly wasn't the way it was done, was it?
- 19 A. The way we did it is in exactly the way I just described
20 it.
- 21 Q. The way you did what. I'm talking about your
22 negotiations with other large industrial customers as
23 set out in the special register which I have shown you?
- 24 A. Could we take the two scenarios? The scenarios about
25 the special register are in effect in the past. And

- 1 I really can't comment on it because I don't know.
- 2 Q. No. So it doesn't make sense then to talk of what you
3 did normally?
- 4 A. No.
- 5 Q. Because, one, you do not know and secondly, it's
6 inconsistent with the notion of an agreed methodology
7 based upon regional averaging?
- 8 A. I can't comment on what I don't know in terms of that
9 register. What I can comment on is what I do know and
10 what I do know is what I have already described in terms
11 of the network access code and the application of
12 regional averaging.
- 13 Q. We most certainly will be coming to that in due course
14 but I'm asking you specifically in relation to your
15 answers to the Tribunal. You gave me the impression
16 that there was some agreed methodology in the past which
17 had been applied normally -- is the word you used
18 several times -- and that constituted the basis of
19 rolling forward. You are now saying it doesn't, that
20 those contracts were negotiated by reference to other
21 criteria and you are talking now of moving forward?
- 22 A. If I did mislead you on the first --
- 23 Q. And you also misled Ofwat as well. You also misled
24 Ofwat as well, didn't you, in saying that you had
25 a non-potable tariff because at the time at which you

1 made that submission in relation to the Large Industrial
2 Tariff for potable water, you had no non-potable tariff.
3 That came much later as we saw earlier in the evidence.
4 Was it 2003?

5 A. I don't know.

6 MR BEARD: We haven't seen that evidence. So I think it's
7 difficult to put that to --

8 THE CHAIRMAN: What he is putting to him is that if you look
9 at the register of special agreements, it's difficult to
10 see what common methodology could have been used to
11 arrive at those figures and yet in your evidence just
12 given to us, you gave the impression that as far as you
13 were aware, all that was being done to price the Albion
14 contract was to apply some pre-existing normal
15 methodology which was regional average pricing and what
16 they are trying to get to grips with at the moment is
17 when did this idea of regional average pricing, as a way
18 of approaching the calculation of the price to be given
19 to Albion for common carriage, where did that arise
20 from? Was that your idea? Did someone tell you that
21 was what was going to be done? How did it come about?

22 A. I don't know. For me, when going into that job, my sort
23 of first involvement in pricing was obviously in
24 relation to the application. So my knowledge stems
25 from, you know, that point and as I understood it,

1 building, as I have said, a couple of times really, in
2 terms of network access code, that was the way it was to
3 be done going forward and it was all the debate and
4 discussion with --

5 THE CHAIRMAN: So are you saying by the time you arrived on
6 the scene, that decision had effectively been taken by
7 including that as the methodology and the network access
8 code?

9 A. Yes, I believe that methodology goes back into
10 establishing the scheme of charges, you know, going back
11 to the first regulatory period.

12 THE CHAIRMAN: Where does that belief come from? Having
13 regard to the different prices in the special agreements
14 register?

15 A. I don't know. It's there. In terms of the, you know,
16 the register, I can't comment on it because obviously
17 I don't have the information or knowledge. As
18 I understand it, and perhaps this is a point you may
19 well get to with Mr Edwards, who would have more
20 knowledge on it than me, as those special agreements
21 have come up for renewal, they have gone on to using the
22 regional average. But please check that. I don't have
23 that degree of knowledge any longer.

24 I can't speak because I don't have the knowledge of
25 that part of it. I do have the knowledge, since, you

1 know, that involvement in terms of network access code,
2 not that I was involved in the detail of drawing it up
3 and as I have said already again on the statement of
4 principles, I can't remember if it's in this, but there
5 was never any doubt in terms of working through Albion's
6 application and frankly anybody else's application.
7 Albion just happens to be the sort of headline in it.
8 If it had been anybody else, that access code would have
9 applied. That methodology contained in there would have
10 applied.

11 THE CHAIRMAN: And you do not remember anybody asking you to
12 do the sums or seeing anybody doing the sums as to what
13 that would mean in terms of likely loss of business for
14 Dwr Cymru.

15 A. I can't remember a particular instance. In the
16 Dave Holton paper, you know, that information is
17 obviously driven from that, I imagine. I can't think of
18 any other reason why that calculation would have been
19 derived on any other basis. So that's where I am on it,
20 you know.

21 MR LANDERS: So when Dr Bryan came back and said that price
22 isn't fair because other people are paying less, you
23 didn't ask your team is that true and if it is true, why
24 is it true?

25 A. One, I don't remember and secondly, what I was concerned

1 about was, you know, were we doing what we said we were
2 going to do, consistent with that. I never understood
3 or was aware that there was any deviation from that. As
4 we now know there wasn't any deviation from it. So my
5 understanding at the time subsequently has proven to be
6 correct. This is the way we do it, this is the normal
7 way of doing it. At the time, why would we make a big
8 issue of it? Let's just get it done.

9 MR SHARPE: It wasn't my intention to question you on the
10 fine print to correctly surmise and Mr Edwards is here
11 for that and I took comfort from your paragraph 14 that
12 you were -- you had a good understanding of the broad
13 issues surrounding the work of Edwards and Holton and
14 would have made myself familiar with the contents of the
15 reports before introducing them to LCE. That's where
16 I take my starting point of all my questions.

