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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th April 2006

Before:
SIR CHRISTOPHER BELLAMY
(The President)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Supported by

AQUAVITAE (UK) LIMITED

Appellants

-v-

WATER SERVICES REGULATION AUTHORITY
(Formerly The Director General of Water Services)

Respondent

Supported by

DWR CYMRU CYFYNGEDIC
and
UNITED UTILITIES WATER PLC

Intervenors

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Rhodri Thompson QC and Dr. Jeremy Bryan, Managing Director of Albion Water Limited appeared on behalf of the Appellant.

Mr. Michael O'Reilly (instructed by McKinnells, Leicester) appeared on behalf of Aquavitae (UK) Limited.

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

Mr. Christopher Vajda QC and Mr. Meredith Pickford (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dŵr Cymru Cyfyngedig.

Mr. Fergus Randolph (instructed by the Group Legal Manager, United Utilities) appeared on behalf of United Utilities.

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. It seems to us that our principal task this
2 afternoon is to determine how the hearing is going to be organised, and how that hearing is
3 going to proceed. I think what we would be most grateful for initially is the views of each of
4 the parties as to how this hearing is going to be conducted and in particular what role is likely
5 to be played by the experts and by the various witness statements which we have so far had.

6 Mr. Thompson, perhaps I could invite you to start and sketch out your vision of the
7 way things should now proceed.

8 MR. THOMPSON: Yes, I am grateful, Sir. I think in outline Mr. Anderson and I both think that we
9 will need about a day to make our respective cases, and I have a document from Mr. Vajda
10 where he suggests that he will need a bit less – a bit more than half a day – for his submissions,
11 and he has allotted rather modest amounts to Aquavitae and United. But the question really is
12 how far that should be submissions and how far it should be evidence and insofar as it is
13 evidence how it should be handled?

14 THE PRESIDENT: Absolutely. I think the submissions can probably take care of themselves to a
15 certain amount – we have had a lot in writing and we have had a lot already in this case. The
16 question is how we handle the evidence on the issues that are still open from the interim
17 Judgment.

18 MR. THOMPSON: Yes, indeed. The only witnesses that are actually my witnesses are Dr. Bryan
19 and Mr. Jeffrey, who have put in statements. Dr. Marshall put in a statement which is on our
20 side, as it were, but which I saw for the first time the same time as Respondent and Dŵr
21 Cymru, so in principle I could ask questions of Dr. Marshall. In reality, it seems to me the
22 only people I am likely to want to ask questions of are Mr. Jones and Professor Armstrong, and
23 it may well be that the points, particularly in relation to Professor Armstrong, will emerge in
24 some form of – I hesitate to use the expression but it has been used before – “hot tubbing” type
25 of debate, in which the Tribunal may wish to take the lead on questions which are still of
26 concern to the Tribunal prefers to hold its hand then obviously if I am to take the lead then I
27 would perhaps want something like an hour to ask some questions of Professor Armstrong and
28 perhaps the same of Mr. Jones – I think something of that order. However, given the slightly
29 unusual nature of this hearing and given that this is very much seeking additional information
30 that the Tribunal has identified as necessary for the purposes of reaching a final judgment in
31 this matter, in my submission it may be appropriate for the Tribunal to take the lead in terms of
32 the types of issue that will be of most assistance in relation to this hearing. I would be quite
33 content to operate on that basis and then to ask any further questions that may emerge out of

1 the approach that the Tribunal itself wishes to adopt. I do not know whether or not that is
2 helpful.

3 THE PRESIDENT: Well, let us take it in stages. I think there is probably a difference between how
4 we look at the expert evidence of Professor Armstrong and Dr. Marshall and how we look at
5 the evidence relating to other matters.

6 MR. THOMPSON: Yes.

7 THE PRESIDENT: In relation I think to the expert evidence it would certainly be of some help to us
8 – and I am not quite sure how this is going to be achieved – to have some indication as to how
9 far the experts (both of them) when they have both absorbed each other's report; in the case of
10 Dr. Marshall she has already seen Professor Armstrong's report, but he has not necessarily
11 seen hers, how much common ground there is and how much disagreement there is. That is
12 the first thing to see whether we need to establish whether these are two intersecting circles
13 that do not quite intersect, or whether they are substantially in agreement, but it depends on
14 what hypothesis you start from. That is one aspect, how to narrow the issues that are
15 outstanding on the expert evidence between now and the hearing; and the second aspect is how
16 we are actually going to conduct the case? From that point of view at this stage insofar as
17 there is a difference between Professor Armstrong and Dr. Marshall, I think we would prefer if
18 possible, as a Tribunal, to see those differences highlighted by way of cross-examination as
19 between the parties rather than necessarily take the lead ourselves because I think at this stage
20 it is quite important that everybody has the opportunity to draw out of the experts what it is
21 they particularly want to challenge or to invite us to bear in mind or whatever, which is not
22 quite the "hot tubbing" I agree. It does not necessarily mean it is a full-scale old style cross-
23 examination, but I think at this stage we would rather be the observers of this particular clash if
24 there is to be one – of course we shall have questions of our own, but I think we would rather
25 the parties took the lead. For example, we are somewhat in the dark at the moment as to how
26 far the Authority challenges Dr. Marshall – no doubt that will become clear as time goes on –
27 or how far the Appellant and the Intervener wish to actually challenged what Professor
28 Armstrong is saying as distinct from commenting on it.

29 MR. THOMPSON: Yes, obviously the Director, as I am tempted to continue to call him, or the
30 Authority ----

31 THE PRESIDENT: Well we have not yet found an acronym for the new Authority that seems
32 appropriate.

33 MR. ANDERSON: It has been troubling us as well.

1 THE PRESIDENT: So I think we ought to continue to call it "The Authority" if we remember, or it
2 may be convenient to refer to the Director, because the Director is referred to throughout in the
3 Judgment and in the documents.

4 MR. THOMPSON: For my part, having had rather a limited amount of time to absorb Dr.
5 Marshall's report my impression is that from our perspective she goes somewhat beyond either
6 the NERA reports on which the Director relied in the Decision, or the quite theoretical analysis
7 of Professor Armstrong and that I suspect our area of interest in relation to Professor
8 Armstrong is how far he really challenges Dr. Marshall's analysis of the reality of the situation
9 as against the somewhat theoretical benefits of ECPR which are described in those reports. I
10 do not think it will be all that difficult to anticipate the sort of approach that we may adopt,
11 both as to the underlying problems in ECPR as we see it and their manifestation in this
12 particular case – again as we see it. I think it is those two aspects that we are likely to wish to
13 explore. Whether that will take very long depends rather on how far Professor Armstrong is
14 really ginned up on the specific facts of this case rather than the somewhat theoretical
15 approach that has been adopted to date.

16 THE PRESIDENT: Yes. That might to some extent be able to be sorted out before the hearing, I
17 just do not know.

18 MR. THOMPSON: If he does not really know anything to dispute what Dr. Marshall says then we
19 will invite the Tribunal to draw certain inferences.

20 THE PRESIDENT: What about the other issues, the question of potable and non-potable costs first
21 of all, which is primarily in your bailiwick, I think? How are we going to sort that out? What
22 approach should we adopt to that?

23 MR. THOMPSON: Well we have obviously got our skeleton argument to draft and we will make
24 our position clear in that. Dr. Bryan has performed a Herculean labour in trying to draw
25 together all the material for the benefit of the Tribunal and to some extent that will be our final
26 word on the subject although we will no doubt put an advocate's gloss on it. In terms of ----

27 THE PRESIDENT: Just on the facts at the moment, insofar as there is a dispute between Mr. Jones
28 and Dr. Bryan, how are we going to go about sorting that out in terms of the various factors
29 that might be relevant to non-potable, as distinct from potable costs of distribution.

30 MR. THOMPSON: What I had envisaged was that there were some fairly substantial points in Mr.
31 Jones's statements which are in themselves quite simple but financially significant. It is
32 probably those issues that I would want to discuss with him as to whether or not he actually
33 stood by his evidence which we obviously strongly dispute.

1 THE PRESIDENT: So from your point of view, as far as we can tell at the moment, there maybe
2 some cross-examination of Professor Armstrong depending on further reflection on how far
3 there really is disagreement between the two experts. I suppose the question then arises as to
4 whether that is something that can be split between you and Aquavita as a way of distribution
5 of tasks, as it were, since Dr. Marshall notably is Aquavita's witness technically rather than
6 yours; and secondly, some questions for Dr. Jones on what you see as the principal issues on
7 the potable/non-potable and presumably on the stand alone costs' points.

8 MR. THOMPSON: Yes, indeed. I think what is difficult is that in conventional litigation that type
9 of cross-examination could go on for weeks.

10 THE PRESIDENT: Yes, well we want to avoid that if we can.

11 MR. THOMPSON: Indeed, so it is really a matter of whether a combination of direction from the
12 Tribunal and further thought in advance can focus these debates to half a day rather than half a
13 year.

14 THE PRESIDENT: Well we are not going to spend half a year.

15 MR. THOMPSON: Well I am delighted to hear it.

16 THE PRESIDENT: But it may be that half a day is a bit optimistic, Mr. Thompson. We are just
17 trying to get a feel for it at the moment.

18 MR. THOMPSON: Is that enough from me on that issue.

19 THE PRESIDENT: For the time being I think, yes, thank you. I think it is probably easier if we go
20 to you next, I think, Mr. O'Reilly, to see how you see it, Dr. Marshall being your expert,
21 primarily.

22 MR. O'REILLY: Yes, in terms of the expert evidence, clearly Albion and ourselves have a fair
23 community of interest and if Mr. Thompson wishes to take the lead in cross-examining
24 Professor Armstrong and asking any supplemental questions of Dr. Marshall then I think we
25 would prefer to sit down and listen to that and ask only one or two additional questions that
26 may seem to us to be relevant in order to put it into what we might call a rather future context,
27 because our interest in this case lies as much with what happens in the future as with anything
28 that happened at Shotton. So to that extent, we are happy to tender Dr. Marshall as a witness
29 and for cross-examination of her to take place in the normal way, for Mr. Thompson to make
30 the main re-examination and for ourselves to come in in case there is anything that we think
31 ought to be addressed in addition.

32 In relation to Professor Armstrong, again Mr. Thompson could carry out the primary
33 cross-examination and we will ask only supplementary questions rather than going through the
34 whole rigmarole again.

1 THE PRESIDENT: Right, and you are not really concerned with the specifics of the facts of this
2 particular case in relation to non-potable and costs?

