Neutral citation [2004] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1046/2/4/04

Victoria House
Bloomsbury Place
London WC1A 2EB

16 November 2004

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellant

-v-

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

(1) DŴR CYMRU CYFYNGEDIG

and

(2) UNITED UTILITIES WATER PLC

Interveners

RULING: INTERVENTION

TABLE OF CONTENTS

I INTRODUCTION

1. In this appeal the appellant Albion Water Limited ("Albion") appeals against decision CA98/01/2004 dated 26 May 2004 (the "Decision") of the Director General of Water Services (the "Director") that Dŵr Cymru Cyfyngedig ("Dŵr Cymru") had not infringed the prohibition set out in section 18 (the "Chapter II prohibition") of the Competition Act 1998 (the "1998 Act"). The Decision was taken following complaints made to the Director by Albion, the first of which was submitted on 11 December 2000, that Dŵr Cymru had infringed the Chapter II prohibition for a number of reasons relating to the price offered by Dŵr Cymru to Albion for "common carriage" access to Dŵr Cymru's water transportation network. In particular, Albion complained that the price offered by Dŵr Cymru to Albion was an excessive price, was discriminatory and gave rise to a margin squeeze.

2. This ruling concerns an application to intervene in the proceedings made by Aquavitae (UK) Limited ("Aquavitae"), Aquavitae having itself also appealed to the against the Decision by a notice of appeal submitted to the Tribunal on 21 July 2004.

II STATUTORY BACKGROUND

3. Section 18 of the 1998 Act provides:

> **"18 Abuse of dominant position**
>
> (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may , in particular, constitute such an abuse if it consists in -
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section -

"dominant position" means a dominant position within the United Kingdom; and
"the United Kingdom" means the United Kingdom or any part of it.

(4) the prohibition imposed by subsection (1) is referred to in this Act as the "Chapter II prohibition".

Section 47 of the 1998 Act provides:

"**47 Third party appeals**

(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to-

(a) a decision falling within paragraphs (a) to (f) of section 46(3);
(…)

(2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.

(3) The making of an appeal under this section does not suspend the effect of the decision to which the appeal relates."

4. The Tribunal's rules of procedure are contained in The Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (as amended) (the "Tribunal's Rules"). Rule 16 of the Tribunal's Rules deals with intervention in appeals before the Tribunal and provides:

"**Intervention**

16. – (1) Any person who considers he has sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.

(2) The request must be sent to the Registrar within the period referred to in rule 15(2)(f).

(3) The Registrar shall give notice of the request for permission to intervene to all the other parties to the proceedings and invite their observations on that request within a specified period.

(4) A request for permission to intervene must state –
(a) the title of the proceedings to which that request relates;
(b) the name and address of the person wishing to intervene;
(c) the name and address of his legal representative, if appropriate;
(d) an address for service in the United Kingdom.

(5) The request must contain –
(a) a concise statement of the matters in issue in the proceedings which affect the person making the request;
(b) the name of any party whose position the person making the request intends to support; and

(c) a succinct presentation of the reasons for making the request.

(6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit.

(7) On granting permission in accordance with paragraph (6), the Tribunal shall give all such consequential directions as it considers necessary with regard, in particular, to the service on the intervener of documents lodged with the Registrar, the submission by the intervener of a statement of intervention and, if appropriate, the submission by the principal parties of a response to the statement of intervention.

(8) In making any decision or direction under this rule the Tribunal shall have regard to the matters referred to in paragraph 1(2) of Schedule 4 to the 2002 Act.

(9) The statement of intervention and the response thereto shall contain:
(a) a succinct presentation of the facts and arguments supporting the intervention;
(b) the relief sought by the intervener;
(c) a schedule listing all the documents annexed to the intervention and, as far as possible, a copy of every document on which the intervener relies including the written statements of witnesses of fact or expert witnesses, if any.

(10) Rules 9, 10 (except 10(1)(b)) and 11 shall apply to the statement of intervention."

5. In this appeal, pursuant to rule 15 of the Tribunal's Rules, the Registrar published a notice on the Tribunal's website on 30 July 2004. As required by rule 15(2)(f) of the Tribunal's rules the notice contained a statement indicating that any person who considered that he had a sufficient interest may apply to the Tribunal to intervene in the proceedings, in accordance with rule 16, within three weeks of publication of the notice (that is to say, by 20 August 2004).

6. Various arguments are raised in the submissions of the parties concerning provisions of the Water Act 2003 (the "WA 2003"), amending the provisions of the Water Industry Act 1991 (the "WIA 1991"). As far as relevant those provisions are the following:

"**56 Licensing of other water suppliers**

Schedule 4, which contains amendments to the WIA to provide for the licensing of suppliers of water other than water undertakers, is to have effect."

7. Paragraph 3 of Schedule 4 to the WA 2003 provides:

"3 After Chapter 2 of Part 3 of the WIA there is inserted –

"CHAPTER 2A

SUPPLY DUTIES ETC: LICENSED WATER SUPPLIERS

Duty of undertaker to supply licensed water supplier etc

66D Sections 66A to 66C: determinations and agreements

(…)

(2) The period for which and terms and conditions on which a water undertaker is to perform any duty under sections 66A to 66C above are-

(a) those which are-

(i) in a case falling within section 66A(2) or 66B(3) above, agreed between the water undertaker and the licensed water supplier in question; and

(ii) in a case falling within section 66C(2) above, agreed between the water undertakers and the licensed water supplier in question; or

(b) in default of such an agreement, those which are determined by the Authority, in a case referred to it by the licensed water supplier in question, if they are acceptable to the supplier,

(subject to the following provisions of this section and sections 66E and 66F below).

(3) The charges payable by a licensed water supplier to a water undertaker under an agreement under paragraph (a) (i) or (ii) of subsection 2 above or a determination under paragraph (b) of that subsection shall be fixed in accordance with the costs principle set out in section 66E below.

(4) The Authority shall issue guidance in accordance with which the terms and conditions of an agreement under paragraph (a)(i) or (ii) of subsection (2) above shall be made.

(5) Before issuing guidance under subsection (4) above, the Authority shall consult such persons as it considers appropriate.

(6) The guidance issued under subsection (4) above shall include guidance with respect to the fixing of charges in accordance with subsection (3) above.

(…)

(9) Neither the OFT nor the Authority may exercise, in respect of an agreement under paragraph (a) (i) or (ii) of subsection 2 above, the powers conferred by –

(a) section 32 of the Competition Act 1998 (directions in relation to agreements); and

(b) subsection (2) of section 35 of that Act (interim directions)

66E Section 66D: costs principle

(1) the costs principle referred to in subsection (3) of section 66D above is that the charges payable by a licensed water supplier to a water undertaker under

the agreement or determination mentioned in that subsection, shall enable the undertaker to recover from the supplier -

(a) any expenses reasonably incurred in performing any duty under sections 66A to 66C above in accordance with that agreement or determination, and

(b) the appropriate amount in respect of qualifying expenses and a reasonable return on that amount,

to the extent that those sums exceed any financial benefits which the undertaker receives as a result of the supplier supplying water to the premises of relevant customers.