17 My second point is this: the access code itself,
18 that was produced, I believe, in August 2000, wasn't it?

19 A. Yes, statement of principles first and I can't remember
20 if -- it was a few months later.

21 Q. Yes, you took up your post in, was it, early 2001?

22 A. 1999.

23 Q. 1999. I beg your pardon, yes. So you had been in post
24 for a considerable period of time. So you can speak to
25 the evolution of those documents and their presentation.

1 This is MD154 and the Tribunal has seen this at
2 least once before in our time. Refresh your memory,
3 it's dated 12 November 1999, well into your watch, as it
4 were. Do you remember it?

5 A. I remember it coming out.

6 Q. You do?

7 A. Yes, I do, yes.

8 Q. And presumably it was something you studied with some
9 interest at the time?

10 A. At the time, yes.

11 Q. At the time, thank you, yes. So you knew once upon
12 a time or were aware of its contents and this was the
13 first attempt by Ofwat to assist companies in meeting
14 their legal obligations and the reason for that is as is
15 very clear from the first paragraph, the Competition Act
16 1998 -- do you see that?

17 A. Yes.

18 Q. "... opens up scope for market competition, shared
19 networks" and so on.

20 A. Yes.

21 Q. I can walk you through the document but let me just take
22 you quickly to page 412 just to give you the nature of
23 the document. Do you see the appendix sets out the
24 principal issues but then the second paragraph is the
25 important one:

1 "Ofwat's competition team welcomes discussion with
2 each company on the development of its statement of
3 common carriage principles."

4 And:

5 "The appendix is not an exhaustive list and may be
6 revised in the light of company response." Comments to
7 be in by Friday 17 December.

8 Do you remember that?

9 A. I remember -- yes.

10 Q. Yes. So this is essentially a consultation document?

11 A. Yes.

12 Q. But nevertheless it did require companies to produce
13 a statement of principles that would cover shared use by
14 the 1 March. That's right, isn't it?

15 A. I believe so, yes.

16 Q. And yes, and do you understand the significance of
17 1 March 2000?

18 A. The Competition Act?

19 Q. Exactly. We see that at the top of page 410.

20 At the bottom of page 410, another important element
21 I draw to your attention and I'll ask you some questions
22 later. You see:

23 "Principal elements of common carriage. It is not my role
24 to prescribe in advance how each company should govern
25 the shared use of its network. You should set out the

1 prices and operating conditions ensuring that they are
2 properly related to costs and are consistent with
3 comparable components of your company's charges."

4 Do you see that?

5 A. Yes.

6 Q. So in a sense the Regulator is saying to you, we are
7 here to regulate this, but it is your responsibility --
8 we are not going to set out a unique way of proceeding.
9 Is that right?

10 A. Yes.

11 Q. So it's up to each company to decide in advance how it's
12 going to do it. Right. On page 411, another important
13 paragraph I draw to your attention, the one beginning
14 "Underlying"?

15 A. I have it.

16 Q. "Underlying any common carriage agreement should be
17 a commitment by the incumbent to equal, fair treatment
18 of entrants and customers. I will not expect the
19 incumbent to finance the entry of a competitor to the
20 market but neither will I allow the incumbent to
21 frustrate entry by setting unreasonable terms for shared
22 use."

23 Do you see that?

24 A. Yes.

25 Q. "For example, an incumbent can expect to recover the

1 reasonable costs of operating an essential facility on
2 a non-discriminatory basis, i.e. to treat entrants on
3 the same basis as it treats itself."

4 You read that at the time?

5 A. I would have done, yes.

6 Q. But then importantly the next paragraph:

7 "Equally, the direct costs of entry to the market
8 should be borne by those likely to benefit directly from
9 competition, not spread across the entire customer
10 base."

11 What do you think the director meant by that?

12 A. I can't remember, to be honest.

13 Q. Have a look at it in more detail and see if you can
14 refresh your memory. It's rather an important passage.

15 A. Okay. Well he is obviously saying any particular costs
16 generated by this element of competition, as it says
17 there:

18 "... should not be spread across the rest of the
19 customer base."

20 Q. Absolutely. So if costs are incurred at a particular
21 point A to B, they should be laid at the door of the
22 party coming in; that's right, isn't it?

23 A. That's what that bit says, yes.

24 Q. Yes. And there shouldn't be any attempt for customers
25 in other parts of the region to pay for -- to subsidise

1 the entry; is that right?

2 A. That's what that says.

3 Q. It doesn't say so in terms but I think we can reasonably
4 read it to mean that the costs of entry should not
5 exceed the direct costs of entry to the market at that
6 point. It doesn't say necessarily they shouldn't be
7 borne by other parties but doesn't it follow logically
8 that other parties shouldn't benefit from the
9 application to common carriage by somebody at
10 a particular point?

11 A. But he is not prescribing here, is he, that that's how
12 it should be done?

13 Q. I think he is saying that the direct costs should be
14 borne by those likely to benefit directly from the
15 competition. That seems pretty prescriptive to me,
16 wouldn't you agree:

17 "... should be borne by those likely to benefit
18 directly from competition."

19 So there shouldn't be any cross-subsidy?

20 A. I'm sorry, it's a time issue for me. I don't remember
21 a lot of this information. It is a long time ago.

22 Q. I had hoped you might refresh your memory a little bit
23 on such a key document. After all, this is the document
24 that led to the principles which you were discussing
25 earlier in (inaudible), isn't it?

1 A. But there had been other MD letters following this, were
2 there not, which also, as I understand it --

3 Q. This was the first?

4 A. Which actually dealt with regional averaging.

5 Q. So you would feel more at home when I question you on
6 those? That's good.

7 A. Okay.

8 Q. Then we go over the page:

9 "Prices and operating conditions ensuring that they
10 are properly related to costs."

