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

Case No. 1046/2/4/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

23<sup>rd</sup> October 2007

Before:  
MARION SIMMONS QC  
(Chairman)  
THE HONOURABLE ANTONY LEWIS  
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**ALBION WATER LIMITED**

Appellant

Supported by

**AQUAVITAE (UK) LIMITED**

First Intervener

-v-

**WATER SERVICES REGULATION AUTHORITY**  
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Respondent

Supported by

**DŴR CYMRU CYFYNGEDIG**

Second Intervener

and

**UNITED UTILITIES WATER PLC**

Third Intervener

Transcribed from tape by  
Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737

**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Rhodri Thompson QC and Mr. John O’Flaherty (instructed by the Managing Director of Albion Water Limited) appeared on behalf of the Appellant.

Mr. Rupert Anderson QC (instructed by the Head of Legal Services, Water Services Regulation Authority) appeared on behalf of the Respondent.

Mr. John O’Flaherty (instructed by Maclay Murray & Spens LLP) appeared on behalf of the First Intervener.

Mr. Christopher Vajda QC and Mr. Meredith Pickford (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the Second Intervener.

Mr. Simon Gardiner (instructed by McInnells) appeared on behalf of the Third Intervener.

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1 THE CHAIRMAN: Good morning. Before we begin can I thank you all for your written  
2 submissions for today. They have helped us, we hope, to give some structure to this case  
3 management conference. The issue now in these proceedings is to whether there has been  
4 an abuse in the context of excessive price. This case management conference is to consider  
5 the procedure and timetable with that determination.

6 Albion have questioned a number of matters in the Authority's report and we think, quite  
7 appropriately, the authority have agreed now to review Albion's calculations, or sensitivity  
8 analyses with a view to reducing the scope of the disagreement between the parties. Our  
9 understanding is that that exercise has not yet taken place, although there has been some  
10 consideration of one or a few points made by Albion.

11 There is no one document, as far as we can see, in which Albion identifies what are the  
12 matters in the report which it believes are "inaccurate or incomplete" – I think those are the  
13 words used. There is reference to a 29 page document prepared by Albion which does not  
14 appear from what I have read to have been provided to the Authority. Albion has  
15 suggested in its submissions that a list of issues should be prepared. The Authority has  
16 suggested in its submissions that Albion should be given an opportunity to make full and  
17 complete submissions on the final report and that the Authority files its response. The  
18 Authority submits that the issue should not be dealt with on a piecemeal basis.

19 It may be helpful if we gave some outline of how we are thinking in that regard, of course  
20 subject to any submissions today. We agree that the matter should not be dealt with on a  
21 piecemeal basis and that it is important, and probably essential, that matters are properly  
22 identified and addressed. The question is: how best can this be done to secure the just,  
23 expeditious and economical conduct of these proceedings. It seems to us that perhaps there  
24 is a sequence of questions which might be addressed.

25 The first might be: Is the excessive price found by the Authority in its final report an abuse  
26 of Dŵr Cymru's dominant position. If the Tribunal were to find that it was an abuse, and  
27 of course we have not yet considered that, then the Tribunal could perhaps make a decision  
28 on the basis of the final report. The second question might be as to whether certain specific  
29 components should have been included in the calculation of costs as of 2001, such as the  
30 provision of back up supplies. Here we are looking at the component irrespective of its  
31 measurement or calculation.

32 If the Tribunal were to come to the view that any such component should not have been  
33 included then consideration could be given whether, having regard to the exclusion of that  
34 component, the resulting costs would be such as to make the price an abuse. If that were

1 the case, and again that has not yet been considered, the Tribunal might be able to make a  
2 decision on the basis of the Authority's final report, of course excluding those components.  
3 The third might be that there are arithmetical errors in the Authority's calculations in the  
4 report. If so, those errors would need to be corrected, and the Tribunal could consider  
5 whether the resulting cost would be such that the price was an abuse.

6 The fourth may be the logical and conceptual approach adopted in the final report, an  
7 example of this maybe the treatment or assessment of the cost of capital. The question here  
8 would perhaps be whether the approach adopted is robust and soundly based.

9 It seems to us that it would be helpful if Albion clearly identified each of the matters which  
10 it believes requires consideration and explain the points it wished to make in respect of  
11 those matters. It could then identify what further disclosure, if any, in respect of each such  
12 point it sought and why that disclosure was necessary, relevant and proportionate. In doing  
13 so it seems to us, from what we have read so far, that it would be helpful if Albion  
14 identified under which of the four question which I have just elucidated the points fall.

15 Also it is important that Albion identifies the relevant paragraphs in the report and  
16 precisely why it challenges what is written in those paragraphs.

17 That would, it seems to us, provide the material on which the Authority and Dŵr Cymru  
18 can then consider these matters and respond. It would also provide the basis for Albion's  
19 disclosure application as I have indicate (if there is one) and perhaps may resolve this  
20 without the need for a further CMC, in relation at least to disclosure.

21 That is the outline of how we see the way forward, subject to submissions today. We are  
22 very alive to securing the just expeditious and economical conduct of these proceedings  
23 and we wish to ensure that the directions made today will achieve that.

24 We would also like to raise two further points: first, we note that the issue headings in the  
25 report of the authority are at variance with the wording of the questions which were posed  
26 by the Tribunal. Now, one aspect of this is that the Authority was asked to investigate the  
27 matter of the costs reasonably attributable to the service of transportation and partial  
28 treatment of water by Dŵr Cymru generally. We would like some assistance as to the  
29 paragraphs in which that question was addressed.

30 The other matter is Dr. Elliott's witness statement. It seems to us, subject to any  
31 submissions today, that actually the appropriate course is that there has to be an application  
32 to the High Court in the other proceedings for release of those documents. I hope that is of  
33 some assistance to the way forward today. I do not know if it would be appropriate if we

1 rose for a moment so one could think about it? Mr. Vajda says “yes”. Is that what you  
2 would like us to do?

3 MR. THOMPSON: I think our general position is that we would indeed strongly endorse the  
4 basic approach of the Tribunal and indeed our draft order was intended to proceed in  
5 exactly that spirit, but obviously it is subject to the guidance of the Tribunal, so it is  
6 probably for the other parties to scratch their heads and see if they are happy to proceed in  
7 that way.

8 THE CHAIRMAN: I think what is being suggested is a little bit more focused.

9 MR. THOMPSON: Indeed, I think I would only say on behalf of Albion Water the Tribunal will  
10 be well aware of the financial position of Albion Water and therefore it does not wish to  
11 incur legal costs until it knows exactly what it is doing, but with this guidance we would  
12 obviously undertake to do our best to provide exactly what the Tribunal asked for.

13 THE CHAIRMAN: It is much easier for everybody to know what the point is if the point is  
14 written in a way that the lawyers can understand it.

15 MR. THOMPSON: Indeed, I think that is what I am trying to say, we had not incurred costs of  
16 the lawyers trying to formulate this ----

17 THE CHAIRMAN: And the idea would be that that would be done.

18 MR. THOMPSON: Indeed.

19 THE CHAIRMAN: One of the thoughts that has been going through my mind is whether this  
20 should be done in what I would call a “Scott Schedule” – everybody is going to look blank  
21 – which is a schedule where it said what the paragraph was, the next column would be the  
22 complaint in relation to that paragraph by Albion, and then one would have the authorities  
23 and so one would be able to look at it across so one could see it immediately as to what  
24 everybody was saying and you did not have to fiddle around with documents, and it was  
25 not in 15 different documents. I do not know if that would be helpful but you could  
26 consider if that was an appropriate way of doing it.

27 MR. THOMPSON: I know what a Scott Schedule is, I cannot say I have very often had to  
28 formulate one, but I am sure we can do something ----

29 THE CHAIRMAN: Yes, I do not know if they are still called “Scott Schedules”, but that sort of  
30 idea.

31 MR. THOMPSON: I am grateful. Subject to that I think Albion Water is more than happy to  
32 follow the guidance of the Tribunal forward, so it may be for the others to ----

33 THE CHAIRMAN: Well Mr. Vajda was saying he would like a few moments, is that right?

1 MR. VAJDA: I think it is extremely helpful for the Tribunal to give that indication and it would  
2 speed things up if I could have, say, 10 minutes.

3 THE CHAIRMAN: Mr. Anderson? It is really you report?

4 MR. ANDERSON: Exactly. What I was planning to do when I came to you today was to  
5 indicate to you that case management and control of this case was now really essential, it  
6 has been going on for years and our concern was arising out of this piecemeal  
7 correspondence we had had that we were really going back to square one, back to raw data  
8 and recalculating the costs.

9 THE CHAIRMAN: The way forward that we are suggesting, subject to your 10 minutes,  
10 seems ----

11 MR. ANDERSON: Very helpful and in principle we would certainly endorse it. My  
12 understanding of it being under the four headings, if you like, that Albion would then make  
13 its case and issues such as disclosure would actually be adjourned until that ----

14 THE CHAIRMAN: And effectively there would be a chronological list with the paragraph  
15 number setting out what that paragraph said, if we did it as a schedule then the next column  
16 would say "This is what is wrong with this", so one could see it side by side, and then the  
17 Authority would answer and say "Yes, I agree", or "I do not agree", for the following  
18 reasons.

19 MR. ANDERSON: Our slight concern was the extent to which Albion would be able to  
20 challenge line by line everything that was in the report, because we would draw a  
21 distinction between the four categories of issue the Tribunal has helpfully identified, and  
22 then going back and challenging every fact and figure about lengths of pipes and this that  
23 and the other, which we were hoping to urge that the Tribunal should take every measure to  
24 avoid.

25 THE CHAIRMAN: Well if, for example, the information you had was that the pipe was 200m  
26 through rural areas and six feet underground, and Albion produced definitive evidence of  
27 the plans that are lodged at the local authority, or wherever it is, that in fact that pipe  
28 through urban areas was 800 ft, or whatever it is, and only two feet under ground, or 12  
29 feet underground, then you would take account of that, would you not.

30 MR. ANDERSON: Absolutely, but if I could just take that example further and say if it was a  
31 debate about whether 75 per cent. or 80 per cent. of pipes of this kind are through urban or  
32 semi-urban and we went through that entire debate during this six months and came to a  
33 view we would be reluctant to have that whole issue reopened if part of the process was to  
34 give the parties an opportunity to respond in the course of our six month investigation.

1 THE CHAIRMAN: No, if the situation is that you can answer that by saying “see para.54 of the  
2 Judgment on 3<sup>rd</sup> October” or whatever the date was, in which it was found that (whatever it  
3 is) then that is the end of the point.

4 MR. ANDERSON: Well the point I am making is that it may have been only said finally in this  
5 report. The question is the extent to which it is now appropriate to start revisiting primary  
6 findings of fact in the report, subject obviously to clear examples.

7 THE CHAIRMAN: I think we cannot deal with that can we in the abstract?

8 MR. ANDERSON: In the abstract, I understand, but subject of course to that very helpful  
9 structure of the types of issue we could go through we would endorse the approach.  
10 In answering your question about where have we answered the question generally as  
11 opposed to locally, my understanding is we adopted the AAC plus methodology to answer  
12 general and the LRIC and the LAC methodologies to look at it on a local costs’ basis. I do  
13 not think I will be able to specify it more specifically than t hat.

14 THE CHAIRMAN: That is very helpful. We just did not want to go down a line where we were  
15 not sure what you were going to say, so we thought we ought to raise it.

16 MR. ANDERSON: We hope we have answered what the Tribunal asked us.

17 THE CHAIRMAN: That is very helpful.

18 MR. THOMPSON: Just before we rise, if we do – there are the four categories of disclosure and  
19 I do not know whether I would necessarily accept that nothing could be said about them  
20 today.

21 THE CHAIRMAN: I was going to raise that because one of the questions is whether I have set  
22 out the four categories correctly, and perhaps you could think about that. It may be  
23 appropriate to have some discussion ----

24 MR. THOMPSON: Yes.

25 THE CHAIRMAN: -- so that there is no dispute about it because there should not be a dispute  
26 about the categories.

27 MR. THOMPSON: I agree about that, but I was actually referring to the four categories of  
28 disclosure that Albion is seeking this morning.

29 THE CHAIRMAN: Oh, I see yes, yes.

30 MR. THOMPSON: We may have something to say about that but I will try and keep it as brief  
31 as possible in light of the Tribunal ----

32 THE CHAIRMAN: It is rather difficult though to consider the disclosure without knowing what  
33 the complaints are.

34 MR. THOMPSON: I accept that but just as a small marker.

1 THE CHAIRMAN: Shall we rise then until just after 11 on **that** clock.

2 (Short break)

3 THE CHAIRMAN: Mr. Thompson?

4 MR. THOMPSON: Madam Chairman, gentlemen, in relation to the suggestion from the  
5 Tribunal the one area where it would perhaps be helpful for some further guidance is areas  
6 where Albion contends that evidence has been omitted or failed to be taken into account  
7 and in particular there are two examples in the papers before the Tribunal; first, the  
8 evidence that now exists as to the actual calculations that were behind the first access price  
9 which has only been disclosed to us in the last few weeks and has been a sort of  
10 process ----

11 THE CHAIRMAN: That is the LC documents, or whatever?

12 MR. THOMPSON: Yes, there was a Board paper produced in January where we have the results  
13 but not the reasoning.

14 THE CHAIRMAN: But that actually goes to the 23p or whatever it is, the Dŵr Cymru price  
15 rather than the report, does it not?

16 MR. THOMPSON: Well in our submission it is highly material evidence and normally would be  
17 regarded by the Tribunal as the best evidence contemporary evidence not produced for the  
18 purposes of litigation, for example, in replica shirts there were indicates to that effect.

19 THE CHAIRMAN: So you are saying they ought to have taken into account whatever the  
20 material, which is contained in those documents, and they failed to take that into account,  
21 and they took other matters into account which were contrary to what was in those  
22 documents?

23 MR. THOMPSON: Yes, I do not know whether the Tribunal has had a chance to look at it, but  
24 in particular there were ----

25 THE CHAIRMAN: We have very bad photocopies so it is very difficult – I have, but it is not  
26 easy.

27 MR. THOMPSON: I think most strikingly there are two figures for bulk distribution of 11p and  
28 12p, which appear to have been produced on an entirely conventional basis and given the  
29 concerns the Tribunal has indicated both about the lack of disclosure from Dŵr Cymru and  
30 the high level of the bulk distribution cost, in our submission that is very material evidence  
31 and should be available to the Tribunal in clear form and I am not sure which of these  
32 categories ----

33 THE CHAIRMAN: Would it come within arithmetical errors, because they have taken into  
34 account some figure which they should have looked at some other figure



1 MR. THOMPSON: Possibly, I just simply raise it ----

2 THE CHAIRMAN: I think it depends on what it is, but it is either they took into account some  
3 figures and there should have been some other figures, or they failed to take into account  
4 some component, so maybe where I dealt with components it is not whether they ought to  
5 have taken into account or wrongly took into account specific components, it is that they  
6 failed to take into account other components.

7 MR. THOMPSON: Indeed, I do not mind where it fits in the boxes, it is simply a matter that  
8 seems to us that it is material.

9 THE CHAIRMAN: If it can be fitted into the fourth it is easier, but if it is a fifth category you  
10 are going to have to ----

11 MR. THOMPSON: I do not kind, as long as I have put down a marker that that type of point is  
12 open to us then I am content. Otherwise it is for the others to comment.

13 MR. ANDERSON: I know that my learned friend, Mr. Vajda, has some points he wishes to  
14 make to you, but if I could just emphasise that our concern is that this case remains  
15 manageable, and one issue that I think the Tribunal should apply its mind to, if I may  
16 respectfully suggest, is what level of review it is appropriate now to embark upon in  
17 relation to the report itself.

18 My learned friend, Mr. Thompson, raises the question of this contemporaneous material in  
19 front of the Board on the setting of the access price, and the Tribunal helpfully put to him  
20 you could categorise that as failing to take into account material. That sets a light off in  
21 my little brain suggesting Judicial Review ----

22 THE CHAIRMAN: I should not have used the word, should I?

23 MR. ANDERSON: -- as an appropriate approach at this stage, bearing in mind, of course, that  
24 this is a full merits' appeal, but it is a full merits' appeal which, if you like, on this issue  
25 they have already won in the sense that our decision has effectively been set aside and the  
26 question for the Tribunal is what is an appropriate way forward as a matter of case  
27 management, given the situation that we are in?

28 THE CHAIRMAN: Mr. Anderson, I was hoping that the way I put the four questions, and the  
29 way I put what would go into the schedule and the headings actually indicated somewhat  
30 the approach that should be taken, because when I got to the methodology I used the  
31 "sound and robust", but if it is an arithmetical error, or if it is a component that should not  
32 have been t here, or should have been there, then you can look at it in the Judicial Review  
33 context but as a matter of just substitution.