(2) In subsection (1) above, "qualifying expenses" means expenses (whether of a capital nature or otherwise) that the water undertaker has reasonably incurred or will reasonably incur in carrying out its functions.

(3) For the purposes of subsection (1)(b) above, the appropriate amount is the amount which the water undertaker –

(a) reasonably expected to recover from relevant customers; but

(b) is unable to recover from those customers as a result of their premises being supplied with water by the licensed water supplier.

(4) Nothing in subsection (3) above shall enable a water undertaker to recover any amount -

(a) to the extent that any expenses can be reduced or avoided; or

(b) to the extent that any amount is recoverable in some other way (other than from other customers of the undertaker).

(5) In this section "relevant customers" means customers to whose premises the licensed water supplier is to make any supply of water in connection with which the agreement or determination mentioned in subsection (1) above is made.

III THE DECISION

8. The Decision, which runs to some 408 numbered paragraphs over 100 pages, sets out the Director's conclusion that Dŵr Cymru, a statutory water undertaker under the Water Industry Act 1991 ("WIA 1991") did not infringe the Chapter II prohibition in the terms offered by Dŵr Cymru to Albion for access to Dŵr Cymru's water distribution pipes and treatment works used for supplying water to Shotton paper mill ("Shotton"). Shotton is a major customer of Albion. The use of a statutory undertaker's water supply network by a third party such as Albion is known as "common carriage".

9. According to the Decision, on 1 May 1999 Albion became the first new statutory water undertaker since the privatisation of the water industry in England and Wales in 1989. It has replaced Dŵr Cyrmu as the statutory water undertaker in respect of Shotton pursuant to what is known as an "inset appointment" made by the Director pursuant to section 7 of the WIA 1991. Section 7(2) WIA 1991 gives power to the Secretary of State or, with the consent of or in accordance with a general authorisation given by the Secretary of State, the Director to replace an existing water and/or sewerage undertaker with another company (known as the "Inset Appointee") for a specified geographic area (known as the "Inset Area"). Section 7 of the WIA 1991 sets out the circumstances in which inset appointments can be made. Where an inset appointment is made the Inset Appointee becomes the licensed water and/or sewerage undertaker for the relevant Inset Area and must carry out all the functions, and has all the rights and obligations of, any other water or sewerage undertaker under the WIA 1991. Albion is the Inset Appointee for the Inset Area of Shotton paper mill.

10. Since May 1999 Albion has purchased water from Dŵr Cymru pursuant to a "bulk supply" agreement. A bulk supply agreement is an agreement between one or more water undertakers for the "supply of water in bulk" defined by section 219 WIA 1991 to mean "a supply of water for distribution by a water undertaker taking the supply". Albion then resells the water to Shotton. Under the current arrangements, as described in the Decision, Albion pays Dŵr Cymru for the water which Dŵr Cymru itself purchases from United Utilities Water plc ("United Utilities"). As the Tribunal understands it at this stage in the proceedings, there is a substantial difference between the price paid by Albion to Dŵr Cymru and the price paid by Dŵr Cyrmu to United Utilities originally. Albion sought to purchase the water itself directly from United Utilities at the point at which the water is abstracted from the River Dee and then to pay Dŵr Cymru to transport the water to Shotton through Dŵr Cymru's pipe network and water treatment works. Albion's complaint concerns the price offered by Dŵr Cymru for transportation of the water to Shotton.

11. The Decision outlines the relevant statutory background to the Director's investigation of the complaint including various provisions of the WIA 1991 (not here relevant) and of the WA 2003. With regard to the WA 2003 the Decision states:

"**Water Act 2003**

20. WA03 received Royal Assent on 20 November 2003. Amongst other things, WIA91 (as amended by WA03) is intended to extend the opportunities for competitive choice in the water industry in England and Wales. Once the relevant provisions have been implemented, customers who consume at least 50Ml per year ("Eligible Customers") will be able to purchase water from water suppliers licensed under the new regime, as an alternative to their incumbent water undertaker.

21. WA03 amends WIA91 by providing a specific framework for new water suppliers to have their water conveyed through distribution networks owned by undertakers to enable the new supplier to supply their customers. In order to do this, the new water suppliers will require a specific licence known as a "Combined Licence". The framework in WIA91 (as amended by WA03) also allows a new supplier to purchase water wholesale from an undertaker at the boundary between the distribution network owned by the undertaker and a customer, to enable the new supplier to supply that customer with the water. The new supplier would require a specific licence (known as a "Retail Licence"). The Government consulted on these proposals.

22. Section 66I(1) WIA91 prohibits the use of a water undertaker's supply system for the purpose of supplying water to any premises of a customer, unless the supply is made by the water undertaker itself or by a licensed water supplier in pursuance of a Combined or Retail Licence under the provisions of WIA91 (as amended by WA03). Under section 17A(8) WIA91, which will be inserted into WIA91 by Schedule 4, paragraph 1 WA03, a relevant undertaker cannot be granted a Combined Licence. However, other companies within an undertaker's wider corporate group will be able to apply for a Combined Licence subject to a new duty imposed on the Water Services Regulation Authority ("Authority"), which will replace the Director, and the Secretary of State that certain powers and duties must be exercised and performed in the manner which they consider is best calculated to, amongst other things, ensure that consumers are also protected as respects any activities carried out by an undertaker which are not attributable to the exercise of functions of the undertaker, or as respects any activities of any person appearing to be connected with the undertaker. In practice, it is expected that this will result in a Combined Licence prohibiting the Combined Licence holder from carrying on any activities in the Water Supply Area of the undertaker with which it is associated.

23. Under the new water supply regime, the access price will be calculated under a specific principle (the "Costs Principle", which is discussed later) which under WIA91 (as amended by WA03) undertakers will have to apply in these circumstances. To the extent that undertakers will be deemed to be engaging in conduct to comply with a legal requirement in so doing, the Chapter II prohibition will not apply to such conduct (Schedule 3, paragraph 5(2) CA98).

24. It might therefore seem unusual for us to produce a decision under CA98 following a complaint relating to access prices, because, whatever the position under CA98, it will be superseded by the relevant provision of WA03.

25. However, in this case, well before the Queen's speech first referred to the Water Bill in 2002, we had already begun our investigation into Albion Water's complaint and agreed to issue a CA98 decision. In general, however, we would not anticipate carrying out further work on CA98 complaints relating to matters (including access pricing) which will be governed by WIA91 (as amended by WA03), to allow us to focus our resources on the new regime."

12. Part of the Decision (paragraphs 227 to 332) considered whether the price offered by Dŵr Cymru to Albion was an excessive price for the purposes of the Chapter II prohibition. That section of the Decision includes the following:

"Efficient Component Pricing Rule (ECPR), the Costs Principle, and the Second Bulk Supply Agreement

317. Dŵr Cymru's method of calculating the First Access Price depends on cost allocation assumptions. In the absence of individual costs data in the water industry in England and Wales (such as the direct costs of treating and distributing water for particular customers), there will always be a certain degree of uncertainty about what assumptions to make (and what, if any, misallocation of costs there has been, when analysing these assumptions). For example, in Step 5 of the calculation of the First Access Price further work by Dŵr Cymru suggested that a different costs allocation should be made from the one originally made.

