

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 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

Transcribed by **OPUS 2 INTERNATIONAL LTD**
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com

HEARING – DAY 7

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.

Wednesday, 19 June 2019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(10.30 am)

THE CHAIRMAN: Good morning.

MR BEARD: Good morning, Mr Chairman, members of
the tribunal.

THE CHAIRMAN: Just before we start, we have one point of
clarification, I think. At the end of yesterday some
spreadsheets were referred to about arbitrage.

MR BEARD: Yes.

THE CHAIRMAN: Right. We didn't look at them.

MR BEARD: No.

THE CHAIRMAN: There is one point about them that we just
want to establish. They are referred to, I think, as
RM10 document 1.

MR BEARD: Yes.

THE CHAIRMAN: Right. They are dated May 2019. I think
what we would like to know is whether the modelling that
they contain or refer to, when that dates from.

MR BEARD: Yes.

THE CHAIRMAN: Could you let us know that?

MR BEARD: Yes, I'll confirm that. I'm not going to do it
off the top of my head.

THE CHAIRMAN: Very wise, thank you.

MR BEARD: But yes, we'll confirm that. It is the modelling
that's referred to in Ms Whalley's statement.

1 THE CHAIRMAN: Absolutely, yes. The date of it could have
2 some significance.

3 MR BEARD: Yes, understood. We will do that. Unless there
4 is anything else?

5 THE CHAIRMAN: No, I think you may ...

6 MR BEARD: The next stage is to call Dr Helen Jenkins.

7 THE CHAIRMAN: Fine. Please proceed.

8 DR HELEN JENKINS (affirmed)

9 THE CHAIRMAN: Do make yourself comfortable. I think you
10 are no stranger to this place. Before you begin,
11 perhaps, Mr Beard, I think we want to be clear what is
12 the basis for Dr Jenkins' evidence. She is a factual
13 witness; is that right?

14 MR BEARD: She is a factual witness.

15 THE CHAIRMAN: Although an eminent expert in her own right.

16 MR BEARD: She is an eminent expert, she is giving factual
17 evidence in these proceedings, but of course she is
18 giving factual evidence in relation to inter alia views,
19 opinions and advice that were given in the course of --

20 THE CHAIRMAN: I suppose the question is: what does factual
21 evidence about expert advice given six years ago
22 actually entail?

23 MR BEARD: Well, speaking to any misinterpretations,
24 misunderstandings or misuse of the material that Oxera
25 under Dr Jenkins' supervision was submitting to

1 Royal Mail, how Oxera dealt with Royal Mail, and insofar
2 as Ofcom are suggesting that there was some sort of
3 scheme or underlying nefarious intent in this case,
4 whether or not Oxera, in giving its advice, was
5 supporting such a scheme or the material evidence in
6 such a scheme.

7 THE CHAIRMAN: When you say misuse, do you mean misuse by
8 Ofcom?

9 MR BEARD: Of course, yes.

10 THE CHAIRMAN: Isn't that straying into legal argument?

11 MR BEARD: Well, you were asking what the relevance of
12 factual material was. The reason why we proffered
13 her --

14 THE CHAIRMAN: I was asking what it was, not its relevance.

15 MR BEARD: I'm sorry. Well, in relation to the statement,
16 I think no issue is taken with the terms of the
17 statement, which are setting out the understanding of
18 Oxera in providing the material they did and explicating
19 the documentary material in question.

20 Now, to that extent it's very much akin to other
21 witnesses who speak to documentary material that is
22 being referred to or relied upon.

23 THE CHAIRMAN: Yes. Our concern obviously is that this does
24 not amount to expert evidence being given by the back
25 door, as it were.

1 MR BEARD: We understand that, and we don't put forward
2 Dr Jenkins in that capacity.

3 THE CHAIRMAN: No.

4 MR BEARD: But we are conscious that in the decision great
5 reliance is placed on Oxera material by Ofcom as
6 relevant documentary material that is going to their
7 case, and to that extent having the senior individual
8 within Oxera who was involved in the preparation of and
9 dealing with Royal Mail in relation to those matters
10 seemed to us both appropriate and indeed necessary.

11 THE CHAIRMAN: Mr Holmes, is any point taken on this?

12 MR HOLMES: Sir, in case it assists the tribunal before we
13 commence the evidence I should perhaps explain the
14 topics that I will be canvassing and those that I will
15 not be canvassing in Dr Jenkins' evidence. By way of
16 correction, Mr Beard is not quite right to say that no
17 concerns were raised in relation to the scope of
18 Dr Jenkins' evidence.

19 THE CHAIRMAN: You said no objection was taken, I think.

20 MR HOLMES: Well, we identified at the outset that we
21 thought that parts of the evidence strayed outside the
22 realm of what is properly factual evidence, and the way
23 we propose to deal with that is by focusing on those
24 parts of the statement which are factual and not
25 canvassing in cross-examination three particular

1 matters.

2 The first is the economics of the universal service
3 on which Ms Jenkins makes various remarks and offers
4 various opinions in section 4 of her statement.

5 The second is the substance of and basis for the
6 opinions that Dr Jenkins gives at various points in her
7 evidence as to whether Royal Mail's conduct should be
8 viewed as anticompetitive foreclosure. Those are
9 matters on which the tribunal will be hearing expert
10 evidence from the parties' appointed experts, and
11 Dr Jenkins is not here today --

12 THE CHAIRMAN: This rather underlines my point. She is
13 allowed, surely, to tell us what it was she told
14 Royal Mail at the time on that subject?

15 MR HOLMES: Yes, of course, and I would like to explore --

16 THE CHAIRMAN: But it doesn't carry expert weight I'm
17 afraid, it's simply evidence that she told you.

18 MR HOLMES: Yes, but in places her evidence goes beyond
19 that --

20 THE CHAIRMAN: I'm sorry to be talking across you,
21 Dr Jenkins.

22 MR HOLMES: Dr Jenkins, I hope you will forgive us. We will
23 come to you shortly, it's helpful to clarify this at the
24 outset.

25 THE WITNESS: I'm totally fine.

1 THE CHAIRMAN: It will make the subsequent discussion
2 a little easier, I suspect, if we get this clear.

3 MR HOLMES: Indeed. So the distinction as we saw it was
4 between the evidence that Dr Jenkins gives in places
5 about her current opinions, and she states in various
6 places what she currently considers to be the status of
7 this conduct, and we don't regard that as relevant or
8 appropriate evidence and we don't intend to challenge
9 it. We will save our points in relation to expert
10 matters, but for the economic experts.

11 THE CHAIRMAN: What's the third?

12 MR HOLMES: I'll come to that in a moment, sir. We will, as
13 you rightly foreshadow, canvass with Dr Jenkins the
14 evidence that was given at the time, insofar as that's
15 material.

16 The third point is that I won't be debating with
17 Dr Jenkins the views she expresses at various places on
18 Ofcom's analysis of contemporaneous documents in the
19 decision, and the conclusions that Ofcom draws from
20 them. The weight that evidence should carry and the
21 interpretation of documents is a matter that can be
22 dealt with in submission.

23 So those three matters will not be within the scope
24 of my cross-examination. Instead, I'll be focusing upon
25 the facts about Oxera's role in the design of the

1 contract change notices and the advice that it gave,
2 focusing on the period from August 2013 to January 2014.
3 So I hope that assists in clarifying the scope of the
4 exercise, sir.

5 THE CHAIRMAN: I think that's very helpful, thank you.

6 Are you going to take issue with that, Mr Beard?

7 MR BEARD: I wouldn't dream of taking issue with Mr Holmes
8 making decisions about how he wants to carry out his
9 cross-examination. Whether or not that is
10 an appropriate range of cross-examination and adequately
11 challenges relevant material, in particular in relation
12 to the last matter, of course he can make submissions as
13 to the interpretation of documents, but if you have got
14 in the witness box someone who is involved in the
15 preparation of those documents and you don't ask them
16 questions, I must properly reserve my position as to the
17 lines Mr Holmes is going to take in due course. But
18 that's a matter for submission. I leave that marker
19 there.

20 THE CHAIRMAN: Thank you. I think we have all made our
21 positions very clear, and you may go forward now.

22 Examination-in-chief by MR BEARD

23 MR BEARD: With that in mind, if we may go to the statement
24 which is in RM3 bundle at tab 1. Now, Dr Jenkins, the
25 cover page says "First witness statement of

1 Dr Helen Jenkins". If you could turn through to
2 page 32, is that your signature?

3 A. Yes, it is.

4 Q. Is this your statement?

5 A. Yes, it is.

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

7 A. Yes, it is, but I have two small -- well, one change,
8 one clarification to make. So the clarification is at
9 paragraph 7.7, and that that sentence should conclude,
10 or rather what I intend by "not foreclose Whistl or
11 an equally efficient operator to Royal Mail". I thought
12 it was not totally clear what that "equally efficient
13 operator" was referring to when I re-read my statement.

14 THE CHAIRMAN: So what words do you want to add?

15 A. That's more just a clarification, but just to be clear
16 that where I talk about an "equally efficient operator"
17 at the end of 7.7, the clarification is I'm intending
18 that to refer to Royal Mail.

19 MR FRAZER: Rather than to Whistl?

20 A. Yes.

21 Then in paragraph 7.10, that paragraph starts "The
22 main conclusion ..." I would like to adjust that to say
23 "One of the conclusions ..."

24 THE CHAIRMAN: No objection from Ofcom to those
25 clarifications?

1 MR HOLMES: No, sir.

2 THE CHAIRMAN: Thank you.

3 MR BEARD: I don't have any questions for you, Dr Jenkins.

4 I imagine Mr Holmes may well do.

5 Cross-examination by MR HOLMES

6 MR HOLMES: Good morning, Dr Jenkins, at last.

7 A. Good morning.

8 Q. Thank you for joining us today. You are managing
9 partner at Oxera, the economic consultancy firm?

10 A. I am.

11 Q. As the Chairman has already mentioned, you are well
12 familiar to many of the people in this room as
13 an experienced and respected economist who has given
14 expert evidence in this tribunal and in the High Court
15 on a number of occasions; that's correct, isn't it?

16 A. That's correct.

17 Q. Royal Mail is a very long-standing client of yours; you
18 have been advising them since around 2003, is that
19 right?

20 A. Yes, that's correct.

21 Q. More generally, Royal Mail is also a long-standing and
22 significant client of Oxera's?

23 A. It is.

24 Q. You are frequently called, as we have discussed, to give
25 evidence as an expert witness in competition and

1 regulatory matters, but as we have discussed, my focus
2 today will be on your evidence as to what happened in
3 the run-up to the adoption of the CCNs and particularly
4 what advice Oxera in fact gave to Royal Mail during that
5 period.

6 A. I understand.

7 Q. Thank you. Can we first consider the structure and
8 composition of the Oxera team during that period, just
9 to make sure that I have understood correctly. You
10 explain at paragraph 2.2 of your witness statement that
11 when Oxera is undertaking an advisory role for a client,
12 you assign three different roles. The first is project
13 director who is responsible for the overall direction of
14 the project, the second is project manager, who manages
15 the project day to day, and the third is project adviser
16 whose role is to contribute ideas, peer review the work
17 and ensure any interrelationships with other Royal Mail
18 work are identified. That's right, isn't it?

19 A. Yes, that's right.

20 Q. Am I right to understand from paragraph 1.2 of your
21 witness statement that you were leading the project
22 during the period from August 2013 to January 2014 as
23 project director?

24 A. Yes, for the work that was initiated in August 2013
25 I was the project director.

- 1 Q. But not for the prior periods?
- 2 A. For the prior periods I was also project director for
3 a number of pieces of work.
- 4 Q. Some pieces but not all, yes. Given the detailed email
5 traffic between Mr Flórez Duncan, your colleague at
6 Oxera, and the Royal Mail teams, can I also take it that
7 he was the project manager taking the lead on the
8 day-to-day work?
- 9 A. Yes, he was.
- 10 Q. In practice, it appears that you weren't copied on most
11 of this correspondence and that you had a relatively
12 limited day-to-day role; would that be a fair conclusion
13 to draw?
- 14 A. No, that wouldn't be a fair conclusion to draw. It's
15 true I'm not always copied in on the correspondence, and
16 there is a period of a few weeks in that time where
17 I was on sick leave and so I wasn't copied in because
18 I was absent from the office.
- 19 Q. I see. What was that period, just so that we know?
- 20 A. From 23 September until the end of October.
- 21 Q. End of October, I see. So you were absent during the
22 period when the 3 October note was submitted?
- 23 A. I was absent then and --
- 24 Q. Were you involved in drafting or preparing the 3 October
25 note?

1 A. I was not involved in the drafting. Luis Correia da
2 Silva stepped in as project director during my absence
3 for the --

4 Q. You didn't mention that in your witness evidence,
5 Dr Jenkins.

6 A. No, I didn't.

7 Q. Yet it's the advice that is relied upon in relation to
8 foreclosure (inaudible).

9 A. I was --

10 Q. I can show you that in the correspondence if you like.
11 That is the advice that you rely upon for your
12 conclusions.

13 A. I was the project director throughout that time, I was
14 closely involved throughout that time. The fact that
15 I was on sick leave for a few weeks didn't change the
16 fact that I was the person who was responsible for that
17 advice to Royal Mail throughout this period, and it was
18 I who attended the meetings in December and January
19 that -- where these -- the culmination of our advice to
20 Royal Mail and so I think we discussed it internally
21 that I am the appropriate person to give the evidence on
22 Oxera's advice.

23 Q. There is no documentary material from the December and
24 January meetings exhibited to your statements or that
25 has been disclosed to Ofcom. Are you aware of that?

- 1 A. Those were meetings where we gave advice in those
2 meetings.
- 3 Q. Oral advice?
- 4 A. Yes, that's right.
- 5 Q. Right. That makes it a little bit hard to consider that
6 advice with you; do you see that?
- 7 A. Our advice is in the emails in the run-up to that and
8 also in the -- there is the material that was presented
9 to the disclosure committee. So there is evidence on
10 the record about those meetings.
- 11 Q. Was the advice materially different from the advice
12 contained in the 3 October note?
- 13 A. The advice had moved on through -- in that period, yes.
- 14 Q. I see. Mr Flórez Duncan is still with Oxera, is he not?
- 15 A. He is.
- 16 Q. He is a partner at Oxera?
- 17 A. He is.
- 18 Q. Why was he not selected as the appropriate witness to
19 give evidence?
- 20 A. Because he was not the project director of the project,
21 and he was not the person who ultimately gave the advice
22 to the senior team at Royal Mail, when they were
23 determining the introduction of the CCNs in December and
24 January.
- 25 Q. Well, we will see how you put the advice in your witness

1 statement when we come to it, and we will see also what
2 is relied upon as showing and recording the advice. It
3 is the 3 October note, Dr Jenkins, I can show you that.

4 A. The 3 October note was relied upon by Ofcom in its
5 decision, and in my witness statement I'm talking about
6 the advice we gave in that note. That advice was --
7 throughout the period that we were advising Royal Mail
8 on these matters, which I think, as I also set out in my
9 witness statement, did not start on -- in August 2013,
10 it started some time back because Royal Mail had
11 consistently been concerned about the tensions that came
12 about from the fact that it had an obligation to provide
13 the USO but was facing a change in its competitive
14 environment with the introduction of direct delivery
15 entry.

16 Now, I was a project adviser on the piece of work
17 that was done in 2012, which was the first major piece
18 of work that Oxera did, assisting Royal Mail in thinking
19 about how it could manage its commercial objectives to
20 deliver the USO in this environment, and so then there
21 was a period of time after that between then and
22 March 2013 where we were also working with the team,
23 then we -- it was picked up again in August with us and
24 that ran through until January.

25 The bulk of our advice and the way we worked with

1 Royal Mail was quite integrated into their team, and
2 sort of talking on the phone, discussing things, and as
3 project director I worked closely with Felipe and he was
4 not delivering this advice without any contact with
5 others in the team, either myself, Luis Correia da Silva
6 or Leonardo Mautino. The four of us were a team that
7 worked together.

8 Q. Are you happy for us to refer to the names of all of
9 your colleagues? We have been quite careful, I think
10 they have been redacted thus far, and I don't know
11 whether you would like those names struck from the
12 transcript. I have no view, it's not material that's
13 confidential to my client, but --

14 A. From my perspective, we're comfortable at Oxera.
15 I don't know if --

16 Q. That's helpful --

17 MR BEARD: If Dr Jenkins is comfortable, then there is no
18 issue in relation to it.

19 THE CHAIRMAN: It might be the start of a great career, who
20 knows.

21 MR HOLMES: Yes.

22 Very good. Can we -- just briefly, and to situate
23 the answer you just gave, you referred to the work you
24 did running up to October 2012 as one of the strands of
25 work, I think?

- 1 A. That's correct.
- 2 Q. That was preparing a piece for submission to Ofcom,
3 wasn't it, as the tribunal has seen, which models the
4 expected impact of direct delivery competition on
5 Royal Mail's volumes and profits, assuming certain
6 particular commercial responses; is that correct?
- 7 A. That's correct.
- 8 Q. I'm grateful. Mr Flórez Duncan was also involved in
9 advising Royal Mail during that period?
- 10 A. He was.
- 11 Q. Can we now consider what advice was sought by Royal Mail
12 in relation specifically to the CCNs in August 2013.
- 13 You were approached by Royal Mail for help in
14 refining a number of options which had been identified
15 by the business for restructuring its existing access
16 contracts; is that right?
- 17 A. Yes, that's right.
- 18 Q. You then formulated a proposal to Royal Mail for the
19 work you would undertake which was dated 22 August 2013?
- 20 A. Yes, that's right.
- 21 Q. You don't exhibit the proposal to your witness
22 statement; instead setting out an excerpt of it in the
23 annex. Do you recall that?
- 24 A. Yes, I recall that.
- 25 Q. Ofcom subsequently sought and obtained disclosure from

1 Royal Mail of the proposal, and it's in bundle OF1 at
2 tab 5. I think this may not be in the witness bundle,
3 so ...

4 So the first paragraph, which was omitted from the
5 excerpt in your witness statement, makes clear that the
6 options under consideration were in order to respond to
7 the threat of direct delivery competition; that's right,
8 isn't it?

9 A. Yes, that's right.

10 Q. It was well understood by Oxera and by Royal Mail that
11 this was the strategic focus of all of the options under
12 consideration at the time; wouldn't you agree?

13 A. I would agree.

14 Q. The options included, as one sees over page, the
15 introduction of a price differential between NPP1 and
16 the other plans; that's option A. They also included
17 targeted discounts in just the SSCs where DD -- that's
18 direct delivery; is that right?

19 A. Yes, that's right.

20 Q. -- is emerging.

21 So one then sees from the first bullet on page 2
22 that one of the tasks identified in the proposal was for
23 Oxera to hold an initial workshop with Royal Mail to
24 discuss and refine the options; that's correct, isn't
25 it?

1 A. Yes, that's right.

2 Q. And the purpose of the workshop was to identify where
3 there are information gaps and to achieve a shared
4 conceptual understanding; that's right?

5 A. Yes, that's right.

6 Q. And it took place on 27 August 2013; that's correct,
7 isn't it?

8 A. That's correct.

9 Q. Did you attend the workshop?

10 A. No, I didn't attend that workshop.

11 Q. So you weren't at the initial workshop --

12 A. No, I was not.

13 Q. -- which set this project in train?

14 A. No, I was involved in the preparation for it and worked
15 with the team afterwards.

16 Q. What did the preparation involve?

17 A. Discussion with Felipe and I think it was -- I won't
18 report my junior colleague who no longer works at Oxera.

19 Q. Yes. This was the consultant I think listed over the
20 page, yes.

21 A. Was the consultant on, you know, just working through
22 the options and having a discussion about our views on
23 that, based on our knowledge, because we had obviously
24 discussed some formulation of these at earlier points in
25 the process.

