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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2nd March 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

and

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

(1) DŴR CYMRU CYFYNGEDIC

and

(2) UNITED UTILITIES WATER PLC

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Rhodri Thompson QC (instructed by Dr. Jeremy Bryan, Managing Director, 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, OFWAT) appeared on behalf of the Respondent.

Mr. Aidan Robertson (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dŵr Cymru Cyfyngedg.

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. Thank you very much to those
2 concerned for the various materials that we have seen since the last time we met. The present
3 view is that the purpose of today is to see where we are, so far as we can, on the three main
4 points that remain in contention in this case, that is to say, first of all, the costs of distribution
5 for potable and non-potable water respectively; the stand-alone costs of Ashgrove, secondly;
6 and the various issues that arise as regards the ECPR and, in particular, expert evidence.

7 In relation to all those issues, I think we would like to try to explore today how far
8 there is likely to be any common ground or disagreement, how far further disclosure is likely to
9 be necessary or should be ordered, and whether we can make any progress in defining further
10 what the issues are.

11 I think we would also like to have a feel by the end of today as to what would be a
12 realistic timetable for the remainder of the case, so that we can start thinking in terms of a
13 hearing we hope, in general terms, sooner rather than later.

14 Although we have done our best to absorb the voluminous material that we have had,
15 there are, of course, things that we will not yet be fully conversant with, so any comments that
16 we may make in the course today are to be taken as extremely tentative and subject to further
17 argument hereafter.

18 Let us try to use today as far as we can as a working session. I think it may be best,
19 although I am in the hands of the parties, to take each of those issues in turn – that is to say
20 potable versus non-potable, stand-alone costs and ECPR – and, first of all, go round the table
21 with the parties and see what their position is, what issues they would like to raise today and
22 what points we can usefully progress. If that is a possible programme for the afternoon,
23 I suggest we start with Albion, followed by Aquavitae and then move to the Director, followed
24 by Dŵr Cymru and the United Utilities.

25 Good afternoon, Mr. Thompson.

26 MR. THOMPSON: Good afternoon, I am grateful again to be before the Tribunal and I am very
27 happy to deal with it in that way. If I could just say, by way of introduction and outline, we
28 think that the topics that need to be covered are whether anything needs to be done in terms of
29 the outstanding queries or disclosure by the Tribunal; secondly, some provision for evidence
30 in reply, which we think is likely to be necessary in this case. Then, in relation to ECPR, there
31 are a number of points: there is the OFT disclosure, the Aquavitae/Albion expert evidence and
32 the proposal of Professor Yarrow; and then by way of background the issue of level playing
33 field, which I think the Tribunal has in mind, in the water industry. I have seen a recent
34 hearing where the same issue applied in another case.

1 With that by way of background, could I just look at the first issue, the issue of
2 potable and non-potable distribution costs. We have obviously only had a limited amount of
3 time to look at Mr. Jones's statement and the attachments thereto, but there was a meeting last
4 Friday where some of the issues were thrashed out. My impression, not having been at that
5 meeting, is that the main points that Mr. Jones makes is that the MEA values are essentially the
6 same for the same specification of pipe, whatever is passing through that pipe; and also the
7 MEA comparisons that were made by me at the hearing last year were not comparing like for
8 like. In particular, Mr. Jones makes the point that there has been a drastic reduction in some of
9 the relevant costs between 1998 and 2004. I think he says that the costs are now about one-
10 third of what they were, and that that accounts for, indeed possibly more than accounts for, the
11 differences that were put before the Tribunal.

12 I think that the Tribunal should have seen that there has been some degree of
13 agreement on the simple question of whether a pipe costs the same regardless of what it is
14 carrying, and we are obviously looking at the issue of whether or not the comparisons we made
15 were valid ones.

16 We would note that there are a number of issues that we do not accept, and in
17 particular we note that there seems to be a degree of inconsistency in relation to the issue of
18 MEA values in the first statement by Mr. Jones and the second statement by Mr. Jones, where,
19 for the purposes of the stand-alone costs, he looks at the position as at 1998, whereas for the
20 position in relation to the comparison he looks at the position in 2004. So we are obviously
21 interested in probing that a little bit more.

22 Otherwise, and this is dealt with in some detail in Dr. Bryan's letter of 27th February,
23 2006, which the Tribunal should have seen, and in particular annex B to that letter. Does the
24 Tribunal have that letter in mind? It is a relatively short letter, but with a number of annexes.
25 It should have been sent to the Tribunal via a lengthy fax from Wilmer Hale of 28th February
26 2006. I think it is a 73 or 74 page fax. My version is numbered at the top by reference to the
27 fax numbers and the letter from Dr. Bryan is at p.39 of the fax. It is in particular annex B
28 which sets out a summary, and it is at p.45 where Dr. Bryan seeks to go through the points that
29 are and are not agreed. He agrees, broadly speaking, in relation to the point that if a pipe is
30 like for like then it will, in principle, cost the same. Then in particular at para.16 and following
31 there are a whole series of issues which Mr. Jones's statement, we say, does not really address,
32 and we say, notwithstanding the rather basic point that a piece of plastic pipe costs the same
33 regardless of what goes through it, there are indeed a number of factors which indicate that the
34 costs associated with potable water are considerably larger than in relation to non-potable.

1 Our general position is that Dŵr Cymru has not addressed those points in its statement
2 and so obviously we have two strategies: one, to ask for further information in so far as we
3 think that there must be such information available; and secondly, a positive case, as it were,
4 that these are points where there will be a significant difference between the two types of water
5 being carried in pipes.

6 Then there are one or two issues which the Tribunal will be familiar with, in particular
7 the issue of location and turbidity, which is addressed by Mr. Jones in his statement and where
8 we are seeking to clarify the position, and we will no doubt wish to make evidence available to
9 the Tribunal on those issues.

10 So, so far as what actually needs to be done today, it seems to us that there is a
11 process of clarification going on between the parties which has not reached an end at the
12 moment. So I do not think there is any need for any order on that, but we do think there needs
13 to be provision for some counter-evidence put in by Albion, probably in the form of a
14 statement from Dr. Bryan with suitable attachments setting out what we think can be derived
15 from the evidence that is now before the Tribunal.

16 THE PRESIDENT: What we really want now, Mr. Thompson, if we can, is to know as closely as
17 possible what it is we have to decide, this being your case that the non-potable costs are lower.
18 In the light of your reading of the material that you have now had, what we need to know is
19 what is still in issue and what it is that you rely on and what it is that we have to form a
20 judgment about. That is what we need.

21 MR. THOMPSON: I do not entirely want to tie my own hands at this stage, but I think that the
22 outline of what our case is likely to be is you will recall that our skeleton argument had
23 attached to it a schedule which I think was called “Methodology 6” in the Interim Judgment,
24 which identified a number of financial factors which we say were relevant differences between
25 the two types of water, and which led to a significant difference in distribution costs. What
26 I anticipate is that we will put in evidence which will refine that submission by reference to the
27 further information that is now available. I think that is likely to be the form of it. Then the
28 Tribunal will inevitably have to choose between the approach reflected in the statement of
29 Mr. Jones, which effectively pooh-poohs any such difference, in particular at paras.112 and
30 113 of that statement – in very general terms he says there is no difference – and the relatively
31 specific points that we will be making that there are, in fact, quite considerable differences
32 which Dŵr Cymru will no doubt seek to challenge.

33 THE PRESIDENT: Your case at the moment in your Notice of Appeal, which is still the framework
34 of the case, lists a number of factors, including typical location, differences in pressure and,

1 I think, some differences in construction costs, although I am speaking from memory, and
2 various other things upon which you rely. So we need to know what of all that is still relied on
3 and still in issue, but I think it is fairly clear what it is we need to know.

4 MR. THOMPSON: I think that is right. Is that enough from me on this topic?

5 THE PRESIDENT: On the topic of potable and non-potable. What we need to do when we come
6 back to it is to set some sort of timetable for that process to reach some sort of conclusion.

7 MR. THOMPSON: I think we would tentatively propose that we should have this month to respond.

8 THE PRESIDENT: To the end of March?

9 MR. THOMPSON: Yes, I think that would be our tentative proposal.

10 THE PRESIDENT: With any luck, by the end of March we will have crystallised what the issues are
11 and what the factual matters are that we need to grapple with.

12 MR. THOMPSON: Yes, I am hopeful that the evidence we put in will make it quite clear what our
13 case is.

14 THE PRESIDENT: Yes, thank you. You may not have any input on this, Mr. O'Reilly?

15 MR. O'REILLY: None at all, sir.

16 THE PRESIDENT: Thank you. Mr. Anderson, what is your view on this?

17 MR. ANDERSON: Our position is simply this: the position the Director took of the Decision was
18 that there is no inherent reason potable and non-potable distribution costs should differ. The
19 Tribunal asked Welsh to produce material in relation to a number of specific questions which
20 the Tribunal likely identified would be material to that question. Welsh has put in that
21 material. It would appear – we were not part of the meeting, the agreement, or anything, but
22 we have seen Dr. Bryan's annexes – that, as a matter of fact, the level of disagreement has
23 narrowed significantly from that which was set out in the Notice of Appeal. It seems to us that
24 on a number of points, by agreeing to the material Welsh has put in, Albion has retreated from
25 the position it was advancing in the Notice of Appeal.

26 That said, of course, it is entirely a matter for the Tribunal and for Albion as to
27 whether they wish to put in further material in rebuttal to that that has been put in by Welsh,
28 but our reading of the material put in by Welsh is that it supports the position that there is no
29 particular reason why, indeed no reason as a matter of fact, there is a difference in the
30 distribution costs for potable and non-potable.

31 We also believe it to be quite clear that this is essentially a question of fact and the
32 Tribunal will not, in our view, require any expert assistance on this. It will essentially be as a
33 matter of fact. The scope of the dispute has narrowed significantly and may, no doubt, further
34 narrow. So, subject to any points of clarification that the Tribunal may have of Welsh, in our

1 submission, the next course should be for Albion, if so advised, to put in any evidence in
2 rebuttal it wishes to put in and then the matter can be decided by the Tribunal. That is our
3 position.

4 THE PRESIDENT: So you are leaving it basically for Welsh Water to put the factual material
5 before us and for the factual argument to take place directly between Albion and Dŵr Cymru
6 with the Director's benevolent surveillance from the side, as it were.

7 MR. ANDERSON: Since the material came from Welsh and it is Albion that disputes it, it seems
8 that that is where the relevant evidence will originate from for the Tribunal to take its decision.

9 THE PRESIDENT: Yes, thank you. Yes, Mr. Robertson?

10 MR. ROBERTSON: We second the Director's approach. It seems to us that the facts are now
11 emerging fairly and squarely in witness evidence before the Tribunal. The Tribunal is in a
12 process where it will proceed to make factual determinations on the basis of our evidence, the
13 evidence that Mr. Thompson seeks to put in by way of reply, and I do not think we would want
14 to resist that.

15 The only matter that does concern us is that we have had a number of requests for
16 further information, further documents, and so on, from Albion. Eleven requests were made
17 on the morning of the meeting that took place on 24th February, and we wrote yesterday to
18 Albion giving the answers to those. We were met with a further 35 requests for information.
19 We have got to the point where we think, "Enough is enough, we do not see the relevance of
20 any of these". It is really for Albion to advance its case on its evidence to the Tribunal. Once
21 the Tribunal has got that evidence, if the Tribunal has got further questions that it wishes to put
22 to the parties then of course it will do so, and then one would proceed to resolve this. I assume
23 the Tribunal would wish to invite submissions from the parties on that evidence and then make
24 its factual determinations in the normal course of proceedings in this Tribunal.

25 THE PRESIDENT: Yes.

26 MR. ROBERTSON: That is how we see things playing out. We are placed with the constructive
27 approach that has taken place so far, that we have been able to agree a number of matters, quite
28 important matters, in our view. Things seem to be proceeding quite smoothly. We think we
29 are getting on with this.

30 THE PRESIDENT: I wonder, while I have got you, whether we could just raise a couple of points
31 that we have noticed, among others. In the course of the last hearing there was a certain
32 amount of debate as to whether the non-potable part of the system was 158 kilometres. As far
33 as we can see from the adding together of the figures in the details of the various systems
34 which are set out in para.37 of Mr. Jones's first witness statement, the system is, in fact, about

1 201 kilometres. I do not know whether that is a fact that has been noticed or whether we are
2 on the wrong track or if you have got comment that you can make on that on the hoof?