11 We have seen that. If we go over to page 414, we
12 see:

13 "Deciding upon the charges for the shared use of the
14 incumbents' network should be an integral part of the
15 each company's statement of principles and I expect each
16 company to charge entrants as it would charge itself."

17 Do you see that?

18 A. Yes.

19 Q. You took that to heart, did you?

20 A. I can't remember, I'm sorry.

21 Q. You can't remember --

22 A. I can't remember the detail of that.

23 Q. You can't remember whether you charged entrants as you
24 would charge yourself?

25 A. I'm sorry, I just don't remember this.

- 1 Q. Don't remember what?
- 2 A. This element here.
- 3 Q. You don't remember it or you don't remember charging
4 yourself as you charged entrants?
- 5 A. I just don't remember this -- well, I don't remember
6 most of it, to be candid, because it is a while ago, so
7 some of the detail on this I am extremely vague on. I'm
8 sorry.
- 9 Q. Let me put it another way. You have introduced average
10 cost and regional average cost pricing. You knew,
11 therefore, or ought to have known, on the basis of what
12 is a fairly clear statement here that if Welsh Water was
13 not charging customers and therefore effectively not
14 charging itself, based on average cost, then you could
15 not be using average cost for common carriage?
- 16 A. Right.
- 17 Q. Because it had to be equal treatment. Do you
18 understand?
- 19 A. Yes.
- 20 Q. That's, I think, what it says and you agree with me. Is
21 that --
- 22 A. I think it sounds reasonable.
- 23 Q. -- your understanding at the time?
- 24 A. Yes.
- 25 Q. So when you read this, you took that forward and said,

1 "This is what we have got to do"?

2 A. I confess this is a grey area for me. So I'm reluctant
3 to come out and say point blank yes or no because you
4 are only going to quite rightly pick my up on it at
5 another time.

6 THE CHAIRMAN: Was it your job or was it part of your job at
7 the time to look at these guidance notes and make sure
8 that the way Dwr Cymru set about pricing common carriage
9 complied with this guidance? Was that your job or was
10 that somebody else's job?

11 A. I wouldn't have gone into the detail of it. I would
12 have expected Mr Holton to be covering these bases and
13 I think it was Mr Holton and Mr Edwards, developing the
14 statement of principles, network access code. So had it
15 come back to me rather than from me to them.

16 THE CHAIRMAN: What was your job description?

17 A. Well, the title? Customer Policy and Income Director.

18 MR LANDERS: These MD letters came to the MD. He then
19 passed them on to you. What did he say to you that he
20 wanted you to do with them?

21 A. First of all, to understand them and then derive the
22 policies that we needed to derive to be consistent with
23 them. I wouldn't have got involved in the detail of it,
24 I confess, because it wasn't an area where I had any
25 expertise. And hence it would go on to the team and if

1 they needed to discuss points of principle with me, they
2 would come and do it. But I don't remember going
3 through a great dialogue with them on it.

4 MR LANDERS: Did you go through a dialogue with the MD?

5 A. No.

6 MR SHARPE: Well, but --

7 THE CHAIRMAN: Sorry, so David Holton was a member of your
8 team?

9 A. Hm-mm.

10 THE CHAIRMAN: Is this fair: you left it to him to come up
11 with a way of pricing common carriage that he thought
12 was consistent with this guidance that was coming from
13 Ofwat?

14 A. Yes, it wouldn't have just been Mr Holton, also
15 Dr Boarer would have been involved in the discussion and
16 I believe Mr Edwards as well.

17 THE CHAIRMAN: Right. But you were their boss?

18 A. Yes, but I wouldn't have got involved in the detail of
19 it.

20 THE CHAIRMAN: But were you answerable to the board for
21 making sure that the way that common carriage was priced
22 complied with these --

23 A. Clearly --

24 THE CHAIR: You say clearly, it may be clear to you, but
25 it's not clear to us at the moment.

1 A. I would have been responsible clearly as the sponsor.
2 So, yes, they would have expected me to be happy that we
3 were complying. Because of time -- and I'm sorry to
4 keep labouring that point but it is a difficult one for
5 me. We are talking about 12 years ago. I don't
6 remember the actual chronology and the detail of any
7 involvement with them on it. So I find it difficult to
8 give intelligent answers which are going to be credible
9 because it's just in the mist of time for me. I know it
10 doesn't make it any easier for yourselves.

11 THE CHAIRMAN: Our difficulty is that in your witness
12 statement you say, if this had happened I would have
13 remembered it and I don't remember it, therefore it
14 can't have happened, and what we are trying to assess is
15 what we can infer about the facts from your lack of
16 recollection of certain discussions.

17 A. Could I explain then what I meant by this?

18 THE CHAIRMAN: Yes. Please.

19 A. As I understood it, when we had -- all this had
20 been put together, so to speak and some of my
21 understanding, which, you know, I have gone over, about
22 the application of regional averages, you know,
23 I understood that fitted with this and therefore we were
24 complying. What I meant by what I would or would not
25 have remembered is, if anyone in the company, so there

1 are a number of levels to it, the board and the exec, me
2 and my team, and in fact Ofwat is another dimension. If
3 we had been trying to find a way -- or develop
4 a conspiracy then, if I can use that word, that would
5 confound Albion's application, I would remember that,
6 because we would have clearly been acting in a way which
7 was seeking to confound the competition.