318. We therefore think that there are dangers in accepting only one approach when assessing costs and whether or not an access price is excessive, even where that approach has been adopted by the company being investigated. When approving tariffs under the annual WIA91 tariff approval process, we examine proposed tariffs from a number of different perspectives. The Telecommunications Notice states that, "*In certain circumstances, where comparative data are not available, regulatory authorities have sought to determine what would have been the competitive price were a competitive market to exist. In an appropriate case, such an analysis may be taken into account by the Commission in its determination of an excessive price*." In this particular case, we have had regard to both the price of the Second Bulk Supply Agreement and the access price which we think that the Costs Principle would generate.

319. We have also considered ECPR. Although it was not used by Dŵr Cymru, it is one of the alternative methods for calculating access prices we considered in our guidance on common carriage access codes. It is also relevant because, as

noted in paragraph 244 above, the Costs Principle in section 66E WIA91 provides for a retail-minus approach to setting access prices and ECPR is the approach most often considered when "retail minus" is discussed. As the Costs Principle is itself a retail minus approach, we have considered ECPR first. (…)

324. The Costs Principle under WA03 is also a type of "retail-minus" approach to access pricing. WA03 amended WIA91 to extend the opportunities for competition in the water industry. WA03 includes a specific legal framework for access to the public supply system within the water industry in England and Wales. All water undertakers are given specific duties to allow new water supply licensees to put water into undertakers' networks for onward sale to customers. The new provisions also set out the type of costs of so doing that undertakers are allowed to recover. This is set out in the "Costs Principle". Water undertakers will be required to set their access prices in accordance with the Costs Principle: [the Decision then sets out sections 66E(1) to (5) of the WIA 1991 (as amended by schedule 4 of the WA 2003, quoted above)].

325. The Costs Principle therefore sets the parameters for calculating access prices. It describes the revenue relating to certain relevant costs and returns that water undertakers can recover from licensed water suppliers. This includes the direct costs of providing access, such as capital costs incurred in order to give access, and the expenses the undertaker incurs in performing its statutory functions that it would otherwise have recovered from the customers who have switched supplier. This may include, for example, costs related to stranded assets.

326. The Costs Principle also describes some costs and returns which water undertakers cannot recover. Any costs that the water undertaker can reduce, avoid, or recover in some other way (other than from customers of the undertaker) cannot be included in the access charge. For example, where the licensee treats its own source of water before putting it into the undertaker's network, the undertaker would treat less water and therefore avoid some power and chemical costs associated with treatment.

327. The "retail-minus" approach to access pricing in the Costs Principle is consistent with the objectives the Government set out in the public consultation that preceded WA03. In support of the Costs Principle, Elliot Morely, Minister for Environment and Agri-Environment stated:

"*We do not want to encourage people to compete who do not take a fair share of the infrastructure costs, because that would mean there were more costs on existing customers, who do not benefit from the competition. That is reflected in section* [66E of WIA91 as amended by WA03], *whereby licensees can enter if they can do things more cheaply than the current undertaker, which puts the onus on them to demonstrate their efficiency. A cost-plus system would allow inefficient entry into the market; there would be less emphasis on the need for efficiency because there would be an element of protection*."

328. Using a "cost-plus" methodology could, in theory, produce the same access prices as a retail-minus approach would produce provided certain restrictive assumptions hold. But in practice the two methods are likely to have different types of errors in the way costs are apportioned. A cost-plus methodology is more likely to lead to errors of exclusion (leading to a lower access price), whereas a retail-minus methodology is more likely to lead to errors of inclusion (leading to a higher access price).

329. When considering any retail-minus approach it is necessary to take the appropriate retail price as a starting point. In this case, the appropriate retail price is that contained in the Second Bulk Supply Agreement at the time Albion Water made its complaint against Dŵr Cymru (i.e. 2000/2001), as Albion Water had effectively become Dŵr Cymru's customer in place of Shotton itself. This price in 2000/2001 was 25.8p/m³. Although we did not formally determine the price in the Second Bulk Supply Agreement, the parties agreed exactly the same price (26p/m³) we indicated that we would be minded to determine, if we were required to do so.

330. Under a "retail-minus" approach the access price would be 25.8p/m³ minus the avoidable costs of resources. These avoidable costs would be the specific costs attributable to the assets used to supply the customer (in this case, the water supplied by United Utilities Water from the Heronbridge Abstraction Point to Dŵr Cymru under the First Bulk Supply Agreement).

331. As noted in paragraph 65, historically Dŵr Cymru has paid approximately 3p/m³ for the relevant water under the First Bulk Supply Agreement. In 2000/2001 the price was 3.3p/m³. The access price resulting from an ECPR calculation would therefore have been approximately 22.5p/m³ (i.e. the retail price of 25.8p/m³ minus the avoidable costs of approximately 3.3p/m³). We think that the Costs Principle would produce the same access price. The difference between this price and the First Access Price of 23.2p/m³ is very small: in percentage terms, it is only 3% of the First Access Price.

Conclusions on excessive pricing

(…)

337. We have considered how best to assess costs, and whether the First Access price is excessive in relation to those costs. On the one hand, Dŵr Cymru adopted a particular approach to calculating the First Access Price which, with our adjustments to correct cost misallocation, would point to costs closer to 19.2p/m³ than the 23.2p/m³ of the First Access Price.

338. However, as discussed above, we think that there are dangers in accepting only one approach when assessing costs and whether or not an access price is excessive. We therefore had regard to the Second Bulk Supply Agreement, the Costs Principle, and ECPR. The access price resulting from an ECPR approach based on the Second Bulk Supply Agreement would be approximately 22.5p/m³. We think that the Costs Principle would produce the same price.

339. In light of the above, and despite our dissatisfaction with the fact that the First Access Price did contain cost misallocation, we have doubts about whether the First Access Price would be said to bear no reasonable relation to the economic value of the service provided, when judged by reference to the difference between the costs actually incurred by Dŵr Cymru and the price charged."

IV PROCEDURAL HISTORY

13. The procedural history of these proceedings, and Aquavitae's involvement in them, is somewhat unusual. The following is a brief summary of the history of the proceedings so far as is relevant to this ruling.

Albion's first appeal

14. On 2 April 2004 Albion first appealed to the Tribunal in respect of its complaint to the Director (Case No 1031/2/4/04). At that time the Director had not published a final decision document concerning Albion's complaint. However, Albion had received from the Director a "draft" decision on 6 June 2003 rejecting Albion's complaint against Dŵr Cymru and the Director had undertaken to issue a further draft decision to Albion by various dates in early 2004. No further draft or final decision having been issued by 2 April 2004, Albion appealed to the Tribunal on the basis that, in all the circumstances, the Director had taken an appealable decision that Dŵr Cymru had not infringed the Chapter II prohibition against which Albion was entitled to appeal. Applications to intervene in that case were received from Dŵr Cymru and United Utilities Water. Neither Albion nor the Director submitted that Dŵr Cymru or United Utilities did not have a sufficient interest to intervene in the proceedings and the Tribunal granted both those parties permission to intervene at a case management conference held on 29 April 2004.