3 MR. ROBERTSON: I do not know the answer to your question as to what the explanation is for the
4 figure that you have arrived at. Inevitably there will be questions such as that which will arise
5 from this evidence and if the Tribunal were able to write to us, they may be points of detail and
6 we should be able to answer them in pretty short order. Ideally we would like to do that before
7 Albion put in their evidence in response so they see the position as fully explained because that
8 will enable them to deal with everything in one fell swoop at the end of March. That way we
9 can proceed to resolving these factual issues.

10 THE PRESIDENT: The second point that we found of interest arises on paras.58 and 59 of
11 Mr. Jones's first witness statement where he tells us about the apparently significant fall in unit
12 costs over the period. Some of the issues in this case may or may not be sensitive to exactly
13 what period it is one is talking about and what base line one takes by way of dates. Are you
14 able to help us at all as to why, in very general terms, unit costs were falling so substantially
15 apparently between 1997/98 and 2002/03 – by about half apparently? If it is not a question
16 you can answer on the hoof do not try and answer it.

17 MR. ROBERTSON: It apparently was an industry wide phenomenon, a reduction in the costs of
18 manufacturing pipe, and it is something on which we can certainly provide the Tribunal with
19 further details and further evidence.

20 THE PRESIDENT: What is related to that is what is the reason for the fall in the asset values at the
21 1999 revaluation – is that the same point?

22 MR. ROBERTSON: I understand that it is. As I say, if the Tribunal were able to write with that and
23 such other questions they may have then we will put in a formal response which can be
24 checked and we can supply any underlying supporting evidence that is necessary to back that
25 up.

26 THE PRESIDENT: Yes, very well. United Utilities, thank you for your figures, Mr. Randolph.
27 I am not sure we have been able to make a great deal of them, but thank you anyway.

28 MR. RANDOLPH: I am glad you have received them. I am sorry you have not been able to put
29 them to as much use as otherwise might have been thought to have been the case. We have
30 produced what we could. You will have noted from para.6 of our letter that covered the annex,
31 the figures, that we will be attempting to deal with the remaining 35 per cent, because it only
32 dealt with 65 per cent, and we will get that to you as soon as possible. We are obviously aware
33 of the fact that this case needs to move on and we do not want to jeopardise Albion's timetable
34 or anybody else's timetable. We just, as ever, want to assist the Tribunal as best we can.

1 THE PRESIDENT: I think our present view is that we have now got a very considerable amount of
2 information about Dŵr Cymru's accounting system and its approach to costs in various ways.
3 That is probably going to be quite enough for the purposes of this case without trying to get on
4 top of your client's accounting costs and systems and approach to figures.

5 MR. RANDOLPH: I am sure my client will be happy to hear that.

6 THE PRESIDENT: For the moment I think we will leave it on the basis of, "don't call us, we'll call
7 you", if I may put it like that, on this particular point.

8 MR. RANDOLPH: I am very grateful, thank you very much.

9 THE PRESIDENT: On that issue if we were to say any further evidence from Albion by the end of
10 the month, with a view to putting in any factual evidence that they wish to put in and doing
11 their best to crystallise the issues on that, is that a satisfactory timetable from the parties' point
12 of view? That would, I think, just leave, Mr. Thompson, Mr. Robertson's comment that they
13 have been receiving a lot of requests for further information. I, myself, would venture to
14 suggest that we may be in some danger at some point of not being able to quite see the wood
15 for the trees, and it may be that you have already got most of the things you actually need,
16 unless there is something crucial on this issue that you are still needing. I am not sure that
17 wide ranging further requests for information are necessarily going to be that helpful.

18 MR. THOMPSON: I hear that indication. I think, to some extent – it is no criticism – it turns out
19 that this hearing is quite shortly after 20th February and so ----

20 THE PRESIDENT: Yes, quite, and no doubt people have not had time to look through all of it.

21 MR. THOMPSON: I think the dust has not entirely settled and we are grateful for the further
22 information we have received. In fact, I received a sheet of paper as we come into the Tribunal
23 today. I think to say "enough is enough", as it were, at two o'clock today might be rather
24 premature and artificial, but I can see that there may be a law of diminishing returns and at
25 some point one has to stop, but I do not think at the moment I would accept that now is
26 definitely the end date.

27 THE PRESIDENT: No, I am not necessarily suggesting that it is, but I think that if Albion confines
28 itself to the information that it thinks it really does need and Dŵr Cymru continues to react in a
29 statesmanlike way and if there turns out to be a dispute on the relevance of a particular request
30 for information and that is brought back to the Tribunal as quickly as possible, then that is
31 probably the most one can say about that particular subject.

32 MR. THOMPSON: I have not sensed that there is, as it were, a problem and I am not seeking any
33 order today because up to date there has been considerable co-operation. On the basis that

1 both sides are sensible I am hopeful that that can go forward along the timetable we have
2 mentioned.

3 THE PRESIDENT: Yes.

4 MR. THOMPSON: Shall I move on to the question of the stand-alone costs?

5 THE PRESIDENT: Yes.

6 MR. THOMPSON: I think that has two aspects. There was an issue about the stand-alone costs of
7 Ashgrove itself, and then there was the broader question about stand-alone costs for non-
8 potable water generally. Mr. Jones's second statement very largely is devoted to the Ashgrove
9 works themselves and the Ashgrove system itself, although he does briefly address at paras.9,
10 10 and 30, and also in an annex, the wider question of non-potable costs.

11 Could I just briefly touch on that. In the second statement of Mr. Jones the Tribunal
12 will find a number of annexes at the back and in particular annex 1 relates across to paras.9, 10
13 and 30 of the statement and sets out an allocation that was made by Dŵr Cymru for the
14 purposes of the Ragfour exercise, and the relevant one comes at the end and is said to be an
15 equivalent of 25.9p per metre cubed. I would simply like to make two observations in relation
16 to that. First of all, there is a footnote, footnote 7, at the bottom of p.2, which says in the
17 second sentence:

18 "The allocation of operating expenditures is a high level allocation that is made for
19 purposes unrelated to tariff setting and does not take account of the fact that certain
20 elements of distribution costs do not apply to large non-potable customers."

21 That is obviously a statement which is of interest to us, given our general case which is pretty
22 much to that effect. So this is a table that we are currently looking at.

23 More generally, the lines 1 to 15 at para.3 make it clear, in our submission, that this
24 exercise was an extremely broad brush exercise. Just to look at it very briefly, lines 6 and 7
25 simply set out the volumes of potable and non-potable water; and line 8 simply identifies the
26 proportion of water which is non-potable. So all that this exercise has done is to divide the
27 costs set out at line 3 into potable and non-potable simply relation to volume, giving figures at
28 lines 10 and 11 of 3.5 and 4.499 for the respective costs of non-potable. So it is indeed a very
29 broad brush exercise which appears to have been done simply by relation to volume. Again, at
30 paras.5, 6 and 7 the capital costs that are allocated here seem to have been done on a pretty
31 arbitrary basis by reference to percentages which Mr. Jones cannot detect the precise origins
32 of, as one sees at para.7. In our submission, this exercise is a particularly vague and
33 unsatisfactory one, and I think that, in fact, Mr. Jones accepts that in his statement. He

1 basically says that this is a difficult and effectively impossible exercise and that it is of very
2 little help. To that extent, we agree.

3 On the other hand, we do note one specific point which Dr. Bryan makes in his letter
4 of 27th February, that there is, in fact, litigation between Dŵr Cymru and Corus in relation to
5 the costs of supply to the three Corus plants, and it appears to us that there must be information
6 that has been generated in relation to that litigation. We have asked Dŵr Cymru about that
7 matter and it seemed to us that that was specific information that might be of relevance and
8 interest to the Tribunal in considering the issue in so far as it goes wider than Ashgrove. So
9 that is a point which I think has not yet been resolved.

10 THE PRESIDENT: Do we know what the issue is in that litigation?

11 MR. THOMPSON: As I understand it, it is a question of whether or not the price charged by
12 Dŵr Cymru is too great.

13 MR. ROBERTSON: If I could help, I am junior counsel for Dŵr Cymru in that case. Dŵr Cymru is
14 suing Corus for non-payment of bills for water that has been supplied to Corus at three sites.
15 There is a summary judgment application listed in the Chancery Division for the week
16 beginning 27th March – in other words, in about three and a half weeks time. In broad terms,
17 Corus is claiming that it should not pay under the large industrial non-potable tariff, that
18 Dŵr Cymru should have entered into special agreements with Corus for supply of water at
19 their sites to replace agreements which it is common ground terminated in 2004.

20 THE PRESIDENT: So they are resisting, as it were, being moved to the ----

21 MR. ROBERTSON: On to the tariff.

22 THE PRESIDENT: ---- on to the tariff, yes, I see.

23 MR. ROBERTSON: There is also a defence and counterclaim raised by Corus alleging abuse of a
24 dominant position by Dŵr Cymru. That is the status of that litigation. It is at summary
25 judgment stage. We are seeking to strike out their defence as having no prospect of success.

26 THE PRESIDENT: Yes, thank you.

27 Mr. Thompson, while you were explaining to me annex 1, I was not quite sure how
28 you understand para.3 of annex 1 to work. There are two observations. First of all, if one
29 compares these figures with some of the figures that were included in Albion's Notice of
30 Appeal, particularly for the year 2002/03 instead of 2001/02, there seems to be a considerable
31 difference in the revenues and expenditures relevant to third party services as one tracks it
32 through the years. The figures seem to vary quite substantially. Even in 2001/02 the operating
33 expenditure related to, I think, bulk supply and non-potable supplies and various other things.
34 What I am not clear about – and maybe you are clearer, and maybe I should ask Mr. Robertson

1 this instead of you, but let us see how you understand it first – is how you get from the
2 £9.679 million to the £9.048 million, leaving roughly £0.6 million relating to the other things
3 that are regarded as third party services.

4 MR. THOMPSON: I did discuss this yesterday with Dr. Bryan because I was to some extent
5 mystified as to whether or not paras.2 and 3 had any relationship to one another at all. I think,
6 looking at it overnight, as far as I could understand it, the £9.048 is calculated in the way set
7 out in lines 1 to 15 of para.3, simply as a percentage allocation by reference to lines 6 and 7,
8 but the £0.631 million, which is the balance at para.2, what makes that up and why it has no
9 apparent capital maintenance expenditure attached to it is a complete mystery to me. I do not
10 know whether Mr. Robertson is in any better a position as to why there is no capital related to
11 that balance or what indeed that balance relates to. I have not got any further on that, I am
12 afraid.

13 THE PRESIDENT: While we are on this general point, it seems to us that some issues in this case
14 depend rather sensitively on what exact time point we are talking about. Are we talking about
15 the date when the Decision was issued; are we talking about the date of the complaint; are we
16 talking about some intermediate date while the investigation was going on, or what? It seemed
17 to us at first sight that if you take these various years, in fact there are considerable changes
18 both in the underlying cost trend and in terms of what items seem to be included under which
19 heading at different stages, which slightly confuses the issue as far as I can see.

20 MR. THOMPSON: It does and there are some difficult questions which I will come back to in the
21 context of Ashgrove, if I may, in a moment. It does seem to us that Dŵr Cymru cannot cut the
22 cake in its favour in all respects, and it may be that if the MEA values have dropped very
23 considerably it is wrong for them to base the stand-alone costs for Ashgrove on an inflated
24 version of 1998 MEA values, which is what they appear to do in Mr. Jones's second statement.
25 As I will show you in a moment, that represents almost 80 per cent of the justification for
26 stand-alone costs.

27 THE PRESIDENT: We are still on stand-alone costs, and we are on his second statement. Do you
28 want to go on and then finish on stand-alone costs?

29 MR. THOMPSON: If I could just say on the general question of non-potable, I think it is worth
30 noting that the 25.9p, which is put forward at para.8 of annex 1, is said to exclude return on
31 capital and rates. By our reckoning, if that were right, it would be very considerably higher
32 than the new tariff, and we find that a striking feature as well.