8 Now, no one on our board -- and I can go into the
9 circumstances which elaborates that point -- I was never
10 in any discussion at board that I heard whereby we said
11 we must develop a way of confounding Albion's
12 application. I was never involved in any discussion
13 with your executive and I was certainly was never
14 involved in a discussion like that with my team and I'm
15 happy to describe the situation in terms of Dwr Cymru
16 from September through to May -- it's the September 2000
17 to May 2001 -- the actual situation that was there is
18 actually quite germane to understanding some of this --

19 THE CHAIRMAN: I have probably let you go on for long
20 enough. Perhaps just answer the questions that
21 Mr Sharpe raised and put to you.

22 A. Right.

23 MR SHARPE: As you point out, Mr Holton -- responsibility
24 devolved to him. I pointed out the other day he is
25 unfortunately not with us and of course you said that

1 Mr Edwards didn't come on the scene in any proper way
2 until the end of 2000.

3 A. Yes.

4 Q. He was occupied with other matters and we had
5 Mr Henderson and Mr Henderson is not with us. There is
6 a hiatus between November 1999 with MD154 and the
7 statement of principles and the over documents you have
8 put out somewhat after 1 March 2000.

9 I'm relying on you as the person responsible within
10 the company, supervising these people, Holton, Boarer
11 and the others, and reporting to Mr Brooker and then to
12 the board to be able to tell us a little bit about them?

13 A. Because of the time involved, and being involved in
14 other things, I don't have the recollection whereby
15 I could recount that deal in a way which would give you
16 the detail. And I'm not going to invent it.

17 Q. Well, in the end the Tribunal has to make up its mind
18 how useful your testimony is going to be but I repeat --
19 and I'll put it just as delicately as I did before,
20 I didn't ask you to come ...

21 Now then, so we have got page 414, access charges,
22 and I put it to you that unless you charged yourself on
23 the basis of average regional prices, then it was quite
24 inappropriate to charge anybody else average regional
25 prices?

- 1 A. Okay.
- 2 Q. And I think you agreed with me that if there were this
3 mismatch of treatment that would be wrong and
4 inconsistent with this guidance; is that right?
- 5 A. That would seem to be the case, yes.
- 6 Q. But we are agreed, aren't we, that access charges to
7 allow incumbents to recover regional networks costs and
8 capital maintenance charges and avoid any over or under
9 recovery?
- 10 A. I think that's what it says, yes.
- 11 Q. Yes, that's right. Now, that could be on the basis of
12 average cost or on the basis of marginal cost, couldn't
13 it?
- 14 A. I don't know, to be honest.
- 15 Q. Simply taking you and saving the trouble actually of
16 going to page 414 which I think you have at the bottom.
17 That's precisely what the Director General is saying,
18 isn't it?
- 19 A. Yes.
- 20 Q. So it might be on the basis of average costs where
21 appropriate on long run marginal cost. Right? O its
22 face, it doesn't mandate average cost or long run
23 marginal cost; it's simply laying out a range of
24 possibilities but it's up to you, the companies, to sort
25 it all out for yourselves; yes, we are agreed?

- 1 A. We clearly decided on average costs.
- 2 Q. Yes. But the words don't actually settle anything.
- 3 It's average costs of what, isn't it? And I'm going to
- 4 be putting it to you later that average costs for the
- 5 relevant -- when you talk about average costs, you mean
- 6 average costs of what?
- 7 A. Clearly an average is obviously an average of all the
- 8 elements that are contained. I couldn't actually give
- 9 you an explicit book definition in terms of how it's
- 10 derived within Welsh Water. I never got into that sort
- 11 of detail.
- 12 Q. Do you think excess cost should properly be based upon
- 13 all the costs of the company, all water?
- 14 A. I don't know the answer to be honest.
- 15 Q. Potable and non-potable?
- 16 A. Because I didn't get involved in the detail it's
- 17 difficult to respond.
- 18 Q. If somebody had come to you and said look, I'm going to
- 19 build a calculation on the common carriage here and we
- 20 want to get the average cost and we are going to start
- 21 with potable water that we know -- we have established,
- 22 has higher costs of treatment and higher costs of
- 23 distribution. All right? What would you say to that?
- 24 A. My response to, you know, this set of circumstances, you
- 25 know, given my background as I have explained and as you

1 now know, I fully expected that the people who were
2 involved in it to apply it in the way they would
3 normally apply it. I wasn't in a position to actually
4 give them clear guidelines, do this, do that or
5 whatever.

6 Q. I understood. I'm putting to you a hypothetical. If
7 it's unfair, tell me and I won't pursue it. But you are
8 sitting down with Mr Holton and he comes in with a piece
9 of paper and says, look here, I have got a way of
10 calculating access charges and I'm going to start off
11 with the total costs actually of all our business,
12 whether it's potable, non-potable, raw water or whatever
13 and I'm going to try and find an average cost of water.
14 That's going to be our starting point. What would you
15 say to that?

16 A. My reaction to the issue of average cost is I just
17 accepted that the team of people who were actually
18 involved in the process were applying existing
19 methodology. I wouldn't have had the knowledge to
20 question them on it. So I just accepted what they were
21 doing.

22 Q. And they didn't say to you, actually, there is no such
23 thing as normal costs, we have never done it before?

24 A. No, they didn't say that.

25 Q. Or normal methodology, rather. We have never done it

1 before. We are making up the rules here. Didn't you
2 understand that's what you were doing?

3 A. No, I don't think they were making up the rules.
4 I think they were operating on existing methodologies.
5 This is what I understood at the time. And I did not
6 have the knowledge to be able to question them on it.