15. At that case management conference the Director contested the jurisdiction of the Tribunal to hear the appeal on the basis that he had not made an "appealable decision" for the purposes of section 46 of the 1998 Act and invited the Tribunal to determine the issue of its jurisdiction as a preliminary issue. The Director indicated, through counsel, that he hoped, but could not undertake, to issue a final decision on the complaint at some point during July 2004.

16. In the event, the Tribunal ruled (see [2004] CAT 9) that the right course at that stage was to adjourn the case management conference to 2 June 2004 in order to review the situation prevailing at that date, and in particular in the light of whether or not by that date a final decision had been taken. In the event, the Decision was issued by the Director on 26 May 2004.

17. The case management conference in case 1031/2/4/04 was resumed on 2 June 2004. Prior to that hearing Albion appealed against a further Decision taken by the Director not to take interim measures pursuant to section 35 of the Competition Act 1998 and alternatively, applied to the Tribunal to impose interim measures pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (the "Tribunal's Rules"). The possibility of appealing to the Tribunal against a refusal by the Director to grant interim measures now arises as a result of regulation 4 and paragraph 30(2) of schedule 1 of the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261). That appeal and application were considered by the Tribunal at the hearing on 2 June 2004 (see Case No 1034/2/4/04 (IR)). In the event Albion and Dŵr Cymru reached agreement on the terms of a consent order providing Albion with a level of margin pending the final resolution of these proceedings. Accordingly it was not necessary for the Tribunal to make a ruling in respect of Albion's application.

18. Shortly before the hearing of the resumed case management conference in case 1031/2/4/04 the Tribunal received, on 1 June 2004, an application pursuant to rule 16 of the Tribunal's Rules from Aquavitae (UK) Limited ("Aquavitae").

19. According to that application Aquavitae is a prospective water retail licensee intending to negotiate with licensed water undertakers for a supply of water upon the coming into force of the WA 2003. Aquavitae stated that it was affected by the Decision as the Director had expressly tested his conclusions in the Decision against section 66E of the WIA 1991 known in the water industry as the "Costs Principle" (and inserted in the WIA 1991 by section 56 and schedule 4 of the WA 2003).

20. In its application Aquavitae stated that the Decision is entirely prejudicial to the interests of Aquavitae and other prospective new entrants to the water retailing market and is based upon serious errors of law including:

    (a) the Director has misdirected himself in failing properly to interpret the relevant provisions of the WIA 1991 and WA 2003;

    (b) the Director erroneously adopted an approach to the Costs Principle according to which a new entrant such as Aquavitae has to demonstrate with a high degree of certainty that an incumbent water undertaker has necessarily experienced a saving as a direct consequence of the water retailer's role; and

    (c) the Director has erroneously formed the view that the Competition Act 1998 will not apply to competition in the water sector upon the coming into force of the WA 2003 whereas, properly applied, the Costs Principle must be interpreted in conformity with the provisions of the 1998 Act.

21. Aquavitae's application of 1 June 2004 further explained that Aquavitae has, like Albion, had difficulty in dealing with existing water undertakers and negotiating arrangements which afford any, or any satisfactory, margin. Although Aquavitae does not, unlike Albion, have an "inset appointment", both Aquavitae and Albion are, according to the application, faced with the same fundamental problem which, according to Aquavitae is how to obtain from monopoly water companies a supply of water at a price that is not excessive or does not give rise to a margin squeeze.

22. According to its application Aquavitae, like Albion, has been operating at a loss for several years and continues to do so for the present, because incumbent water companies were encouraged by the Director not to give any material margin on their retail price and Aquavitae has continued in business for the sole reason that it expected to be able to take advantage of a new regulatory regime to be introduced by the WA 2003, (expected by Aquavitae to come into force in November 2005). According to the application of 1 June 2004 Aquavitae's expectations as to the

operation of the future regulatory regime under the WA 2003 were "dealt a significant blow" by the Decision. According to the application the approach adopted by the Director, in particular in his approach to the Costs Principle means that the introduction of the new regime in the WA 2003 will in effect be "entirely illusory" and "next to worthless".

23. At the resumed case management conference on 2 June 2004 the Tribunal indicated, having read the application of 1 June 2004, that it was, provisionally, minded, in due course, to permit Aquavitae to intervene in the proceedings. However, as the Director had by then taken the Decision any application ought to be made in any new appeal yet to be made by Albion against the Decision. Dŵr Cymru and United Utilities both indicated that they were likely formally to object in due course to any intervention by Aquavitae in an appeal against the Decision by Albion. The Director indicated through counsel that at that stage, he was not likely formally to object to an intervention by Aquavitae subject to some concern as to the manageability of the proceedings if there was a multiplicity of interveners. The Director noted that the proposed intervention of Aquavitae was concerned with, at best, a relatively limited aspect of the Decision, the treatment of section 66E of the WIA 1991. Section 66E was not in force at the time and was very much a side issue to the Decision itself. The Director was concerned about the prospect of being dragged into dealing with a side issue which, while fascinating in theory, did not really have much of an implication for the Decision itself. Counsel for the Director suggested the possibility that any intervention that was to be made by Aquavitae should be in writing with any further steps to be taken by Aquavitae subject to the permission of the Tribunal.

Aquavitae's appeal

24. What then happened was that on 21 July 2004 Aquavitae itself submitted a notice of appeal against the Decision. That notice of appeal was registered by the Tribunal under case number 1045/2/4/04. According to Aquavitae's notice of appeal, the Decision is the first appealable decision to have been taken by the Director applying the provisions of the Competition Act 1998 to the water sector since that Act came into force in March 2000. The Decision has a significance beyond its application to the specific behaviour of Dŵr Cymru but purports to address the application of the

Competition Act 1998 to competition in the water sector in a general manner, including as regards the principles to be applied in determining access prices generally and setting out "the Director's broad philosophy" in relation to competition.

25. According to the notice of appeal the Director has adopted an approach in the Decision to the calculation of a "retail-minus" access price calculation which makes the profitability of a dominant incumbent water company the first priority and resolves doubts in favour of the dominant company. The Decision, according to Aquavitae, "effectively kills off water retail competition and common-carriage competition" and pays insufficient regard to the intention of Parliament.

26. Aquavitae submitted in its notice of appeal that the Decision has had a direct effect on its bargaining position in negotiations with other water companies by its finding that the offering of a price which does not allow a new entrant to earn any margin at all is not an abuse of a dominant position. Furthermore, Aquavitae challenged the interpretation given by the Director to the Costs Principle in section 66E of the WIA 1991 which, according to the notice of appeal, did not form a peripheral element of the Director's reasoning in the Decision but rather was a central element of it.

27. Aquavitae sought the following relief:

    (a) A determination by the Tribunal that the approach of and price offered by Dŵr Cymru to Albion is inconsistent with the Costs Principle; and

    (b) A determination and/or declaration that the Competition Act 1998 will continue to apply to the water sector even after the coming into force of the provisions of the WA 2003.