- 1 Q. Yes.
- 2 A. So it wasn't the first time we were coming to a session
3 where we would be discussing these types of commercial
4 responses with Royal Mail.
- 5 Q. Yes.
- 6 A. So we had a lot of background and we had a shared
7 understanding on the Oxera side of what we thought the
8 relative boundaries and issues would be, and that
9 actually the focus of this workshop was very likely to
10 be around the information gaps.
- 11 Q. Indeed, that's helpful, and indeed, as you say in
12 a subsequent document, the price differential proposal
13 is effectively the proposal that was originally put
14 forward in October 2012 in a somewhat modified form,
15 isn't it?
- 16 A. By Royal Mail to its customers?
- 17 Q. Yes.
- 18 A. Yes, that's right.
- 19 Q. Yes, I'm grateful.
- 20 Do you recall whether any presentations were made at
21 the workshop by either Royal Mail or by Oxera?
- 22 A. I don't believe so.
- 23 Q. Don't believe so. Do you recall seeing a note made
24 either by Oxera or Royal Mail in relation to the
25 discussions at the workshop?

- 1 A. There were notes that were produced subsequent to the
2 workshop.
- 3 Q. Was there a note of discussion at the workshop on the
4 information that you were seeking to gather to fill your
5 gaps?
- 6 A. There was, I don't think our team wrote up a line by
7 line aspect of what came out --
- 8 Q. That wasn't the question I asked you, I'm sorry, just
9 to --
- 10 A. Sorry.
- 11 Q. No, not at all. It was just whether you recall having
12 seen a note prepared either by Royal Mail or Oxera
13 covering the discussions at the workshop?
- 14 A. I don't recall seeing a note of that regard.
- 15 Q. No. Was it usual for -- you were obviously very
16 integrated with Royal Mail. Was it usual not to commit
17 discussions and information collection of that kind to
18 paper?
- 19 A. The nature of those types of discussions would be
20 brainstorm in nature. The timetable was quite tight on
21 this and Royal Mail were not ... you know, were
22 conscious about having efficiency in the advisory
23 relationship, and so what came out of that were some
24 specific areas that we would write something down about,
25 and the rest of it, there was not felt in general in our

1 day-to-day work with Royal Mail that we needed to write
2 everything down and exchange notes on that basis.

3 Q. No. So you just gathered the information orally, you
4 sort of soaked it up at the meeting and that gave you
5 the basis on which to proceed?

6 A. I'm sure my colleagues did take notes and did refer to
7 those notes when we discussed it. I'm sure there are
8 possibly emails --

9 Q. But you didn't see them?

10 A. But I didn't see their private notes, no, absolutely
11 not.

12 Q. You didn't see them, okay. So the notes at this crucial
13 information gathering stage were not shared with you?

14 A. I think the word "crucial information gathering stage"
15 is probably a bit strong there. As I say, this should
16 be seen as a continuum and our knowledge of
17 Royal Mail's -- what information Royal Mail held had
18 been built up over many years of working with them, and
19 the types of information we're talking about here are,
20 for example, their LRIC model and we had a good
21 understanding of that LRIC model from various other
22 workstreams that we had been working on over the
23 previous years.

24 Q. Yes.

25 A. We had had at an earlier period, I think probably 2009

1 or 2010, one of the workstreams that we had been asked
2 to do was a full audit of all the models that Royal Mail
3 had.

4 Q. Yes.

5 A. So -- and Leonardo Mautino had run that.

6 Q. Yes.

7 A. So in that sense it might seem odd that we didn't write
8 everything down, but we all had quite a strong shared
9 understanding of what was available and at that time it
10 was about then understanding what wasn't yet there and
11 thinking about what to take forward.

12 Q. Yes, I see, yes.

13 A. We didn't need to share a lot of information about what
14 was there because we had a good common understanding.

15 Q. It's really a good mark of how well integrated into the
16 Royal Mail operation Oxera was during this period; do
17 you agree with that?

18 A. We were -- we were close, we had a close advisory
19 relationship to Royal Mail, at all times we understood
20 that our role was to provide good independent advice to
21 Royal Mail.

22 Q. Yes. The immediate output required of Oxera following
23 the meeting was to prepare preliminary notes on two of
24 the options for responding to the threat of direct
25 delivery, wasn't it?

- 1 A. It was.
- 2 Q. And those were the price differential option and the
3 option of targeted discounts in SSCs where direct
4 delivery is emerging; is that right?
- 5 A. Yes, that's right.
- 6 Q. What was your involvement in the preparation of those
7 notes?
- 8 A. I had a conversation, I think, with Felipe, in that
9 period in between those two, but he took forward the
10 writing of those notes.
- 11 Q. Did you review them at any stage before they were sent?
- 12 A. I don't believe I reviewed them before they were sent.
13 I attended the meeting that -- where they were
14 discussed, which was a week after, or so, they were
15 sent.
- 16 Q. So in terms of the documentary evidence that is before
17 this tribunal documenting Oxera's advice during this
18 period, you can't yourself claim to be the author of any
19 of the three notes that we have?
- 20 A. I'm not the author of them. As the project director it
21 would be unusual to be the author, but you are
22 responsible for the work of the business.
- 23 Q. But you didn't review, you say, the notes, the two
24 preliminary notes?
- 25 A. I discussed their content with Felipe, and didn't review

1 the detail. These were interim pieces of work at --
2 working towards a final piece of advice.

3 Q. That was the 3 October advice?

4 A. That was the 3 October advice.

5 Q. In which you weren't involved?

6 A. I was not involved in that, but for a different reason.

7 Q. Yes.

8 Now, I think you have been in court during this
9 process, this trial so far, the tribunal, for most of
10 it?

11 A. I was here this week and I was here for some parts of
12 Wednesday and Thursday.

13 Q. So you were here for Ms Whalley's evidence?

14 A. Yes, I was.

15 Q. Do you recall that I took Ms Whalley to the first
16 version of the note on the targeted discounts option
17 which described the option as a relatively expensive way
18 to deter entry and suggested that the exact value of the
19 discount would be set so as to achieve two main
20 objectives, the first of which was maximising the
21 probability of TNT, that's Whistl, not rolling out or
22 even scaling back its direct delivery operations; do you
23 recall that?

24 A. I do recall that.

25 Q. Oxera well understood this option sought to respond to

1 the threat of direct delivery by deterring Whistl from
2 proceeding with its roll-out plans, didn't it?

3 A. Sorry, could you just repeat the question? What did we
4 well understand?

5 Q. Of course. Oxera well understood at the time that this
6 option was intended to respond to the threat of direct
7 delivery by deterring Whistl from proceeding with its
8 roll-out plans?

9 A. All of the options that were being considered at that
10 time were around Royal Mail and us helping Royal Mail
11 with the difficult tension that it faced with designing
12 commercial responses to the threat of direct delivery
13 entry to the USO.

14 Now, by its -- by their nature, any commercial
15 response by Royal Mail in this way was very likely to
16 have some detrimental effect on the entrant into that
17 market.

18 Q. But it was the intended effect, wasn't it? That's clear
19 from the note. It was the intended effect. The
20 intention -- shall I read you the passage? Shall we go
21 to the note?

22 A. I'm an economist, so the word "intended" in that sense,
23 it is implicit in a commercial response that it will
24 have an impact in the competitive environment, right,
25 and it will be intended to have an impact in the

1 competitive environment.

2 Q. Yes.

3 A. It is absolutely clear that throughout all the time we
4 were doing this advice with Royal Mail, we were trying
5 to understand that balance of what would be legally and
6 economically -- so from an economics perspective, how do
7 you do that balance? For us, the areas that we were
8 focusing on there was around: how do you not deter
9 efficient entry? That was actually what we understood
10 Royal Mail wanted us to assist them with.

11 Q. No, I understand, but you did want to avoid a decline in
12 volumes through actual entry, or Royal Mail did want
13 that?

14 A. No, that is not true.

15 Q. Royal Mail did not -- well, so the targeted discounts
16 were described as a relatively expensive way to deter
17 entry, and it's said that one of the two objectives in
18 setting the exact value of the discount would be
19 maximising the probability of TNT not rolling out or
20 even scaling back its direct delivery operations. Are
21 you suggesting that in relation to that note it was not
22 understood by Oxera that Royal Mail's intention was to
23 maximise the probability of TNT not rolling out or even
24 scaling back its direct delivery operations?

25 A. Yes, so that -- I don't have it in front of me --

- 1 Q. We can open it if that would help?
- 2 A. Yes, that would help.
- 3 Q. It's the cross-examination bundle, tab 2. Have you
4 reviewed this note recently, Dr Jenkins?
- 5 A. Yes, I reviewed this note --
- 6 Q. Did you discussed its contents with the Royal Mail team
7 in preparing to give evidence today?
- 8 A. No, I didn't, but I have discussed it with Felipe Flórez
9 Duncan.
- 10 Q. Yes.
- 11 A. I think, as I heard in the evidence yesterday, this is
12 the first draft, first and second draft of the note had
13 this phrase in there.
- 14 Q. Yes.
- 15 A. We were asked to do two things in these notes. The
16 first was to give a preliminary assessment of whether
17 this option might raise any competition or regulatory
18 concerns from an economics perspective, and that's
19 section 2 of the note.
- 20 Q. Yes.
- 21 A. And then provide further initial thoughts on the
22 potential commercial impact on Royal Mail.
- 23 Q. It doesn't say that. It says "Initial thoughts and
24 commercial considerations to assist in the design and
25 modelling of Option E". That's what it says on page 3.

- 1 A. Sorry, maybe I have a later draft. What tab was it?
- 2 Q. Tab 2 is the initial version. Maybe that was something
3 that changed. Do you see tab 2?
- 4 A. I think I have tab 2.
- 5 Q. Maybe the tabs are confused. Do you see under the
6 heading in the second paragraph on page 3?
- 7 A. Sorry, I'm reading from the introduction.
- 8 Q. Forgive me.
- 9 A. I'm reading from the introduction about what we were
10 asked to do.
- 11 Q. Yes.
- 12 A. Section 3 was dealing with our initial thoughts on the
13 potential commercial impact including ideas on how to
14 model the commercial effects. Right. So section 3 was
15 us saying what we might do to assist Royal Mail in
16 understanding the commercial effects of it.
- 17 Q. If you could look at the title on page 3:
18 "Initial thoughts on commercial considerations to
19 assist in the design and modelling of Option E."
- 20 A. So I'm just explaining to you that they were the two
21 things that we were asked and they were set out in the
22 introduction and this section is dealing with our -- we
23 were asked what could we do to assist in Royal Mail
24 understanding how option E might impact in the market.
- 25 Q. But the title, let's take it in stages, refers to

1 assisting with the design of option E; do you see that?

2 A. Yes.

3 Q. And that doesn't suggest modelling its impacts to ensure
4 that they avoid harm to any particular competitor or to
5 an efficient competitor?

6 A. Of course they do, because the design of it is how you
7 are going to determine if you are the right side of the
8 line. You need to model it to understand it and that
9 way that will inform the design of it.

10 Q. But you are suggesting how to design it in this note, to
11 achieve Royal Mail's objectives. If you turn to page 4,
12 in the second paragraph down:

13 "The exact value of the discount would be set
14 between 0% and the level required to ensure that the
15 prices still cover long run average incremental cost
16 [and you can see how that high that could be in a
17 passage which is confidential] ... so as to satisfy two
18 main objectives:

19 "Maximising the probability of TNT not rolling out
20 or even scaling back its current direct delivery
21 operations;

22 "Minimising the commercial impacts to Royal Mail
23 suffered across the discounted and non-discounted
24 regions."

25 So deterring entry in the least expensive way

1 possible within the confines of this possible technique?

2 A. So if I can explain?

3 Q. Yes.

4 A. So that first sentence is very important, which is the
5 level required to ensure prices still cover LRIC. So as
6 I said, the advice we were giving Royal Mail was to
7 assist it in understanding where the boundary lay in
8 this difficult task --

9 Q. I understand that. I understand that. And I don't
10 dispute that --

11 A. If you could let me finish.

12 Q. Apologies.

13 A. -- that difficult task of deciding where to set the line
14 of a commercial pricing response, and in order that they
15 did not deter efficient entry. That was what we were
16 looking for. Hence we said, when we're looking at this
17 modelling, what we will be doing is ensuring that the
18 prices cover long run incremental cost and that would
19 be -- that's a way of ensuring that efficient entry is
20 not deterred, but given that, then the wording that is
21 used there, "maximising the probability", that is in
22 a sense modelling speak of how we are actually going to
23 do this, which is to say: these commercial responses
24 have been asked -- Ofcom has said "Royal Mail, you need
25 to think of ways in which you can protect the USO using

- 1 the legal pricing freedoms".
- 2 Q. Yes.
- 3 A. Right. And implicit in that was there was very likely
- 4 to be an impact on entrants but that efficient entry
- 5 would still be possible. Right?
- 6 Q. I fully understand.
- 7 A. So that was language that Oxera introduced with the idea
- 8 of maximising profit -- maximising the probability,
- 9 being language that was about actually how the team were
- 10 thinking of setting up a model to actually model what
- 11 the impact would be of different prices.
- 12 Q. So we obviously don't have any notes, we don't have any
- 13 documents that shed light on what was discussed at the
- 14 workshop, but your evidence today is that you did not
- 15 understand Royal Mail to want, by this option, to
- 16 maximise the probability of TNT not rolling out or even
- 17 scaling back its current direct delivery operations, and
- 18 to deter entry; is that your evidence?
- 19 A. Royal Mail did not want to deter entry. It wanted to
- 20 ensure efficient entry was feasible but it wanted to
- 21 encourage the use of its network to the extent possible
- 22 within the legal bounds.
- 23 Q. And in order to encourage the use of its network to the
- 24 extent possible within the legal bounds, it wanted to
- 25 deter -- never mind efficient entry -- entry by a direct

1 delivery competitor that would reduce the usage of its
2 network; is that right?

3 A. I think in meetings with Royal Mail and their commercial
4 teams, whether at all times Royal Mail people talked
5 about efficient entry, you know, that may or may not
6 have happened; but in terms of what Royal Mail itself
7 was seeking to achieve, it was in order to incentivise
8 the use of its network to the fullest extent possible
9 within the legal bounds to allow for efficient entry.

10 Q. And the entry of a direct delivery competitor would
11 reduce the use of its network?

12 A. An efficient direct delivery entry was very, very likely
13 to reduce the use of Royal Mail's network, and that was
14 the work we had done in 2012 which showed the impact.

15 Q. When you say "efficient", do you mean as efficient as
16 Royal Mail, or what's the use of "efficient" that you
17 are using there?

18 A. At that time I think mostly -- I think yes, throughout
19 that time what we had in mind as our benchmark was as
20 efficient as Royal Mail, but that was the appropriate
21 benchmark.

22 Q. I see. We will come back to that, but would you accept
23 that an entrant that was less efficient than Royal Mail
24 could also reduce the use of its network insofar as it
25 reduced prices below those that were being set by

- 1 Royal Mail in its monopoly position?
- 2 A. Yes, and I think this is where the cherry-picking
3 argument comes in, that the issue with cherry-picking
4 in -- where there is universal service obligation is
5 that you have competition between different business
6 models, and so cost orientation and cost reflectivity on
7 the part of the universal service provider, even at the
8 most efficient level, may still leave open the
9 possibility that there will be entry from an entrant who
10 has a competitive advantage in a small area, and their
11 costs will be below those of the USO provider, and that
12 would constitute efficient entry in this approach.
13 However, it would mostly be predicated on the fact that
14 that entrant wasn't -- didn't have to match the business
15 model of the universal service provider.
- 16 Q. Yes, but in a situation of monopoly price wouldn't be
17 constrained to cost in any event, would it?
- 18 A. But in this situation you had a heavily regulated
19 business that was loss-making through this time, that
20 had a major modernisation programme in place and had
21 improved its profitability, but -- and had been subject
22 to stringent price control regulation for a varied(?)
23 period.
- 24 Q. Was there any price control regulation in relation to
25 access at the relevant time based on your knowledge of

1 the industry?

2 A. Not at the time of this, they had removed the access
3 regulation, but I think as you had --

4 Q. Had there been price increases in 2012 and 2013?

5 A. There had been price increases.

6 Q. Yes.

7 A. But as you heard from Ms Whalley, that was from
8 a position of significant underprofitability and,
9 you know, the Oxera team were advising Royal Mail
10 through that difficult period where they were in serious
11 financial difficulty, so this was not a situation where
12 you have a monopolist who is very strongly profitable
13 and in a very comfortable position; this was a business
14 that was in serious financial difficulty.

15 Q. Do you recall that I showed Ms Whalley email
16 correspondence between your colleague, Mr Flórez Duncan,
17 and Royal Mail employees in which Royal Mail requested
18 that the note, the first draft of the note we were just
19 looking at, be amended to remove -- or a draft of the
20 note, it wasn't the first in fact -- reference to the
21 objective of maximising the probability of TNT not
22 rolling out or even scaling back its direct delivery
23 operations, on the basis that the Oxera paper would not
24 benefit from privilege and that the reference was then
25 deleted from the final version of the note? Do you

- 1 recall that?
- 2 A. I do recall that.
- 3 Q. Did Mr Flórez Duncan inform you that Royal Mail was
4 requesting that Oxera revise its note of advice because
5 of concerns about disclosability?
- 6 A. Felipe told me at the time that there were some changes
7 to the note.
- 8 Q. Did he explain the reason for which the changes were
9 being requested?
- 10 A. I don't believe so, I don't recall that, and I have had
11 a conversation with him where he genuinely said that
12 because of the context of this -- I think you even see
13 in those email exchanges that when it's first suggested
14 there might be some changes, Felipe's first response is
15 "We need to make sure we are preserving the essence of
16 our advice".
- 17 Q. Yes.
- 18 A. And that is a principal point that we would stick to.
19 But when he saw the query that had been raised about
20 this, he understood that and thought, "Yes, fair enough,
21 I should take that out, that could be misinterpreted"
22 and he took it out.
- 23 Q. Based on your conversation, what did he understand was
24 the concern?
- 25 A. That the phrase "maximising the probability" may not be

1 understood in the context in which he intended it.

2 Q. And needed to be removed for concerns about
3 disclosability?

4 A. That it didn't accurately reflect what Royal Mail's
5 intentions were at that time, and it could be read to
6 mean that.

7 Q. Shall we look at the email in which the redaction was
8 requested? It's at tab 6, and it's at the foot of the
9 page. It starts at the foot of the page. You see the
10 request from a Royal Mail employee:

11 "Hi Felipe, on the basis this paper won't be
12 privileged, please remove (or I can do so) the following
13 text (in the objectives section):

14 "'maximising the probability of TNT not rolling out
15 or even scaling back its current DD operations'.

16 "We can talk about it tomorrow, but it should not be
17 included in any document which could be disclosed in the
18 event of an investigation."

19 So is the reason that's being presented there for
20 the deletion anything to do with a concern that it
21 didn't accurately reflect Royal Mail's commercial
22 intentions?

23 A. In the words on the page, they don't -- it doesn't say
24 that. In the understanding of why that request would
25 come, that is -- that is our understanding, that was

1 Felipe's understanding at the time, and obviously you
2 look back on these emails and look back on the original
3 drafting and you say "Yes, that is not good drafting".
4 In general, you look at the final version of the note
5 which we were happy with, right, and in a sense my life
6 would have been much easier in giving advice if
7 I actually had thought that Royal Mail's intent was to
8 exclude Whistl, because it would be more straightforward
9 to say "Don't do this". Right?

10 Like, all of this advice, all the work we were doing
11 was about helping Royal Mail understand this not
12 clear-cut line about what type of behaviour would
13 actually be legal, and how they would be able to prove
14 it in the inevitable case that would be brought forward,
15 which was not because we thought what they were doing
16 was necessarily wrong, but because it had been very much
17 flagged in the industry that a complaint would happen.

18 Q. No, I understand. You made very clear your position.
19 If I can encapsulate it, it's that you were trying to
20 find ways, the Royal Mail, in which it could lawfully
21 retain volumes, measures that would retain volumes
22 rather than seeing them lost to direct delivery
23 competition. Is that fair?