33 THE PRESIDENT: Yes.

1 MR. THOMPSON: Turning to the Ashgrove position itself, that issue is conveniently set out in a
2 table at para.28 of Mr. Jones's second statement. I have actually prepared a document which
3 I hope will be useful to the Tribunal in seeing where the real substance of the issues are on this
4 question. Could I just hand it up? It is simply an expanded version of the first three lines.
5 (Same handed)

6 The Tribunal will have seen that at paras.24 through to 27 of Mr. Jones's statement,
7 there is a section on the appropriate rate of return, and the conclusion at para.27 is that the
8 appropriate rate of return is 17.5 per cent – you will see that at the top of p.10. You will also
9 see that the capital costs are said to be 9.378 and 3.279 for the pipeline and the works
10 respectively, giving total capital costs of 12.657, an equivalent annual cost of £2,244,491, and
11 giving rise to a price per metre cubed of 25.6p, as against a total price per metre cubed of
12 32.4p. You will see from the table I have just handed up that if one looks at what 17.5 per cent
13 is in relation to those costs, it is, in fact, almost the totality of those costs. It equates to 18.9p,
14 3.79p, 2.65p, and in total 25.5p. That is approximately 78.7 per cent of the charge that is said
15 to be justified on a stand-alone basis.

16 So I think it will immediately be clear to the Tribunal that the real issue here is
17 whether the capital costs are right, the £12.657 million, which the Tribunal will be aware is
18 two or three times what the Director himself found was to be the correct amount in the annex
19 to his Decision, and whether the rate of return of 17.5 per cent can possibly be right. If one
20 looks just at the top line you will see that there is a cost of just over £9 million which is said to
21 be an equivalent annual cost of £1.64, so almost a quarter – certainly a fifth – of the total cost
22 is to be an equivalent annual cost lasting for 100 years. In our submission, that is a striking
23 figure and one that we, at first blush at least, would propose to challenge. That is one issue
24 which we think will need to be addressed.

25 In terms of the cost of the Ashgrove works itself, the Tribunal will be aware that there
26 is also other information on the papers. There is the schedule that the Director produced in
27 relation to treatment costs, if you recall, which led to the reduction in the treatment costs in the
28 Decision. There is also document D21, and so we would propose to put in evidence seeking to
29 draw together the evidence that is before the Tribunal and making the points that we think are
30 appropriate on that.

31 In relation to the operating expenditures ----

32 THE PRESIDENT: Are you thinking in terms of some sort of accountancy evidence or are you
33 thinking in terms of Dr. Bryan's evidence?

1 MR. THOMPSON: I think we have sufficient internal firepower to deal with the matter. It is
2 essentially making points by reference to the evidence before the Tribunal, which I think will
3 be more valuable than simply trying to move straight to submissions.

4 THE PRESIDENT: Yes.

5 MR. THOMPSON: In terms of the operating expenditures, I think just to look at the major items,
6 the item, payment for flow balancing service, £86,246, the rates of £260,733 and the business
7 management and overhead of the reassuringly round figure of £100,000, it appears to us that
8 each of those requires some scrutiny. In particular, the flow balancing service, we question
9 whether that is the most economical way of providing that particular service and whether or
10 not a variable speed pump might not have been thought of as a more economical way of
11 replacing that.

12 THE PRESIDENT: That is, one infers, what has presumably been paid for the use of the lagoons?

13 MR. THOMPSON: Indeed, and I think, on a stand-alone basis, we question whether that is the right
14 way of looking at it under the applicable guidelines and normal practice. The rates question
15 appears to us to be an inflated sum just as a matter of impression, because it represents a
16 substantial percentage of Dŵr Cymru's total rates bill. We suspect that it has been prepared on
17 an erroneous basis, and £100,000, apart from being a round figure, we also think is
18 considerably too high. We have specific queries and questions on the other smaller sums, but
19 I think that gives the Tribunal a flavour of the types of the issue that we will be wishing to
20 address in further evidence.

21 THE PRESIDENT: Presumably something like the rates bill is verifiable by reference to whatever
22 rates were, in fact, paid?

23 MR. THOMPSON: That may be so. I am not sure whether there was any allocation of rates to
24 Ashgrove specifically, but essentially this is a question which I think can be addressed on the
25 papers and by reference to evidence that we have available as to the normal practice.

26 I hope that gives a flavour of the issues sufficient for present purposes. Again, we
27 would propose that we would have the opportunity to put in further evidence by the end of the
28 month.

29 THE PRESIDENT: Yes, that sounds a sensible idea. I am just reminding myself where these
30 various figures come from.

31 MR. THOMPSON: The position in relation to the capital valuation is set out at annex 2. There is
32 one point I should make so that the Tribunal have it in mind. At paras.6, 7 and 8 you will see
33 that the starting point for the valuation is the MEA values at 1997/98 prices. At para.7 there is
34 an uplift of 14 per cent to those figures, and that obviously gives the starting point of just over

1 £9 million for the main capital cost items. I think, given what the Tribunal has already said,
2 there may be a question mark about whether it is right, given that prices actually fell by a half
3 or a third, to use the higher price and then inflate it by 14 per cent, whether that is actually a
4 sound and reasonable approach for Dŵr Cymru to have adopted. Obviously, if you cut the
5 figure in half rather than multiplying it by 1.14, it would have made a pretty striking difference
6 to all the figures that followed.

7 THE PRESIDENT: Yes. In practical terms, your evidence on these points by the end of the month?

8 MR. THOMPSON: Yes.

9 THE PRESIDENT: Yes, Mr. Anderson?

10 MR. ANDERSON: Again, we would see that as a sensible way forward. We have not seen these
11 figures presented in this form before. It is produced in response to the Tribunal's request. We
12 have not considered them in any detail. We would propose that anything we wish to say on
13 them should await the further material from Albion. Then we can see what is controversial and
14 make submissions accordingly.

15 THE PRESIDENT: I think, if possible, in due course we will want the Director's view on whether
16 this is a proper way to go about this sort of calculation on the facts of this case. I think perhaps
17 in that connection, although the argument has now, to some extent, moved away from the
18 general argument on the regional available costing that figured quite largely at an earlier point,
19 I think that issue is still probably very much a live issue in the case. We note from the
20 information that we have seen that, on the whole, the non-potable systems do seem to be stand-
21 alone systems. They do, on the whole, seem to be separate from the generality of the potable
22 system. They also seem to cover quite a large range of different sorts of situation – either short
23 pipes, short distances, long distances, big pipes, small pipes, customers of various shapes or
24 sizes – and the general question of whether one should seek to get closer to some kind of
25 stand-alone cost for non-potable systems is, I think, a question that may well be in the back of
26 our minds as this case unfolds. We just need to bear that in mind.

27 MR. ANDERSON: I can well see that and I am quite sure that we will wish to be putting in some
28 observations and submissions on that issue as well as on these particular calculations. We will
29 wait, we would suggest ----

30 THE PRESIDENT: As I have understood it, you have not been involved in or seen, before the
31 service of this evidence, the approach that Dŵr Cymru has adopted?

32 MR. ANDERSON: That is correct.

33 THE PRESIDENT: That is very helpful. Could I just ask you one other question while I have got
34 you on your feet, as it were, on this element, in relation to RAG4 and the stripping out of non-

1 potable and certain other costs relating to bulk supplies in order to get to a proper basis for
2 making a comparison in relation to the potable system.

3 MR. ANDERSON: I think that is the stripping out of everything other than potable?

4 THE PRESIDENT: Everything other than potable, that is right, that is the way round it was. I think
5 there are two questions. Although it is directed to stripping out everything except potable,
6 some things seemed to be left in that do not relate to potable, which seemed to be the rates,
7 doubtful debts and exceptional items, and perhaps other things. We are not quite clear in our
8 own mind why that is so, and it would be helpful, I think, to know your thinking on that point.

9 MR. ANDERSON: I think I would prefer if we answered that in writing.

10 THE PRESIDENT: Yes, that would be very helpful.

11 MR. ANDERSON: Yes, certainly.

12 THE PRESIDENT: The second question is, given that you have RAG4, how one might suppose a
13 company might go about complying with that obligation to strip out. We had, I suppose
14 perhaps naively, imagined that someone would actually look at the costs or make assessment
15 of the costs of non-potable and the various assets that were used in non-potable, and so forth
16 and so on, and that therefore there would be some reasonably good record within the company
17 of what was potable and what was non-potable. Our impression at the moment – I am not
18 inviting a comment yet, but I would be glad of one in due course – is that it is not done in any
19 particular scientific way, shall I put it broadly. We may well want to know in due course, or be
20 interested to know in due course, whether, in the Director's view, that is how he considers this
21 regulatory system is supposed to work in this area.

22 MR. ANDERSON: We will certainly address both those points.

23 THE PRESIDENT: I think indeed in that regard we may well need to have the Director's view on
24 the apparent approach to the asset inventory adopted by Dŵr Cymru, which does not seem to
25 quite follow what the regulatory requirements seem to be.

26 MR. ANDERSON: We will take that from the transcript and respond accordingly.

27 THE PRESIDENT: Thank you, Mr. Anderson. Yes, Mr. Robertson?

28 MR. ROBERTSON: We simply second the approach taken by the Director, which is that we are
29 content for Albion to put in its evidence on Ashgrove, stand-alone costs generally, by the end
30 of this month and then we will take things forward by way of submission. I do not think there
31 is any need to adumbrate those submissions at this stage. That seems to be a sensible process
32 for getting to the bottom of the facts and the evidence. Obviously the Tribunal will guide the
33 parties as to the specific points it wants addressing in the usual way.

1 THE PRESIDENT: I can think that we may well at some point have at least one question for
2 Dŵr Cymru which arises out of what we were just saying a moment ago. If you take paras.58
3 and 59 of Mr. Jones's first witness statement, we gather that MEA values dropped between
4 1998 and 2004 such that the 1998 value was about three times higher than the 2004 value, and
5 this is to do with changes in technology, and so forth, which you explained to us. I assume,
6 I do not know if I am right or not, if I go back to annex 2 to Mr. Jones's second witness
7 statement, if we are on p.3, where you give us an MEA value for the water main in 2000/01 at
8 1997/98 prices, if one was going to do the same exercise at 2004 prices, one would effectively
9 divide the figure you have there, which is about £8 million, by three to get to the MEA value in
10 2004. I do not know if that is a fair inference to draw from the evidence, that is to say the
11 MEA value in 2004 would be about £2.8 million as against £8 million based in 1997/98?

12 MR. ROBERTSON: I think in broad terms the answer to that would be, no, it is not a fair inference,
13 but that is something that we would deal with specifically in writing in the same amount of
14 detail that it is being presented here by Mr. Jones.

15 THE PRESIDENT: The broad question is – the broad issue I think here is – that you have done this
16 calculation on the basis of 1997/98 prices and added on an uplift factor for inflation, whereas,
17 according to the other part of the evidence, through this period costs are, in fact, falling, and if
18 one took a slightly different period and, instead of basing it on 1997/98 prices, based it on
19 some later price one would get a lower figure.

20 MR. ROBERTSON: I think that depends on, when one is dealing with MEA valuation, whether you
21 are taking a snapshot at a point in time. It is a matter that we would prefer to deal with in
22 writing, because these are very detailed explanations.

23 THE PRESIDENT: You will probably need to deal with it in relation to whatever further points
24 Dr. Bryan makes. I think there is almost certainly going to have to be some reply from you on
25 that. I am just drawing to your attention a point upon which we have a question at this stage, if
26 I can put it that way.

27 MR. ROBERTSON: That is very helpful, to know that that is a point in the Tribunal's mind and we
28 will deal with it at the appropriate point.

29 THE PRESIDENT: Yes. I think Professor Pickering has a question.

30 PROFESSOR PICKERING: Mr. Robertson, I am interested to know what sort of organisational
31 structure Dŵr Cymru operates in terms of identification of profit or indeed cost centres. Is the
32 totality of the potable business a single centre? Is the totality of the non-potable business a
33 single centre, or are we at a position where you disaggregate so that you have got performance

1 data and cost data in relation to the Ashgrove system alone? For example – you may want to
2 answer this now, you may want to put something in writing ----

3 MR. ROBERTSON: I think, in very broad terms, Professor, there are not separate cost centres or
4 separate organisational centres for non-potable as against potable, and that applies by the same
5 reasoning to Ashgrove as a separate system. That is in very broad terms.

6 PROFESSOR PICKERING: There are none? There are not separate centres?

7 MR. ROBERTSON: (After a pause) I am told that we will set this out in writing. That is probably
8 the best way of explaining it because it is complex.

9 PROFESSOR PICKERING: That would be very helpful, thank you. May I just ask you one other
10 question relating to para.28 in Mr. Jones's second witness statement and this table. Again, you
11 might want to write to us about this. The text above the table itself talks about estimates.
12 I wonder what, if any, of these figures in this table are, in fact, accounting data that are
13 confirmed as opposed to estimates and calculations?