1 MR. ANDERSON: Well again then it rather begs the question: “What is an arithmetical error?”  
2 You can have an arithmetical error that appears on the face of the document, for example,  
3 you go through that equation and you can say you have made a mistake – you have put the  
4 decimal point in the wrong place.

5 THE CHAIRMAN: Yes.

6 MR. ANDERSON: Or you can have an arithmetical error which is saying: “You have got the  
7 wrong length of pipe, because if you actually take these ordinance survey maps and  
8 measure them accurately you will have seen that you are two kilometres out. If we are  
9 getting into that sort of mistake within the category of arithmetical mistake or  
10 methodological mistake, then we really are back in the position where every single  
11 component of this exercise is up for grabs, that is what we are concerned to avoid.

12 THE CHAIRMAN: The difficulty is that we are looking at it very hypothetically this morning  
13 because we do not actually know what the points are.

14 MR. ANDERSON: That is perfectly true, and I accept that.

15 THE CHAIRMAN: We were told there were arithmetical errors and inaccuracies. We have  
16 been told about one where there has been some debate in the correspondence about and  
17 calculation. It is not clear to the Tribunal whether the letter from Albion in response to  
18 your reply closed the matter down, or whether actually the point you made was not  
19 accepted and there was some inflated amounts.

20 MR. ANDERSON: From our point of view we understood that we had clarified the matter to  
21 their satisfaction but no doubt ----

22 THE CHAIRMAN: Well we will find out, will we not? I think the question of how we go about  
23 it, whether they are appropriate items and how much investigation can be done in relation  
24 to them needs to be adjourned until we find out what the items are.

25 MR. ANDERSON: Absolutely. Provided we can just, as the Authority, put down a marker that  
26 we are not accepting that merely because my learned friend can put a point under one of  
27 your four headings it necessarily follows it is appropriate for this Tribunal to review that  
28 that was now defunct.

29 THE CHAIRMAN: No, in your column you will say: “This is not appropriate for the following  
30 reasons”.

31 MR. ANDERSON: Yes.

32 (The Tribunal confer)

33 THE CHAIRMAN: I do not think it is clear until we see what the points are as to whether or not  
34 these points are relevant and how one deals with them, if there are those sorts of points that

1           you are indicating, and that you have put your marker down. This is actually the original  
2           appeal against an original decision.

3 MR. ANDERSON: Yes.

4 THE CHAIRMAN: So it may be that one needs to go back - I am sitting here new and I have not  
5           yet managed to go through the file to find out which the document is – I understand that  
6           the notice of appeal was amended on a number of occasions.

7 MR. ANDERSON: Yes.

8 THE CHAIRMAN: I assume that there is a document which is the amended notice of appeal.

9 MR. ANDERSON: There is a document that is an amended notice of appeal but it is not a  
10          document in which you will find anything really capable of addressing the issues that now  
11          arise in this report. What happened was that there was an interim Judgment in which the  
12          Tribunal concluded that they really did not have enough on which they could decide these  
13          issues.

14 THE CHAIRMAN: You mean the October Judgment?

15 MR. ANDERSON: This was an earlier Judgment.

16 THE CHAIRMAN: Earlier than that?

17 MR. ANDERSON: There was an earlier substantive Judgment ----

18 THE CHAIRMAN: The October Judgment is it not?

19 MR. ANDERSON: I think it was before October, there was an interim Judgment in which the  
20          Tribunal effectively said “We want the parties now to address us on ...” a list of issues.

21 THE CHAIRMAN: Yes.

22 MR. ANDERSON: One of which was transportation and treatment costs. We then went through  
23          that and there was the next substantive Judgment in which the Tribunal held: “We think  
24          there may be an excessive price but we do not have the material in which we can decide  
25          that.” There was then the next Judgment in which it was referred back to us to look at.

26 THE CHAIRMAN: Yes.

27 MR. ANDERSON: A lot of what has been addressed in this report arises out of what the  
28          Tribunal found and directed us to do rather than what is to be found by way of challenge to  
29          our original decision, because it was apparent long before the Judgment that referred the  
30          work back to us that the Tribunal was going to set aside our decision on excessive pricing  
31          on the grounds that it could not stand, it was inadequately reasoned, or unsupported by  
32          material.

1 The next question was: does the Tribunal remit it back to OFWAT or embark on a different  
2 process, and the process the Tribunal adopted was to refer questions back to us under  
3 19(2)(j) with a view to taking the decision itself.

4 THE CHAIRMAN: You are saying that we need to look at the interim Judgment and then I think  
5 there are two Judgments afterwards, the second Judgment being the December Judgment  
6 which referred it back to you under 19?

7 MR. ANDERSON: By way of background the interim Judgment, but I am not sure that that will  
8 inform the Tribunal greatly. The two critical Judgments are what I call the “main  
9 Judgment” and the “remedies’ Judgment” or “final Judgment”.

10 THE CHAIRMAN: Yes, I have actually read quite a lot of material, but what I have not done is  
11 gone back to the notice of appeal.

12 MR. ANDERSON: Clearly, madam Chairman, you have.

13 THE CHAIRMAN: What I have not done is go back to look at the amended notice of appeal, but  
14 what you are saying is you do not think it is relevant?

15 MR. ANDERSON: I do not think it is relevant in the sense that I do not believe it has been  
16 amended post any of the Judgments. It is the Judgments that have overtaken the events.

17 THE CHAIRMAN: Right.

18 MR. ANDERSON: Just on the point I was making about the level of review, I fully recognise  
19 and, indeed, one could not avoid recognising, that it is difficult to talk in the abstract, but  
20 one of the points that we raise on this sort of Judicial Review test is that if one looks at, for  
21 example, the rate of return, you could have submissions from Albion that it should be “X”,  
22 and Welsh that it should be “Y” and we take the view that it should be somewhere in the  
23 middle.

24 THE CHAIRMAN: That is why I said about methodological – those sorts of matters have to be  
25 sound and robust. If you have two expert opinions and both could be used reasonably, then  
26 subject to what the submissions are the approach could well be that that is within your  
27 margin of appreciation.

28 MR. ANDERSON: Absolutely, the Tribunal should not at this stage because the whole point of  
29 referring it back to us was to avoid the Tribunal having to; the point is to go back and say  
30 that we can ignore what is in the report on rate of return, let us listen to the actual source  
31 arguments and take our own view.

32 THE CHAIRMAN: Mr. Anderson, I think what you are saying – if I can just summarise it so  
33 that Mr. Thompson and I both understand – is that if the matter is one that is not saying “it

1 is wrong”, that no authority doing what you were doing could have done that, i.e. they have  
2 made an arithmetical error ----

3 MR. ANDERSON: Yes.

4 THE CHAIRMAN: -- or they have used a methodology which nobody accepts as a proper  
5 methodology – I am using “methodology” in a very wide sense. What it is, is that you  
6 have used a formulation of a test, there are other formulations of a test that are equally  
7 acceptable, if that is going to be the bench then what you are saying is that it is not for us to  
8 substitute our test for your test?

9 MR. ANDERSON: I am saying that as a matter of case management. I am not saying that as a  
10 matter of jurisdiction you could not, I am simply saying the only sensible way forward, and  
11 the way that was envisaged, we would submit, by the Tribunal when it referred this work  
12 was for this work to have some relevant status for the Tribunal and not simply ----

13 THE CHAIRMAN: Well that ought to come out of the identification of what the complaints are,  
14 because if the complaint is that you ought to have used a different methodology then your  
15 answer will be the methodology we used is properly accepted and can be supported, and  
16 therefore we were reasonable to use it.

17 MR. ANDERSON: If the answer to the question is: “A reasonable Authority could have adopted  
18 this approach” that is fine, we are happy with that. If the answer is the Tribunal is going to  
19 take its own view on what they think the right methodology might be, then the debate is  
20 inevitably going to be much broader.

21 THE CHAIRMAN: What we said earlier, and it is subject to argument of course, and it may be  
22 said that we would use a different approach, but on that sort of area it was “sound and  
23 robust” which I think are the words that came out of some of the earlier Judgments – not in  
24 Albion, but in other cases.

25 MR. ANDERSON: Yes.

26 PROFESSOR PICKERING: Mr. Anderson, as you know, I am not a lawyer so I am chancing  
27 my arm here, but your comments have arisen in the context of what Mr. Thompson was  
28 saying about information that they may still require – correct me if I am wrong – but it  
29 seems to me that we have three propositions here. First, you acknowledge that we set aside  
30 the decision of the Authority that the first access price was not unreasonable, the 23.2p,  
31 although the Authority’s first work leading to the decision came up with a slightly lower  
32 figure. You said “This is still in the -- noise and other ways of looking at it would give  
33 perhaps the sort of number that DC came up with”, yes?

1 MR. ANDERSON: What I say is that it ought to have followed as a natural conclusion from  
2 what was contained in the main Judgment that you would set aside our finding that the  
3 price was not abusive.

4 PROFESSOR PICKERING: Well, let us come on to this, that was my first point. My second  
5 point is that the authority in its final report, which we have recently received, confirms that  
6 the first access price quoted by Dŵr Cymru is excessive and that is in the report.

7 MR. ANDERSON: Well it is in excess of its costs.

8 PROFESSOR PICKERING: Well I think “is excessive” is the terminology used. The third point  
9 is that you do not accept that the price is abusive.

10 MR. ANDERSON: Yes.

11 PROFESSOR PICKERING: There is a distinction you make between “excessive” and “abusive”  
12 and I think I am right in saying that you say it is excessive, but you say it is not abusive.

13 MR. ANDERSON: Not unfair.

14 PROFESSOR PICKERING: So therefore it seems to me that the task for those who wish to  
15 comment upon this is first of all to comment on OFWAT’s Judgment as to the size of the  
16 gap between the first access price and costs ----

17 MR. ANDERSON: I think the Phase 2 in the report.

18 PROFESSOR PICKERING: Yes, and secondly, obviously as part of that to address the question  
19 whether it believes that OFWAT has now addressed the question of costs correctly. Now,  
20 if I am right about that, it seems to me that there would be an anticipation that Albion need  
21 not worry itself in too much detail about how Dŵr Cymru came to the first access price.  
22 What I imagine task is really to do, as with its initially appeal, is it is challenging the  
23 Authority, and therefore I would hope, if I may say so, Chairman, and please feel free to  
24 correct me if I am wrong, that Albion would be able to keep that in its mind that perhaps  
25 William Occam’s principle of the Occam’s razor could be usefully applied so that we  
26 actually focused on the matters that are properly the subject of the direct challenge as  
27 opposed to the indirect argument about background.

28 MR. ANDERSON: I think, Professor, that is absolutely right. I think the issue of whether we  
29 reach the right conclusion on the consequences of our factual findings – I would see that as  
30 item 1 of the four issues that have been identified – that is clearly a discrete debate and you  
31 are right, Professor, we have moved on from why, if you like, Welsh quoted the price that  
32 it quoted at the time, and that may be an answer to any request for disclosure that Mr.  
33 Thompson on behalf of his clients makes at some stage. But we would agree with your  
34 analysis of where we now are, yes.

1 PROFESSOR PICKERING: Thank you.

2 THE CHAIRMAN: From that of course, the question of how they got originally to the 23p and  
3 the documents that have now come out have to be very carefully used so that if there was  
4 material in them which showed that the information which you have relied on now was  
5 inaccurate, then that may be relevant.

6 MR. ANDERSON: Well that of course is material that has already been ----

7 THE CHAIRMAN: Disclosed, absolutely.

8 MR. ANDERSON: -- dealt with.

9 THE CHAIRMAN: But if they are being used to say the 23p is wrong, then that is not the  
10 question we are now addressing.

11 MR. ANDERSON: No, the 23p is a given in the sense that that is the price we are looking at.

12 THE CHAIRMAN: Absolutely, the question is now what is the price it ought to have been?

13 MR. ANDERSON: Yes, we know the 23p, that is what they quoted. We are now looking at the  
14 cost to see whether that was justified or not.

15 THE CHAIRMAN: Yes, and it does seem to us, and I think Professor Pickering has alluded to it  
16 slightly, that it is important when one is looking at identifying the items which one is going  
17 to say need to be re-looked at by the Authority, that one does not get bogged down by  
18 matters which have little or no significance to the actual outcome, and that one  
19 concentrates on the matters which are significant to the outcome, and that is your point  
20 about line by line.

21 MR. ANDERSON: It is one of my two points, the other main point is the point that I think you,  
22 madam Chairman, have identified and that is the margin of appreciation. If it is open to  
23 Albion now to go through the report and say: "That may be a reasonable view but we think  
24 this is a better view" then that is going to make this whole process, in our respectful view,  
25 unmanageable; that is our concern.

26 THE CHAIRMAN: Mr. Vajda?

27 MR. VAJDA: Madam Chairman, listening to the debate between the Tribunal and Mr. Anderson  
28 has, in my respectful submission, reinforced the point that the first question the Tribunal  
29 needs to determine is what level of review there should be for the final report, that is  
30 absolutely critical. What I am going to outline is a number of what I hope are principal  
31 submissions on this.

32 To begin with, as a matter of principle, so far as I can see it, there are two levels of view  
33 that are open to the Tribunal. One is what I might call "full merits" which would be to  
34 treat the final review as a decision ----

1 THE CHAIRMAN: Can I just question at the moment the word “review”, because we are not  
2 actually reviewing the report. As I understand it, the Tribunal asked for certain  
3 information to be obtained and that has been put into what is called “the final report”. That  
4 information is now before us as effectively evidence in order for us to be able to determine  
5 what the price should be fixed at, and that leads on to then being able to determine whether  
6 that has been an abuse.

7 I think in that context one is looking to say: “Can we rely on the information that has been  
8 provided to us?” If there are matters which fall within the four categories that I alluded to,  
9 then that may question whether the information is such that we can rely on it, and the  
10 Authority may say: “Actually, even if this was our final report, we do not stand behind X  
11 or Y and it should be A or B”. But I think it is not a review – we are not reviewing the  
12 report, it is evidence which is before us in order to make the decision the Tribunal said it  
13 could make.

14 MR. VAJDA: It may be, madam Chairman, that this is a question of semantics ----

15 THE CHAIRMAN: It may be.

16 MR. VAJDA: -- because there is a challenge to certain aspects of the report. I have used the  
17 word “review” in a non-technical sense to say, if you like, what is the next step the  
18 Tribunal is going to take? How is the Tribunal going to approach this report?

19 THE CHAIRMAN: But we do not at the moment know what those challenges are. We know  
20 one of them.

21 MR. VAJDA: Absolutely, and what I am going to do, and I would be grateful if the Tribunal had  
22 a little patience with my submissions, is to try and show what a principled approach may  
23 be, and if I come back to the question of review – and I use that bearing in mind the  
24 observations that madam Chairman ----

25 THE CHAIRMAN: The Authority’s report is evidence before the Tribunal.

26 MR. VAJDA: -- all right, what do we do in relation to challenge to the evidence --

27 THE CHAIRMAN: Or it contains information to assist the Tribunal reaching a decision.

28 MR. VAJDA: -- or the information. There are essentially two ways that one can look at it. First,  
29 one can treat this as effectively what I call a “merits’ appeal” – an appeal on the merits –  
30 and the alternative which has, in a sense, already been floated, is that one can say that one  
31 can review the evidence but on a Judicial Review basis.

32 Before I develop those submissions, and I am going to do that quite shortly, I just want to  
33 say one thing that may not be apparent but the Tribunal needs to be aware that this is the  
34 position – and I hope it will not come as a surprise to the Tribunal to know – that Dŵr



1 Cymru itself has a number of concerns about the final report and the evidence. The  
2 Tribunal should not be under the misapprehension – I am sure it is not – that effectively  
3 this is a one way street, because in fact there are seven quite important issues where, if this  
4 were opened up, Dŵr Cymru would wish to say its piece. I am not going to go into those  
5 seven points, but the Tribunal needs to be aware what would happen if one went for a full  
6 merits’ review.

7 What I would like to do briefly is to set out first of all why we say that it is appropriate in  
8 the context where we are today, that one should have less than a full merits’ review, and I  
9 will do that by reference both to certain facts that are specific to this case. I will then take  
10 the Tribunal to what we consider to be a useful analogy in relation to another of the  
11 Tribunal’s powers in the Communications Act to see how that works, and then I am going  
12 to show the Tribunal a recent case in the Court of Appeal that I am sure the Chairman will  
13 be familiar with – the case of “E”, as to what the scope of Judicial Review is, because that  
14 may not be clear to the two wing members of the Tribunal.