3 MR. O'REILLY: No, that is right, there were three topics that you asked that further information be
4 provided on, and only one of them, the ECPR point we are directly interested in.

5 THE PRESIDENT: Yes, I see, thank you. Yes, Mr. Anderson, how do you see it?

6 MR. ANDERSON: Well, as you anticipated, we have not had a chance to put Dr. Marshall's expert
7 report to Professor Armstrong, and until we have done that we are not really in a position to
8 take a view on the extent to which they disagree. My own impression from having read Dr.
9 Marshall's report is that a great deal of it can in fact be dealt with by way of comment, and that
10 the extent to which there were actual differences of academic or expert opinion between them
11 they may be relatively limited. Having said that, clearly once we have considered the report
12 ourselves and taken Professor Armstrong's views, what I would envisage would be a short
13 report in reply by Professor Armstrong (since Dr. Marshall's report is at least in part a response
14 to his report) that will then indicate the main areas of difference and then an element of cross-
15 examination in addition to comment may well be necessary, but I would not envisage that
16 being a particularly lengthy exercise. We believe it probably would be helpful for the two
17 experts to be present before the Tribunal, be cross-examined to the extent necessary and then
18 be available for the Tribunal to put any questions the Tribunal may have, but I would not
19 envisage that particular exercise taking very long since I believe a great deal can be dealt with
20 by way of comment in written submissions in advance. That is how we would envisage the
21 expert evidence being addressed. I suspect we would obviously be taking the lead in cross-
22 examining Dr. Marshall.

23 THE PRESIDENT: Yes, it is difficult to get a feel for this.

24 MR. ANDERSON: Well, you will have seen, for example, a great deal of Dr. Marshall's report is
25 addressing the position in New Zealand and America and her experience in the gas industry.
26 Everything she says may well be absolutely true, it may not be necessary to go through those
27 matters with her in any detail or at all in cross-examination. But there are certain points where
28 she does take, it would appear, a different view to Professor Armstrong and those may well be
29 matters on which we would wish to ask questions in addition to making comments. But we
30 only got this report last Friday morning and we simply have not had a chance to absorb all 88
31 pages and give the Tribunal any fuller an indication at this stage than that. I do not at the
32 moment see a round table discussion between the experts as being particularly useful, but I
33 think the areas of dispute are pretty discrete and pretty clear in fact and it may just be that all

1 the Tribunal needs is some exposition from each expert as to why they are holding the view
2 that they hold on those areas where there is a difference.

3 THE PRESIDENT: Subject to my colleagues' view, I am getting a feel that we might well need at
4 least a morning for the experts, but perhaps longer if there is significant disagreement.

5 MR. ANDERSON: I suspect a morning would be about right, yes.

6 THE PRESIDENT: We had better build in a bit of leeway or 'headroom' as it might be called.

7 MR. ANDERSON: Yes, of course that is sensible, Sir.

8 THE PRESIDENT: What about the other two issues?

9 MR. ANDERSON: Well therein lies some difficulty in this sense, there was a great deal of material
10 in Dr. Bryan's statement and all the appendices (which, in fact, I believe are not just
11 appendices they are also his testimony) there is a great deal of it with which we do not agree,
12 and which we dispute. Now, if traditionally one is to be taken to accepting all evidence that is
13 not challenged in cross-examination it would take a great deal of time to go through the whole
14 of that evidence putting every point to Dr. Bryan to demonstrate that we do not accept it. We
15 would hope that we could, in fact, deal with the bulk of that exercise by way of written
16 submissions in response to what Dr. Bryan has put in, going through his calculations, his
17 assumptions and pointing out where we disagree, and therefore not to find ourselves in the
18 position of having to put everything to him in cross-examination – otherwise being taken to
19 have accepted it. Having said that we would probably still wish to put some questions to him,
20 and it is really quite difficult to identify how much time will be required for that. I have no
21 doubt that Welsh Water will also want to put questions, because a great deal of what he is
22 saying is specific to them and their figures, and Mr. Jones's evidence, and also Mr. Jeffrey,
23 comments on the evidence of Mr. Hope (an Ofwat witness) concerning the development of
24 Ofwat's thinking on ECPR.

25 THE PRESIDENT: Mr. Hope is your witness, is he not?

26 MR. ANDERSON: Yes.

27 THE PRESIDENT: So you may want to ask Mr. Jeffrey some questions?

28 MR. ANDERSON: May do, it is relatively late that we got them, but I would hope that a great deal
29 of what is in issue could actually be set out in writing in advance of the hearing and that may
30 limit the scope of extensive cross-examination though, as I said, we would not want to find
31 ourselves in the position of having been held to have accepted some evidence because we did
32 not formally challenge it in cross-examination. If we were required to do that then I can see
33 the cross-examination lasting several days possibly from all the witnesses.

1 THE PRESIDENT: We are certainly open to the proposition that so long as a party makes his
2 position clear that such and such a point or paragraph is not accepted it is not necessarily
3 fruitful to go through the exercise of putting it ----

4 MR. ANDERSON: You will recall, Sir, that in the first hearing there were a number of
5 methodologies put forward by Albion, which were dealt with in appendices to our pleadings
6 and specific figures that were not accepted, and the reasons why they were not and so on were
7 debated in those appendices, and in the pleadings in that way. A lot of Dr. Bryan's evidence is
8 similar in kind to that sort of dispute that was before you last time, it was in more detail and it
9 can no doubt be dealt with by us and by Welsh where appropriate in detail, in writing, in
10 advance of the hearing but I doubt it would be possible to deal with everything without having
11 any questions to put to the witnesses in cross-examination.

12 THE PRESIDENT: Yes, in this sort of case we are not dealing with issues of primary fact as to who
13 was where on the night in question and whether the blood-stained dagger was left inside or
14 outside the front door. We are dealing with arguments of a quite different sort of nature. So it
15 may be that extensive cross-examination is not the right tool for trying to form a view on those
16 sorts of issues anyway.

17 MR. ANDERSON: I think, with respect, Sir, that is right. I do not think cross-examination is the
18 most effective tool for assisting the Tribunal to resolve the issues which the Tribunal has to
19 resolve which are not, as you rightly say, involved in identifying primary issues of fact, and
20 factual dispute between the parties on, for example, what is the appropriate length of piping or
21 whatever. That may well be right.

22 THE PRESIDENT: No, we could spend weeks ----

23 MR. ANDERSON: I suspect we cannot avoid cross-examination altogether.

24 THE PRESIDENT: Well that suggests again that we are going to need at least a morning. I suspect
25 on this issue probably a bit longer to deal with Dr. Jones from Mr. Thompson's point of view,
26 and Dr. Bryan and Mr. Jeffrey from your point of view, let alone Dŵr Cymru's point of view.

27 MR. ANDERSON: Yes. Again it may well be that closer to the hearing when the written
28 submissions are in and the nature of the actual dispute is clearer one might be able to give a
29 more definite position on quite what extent of cross-examination is required, but at this stage I
30 would have thought that it was sensible to set aside at least half a day for cross-examining the
31 factual witnesses.

32 THE PRESIDENT: (After a pause) Mr. Lewis is suggesting a day and I think that is probably
33 correct.

34 MR. ANDERSON: A day?

1 THE PRESIDENT: Yes. At least for working purposes at the moment so far we have half a day to a
2 day for the experts, and half a day to a day for other issues as far as evidence is concerned, or
3 matters that are primarily matters of evidence, although within the evidence on all issues there
4 is quite a lot of submission of various kinds that are mixed up in it.

5 MR. ANDERSON: That is certainly true, but that could certainly be dealt with for the most part in
6 writing and without going through that sort of issue in cross-examination. In my view in two
7 days the Tribunal would safely get through the evidence, subject of course to what the other
8 parties have to say. We certainly would not need anything like that to cross-examine.

9 THE PRESIDENT: Right, thank you. Yes, Mr. Vajda?

10 MR. VAJDA: Sir, I myself come new to this and you will have seen the skeleton that we have put in
11 and the discussion that has been going on in the last few minutes we have found very
12 illuminating because it illustrates, in my respectful submission, the problems with the rights of
13 defence in this case. As Mr. Thompson said, in normal litigation one would have a full cross-
14 examination where there are serious disputes of fact. If I can just take up two points that
15 concern my clients in particular. On the question of the cost of distribution of non-potable and
16 potable water, you will recall, Sir, that the Authority, or the Director (however one calls it)
17 took as the basis of its decision an assumption where the two costs were the same. Plainly, it is
18 within the scope of the remit of this Tribunal to determine whether or not that assumption is
19 correct.

20 THE PRESIDENT: Yes.

21 MR. VAJDA: In my respectful submission it would be plainly wholly inappropriate for this
22 Tribunal, assuming it came to the conclusion that assumption was incorrect, then itself to seek
23 to determine what the actual cost of non-potable distribution was. This is something that has
24 never been done by the Director. As the Tribunal can see there is a very serious dispute
25 between the witness evidence of Dr. Bryan on this matter and our own evidence of Christopher
26 Jones. In our respectful submission, and this is reflected in the draft order that we forwarded
27 this morning, we think it is important to disentangle two points. The first is plainly in the
28 context of the appeal the Tribunal must decide whether the assumption the Director made was
29 correct or not. In that sense plainly the Tribunal can, as it were, look at the evidence that it has
30 requested but in my submission it would be wholly inappropriate for the Tribunal to go on to
31 stage two and the very fact that we have been talking about abbreviated cross-examination
32 would be astonishing in my respectful submission for this Tribunal to reach a conclusion on
33 what the non-potable distribution price was on a sort of ----

34 THE PRESIDENT: You have just jumped from “price” to “cost”, which is a quite different thing.

1 MR. VAJDA: Sorry, well I am looking at the cost, what the cost would be on the basis of half a
2 day's cross-examination, something like that. That, we would say, would be inappropriate.

3 THE PRESIDENT: But how do we decide whether the costs are the same without making some stab
4 at what the costs are?

5 MR. VAJDA: The test is whether or not, on the material that the Tribunal has before it, the
6 assumption that the Director made was correct or not.

7 THE PRESIDENT: To do that we have to have some factual evidence about what the differences
8 are.

9 MR. VAJDA: Yes.

10 THE PRESIDENT: What the order of magnitude of the differences is and whether it makes any
11 difference and so forth and so on.

12 MR. VAJDA: Yes. But the fact that a lower body has committed an error and that there is material
13 before the higher Tribunal which indicates an error has been committed, does not mean that the
14 higher Tribunal should then go on to decide what the actual cost should be, and that is my
15 submission. As I say, there are, in my respectful submission, two separate issues here and
16 certainly we say it would not be right, it would be inconsistent with the two tier system that has
17 been set up by Parliament, inconsistent with the rights of defence for the Tribunal to reach a
18 decision which is on highly contested evidence, without form of disclosure or discovery that
19 one has in normal litigation in this case.

