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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 June 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL

Intervener

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HEARING – DAY 6

APPEARANCES

Mr Daniel Beard QC, Ms Ligia Osepciu and Ms Ciar McAndrew (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Josh Holmes QC, Ms Julianne Kerr Morrison and Mr Nikolaus Grubeck (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Jon Turner QC, Mr Alan Bates and Ms Daisy MacKersie (instructed by Towerhouse LLP) appeared on behalf of the Intervener.

Tuesday, 18 June 2019

(10.28 am)

MS SUSAN WHALLEY (continued)

Cross-examination by MR HOLMES (continued)

THE CHAIRMAN: Mr Holmes, good morning.

MR HOLMES: Good morning.

THE CHAIRMAN: Please carry on.

MR HOLMES: Good morning, welcome back.

Ms Whalley, when we broke yesterday we were in the course of discussing the contemporaneous documents, and I'll resume with them in a moment, but first can I ask you one clarificatory question arising out of the evidence you gave yesterday.

You said yesterday that you tried to find a way to protect the universal service at the same time as not doing anything that would inhibit the progress of another player in the market, because you knew you couldn't do that. You used that formulation or a similar one twice.

When you say that you knew you couldn't do that, do you mean that you knew you were not permitted to engage in conduct to inhibit the progress of another player in the market for the purposes of competition law or that you lacked the practical means of achieving such an outcome?

1 A. (Pause). Royal Mail was very conscious of its
2 obligations, its legal and competition law obligations,
3 and understood that it could not do anything which would
4 foreclose competition in the market.

5 Q. So your evidence is that you knew at the time that it
6 would be contrary to competition law to inhibit the
7 progress of another player in the market; is that right?

8 A. We, the company, considered that it should not and could
9 not do anything which would prevent an efficient
10 competitor from competing in the market.

11 Q. As regards the practical means available to Royal Mail
12 to inhibit a direct delivery entrant's progress in the
13 market, would you accept that Royal Mail had a powerful
14 tool available to it, namely the ability to manipulate
15 the terms on which the entrant purchased access, which
16 was an essential input to its business?

17 A. (Pause). No, that is not how we considered it at the
18 time, and in fact at the time Royal Mail considered that
19 it actually had relatively few degrees of freedom and
20 actions that it could take in order to protect the
21 universal service in a declining market, and with
22 considerably increased competition.

23 Q. The question wasn't about how you saw it at the time,
24 Ms Whalley. The question was about Royal Mail's
25 ability. Based on your knowledge of the market, would

1 you agree that Royal Mail had the ability to inhibit
2 a direct delivery entrant's progress in the market by
3 changing the terms on which the entrant purchased access
4 which was an essential input to its business?

5 A. (Pause). No, Royal Mail considered that it had some
6 flexibility to look at zonal prices, and indeed that was
7 part of the guidance from Ofcom that that was an element
8 of commercial freedom that Royal Mail should assess in
9 considering its commercial responses to the changing
10 market conditions.

11 Q. Well, I'm asking you, based on your knowledge of the
12 market, whether you agree that by charging a higher
13 price to the entrant, Royal Mail could raise the
14 entrant's costs across all of the access services which
15 the entrant still needed to buy in from Royal Mail,
16 thereby deterring its direct delivery roll-out? Do you
17 accept, just based on your understanding of the market,
18 that that was a possibility?

19 A. (Pause). Royal Mail considered that making adjustments
20 to the zonal costs and prices for access would, could
21 have an impact on the prices that players were paying in
22 the market. But at all times Royal Mail took into
23 account very carefully its obligations to make sure that
24 any adjustments to prices were fully cost-reflective,
25 and that was important in order to try and make sure

1 that the impact of cherry-picking delivery
2 competition -- in that context, Royal Mail was still
3 able to provide the universal service in a sustainable
4 way.

5 Q. Let's leave aside zonal prices, Ms Whalley, because
6 Ofcom's decisions on this case don't raise the question
7 of the lawfulness of the zonal tilt adjustment, do they?
8 Think about the price differential for a moment, if you
9 would, and consider whether the ability to adjust prices
10 between the plans gave Royal Mail a powerful tool to
11 discourage a direct delivery entrant by raising its
12 costs of purchasing the essential input of access across
13 all of the mail that it would still need to route via
14 Royal Mail's delivery network. That is a powerful tool,
15 isn't it, based on your understanding of the market?

16 A. I wouldn't describe it as a powerful tool. No.

17 Q. Okay, very good. Well, let's look at the documents. We
18 had got yesterday as far as the pricing strategy board
19 paper of 23 July 2013. Can we now move on to August of
20 2013, and consider a document which is in bundle C4A at
21 tab 17.

22 This is another slide deck prepared for the pricing
23 strategy board on 21 August 2013, and I should probably
24 have asked you this before: you sit on the pricing
25 strategy board; is that correct?

- 1 A. Yes.
- 2 Q. The title of the slide deck is "Letters pricing
3 strategy: Business objectives and initial view of
4 pricing options". So this document should shed light on
5 Royal Mail's true business objectives in bringing
6 forward pricing options; would you agree? Judging from
7 the title.
- 8 A. Yes.
- 9 Q. Turning on to page 1, there are some key questions
10 identified for the meeting. The first question relates
11 to wholesale pricing. That means access pricing,
12 doesn't it?
- 13 A. Yes.
- 14 Q. The question that is posed is: "how should the business
15 focus its attention on Wholesale pricing options to
16 protect the USO and increasing rate card prices as part
17 of the annual Tariff?"
- 18 So the business objective of the wholesale pricing
19 options, which we will come to in a moment, was
20 therefore in part to protect Royal Mail's increasing
21 rate card prices; is that correct?
- 22 A. (Pause). The prime focus of the options was protecting
23 the USO.
- 24 Q. But --
- 25 A. There was an annual tariff process where typically

1 Royal Mail would increase prices as part of that tariff
2 process.

3 Q. But you were looking to protect increasing prices; is
4 that a right reading of that question?

5 A. (Pause). I think the right way to interpret that is
6 that the company was looking at pricing options to
7 protect the universal service, and pricing including
8 rate card prices was one element of that.

9 Q. So in the language of the letter strategy document we
10 looked at yesterday, Royal Mail was looking at how it
11 could capture the value of letters; do you agree?

12 A. Yes.

13 Q. Okay. Turning on to slide 6, three options or
14 propositions are identified to protect the universal
15 service. Can we work through these in reverse order,
16 beginning at the bottom. So the third proposition is:

17 "Other ideas like increasing the price differential
18 between geographical zones and reducing advertising
19 prices by up to 20%."

20 Now, these are the two responses that were
21 identified as competition law compliant in the Oxera
22 paper submitted to Ofcom in October 2012, modelled as
23 a commercial response, aren't they?

24 A. They were discussed by Oxera, yes.

25 Q. But more than that, they were modelled by Oxera as the

1 commercial responses in order to determine whether they
2 would allow you to protect the 5% EBIT margin to which
3 you felt you were entitled; that's correct, isn't it?

4 A. They were part of the Oxera modelling, yes.

5 Q. So on the one hand changing the zonal tilt to reduce
6 prices in urban areas and cutting retail and access
7 prices for a type of product where demand is judged most
8 likely to switch to a direct delivery entrant; that's
9 right, isn't it?

10 A. Sorry, could you say that again?

11 Q. So the two proposals there, the two ideas there, are on
12 the one hand changing the zonal tilt so that prices are
13 lower in urban areas, and cutting retail and access
14 prices for the type of product, advertising mail, where
15 demand is judged most likely to switch to a direct
16 delivery entrant; that's right, isn't it?

17 A. Yes, those were the two options there.

18 Q. Yes. The second column considers whether there is any
19 value to be had from these options. Pausing there, is
20 that a reference to the value that can be captured from
21 letters or some other measure of value?

22 A. (Pause). My recollection, this was the value from
23 letters.

24 Q. You see that the conclusion is that: "These options",
25 the two we've just been discussing, "will continue to be

1 available but they are unlikely to drive value to the
2 same extent as the above options".

3 That's because, as we know from the October 2012
4 Oxera modelling results, this combination doesn't
5 provide sufficient protection to Royal Mail's letter
6 volumes to meet your 5% operating profit target; that's
7 right, isn't it?

8 A. Yes, we considered at the time that these options were
9 not sufficient to protect the universal service to be
10 financially sustainable, in particular because reducing
11 prices, for example advertising, took revenue straight
12 out of the top line of the business, which was already
13 under a £200 to £250 million threat from e-substitution.

14 Q. So cutting prices in response to competition reduced
15 revenues and profits, and for that reason it wasn't
16 pursued?

17 A. Yes, that's correct.

18 Q. The second proposition is a minimum volume pricing
19 commitment in each geographical area; do you see that?

20 "Access operators pay for a minimum volume for each
21 geographical area ... regardless of whether they give
22 Royal Mail this volume to deliver."

23 Do you see that?

24 A. Mm.

25 Q. So access customers would pay something in each SSC,

1 whether or not they used Royal Mail or a direct delivery
2 competitor. Can you speculate on how that would affect
3 a direct delivery entrant's plans to roll out?

4 A. What I can say is that this was an option that was
5 considered at the time. However, based on further
6 consideration and advice, this was an option that we did
7 not think was a feasible option to pursue.

8 Q. But in effect it would achieve the same thing as the
9 price differential, wouldn't it? It would raise the
10 costs of an access operator that rolled out services in
11 competition with Royal Mail, because that access
12 operator would have to pay for volumes that it wasn't in
13 fact using in the SSCs where it rolled out.

14 A. (Pause). Sir, I'm not sure what the question is,
15 please.

16 Q. The question is that this option would deter direct
17 delivery roll-out by raising the costs of an access
18 operator that opened its own direct delivery operations
19 in particular areas, because in those areas there would
20 still be a requirement to purchase volumes from
21 Royal Mail at a particular level; do you agree?

22 A. Yes, and so we considered that that construct was not
23 an option to take forward.

24 Q. Yes. Then the first proposition:

25 "Create a price/financial incentive for committing

1 to a national distribution of mail to all postcodes".

2 That is the price differential, is it not,

3 Ms Whalley?

4 A. Yes.

5 Q. And this would also raise a direct delivery entrant's
6 costs, rendering them less competitive than their access
7 only competitors and deterring them from entering.

8 (Pause). Do you agree?

9 A. (Pause). At the time, the company recognised that any
10 step that it took to try and protect the universal
11 service could potentially have an impact on the costs of
12 another player in the market, because in a declining
13 market there simply -- if you are taking a step to try
14 and protect the activities of one business, in this case
15 the universal service, which was a legal obligation, the
16 company recognised that there could be an impact on
17 other players in the market.

18 The question that we debated long and hard, with
19 significant work and significant advice, was whether any
20 action that we took, that Royal Mail took, whether that
21 action would have an exclusionary impact on another
22 player in the market, and we were all the time focused
23 on trying to find a solution and a response which could
24 protect the universal service but which would not stop
25 a direct delivery player or any other player in the

1 market from competing.

2 Q. But the impact on a direct delivery entrant isn't some
3 collateral effect of the proposition which is described
4 here. You can see from the language used that the
5 intention is to create an incentive for operators to
6 commit to a national distribution of mail; that's to say
7 purchasing mail delivery volumes from Royal Mail across
8 the country. It's a financial incentive to buy from
9 Royal Mail, and therefore a deterrent to self-supply or
10 to purchase from a direct delivery entrant. (Pause).
11 Would you agree with that?

12 A. (Pause). There was significant -- there were benefits
13 to Royal Mail from having a national fall-to-earth of
14 access volumes, remembering that by this time access
15 volumes were approaching 60% of the market. So in order
16 to plan the business, there were benefits to having
17 a national fall-to-earth, and the company believed that
18 companies, other players who chose not to give
19 a national fall-to-earth were benefitting from
20 additional flexibility in the way that they used access
21 services. But there was a benefit from a national
22 fall-to-earth.

23 Q. Turning to the second column, the value to be had from
24 the first proposition and the second is said to depend
25 on whether they can be cost justified:

1 (Proposition needs to be justified to ensure
2 regulatory cooperation)."

3 So these propositions, including the price
4 differential, were being considered before Royal Mail
5 knew whether there was a cost justification that could
6 be offered in relation to them; do you agree?

7 A. I would not agree with that, for the following reason:
8 back during 2012, Royal Mail had discussed the benefits
9 of volume certainty and the potential for a lower price
10 based on that volume certainty. So this was not a new
11 concept. As I said, access volumes by this time were
12 well over 50% of the market, and in order to plan and be
13 as efficient as possible, understanding where the
14 volumes were falling in the operation was extremely
15 valuable to plan that operation.

16 So this was not a new concept. The challenge was to
17 align on a methodology and a modelling that was robust
18 in terms of an objective justification, and that
19 modelling was very complex and took time to do. So
20 I don't accept that the company had come up with this
21 idea, as was indicated here.

22 Q. So if the business was genuinely motivated by cost
23 considerations, would one really see on this slide the
24 language that "the proposition needs to be objectively
25 justified to ensure regulatory cooperation"? Doesn't

1 that suggest that the cost justification is being
2 pursued to deal with the regulatory consequences of
3 an action which has another underlying business purpose?

4 A. (Pause). I'm sorry, that's not how I read this or how
5 it was intended at the time. The company knew that any
6 step that it took to try and protect the universal
7 service in an increasingly competitive market would come
8 under scrutiny, and therefore was so conscious that any
9 proposal that was put forward had to be robust and fully
10 scrutinised, and it's in that context that this was
11 written.

12 Q. I see. The final column, "Prioritisation for
13 April 2014", greenlights the price differential for the
14 January CCNs, doesn't it?

15 A. Yes. We thought that was an option that we could
16 consider for April 2014.

17 Q. And you say that Oxera are looking at this, so Oxera,
18 then, returning to the stage. If we could put aside C4A
19 for a moment and go to OF1, Ofcom defence bundle 1.

20 It's the Oxera proposal of August 22, 2013.

21 MR BEARD: It just happens that's not one of the bundles the
22 witness has, so we're just sorting out a copy of the
23 document.

24 THE CHAIRMAN: Right.

25 Make sure the witness has time to consider it.

1 MR HOLMES: Of course, yes.

2 THE CHAIRMAN: Which tab in the bundle is it?

3 MR HOLMES: It's tab 5, it's an Oxera proposal that was
4 provided to Royal Mail on August 22, 2013.

5 Have you seen this document before, Ms Whalley?

6 A. This document was not in my witness statement or
7 referred to in my witness statement, so I have not --

8 Q. But do you recall it from the time, when you were
9 commissioning Oxera to do this --

10 A. To be honest, I don't recall this specific document.
11 There were very many documents at the time.

12 Q. It's really just for expository purposes for what we are
13 going to come to next. You will see that Royal Mail is
14 considering a number of options to restructure the
15 existing access contracts in order to respond to the
16 threat of direct delivery competition. You see that on
17 page 1?

18 A. Mm.

19 Q. That was your understanding of the work that Royal Mail
20 was indeed undertaking at the time.

21 A. (Pause).

22 Q. Ms Whalley, I will give you time to consider this
23 document if you need to, but the questions I'm asking
24 you are really quite basic and they don't derive from
25 the contents of the document. So by all means take time

1 to review it, can I just try putting the questions to
2 you and see if you feel able to deal with them. They
3 are really referring to quite short passages from the
4 document; would that be satisfactory?

5 A. Okay.

6 Q. Thank you. So the first question I put on page 1, do
7 you see under "Background and introduction":

8 "Royal Mail is considering a number of options to
9 restructure the existing access contracts in order to
10 respond to the threat of direct delivery competition."

11 I think we can agree that that is a fair description
12 of what Royal Mail was considering at the time, can't
13 we?

14 A. Yes.

15 Q. Then turning to page 2, there are a list of options
16 which Royal Mail has commissioned Oxera to consider as
17 part of its work. Do you see that option A is:

18 "Introduce a price discount on NPPI (SSC), without
19 a volume commitment."

20 That is the price differential; is that correct?

21 A. It was the thinking on the price differential at the
22 time, yes.

23 Q. Yes. I would like also just to draw your attention to
24 point E. Another option that was being considered at
25 the time was:

1 "Targeted discounts in just the SSCs where [direct
2 delivery] is emerging."

3 That's correct, isn't it?

4 A. That's what's written here, yes.

5 Q. But do you recall that that option was also under
6 consideration by Royal Mail at the time?

7 A. That was an option that Royal Mail had on the table at
8 this time. However, it was an option that was, from
9 recollection, relatively quickly taken off the table --

10 Q. Yes.

11 A. -- in terms of options that the company and the board
12 decided to progress.

13 Q. Yes. That's all we need from that document.

14 A workshop took place between Royal Mail and Oxera
15 on 27 August 2013; that's right, isn't it?

16 A. I believe so, yes.

17 Q. You attended that meeting, didn't you, Ms Whalley?

18 A. I would have done, yes.

19 Q. Well, you say in your witness statement --

20 A. Yes, I did.

21 Q. -- at paragraph 185 that you did. You don't exhibit any
22 contemporaneous note or minutes of the workshop. Were
23 any notes or minutes made or any presentations given at
24 that workshop? (Pause). Would you like to look at the
25 paragraph of your witness statement? It's 185.

1 (Pause)

2 Would you like me to repeat the question?

3 A. I -- to be honest, I can't recall whether there was
4 a document at this meeting. What I can say is that at
5 this time the company was thinking about a number of
6 different options, and subsequent work was then done on
7 these options.

8 Q. Well, no notes or minutes or presentations have been
9 disclosed to Ofcom at any stage of this process in
10 relation to that meeting, so all we can go on is the
11 output from Oxera which was produced after the meeting
12 and the light that sheds on Royal Mail's intentions.

13 So can we now look at that, and I would like to go
14 to some documents in the cross-examination bundle,
15 please. If you could turn to tab 1, you can see that
16 this is an email from an Oxera person, who I understand
17 I can refer to, Mr Flórez Duncan, sent to various
18 Royal Mail employees on 3 September 2013.

19 Do you recall working with Mr Flórez Duncan during
20 the relevant period in the run-up to the CCNs,
21 Ms Whalley?

22 A. I recall that Mr Duncan was part of the Oxera team.

23 Q. This, you can see from the date, is a week after the
24 pricing workshop we discussed. We can see that Oxera
25 had committed to providing initial thoughts on two of

1 the options under consideration. You see there
2 option A, the price differential, and option E, the
3 targeted discount option in areas where direct delivery
4 was emerging.

5 Do you recall those options from the paper you
6 looked at a moment ago?

7 A. Yes.

8 Q. The first draft of the note on option E is at tab 2.
9 Now, I appreciate that this option was not progressed,
10 Ms Whalley. The reason why I would like to discuss it
11 with you is to see what light it sheds on the purposes
12 underlying the options that were under consideration.

13 Now, I will take you to particular passages. If you
14 need longer to familiarise with the document, that's
15 understood. But let me first show you particular
16 passages and ask you to comment on them.

17 You see from the first paragraph, the description of
18 the option again, "Targeted access price discounts and
19 selected SSCs where direct delivery entry is emerging".

20 Turning forward to page 3, there is another feature
21 of the option which is also described in the first
22 complete bullet at the top of the page:

23 "Furthermore, it is understood that Royal Mail may
24 be considering introducing these discounts on a time
25 limited basis, for example to respond to the threat of

1 direct delivery, then once the threat has been averted
2 prices will be raised back to previous levels."

3 Do you recall that feature of the proposal that
4 Royal Mail was considering at that point?

5 A. (Pause). What I remember about this option, sir, is
6 that at the time the company was brainstorming and
7 thinking through a number of different options. This
8 option E was put on the table and discussed but, as
9 I have, I think, said, this option was considered not to
10 be a viable option and therefore taken off the table.

11 Q. You didn't answer my question, Ms Whalley. My question
12 was: do you recall that at the time the thinking was
13 possibly to introduce the discounts on a time limited
14 basis and to re-introduce them after the threat from
15 direct delivery had been averted?

16 A. I don't remember all of the discussions around the
17 different options that were --

18 Q. That is again not an answer to my question, Ms Whalley.
19 My question was a specific question about your
20 recollection of this particular feature. I'm not asking
21 whether you recall all of the discussions around this
22 option. I'm asking you if you recall this particular
23 feature?