7 Q. But in retrospect I think you must understand they
8 weren't, were they?

9 A. I don't know. That's not my understanding. As far as
10 I understood it, they were.

11 THE CHAIRMAN: But you must have realised that Dwr Cymru had
12 never -- I think this is right -- quoted for a common
13 carriage price before. This was something new,
14 introduced by the Act. So I'm not sure what you mean by
15 doing what they had done before because there had never
16 been a common carriage price quoted.

17 A. But again as I understand it, the use of regional
18 average pricing had gone into establishing the domestic
19 charges, for example. So my understanding at the time
20 was there was an existing in-company methodology of
21 establishing the average price. There are other people
22 who will be able to answer questions --

23 THE CHAIRMAN: Someone within Dwr Cymru must have taken the
24 decision that that was then how you should approach
25 pricing, this new service. Was that you who took that

1 decision? Was it the board? Was it Mr Holton, was it
2 Dr Boarer? Who gave the instruction that you should
3 come up with a price based on regional average pricing?
4 I think that's what we are trying to understand.

5 A. Okay. I understand the question. Thank you for putting
6 it like that. Clearly it would have come from the team
7 and it would have gone to the board ultimately and it
8 would have gone through the executive team. Ultimately
9 the board would have approved it.

10 THE CHAIRMAN: Right. And when did that happen?

11 A. I can't remember the actual timetable of it.

12 THE CHAIRMAN: Do you remember being present at the board
13 when that was discussed?

14 A. I don't, I'm sorry. For me and the rest of the board,
15 this was one of a number of business issues there were
16 being processed. So whilst this clearly was important,
17 I'm not trying to downplay that importance -- it was
18 also just -- it was one issue of many issues that went
19 through the Dwr Cymru board and I can assure you
20 I wouldn't be able to recount to you the detail of those
21 other issues either if you were asking me at this point
22 in time about them.

23 So I regret I can't give you the details but to
24 answer your question in the way you completely explained
25 it, ultimately, whilst it would have come through the

1 team and gone to me, as I have said, it's almost a naive
2 explanation, I guess, but I accepted that what they were
3 doing was being done in the way that it was normally
4 done because of previous applications. I wouldn't have
5 challenged it because I did not have the knowledge. It
6 would have gone through the exec and been discussed.
7 I can't remember whether, you know, any of the team were
8 involved. It would have gone to the board, thus
9 ultimately would have been --

10 THE CHAIRMAN: So the team come up with the regional average
11 pricing methodology, you say? Who was it who told them
12 that they needed to come up with a pricing mechanism for
13 common carriage?

14 A. I think I said earlier on that, because that's the way
15 we approached pricing, as I say, our scheme of charges
16 was built on it, it was just -- that's the way --

17 THE CHAIRMAN: But somebody must have said, "Okay, team,
18 task for this week. Come up with a way of pricing
19 common carriage."

20 Was that you who tasked them with doing that?

21 A. To be honest, I'm not even sure someone would have said
22 it quite like that: go and do this based on that. You
23 know, it would more likely, "Approach this from the
24 point of view we normally derive our charges, and apply
25 it in this context." But it needed to be consistent.

1 You know, we couldn't apply -- go fast -- the reason
2 I say that, if we were going to change the methodology
3 which had been in use, and I can be questioned on, you
4 know, special, you know, tariff lists and all that, but
5 they were pre-existing, if we moved away from that, then
6 we would arguably have been contriving to find a way to
7 confound competition. The fact that we applied normal
8 methodology actually would suggest there was no
9 contrivance, no conspiracy.

10 MR SHARPE: Well, I have taken you to the directors'
11 references to average and marginal cost and so you knew
12 or ought to have known that Ofwat's preliminary thinking
13 might be appropriate to use marginal costing and it
14 might be appropriate to use average cost and I asked you
15 what you thought they thought they meant by average
16 cost. I'm not sure I got an answer. I know what an
17 average is. I know what a cost is. What average costs
18 would be appropriate in this case having regard to the
19 answers you have just given to Madam Chairman?

20 A. I suppose the answer is rather simplistic. I assumed
21 within the business there was an established method of
22 doing that and that, you might say naively, that's the
23 way I expected and understood our people would actually
24 deal with it. More than that I really can't say.

25 Q. There is no question all classes of customers being

1 charged the same average price, was there?

2 A. More classes?

3 Q. We weren't talking of a uniform price for every
4 customer, were we, or every applicant for common
5 carriage?

6 A. Sorry, just by way of my understanding of your question,
7 are you including the -- you know, the list of special
8 agreements in that?

9 Q. We have already established that there is a considerable
10 variation between the prices. Your answer to my
11 question there, subsequently, anyway, was that these
12 were historic arrangements?

13 A. As I understand it.

14 Q. Yes. With the implication that when history ended, they
15 would all be put on a particular tariff. Is that right?

16 A. I also understand that as and when they have come to
17 completion, that's the way they will have been dealt
18 with.

19 Q. We have no evidence to that effect at all, have we?

20 A. Right.

21 Q. But I want to go back to the average. I don't want to
22 flog a dead horse here but you have no information to
23 the Tribunal what is meant by average. So I'm going to
24 put it to you there was no question of all classes of
25 customers being charged the same.

1 A. Right.

2 Q. So the issue essentially was that it was open to you,
3 consistent with adherence to the guidance that was being
4 offered, albeit in a preliminary way here, to define
5 classes of customers and make sure that people within
6 each class were not being discriminated against and
7 would be charged the same. Is that right?

8 A. That would be consistent with condition E, I think, is
9 it?

10 Q. Whatever it was, you had to be fairly transparent in the
11 methodology you were going to use and you acknowledge
12 that, don't you?