20 THE PRESIDENT: What further discovery could there possibly be at this stage, Mr. Vajda? This
21 case has been going on interminably with a huge amount of discovery.

22 MR. VAJDA: It has, but one has to bear in mind that the function of this Tribunal is an appellate
23 function. It has the power to reach a decision that the Director may make but only in the
24 context of its appellate function.

25 THE PRESIDENT: Just a minute, we have to distinguish between two questions. The first question
26 is whether the Tribunal should set aside the Decision.

27 MR. VAJDA: Yes.

28 THE PRESIDENT: At this stage that is the only question that we are concerned with. We have not
29 got to the second stage as to whether we should substitute ourselves for the Director and take a
30 decision, and we could only get to that stage if we were to set aside the Decision and we
31 cannot at the moment say whether or not we are going to set aside the Decision – we have no
32 idea.

33 MR. VAJDA: I appreciate that.

1 THE PRESIDENT: But in order to decide whether or not to set aside the Decision, we have to go
2 into some of these factual issues.

3 MR. VAJDA: Yes, I fully accept that.

4 THE PRESIDENT: And that is what we have to do.

5 MR. VAJDA: The concern of my client is simply that they do not want to find that at the end of the
6 substantive hearing the Tribunal produces an infringement Decision which sets out various
7 findings of fact which have not ----

8 THE PRESIDENT: That, at the moment, is a hypothetical scenario which we would not go down of
9 taking any infringement decision without following whatever procedure turns out to be
10 appropriate in the light of the evidence that we have got. We may not ever be in a position to
11 take an infringement decision but we cannot, at them moment, preclude ourselves from going
12 into the facts in order to decide whether the present decision is sustainable or not.

13 MR. VAJDA: We are entirely at one with the timing on this, but this is why in a sense the scope of
14 the hearing next month is so important because we quite see in relation to the question of the
15 cost of distribution of the two that is something the Tribunal needs to go into for the purpose of
16 determining whether or not the decision as reasoned can stand. There is very detailed
17 evidence now by Albion which contradicts in major respects equally detailed evidence by Dŵr
18 Cymru on what the costs actually are. That is a completely different issue in terms of if the
19 Tribunal was minded to say "We are going to find that the costs of distribution of non-potable
20 water is X", then that is something, with respect, that is going to require a considerable amount
21 of care to be gone into, apart from the fact, as I say, that this is a matter which on the two tier
22 system ought to be dealt with by the Director.

23 THE PRESIDENT: But we do not know yet how far we need to go. It may be that we may have to
24 go into the facts in order to say it is perfectly plain on the evidence that the Director's figure in
25 the Decision is completely justified.

26 MR. VAJDA: If I can put it another way, we are here in the Competition Appeal Tribunal, we are
27 not obviously in the Competition Commission and so what we (my clients) need to know is the
28 format and scope of the hearing in May. If, as I apprehend the President is saying, the format
29 is going to be simply limited to the question of whether or not the Director's decision should
30 stand that already will be of great comfort to my clients.

31 THE PRESIDENT: I am sorry to interrupt you, and forgive me for making it clear, in the context of
32 deciding whether or not the Director's Decision should stand, we take the view – at least at the
33 moment – that we need to go into these factual issues. So if there are points in Dr. Bryan or
34 Mr. Jeffrey's evidence that you need to challenge then you need to challenge them now in this

1 hearing. How that is done is another matter. As I was discussing with Mr. Anderson a
2 moment ago it does not necessarily mean to say that you have to say “I have to put it to you” in
3 relation to all 83 paragraphs, but if there are significant points that you wish to make to
4 undermine the evidence that is put forward by the Appellant, or to support your own case, this
5 is the time when you need to do that.

6 MR. VAJDA: Well that is, in a sense, why it is useful to have this debate now, because if one is
7 going to go into that one needs to know what target it is the Tribunal is aiming at at the end of
8 the day. If it is simply on the question of is the assumption right? then one could go into the
9 facts in a different way from the question: is the Tribunal, like the Competition Commission,
10 actually going to make a finding of fact as to what the cost of non-potable distribution is?

11 Can I give the Tribunal the other example that has already been canvassed, the
12 question for stand-alone costs? There is an important issue that plainly the Tribunal needs to
13 go into in the context of considering whether or not the Decision is correct, which are stand-
14 alone costs relevant or not? The Tribunal may reach a decision that is at variance with the
15 Director on that. There is then a completely different question, namely, as I understand the
16 thinking in the interim Judgment what the Tribunal was saying was that stand-alone costs
17 might be relevant by way of cross check, but then the question is: who is going to determine
18 what those stand alone costs are, because again this is an area where there is massive dispute
19 between Albion and Dŵr Cymru in the witness evidence. As the Tribunal is aware the
20 Director did not deal with this matter at all, because the Director took the view (which may be
21 right or may be wrong) that the stand-alone costs were completely irrelevant so there has been
22 absolutely no finding on that. Indeed, as you, Sir, said a moment ago we are not, in a sense,
23 dealing with issues of facts in the sense of who was fingered with the dagger, there are
24 questions of margins appreciation, assessment of facts, things of that sort. We would say in
25 relation to the stand-alone costs, which have never been looked at by the specialist Regulator
26 in this case, we say it would be completely inappropriate, with respect, for the Tribunal to
27 determine what those stand-alone costs are. We are not saying the Tribunal cannot form a
28 view as to whether or not the Director was right or wrong to ignore the stand-alone cost, we
29 say it is a completely different matter for the Tribunal then, if it decides the Director was
30 wrong to do that, then to go on and actually itself determine what those stand-alone costs were.
31 Again, we need to have clarity on that today because we need to know how to prepare for the
32 hearing at the end of May.

33 THE PRESIDENT: The basic position I think we have at the moment is that we have a whole lot of
34 evidence and we need to decide at some point what we make of it. The stand alone cost – it is

1 actually a point I wanted to raise with you anyway – we were approaching the issue, prompted
2 I think by the Appellants, in the relatively simple way that in most normal circumstances if
3 somebody is asked to provide a service, which in this case is the hire of a facility, one of the
4 things they might ask themselves is “What does it actually cost us to run this thing?” “What
5 sort of profit are we expecting to make?” and those parameters will give us a price. If the
6 approach in the Decision is right then that way of looking at it should meet the so-called ‘top
7 down’ way that the Decision approaches, and Albion say that is one way in which he should
8 have done it. We have experienced enormous difficulty in this case so far in establishing what
9 the costs of the Ashgrove system are.

10 MR. VAJDA: That is precisely a matter why it should go back to the Regulator.

11 THE PRESIDENT: Well you cannot really say that at this stage, Mr. Vajda, because we have been
12 asking ----

13 MR. VAJDA: Well I am saying it at this stage.

14 THE PRESIDENT: Well I know you are saying it, but ----

15 MR. VAJDA: And I am saying it quite loudly because it is a fundamentally important point to the
16 rights of defence of my client; it is a point which is not going to go away.

17 THE PRESIDENT: Your client is defending itself vigorously at the moment ----

18 MR. VAJDA: Well I am delighted to hear it.

19 THE PRESIDENT: -- and has produced a whole lot of evidence. I think I have again to say it is not
20 quite what we were expecting. We were expecting the costs of the system, as it is at the
21 moment, and not the costs of what a new system would be were it to be constructed on a
22 Greenfield site, and were one to adopt a particular rate of return over a fairly long period of
23 time, which is another way of looking at it. But at the moment it is quite difficult to go into all
24 this side of it without forming an impression as to where the balance of the argument is, and
25 that is a different matter from actually taking an infringement decision, if we were even in a
26 position to do that, and goodness knows whether we ever would be.

27 MR. VAJDA: Yes, but then it is a very important question in relation to the stand-alone cost. If the
28 Tribunal is going to look at the issue which is, as I say, was the Director right effectively to say
29 that stand-alone costs are irrelevant, and that is plainly an issue for the Tribunal, it has been
30 raised in the Appeal and the Tribunal must deal with it. I have no difficulty with that. If the
31 Tribunal is telling me that that is effectively the scope of the inquiry next month, that is fine. If
32 the Tribunal is saying “No, we might actually wish to determine ourselves what the stand-
33 alone cost is” then our attitude to the hearing and what needs to be done is going to be very
34 different, because the Tribunal is going down a path that itself accepts is extremely difficult. I

1 put down this marker in case this case goes any further; we say it should not be done by the
2 Tribunal it should go back to the Regulator, and we need to know the scope of the Tribunal's
3 fact finding approach at the hearing in May, so that we can properly prepare for that hearing.

4 THE PRESIDENT: It is quite difficult to define the fact finding approach beyond saying that we
5 need to find such facts as we need to find in order to decide whether the stand-alone costs'
6 approach is relevant or not. If you were going to be precise about it, it is rather difficult for us
7 to just leave Dr. Jones's evidence just hanging in the air without making some attempt to
8 assess whether it is right or not. If it is right, then you win on that point. If it is wrong, then a
9 whole series of further questions arise, but we have no idea exactly what questions, or how far
10 we go and whether we hear the parties again in the light of some further finding or provisional
11 findings, until we have got to the bottom of it.

12 MR. VAJDA: That is why we have produced this draft order which we would hope would satisfy
13 everybody's desire to find a scope, as it were, for the hearing in May.

14 MR. THOMPSON: Sir, we have not seen the draft order, and to our way of thinking we are going
15 somewhat off at a tangent.

16 THE PRESIDENT: Has it not been circulated?

17 MR. VAJDA: I apologise.

18 MR. PICKFORD: It was circulated at noon.

19 MR. VAJDA: It was circulated, but I apologise that Mr. Thompson has not received it. This is
20 certainly not written in stone but was intended to assist.