24 A. That's right. That would give its customers the benefit
25 of the network that it had.

1 Q. Yes. In relation to the other option, one of Oxera's
2 first specific instructions following your engagement
3 was to consider how such a price differential could be
4 justified and quantified; that's correct, isn't it?

5 A. That's correct.

6 Q. So your primary focus in relation to the price
7 differential, option A, was on consideration of
8 objective justifications for the proposal and on helping
9 Royal Mail work out how to quantify them; is that right?

10 A. Yes, that's right.

11 Q. On 3 October 2013 Oxera provided advice to Royal Mail in
12 the form of a note entitled "Economic assessment of the
13 proposed actions on access contracts".

14 Now, I appreciate that you were absent when this
15 note was being settled, but to your knowledge was the
16 Oxera team by this time conscious of the need to steer
17 a course between giving independent advice and avoiding
18 statements about Royal Mail's objectives, commercial
19 objectives, because of the subsequent disclosability of
20 the note?

21 A. (Pause). It's a difficult question to answer. I just
22 don't think that's --

23 Q. You don't understand it?

24 A. No, no, it's almost like that it put an A or B, and
25 I don't think that's a good reflection of how we think

1 about the advice we give.

2 Q. Right, I see. Perhaps we will leave that there.

3 Can we look at the note, please. I think it's in
4 several places. I have it in C4A at tab 27 but I think
5 it's also in the RM3 bundle, wherever is most
6 convenient.

7 We see from the title "Economic assessment of the
8 proposed actions on Access contracts", it's described as
9 legally privileged. Is it usual for Oxera to flag its
10 notes of economic advice as legally privileged?

11 A. We were working with Herbert Smith closely in this
12 period, and we would have been asked to put that legal
13 privilege badge on this work.

14 Q. I see. If we can --

15 THE CHAIRMAN: Sorry, can I just be clear about that? So
16 you are submitting a note, what, in anticipation of
17 litigation, or for review by lawyers, or some other
18 basis of privilege, or what? Privilege is for the
19 clients, not for the advisers, as I'm sure you know.

20 A. I do know. So I think that my understanding of being
21 asked to put the words "legally privileged" on material
22 where the lawyers were involved was that the advice was
23 effectively informing the legal advice that would then
24 be given to the client on any given topic, but in these
25 situations where the client was involved and where we

1 were getting information directly from the client, the
2 validity of a claim of privilege would not necessarily
3 be straightforward.

4 THE CHAIRMAN: I think that's putting it charitably.

5 A. At the time I don't think we thought very hard about it.
6 We were asked to put the words "legally privileged" on
7 it and we were working closely in a team which involved
8 Herbert Smith and Royal Mail.

9 THE CHAIRMAN: You were not retained by Herbert Smith. I'm
10 allowed to refer to them, I think?

11 MR HOLMES: I think so, sir.

12 A. No, we were retained directly with Royal Mail.

13 THE CHAIRMAN: Your contractual relationship was with Royal
14 Mail and this note was submitted to Royal Mail and not
15 to Herbert Smith?

16 A. I would have to see the email, whether Herbert Smith
17 were cc'd on that email or not.

18 THE CHAIRMAN: I mean submitted to Royal Mail as client, not
19 as Herbert Smith as advising lawyer. They may be
20 copied, but that's not the point.

21 A. Yes. Certainly they were -- certainly Royal Mail was
22 one of the people we were sending this note to.

23 MR HOLMES: In relation to who submitted the document, to
24 whom the document was submitted, could I just ask you to
25 turn to tab 19 of the Ofcom cross-examination bundle.

1 THE CHAIRMAN: I don't want to start a hare here, but --

2 MR HOLMES: No, no, sir, it's only for your assistance and
3 in case it enables the witness to answer that question.

4 A. Yes, so that didn't include a Herbert Smith person on
5 that email.

6 Q. Can we turn within the note to page 4. Perhaps it's
7 best to pick it up at page 3 at the foot. You see there
8 one enters into the substantive portion after leaving
9 the executive summary.

10 You see in the introduction:

11 "This note contains Oxera's economic assessment of
12 the actions that Royal Mail is considering undertaking
13 to reform the current access contracts."

14 There is no reference there to the "in order to
15 remove the threat of direct delivery entry", but perhaps
16 there is nothing much that one can make of that.

17 On page 4, one then sees that there are set out the
18 actions that were being proposed as at that date, and
19 they're divided into three categories, aren't they?

20 A. Yes.

21 Q. An initial wave of steps in April 2014, including the
22 price differential at point 2, and the zonal tilt at
23 point 3; is that right?

24 A. Yes, that's right.

25 Q. There is then another set of actions that are to be

1 implemented after April 2014 following a discussion
2 document; that's correct?

3 A. Yes.

4 Q. So unlike the first wave, these would be subject to
5 prior consultation with customers; that was your
6 understanding?

7 A. I think all of these would be implemented with prior
8 customer consultation because the process that
9 Royal Mail needed to go through was to provide
10 a consultation three months in advance, that's why the
11 January date was important for the -- that was the
12 announcement of the CCNs, and because of the suspensory
13 provisions that each of these would have some
14 consultation with customers, but it was almost the level
15 of consultation that would be required at each level.

16 Q. I understand. I don't think I need to debate it with
17 you, but just for the record Ofcom does not accept that
18 the contract change notices were a consultation process.

19 The third step is:

20 "To be implemented as required in response to
21 observed volume patterns", and that is described as
22 "tactically introduce incentives (price discounts) in
23 SSCs with significantly above trend volume drops".

24 So would it be fair to describe this as the latest
25 incarnation of the targeted price discounts in

1 particular SSCs that were under discussion in the
2 option A note?

3 A. So I think it's important to bear in mind that when one
4 talks about an incarnation, that you are thinking about
5 the principle here was one that many businesses might
6 want to adopt, which is you're facing specific
7 competition and you want to be able to respond to that
8 as best you can.

9 Q. Yes.

10 A. And so I think the actual form that was being discussed
11 at this point for this type of response was quite
12 different to some of the earliest suggestions that
13 Royal Mail had had.

14 Q. But the significantly above trend volume drops, which
15 aren't pinned on Whistl here, were in fact as a result
16 of direct delivery competitive entry?

17 A. They would have been able to be used in that, but
18 I think one of the main differences compared with the
19 very earliest discussions around this type of element,
20 and I think ultimately why Royal Mail did not take it
21 forward, was the idea that this would somehow need to be
22 for incremental sales, so incremental volumes, and how
23 difficult it would be to ensure that you were allowing
24 direct delivery entry to happen and then trying to just
25 compete for --

1 Q. For the contestable -- yes, I see.

2 A. -- a contestable bit of it, and that that would be very
3 difficult to implement.

4 Q. Yes, I understand.

5 A. So I think that was quite a big difference in Royal
6 Mail's thinking about how they might have to implement
7 such a proposal and why it shouldn't just be seen as:
8 oh, here's option E and now it's option A and they're
9 the same thing.

10 Q. No, that's a helpful clarification, thank you.

11 At tab 2.2 there are then some high level
12 observations on the overall package of actions. You see
13 the first paragraph states that:

14 "The number of access contract changes that
15 Royal Mail is planning to introduce in the market is
16 quite large. We understand that the objective
17 underpinning this strategy is to make the package of
18 proposals more multifaceted and therefore more complex
19 for someone to challenge as well as potentially more
20 effective at achieving Royal Mail's commercial aims."

21 So just pausing there, Oxera's understanding at the
22 time of the package of proposals, including the price
23 differential, was that it had been deliberately designed
24 by Royal Mail to be complex and therefore harder to
25 challenge; is that right, Dr Jenkins?

1 A. That one of the considerations Royal Mail was thinking
2 about was how to ensure that it would be able to
3 implement these changes, and not be subject to
4 significant challenge, yes.

5 Q. That wasn't really what this says, though, was it? What
6 it says here is that it was made complex deliberately in
7 order to make it harder to challenge.

8 A. Well, as well as effective of it meeting their
9 commercial aims.

10 Q. So Royal Mail was throwing up dust?

11 A. It wasn't throwing up dust, it was not concerned about
12 the complexity of its proposals.

13 MR HOLMES: Sir, I'm conscious of the time. I don't know if
14 this would be a convenient moment for the shorthand
15 writer.

16 THE CHAIRMAN: Fine, yes, we will take ten minutes.

17 (11.35 am)

18 (A short break)

19 (11.45 am)

20 MR HOLMES: Dr Jenkins, we were in the note on page 5
21 looking at Oxera's high level observations. After the
22 first paragraph, which I've discussed with you, Oxera
23 then makes some points in this connection. First, it
24 notes that the risk of complaint is greater because of
25 the multifaceted and complex nature of proposals. Then

1 the second point in the third paragraph is that:

2 "When presented with a multifaceted complaint, the
3 likelihood that Ofcom decides to open an investigation
4 will also be considerably greater. This is because in
5 order to reach a final decision on the merits of
6 a multifaceted complaint, it is likely to feel the need
7 to request considerably more information and give itself
8 the time to fully assess the facts of the case."

9 So Oxera's advice to Royal Mail at the time was that
10 complexity would also be likely to prolong a subsequent
11 investigation; is that correct?

12 A. I think there we were giving some alternative views to
13 what we heard from Royal Mail, which was their view was
14 complexity would somehow make this more likely to be
15 challenged, and we were providing them with the view
16 that that wasn't -- didn't seem to us a good criterion
17 on which to decide what you were going to take forward
18 and it was much better just to put forward the
19 elements --

20 THE CHAIRMAN: More likely or less likely?

21 A. I think they were saying "Oh, we think it's less likely
22 for someone to challenge" and we were saying we don't
23 think you can rely on that as an assumption. It could
24 be more likely and you should therefore put forward the
25 package of elements that you think are needed to achieve

1 the aim.

2 MR HOLMES: The aim, the commercial objective, yes.

3 Then the suggestion that:

4 "A multifaceted complaint will require from Royal
5 Mail a very clear and simple articulation of the
6 rationale which binds together the entire package of
7 actions as well as internal consistency between the
8 various arguments and the evidence put forward to
9 support each action individually. This will be key in
10 order to avoid hostages to fortune that could undermine
11 the support for individual actions, let alone the whole
12 package of actions."

13 So were you telling Royal Mail there that it had to
14 get its story straight?

15 A. We were saying to them that in our experience, when
16 you're engaging in something which is going to be
17 complex, that having a lot of clarity about the reasons,
18 having the evidence, understanding it, and making sure
19 you have really discussed that thoroughly internally is
20 the way to ensure that you (a) put forward a good set of
21 proposals and (b) you have the strongest case to get
22 them through.

23 Q. A clear message?

24 A. It's not just the message, like, that has -- you need to
25 be able to explain why you are doing it, that you don't

1 start from what's our message, you start from what am
2 I trying to achieve, what am I going to do. But if you
3 can't then explain that, then you will be in difficulty.
4 That would be our advice to all clients.

5 Q. So you start with what you are trying to achieve,
6 I understand.

7 In relation to the last point, you continue:

8 "Based on the discussions we have had with
9 Royal Mail over the last month, our understanding of the
10 story which binds the package of actions together would
11 look as follows."

12 There is then a lengthy series of bullets setting
13 out the story that Oxera is suggesting. It doesn't
14 contain any reference to the threat of direct delivery
15 competition, does it, Dr Jenkins? Do take a moment to
16 consider it if you need to.

17 (Pause)

18 A. It doesn't make reference to that. It makes reference
19 to "safeguard the financial sustainability of the USO".

20 Q. Yes. So should the safeguarding of the financial
21 sustainability of the USO be read as a proxy in this
22 summary for guarding against the threat of direct
23 delivery competition?

24 A. The reason why Royal Mail was concerned about direct
25 delivery competition was the fact that it would

1 undermine the financial sustainability of the USO.

2 Q. I see.

3 A. It wasn't concerned about it in -- you know, the reason
4 it was using its commercial flexibility in this way was
5 in order for it to safeguard the financial
6 sustainability of the USO.

7 Q. There is then, at the foot of the footnotes, a paragraph
8 which states that:

9 "Although this is a simple, clear and credible
10 rationale for the package of actions it's planning to
11 introduce" --

12 A. Sorry, I can't --

13 Q. I'm sorry, we're on page 6. Do you see at the foot of
14 the footnotes, the note continues:

15 "We consider that at a high level Royal Mail has
16 a simple, clear and credible rationale for the package
17 of actions it is planning to introduce which Ofcom would
18 be compelled to take seriously. However, as is often
19 the case with pricing proposals which have the potential
20 to have anticompetitive effects, the devil will be in
21 the detail of the arguments and evidence for each
22 individual proposal."

23 That's why you turn to consider the various
24 individual actions. So can we begin with action 1,
25 which is "Further requirements and tighter tolerances on

1 PP1".

2 The note explains, in the final paragraph of page 6,
3 that:

4 "The rationale/objective justification for the
5 changes being proposed is to ensure that PP1 more
6 closely and tightly reflects the national fall-to-earth
7 profile of mail across the whole of the UK market which
8 is closely linked to the USO on Royal Mail to deliver to
9 every address. The changes will mean that large access
10 customers on this plan need to post mail into every SSC,
11 otherwise penalties and surcharges would kick in as soon
12 as one SSC were failed."

13 So am I right that the proposal here was to make
14 NPP1 more stringent, tying operators more closely to
15 Royal Mail's national fall-to-earth profile?

16 A. I think it wasn't really changing the principle of that,
17 but it was changing the flexibility that Royal Mail
18 would allow customers.

19 Q. Yes, reducing the flexibility?

20 A. Reducing the flexibility.

21 Q. So that there was -- they, for example, would have the
22 ability to fail to meet the same profile as Royal Mail
23 in a smaller number of SSCs?

24 A. That's right.

25 Q. And the tolerances would similarly be tightened?

1 A. Yes, that's right.

2 Q. And the effect would be to make it harder for a direct
3 delivery entrant to attempt to pursue a roll-out on any
4 material scale on NPP1; would you agree?

5 A. It would provide a challenge. Or, rather, it would
6 reduce the flexibility for someone who was on that price
7 plan.

8 Q. There is then Oxera's assessment. Can we consider the
9 final paragraph under that heading, which is the
10 penultimate paragraph on the page:

11 "Royal Mail's best line of defence in the event of
12 an investigation would be to argue that these changes
13 should be assessed on their own merits and that when
14 seen through the lens of the key rationale that a
15 national price plan is meant to capture, ie to be
16 representative of the nationwide fall-to-earth profile
17 consistent with USO obligation to deliver to every
18 address in the UK, they constitute fair and reasonable
19 charges (sic) in the contract terms [changes, sorry, to
20 the contract terms] to tighten up what are currently
21 fairly loose requirements. Furthermore, implementing
22 action 1 would subsequently make it easier to justify a
23 value based (commitment) price differential between PP1
24 and PP2/PP3."

25 Is the point you were making in the final sentence

1 that by changing the terms and conditions to make NPP1
2 more rigorous, it would be easier to justify pricing
3 APP2 at a premium on the basis that it's more flexible?

4 A. Yes. Inherently the -- a value justification that is
5 about one plan being more flexible than another requires
6 there to be a difference in the flexibility of the
7 plans, and I think this approach by Royal Mail, I think,
8 is a useful -- is useful to understanding the context of
9 Royal Mail managing its business. So they had -- they
10 had been managing their business with these different
11 price plans, but at a time when your -- as a business,
12 they were basically set up to deliver all the post
13 across the country, they're the universal service
14 provider, there is no downstream competition, direct
15 delivery entry.

16 So many of these things they sort of didn't need to
17 worry about. The way they thought about it is "We need
18 to be able to forecast market-wide changes, market-wide
19 what's happening, negotiate with unions at a national
20 level". This was forcing them to actually think really
21 hard about how they were going to manage their
22 downstream network in the face of this competition, and
23 this was one of the things that they came to, which was
24 "Actually we haven't paid that much attention to the
25 actual tolerances on these contracts and if we are going

1 to need to understand exactly what our national
2 footprint is, we're going to need to start by tightening
3 these tolerances".

4 Q. It would also support -- the changes to NPP1 -- a higher
5 level of price differential based on the approach
6 Royal Mail was taking to modelling which considered the
7 amount of surcharges that would be payable under NPP1
8 across the market as a result of customers using
9 a direct delivery entrant's delivery services rather
10 than Royal Mail's; that's right, isn't it?

11 A. (Pause). I think that is right. They certainly were
12 doing the value justification -- it was effectively
13 almost -- it seemed to me it wasn't actually getting at
14 the value that a customer would have, but it was getting
15 at -- trying to get at -- from, in a sense, what was the
16 minimum that they would be able to charge as
17 a differential based on value. Because obviously you
18 can't charge more than the surcharges someone would pay
19 on your less flexible contract. So they were trying to
20 get a handle of that kind of question, but actually they
21 weren't really getting out what the value to customers
22 were and I think that --

23 Q. They were measuring what the surcharges would be if this
24 were all being done on NPP1?

25 A. Yes, that's right, because in a sense you obviously

1 wouldn't be able to have a differential that is ... if
2 you're -- that is less than those surcharges or
3 otherwise everyone would go onto the less flexible
4 contract and pay the surcharges.

5 Q. If you turn to consider -- sorry. The point that we
6 have just been discussing is discussed under the
7 "Interlinkages with other actions":

8 "In addition to increasing the likelihood of
9 [redacted] joining a complaint by TNT, action 1 is also
10 likely to have a strong impact on the modelling
11 developed to support the value based argument for the
12 introduction of a price differential under action 2."

13 That is right, isn't it?

14 A. Yes.

15 Q. So it would support a higher differential, the changes
16 that are being done under action 1?

17 A. Yes.

18 Q. Yes. You then turn to consider action 2, a 0.3p price
19 differential between PP1 and PP2/PP3. Then there is
20 towards the foot of the page "Oxera assessment" and the
21 first thing you say is that:

22 "The rationale for this price differential, when
23 articulated as a discount offered in return for a
24 commitment for customers to post in every single SSC, is
25 clear, simple to articulate and intuitively appealing."

1 You then say in the following paragraph:

2 "It would have been ideal to have a cost
3 justification for this price differential as this would
4 provide a compelling and a more mainstream objective
5 justification in a competition law sense for an action
6 that can have potential anticompetitive effects. See
7 below our understanding of the nature of the competition
8 complaint that this action is likely to trigger.

9 "However, we understand that it has not been
10 possible to articulate and quantify a pure cost
11 differential on the basis of the planning benefits that
12 Royal Mail would derive if all access customers were on
13 PP1 rather than PP2 or PP3.

14 "The discussions with operations staff suggest that
15 if Royal Mail could have sufficiently early indication
16 from its customers about its posting profiles,
17 Royal Mail could derive considerable planning benefits.
18 This, however, appears to provide support for profile
19 commitment of any kind but not exclusively linked to the
20 national fall-to-earth profile of PP1. For example, if
21 Whistl shared its plans in advance with Royal Mail and
22 committed to this profile, Royal Mail would in theory
23 derive considerable value from this information."

24 So the cost justification at this point seems
25 difficult to you as a justification that is linked to

- 1 NPP1 by comparison with APP2; is that right?
- 2 A. Yes, at that point there were two difficulties. One was
3 just the engagement with the operations team, and as
4 I said, that -- this was the process that Royal Mail was
5 going through of rethinking how it was going to manage
6 its delivery business in the face of competition. So
7 the advice we were giving was that they needed to think
8 about how they would manage the business differently,
9 and from what we heard from them about why -- I mean, as
10 you said, they were already talking about this in 2012,
11 it was already being discussed internally, because
12 Royal Mail had this very clear sense that they needed to
13 understand their volumes in order to be able to plan
14 effectively.
- 15 Q. Yes.
- 16 A. And so, as we worked with them, we distilled that into:
17 okay, you need to be thinking about planning benefits.
- 18 Q. Yes.
- 19 A. Right, so that was one thing that that -- even though
20 they had in mind what a rationale was, they didn't, as
21 at that time their operations department wasn't well set
22 up to do -- to think about the planning benefits from
23 this type of information.
- 24 Q. Yes.
- 25 A. And then the second bit was that Royal Mail was telling

1 us that it was something that was tied particularly to
2 the national profile, because they needed to deliver to
3 all SSCs to meet their universal service obligations,
4 but when we talked to them and their planning team, as
5 you see there, it seemed to us that there would be
6 benefits from getting that information, regardless of
7 profile.