28. On 20 August 2004 Dŵr Cymru submitted a request for permission to intervene in Aquavitae's appeal. Dŵr Cymru submitted that it was the subject of the contested Decision and that Aquavitae's appeal may involve scrutiny of its market position and conduct. Dŵr Cymru also submitted in its application to intervene that Aquavitae's appeal was inadmissible. Dŵr Cymru submitted that Aquavitae has had no involvement in the Director's investigation leading up to the Decision, either as a

complainant or as a third party from whom information was sought. Aquavitae is not a party to the arrangements for the supply of water to Shotton paper and has no direct knowledge of Dŵr Cymru's access negotiations with Albion Water. Further, Aquavitae is not and was not a customer of Dŵr Cymru and therefore has no interest in the terms and conditions offered by Dŵr Cymru for common carriage access to its network.

29. Dŵr Cymru also submitted that the appeal by Aquavitae should be considered inadmissible as:

(a) it is not an appeal "against, or with respect to" an appealable decision as required under section 46 of the Competition Act 1998 and therefore disclosed no valid grounds of appeal. While the Decision was a decision concerning the application of the Chapter II prohibition, Aquavitae's appeal was an appeal against the Costs Principle in the WA 2003 which was not in force at the time of the Decision. The application of the Costs Principle and the WA 2003 is therefore irrelevant and not capable of appeal to the Tribunal under the guise of a purported review of the Decision;

(b) the relief sought by Aquavitae insofar as it seeks determinations and/or declarations relating to the Costs Principle and/or the effect of the WA 2003 is not relief within the power of the Tribunal to grant;

(c) in any event, Aquavitae does not have a sufficient interest to appeal against the Decision as required by section 47(2) of the 1998 Act. Aquavitae's contention that the Decision "effectively sets a general precedent extending into the future" cannot be accepted. The Decision is concerned with Dŵr Cymru's conduct as regards a specific inset appointee in specific circumstances and cannot predetermine the conduct of other water companies in relation to requests for access by other applicants nor predetermine the approach of the Director to any subsequent complaint that may be made to him. Aquavitae's proper recourse is to make a complaint to the Director if and when a specific

issue arises in connection with its own negotiations rather than attempting to deal with hypothetical issues by appealing against the Decision.

Albion's second appeal

30. On 23 July 2004 Albion also submitted a further notice of appeal, appealing against the Decision (case 1046/2/4/04).

31. A case management conference was held on 21 September 2004 jointly in this case (that is Albion's appeal against the Decision in case 1046/2/4/04) and Aquavitae's appeal (case 1045/2/4/04). Prior to the case management conference a consent order was made granting permission to intervene in case 1046/2/4/04 to Dŵr Cymru and United Utilities (both of whom had previously been granted permission to intervene in the earlier proceedings).

32. At the case management conference the Director submitted that Aquavitae's appeal is inadmissible and should be dismissed on the grounds that Aquavitae does not have sufficient interest in the Decision. The Director submitted that this issue should be determined as a preliminary issue.

33. The Director submitted defences to Albion's appeal and to Aquavitae's appeal on 15 September 2004, a short extension of time for the service of the Defence having been granted by the Tribunal.

34. In his defences the Director challenged the sufficiency of Aquavitae's interest to appeal against the Decision. That challenge was based on the following:

    (a) Aquavitae did not participate in the investigation of the complaint brought by Albion;

    (b) Aquavitae has not itself, so far as the Director is aware, sought common carriage access from Dŵr Cymru or any other water undertaker. Therefore, the Decision will not pre-determine the

outcome of Aquavitae's negotiations with other water undertakers as it concerns common carriage access rather than any wholesale price Aquavitae may negotiate following the introduction of the WA 2003.

(c) Disagreement with the Director as to his analysis does not confer a sufficient interest in the Decision or a right of appeal to the Tribunal.

35. On 21 September 2004, shortly before the case management conference commenced, Aquavitae submitted a handwritten application to intervene out of time in Albion's appeal (i.e. case 1046/2/4/04). In that application Aquavitae referred to its notice of appeal. Aquavitae's application stated that it had considered that the safest and least complicated option for it was to be a *de jure* appellant against the Decision. Aquavitae referred to an application made by the Director to the Tribunal for an extension of time to lodge the Defence to the appeals submitted by both Aquavitae and Albion on the basis that "the appeals raise important (but different) policy issues regarding water industry legislation". According to Aquavitae's application, Aquavitae had reasonably believed that no point was, or would be, taken by the Director as to the admissibility of its appeal. However, if it appeared that the proceedings were to be interrupted by an "admissibility point", then Aquavitae considered that the most expeditious way of proceeding was to apply to intervene in Albion's appeal. The Director had by then indicated his intention to take an admissibility point in his written submissions for the case management conference submitted on 14 September 2004. Aquavitae submitted that it would be just and equitable to permit Aquavitae to intervene in Albion's appeal out of time. Aquavitae also applied for an order that its notice of appeal stand as its statement of intervention in the Albion appeal and that its appeal be stayed generally in the meantime.

36. At the case management conference on 21 September 2004 the Tribunal gave initial consideration to the most effective way of proceeding in relation to the appeals lodged by Albion and Aquavitae against the Decision. The Tribunal noted that the question of more than one appeal against the same Decision or covering the same subject matter is a question of some general importance across the work of the Tribunal. This case is now the third case in which the issue has arisen. In the Tribunal's view, in general, the Tribunal's case management powers should be exercised in a way that

leads to the most efficient conduct of cases such as these. The Tribunal raised three potential alternatives:

(a) that one or other of the appeals be stayed;

(b) that the appellant in the second case be treated as an intervener in the first case and play a subsidiary role as intervener in the first case, its appeal being stayed in the meantime; or

(c) both appeals proceed together but with very tight control over the points to be argued before the Tribunal

The Tribunal indicated that its preliminary view was that in this case there were attractions in the second course outlined above.

37. The Director objected to those three alternatives outlined above and submitted that the question of whether Aquavitae should play any role at all in any of these proceedings, whether by way of separate appeal or by way of intervention in Albion's appeal should be determined as a preliminary issue. The Director submitted that it is inappropriate for Aquavitae to intervene in Albion's appeal and Aquavitae has no sufficient interest to do so, particularly in the light of Aquavitae's application that its notice of appeal stand as its statement of intervention in Albion's appeal. Dŵr Cymru and United Utilities endorsed the Director's view at the hearing. Dŵr Cymru further submitted that if Aquavitae were to be given permission to intervene then their role ought to be circumscribed as there would be significant issues in relation to the confidentiality of documents and, while it might be appropriate for those documents to be disclosed to Albion, it would not be appropriate to disclose them to Aquavitae.

38. Counsel for Aquavitae submitted at the hearing that, if permitted to intervene in Albion's appeal, he proposed to make no long oral submissions, that any further intervention would be primarily in writing. In his submission, that was the tidiest way of proceeding and would not prejudice any of the other parties.