15 MR. THOMPSON: Could I just raise the question of whether any of this is appropriate at this  
16 stage? Even in Judicial Review challenges are often brought on *Wednesbury* grounds that  
17 fail. If they are unreasonable then you may be sanctioned in costs for having brought  
18 pointless challenges. I hear clearly what the Tribunal says and what Mr. Anderson says.  
19 The precise level of review will obviously be an issue at any final determination. Mr.  
20 Vajda can make points of this kind at that stage, but I understand the thrust of what is being  
21 said and I think the Tribunal can see that it is not in Albion’s interests – even on its own  
22 account – to waste money on lawyers, let alone the risk that it might have to pay costs for  
23 having wasted the Tribunal’s time – not something that I am in any way suggesting – but I  
24 really think at this stage to have a lengthy debate about the level of review on a case of this  
25 kind is an utter waste of time.

26 THE CHAIRMAN: Well, especially, it seems to me at the moment, until we know what the  
27 points are, because it may be that if all the points are effectively mathematical errors, or if  
28 the point is whether some item ought to have been in or out, they are evidential points.  
29 Although they happen in Judicial Review they can be sorted out at a different level, and I  
30 would have thought, Mr. Vajda, that these submissions that you are going to make will  
31 have to be made again because we have not had today written submissions in relation to  
32 this and a lot of it can be done by written submissions. One does not know what the  
33 problem is and therefore one does not know what one is addressing at the moment and as

1           you are talking I was thinking, in fact, what Mr. Thompson is saying and I do not quite  
2           understand at the moment why we need to address this today?

3 MR. VAJDA: Well, with respect, madam Chairman, I would first of all ask that the Tribunal  
4           hear me out; it is slightly unusual to be interrupted by one's opponent, I can understand Mr.  
5           Thompson wants to reply but not to hear a submission of leading counsel on an issue which  
6           is important, given that the Tribunal itself has said that it wishes these proceedings to be  
7           manageable and conducted in a just, expeditious, and economic ----

8 THE CHAIRMAN: Maybe you could tell us why this is relevant today because then we can put  
9           it into its context.

10 MR. VAJDA: It is relevant today because in relation to the four categories, for example, that  
11           you, madam Chairman, put out one needs to know what is the test. In the Court of Appeal  
12           the first thing they will say is "What is the test that is being applied?" that is absolutely  
13           critical and that is something we say needs to be sorted out there, then one can have the  
14           four issues when one knows what the test is. That is important.  
15           What I am seeking to do, and I am not spending hours and hours, I am seeking to spend a  
16           few minutes to try and help the Tribunal in relation to what we say the approach is, because  
17           that is why I say we need to have a principled approach. The first question is: are we  
18           having an appeal on the merits or are we having Judicial Review, and that is something that  
19           the parties need to know and something that I respectfully submit the Tribunal needs to  
20           address here and now. I am not in anyway shutting up Mr. Thompson or the Authority, but  
21           what I am somewhat concerned about is that I am being bounced out of this; the Tribunal  
22           may not like what I say, and may reject it, but it is very unusual to be told that I cannot  
23           even actually say what I think, what my clients submit, is an appropriate way forward.

24 THE CHAIRMAN: I will let you say whatever you want to say. As you saw, I was not  
25           interrupting you although what was going through my head was the same as Mr.  
26           Thompson's intervention, so I was going to let you continue.

27 MR. VAJDA: Well I am grateful.

28 THE CHAIRMAN: But having had the interruption it does seem to me that the complaints need  
29           to be identified, see what they are. Once we see what they are we can then decide on what  
30           basis we analyse that evidence, or the evidence before us. Until we know the "issues" – if I  
31           can put it that way – the identification of what they say is wrong with the report, and  
32           therefore is evidence that we should not accept, until that is sorted out I think it is totally  
33           hypothetical. So you can say what you like but at the moment I do not think that this is a  
34           matter – subject to what everybody else says – that we can decide today, and it is not really

1 a case management matter, it is a specific point which will need to be raised – I agree it  
2 needs to be raised. I understand your point but the actual decision and the submissions  
3 need to be thought about very carefully in the context of the evidence that is before us.

4 MR. VAJDA: Absolutely. I am, for may part, far from wishing to bounce anybody into a  
5 decision, but what is absolutely critical – and I come back to that – is what is the test? We  
6 had the 29 page document that madam Chairman referred to ----

7 THE CHAIRMAN: Have you seen that?

8 MR. VAJDA: No, we have not, but we have seen from the correspondence that has been copied  
9 in on the Tribunal, which we have been copied in, that there is effectively a root and branch  
10 attack on large parts of the report. What I am saying, and I do not want to shut Mr.  
11 Thompson out in terms of arguing what the test is, but most courts in this country in my  
12 experience over 25 years, is the first thing you do is to say: “What is the test that we are  
13 going to approach?” If you simply say a list of issues it means we will come back here in a  
14 month or two with all these issues and then we have to go through this again. We will have  
15 spent a lot of money, Mr. Thompson will have spent a lot of money and the Authority will  
16 have spent a lot of money dealing with a Scott schedule because if, in fact, you go down  
17 the Judicial Review route the Scott schedule (insofar as there is one) may be very, very  
18 much shorter and that is why I am very concerned that we grapple with this now because  
19 that is intended to dovetail with what you, madam Chairman, have said which is that we  
20 have to keep this in a manageable way. If we get 200, 400, 500 things under the list of  
21 issues, what is the test that is going to be applied, and therefore we think it is the discipline  
22 to everybody, and I say that the Tribunal should be under no misapprehension that Dŵr  
23 Cymru itself has a number of criticisms of this report in terms of the evidence, that the  
24 Tribunal needs to set down the ground rules. Of course, having heard everybody – and I  
25 am not seeking to shut anybody out – the first thing is to establish the ground rules, then  
26 the pleadings and that is the way it is normally done, and if one is in the Administrative  
27 Court – as, madam Chairman, you know – everybody knows that that is traditional. You  
28 do not go to the Administrative Court and say “Here is my list of issues, and we will then  
29 have a case management conference in front of Mr. Justice Underhill to determine which of  
30 them can go under Judicial Review.” That is a nonsense. What you say is: “This is  
31 Judicial Review.” You, madam Chairman, are well aware of this, in a merger case in this  
32 Tribunal it is not done that we simply put in everything and the kitchen sink and then we  
33 have a CMC, the rule is Judicial Review.

1 The difference here is that there is no rule in the Tribunal's book saying that this should be  
2 Judicial Review, or there should be an appeal on the merits; the Tribunal has a discretion.  
3 What I am saying ----

4 THE CHAIRMAN: No, as I understand it the appeal is an appeal on the merits, the question is  
5 what we do with this evidence.

6 MR. VAJDA: Absolutely, because what has happened is that there has been a referral back to  
7 the Authority and, so far as I am aware, there has been no case law or anything as to what  
8 the Tribunal should do when it gets a report back.

9 THE CHAIRMAN: And we are going to have to decide at some point, but in the context of the  
10 complaints that are being made.

11 MR. VAJDA: This will be something which will be familiar to you, madam Chairman, but it  
12 may not be familiar to the wing members, if we could look at the procedure in relation to  
13 price control, which is a matter you are very familiar with because I think you have done  
14 some recent cases. This is in relation to the procedure which we say is very similar to the  
15 procedure here where you have an appeal on the merits. It is tab 5. I do not know if you  
16 have sat on a telecoms' appeal or not, but this Tribunal has a role in appeal of merits  
17 against Ofcom and that is set out in s.192 of the Communications Act. If we go to 195(2) it  
18 says: "The Tribunal shall decide the appeal on the merits by reference to the grounds of  
19 appeal set out in the notice of appeal". That is p.5 of the print out.

20 THE CHAIRMAN: And that is the same as in the Competition Act in Schedule 8 Part 1.

21 MR. VAJDA: Mr. Bailey is nodding to me so ----

22 THE CHAIRMAN: The difference is in the words "must determine" rather than "shall decide",  
23 but that may be semantics or not, I do not know.

24 MR. VAJDA: If I could ask the Tribunal to look at s.193, reference of price control matters to  
25 the Competition Commission:

26 "The Tribunal rules must provide in relation to appeals under s.192(2) relating to  
27 price control that the price control matters arising in that appeal, to the extent that  
28 they are matters of description specified in the rules, must be referred by the  
29 Tribunal to the Competition Commission for determination.."

30 So there is an obligation that you have to send it off to the Competition Commission. The  
31 next step, if we then go to subparagraph (6) – and I apologise that the toner has worn out a  
32 bit here, but:

33 "Where a price control matter arising in an appeal is required to be referred to the  
34 Competition Commission under this section, the Tribunal, in deciding the appeal

1 on the merits under s.195, must decide that matter in accordance with the  
2 determination of that Commission.”

3 But that is subject to an important qualification in (7).

4 “Subsection (6) does not apply to the extent the Tribunal decides, applying the  
5 principles applicable on an application for judicial review, that the determination  
6 of the Competition Commission is a determination that would fall to be set aside  
7 on such an application.”

8 Pausing there, what Parliament has said is that in telecoms you have an obligation to refer  
9 off to a specialist body in the context of an appeal on the merits. That specialist body then  
10 produces a report. It comes back here, and Parliament is not saying that this Tribunal is  
11 bound to accept that report of the Competition Commission because plainly if the  
12 Competition Commission had completely ignored evidence put in by a party that would  
13 breach all principles of natural justice.

14 THE CHAIRMAN: There has to be an Article 6 review.

15 MR. VAJDA: There has to be an Article 6 review, so what you have there is, what you say is

16 “Yes, of course, the Competition Commission is subject to review but on JR sanctions.”

17 One can see the sense of that because effectively the Competition Commission is, if you  
18 like, the expert body and that means that you are not going to revisit every figure and all  
19 the rest of it in a report but if there is a *Wednesbury* unreasonableness, something like that,  
20 you can review it.

21 In that context – and again this case is probably familiar to madam Chairman, but may not  
22 be to the wing members – may I just take you to a short passage in the Judgment of the  
23 Court of Appeal in the *E* case which I am sure is familiar to you, madam, which is at flag 2.  
24 Now, Professor Pickering, Mr. Lewis, this is all to do with immigration so it is a 100 miles  
25 from this case. Could I ask the Tribunal to pick up just one paragraph which is at p.1375 of  
26 this report, it is para. 66. This is all very much of a piece with what we have seen under the  
27 Communications Act because the question here is “What was the scope of Judicial  
28 Review? Does it include questions of fact”. What Lord Justice Carnwath said:

29 “In our view, the time has now come to accept that a mistake of fact giving rise to  
30 unfairness is a separate head of challenge in an appeal on a point of law, at least in  
31 those statutory contexts where the parties share an interest in co-operating to  
32 achieve the correct result.”

33 That plainly applies to Judicial Review and plainly applies in the context of these  
34 proceedings.

1 He then sets out effectively a checklist of four matters.

2 “First, there must have been a mistake as to an existing fact, including a mistake  
3 as to availability of evidence on a particular matter. Secondly ...”

4 and this is of some significance we would say:

5 “... the fact or evidence must have been ‘established’, in the sense that it was  
6 uncontentious and objectively verifiable.”

7 Before we go to the third if we just go to the right hand column, para.63, there is quite a  
8 useful passage by Lord Slynn who explains what is perhaps a slightly obscure expression.  
9 If one is looking at 63 between C and D, this is what Lord Slynn said in the Criminal  
10 Injuries Compensation Board:

11 “The fact was ‘established’, in the sense that, if attention had been drawn to the  
12 point, the correct position could have been shown by objective and uncontentious  
13 evidence.”

14 For example, something that was a plain arithmetical error would fall into that category,  
15 but what is not in the category obviously matters of judgment.

16 If we then go back to para.66 that is then the second point that the Court of Appeal made.

17 “Thirdly the appellant (or his advisers) must not have been responsible for the mistake.”

18 That is obvious.

19 “Fourthly, the mistake must have played a material (not necessarily decisive) part  
20 in the Tribunal’s reasoning.”

21 Now, we say that that approach offers a useful template to the Tribunal because it ensures  
22 that justice is done, and obviously justice is absolutely essential because no one can suggest  
23 that Judicial Review on that basis creates any denial of justice. So the justice target is met.

24 It also ensures what we would consider the two other targets that the Tribunal has  
25 mentioned in its opening statement, namely, the expeditious target and the economical  
26 target, because it effectively sets out quite clearly what the parameters are. It does not  
27 exclude challenge to the evidence, but it sets out quite clearly what the parameters are. We  
28 say that that is all of a piece with the relationship the Tribunal has with the Competition  
29 Commission in price control matters and in my respectful submission that is a similar sort  
30 of relationship that the Tribunal has had with the Authority in deciding to refer this matter  
31 back to the Authority. It does not mean that the Authority’s report is bullet proof, but it  
32 means that it can be attacked where you have, if you like, a justice point, but the  
33 parameters of that are laid down. That, we say, really meets very much the three targets  
34 that the Tribunal itself has stressed time and time again which we would stress. It gives

1 clarity to the parties as to where we are and it provides a way forward for both parties and  
2 the Authority.

3 What I would respectfully suggest is that we have no quarrel at all with, in a sense, the  
4 categories that you outlined at the beginning but what would be of assistance is to say that  
5 effectively that if it is on a Judicial Review basis that is the template within which one  
6 raises matters within those categories and that is the submission; it is nothing earth  
7 shattering but it is intended to give practical effect to justice, expedition and economy, and  
8 we say that ticks all three boxes and that is the way that we say we can put your very  
9 pertinent question within the framework, and there is also the position of my clients to  
10 consider whether or not they are going to want to challenge bits of the report. It puts the  
11 framework on us as well, and that we say is the way forward, and that is really all I want to  
12 say on the test.

13 I would invite the Tribunal to adopt that approach here. That is all I really need address the  
14 Tribunal on at the moment, I am not going to deal with the issue of disclosure because as I  
15 understand it that is at the moment somewhat parked.

16 I can address the Tribunal further in terms of how I see this working out in terms of  
17 timetable and submissions.

18 THE CHAIRMAN: We will park that for a moment. In relation to the idea of setting out the  
19 items, whatever they are, and for the responses, and possibly doing that in the form of a  
20 schedule, so it becomes very clear on the face of it so we can just tick boxes effectively and  
21 we can see where the differences are, you are happy with that idea?

22 MR. VAJDA: I am happy with that provided it is within the JR template, absolutely, yes, we  
23 think that would be a very sensible way forward, yes.

24 THE CHAIRMAN: Mr. Anderson, are you saying anything ----

25 MR. ANDERSON: You will appreciate from the debate that I was having with you that we  
26 have some sympathy for the approach that Mr. Vajda is suggesting. We do think it might  
27 be helpful for there to be some guidance from the Tribunal limiting the extent of the  
28 challenge that is available. We are similarly concerned with getting down into findings of  
29 fact, differences of view on appreciation. What I was going to propose, had the debate  
30 taken a different route this morning, was points of law, manifest errors of appreciation or  
31 fact, which is a test that arises out of the jurisprudence of the Court of First Instance, and  
32 procedural unfairness and lack of reasoning as categories of challenge. I fully recognise  
33 that this is an appeal on the merits jurisdictionally, but as I say the appeal on the merits has  
34 effectively been concluded in the sense that our decision is effectively being set aside.

1 THE CHAIRMAN: It has not been concluded because part of the appeal on the merits is the  
2 merits of these points, is it not? So the question is in the overall appeal on the merits this is  
3 evidence that was asked for, on what basis does this Tribunal accept or reject that  
4 evidence?

5 MR. ANDERSON: And I think Mr. Vajda fully recognised that he is not suggesting his way  
6 forward as a matter of jurisdictional requirement on the part of the Tribunal, merely as a  
7 constructive and pragmatic way forward in the circumstances of this case. What the  
8 Tribunal does now have is a long report containing information and really the question the  
9 Tribunal wants to direct its mind to, if I may say so, is what weight do we attach to this  
10 information, and is it reliable? We are deeply concerned – as I would hope the Tribunal  
11 would be – that this case does not develop into the revisiting of everything that is in that  
12 report, otherwise there was simply no point in having the exercise. So we do think there  
13 would be something to be gained from the Tribunal making clear to those that seek to  
14 challenge, and it is clear it is not just Albion, it may be Welsh as well, that they are not free  
15 to challenge, or they should not be challenging each and every paragraph without some  
16 limit on the extent to which the Tribunal will simply take a different view on the basis of  
17 source data. So whether it is a JR test, or it is qualified to only manifest errors of  
18 appreciation we do not mind. But what I had understood, and a way forward is to wait and  
19 see what the complaints are and then respond to it. But equally, I see the merit in Mr.  
20 Vajda's approach which is to set out the ground rules first and then Albion knows what it  
21 can challenge. So in a sense we are in the Tribunal's hands, but I think it has been a  
22 helpful debate in the sense that it has identified that there are concerns about a simple wide  
23 ranging root and branch attack on the report.