14 MR. ROBERTSON: Again, I think we will answer that one in writing.

15 PROFESSOR PICKERING: Thank you.

16 THE PRESIDENT: I think for the moment, Mr. Robertson, we will leave that there. Thank you.

17 Mr. Thompson, one point I perhaps should have raised while we are on this, and I just
18 do not know whether it is still pursued by you: in Dr. Bryan's various requests there is one
19 request for some further disclosure on the workings supporting the introduction of the new
20 tariff for non-potable in 2003 – I think it was 2003/04. Is that a request that you are pursuing
21 at the moment for disclosure of working documents on that?

22 MR. THOMPSON: Sir, can I take instructions from Dr. Bryan who is probably closer to that level
23 of detail than I am?

24 THE PRESIDENT: You may not wish to take a position now.

25 MR. THOMPSON: (After a pause) In principle, it is a point of some importance in that it appears to
26 us that the figures that are now being advanced are significantly higher than those that appear
27 in the new tariff, and therefore there must have been different and lower figures put to the
28 Director, which presumably the Director himself should be aware of. It would seem to us
29 unsatisfactory, if that is the position, that neither we nor the Tribunal were aware of what the
30 lower figures were.

31 THE PRESIDENT: Yes. You may not have had a chance to consider this, Mr. Anderson, but at the
32 moment there does not seem to be – or we probably missed it if it is there, and it may be there,
33 I am not saying it is not there – we have not yet spotted the relationship between figures that
34 Mr. Jones has now helpfully provided to us and the figures that finished up in the new tariff

1 introduced for non-potable supplies, if there is a relationship, which raises the question of what
2 was the basis for that new tariff, which is at the moment a topic we might wish to understand a
3 bit better than we do at the moment.

4 MR. ANDERSON: Again, I am not in a position to respond to that at this stage. We certainly hear
5 what you say, sir.

6 THE PRESIDENT: Will you just note that and it may be that we shall need to come back to it,
7 I hope without causing undue inconvenience or extra work, but it arises in particular from the
8 figures that we have now got, I think.

9 MR. ANDERSON: Yes, certainly.

10 THE PRESIDENT: Let me go back to my check-list to see where we are so far. I think this is on
11 further documents and I think this is a question for Mr. Robertson at the moment, if I may. We
12 have the impression that in the period that we are concerned with there are just two business
13 plans that are relevant. There is the 1999 plan and 2004 plan.

14 MR. ROBERTSON: That is correct.

15 THE PRESIDENT: We have some, but not all, of the various June returns and I think we would
16 probably quite like a full set now.

17 MR. ROBERTSON: I am sure that can be arranged.

18 THE PRESIDENT: I think 1999/2000, 2000/01, 2001/02, 2002/03 is probably the set that we need
19 so that you can trace through these various changes and understand the trends in the figures. It
20 is sometimes not always entirely safe just to choose a particular year and look at that in
21 isolation.

22 MR. ROBERTSON: Yes, we can supply those.

23 THE PRESIDENT: Thank you. (The Tribunal conferred for a short time) Mr. Thompson, that,
24 I think, probably does take us to ECPR issues.

25 MR. THOMPSON: In relation to the ECPR question, the Tribunal will be aware of an exchange of
26 correspondence culminating in a letter from Ofwat of, I think, today, or possibly late last night,
27 essentially saying, as I understand it, that the only disclosure that they consider relevant and
28 which they are proposing to make is of documents that appear on the file of this particular
29 case. I think the Tribunal will have seen letters both from ourselves and from Aquavitae
30 questioning whether that was the approach envisaged by the Tribunal in its order or at the
31 hearing where our impression was that the scope of this ECPR issue was a relatively general
32 one and there is no reason to define the scope of disclosure by reference to what happens to be
33 on the file in this case, which obviously raises specific points and it is essentially rather
34 chancy, what happens to be on the file in relation to this broader question. So it does not

1 appear to us that the Director is taking the right approach at the moment. I think that is the first
2 point.

3 The second point, the position on expert evidence: as I understand it, there is nothing
4 to indicate that the Director's expert is not intending to report on 20th March, and so we are
5 anticipating that that is the position.

6 We have discussed with Aquavita our own expert evidence. I do not think anybody
7 has actually been appointed and possibly not approached. There is obviously a question about
8 timing for that.

9 In relation to Professor Yarrow, I do not know whether the Tribunal wants to say
10 anything about that beyond the letter that we received yesterday. I think our attitude to that is
11 to be somewhat cautious, in that we are not in any way questioning the expertise of
12 Professor Yarrow, but we do feel that, unless he is specifically appointed as an expert by the
13 Tribunal, then the status of anything he may produce will be somewhat questionable.
14 Although we are not in any way doubting his independence he obviously has a number of
15 cases to his name for and against Regulators, and we have no real knowledge of how he could
16 be appointed as an *amicus*. It appears to be us to be rather a different procedure from a
17 barrister being appointed, effectively by the Government, to act as an *amicus* to the court for
18 an individual effectively to put himself forward as an *amicus*. We are not necessarily shutting
19 our face to it completely but we do consider that it might raise a number of problems, and
20 certainly if it were to be made, as it were, open season for anybody to chip in with their views
21 as an *amicus*, it seems to us that that might be a somewhat chaotic situation and might indeed
22 skew the balance of the hearing, given the commercial interests that are ranged on the various
23 sides in this case. That is an indication of our position in relation to Professor Yarrow.

24 Is there anything else that I need to say at this stage in relation to ECPR? I think that
25 was all I was proposing to say otherwise.

26 THE PRESIDENT: I think we might share with you such thinking as we have been able to do on the
27 general issue raised by requests like the one we have received from Professor Yarrow, which is
28 the first occasion we have received a communication of this kind which has arrived out of the
29 blue. So far the Registry has done no more than contact Professor Yarrow to ascertain
30 whether, if permitted to do so, he would still wish to submit something and whether he has
31 acted in the past for any body in the water industry, to which he says he has not.

32 Beyond that we have refreshed our memory as to what the Rules are in the
33 US Supreme Court, which has an interesting procedure whereby views from persons of stature
34 can be presented and the court will then hear the parties on whether those views should

1 actually be admitted, either because they are not relevant or for some other reason, but in
2 certain circumstances you can admit that sort of wider evidence.

3 The rather exceptional situation that we have in this particular case is that we are
4 grappling with issues that are fairly profound and of wide-ranging importance for the industry,
5 and the Tribunal's primary interest is to get to the bottom of things on the widest possible base
6 of knowledge that can be legitimately assembled within the framework of the procedure. We
7 are probably a little way away from the traditional adversarial situation in which a court trying
8 an ordinary civil action is blinkered by what the parties actually put in front of us. We have a
9 slightly more flexible approach than is traditionally the case.

10 If you were to look at our Rules of Procedure, our present view is that a combination
11 of our various case management powers and our power to control the evidence would at least
12 permit us to say to Professor Yarrow, if we wish to, "If you want to submit a document send it
13 to us by such and such a date and we would then invite the parties to say whether we should
14 send it to you or whether we should take any account of it and, if so, what". It has, I think,
15 been communicated to Professor Yarrow by the Registry that if went down this route then he,
16 Professor Yarrow, would have to make himself available for any questions or cross-
17 examination anybody might want to put to him.

18 That is as far as we have got, I think, in thinking about this rather novel situation.

19 MR. THOMPSON: I do not know if I could add three points: first of all, we were helpfully sent a
20 short biography of Professor Yarrow and at the bottom in relation to recent policy work he
21 does indicate that he has acted recently for Scottish Water in relation to the licensing regime in
22 Scotland. We take that to be one of the incumbent water undertakers.

23 THE PRESIDENT: In Scotland?

24 MR. THOMPSON: Yes. So to that extent I suppose he could not say he has no recent involvement
25 in the water industry.

26 THE PRESIDENT: I think he was talking about the England and Wales industry. Scotland has a
27 different set-up. I do not know.

28 MR. THOMPSON: The second point I would like to make this – I think I may have made it briefly
29 before: if Professor Yarrow were to be invited to do this, I think it would raise the question
30 about whether or not each of the incumbent water undertakers could themselves come forward
31 and say, "We have got something very interesting to say as well", in which case it does appear
32 to us to be a rather different situation from perhaps the public interest type of question where
33 there might be some very obvious commercial incentives for people to come forward and say,

1 “I would like to be heard in this case”. I think it would need to be carefully handled to ensure
2 that one did not open the door to a mass of such offers of help.

3 THE PRESIDENT: What the Tribunal really wants to have, and I do not know whether we can
4 achieve it – I will try and articulate what it wants to have – we would in many ways not be
5 averse to having informed expert views from persons of stature who have no axe to grind as
6 such in terms of any commercial angle or relationship on what, on an objective basis, the
7 advantages and disadvantages of an ECPR approach to pricing are, if it is disputed. It may be
8 that we shall see the Director’s evidence and there is not so much dispute as one might imagine
9 that there is. I just do not know. If we are in a situation where, for whatever reason, Albion
10 and Aquavitae have not yet equipped themselves with expert evidence there is perhaps some
11 question as to whether all the matters that need to be drawn to our attention will be drawn to
12 our attention in as balanced a way as possible.

13 MR. THOMPSON: I am mindful of those points and that is why I have expressed myself rather
14 cautiously on the issue. I think everyone is rather exploring their way, at least in this
15 jurisdiction.

16 THE PRESIDENT: We go very carefully, and I think you have a point when you say, “If we were to
17 allow Professor Yarrow in we would have to consider devising some mechanism to make sure
18 that the facility was open to other persons of academic independent stature who would wish to
19 express a view.

20 MR. THOMPSON: Yes, or perhaps my concern was rather the opposite, that it was not open to
21 everybody to weigh in and chip in with their views left, right and centre, which might leave the
22 whole thing somewhat unwieldy.

23 THE PRESIDENT: It would certainly be a procedural development, for which there is at least a US
24 precedent. There is, as yet, no domestic precedent, unless you regard the Competition
25 Commission type of investigation as a kind of precedent.

26 MR. THOMPSON: If I may just touch on the third point, which is that I do not think we are very
27 enthusiastic about paying for Professor Yarrow’s labours, and we would like it make it clear
28 what the basis on which he would be undertaking this extra work.

29 THE PRESIDENT: It has not so far been suggested that he should be remunerated. I do not know
30 that we have got so far as thinking about that.

31 MR. THOMPSON: I am grateful. I think those are the points that I wanted to make.

32 THE PRESIDENT: Yes. What should we be saying about expert evidence in relation to Albion and,
33 in a moment, Aquavitae? The Director’s evidence is expected on 20th March. What is going to
34 happen then, in your submission?

1 MR. THOMPSON: I think that may be something that it would be better for Mr. O'Reilly to
2 address, in that I think Aquavita, as was indicated at the last hearing, are more ready and able
3 to instruct an expert than we are.

4 THE PRESIDENT: Yes. Yes, Mr. O'Reilly?

5 MR. O'REILLY: Sir, we have identified some suitable candidates. Now that it is clear that the
6 Director is not going to give disclosure as we had expected we can get on an appoint someone.
7 We anticipate having a report by Easter, which is earlier than the date that was originally
8 envisaged, which was the 24th.

9 THE PRESIDENT: Just let me remind myself of when Easter is.

10 MR. O'REILLY: Easter Sunday is on 16th April, so if we can say some date, such as the 13th, which
11 is Maundy Thursday, so that it is delivered to the Tribunal and other parties before Easter.

12 THE PRESIDENT: That is on the basis that your envisaged expert will have had a chance to see the
13 Director's expert report and will be effectively seeking to answer it?

14 MR. O'REILLY: Indeed, and we have had no indication that there is going to be any delay on the
15 Director's part.

16 The reason we are volunteering to come early is simply because we think this matter
17 needs to be heard early.

18 THE PRESIDENT: Absolutely, it does, yes.

19 MR. O'REILLY: In respect of Professor Yarrow, quite clearly the Tribunal needs to have all the
20 material that it can lay its hands on legitimately. We, too, have concerns. We know that there
21 is a situation in America whereby people can give officious evidence, but we have got some
22 concerns about it, both in terms of whether or not there is going to be a "free for all", and also
23 in terms of whether or not those who come forward with completely officious evidence may
24 have some axe to grind. Certainly no aspersion is being cast on Professor Yarrow whatsoever,
25 but the Tribunal will have to invent a test for those who are eligible and those who are
26 ineligible, and it seems to me that we may have an entire case management conference trying
27 to devise that test and hearing submissions on it. What we do not want to have happen is for
28 the hearing to go over the summer and into the autumn.