39. Albion raised no objection to Aquavitae's intervention.

40. Having considered those submissions at the case management conference on 21 September 2004 the Tribunal considered that it remained unenthusiastic about the proposition that Aquavitae should not be heard at all in the proceedings and it remained, provisionally, the Tribunal's preference that Aquavitae be permitted to intervene in the Albion Water appeal and that its own appeal (case 1045/2/4/04) be stayed. However, the Tribunal proposed that Aquavitae prepare, within 7 days, a "concise statement" of the issues upon which it wished to be heard in the appeal on no more than two sides of paper and that there should then be a chance for those who opposed the intervention to consider whether they were prepared to agree to Aquavitae being permitted to intervene on those particular points, on the further understanding that Aquavitae sought no confidential information and that the Tribunal itself would control the points on which it wished to hear argument from Aquavitae as intervener.

41. The Tribunal therefore ordered that Aquavitae file and serve a concise statement of the issues upon which it wishes intervene in the proceedings by 5pm on 28 September 2004 and that the Director and the Interveners inform the Tribunal Registry, the other parties and Aquavitae by 5pm on 12 October 2004 whether, and if so to what extent, intervention by Aquavitae in the proceedings was agreed.

Aquavitae's concise statement of issues

42. Aquavitae served the requisite concise statement of the issues upon which it wished to intervene on the other parties on 28 September 2004. According to that statement:

(a) in the Decision the Director "had regard to…the access price which we think that the [WA03] Costs Principle will generate" in order "to determine what would have been the competitive price were a competitive market to exist" (Decision, paragraph 318);

(b) on that basis, the Director adopted a "retail-minus" formulation for the computation of the Costs Principle price (Decision, paragraph 324);

(c) Albion has challenged the Director's calculation.

(d) In support of Albion's challenge Aquavitae seeks to make brief submissions to the Tribunal on the following matters which are in issue in Albion's appeal (the resolution of those matters being critical to the future viability of Aquavitae's business):

(i) how, in principle, is the appropriate "retail" price to be identified; and did the Director err in principle in the Decision by simply equating the appropriate retail price with the price currently set by the incumbent undertaking? (Decision, paragraphs 331 and 346);

(ii) how, in principle, is the "minus" element to be computed; and did the Director err in principle in the Decision by deciding that the only category of deduction in accordance with the WA03 was the direct cost of supply by United Utilities? (Decision paragraph 330);

(e) Aquavitae's submissions would be restricted to issues of principle and it would not therefore seek to introduce evidence in relation to Shotton nor would it seek access to any confidential material.

(f) Aquavitae also sought permission, if it would be helpful to the Tribunal, to make brief submissions on the statutory background and the relationship between the 1998 Act and the WIA 1991 and WA 2003.

43. Albion did not object to Aquavitae's intervention in the proceedings on the basis of the above statement. United Utilities no longer objects to Aquavitae's intervention on the basis of the above statement, but makes certain submissions concerning the scope of the intervention. However, the Director and Dŵr Cymru did not agree that Aquavitae should be permitted to intervene on the basis of the above concise statement.

V THE PARTIES' SUBMISSIONS

The Director's submissions

44. On 12 October 2004 the Director lodged submissions on the intervention of Aquavitae in this appeal. In those submissions the Director states that he has real doubts that Aquavitae has a "sufficient interest in the outcome of the proceedings" within the meaning of rule 16 of the Tribunal's Rules for substantially the same reasons as those set out in his Defence to Aquavitae's notice of appeal.

45. However, mindful of the Tribunal's provisional view expressed at the case management conference on 21 September 2004 the Director is prepared not to object to the intervention of Aquavitae in the proceedings but only subject to certain conditions, outlined below.

46. In not objecting to the intervention of Aquavitae in the proceedings the Director has taken note of, and relies on, the following representations made by Aquavitae at the case management conference on 21 September 2004:

    (a) Aquavitae welcomes any intervention it makes being circumscribed;

    (b) Aquavitae's intervention will primarily be in writing and Aquavitae will not make long oral submissions;

    (c) Aquavitae's submissions will be restricted to issues of principle and questions of law;

    (d) Aquavitae will not introduce evidence relating to the particular facts of the case nor seek access to any confidential information;

47. The Director also submitted that Aquavitae had stated that if granted permission to intervene it would not seek its costs of intervention and that the Director relied on that statement.

48. In its concise statement of issues Aquavitae sought to raise two issue, namely:

(a) how in principle the appropriate "retail" price is to be identified; and

(b) how, in principle, the minus element is to be computed.

49. With regard to issue (a) the Director does not object to limited intervention by Aquavitae on the issue of whether, in principle, the undertaker's retail price is the correct starting point for a calculation under the Costs Principle (set out in section 66E WIA 1991 (as inserted by section 56 and paragraph 3 of schedule 4 of the WA 2003). This concession is made without prejudice to the Director's submission that the Tribunal need not and should not give guidance on the Costs Principle.

50. Aquavitae's submissions on issue (a) in the Director's submission, should be confined to brief legal submissions on points of principle and not submissions as to the actual facts, figures and findings in dispute or the application of the points of principle in the particular circumstances of the Director's Decision rejecting Albion's complaint. Since Aquavitae played no part at the administrative stage it has no interest in the actual Decision and is not and will not be privy to the underlying confidential information underpinning the Decision.

51. With regard to issue (b), how in principle the "minus" element is to be computed, the Director does maintain his objection to Aquavitae's intervention. The Director's reasons for this are the following:

(a) The "minus" element referred to in issue (b) is set out in sub-sections (3) and (4) of section 66E of the WIA (as amended by the WA 2003). Sub-section (4) refers to so-called "ARROW costs". However, the Decision says nothing about the legal interpretation of sub-sections (3) and (4) or ARROW costs. In the absence of anything in the Decision relating to the correct legal interpretation of the relevant sub-sections any assessment of the Director's approach to the "minus" element of the Costs Principle in this case would turn on the detailed facts of this particular case rather than an issue of principle;

(b) Aquavitae's object in intervening on this issue appears to be to obtain detailed guidance from the Tribunal on the practical issues relating to the Costs Principle and ARROW costs. These practical issues were not considered in the Decision. Detailed practical issues such as whether undertakers should be required to streamline their businesses; how, if at all, undertakers should be required to disaggregate their costs; how savings are to be computed (whether on a location-specific basis, an averaged basis or some other basis); exactly what percentage of retail costs could amount to ARROW costs; and whether or not the Director should set particular targets for undertakers relating to ARROW costs are not dealt with in the provisions which set out the Costs Principle in WA 2003. Rather, such issues are properly, and were intended to be, a matter for the Director to issue guidance upon pursuant to section 66D(4) WIA 1991 (as introduced by section 56 and paragraph 3 of schedule 4, WA 2003).

(c) In this regard, the Director has begun to set up industry advisory groups to assist the implementation of the new regime to be introduced by WA 2003. In particular an Access Terms and Strategic Supplies Advisory Group has been set up, of which Aquavitae has been an active member, to consider, inter alia, access charging methodology and the Costs Principle, charging methodology issues, definition of retail cost items for the calculation of wholesale charges and how to ensure wholesale and access charges respond to changes in the level of retail charges and/or avoidable costs. That group, chaired by Ofwat, has now been wound up but further advisory groups have been set up to consider detailed issues not yet resolved. The intention is to conduct a "case study exercise" and the next step will be for the Director to publish a consultation paper on his draft guidance. He intends to publish the final guidance in spring 2005. If Aquavitae wishes to challenge the detailed practical issues to be covered by the guidance then it has the opportunity to put forward its views as a response to the consultation paper rather than before the Tribunal.