24 THE CHAIRMAN: Mr. Thompson?

25 MR. THOMPSON: Well I have a small number of points but I think I have probably made the  
26 core one already, that it seems to me this is really a premature debate. I have indicated, and  
27 I can confirm – and it is obviously evident in the files – that a great deal of correspondence  
28 has gone backwards and forwards, essentially directly between Albion and the Authority  
29 and given what is at stake I make no apologies for that on behalf of Albion.

30 THE CHAIRMAN: It would be better if that was not the way we approached it now because  
31 although on your side Albion absorbs the costs, and there are no legal costs as such, on the  
32 Authority's side and on Dŵr Cymru's side there are costs, so it is not avoiding legal costs  
33 actually because it is increasing their costs. It is much better if it is all done in a proper  
34 format and in ways that the lawyers can understand what the points are.



1 MR. THOMPSON: I think everyone understands the circumstances which have given rise to this  
2 situation.

3 THE CHAIRMAN: Yes, and I think one has to appreciate that sort of correspondence does incur  
4 costs even if it is initiated on your side and ring fenced as Dr. Bryan, and because of the  
5 previous costs' Judgment, which may or may not be the way forward, I do not know, does  
6 have repercussions in relation to that.

7 MR. THOMPSON: That is a helpful indication. So far as the specific points are made, I would  
8 not accept the analogies that Mr. Vajda seeks to draw, either with the merger regime,  
9 which I think he rather apologetically introduced because he recognises that that is  
10 expressly a different legal regime, but exactly the same point, in my submission, arises in  
11 relation to s.193, the Competition Commission is given a particular status under that  
12 provision which is, as I see it, exactly the same as the status it has in merger cases, and so it  
13 does not seem to me that gets him anywhere. Likewise, the *E* case, in the passage he read,  
14 was said to be an appeal on a point of law and likewise is markedly different from this case  
15 where an appeal has, in fact, in substance succeeded as Mr. Anderson recognises, and in a  
16 sense we are looking at what happens next, whether the Tribunal should itself find that  
17 there is an abuse as it indicated at 281 it was inclined to do and obviously the decision may  
18 go one way or the other.

19 The only question it seems to me to arise is where an issue of policy or methodology – or  
20 however one cares to put it – is being put forward by the Authority, given – I will resist  
21 saying 'water under the bridge' – the stage we are in these proceedings, the prospect of  
22 another ECPR type debate I agree, fills us all with horror, and I am sure the Tribunal and  
23 the Authority and Dŵr Cymru would be horrified at that thought.

24 THE CHAIRMAN: As I understand it on that debate, what the Tribunal actually decided, it may  
25 not be written in that way, but actually when you analyse it, it was – if I can put it in this  
26 way – 'no reasonable Authority would have used that methodology' and therefore would  
27 be within the Judicial Review area. That is right, is it, because if I am wrong ----

28 MR. THOMPSON: I think the conclusion was reached in fairly cautious terms in the end that  
29 that methodology was not a safe cross-check in all the circumstances of this case.

30 THE CHAIRMAN: So that would be within the Judicial Review test area?

31 MR. THOMPSON: Indeed, but insofar as Mr. Anderson and Mr. Vajda and their clients are  
32 worrying that this case will expand again into some further enormous debate then that is  
33 clearly not in Albion's interests and, for the record, I do not think it was ever particularly  
34 Albion's wish that these proceedings should go on as long as they have – initially, at least,

1 we rather hoped that it would be done and dusted rather quickly, so that is not in Albion's  
2 interest.

3 So far as there are specific issues about the standard and whether or not what we say on a  
4 particular point meets the relevant standard, as I think the Tribunal itself has indicated, it is  
5 hopelessly vague at this stage to try to determine any such question. The indications from  
6 the Tribunal will be borne in mind insofar as there are other relevant statements in court  
7 Judgments, for example the CFI or the Admin Court, which may be prayed in aid by  
8 analogy we have heard what my learned friend says about it, and obviously we will make  
9 our submissions in due course about whether we think those points are any good, insofar as  
10 they are relevant, but beyond that I cannot see any need to engage in this debate.

11 So far as Mr. Vajda says that this is the normal approach in the Admin Court that is very  
12 far from the truth. I think if you appeared before the Master or someone to try to get  
13 guidance about how you should plead your case on a Judicial Review by reference to  
14 learning on questions of fact, you would be met with complete disbelief. Points are in fact  
15 raised and then maybe weeded out at permission stage or may go forward and fail in due  
16 course, but it is not normal in any way to try and sort this sort of thing out in the abstract in  
17 advance.

18 THE CHAIRMAN: Well we do not know what the points are but, for example, if the situation  
19 was that there is some methodological approach and the Authority has used one appropriate  
20 approach and there are other appropriate approaches that they could have used, then Mr.  
21 Vajda's point would be – I think this is really what you are saying – we should not engage  
22 in a whole lot of expert evidence and then decide which approach we favour.

23 Now as I understand it, and the example you gave is a good example, in the previous  
24 decisions and that was why I said that my understanding was that in that example what the  
25 Tribunal was doing was saying that the approach used was not an appropriate approach and  
26 when I put out the various sequence of questions, when I got to methodology I specifically  
27 said "sound and robust".

28 MR. THOMPSON: Yes, I have not gone back to the authorities where I am sure this issue has  
29 been ----

30 THE CHAIRMAN: That is the word used here, and in previous cases. Now, whether the parties  
31 say that that is the test that we should use here, depends on what the item is.

32 MR. THOMPSON: Indeed.

1 THE CHAIRMAN: But you are not saying, as I understand it, that you are going to produce a  
2 whole lot of expert evidence, etc. and say “Well actually they use that approach, it may be  
3 appropriate, but there is another approach over **here** that would be equally appropriate.”  
4 MR. THOMPSON: I think I am really saying that I have no intention of running a selection of  
5 bad points and losing, is really what it comes to.  
6 MR. ANDERSON: I am wondering if that is a concession or not? (Laughter)  
7 THE CHAIRMAN: I think it depends on us as to whether there are bad points or not.  
8 MR. THOMPSON: Indeed, obviously I have to exercise judgment about whether the points I run  
9 are good and whether in this particular Tribunal they are likely to succeed, but beyond that  
10 I am not sure that Mr. Vajda’s points really assist.  
11 MR. VAJDA: Could I just have a short reply on that?  
12 THE CHAIRMAN: Yes.  
13 MR. VAJDA: I think the key issue that the Tribunal needs to ask themselves is why is Mr.  
14 Thompson not content with the Judicial Review test, and my answer is ----  
15 THE CHAIRMAN: He is not saying he is not, actually. He does not know what is in the box at  
16 the moment, he has not got his tools.  
17 MR. VAJDA: What I was going to say because effectively the black hole in my view. Judicial  
18 Review is a test that we all know and understand and it provides discipline, economy,  
19 justice and expedition. On the question of cost it is important both to the Authority and to  
20 my clients that if there is no discipline at this stage we are going to have to reply to all this  
21 and incur additional cost which may be held that it is unnecessary. We say that it may well  
22 be one needs to have a CMC at some point to sort this out, but let us impose the discipline  
23 at this stage because it ticks those three boxes and I heard no satisfactory explanation, apart  
24 from I am not going to make bad points, as to why we cannot go for that test.  
25 THE CHAIRMAN: Thank you. Can I just ask, there is that point to consider – I am not going to  
26 say “decide”. We have to do the directions in relation to the points of contention, or  
27 whatever one calls them, which is where we started. There is some issue on disclosure, as I  
28 understand it. What else do we need to deal with today – is there anything?  
29 MR. THOMPSON: It may be worth sketching out what the issues on disclosure are in very brief  
30 form.  
31 THE CHAIRMAN: Yes.  
32 MR. THOMPSON: There is the question of the expert evidence of Dr. Elliott, where the  
33 Tribunal has indicated that we should go before the High Court.  
34 THE CHAIRMAN: Am I not right about that?

1 MR. THOMPSON: I had understood – I may be incorrect – that if, as is the case, CORUS  
2 consents, Dŵr Cymru consents, and the Authority, there is no reason why the matter could  
3 not be dealt with by consent.

4 MR. VAJDA: There seems to be an error of fact creeping in, Dŵr Cymru does not consent.

5 THE CHAIRMAN: Now you know the answer, they do not consent.

6 MR. THOMPSON: Well in that case we have to go in front of the court ----

7 THE CHAIRMAN: My understanding is – but you can correct me – is that if there is material  
8 produced in a case on disclosure, then that material can only be used for the purposes of the  
9 case unless – am I going to be told I am wrong? I am right – unless the court gives  
10 permission for it to be used otherwise. As I understand it, it is the court which is the court  
11 of that particular case and not any court. I have been pointed to CPR Rule 32.12, p.841.

12 MR. THOMPSON: My understanding was so far as that goes this could be dealt with by Dr.  
13 Elliott himself giving consent under 12(2)(a) and so far as I understand it from CORUS  
14 that would be acceptable. I had understood the problem arose because it included some  
15 material which Dŵr Cymru had provided and that Dŵr Cymru therefore asserted some  
16 form of confidentiality in relation to it. It is not entirely clear to me what it is, but I had  
17 assumed that it could be dealt with by Dŵr Cymru consenting and we invited Dŵr Cymru  
18 to do that, or at least give some explanation why it did not do that given that this was  
19 material that was relevant. If I am wrong about the legal position then I am happy to look  
20 at it. So far as that goes I think that could be dealt with by consent through CORUS or in  
21 particular through Dr. Elliott.

22 THE CHAIRMAN: The difficulty is that this is a sort of expert witness is it not?

23 MR. THOMPSON: Yes.

24 THE CHAIRMAN: And the expert witness is given certain information by its client. I assume  
25 this document was not read in court? It did not open on the file.

26 MR. THOMPSON: I do not know. There has been skirmishing up and down in that case – how  
27 far they have actually got and whether or not there has been cross-examination of Dr.  
28 Elliott is not within my knowledge.

29 THE CHAIRMAN: We are actually assuming at the moment that it has not been disclosed in  
30 open court.

31 MR. THOMPSON: Mr. Vajda or his clients should know the answer to that question. I had  
32 hoped that this would be an amicable matter, that it was obviously a relevant piece of  
33 evidence, but it is clear that Dŵr Cymru wants to dig its heels in and so it is really for Mr.  
34 Vajda.

1 MR. VAJDA: Those behind me say that it has not been read in open court, that case is currently  
2 stayed, but this is a classic ----

3 THE CHAIRMAN: So he has not been cross-examined?

4 MR. VAJDA: No, but this is a classic scatter gun fishing approach. As you said at the  
5 beginning, madam Chairman, in relation to disclosure obviously we can get into disclosure  
6 and I can make my comments on this but you are entirely right that that is the correct  
7 procedure, but apart from that the High Court Judge will want to know how that is relevant  
8 to the challenge to the final ----

9 THE CHAIRMAN: Absolutely.

10 MR. VAJDA: Your analysis, madam Chairman, is entirely right.

11 THE CHAIRMAN: I think that “(a) the witness gives consent”, there is no property in a witness,  
12 so you could go and take a statement, and if he gives you the statement that he gave to  
13 somebody else that is what para. 2(a) means. I am not convinced at the moment that that is  
14 the same for an expert witness, you can see the distinction. It has not been put in evidence  
15 and therefore if it is not the same for an expert witness we are in (b). Now, you might want  
16 to consider what you want to do – whether you want to say the position is the same, but  
17 without seeing the document it would be very difficult. The court with cognisance of it  
18 unfortunately – am I right in thinking this was Mr. Justice Hart?

19 MR. VAJDA: You are right, the late Mr. Justice Hart, yes.

20 THE CHAIRMAN: So unfortunately the Judge has died, so you cannot go back to the particular  
21 Judge. We do not have the jurisdiction of the High Court and the other case is a High  
22 Court action and we are intervening in that action if we make an order that they have to  
23 disclose it. You see the difficulty?

24 MR. THOMPSON: Yes.

25 THE CHAIRMAN: To short circuit it, the easiest thing is to go to the High Court, because that  
26 short circuits all the problems. It may be that we are allowed to do it, but it short circuits  
27 all the problems.

28 MR. THOMPSON: We will consider that issue, I came to it first because, madam Chairman, you  
29 mentioned it to me.

30 The other three points fall into two categories. There are two contemporary documents.  
31 One a contract for the manufacture of a particular length of pipeline which is strikingly  
32 similar both in dimensions and length to this one, which we raised – albeit at a late stage –  
33 with the Authority, and they said “Too late, the shutter has come down, we are not going to  
34 look at that issue.” Given the nature of the facts it appears to us that it is something that is

1 relevant and therefore since it is within the knowledge of Dŵr Cymru and could easily be  
2 within the knowledge of the Authority we would invite them to disclose it and if not we  
3 will in due course seek an order, either today or whenever is appropriate.

4 The other contemporary documents we have touched on and they are partially disclosed,  
5 but they are disclosed in one important respect – in virtually illegible form.

6 THE CHAIRMAN: The memoranda or whatever they are? The LC documents?

7 MR. THOMPSON: Yes, it does appear to us – notwithstanding the observations of Professor  
8 Pickering, which I heard and bear in mind – that they are material documents, not only  
9 given the history of this case, but also in that they do contain costs' information and also  
10 comments which, particularly on the second limb of the test may be relevant to questions  
11 of whether or not this price was unfair, because it is a relevant question – for example in  
12 the Court of Appeal in *At the Races* – what the overall factual context is in which a price is  
13 set and therefore it does appear to us that there cannot be any legitimate claim of  
14 commercial confidentiality in relation to documents which are now over six years' old, and  
15 that the redactions as they appear come in the middle of the narrative on these issues, and I  
16 does appear to us at the very least Albion's legal representatives and the Tribunal should  
17 see the whole thing in a clear and unredacted form because inevitably the redactions raise  
18 certain question marks as to why the redactions have been made; it may be on a legitimate  
19 commercial basis but one can see no reason why the Tribunal and the lawyers should not  
20 see the documents in a clear and unredacted form. That is the simple point on that.  
21 Then the other category of disclosure is a different one, it relates to the Dŵr Cymru tariff  
22 model which, as we understand it from various parts of the report, has been used in the  
23 formulation of the authorities' various methodologies and in particular in relation to the  
24 AAC Plus, and it does seem to us very difficult to assess the quality of the methodology  
25 without understanding how it is constructed and that would be an issue both for the  
26 Tribunal and for ourselves. It does appear to us that that issue, at least, should be  
27 addressed now because otherwise we may be back in the area of blundering around in a  
28 dark room criticising the Authority and then they say: "Ah, but the reason why we did this  
29 is because the tariff model says that", and at the moment we just have to guess. So we  
30 cannot see any reason why, for the purposes of these proceedings that cannot be disclosed.  
31 If that was integral to the Authority's methodology then the Authority should explain how  
32 it used it and what it says, so that is the simple point on that. It does seem to us that from  
33 the perspective of Mr. Vajda and Mr. Anderson the sooner that is disclosed the better so we

1 do not waste time with making claims which actually turn out to be unsubstantiated  
2 because of some point that we simply do not know.

3 THE CHAIRMAN: Am I right in thinking that what we call the LC documents were not before  
4 the Authority when they wrote their report?

5 MR. THOMPSON: Oh yes, they have had them, I think, since 2001.

6 MR. ANDERSON: The LCE papers were available to us. They were supplied in response to the  
7 s.26 notices.

8 THE CHAIRMAN: Are they documents you took into account.

9 MR. ANDERSON: We took all documents into account. I would need to seek clarification. The  
10 problem we have with all these various requests for disclosure – the problem that has been  
11 identified at the outset today – we do not know what the case is. It is quite clear from my  
12 learned friend’s last submission in relation to the tariff model that that is a classic example  
13 of a fishing expedition. He says “We do not know what is in it, we do not know whether it  
14 will help us, we do not know whether it is going to shed light on the report, let us have  
15 what they wish to say in relation to the report and then we can address the question of  
16 disclosure. Dr. Elliott’s report – we did not take that evidence into account in reaching our  
17 report.

18 THE CHAIRMAN: I think Dr. Elliott’s report is a separate matter which I think they are going  
19 to consider what they do about it – we can forget that for today.

20 MR. ANDERSON: These other issues, such as what about the source information on this LG  
21 mains, which Mr. Thompson says was raised at a late stage ----

22 THE CHAIRMAN: The contractual document?

23 MR. ANDERSON: Yes, five days before the report went to the Tribunal, after even the draft  
24 report, although we had been requesting from the outset information on local cost, so we  
25 can have a debate on whether that is an issue, and if it is an issue whether any disclosure is  
26 needed, but not today. The same with the tariff model, if what they are saying is we do not  
27 understand your equations, your arithmetic in the report, we cannot understand that unless  
28 you give us more information, then we will see that that is an issue, but it is not an issue  
29 today and therefore there is no basis for disclosing the tariff models in respect of which I  
30 should say it is not as simple as source information for the calculations we have  
31 undertaken. It is the tariff model created by wealth for producing all its tariffs for all its  
32 customers, potable and non-potable, with input information from 2001, and then  
33 calculations derived there from. If it is part of Mr. Thompson’s case that the report is

1 inadequately reasoned or he cannot understand it then that no doubt will be part of his  
2 submissions.