13 A. Yes.

14 Q. Not only with Ofwat but also with the Albions of this
15 world, people seeking to enter into a relationship with
16 you. You agree with that? Thank you.

17 A. And I think just to add a bit to that point,
18 I think I have mentioned it previously: as I understood
19 it in the meeting I understood that was taking place
20 with Mr Holton and representatives from Albion Water,
21 I think Mr Holton didn't certainly mention that. He
22 didn't need to mention it -- mention it in the network
23 access code. So the issue about what was going to be
24 applied was understood and had been understood since
25 the -- you know, when the access code, if not the

1 statement of principles, which I can't recall whether
2 it's included -- there was no doubt about how we were
3 approaching it.

4 Q. Yes, I don't think it quite answers my question. It's
5 one thing to talk about average costs but average costs
6 of what?

7 A. If you are asking me to give you a -- you know,
8 a detailed explanation of what that represents in our
9 terms, I couldn't do it.

10 Q. It needn't be detail. Here we are dealing with
11 a situation with Albion that was one of three customers
12 only who were going to you for the purchase of on the
13 one hand and in this case carriage, of non-potable water
14 of very significant volumes. Partially treated,
15 non-potable water?

16 A. I understand. I'm not going to pull you up on that.

17 Q. And there was only three customers and that's what all
18 of them had in common and I call that a class.

19 A. Right.

20 Q. And you look at the average costs of that class --

21 A. We clearly didn't do it like that.

22 Q. No, you didn't do it that way.

23 A. No.

24 Q. This was by way of being a consultation document, wasn't
25 it?

- 1 A. Yes, this one was, yes.
- 2 Q. Did you respond to it?
- 3 A. I don't recall.
- 4 Q. You don't recall?
- 5 A. I don't recall.
- 6 Q. Let me take you over the page. Tab 32. You see, you
7 may not have responded to it but if you would like to go
8 to the last page, 418?
- 9 A. Dr Brooker did this one.
- 10 Q. He did, your managing director. Did he tell us that he
11 was going to respond?
- 12 A. The dates on the letter being 23 December 1999?
- 13 Q. Yes.
- 14 A. He may well have done. I do not remember.
- 15 Q. You don't remember?
- 16 A. No.
- 17 Q. He didn't see fit to sort of share that he was going to
18 reply to Ian Byatt. He didn't tell you he was going to?
- 19 A. I really don't remember.
- 20 Q. Would you have remembered?
- 21 A. No, I wouldn't. This is -- what are we talking
22 about? -- 13 years ago and I think, looking at the
23 reference on it, it looks as if Dave Holton would have
24 had an involvement --
- 25 Q. That's what DJH might indicate, mightn't it? He can't

- 1 help us on that and --
- 2 A. I think so.
- 3 Q. And he might have drafted the letter for Mr Brooker?
- 4 A. That reference would suggest it but I really don't know
5 but, yes, it would suggest it.
- 6 Q. All right?
- 7 A. Just to repeat myself, I just don't have a recollection
8 of it.
- 9 Q. I quite understand. If you go over the page to
10 page 417. Some of this my learned friend Mr Beard has
11 taken the Tribunal to and I don't think it's appropriate
12 to ask you any further questions on it but I think the
13 important point for our purposes is the statement at the
14 bottom of the page:
- 15 "We are currently developing our pricing policies
16 which will need to take account of the following."
- 17 We see what he has got to say here, it's rather
18 interesting:
- 19 "Averaging tariffs doesn't account for the ease or
20 difficulty of supplying the water at certain points.
21 MD154 supports average costs but would not give
22 incentives to efficient entry points for new
23 entrants."
- 24 Do you read that?
- 25 A. Yes.

1 Q. Had you read this letter before your preparation for
2 this hearing?

3 A. No, I hadn't.

4 Q. What did you take him to mean by that paragraph?

5 A. I don't really know, to be honest.

6 Q. Let me try and help you. The issue he seems to be
7 identifying is that if access prices were based on
8 average costs, then they might encourage access in areas
9 where costs are high and discourage access in areas
10 where costs are low, thus encouraging inefficient entry?

11 A. Okay.

12 Q. I think that's what Dr Brooker is putting his fingers on
13 here, I think.

14 A. I think he may well have been, yes.

15 Q. In other words, he understood all too well if you have
16 a low cost area, where arguably profits could be
17 substantial, if you were going forward with an average
18 cost methodology, spread across higher cost activities,
19 the cost at that point would be higher than that the
20 actual cost. In the language we are used to, after
21 Ms White, marginal cost of entry?

22 A. Oh, please!

23 Q. I feel the same way, Mr Williams. But nevertheless the
24 point is a very simple one, that average costs here will
25 distort entry and what Dr Brooker very public-spiritedly

1 is saying is that it's the wrong approach, you are not
2 going to get efficient entry. It won't give incentives
3 to efficient entry points to new entries but it might
4 keep them out of the market: I think that's what he is
5 saying, isn't it?

6 A. It could well be, yes.

7 Q. Yes.

8 A. Depending on one observation on that. Clearly we went
9 down the route of average pricing. So whatever happened
10 between whatever he meant there, which I can't be sure
11 of because I obviously am not that familiar with it.
12 Had I known about it at the time, I obviously don't
13 remember it. Whatever that might say, that doesn't
14 alter the fact that what we decided to do is -- what
15 actually is in the network access code.

16 Q. Indeed. There is no argument you went down a different
17 rout, one not based on local costs and that's very
18 clear?

19 A. And I think it's also fair to say, in considering each
20 and all of these various elements, that might have been
21 a -- that clearly was a factor in his mind at that point
22 in time but he must have weighed that up in his
23 consideration the recommended approach and gone down the
24 average route.