8 Q. So if a customer, any customer, could say that they were
9 going to withdraw a large volume in a particular
10 locality, then there would be cost benefits from being
11 able to plan in that locality by Royal Mail in order to
12 reduce its capacity there in a timely fashion, and that
13 could be rewarded regardless of whether the customer was
14 on NPP1 or on some other plan; is that right?

15 A. The CCN that was put in place had in it that the
16 customers would need to provide 24-month ahead forecasts
17 on a monthly basis, with only one opportunity to change
18 those forecasts in any given year. Now, that was
19 actually quite a different approach, right, like -- and
20 the conversations we had with Royal Mail were that that
21 would require customers to be looking ahead and
22 forecasting and that would allow it to be planning,
23 given that it would have some forecast certainty. It
24 also had in it that customers would need to flag to them
25 where they thought they were going to be having

1 reductions in certain locations, but actually the NPP1
2 new character was around the stringency around those
3 forecasts, or at least that was our understanding.

4 Q. But the justification for the price differential which
5 you are canvassing in this paragraph is having
6 sufficiently early indication from its customers about
7 its posting profiles to provide Royal Mail with
8 considerable planning benefits?

9 A. So, yeah, so it wasn't so much about: oh, you are going
10 to be reducing here and there; it was: what will you be
11 posting over the next two years and where will they be
12 posted.

13 Q. But that was in subsequent discussions in any event.
14 The value to Royal Mail was specifically in being able
15 to reduce the size of its network in particular areas
16 where volume was taken out, wasn't it?

17 A. No, this discussion about knowing where -- how much and
18 where it will be posted, in the discussions with
19 Royal Mail there was a lot of talk about e-substitution
20 as well as direct delivery.

21 Q. Yes, but that's a volume loss as well, yes?

22 A. Yes, absolutely, but that's more: how much are you going
23 to be posting? And what they wanted to know from their
24 big banks was: at what point are you going to make
25 a major change in how you interact with your customers?

1 And again it's like a -- it's a business model threat.
2 And the advertising mail price changes that we were
3 looking at in the 2012 work, those are more targeted at
4 the e-substitution threat, right, because it was people,
5 instead of sending people things, were emailing them
6 direct mail, and that work said, "You're actually not
7 going to change behaviour by small changes to your
8 advertising mail, that's not going to halt this
9 reduction".

10 Now, it's right that when Royal Mail came to try to
11 calibrate the forecast benefits, what they used for that
12 calibration was the information they had from the early
13 entry of TNT in a number of places.

14 Q. Yes.

15 A. But the principle was that people would give them the
16 information on where they were going to post, and we
17 flagged to them that that calibration wasn't perfectly
18 matched to what they were actually asking for.

19 Q. In other words, if Whistl gave you that information,
20 that would also have benefits?

21 A. Yes, if any customer gave you that information, it could
22 give you benefits of that type.

23 Q. So linking a more favourable pricing on the basis of
24 this cost justification to NPP1 couldn't be supported?

25 A. Well, I think there you get into the fact that it's only

1 NPP1 where customers were agreeing to post on an SSC
2 footprint, and so that was the discussion with Royal
3 Mail.

4 Q. But other customers might have information about their
5 volumes on an SSC basis?

6 A. They might. They might have information on that.

7 Q. Indeed you were specifically pointing to Whistl in this
8 paragraph?

9 A. That's right.

10 Q. This is a point I think that you cover in 9.19. You
11 say:

12 "We had given advice to Royal Mail that it might
13 also need to consider discounts to customers who might
14 be able to give advance volume forecast information at
15 an SSC level but were unable to meet the full geographic
16 requirements so as to be on NPP1 price plan. As
17 I explain in section 7 above, we understood that this
18 was an option that was being considered further
19 internally."

20 A. Yes.

21 Q. So am I right that there were two grounds on which you
22 nonetheless got comfortable with the cost justification?
23 The first is the one that's set out at the top of
24 page 31:

25 "We understood that Royal Mail thought that this was

1 unlikely to be attractive to customers, given those on
2 APP2 valued the flexibility this price plan gave."

3 So one point was a factual instruction or indication
4 you received from Royal Mail about what their customers
5 would want?

6 A. That's right, and also the way in which the changes were
7 going to be introduced.

8 Q. Ah, yes, is this the point at 9.20? You were also told
9 that -- your understanding was that:

10 "... these discounts could be offered in the future
11 were customers to request it and ... willing and able to
12 provide [and deliver] forecasts ..."

13 Is that right?

14 A. Yes, "provide the detailed forecasts", yes, that's
15 right.

16 Q. Yes. So you thought that even if there wasn't
17 a workable cost justification for the price differential
18 in its original form, it could be fixed at some later
19 point; is that the point being made there?

20 A. No, I think I would put that slightly differently, that
21 we felt there was a clear commercial justification for
22 Royal Mail wanting to know about volumes that were being
23 posted on their network as a way for them to more
24 efficiently manage their business in the face of direct
25 delivery competition. And the question then was: how

1 were they going get that information and how were they
2 going to use that information?

3 Now, our advice through this period was flagging to
4 them that unsurprisingly certainly from my perspective,
5 Royal Mail's operations were not always able to give
6 a very clear indication of how they would use it, what
7 the value would be to them, and so for me that was more
8 about the calibration of the discount rather than the
9 principle of it, and our advice throughout -- and then
10 we had -- we highlighted that the specific calibration
11 they were using was one that was -- would be open to
12 a range of other customers to offer that type of
13 information, and that they -- in our view, that they
14 should look at introducing a lower number than the
15 numbers that they had from that.

16 In our view, there was, you know, a potential
17 virtuous circle, which was you needed to offer
18 a discount for a customer to give you the information,
19 because that was going to be costly for them to comply
20 with that and do it, and by getting the information
21 Royal Mail would be able to plan better, and until they
22 actually had information they would -- it's hard to
23 actually calibrate exactly what the value to you is of
24 that information, and that therefore starting with the
25 smaller number was the right way to go because you would

1 get the information, you would start to build it and
2 over time you would be able to adjust that, that
3 difference, and that they should consider the fact that
4 that information should or could also be sought from
5 other customers other than on NPP1.

6 Q. But how would you calibrate it if you weren't seeking
7 the information from the other customers?

8 A. You would calibrate it on the information you did
9 receive from NPP1 customers.

10 Q. But how would you calibrate the value if there was --
11 there could be greater value in the information you
12 weren't receiving; how would you factor that in if you
13 weren't collecting the information?

14 A. There might be greater value than information you are
15 not receiving, but if a customer doesn't consider giving
16 you that information is worth the discount you are
17 offering, then you are not going to get that
18 information. You can only work --

19 Q. That's entirely circular, Dr Jenkins, because the
20 information wasn't being requested. There was no
21 opportunity to get a more favourable price range.

22 A. And our advice was that they should be open to receiving
23 on the basis of the -- their -- the understanding of the
24 planning benefits, they should be open to receiving that
25 information from a range of customers.

1 Q. You weren't the only person, you weren't the only people
2 telling Royal Mail at the time that Whistl could perhaps
3 provide this information. Whistl also said so in
4 meetings with Royal Mail, before the launch of this
5 error form.

6 A. I wasn't aware of that at the time.

7 Q. And Ofcom also raised it at a meeting. Why would
8 Royal Mail not fix this obvious design flaw immediately
9 by offering Whistl the more favourable pricing in
10 exchange for forecast information?

11 A. I think, as I understood it at the time, Royal Mail's
12 view was that to make that a condition of APP2 would
13 have an impact on all APP2 customers and that they were
14 open to have those discussions. What -- my
15 understanding of what they thought would happen was that
16 the terms would be suspended, there would be
17 a discussion with Ofcom under regulatory arrangements,
18 and that those sorts of questions would come about,
19 that -- how best to structure this.

20 Q. With respect, Dr Jenkins, that doesn't make sense on its
21 own terms. It wouldn't need to be a requirement under
22 APP2, would it? It could simply be an option offered to
23 by far the largest customer on APP2?

24 A. It could be an option for all APP2 customers.

25 Q. Yes.

1 A. I think there was concerns about the bespoke nature of
2 it.

3 Q. So a decision was made to go ahead with an obvious flaw
4 in this justification, but you were comforted by the
5 fact that an amendment could subsequently be made?

6 A. The justification for having that information and the
7 amount of value that Royal Mail would have from the --
8 in terms of the planning efficiencies was a sound
9 justification in our view, and we flagged to them the
10 risk around the fact that they should consider offering
11 that more broadly.

12 Q. Can we return to the note?

13 THE CHAIRMAN: Are you moving off cost justification or are
14 you still on it?

15 MR HOLMES: I was about to move off cost justification.

16 THE CHAIRMAN: While we're still on it, could I ask
17 Dr Jenkins: all this considering of forecasting
18 information about requirements over two years, you
19 considered, am I right, you considered that from the
20 point of view of justifying the price differential?

21 A. Yes.

22 THE CHAIRMAN: So it was a cost justification.

23 Did it ever occur to anybody in this pot of advice
24 being given that if the customer in question is
25 a potential direct delivery entrant, that kind of

1 forecasting information is highly valuable commercial
2 information about the future intentions of a potential
3 competitor. Was that not taken into account?

4 A. There was a discussion about -- which I recall was in
5 those last stages, December/January, because it was at
6 that point that this discussion that that information,
7 if Whistl were to transfer to NPPl, could be of value to
8 Royal Mail, and that there would need to be some
9 ringfencing arrangements to ensure that that information
10 was provided to the operations team in some way but not
11 shared with the commercial.

12 THE CHAIRMAN: I see, so internal arrangements to stop it
13 seeping into the -- is that realistic, in
14 an organisation like this?

15 A. Well, Royal Mail already had had and operated some very
16 stringent information boundaries between the wholesale
17 and retail business as part of the margin squeeze and
18 regulatory arrangements, because they already were
19 getting a lot of information from the access
20 arrangements about the posting and who the customers of
21 their rivals were, and they were not able to -- not
22 allowed to pass that information on to the retail
23 business. So they had experience of operating stringent
24 information restraints.

25 THE CHAIRMAN: In the absence of that, one could possibly

1 think this might be a rather strange situation in which
2 you welcome competition from an efficient entrant
3 provided you are told where it's going to happen. But
4 I just throw that into the pot, Mr Holmes.

5 MR HOLMES: I'm obliged, sir.

6 A. And I think this is part of the challenge with how you
7 manage a universal service obligation which requires you
8 to stand ready to post -- poster in any place at any
9 time the maximum -- at any point you are the deliverer
10 of last resort, when in fact if it doesn't turn up then
11 you have idle resources. So it was a difficult
12 question, this was something that Royal Mail had been
13 engaging with the regulator for a long time, saying if
14 you look at how this is managed elsewhere you need to
15 have some regulatory assistance because there is a real
16 genuine difficulty in drawing the line here.

17 THE CHAIRMAN: Regulatory assistance?

18 A. In 2012, that's what Royal Mail had been saying to
19 Ofcom. We need to set a regulatory framework --

20 THE CHAIRMAN: You mean assistance from the regulator, not
21 from advisers.

22 A. Pardon?

23 THE CHAIRMAN: Assistance from the regulator, not from
24 advisers specialised in regulatory matters.

25 A. No, no, no. To work with the regulator to put

1 a framework in place to preserve the USO in the face of
2 direct delivery efficient entry.

3 THE CHAIRMAN: Okay.

4 MR FRAZER: Could I just ask, whilst we're here, was it your
5 understanding that given all the internal safeguards
6 that could be put in place, was it your understanding
7 that information from Whistl would have a value once it
8 moved on to NPP1 but would not have a value whilst it
9 remained on APP2?

10 A. It would have a value if it were provided, if it were
11 able to be provided under APP2. The information -- from
12 our understanding, information at an SSC level was what
13 was required to have value for planning.

14 Now, the APP2 contract was structured on this zonal
15 level, which I think you probably understand that it
16 wasn't at an SSC level. However, it could probably be
17 provided at an SSC level that would require a change to
18 the terms of the APP2 contract, whereas it was already
19 a requirement of the NPP1 contract.

20 MR FRAZER: Thank you.

21 PROFESSOR ULPH: Why didn't you just offer them the advice:
22 provide a discount to APP2 customers who can do that,
23 and the discount is just the difference between APP2 and
24 NPP1?

25 A. We advised them that they should consider providing

1 discounts to customers who were able to provide the
2 information at the SSC level.

3 PROFESSOR ULPH: Thank you.

4 THE CHAIRMAN: And that advice was not legally privileged?

5 A. No. Clearly.

6 MR HOLMES: So can we return to the 3 October note,
7 Dr Jenkins. We were on the second complete paragraph on
8 page 9, which reads:

9 "Ultimately it is understood the greatest commercial
10 risk, and therefore cost, that Royal Mail faces is the
11 potentially higher risk of volume loss/stranded costs
12 that would materialise if TNT [Whistl] remains on PP2 at
13 current price levels and tolerances and is therefore
14 able to roll out its direct delivery more widely.
15 However, this cost argument is unlikely to be a valid
16 objective justification, in a competition law case, of
17 conduct that can have the effect of restricting
18 efficient competition."

19 Now, the premise of that paragraph is that Oxera and
20 Royal Mail both understood at the time that Whistl would
21 only be able to roll out its direct delivery network
22 more widely if it remained on PP2 and that was because
23 of the economically prohibitive surcharges that a wider
24 roll-out would result in under NPP1; that's correct,
25 isn't it?

- 1 A. That's correct.
- 2 Q. So the thinking was that Whistl would only roll out on
3 PP2?
- 4 A. Well, I think the understanding was it could roll out
5 a certain way on NPP1 and then there is, you know,
6 a grey area --
- 7 Q. But up to a small level, is that right?
- 8 A. I think this goes to this question of: they could do
9 a certain amount on NPP1 without incurring any
10 surcharging, then there would be a period where they
11 could continue to roll out and they may incur some
12 surcharges, and then they would ultimately have to
13 switch to one of the other contracts to do the full
14 roll-out that was in their public statements.
- 15 Q. Just to break that down, that would be, whatever it is,
16 six SSCs, the first six SSCs, no surcharges because
17 they're within the permitted tolerances under the terms
18 of NPP1?
- 19 A. Yes.
- 20 Q. Then from six to let's say 13 Whistl would be incurring
21 ever greater surcharges as it rolled out above that
22 level, and at 13 you would hit a point where any gains
23 from direct delivery roll-out in terms of, you know, the
24 savings that could be made would be outweighed by the
25 surcharges that would be incurred under NPP1; is that

1 right?

2 A. Yes, so that Whistl, you know, Whistl had a strong cost
3 advantage in those areas that it was likely to be
4 rolling out on, or that was our understanding, that was
5 the rationale for the direct delivery entry,
6 significantly driven by the fact it didn't have to meet
7 all the universal service requirements on frequency of
8 delivery and things.

9 So it has that benefit, and -- but then, as it's
10 rolling out, it's going to be making use of Royal Mail
11 in that transition period, so there's just this balance
12 to be had.

13 Q. But above the 13 SSCs, whatever benefits would be
14 outweighed by the surcharges that would be incurred?

15 A. That's right, because at that point they have a very
16 significant footprint themselves, and so there is no
17 point sort of still saying "We're going to post on your
18 national footprint, Royal Mail", because they have
19 clearly got a big enough network that they are doing it
20 themselves.

21 Q. If they rolled out above 13 it would be on PP2. They
22 would rather take the cost of the price differential at
23 that point if they're going to carry on at all; is that
24 right?

25 A. Yes, I mean, you have got to remember that the

1 distributed LRICs for the different zones were
2 [redacted] to [redacted] and the access charge was 20p,
3 so there is a lot of cost advantage there, and this
4 price differential was only 0.2 of a penny and would
5 only be payable on a fraction of the volumes that TNT
6 was delivering. So, you know, that was our
7 understanding, that relatively quickly TNT would be
8 better off on the plan that had -- that was 0.2 more
9 expensive and then just rolling it out to get the
10 advantage of their delivery, their lower costs of
11 delivery.

12 Q. So in the early stages they would take a massive upfront
13 hit, because at that point --

14 A. No, no, because there is no surcharges upfront.

15 Q. Well, up to six there are no surcharges. Six to 13
16 there are surcharges on NPP1. Then above 13 they would
17 take a big hit because they would still have a large
18 majority of their volumes being supplied all across the
19 country on the access contracts and on all of those
20 volumes they would have to pay the 0.2p surcharge.

21 That's right, isn't it?

22 A. So I think --

23 Q. Where there is a 0.2p price differential under APP2?

24 A. I understand what you're saying. There's a point at
25 which there's a cost comes into play and the point is

1 you then think of how much is that spread over all the
2 volumes that they're already delivering, that they
3 haven't been incurring it on, and I think it's important
4 not to think about, oh, from this point A to point B
5 there is this big change, it's like is there the scope
6 for an efficient entrant to enter? Are the costs that
7 they will -- the price they will be paying, how does
8 that relate to the costs of an efficient entrant? And
9 throughout this period with -- even with those, the
10 price changes that Royal Mail were considering, was our
11 understanding that there was scope for efficient entry.

12 Now, it may be that Whistl hadn't fully anticipated
13 all that flexibility and had been making plans on the
14 basis that Royal Mail wouldn't change its prices. I'm
15 sure that wasn't the case, I've not seen the material,
16 but the question is: is there scope for efficient entry?
17 And our analysis that we were doing at the time
18 confirmed, in our view, that there was always scope for
19 an efficient entrant to enter in the direct delivery
20 area.

21 Q. Provided the price differential wasn't such strong
22 poison it would put off an entrant with the same
23 efficiencies as the incumbent monopolist --

24 A. Not the same efficiencies. There will be different
25 efficiencies, their own efficiencies.

1 Q. You explored earlier, you said that you thought the
2 benchmark earlier was the as-efficient-competitor. Did
3 I misunderstand?

4 A. The benchmark is as efficient as Royal Mail, but they
5 have different business models. So Royal Mail can't
6 meet competition below its own efficient costs. So the
7 essence of the regulatory regime, as I understood it,
8 was that Ofcom was encouraging the entry of different
9 business models to the extent that they were more
10 efficient than the model of the universal service
11 provider.

12 So it's the benchmark should be Royal Mail's costs
13 and you would expect to see entry for those people who
14 are more efficient than Royal Mail in the delivery. Not
15 delivering the same thing, not doing it the same way,
16 but more efficient than Royal Mail.

17 Q. They should be able to get over the price disadvantage
18 resulting from the price differential?

19 A. That they're --

20 Q. Their raised costs they should be able to deal with?

21 A. That they will have. As long as all the prices that are
22 being considered are above those of the efficient
23 entrant benchmark, then there should be no difficulty
24 for an entrant.

25 Q. Free pass. I understand.

1 The other point on this paragraph is that you say
2 that the cost justification wouldn't be available in
3 relation to what is the greatest commercial risk --

4 A. I'm sorry, I've lost where we are.

5 Q. I'm sorry, we are in the second complete paragraph down
6 on page 9, this is the stranded costs paragraph.

7 A. Yes.

8 Q. You say that.

9 "The greatest commercial risk and therefore cost
10 that Royal Mail faces is the potentially higher risk of
11 volume loss/stranded costs that would materialise if TNT
12 remained and rolled out."

13 Yes?

14 A. Yes.

15 Q. You say that's not a valid objective justification in
16 a competition law case. To be clear, the commercial
17 risk there is the risk of Royal Mail losing volumes;
18 that's right, isn't it?