3 THE CHAIRMAN: Then we will see if the tariff model is relevant.

4 MR. ANDERSON: We will see if could conceivably be, but today we would submit is not the  
5 day for seeking or ordering any disclosure at all.

6 THE CHAIRMAN: Mr. Vajda, I think you would only be making submissions if we decided  
7 these documents were relevant and ought to be disclosed, and if they are your documents  
8 then as to confidentiality.

9 MR. VAJDA: I will not trouble the Tribunal unless the Tribunal want to hear from me.  
10 Obviously, if the Tribunal were minded to make a disclosure then ----

11 THE CHAIRMAN: Then we would have to think about confidentiality. What about the  
12 documents that have been disclosed, certainly the ones that have been provided to me, and  
13 sometimes the photocopying gets really bad, that are very difficult to read?

14 MR. VAJDA: We have done our best on that, but I think Albion made a comment on that.  
15 These are old documents and we are all in the same boat.

16 THE CHAIRMAN: Will you allow them to come and look at the originals somehow – or the  
17 lawyers to come and look at the originals?

18 MR. VAJDA: I am told that if OFWAT send the documents by post as opposed to by fax that  
19 might improve the situation. I had not appreciated the documents had only been sent by  
20 fax and not by post.

21 THE CHAIRMAN: I do not think that this is a matter that we need to get involved in but it  
22 would be helpful if the documents were ----

23 MR. VAJDA: Yes, insofar as they are documents that they already have an attempt can be made,  
24 and I understand that point. Unless the Tribunal is minded to make any order against my  
25 clients I will not address the Tribunal at all on disclosure.

26 THE CHAIRMAN: Thank you.

27 MR. VAJDA: There is the issue of Aquavitae which obviously the Authority wrote to the  
28 Tribunal about, and again in terms of hitting the target of justice expedition and economy,  
29 in my submission that should be rule on today, but it is really Mr. Anderson who has made  
30 the running on that.

31 THE CHAIRMAN: You were about to stand up, we will leave Aquavitae just on the side for a  
32 moment.

33 MR. THOMPSON: Just on the end of the disclosure point I do not know if the Tribunal has  
34 seen, there has been an effort by Dr. Bryan to transcribe the completely illegible appendix



1 1 and there has been no comment from Dŵr Cymru on his transcription – we are taking  
2 that to mean that it is accurate, but if Dŵr Cymru does not know, or does not care that is  
3 one thing, but it is obviously an unsatisfactory state of affairs for us to be guessing what  
4 commercial documents that a major company has, if it can confirm one way or the  
5 other ----

6 THE CHAIRMAN: If you are relying on something that is not actually the document because it  
7 has been wrongly transcribed because of the difficulties of reading it.

8 MR. THOMPSON: We have a very poor copy of the fax, it does not seem to be necessary ----

9 THE CHAIRMAN: I think Mr. Vajda is looking at that at the moment. Well surely that can be  
10 sorted out between you and if there is a problem then it needs to be sorted out. If you  
11 cannot amicably sort it out, as one would hope that it could be amicably sorted out then  
12 you will have to raise it again.

13 MR. THOMPSON: Obviously it is wearisome from our point of view, whoever bears the legal  
14 costs ----

15 THE CHAIRMAN: No, I know.

16 MR. THOMPSON: -- it would be much better to just do it properly straight away and given the  
17 resources on the other side you would have thought that that was possible. As to the other  
18 questions that are formally before you there is the point of *Aquavitae*, although I am not  
19 today appearing for *Aquavitae* I have in the past and I have seen those submissions.  
20 Briefly I would not accept that they were irrelevant, particularly on the second limb where  
21 there are questions both as to the market position in *At The Races* in the passage quoted by  
22 the Authority, the market situation was taken into account in that case and it was said it  
23 was not a case where anyone was likely to be out of business and that is obviously the  
24 opposite to here. Also, insofar as there is an issue as to how much margin of appreciation  
25 we should give to this Authority the question of how this Authority is treating this exercise  
26 and how far it is committed to the introduction of competition on this market in my  
27 submission is relevant.

28 THE CHAIRMAN: Why is any of that relevant to today?

29 MR. THOMPSON: That is the question that has been raised in relation to *Aquavitae*.

30 THE CHAIRMAN: Yes, but why is it relevant to today?

31 MR. THOMPSON: Well it is put in at one point or another. The other point is in relation to the  
32 Court of Appeal proceedings. I think at least formally the issue is before the Tribunal as to  
33 what the relationship between ----

1 THE CHAIRMAN: Yes, but as I understood it actually everybody agrees that the right answer is  
2 that we forget the state of identification and see what evidence is before us and how we are  
3 going to deal with it. I understand the Court of Appeal is in January ----  
4 MR. THOMPSON: Yes.  
5 THE CHAIRMAN: -- it is agreed that we will get on with this in the meanwhile, and so we can  
6 put the Court of Appeal on one side for the time being ----  
7 MR. THOMPSON: To some extent I do not want to ----  
8 THE CHAIRMAN: -- and they can pop up ----  
9 MR. THOMPSON: Essentially protecting Albion's position that it should not suddenly be said  
10 in the Court of Appeal that we are madly dashing on ahead with a case in the Tribunal over  
11 which it has no jurisdiction ----  
12 THE CHAIRMAN: No, they are only dealing with two specific legal points. It is very clear that  
13 there are two very specific points. One may have some implications in relation to this case,  
14 but everybody is agreed we should get on down the line and I think part of that is that some  
15 of the discussion and outcome of that may be relevant to something that is going on in the  
16 2007/2008 discussions about price and that therefore it is not a waste of time in any event  
17 even if the Court of Appeal went down a different road.  
18 MR. THOMPSON: Yes, I am grateful. I just simply wanted, partly for my own client's  
19 protection, to make sure that we all were on the same wavelength.  
20 THE CHAIRMAN: If everybody is agreed I do not think there is a problem.  
21 MR. THOMPSON: I am grateful, those are the only two points.  
22 MR. ANDERSON: I would have answered on the subject of Aquavita<sup>e</sup> but I do not know if  
23 Aquavita<sup>e</sup> ----  
24 THE CHAIRMAN: I do not think we have quite got there yet.  
25 MR. ANDERSON: I do not know if Aquavita<sup>e</sup> is represented or not, and I am sorry I just ----  
26 THE CHAIRMAN: I think they are today, are they not?  
27 MR. O'FLAHERTY: Yes, madam.  
28 THE CHAIRMAN: You were nodding to say that it is premature, were you?  
29 MR. O'FLAHERTY: Well as long as we are allowed to maintain our position as an Intervener  
30 then there is really nothing for us to say on the issues before the Tribunal today as set out in  
31 the agenda.  
32 THE CHAIRMAN: I do not know enough about what happened in the history – that is not a part  
33 that I have read into – but whether or not you are entitled, we do not need to decide that  
34 today.

1 MR. O'FLAHERTY: No, madam.

2 THE CHAIRMAN: So we could perhaps forget you were here. (Laughter)

3 MR. O'FLAHERTY: Well in our submission we have been forgotten perhaps once too often  
4 now by more than one Authority, but certainly as regards the agenda for today you can  
5 forget about us, as long as you are not proposing to eliminate us.

6 THE CHAIRMAN: If we say nothing about you, you either are or you are not but that can be  
7 dealt with at some future date.

8 MR. O'FLAHERTY: Indeed, madam.

9 MR. VAJDA: Well if we can forget about them today what is the relevance of them at all in  
10 these proceedings – I get back to the question of just, economical and expeditious. I am  
11 looking at the statement of intervention which was made on that basis on which they were  
12 entitled to intervene in 2004, it was in relation to the access prices generally ----

13 THE CHAIRMAN: Can I just ask you, this is a point of information for me, they are interveners,  
14 or is there some question as to whether they are interveners?

15 MR. VAJDA: No, there is no doubt that they are interveners, and there was effectively an order  
16 made by the Tribunal in 2004. They then produced a concise statement of issues on which  
17 they were going to confine their intervention, that was done in 2004, and the short point is  
18 that where we are now at is completely different because they were going to intervene, and  
19 did intervene on some general point, particularly a s.66(e) point – that was their  
20 intervention – what we are now focusing on, and I hesitate to use the word “review”, are  
21 the next steps in relation to the final report which is simply Dŵr Cymru and Albion  
22 specific. In relation to that I cannot see (and we can hand up copies of their statement)  
23 how they have any interest at all.

24 THE CHAIRMAN: Once we have determined the price do they have an interest in the abuse  
25 question? They would say they would, yes.

26 MR. ANDERSON: In our submission they clearly do not, the question is whether this particular  
27 price quoted by this particular company to Albion is excessive and, if so, unfair. It is not a  
28 point of general principle. Aquavitae's intervention in this case was directed to the part of  
29 the case that has now been wholly disposed of, namely, the overlap between an ECPR test,  
30 which has been rejected and the costs' principle being introduced by a new regime that was  
31 not in force at the time the first access price was relevant and was not within the  
32 jurisdiction of the Tribunal. Aquavitae had their say on that, they called Dr. ----

33 THE CHAIRMAN: To do with the ECPR, when I looked at the intervention I thought the ECPR  
34 point has been decided, it is out, and therefore that is not to be resurrected.

1 MR. ANDERSON: No, it does not need to be resurrected no, certainly not. That is what their  
2 interest was and on the costs' principle. The matter was resolved, they came along to the  
3 Tribunal wanting interim relief, effectively saying: "Will you direct the Authority to  
4 change its guidance to reflect your views on the costs' principle and s.66(e)?" And the  
5 Tribunal said: "No, we cannot do that." They then came back when the question was  
6 whether or not their stayed case should be discontinued or not, and the then President of the  
7 Tribunal indicated to them: "Is there any point in not discontinuing you case?"

8 THE CHAIRMAN: No, and that has gone, as I understand it.

9 MR. ANDERSON: Yes, but it has gone effectively on the basis that there was nothing left for  
10 them to do in the proceedings. Their case should be discontinued because the relief they  
11 were seeking was now academic, the only outstanding issue in this case was whether the  
12 price that Welsh quoted to Albion was excessive or not and Aquavitae has no role in that  
13 whatsoever. That is why we say in our submissions that we would invite the Tribunal to  
14 make it clear that Aquavitae has no continuing interest in these proceedings whatsoever,  
15 even though they are, technically speaking, interveners. In our submission the appropriate  
16 course is not only to forget that Aquavitae are here today but also to suggest they do not  
17 turn up for any further hearings because they have no role in this case whatsoever.

18 MR. VAJDA: Can I say, it is all very well to say "Let's forget about Aquavitae", but Aquavitae  
19 in fact ----

20 THE CHAIRMAN: Poor Aquavitae have not put their case forward yet, but yes, we are doing it  
21 slightly backwards.

22 MR. VAJDA: They produced a 23 page document which of course I had to read, my solicitors  
23 had to read, it all adds to the cost of this, and now Mr. O'Flaherty says "You can forget  
24 we're here", then why was a 23 page document put in? It is simply adding to the cost and  
25 the question is: what is their role where we are now at? In that respect we adopt what Mr.  
26 Anderson has said.

27 THE CHAIRMAN: Do you want to help us?

28 MR. O'FLAHERTY: Yes, madam. There are a number of reasons why we should continue as  
29 an intervener in this case. First, there is the point made by Mr. Thompson concerning the  
30 general industry background. This has been put forward by all times by all parties as an  
31 extremely important test case for the industry as a whole.

32 THE CHAIRMAN: Hold on, just so that I understand, because it is not terribly easy for me  
33 sitting here when I have not been in it all the time, I have been handed up something called  
34 "Concise Statement of Issues"?

1 MR. O'FLAHERTY: Yes.

2 THE CHAIRMAN: And that is what you were allowed to intervene on as far as I understand?

3 MR. O'FLAHERTY: That is right, madam, yes.

4 THE CHAIRMAN: Right, now if we look at that Concise Statement of Issues what is it now that  
5 you are saying is what you are intervening on or continuing to intervene on?

6 MR. O'FLAHERTY: The continuing matter would be what you see at para.F, and it is the  
7 interrelationship between the '98 Competition Act.

8 THE CHAIRMAN: I am sorry, I do not have para.F, I have something which has "1" and "2"  
9 and "Background Issues".

10 MR. O'FLAHERTY: Well we were given permission by the Tribunal, if you have the Judgment  
11 granting permission.

12 THE CHAIRMAN: No – we may have it but not in front of us at the moment – I am sure we  
13 have it.

14 MR. O'FLAHERTY: The relevant paragraphs are paras. 42, which refer to ----

15 THE CHAIRMAN: What date is the Judgment?

16 MR. O'FLAHERTY: That is the Judgment dated November 2004.

17 MR. VAJDA: It is 16<sup>th</sup> November 2004.

18 THE CHAIRMAN: We will have it in one second.

19 MR. VAJDA: Page 22 of that Judgment, madam Chairman.

20 MR. O'FLAHERTY: Page 22 and p.31, madam. You need to begin previously at p.21 which sets  
21 out Aquavitae's Concise Statement of Issues.

22 THE CHAIRMAN: Yes, but let us start by finding out what the Tribunal decided and then we  
23 can go back.

24 MR. O'FLAHERTY: If we go to para.69 on p.31 that is the relevant paragraph for my  
25 submissions now.

26 PROFESSOR PICKERING: "Aquavitae does not in itself hold an appointment"?

27 MR. O'FLAHERTY: Yes, Professor.

28 THE CHAIRMAN: I am looking at para.73 last sentence, and then you are going to take me  
29 back.

30 MR. O'FLAHERTY: To para.69.

31 THE CHAIRMAN: And that goes back to 69 does it? No, because:  
32 "Aquavitae has already limited the scope of its intervention from the matters set  
33 out in its notice of appeal and the Tribunal does not consider it appropriate to  
34 limit the scope yet further, as suggested by the Director."

1 Then it says they are reluctant to determine at this stage the particular matters. This is 16<sup>th</sup>  
2 November, and what has been handed up to us is an order of 21<sup>st</sup> September, which was  
3 earlier, and what it says actually at 78(4):

4 “Aquavitae, if so advised, is to lodge its statement of intervention ... Such  
5 statement is to be concise and limited to the issues of principle set out in its  
6 statement of issues dated 28 September, and only in so far as those issues are  
7 relevant to the legality of the Director’s Decision ...”

8 MR. O’FLAHERTY: Yes, madam, and the two issues on which Aquavitae was allowed to  
9 intervene were effectively: (a) the interpretation of s.66(e) or what has been referred to as  
10 the “costs principle”; and (b) the applicability of the Competition Act to the Water Act in  
11 the new regime. They are the matters on which ----

12 THE CHAIRMAN: And they have been decided?

13 MR. O’FLAHERTY: Well if you look at the order for discontinuance ----

14 THE CHAIRMAN: No, forget about the order for discontinuance, in the Albion proceedings  
15 those matters have been decided. The costs’ principle is ----

16 MR. O’FLAHERTY: It is s.66(e) and it is also, broadly speaking, retail minus and ECPR. They  
17 are all interrelated.

18 THE CHAIRMAN: And that has all been decided?

19 MR. O’FLAHERTY: That has been decided.

20 THE CHAIRMAN: So there are no more submissions on that.

21 MR. O’FLAHERTY: There will be no more submissions on that.

22 THE CHAIRMAN: Then on the Competition Act and the Water Act, as I understood it, that has  
23 also been dealt with in the previous Judgments of this Tribunal?

24 MR. O’FLAHERTY: Madam, as you will see from our submissions it has, in fact, been dealt  
25 with by the Tribunal, although not ruled on conclusively. But the point is, madam, as you  
26 will also see from our submissions our level of discontent, and our continuing interest in  
27 this case arises from the approach of the Regulator to the decision of the Tribunal on that  
28 very point, because the Regulator maintains the position entirely inconsistent with the final  
29 Judgment of this Tribunal on that very point, and it is against the background of the  
30 approach of the Regulator to competition in this industry and to decisions on questions of  
31 abuse that we wish to maintain our position as intervener in a very limited capacity.

32 MR. ANDERSON: It is on the basis of that that we do object to Aquavitae making submissions  
33 of that kind to this court today. It is quite clear that its complaint effectively is that the  
34 Authority, outside the scope of these proceedings, is somehow not paying sufficient

1 attention to the judgment of the court, that is manifestly not an issue that arises in the  
2 context of these proceedings now, and that is why we submit that it is no longer appropriate  
3 for Aquavitae to be an intervener, or for my learned friend to be standing up making these  
4 prejudicial remarks in the present context.