29 THE PRESIDENT: I do not think there is any risk of that, Mr. O'Reilly, or I hope not anyway.

30 MR. O'REILLY: Thank you.

31 THE PRESIDENT: What about the disclosure issue? I think Mr. Thompson is pursuing an
32 application for disclosure at the moment – is that right?

33 MR. THOMPSON: I am not sure if it comes to that. It appears that the Director has been operating
34 on one ----

1 THE PRESIDENT: You mean we have already ordered it, so ----

2 MR. THOMPSON: As we understood it, he had agreed to provide it but he seems to have decided to
3 do something different. We would have thought that public officer in that position, once it was
4 clarified what he was supposed to be doing, would do it.

5 THE PRESIDENT: Yes, I am sorry, Mr. O'Reilly.

6 MR. O'REILLY: If I could simply refer you to your order number 9 made at the last case
7 management conference, we propose to say no more about it other than we find it quite
8 discreditable conduct. We simply move on. We need to get this matter heard. So we are not
9 pursuing an order for inspection of the documents.

10 THE PRESIDENT: Thank you. Yes, Mr. Anderson? I think, if I may say so to begin with, there
11 may have been some misunderstanding about what it was that we were driving at on the last
12 occasion. What we were trying to make clear was that in the contested Decision which this
13 case is all about – and one forgets that it is a Decision that is under challenge – there is a
14 reference to the NERA report produced for Northumbrian Water, but there was not any
15 reference to any further materials. What was in Professor Pickering's mind particularly, but
16 also in the minds of the Tribunal as a whole, was, what is it that the Director had in mind when
17 he decided that this was an appropriate pricing approach for the purposes of the Chapter 2
18 Prohibition. That is evidenced by what documents there were in the Director's possession
19 bearing on that issue at the time. If there were not any documents and he was simply going on
20 the NERA report that is one thing, but if he had independently applied his mind to the issues
21 and documents had, as a result, been generated that was another thing, and that would be
22 highly material. Although up to a point one can rely on expert evidence, you can come along
23 later and say that, from an expert's point of view, this is fine, or whatever. What we are really
24 interested in is why the Director did it, what he thought he was trying to achieve when he did
25 do it.

26 MR. ANDERSON: I understand that, sir. If I can explain why we have taken the approach we have
27 taken.

28 THE PRESIDENT: I think our intention was to include documents like the documents in this expert
29 group that had apparently been considering these issues as part, as it were, of the "*travaux*
30 *preparatoire*", if you will forgive the expression, that led to the apparent adoption of this
31 policy from the Director's point of view.

32 MR. ANDERSON: It becomes more complicated than that because of the context of the creation of
33 the new water regime under the Water Act 2003 and the costs principle. The position, if I may
34 explain, is this: what we disclosed was third party material that was on the files relating to the

1 Shotton Decision. Those third party materials we have disclosed to the parties, to the Tribunal,
2 and we have made them available to our expert. Those documents appear on the files because,
3 to the extent that any member of the team that led to the taking of this Decision had considered
4 those materials, they are placed on the file and those materials have been made available.

5 THE PRESIDENT: These various articles and – forgive me the name temporarily escapes me, is it
6 Mr. Bland’s letter were on some files relating to this case?

7 MR. ANDERSON: Yes. Those were documents read in the context of the process giving rise or
8 leading up to this Decision. The Consultative Common Carriage Working Group, the advisory
9 panel referred to, was a panel set up back in the early part of 2000. It was a sounding board,
10 comprised in part staff from Ofwat and in part the great and the good, which led up to the
11 issuing or the publication of MD163. MD163, we would submit, speaks for itself. That is a
12 position set out in that document. That is available. How that document came to be made in
13 2000 we would say is not going to be of material assistance to this Tribunal.

14 You say, sir, that what you are trying to get at is why the Director came to the view
15 that he came to in the Decision that ECPR was an appropriate methodology to apply in this
16 case. By the time he came to take that Decision in 2004 ECPR was an established
17 methodology. It had found its way enshrined in legislation in the costs principle. Its
18 application in this case is not complex. The Director took the second bulk supply price and he
19 deducted the resource cost. The Tribunal has raised in the interim Decision a number of
20 concerns about the applicability or the appropriateness of that approach in the context of the
21 water industry at the time of the Decision. That, we would submit, is a matter on which the
22 Tribunal will want expert opinion as to its appropriateness and will receive submissions from
23 the parties. It is a test, if I may say so, that should be approached objectively by the Tribunal.
24 Is the application of ECPR appropriate or not in the context of this case? That the Tribunal
25 should determine on the basis of the submissions and materials placed before it.

26 Whether, in the context of generating MD163, certain people may have expressed one
27 view or another, whether even Ofwat itself may have taken different views on over time, is
28 neither here nor there. ECPR was applied and it is either an appropriate methodology or it is
29 not. We would submit that trawling through all the files in Ofwat, which will be an onerous
30 task, is unlikely to be of great assistance to the Tribunal. We have disclosed the material, as
31 I say, that is on the files that is relevant to the taking of this Decision. We have not disclosed
32 the wealth of material that may well have been received by Ofwat and considered by Ofwat in
33 the context of the technical advisory groups on the costs principle, but if one applied a blanket
34 ECPR search, if you like, to the whole of Ofwat’s files, one would come across a huge amount

1 of material. In so far as there was material, as opposed to internal deliberations – material –
2 that material is the material that we have disclosed and has been made available to our expert
3 and has been disclosed to the other parties so that they can make that available to their expert.
4 We have not disclosed to our expert, because we do not believe it will assist him in his
5 deliberations on whether ECPR is appropriate or not, the internal workings of this sounding
6 board group set up in 2000 for a specific purpose back then, some three years before this
7 Decision. That is why we would submit that what we have disclosed is entirely in accordance
8 with your order – i.e. the materials in so far as there were any on which this Decision in this
9 case was based – and we have made that material available to our expert and to the other
10 parties. We would not see that the deliberations of this advisory panel, as I say part of which
11 was made up of Ofwat personnel, will be of any assistance to the Tribunal in what the Tribunal
12 has to grapple with this case.

13 What the Tribunal is grappling with is whether the application of the ECPR
14 methodology entrenches monopoly rents, entrenches inefficiencies, or acts as a barrier to
15 efficient entry, issues like that, those are issues that will stand and fall to be determined
16 objectively by the Tribunal on the material placed before the Tribunal, and indeed any other
17 material that may be before the Tribunal – and that I can come on to, the question of who
18 should be invited. With respect, the internal deliberations of Ofwat, or the workings of this
19 advisory panel, which are the only other matters that have been identified in this
20 correspondence, we would submit will not assist.

21 Clearly, if Ofwat had on its files facts and figures that demonstrated a particular effect
22 from the application of ECPR then one could see a case for relevance. What we are really
23 talking about is simply opinions expressed by people over time – whether it is water
24 undertakers or others in the context of the costs principle, technical advisory groups or the
25 views of individuals on this consultative committee back in 2001, they will only be opinions,
26 opinions which may or may not still be held today, opinions which may or may not have been
27 accepted, but it will not, we would submit, really assist the Tribunal in what the Tribunal is
28 trying now to do in relation to ECPR in this case.

29 THE PRESIDENT: Let us park the working group thing for a moment, because I do not think we
30 knew about the working group when we made the order. Let me just go back to what I think
31 we originally had in mind. We originally had in mind the possibility that there would have
32 been at some point an internal deliberation within Ofwat that led to a view that it was
33 appropriate to adopt an ECPR pricing mechanism for common carriage. Such a view might,
34 for example, be found in some paper that went to the Director or, had it been a board, would

1 have gone to the board, which would have said, or might have said, “There are these
2 advantages, there are these disadvantages, we think the advantages outweigh the
3 disadvantages”, or, “There are a whole range of advantages”, or whatever, that would have
4 helped us understand why it is the Director went for what he did other than what was in the
5 paper from NERA. If there is nothing, or you are not going to disclose anything, we will just
6 assume that there is not anything.

7 MR. ANDERSON: Let me say two things, if I may, in response to that: firstly, if there was a
8 misunderstanding, and I apologise for that, what I thought you had in mind was any third party
9 material on which the Decision may have been based that we would make available to our
10 expert and thereby give our expert an unfair advantage over any other expert, and that I hope
11 I have dealt with. We have disclosed that material.

12 So far as internal deliberations or submissions, for example, to the decision-maker in
13 this case, the function of the Tribunal in this particular case is not a judicial review function.
14 You are not deciding whether no reasonable Director could have taken this Decision, or
15 whether he took into account irrelevant considerations, you are asking yourself objectively
16 whether the application of ECPR in this case is appropriate or not. For that purpose it is not
17 necessary for the Tribunal to have sight of, or for the other parties to make submissions on, the
18 internal deliberations of Ofwat, which is effectively what, sir, you are asking me whether we
19 intend to disclose ----

20 THE PRESIDENT: What I am trying to get at, Mr. Anderson, is whether it is really your position
21 that Ofwat’s justification for having gone down this route is not what Ofwat thought at the
22 time, but what its expert now says is the justification. That is a somewhat surprising position.

23 It is quite a surprising position that a Regulator wanted to rely on expert evidence in
24 the first place instead of his own judgment as to what is right and what is wrong for this
25 industry.

26 MR. ANDERSON: Sir, we are perfectly prepared to put in a witness statement from the appropriate
27 officer within Ofwat explaining why it is they came to the decision they came to. That we can
28 do. We are just slightly concerned about a wide ranging request for disclosure into what was
29 described in Albion’s letter, lifted from a paper that Mr. Hope submitted in 2001, about the
30 debate within Ofwat. If what you are interested in, sir, is why it is that Ofwat reached the
31 decision it reached in this Decision about the applicability of ECPR, we will put in a witness
32 statement explaining that.

33 THE PRESIDENT: Any witness statement would need to go back to the documents that were
34 around at the time so you might just as well disclose the documents.

1 MR. ANDERSON: We have effectively disclosed the third party documents. What there is in terms
2 of internal deliberations we would say is not going to assist the Tribunal. As I say, the real
3 question for the Tribunal is whether the application of ECPR has this potentially adverse effect
4 that has been identified in the concerns that you, the Tribunal, have set out in your Interim
5 Judgment. That question does not turn on why the Director did or did not choose to adopt it in
6 this case. As I say, it was an accepted methodology, it was another way of approaching access
7 pricing. It was a way that was enshrined in the costs principle, it was about to become the
8 norm. There is a great deal of debate within the industry, and had been for a number of years,
9 about the appropriateness or otherwise of the ECPR and how it should be applied. That is
10 what these technical advisory groups were engaged in. That was contemporaneous with
11 consideration of this complaint.

12 We can go back and look again in the light of what you have said, sir.

13 THE PRESIDENT: Just a moment, Mr. Anderson. (The Tribunal conferred for a short time)

14 MR. ANDERSON: If it assists the Tribunal, I have been instructed that we could prepare a witness
15 statement that sets through the evolution of the Director's thinking on the applicability of
16 ECPR by references to a number of statements have been made by the Director over time,
17 MD163, the final guidance on the Common Carriage Access Code, the Decision, and so on,
18 and in the minutes of the technical advisory groups, from which we believe it would then
19 become apparent that the Director adopted this as an approach in this case and considered it to
20 be appropriate.

21 PROFESSOR PICKERING: Mr. Anderson, I am sure that that would be very helpful. Can I just to
22 clarify in my mind: the Director's position is that MD163 when it was published was a
23 statement of the position that Ofwat had reached in relation to ECPR – is that right?

24 MR. ANDERSON: May I take instructions as I do not want to say anything on the record that may
25 be wrong.

26 THE PRESIDENT: We will not hold you to off-the-cuff remarks, Mr. Anderson, I promise you.

27 MR. ANDERSON: I am told that is correct. It reflected certainly our thinking at the time, but our
28 thinking has advanced.

29 PROFESSOR PICKERING: Thank you. The next step to which you referred, Mr. Anderson, in
30 your earlier comment this afternoon was, as you put it – my interpretation of you rather than
31 my acceptance – is that the costs principle is viewed by the Director as the embodiment in
32 legislative terms of ECPR?

33 MR. ANDERSON: There will no doubt be some qualification as to my putting it quite as blankly as
34 that, but essentially that is what I said, yes.

1 PROFESSOR PICKERING: Which is not necessarily something that everybody would accept, and
2 indeed in the Decision it looks to me, just looking at it quickly again, that the Decision is
3 written fairly carefully in terms of whether the two are to be treated as identical or similar, or
4 offering a similar sort of approach. There is there a point about an assumed linkage which
5 perhaps would actually need to be discussed and left open for testing. Could we accept that?