21 THE PRESIDENT: I am not sure that I have actually got it at the moment. (Document handed to the
22 Tribunal).

23 MR. VAJDA: I do not know whether it would be helpful, Sir, if I could just talk you through the
24 thinking. As I say, it is not written in stone, but what we have sought to do in para.1 is
25 effectively pick up the points that I think you, Sir, raise at para.427 of your Interim Judgment,
26 which are the things that you would look at. Then para.2 to effectively make clear that matters
27 would not form the base of a decision following the hearing in May. If I can just focus for the
28 moment on the two points that I have been dealing with a moment ago, which is the
29 distribution costs, and that we have sought to deal with at 2.3; that effectively is the antithesis
30 of 1.1 in the order. 2.4 is the stand-alone cost. Again, we are not saying that one ignores
31 everything in relation to stand-alone costs, because we have highlighted that at 1.2 as one of
32 the issues that the Tribunal wished to be addressed on which is plainly relevant in terms of
33 determining the lawfulness of the Director's Decision. That is what we have sought to do, so
34 that everybody knows ----

1 THE PRESIDENT: At either end of the spectrum two things are fairly clear. First, we are not going
2 to go into 2.1 and 2.2. Secondly, at least at present advised, if hypothetically the situation
3 should ever occur we are not at present minded to take an infringement decision without
4 making sure the parties are heard appropriately, even if it ever becomes appropriate for the
5 Tribunal to do it rather than remit it.

6 MR. VAJDA: If one just focuses on 2.3 – obviously we are not seeking to shut it away permanently
7 – we would say that this would not be a matter which needs to be determined at the hearing.
8 Plainly, there may have to be further debate between me and Mr. Thompson, assuming the
9 Director's Decision were set aside as to what is to happen, but 2.3 is quite important in terms
10 of our preparation for the hearing in terms of evidence, as is 2.4.

11 THE PRESIDENT: Well we are not expecting any further evidence at the moment, Mr. Vajda, we
12 have had the evidence; we have the evidence.

13 MR. VAJDA: But the problem, Sir, is that there is a massive dispute of evidence and, indeed, as
14 you, Sir, have pointed out, how is this Tribunal going to resolve that? This is not a case where
15 all the evidence is at one, there is a massive dispute of evidence.

16 THE PRESIDENT: Yes.

17 MR. VAJDA: And that is what needs to be grappled with in the present case. We say plainly the
18 evidence the Tribunal has can go to 1.1, 1.2 and that is plainly within the scope of the Appeal.
19 What we say would be inappropriate is for the Tribunal at the hearing with half an hour or an
20 hour's cross-examination – something like that – massive disputes of fact in relation to matters
21 where the Director has never taken a decision, for it to make the findings that we have set out
22 in 2.3 and 2.6.

23 THE PRESIDENT: If we just take 2.3. The Director, in the Decision which is our starting
24 point, ----

25 MR. VAJDA: Yes.

26 THE PRESIDENT: -- says for various reasons these costs are the same for the two types of water.
27 In the Appeal that is challenged and, on behalf of Albion, Dr. Bryan says that there are in fact
28 some quite substantial differences in costs. At time of the interim Judgment we said to
29 ourselves "Can we really sort out whether or not he is right without having some further
30 evidence and submissions about it?" Quite a lot of the evidence we have now got is about the
31 physical characteristics of these two types of systems, where they are, whether they are rural,
32 whether you have to maintain them; are they maintained? – all sorts of things. That is
33 certainly the sort of thing that we thought we would need in order to determine whether they
34 were the same.

1 MR. VAJDA: Just taking that up I could see that the Tribunal could form the view on the basis of
2 the evidence, disputed though it is, "We are not satisfied that the Director was right to make
3 the assumption he did", that would be a perfectly permissible outcome for the Tribunal to
4 make. It may be taken off to the Court of Appeal, but it is a perfectly permissible option.
5 What we say, with respect, would not be an appropriate option at this stage is on the basis of
6 all this mass of contradictory evidence, for the Tribunal to say two things. First, we think the
7 Director's assumption was wrong; and secondly, we actually now think that the cost of
8 distribution of non-potable water is Xp m³, and that is something which is of great importance.

9 THE PRESIDENT: It may very well be, but at this stage our difficulty is – and this is all completely
10 hypothetical – you may be right, they may be entirely the same, and it is very difficult for us as
11 a Tribunal to commit ourselves to doing something on the basis of a hypothesis that is not yet
12 established, or we do not know what form it ever could or might be established. It is very
13 difficult to address this point without forming some view as to what the difference in the cost
14 is.

15 MR. VAJDA: That is why I say it is a two stage process. I can see the Tribunal taking the view on
16 the basis of this evidence ----

17 THE PRESIDENT: It is a merits' Appeal, it is not just a JR.

18 MR. VAJDA: No, it is a merits' Appeal, that is absolutely true, but we come back to the system, it is
19 a two tier system, and ----

20 THE PRESIDENT: Yes, but this point has been in the case for two years now.

21 MR. VAJDA: Well it may have been in the case for two years but rights of defence have been
22 around for 30 years.

23 THE PRESIDENT: Well you have got your rights of defence. If you want to spend three weeks
24 cross-examining we have not ruled that out.

25 MR. VAJDA: With respect we do not have the right to defend. This is not an appropriate place for
26 these issues to be ventilated for the first time, and what is of concern to my clients is that
27 leaving aside the specialities of Competition law, one has effectively a two-tier system. Any
28 findings of fact that this Tribunal make that the cost of distribution for non-potable is X is
29 effectively a unappealable finding of fact because as you, Sir, know an Appeal from this
30 Tribunal to the Court of Appeal lies only on a point of law, and this is an absolutely
31 fundamental issue; there need to be two sets of eyes on this. In relation to something the
32 Director has not done it would be quite inappropriate for this Tribunal to make a finding of fact
33 which is then effectively unappealable to the Court of Appeal. It would be in breach of the
34 rights of defence; it would be in breach of the way that the appeal systems operate in this

1 country. We say it is perfectly understandable why my clients wish to ensure that the scope of
2 the hearing is confined to the question as to whether or not this assumption was a right or
3 wrong one, which plainly the evidence goes to, but we say it would, with respect, be wrong
4 and we need to sort this out now for the Tribunal effectively to go further and say "We are
5 going to make an unappealable finding of fact.

6 THE PRESIDENT: Well we hear what you say, Mr. Vajda. What do you actually want to do as far
7 as the hearing is concerned?

8 MR. VAJDA: So far as the hearing is concerned, on the evidence I have effectively made my
9 general submissions which is that the evidence plainly should go to the question as to whether
10 or not the Director's decision was correct or not. In relation to Dr. Bryan, for example, the
11 Tribunal has to grapple with the question: is it going to want to make findings of fact in
12 relation to 2.3 and 2.4? If it is we are going to have to cross-examine Dr. Bryan on those
13 issues, because obviously there is a huge dispute, and it is not a matter that can be resolved in
14 half an hour or something like that, because these are big issues, and there is a huge dispute of
15 fact between the parties. That is not a criticism of the parties, they approach it from different
16 angles.

17 THE PRESIDENT: That is, I think, some of the problem. I do not know, it remains to be seen,
18 whether there are disputes of fact, or whether it is a dispute as to how one should approach the
19 facts, which is slightly different. At a very basic level, is it disputed that a large proportion of
20 these pipes are, as alleged, in rural locations? If it is disputed the simple way to do it is not to
21 cross-examine uphill and down dale, but to get an engineer to go over the mountains and find
22 out where they are. Once you have established what is in a rural location and what is not, it is
23 only a question of argument I would have thought as to what inference, if any, you draw from
24 that – is it not?

25 MR. VAJDA: Well somebody has to make a finding. I certainly do not want to ----

26 THE PRESIDENT: He is saying these are low maintenance, relatively less complicated systems that
27 are for the various reasons he gives – and there are about four or five of them – less expensive
28 than potable. Now that is not a massively difficult issue, it is basically an engineering issue to
29 decide.

30 MR. VAJDA: The evidence of Mr. Jones is to the opposite effect.

31 THE PRESIDENT: Fine – well, I am not sure that the evidence is to the opposite effect, your
32 interpretation of the evidence is to the opposite effect, but it is not rocket science to sort this
33 out, it is about the most basic system that you could possibly imagine, a non-potable water
34 system. I am not quite sure what the great difficulty is at the moment. But if you want to

1 cross-examine you are free to do so, obviously there will be cost implications, but that is
2 another matter. You should say what you want to do.

3 MR. VAJDA: Essentially our approach will be two-fold. First, we have made our submissions as to
4 why we say it would be inappropriate for the Tribunal to rule on 2.3 and 2.4, and that is
5 obviously important if the case goes further, that everybody knows that we have made an
6 application which has been either effectively not dealt with or rejected, and we would be
7 grateful if the Tribunal could effectively rule on that so we know where we stand. Assuming
8 the Tribunal is effectively minded to say that all options remain open we will do the best that
9 we can, although obviously making our reservation on the point of principle, we would
10 obviously reserve the right in those circumstances to cross-examine Dr. Bryan, because plainly
11 we need to protect our position – although that is obviously without prejudice to our points that
12 we make at 2.3 and 2.4. That is how we would approach the evidence in relation to those two
13 points, Sir.

14 THE PRESIDENT: You need to say, and if you have not been in the case that long you may not be
15 able to say today, but we need to plan this hearing in terms of a timetable.

16 MR. VAJDA: Yes, in fact, I do not know if you, Sir, have the timetable that we submitted – I think
17 it has been handed up.

18 THE PRESIDENT: Yes.

19 MR. VAJDA: That timetable is predicated effectively on the basis that the hearing deals with the
20 points at 1.1 to 1.3, and what we had intended to do (and would still be doing) – obviously
21 again this is not written in stone – was to address the Tribunal on 1.1, 1.2 and 1.3, and we
22 intend to address them by reference to the evidence that is in the case.

23 THE PRESIDENT: But on what factual basis are you going to do that unless you challenge
24 Dr. Bryan's evidence, and he challenges your evidence? When I say "challenge", we do not in
25 this Tribunal follow the traditional rule that if everything is not cross-examined it is agreed to
26 be ----

27 MR. VAJDA: Yes, if I may say so ----

28 THE PRESIDENT: Which is a dotty sort of rule to have in this case.

29 MR. VAJDA: Yes, absolutely. You can challenge it in all sorts of ways, in writing, by making
30 statements, and all the rest of it. But if there is a particular point that for a forensic reason you
31 want to put to a witness, for example, "Had you not overlooked A, B, C and D?" with a view
32 to undermining the credibility of the witness our rules of procedure admit of that possibility
33 too, if that is the route you want to go down.

1 MR. VAJDA: Certainly, Sir, we would wish to reserve time, and if you, Sir, had in mind that part of
2 the hearing dealt with evidence first we would certainly wish to preserve our position in terms
3 of cross-examining Dr. Bryan and also we may have to cross-examine Mr. Jeffrey as well.