5 MR. O'FLAHERTY: Madam, what manifestly is in issue is the approach that this Regulator  
6 takes to questions such as the determination of an abuse of dominance and that is the  
7 question that remains before the Tribunal.

8 THE CHAIRMAN: What I was trying to interrupt you on was I was trying to find, and therefore  
9 wanted to stop you so that I could find it and I now have, your submissions for this hearing.  
10 I have now got them in front of me. They appear to relate to the ECPR evidence which I  
11 thought we had just agreed had all gone, so I am not quite sure why you are making  
12 submissions to us now in relation to that in this document?

13 MR. O'FLAHERTY: We merely note that to the extent that our appeal has been discontinued in  
14 case 1045 it was discontinued with our acquiescence on two bases, one of which that  
15 ECPR had been dealt with. It has been dealt with and we do not seek any other form of  
16 order or relief in relation to that, we merely make the observation that ECPR continues to  
17 be applied in all cases except the Shotton case. It is an observation and no more, madam.

18 THE CHAIRMAN: Well as I understand it that was decided back in 2006.

19 MR. O'FLAHERTY: Yes, madam.

20 THE CHAIRMAN: That is where this Tribunal is, it is not now open in the Albion case, so your  
21 intervention in relation to that aspect is closed.

22 MR. O'FLAHERTY: We do not seek any order, or any form of relief, or any further comment in  
23 relation to ECPR.

24 MR. ANDERSON: So why are you making an observation on it?

25 THE CHAIRMAN: Yes.

26 MR. O'FLAHERTY: We made our observation and we do not seek any form of relief from the  
27 Tribunal.

28 THE CHAIRMAN: No, but you would not be seeking a form of relief in relation to intervention.  
29 What you are doing is you are intervening in order to support Albion's case, well Albion  
30 no longer has a case because they have succeeded on that case.

31 MR. O'FLAHERTY: Madam, we provide what we say is relevant background information to the  
32 approach of this Regulator and no more.

33 MR. ANDERSON: That is an entirely novel submission that one can come along to court and  
34 say we provide relevant background information – I have not heard of that in 25 years at

1 the Bar as being a basis for intervention, particularly in relation to where we have a  
2 narrowly focused issue now, which is what to do with the final report, that is the issue. If  
3 we have more paper from Mr. O’Flaherty we have to look at it and respond to it and that  
4 just ----

5 THE CHAIRMAN: Well clearly in relation to the costs’ principle that matter has been closed,  
6 you cannot make relevant submissions because no submissions are going to be further  
7 made on that matter.

8 MR. O’FLAHERTY: Yes, madam.

9 THE CHAIRMAN: In relation to the Competition Act and the Water Act, as I understood it that  
10 matter had also been previously dealt with. It may well be that over lunch you need to  
11 discuss with Mr. Anderson whether or not you have an appropriate intervention because at  
12 the moment, and we have not decided this of course, it does seem to me that both areas are  
13 areas in which they have already been determined by this Tribunal, and the questions that  
14 are now before us are not to do with what relief that you get because it is to do with what  
15 relief ----

16 MR. O’FLAHERTY: Of course, madam. There has been a determination – a general  
17 determination – that the Competition Act of course does apply to the Water Industry  
18 regardless of the fact there are various sectoral Acts which govern behaviour in that  
19 industry; that matter has been decided. Matters that were left undecided relate to very  
20 specific points as to when activities of incumbent water companies who follow what is said  
21 to be lawful guidance on the part of the Authority are exempted from the provisions and, in  
22 particular, the Chapter II prohibition.

23 THE CHAIRMAN: That is not before us, is it?

24 MR. ANDERSON: No, and this Tribunal has ruled against Aquavitae twice on that very point, it  
25 is not before you.

26 THE CHAIRMAN: And that point is not a point that is before us in the Albion case.

27 MR. O’FLAHERTY: That point may not fall to be ruled upon, but the approach that the  
28 Regulator is taking to abuse of dominance cases on which my client, as the only other  
29 active player – or attempted player in this industry, attempted new entrant – is able to  
30 comment. We are the only people out there seeking actively, other than Albion, to enter  
31 this industry and we are the only people who can comment, provide relevant background  
32 industry comment, or relevant comment on the approach of the Regulator, to a matter that  
33 is directly before this Tribunal, namely, the approach of the Regulator to the question of  
34 abuse of dominance, in this case excessive pricing.



1 PROFESSOR PICKERING: Mr. O’Flaherty, in your Concise Statement, or your learned  
2 friend’s Concise Statement, you refer to the setting of the appropriate retail price and the  
3 computation of the minus element, and then the relationship between the Competition Act  
4 and the Water Act. We are looking at the reasonableness of the access price, which is not a  
5 retail price – and again the caveat I made earlier this morning that I am not a lawyer and I  
6 would not be aware of the procedures that are available – but it seems to me that if you  
7 have an ongoing concern about the conduct of the Regulator then it is not appropriate to  
8 seek to keep that before this Tribunal in this case. Whether or not, as you imply, you  
9 should seek to resuscitate case 1045 or do something else, indeed, whether or not there is  
10 another route and procedure for you to go down, I would hope that perhaps there is because  
11 I do not think it is healthy that a company should feel continually dissatisfied. Frankly, I  
12 do not think you are helping me to see why you have a continuing input in relation to the  
13 issues that remain in this case given the self-denying ordinance that was given to the  
14 Tribunal some years ago.

15 MR. O’FLAHERTY: The only thing I would say in response to that, Professor, is that if we  
16 return to the four categories that were set out by the Chair, category one was the question  
17 of whether or not the issue of abuse on dominance could be decided by this Tribunal on the  
18 basis of the report from the Authority itself, and the reasonableness of the approach taken  
19 by the Authority. We would say that we are the only other party – other than Albion – who  
20 can make any valid contribution on that at all.

21 THE CHAIRMAN: I think you have misrepresented what the first question is, actually.

22 MR. O’FLAHERTY: I am sorry, I understood that it was the excessive price and abuse ----

23 THE CHAIRMAN: Absolutely, taking the excessive price as found then it is a question for the  
24 Tribunal as to whether that is an abuse.

25 MR. O’FLAHERTY: It is indeed, madam.

26 THE CHAIRMAN: The guidance, if I can put it that way, that has been given – because they  
27 were asked for their view – is that it is not an abuse and they have set out their reasons why  
28 it is not an abuse, and those would be I assume the basis of the submissions, when we have  
29 to consider whether or not it is an abuse.

30 MR. O’FLAHERTY: Indeed, madam, and we would say that if we were limited to continuing to  
31 intervene, purely to comment on that matter that would be a substantial benefit.

32 THE CHAIRMAN: Is that a matter on which you had been given a right to intervene in any  
33 event?

1 MR. O'FLAHERTY: To the extent that we have intervened on the interaction between the  
2 Competition Act 1998 and the statutory framework in this industry in general, we would  
3 say that it is because it is a matter that goes directly to how the Competition Act 1998 has  
4 been applied.

5 THE CHAIRMAN: Where in the submissions that you have provided is that point? I am not  
6 saying it is not there I am just asking where it is.

7 MR. O'FLAHERTY: It has not been made specifically yet. We refer to the relevant material at  
8 paras. 14 to 16 and footnote 6. It is where we comment on this general approach and what  
9 might be seen as the question of the reasonableness of a finding of abuse given certain  
10 factual backgrounds.

11 THE CHAIRMAN: If these are relevant matters – if they are – are they not matters which  
12 Albion can make of their own, because we are considering costs here?

13 MR. O'FLAHERTY: In my submission we have added very little to costs in any event, and we  
14 will continue to do so. We would say the justice of allowing us to comment outweighs the  
15 extremely limited cost of any very limited intervention we might continue to have.

16 THE CHAIRMAN: 15 is to do with some Freedom of Information Act point which I do not  
17 think is to do with the point we are now on.

18 MR. O'FLAHERTY: No, it is not, madam. It is para.14 and footnote 6 effectively. That is  
19 looking at what OFWAT are saying now?

20 THE CHAIRMAN: Yes, madam.

21 MR. ANDERSON: I think my learned friend needs to be clear as to what that paragraph is  
22 directed at. That paragraph is not directed at anything to do with this case whatsoever. It is  
23 directed at Access Code Guidance that we issue to the industry as a whole, they do not like  
24 the guidance because they say we are interpreting the costs' principle in an incorrect way.  
25 I am getting a very strong feeling of déjà vu because this is now the third time I have made  
26 these submissions, when his complaint is that OFWAT is issuing guidance that is  
27 inconsistent with some views on the costs' principle that this Tribunal expressed. The  
28 previous President had some sympathy perhaps with the merits of what they were saying,  
29 but said "We cannot help you", and it is in one of the paragraphs that I have annexed to the  
30 letter. "We cannot help you, go and JR or complain".

31 A second time they came back and said: "This is our complaint, can you help us?" and the  
32 Tribunal said "No, we cannot". They are back here a third time and the only difference in  
33 the interim is that they have written to us saying: "We do not intend to JR your guidance."

1 THE CHAIRMAN: From my limited reading my understanding was that what Mr. Anderson has  
2 now said is the position. I understand that that is effectively what the members of this  
3 Tribunal who have been in it all the time also believe.

4 MR. O'FLAHERTY: It is written in plain English in the Judgment of the Tribunal, madam.

5 THE CHAIRMAN: Absolutely, para.358. So at the moment it is very difficult to understand  
6 what relevance you now have. As it is now 1 o'clock – I just want to make a list of the  
7 points that we are going to have to consider outside – I suggest that over lunch there are  
8 two matters to deal with: (i) what directions do we need in relation to the identification of  
9 the issues and the responses, and other directions? (ii) I suggest you think about your  
10 position and whether, in fact, there is anything that is left, and whether or not you add  
11 anything and whether it is cost effective because Albion can make the points for  
12 themselves, so what do you add? You might discuss that with Mr. Anderson and see where  
13 you get to, but you have heard how we think at the moment.

14 The other matter that we need to deal with is Mr. Vajda's point on the "standard" – shall I  
15 call it that?

16 MR. VAJDA: Or the "test", yes.

17 THE CHAIRMAN: On the test, yes. There is also the disclosure point. Is there anything else –  
18 have I missed one?

19 MR. VAJDA: I had assumed, possibly wrongly, that we had already dealt with disclosure and  
20 that the Tribunal does not want to hear anything more about that, so I am not entirely sure  
21 what needs to be discussed over lunch.

22 THE CHAIRMAN: No, no, no, you do not have to discuss that over lunch – sorry. I was saying  
23 over lunch you need to discuss the directions if you can, so that we have something to work  
24 from.

25 MR. VAJDA: Yes, I understand.

26 THE CHAIRMAN: And the timing of it, and what is reasonable, because we do not want this to  
27 go on for months, and months, and months.

28 MR. VAJDA: But so far as disclosure is concerned the Tribunal is not having any submissions  
29 from anybody.

30 THE CHAIRMAN: No.

31 MR. VAJDA: I apologise.

32 THE CHAIRMAN: Over lunch it is the directions and the relevant timing of how that is going  
33 to be dealt with, and we do have in mind that Albion have had their 29 pages, or whatever  
34 it is, for a long time. They were asked to and have not as yet produced a list. We are now

1 in nearly the end of October, and so it should not really take too long for Albion to identify  
2 the points, but I do appreciate Mr. Anderson's position and it is going through the lawyers  
3 now. So one needs to balance that, but there has been a long delay.

4 All I am saying is that directions and the timing is always useful to discuss rather than  
5 discuss it between us – it would be nice to have a document that we can look at. Aquavitae  
6 is going to consider its position – that is on your side of court over lunch. On our side it is  
7 the test and disclosure.

8 MR. THOMPSON: There is only one other point. It is always a pleasure to hear from Mr.  
9 Randolph, but if there is going to be a clearing out of interveners, he has not seen reason to  
10 speak so far and there may be a question whether he will have a reason to speak again.

11 THE CHAIRMAN: That is United Utilities?

12 MR. THOMPSON: I am not suggesting it should be now, but ----

13 MR. RANDOLPH: No, but just so I can put a marker down, madam, there is an enormous  
14 distinction between my client's position ----

15 THE CHAIRMAN: Absolutely.

16 MR. RANDOLPH: -- and Aquavitae's. We have been given general ability to intervene.

17 THE CHAIRMAN: If I can just short circuit it and we will deal with it after lunch ----

18 MR. RANDOLPH: Absolutely.

19 THE CHAIRMAN: -- your position is that it may well be that when we identify the issues or the  
20 challenges – I do not really want to call them “issues” as such at the moment ----

21 MR. RANDOLPH: No, “matters”.

22 THE CHAIRMAN: -- the “matters”, identify the matters, if they involve your client then your  
23 presence may be relevant.

24 MR. RANDOLPH: Indeed, but at the moment we do not know that and therefore I think our  
25 presence is required, but I would hope very much that Mr. Thompson is not suggesting that  
26 an application is going to be made that somehow United Utilities should follow Aquavitae  
27 – if that is going to be the case – out of the door.

28 THE CHAIRMAN: Well that is why I raised ----

29 MR. RANDOLPH: That is why I am slightly concerned, because I would like to know what I  
30 am facing after the short adjournment – is there going to be an application by Albion to  
31 seek to exclude us in which case I would rather like to know and on what grounds.

32 MR. THOMPSON: Given that we were seeking economy and expedition it is perhaps  
33 unfortunate that the two longest debates seem to have involved Aquavitae and United. I  
34 am not pressing anything, I am seeking to speed the matter up.

1 THE CHAIRMAN: So although it is very nice to see you we do not actually see you here today  
2 at all.

3 MR. RANDOLPH: I will be here after lunch, just in case. Thank you so much.

4 THE CHAIRMAN: Shall we say 2.15? That will give us some time for consideration as well.

5 (Adjourned for a short time)

6 THE CHAIRMAN: Good afternoon, can I ask what the position now is about Aquavitae?

7 MR. O'FLAHERTY: Yes, madam, I have spoken very briefly with Mr. Anderson, but I did not  
8 really need to. We have considered our position carefully over the lunch break, and in light  
9 of indications from the Tribunal, and the reality of the situation we are minded to withdraw  
10 as an intervener in this case.

11 In our view the case continues to concern issues of costs, which was obviously an issue we  
12 originally had permission to intervene, albeit on a far more limited basis and in our  
13 submission we would be well placed to make comments or to express an opinion on the  
14 approach of the Regulator in relation to what we call the 'category one' question.

15 Aquavitae has, at its own expense, played an extremely valuable role in these proceedings,  
16 in particular in relation to the ECPR where its submissions were virtually accepted entirely  
17 in a very long segment of the Tribunal's Judgment. But the sad reality is that despite all of  
18 that Aquavitae has still received absolutely no useful remedy of any sort whatsoever, due  
19 largely in our submission to the intransigence of the Regulator, and to its disregard for the  
20 relevant passages ----

21 MR. ANDERSON: He is either withdrawing or he is not, madam Chairman. (Laughter).

22 THE CHAIRMAN: This Tribunal expressed certain views in paras.356 to 358 of the Judgment  
23 of 18<sup>th</sup> December.

24 MR. O'FLAHERTY: Yes, madam.

25 THE CHAIRMAN: And the Tribunal cannot really do more now than was expressed there and it  
26 is not within these proceedings that that can be taken further. That is all you are saying,  
27 really, is it not?

28 MR. O'FLAHERTY: We have made the Tribunal aware of the reality of the situation as we see  
29 it and we will have to seek a remedy elsewhere.

30 THE CHAIRMAN: Thank you. There are two points on which we have been addressed today  
31 upon which we need to express our view.

32 The first relates to Mr. Vajda's submissions concerning the test to be applied when  
33 considering the matters in the report, which Albion are going to dispute. Those matters

1 have not yet been identified. Albion submit that we should wait until the matters have been  
2 identified and the dispute between the parties is known before we consider the test.

3 The Authority submits that they are neutral as to when we consider the point. It seems to  
4 us appropriate to wait to see what the matters are before considering what test is to be  
5 applied to determine them.

6 The second point is an application for disclosure by Albion of two contracts relating to the  
7 manufacture of pipelines, and for the disclosure of the Dŵr Cymru tariff model. Without  
8 knowing what are the matters in dispute and how the content of these documents is relevant  
9 to them, we cannot decide whether these documents should be disclosed, so any application  
10 for disclosure needs to be renewed at the appropriate time.

11 I think that deals with the two matters that were left on this side of the line. That now  
12 leaves the timetable – how did you get on with that?

13 MR. THOMPSON: First of all, without in any way wishing to criticise your predecessor in your  
14 role, if I may say so that was, if nothing else, a model of laconic judgment, if I may say so,  
15 we are grateful for that.