6 MR. ANDERSON: I have no doubt the Decision was drafted carefully and no doubt far more
7 carefully than the words I have just expressed. I see what you are saying and one could no
8 doubt look at the minutes of the advisory groups, from which the nuances may become
9 apparent.

10 PROFESSOR PICKERING: Then having that legislation, although, if I remember rightly, not
11 actually in force, or the relevant part not in force at the time of the Decision on this case in
12 May 2004, you have disclosed to us 11 or 12 papers of varying lengths, and of varying
13 relevance, may I say having read them all, to this particular case and to the water industry in
14 general. Although you have commented that there has been a lot of discussion about the
15 application of ECPR in the water industry – I am open to correction on this – I do not think
16 I have read a single paper that actually addresses the application of ECPR to the water
17 industry. So these considerations have not got into the public domain, and there are other
18 utilities that tend to be the focus of ECPR type discussions.

19 MR. ANDERSON: I think the only paper that was water industry specific were the NERA reports,
20 which we referred to in the Decision.

21 PROFESSOR PICKERING: That was not one of that block of disclosures, in fact, because we had
22 that earlier.

23 MR. ANDERSON: You have already got that, yes.

24 PROFESSOR PICKERING: I would offer the comment that I think anybody looking at those papers
25 that you have disclosed would come to the conclusion that the papers tended to be talking
26 about ECPR in a theoretical framework. A number of them, but not all, liked the nature of the
27 analytical reasoning, but they all tended to emphasise significant caveats about the application
28 of ECPR in general terms.

29 Given that, I have to say I am a little surprised that, as you have disclosed those
30 papers, there is no reference to any of those papers in the Decision, and that you have not
31 actually shown any internal discussion related to this Decision which actually drew upon and,
32 if necessary, refuted the implications and the considerable doubts cast by the papers that you
33 have chosen to disclose on the applicability of ECPR in general, let alone, in terms of applying
34 those concerns to the situation of the water industry and the situation faced by Dŵr Cymru in

1 the water industry. So there seems to me to be a gap in this logical sequence, and it may be
2 that the witness statement that you have offered will actually give us that linkage.

3 MR. ANDERSON: It will. Thank you. That was the purpose of suggesting it. I can see entirely,
4 Professor, the concerns because the position has evolved over time. It may be that there was
5 not a great deal of third party material on which the deliberations took place.

6 THE PRESIDENT: Let us accept your offer of a witness statement along the lines you have
7 indicated, Mr. Anderson.

8 MR. ANDERSON: Can I move on to the experts?

9 THE PRESIDENT: Yes, of course.

10 MR. ANDERSON: We are on course to provide our expert evidence by 20th March. It is going to
11 take the form of an independent academic expert and there will then be supplemented a
12 submission by Ofwat relating it specifically to the water industry.

13 So far as Professor Yarrow is concerned, we must disclose that we approached
14 Professor Yarrow.

15 THE PRESIDENT: Right. That we did not know.

16 MR. ANDERSON: We did not know about Professor Yarrow's involvement until yesterday
17 evening.

18 THE PRESIDENT: No, quite.

19 MR. ANDERSON: We approached Professor Yarrow. There was discussion with him with a view
20 to identifying what the Tribunal may be interested in in terms of ECPR. We provided him
21 with a copy of the Decision, a copy of the Interim Judgment and the NERA reports. We have
22 not instructed him. We have instructed another expert. The matter stayed there.

23 THE PRESIDENT: I see. That is certainly relevant information, Mr. Anderson, for which I am
24 grateful.

25 MR. ANDERSON: Yes, I was well aware as soon as I saw the fax from you yesterday that it was
26 relevant evidence.

27 THE PRESIDENT: Yes, thank you.

28 MR. ANDERSON: We have no objection in principle to Professor Yarrow submitting an opinion, a
29 view, to the Tribunal if he so wishes. Like Mr. Thompson, we have no wish to pay him to do
30 so. We do see the advantage to the Tribunal of having, if you like, as many independent
31 academic views as are reasonably available or possible for the Tribunal, because we recognise,
32 as the Tribunal does, that it is an important point of principle and the Tribunal should be, and
33 no doubt will be, approaching this issue objectively on the basis of whatever material can be
34 available. We do have some reservations about throwing the court open to all and sundry. We

1 are a little concerned about that. We see from Professor Yarrow's CV that he clearly has
2 relevant expertise having advised in this area in terms of the gas industry, the electricity
3 industry, the railways, the postal – kinds of industries where ECPR issues that arise in this case
4 may have relevant analogies. So we would see him as having relevant expertise, independent,
5 undoubtedly well qualified and we have no objection to the Tribunal taking up his offer.

6 THE PRESIDENT: Notwithstanding your earlier conversation with him?

7 MR. ANDERSON: No, notwithstanding our earlier conversation. We would clearly envisage
8 reserving our position in terms of what to make of whatever he put in, whether that is putting it
9 to our expert or calling him, but, as I say, that is our position in relation to Professor Yarrow.

10 THE PRESIDENT: Yes, thank you very much, Mr. Anderson. Mr. Robertson, do you have a view
11 on any of this?

12 MR. ROBERTSON: Only to say in relation to Professor Yarrow that we support what Mr. Anderson
13 has just said.

14 THE PRESIDENT: I do not know if you have a view, Mr. Randolph?

15 MR. RANDOLPH: I always have a view! My view is somewhat challenged, one might say, by
16 virtue of the fact that those instructing me have not actually seen the fax that was sent out.
17 I assume that it was sent to the United Utilities as well as to everybody else.

18 THE PRESIDENT: It certainly should have been. Whether it was or has got through to you I do not
19 know.

20 MR. RANDOLPH: It has been snowing quite a lot in the North and it is quite a long way and so
21 those people sitting with me were not in the office this morning and therefore they may not
22 have received it. I would not like to make any submissions with regard to the procedures of
23 this Tribunal with regard to accepting this type of evidence, save to say one does not want a
24 plethora of evidence.

25 THE PRESIDENT: Open season, yes.

26 MR. RANDOLPH: Exactly. The only other point that Mr. Anderson raised, and I think it is
27 important, and as I am an Intervener supporting his case I would like to emphasise the point he
28 made, is with regard to the job of the Tribunal. As you, sir, said, we are looking at the
29 Decision here and looking to see whether that was right or wrong effectively. We are looking
30 to see the appropriateness of the Director's approach to using ECPR in this particular instance.
31 To do that that is an objective task, it seems to me.

32 What, with respect, Professor Pickering seems to be asking my learned friend
33 Mr. Anderson about seemed to merge towards, or move towards, the subjective intent.
34 Certainly if you look at it in an analogous position, shall we say, when civil courts look at, say,

1 construing contracts, implied terms, we are all very well aware of what the courts over the
2 years have said about the dangers of looking at subjective intent, what might have happened,
3 what individual parties said prior to, say, the making of a contract – the well known line of
4 authority, *Prenn v. Simmonds* and following. That may well be something that the Tribunal
5 should bear in mind as well because if you are looking objectively at what Ofwat should, or
6 what the Director should or should not have done with regard to ECPR, what might have been
7 said earlier on internally really does not inform that Decision, in my submission, for the very
8 reasons that are set out in what I what I would submit to be the analogous case law relating to
9 construction and implication of terms. It is extremely wide ranging and it does not really
10 answer the question that you are looking for, and that is, “Was it appropriate objectively?”
11 “Was it appropriate objectively?” is a question that can be answered on the basis, hopefully, of
12 the information that has been provided and will be provided by the Director. Looking
13 internally at discussions is moving on.

14 THE PRESIDENT: What we are trying to get at is not anything that people in a working group
15 round a table may themselves have thought, what we are trying to get at is why the Director
16 went down this route.

17 MR. RANDOLPH: Indeed.

18 THE PRESIDENT: You may well come along with an expert later on and say, “This was a very
19 good route to go down for the following expert reasons”, but there is a prior stage, as it were,
20 to that, which is why the Regulator took the view he did, and that is up to him to explain to us.

21 MR. RANDOLPH: Indeed, subjectively.

22 THE PRESIDENT: We are seeking to see whether there is going to be an explanation forthcoming,
23 because up to now any giving of any such explanation as been resisted as far as I can make out.

24 MR. RANDOLPH: I am sure there will be. Thank you, sir.

25 THE PRESIDENT: (After a pause while the Tribunal conferred) Mr. Anderson, as a matter of
26 practicality in relation to this witness statement, would it be utterly unreasonable of us to ask
27 whether that could be served at the same time as your expert evidence?

28 MR. ANDERSON: I think we would ask for until the end of the month frankly. There is actually
29 quite a lot of material.

30 THE PRESIDENT: We can all imagine what it has been like and is like getting all these things
31 together. We are not unaware of that.

32 MR. ANDERSON: That would, of course, meet in terms of timetable with the production of the
33 material that Albion are producing in terms of your ongoing timetable.

34 THE PRESIDENT: Let us provisionally say ----

1 MR. ANDERSON: As I say, we do not believe that that particular witness statement is going to
2 impact upon the ability of experts to express a view.

3 THE PRESIDENT: I can see an advantage in allowing those two streams to flow separately and just
4 allowing your expert evidence to be produced, as such, and the witness statement will follow
5 on later. There is going to be no inter-relationship between these two exercises, as
6 I understand it.

7 MR. ANDERSON: There should not be, sir.

8 THE PRESIDENT: That seems fine. I think, as far as Professor Yarrow is concerned, the Tribunal
9 has had the helpful submissions from the parties on that and I think we will simply reflect on
10 the situation and communicate a view in due course when we have decided what we are going
11 to do about it. Obviously we will communicate it to you sooner rather than later, but we need
12 to think about it.

13 MR. ANDERSON: Yes.

14 THE PRESIDENT: That I think probably takes us to the question of timing of a hearing. Are there
15 other matters that anyone would like to raise before we get to the question of timing?

16 MR. THOMPSON: We are all keen to press on, but I am slightly concerned that with this new
17 development we would be getting a further statement on ECPR at the end of March. I and
18 Mr. O'Flaherty are away in the week before Easter, and I am just wondering whether it is
19 actually going to be possible to commit to an expert report for Maundy Thursday if we are still
20 getting evidence on 31st March. That only gives, I think, four working days. I think perhaps
21 the week after Easter might be a better bet for the service of our expert evidence.

22 THE PRESIDENT: Just a moment, Mr. Thompson. (The Tribunal conferred) I think,
23 Mr. Thompson, the way we are looking at it at the moment is that your expert or Aquavita's
24 expert, or whoever's expert it is, is going to respond to the Director's expert. He need not
25 worry about responding also to the witness statement within the same time-frame. If he wants
26 to respond to the witness statement, if it is necessary to respond to the witness statement, then
27 he can deal with that at a later moment and can have a bit more time to do it. Is that not a
28 reasonable way to go on?

29 MR. THOMPSON: Just to clarify, as I understand it, Professor Pickering raised it, there is now,
30 I think, 11, effectively a somewhat random selection of third party documents which happen to
31 have been read by Ofwat officials during the course of this case and therefore were placed on
32 the file. That is, as I understand it, the only evidence that Ofwat proposes to put to their expert,
33 whereas this internal material which feeds into the witness statement may emerge only on
34 31st March for all the experts. To my way of thinking that is a somewhat unsatisfactory

1 position because it seems to me possible that some of this material will be of general interest
2 and which the experts would want to take into account. I am not entirely clear that this is
3 going to work terribly well. That is partly because I do not understand exactly what it is that
4 has been holding Ofwat up and what is now going to suddenly be possible. My more general
5 concern is that if, as seems to me possible, there is something relevant in what appears on
6 31st March, I am away from 7th April, so we will only have four working days to deal with it
7 and then be expected to produce an expert report the following week just before Easter. That is
8 my concern, whether or not it might not be possible simply to extend that timetable one week
9 to enable us to have that working time, if necessary, going up to, I think, 21st April. It is not a
10 very large issue.

11 MR. ANDERSON: If I may just add, I do not want to get into a debate on timetable, that is entirely
12 a matter for you and Mr. Thompson, but could I just clarify, so that it is quite clear, what
13 I envisage, and what we envisage, by this witness statement. It is going to be a factual
14 description of why the Director ended up in the position he ended up in when he took the
15 decision of applying ECPR by reference to the particular published statements that have been
16 made at various stages throughout. It is not going to be a debate on the merits of ECPR, which
17 is what, as I understood it, the expert evidence was to be directed to. I believe
18 Mr. Thompson's concerns about that witness statement having a bearing on his expert's ability
19 to respond to our expert are without foundation.