24 A. (Pause). If it --

25 Q. This is a question of recollection, Ms Whalley --

1 A. I'm just --

2 Q. -- it's not a question of reflection.

3 A. No, but I -- at the time there were many different
4 options that were being discussed and that were on the
5 table --

6 Q. That is again avoiding my question, Ms Whalley, but we
7 can move on if you are not prepared to answer it.

8 What do you think might be meant by "the risk of the
9 threat of direct delivery being averted" in that
10 passage? What would constitute averting the risk of the
11 threat of direct delivery in a particular SSC?

12 A. This paper was not written by me or by anyone at
13 Royal Mail.

14 Q. And you are not prepared to speculate?

15 MR BEARD: Sorry, I think it's not appropriate to ask
16 a witness to speculate, and I don't think that's
17 a proper question.

18 MR HOLMES: Very well, I'm happy to move on, sir.

19 THE CHAIRMAN: I think we will draw --

20 MR HOLMES: Your own conclusion.

21 THE CHAIRMAN: -- whatever conclusions are appropriate.

22 MR HOLMES: Yes.

23 If you would look at the middle of page 2, you can
24 see that despite a high level positive view from Oxera,
25 they also highlighted certain competition or regulatory

1 risks, and they say at the first bullet:

2 "The way in which the selected SSC areas are chosen
3 can have a material impact on the riskiness of the
4 practice from a competition law perspective. The
5 highest risk approach in this regard would be to select
6 SSCs based solely on public announcements or known
7 roll-out plans by TNT and/or only in response to actual
8 entry by direct delivery competitors. If this were the
9 case, it could lead to the portrayal of the entire
10 pricing scheme as part of a plan to eliminate
11 a potential rival from the downstream delivery market."

12 But at the next bullet they say that:

13 "The ideal scenario would be to target price
14 reductions on SSCs which are known or could be argued to
15 have lower than average costs, thereby introducing
16 a cost base justification which would make the scheme
17 even more defensible in the event of an investigation.
18 Absent concrete evidence from a fully cost based
19 justification, in order to minimise the risk identified
20 above, the selection of SSCs could be based on objective
21 criteria which could be hypothesised to have an impact
22 on cost eg, number of delivery points, volume of mail,
23 stem lengths between delivery points, and delivery
24 offices). It would be expected that the SSCs that are
25 most at risk to competition would be captured by such

1 objective criteria, although it is recognised that such
2 mapping will not be perfect."

3 So the cost justification that is being proposed by
4 Oxera in relation to this proposal was an ex post
5 justification which was thought to be likely still to
6 capture the SSCs that are most at risk of competition.
7 Do you see that?

8 A. (Pause). As I said before, this was an option that the
9 company did not progress --

10 Q. Again, that wasn't the question. In this case, do you
11 accept that the cost justification that is being
12 suggested here is not the real commercial rationale,
13 which is in fact to target the SSCs most at risk of
14 competition? In this case, not the option that was
15 pursued, but in this case, the cost justification was
16 an ex post justification.

17 A. (Pause). As I said, this was not an option that we
18 progressed at the time.

19 Q. Well, that is not an answer to my question. Over the
20 page, you see that there are initial thoughts on
21 commercial considerations to assist in the design and
22 modelling of option E, and you will see that the
23 incentives and financial impact on a DD operator are
24 modelled to see whether they might lead to a "no entry"
25 scenario or an "entry" scenario by the direct delivery

1 operator.

2 And moreover, you will see that under the "no entry"
3 scenario:

4 "Under the discounting regime for areas where TNT
5 would consider entry, a lower access price offers a low
6 risk alternative to setting up own operations. Hence
7 TNT could recognise that there are commercial and
8 operational benefits to remaining with Royal Mail while
9 no further action on TNT's own behalf is required."

10 Then in the paragraph beginning "Furthermore" you
11 see:

12 "If the discounts are also offered in the areas
13 where TNT already has DD presence, it is possible that
14 these assets could be scaled down/withdrawn to take full
15 advantage of the lower access price. Whether this
16 represents a credible and profitable strategy for TNT
17 would crucially depend on the level of the discount."

18 Do you see that?

19 A. I see that.

20 Q. Why do you think Oxera is considering, for the benefit
21 of Royal Mail, the incentives and financial impact on
22 a DD operator and whether the DD operator would proceed
23 with entry or would pursue a "no entry" scenario?

24 A. One of the lenses that the company was looking at all of
25 these options at the time was the extent to which any

1 action that was taken by the company would have
2 an impact to prevent a direct delivery player from
3 progressing in the market.

4 Q. And why was that?

5 A. Maybe this is a question -- I mean, this is Oxera
6 advice.

7 Q. It is.

8 A. This is not a Royal Mail document.

9 Q. But I'm using it to ask, really, about your underlying
10 intentions.

11 MR BEARD: Just to be clear, the question was "Why do you
12 think Oxera is considering?" Dr Jenkins is going to be
13 available for questioning about what Oxera was thinking.

14 MR HOLMES: Well, we can certainly raise this with
15 Dr Jenkins.

16 THE CHAIRMAN: I have a feeling, Mr Holmes, this is not
17 really progressing very far.

18 MR HOLMES: Well, there is one more point to put in relation
19 to this document, sir, which is an important one because
20 it does relate directly to Royal Mail's objectives.

21 THE CHAIRMAN: But I don't think you are going to get
22 Ms Whalley's opinion on what Oxera were advising.

23 MR HOLMES: I am happy to let that question lie.

24 THE CHAIRMAN: It might be a good idea to ask Oxera in due
25 course.

1 MR HOLMES: Indeed.

2 If we could turn to page 4, "Financial impact on
3 Royal Mail". The first sentence states:

4 "From Royal Mail's perspective, a selective,
5 SSC-level discount could be a relatively expensive way
6 to deter entry ..."

7 Then it explains why.

8 Then in the following paragraph:

9 "The exact value of the discount could be set
10 between 0% and the level required to ensure that prices
11 still cover long run average incremental costs ... so as
12 to satisfy two main objectives."

13 First bullet:

14 "Maximising the probability of TNT not rolling out
15 or even scaling back its current DD operations, and
16 minimising the commercial impacts to Royal Mail suffered
17 across the discounted and non-discounted regions."

18 So I put it to you, Ms Whalley, that the intention
19 underlying this proposal from Royal Mail was to maximise
20 the probability of TNT not rolling out or even scaling
21 back its current DD operations and to deter entry.

22 A. I disagree with that.

23 Q. So you think Oxera simply misunderstood your commercial
24 intentions?

25 A. As I said, this is an Oxera document. Royal Mail did

1 not write this document. Royal Mail was very clear all
2 the way through this that it needed to try and take some
3 action to protect the universal service but any action
4 that it took should not prevent another player in the
5 market, who was efficient, from being able to progress
6 its activities. That was the thinking in the company
7 and the focus of the discussions at the time.

8 Q. So would you expect, then, Royal Mail personnel, when
9 they received this document, to correct Oxera's
10 misapprehension about the intentions that were being
11 perceived?

12 A. (Pause). At the time there were many documents, there
13 were many discussions, and this document -- this option
14 was ... as I've said before, it was relatively quickly
15 considered not to be a viable option.

16 Q. I see. Well, let's see how Royal Mail did respond to
17 the email, to this note when it landed. The response is
18 at tab 3 of the cross-examination bundle, or one of the
19 responses. If you could turn to the second page in the
20 chain, you see that this is an email -- you see at the
21 bottom of page 1, in fact -- from a Royal Mail employee,
22 I'll call her Ms X, sent at 18.04. Do you see that? In
23 the second paragraph, Ms X notes that:

24 "From a legal perspective, the Oxera notes would not
25 be legally privileged."

1 Now, the implication of that is that the notes would
2 be disclosable, isn't it, Ms Whalley?

3 A. Sorry, which part of the document are you referring to?

4 Q. Do you see there is an email beginning "Hi Felipe", an
5 email to Mr Flórez Duncan?

6 A. Is this tab 3?

7 Q. It's tab 3. Do you see an email chain at tab 3 of your
8 cross-examination bundle, and do you see there is a --
9 at the foot of page 1, you begin an email there -- do
10 you see?

11 A. Mm.

12 Q. -- from Ms X to Felipe Flórez Duncan, responding to him
13 having received the note. I was drawing your attention
14 to the second paragraph of that email:

15 "From a legal perspective, as the Oxera notes would
16 not be legally privileged", and then she continues to
17 make some points.

18 So first of all "would not be legally privileged",
19 do you agree that the implication of that is that the
20 notes would be disclosable?

21 A. I believe so.

22 Q. Yes. Because they are not legally privileged, and
23 therefore disclosable, Oxera is asked to amend the note
24 in two ways:

25 "Please soften the wording throughout to make it

1 clear that we're trying to ensure that DD operators pay
2 an appropriate price for accessing the network and also
3 achieve pricing which is compliant with competition
4 law."

5 Then on the time limit point, then -- the second
6 bullet:

7 "I understand (from [redacted]) that we have not
8 definitely decided to make option E's pricing 'time
9 limited' so please amend any reference accordingly."

10 Then thirdly:

11 "On the time limited pricing point, please remove
12 the reference to 'responding to the threat of DD and
13 then putting prices back up'."

14 Now, these requests aren't made on the basis that
15 Oxera has misunderstood Royal Mail's objective, were
16 they?

17 A. I've not seen this email exchange, I was not copied in
18 to this email exchange --

19 Q. Well, you are the only Royal Mail witness that I can ask
20 these questions to.

21 A. -- and I'm not, therefore, aware of all of the
22 discussions that took place at the team level between
23 Oxera and Royal Mail.

24 Q. Well, let me put it like this: were you aware that
25 documents were being amended with a view to the risk of

1 their disclosability in subsequent competition
2 proceedings?

3 A. (Pause). I was not aware of this email exchange --

4 Q. That wasn't the question I asked you.

5 A. -- that's all I can say.

6 Q. That was not the question I asked you, Ms Whalley. Were
7 you aware of documents being amended because of their
8 disclosability in subsequent competition proceedings?

9 A. (Pause). What I remember was that there were, as the
10 thinking progressed, there were a number of documents
11 that were being discussed and, as advice was received,
12 the thinking in the documents was updated.

13 Q. That again is not an answer to the question I asked.

14 A. I do remember that, but I don't -- I don't -- I haven't
15 seen this email, I don't have any knowledge of documents
16 being updated.

17 Q. Yes. I understand.

18 The first email in the chain shows Mr Duncan's
19 response. So by then he has spoken to another
20 Royal Mail employee, let's call her Y. Do you see that
21 from the first line, Ms Y? And that he intends to
22 circulate an updated note in the light of their
23 telephone discussion. He acknowledges that the time
24 limited point could cause problems and suggests deleting
25 it, and he then suggests that he will "reflect on the

1 first point about softening language" but expresses
2 "concern that Oxera has sought to provide an independent
3 and objective view on whether the pricing option as
4 presented to us can pose competition law problems from
5 an economics perspective."

6 So Oxera's position is: we're trying to advise you
7 on the implications of the proposal you have provided to
8 us, and the request to "soften the advice because it's
9 disclosable" risks watering down its substance; do you
10 see that?

11 A. Yes.

12 Q. Then an updated version of the note is provided at
13 tab 5, and you will see that, at the top of page 3, the
14 reference to "time limited discounts that apply only
15 until direct delivery threat was averted" has now been
16 deleted, and the text under "The financial impact on
17 Royal Mail" at the bottom of page 3 has changed such
18 that the first set of bullets expand on the way that the
19 proposed discount would impact on revenue, but the
20 comments about the cost of deterring entry and the
21 objective of maximising the probability of Whistl not
22 rolling out or even scaling back its roll-out are still
23 in the note.

24 So it appears from this that, after speaking with
25 Royal Mail about the note, Oxera's understanding was

1 still that the intention was to deter Whistl from
2 entering the market.

3 A. (Pause). Sorry, which bit in the note are you referring
4 to?

5 Q. If you look at the top of page 3, the reference to
6 "recoupment", to "raising prices after the risk of the
7 threat of direct delivery has been averted" has gone
8 from this document now.

9 Equally, at the bottom of the page, under "Financial
10 impact on Royal Mail", you have an expanded discussion
11 of the impact on revenue, but there is still a reference
12 made to this being a relatively expensive way to deter
13 entry. Over the page, you still see a reference to
14 maximising the probability of TNT not rolling out or
15 even scaling back its current DD operations.

16 So the conversation that has been had with Ms Y has
17 not led Mr Flórez Duncan to believe that the intentions
18 stated here are inaccurate or require to be amended; do
19 you see that?

20 A. Mm.

21 Q. So I put it to you again: this was the intention that
22 Royal Mail was pursuing by means of this option,
23 maximising the probability of TNT not rolling out or
24 even scaling back its current DD operations; that was
25 what Royal Mail wanted to achieve commercially,

- 1 otherwise it would have been corrected.
- 2 A. One of the reasons why this option was rejected was
3 because the company considered that it would have
4 an impact potentially on Whistl, TNT, that could not be
5 supported.
- 6 Q. Was that the intention of the proposal when first
7 formulated?
- 8 A. As I said, there were a number of different options that
9 were being considered --
- 10 Q. This is not an answer to my question.
- 11 A. I understand it's not an answer to your question.
- 12 Q. Is the answer that you don't know what the intention
13 that Royal Mail was pursuing by this option was?
- 14 A. There were a number of different options, and one of the
15 questions that we asked Oxera and we asked Oxera for
16 advice on for each of the options was what would be the
17 impact, and maybe this is, you know, this is an Oxera
18 document, it's not a Royal Mail document, and we asked
19 Oxera to give advice on the different options and the
20 potential impact of the different options.
- 21 Q. At tab 6, Royal Mail again seeks to amend the document,
22 and you see that from the email at the foot of the page
23 from Ms X. She states:
- 24 "Hi Felipe, on the basis this paper won't be
25 privileged, please remove, or I can do so, the following

1 text in the 'Objectives' section: 'Maximising the
2 probability of TNT not rolling out or even scaling back
3 its current DD operations'. We can talk about it
4 tomorrow, but it should not be included in any document
5 which can be disclosed in the event of
6 an investigation."

7 Do you see that?

8 A. I do. Again, this is not an email that I have seen,
9 I was not copied in to this email.

10 Q. So you weren't aware that Royal Mail was trying to
11 clothe particular aspects of the fact position with
12 privilege?

13 A. I was not aware of this email exchange, no.

14 Q. I see.

15 A. I can't comment on it.

16 Q. Very good. Just to complete the story, you see at tab 7
17 the amended note that was then prepared by
18 Mr Flórez Duncan, and at page 4 it removes the
19 problematic passage in order to produce a disclosable
20 document that did not reflect that intention.

21 Can we turn now to the price differential. That had
22 the same goal as this option A that was canvassed
23 alongside it in September, namely to deter entry by
24 Whistl, didn't it, Ms Whalley?

25 A. So which option are we now back on?

- 1 Q. We are now on price differential.
- 2 A. The price differential.
- 3 Q. The price differential also had the intention to deter
4 entry by Whistl?
- 5 THE CHAIRMAN: The same as option E, not the same as
6 option A.
- 7 MR HOLMES: Yes. Exactly, sir, I'm grateful.
- 8 A. (Pause). Sorry, could you repeat the question?
- 9 Q. The question, of course. Of course.
- 10 The price differential had the goal of deterring
11 entry, didn't it, Ms Whalley?
- 12 A. (Pause). I disagree with that statement. The focus --
13 as I think I said, Royal Mail recognised that anything,
14 any steps that were taken under the commercial freedom
15 could have an impact on the costs for another player.
16 We recognised that, but we also recognised that the
17 market was becoming more competitive, there was another
18 player with plans to expand, and there were -- any steps
19 that we took had to be consistent with our legal and
20 regulatory obligations. So --
- 21 Q. So the answer is no?
- 22 A. -- I don't accept that we were trying to --
- 23 Q. Deter entry.
- 24 A. -- deter entry.
- 25 Q. By Whistl?

1 A. I don't accept that.

2 Q. No, good, well, we can now turn to see what the
3 documents say.

4 At tab 9, you will see an email exchange, Royal Mail
5 writing to Mr Flórez Duncan and another Oxera person at
6 the bottom of page 1, and explaining that they're
7 "preparing a presentation for senior Royal Mail Group
8 colleagues on the access pricing proposals on which you
9 had advised."

10 Then:

11 "The first slide in the attached [PowerPoint] is
12 intended to go into the main (ultimately non-privileged)
13 part of the presentation and the remaining three will
14 form part of a privileged annex that will contain
15 a legal assessment and the supporting economic advice."

16 There is also a reference to:

17 "... a scanned copy of [in inverted quotes] 'Slide
18 8' which explains the scenarios being considered, but
19 please note the impact numbers will change once [another
20 person at Royal Mail] has done some more work on them."

21 So two things sent across.

22 First of all, the slide deck in question being
23 broken into a non-privileged and a privileged annex, or
24 an ultimately non-privileged part, was it a common
25 practice at Royal Mail to produce slide presentations

1 that consisted of a part that was intended to be
2 ultimately non-privileged, in your experience?

3 A. To be honest, I really can't remember.

4 Q. You can't remember if --

5 A. I can't remember that.

6 Q. -- Royal Mail --

7 A. I can't remember.

8 Q. -- prepared some slides with a view to them being
9 ultimately non-privileged? Very well.

10 If we turn on to tab 10, you find the slide
11 presentation in question. You see the first page,
12 although it's said to be mainly -- to go into the main
13 ultimately non-privileged part has nonetheless been
14 heavily redacted for privilege.

15 Just looking at the heading, "Ofcom expects
16 Royal Mail to use commercial levers to protect the USO
17 but we must be mindful of the regulatory conditions and
18 competition law". That's a sentiment that you would be
19 very happy to see disclosed in any regulatory and
20 competition law proceedings, isn't it, Ms Whalley?

21 A. Yes, that's how I remember it at the time.

22 Q. Yes.

23 THE CHAIRMAN: Are we reaching a suitable point to pause?

24 MR HOLMES: Yes, let's pause now, sir, and we can continue
25 after the break.

1 THE CHAIRMAN: Ten minutes.

2 (11.42 am)

3 (A short break)

4 (11.52 am)

5 MR HOLMES: Ms Whalley, we were considering the slide
6 presentation at tab 10 of the cross-examination bundle.
7 Could you turn now to page 2, which is part of the
8 presentation that was intended to be clothed in legal
9 privilege. You will see parts have indeed been redacted
10 for privilege, but the economic assessment remains
11 visible in the third column. Do you see that?

12 A. Mm.

13 Q. Action 2, in the list of individual actions, is "up to
14 0.3 pence price diff between NPP1 and NPP2". That is
15 the price differential, isn't it?

16 A. Yes.

17 Q. NPP2 was the name at the time for APP2; is that right?

18 A. Yes.

19 Q. And the economic assessment which is quoted, although
20 it's still provisional, is:

21 "Justification based primarily on value dependent on
22 surcharges which are within Royal Mail control. Ofcom
23 may not view this as sufficient objective justification.
24 The impact on the upstream market may be significant."

25 So the objective justification at this point had

1 shifted towards value to customers and away from costs;
2 is that right?

3 A. My recollection at the time was that the discussions
4 were on both a value justification and a cost
5 justification, where the value justification was the
6 value to customers on APP2 from the increased
7 flexibility that they had under the APP2 contract to
8 give to Royal Mail for onward posting a less specific
9 profile of mail, because under APP2 they were able to
10 provide mail categorised in four zones, which gave
11 additional flexibility to those customers compared with
12 the NPP1 customers who had to provide the profile on the
13 83 SSCs.

14 So at the time, and this I think was back in
15 September, early October, the discussion as I remember
16 was on both considering the value justification as well
17 as the cost justification which was the benefit to
18 Royal Mail from the advance forecast information to
19 enable better planning of the operation. So both
20 elements were in discussion.

21 Q. In the case of Whistl, by far the largest APP2 customer,
22 representing the lion's share of all APP2 volumes, what
23 is the increased flexibility that Whistl will enjoy?