19 A. It's the risk that Royal Mail has to maintain a network
20 of a given size to meet its universal service
21 obligation, and yet -- and it loses volumes, but it
22 still has to sort of have those costs sitting there in
23 some sort of deliverer of last resort.

24 Q. The reason why you advised that wasn't a valid
25 justification is because a dominant company cannot

1 justify blocking a competitor on the basis that
2 otherwise the dominant company would sell less of its
3 product or fail to utilise its assets; is that the point
4 that's being made?

5 A. I think the way we thought about it was just that
6 Royal Mail needed to think about how to make its
7 business more flexible to be able to respond to that,
8 and that's why getting information about forecasts was
9 the right way to think about this and not to think about
10 it, that they -- even though it was also true that they
11 had a given footprint and a given set of obligations to
12 their employees, that they -- and therefore it would be
13 painful when they were facing this competition, that the
14 right way for them to think about it was about how they
15 were going to manage their network in the future.

16 Q. The next paragraph states:

17 "On the other hand, the principle of customers
18 paying a premium for flexibility alternatively being
19 rewarded for commitment is a commercially rational and
20 well-understood practice in many industries.

21 "For example, mobile phone pay as you go prices are
22 more expensive than customers on contracts; flexible
23 rail/air tickets are more expensive than economy; basic
24 tickets ..." et cetera.

25 Now, those differentiations in pricing are designed

1 to ensure that you extract as much as possible from
2 customers according to their willingness to pay; is that
3 right?

4 A. No.

5 Q. No, okay. So explain to me what it means.

6 A. So it means that -- it's not -- well, any price that
7 someone purchases, it means someone is willing to pay
8 that amount for it.

9 Q. Yes, yes.

10 A. They may have been willing to pay more than it, so it's
11 not about extracting maximum willingness to pay. But
12 what it is saying is people have different preferences
13 and therefore if you only offer one product, you don't
14 necessarily match the preferences of everybody, and
15 therefore you can design products with differentiated
16 features that better match the interests of customers
17 and that way it will generally be output expanding, in
18 a technical term, because you are going to be able to --
19 you will sell more of your product than if you have only
20 one option.

21 Q. Yes, I understand. This is the value justification; is
22 that right?

23 A. Yes, that's right.

24 Q. Yes. You go on to give your advice about that in the
25 following paragraph, and you say:

1 "The real question will be whether Ofcom, when
2 investigating this practice under a competition law
3 complaint, would be willing to accept that this argument
4 can be an objective justification for conduct which may
5 have the effect of restricting competition. It is
6 difficult to provide definitive answer to this question
7 at this stage, partly because this would be a novel
8 justification for which, to our knowledge, there are no
9 competition law precedents. However, a key factor that
10 is likely to influence Ofcom's willingness to accept the
11 argument is the extent to which the level of the price
12 differential proposed, 0.3p per item, will actually have
13 a material impact on TNT's direct delivery plans."

14 So you were saying: don't bank on this value
15 justification, also have an argument ready that there is
16 no anticompetitive effects; is that right?

17 A. Yes, that is --

18 Q. That was your advice, yes.

19 Can you turn on and review the final paragraph of
20 this section on page 10, towards the foot of the page,
21 so above the heading "What would the nature of
22 a competition complaint be likely to be?":

23 "Work and evidence demonstrating that the price
24 differential will not have an exclusionary effect is
25 therefore of paramount importance, although we

1 appreciate this is somewhat counterintuitive from
2 a commercial perspective as ideally you would want to
3 show the opposite."

4 So first point there, Oxera is saying "You have to
5 try and get some modelling that shows that there isn't
6 an exclusionary effect", is that right?

7 A. Yes, that's right.

8 Q. It's also saying that the commercial perspective of
9 Royal Mail would be that Whistl would be excluded;
10 that's right, isn't it?

11 A. I think that what Royal Mail was thinking about was that
12 they did want to see that they were thinking of
13 commercial responses that were going to be effective at
14 encouraging people to make use of their network, and
15 that therefore, when we were saying to them "You need to
16 be able to show that an efficient entrant will not be
17 excluded", and they were of the view that Whistl would
18 be able to enter because they had lower costs, so
19 Royal Mail were finding this part of the process quite
20 challenging.

21 I have -- you know, that's accurate, they were
22 feeling the risk to their business from the threat of
23 direct delivery entry and they were struggling with the
24 idea that they -- that there would be commercial
25 responses that would allow an efficient entrant to

1 flourish and they would have no commercial response that
2 would be available to them. They were -- that was
3 something we spent a lot of time talking about, but that
4 was what they understood.

5 Q. I see. But from their perspective, the commercial
6 perspective, the price differential option had the same
7 underlying objective as we saw earlier in relation to
8 the selective discount option, they were both part of
9 the same package of measures to respond to the threat of
10 direct delivery competition by deterring entry by
11 Whistl; is that correct?

12 A. They were considering these in the context of designing
13 commercial responses that would be lawful ways of
14 encouraging the use of the Royal Mail network while
15 allowing an efficient direct delivery entrant to enter
16 the market.

17 Q. I want now to turn to consider the advice you gave about
18 the effects of the price differential prior to its
19 issuance, prior to the issuance of the CCNs in
20 January 2014. First of all, I just want to be clear
21 about what you did and didn't do.

22 Oxera wasn't instructed to conduct a formal
23 foreclosure analysis until after Whistl's complaint in
24 January 2014; that's right, isn't it?

25 A. That's correct.

- 1 Q. Oxera's original proposal in August 2013 was on the
2 basis that Royal Mail would take the lead on any
3 modelling work that may be required; is that right?
- 4 A. Yes, that's right.
- 5 Q. And Oxera did not take any of the -- undertake any of
6 the modelling work during its advisory role prior to the
7 issuing of the CCNs?
- 8 A. That's right.
- 9 Q. You say at paragraph 7.3 of your witness statement, if
10 we could just turn that up, that you were made aware
11 that Royal Mail had in the interim period developed some
12 modelling to assess the impact of the changes of
13 a direct delivery entrant. Do you recall how and by
14 whom you were made aware?
- 15 A. (Pause). That would have been in the various meetings
16 with the Royal Mail staff members that we were meeting
17 regularly.
- 18 Q. Yes. When you say "the interim period", does that mean
19 the period between your last engagement to advise
20 Royal Mail ending in April 2013 and the engagement in
21 relation to the CCNs which commenced in August 2013?
- 22 A. Yes, I think I wouldn't actually be able to remember
23 exactly when now, but it was certainly in that latter
24 half of 2013.
- 25 Q. The modelling in question comprised Royal Mail's entry

1 cost model and entrant strategy model; that's right,
2 isn't it?

3 A. Yes, that's right.

4 Q. Oxera was not asked by Royal Mail to review this
5 modelling until early 2014 after the CCNs were issued;
6 is that right?

7 A. That's right.

8 Q. This was not modelling to apply an
9 as-efficient-competitor test based on Royal Mail's own
10 costs, was it?

11 A. No, it wasn't.

12 Q. It was based instead on a bottom-up calculation by Royal
13 Mail of the likely recurring costs that would be
14 incurred by an entrant into the downstream UK letters
15 delivery market?

16 A. Yes, so it was trying to get at this idea that the
17 entrant was likely to have quite a different business
18 model from Royal Mail, and that because of this
19 difficult nature of the choices that Royal Mail were
20 making in their commercial responses, while it was
21 difficult, they wanted to have some understanding of the
22 impact on an efficient entrant.

23 Q. They wanted -- for their own commercial purposes they
24 wanted and needed to understand how a direct delivery
25 entrant's incentives would be affected, and

1 an as-efficient-competitor model wouldn't really shed
2 much light on that, would it?

3 A. That's right, you would need to understand -- though
4 actually what you need to understand quite a lot is the
5 demand, what your customers will want, right, and so
6 they had that side of it, and then you need to
7 understand something about your entrant's costs to get
8 an idea of what your likely competitive -- competitive
9 price you will be forced to meet.

10 Q. If we could just turn to the entrant cost model, it's
11 described at tab 40 of bundle C4A. You see on page 2
12 they sort of build a network up from the ground, that's
13 what they mean by bottom-up, isn't it, and you see
14 establishing the location of delivery units and you see
15 how that was calibrated at point 6?

16 A. Yes.

17 Q. It's confidential, so I won't repeat it. You see at
18 point 12 on page 3 how the staff costs were selected
19 under the model?

20 A. Yes.

21 Q. You see on point 15 on page 4 how the distance between
22 delivery units and mail centres is calculated?

23 A. Yes.

24 Q. So this was Royal Mail's best attempt to assess what the
25 expected impact of the price changes on Whistl would be,

- 1 wasn't it, this modelling?
- 2 A. It was, taking Whistl as ...
- 3 Q. Yes, as the entrant?
- 4 A. As the relatively efficient, you know, the efficient
- 5 entrant as opposed to as-efficient-competitor to
- 6 Royal Mail.
- 7 Q. With respect, for their commercial purposes Royal Mail
- 8 didn't care whether Whistl was to be regarded as
- 9 efficient or not, did it?
- 10 A. It was --
- 11 Q. It just needed to understand how Whistl would be
- 12 affected by particular pricing.
- 13 A. It wanted -- no, it wanted to understand how Royal Mail
- 14 would be affected by the depth of discounting and
- 15 volumes in specific areas.
- 16 Q. But that in turn would require an understanding of how
- 17 Whistl would develop its network and how, what volumes
- 18 it would achieve under various scenarios; that's right,
- 19 isn't it?
- 20 A. That's right.
- 21 Q. Yes. This modelling is what underlies the traffic light
- 22 slide that I discussed with Ms Whalley. Do you know
- 23 what I mean by the traffic light slide? The slide
- 24 coding different options in red, yellow and green.
- 25 That's right, isn't it?

1 A. Yes, that's right.

2 Q. It also underlies the adjacent slide in that slide
3 deck --

4 A. Actually, to be honest I don't fully know that. That's
5 my assumption.

6 Q. Okay, very good, yes, well, I won't continue with that
7 line of questioning then.

8 You say at paragraph 7.3 of your statement that the
9 modelling had been developed -- can we just turn back to
10 your statement? Apologies for the jumping around. You
11 say at paragraph 7.3 that:

12 "The modelling had been developed to assess the
13 impact of the changes on a direct delivery entrant so
14 that Royal Mail could be sure that an efficient
15 end-to-end competitor would be able to operate
16 successfully under the proposed access pricing changes."

17 Do you see that?

18 A. Yes.

19 Q. By efficient competitor, as we've discussed, this isn't
20 an as-efficient-competitor, this is Whistl?

21 A. I think that my understanding, and that was from
22 discussing things with the people who were building the
23 entrant model, was they calibrated it on certain aspects
24 that they could benchmark of Whistl's entry, such as, as
25 you pointed, the staff costs that were in the public

1 domain, but they were also making assumptions, and so
2 that's a sense in which they were trying to say what
3 would an efficient end-to-end entrant -- but it's
4 absolutely right that they were using the information
5 about Whistl's roll-out as a key input to that
6 understanding.

7 Q. Yes. You identify a purpose of the model as being in
8 order to ensure that an end-to-end competitor would be
9 able to operate successfully. But the model was also
10 used for commercial purposes, to decide which
11 combination of actions would be most beneficial to
12 Royal Mail, wasn't it?

13 A. It would be used for commercial purposes as well, yes.

14 Q. Yes, thank you. Your understanding was that this model
15 was preliminary; is that correct?

16 A. Whether it was preliminary, it was being built at the
17 time, and our experience over years of working with
18 Royal Mail is that they had -- they would continue to
19 develop.

20 Q. Quite sophisticated, yes, I see.

21 So can we now turn to the discussion of effects in
22 the 3 October note, please. So that goes back to C4A,
23 tab 27, page 9. I want to start at the penultimate
24 paragraph on page 9:

25 "Oxera has not been provided with evidence showing

1 the impact that a price differential of this magnitude
2 would have on TNT's incentives or its direct delivery
3 business plan."

4 Pausing there, this is simply the observation that
5 we've just canvassed that you didn't do the model and
6 you hadn't --

7 A. That's right.

8 Q. -- directly proofed, checked the modelling.

9 "However, we understand that whilst small relative
10 to the overall access price, 1.5%, 0.3p is a substantial
11 proportion of the upstream margin that access operators
12 compete on, between 15% and 60%, depending on whether it
13 is measured on the basis of Royal Mail upstream costs or
14 the margins available for some individual customer
15 contracts. In the short run, we have been told by
16 Royal Mail that TNT would migrate to PP1 to avoid being
17 placed at a competitive disadvantage."

18 That's the point we had discussed before. They had
19 moved first of all to PP1 because otherwise they would
20 be hit with the price differential, and that would place
21 them at a competitive disadvantage vis-à-vis for example
22 another access operator on NPP1; is that right?

23 A. Yes.

24 Q. "This would allow them to continue their current level
25 of roll-out ..."

1 That means the roll-out that they had already done
2 and perhaps a little more; is that right?

3 A. Yes.

4 Q. "... and reassess whether they would be prepared to make
5 the step change in their roll-out required to compensate
6 for the additional 0.3p per item that it would have to
7 pay for the mail it would continue to send via
8 Royal Mail."

9 So there would be a pause to reflect and to decide
10 whether they ramped up and went hell for leather; is
11 that right?

12 A. I'm not sure there is necessarily a pause. They would
13 assess, they would reassess, you know, before the price
14 differential they would have a plan and then with the
15 price differential they would have to reassess. It
16 doesn't necessarily mean pause.

17 Q. They would have to -- yes, I see -- recalibrate.

18 "Hence an argument could be made that while the
19 price difference could have some impact on TNT's
20 decision-making process, in the short run TNT would
21 suffer no financial impact [that's while it remained on
22 PP1], whereas in the medium to long term if TNT decided
23 to roll-out on a large scale, as originally announced,
24 profit margins earned would more than compensate the
25 0.3p difference, and would in any case likely trigger

1 an investigation by Ofcom into the effects of this
2 roll-out on the financial sustainability of the USO."

3 Then your advice:

4 "On the basis of this straw man, which would need to
5 be confirmed by detailed modelling, we consider that
6 Royal Mail has a fighting chance of successfully arguing
7 to Ofcom that a price differential of this magnitude
8 would not have the effect of restricting genuine
9 end-to-end competition. Needless to say, there is no
10 guarantee of a successful defence and Ofcom may take
11 a different view, faced with similar facts."

12 Now, Dr Jenkins --

13 A. Sorry, I just clarify, because you started by saying
14 "and now your advice" when you started reading that, but
15 I think the previous paragraph was also our advice, and
16 it was us who were putting forward -- we had been told
17 by Royal Mail that TNT would migrate to PPl to avoid
18 being placed at a competitive disadvantage, but it is
19 our advice about the argument being made that you then
20 would go from the short term no effect, medium term
21 they're going to be fine.

22 Q. It doesn't look like your advice, with respect,
23 Dr Jenkins. What it says is you first of all describe
24 the modelling that Royal Mail has undertaken, that has
25 been described to you, and Royal Mail's understanding of

1 the incentive effects in the early stage. Then you
2 begin with:

3 "Hence, an argument could be made ..."

4 That's a quite lukewarm adoption of advice, isn't
5 it, that while the price difference could have some
6 impact in continuing --

7 A. This is at an early stage, so this is in October, but
8 this is indeed our advice. So we were told by
9 Royal Mail that TNT would migrate to PP1, so then
10 it's -- this would allow them to continue their current
11 roll-out --

12 Q. What it actually says is that an argument could be -- so
13 your advice is that an argument could be made?

14 A. Yes, our advice was that, with that knowledge, knowing
15 what we knew about the roll-out, then an argument could
16 be made that there is no effect in the short term, and
17 then in the medium term they're going to be fine because
18 there is a big price advantage.

19 Q. We're both in the advisory business, aren't we,
20 Dr Jenkins? We both know what advice looks like. And
21 the following paragraph is describing an assessment
22 based on that argument that could be made?

23 A. Yes --

24 Q. "On the basis of this straw man, which would need to be
25 confirmed by detailed modelling, we consider that Royal

1 Mail has a fighting chance of successfully arguing to
2 Ofcom that a price differential would not have the
3 effect of restricting genuine end-to-end competition.
4 Needless to say there is no guarantee of a successful
5 defence and Ofcom may take a different view faced with
6 similar facts."

7 It's pretty lukewarm, isn't it?

8 A. At this point in time, as you pointed out, we had not
9 done the modelling, we had had conversations with
10 Royal Mail, so this is us saying, you know, "Guys, we
11 see how this can play out, but you haven't yet done the
12 modelling, we haven't checked that modelling", and yes,
13 we are saying that in a not very strong way because
14 we're nervous that if we write, "Oh, it's totally fine,
15 don't worry about it", then --

16 Q. They'll come back and bite you. I understand that,
17 of course.

18 A. So we are then saying further work needs to be done, but
19 we're saying that you can see a logic for how this will
20 not --

21 Q. But you never checked the advice before the CCNs were
22 introduced, you never checked the modelling?

23 A. We didn't check the modelling before the advice.

24 Q. You didn't check the modelling.

25 THE CHAIRMAN: With the benefit of hindsight, it's

1 remarkably prescient, this paragraph, isn't it?

2 MR HOLMES: Well, I think -- well, Dr Jenkins will correct
3 me if I'm wrong --

4 THE CHAIRMAN: Ofcom has taken a different view.

5 MR HOLMES: Yes, indeed. Indeed, sir, yes.

6 THE CHAIRMAN: That's why we're here.

7 MR HOLMES: Yes.

8 I just want to consider a few paragraphs with you in
9 your witness statement. Paragraph 3.5 on page 5. 3.6,
10 I apologise. So you say first of all that, you explain
11 in the advice that the basis for your understanding
12 "throughout this period that the proposed price
13 differential would not foreclose Whistl or an equally
14 efficient operator".

15 Now, the "not foreclosing Whistl", that's based on
16 the understanding that Royal Mail conveyed to you which
17 was set out in the paragraph we just looked at in the
18 modelling that you hadn't checked; is that right?

19 A. And our own knowledge of the cost modelling, so the
20 extent of costs in the sector.

21 Q. I see, so general industry knowledge?

22 A. We had not fully checked the modelling at that point.

23 Q. Well, you hadn't. Your evidence is a bit stronger than
24 that: you hadn't --

25 A. We hadn't redone that modelling.

- 1 Q. No. You say also that you were --
- 2 A. So, sorry, the only other thing I would add is that the
3 other thing it was informed by was the work we had done
4 in 2012 where, when we were doing that first piece for
5 Ofcom showing given Whistl's proposed roll-out plans,
6 what the impact on Royal Mail's business plan for that
7 five years. So that involved us knowing something about
8 that roll-out and Whistl's business at that time.
- 9 Q. Yes, I see.
- 10 A. But that was not -- the entrant cost model and entrant
11 strategy cost model had developed further since that
12 time.
- 13 Q. As regards your understanding about the impact of the
14 proposed price differential on an equally efficient
15 operator, you didn't advise Royal Mail in relation to
16 the impact on an equally efficient operator in any
17 written materials that are before this tribunal, did
18 you?
- 19 A. So, as I clarified, that's equally efficient operator to
20 Royal Mail.
- 21 Q. Royal Mail, yes.
- 22 A. So the zonal tilt work, a lot of that was related --
- 23 Q. But for the price differential?
- 24 A. No, yeah, the price differential is the same point, it's
25 knowing about the LRIC, the DLRIC. The price

1 differential would not cause a problem for someone who
2 had the same costs as the distributed LRIC of --

3 Q. But it's not set out in your 3 October note?

4 A. It's not set out at the 3 October note.

5 Q. Or any other material, advisory material, that is before
6 the tribunal, is it?

7 A. No.

8 Q. No.

9 A. We -- in a sense, as I said before, the price
10 differential was very small, it was 0.2, what we knew
11 was the DLRICs were like [redacted], from the current
12 access prices. So you have a lot of ability to absorb
13 a 0.2 price differential and with the types of roll-out
14 that were being considered we -- it was almost like
15 a back of the -- I mean, genuinely it was a back of the
16 envelope thought process that we discussed internally,
17 we didn't write it down, we didn't do the analysis. We
18 did do that in the subsequent work --

19 Q. Yes.

20 A. -- which confirmed what we had thought.

21 Q. And that's the formal foreclosure analysis --

22 A. That's right.

23 Q. -- that you did only after the administrative procedure
24 had commenced?

25 A. Yeah.

1 Q. Then the other point I wanted to check on this paragraph
2 is in the final sentence:

3 "In this context, the fact that Royal Mail gained
4 an understanding of the risks of its conduct through our
5 advice cannot in my view be used to establish abuse of
6 dominance, nor can it be used to vans the argument that
7 Royal Mail had the intention to foreclose a rival."