(d) Aquavitae should not be permitted to make submissions on whether the Director erred in principle in the present case by deciding that the only category of deduction that the WA 2003 obliged him to consider was the direct cost of United Utilities' water supply: the Decision does not contain any such decision. Moreover, this would be a detailed case-specific matter that is not an issue of principle.

(e) The Director notes that in its concise statement of issues Aquavitae states that it would also appreciate an opportunity to make brief submissions on the interplay between the Competition Act 1998 and WA 2003 regimes if invited to do so by the Tribunal. The Director does not consider that the Tribunal can, or need, consider arguments advanced by Aquavitae which relate to such an interplay. However, should the Tribunal consider, during the course of the proceedings, that it requires further submissions on this issue, the Director submits that he and the existing Interveners should have a further opportunity to be heard on whether it would be appropriate for Aquavitae to make submissions.

52. The Director invites the Tribunal to make an order that Aquavitae be permitted to intervene solely on the issue of whether, in principle, the undertaker's retail price is the correct starting point for a calculation under the Costs Principle and that Aquavitae be permitted to rely solely on limited paragraphs of its notice of appeal and to the extent that they relate to that issue. The Director further invites the Tribunal to order that Aquavitae make no further oral or written submissions without the permission of the Tribunal, that Aquavitae not be given access to confidential documents or be permitted to adduce evidence and that Aquavitae bear the costs of its involvement in the proceedings. Dŵr Cymru and United Utilities had indicated in advance to the Director that they would be prepared to consent to Aquavitae's intervention in the proceedings on those terms.

The Interveners' submissions

53. Dŵr Cymru submitted that it had seen the submissions of the Director in response to Aquavitae's concise statement of issues and the terms of the Director's proposed order limiting the scope of Aquavitae's intervention before the Tribunal. Dŵr Cymru fully supports the position taken by the Director that Aquavitae's intervention be limited to the first point raised in the concise statement of issues but rejecting Aquavitae's intervention on the second point in that statement. As regards Aquavitae's desire to make submissions on the interplay between the Competition Act 1998 and the WA 2003 if invited to do so by the Tribunal, Dŵr Cymru endorses the position of the Director that he and the existing Interveners be given an opportunity to be heard on whether it would be appropriate for Aquavitae to make such submissions.

54. Dŵr Cymru further supports the Director's request that the Tribunal define the limited terms of Aquavitae's role in the proceedings by order and agrees with the terms of the order the Director invites the Tribunal to make.

55. United Utilities submitted that Aquavitae's concise statement of issues is much narrower than the intervention it previously sought to make in its grounds for intervention submitted to the Tribunal on 1 June 2004. In the light of the restricted nature of Aquavitae's proposed intervention United Utilities no longer opposes Aquavitae's intervention on the grounds of insufficient interest in the proceedings. However, United Utilities made the following further submissions:

    (a) although Aquavitae seeks to describe the Director's alleged mistakes in the Decision as issues of principle that cannot be the position. It is one thing to address the Tribunal on the principle of identifying the retail price and the computation of the minus element under the Costs Principle. It is another to submit that the Respondent erred in its findings on those points. This moves away from a principle to the facts of the Decision.

    (b) there is a possible conflict between the Tribunal and the Director if the Tribunal were to hear and determine the matters of principle covered in

Aquavitae's intervention because the issues raised by Aquavitae relate to the Costs Principle. The Costs Principle is a pricing principle introduced and defined by the WA 2003 and intended by Parliament to apply to competition in water supply using newly created Water Supply Licences. At present the relevant parts of the WA 2003 have not yet been brought into force. Under the WA 2003 the Director is required to develop guidance, inter alia, on the Costs Principle. It is clear that Parliament intended the elucidation of the Costs Principle to fall to the Director and Aquavitae have had ample opportunity to make representations to the Director through a legitimate process. Accordingly United Utilities is concerned that should the Tribunal see fit to consider the issues raised by Aquavitae this could cut across, and indeed, subvert, a role which has been assigned by Parliament to the Director.

(c) United Utilities had seen the Director's submissions to the Tribunal in draft and the terms of the order proposed by the Director and agreed with them.

Aquavitae's submissions

56. In response to the above submissions of the Director and the Interveners, Aquavitae made the following submissions.

57. Aquavitae noted that the Director had waived his objections to its intervention but only if such intervention is to be confined to the first point in its concise statement of issues. However, Aquavitae does not understand why the "issues" should be treated differently – Aquavitae's intervention regarding one matter being permissible but its intervention on another matter not. Both of the matters raised by Aquavitae are, in its submission, equally important components of the applied "retail minus" formulation in the Decision and necessary ingredients of "the access price which we think that the [WA03] Costs Principle will generate", as referred to in paragraph 318 of the Decision.

58. Aquavitae submits that it should be permitted to make any submissions by reference to the Decision. The Decision sets the context of the appeal. Aquavitae will not deal with transaction details or seek access to confidential information but is entitled to submit, as a matter of principle, that the use of the retail price of 25.8p/m³ set by Dŵr Cymru as the starting point for the access price calculation was correct only to the extent that that price was a reasonable price in the first place. Aquavitae's challenge will not be based on the retail price in this case being wrong as a matter of fact but on the calculation of the retail price on that basis being wrong as a matter of principle.

59. The Director's objections to Aquavitae's intervention in relation to the "minus" issue (that the Decision does not expressly deal with ARROW costs and that it is inappropriate for Aquavitae to seek detailed guidance on the Costs Principle in these proceedings) are not borne out by the text of the Decision. First the Director did make a calculation in accordance with the WA 2003. The Decision, at paragraph 331 states: "*We think that the Costs Principle would produce the same access price*". It would not have been possible for the Director to have made such a calculation without consideration of ARROW costs which form part of the Costs Principle. Secondly, at paragraph 326 of the Decision ARROW costs are specifically referred to: "*The Costs Principle also describes some costs and returns which water undertakers cannot recover. Any costs that the water undertaker can reduce, avoid or recover in some other way (other than from customers of the undertaker) cannot be included in the access charge.*"

60. Aquavitae accepts that it would be inappropriate for the Tribunal to give detailed practical guidance on the Costs Principle. However, the Director's function under section 66D(4) WIA 1991 is to give detailed guidance "in accordance with the law". Aquavitae wishes to intervene to make submissions concerning errors of law made by the Director in the Decision not to ask the Tribunal to issue detailed practical guidance, which is within the Director's province.

61. In any event, the Director's references to the various advisory group meetings being the correct forum for considering the issues arising from the present case is surprising considering that neither he nor any senior official of his attended such meetings. This points, in Aquavitae's submission, to the Director's view that such meetings were

concerned with issues of detail rather than the fundamental principles with which this case is concerned. Further, although Aquavitae sought to have the correct interpretation of the relevant statutory provisions discussed at those advisory group meetings this request was rejected out of hand by the Director's staff.