24 A. (Pause). So for any customer on APP2, Whistl included,
25 there was greater flexibility to meet the criteria for

1 mail in the four zones which gave those customers
2 greater flexibility around the posting profile of their
3 mail.

4 Q. So it was the flexibility of not having to observe
5 a national profile and therefore of being able to
6 compete with Royal Mail without incurring prohibitive
7 surcharges; that's the case, isn't it?

8 A. That was one of the characteristics of APP2, yes.

9 Q. Now, although you say both were in play, we saw that the
10 early slides, presentations yesterday, referred to
11 a cost justification, didn't they? They said that it
12 was difficult. Do you recall that?

13 A. Yes.

14 Q. Now the justification is based primarily on value; do
15 you see that?

16 A. (Pause). That is what is written in this document but,
17 as I just said, my recollection at the time -- and
18 I haven't seen this, this is not in my witness bundle,
19 I have the document that was presented in
20 October 2013 -- but my recollection was that the
21 discussion was focused on both the value differential as
22 well as the cost -- sorry, the value justification and
23 the cost justification.

24 Q. But you just --

25 A. And there was ongoing work on the cost justification.

1 Q. And ultimately, in the paper to the disclosure board in
2 January, I think it was 6 January, it was the
3 differential, the amount of the differential was
4 justified by reference to the cost calculations, wasn't
5 it? Do you recall that?

6 A. Yes, in the disclosure committee papers there was
7 justification for the cost differential, and then in the
8 subsequent paper there was also a discussion on the
9 value differential, the value justification.

10 Q. They were both referred to there.

11 A. Yes.

12 Q. But the valuation was done by reference to cost; that's
13 right, isn't it? That was the ... solely based on ...
14 perhaps we should go to it.

15 A. The most quantified view was based on the cost.

16 Q. If you could just take C4B/79. So it's bundle C4B.
17 Sorry for all the files, Ms Whalley. This case has
18 killed a lot of trees.

19 A. There are a lot of trees, indeed.

20 Q. Do you see tab 79 in C4B?

21 The point I was making is simply what one sees at
22 2.10:

23 "The justification of the price differential is
24 solely based on the calculations of the cost
25 differential between the two scenarios, not the value to

1 customers of the additional flexibility."

2 That was where you ultimately pinned your colours;
3 is that right?

4 A. (Pause). Yes.

5 Q. And --

6 A. Because it was on the cost justification that was most
7 quantifiable.

8 Q. Doesn't this equivocation between different
9 justifications which one sees running through the
10 documents and also which surfaced during the course of
11 your evidence yesterday confirm that these are ex post
12 considerations, they are advanced in order to get
13 regulatory compliance and not because they are the true
14 reason for Royal Mail's actions?

15 A. (Pause). That's not how I would characterise it. As
16 I think I've said, we were extremely conscious that any
17 proposal that was put forward under commercial freedom
18 would come under significant regulatory scrutiny, and
19 that therefore any proposal needed to have sound
20 justification for those proposals. So -- and in the
21 case of the cost justification, what I remember at the
22 time, this was a very serious and important factor for
23 Royal Mail, if volumes were going to come out of the
24 business at the rate of 15% to 20% market share loss at
25 the local level, having the advanced information of that

1 volume loss was critical to enable the company to plan
2 for those volume declines at the local level. So it was
3 not a theoretical construct; it was a critical factor in
4 Royal Mail in the face of declining volumes to at least
5 be able to plan the operation to take out cost as best
6 it could when those volume declines inevitably took
7 place.

8 Q. The problem with the cost justification, Ms Whalley,
9 I want to put to you, is the one that you set out in
10 an email at tab 12 of the cross-examination bundle.
11 This is a long and involved email chain in relation to
12 cost justification. You see on page 3 there is an email
13 from Mr Flórez Duncan in which he says -- he refers to
14 "some documents circulated by a Royal Mail employee
15 which are notes of meetings with ops". What are ops?

16 A. Operations.

17 Q. It's a department of Royal Mail; is that right? Or
18 a division of Royal Mail?

19 A. It's the teams within Royal Mail that run and manage the
20 network, everything from mail centres to delivery
21 offices. That's operations.

22 Q. He continues:

23 "Please find below our views and comments on how
24 this can be used to provide a robust cost justification
25 for a price differential between NPP1 and NPP2/PP3.

1 "In summary, we consider that there is a lot of
2 useful information contained in these documents which
3 point directionally towards there being a cost
4 justification for why NPP1 is less costly and more
5 valuable for Royal Mail than NPP2 or PP3. All of this
6 will be helpful in order to prepare an argument that
7 a price differential is objectively justified.

8 "However, we also consider that in order to be able
9 to provide a robust justification to a competition law
10 standard, further work and evidence would be required.
11 There are two aspects that we would highlight in this
12 regard. Below we explain these two points and provide
13 some ideas on how to overcome them.

14 "1) The 'value' for Royal Mail resides in getting
15 advance knowledge of volume profiles, but these profiles
16 do not necessarily have to be in accordance with NPP1
17 [that's the national profile]. A common theme across
18 both documents coming out of the detailed discussions
19 with Ops, is that Royal Mail derives considerably more
20 value from the receipt of timely information on the
21 volume profile of access customers (whatever this
22 profile is), [ie whether national or zonal], rather than
23 from any intrinsic benefit from an Ops perspective that
24 a national profile by SSC ... has over other profiles
25 that are possible under NPP2/PP3. In other words, if

1 Royal Mail customers on NPP2 or PP3 were able to commit
2 to post mail according to pre-specified profile of mail
3 and shared this information with Royal Mail one to
4 two years in advance, the value for Royal Mail from a
5 planning perspective would be very large. For a very
6 large customer, such as TNT, the value of this
7 information could be the same, if not greater, than the
8 value coming from the implicit commitment made by most
9 customers on NPP1."

10 Then looking at your response to his email, you
11 raise a couple of questions. Do you see that email at
12 the foot of page 2?

13 A. Mm.

14 Q. "Given the value of potential cost justification seemed
15 to be from the certainty of the volume and profile,
16 could it be argued that if that info could be provided
17 under PP2 and 3 that would also qualify for a discount,
18 ie there is a base price for a plan and then a discount
19 if the customer can provide a forward view of volume."

20 Do you see that?

21 A. Mm.

22 Q. That's the problem with the cost justification, isn't
23 it, Ms Whalley?

24 A. (Pause). Perhaps I could take a minute to explain the
25 level at which planning information and volume

1 information is helpful to Royal Mail. If there is
2 information -- and then I will answer your question.

3 Q. Yes, of course. Yes.

4 A. If there is information at a zonal level, urban
5 for example, urban can include Leeds, Manchester,
6 Liverpool, other urban areas. Information at that level
7 is not helpful to plan an operation which is local. At
8 an SSC level, of which there are 83, each SSC is on
9 average between 15 and 20 delivery offices, which are
10 operational in a local area. And the availability of
11 that information at a local level could practically be
12 used by the delivery office managers and the local
13 managers to make structural changes to the delivery
14 routes, the level of resource at the local level in
15 order to be able to manage the volume declines and try
16 and ensure that the resources in the operation were as
17 closely aligned as possible to the volumes and the
18 workload, which was important for efficiency.

19 The issue with APP2 -- and we had many, many,
20 I recall many, many discussions around this point -- the
21 issue with APP2 is that customers and, whilst
22 I recognise that TNT/Whistl was the major customer under
23 APP2, it was not the only customer under APP2. And
24 those customers did not plan their business using SSCs;
25 they planned it on the basis of 11,000 postcode areas

1 which then came into the zones, and therefore we
2 considered at the time that it was not practical for
3 APP2 customers to provide that level of forecast at the
4 SSC level.

5 The company, in all those discussions, did actually
6 think that if these proposals went to a complaint and
7 Ofcom reviewed that complaint and made a decision around
8 that complaint, the company at the time and part of the
9 discussion was wondering whether actually Ofcom might
10 ask Royal Mail to take the APP2 contracts and
11 restructure them based on SSCs rather than zones.

12 In the meantime, in our consideration, the
13 consideration at the time, Royal Mail was aware that
14 TNT/Whistl would probably have that information. We
15 questioned whether Whistl might want to provide that
16 information, but we considered it was possible for
17 Whistl to move from APP2 to NPP1 and to be in a position
18 to provide that information.

19 So that was the discussion that I recall at the time
20 around the forecasting and volumes and the cost
21 justification for the price differential.

22 Q. Well, can we see what Mr Felipe Flórez Duncan says at
23 the top of page 4, because I think it directly addresses
24 the answer you have just given. Do you see the fifth
25 line from the top? He says:

1 "What is less helpful is that the justification
2 provided means that customers who are on NPP1 but are
3 not able to meet the criteria and tolerances of this
4 price plan, should still be able to receive a discount
5 if they are able and willing to tell Royal Mail with
6 sufficient advance notice and a sufficiently high level
7 of precision (eg, which SSCs, when) that they are
8 unlikely to meet the criteria of PPI but are willing to
9 commit to another profile."

10 So I think that although it's slightly involved,
11 what Mr Duncan is saying is that you could offer the
12 option to Whistl to provide this information which, on
13 your case, would unlock cost savings and benefits in
14 exchange for more favourable pricing; but instead you
15 chose to tie the price differential exclusively to
16 a national profile which Whistl could only remain upon,
17 given the criteria and tolerances, without incurring
18 prohibitive surcharges, if it did not pursue its direct
19 delivery roll-out ambitions.

20 So, first of all, doesn't that cast doubt on the
21 veracity of your objective justification based on costs?
22 If you were really interested in cost savings, surely it
23 would have been in your interest to do as
24 Mr Flórez Duncan is here suggesting to you?

25 A. What I can say about that, from the internal discussions

1 at the time, Royal Mail did not have bespoke access
2 contracts. There were a significant number of access
3 players in the market. The simplest structure from
4 Royal Mail's point of view would have been to have had
5 one access contract. However, Royal Mail recognised
6 that different customers had different needs, different
7 posting needs. In some cases they had their own
8 customers. And the evolution of the access contracts
9 had been to establish a small number, three, access
10 contracts which could meet the needs of different access
11 customers. It simply was not practical to have had
12 bespoke contracts for --

13 Q. You wouldn't have needed bespoke contracts though, would
14 you Ms Whalley?

15 A. With all -- well, if I may say, had -- Whistl/TNT was on
16 an APP2 contract, and part of the discussion at the time
17 was if there was, in effect, a bespoke contract for
18 Whistl, who might be able to provide the volume
19 information but was not on an NPP1 contract, then there
20 would have been an impact on other players on APP2.

21 As I said before, we did consider that it was
22 possible that Ofcom, if there were a complaint, would
23 look at whether Royal Mail should develop APP2 as
24 a contract with volume forecasting. We did consider
25 that.

1 Q. But you wouldn't need a bespoke contract, you just have
2 a condition under APP2 which allows parties to supply
3 this valuable forecast information, if they are able to
4 do so, in exchange for the favourable pricing. No other
5 APP2 customer would be adversely affected, and there is
6 no need to have a bespoke contract just for Whistl.

7 That's what Mr Flórez Duncan is suggesting.

8 A. So at the time we considered that, on APP2, as I said,
9 no other customer would be able to provide that level
10 and reliability of information --

11 Q. When you say no other customer, you mean other than
12 Whistl?

13 A. Other than potentially Whistl.

14 Q. Yes, I see.

15 A. And we considered that Whistl could move to NPP1 and
16 gain --

17 Q. Well, we will see what you thought would happen on NPP1
18 if it moved.

19 Can we turn now to tab 11, please, Ms Whalley.

20 So this is a hard copy slide which was attached to
21 the email I showed you earlier, attaching also the slide
22 deck with the ultimately non-privileged first page.

23 You will see it appears to form part of some other
24 separate slide deck. As well as being in scanned form
25 it's got a different Royal Mail logo on it from the

1 slide deck at slide 10, it is in a different font and
2 has a different footer.

3 Now, we haven't seen the wider slide deck from which
4 it's drawn. Can you shed any light?

5 A. So the wider slide deck -- I have never seen this
6 version of this slide. The wider slide deck from which
7 this page was drawn is a document, I believe it's at
8 tab 69 of my witness statement --

9 Q. But that is prepared some time after -- this was
10 attached to an email of 10 October 2013.

11 A. But what I'm saying is I have not seen this --

12 Q. I see. So you cannot shed any light on --

13 A. -- so I cannot shed any light.

14 Q. I see. You will see someone has --

15 A. What I can shed light on is the --

16 Q. I am going to take you to that slide, Ms Whalley. I'm
17 conscious of the time, so if we could -- when we come to
18 that slide, you can make any points you want to about
19 it.

20 THE CHAIRMAN: The difference, Mr Holmes, is that this slide
21 at tab 12 has writing on it.

22 MR HOLMES: Yes.

23 THE CHAIRMAN: Is that the point? Yes.

24 MR HOLMES: Well, certainly one of the points is that it has
25 handwritten comments on it, and I was going to ask

1 Ms Whalley if she recognised the handwriting.

2 A. I have no idea. I'm sorry.

3 Q. That's good.

4 The manuscript amendments have added that the slide
5 is privileged. Do you think this was to try to prevent
6 its subsequent disclosure?

7 A. I don't know. I really don't know where this slide came
8 from.

9 Q. Okay.

10 A. All I can talk about is the final version of this slide.
11 I don't know where this came from.

12 Q. Well, let's then perhaps take it from your final
13 version, if you feel more comfortable speaking to that
14 one. So it is in C4A at tab 35, but you may have it --
15 I think it's in a number of places in the bundles, but
16 that's where I have been working from it.

17 I think it's the same, it's the October -- yes.
18 Just to confirm, does your document have at the front of
19 it "Options for protecting the USO: draft discussion
20 document, October 2013"? Very good.

21 So if you could turn to the slide, which is
22 slide 10, on the slide two of the options are marked in
23 red, three in yellow, and one in green.

24 Now, the green column is in substance the option
25 closest to the one ultimately implemented by Royal Mail;

- 1 that's correct, isn't it?
- 2 A. Yes.
- 3 Q. And green signifies that it was, in Royal Mail's view,
4 the best approach; is that correct?
- 5 A. Yes, we considered it was the best approach to try and
6 protect the universal service, yes.
- 7 Q. And the left column shows that in assessing whether the
8 option was best, Royal Mail looked at three factors: the
9 likely outcome for the direct delivery operator; the
10 market share loss; and the Royal Mail revenue loss.
11 That's right, isn't it?
- 12 A. Yes.
- 13 Q. The green column achieves the end state scope of Whistl
14 switching to PP1 and staying there; do you see that?
- 15 A. Yes, but what's important on the green column, if I may
16 explain, is the date 2014. So when the company was
17 doing the modelling, and it was modelling, under this
18 option what we thought might happen -- and it was
19 a view -- was that TNT/Whistl would switch to PP1, and
20 the numbers here are based on, as you can see it says
21 "by 2014", so that was an assumption of what might
22 happen in 2014; whereas, for the other scenarios, it is
23 more of an end state by 2017.
- 24 Q. So --
- 25 A. So there is a reason for that.

1 Q. But, Ms Whalley, forgive me, the switching to PP1 and
2 staying there is linked to the market share loss and the
3 revenue loss which is then shown. Do you see that?
4 1.4% and 40 million; yes?

5 A. That was the modelled estimate for 2014.

6 Q. Well, not only for 2014.

7 A. No, however, if I may, please, look at slide 10 --

8 Q. Yes.

9 A. -- in conjunction with slide 11 --

10 Q. Yes, I'm going to take you to slide 11.

11 A. -- the reason for that is there were many moving parts,
12 and at the time Royal Mail considered that there were
13 a number of different options that Whistl might have,
14 and as you can see from the three graphs that are on
15 page 11 -- and these were just three possible
16 outcomes -- so there was an option, if there was no
17 change, that was the top graph --

18 Q. But that's not an option, is it, in relation to
19 scenario 2? That's no action. What's being modelled
20 there is scenario 0 in the above slide, isn't it?

21 A. That's correct.

22 Q. So the two options for Whist that you have modelled --

23 A. So the two options --

24 Q. -- are the two at the bottom of the page, aren't they,
25 Ms Whalley?

- 1 A. Yes, and --
- 2 Q. The one that shows a steady state of 1.4% and 40 million
3 of revenue loss over the period of the plan is the
4 middle of the graphs, isn't it, Ms Whalley?
- 5 A. Yes, but the 1.4% is reached by 2014, that was the
6 reference in the green chart, or the green column in the
7 chart on slide 10.
- 8 Q. So tell me, which do you think Royal Mail hoped and
9 expected to happen out of these two charts, the middle
10 chart and the bottom chart?
- 11 A. We actually didn't know.
- 12 Q. No, you may not have known what would happen; which did
13 you hope and expect would happen?
- 14 A. Royal Mail thought it was possible and feasible that
15 actually scenario 3 might happen.
- 16 Q. You are deliberately evading my question, Ms Whalley, if
17 I may say so. Can we turn to slide 9.
- 18 A. Would you like to pose your --
- 19 Q. What did you hope and expect of those two scenarios to
20 happen? Look at the second bullet on page 9:
- 21 "Introducing a small price incentive, less than
22 1.5%, for customers committing to a national profile of
23 mail is likely to be attractive to almost all customers
24 and will not exclude direct delivery competition. The
25 market share in delivery we might expect to lose within

1 the permitted tolerances of price plan 1 is 1.4%
2 representing 30 to 40 million of revenue."

3 That was your expectation.

4 A. When we were discussing this at the time, I don't think
5 it's right to characterise it as our expectation.
6 You're right to say the modelled number is that, but we
7 were not aware at the time of the nature of Whistl's
8 business plan, its investment, how it would -- at the
9 time this was done, how it would consider, and we
10 thought there was an option, as set out on the bottom of
11 slide 11, that actually TNT would take the opportunity
12 to accelerate the roll-out. We recognised there would
13 be a cost to Whistl of doing that, but we did consider
14 that that was a possibility.

15 Q. If you thought it was the outcome that was more likely
16 or reasonably likely to occur, it would have been
17 plainly irrational to adopt scenario 2, wouldn't it?
18 Because the result of scenario 2, on the bottom of these
19 charts, is to accelerate Whistl's roll-out, to lead it
20 to erode your market share faster because it's going
21 hell for leather to escape the access charge penalty
22 that you are introducing by means of the price
23 differential.

24 So Royal Mail would have preferred to go for the "do
25 nothing" scenario shown in the top of the three charts.

1 It certainly wouldn't have proceeded with scenario 2 if
2 it had really thought that there was a prospect of the
3 bottom chart coming to pass. Its behaviour is only
4 rational on the assumption that what it expected, as
5 indicated in the second bullet on page 9, is that you
6 end up at a steady state from the get-go of about six
7 SSCs and a market share of about 1.2%, 1.4% for Whistl,
8 scarcely larger than the one it had already achieved.

9 A. I don't think that's a fair reflection of the
10 discussions that Royal Mail had at the time in putting
11 together these options. As I said, we considered that
12 there were options that Whistl might have, and we
13 actually did not know what Whistl would do, and we
14 thought that there were options whereby Whistl could
15 continue its roll-out, recognising --

16 Q. You had to take a punt.

17 A. -- there would be a cost to that.

18 Q. And the cost would have been no profit for two or
19 three years; is that right? That's your bottom
20 scenario, that Whistl would be able to engage external
21 investment in a risky proposition that was non-profit
22 making for two to three years while it built economies
23 of scale; is that correct?

24 A. That potentially would have been one of the
25 implications. We did recognise that, in rolling out on

1 NPP1, for example, there would have potentially,
2 depending on the volumes, been surcharges that Whistl
3 would have incurred. But, had Whistl been able, through
4 its roll-out, to build up significant volumes, and on
5 the basis of what we were seeing at the time in
6 Manchester, for example, that seemed to be the case,
7 then it was possible that the volumes and the benefit of
8 the significant and additional volumes would outweigh
9 the costs of any surcharges that Whistl would be
10 incurring.

11 Q. I'm tempted to say that there is a rich irony in
12 Royal Mail suggesting that Whistl could forego
13 a reasonable rate of return, two to three years, in
14 circumstances where your justification for your conduct
15 was to achieve an EBIT of above 5%, and in circumstances
16 where your public documents indicate that you thought
17 a 10% to 14% EBIT was more appropriate given the risk
18 value of the company to investors.