16 In terms of the timetable I am afraid my starting point remains the timetable I suggested in  
17 our order which is that we should have four weeks to 20<sup>th</sup> November to define our position  
18 in the terms that the Tribunal has indicated.

19 THE CHAIRMAN: In a schedule. Do you think the schedule is a good idea, now that you have  
20 all had lunch to consider it?

21 MR. THOMPSON: Yes, in the order that the Tribunal has indicated, and so far as possible by  
22 specific reference to the report, so that everybody can see what we are talking about. That  
23 seems an excellent idea if I may say so.

24 The difference is that I think it is now accepted between the three principal parties, if I may  
25 call them that, that it would be appropriate for Dŵr Cymru and Albion to fire off together  
26 on any points they may wish to raise in relation to the report – Mr. Vajda said he had, I  
27 think, seven points that he may wish to raise.

28 THE CHAIRMAN: You say “fire off together”.

29 MR. THOMPSON: He may have points under the same headings in relation to the report and so  
30 he would produce on 20<sup>th</sup> November his version ----

31 THE CHAIRMAN: Oh, I see.

32 MR. THOMPSON: -- and we would produce on 20<sup>th</sup> November our version. I think that is what  
33 is being suggested by ----

34 THE CHAIRMAN: So you are going to put before us these seven or nine points?

1 MR. VAJDA: Yes.

2 MR. THOMPSON: And we would suggest that then the Authority has until 18<sup>th</sup> December to  
3 respond. I think the only point of disagreement is that the Authority considers that equity –  
4 rather than suggesting four weeks each – indicates that we should have three weeks and the  
5 Authority should have five. With respect, we think that is a very poor idea, they have  
6 produced the report, we have to make the running trying to work out what it all means, and  
7 to put ourselves together in a clear form.

8 THE CHAIRMAN: As I understand it your client has done that, but it needs to be refined and  
9 put into some sort of legal context.

10 MR. THOMPSON: Yes, and that is quite a substantial job. I appreciate that time has moved on  
11 that without in any way complaining that is partly because it has proved quite difficult to  
12 get this CMC on.

13 THE CHAIRMAN: That is a valid comment.

14 MR. THOMPSON: And we have been waiting really to see what we were supposed to do before  
15 we started doing it.

16 THE CHAIRMAN: Counsel could not do it immediately, and then unfortunately we could not  
17 do it immediately after counsel could do it, so one got rather a long delay, yes, I appreciate  
18 that.

19 MR. THOMPSON: That is the reality. It does seem to us that four weeks is the minimum  
20 realistic period. I am away this week, Mr. O’Flaherty is away next week – this is a very  
21 small ship we are on – and Dr. Bryan has a number of other things he has to do.

22 THE CHAIRMAN: And 18<sup>th</sup> December is another four weeks is it? Or is it three weeks?

23 MR. THOMPSON: I think it is four weeks – I think there are 30 days in November, so I would  
24 think that that is 28 days.

25 THE CHAIRMAN: If one accepted these dates then we are coming up to Christmas anyway, so  
26 whether it is three or four weeks makes little difference I would have thought.

27 MR. THOMPSON: Yes, we are seeking four weeks for ourselves and offering four weeks to Mr.  
28 Anderson. If he wants to say he wishes to put this in on Christmas Day then I doubt it will  
29 make much odds to us.

30 MR. ANDERSON: If that is an invitation to respond on the timetable ----

31 THE CHAIRMAN: That is an invitation for another week, is it not?

32 MR. ANDERSON: Our first point is that we see no useful purpose being served in items 1 and 2  
33 on my learned friend’s schedule. This idea of identifying the issues, and then us  
34 responding to those issues ----

1 THE CHAIRMAN: No, I thought I had been more specific in my opening than they were and  
2 we were going to do it my way.

3 MR. THOMPSON: I thought not only as a matter of reality, but also as a matter of merit and  
4 agreement that we were going to follow the Tribunal's indication; that is clearly why we  
5 are here.

6 THE CHAIRMAN: Yes.

7 MR. THOMPSON: So we are obviously going to follow the format laid down by the Tribunal.

8 MR. ANDERSON: So what we are envisaging is one round of pleadings, if you like. It will be  
9 their statement on what they say is wrong about our report.

10 THE CHAIRMAN: What I hope we will get but I do not want to actually say I only want it in a  
11 schedule, because it may not be appropriate, and you can only sometimes tell this when  
12 you are doing it. What would be very useful – because otherwise somebody has to do it –  
13 is that we have the paragraph of the report that is being challenged, Albion's reasons for  
14 challenging it – I am going to leave Dŵr Cymru out of it for the moment – your answers  
15 and then we have to consider whether we should have Albion's answers, and then we have  
16 it all there and just run across the line, because they should be very specific.

17 MR. ANDERSON: That may be one way of doing it. I would not like to suggest how my  
18 learned friend should present his criticisms of our report. An alternative would be to take  
19 your four headings and identify under each heading ----

20 THE CHAIRMAN: Well no, I thought what one was going to do was to identify under those  
21 headings so you would have effectively four sub-schedules.

22 MR. ANDERSON: It may be a very sensible way forward and if that is the sole rounds, if you  
23 like, of submissions, one can then move to straight to hearing after we have responded to  
24 what the two parties have done.

25 In terms of the timing of that exercise ----

26 THE CHAIRMAN: The question is whether or not Albion ought to have a right of reply on the  
27 submissions?

28 MR. ANDERSON: As I understood the exercise, they will be commenting on information that  
29 we have put in to you. They say that three weeks is unreasonable and they need four weeks  
30 but we see it as four months and three weeks on which to comment on our report. They put  
31 in their observations, submissions, criticisms, whatever one calls it of our report. We will  
32 then put in something to clarify that, being information it is not a decision under appeal ----

33 THE CHAIRMAN: No, absolutely.



1 MR. ANDERSON: -- and then it comes to the Tribunal. What we had envisaged was that that  
2 exercise could be completed by Christmas so the Tribunal could then list something in the  
3 New Year at its convenience, without further rounds of pleadings, without further CMCs,  
4 just their criticisms of our report, Welsh's criticisms of our report. I only suggested an extra  
5 week for us because we will be getting two lots of criticisms at the same time – we may be  
6 able to do it in 24 hours, we simply do not know because we do not know what the  
7 criticisms are, but that is where the inequity that my learned friend refers to comes from.

8 THE CHAIRMAN: We now have the Dŵr Cymru column.

9 MR. ANDERSON: Exactly, but because we were responding to that column at the same time as  
10 the Albion column, we thought maybe five weeks rather than four weeks from our point of  
11 view. So what we would effectively get on – whenever it is - 13<sup>th</sup> November ----

12 THE CHAIRMAN: 20<sup>th</sup> November I think is what is asked for.

13 MR. ANDERSON: That is what Mr. Thompson is asking for. We are suggesting that could be  
14 brought forward a week or so, simply to allow more time to respond to it. There will be  
15 effectively what Albion has to say about our report, and what Welsh has to say about our  
16 report received by the Tribunal and by us simultaneously. We will then respond to that and  
17 then hand it over to the Tribunal for it to have its hearing to resolve any issues that the  
18 Tribunal may then have to resolve.

19 THE CHAIRMAN: Mr. Vajda, we do not know at the moment whether your points go to points  
20 of complaint by Albion, or whether they are completely separate, and we do not know  
21 whether, having regard to Albion's complaints, your complaints are going to be significant.  
22 You are going to say your complaints are significant in any event?

23 MR. VAJDA: Our own complaints will either be significant or they will not be significant, it  
24 does not really matter what Albion's position is, the Tribunal will no doubt give them the  
25 same care and attention that they give Albion's complaints.

26 THE CHAIRMAN: No, the reason I am saying that is that if we do it by a schedule, there are  
27 two matters on that schedule, and you are not responding to Albion's points at all.

28 MR. VAJDA: No, no, we are not responding.

29 THE CHAIRMAN: You are happy to do it your way?

30 MR. VAJDA: Happy, we want to do this: the key targets: just, expeditious and economic.

31 THE CHAIRMAN: So you are happy to go ----

32 MR. VAJDA: Absolutely.

33 THE CHAIRMAN: All right. So you are not actually going to respond to Albion's complaints.  
34 That sounds very sensible, actually, because it is the Authority's report and the Authority

1 should respond to their report effectively, to the complaints on their report. I understand  
2 that now.

3 Who do you expect to respond to your complaints – just the Authority or the Authority and  
4 Albion?

5 MR. VAJDA: No, the Authority, but there will then be a hearing which we respectfully suggest  
6 should be no more than a day – again hitting the target of just, economic and expeditious.  
7 If the Tribunal want to say in advance that “We would like Albion to have two hours and  
8 address us on the following three issues, and Welsh ...”

9 THE CHAIRMAN: Well we do not know yet because we do not know what the issues are.

10 MR. VAJDA: That is effectively how we would visit it.

11 THE CHAIRMAN: So effectively you are going to produce a schedule, if we do it by schedule,  
12 and Albion will produce a schedule?

13 MR. VAJDA: Yes, and I adopt entirely what Mr. Thompson said, we certainly have in mind to  
14 follow what you, madam Chairman, said this morning, absolutely.

15 THE CHAIRMAN: I do not want to completely hold you to it just in case when you do it it does  
16 not work, but it does seem to me to be an easy way to do it.

17 MR. VAJDA: I am grateful.

18 MR. ANDERSON: When we receive those submissions and if they are each done by schedule, I  
19 hope they may be done in an electronic form that we can then combine it into a single  
20 schedule ----

21 THE CHAIRMAN: I would hope so, yes.

22 MR. ANDERSON: -- we will then respond to those criticisms of our report in the light of the  
23 debate we had this morning, in terms of whether it is a question of something is  
24 arithmetically incorrect on its face, or there is some unreasonable inference we have  
25 drawn.

26 THE CHAIRMAN: I do not know if there is any further evidence, for example on the pipeline  
27 there are these local authority plans, or something?

28 MR. ANDERSON: On the LG mains’ pipeline our submission will be they simply raise that too  
29 late in the day and it should not be troubling the Tribunal now. That will be our position  
30 on that.

31 THE CHAIRMAN: And Albion will, I assume, attach the evidence on which they are relying to  
32 support the fact that the information in the document is wrong?

33 MR. THOMPSON: As I think the Tribunal has already indicated, there may be issues of  
34 disclosure arising from points we make, but obviously ----

1 THE CHAIRMAN: We do not know that yet and you can make a separate application and we  
2 can have a CMC.

3 MR. THOMPSON: We will have to, as it were, put a positive case of some kind to justify that. I  
4 think the reason why it arose so late was it was apparently something in April that Dŵr  
5 Cymru indicated, put us on inquiry and it took us until June to track down the relevant  
6 issues, and we are still struggling along, with not a great deal of assistance from the other  
7 side of the room, to discover the price of a particular contract.

8 THE CHAIRMAN: It may be possible, I do not know, if we could deal with any disclosure  
9 application on paper?

10 MR. THOMPSON: Yes. I have certainly no incentive to run up legal costs.

11 THE CHAIRMAN: It is worth trying, is it not? I am not binding myself or you (or any of you) to  
12 it, but we could try and do it on paper which would be cheaper.

13 MR. THOMPSON: Yes, I think the only question we have not really touched on is whether or  
14 not it is going to be satisfactory to proceed to a hearing on the basis of the Authority's  
15 responses to Dŵr Cymru and our criticisms, or whether it would be useful to have  
16 something in writing to see whether or not there has been a narrowing of the ground.

17 THE CHAIRMAN: Also at that hearing we will be dealing with abuse, I suppose – or were you  
18 intending only to deal with excessive price?

19 MR. ANDERSON: From our point of view, we are proposing to respond to criticisms made of  
20 this 227 page document of information that the Tribunal asked us to collect for their  
21 benefit. We have included within that report a conclusion on both excess of price over cost  
22 and unfairness.

23 THE CHAIRMAN: Yes, but we would need submissions, would we not, in order to decide  
24 whatever price it is is an abuse, we would need to hear everybody's submissions on that.

25 MR. ANDERSON: Well you have our view on it, because we have included it in our report in  
26 order to be helpful, you will then have no doubt the views of Welsh and Albion in response  
27 to that.

28 THE CHAIRMAN: So the hearing which we are going to have will be to resolve both these  
29 matters that have been identified in the schedule, whatever dispute arises having regard to  
30 the schedule, and to hear oral submissions on abuse.

31 MR. ANDERSON: It is certainly our position that we have now reached the point in these  
32 proceedings, subject of course to any of the legal points on jurisdiction and that might arise  
33 in the context of the Court of Appeal, that we do not want you to send back to us anything  
34 more on the subject of excessive pricing.

1 THE CHAIRMAN: Is that hearing to be before the Court of Appeal comes out with its decision?  
2 Because they are hearing it, as I understand it, the second week in January?  
3 MR. ANDERSON: They are hearing it on 14<sup>th</sup> January, yes.  
4 THE CHAIRMAN: Taking a rule of thumb one can say that it takes about six weeks for a  
5 Judgment to come out, so is it appropriate – and I have not thought about this so I am just  
6 raising it – to have the hearing before that Judgment comes out?  
7 MR. ANDERSON: I will take instructions. My own immediate reaction to that is that I suspect  
8 a lot of that hearing will be directed to points of clarification on the details of the report,  
9 and of course this entire exercise may in a sense ultimately prove academic if the Court of  
10 Appeal decision goes one way.  
11 THE CHAIRMAN: But I understand that it may well be that the exercise in relation to these  
12 matters, although possibly academic within this case, is not academic for the industry, and  
13 that is why we are proceeding. So my question is whether or not the hearing is going to  
14 deal only with the excessive price issue, or whether we are going to deal with the whole  
15 thing?  
16 MR. ANDERSON: I am having some difficulty identifying the difference between the excessive  
17 pricing issue and the “whole thing”. The only thing left is abuse in the context of excessive  
18 pricing.  
19 THE CHAIRMAN: No, but we have to decide what the price or we have to have some basis as  
20 to whether we decide that the price in the report is the right price or for the reasons that  
21 have been challenged it is not the right price and there is some other price.  
22 MR. ANDERSON: You have to decide whether the price that was quoted, the 23p, was so far in  
23 excess of the costs as to be abusive. I do not see that as a distinct exercise from the  
24 exercise that you will be doing on our report.  
25 THE CHAIRMAN: I appreciate that. I am not making myself clear enough. There are two  
26 stages. We first have to decide what the costs are in order to decide whether it is excessive.  
27 We then have to decide whether that is an abuse, whether that is unfair.  
28 MR. ANDERSON: I follow you, that is two stages in our report.  
29 THE CHAIRMAN: There are two stages in your report.  
30 MR. ANDERSON: Our report covered both and we were envisaging that both the submissions  
31 of the parties on our report would cover both stages and the hearing would cover both  
32 stages.  
33 THE CHAIRMAN: Right, and what I am asking you – you said the hearing is to cover both  
34 stages?

1 MR. ANDERSON: Yes.

2 THE CHAIRMAN: If the hearing is to cover both stages then is it right that we are having a  
3 hearing in relation to the second stage before the Court of Appeal.

4 MR. ANDERSON: There is no logical reason not to have the hearing on the second stage, if you  
5 are going to have the hearing on the first stage. It is either pointless to have embarked on  
6 this entire proceeding in front of you at all ----

7 THE CHAIRMAN: You said that there are other reasons why one is dealing with the first stage.

8 MR. ANDERSON: Not really, with respect, madam Chairman. Those are very fact specific  
9 issues of no particular significance outside of this relationship between **this** company and  
10 **that** company.

11 THE CHAIRMAN: All right, so what you are saying is that the right answer is that we have a  
12 hearing some time towards the middle to the end of January?

13 MR. ANDERSON: Some hearing unaffected by the date of the Court of Appeal hearing which is  
14 directed to margin squeeze and dominance.

15 THE CHAIRMAN: And of course we have to avoid the dates of the Court of Appeal hearing.

16 MR. ANDERSON: Those specific dates, yes. (Laughter)

17 MR. THOMPSON: If I could make a pragmatic suggestion – I think unfortunately I started this  
18 hare running by saying that it might be useful for Mr. Vajda and myself at least to have an  
19 opportunity to respond to the Authority, so as to define the issues as far as possible before a  
20 hearing. In my submission that still seems to me a sensible idea.

21 THE CHAIRMAN: Yes.

22 MR. THOMPSON: In relation to abuse, as I understood it that is really category one, even  
23 assuming the report is right on the numbers, there is still an issue ----

24 THE CHAIRMAN: My first question, yes.

25 MR. THOMPSON: -- and so in a sense we will put submissions on abuse under that first  
26 heading and obviously it will be *a fortiori* if the excess is greater ----

27 THE CHAIRMAN: Absolutely.

28 MR. THOMPSON: -- and Mr. Vajda conceivably may suggest the excess is less – it is possible.

29 THE CHAIRMAN: Yes, and of course submissions on abuse are not points going into this  
30 schedule because they are different submissions, there are going to be authorities and other  
31 things showing what the ----

32 MR. THOMPSON: Yes, but it will come under that first category.

33 THE CHAIRMAN: That needs to be done in some form of written submissions or skeleton  
34 argument, or whatever one calls it.