8 I understand you there to be making a point about
9 the inferences that can be drawn from the fact that
10 Royal Mail gained an understanding of the risks of its
11 conduct and not giving primary factual evidence about
12 what Royal Mail's intentions actually were; is that
13 right?

14 A. That's correct.

15 MR HOLMES: I'm grateful.

16 I have no further questions, sir.

17 THE CHAIRMAN: Thank you very much. Any questions from my
18 colleagues? Mr Turner, do you want to ...?

19 MR TURNER: I do. Given the time, shall I start after the
20 short adjournment?

21 THE CHAIRMAN: I think that would be appropriate, unless
22 there were some quick points you want to make.

23 MR TURNER: Well, Professor Ulph I think has a question.

24 THE CHAIRMAN: Sorry. Professor Ulph, yes, please.

25 Questions from THE TRIBUNAL

1 PROFESSOR ULPH: I have a couple of questions of
2 clarification.

3 If you look at paragraph 6.9 in your evidence, you
4 were talking about zonal pricing with profile and volume
5 commitments?

6 A. Yes.

7 PROFESSOR ULPH: So am I right to understand that a lot of
8 the thrust of your advice was that, to avoid
9 cherry-picking, you were trying to encourage Royal Mail
10 to move much more to zonal pricing? Is that your ...

11 A. I think Royal Mail itself was understanding --
12 understood well that one of the ways to respond to
13 cherry-picking is to use as much flexibility as they had
14 with their zonal prices. So, yes, they were working
15 with them on what would be the range of zonal pricing
16 responses they could consider.

17 PROFESSOR ULPH: Okay. But would one implication be that
18 you felt that these national price plans weren't helping
19 them to really address cherry-picking, that really zonal
20 pricing would be a much more effective way of addressing
21 cherry-picking?

22 A. So the national price plan -- because the customers who
23 are on the national price plan are posting on a national
24 footprint, then you don't have so many concerns around
25 cherry-picking, and then you have a zonal -- so they

1 also had a zonal price plan which would then be what
2 would be utilised by an entrant who didn't want to post
3 on a national footprint. And then they had a -- yeah,
4 it is kind of confusing because they had a national
5 zonal plan that was APP2, right, and that had a lot more
6 flexibility in it.

7 PROFESSOR ULPH: I understand that.

8 A. And it was that bit where, yes, we were looking at them
9 looking at how to price the zones within that national
10 plan or the core zonal plan.

11 PROFESSOR ULPH: Thank you.

12 You talk at the end of that paragraph about the
13 extent of cost reflectivity. You (inaudible) zonal
14 pricing.

15 A. Yes.

16 PROFESSOR ULPH: So can I just check: are you talking about
17 Royal Mail's costs, or are you talking about Whistl's
18 costs, or a potential entrant's costs?

19 A. Yeah, there I'm talking about Royal Mail's costs, so it
20 was our advice to them about the zonal tilt that they
21 would have -- they could use the flexibility to price
22 their zones between the distributed LRIC and the
23 distributed standalone cost for each, for each zone, but
24 it was bounded by their costs, and then the question is:
25 where in that zone do you put your price? And that was

1 what the uncertainty was around, because the actual
2 costs of the direct delivery entrant will be quite
3 different from Royal Mail's costs, but Royal Mail is
4 constrained to price according to its costs; and
5 actually the zonal tilt that was proposed in the CCNs
6 was one that changed the ranking where London had been
7 the more expensive one to one of the less expensive
8 ones, and that ranking change was driven by the fact
9 Royal Mail was including in their decision process of
10 where in this band competitive conditions, which
11 included the entrant's costs, because they knew that
12 entrant was more efficient than them in the London area,
13 so they were taking the flexibility they could in this
14 band; and that, that you see -- we were flagging that as
15 potentially risky because that can be interpreted by
16 a regulator as a targeting, because you are sort of
17 picking the place with reference to the entrant.

18 Now, it's still -- it still allows efficient entry
19 because you are still in the appropriate band, but it's
20 the question of where you picked in each of the four
21 bands. So it was a mix of definitely being
22 cost-reflective of Royal Mail, but the point that you
23 picked being influenced by the costs of your rivals. So
24 it was a mix of the two.

25 And for cherry-picking, to avoid cherry-picking, you

1 actually have to have an attention to the entrant's
2 behaviour, right, in order to help with cherry-picking,
3 within the bounds of what is legal from the perspective
4 of allowing an efficient entrant,
5 an as-efficient-entrant to flourish.

6 PROFESSOR ULPH: But if you are trying to avoid
7 cherry-picking by an as-efficient-entrant, why do you
8 need to worry about the costs of the entrant?

9 A. Well, they weren't using the costs of the entrant other
10 than in the sense that, because the -- sorry, I'll start
11 again.

12 The as-efficient-entrant isn't delivering the same
13 service as Royal Mail, so its costs can be very
14 different and can be much lower than Royal Mail's costs,
15 so an as-efficient universal service provider, that
16 would be fine, right, but actually here the floor that
17 Royal Mail can charge is the LRIC for a universal
18 service provider; the actual entrant may have even lower
19 costs than that, and therefore there will always be
20 an opening for cherry-picking. Even if Royal Mail had
21 used the maximum flexibility in their zonal pricing,
22 there was that possibility.

23 PROFESSOR ULPH: Okay, so just to be clear, you are using
24 the term "as-efficient" to be as-efficient USO?

25 A. Yes, as efficient as Royal Mail, who is the USO

1 provider.

2 PROFESSOR ULPH: So if somebody came in across the entire
3 nation, that would be your definition, an as-efficient
4 USO provider, if everybody set up in every SSC?

5 A. Yes, that would -- so Royal Mail is constrained to price
6 according to its own costs, right, that's -- that was
7 our advice about legally that's what it should do, and
8 its costs could be interpreted as someone entering who
9 is as efficient as Royal Mail in providing the services
10 that Royal Mail provides, which are an across the whole
11 country service, that's what Royal Mail provides, and
12 that's the lowest Royal Mail could price in its zones
13 for a service that would provide that. They are facing
14 competition from someone who doesn't have those
15 obligations.

16 PROFESSOR ULPH: I understand that, but you did say the
17 zonal tilt then was changed to partly reflect Whistl's
18 costs, so that wasn't just ...

19 A. So because they understood that Whistl's costs in London
20 were below those of Royal Mail and therefore, whereas
21 when they didn't face competition they were recovering
22 their costs in a way that reflected only Royal Mail's
23 costs and there London was the highest cost zone, when
24 you just look at Royal Mail's costs with nothing else,
25 right, and it's a fully allocated cost model there, so

1 they're taking incremental costs and adding
2 an allocation to each one.

3 Here, once they move into the competitive
4 environment, they were taking advantage of the cost
5 flexibility between the LRIC floor and the standalone
6 cost ceiling, and therefore positioning the London cost
7 lower than it had been before because they knew that the
8 entrant had lower costs in London.

9 PROFESSOR ULPH: Okay, so we are using the term "efficient"
10 in somewhat different ways in different contexts?

11 A. Yes.

12 PROFESSOR ULPH: So would it be reasonable to say that it
13 was almost like an as-inefficient-entrant model you're
14 really looking at?

15 A. Inefficient because they're not providing a USO?

16 PROFESSOR ULPH: Because their costs were higher than those
17 of plausible entrants.

18 A. Because Royal Mail's costs are higher? But their costs
19 are higher because they have a universal service
20 obligation.

21 PROFESSOR ULPH: So as efficient as a USO, although not as
22 efficient ...

23 A. As a standalone direct delivery entry who only has to
24 launch in certain places.

25 PROFESSOR ULPH: Okay. I think that's fine. Thank you.

1 THE CHAIRMAN: Thank you. We will resume at 2 o'clock.

2 (1.05 pm)

3 (The short adjournment)

4 (2.00 pm)

5 Cross-examination by MR TURNER

6 THE CHAIRMAN: Mr Turner.

7 MR TURNER: Dr Jenkins, I'm going to ask you some questions
8 about certain factual aspects of your evidence. Do you
9 have your statement in front of you?

10 A. Yes, I do.

11 Q. We begin at paragraph 1.4. We have the traditional form
12 of words for a factual witness, and you say that where
13 facts and matters aren't within your own knowledge in
14 what you go on to talk about, but they come from
15 information obtained from other sources, you endeavour
16 to identify the sources.

17 Did you make those endeavours before signing your
18 statement?

19 A. Yes.

20 Q. And you reviewed it to ensure that wherever the text
21 said you understood from Royal Mail something was the
22 case, that you would identify the source wherever
23 possible; yes?

24 A. I think wherever possible I did best endeavours, doing
25 this last year, for when a significant amount of time

1 had passed since the events.

2 Q. In fact, you give evidence to the tribunal in this
3 statement on your second-hand understanding from the
4 company generally and what you understood Royal Mail's
5 thinking to be at least ten times, and in not one of
6 these cases, not one, do you ever identify the source of
7 your information within Royal Mail at any point,
8 I think, do you?

9 A. No, it was my understanding from working with
10 Royal Mail.

11 Q. It was by no means only Ms Whalley who was the source of
12 your information within Royal Mail; there were other
13 individuals too?

14 A. That's correct.

15 Q. None of whom have given evidence.

16 Now can we go back to a paragraph that Mr Holmes
17 took you to, which was paragraph 9.19. It's at the foot
18 of page 110. I'm going to ask you a few questions on
19 the cost justification for the price differential. So
20 if you refresh your memory as to what you say there.

21 A. In paragraph 9.19?

22 Q. 9.19.

23 A. Yes.

24 Q. Essentially you are saying that in response to your
25 advice that Royal Mail "might also need to consider

1 discounts" to non-NPP1 customers who could give forecast
2 information, you understood this was an option being
3 considered internally.

4 Pausing there, the need was for what reason? What
5 would happen if this was not done? Might need to in
6 order to avoid what consequence?

7 A. Need to consider these discounts on the basis of the
8 discussions we had had with them about the value of that
9 information to them in terms of their efficiency
10 planning.

11 Q. They might need to do that, why? Because --

12 A. To achieve efficiency gains.

13 Q. So purely looking at it in an economic context, might
14 need to in order -- for reasons of efficiency; that's
15 what you meant?

16 A. That was the main thrust of our advice at the time, was
17 that from what we had heard from the operations team,
18 that the value of that information to Royal Mail in
19 terms of its planning benefits would not necessarily
20 only accrue to -- from customers who were on NPP1, but
21 to any customer who was willing to give SSC information.

22 Q. Now, I understand that, but you might need to take that
23 into account why? Why might they need to do that?

24 A. Well, that was part of our advice in terms of their
25 regulatory compliance as well as -- but from a core

1 point -- obviously it was: can they, do they think they
2 will be able to get the relevant information from the
3 other customers. That's what they needed to consider.

4 Q. Now, at the top of the next page you go on to say that
5 you "also understood that [the company] thought this was
6 unlikely to be attractive to customers, given those on
7 [the APP2 plan] valued the flexibility this price plan
8 gave"; yes?

9 A. Yes, that's right.

10 Q. Do you recall now, was it again Ms Whalley who was the
11 source of that information, or can you remember who it
12 was?

13 A. There -- as I think you can tell from our advice through
14 this period, we discussed this in a number of different
15 situations, so there -- it would not have just been
16 Ms Whalley who had that understanding, but at this point
17 I can't recall the names of everyone at Royal Mail who
18 might have said that to me.

19 Q. Given the potential importance of this, as we say, in
20 the first sentence you are referring to something the
21 company might need to consider, and you have explained
22 that was for regulatory compliance purposes, did you
23 test this point with that or those Royal Mail
24 individuals, or did you accept what was said by them
25 uncritically? Because the statement simply leaves it

1 unclear.

2 A. We discussed the point with them, so we did test it as
3 well, about whether customers would find that attractive
4 who were on APP2, and the -- as I said before, NPP1 not
5 only had the national profile but it also had the
6 forecast commitments up to two years ahead, and actually
7 some of the conversations that we were having with
8 Royal Mail at the time, which, you know, included
9 commercial, the regulatory team, there were a lot of
10 different people, were also that some of the current
11 customers on NPP1 may not find it attractive to be bound
12 by these commitments and would also be switching away
13 from NPP1 with these constraints on them. So --

14 Q. The answer is you tested it critically?

15 A. We did test it. But what we did was we discussed it, we
16 discussed the issue, we understood that it was more than
17 just a first statement by Royal Mail, but that they had
18 thought about it.

19 Q. No, you needed to give them independent advice, didn't
20 you?

21 A. Yes.

22 Q. Yes.

23 Do you have a copy of a short document that I would
24 like to ask you some questions about? It may be being
25 handed to you now. I hope the tribunal and everybody

1 else has copies.

2 Were you involved personally in those discussions
3 with the Royal Mail people, or did you merely have the
4 information relayed back to you by your colleagues?

5 A. At times I was directly involved in those conversations.

6 Q. Did the Royal Mail individuals involved in those
7 conversations make you aware that APP2 customers as
8 a category already had to provide Royal Mail every day
9 with seven-day rolling forecasts of their mail volumes
10 on a highly specific geographic basis? Did you know
11 that?

12 A. Yes, I knew that.

13 Q. Can we open the document, just to make sure that we're
14 singing from the same hymn sheet. If you look at 11.1,
15 here we have the pre-notification of posting. Stage 1
16 refers to a seven-day rolling forecast, and if you drop
17 down to 11.2.7, look at the second paragraph, each day's
18 forecast will include your anticipated volume of mailing
19 items for handover at each inward mail centre.

20 So do I take it you knew that this was something
21 that also applied to the APP2 customers?

22 A. Yes, I understood that operationally APP2 customers knew
23 which SSCs they were going to be putting their mail into
24 and provided -- I must say I've never seen this document
25 before, I didn't know the exact details, but the --

1 obviously a customer knows where they're going to be
2 injecting the mail into Royal Mail's system and that is
3 on an SSC basis, but they're not charged on that basis
4 and it was my understanding that the invoicing and
5 commercial relationships between Royal Mail and the APP2
6 customers had no -- had nothing related to SSCs in that;
7 it was only on the operational level.

8 Q. Yes, and on the operational level, then, I think we can
9 agree that the APP2 customers did have to provide
10 information to Royal Mail on the local level; yes?

11 A. But only, like, on the day or the day before posting
12 when they obviously would know what they were doing,
13 they didn't have to provide long run forecasts on that
14 basis.

15 Q. Now, were you aware of the 28 day forecast they had to
16 provide for the key national postings? Was that part of
17 what you had accumulated in your knowledge over the
18 16 years of advising?

19 A. No, I had not.

20 Q. So if you look on the following page, 11.5, you see
21 a reference to these key national postings. It's not
22 a term you are familiar with?

23 A. No, it's not.

24 Q. All right. Well, take it on the basis at the moment, as
25 assumption, that it's a matter that deals with

1 exceptional events where there may be increased postings
2 like voter card mailings for local elections, and
3 grocery stores issuing new loyalty cards and so forth.

4 So whenever those events occur, if we go down to the
5 bottom of the page and look five lines up, at a minimum
6 the line listing you will see four lines up now will
7 detail the number of mailing items per container by SSC,
8 destination, name and format. If you turn over the
9 page, the sort of structure of information that's
10 needed, and you will see the sixth column which is SSCs
11 specifically.

12 So I understand you're saying that it wasn't
13 a two-year forecast, but I think we can agree that the
14 APP2 customers also operationally, to your knowledge,
15 were providing detailed ongoing information at
16 a granular level; yes?

17 A. The APP2 customers were obviously injecting their mail
18 into the Royal Mail structure, which included the SSCs,
19 so yes, they did know where they were posting, but they
20 weren't providing --

21 Q. Two-year forecasts?

22 A. The -- yes, that information.

23 Q. Did the Royal Mail individuals whom you spoke to give
24 you any real life examples when you were discussing this
25 with them of a business whose pattern of putting mail

1 through the network was so unpredictable that it would
2 illustrate to you how APP2 customers wouldn't find it
3 attractive, by and large, to give advance forecasts of
4 the kind that Royal Mail would want in order to plan the
5 Royal Mail's business? Were you given any examples?

6 A. There were some examples discussed that were around --
7 but they were relating to the direct delivery entry, and
8 examples where the operations team had said that all of
9 a sudden big customer volumes had suddenly appeared
10 where they had been absent from a period, and I recall
11 there was one, if I recall, it stuck in my mind because
12 it was the Harrods catalogue, because of the part of
13 London that was being targeted, so they had been not
14 delivering them and then all of a sudden they all turned
15 up on a given day. So that suggested obviously that I'm
16 sure the customer providing those had given one day's
17 notice but Royal Mail hadn't been expecting them.

18 Q. Did I hear correctly a few moments ago that you said
19 that the NPP1 customers weren't always happy with the
20 idea of providing such long range forecasts?

21 A. I understand there were some discussions between
22 Royal Mail and its NPP1 customers and that was one of
23 the things we discussed in the run-up to the roll-out.

24 Q. Can you clarify that? What was the dissatisfaction that
25 was relayed back to you?

1 A. That providing two-year forecasts in advance in that
2 way, with limited flexibility, there would be some of
3 the customers who would be planning to post on
4 a national basis would potentially find that onerous to
5 be providing forecasts at that level.

6 Q. Turning to Whistl for a moment, were you specifically
7 made aware or did you know anyway that Whistl would be
8 in the best position of all to give Royal Mail valuable
9 information from Royal Mail's perspective, or was it
10 something that you raised yourself proactively with the
11 Royal Mail individuals with whom you conversed?

12 A. I don't recall whether -- who mentioned it first,
13 though, with respect to Whistl, but I think relatively
14 early in the process we were asking the question about
15 whether it would be valuable to have that information
16 even if it wasn't on the full national profile.

17 Q. Did you ask Royal Mail whether they had raised it with
18 Whistl or were going to?

19 A. Er --

20 Q. Did you ask them that?

21 A. I don't recall if I directly asked them, I certainly ...
22 I think by the time we were talking about that in a lot
23 of detail, it was Ofcom itself had also raised a similar
24 query of Royal Mail in December, so we were just openly
25 talking about what the constraints were from having --

- 1 offering it in a broader way.
- 2 Q. I think you were aware that there was a meeting in
3 January 2014 at which Royal Mail met with its customers,
4 including Whistl, to discuss the forecasting
5 requirements; were you aware of that?
- 6 A. Yes, I think I was aware of it. I ... you know, it
7 was --
- 8 Q. It's all a long time ago.
- 9 A. It was a long time ago but it was clear that after they
10 issued the notices they were going to meet with
11 customers, whether that was collectively or
12 individually, but yes.
- 13 Q. If we just have a look together at a copy of the meeting
14 note. It's in the Whistl bundle, tab C, it's one of
15 these files with Russian doll tabulation. So it's
16 section C, or first tab C, and then tab 5, and page 568.
17 Do you have that?
- 18 A. Yes, I have that.
- 19 Q. On my copy there is lots of names in multiple colours,
20 so I'm assuming they're all confidential. I think you
21 can see from this that there is at least one TNT
22 representative --
- 23 A. Yes.
- 24 Q. -- in the first block, in blue on my copy. Underneath
25 that, a group of the Royal Mail representatives?