19 But laying that point to one side, you have the
20 foregoing of a reasonable rate of return for two to
21 three years. You also have a greatly accelerated
22 roll-out by TNT, generating operations at a rate that
23 would cover 40%, in excess of 40% of all premises by
24 quarter 2 of 2016.

25 So you are also expecting that Whistl, on this

1 scenario, would be able to greatly accelerate its
2 roll-out, aren't you? That that would be a feasible
3 proposition.

4 A. At the time we were obviously not aware of the
5 discussions that Whistl was having with potential
6 investors, but we did consider whether Whistl might take
7 advantage to try and accelerate its coverage of 42% of
8 delivery points.

9 Q. If you could turn to slide 7, I want to consider what
10 you hoped and expected was the outcome with you, in the
11 light of the bullets shown, in the yellow column,
12 "Launch package of initiatives without reducing average
13 prices".

14 Do you see that the option, the description is:
15 "Price recognition for a national profile."
16 That's the price differential, isn't it?

17 A. Yes.

18 Q. And "Revised zonal prices", that's the zonal tilt,
19 isn't it?

20 A. Yes.

21 Q. You then set out:

22 "What do we have to believe? No revenue dilution
23 because average prices will increase at or above plan.
24 DD operators will move to PP1 to avoid surcharges. DD
25 will not expand to point of damaging commercial return."

1 Now, all of those propositions are consistent with
2 your hope and expectation being that Whistl will stop at
3 1.4% and Royal Mail's revenue loss will be confined to
4 40 million, the green scenario 2 in the traffic light
5 chart, are they not, Ms Whalley?

6 A. (Pause). From the point of view of the universal
7 service, that would have been the best outcome.
8 However, as I said, we considered that Whistl had
9 options and could progress with its roll-out beyond the
10 six SSCs under these proposals.

11 Q. Taking the pain of the raised costs under APP2 and
12 foregoing profits for several years as a result of your
13 action in introducing the price differential; that's
14 right, isn't it, Ms Whalley?

15 A. (Pause). There was going to be -- sorry, could you just
16 rephrase the question again for me, just repeat the
17 question?

18 Q. So Whistl would take the pain of the raised costs under
19 APP2 and forego profits for several years as a result of
20 your action in introducing the price differential;
21 that's what you are suggesting was Whistl's option?

22 A. (Pause). Yes, we recognised that, in progressing under
23 NPP1, Whistl in the short term might incur some
24 additional costs. However, it was possible that, with
25 the roll-out, with significant market share, recognising

1 that Whistl had 50% of access volumes which were volumes
2 with customers that it could potentially switch to
3 delivery, we considered that there was a feasible option
4 for Whistl, as an efficient entrant into the market, to
5 be able to progress and build up its volumes in a direct
6 delivery operation.

7 Q. If you considered that the bottom chart, despite its
8 adverse impact on Royal Mail, was the likely outcome of
9 your proposed scenario 2, why do the scenarios shown in
10 slide 10 only show the outcome of the middle chart? Or
11 are you suggesting that the scenario 2 isn't confined to
12 the middle chart?

13 A. (Pause). In the bottom chart, had Whistl rolled out in
14 this way, then the revenue loss to Royal Mail would have
15 been material because Whistl would have reached 42% of
16 delivery points. I can't say exactly which one of
17 scenarios 0, 1, 3, 4 and 5 it would relate to, but this
18 scenario would be, I think, consistent with some of the
19 other scenarios here.

20 Q. So, I'm sorry, we agreed earlier that the bottom two
21 charts on page 11 were both modelling scenario 2. One
22 is with an assumption of no profit; yes? I put a point
23 to you earlier that it would be irrational to adopt
24 scenario 2 if you really thought the outcome would be
25 the bottom chart, because it's worse for you than the

1 "do nothing" chart at the top. But the second point is
2 that scenario 2 shown in 10 is undoubtedly the middle
3 chart here, and one can see that because if you look at
4 the bottom of the page, all of these assume no major
5 investment is available to the entrant and that the
6 entrant needs 10% profits in any expansion; yes? So
7 that's the assumption of 10% profitability of each year
8 of the roll-out.

9 The bottom chart is what happens under scenario 2 on
10 the assumption that Whistl foregoes that profitability.
11 So what's shown in chart 10, I put it to you, isn't the
12 bottom -- sorry, what's shown in scenario 2 on slide 10
13 is the outcome of the middle of the charts on page 11,
14 not the bottom of the charts on page 11. Do you see
15 that, and do you agree?

16 A. (Pause). That's not how we considered these charts. So
17 in the green column, the 1.4%, 40 million, is the impact
18 in 2014. At that point, remembering that we didn't know
19 Whistl's plan, we didn't know the level of investment
20 that Whistl was seeking, we didn't know Whistl's
21 margins, we didn't know anything about the investment
22 scenario for Whistl, and what we considered was that
23 there would be options -- as I've talked about -- for
24 Whistl to progress and, as I said, we did recognise that
25 there would be a cost, either in a surcharge or in the

1 higher price due to the differential, for a period of
2 time which might impact the Whistl business until it had
3 built up significant volumes, at which point those
4 significant volumes and the money earned on those would
5 outweigh any costs. We did think that was a feasible
6 option.

7 Q. Ms Whalley, I'm going to put it to you that scenario 2
8 in slide 10 shows the market share loss and the revenue
9 loss based on the middle chart on page 11, and I'm going
10 to explain in three stages why that's the case, and you
11 can tell me if you disagree.

12 On page 10, do you see at the bottom in the third
13 line under the table it is stated that -- the assumption
14 is that the entrant needs 10% profits in any expansion;
15 do you see that? Yes?

16 A. (Pause). Yes, I see that.

17 Q. The second point is that, if you look at the charts on
18 page 11, the middle chart assumes profits, expansion
19 through profit; yes? Do you see that --

20 A. Yes.

21 Q. -- from the heading? And the bottom chart assumes no
22 profit. I can take you, if you like, to the underlying
23 working notes if you disagree with me, but these charts
24 show the output of spreadsheets that are calculated on
25 those two bases, the middle one with profits, the bottom

1 one without profits.

2 So it follows, therefore, that the scenario 2 in
3 slide 10 is recording the results, despite that
4 reference to "by 2014", of the middle chart. Do you see
5 that, and do you accept it, or shall we go to the
6 working notes?

7 A. I have not seen the working notes.

8 Q. Okay.

9 A. I'm not familiar with those working notes. The middle
10 chart on page 11 --

11 Q. Yes.

12 A. -- would, I think, be consistent with the green
13 column --

14 Q. Yes.

15 A. -- if Whistl had decided not to continue with the
16 roll-out.

17 Q. Very good, so we have got --

18 A. However, the bottom chart reflects the green column, had
19 Whistl decided with investment and recognising there was
20 a cost to progress at pace with the roll-out.

21 Q. But I have just put to you why that clearly isn't the
22 case, Ms Whalley. The scenario 2 isn't intended to
23 cover both of those charts, the position as at 2014,
24 because you can see from the assumptions at the
25 bottom -- do you see the bottom line? -- that the

1 assumptions for all of the modelling shown in slide 10
2 is that the entrant needs 10% profits in any expansion.
3 So that 1.4% and 40 million is the end state --
4 A. But what I'm then saying --
5 Q. -- under the middle chart.
6 A. -- is that in slide 11 that bottom slide was a scenario
7 that Royal Mail considered was a possible scenario --
8 Q. Yes, I understand that.
9 A. -- for Whistl to roll out without --
10 Q. Without profit.
11 A. It would imply that there was a lower profit than 10%
12 potentially.
13 Q. No, it's zero profit, I can show you, perhaps if we turn
14 forward to the working notes.
15 A. I haven't seen the working notes.
16 Q. I'm simply making good the point, Ms Whalley.
17 THE CHAIRMAN: Mr Holmes, I don't want to interrupt your
18 flow. Isn't the date of "by 2014" relevant, in that --
19 on the third chart on page 11, "by 2014", there is still
20 relatively little direct delivery expansion? Is that --
21 all the witness maybe is saying, is that by 2014 revenue
22 loss has not been very great?
23 MR HOLMES: Yes, but I had understood her to be saying that
24 scenario 2 in this slide --
25 THE CHAIRMAN: No, I understand that. I am just wondering

1 whether the source of what appears to be
2 a misunderstanding is that date which is influencing
3 whether the green column is consistent with chart 13 or
4 not. On its face it is strictly consistent, but not
5 maybe in the way that you are suggesting.

6 MR HOLMES: I'm grateful.

7 So to be clear, Ms Whalley, you are only assuming
8 that scenario 2 could cover either of those because of
9 the insertion there of the date "by 2014"?

10 A. Yes.

11 Q. But equally it's clear from the slide that in fact,
12 because what is being included in slide 10 is a scenario
13 with 10% profits, that it is the middle chart which is
14 being shown, in which the overall loss, on exactly the
15 same metric as the other scenarios, is 40 million and
16 the overall market share loss, not just in 2014 but
17 looking forward, is limited to 1.4%, and that's why that
18 scenario was selected.

19 A. But that's under the assumption that there's no major
20 investment --

21 Q. Yes.

22 A. -- and the entrant would need 10% profits.

23 Q. Yes, exactly, correct.

24 A. That's --

25 Q. Why would you include that scenario in slide 10 if you

1 didn't regard it as the one that you expected and wanted
2 to result?

3 A. (Pause). As I said, that was -- when we were
4 considering these options -- and I come back to what
5 I have said before, which is that Royal Mail was very
6 mindful that whatever it did to try and use the
7 commercial freedoms that Ofcom had asked it to do,
8 should not prevent another entrant in the market from
9 competing, Royal Mail considered that there were options
10 for Whistl, as shown on slide 11, to progress with its
11 roll-out.

12 THE CHAIRMAN: I think the witness accepts that the third
13 chart on page 11 would require considerable investment
14 and foregoing of profit.

15 MR HOLMES: Yes. I am grateful.

16 THE CHAIRMAN: That may be sufficient for you.

17 MR HOLMES: Yes, it would, sir. I think we can move on.

18 There is only one more question, sir, so --

19 THE CHAIRMAN: You are not going to take us to spreadsheets
20 before lunch, Mr Holmes?

21 MR HOLMES: I see that that would be an unwise course, sir,
22 so I shan't attempt that.

23 All I shall ask is this: on your understanding, do
24 any of these charts model a situation in which Whistl
25 made substantial use of arbitrage?

1 A. (Pause). I don't think I know the answer to that
2 question.

3 Q. Okay, then we shall leave it there. Just on arbitrage,
4 Royal Mail's approach was that arbitrage was a problem
5 and it was taking and continues to take steps to address
6 it; that's correct, isn't it?

7 A. Royal Mail didn't like arbitrage because it was worth
8 8 million in revenue. However, it was used by players
9 in the market.

10 MR HOLMES: I am grateful.

11 I have no further questions, sir, so that concludes
12 my cross-examination of this witness.

13 THE CHAIRMAN: Just before you stop, that 8 million figure,
14 that's not a confidential figure, is it?

15 MR HOLMES: It's in Ms Whalley's statement, and I don't
16 believe --

17 A. I think, to be precise, it's 7.8.

18 THE CHAIRMAN: Thank you.

19 So you have no further questions?

20 MR HOLMES: That's correct, sir.

21 THE CHAIRMAN: So after lunch it will be Mr Turner?

22 MR TURNER: Yes. There is a fair amount to get through, but
23 we hope to conclude by the end of the day.

24 THE CHAIRMAN: We are ready and waiting. We will return at
25 2 o'clock.

1 MR BEARD: I should just say, if Mr Turner is unable to
2 complete this afternoon, Ms Whalley will not be
3 available, unfortunately, tomorrow.

4 THE CHAIRMAN: I think you did say that yesterday, or
5 somebody said it yesterday; that's a strong incentive,
6 to both parties, may I say, to conclude today with this
7 witness.

8 MR TURNER: Absolutely. If it cannot be done today, then we
9 will ask permission to interpose Ms Whalley later in the
10 week.

11 THE CHAIRMAN: We shall cross that bridge when we come to
12 it, if we come to it.

13 MR TURNER: Yes.

14 THE CHAIRMAN: Thank you very much. 2 o'clock.

15 (1.01 pm)

16 (The short adjournment)

17 (1.59 pm)

18 Cross-examination by MR TURNER

19 THE CHAIRMAN: Mr Turner, good afternoon.

20 MR TURNER: Good afternoon, sir.

21 May it please the tribunal, to speed the plough we
22 have prepared a cross-examination bundle, you should
23 have copies of this.

24 This very largely does not contain new documents,
25 but what it is is putting all of the things that I'm

1 going to ask about into one place to avoid the waste of
2 time when you are searching for the files. I have tried
3 to make it quicker.

4 THE CHAIRMAN: Very considerate, thank you.

5 MR TURNER: Ms Whalley, do you have a copy of that file?

6 A. I do.

7 MR TURNER: If the members of the tribunal do too, I shall
8 begin.

9 Ms Whalley, I would like to begin by focusing on one
10 of the major themes of your evidence, and if you have
11 your witness statement there in one place or another,
12 you find it in paragraph 136, if you could go there,
13 please. Do you have that? If you cast your eye over
14 what you say there, essentially your point is that
15 Whistl's entire business model for direct delivery was
16 based on cherry-picking business from Royal Mail from
17 the start, when it started rolling out the direct
18 delivery network in specific areas; is that right?
19 That's what you say.

20 A. (Pause). Yes.

21 Q. Thank you.

22 Now, in the new bundle that you have been given, if
23 you turn to the second tab, there is a document that we
24 have seen before. This is the presentation which
25 Royal Mail gave to Ofcom on 10 December 2013, and the

1 title is "April 2014 access pricing". Do you have that?

2 A. Yes.

3 Q. You remember that you attended this on behalf of
4 Royal Mail?

5 A. I was at the meeting, yes.

6 Q. You said yesterday twice in the course of the day, "We
7 welcomed competition, the company welcomed competition,
8 but thought it needed to be on a fair basis". Do you
9 remember that?

10 A. Yes.

11 Q. If we go to page 10 in this presentation, which you
12 attended, we have the "Conclusions" page. If you look
13 at the second bullet, your slide says:

14 "We believe direct delivery has the ability to limit
15 customer choice and damage the viability of the USO as
16 this form of competition is not on a level playing
17 field."

18 This form of competition. So I gather from this,
19 Ms Whalley, that Royal Mail saw direct delivery
20 competition, in general, as being inherently an unfair
21 form of competition because of the absence of a level
22 playing field; is that right? (Pause). Rather than
23 parsing the words, it's your reaction that I'm
24 interested in.

25 A. (Pause).

- 1 Q. Shall I repeat that?
- 2 A. If you could repeat it for me, please, yes.
- 3 Q. The proposition with which I'm asking you to agree is
4 that Royal Mail saw direct delivery competition, in
5 general, as an unfair form of competition, and that was
6 because of the absence of a level playing field.
- 7 A. (Pause). So Royal Mail saw direct delivery competition
8 as a potential risk to the universal service because
9 a direct delivery entrant had the ability to determine
10 which areas of the country it delivered in, how many
11 days of the week it delivered, and what type of mail it
12 delivered, and that was a potential risk to the
13 universal service because of the risk that a direct
14 delivery entrant could start delivering significant
15 amounts of mail in dense urban areas, leaving Royal Mail
16 needing to deliver in higher-cost parts of the country,
17 and this could have an impact on the inherent
18 cross-subsidies in a sustainable universal service.
- 19 Q. Now -- very good, we'll come to those individual points
20 in just a moment, Ms Whalley. I would like to focus,
21 though, on a concept that you have here, and which you
22 mentioned numerous times yesterday too, of the level
23 playing field.
- 24 I am suggesting to you your concern, the one that
25 you put to Ofcom, was the absence of a level playing

1 field. We will go into the reasons in a moment. Can
2 you agree with that proposition? (Pause). It is, after
3 all, what you said numerous times yesterday.

4 A. So what -- one of the concerns that Royal Mail had was
5 that direct delivery competition could have an impact on
6 the sustainability of the universal service in line with
7 the graveyard spiral that was highlighted by Mr Hooper
8 in his report. And one of the reasons that Royal Mail
9 was concerned was that the rate of growth of access
10 volumes in the UK, as a result of some of the issues
11 that we spoke about yesterday, was significantly greater
12 than in any other country, and the level of bulk mail
13 volumes which were with upstream players had the
14 potential to increase the volumes that would be
15 attainable for a direct delivery player at a level which
16 could have an impact to drive the graveyard spiral. So
17 that was one of the concerns that Royal Mail had.

18 Q. Ms Whalley, I don't mean to hurry you unduly, but is the
19 answer to my question yes or no? Have you forgotten the
20 question?

21 A. Please repeat the question.

22 Q. Were you concerned, essentially, about direct delivery
23 competition as an unfair form of competition because of
24 the absence of a level playing field? Is the answer yes
25 or no?

1 A. Yes, we were concerned that ... we were concerned that
2 direct delivery could have a very significant impact on
3 the universal service, given the market landscape and
4 the regulatory landscape that existed.

5 Q. Would you agree that a level playing field, the words
6 that you have used numerous times, means level for all
7 the parties and not just the incumbent? It's not in the
8 document, it's a point I'm putting to you directly.

9 A. When -- the term "level playing field", when we talked
10 about that, when Royal Mail talked about that, it was in
11 the context that the market and the regulatory framework
12 should give different players in the market the ability
13 to compete fairly.

14 Q. On a level basis?

15 A. Fairly.

16 Q. Do you mean by that on a level basis, fairly?

17 A. Fairly is what I mean. Fairly. That it was fair.

18 Q. Well, let's look at how you describe the problem in your
19 own words. So if you still have paragraph 136 in front
20 of you, this is how you have unpacked it in writing. If
21 we look six lines down at your text, you say this:

22 "Direct delivery is based on an entrant's ability to
23 price at a level below Royal Mail, regardless of how
24 efficient Royal Mail becomes, because of the inherently
25 higher costs attached to delivering the universal

1 service, which the entrant does not face, rather than
2 due to the entrant's own underlying efficiency
3 advantages."

4 Is that really the gist of your point? That was the
5 nub of the unfairness that you are drawing attention to
6 now?

7 A. (Pause). So, yes, we considered that there were cost
8 advantages for a direct delivery player because a direct
9 delivery player did not face the obligations of
10 providing the universal service that Royal Mail did.

11 Q. And that was the source of the unfairness; is that your
12 point?

13 A. (Pause). I wouldn't say that that was the sole point of
14 consideration when I referred to a fair playing field,
15 no.

16 Q. Because you have another consideration in mind that you
17 are going to tell us? (Pause). Ms Whalley, shall we
18 leave it that you can't think of one at the moment?

19 A. Yes, if we can come back to that.

20 Q. Let's stick with what you had said here and the sentence
21 we have just read together. Now, with your eye on the
22 page, would you agree with this: let's take the logic in
23 your sentence and see where it leads us; would you agree
24 that by the same reasoning it would equally be unfair on
25 the new entrant if it was Royal Mail competing against

1 it in bulk mail delivery by relying on inherently lower
2 costs, which Royal Mail enjoys as a result of delivering
3 the universal service, which the entrant does not enjoy?
4 That's the logical corollary of what you say there,
5 isn't it? Sauce for the goose is sauce for the gander.

6 A. In theory, yes, but I don't believe that was the case.

7 Q. You thought there were no unique advantages attaching to
8 Royal Mail as its position -- from its position as the
9 designated universal service provider. Can I put to
10 you, for example, the exemption from charging VAT to
11 customers for direct delivery, which only Royal Mail
12 enjoyed, was such a unique advantage, wasn't it?

13 A. (Pause). Access was indeed exempt from VAT. However,
14 there are significant costs and obligations that are
15 present for a universe service provider where the
16 universal service provider is required to deliver in all
17 parts of the country and, in the case of the UK, six
18 days a week --

19 Q. We can agree that --

20 A. -- with a unionised workforce.

21 Q. So we can agree, Ms Whalley, that there are advantages
22 as well as disadvantages for Royal Mail from its
23 position as the designated universal service provider;
24 is that right?