20 THE PRESIDENT: It is a rather loose way of putting it, but I was not, myself, expecting any
21 particular surprises or new material in this envisaged witness statement.

22 MR. ANDERSON: None, as far as I can see.

23 THE PRESIDENT: Let us go back over this. Is this going to be a useful exercise at all, I am
24 wondering? We know what the position was up until at least MD163, which I think from
25 memory said, "There are three ways of doing it and we are not going to say that any of them is
26 ruled out under the 1998 Act". Then we have a comment in the Decision to the effect that
27 there is this report from NERA and some may think that this approach may lead to higher
28 prices for entrants, or words to that effect, "but it is an alternative approach and we are going to
29 apply it here". That is what it comes down to.

30 MR. ANDERSON: In essence, that is the position I was attempting to make to you, that it is not
31 actually going to inform your decision on the issue on ECPR to know the process by which the
32 Director ended up applying it in this case, also for the reasons that Mr. Randolph explained. It
33 is an objective test, but given the interest the Tribunal has expressed in why the Director took
34 the view he took we will produce what we hope will be an utterly uncontroversial statement

1 explaining the evolution of the thinking by reference to public statements and distinctions that
2 may or may not have been drawn as between the costs principle and ECPR. It should not be
3 controversial. It will not be disclosing new information.

4 THE PRESIDENT: (After a pause while the Tribunal conferred) Yes?

5 MR. ANDERSON: The only further that I should make is that, of course, in the course of that
6 evolutionary thinking it may well be that the expert instructed by Mr. Thompson may wish to
7 disagree with any particular, if you like, change in emphasis that may have occurred in Ofwat.
8 Therefore, there may conceivably be points that he might wish to raise at some stage, but again
9 that could be dealt with by way a supplementary letter from him without him needing to delay
10 his consideration of these essential economic and conceptual issues. As I say, as far as
11 timetable is concerned, it is entirely a matter for you.

12 THE PRESIDENT: I think the answer, Mr. Anderson, is we will leave you with your timetable for
13 31st March on the basis of the kind of statement that you have been discussing, and we will
14 allow Albion and Aquavitae another week to put in the expert evidence. That will take us to
15 the 23rd, is that right?

16 MR. THOMPSON: Friday is the 21st, I believe. I think there is a provisional date of the 24th, which
17 has already been suggested in the order, for a further possible case management conference.
18 I am not sure whether that is still live, but the date of the 24th appears in the order.

19 THE PRESIDENT: Let us park that for a minute because that may be a bit tight on the timetable we
20 are now envisaging, because we will need to have a bit of time to read what has come in and
21 we cannot necessarily do that over the week-end of the 22nd/23rd.

22 We need now to look at some hearing dates, I think. It is, I would have thought,
23 highly desirably to get this case on in May, if we possibly can.

24 MR. THOMPSON: Yes, I think we are all agreed about that.

25 THE PRESIDENT: There are several questions. What is the shape of the hearing going to be – in
26 other words, how, in particular, are we going to handle Mr. Jones's evidence and the expert
27 evidence, how long are we going to need and how are we going to try to focus it beforehand so
28 that we concentrate on the things we really need to concentrate on?

29 To a certain extent, we are thinking aloud, Mr. Thompson, but I think on this kind of
30 timetable, what are we looking at? We are probably looking at the week beginning 22nd May.
31 Have you got your diaries and calendars to hand? The week beginning 15th May would leave
32 us with three weeks. That might be feasible. It would advance things by a week, which would
33 be useful. That is probably the choice at the moment, I think, between the 15th and the 22nd,
34 subject to colleagues' diaries, and so forth.

1 MR. THOMPSON: I think perhaps the easiest question is whether or not we need to have another
2 CMC before the main hearing. That was pencilled in for the 24th. I do not know whether the
3 Tribunal thinks it would be useful to have a case management conference, perhaps where it
4 indicates issues that it has a particular interest in.

5 THE PRESIDENT: I am sure it is likely that it will be useful, Mr. Thompson. I would have thought,
6 if the stuff is coming in on the 21st, the 24th is too early, but we might consider the 28th, for
7 example, or, say, 2nd. I imagine the May Bank Holiday is the 1st, I do not know, my calendar
8 does not show any holidays.

9 MR. THOMPSON: Tuesday, 2nd May, if one then worked forward from that to give some time for
10 submissions, that might suggest that 15th May would be too close but the week beginning the
11 22nd might be possible, if one was giving broadly two weeks for a first round of submissions
12 and a week in response, something of that kind.

13 THE PRESIDENT: It looks to me in practical terms – I am not sure I have got my mind round
14 skeleton arguments and matters of that sort at the moment – as if the 22nd is probably more
15 realistic as a start date than the 15th.

16 MR. THOMPSON: Yes, I think we originally made a time estimate of a day. I do not know whether
17 the Tribunal considers that to be realistic, or whether in fact it is going to be longer.

18 THE PRESIDENT: That, I think, depends on how we handle the expert evidence and the expert
19 evidence of Mr. Jones. You need to take a view on whether you are going to want to cross-
20 examine Mr. Jones. It is possible that we may have some questions for Mr. Jones, so it may be
21 that we have to build in a slot for Mr. Jones to help us in that respect. That is one aspect.

22 The second aspect is how we deal with the experts, assuming they are in
23 disagreement. In previous cases we have been somewhat cautious about the full-blown
24 approach of extensive cross-examination of experts through counsel and have preferred a more
25 structured discussion. That may or may not be appropriate in this case, but we would need to
26 allow at least a day for that if there was a significant difference between the parties.

27 MR. THOMPSON: Yes. I am not necessarily committing myself now in advance of all the
28 evidence having gone in, but I do not anticipate at the moment any lengthy cross-examination
29 of Mr. Jones. It appears to me more likely that the Tribunal will have some questions which it
30 may direct at either one of the parties arising from the conflicting evidence which will no
31 doubt go in on the facts, and that there will also be issues of principle in relation to ECPR
32 where no doubt we will wish to put together a positive case along lines which I suspect will not
33 be entirely unforeseeable. The Tribunal may wish to ask some questions on that. Whether or
34 not it will be useful to debate those issues with the experts, rather than using those experts as

1 background material for submission, I think, until one sees the expert reports, it is difficult to
2 tell. I am well aware that the Tribunal, and, in my submission, very practically and sensibly,
3 does not tend to derive enormous benefit from forensic cross-examination of a kind that may
4 be familiar to other Tribunals.

5 THE PRESIDENT: It is a bit hard to put a precise bracket on it at the moment, is it not?

6 MR. THOMPSON: It is.

7 THE PRESIDENT: We may have to revisit this when the stuff is in, but I would have thought,
8 subject to my colleagues' views, that we are not going to allocate more than a week at the
9 outside, but it is probably more than a day. That is the bracket that we have got at the moment.
10 We have got five parties. I know we have already covered a lot of ground in the Interim
11 Judgment and so forth and there is a lot we can take as read, as it were, but my feeling is that it
12 is not a one day case. It is more likely to be a three/four day case.

13 MR. THOMPSON: I think that both the factual side of it and the ECPR side of it will take at least a
14 day, each of those aspects, which suggests that it will be a minimum of two days and is more
15 likely to expand than contract. I would think that is a reasonable approach.

16 THE PRESIDENT: I would have thought we are looking at something like three days with another
17 day in reserve for eventualities. What do you think, Mr. Thompson?

18 MR. THOMPSON: I do not dissent from that. I would hope that two to three days was realistic.

19 THE PRESIDENT: Obviously we do not want to expend costs more than we need to.

20 What we are doing is looking at a provisional listing for the hearing for 22nd May with
21 a provisional time estimate of plus or minus three days, with a provisional case management
22 conference on Tuesday, 2nd May.

23 MR. THOMPSON: Yes. We have quite a number of counsel and solicitors here. I do not know
24 whether we should have some sort of break to confirm exactly availability.

25 THE PRESIDENT: Let us see whether the discussion so far creates major difficulties or whether it
26 is useful to have a break or what. Mr. Anderson, have you been following our line of thought?

27 MR. ANDERSON: I have been following it closely. I certainly agree that this is not a one day case.
28 We would agree that, as things stand today, it looks like it is a three to four day case.

29 THE PRESIDENT: Yes.

30 MR. ANDERSON: It is also a case that, in our submission, is clearly going to benefit from a round
31 of written submissions before the hearing. Whether one calls them skeleton arguments or
32 written submissions, you made it clear when you handed down the Interim Judgment that you
33 had, in that Interim Judgment, decided nothing and that everything was open.

34 THE PRESIDENT: Yes, absolutely.

1 MR. ANDERSON: And there were quite a lot of issues on which Ofwat would wish to make written
2 representations augmented by oral submissions. We suspect the 22nd May is rather tight, given
3 that the expert evidence, and so forth, will only have been completed by the 21st, and to fit in
4 meaningful rounds of written submissions that narrow the issues and focus the hearing all
5 within the space of a month, including enabling the Tribunal to digest those written
6 submissions, to then have the hearing as early as the 22nd is, in our view, optimistic. We would
7 suggest perhaps a couple of weeks after that in order to ensure that everything is ready for a
8 hearing that fully addresses everything that the Tribunal wishes to be addressed on to enable it
9 to reach a final decision in this case.

10 So we would, for the sake of a couple of weeks, err on the side of caution to ensure
11 that the parties have adequate time to prepare both their written and oral submissions so that
12 the Tribunal is then able to hear from the parties in a focused and structured way, with
13 probably a CMC at some point in that timetable.

14 That is our position. It is not that the 22nd presents any particular clash in diaries as
15 far as I can see, it is just that we think that is optimistic.

16 THE PRESIDENT: Let us try and look at that in practical terms. Assuming the last phase of the
17 expert evidence is in by 21st April, and bearing in mind from the Director's point of view that
18 once the Director's expert and supplementary statement is in there is then time to start thinking
19 about whatever it is that you want to say, which gives you more or less the month of April.
20 The broad lines of battle are fairly well drawn already, although no doubt new nuances will
21 appear as time goes on. It would perhaps be reasonable to expect Albion – because, as the
22 Claimant, they probably still go first, do they not, Mr. Anderson, I would have thought – to put
23 in its written submission by when, Mr. Thompson? The options I think are the 5th and the 12th,
24 but you are going to say that it is going to be the 12th, I think.

25 MR. THOMPSON: I think it probably depends whether the Tribunal thinks a CMC on the 2nd,
26 where it may indicate the areas that are of particular interest to it, if that were to be the case
27 then I would think that we would seek at least ten days to deal with such points. If that were
28 the approach then the Friday of the following week would be the 12th. It might be tight for us
29 to deal with it before then.

30 THE PRESIDENT: Though we have the practice of indicating things that are of interest to us, it is
31 still your case and you still have to make the case that you are making.

32 MR. THOMPSON: Indeed, and I suspect that if, as Mr. Anderson indicates, he is intending to
33 launch a broadside against some parts of the Interim Judgment, we may have something to say

1 in response to any of those points, because that is obviously quite fundamental and I think we
2 must be entitled to have some opportunity to respond to such a case.

3 THE PRESIDENT: Let us see if we can press Mr. Anderson on that a little bit. Broadside against
4 the Interim Judgment, Mr. Anderson?

5 MR. ANDERSON: I would not for a moment suggest we are going to launch a broadside against it!

6 THE PRESIDENT: I am only teasing!

7 MR. ANDERSON: There are of course points!

8 THE PRESIDENT: There are certain salvos nonetheless that might be fired!

9 MR. ANDERSON: There are points we would wish to make, yes. We would not in the
10 circumstances, given the existence of the Interim Judgment, necessarily be confining ourselves
11 to responding to points that Mr. Thompson may make in his written submissions. We
12 therefore do recognise that it would no doubt be appropriate for Mr. Thompson to have an
13 opportunity to consider and respond to whatever we put in in writing, whether it is categorised
14 as a broadside or otherwise, before the hearing. That is why, on this sort of timetable, we see
15 the 22nd as being rather optimistic, because that would only give effectively seven days
16 between receipt of Mr. Thompson's written submissions and the start of the hearing.

17 THE PRESIDENT: You have presumably, reading between the lines, already got things that you
18 want to say, or feel that you might want to say. Why can we not use the time in some way that
19 enables you to say them sooner rather than later, as it were? It is helpful to us to get as much
20 material as we can as early as possible.