25 Q. It wasn't a recommended approach. Let's not rewrite

1 history. I showed you the text. It says "average costs
2 for marginal costs" and you are quite unable to describe
3 what the Director General meant by "average costs" so
4 let's not rewrite history to suit ourselves?

5 A. I think you have misunderstood me. I wasn't talking
6 about the direction of Ofwat in terms of we decided to
7 go down that route.

8 Q. I thought you said that you followed the route that
9 Ofwat --

10 A. No, I certainly didn't mean that.

11 Q. I'm sorry, obviously that wasn't the route that Ofwat
12 proposed, was it?

13 A. If the regional average approach was a route that Ofwat
14 allowed and -- as I keep saying, just to reinforce the
15 point -- in terms of network access and statement of
16 principles and the ongoing dialogue with Ofwat during
17 all this period, at no time were we told we couldn't do
18 it.

19 Q. We will come to that in due course. I fear we have
20 a long way to go, Mr Williams, so let's not spoil it.
21 He talks about average costs. It needn't be regional.
22 It could be the average of anything that wasn't marginal
23 and what Dr Brooker is really pointing to is the fact
24 that this has the ingredients of inefficiency, or the
25 other way round. It could actually act as a deterrent

1 to efficient entry. And Dr Brooker very
2 public-spiritedly has sent us that. What it does mean
3 of course is he was entirely on top the issue, wasn't
4 he?

5 A. I imagine he would have been, yes. He was a very
6 knowledgeable individual.

7 Q. He was. But he is displaying his knowledge helpfully to
8 us because he is saying if you charge an average cost,
9 you might deter an efficient entrant and therefore
10 I don't think that's right. It just lumps all the
11 incentives. What you should be thinking of is some
12 alternative, give incentives to efficient entry.

13 So at this point at least, Welsh Water were keen to
14 dissuade Ofwat from going down the average cost route.
15 That's a fair reading of Dr Brooker, isn't it?

16 A. I don't think it is, actually.

17 Q. You think he is in favour of average costs?

18 A. I don't think just taking that one paragraph and
19 extrapolating the position you just described it
20 necessarily comes to that conclusion.

21 Q. I think it does. I think he is saying it doesn't
22 account for ease or difficulty of supplying water. It
23 doesn't give incentives to efficient entry points. You
24 have got to need to take in -- your own pricing policies
25 will need to take account of the following and over the

1 page he is quite keen to have a meeting to discuss these
2 matters. Understood? Over the page we have the assumed
3 principles which my learned friend took the Tribunal,
4 I think in opening and --

5 A. Yes.

6 Q. He is very much aware of the downside to average cost
7 pricing but that's the view that the company is
8 beginning to take. He wanted to discuss it. But the
9 inference I draw from this, his comment, which is
10 a critical comment, and the possibility of having
11 a meeting, was that he want in some way to persuade
12 Ofwat to modify its position. That's my reading of the
13 document. Is that a fair reading?

14 A. It could be read that way.

15 Q. Why have a meeting? He has got better things to do.

16 A. I really don't know.

17 THE CHAIRMAN: Did Dr Brooker discuss this with you at the
18 time?

19 A. I don't recall it, to be perfectly honest.

20 THE CHAIRMAN: Is it something that you would have been able
21 to discuss -- if he had said to you, look, Jeff, let's
22 get together and work out what we are going to write to
23 Mr Byatt, is that something that's likely to have
24 happened or was he likely to have the discussion
25 directly with David Holton?

1 A. It's quite likely he and Dave might have spoken it.
2 I think that probably more likely. I wanted to have
3 a clear understanding of what my knowledge level was at
4 this point in time.

5 THE CHAIRMAN: So is what you are saying that Dr Brooker
6 might have realised he would have a more fruitful
7 discussion about this with Mr Holton than perhaps with
8 you. Is that a fair --

9 A. I think that's more than reasonable. Given my level of
10 knowledge, given Dave Holton's detailed involvement in
11 this.

12 THE CHAIRMAN: I'm trying to distinguish between your state
13 of knowledge at the time about these kinds of things as
14 compared to what you remember now about them.

15 A. I wouldn't -- I certainly wouldn't pretend to have
16 in-depth knowledge of, you know, that this would require
17 and I hope I have been --

18 THE CHAIRMAN: At the time you wouldn't have had that.

19 A. At the time. How much -- in this job, quite a bit of
20 activity from that particular team, I wouldn't have
21 spent a great deal of time, you know, describing to them
22 how they should do it, because I did not have that
23 technical knowledge. To come back to your point really:
24 I think the fact that Dave Holton seemingly has drafted
25 this -- I'm surmising -- that he and Mike Brooker spoke

1 about it.

2 MR LANDERS: Can I ask: did you encourage your team to speak
3 directly to -- not just on this, but in general was it
4 your approach to encourage your team to speak directly
5 to members of the LCE board about issues like this?

6 A. There was no "you must speak to me first" type of
7 mentality. We operated in very much an open plan
8 environment. Mike Brooker sat on the middle floor right
9 at the end. You could knock on his filing cabinet -- he
10 didn't have a door -- and speak to him about anything at
11 any time clearly if you had the time to do it. So there
12 was no: look, I'm the director, you speak to me before
13 you speak to the MD. We didn't operate like that.

14 MR COWEN: Sorry, forgive me. I just note that this was
15 a letter that was taking place just before Christmas.
16 An interesting time for everybody. And it's copied to
17 the First Secretary of the Welsh Assembly, Kim Howells?
18 That's at the end and Kim Howells was at the time at the
19 DTI responsible for competition policy.