25 A. Potentially, yes.

1 Q. Your essential point is that a like for like comparison
2 is needed so that you have overall a level playing field
3 between Royal Mail and an entrant?

4 A. (Pause). I come back to the point I made before that we
5 believed that the playing field needed to be fair.

6 Q. And did you, on that basis, argue that the VAT exemption
7 you enjoyed should be removed? Or did you rather
8 vigorously defend the preservation of that exemption?

9 A. We did. As part of the mandated access regime, we
10 defended it.

11 Q. Now, a few moments ago you were outlining the different
12 ways in which a new entrant in bulk delivery engages in
13 cherry-picking, and you have covered that in your
14 statement too. That's a couple of paragraphs back on
15 page 41, if you want to go there, at paragraph 134. Do
16 you have that?

17 A. Yes.

18 Q. So I'm looking at the foot of page 41, and four lines up
19 from the bottom there is a sentence which begins
20 "Rather"; have you got that?

21 A. Yes.

22 Q. "Rather, the entrant's strategy would be to cherry-pick
23 the most profitable parts of the market ..."

24 Pausing there, you mean the most profitable parts
25 for whom? Do you mean for Royal Mail?

- 1 A. And potentially for the entrant.
- 2 Q. Do you mean for Royal Mail as well as the entrant? Who
3 do you have in mind?
- 4 A. (Pause). I can't remember exactly when I wrote this,
5 but I believe I was referring to urban areas.
- 6 Q. That's the first of the points that we are about to come
7 to, but before we get there, the basic proposition is
8 the entrant will be cherry-picking the most profitable
9 parts of the market in various ways. My proposition is
10 that you would have included in the idea of for whom
11 that is the most profitable Royal Mail itself. That
12 must be the concern from cherry-picking, mustn't it? It
13 shouldn't be difficult.
- 14 A. One of the concerns that Royal Mail had was losing
15 volumes from dense parts of the market and being -- then
16 having a disproportionate amount of volume in higher
17 cost to serve areas.
- 18 Q. So we can agree that when you said "the most profitable
19 parts of the market", you did mean, least among others,
20 to Royal Mail?
- 21 A. Yes.
- 22 Q. You then, in the following subparagraphs, do unpack
23 that. So let's look at those in turn. (a) is focusing
24 on the low cost to serve areas, with the high population
25 density, notably the dense urban areas. (b) was

1 providing the slower service, that's the three days
2 a week economy service as opposed to the six days a week
3 that Royal Mail has to provide. (c) was focusing on
4 business mail, usually -- mostly machine sequenced into
5 the order it will be delivered.

6 So you have given three dimension for cherry-picking
7 by the new entrant: one, the areas of coverage; two, the
8 delivery frequency, that's the three-day a week economy
9 service point; and, three, the type of mail. That's
10 right?

11 A. Yes.

12 Q. Now, your account here does not mention that you made
13 exactly the same points to the regulator Ofcom in 2014,
14 nor that the regulator gave clear reasons why what you
15 said was wrong on each of those points, does it?

16 (Pause). So my proposition is that the witness
17 statement does not refer to the fact that you had made
18 exactly these points to Ofcom by way of submission.

19 A. I believe in my witness statement I did refer to the
20 fact that we had had a dialogue with the regulator about
21 our concerns on direct delivery and the impact of direct
22 delivery and potential cherry-picking on the universal
23 service.

24 Q. And you did. But, Ms Whalley, even a careful reader
25 looking at what you say here might be forgiven for

1 thinking that Ofcom had agreed with you about the
2 supposed inherent dangers of cherry-picking; isn't that
3 right?

4 A. I'm sorry, I'm not following your logic on that point.

5 Q. Let's go forward -- have a look, if it helps, at page 62
6 of your statement, and look at paragraph 202. Do you
7 have that?

8 A. Yes.

9 Q. That begins by saying, you say:

10 "The CCNs as a whole sought to address ..."

11 Then you set out certain matters, (a), (b) and (c).
12 If we look at (b) and drop halfway down, you first refer
13 to Mr Hooper, and then you say:

14 "Ofcom itself recognised in the APR [which stands
15 for access pricing review] consultation that a rival
16 direct delivery operator's ability to cherry-pick entry
17 could have a negative impact on Royal Mail, if,
18 for example, it were effectively subsidising entry by
19 an inefficient operator", and there is a footnote.

20 So I say again, one receives the impression, does
21 one not, Ms Whalley, from this that Ofcom to some extent
22 was recognising the predicament that Royal Mail was in
23 at the material time and its vulnerability to the types
24 of cherry-picking that you outlined, those three kinds
25 of cherry-picking? Yes? (Pause). That's how the

- 1 reader would understand your statement.
- 2 A. So what I would say on that is that, in a number of
3 documents, I believe Ofcom had made a reference to
4 a recognition that direct delivery could have an impact
5 on the sustainability of the universal service, and
6 I believe in one document Ofcom did say that actually
7 direct delivery could have an even bigger impact than
8 the access regime had had. However, I come back to what
9 I said yesterday, which is: despite Ofcom highlighting
10 that concern, its guidance in March 2013 was that
11 Royal Mail should use its commercial freedoms to address
12 the risks of that direct delivery competition and its
13 potential impact on the universal service.
- 14 Q. So, Ms Whalley, stay with 202(b). We see there you're
15 referring to Ofcom itself giving this recognition. Do
16 you see that? And there you do footnote a reference to
17 a document to support what you say Ofcom recognised. Do
18 you see that? Do you see that you are quoting --
- 19 A. Mm.
- 20 Q. -- from paragraph 7.44 of this access pricing review
21 paper? You see that you are doing that?
- 22 A. Yes.
- 23 Q. Did you choose that document yourself to quote from?
- 24 A. Could I have the document, please?
- 25 Q. You will find it in the cross-examination bundle, in the

1 third tab. (Pause). So that's the document you were
2 relying on. Are you familiar with the document that you
3 were relying on?

4 A. I don't believe it's the third -- that's the monitoring
5 update.

6 Q. This is in fact the document. If you go in it to
7 page 82 --

8 A. I haven't got it. I don't have that document.

9 Q. You may be in the wrong bundle, Ms Whalley. I'm sorry
10 for the confusion. The new bundle.

11 A. This one? Sorry. There are too many trees.

12 Q. I understand that entirely. So it's that new bundle,
13 it's the third tab. Sorry for that. If you look at the
14 first page, there is the document that you are
15 footnoting, and this is the document you are relying on
16 for that proposition, which is part of your statement.

17 The question was whether you chose that document
18 yourself to quote from.

19 A. Yes.

20 Q. You did.

21 Now, if we start at page 74, we have Ofcom's
22 provisional conclusions. Can I pause just to check that
23 you still remember this document that you quoted from?

24 A. This document was at the end of 2014, after the CCNs.

25 Q. Yes, it's the one that you quote.

- 1 A. We did not have this document at the time of the CCNs.
- 2 Q. No, this is the document, however, that you are relying
3 on yourself.
- 4 A. Mm.
- 5 Q. Yes? Do you remember it?
- 6 A. Yes.
- 7 Q. Now, if we look at paragraph 7.2, just so that we can
8 orientate ourselves, what's going on, if I've understood
9 it correctly -- and please say if I haven't -- is that
10 Ofcom had identified a group of concerns, and those were
11 concerns about the prospects of Royal Mail behaving
12 unfairly to disadvantage new entrants in bulk mail
13 delivery, wasn't it? It's what this was about.
- 14 A. (Pause). Yes.
- 15 Q. To speed it along, if we look at the first bullet at
16 7.2:
- 17 "Royal Mail has the flexibility to structure its
18 access charges so as to set relatively high charges (by
19 comparison with its own costs) in areas where entry is
20 unlikely while setting relatively low charges in areas
21 open to competition. In doing so it can deter
22 beneficial entry in bulk mail delivery."
- 23 So essentially the concern was of targeting without
24 proper cost-reflective pricing; that's right, isn't it?
- 25 A. (Pause). Yes, that was a concern that Ofcom expressed.

1 Q. Yes, and to meet that concern they had certain proposals
2 to counter the problem of Royal Mail's undue discretion
3 in setting the access charges which could have
4 anticompetitive effects.

5 If we look at the next page, 75, you see a summary
6 of those proposals there at the top in four bullets. Do
7 you see that?

8 You will recall those proposals.

9 A. (Pause). Yes.

10 Q. The first of them, the first bullet, is a proposal to
11 introduce a rule essentially requiring cost-reflective
12 pricing by you so that for every service the ratio of
13 the zonal charges would equal the ratio of the zonal
14 costs; so that was one of the proposals, wasn't it?

15 A. That was one of Ofcom's proposals at the time.

16 Q. We then have the heading in the middle of the page --
17 this is just so that we can explain the paragraphs that
18 you have quoted, in a few moments:

19 "Our concern about zonal charges."

20 Perhaps you can read 7.9 and 7.10 briefly to
21 yourself.

22 (Pause)

23 So to summarise, am I right, Ms Whalley, that to
24 meet the concern of possible anticompetitive behaviour
25 that Ofcom perceived, at this point they had a proposal

1 that you should set cost-reflective pricing in the way
2 they outlined? So, for example, if you wanted to set
3 rural and suburban zone charges well above your fully
4 allocated costs, then you also had to do so in the
5 London and urban zones, the ones where you faced the
6 threat of entry. That was the proposal, was it not?

7 A. So, sir, if I may say, that was the proposal from Ofcom
8 in this document. One of the concerns that Royal Mail
9 had, and I think this was a very legitimate concern,
10 Royal Mail had asked Ofcom for guidance on "fair and
11 reasonable", so when Ofcom published its new regulatory
12 framework it did indeed say -- and I think repeated, and
13 I refer to it in my witness statement -- that it
14 recognised that it needed to provide guidance on "fair
15 and reasonable" for the access framework. That guidance
16 was not forthcoming at the time that it had set out in
17 March 2013 that it expected Royal Mail to use its
18 commercial freedom to come up with commercial actions to
19 mitigate the risk of direct delivery on the universal
20 service, and indeed I believe that as late as 2014 Ofcom
21 recognised that it had not provided guidance on "fair
22 and reasonable" to the market.

23 So when Royal Mail was putting together, as best as
24 it possibly could, the commercial responses to the
25 threat of direct delivery to protect the universal

1 service, it did not have the benefit of Ofcom's guidance
2 on "fair and reasonable".

3 Q. Now --

4 A. This information here came late in 2014 and was not
5 available, as I think would have been helpful, in a more
6 timely fashion.

7 Q. Yes --

8 A. So that's what I wanted to say about that.

9 Q. Thank you, Ms Whalley.

10 Now, it is -- this is the document which you are
11 quoting for your proposition in your witness statement.
12 Let's go to that now, on page 82. You will recall that
13 in your witness statement a small part of this is quoted
14 as support for the notion that Ofcom recognised the
15 inevitable problems, risks of cherry-picking.

16 Would you read 7.44, from which you quote, and 7.45
17 together on page 82 at the top, and particularly 7.45.

18 (Pause)

19 Have you had a chance to read that?

20 A. (Pause). Yes.

21 Q. So we can see, can't we, Ms Whalley, that Ofcom was not
22 agreeing with Royal Mail's perspective that there was
23 some inherent problem with competition in bulk delivery
24 for so long as Royal Mail was under the universal
25 service obligation? I suggest that the position, as we

1 can see here, is rather that Ofcom were saying that if
2 Royal Mail's access charges in the areas where
3 an entrant didn't enter were based on Royal Mail's costs
4 of delivery, not a uniform charge, there would be no
5 artificial cost advantage for an entrant. That was
6 Ofcom's point, wasn't it?

7 A. (Pause). Could you just reiterate your explanation of
8 that for me?

9 Q. Reading 7.45 in particular, Ofcom is saying that if your
10 access charges in the areas where an entrant doesn't
11 enter are based on your costs of delivery there, you
12 have that freedom, there is no artificial cost advantage
13 for the entrant; that's right, isn't it? (Pause). It's
14 what Ofcom says here.

15 A. Yes, that's what Ofcom says.

16 Q. And Royal Mail already had the power to do that, didn't
17 it, to charge different prices in different areas, and
18 the only question being considered here was whether
19 Royal Mail should be made subject to a duty? (Pause).
20 You would agree with that?

21 A. (Pause). What do you mean by "duty"? It doesn't refer
22 to a duty.

23 Q. No, Ofcom was considering imposing a requirement, its
24 proposals involved among other things imposing
25 a requirement, and we looked at that a moment ago. My

1 point is that Royal Mail already had the power to do
2 this, didn't it, to impose different prices in different
3 areas? I think you can agree with that.

4 A. Yes. There were opportunities using zonal prices, yes.

5 Q. And Ofcom also pointed out here that even if you have
6 a less efficient operator who is prepared to accept
7 a lower mark-up than Royal Mail, and it can offer
8 a better price to the customer, that's a source of
9 genuine competitive advantage which has the potential to
10 offer benefits to consumers? We see, don't we, that
11 that was Ofcom's perspective?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. It's not one that we find in your statement, in your
16 account of cherry-picking and your dialogue with Ofcom,
17 is it? (Pause). Ms Whalley, is the answer yes or no?

18 A. The focus of my statement, though, was on the events in
19 2013. This guidance and proposal from Ofcom was
20 a document late in 2014.

21 Q. With respect, Ms Whalley, that's not right. Look at
22 paragraph 7 of your statement on page 3. The vast
23 majority of everything in it, right up until the last
24 letter, 7(h), is all about the industry context and
25 history, isn't it?

- 1 A. In terms of context, yes.
- 2 Q. And, moreover, you quote yourself from this document for
3 that point, don't you, in paragraph 202?
- 4 A. (Pause). Yes.
- 5 Q. Let's move on.
- 6 The last sentence of 7.45 refers to paragraphs A5.91
7 to A5.108, and you find those in the next tab of the
8 bundle in front of you, tab 4. If you go in that to
9 page 24, I think the starting point is a paragraph
10 there, A5.97. Do you see that, near the top of page 24?
- 11 A. Yes.
- 12 Q. You will see the Royal Mail argument being summarised
13 that the combination of the universal service
14 obligations and this regulatory requirement created the
15 scope for cherry-picking arbitrage by an entrant across
16 three dimensions, coverage, delivery frequency and type
17 of mail; yes?
- 18 A. Yes.
- 19 Q. So we come back to the point, Ms Whalley, that these are
20 exactly the same three points that you have made again
21 to this tribunal in your witness statement; yes?
- 22 A. Yes.
- 23 Q. And we see in the following paragraphs that Ofcom
24 rejects each of them in turn, don't we? Turn the page.
- 25 (Pause)

1 to accept a mark-up which is lower, is engaging in
2 standard competitive behaviour, aren't they? Those are
3 the features of ordinary competition.

4 A. Mm.

5 Q. The nub of your concern -- I'm sorry, when you say "Mm"
6 you have to say "Yes" for the transcript.

7 A. Yes. Yes.

8 Q. The nub of your concern is what you alluded to yesterday
9 in conversation with Mr Holmes, and that's the fear of
10 losing volumes through a process of competition. Isn't
11 your key concern that because of the high proportion of
12 fixed costs in your delivery network, your average cost
13 of delivering universal service mail goes up when the
14 volumes go down, a point that you made yesterday?
15 That's the real concern, isn't it?

16 A. (Pause). Yes, there was a concern that if volumes
17 reduce, the unit costs go up.

18 Q. So this is not about cherry-picking; this is about
19 resistance to the competitive process in this area
20 because of the fixed cost business that you have; isn't
21 that right?

22 A. (Pause). Yes, there is a concern that the universal
23 service was threatened. If significant volumes are lost
24 then the unit cost goes up and the unit cost is higher
25 in certain parts of the country where it is higher cost

1 to deliver. So cherry-picking is a part of that.

2 Q. Well, we won't go back into the detail of the argument,
3 given the time, but can I put to you that even if
4 an entrant was able to enter the market on a fully
5 national basis, that would present the same problem for
6 you of the prospective loss in volumes, which could
7 threaten the USO, couldn't it?

8 A. Yes, a loss of volumes would threaten the USO.

9 Q. Now, we won't deal with the other points, we will come
10 back to those later with the experts, but I'll turn now
11 to the issue of the market constraints that Royal Mail
12 was under, and I may as well begin, before we leave this
13 document, by looking at paragraph A5.109, if you still
14 have it open in front of you. Do you have that?

15 A. Yes.

16 Q. If you could perhaps read that to yourself.

17 (Pause)

18 Here, perhaps in a nutshell, Ms Whalley, would you
19 agree that we see Ofcom's position on how competition
20 would affect Royal Mail in this area? That's their
21 position, isn't it? (Pause). Strong constraint on
22 prices, expanding the market and creating incentives for
23 you to realise efficiencies, putting downward pressure
24 on industry costs and encouraging you to pass those
25 benefits to consumers.

- 1 A. That's what Ofcom has written.
- 2 Q. Well, more than that. You would agree that was
3 generally their position?
- 4 A. Mm.
- 5 Q. Yes. Now, in your evidence yesterday you said this:
6 "... direct delivery competition ... was something
7 that we needed to take account of in how we planned the
8 business."
- 9 I think we can be more specific than that,
10 Ms Whalley. You would presumably accept, wouldn't you,
11 that direct delivery competition from Whistl and the
12 threat of a significant roll-out acted as a constraint
13 on your price setting for downstream delivery at the
14 time before Whistl's service came to an end? It had
15 that effect, didn't it? It forced you to moderate your
16 price increases.
- 17 A. (Pause). There were many factors that Royal Mail took
18 into account when making judgements on price.
- 19 Q. Did this particular factor affect your price setting,
20 the threat of direct delivery? Did it exert a market
21 constraint or not? (Pause). Ms Whalley, you must
22 remember whether it did play a factor in your thinking.
- 23 A. As I said, there were a number of factors when we
24 considered price changes. Given the rate of
25 e-substitution in the market, we also looked at,

1 for example, elasticities. So it was not the only
2 factor that we took into account.

3 Q. Now, I'm not saying it was the only factor, but I think
4 you are implicitly agreeing it was a factor; do we agree
5 on that?

6 A. We had to take into account the competitive environment.

7 Q. So let's turn on in that same cross-examination bundle
8 to tab 6, it's another document we have seen, it's the
9 letters strategy paper from June 2013, when Whistl is in
10 the market.

11 If we turn to page 4, you have the executive
12 summary. You see the second row down marked "Context"
13 on the left in red type, and you see five bullets.

14 Look at the penultimate bullet. There are four risk
15 drivers which could materially impact on letters
16 revenue, and those are set out.

17 Then if we go to the next row, marked "Theme 1" in
18 red on the left-hand side, we read the first bullet:

19 "To deliver the planned revenue we will increase
20 prices broadly in line with RPI. Small, smooth
21 increases aimed to avoid customers being prompted to
22 switch from mail and avoiding increasing the risk of
23 direct delivery."

24 Now, leaving aside the risk of e-substitution, one
25 of the factors mentioned here, Ms Whalley, is clearly

1 avoiding the risk of direct delivery, isn't it? So we
2 can see here how competition in bulk mail was operating
3 as a market constraint on your power over pricing.

4 A. Yes.

5 Q. As well as price, another dimension of competition is
6 that it typically increases customer choice compared to
7 a monopoly service. Can I suggest to you that Whistl,
8 then TNT, was offering the choice of an advanced form of
9 delivery service which Royal Mail was not offering, but
10 for which there was widespread support among customers;
11 do you agree? (Pause). That Whistl was offering
12 a standard service which was an advanced form of
13 delivery service to customers?

14 A. No, I have no evidence of that.

15 Q. Really?

16 A. What I can say on that was that the satisfaction for
17 postal services was at a very high level, over 85%.

18 Q. Did you have no knowledge of the form of service that
19 Whistl was offering to customers?

20 A. What I had no knowledge of was any research or evidence
21 which indicated whether that service was valuable to
22 customers. I didn't have any evidence of that.

23 Q. But is it implicit in your answer that you did know and
24 do know now that Whistl offered customers tracking to
25 the door as part of its standard offering? This is

1 a factual matter.