4 THE PRESIDENT: Yes.

5 MR. VAJDA: Obviously I am fully aware of the constraints, the way that this Tribunal operates and
6 the amount of time that the Tribunal has set aside for this case, which is three days, as I
7 understand it, with a back up day of a fourth day, and we will obviously have to cut our
8 cloth ----

9 THE PRESIDENT: Well I am not prepared to accept that, Mr. Vajda. You tell me how much time
10 you want.

11 MR. VAJDA: If you, Sir, are now saying that 2.3 and 2.4 are on the table ----

12 THE PRESIDENT: 2.3 and 2.4, let us stick with 2.3 and come to 2.4 in a moment.

13 MR. VAJDA: Yes.

14 THE PRESIDENT: They are somewhat ambiguous, if I may say so, because it is very difficult to
15 deal with 1.1 without going into 2.3, is it not?

16 MR. VAJDA: No, with respect. It is the sort of thing that Tribunals ----

17 THE PRESIDENT: I may be that one decides that there is no perceptible difference between Dŵr
18 Cymru's cost of potable and non-potable water, but that is deciding what were Dŵr Cymru's
19 costs of distribution for potable and non-potable water.

20 MR. VAJDA: With respect, no. The Director made an assumption and the question is whether that
21 assumption was correct.

22 THE PRESIDENT: Well, he made a finding, he said they are the same, or you can treat them as the
23 same.

24 MR. VAJDA: Well, yes.

25 THE PRESIDENT: If we find they are the same, end of story. We are not going to be precluded
26 from making a finding of that sort at this stage – are we?

27 MR. VAJDA: The Tribunal is entitled to say that the Director made no error in terms of his
28 assumption.

29 THE PRESIDENT: Well that is finding what the costs were, is it not?

30 MR. VAJDA: Not necessarily.

31 THE PRESIDENT: Well that is finding on the evidence that there is no demonstrable difference in
32 the costs, it may make a difference, it may not; we do not know.

33 MR. VAJDA: What very often happens in appeals, whether it is in the VAT field or an Employment
34 Appeal, a higher Court may say "We are not satisfied on the material below that the decision

1 maker reached the right decision”, and send it back without the appellate body actually making
2 a precise finding as to whether or not X actually happened. What they are saying is that, “On
3 the material before us, are not satisfied that this was done properly by the decision maker.”

4 THE PRESIDENT: Yes, but you have to reason that?

5 MR. VAJDA: Oh yes.

6 THE PRESIDENT: You have to say the material before us, for argument’s sake – and this is purely
7 hypothetically – you have 16p I think it is for distribution costs – to take an absurd example:
8 “The evidence before us does not justify more than ½ p, therefore we are not satisfied that ...”
9 whatever.

10 MR. VAJDA: Yes, that paragraphs whatever of Dr. Bryan’s evidence “... lead us to have serious
11 doubts as to whether or not the Director was justified, this matter needs to be reconsidered, and
12 the Director needs ...” indeed the Tribunal could direct that the Director needs to take account
13 of particular paragraphs in the evidence. That is the sort of thing that could well ----

14 THE PRESIDENT: Well that is a Judicial Review, Mr. Vajda.

15 MR. VAJDA: No, it is not just a Judicial Review with respect, it is something I have seen very often
16 in other areas, VAT, it is not just Judicial Review.

17 THE PRESIDENT: The basic problem is we simply cannot decide now today what it is it is going to
18 be appropriate to do because we do not know.

19 MR. VAJDA: The one thing I have done is to put down a marker as to the position of my client, and
20 you, Sir, have asked what we would like to do in a sense that everything is going to be left
21 open, to which the answer is that we would wish to cross-examine Dr. Bryan in relation to both
22 the non-potable/potable distribution and also the cost of the stand-alone system.

23 THE PRESIDENT: Well you let us know in due course how much time you would like for that.

24 MR. VAJDA: Yes. Mr. Pickford reminds me to say that obviously the time estimate was based on
25 there being no cross-examination, but I think that follows from what I have said. I do not
26 know if there is anything else I can assist the Tribunal with at the moment. That is effectively
27 my position on the evidence. As I say, we would be grateful if the Tribunal actually rules on
28 our application so that we know where we stand. I understand that you, Sir, have effectively
29 informally given an indication which is ----

30 THE PRESIDENT: The informal indication is that we are not prepared to make an order in the
31 terms that you are asking for it today. We are aware of the points that you make.

32 MR. VAJDA: Yes, that we are not going to be dealing with 2.1 and 2.2 at the substantive hearing.

33 THE PRESIDENT: Yes.

34 MR. VAJDA: I am grateful.

1 THE PRESIDENT: Yes, Mr. Randolph?

2 MR. RANDOLPH: Sir, I can be brief. Where we are at the moment, it seems to me, on the
3 timetable is a slightly tight timetable because based on Mr. Vajda's proposed timetable, and
4 what you have already discussed with the representative of Albion and the Authority, we are
5 looking at about – to take a median course – a day and a half for cross-examination, and that of
6 course was predicated or was based on the position of the Appellant and the Respondent, not
7 necessarily that of the Intervener. I can say immediately that we will not be seeking to cross-
8 examine anybody, if that helps that is all to the good. However, we are still looking at, say, a
9 day and a half of cross-examination.

10 THE PRESIDENT: Well more likely two, I think.

11 MR. RANDOLPH: More likely two.

12 THE PRESIDENT: Two to three in the light of Mr. Vajda's indication.

13 MR. RANDOLPH: Well indeed. Then, of course, one looks at the position of the openings or the
14 submissions – opening or closing – maybe it would be helpful just to have closings – have the
15 evidence and then closings. I just throw that in because that would solve some time dispute.

16 THE PRESIDENT: Yes.

17 MR. RANDOLPH: Just one small point. The timetable allocates five minutes to my client.

18 THE PRESIDENT: Yes, it was a somewhat meagre allocation.

19 MR. RANDOLPH: It is, so I just put my marker down (laughter) that we will be looking for 30
20 minutes, if we were on a par with Aquavitae, not necessarily because we want to say similar
21 things to Aquavitae – probably not – but I think our skeleton plus, say, 30 minutes, and that is
22 obviously based on the present position; I would hope that that would be sufficient. If we are
23 right on that, and right on the closings, then that makes the present timetable tight to say the
24 least, and it would definitely go into a fourth day.

25 THE PRESIDENT: I think that is inevitable.

26 MR. RANDOLPH: And it may go into a fifth.

27 THE PRESIDENT: That cannot be ruled out at this point.

28 MR. RANDOLPH: No, it cannot, it is just for diary purposes, Sir. If you were to give an indication
29 to that effect then obviously it would be helpful to us, because I do not know whether the
30 Tribunal is occupied on the following Monday, for example? But equally that might be a
31 useful time, if the parties had the weekend to think through their closings, then obviously that
32 could assist.

33 THE PRESIDENT: Well, at least provisionally – and I am just looking at the Tribunal diary – it
34 may assist the parties to know that we were not planning to sit on the Friday.

1 MR. RANDOLPH: Because we start on the Tuesday, of course, because the Monday is a Bank
2 Holiday.

3 THE PRESIDENT: We start on the Tuesday. So at the moment we have the Tuesday, Wednesday
4 and Thursday and on this orientation we would probably resume on the Monday.

5 MR. RANDOLPH: Yes, and that of course might work out rather well, because then the parties
6 would have more than a weekend.

7 THE PRESIDENT: It is often useful to have a pause at a certain point, especially if there has been
8 evidence.

9 MR. RANDOLPH: Exactly. The only other point I would make, Sir, is a short one on
10 housekeeping. As Intervener we have often seen missives and communications going across
11 our heads, and I completely understand that, and we do not have the final attachments from
12 Dr. Bryan's witness statements. It is not a criticism, we completely understand the position,
13 because they are trying to liaise with the Authority. What would be helpful for us – and maybe
14 for the Tribunal as well – is just to have an index of documents that the parties think should be
15 in some form of a bundle before the Tribunal. I am not asking – and specifically not asking the
16 Appellant – to put a bundle together because the Appellant has more than enough to do
17 probably, and it is not its job given the circumstances, but it would be helpful for us – as we
18 are somewhat bypassed – to know exactly what documents are going to be before the Tribunal
19 and are going to be used. Most of it will be self-explanatory because it will effectively be the
20 documents and the bundles that were before the Tribunal on the last occasion, maybe not all of
21 them, and further evidence which has come before it; there may be correspondence that the
22 parties want to put in – and I think just having an index or having a list of documents that may
23 be the Appellant and the Respondent would be seeking to definitely have in would certainly
24 assist us, and that is a minimum cost it seems to me, and something the parties will be having
25 to deal with in any event in their preparation.

26 THE PRESIDENT: On that last point, Mr. Randolph, I think you had better address yourself to the
27 Director. We are not keen on bundles in this Tribunal, it simply duplicates what we have
28 already.

29 MR. RANDOLPH: No, I was not asking for bundles, Sir.

30 THE PRESIDENT: But you ought to have everything that has been copied to the other parties. It is
31 a question of simply checking that you have got everything, I think.

32 MR. RANDOLPH: Yes.

1 THE PRESIDENT: So if your solicitors get in touch with the Director's legal advisers they will be
2 able to assure you that you have got everything. Before you sit down, could I just alert you to
3 one point that affects the Intervener. You have intervened in support of the Director.

4 MR. RANDOLPH: Absolutely.

5 THE PRESIDENT: Imagine, in the circumstances of this case that the possibility of having Albion
6 as a customer, or the possibility of having this additional supply would be of commercial
7 interest to United Utilities, but for some reason your clients do not seem particularly keen to
8 compete with Dŵr Cymru for this particular supply to this particular customer, and we may
9 very well want to know at the hearing what is the background to that.

10 MR. RANDOLPH: Yes, I am very grateful for that and obviously we will be ready to answer your
11 questions.

12 THE PRESIDENT: Yes, Mr. Thompson, back to you?

13 MR. THOMPSON: Yes, Sir.

14 THE PRESIDENT: Do you have any submissions you want to make as regards Mr. Vajda's
15 position?

16 MR. THOMPSON: Well I do, but if I may keep it in order, because to some extent Mr. Vajda went
17 off on a frolic which he had anticipated last Thursday and perhaps in earlier correspondence,
18 but if we leave that on one side for a moment. I think Mr. Anderson indicated that he might be
19 prepared to deal with Dr. Bryan, and Dr. Marshall by way of written submissions. That, of
20 course, raises a question about when he is proposing to do that. Mr. Vajda and Mr. Anderson
21 have had Dr. Bryan's statement for almost three weeks now, but I did not hear any particular
22 suggestion of when they are going to tell us what it is they disagree with in Dr. Bryan's
23 submissions, although at least in the case of Mr. Vajda he indicated there was something he
24 disagreed with and he appeared to disagree quite strongly, but it would obviously be useful if
25 he told us what it was.