20 A. Right.

21 MR COWEN: I just wonder whether that would be important to
22 you in managing this with your boss?

23 A. It was a pretty -- it wasn't a particularly hierarchical
24 organisation. We tried to keep it like that, you know,
25 because we trusted people to get on and do stuff and use

1 their expertise.

2 MR COWEN: Thank you.

3 MR SHARPE: Just to conclude on this point, Mr Cowen
4 actually was ahead of me because it seems clear that
5 Mr Brooker was not very keen on average cost pricing,
6 for the reasons given. Can I finally take you to tab 39
7 in the same bundle? Do you recognise this? This was
8 the sectional guidance on the application of the
9 regulator's concurrent powers, isn't it? Right? And
10 I think we can take the point very quickly at page 496,
11 paragraph 4.14. So this was Ofwat's guidance to the
12 industry. We pick it up at the bottom:

13 "Excessive prices ..."

14 You will recall there is a close relationship, isn't
15 there, between the Competition Act and common carriage,
16 because this was the means by which common carriage
17 would ultimately have been enforced, wasn't it? It
18 might have been in this case:

19 "Where an undertaking is dominant in a market,
20 it's possible that prices may be set at excessively high
21 levels. Prices may be considered excessively high when
22 the price charged bears no reasonable relation to the
23 economic value of the good or service supplied. In
24 this instance such behaviour could be an abuse of
25 a dominant market position under the chapter 2 prohibition. In

1 cases where there may be excessive pricing, the
2 director may have regard to measures of the
3 profitability or the standard alone costs of an
4 activity."

5 Mr Cowen flagged the fact that this went to the DTI,
6 the junior minister responsible for competition policy
7 and what we have got here, I submit to you, is an
8 acknowledgment that average cost principles are no use
9 at all. We are concerned of a broader average,
10 particularly on a regional basis and that when the
11 Regulator came to assess excessive costs, possibly in
12 relation to common carriage, he would be looking at the
13 stand alone costs of an activity. That's right, isn't
14 it? That's when it means?

15 A. That seems to be what it means.

16 Q. Yes.

17 A. What confuses me and I have forgotten the date
18 unfortunately and indeed I have forgotten the number of
19 the MD letter. So it's the MD letter that allowed for
20 regional average. I'm not sure the respective timings
21 of any and all of this and how tied up it was.

22 Q. This is the guidance which guides the application of the
23 Competition Act and to the extent that Ofwat ever uses
24 its concurrent powers under the Competition Act, this is
25 the basis at this time of how they are going to do it.

1 As for the MD letters you are referring to --
2 I think this might actually be a convenient moment or we
3 are coming to a convenient moment.

4 Your recollection is wrong of subsequent MD letters
5 and I'm going to take you to them tomorrow but may
6 I suggest a bit of bedtime reading, if you would kindly
7 go back and look at MD163. That would be a help and if
8 you find references to average cost pricing, will you
9 let me know tomorrow morning. I should ask you for
10 a reference.

11 Madam, I think that might be a convenient moment.
12 I will certainly finish with Mr Williams tomorrow,
13 Wednesday, and may well be starting Mr Edwards, probably
14 in the course of the afternoon. I can't guarantee that
15 but that's the plan.

16 THE CHAIRMAN: Yes, thank you. You can leave the witness
17 box, Mr Williams. But let me remind you that you
18 mustn't have any discussions with anyone on your team or
19 anyone at Welsh Water about your evidence. Don't
20 discuss the case with anyone at all.

21 A. Thank you. I quite understand.

22 THE CHAIRMAN: Tomorrow we can start at 10.30, or come back
23 at 10?

24 Two points I want to raise. First in relation to
25 timetable, what the Tribunal is minded to do at the

1 moment is have closing submissions on 5 and 6 November,
2 with any written notes lodged with us by close of play
3 on 1 November. The second matter I wanted to raise
4 again was how people are getting on with devising the
5 model that we might be able to use in our deliberations.

6 Mr Beard?

7 MR BEARD: Taking those points in turn, the referendaire
8 kindly alerted us to this at lunchtime. We need to just
9 confirm the position. I have a floating listing during
10 that time. I'm trying to get it moved to the back end
11 of the window, in which case I think Monday and Tuesday
12 will work but if I could have until tomorrow morning to
13 confirm the position, I would be grateful.

14 In relation to the model, we are looking at how to
15 build a model and we will talk to the other side about
16 where we have got to but just by reason of other things
17 that have been preoccupying people, I can't pretend that
18 we are at a stage where we could hand something over
19 right now, but we do have it well in mind and we are
20 progressing matters.

21 MR SHARPE: On our side we are fairly heavily engaged in
22 cross-examination and closing. Would a deadline of
23 1 November with the written submissions -- perhaps best
24 we can have an agreed document. Would that be
25 sufficient or would you like it earlier? You are

1 looking for a model on the quantum aspect of the case,
2 as I understand it.

3 THE CHAIRMAN: The 1 November, that was any written
4 submissions for your closing submissions.

5 MR SHARPE: Yes, I'm asking when would you wish to see the
6 model?

7 THE CHAIRMAN: Well, it's to help us during our
8 deliberations, so by the latest at the end of the
9 6 November --

10 MR BEARD: That was what we were assuming but we will get on
11 with it in the meantime.

12 THE CHAIRMAN: Yes. Right, 10.30 tomorrow morning, then.
13 (4.40 pm)

14 (The court adjourned until 10.30 am the following day)

15

16 I N D E X

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