2 A. Yeah, I was aware that that's what Whistl was seeking to
3 provide. As I said, I had no evidence whether that was
4 a service that customers valued.

5 Q. Well, given your knowledge of the mail business, might
6 you be able to give the tribunal now, in your own words,
7 any reasons why customers might value such a service, or
8 can't you think of any?

9 MR BEARD: Is that a factual question or again speculation?

10 MR TURNER: It's not speculation, it's asking about the
11 witness's knowledge of the mail business and she will
12 answer. (Pause). Can you see anything of value to
13 customers, your former customers, in the provision of
14 this form of service?

15 A. I could comment on parcels. I believe it's speculation
16 to comment on letters, because I never did any research
17 into this for letters.

18 Q. Were you aware of it being even considered within
19 Royal Mail at the time?

20 A. (Pause). Royal Mail was not, to my best knowledge,
21 considering scanning letters at the doorstep.

22 Q. Let's approach this from one final direction. If you go
23 to tab 8 in the new bundle, you have an extract from
24 a Whistl document, a commercial due diligence report
25 that was prepared by PwC for the prospective investor.

1 May I ask, have you ever seen this document before?

2 A. No.

3 Q. Turn to the second page that you have there, you have
4 a slide 49.

5 If you run your eye over the title, and the
6 customers' comments summarised on the right-hand side,
7 would you agree from your business perspective that
8 these are plausible comments?

9 MR BEARD: Is the question whether or not these comments
10 were actually made by customers to PwC or whether or not
11 this type of comment is the sort of thing that customers
12 might make? It is very difficult --

13 MR TURNER: It is the latter, Mr Beard.

14 MR BEARD: It is a bit difficult when it's a document that
15 is not --

16 THE CHAIRMAN: Mr Beard, we are having difficulty enough,
17 I would be grateful if the questioning continued, and
18 indeed the answer.

19 A. I have not seen this before.

20 THE CHAIRMAN: That's not what you are being asked,
21 Ms Whalley.

22 A. And I cannot comment and speculate on these findings.
23 This is not research that Royal Mail did. So I'm unable
24 to ... to get, to be drawn into a discussion on this
25 research.

1 THE CHAIRMAN: Could I just say that as far as I'm
2 concerned, I don't speak for my colleagues obviously,
3 the impression I'm getting from the evidence you are
4 giving on this point is that Royal Mail looked at its
5 own quality and specification of service and didn't
6 consider anybody else's; is that a fair conclusion?
7 A. Royal Mail undertook research among its own customers on
8 satisfaction levels with the service that was being
9 provided --
10 THE CHAIRMAN: By Royal Mail?
11 A. By Royal Mail. We did do --
12 THE CHAIRMAN: Yes, that is what I was assuming.
13 A. Yes, that is what --
14 THE CHAIRMAN: So my conclusion is, subject to whatever else
15 is said, a reasonable one; is that right?
16 A. The focus of the Royal Mail research, I think it is fair
17 to say, was on satisfaction levels with --
18 THE CHAIRMAN: Royal Mail services.
19 A. -- Royal Mail services.
20 THE CHAIRMAN: Okay, I'm content with that conclusion.
21 I don't know whether Mr Turner is, but I am.
22 MR TURNER: I am obliged, and we will move on.
23 Turn to another area, Ms Whalley. Turn to
24 paragraph 134 of your statement. So this is what we
25 started off by looking at, you will recall. Do you have

1 it in front of you?

2 A. Yes.

3 Q. We looked at the sentence just above letter (a) at the
4 bottom where your evidence was that the entrant's
5 strategy would be to cherry-pick the most profitable
6 parts of the market.

7 If we turn the page to 136, four lines down, your
8 evidence continued:

9 "This 'cherry-picking' is exactly what Whistl did
10 when it started [that should say "rolling out"] its
11 direct delivery network in specific areas."

12 Were you aware, when you signed your statement, that
13 Whistl's roll-out had begun in areas of London?

14 A. Yes.

15 Q. And you knew also, I think, that Royal Mail's delivery
16 costs in London, where there is a high density of
17 addresses, were higher than in all the other zones,
18 including in rural zones, didn't you?

19 A. I believe on a fully allocated cost, not on a LRIC cost.

20 Q. We will look at that in a moment. If I put those two
21 points together, that Whistl began the roll-out in
22 London and that the costs in London for you were in
23 fact, let's say, high, can you accept that your witness
24 statement is rather misleading by suggesting that Whistl
25 was cherry-picking by taking the most profitable

1 business areas from you, because those were not, so far
2 as Royal Mail was concerned, the most profitable
3 business? Is that right?

4 A. I am afraid I cannot remember the profit margin of all
5 of the different zones.

6 Q. But you felt qualified enough to say what you did in
7 your written evidence, that this was the form of
8 cherry-picking which was exactly what Whistl did when it
9 started rolling out its network. So at the time you
10 signed this statement, you did feel qualified to make
11 that point.

12 A. But I would also like to point out that Whistl was not
13 only rolling out in London, it was other urban areas
14 with dense populations that were profitable. It was not
15 only London.

16 Q. We may come to that, but they began the roll-out in
17 London, didn't they, and the point that I have made
18 therefore surely applies concerning the misleading
19 nature of this part of your evidence?

20 A. (Pause). As I said, I cannot remember all of the
21 details relative to the LRIC versus FAC, and maybe
22 that's a point that may get discussed with the experts,
23 but there were differences in the different zones on the
24 costs and therefore the profitability.

25 Q. I think you said a moment ago that you think the costs

1 may have been higher for you on a fully allocated cost
2 basis in London than elsewhere, but not on a long run
3 incremental cost or other basis; was that what you were
4 saying?

5 A. That is my recollection, but, as I said, I don't have
6 the precise numbers in my head.

7 Q. Shall I give them to you? If you turn to tab 10 in this
8 document overleaf, we have one of your papers,
9 Royal Mail's, marked "Zonal cost calculations".

10 A. Where ...?

11 Q. It's the same bundle, the new one, and you need to go to
12 tab 10 and look at it in landscape. Do you see it's
13 dated 25 March 2014? Would you, at the time, have seen
14 this before?

15 A. (Pause). To be honest, I can't remember.

16 Q. Well, shall we go in it to the last page, page 5 -- it
17 contains updated results -- and have a look together and
18 what it says.

19 So here we see on the left-hand side a blue column
20 marked "Floor" and on the right-hand side a yellow
21 column, a row at the top marked "Ceiling", and then
22 "Price" wedged in the middle in green.

23 For "Floor" we have an acronym on the left, DLRAIC.
24 Are you familiar with what that stands for?

25 A. The LRAIC was the long run average incremental cost.

- 1 Q. And for "Ceiling" on the right we have another acronym,
2 DSAC. Do you know what that stands for?
- 3 A. I believe it's a standalone cost.
- 4 Q. If we run our eye across this table, we see London as
5 the last but one row at the bottom, and I think we see
6 that on all measures of cost, both these measures of
7 cost, London is higher than any other zone, isn't it?
- 8 A. Yes.
- 9 Q. In summary, when Whistl started doing its own deliveries
10 in London, Whistl didn't cherry-pick the areas that were
11 cheapest for Royal Mail to serve, let alone leave you
12 with no option but to charge unprofitable average prices
13 elsewhere in the country, did they? (Pause).
14 Ms Whalley, it's a yes or no.
- 15 A. I apologise, there is a level of detail in these
16 documents, which are not attached to my witness
17 statement, which are going to a level of detail that
18 I don't have in my head.
- 19 Q. That I understand, Ms Whalley, but we are testing the
20 point that you have made in your witness evidence in
21 paragraphs 134 and 136, and in response to what you said
22 there, do you recall, about Whistl engaging in
23 cherry-picking when it started rolling out its network
24 in specific areas? I'm putting to you that it didn't
25 cherry-pick the areas that were cheapest for Royal Mail

1 to serve, and it didn't leave Royal Mail with no choice
2 but to charge unprofitable average prices elsewhere in
3 the country? Can we agree on that?

4 A. (Pause). My recollection at the time was that the price
5 for London was high and one of the changes that we made,
6 Royal Mail made in the zonal pricing was to reduce the
7 price in London so that Royal Mail was better able to
8 compete in London with a new entrant into the market.
9 That is one of my recollections.

10 Q. Yes. We will come to that in a moment. While we have
11 this page open in front of us, will you agree I'm
12 interpreting this correctly when I look at the London
13 row and I see that the average price there is very
14 close, [redacted], to the floor prices, floor costs?

15 I'm now told that this is a confidential document,
16 I'm reminded. So without mentioning the figures, can we
17 agree that the average price which is quoted for London,
18 without mentioning it, is close to the floor costs on
19 the left rather than the ceiling costs on the right?

20 Whereas, if we look at suburban or rural, we see it
21 done in a different way, that the price there is very
22 close to the ceiling and far away from the floor; do you
23 see that?

24 A. I can see that, and again I apologise, I have not --
25 this is the first time I have seen this document, and

1 I believe that these prices here may have reflected ...
2 proposals that would make London a more competitive part
3 of the market for Royal Mail. But, as -- I have not
4 seen this document before.

5 Q. Well, let's press on. In your evidence yesterday you
6 were asked by Mr Holmes why zonal prices didn't protect
7 you against cherry-picking. Do you remember him asking
8 you that?

9 A. Yes.

10 Q. I'll summarise your answer, but for the transcript it's
11 Day 5, page 68. You said that before the CCNs the zonal
12 prices were not cost-reflective, and it was an element
13 of the CCNs to adjust zonal prices to be more
14 cost-reflective, to ensure operators using parts of the
15 zonal contract were paying a more cost-reflective price.
16 Do you remember giving that answer?

17 A. Yes.

18 Q. So let's consider how you were setting your zonal
19 prices, given Royal Mail's relative costs in the four
20 types of zone. If we go on to tab 12, have you seen
21 this before, this letter? It's Royal Mail's letter to
22 customers dated 28 February 2011, giving the access
23 prices that they would pay for the forthcoming year,
24 2011/2012. Do you see that?

25 A. I do, and again I have not -- I cannot remember seeing

1 this document. This document was not part of my witness
2 statement.

3 Q. Now, that doesn't matter.

4 A. I was not running the access and wholesale business at
5 this time.

6 THE CHAIRMAN: Shall we see what Mr Turner wants to make of
7 it before you --

8 A. Yes.

9 THE CHAIRMAN: -- distance yourself from it?

10 A. Yes, of course, sir.

11 MR TURNER: Shall we see how it bears on the evidence that
12 you gave yesterday.

13 Now, we see from the second paragraph, which begins
14 "As we previously stated, we thought carefully about
15 these price increases", that what the letter was doing
16 was notifying price increases to your customers.

17 Can I ask you whether you know this is something
18 that Royal Mail consistently did more or less every year
19 since 2010?

20 A. Yes.

21 Q. The table at the bottom shows the percentage variances
22 for the different zones from the average national price,
23 which is the middle column. Yes?

24 A. Mm.

25 Q. So that's from the national price, which is charged

- 1 under both NPP1 at the time and APP2; is that right?
- 2 A. Yes.
- 3 Q. So if I understand it correctly, it means that if we're
- 4 looking -- let's take letters at the top, that letter
- 5 prices in the urban zones are 10.9% lower than the
- 6 national average; yes? Is that right?
- 7 A. Yes.
- 8 Q. And suburban 0.3% higher, and rural 11% above the
- 9 national average?
- 10 A. Mm.
- 11 Q. And London, for London we have 9.9% higher than the
- 12 average. Have I understood it correctly?
- 13 A. Yes.
- 14 Q. Above the table, you will see a sentence beginning
- 15 "Secondly":
- 16 "... the zonal pricing variances to the national
- 17 prices have been updated slightly to become even more
- 18 cost-reflective."
- 19 Can you confirm, please, your understanding of what
- 20 is meant by "cost-reflective" there in the letter?
- 21 A. I believe it means reflective of the costs of
- 22 Royal Mail.
- 23 Q. Let's turn on to the next tab.
- 24 A. At a fully allocated cost level.
- 25 Q. Thank you.

1 Let's turn on, tab 13. So we here have a letter
2 which is now dated January 2012, and this is giving the
3 new access prices for the forthcoming year again. There
4 is a third paragraph marked "Summary of changes". Do
5 you see that?

6 A. Mm.

7 Q. It's right to say, isn't it, that you were increasing
8 your prices again; yes?

9 A. Yes.

10 Q. Turn over the page to page 2, we have again another
11 table at the bottom, I think this is the corresponding
12 exercise to the one we have just carried out, isn't it?

13 A. It looks like it.

14 Q. And again you say, just above the table, that the zonal
15 prices have been updated to become even more
16 cost-reflective; yes?

17 A. Yes.

18 Q. That would mean cost-reflective in the same sense that
19 you have just explained to the tribunal; yes?

20 A. Yes.

21 Q. So let's turn forward to tab 14. We now have a letter
22 concerning the year immediately before the CCNs with
23 which the case is concerned. If we look at "Summary of
24 changes", am I right that this is again notifying
25 customers of more price rises; yes?

1 A. Yes.

2 Q. If we turn over the page, we have the 2013/14 variances,
3 and we have the same pattern; yes?

4 A. Yes.

5 Q. So would you agree that it was wrong yesterday for you
6 to say that the pre-2014 prices were not
7 cost-reflective?

8 A. (Pause). My recollection was that these prices were set
9 on fully allocated costs and not LRIC costs. I may have
10 got that wrong, but that was my recollection, and there
11 is a difference between the LRIC cost and the fully
12 allocated cost.

13 Q. Is it your evidence, therefore, that if you had adopted
14 a different cost base consistently for all of the
15 different zones, that would have led to a different
16 pattern?

17 A. (Pause). I don't know.

18 Q. Well, let's go forward to the next tab, 15.

19 THE CHAIRMAN: Mr Turner, I am sorry to interrupt, but we
20 are approaching interval time, if not exceeding it.

21 MR TURNER: Sir, you are right. This is the last letter in
22 this sequence, so I can either leave it for the moment
23 or finish this.

24 THE CHAIRMAN: It rather relates to how we are doing for
25 time.

1 MR TURNER: There is a lot to go through. I am trying to be
2 as quick as I can.

3 THE CHAIRMAN: Yes.

4 MR TURNER: I am going to be taking up the full amount of
5 time that the tribunal will give me the indulgence to
6 have.

7 THE CHAIRMAN: Right, which is until 4.30.

8 MR TURNER: Yes.

9 THE CHAIRMAN: Mr Beard is going to re-examine. How long
10 does Mr Beard think he wants?

11 MR BEARD: Not very long. I have only got a couple of
12 questions at the moment. I just wonder -- I mean, if
13 Mr Turner thinks he will not be done in the next hour,
14 maybe it's useful just for him to think about that so
15 Ms Whalley can know whether or not she is coming back on
16 Thursday.

17 THE CHAIRMAN: Are you about to come to some devastating
18 point or what?

19 MR TURNER: I have been making devastating points.

20 THE CHAIRMAN: You may very well say that, Mr Turner, I
21 couldn't possibly comment.

22 MR TURNER: You will be the judge of that.

23 Sir, yes, I will do what I can. There is
24 a realistic prospect, depending on how we go, that
25 I might finish and then Ms Whalley will be done.

1 THE CHAIRMAN: I have to say, we have conferred on that, we
2 are most uncomfortable at the thought of Ms Whalley
3 being obliged to be in purdah for any lengthy period.
4 We think that is unfair on her.

5 MR BEARD: We are too, it's simply that Mr Turner indicated
6 that he might need more time and tomorrow is not
7 available and therefore we just simply are trying to be
8 cooperative.

9 THE CHAIRMAN: Yes. I repeat what I said, we are not very
10 happy about a long period of purdah, so if we can get
11 this finished today that would be good all round. I am
12 conscious I am taking up time now. It might be better
13 if you finish your point and then we will break for
14 five minutes.

15 MR TURNER: I am obliged, sir.

16 THE CHAIRMAN: Thank you.

17 MR TURNER: Ms Whalley, if you will go to tab 15, please.

18 So here we have the zonal variances which were announced
19 in the CCNs in 2014; yes?

20 A. Yes.

21 Q. If we turn to the third page, we have the customary
22 table, and looking at the top right-hand side for
23 letters, London is now no longer 9.9% above the national
24 average price, it drops to 25% below the national
25 average price; yes?

- 1 A. Yes.
- 2 Q. That pricing was a fundamental departure from the
3 position historically for London, wasn't it?
- 4 A. Yes.
- 5 Q. There hadn't been any significant reduction in your
6 costs of delivery between January 2013 and January 2014,
7 had there?
- 8 A. Royal Mail was taking costs out of its network all the
9 time. However, I believe that the difference here was
10 moving to a LRIC basis for the costing as part of
11 proposals to use commercial freedom in order to be able
12 to ensure that Royal Mail could compete. I believe that
13 that was the biggest difference here.
- 14 Q. To be clear, you are talking about a LRIC basis for
15 London alone, not for the other zones? (Pause). Yes?
- 16 A. My recollection was that Royal Mail made these pricing
17 proposals with reference to LRIC which --
- 18 Q. For London?
- 19 A. -- it was entitled to do.
- 20 Q. For London?
- 21 A. Yes.
- 22 Q. Alone?
- 23 A. I can't remember whether it was for London alone, but
24 I can -- I believe it was for London.
- 25 Q. Last point, Ms Whalley, and then we will break.

1 If you could go into your statement at
2 paragraph 199, which you should find on page 61, you
3 will recall that it was part of your written evidence
4 for this tribunal to discuss these price changes and the
5 reasons for them, wasn't it?

6 A. Yes.

7 Q. You will see that you say in the middle of the paragraph
8 that the CCNs include modifications which had the impact
9 of reducing prices for the urban and London zones and
10 increasing suburban and zonal prices. The next
11 sentence --

12 A. Yes.

13 Q. -- then explains:

14 "This was to ensure prices took account of the
15 relevant costs to Royal Mail of delivering mail in these
16 areas."

17 Now, emphasising the phrase "the relevant costs to
18 Royal Mail", on reflection, can we agree that that is
19 not a fair and accurate statement?

20 A. I don't understand why not, if the basis was LRIC.

21 Q. Because here, Ms Whalley, I would suggest to you that
22 the phrase "prices taking account of costs to
23 Royal Mail" means something altogether different from
24 cost oriented prices for each of the zones. What it
25 means is that you were treating pared-down estimates of

1 Royal Mail's costs in London, the incremental costs, as
2 a floor for prices in London and you were actually
3 setting prices in London uniquely low to target the
4 small-scale new entry from Whistl; that's right? It was
5 to meet the competition in the local areas where the new
6 entrant was coming in.

7 A. So my recollection at the time was, as part of
8 a commercial response to protect the universal service,
9 Royal Mail looked at its zonal pricing and set proposals
10 for zonal prices in order to ensure that Royal Mail
11 could compete in London.

12 Q. Now, lastly, Ms Whalley, in view of that, if you could
13 just turn back to tab 3 for a moment, we looked earlier
14 at paragraphs 7.9 and 7.10 on that page, what you say in
15 the final sentence of your witness statement in
16 paragraph 199 was this:

17 "Ofcom has not objected to these charges (sic)."

18 Yes? Do you see that?

19 THE CHAIRMAN: "Changes".

20 A. Yes.

21 MR TURNER: I'm sorry, "changes".

22 Ms Whalley, that may be technically correct in
23 relation to this current infringement decision, but it's
24 rather economical with the truth, isn't it? Because the
25 zonal price rejigging was a measure in the CCNs which

1 you were combining with the price differential between
2 the two national plans with a single aim, which was to
3 counter Whistl's roll-out of a competing delivery
4 service; would you agree?

5 A. I would not agree with that, and we talked about that
6 before, and if I go to this last point here on 199, when
7 this was written it was in the context of the CCNs and,
8 if you recall, one of the concerns that Royal Mail had
9 at the time was indeed that Ofcom, at that time, had not
10 provided any guidance to Royal Mail or the market on
11 what it meant by "fair and reasonable terms of access".
12 This guidance was not available at the time.