26 In relation to Mr. Vajda's points you may have seen some restrained submissions
27 from ourselves in relation to Mr. Vajda's submissions put in on Thursday.

28 THE PRESIDENT: We have seen them, Mr. Thompson, but I do not know that I can immediately
29 put my hand on them.

30 MR. THOMPSON: They are called "Submissions on behalf of Albion in response to Dŵr Cymru's
31 skeleton argument".

32 THE PRESIDENT: Yes.

33 MR. THOMPSON: It is a six page document.

34 THE PRESIDENT: Yes, it is just coming up. (Document handed to the Tribunal)

1 MR. THOMPSON: I did not propose to go through them. We do say that Mr. Vajda's position is
2 quite unreal and appears really to have failed to grasp the essential purport of the interim
3 Judgment. In our submission, and it is a point that I made the last time we were here, when we
4 raised the question of the costs of this further exercise. If the only issue before the Tribunal
5 was whether or not the Decision was properly reasoned, in my submission we were clearly
6 entitled to final Judgment on that issue last December because there was a whole host of
7 problems with the reasoning which were identified by the Tribunal last December. To suggest
8 that after a further hearing, approximately twice as long as last year's hearing, we may then
9 reach an interim stage where we consider the question of remitting the matter back to the
10 Authority – possibly whether we might look at the question of dominance – and then
11 conceivably look at the question of the correct price, in my submission this would be a case
12 where the Tribunal would be at risk of regulatory capture by Dŵr Cymru in a way that is fairly
13 obviously the purport of our complaint against the Authority, not only in this case, but in a
14 number of cases whereby the incumbent water companies spin out cases almost indefinitely,
15 by raising all sorts of hares and chasing them off across the fields so that nothing is ever finally
16 decided.

17 In my submission the purpose of this further hearing was to give the Tribunal discrete
18 information on three questions which the Tribunal had ruled were relevant, namely, the
19 distinction between potable and non-potable water, the stand-alone costs of Ashgrove, and the
20 relevance of ECPR, and that the whole purpose of this further exercise is to enable the Tribunal
21 to give a final Judgment, not some form of further interim Judgment. I must say that on this
22 side of the room we were somewhat dismayed to hear that the Tribunal does not intend to rule
23 on the question of dominance in this case. It already indicated its view that the Director's
24 tentative position on dominance was wrong (para.145 Interim Judgment); in my submission
25 there could hardly be a clearer case of dominance than an incumbent 100 per cent. monopolist
26 who had been operating the only assets relevant to the market for some 50 years. In my
27 submission it is not acceptable for this case simply to drift on with no prospect of it ever being
28 finally resolved, given the facts being as clear as they are in our submission, and in my
29 submission I have heard nothing to suggest that the facts are not as clear as we say that they
30 are.

31 THE PRESIDENT: On dominance we have not got anything at the moment beyond the assumptions
32 in the Decision.

33 MR. THOMPSON: Well except the facts I have just described which, in my submission, are more
34 than ample for a finding of super-dominance.

1 In relation to the question of whether or not specific numbers should be the subject
2 matter of this case, in my submission feelings of outrage on this side of the room are well
3 justified. If one simply looks at the evidence that Mr. Vajda's clients have put in, for example,
4 in relation to the stand-alone costs, Mr. Jones gives a quite specific figure, I think some 32p
5 higher than his current price, as the stand-alone costs, and the rate of return at 17.5 per cent.,
6 the £10 million that he says is the valuation, to suggest that it would be somehow improper for
7 the Tribunal to reach a conclusion on this evidence, which has been put in by Dŵr Cymru itself
8 in response to questions from the Tribunal, without any expression of dissent, and then to say
9 the Tribunal should not reach any conclusions, in my submission that is completely
10 unacceptable and threatens to just send this case into a complete morass.

11 Mr. Vajda and I were both involved in the *Genzyme* where the President will recall
12 that on a basis of evidence quite specific numbers were debated and a particular figure was
13 identified by the Tribunal as the correct figure. In my submission that is a perfectly acceptable
14 approach, given the representation that is present here, the Authority is represented, Dŵr
15 Cymru is very fully represented and has spent a great deal of money on this case, and any
16 considerations of fact or law relevant to these questions can be put before the Tribunal. The
17 suggestion that this Tribunal is somehow unfit to reach a conclusion, given the resources that
18 have been devoted to this Appeal, in my submission is simply ridiculous and outrageous. So
19 that is by way of general submission.

20 Turning to how this case should be handled, it seems to us that there may be some
21 merit in having short openings, perhaps on the first morning of the hearing, and then starting in
22 on the factual evidence. I had thought until I heard Mr. Vajda that perhaps a day would be
23 appropriate for the factual evidence, and a day for the expert evidence ----

24 THE PRESIDENT: Yes, well that is where we were.

25 MR. THOMPSON: -- after which we would have closings. Dr. Bryan has indicated that he would
26 be more than content to debate the facts in his witness statement, which he says are based on
27 the facts as appear from the Regulator and from Dŵr Cymru with Mr. Vajda at whatever length
28 Mr. Vajda wishes to do so. He has no fear of such cross-examination, but we consider that it
29 may not be the best use of the Tribunal's time. If Mr. Vajda wishes to cross-examine Dr.
30 Bryan for a week it may well be informative for the Tribunal but we doubt that it will be the
31 best use of time. We think that the original timetable would be achievable with a day for
32 factual evidence, a day for expert evidence, and then a day and a half for closing submissions.

33 THE PRESIDENT: Yes.

1 MR. THOMPSON: That would be our position on that, Sir. We would be grateful for clarification
2 as to when we are going to get any written submissions in relation to Dr. Bryan and Dr.
3 Marshall's evidence.

4 THE PRESIDENT: Very well. I think where we are, broadly speaking, at the moment is that we are
5 going to have to set aside at least two days for the factual evidence in this case. We may need
6 longer depending on the extent to which Dŵr Cymru would like to cross-examine, and I think
7 we would be glad of some indication about that, Mr. Vajda, as soon as convenient ----

8 MR. VAJDA: Certainly yes.

9 THE PRESIDENT: -- so that we can plan accordingly. The other outstanding question is what
10 further replies or comments in writing are going to come in? That is in two respects, namely,
11 any comments Professor Armstrong has on Dr. Marshall's evidence; and secondly, any further
12 replies to the witness statements of Dr. Bryan and Mr. Jeffrey. I do not know if you have any
13 views on those questions, Mr. Anderson, because we ought to set some sort of timetable,
14 should we not, between now and then in order to leave everybody ----

15 MR. ANDERSON: What we had envisaged was no further round of written submissions as such,
16 but we are due to serve on 17th May our submissions, that that document would contain
17 everything we want to say on everything that has been served on us before the hearing. Some
18 of it will be in the form of annexes, but we were not envisaging a further round of responding
19 to the bits and pieces – I say “bits and pieces” they come in by the bucket load week by week.
20 We were hoping to deal with everything in one go on 17th May. Some of it may be in the form
21 of appendices, but when we talk about skeleton arguments on 17th May I suspect what we will
22 be putting in writing will be a great deal longer than anything I was proposing to say orally
23 by way of submission. So there will be written submissions dealing with everything. It may
24 well be that in the particular case of Professor Armstrong and Dr. Marshall it may be sensible
25 for that particular issue to be identified earlier so that the parties can be in a clearer position to
26 know whether it will be helpful for there to be discussions between those experts. But in
27 relation to the wealth of material that has been submitted, that we were envisaging dealing with
28 by way of a single submission on 17th May rather than splitting it into different pieces. That
29 would then give ample time to note the extent to which we intend to ask questions of Dr. Bryan
30 and Mr. Jeffrey (if at all) at the hearing. It will also give the parties plenty of time to know the
31 extent to which we do not accept that evidence. That is what we envisage.

32 THE PRESIDENT: And by that date at the latest also your position on Dr. Marshall?

33 MR. ANDERSON: Yes, hopefully on that beforehand, but certainly no later than that. So you will
34 get everything that we intended to say in writing in one go on 17th May.

1 THE PRESIDENT: Does that sound practical, Mr. Thompson?

2 MR. THOMPSON: Well we are somewhat bemused by that suggestion. Our skeleton argument at
3 the moment is scheduled for service on 3rd May, and it is to our way of thinking completely
4 absurd for the Director to suggest he is going to put his evidence in two weeks' later – or
5 whatever it is. We obviously cannot deal with that. I do not quite know what the complaint is.
6 Dr. Bryan volunteered that he would put in his evidence early, and he did. The Director has
7 therefore had Dr. Bryan's evidence for nearly three weeks. I am not quite sure why he now
8 thinks he cannot deal with it for approximately a month, and why he should not put in his
9 written submissions – whatever they are – within the next week or so, and we can then deal
10 with them in our skeleton argument. The thought that he will not only have a two week
11 advantage in terms of skeleton arguments, but also he will then spring whatever he wants to
12 put in terms of effectively new evidence two weeks after we have put in our skeleton
13 argument, seems to us to be completely unsatisfactory.

14 THE PRESIDENT: I think we are slightly muddling up "submissions" and "evidence".

15 MR. ANDERSON: I was not envisaging that we intend to put in evidence in reply to what Dr.
16 Bryan and Mr. Jeffrey have said. My reading of what Dr. Bryan and Mr. Jeffrey have, in fact,
17 put in is in the form of part of the case that Albion is advancing. It is argument based on
18 material which they say has been disclosed by Welsh and the Regulator. We therefore
19 envisage that as part of their case which will then be brought together focused in Mr.
20 Thompson's skeleton on 3rd May. We will then respond to all of that in one go on 17th May. It
21 is not a question of putting in further evidence, it is a case of answering the case that is now
22 being put by Albion in these various documents.

23 THE PRESIDENT: So as far as you are concerned, just let us take a 'for instance' – it may be
24 slightly risky to do but let us have a go anyway. If we take Dr. Bryan's evidence and some of
25 the annexes to that evidence, if we are looking, for example, at Annex A, which is our old
26 friend 'potable and non-potable', as I was saying earlier, the broad thrust of that is that for
27 various reasons non-potable distribution costs can be expected to be lower than potable
28 distribution costs, to do with location and distance and maintenance and various other so-called
29 cost drivers. I think what you are saying is, at least at the moment, the Director is not putting
30 any evidence as such about that?

31 MR. ANDERSON: We will go through that, comment on it, and say "That is right", "That is
32 wrong", "We do not agree with that", we were not envisaging producing any primary evidence
33 on those cost drivers, those factors that are being identified. That is our present view on that.