62. Aquavitae submits that it was the Director and not Aquavitae that decided unilaterally to set out his interpretation of the Costs Principle on record in the Decision without any reference to the advisory groups. That being the case, Aquavitae is entitled to intervene concerning errors of law made.

63. Aquavitae undertakes in its submissions to bear its own costs of its intervention if permission is granted.

VI THE TRIBUNAL'S ANALYSIS

64. We grant permission to Aquavitae to intervene on the basis set out in its concise statement of issues dated 28 September 2004.

65. Although the Director submits that he has "real doubts" as to whether Aquavitae has a sufficient interest in the outcome of these proceedings entitling it to intervene his submissions have been directed to limiting the scope of any intervention to be made by Aquavitae rather than its sufficient interest.

66. In his Defence to case 1045/2/4/04 the Director challenged the sufficiency of Aquavitae's interest to appeal against the Decision. That challenge was based on the following:

    (a) Aquavitae did not participate in the investigation of the complaint brought by Albion;

    (b) Aquavitae has not itself, so far as the Director is aware, sought common carriage access from Dŵr Cymru or any other water undertaker. Therefore, the Decision will not pre-determine the outcome of Aquavitae's negotiations with other water undertakers as it

concerns common carriage access rather than any wholesale price Aquavitae may negotiate following the introduction of the WA 2003.

(c) Disagreement with the Director as to his analysis does not confer a sufficient interest in the Decision or a right of appeal to the Tribunal.

67. In the Tribunal's view, although it will often be the case that persons with a sufficient interest to intervene in proceedings before the Tribunal will have participated (or will have sought to participate) in the proceedings before the Director at the administrative stage, that is not a necessary pre-condition to having a sufficient interest to intervene before the Tribunal. It seems to the Tribunal that sufficiency of interest is a matter that is to be determined at the time an appeal has been made (following the taking of an appealable decision). Persons with a sufficient interest in a decision may not be aware of the proceedings before the Director unless, for example, the Director has taken steps to consult them. Even if aware of the proceedings, it may not be clear how a decision affects such a person until the time it is published.

68. The Tribunal has also noted in this context that the Director has stated in the Decision (at paragraph 25) that he does not anticipate carrying out any further work on complaints made to him under the 1998 Act relating to access pricing, which will be governed by the provisions of the WA 2003, in order to focus resources on the new regime.

69. Although Aquavitae does not itself hold an inset appointment it is, according to its notice of appeal in case 1045/2/4/04 seeking to establish itself as a water retailer in the United Kingdom. It appears to the Tribunal, at this stage in the proceedings, that it cannot be excluded that the principles of the 1998 Act as applied in the Decision, the relationship between the Director's application of the 1998 Act and the sector-specific legislation contained in the WIA 1991 and the WA 2003 and, in particular the scope of the Chapter II prohibition in the light of the application of the Costs Principle, may have a material effect on that business.

70. The Decision sets out an analysis (see above) of the application of the Costs Principle in particular in the context of an assessment of whether or not a common carriage

access price is excessive and whether or not it gives rise to a margin squeeze for the purposes of the Chapter II prohibition.

71. Without at this stage deciding what significance the Costs Principle has in this case, the Tribunal's view is that, in all the circumstances, Aquavitae does have a sufficient interest to intervene in Albion's appeal.

72. The Director's submissions are largely directed to limiting the scope of any intervention made by Aquavitae. In particular, the Director objects to Aquavitae making submissions concerning how, in principle, the "minus" element of a retail-minus calculation in accordance with the Costs Principle is to be computed. The Director states that the Decision says nothing about the "minus" element of the Costs Principle, that this is a detailed practical issue and it is not the function of this Tribunal to give detailed guidance which is, instead, to be issued by the Director. Aquavitae has an opportunity to make submissions to the Director on these matters in industry advisory groups and in response to consultations.

73. The Tribunal is not minded, at this stage, to limit the intervention of Aquavitae as suggested by the Director. It appears to the Tribunal that the Director's submissions are submissions that go to the merits of Aquavitae's position, as set out in the concise statement of issues, rather that whether or not those submission should be made at all. The Director will have every opportunity to rebut those submissions during the course of the procedure, including the opportunity to make submissions as to the relevance of these issues, if any, to the lawfulness of the Decision under appeal. However, Aquavitae has already limited the scope of its intervention from the matters set out in its notice of appeal in case 1045/2/4/04 and the Tribunal does not consider it appropriate to limit the scope of the intervention yet further, as suggested by the Director.

74. In general, and in particular in complex cases, the Tribunal is reluctant to determine at this stage of the proceedings that particular matters an intervener wishes to raise are irrelevant or without merit, except in the clearest of cases. Any other approach would involve the Tribunal going much further into the merits of the case than is appopriate on an application to intervene. On the material before us we cannot at this stage say

that the points made by Aquavitae in its concise statement of issues are outwith the scope of the present appeal.

75. Furthermore, it does not appear to the Tribunal that any party will be prejudiced if Aquavitae is permitted to intervene on the basis of its concise statement of issues. In particular, the Director has already included as Annex II to his Defence in these proceedings a "Costs Principle Paper" setting out his views as to the application of the Costs Principle to the facts of this case. All parties will have a further opportunity to make submissions, as necessary, in their skeleton arguments and at the main hearing. Aquavitae does not seek its costs.

76. As regards Aquavitae's request for permission to make submissions on the relevant statutory framework, the Tribunal has expressed the view, on more than one occasion in the context of these proceedings, that that is a matter on which the Tribunal may require assistance from the parties. It appears that it may, again without deciding at this stage, be important for the proper understanding of the issues in this case, as a background matter if for no other purpose. Indeed Annex I to the Director's Defence in these proceedings is a 28-page "summary of the relevant legal framework" setting out the Directors' view of these matters. In those circumstances the Tribunal considers that it is likely to be assisted by further short submissions on the statutory framework from Aquavitae and that it would not be appropriate to restrict Aquavitae from making such submissions, if so advised, in a statement of intervention.

77. The Tribunal is, however, well aware that the issues in the present case concern the legality of a decision taken by the Director under the Chapter II prohibition of the 1998 Act. It is only in that context that the statutory framework is relevant. All parties will no doubt bear in mind that the determination of the appeal in this case is not a roving inquiry into the possible workings of the WA 2003, but a consideration of the specific issues that arise from the contested Decision of 26 May 2004.

78. In these circumstances the Tribunal directs as follows:

(1) Aquavitae's appeal in case 1045/2/4/04 is stayed.

(2) Aquavitae is granted permission to intervene out of time in Albion's appeal in case 1046/2/4/04.

(3) Each party to case 1046/2/4/04 is to serve on Aquavitae a non-confidential version of its pleadings within 14 days of the date of this order.

(4) Aquavitae, if so advised, is to lodge its statement of intervention within 21 days of receipt of the last of the pleadings served purusant to (3) above. Such statement is to be concise and limited to the issues of principle set out in its statement of issues dated 28 September 2004, and only in so far as those issues are relevant to the legality of the Director's Decision of 26 May 2004.

(5) Costs are reserved.

Christopher Bellamy Antony Lewis John Pickering

Charles Dhanowa November 2004
Registrar