13 Q. I understand that, Ms Whalley, but just to be absolutely
14 clear, my question to you was about the basis for your
15 pricing, and what I put to you was that this pricing, as
16 you adopted it in London, had the same single aim as the
17 price differential and it was to combat Whistl's further
18 roll-out of a competing delivery service; is that right?

19 A. The way I would characterise it, and Royal Mail
20 discussed it at the time, was to use Royal Mail's
21 commercial freedom in order to try and be able to
22 compete on a fair basis with a new delivery entrant in
23 order to help protect the universal service. That's how
24 I would characterise it.

25 MR TURNER: Thank you.

1 Sir, shall we leave it there?

2 THE CHAIRMAN: Yes. Five minutes.

3 (3.36 pm)

4 (A short break)

5 (3.41 pm)

6 THE CHAIRMAN: Crack on.

7 MR TURNER: Ms Whalley, I want to turn now to a new topic,
8 and the topic is the issue of eligibility for the
9 national price plans, and the conditions under which
10 a customer would be able to move over from one to the
11 other.

12 In the new bundle, if you turn to tab 15 --

13 A. Is this the same bundle as I had before?

14 Q. Yes. It's the recent one. You should have at tab 15
15 a document 10 January 2014, it's the notice of the CCNs.
16 Do you have that?

17 A. Yes.

18 Q. You see in it, on the first page, paragraph 2.1,
19 something you will be familiar with, that there are
20 two-year forecasting requirements for the NPP1 plan
21 being introduced. Do you see that, 2.1(a) and (b)?
22 Customers had to provide a two-year notification, and so
23 forth.

24 A. (Pause). Yes.

25 Q. So with that in mind, if we then go to tab 18, we have

1 the access letters contract pro forma. In it, you go to
2 page 39, which has the NPP1 plan terms. Tell me when
3 you have that. It's headed "Schedule 3. Price plan.
4 Option A". Do you have that?

5 A. Yes.

6 Q. The paragraph on eligibility is 2.1, under the bold
7 heading, "Eligibility to opt for a National Price Plan",
8 and you will see it says:

9 "You may only opt for [NPP1] (SSCs) if you are able
10 to prove to our reasonable satisfaction that you have
11 a reasonable likelihood of meeting the National Spread
12 Benchmark and the Urban Density Benchmark."

13 Would you agree with me that the natural way to
14 understand that is that Royal Mail would need to be
15 satisfied that the customer's forecast mail intentions
16 that it had to submit would fit with the plan's
17 requirements? (Pause). The phrase "reasonable
18 likelihood of meeting" gives us the clue.

19 A. Yes, although I recall that there were opportunities to
20 be on this price plan and to have profiles that were
21 divergent and to still be on the price plan, albeit that
22 there were surcharges that would have been in place. So
23 that's my caveat.

24 Q. We're dealing here with the conditions of eligibility
25 for joining it in the first place, and we have agreed

1 that the natural way for a business to understand what's
2 written is that it's forward looking; that's right?

3 A. Yes.

4 Q. I would suggest it fits with the way that Royal Mail
5 actually behaved in practice, and suggest that
6 Royal Mail examined the forward looking plans of
7 a business to see not only if they were currently
8 compliant with the benchmarks, but whether they would
9 continue to meet the benchmarks; isn't that right? It's
10 the way it was done?

11 A. What I remember is that the requirement for the forecast
12 and the volume information was a new requirement --

13 Q. Yes, it was.

14 A. -- under the CCNs.

15 Q. Let's look together at how Royal Mail was considering
16 how it would work. If you go to tab 20, please, you
17 should have a heading "Notes from meetings and
18 conference calls with operations on planning and
19 forecasting and insight into changes in customer
20 behaviour". Do you have that?

21 A. I do see the document here, but again this document was
22 not part of my witness bundle, so this is a new
23 document.

24 Q. I'm not worried about that, but it's the point that
25 comes out of it that we're interested in your evidence

1 on.

2 If you could turn to the second page, please, you
3 will have a little bullet at the top on the left-hand
4 side. Do you see that?

5 A. On page 2?

6 Q. Yes, at the very top, after two lines which are
7 a run-over from the previous page, there is a bullet?

8 A. Yes.

9 Q. What it says is that:

10 "When [a confidential well known high street firm]
11 wanted to set up their own account on NPP1 for their
12 [blank] business, the requirements of the plan required
13 them to discuss with us their profile and volumes to
14 assess whether they would be able to conform to the
15 requirements of NPP1. Our analysis of their data and
16 discussions with their senior managers regarding plans
17 for their business led [it should say "led us to
18 conclude"] that they would not be able to conform to
19 NPP1 and they were therefore not allowed to take up
20 NPP1."

21 So, Ms Whalley, this supports the idea that
22 Royal Mail's practice, how it was liaising with
23 customers about the new requirements, matched what one
24 would naturally understand the words on the page to
25 mean, doesn't it?

1 A. Yes. I'm not aware myself of the specifics of this
2 customer --

3 Q. No.

4 A. -- however, so I cannot comment on the reasons why, in
5 this case, that may not have been appropriate.

6 Q. No, but we see the approach.

7 Now, under the new terms for NPP1 which were being
8 introduced, a customer wouldn't qualify if it failed to
9 meet the national spread benchmark in five SSCs in
10 England and Wales, down from six previously; is that
11 right?

12 A. Yes.

13 Q. Would you agree that a customer such as Whistl/TNT which
14 was carrying out its own deliveries in four SSCs prior
15 to the CCNs in London and Manchester and had concrete
16 plans to roll out the others within the coming year,
17 would not be able to prove to Royal Mail it was
18 reasonably likely that they would pass the benchmark?
19 In fact, Ms Whalley, was it not obvious that they would
20 fail the benchmark in 2014 and almost straightaway?

21 A. My understanding at the time was that the access team
22 who managed contracts with customers believed that it
23 was feasible for TNT/Whistl to move from APP2 to NPP1,
24 and indeed in my witness statement I do have a meeting
25 note from a meeting which I did not attend but

1 a colleague did attend, which I believe, from memory,
2 was on 17 December in 2013, where there was a discussion
3 on the potential for Whistl to move to NPP1.

4 Q. We will come to that, Ms Whalley, in a moment, so please
5 be patient.

6 You would agree with me that based on the available
7 criteria published and based on what we can see of
8 Royal Mail's own practice, that I'm right to say that
9 Whistl might expect that it would not be able to meet
10 the terms of the NPP1 plan? It must follow, mustn't it?

11 A. As I said, I don't know in this particular case why this
12 customer was not able to do that, and how that related
13 to the profile of TNT/Whistl at the time. That's not
14 information that I had.

15 Q. We don't need information, Ms Whalley, all we need to
16 observe is that the decision was being made, as one
17 would expect, on the basis of the plans that they
18 submitted, and that Whistl's plans were to have
19 a roll-out, which would mean that they would be in
20 breach. So I ask you again: can we agree that if Whistl
21 was, according to its plans that it would need to
22 submit, going to be in breach of the benchmark, it
23 wouldn't be able to prove it had a reasonable likelihood
24 of meeting it and be eligible for the plan? Wouldn't
25 that be the natural inference?

- 1 A. My understanding is -- and I believe that this is
2 a legal, I think it was addressed in the reply as
3 a legal point around reasonable endeavours.
- 4 Q. Now, I'm not going to get into the legality of it with
5 you, Ms Whalley, at all. I am asking you for your
6 business understanding, given the nature of the contract
7 terms that you were putting out and the way that your
8 operations team were dealing with this. So let's leave
9 the legality to one side.
- 10 A. My understanding at the time was that it was feasible
11 for Whistl to move to an NPP1 plan and to continue
12 roll-out, recognising -- and I do recognise this -- that
13 depending on the volumes and the locations, there may
14 have been surcharges that were applicable.
- 15 Q. Is the basis for your understanding what you were saying
16 a moment ago, your reference to this meeting that took
17 place between Royal Mail senior executives and Whistl
18 executives? Is that what you take as the basis for your
19 understanding?
- 20 A. I remember that at the time there were a number of
21 discussions that were held on this point. That's what
22 I can say.
- 23 Q. And what was your reference to that meeting intended to
24 signify? Was it relevant to this point?
- 25 A. Sorry, relevant to which point?

1 Q. To the question of eligibility of TNT/Whistl to join the
2 NPP1 plan, the point that we are discussing.

3 A. So the reason that I made a reference to the meeting is
4 that my understanding is that at that meeting there was
5 a discussion around the potential for Whistl to move to
6 NPP1, and indeed I believe that colleagues at that
7 meeting indicated a willingness to have a discussion
8 with Whistl about how to do that.

9 Q. Well, it is covered in your witness evidence, as you
10 say, so let's look at that. It's on page 66 of your
11 statement at paragraph 219, at the foot of the page. So
12 there we have your evidence on this point.

13 I'm not sure Ms Whalley has the document.

14 A. No, I do have the document.

15 Q. Now, Ms Whalley, none of the Royal Mail executives who
16 were at the meeting have been called as witnesses of
17 fact, unfortunately. But you say, in the third line of
18 219:

19 "I was briefed after the meeting and have reviewed
20 Whistl's notes of the meeting, which are exhibited."

21 Yes?

22 A. Yes. Do we have that, the meeting notes?

23 Q. I'm coming to that in a moment. May I ask you, before
24 we go there, who briefed you, please?

25 A. (Pause). I presume that it was -- which of these names

1 are confidential?

2 MR BEARD: The first of the names there is not confidential.

3 The other two I think remain confidential.

4 A. So I presume that it was the first name here.

5 MR TURNER: And are you aware of any other note which was

6 taken of this meeting on the Royal Mail side?

7 A. (Pause). I don't (inaudible).

8 Q. There isn't one in the bundle. I am asking if you can

9 remember any other note of this meeting which was

10 prepared on the Royal Mail side?

11 A. I don't remember.

12 Q. This note, which you do exhibit, the Whistl note,

13 presumably contains nothing which is at odds with the

14 briefing you received or else you would have said so in

15 your witness statement. Would that be right? (Pause).

16 I can tell you you don't refer to anything.

17 A. I don't refer to any other note, that's correct.

18 Q. Well, the minutes that you exhibit in your evidence are

19 at tab 21 in this same bundle. Can we look at those,

20 please. If we turn to the second page and look at the

21 top, three lines down, I think I can refer to these

22 names because the Whistl names are not confidential, and

23 we have been told by Mr Beard that the first Royal Mail

24 name is also now not confidential.

25 So you see the third row down:

1 "NW, Mr Wells, asked if RM had considered the impact
2 on TNT post. SA said they considered the revenue from
3 each customer and the price plans, they would look at
4 the impact on each customer and assess where some
5 customers have a possible mitigating effect."

6 Do you see that?

7 A. Mm.

8 Q. On reflection, would you agree that this was somewhat
9 economical with the truth on Mr Agar's part, assuming
10 this note is complete? That is not a full answer to the
11 question that was put to him by Mr Wells?

12 A. I can't comment on that, I wasn't at the meeting, and so
13 these are not my meeting notes.

14 Q. No, but we can agree that the price differential and the
15 zonal tilts had been designed with the impact on Whistl
16 and its roll-out at least in mind; wasn't that the case,
17 from everything that we have gone through so far?

18 A. As I said, I was not at the meeting, so I am therefore
19 not able to comment on the accuracy of what is in -- is
20 in these notes at that point.

21 Q. I'm not asking you about that; I'm saying that if the
22 note was complete, that was a rather misleading answer
23 to be given to Mr Wells' question.

24 A. And what I'm saying is I don't know whether that's
25 what -- exactly what was said, because I was not at the

1 meeting, so I can't comment on that.

2 Q. Now look at the foot of page 2, the last but one entry:

3 "NW said this would impact both the downstream
4 access and end-to-end activities of TNT Post. The net
5 result would be it could well scupper the set-up of an
6 alternative E2E network. NW asked if RM was aware of
7 the impact on TNT Post's business."

8 Then this:

9 "SA said the prices would be cost-reflective and
10 that TNT Post has options to mitigate the effect. SA
11 said that TNT Post currently satisfied the conditions of
12 NPP1."

13 So, Ms Whalley, can we agree that this says only
14 that at TNT's current level of roll-out, TNT satisfies
15 the conditions of the plan?

16 A. That is what is said here. Again, I was not at the
17 meeting so I don't know whether -- I don't know exactly
18 what was said at the meeting, but that is what is said
19 here.

20 Q. And your briefing after the meeting, by the individual
21 concerned, doesn't lead you to take a different view?

22 A. As I said earlier today, based on the discussions that
23 Royal Mail had at the time, the view was that Whistl
24 could move to NPP1 and continue, albeit recognising
25 there would be some surcharges depending on precise

1 volumes and locations.

2 Q. Can we agree --

3 A. That's my view.

4 Q. Understood, but you need to focus on my question, which
5 is about what is said here. This says nothing about
6 what would happen if TNT were to submit a two-year
7 forecast which showed an aggressive roll-out plan to
8 further SSCs, does it? In other words, Ms Whalley, it
9 may be the case that if TNT stops its roll-out, that it
10 can join the plan; it has that option. But if it
11 continues its roll-out, that is incompatible with the
12 terms of eligibility for the plan, isn't it?

13 A. (Pause). I go back to what I said before, which is that
14 Royal Mail considered that there was -- there were
15 options for Whistl to continue its roll-out on NPP1 to
16 additional SSCs, albeit with surcharges.

17 Q. Now, Ms Whalley, I can't take that much further, but
18 there is some confusion in the papers about the
19 circumstances in which a customer who was on the NPP1
20 plan, assume that you get on to it, is then liable to be
21 switched over to another zonal plan for non-compliance;
22 are you aware of that debate in this case?

23 A. My understanding, and I think it goes back to what
24 I mentioned before on reasonable endeavours, which
25 I don't feel, as I'm not a lawyer, qualified to talk

1 about, but which may come out in further discussion, but
2 my recollection was that a player could only be asked to
3 move to a different plan if there was more than 15%
4 volumes that didn't comply, and my understanding was
5 that Royal Mail didn't think that would be the case in
6 this instance.

7 Q. Now, Ms Whalley, I'm not asking you in any way about the
8 correct legal interpretation of these documents. What
9 I am asking you about is the business understanding of
10 these documents, how they were operated, how they were
11 received and the information about how they would be
12 operated that was communicated by Royal Mail to Whistl.

13 Now, can we turn, please, to tab 17 in the
14 cross-examination bundle. This is a document which
15 we've already seen, the proposed actions on the access
16 contracts to protect the USO. In it, please, can you
17 turn in the customer analysis section to page 22. Do
18 you have that?

19 A. Mm.

20 Q. So here, it's in green, so we have to be careful about
21 who it is. You see the customer identified at the top,
22 and we can see from the first row under "Change":

23 "PP1: 6 failed SSCs [going down] to 5."

24 That this customer was failing to meet the plan
25 benchmark in a fair number of SSCs in England and Wales;

1 yes?

2 A. Mm.

3 Q. We see at the bottom:

4 "Would they switch plans?"

5 The comment that:

6 " ... they are compliant enough with [the] cheapest
7 plan."

8 Yes?

9 So presumably in Royal Mail someone does take the
10 approach that this customer's failures can be forgiven
11 on the basis that Royal Mail will accept them making
12 reasonable endeavours to comply with the plan; yes? To
13 comply with its terms.

14 A. That would be my understanding.

15 Q. Yes. Now let's look back at the Royal Mail presentation
16 which was given to Ofcom, which we started with, at
17 tab 2, in December. Turn in it to page 9. So in time
18 this is a later document, but on page 9 you have a slide
19 talking about the impact on different customers in the
20 market and referring to their options to switch.

21 If you look at the bottom, and I'm not sure if this
22 is confidential so I shan't read it out, the bottom
23 customer on the left and the impact on the right, you
24 see what is said there about the impact?

25 A. Yes.

1 Q. My question, Ms Whalley, is: would this business
2 document not suggest that Royal Mail was taking the
3 position that a failure by a customer -- I won't mention
4 this named customer -- to meet the requirement would
5 allow Royal Mail to switch them compulsorily and that
6 this formed part of the presentation you attended with
7 Ofcom? (Pause). It's the word "therefore" will be
8 switched.

9 A. What I don't know and I can't comment on is whether, in
10 the case of this particular customer, there was
11 a change. I am unable to comment on that. These
12 documents are from different times. I'm unable to
13 comment on that. I don't know.

14 Q. No, I'm not asking you to comment on that specific. I'm
15 asking you to comment on the approach. If you simply
16 focus on that box with impacts, it's the "therefore"
17 will be switched to another price plan which is
18 important, and I'm asking you whether that captures
19 correctly the approach that Royal Mail was then taking
20 commercially to how these plans would interact?

21 A. My recollection at the time is that the access team were
22 having discussions with customers on their business and
23 the extent to which it fit with different plans. As
24 I mentioned, I cannot comment on this particular
25 customer and whether there was a reason for the

1 "therefore" in this instance. I can't comment on that.

2 I don't know.

3 Q. Fine. In view of the time, let's move on. If you can
4 turn back to the note of the meeting, which was at
5 tab 21 of this bundle, and look in it -- turn to page 4.
6 Do you have that?

7 A. Yes.

8 Q. Fourth page. Third entry up, somebody whose name cannot
9 be mentioned, we will call them Ms X, asked how a price
10 differential would create a problem for end-to-end, and
11 you will see the answer given by the Whistl attendee
12 that:

13 "... 40% of volumes were from customers with their
14 own contracts, CDA or agency, with RM and therefore had
15 total visibility of the Royal Mail price and so a price
16 differential would create a material difference from our
17 competitors. If the [Royal Mail] price is included in
18 our full price, the differential would result in
19 a decrease of our profits."

20 Do you see that?

21 A. Yes.

22 Q. Were you surprised that Ms X did not know how a price
23 differential would create a problem for end-to-end,
24 given her active role in the discussions with the RM
25 team to create these proposals?

1 A. (Pause). Again, I was not at the meeting, so I cannot
2 comment in what context that she asked that question,
3 and whether she was asking it in order to get a view.
4 I can't comment on that, I wasn't at the meeting.

5 Q. No, but she would have had a fair idea, wouldn't she, of
6 the impacts that she was asking about? Do you agree
7 with that?

8 A. Quite probably.

9 Q. Royal Mail was being told here by Whistl that under this
10 new price differential the CDA customers were going to
11 find the Royal Mail price to them directly was going to
12 be higher for deliveries wherever in the country Whistl
13 wasn't delivering. Would you accept that that might
14 well deter such customers from going on to place
15 significant amounts of delivery business with Whistl?
16 Would you at least accept that?

17 A. Potentially, yes.

18 Q. Can we turn back to tab 17, to the customer analysis
19 that we were looking at before, and now go to page 25.
20 Page 25, when you have it, is about Whistl, TNT as it
21 was then called; do you see that?

22 A. Mm.

23 Q. We see what's said towards the foot of the page:

24 "Likelihood of complaint: high, as they would need
25 to switch to PP1 to continue to compete with UK Mail,

1 but that would then dent their direct delivery
2 ambitions."

3 So that was appreciated by Royal Mail too, prior to
4 the meeting with Whistl, was it not?

5 A. I think, as I've said, it was recognised that if Whistl
6 moved on to NPP1 and continued with its roll-out, there
7 would be an impact on costs from surcharges.

8 Q. Well, it says here, Ms Whalley, "that would then dent
9 their direct delivery ambitions". The natural meaning
10 of that, surely, is that there was an understanding that
11 it would have a competitive impact, wasn't it? (Pause).
12 It must be, Ms Whalley, mustn't it?

13 A. Yes, as we discussed earlier there were options, and
14 I refer back to the different blue charts that we talked
15 about earlier today.

16 Q. Well, now can we go to slide 17, and I would like to
17 suggest that Royal Mail also understood, at the time of
18 that meeting, that the price differential would impact
19 on other big customers. Here this one is confidential
20 again, but we see at the top of slide 17 that it's
21 a well known organisation. You see in relation to the
22 row "six failed SSCs to five" its existing position.

23 It would be the case, wouldn't it, that this would
24 make it more difficult for an organisation such as this
25 to place more business with Whistl and suffer the higher

1 charges that would result? Isn't that the natural
2 understanding to take from what we see?