34 THE PRESIDENT: So it is submissions but no further evidence?

1 MR. ANDERSON: Yes. Frankly, from a practical point of view we are simply not going to be in a
2 position to put in two rounds of further written material.

3 THE PRESIDENT: No, well there is a law of diminishing returns anyway.

4 MR. ANDERSON: So we would prefer to put in one response that deals with everything on 17th
5 May as agreed after a lengthy debate in this Tribunal about that timetable and it should not
6 disadvantage my learned friend, Mr. Thompson, where I envisage his skeleton argument
7 drawing together his arguments on the basis of the material that he has put in. We have put in
8 very little material since the interim Judgment. We have put in our answer to the question,
9 there is a short letter answering a few questions raised at the last CMC. The bulk of what we
10 intend to put in will be addressing what is set out in the interim Judgment with which we
11 disagree, the three main topics – distribution, stand-alone costs, ECPR/margin squeeze – and
12 dealing with the material that has been submitted by the parties since the interim Judgment.
13 That, in my view, is most sensibly put before the Tribunal and the parties in the form of one
14 submission with annexes. That is what we had always envisaged would happen.

15 THE PRESIDENT: So Mr. Thompson, how does that strike you? We will come to Dŵr Cymru in a
16 minute, but from the Director's point of view there is no further evidence as such, just his
17 comments on your case. Presumably his comments will reply to your skeleton argument, plus
18 the points that you make in the new evidence?

19 MR. THOMPSON: Yes, I hear what he says. I must confess I think to some extent it does go over
20 ground that we did debate at the last hearing, and we went away not entirely happy, and I must
21 confess part of what we were unhappy about is that we would be sprung with a large amount of
22 big material quite a long time after we had given the Director his material, and with our very
23 limited resources having to deal in two weeks with something that he had taken two months to
24 address. It does appear to us that again we got rather the short end of the straw.

25 In relation to the expert, I do not know what Mr. Anderson's position is, but it seems
26 to me that that is likely to be a different issue, where there may be points of substance, as it
27 were – at least of expert substance – and in my submission it is not very satisfactory that that
28 material should be produced so late. So at least in that respect it seems to me that that should
29 be produced considerably earlier.

30 I do not know what Mr. O'Reilly's position in relation to Aquavitae is, but insofar as
31 he is a spokesman for Dr. Marshall it appears to me that he may have a view as to whether or
32 not 17th May is an appropriate time for Professor Armstrong to reply to Dr. Marshall's report,
33 almost a month after receipt.

34 THE PRESIDENT: Dr. Marshall's report was served when?

1 MR. THOMPSON: Last Thursday?

2 THE PRESIDENT: Which was the 20th?

3 MR. THOMPSON: Yes, so it would effectively be four weeks.

4 THE PRESIDENT: Have you any comment on that, Mr. O'Reilly?

5 MR. O'REILLY: We would obviously like to see the comments of Professor Armstrong sooner
6 rather than later, and we would simply echo Mr. Thompson's concerns about it. Obviously I
7 do not have Dr. Marshall's diary with me so I am unable to say exactly when she would be
8 able to deal with the comments made by Professor Armstrong but clearly the sooner the better.

9 THE PRESIDENT: Yes.

10 MR. THOMPSON: If I may, it is a point that arose very much in passing in Mr. Anderson's last
11 remarks. He referred to the possibility of some criticism of the interim Judgment, and it is an
12 issue we did discuss in the January hearing. We received a letter seeking further disclosure in
13 relation to Albion's role and we are somewhat concerned that there may be some attempt to
14 widen the scope of the hearing to run over some material that was dealt with last year which
15 we do not understand to be the purpose of this hearing coming up. Again, we are somewhat
16 concerned if we are only going to get notice of some intended increase in the scope of the
17 hearing on 17th May, and it really seems to us that if there are other issues that either Dŵr
18 Cymru or the Authority want to squeeze into this relatively small bag the sooner they say what
19 those issues are the better, and now would be a particularly good time.

20 THE PRESIDENT: That was a request I think mainly directed towards you, Mr. Anderson?

21 MR. ANDERSON: It is true that we did write a letter seeking further disclosure from Albion on the
22 question of what retail services do they in fact supply to Shotton and what are the costs of
23 those services? We do not believe that in any sense widens the debate beyond the three areas
24 that the Tribunal have identified. The section at the end of "Price Squeezing" finishes with the
25 comment "For these reasons we do not feel able to decide this case without hearing further
26 argument on the above points." So we were requesting information to try and get to the
27 bottom of what the Tribunal had itself described as an awkward issue of fact, namely, precisely
28 what does Albion provide to Shotton, what is its costs and does it displace Welsh in doing any
29 of those activities?

30 THE PRESIDENT: The awkward issue of fact was more "What did Welsh supply to Shotton?" That
31 is why it was awkward.

32 MR. ANDERSON: And part of that also is what does Albion now supply to Shotton? What are the
33 costs associated with that? – all relevant to the question of margin. We have had a response
34 from Albion, we were not proposing to seek any order from the Tribunal today on that. We

1 will respond to Albion in reply to the letter that we received from them this morning. But just
2 to reassure my learned friend it is not an attempt to re-open issues that have been decided. It is
3 an attempt to seek information which it should not be onerous for Albion to provide if the
4 information exists, to assist the Tribunal on what is still a live issue, namely margin squeeze. I
5 do not know if that assists the Tribunal. That is what that particular debate is about.

6 THE PRESIDENT: You have made a request and they have answered it.

7 MR. ANDERSON: We have made a request and they have responded to it.

8 THE PRESIDENT: They have responded to it, and as far as the Tribunal is concerned I think
9 probably the best thing is we just make what we can of what we have at the moment.

10 MR. ANDERSON: Well we are not seeking an order from the Tribunal today for disclosure, no, that
11 is right.

12 MR. RANDOLPH: Sorry to butt in, just picking up on what Mr. Anderson said about things
13 decided. This goes back to what you, Sir, said ----

14 THE PRESIDENT: Yes, quite, he means outside the parameters of the three points that we
15 specifically left open.

16 MR. RANDOLPH: Yes, well that is exactly the point, because as you, Sir, said, when handing down
17 the Judgment in open Tribunal "Nothing has been decided."

18 THE PRESIDENT: Yes.

19 MR. RANDOLPH: So that is still the position, I assume – nothing has been decided?

20 THE PRESIDENT: Nothing has been decided.

21 MR. RANDOLPH: Thank you very much.

22 THE PRESIDENT: Yes, Mr. Vajda, I cannot now recall offhand exactly when the date for your next
23 salvo is?

24 MR. VAJDA: We are due to put in our skeleton, I think, the same day as the Director, which is 17th
25 May. Subject to the views of the Tribunal we would seek to adopt the approach of Mr.
26 Anderson. I perhaps should say one thing in relation to evidence and Mr. Jones, and the point
27 that you, Sir, put to me earlier. I quite understand the Tribunal wants to know what our
28 position is as soon as possible and we would undertake to write to the Tribunal – obviously
29 copied to Mr. Thompson – by the end of this week as to time for cross-examination and
30 whether or not we would want to put in more evidence, as opposed to doing it the Director's
31 way, which as I understand it was just one lump sum, and you put everything in. We will then
32 inform the Tribunal whether we would propose to adopt the Director's approach and if not I
33 am aware if we are going to put in fresh evidence we would need to do better than 17th May.

1 THE PRESIDENT: If there is a question of further evidence that is beginning to impinge on a lot of
2 other case management issues.

3 MR. VAJDA: Yes, I see that, but obviously I am mindful of what you, Sir, said to me earlier, and if
4 we are going to go into that ----

5 THE PRESIDENT: Yes.

6 MR. VAJDA: Certainly, it is not our intention to have trial by ambush or anything of that nature. I
7 am well aware of your concern that if we are going to do something on the evidential point we
8 need to alert the Tribunal as soon as possible, and Albion and I undertake to do that.

9 Certainly, insofar as if new evidence came in and Mr. Thompson wanted to then put in a
10 supplementary skeleton to deal with that, I have no objection to that at all if he wanted to do
11 that.

12 THE PRESIDENT: For the hearing to be a useful hearing we have to have time as well to absorb it
13 all, and everybody has to have time to consider it and so forth and so on, so it is getting a bit
14 tight now if we are to hold this date.

15 MR. VAJDA: Yes, I hear very much what you say, Sir.

16 THE PRESIDENT: Yes, well it is difficult, I think, to do more at this stage than to say that the
17 existing timetable for written skeletons/submissions for the moment stands, and that the
18 hearing will commence on 30th May. I think we may need a bit more help from the parties, but
19 we certainly had in mind for the shape of that hearing that logically we should deal with the
20 Jones/Bryan/Jeffrey evidence before we deal with the expert evidence, so we will deal with
21 that first.

22 The question arises whether we should have any opening statements about all that, to
23 set the scene. What do you think about that, Mr. Thompson? I am just trying to picture it in
24 my mind's eye at the moment?

25 MR. THOMPSON: I personally would submit that it probably would be useful to have opening
26 statements, but very much curtailed so that, for example, no more than, say, half an hour or an
27 hour from Mr. Anderson and myself and possibly Mr. Vajda, and less from our two
28 redoubtable Interveners – “other redoubtable Interveners” I should say. I would have thought
29 that if we left the first morning for opening statements that might be a useful use of time, but if
30 the Tribunal simply wants to go straight in on the evidence obviously we will comply with
31 that. It seems to us that there may be some water that has flowed under the bridge between
32 now and then and it might be good to orientate ourselves with opening statements.

33 MR. VAJDA: For my part I would be very happy to dispense with opening statements. Pleasant
34 though it is to hear Mr. Randolph and Mr. Thompson on their feet the case is well set out in the

skeleton and so on, and given the pressure of time that we are under – reading Mr. Thompson as an opponent is also a great pleasure – we could go straight into the evidence if that would assist the Tribunal.

THE PRESIDENT: What do you think, Mr. Anderson?

MR. ANDERSON: We will have put in our written submissions on the 17th May, nothing will have happened in terms of the timetable between that and the start of the hearing that will mean that there is anything I will wish to add to what is in my written submissions, so I support Mr. Vajda that it is probably a bit of waste of time to have opening submissions – launch straight into the evidence and then have submissions after the evidence.

(The Tribunal Confer)

THE PRESIDENT: Our view as a Tribunal is that it would help us to have an opening, so as to help us listen out for what it is that we need to be listening out for in the evidence, and to remind ourselves of the salient points. So if we said, for example, one hour per side, as it were, and if one side or the other does not wish to take that up then it is not compulsory, but if anybody does wish to take it up then I think they should be allowed to have that opportunity.