1 MR. THOMPSON: But the pragmatic suggestion was that if the hearing goes ahead in the  
2 period after the Court of Appeal hearing, but before Judgment, it might be appropriate for  
3 this Tribunal, with respect, to reserve Judgment on this matter until it sees what the Court  
4 of Appeal has to say about jurisdiction.

5 THE CHAIRMAN: Yes, well it is unlikely, because it will probably be after the Court of Appeal  
6 had heard the case, but before it gives Judgment, it is unlikely that our Judgment would  
7 come out before the Court of Appeal Judgment.

8 MR. THOMPSON: Well that is what rather occurred to me, that pragmatically there may ----

9 THE CHAIRMAN: Pragmatically that is not a problem.

10 MR. THOMPSON: And so we can all proceed quite happily, the only point being that while we  
11 are preparing for the Court of Appeal may not be the best time for us to be preparing for  
12 this hearing.

13 THE CHAIRMAN: That is why I was putting the Court of Appeal into the timetable.

14 MR. THOMPSON: Exactly. It might be sensible to leave a little time after the Court of Appeal  
15 hearing before any final submissions and hearing in this matter.

16 THE CHAIRMAN: If one does that then one is into February, so one is very near whenever the  
17 Court of Appeal – on a rule of thumb – are going to deliver Judgment, so is it right that we  
18 should be having a hearing pragmatically before the Court of Appeal, that is the only  
19 question?

20 MR. THOMPSON: In our submission it will not alter our submissions on the ----

21 THE CHAIRMAN: All right. The Authority is saying that you should have three weeks and not  
22 four weeks, but actually because of Christmas the whole thing does not make very much  
23 difference, does it.

24 MR. ANDERSON: The position was this: it was indicated to me that Welsh would be able to  
25 put in their schedule in two weeks. Mr. Thompson ----

26 THE CHAIRMAN: That is an indication by?

27 MR. ANDERSON: By Mr. Vajda.

28 THE CHAIRMAN: Right.

29 MR. ANDERSON: Mr. Thompson had indicated in his written submissions he needed four  
30 weeks. Now, from our point of view we wanted to be sure that we could get in anything  
31 we needed to do by Christmas, and it is possible though I do not know because I do not  
32 know what they are going to say, that four weeks to respond to what might be very detailed  
33 schedules might be tight, so that is why we were suggesting moving it back a week in our  
34 favour for responding given that Albion appear to have done a great deal of the work

1 already – they have had this 29 page document floating around for a long time, they have  
2 had our report for four months. So it was not really comparing three weeks with five  
3 weeks, it is four months and three weeks with five weeks, that was my thinking, simply to  
4 be sure that we would get this all in by Christmas.

5 THE CHAIRMAN: Yes, but what has not happened on their side, as I understand it from the  
6 opening remarks, is that Mr. Thompson has not been involved, and now he is going to get  
7 involved, so he has to get himself up to speed with these points and understand them, and  
8 be able to make sure that they are written in a way that is clear and cause the least difficulty  
9 for the other side to respond, so that it can be dealt with expeditiously.

10 MR. ANDERSON: If the extra week enables Mr. Thompson to cast the submissions in such a  
11 way that it takes us less time to respond to them we will not need five weeks we will only  
12 need four weeks.

13 THE CHAIRMAN: Right, four and four, so that is 20<sup>th</sup> November and 18<sup>th</sup> December, is it?  
14 What Albion and Dŵr Cymru are doing is identifying the points of dispute in the  
15 Authority’s final report by reference to the paragraph in the report and by giving details of  
16 the matters in dispute and why they submit that the Authority – if I say “is wrong”, does  
17 that cover everything and is not too contentious, or would you like some other words?

18 MR. VAJDA: I am not in a position to assist the Tribunal given that my test argument was  
19 rejected, so I am going to stay silent.

20 THE CHAIRMAN: “... and why they submit that the Authority is mistaken” – will that do it?  
21 When are we going to decide this test? I suspect that that is going to be something at this  
22 hearing? Then the Authority is going to respond to the points raised by Albion and Dŵr  
23 Cymru – that is it, really.

24 MR. ANDERSON: Yes.

25 THE CHAIRMAN: Everybody here understands the basis on which all that is hopefully going to  
26 be done. Then we will need some skeleton arguments for the hearing. Is that going to be  
27 done consecutively?

28 MR. THOMPSON: I had originally suggested that we would put something in by 28<sup>th</sup> January  
29 and submissions in response by 12<sup>th</sup>, but it is possible that Mr. Vajda and I should be firing  
30 off together if that the favoured approach, and then give the Authority two weeks to  
31 respond.

32 THE CHAIRMAN: You say 28<sup>th</sup> January?

33 MR. THOMPSON: I suggested that.

34 THE CHAIRMAN: Because they are having regard to the 14<sup>th</sup> January being ----

1 MR. THOMPSON: -- both Christmas and the Court of Appeal.  
2 THE CHAIRMAN: How long is the Court of Appeal set down for?  
3 MR. THOMPSON: Just two days, I think. Then no doubt Mr. Anderson will want some time to  
4 respond which would indicate a hearing in mid-February, I think.  
5 THE CHAIRMAN: Well, at the end of February, actually, 28<sup>th</sup> January, you are then 14<sup>th</sup>  
6 February, so we could not have a hearing before the last week in February.  
7 MR. THOMPSON: I think 12<sup>th</sup> would be two weeks on from 28<sup>th</sup> January. Then a few days  
8 after that – it could be any time after 17<sup>th</sup> February, something like that.  
9 THE CHAIRMAN: I will have to look and see what the days of the week are. Is that all right?  
10 MR. VAJDA: I have rather stupidly come without my diary. I think around that time late  
11 February – I know I have a five day trial on 18<sup>th</sup> February and I think I have something in  
12 the first week of March, but if we are only looking for days.  
13 THE CHAIRMAN: The last week in February is that good or bad in the sense you have  
14 something in the first week of March.  
15 MR. VAJDA: I have potentially got three days in the Court of Appeal in the first week of  
16 March, I am told.  
17 THE CHAIRMAN: What I am thinking is that you are going to have to prepare for that – that is  
18 the other case, is it?  
19 MR. VAJDA: Yes. Well then it is into the second week of March. Would it be possible to liaise  
20 through the ----  
21 THE CHAIRMAN: I prefer to fix a date because we are all here and it is not only your diaries  
22 but also our diaries which are also very complicated.  
23 MR. VAJDA: I am sure.  
24 THE CHAIRMAN: And if we leave it, it becomes even more complicated, so I prefer to fix a  
25 date and if it turns out that there is some really difficult clash ----  
26 MR. VAJDA: So the current timetable, including skeletons, has taken us to the middle of  
27 February.  
28 THE CHAIRMAN: Yes, what we are doing: Albion and Dŵr Cymru skeleton arguments ----  
29 MR. THOMPSON: 28<sup>th</sup> I see is a Monday, it may be that we could push that back to say 25<sup>th</sup>  
30 January and then Mr. Anderson would be, say 8<sup>th</sup> February, and that would then open up  
31 the middle of February.  
32 THE CHAIRMAN: Right, 25<sup>th</sup> January. Authority skeleton argument – and the skeleton  
33 arguments should include at least, the test, the excessive price having regard to whatever  
34 comes out of the schedule, and the abuse question.



1 MR. THOMPSON: Yes.

2 THE CHAIRMAN: I do not know if it will include anything else but it is those three things.

3 MR. THOMPSON: I think it is difficult to predict until the schedules have been written, how  
4 much there will be to say on the skeletons.

5 THE CHAIRMAN: The Authority's skeleton arguments by what date did you say?

6 MR. ANDERSON: 8<sup>th</sup> February.

7 THE CHAIRMAN: 8<sup>th</sup> February.

8 MR. VAJDA: So if we could find a date before 18<sup>th</sup> February.

9 THE CHAIRMAN: Well if the skeleton arguments come in on the 8<sup>th</sup> we could do it, say – what,  
10 before the 14<sup>th</sup> February?

11 MR. VAJDA: From my personal point of view I would like the hearing completed before 18<sup>th</sup>  
12 February.

13 THE CHAIRMAN: So we could do it on the 14<sup>th</sup> and 15<sup>th</sup>?

14 MR. THOMPSON: That seems possible, I am not sure how many diaries everyone has here, but  
15 that seems like a possible way through this.

16 MR. VAJDA: There is a question also as to the length of the hearing and we were thinking a  
17 day.

18 THE CHAIRMAN: I know, all I have done is one day with one day in reserve. If we do not get  
19 it in our diary then we have a problem.

20 MR. VAJDA: Yes, but I think there is also a question of discipline of the advocates, and if one  
21 says a day ----

22 THE CHAIRMAN: Absolutely.

23 MR. VAJDA: Because otherwise with a day in reserve it will become two days.

24 THE CHAIRMAN: No, because we will timetable it in a day nearer the time, all right?

25 MR. VAJDA: Yes, but there is a day in reserve which we will either lose, and say “It is only one  
26 day”, and that depends on what happens because we do not quite know. I have not  
27 forgotten about United Utilities, all right? So the hearing is 14<sup>th</sup> February, with 15<sup>th</sup> in  
28 reserve, so I am not saying 14<sup>th</sup> and 15<sup>th</sup> – at least in our diaries we keep that free in case.  
29 What we do not want to do is get to the end of the 14<sup>th</sup> and then have to fix another day  
30 some time, so if we keep two days in our diary, with 15<sup>th</sup> in reserve. Now, United Utilities,  
31 where do you come into this?

32 MR. RANDOLPH: Madam, as you will have seen from our submissions at the moment, at least,  
33 we certainly not intending today to say anything about the report – it is not our report, it is  
34 not to do with our pricing, so leave the parties to battle it out, You said before the short

1 adjournment, madam, that we do not know what the issues are or what matters are going to  
2 be raised. It might be a fairly slim possibility in my mind at the moment – it might be –  
3 that something comes out of there that we can assist the Tribunal on. I am not expecting  
4 that to be the case, but if one wanted to plan properly for it, it would seem sensible, rather  
5 like the way we suggested that we did the submissions, in other words we come in tail end  
6 Charlie just to wrap up and, as it happened, there were a couple of matters that we needed  
7 to address the Tribunal on.

8 In this fairly tight timetable between 8<sup>th</sup> February, when the Authority will be putting in  
9 their written submissions, and the 14<sup>th</sup> February when the hearing is ----

10 THE CHAIRMAN: Nothing is going to come out of the Authority's submissions, is there?

11 MR. ANDERSON: It is just a skeleton.

12 THE CHAIRMAN: Exactly, nothing is going to come out of that, so you could put them in on  
13 8<sup>th</sup> February.

14 MR. RANDOLPH: Absolutely, I am very grateful.

15 THE CHAIRMAN: Albion skeleton argument, no duplication ----

16 MR. RANDOLPH: United Utilities, madam.

17 THE CHAIRMAN: I am sorry, "UU".

18 MR. RANDOLPH: I am sure Albion would not duplicate in any event... (Laughter) ... but we  
19 definitely will not.

20 THE CHAIRMAN: No duplication of submission brought by other parties.

21 MR. RANDOLPH: I am grateful.

22 THE CHAIRMAN: And that is 8<sup>th</sup> February?

23 MR. RANDOLPH: Yes.

24 THE CHAIRMAN: That leaves the question of any applications for disclosure. I think we have  
25 to leave that but there is plenty of time within that timetable for that to be dealt with.

26 MR. THOMPSON: Certainly, and we have noted the point about possibly being able to raise  
27 matters in writing.

28 THE CHAIRMAN: Absolutely.

29 MR. THOMPSON: And hopefully we can deal with anything by some form of agreement.

30 THE CHAIRMAN: I anticipate it is not envisaged at the moment that there is going to be any  
31 further evidence, any further oral evidence, or anything of that sort?

32 MR. THOMPSON: Oral evidence I think unlikely, but whether or not on either issue ----

33 THE CHAIRMAN: You may have some written documents?

34 MR. THOMPSON: There may be some further evidence to put in, I think that is a possibility.

1 THE CHAIRMAN: But that will be put in with the schedule.

2 MR. THOMPSON: Yes, I think probably any additional evidence would fit into that timetable  
3 without ruling out changes, but I think that would seem perfectly reasonable.

4 THE CHAIRMAN: If there are any applications, then we need earlier rather than later so that it  
5 does not have an effect on 14<sup>th</sup> February?

6 MR. THOMPSON: Certainly.

7 THE CHAIRMAN: Is there anything else?

8 (The Tribunal confer)

9 PROFESSOR PICKERING: Chairman, could I just offer a modest reflection on something that  
10 Mr. Anderson said just now. It is in relation to the length of time that Albion gave notice  
11 of its request for information about the pipeline costs. I am not sure what notice you  
12 should take of what I am going to say but I imagine that one would envisage that a  
13 regulatory authority would recognise setting aside commercial considerations, the  
14 desirability of a significant degree of transparency and I would personally hope that in the  
15 context of appropriate requests for information that a degree of recognition of that as a  
16 good principle for a regulator might be considered.

17 MR. ANDERSON: Absolutely, and the position in this case is that we had been asking from the  
18 outset for the parties to provide to us whatever information they considered relevant to the  
19 question of local costs. We have received very little, and then at the very last minute this  
20 point came in five days before the final report. That is why we said it is too late in that  
21 context to be taken into account on this report, that is the only point, but we take on board  
22 fully what you say, Professor.

23 PROFESSOR PICKERING: Thank you, Mr. Anderson.

24 THE CHAIRMAN: Mr. Anderson, I have not thought this through, but the question is – and I do  
25 not think I am going to ask you to answer it, I am just going to pose it, unless you want to  
26 answer it – whether or not if evidence which is relevant is provided five days before, it is  
27 appropriate to ignore it?

28 MR. ANDERSON: Perhaps I did not make myself clear. This is not evidence that was provided  
29 to us, this was a line of inquiry Albion suggested we should go down.

30 THE CHAIRMAN: Well the same may apply, I do not know. If, as a regulator, you get some  
31 indication that there is (or may be) relevant evidence, then is it right for a regulator to  
32 ignore it? I do not know what the answer to that is and I do not know the circumstances.

33 MR. ANDERSON: I will not answer that in the abstract.

1 THE CHAIRMAN: It is an extension of what Professor Pickering says, and it may need to be  
2 considered.

3 MR. ANDERSON: Indeed, it may be considered but also as a criticism of our report on the  
4 grounds that we failed to take into account something that was relevant.

5 THE CHAIRMAN: And if it is relevant the reason is that it only came in five days ----

6 MR. ANDERSON: We can address it, if it is raised as a criticism, in our response.

7 THE CHAIRMAN: Let us see what happens.

8 MR. ANDERSON: But there comes a point in an investigation, and we are undertaking an  
9 investigation on your behalf within a timetable you have set, there comes a point where we  
10 have to say “Enough is enough, we have five lever arch files, let us present it to the  
11 Tribunal, that is what they have asked us to do, and the Tribunal can make of it what they  
12 will.”

13 THE CHAIRMAN: It may be that we now have to take into account that information.

14 MR. ANDERSON: It may be.

15 MR. THOMPSON: I do not want to spell this out, but I think the point we are making is not that  
16 in the three days that remained it was unreasonable that they did not drop everything else  
17 and do it, but given that the Tribunal is ultimately going to have to decide this ----

18 THE CHAIRMAN: We need to look at that information.

19 MR. THOMPSON: -- this relevant evidence over eight months it should be possible to produce  
20 two or three sheets of paper seeing what the costs were of this pipe, and we cannot for the  
21 life of us see why that is beyond the powers of the Authority and Dŵr Cymru.

22 THE CHAIRMAN: But is there another way of putting it, because as I understand it we have  
23 asked for some information which we are going to take into account in reaching our  
24 decision. If it turns out that it was excluded for whatever reason then that may be further  
25 information that we ought to take into account.

26 MR. THOMPSON: Indeed, I think that is the point I am making.

27 THE CHAIRMAN: Rather than they failed to take it into account and getting into this Judicial  
28 Review situation, the fact is there is the information, should we now take it into account?

29 MR. THOMPSON: Indeed.

30 THE CHAIRMAN: I do not know what the answer is, at least we have cleared the air a little bit  
31 about that. Is there anything else? No, well can I thank everybody for dealing with that in  
32 a very sensible way – I hope – and if not before we will be together on 14<sup>th</sup> February.  
33 Thank you.

34