3 A. (Pause). Can you just explain again the link between
4 this customer and Whistl?

5 Q. If this customer is already failing the limit, five
6 SSCs, then were it to fail more by placing additional
7 business with Whistl, then it would become subject to
8 charges and its costs would go up, which would be
9 naturally likely to serve as a deterrent. My
10 proposition is that this was something that Royal Mail
11 understood in its customer analysis of the impact of the
12 price differential.

13 A. (Pause). Our discussion at the time focused on, if
14 Whistl were able and progressed with its roll-out, as we
15 thought it could, then if there were a cheaper price,
16 then there were opportunities for Whistl to convert
17 significant amounts of volume into its network from its
18 upstream customers. That's how we thought about it.

19 MR TURNER: Sir, in view of the time, I'll tell you where
20 I am, I have perhaps one more question that I will put
21 arising from the meeting note, and then one question on
22 arbitrage, so there is a possibility we might sail
23 a little bit beyond 4.30, but then if we come to a hard
24 stop it may avoid the need for any further issue on
25 cross-examination, if you will permit.

1 THE CHAIRMAN: I think we are willing to go with that,
2 Mr Turner.

3 MR TURNER: I am obliged.

4 Please can we go back, Ms Whalley, to the meeting
5 note at tab 21 --

6 A. Yes.

7 Q. -- and look at page 3, and you will see towards the foot
8 of page 3, the third entry from the bottom:

9 "SA said that RM have not considered what impact the
10 6 December 2013 decision will have on that investment
11 [this is the planned investment in Whistl, so he said
12 they hadn't considered it]. He said that they were only
13 aware of the announcement by Herna ... [PostNL CEO] and
14 they 'had an inkling' of an investor being lined up.
15 They had indicated the potential price plan
16 differential, page 84 of the Royal Mail IPO prospectus,
17 and sent a letter in January 2013. He said he presumed
18 these statements had led to ... CEO of [that company]
19 making the statements he did about the level of
20 differential. He added that RM would do nothing which
21 does not meet its regulatory and legal obligations."

22 Now, in fact, Ms Whalley, I would suggest that
23 Royal Mail's strategic thinking about what to do to
24 combat the risk of direct delivery and protect the
25 sustainability of the USO was informed by a clear

1 awareness on TNT -- that TNT's progress may depend on
2 external investment; it may depend on that. It was
3 a matter that you knew, was it not, and that you were
4 working into your thinking?

5 A. So regarding Whistl's investment, we knew that Whistl
6 was looking for investment.

7 Q. And that it --

8 A. We had no idea of who the investor might be, level of
9 investment; the first time that that information was
10 available was, I believe, on 13 December.

11 Q. Can we go back, Ms Whalley, to the document that
12 Mr Holmes took you to just before lunch, which is at
13 tab 19 on page 10. Just focusing on the final line of
14 the slide on page 10:

15 "All of these assume no major investment is
16 available to the entrant, and the entrant needs 10%
17 profits in any expansion."

18 Will you accept that Royal Mail's strategising about
19 the best course of action for it to take and what would
20 best combat the threat of direct delivery was informed
21 by awareness that TNT's progress may depend on getting
22 external investment?

23 A. (Pause). Yes, we were aware that TNT/Whistl was looking
24 for external investment.

25 Q. And that, whether or not it got it, would affect the

- 1 progress of its roll-out plans?
- 2 A. (Pause). Yes, we presumed -- yes.
- 3 Q. Before this meeting, the meeting in December that we
4 were talking about, Royal Mail had also signalled to the
5 market that it was getting ready to do something in this
6 area, including by introducing a price differential
7 between the plans, wasn't it?
- 8 A. Royal Mail made a communication to the market, I believe
9 it was -- I think it was on 6 December, and the reason
10 for that was that there was speculation in the market,
11 and as a responsible company the decision was that
12 Royal Mail should communicate to customers its thinking
13 in order to quell the speculation that was going on in
14 the market, and that communication took place, as
15 I said, I think, December 6.
- 16 Q. Shall we turn to tab 25 and finish this? Tab 25 in this
17 same bundle has minutes of the meeting of the board of
18 directors on 11 December.
- 19 A. Mm.
- 20 Q. You will see in attendance two names that I think I can
21 mention in the second block down, Stephen Agar and
22 Sue Whalley.
- 23 A. Mm.
- 24 Q. If we turn to page 3, at the top, letter (g):
25 "(i) Stephen Agar explained the company would be

1 introducing a price differential reflecting a cost
2 benefit to Royal Mail and increasing the zonal price
3 differentials to better reflect competitive conditions
4 between zones. He advised the board that the company
5 had signalled to the market it was getting ready to do
6 something in this area and TNT had immediately contacted
7 Ofcom to complain."

8 If I can then look, in conjunction with that, at
9 (iii) just below:

10 "The board discussed TNT, and Stephen Agar reported
11 on their service in comparison to Royal Mail."

12 Pausing there, it looks like he at least was
13 comparing the service.

14 "He further advised that he believed that TNT had
15 now received financial backing for expanding end-to-end
16 operations beyond the current zone."

17 So, Ms Whalley, I would suggest that, going back to
18 the way Mr Agar put it in the meeting that took place on
19 17 December, this was more than an inkling that he had,
20 as he put it, in response to the question; this was part
21 of a discussion on the steps which Royal Mail was
22 putting in place to counter the threat of direct
23 delivery. It was part of their core thinking in terms
24 of the steps that they were going to take, wasn't it?

25 A. I think I've said already that, yes, Royal Mail was

1 concerned about the impact of the changing market
2 conditions, not only direct delivery but also increasing
3 e-substitution, on the USO to the order of £500 million
4 a year, and Royal Mail, having had many discussions with
5 Ofcom, appreciated and understood that Ofcom was not
6 going to make any intervention until it had seen
7 Royal Mail use its commercial freedoms. In that
8 context, Royal Mail management and the board assessed
9 different options that it could take using its
10 commercial freedoms in order to try and protect the
11 universal service. A £200 million impact would have
12 wiped out the cash flow of the company at the time. The
13 margin was 3.3%. But at all times, in assessing those
14 different options, Royal Mail was very mindful of its
15 legal and regulatory obligations and did a huge amount
16 of work, sought advice, in order to try and make sure
17 that any proposals it put into the market were on the
18 right side of the line, because it was worried about the
19 impact of the changing market environment on the
20 universal service.

21 Q. Ms Whalley, I don't doubt for a moment that Royal Mail
22 considered that it was under threat and stood to lose
23 a lot. I asked you a specific question, whether its
24 awareness of the possible impact of the signal to the
25 market given by Royal Mail on Whistl's potential for

1 obtaining investment was part of your thinking about
2 what may well happen in terms of Whistl's ability to
3 continue a roll-out. So it was a specific question and
4 if you could answer that, I should be grateful.

5 A. Yes.

6 No, Royal Mail, as I mentioned, responded to the
7 market on 6 December because there was significant
8 speculation in the market, and we thought it was
9 appropriate to communicate to the market our thinking.

10 I had got no information around a potential investor
11 until I believe it was communicated by Whistl on
12 13 December, and up until that point any discussion at
13 Royal Mail around the potential investor into Whistl was
14 speculation. We did not know.

15 Q. Now, Ms Whalley, I'll leave that now. In view of the
16 time, I'm going to go to one last point, which is on
17 arbitrage, and your evidence about that.

18 Can we begin at tab 29. So this is Royal Mail's
19 notice of appeal. So you have seen this before, you are
20 acquainted with the company's arguments in this case;
21 yes? (Pause). I'll take you to it in a moment,
22 Ms Whalley, but you are generally aware of the contents
23 of this document, and I take it that you have read the
24 notice of appeal?

25 A. Yes.

1 Q. Now let's look at the top of page 376, letter (b), which
2 belongs, as you see from the previous page, to 5.39.

3 That says:

4 "Whistl could have rolled out its end-to-end
5 operations to the target of 31 SSCs indicated in its
6 business plan by arbitraging between the NPP1 and ZPP3
7 price plans without needing to switch to APP2."

8 So there is the proposition. Then if you go to
9 5.42, you are relied on:

10 "As explained by Ms Whalley, notwithstanding
11 Royal Mail's concerns over the practice, access
12 operators including Whistl had been exploiting arbitrage
13 opportunities between Royal Mail's different price plans
14 for many years and still are doing so today, over four
15 years after the announcement of the CCNs."

16 So you are relied on in the context of the point
17 that access operators including Whistl had been
18 exploiting arbitrage opportunities for many years. Is
19 it actually your evidence to this tribunal that Whistl
20 had been exploiting arbitrage opportunities for many
21 years or at all? (Pause). Is that your evidence?

22 A. My understanding was that Whistl was, of the total of
23 the 7.8 million that I believe was lost revenue for
24 Royal Mail on arbitrage, that Whistl/TNT may have
25 accounted for about 2 million of that. That is my

1 recollection.

2 Q. And where do you get that from, please?

3 A. It was in one of the documents, I can't remember which
4 one.

5 Q. It's not a point in any part of your witness evidence,
6 is it? Shall we turn to the paragraphs that are relied
7 on in the notice of appeal in your evidence, which are
8 on page 34 of your statement. Do you have that?

9 A. Yes.

10 Q. If you refresh your memory about what you said in those
11 two paragraphs, and read that to yourself.

12 A. Sorry, which paragraphs are you looking at?

13 Q. These are the ones that are said by Royal Mail to be the
14 basis for this proposition that you had supported this.
15 105 and 106 on page 34.

16 (Pause)

17 We can look at 107 as well.

18 A. Yes.

19 Q. Now, nothing in your evidence, Ms Whalley, mentioned
20 Whistl, did it?

21 A. No.

22 Q. In fact, I would suggest to you that Whistl had not been
23 exploiting arbitrage possibilities. Were you shown at
24 any point what the Whistl witness, Mr Polglass, had said
25 about Whistl exploiting arbitrage before you came to

- 1 give evidence today?
- 2 A. I believe I did see Mr Polglass's statement, if you have
3 that.
- 4 Q. Yes, it's in the same bundle, tab 30, and you need to go
5 in it to the bottom right-hand side, number 493. So you
6 have seen this before, but essentially his point is that
7 the suggestion that they had been exploiting arbitrage
8 for many years is simply not true. I'll put it to you
9 that you do have no reason to disagree with what he
10 says?
- 11 A. (Pause). My recollection was different from that, but
12 I agree it's not in my evidence, in my witness
13 statement.
- 14 Q. And you will be aware, I think, that shortly before the
15 notification of these CCNs, Royal Mail had announced
16 generally to its customers, in November 2013, that it
17 was going to change the access contracts to mitigate the
18 risk of arbitrage exposure; do you remember that?
- 19 A. I do remember that --
- 20 Q. Signalled to the market.
- 21 A. I do remember that. Arbitrage was a cost to the
22 business. However, it was a practice that was used by
23 a number of different customers, and as proved to be the
24 case when we started discussing this, it proved to be
25 extremely difficult, because of the way in which

1 different customers used it for their needs, to gain any
2 consensus in the market on how this might change.

3 So although Royal Mail did not -- arbitrage was not
4 helpful and beneficial for Royal Mail, at the same time
5 Royal Mail saw that this was a very difficult practice
6 to change because it had become embedded in a number of
7 customers and their way of doing business.

8 Q. Now, Ms Whalley, coming to the end, if you go, please,
9 to tab 32 in the bundle, there you have the letter we
10 have just been discussing, 15 November 2013, in which
11 Royal Mail did bring generally to customers' attention
12 that it was seeking to take steps to avoid exposure to
13 the risk of arbitrage; do you see that?

14 A. Mm.

15 Q. In those circumstances you would agree that it would be
16 a rather rash business response to plan a roll-out that
17 would involve significant arbitrage, would it not?

18 A. I think all players in the market who were using
19 arbitrage were well aware that it was very difficult for
20 Royal Mail to make changes because there was no solution
21 on arbitrage that would be likely to be agreed by all
22 players in the market. I think that was well understood
23 at the time, actually.

24 Q. Was the answer to my question yes?

25 A. Sorry, can you repeat the question?

1 Q. Whether it would have been unsafe for a business, in
2 view of Royal Mail's declared attitude, to plan for
3 business based on the intention to engage in arbitrage?

4 A. No, I don't necessarily think so, for the reason that
5 I just stated.

6 Q. Can you expand on that again, please?

7 A. Because, as I stated, arbitrage was used by a number of
8 customers and there was a cost to Royal Mail of that
9 arbitrage, and as we considered the options and as the
10 business went on, as I understand it, to discuss the
11 options with different customers, there was no option
12 that was agreed by all customers, and therefore it has
13 proven very difficult to change, and still exists.

14 Q. Yes, Ms Whalley, I'm not sure that was an answer to my
15 question, but we'll leave it there and I'll show you one
16 final document and then we're done.

17 Could you go, please, to tab 33. This is a letter
18 from TNT Post, now Whistl, dated 26 November 2013, and
19 it relates to arbitrage. If you turn over to page 3,
20 there is a heading, "Preventing arbitrage":

21 "There are a number of other measures which ...
22 could and should be adopted to minimise arbitrage
23 without the need to alter tolerance [here] on NPP2 ..."

24 Were you aware that Whistl was in discussion with
25 Royal Mail about the problem of arbitrage after its

1 announcement and that it recognised Royal Mail's wish
2 and intention to drive it out?

3 A. I was not -- I was aware of the broad discussion in the
4 market. I was not -- I have not seen this letter
5 before, and I was not aware of any detailed discussion
6 at the time at this level of detail. I was not.

7 MR TURNER: Sir, I have no further questions.

8 THE CHAIRMAN: Mr Beard, do you wish to re-examine?

9 MR BEARD: I do, but I'm going to be very brief.

10 THE CHAIRMAN: Please proceed to be very brief.

11 MR BEARD: It may be slightly out of order, but so that
12 I pick up one or two --

13 THE CHAIRMAN: Out of order?

14 MR BEARD: Out of order of papers that have been -- I don't
15 mean lawful, but it may be that as well; we will see.

16 Re-examination by MR BEARD

17 MR BEARD: Ms Whalley, if we could just go back to your
18 witness statement, paragraph 106, second sentence, you
19 refer to Royal Mail's modelling team analysing levels of
20 arbitrage.

21 Can you just explain what Royal Mail's modelling
22 team were and what they were doing here?

23 A. So Royal Mail's modelling team was a team of expert
24 modellers who were looking at how different customers
25 were using the different price plans in order to try and

1 reduce their overall costs by using zonal contracts in
2 conjunction with another national contract. That's what
3 they were doing.

4 Q. I see, and that was where you got the figure, was it,
5 that then follows in the following sentence?

6 A. I believe so, yes.

7 Q. Do you know -- the exhibit is in the bundles, in the
8 sense that there is a holding place for it in the
9 bundles. Because it's a huge Excel spreadsheet, I think
10 it is had electronically so I can't provide it to you,
11 Ms Whalley, to look at.

12 Do you recall looking at that spreadsheet before
13 preparing your witness statement?

14 A. I recall looking at it a while ago, a long -- yes,
15 a while ago.

16 Q. Do you recall whether or not it descends into detail of
17 particular customers?

18 A. I believe it did.

19 Q. So when you were being asked about where sources of
20 numbers for, in particular, Whistl that you recalled
21 were from, could it be that it was from that
22 spreadsheet?

23 A. It could be that it was from that spreadsheet.

24 Q. I'm grateful.

25 You were taken variously but perhaps most recently

1 in the cross-examination bundle from Mr Turner, just so
2 it's the most recent time you have been to it, to
3 a document at tab 17, which is also in bundle C4A at
4 tab 25, but just at 17, and you will recall that
5 document. If we go to, for example, slide 17, page 17,
6 this was one of the pages Mr Turner took you to, it
7 concerned a particular customer, I'm not going to ask
8 about that, on the left-hand side the column is headed
9 "Change", and the first change that's indicated is PP1
10 moving from six failed SSCs to five, and then there are
11 three or four others, and then at the bottom there is
12 a one plan only rule. Do you recall what that was as
13 a possible change?

14 A. I believe that that was a change if a decision or
15 a proposal were to be made at any time to move from
16 three access plans to one plan.

17 Q. So that would be putting in place one plan, was it? And
18 was that ever adopted?

19 A. No.

20 Q. Whilst we're in that bundle, could we go on to tab 19,
21 so that's draft discussion document October 2013, which
22 is at C4A/35 in addition.

23 A. Is this the October '13 --

24 Q. Yes, that's the one, exactly. The page I just wanted to
25 ask you very briefly about, you have already been to,

1 page 7, helpfully highlighted in yellow.

2 You were asked questions about one of the bullet
3 points in the yellow on the launch package of
4 initiatives without reducing average prices.

5 You will see at the top left, "Strategic Option",
6 then "Description", so that's the first bullet,
7 "Introduce revised PP1 T&Cs and price recognition for
8 a national profile", and then "Revise zonal prices".

9 Then under "What do we have to believe?", there are
10 six bullet points. The first is:

11 "No revenue dilution because average prices will
12 increase at or above plan."

13 Second is:

14 "DD operators will move to PP1 to avoid surcharges."

15 Third:

16 "DD will not expand to point of damaging commercial
17 return."

18 Fourth is:

19 "Ofcom will intervene if/when there is tipping point
20 on volumes and Royal Mail has done as much as it can."

21 Fifth is:

22 "Tipping point might become more likely if DD
23 receives external investment."

24 Sixth is:

25 "Proposals defensible to Ofcom [and the] CAT".

1 Do you recall those last three points, and what do
2 they mean?

3 A. Well, the last one I think is clear and it's what I have
4 said before, that we were, Royal Mail was mindful of its
5 legal and regulatory obligations and therefore any
6 commercial response needed to be on the right side of
7 the line and consistent with our obligations.

8 In terms of the other two points, Royal Mail was
9 concerned that Ofcom was potentially underestimating the
10 risk of direct delivery, in part because of the
11 experience between 2006 and 2010 where access volumes
12 had taken off exponentially faster than the regulator
13 had predicted, and therefore here Royal Mail did
14 consider whether there would be a point at which Ofcom
15 would assess the situation and would actually conclude
16 that an intervention was indeed required because
17 otherwise the universal service was not sustainable, and
18 Royal Mail's concern all along -- and that was one of
19 the key points of our discussion with the regulator --
20 was a risk that if it got to that point, then any
21 intervention would simply be too late.

22 Q. One final question, completely separate topic, could you
23 take up your witness statement, in the course of your
24 evidence on a number of occasions you referred to the
25 fact that there was an expectation that Ofcom would give

1 guidance on "fair and reasonable", and you had referred
2 to it in your witness statement. Given the time, I am
3 going to grossly lead the witness in relation to where
4 that might be found in the witness statement.

5 THE CHAIRMAN: This is what you meant by out of order?

6 MR BEARD: Precisely. I am recognising that I am entirely
7 out of order at this point.

8 It's on page 49. Could you just very briefly cast
9 your eye over the first section of that part of your
10 witness statement under heading H and the question is:
11 was that the section of the witness statement to which
12 you were referring in the course of your answers?

13 A. (Pause). Yes, indeed. Ofcom had said to Royal Mail
14 that Royal Mail needed to use its commercial freedom to
15 protect the USO in the face of changing market
16 conditions, and although Ofcom had said and recognised
17 that it needed to provide guidance on fair and
18 reasonable for access, and actually I believe Ofcom had
19 recognised that it was not only Royal Mail but other
20 industry participants who were needing that guidance,
21 that that guidance was not forthcoming and, indeed, in
22 2014, at the end of 2014, Ofcom recognised that it had
23 failed to provide that guidance on fair and reasonable.
24 So that's what I was referring to.

25 MR BEARD: I'm going to leave it there, Mr Chairman, and

1 get through the Whistl witnesses in the timetable that
2 exists, I think I am perfectly content for it to be
3 indicated to them that we start on Thursday.

4 THE CHAIRMAN: You are the appellant, you must have your
5 days in court.

6 MR BEARD: Yes, we will of course have plenty of those
7 still.

8 MR HOLMES: We are also obviously content with that, sir.

9 THE CHAIRMAN: Right. Thank you, everybody. Thank you.

10 (5.05 pm)

11 (The hearing adjourned until 10.30 am
12 on Wednesday, 19 June 2019)

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