1 A. Yes.

2 Q. If we turn over two pages to page 570, there are some
3 headings. The third one down is "Forecasting frequency
4 and adjustment", and after the first sentence:

5 "[X] clarified that a customer would have the
6 opportunity to adjust forecast once during a year, once
7 at year end for the next 2 years and again in the middle
8 of year 2. In effect forecasts could be adjusted every
9 6 months. Royal Mail would expect a variance of less
10 than 10% in a 12 month period.

11 "Members registered their strong objection to the
12 proposals as tabled. The requirement for a 2 year
13 forecast was unrealistic. Responsible customers had
14 demonstrated their intention to work closely with
15 [Royal Mail] account managers to improve both short and
16 medium term forecasting. Members did not believe that
17 the impact of individual forecasts on Royal Mail's
18 long term network planning was significant. Many
19 customers simply didn't have significant volumes, whilst
20 others were in effect competing with each other which
21 would result in a neutral impact on Royal Mail's
22 volumes. The requirements appeared unnecessarily
23 complicated."

24 Then [X] again comments that:

25 "... forecasting both short, medium and long term

1 was absolutely vital to Royal Mail as a business and its
2 ability to efficiently respond to volume changes [and so
3 on] ... Hence the requirement for PP1 users."

4 Then below that:

5 "Price Plan 2/3 forecasting commitment":

6 "Members asked if holders of PP2 and 3 contracts
7 could get a similar price commitment for meeting PP1
8 forecasting commitments?"

9 And [X] comments that "this was not available".

10 Not available. Is this the sort of information, if
11 you had seen this, that would have been relevant to the
12 advice you gave on regulatory compliance?

13 A. Yes.

14 Q. Because?

15 A. I would -- you know, it's discussing customers' views on
16 the proposed terms and conditions of the price plan.

17 Q. It is doing that. Would it have made you less relaxed
18 about the position that you took, which you describe in
19 your witness statement?

20 A. No, because -- I think that was actually what we really
21 understood from our conversations with Royal Mail, is
22 that this transition to -- away from Royal Mail having
23 all the information and being able to manage its network
24 on the basis of the total mail volumes expected for the
25 UK, to one where it was going to be having to share

1 those volumes with competitors and in ways that were
2 less predictable, that Royal Mail was going to have to
3 seek this information from its customers and those
4 customers themselves were going to find that difficult.
5 So I actually would have -- I expected that this would
6 be something that was a transition for the industry.

7 Q. That's not quite what I meant. If we look at the last
8 page here, 111, in your witness statement, at the top of
9 9.19, page 920, looking at the summary there that you
10 give:

11 "We also understood that Royal Mail thought this was
12 unlikely to be attractive to customers given those on
13 APP2 valued the flexibility this price plan gave."

14 Further down in 9.20:

15 "There was the understanding that these discounts
16 could be offered in the future were customers to request
17 it and were willing and able to provide the detailed
18 forecasts."

19 I'm putting to you that, now that you have seen the
20 exchange that did take place there, had you seen that,
21 and in particular the price plan 2 forecasting
22 commitment exchange, might that have affected the nature
23 of the advice you gave on regulatory compliance? I'm
24 asking a specific question about the price plan 2
25 customers.

1 A. I think I would want to understand exactly what had gone
2 on, because that's factually correct, that it was not
3 available at the time, and I don't know what the
4 follow-up questions were, I don't know exactly what
5 person X would have answered or how far they were
6 pressed. All I know is that in conversations I had with
7 Royal Mail they said they would be willing to discuss it
8 with customers but that they thought customers would
9 not -- would value the flexibility that they would have
10 on the APP2 contract.

11 Q. I think you said this morning to Mr Holmes that
12 Royal Mail didn't relay this to you at the time; is that
13 right?

14 A. Yes, that's right.

15 Q. When did you learn of this from them? How soon after?

16 A. I don't recall.

17 Q. Let's move to a different point, which is the part of
18 your statement in which you set the scene by giving
19 a general account of the industry and the economics.
20 So, as you know, this begins on page 85 in the bundle
21 reference, and it's section 4. The bold heading at the
22 bottom --

23 A. Sorry, is this my witness statement?

24 Q. We're in your witness statement.

25 A. Because I think I have it in a different bundle, I don't

1 have the same page.

2 Q. Sorry, yes, it's internal page 5.

3 A. Yes.

4 Q. So here you begin a long section which is entitled "The
5 economics of direct delivery in the presence of
6 a universal service obligation".

7 If we turn on in this to page 7 of the internal
8 numbering, page 87 of the external numbering in my copy,
9 we have paragraph 4.5. If we look at paragraph 4.5, you
10 say five lines down:

11 "To give efficient entry signals, Ofcom has
12 recognised that zonal pricing should be set on the basis
13 of the long run incremental costs of Royal Mail's
14 delivery activities in each zone."

15 Then there is a quotation. So this sets out what
16 Ofcom, you said, has recognised, and Ofcom's view that's
17 recorded here is that there should be LRIC orientated
18 prices in each zone; yes?

19 A. Yes.

20 Q. We see from the footnote that you give, footnote 8, that
21 you are referring to a 2012 statement by Ofcom; yes?

22 A. Yes.

23 Q. Now, as you know, Ofcom's position developed subsequent
24 to that in 2014, didn't it?

25 A. It did.

- 1 Q. You heard that discussed in court yesterday with
2 Ms Whalley, and you yourself do allude to it, although
3 quite tersely, in paragraph of 6.9 of your statement.
4 So this is the access pricing review.
- 5 A. Yes.
- 6 Q. The gist, if I can summarise it, was that if Royal Mail
7 uses a particular cost measure like FAC for the
8 allocated costs for orientating its prices in one zone,
9 like rural, it should do the same in the others, such as
10 London. Do you recall that from watching the
11 cross-examination of Ms Whalley yesterday, or shall we
12 look at that again?
- 13 A. You mean what was Ofcom's stated position in the access
14 pricing review in 2014?
- 15 Q. That's what I mean, yes.
- 16 A. I think that, yes, they -- my recollection is that they
17 were encouraging Royal Mail to use LRIC but to also
18 include a fully allocated cost element when deciding the
19 mark-ups within each zone.
- 20 Q. It wasn't quite that. Shall we just look at that again?
- 21 A. Sure.
- 22 Q. I don't know if we have the Whalley cross-examination
23 bundle from yesterday, please. It's in tab 3 of that
24 bundle that we were looking at yesterday. So if you
25 refresh your memory, it was on page 75 in tab 3. What

1 you will remember is that under the heading "Our concern
2 about zonal charges", Ofcom summarises its position in
3 those two paragraphs, 7.9 and 7.10. In 7.9, they said,
4 five lines down:

5 "Our proposals would require Royal Mail to set
6 a pattern of zonal charges that reflects the underlying
7 costs. This is consistent with the guidance we provided
8 in March 2012, and would prevent Royal Mail from
9 increasing the gradient of the zonal tilt in a way that
10 could deter entry."

11 Then they explain:

12 "The relative difference in access charges across
13 zones would thus reflect the relative difference in the
14 FAC. Royal Mail would not be able to selectively reduce
15 charges in some zones while setting high charges in
16 others", and so forth.

17 You remember that?

18 A. Yes, I see that.

19 Q. Now, this is plainly different from what you were
20 advising, as you explained to the tribunal this morning?

21 A. Yes, that's right.

22 Q. On reflection, in the general part of your witness
23 statement where you were explaining the market and the
24 regulation, might it have been better to refer to this
25 to give an accurate and full picture?

1 A. I think the question of the price flexibility that
2 Royal Mail had with its zonal pricing is one that, at
3 the time we were giving this advice, there was a lot of
4 lack of clarity, and in fact that's I think why I picked
5 the quote I have in paragraph 4.5 of my witness
6 statement because that was the information Royal Mail
7 had at the time.

8 Zonal pricing had been one of the things that we had
9 discussed with Ofcom in 2012 with respect to which
10 commercial responses were appropriate, and in 2012 what
11 Ofcom were saying was it should be derived subject to
12 principles and guidance provided by Ofcom, and this was
13 precisely because if you look at the guidance that Ofcom
14 makes in other sectors that it regulates where it faces
15 similar sorts of questions, which is entities that have
16 a lot of common costs to be recovered off a number of
17 different services, so then you've got the floor of
18 incremental costs and then you've got the question of
19 how you are going to recover those common costs and what
20 the appropriate mark-up is.

21 At the time we were giving the advice, and at the
22 time I wrote my witness statement, my view is that there
23 is a lot of relevant flexibility for an entity in
24 determining those prices.

25 Now, with respect to the APR review, I do mention

1 that in my witness statement, and my understanding is
2 that Ofcom didn't implement this, and this was just
3 a consultation, and these are not the guidance, this
4 isn't the guidance that is in the postal sector
5 currently, but I stand to be corrected, but that is my
6 understanding.

7 Q. Can we agree this, just to summarise it: at the time of
8 the CCNs, Royal Mail had discretion to set different
9 prices in different areas; there wasn't a uniform price
10 constraint?

11 A. That's correct.

12 Q. And second, that Ofcom's position, at least in the 2014
13 paper, was that a consistent approach to cost-reflective
14 prices should be adopted for all the zones to enable
15 efficient entry?

16 A. Well, this was some guidance that Ofcom was providing,
17 you know, some considerable time after the point at
18 which Royal Mail had been asked to exercise its
19 commercial response. At that time we were giving advice
20 to Royal Mail on how it might think about using that
21 flexibility and we were flagging the point that it was
22 unclear how Ofcom -- what guidance Ofcom would have or
23 what position Ofcom would take. And indeed at the time
24 we were giving the advice, Royal Mail could have been
25 investigated by Ofcom under either regulatory rules

1 under the Postal Services Act, or it could be
2 investigated under the competition rules. It's
3 obviously -- Ofcom has a lot of freedom under the
4 regulatory rules to set guidance about how this type of
5 uncertainty should be resolved in order to facilitate
6 market developments. You know, that's my understanding
7 of the role of a regulator in these regulated sectors
8 and that's why there are special regulatory
9 arrangements.

10 So the fact that Ofcom put out a consultation, to
11 which Royal Mail replied and we assisted Royal Mail in
12 its response to that, which actually queried whether or
13 not this was the right way to do this, and then Ofcom
14 didn't implement them to my understanding, then I think
15 this -- there isn't one answer to this question, is what
16 I would say.

17 Q. No, Dr Jenkins, that was quite a long answer, but all
18 I'm trying to do here is focus on the general section of
19 your witness statement and look at the fairness with
20 which you are presenting certain points.

21 I have one other to mention. If we look back a page
22 to 4.2 on page 6 of the internal numbering, you are
23 referring there to something that's been referred to
24 already in this case, the graveyard spiral, in
25 paragraph 4.2. Do you see that?

1 A. Yes, I do.

2 Q. I think we also see that the reference there is this
3 arising from the uniform price constraint under the USO?

4 A. Yes, that's right.

5 Q. And that "a 'graveyard spiral' can occur when the
6 entrant attracts profitable customers and the incumbent
7 would be obliged to raise its (uniform) prices".

8 We can agree that that wasn't relevant to the
9 situation at the time of the CCNs, can't we?

10 A. I think that it's true that the regulation had already
11 allowed for different zonal prices at this point, but
12 that the principle -- I think there I'm citing the fact
13 that there was a long history of discussion in the
14 academic community and more generally about the
15 challenges for a universal service operator when
16 competition is introduced.

17 Now, it's very severe if you have uniform pricing
18 and it is mitigated as you move to geographically
19 de-averaged prices. But the basic problem still is
20 there, depending on how and the way in which the
21 geographic de-averaging is done.

22 Q. That will be for the experts, but the point is your
23 evidence here was referring to something that was
24 outdated at the time of the events that we're concerned
25 with in this case; yes?

1 A. I think it's clear what that research is referring to,
2 and I do think it's a useful context for the debate.

3 Q. Let's move on to another topic, which is your
4 consideration of Whistl. If you go forward to page 22,
5 102 of the external numbering, paragraph 8.1. Do you
6 have that? (Pause). Again, Mr Holmes touched on this.
7 You didn't conduct a formal foreclosure analysis until
8 after January 2014; yes?

9 A. That's right.

10 Q. And you have clarified that prior to that, your advice
11 was "based on an understanding throughout the period
12 that the changes, including the proposed price
13 differential, would not foreclose Whistl or an EEO", and
14 you were asked some questions about this by Mr Holmes,
15 and I think to summarise you were saying that your
16 understanding in relation to Whistl was based on, he
17 summarised as general knowledge of costs in the sector
18 and you added the work that you've done in 2012 showing
19 the impact of Whistl's likely business plan then on
20 Royal Mail?

21 A. Yes, that's right.

22 Q. Just looking at paragraph 8.3 over the page, I couldn't
23 help noticing that here, as elsewhere, your reference to
24 why an efficient end-to-end entrant would be okay,
25 looking at the third line for example there, emphasises

- 1 that it's operating at scale, isn't it?
- 2 A. Yes, that's right.
- 3 Q. Focusing on Whistl, one thing that doesn't appear from
4 your statement anywhere is that you considered not just
5 whether Whistl would be profitable operating at scale
6 eventually, but a rather more important question for
7 competition, I would suggest, and that was whether
8 Royal Mail's price differential could actually inhibit
9 Whistl from achieving scale in the first place by making
10 it more difficult to attract customers, for example.
- 11 A. I think this goes back to some of the comments I made
12 this morning, which is the task Royal Mail had was to
13 think of commercial responses that incentivised
14 customers to use its network efficiently, and the
15 consequence of that may well have been that a customer
16 would use Royal Mail's network rather than Whistl's
17 network, and --
- 18 Q. My question, though, is whether you considered the
19 dimension that I've just put to you?
- 20 A. So hence, yes, we were looking at the price differential
21 from the perspective of: would it allow Whistl to roll
22 out? It may well have been something that made life
23 more difficult for Whistl to roll out; that was inherent
24 in the nature of a commercial response by Royal Mail
25 from the position it had been in when its access prices

1 were not set with an eye to responding to entry in the
2 delivery network.

3 Q. Now, in the 3 October note that Mr Holmes took you to,
4 you did point out that the price differential after all
5 would be a substantial precaution -- your words -- of
6 the upstream margin that access operators compete on,
7 didn't you?

8 A. I did.

9 Q. And therefore would make it potentially more difficult
10 to attract customers; yes? I'm just asking you whether
11 you agree with this proposition or not.

12 A. Well, it is a substantial proportion of the upstream
13 margin, the customers that Whistl would be attracting
14 would not be access only customers but end-to-end
15 customers, so Whistl wouldn't be relying solely on that
16 access margin for those customers they attracted to
17 their direct delivery business.

18 Q. But for the customers that they were seeking to attract
19 in, in competition against let's say UK Mail, I think
20 you would agree at least there that that could make
21 competition more difficult. It was after all what you
22 said in the 3 October note.

23 A. It could make it more difficult.

24 Q. And therefore make a roll-out perhaps more lengthy or
25 more costly or more risky, for that reason?

1 A. The roll-out that Whistl would have been planning would
2 have had as one of its parameters Royal Mail pricing,
3 and that would be an important parameter for Whistl for
4 its roll-out, I have no doubt about that, and I would --
5 at the time I would have assumed that Whistl was
6 considering the fact that Royal Mail had been exhorted
7 by Ofcom to consider commercial responses. So that
8 means it is possible those prices would change and it
9 would be prudent of Whistl to assume they would change
10 in a way that is going to make their life quite likely
11 more difficult.

12 Q. Yes. Without going into your opinions on it, is it
13 something beyond what we have seen in the 3 October note
14 that was specifically addressed in the advice that you
15 gave to Royal Mail, beyond that reference?

16 A. No.

17 Q. What about maintaining the confidence of an investor,
18 was that something that you ever considered with
19 Royal Mail?

20 A. We did consider that with Royal Mail, and that was on
21 the basis that the roll-out at scale looked
22 significantly profitable for Whistl, it had a very
23 strong cost advantage, and that our understanding -- the
24 team's understanding, my understanding is an investor
25 would have been looking at the medium to long-term

1 prospects of this business as it was a significant
2 entry.

3 Q. So let's just pause and see what you have said to us
4 all. You have just said that you did discuss
5 specifically with the client, Royal Mail, the investment
6 position of Whistl and the impact that its behaviour
7 might have on the confidence of an investor; have
8 I understood you correctly?

9 A. We discussed the question of whether an investor in
10 Whistl would -- how an investor in Whistl would be
11 thinking about its investment in Whistl and -- so that
12 is what we were talking to Royal Mail about, and we
13 were -- actually not at this point, not in the October 3
14 document, that would have been later in the process.

15 Q. We see nothing about that in any of the papers, and
16 there are quite a lot. Was that because it was
17 considered to be privileged?

18 A. No, it would have just been in discussion in meetings in
19 the run-up to the proposals to the board, which the
20 papers for that were being written by the internal
21 Royal Mail team.

22 Q. All right. I'll move to my penultimate topic, if I may.
23 It's a point of clarification more than anything else.
24 You said this morning, in discussion with Mr Holmes,
25 that under the NPP1 plan there was a certain amount of

1 roll-out that could be done without incurring any
2 surcharging; is that right? Is that your understanding?

3 A. That's my understanding.

4 Q. Well, that was of course the national spread benchmark.
5 I don't know how familiar you were with these plans, but
6 you know there was another aspect to NPP1 which has been
7 talked about called the urban density benchmark; had you
8 heard of that?

9 A. I'm sure I have heard of that, but the national spread
10 benchmark is probably the one I have more firmly in my
11 mind about NPP1.

12 Q. So were you unaware that under the urban density
13 benchmark there would be surcharges straightaway when
14 Whistl opened in an urban area such as Manchester?

15 A. I probably was not fully aware of that.

16 Q. Right, well, we'll pursue that separately.

17 Turn, then, to the last topic, which is how you
18 finished just before lunch, on the issue of efficiency
19 and pricing, and the questions that Professor Ulph
20 raised with you.

21 Now, you said, I think, that Whistl's costs in
22 London were below those of Royal Mail?

23 A. Could be below those of Royal Mail. I may have said
24 "were", I didn't know what Whistl's costs were in
25 London, so it could be.

- 1 Q. And that Royal Mail's costs were higher or could be
2 higher because they have a USO?
- 3 A. So Royal Mail's zonal prices for London under a fully
4 allocated cost benchmark were higher than the other
5 zones, so that's what I intended to say.
- 6 Q. What is it about the USO that would mean that Royal Mail
7 had higher costs in London?
- 8 A. The scale of its operations, the need to have staff
9 available six days a week and on standby for flexing,
10 depending on the actual out-turn volumes on any given
11 day.
- 12 Q. Are you aware of any other reasons that Royal Mail might
13 have particularly high costs in London?
- 14 A. Er ...
- 15 Q. Not to do with those factors, which I would suggest
16 apply nationally.
- 17 A. It has -- I think it had -- well, this is my
18 recollection, and I, you know, don't remember it
19 perfectly well, but I think it might be the buildings
20 rent, if I recall, and they -- I think their labour
21 costs were higher in London compared with other aspects
22 of the Royal Mail network.
- 23 Q. Leaving other factors to one side, the ones that you
24 have mentioned concerning the universal service network,
25 those sorts of considerations are ones that a rival

1 could compete on legitimately, lower labour costs, lower
2 building rents; you would agree with that?

3 A. It's the scale, it's a scale, it's the fact that they
4 might need more buildings because they need to have the
5 capacity and they need to have people available and on
6 standby, then if you add to that the cost of those, then
7 that's why you would expect to see London more expensive
8 than other parts of the network.

9 Q. Right. Finally let's turn back to a document that we
10 looked at yesterday. If you have that Whalley
11 cross-examination bundle still to hand, please, can you
12 go in it to something we looked at with Ms Whalley,
13 which is tab 10. There is a slide deck marked "Zonal
14 cost calculations" and it's dated 25 March 2014. Will
15 you have seen this before?