MR. THOMPSON: The only other point we would raise is a plea for grace, as it were, in that this Appeal is bearing quite hard on this side of the room, 3rd May is looking very soon, and whether we might seek indulgence to go back to the 5th?

THE PRESIDENT: Yes, I think so, Mr. Thompson.

MR. THOMPSON: I am grateful.

MR. VAJDA: And can we have ----

THE PRESIDENT: I knew you were going to say that, Mr. Vajda. (Laughter) That slips it to the Friday, Friday to Friday.

MR. THOMPSON: If we say 1 o'clock on Friday, 19th – people going away for the weekend or whatever.

THE PRESIDENT: We have to have it by 1 o'clock in order to circulate it to Tribunal Members, none of whom are in London. Very well, in outline then we will start on 30th May with opening statements, maximum one hour each but people are entitled to renounce if they wish. Perhaps you would let us know in due course whether you do renounce or not. We will then deal with the evidence of Dr. Bryan and Mr. Jeffrey, which it is logical to deal with first, I think, because they represent the Appellants; and then with the evidence of Mr. Jones. We will assume for planning purposes that one way or another that will take up probably most of the rest of that day, unless we are informed by the parties that it can go shorter, or if it looks as if it is going to longer, we would like as early an indication for that as possible. We will then,

1 all being well – and this is probably being optimistic – on Wednesday, 31st May look at the
2 expert evidence, and again what is the right order of batting in that? It is probably logical to
3 follow the same order and deal with Dr. Marshall first and then Professor Armstrong. Would
4 you say that was right?

5 MR. ANDERSON: I would have thought the reverse because the way in which the reports went was
6 the reverse, Professor Armstrong went first and Dr. Marshall replies, so probably Professor
7 Armstrong first.

8 THE PRESIDENT: Very well, let us deal with Professor Armstrong first and then Dr. Marshall.

9 Then at some point, hopefully on Thursday, 1st June, we will get to the submissions and that is
10 probably a day for you, Mr. Thompson?

11 MR. THOMPSON: Possibly, Sir. I must say I am slightly concerned, if the case is going to be cut
12 off at the end of Thursday, that the second half of Thursday afternoon may be a difficult time
13 to start and it might be better to have submissions starting clean on the Monday.

14 THE PRESIDENT: Well it largely depends how we get on in the evidence. Maybe we cannot
15 completely foresee that. But you are suggesting the possibility of starting the submissions on
16 the Monday?

17 MR. THOMPSON: I do not know that my submissions are necessarily going to be very long. I
18 think it is more ----

19 THE PRESIDENT: No, well we have had a lot in writing, we know quite a lot about this case one
20 way and another – it has been going on quite a long while. What is the global estimate of the
21 globality of all the submissions? Is it two days or more than two days?

22 MR. VAJDA: On the basis of not evidence, it is three days, and I may be that the Tribunal thinks
23 that is excessive, but that is certainly what we had tentatively put forward. I know Mr.
24 Randolph for one has indicated that he would like more than the allotted five minutes.

25 MR. RANDOLPH: Yes.

26 MR. VAJDA: We have worked on the basis that Mr. Thompson should have a day, the Director
27 should have a day, we would have less than a day, and then Albion to have a reply.

28 THE PRESIDENT: It is probably wise to have at least three days reserved, is it not, Mr. Thompson
29 for the submissions' part ----

30 MR. THOMPSON: This case inexorably grows.

31 THE PRESIDENT: I know it does and it is very difficult to know quite what to do about it. The
32 only question I am debating – well we will see how we go but the broad scheme is one day
33 each for the principal parties, and then I think probably Dŵr Cymru is the Intervener – how
34 much were you indenting for, Mr. Vajda?

1 MR. VAJDA: I put down three and half hours, and I would say in that regard certainly, insofar as
2 one is allowed to trade in speech time, I would prefer to trade in my opening remarks probably
3 for that sort of time. We have tried to strike a balance because obviously we are only an
4 Intervener, but an important one. We would like three and a half hours but obviously that is
5 subject to the Tribunal.

6 THE PRESIDENT: Yes. Well in principle I think you should have what you asked for.

7 MR. THOMPSON: Can I just clarify, is the Tribunal able to sit through 'til Wednesday on this case?

8 THE PRESIDENT: As far as I know. Just let me check the diary.

9 MR. THOMPSON: Because the effect of this discussion I think is to extend this to a six day case in
10 effect.

11 THE PRESIDENT: Well we have said two days for the evidence, and it was looking like two to
12 three days for the submissions.

13 MR. THOMPSON: Yes, but my impression was that the provision in relation to the factual
14 evidence, at least if Mr. Vajda keeps to his word, is somewhat on the optimistic side. From
15 what I heard it seemed unlikely you would get through all the factual evidence in a day. It
16 sounds to me unlikely that you will get through all the openings and evidence in two days, and
17 I am somewhat concerned if I am going to be expected to finish my submissions as well before
18 the weekend, and then have everybody else coming fresh on Monday.

19 THE PRESIDENT: Well, my informal feeling would be, Mr. Thompson, that it is desirable to start,
20 if we can on the Thursday, unless you are seriously disadvantaged by starting on the Thursday.
21 It may very well be that a certain amount will have happened the last two or three days so it
22 would be equally convenient and fair for you to finish on the Monday.

23 MR. THOMPSON: Yes, and I think probably an overall estimate of a day is reasonable, although
24 obviously if I can be quicker than that I will be.

25 THE PRESIDENT: Quite, but that is a day overall, which leaves the Director probably starting on
26 5th, and finishing on 5th or going into the 6th, depending on how we are getting on, and the rest
27 of it being wrapped up on the 7th, which is true does come to six hearing days. I am struggling
28 a bit to see how we can shorten that.

29 MR. THOMPSON: I think the only way would be for the evidence to go short, but at the moment
30 we certainly cannot assume that to be the case.

31 THE PRESIDENT: Yes.

32 (The Tribunal confer)

33 THE PRESIDENT: I know there are some aspects to that indicative timetable that are a bit vague at
34 the moment, but I think we have to allow it to play out as best we can.

1 MR. THOMPSON: Yes, I do not know whether Mr. O'Reilly wants to say this for himself, but there
2 is certainly a degree of consternation, I think, that what was supposed to be, as it were, a
3 follow on hearing which might or might not be necessary to clarify some points of fact, is now
4 expanding to at least twice and possibly three times the original "final" hearing. But it may be
5 that there is no way out of it, but it certainly is an increasing strain on this side of the house.

6 THE PRESIDENT: Well I see that, Mr. Thompson, but I do not see at the moment how we can get
7 through the evidence collectively in less than two days, or how we could allocate less than a
8 day each to the principal parties.

9 MR. THOMPSON: No, I agree ----

10 THE PRESIDENT: I am sorry that it is a strain and that it has developed like this, but it has and
11 there are very substantial expert reports and factual issues that have been raised.

12 MR. THOMPSON: I am reluctantly coming to that view, I must say.

13 THE PRESIDENT: I appreciate all the difficulties. Mr. O'Reilly, I do not know that I can say a
14 great deal more.

15 MR. O'REILLY: I am grateful to the Tribunal for listening to the point and it is a strain on this side,
16 but if that is what has to happen, then that is what has to happen.

17 THE PRESIDENT: I think that probably does and for all kinds of reasons. The only point still have
18 in my head, there may be others, is by when Professor Armstrong is going to be able to let us
19 know the extent to which he disagrees with Dr. Marshall. I think it would be convenient if we
20 could be a bit more definite about that, Mr. Anderson?

21 MR. ANDERSON: Professor Armstrong will not be in a position to look at Dr. Marshall's report
22 until next week, but we should be able to give an indication in the course of that week.

23 THE PRESIDENT: Well 4th May would be two weeks from the service of Dr. Marshall's report, so
24 if we said best endeavours by 5th May?

25 MR. ANDERSON: Yes, we shall certainly use our best endeavours.

26 THE PRESIDENT: Let us proceed on that basis.

27 MR. O'REILLY: That then will be the same day that Mr. Thompson has asked to hand in his
28 submissions and by association it will be the day we hand in ours.

29 THE PRESIDENT: Right, yes.

30 MR. O'REILLY: I am just wondering whether we might have until Monday in that event?

31 MR. ANDERSON: It is going to play a very small part of what Aquavitae and Albion should be
32 putting in their written submissions, and if it were to cause that submission of theirs to move
33 over to the following Monday, having already been granted the extension of the Wednesday to
34 the Friday, one is pushing the whole case (by the best part of a week) further on, so we would

1 strongly resist that. Albion gets an opportunity on 24th May to respond again in writing, a
2 point overlooked when I said nothing would happen between the service of our submissions on
3 17th May and the hearing, but the purpose of Professor Armstrong giving that indication is
4 really to define the scope of any dispute between the parties, between the experts, for the
5 benefit of the Tribunal, not particularly to inform any great detail the substance of the
6 submissions, because Professor Armstrong's views are known, his report has been served. It is
7 really a response to Dr. Marshall.

8 THE PRESIDENT: What we want to know is what is the real disagreement between the experts?

9 MR. ANDERSON: Yes. We would hope to get that out in the course of that week, but we would
10 urge the Tribunal not to allow that exercise to put the timetable for written submissions off
11 anymore than it already has been this afternoon.

12 THE PRESIDENT: Well if, as you kindly remind us, we have the 24th for any final re-reply by
13 Albion, why do we not simply say that Aquavita puts in any further comment it may have on
14 Professor Armstrong by 24th May, which might save you working entirely over that weekend,
15 Mr. O'Reilly.

16 MR. O'REILLY: I am very glad you are looking after my interests, Sir, thank you.

17 THE PRESIDENT: Well I am conscious that that is not an entirely ideal structure, but perhaps that
18 is as far as we can take it all at the moment.

19 MR. VAJDA: Can I just raise one small point? In terms of the evidence of fact, and we will come
20 back to the Tribunal as soon as possible, it may be that the Tribunal did indicate that the order
21 that it wished to hear the witnesses of fact ----

22 THE PRESIDENT: Well we rather thought that Dr. Bryan and Mr. Jeffrey ought to go first, because
23 they are the Appellants.

24 MR. VAJDA: Yes.

25 THE PRESIDENT: And then Mr. Jones?

26 MR. VAJDA: Fine, thank you.

27 THE PRESIDENT: Are there any other points anyone wants to raise? Thank you very much.

28 (The hearing concluded at 4.00 p.m.)