16 MR BEARD: I'm sorry, just before Mr Turner goes on, before
17 the short adjournment there were one or two figures that
18 were referred to that should be treated as confidential.
19 I don't know whether Mr Turner is going to refer to any
20 figures here but we would like to make sure that there's
21 a minimum of references to those sorts of figures and
22 we'll deal with that in the transcript subsequently.

23 THE CHAIRMAN: You want to maintain them as confidential?

24 MR BEARD: Yes.

25 THE CHAIRMAN: Even at this stage?

1 MR BEARD: Even at this stage in relation to particular
2 figures, yes.

3 THE CHAIRMAN: Five years on?

4 MR BEARD: Yes.

5 MR TURNER: Do you have the document?

6 A. I do.

7 Q. So we were looking at page 5 before.

8 A. Sorry -- oh, yes. Yes.

9 Q. You will see there was the average price wedged in the
10 middle, and the left something marked "floor", the right
11 something marked "ceiling".

12 A. Yes, that's right.

13 Q. Without mentioning any of those individual figures on
14 the left, those low figures, those relate to a cost
15 measure LRIC or a version of it, don't they?

16 A. Yes, that's right.

17 Q. What goes into that very low level of costs? Is it the
18 universal service network costs?

19 A. These are distributed LRICs. The "D" stands for
20 distributed. So I am not fully au fait with all the
21 intricacies of Royal Mail's LRIC pricing, but -- and
22 this distributed LRIC concept is a concept that Ofcom
23 actually has developed in its regulatory practice --

24 Q. You referred to it in your statement, of course, and you
25 footnoted the reference.

1 A. Yes. So the LRIC is for the specific services being
2 considered but the distributed LRIC then adds some
3 contribution for the common costs that are associated
4 with the -- that increment. Now, it's my understanding
5 that one of the inputs to that distributed LRIC are
6 the -- what are called I think the outdoor delivery
7 costs, that's what it's called, and those are allocated
8 and any overheads associated with those will then also
9 be allocated to these LRIC numbers. But where, if
10 I understand your question, obviously a lot of those
11 outdoor costs are also allocated to the delivery of
12 universal service products as well.

13 Q. On the right-hand side, the distributed stand alone cost
14 or DSAC, what does that contain?

15 A. I have to say that I always focused a lot more on the
16 LRICs than stand alone costs because we weren't going to
17 be at that level.

18 Q. Let's stay with the LRIC. One last question. Looking
19 at those costs there on the left, if Royal Mail was
20 pricing against those levels of cost, that's something
21 that it would be expected that a real life new entrant
22 would be able to match?

23 A. These would be the lower level floors such that a -- if
24 you wanted to encourage efficient entry, then entrants
25 that would be able to beat these would have to be more

1 efficient than a universal service operator.

2 Q. What was the answer to my question, please? Would you
3 expect a real life entrant to be able to match that
4 level?

5 A. I don't know whether a real life entrant would be able
6 to match that level, I didn't have that information.
7 What's relevant is the price, whether the costs of that
8 entrant would be below the price that Royal Mail would
9 implement based on those LRICs, but in principle what
10 I know is that if Royal Mail were to price at that level
11 any entrant would be more efficient than Royal Mail,
12 which would be a relevant entry.

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

14 Further questions from THE TRIBUNAL

15 THE CHAIRMAN: Thank you, Mr Turner.

16 Dr Jenkins, am I right in thinking that in your
17 advice to Royal Mail, 2012 through 2014, you were
18 looking at issues from a competition, competition law
19 perspective? The risks that you identify always seem to
20 be identified as competition law risks; is that fair?

21 A. I think we were looking from both a regulatory and
22 competition perspective in what we were doing. I agree
23 that at times the way it's framed is within -- says
24 competition law, but there are other times where we talk
25 about regulation and competition. We were aware of the

1 regulatory constraints on Royal Mail, particularly
2 around no undue discrimination, so that was always in
3 our minds when we were giving the advice.

4 THE CHAIRMAN: The challenge that you refer to from time to
5 time that you're trying to help Royal Mail guard against
6 or meet, that's a competition law challenge, am I right?

7 A. Or regulatory challenge.

8 THE CHAIRMAN: It's not what you said. You said competition
9 law. So we are to take regulatory and law as included
10 in competition law for these purposes, are we?

11 A. But in the discussions with Royal Mail, there were -- we
12 discussed the fact that meant that the regulator may
13 pursue them under regulatory rules, which is indeed what
14 happened with the zonal tilt. I think we were -- we
15 and -- Royal Mail had asked us to focus particularly on
16 the competition law challenges because of the
17 prohibition element of that, I think.

18 THE CHAIRMAN: Right. Another question: did you advise on
19 or were you asked to advise on any aspect of what has
20 been referred to as arbitrage in consideration of these
21 various price plans and possible price responses?

22 A. I think in our 3 October note we make reference to
23 arbitrage as one of the reasons why an entrant would
24 have flexibility, that's one of our suggestions as to
25 the answer to criticisms around that in our 3 October

1 note. When we actually did our modelling, we -- which
2 happened in 2014, we made the assumption of no arbitrage
3 to be conservative, but it was our understanding that
4 arbitrage was available.

5 THE CHAIRMAN: Did you examine in any detail the mechanics
6 of arbitrage?

7 A. No, certainly not at this time. We just were aware that
8 it was possible.

9 THE CHAIRMAN: So it's just a high level point?

10 A. Yes.

11 THE CHAIRMAN: Thank you.

12 PROFESSOR ULPH: Just following up on that point, you said
13 several times that you thought there was an advantage to
14 APP2 because it gave more flexibility?

15 A. Yes.

16 PROFESSOR ULPH: You could turn that the other way round and
17 say that there is a cost to NPP1 of a lack of
18 flexibility?

19 A. Yes.

20 PROFESSOR ULPH: When you are thinking about that idea, do
21 you have in mind price costs or non-price costs?

22 A. For the customer?

23 PROFESSOR ULPH: Yes.

24 A. Non-price costs, because it's a constraint on the
25 customers' flexibility.

1 PROFESSOR ULPH: That's very helpful. Well, then, just in
2 answer to your last question, if there was arbitrage,
3 does that remove all of those issues? If you arbitrage
4 any plan, APP2 or NPP1, does that give you the
5 flexibility?

6 A. It certainly gives flexibility, because you could have
7 your plan of what you are going to commit to on the
8 national footprint and then post the rest through the
9 zonal product -- through the zonal plan. I think there
10 is still a constraint potentially on a customer that
11 they have to provide the forecasts and stick to them.
12 So there is --

13 PROFESSOR ULPH: I didn't have in mind the forecasts, I just
14 had in mind the idea you had to meet the profile. So
15 you have to make some adjustments --

16 A. Yes.

17 PROFESSOR ULPH: -- to either some customers you take on who
18 might be outside the profile or make other real
19 changes --

20 A. Yes.

21 PROFESSOR ULPH: -- to your business in order to meet the
22 flexibility. Is that how you understand?

23 A. Yes, so that would be the constraints on the customer
24 who signed up to NPP1, they would have to find another
25 way of serving those customers if they stayed on NPP1.

1 PROFESSOR ULPH: Okay, thank you.

2 THE CHAIRMAN: Mr Beard, do you wish to re-examine?

3 MR BEARD: Yes, I only have one or two questions, actually

4 I think mainly clarifications.

5 THE CHAIRMAN: I don't want to restrict you, but is this

6 going to take more than five minutes?

7 MR BEARD: I'm guessing about five minutes, I only have four

8 questions.

9 THE CHAIRMAN: Yes. Otherwise we might pause and come back.

10 MR BEARD: I'm happy ...

11 THE CHAIRMAN: I think we will pause for five minutes and

12 return, if we may.

13 (3.00 pm)

14 (A short break)

15 (3.05 pm)

16 THE CHAIRMAN: Before we proceed further, Professor Ulph has

17 just one more question.

18 MR BEARD: Of course.

19 THE CHAIRMAN: I say just one more.

20 PROFESSOR ULPH: Dr Jenkins, can we just go back to this

21 issue of the zonal prices, and how exactly they were

22 being adjusted.

23 So part of your evidence is that what was happening

24 was that Royal Mail was trying to better understand its

25 long run incremental costs and that led to a rethinking

1 of what the zonal prices should be. We also had
2 a discussion this morning about the extent to which the
3 changes in the zonal prices were reflective of just
4 Royal Mail's costs or also took into account the costs
5 of Whistl.

6 As I understood your answer, you were saying that
7 there was a zone between incremental costs and the
8 standalone costs, and what was happening was that where
9 in that zone you were would depend on Whistl's costs and
10 you were putting the prices down towards the bottom end
11 of that zone to reflect the fact that Whistl actually
12 had lower costs in London.

13 I just want to understand, was there any sense in
14 which they were pulled below the distributed long run
15 incremental costs to reflect the fact that Whistl
16 actually had lower costs than Royal Mail for operating
17 in London?

18 A. No. So the principle of the advice on the zonal tilt
19 was that Royal Mail always needed to stay above its
20 distributed LRIC and somewhere in the zone between that
21 floor of distributed LRIC and the standalone costs, and
22 perhaps a better way that I could have put it this
23 morning is: you have got four zones and you have got
24 four LRIC, distributed LRIC measures for those zones,
25 and then you have the common costs that need to be

1 recovered off those four zones. So the question then
2 is: how much do you increase each of those LRICs to
3 recover all of those costs? And that whereas in the
4 past Royal Mail had used a fully allocated cost method
5 which sort of has a pre-set accounting based
6 determination of where those costs are recovered and
7 then an equal mark-up in every zone, Royal Mail's
8 understanding was that part of their increased
9 flexibility that Ofcom had allowed them, through the
10 regulatory reforms that had happened and the exhortation
11 to use commercial response, was for Royal Mail to think
12 about how it -- what it should recover from each of
13 these zones, and the conversation I had with Mr Turner
14 before was Mr Turner saying: and then there was some
15 consultative clarity on that question in 2014. But at
16 the time in 2012 there was no guidance from Ofcom.

17 What then Royal Mail did was it never, certainly
18 never went below the floor, but it considered the
19 competitive environment in each of those zones when it
20 was deciding how much cost to recover, and that
21 competitive environment was informed by the costs of
22 competitors, but Royal Mail didn't know those, and
23 what -- but what it knew was that Whistl was looking to
24 roll out in urban and London zones and therefore it
25 sought to recover fewer of the common costs from those

1 zones where it was anticipating it was going to face
2 significant competition.

3 PROFESSOR ULPH: So essentially they were changing the
4 proportions to which they recovered the common costs
5 across the zones?

6 A. That's right.

7 PROFESSOR ULPH: And you lowered those particularly in
8 London and where they were facing competition?

9 A. London and the urban zones and those are the two zones
10 that were lowered in the proposals that were launched in
11 January 2014, but it was -- the mark-up component was
12 lowered, not -- they certainly didn't go below the LRIC
13 floor.

14 PROFESSOR ULPH: It's still quite hard to understand how
15 that can account for the fact that London went from
16 a plus 10% mark-up to a minus 25%.

17 A. That was plus 10% from the average price, so you think
18 of the average and said it was plus 10% and then it was
19 minus 25%, but the actual mark-up was around -- was
20 double the LRIC. So I think -- that could be wrong,
21 I don't actually remember the fully allocated cost in my
22 head, but there was a significant amount of common cost
23 to be recovered. Yes. And I'm probably not supposed to
24 say the numbers anyway.

25 But if you think that the plus 10 and the minus 25%

1 were against the average, not against the previous
2 price. So whereas London had previously --

3 PROFESSOR ULPH: I understand it's not against the previous.
4 I think there are two different calculations. It just
5 seemed like there was an order of magnitude shift,
6 that's all, slightly hard to understand, just because
7 you are changing the basis of which you are doing the
8 costs here. You must be stripping out a lot of the
9 common costs, I think?

10 A. The common costs were being moved on to rural and
11 suburban, those prices were going up, so that overall
12 Royal Mail was still recovering its costs but the places
13 it was recovering them from were changing. I don't know
14 if I can say any of the numbers to give you an idea of
15 the sort of shift, but my recollection is it was in the
16 order of a 4p change, but I could be wrong on that.

17 PROFESSOR ULPH: Okay, so one final thing. Is this getting
18 back a little more towards the targeted price changes,
19 so are you saying "We're targeting this at the zone
20 where we anticipate entry"?

21 A. Where we face competition, yes.

22 PROFESSOR ULPH: Where you face competition.

23 A. And that was why when we were giving advice on this in
24 2012 we were identifying those zonal tilts as also being
25 risky to Royal Mail and that they needed to think

1 carefully and ensure that they were leaving scope for
2 efficient entry, which as long as they were above their
3 LRIC floors they should be, and we gave similar sorts of
4 risk advice with respect to the price differential, and
5 in the end it's only the price differential that Ofcom
6 has moved against.

7 PROFESSOR ULPH: I think that's been helpful, thank you.

8 THE CHAIRMAN: Mr Beard.

9 Re-examination by MR BEARD

10 MR BEARD: Dr Jenkins, I think I have four questions that
11 are just broadly clarifications of things from the
12 transcript, and then I have one other.

13 The first refers back to some questions just for
14 notes which are on page 33 of the draft transcript --
15 sorry, 32 and 33 -- where you were asked about access
16 pricing regulation, and there was an exchange between
17 you and Mr Holmes about access pricing regulation, and
18 you said -- we have a partial question:

19 "... in relation to access at the relevant time
20 based on your knowledge of the industry?"

21 This is in the context of asking about access
22 regulation. And you answered:

23 "Not at the time of this, they had removed the
24 access regulation, but I think as you had --"

25 Then there is some overspeaking, and I just want to

1 clarify, the time we're talking about is 2012/2013. Was
2 there any form of access pricing regulation in place in
3 the market at that time? If you don't remember, it
4 doesn't matter. I'm just trying to clarify what was
5 said and how the answers work here.

6 A. My recollection is that Royal Mail was obliged to
7 provide access to a subset of products, I think it was
8 still at that time a subset of its bulk mail products,
9 and there were restrictions on its pricing in terms of
10 it being fair and reasonable and -- but they were fairly
11 loose regulations, and there was no price control, as
12 I recall.

13 Q. You referred later in your evidence to margin squeeze
14 constraints. Do you remember when those were put in
15 place?

16 A. Margin squeeze controls were put in place I think from
17 2004 or 2005. I may be wrong about that, but they were
18 in place for some time, probably -- yes, because that's
19 when access started in 2004, and maybe those were still
20 in force in 2012, so that was ensuring that Royal Mail
21 kept an appropriate margin between whatever access price
22 they were charging and the retail product that was being
23 delivered.

24 Q. Thank you.

25 Just on page 37 you were asked, in the context of

1 some of Mr Holmes' questions about the 3 October 2013
2 note, he asked:

3 "... to your knowledge was the Oxera team by this
4 time conscious of the need to steer a course between
5 giving independent advice and avoiding statements about
6 Royal Mail's objectives, commercial objectives, because
7 of the subsequent disclosability of the note?

8 "Answer: It's a difficult question to answer.
9 I just don't think that's --"

10 And Mr Holmes said:

11 "You don't understand it?"

12 "Answer: No, no, it's almost like that it put an A
13 or B, and I don't think it's a good reflection of how we
14 think about the advice we give."

15 I just wanted to ask, in relation to that, given the
16 question that was posed, how do you think about the
17 advice you give in that context?

18 A. The advice we give is independent advice to the best of
19 our ability, given the information we have at that time,
20 and we work with our clients to give them that -- give
21 that advice to the right people at the client so that
22 they can make good decisions.

23 Q. Page 68 of the transcript -- again, note it's not for
24 you, Dr Jenkins -- Mr Holmes put various questions to
25 you about a roll-out to six and then 13 SSCs. I think

1 he was putting them hypothetically. Were those numbers
2 specific numbers that you used in any of your
3 assessments?

4 A. At any time in the advice we gave?

5 Q. I think the questions were specifically focused on
6 around October 2013.

7 A. We were aware of the six SSCs that were being discussed
8 as the flexibility within NPP1, but 13 SSCs was not
9 a number we would have been using at the time.

10 Q. At one point, I think it's on page 111, we think that
11 you referred to the fact that you expected that
12 Royal Mail were going to meet customers after the CCN
13 announcements. Why did you understand that to be the
14 case?

15 A. Well, as I said, Royal Mail was on a journey of
16 transition in the industry, and they -- throughout that
17 time we were advising them they were thinking quite hard
18 about their customer engagement and there was obviously
19 also the suspensory provision in the notices. So my --
20 it was my understanding that they would be discussing
21 the changes they were proposing with their customers to
22 understand the likelihood of complaint and suspension
23 and whether they would be able to implement them.

24 Q. Just one final question: Mr Holmes' questioning of Oxera
25 material essentially ended on the 3 October 2013. You

1 have referred to meetings you had in January 2014 and
2 December 2013. Are you able to summarise for the
3 tribunal what occurred at those meetings and what you
4 advised on?

5 A. So there were a few meetings that went on at that time.
6 They were around refining the characteristics of the
7 notices in early January -- in a sense that was the
8 culmination of all that advice -- in early January,
9 before the disclosure committee where I was asked to
10 attend to give advice to the senior executive team at
11 Royal Mail summarising Oxera's advice over those months
12 in advance of them putting forward the CCNs.

13 Q. In your witness statement you refer to -- if you have it
14 at internal page 22 -- you refer at 7.16 to "Oxera's
15 advice to Royal Mail in relation to the development of
16 the price proposals, and our overall conclusions ..."
17 being summarised in a paper that came out later,
18 February 2014.

19 Is that summary of the advice that you are referring
20 to in January, that you were giving in January?

21 A. Yes, that's right.

22 MR BEARD: I don't have any further questions for
23 Dr Jenkins.

24 A. I have one further thing in answer to the Chairman's
25 question, that actually the proposal that we prepared on

1 August 22 does say to assist Royal Mail from
2 a regulatory and competition policy perspective. So
3 that was our understanding. I think it's right that
4 a lot of our advice focused on the competition -- the
5 tests under competition from an economics perspective.

6 Further questions from THE TRIBUNAL

7 THE CHAIRMAN: Thank you, Dr Jenkins.

8 One last question: in the light of what has happened
9 since 2014, you were closely involved in the formulation
10 and development of the proposals that led to the matters
11 which have been the subject of Ofcom's decision. Is
12 there anything with the benefit of hindsight that you
13 would have said or done differently?

14 A. That's a good question.

15 THE CHAIRMAN: I'm aware that it's a good question! I'm
16 being modest.

17 A. With the benefit of hindsight, I think I would have been
18 stronger in my advice around exploring why the price
19 differential -- that the price differential should be
20 about any profile commitment of SSCs, either exploring
21 that in more detail with Royal Mail to really understand
22 why their view was it wouldn't be attractive to its
23 customers, or emphasising more strongly that that might
24 be something they should consider.

25 THE CHAIRMAN: So the cost justification, basically?

1 A. Not the cost justification. I think the cost
2 justification --

3 THE CHAIRMAN: The value justification?

4 A. No, it was which contracts they offered that price --
5 how they structured the price differential to reflect
6 the cost justification.

7 THE CHAIRMAN: Right. Thank you. I think you are
8 discharged, you may step down.

9 THE WITNESS: Thank you.

10 THE CHAIRMAN: Thank you.

11 (The witness withdrew)

12 THE CHAIRMAN: So what do we do, 3.30?

13 MR BEARD: We are going to, with the tribunal's permission,
14 pause and begin Mr Polglass tomorrow morning. Is that
15 acceptable?

16 THE CHAIRMAN: Come again to fight another day. Right,
17 thank you. We'll see you tomorrow at 10.30.

18 (3.30 pm)

19 (The hearing adjourned until 10.30 am
20 on Thursday, 20 June 2019)

21

22

23

24

25

INDEX

PAGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DR HELEN JENKINS (affirmed)2

Examination-in-chief by MR BEARD7

Cross-examination by MR HOLMES9

Questions from THE TRIBUNAL95

Cross-examination by MR TURNER102

Further questions from THE TRIBUNAL134

Re-examination by MR BEARD143

Further questions from THE TRIBUNAL148