21 MR. ANDERSON: I see that, but in a sense on the main areas there is a relationship between ECPR
22 and, for example, margin squeeze which cannot really be addressed until we know what the
23 expert evidence before the Tribunal is and how to address it.

24 THE PRESIDENT: That is true.

25 MR. ANDERSON: On matters such as stand-alone costs and the costs of potable and non-potable
26 distributions, that is in a sense still a moving feast. So whilst we certainly have views that are,
27 in a sense, fairly stand-alone in terms of how they are likely to be affected by what will happen
28 – I am thinking, for example, on averaging and de-averaging in the context of the stand-alone
29 costs, where we have a position, but we do not think it is going to be the best way to present
30 our case to dribble out little bits of what we want to say in stages. We would prefer to put in a
31 coherent submission addressing the issues in the context of the interim judgment, in the context
32 of the evidence, including the expert evidence, and in the context of Albion's submissions. We
33 believe that would be the best way of presenting our case and the way in which would be of
34 most assistance to the Tribunal. Certainly work can progress during that time, we would be a

1 little hesitant to volunteer to let you have parts of what we want to say at stages throughout this
2 process. We would still, I think, be looking at at least 14 days after submission of
3 Mr. Thompson's written submissions for the submission of our written submissions, albeit
4 work will have been done before that.

5 THE PRESIDENT: That would imply that, if Albion put in its written submissions on 12th May, you
6 will reply with your submissions on the 26th – is that right?

7 MR. ANDERSON: Yes, it is.

8 THE PRESIDENT: Which means that I do not think we could conveniently start the hearing before
9 5th June.

10 MR. ANDERSON: That is what I said, I thought perhaps another couple of week beyond the 22nd
11 would be more realistic in the circumstances.

12 THE PRESIDENT: Which is a little later than I think the Tribunal would want to start the hearing,
13 because we are quite anxious to get this case on. It is today only 2nd March, so we have got the
14 whole of March, the whole of April and the whole of May, and it would seem a bit surprising if
15 we need another three months before we can get on to the hearing.

16 MR. ANDERSON: I understand that, sir, but of course a number of very important issues are raised
17 by your Interim Judgment.

18 THE PRESIDENT: No, I am not under-estimating it, I am just trying to balance everybody's
19 interests and arrive at some workable compromise. Shall we see if others have got any input
20 on this. Mr. O'Reilly, I was just going to ask you whether you have any input on the timetable
21 issue?

22 MR. O'REILLY: Perhaps I can just consult for one moment?

23 THE PRESIDENT: Is it useful for us to rise for a few minutes?

24 MR. O'REILLY: I will only be 30 seconds, sir.

25 MR. THOMPSON: (After a pause) Sir, there is one point which is troubling me. The scope of this
26 witness statement has, to some extent, grown and shrunk, and it seems to be in a shrinking
27 stage. I cannot, at the moment, see any reason why the Director needs nearly a month to refer
28 to a number of published documents in relation to ECPR. If he would produce that on the
29 20th in parallel with his expert report the whole timetable could be put back on track and we
30 could re-commit to putting our expert report in before Easter. At the moment I cannot really
31 understand what it is that is going to take a month if all it is is rehearsing a number of
32 published documents in a form that Mr. Anderson does not think will help very much. If we
33 could do that, then we could put the whole timetable forward probably two weeks.

1 THE PRESIDENT: That would put your evidence in by the 14th, which would what, enable you to
2 serve your submissions for the hearing by, say, 28th?

3 MR. THOMPSON: We could possibly have a CMC on either the 21st or the 24th. We could then
4 deal with points that the Tribunal may wish to raise with at least a week to address them.

5 I must confess, it would also be helpful – I do not know if Mr. Anderson is going to
6 say this is unacceptable – if there are points that he wishes to raise about the correctness of the
7 Interim Judgment, I cannot, myself, see why he cannot say what they are, ideally as soon as
8 possible. I cannot see why he should not do that before Easter myself and then we could
9 define the scope of the hearing more effectively. Obviously, if he has got a large number of
10 salvos that will affect the timetable for the hearing and we will have to think about them. If, in
11 effect, it is a mini-appeal against the Interim Judgment I cannot see anything unjust in him
12 saying what the points are that he does not accept. I do not see why he has to wait for the
13 expert reports or the factual issues, which, as it were, are premised on the Interim Judgment,
14 before he tells us which parts of it he does not accept. On the face of it, it would be a complete
15 waste of time for us to put in submissions and then two weeks later discover for the first time
16 that there are fundamental points that he wishes to raise which he is raising perhaps only a
17 week before the hearing.

18 THE PRESIDENT: Yes.

19 MR. THOMPSON: That rather puts the ball back in Mr. Anderson's court, but on the face of it
20 I cannot see any injustice in doing that. He is, after all, very much better resourced than we are
21 on this side of the room.

22 MR. ANDERSON: In terms of the witness statement, I am instructed that we could possibly manage
23 27th March. That is bringing it back to the beginning of that week rather than the end of that
24 week. It is not just a question, of course, of rehearsing published statements. We are going
25 through the files to explain the development of the thinking within Ofwat which may involve a
26 degree of consultation. What we said was that we were not proposing to burden the Tribunal
27 or disclose anything other than the various public statements which will be the goal-posts or
28 the marking-posts against which the witness statement will be prepared. As I say, we do not
29 see how in any substantive way that witness statement affects the ability of my learned friend's
30 expert to address our expert witness.

31 In relation to my learned friend's second point, of course we are not proposing to
32 launch a mini-appeal against the Interim Judgment. We are addressing the issues arising out of
33 the Interim Judgment in the light of what is being presented, as requested by the Tribunal, in
34 the course of the process that has evolved since the Interim Judgment. As I say, the Interim

1 Judgment, as you made quite clear, has decided nothing and everything left is open. We will
2 simply be identifying the points we wish to make in the context of the debate as it is evolving
3 through these case management conferences. That will appear in our written submissions.

4 THE PRESIDENT: I think one has got to cut this Gordian knot somewhat. Speaking for myself,
5 I am very hesitant to start the hearing of this case any later than 22nd May, frankly,
6 Mr. Anderson, because I think we must press on. Since we are only at 2nd March, it must be
7 doable one way or another. If you put this statement on 27th March – well, if you can put it in
8 on the 27th why can you not put it in on the 24th?

9 MR. ANDERSON: We work at week-ends, sir.

10 THE PRESIDENT: Today is the 2nd. The 24th is three weeks. I know there is a lot going on on your
11 patch at the moment, but nonetheless if this is simply a gathering up of things that are already
12 in the public domain ----

13 MR. ANDERSON: Sir, it is not simply a question of gathering up things that are already in the
14 public domain. They are already in the public domain and they can simply be listed and
15 served. What I had in mind was rather more than that.

16 THE PRESIDENT: If we were to say provisionally the 27th, can we still maintain Albion's date of
17 13th, Mr. Thompson – Maundy Thursday is the 13th?

18 MR. THOMPSON: (After a pause) I think it is consistent with our general self-portrayal as efficient
19 market entrants that we are going to make a radical proposal which we hope will be
20 satisfactory. I am actually away from the 6th, so what we are suggesting is that we may put in
21 our expert evidence on 7th April, but we would crave the indulgence of also putting in
22 Dr. Bryan's witness evidence on the same date, in that he is actually away in the previous
23 week. It seems to us that that would lead a way through, that we would put in our expert
24 evidence on 7th April, together with the evidence of Dr. Bryan. It will obviously be a bit of
25 rush for us but, in a sense, there is no great gain in the week before Easter for us.

26 THE PRESIDENT: That means that the expert evidence is due on the 13th March – is that right?

27 MR. ANDERSON: The 20th March.

28 THE PRESIDENT: The expert evidence on the 20th, the supplementary witness statement from the
29 Director on the 27th, Albion's evidence on 7th April. That enables us to hold – what was the
30 provisional date for the CMC, Mr. Thompson?

31 MR. THOMPSON: The 24th was the provisional date. We could even move that forward to the
32 21st, if that was ----

33 THE PRESIDENT: We can provisionally move that forward to Friday, 21st ----

1 MR. ROBERTSON: Sir, I happen to be away the week after Easter. I had worked on the basis that
2 we were going to have the CMC on the 24th. I am away on the 21st.

3 THE PRESIDENT: We will work the Friday to Monday rule in reverse and keep the 24th.

4 MR. ROBERTSON: I am grateful. Can I also mention that there may be the possibility of reply
5 evidence from Dŵr Cymru in response to Dr. Bryan's evidence. Presumably an application to
6 serve reply evidence can be considered at that CMC on the 24th?

7 THE PRESIDENT: There may be, but I think there will become a law of diminishing returns. We
8 can probably deal with it in a hearing one way or another.

9 MR. ROBERTSON: That is understood.

10 THE PRESIDENT: That would mean, I think, we could aim to start on 22nd. That would imply
11 Albion's submissions in on 5th May. Mr. Thompson, is that feasible? Albion no later than the
12 5th, and that leaves you, I think, Mr. Anderson, to make a bid for some date in the week
13 beginning the 15th – perhaps we could say the 15th itself.

14 MR. ANDERSON: Monday, the 15th?

15 THE PRESIDENT: Monday, the 15th.

16 MR. ANDERSON: My learned friend, Mr. Thompson, may feel able to make his submissions
17 earlier than 5th May, given that nothing will have happened other than the CMC between
18 7th April and 5th May, which is the submission of his own evidence. He ought to be able to
19 produce his written submissions on the basis of the last event, which is his own evidence, in
20 less than a month, I would have thought, subject of course to holiday commitments.

21 THE PRESIDENT: 2nd May, Mr. Thompson? I am sorry this is taking a bit of time, ladies and
22 gentlemen.

23 MR. THOMPSON: I am only looking at the way these things work out. There is a Bank Holiday, is
24 there not?

25 THE PRESIDENT: 3rd May.

26 MR. THOMPSON: The 3rd May I think would certainly be possible.

27 THE PRESIDENT: 3rd May for Albion.

28 MR. ANDERSON: My bid is 14 days, Wednesday, 17th May.

29 THE PRESIDENT: We have got it down to a three day range, Mr. Anderson, it is either the 15th,
30 16th or 17th.

31 MR. THOMPSON: I do not want to intervene unduly, but I would obviously make a bid that the
32 12th would be a better date. It would enable any final submissions in response in the week
33 before the hearing, but maybe that is pushing the Director too hard. In my submission, he
34 ought to know what his case is as well.

1 MR. ANDERSON: The reason I asked for a couple of days into that week is for personal reasons,
2 that I am in the Court of Appeal that previous week. So any time that the Tribunal were able to
3 grant us in to the week of 15th May would be very much appreciated.

4 THE PRESIDENT: I am inclined to say that we should got Wednesday, the 17th for the Director, but
5 I would be inclined to suggest to my colleagues that we might actually start the hearing on the
6 23rd instead of the 22nd, just to give that little bit extra time for everything to draw breath.

7 MR. ANDERSON: We would certainly support that suggestion, yes.

8 THE PRESIDENT: That would mean it is no more than four days because we have got to finish it
9 that week. (The Tribunal conferred for a short time)

10 Mr. Anderson, Professor Pickering points out that there is a Tribunal meeting on
11 Tuesday, 16th. Without changing the formal timetable, anything that is able to be got to the
12 Tribunal on the 16th will be read earlier, not with any lesser degree of attention but with a
13 proper degree of attention if it happens to arrive on that day rather than the following day.

14 MR. ANDERSON: Having reserved my position in terms of not wishing to split up our
15 submissions, if there are discrete matters – for example, ECPR – on which we can make our
16 submission earlier we will do our best. We are as keen as anyone that the Tribunal has an
17 opportunity to consider the material fully and then the best use can be made of the oral hearing.
18 We are grateful for that indication about the meeting of the Tribunal on the 16th.

19 THE PRESIDENT: In relation to the Interveners, Mr. Robertson, I am not sure how much we need
20 from the Interveners really.

21 MR. ROBERTSON: I think we need to consider the position. There is obviously the evidence of
22 Mr. Jones and any possible reply evidence, but if we are going to put in submissions then we
23 would suggest doing it at the same time as the Director.

24 THE PRESIDENT: Yes. Our impression is that there will not be a great deal of need for further
25 submissions.

26 MR. ROBERTSON: We will keep it targeted and we will bear that comment in mind.

27 THE PRESIDENT: I think the same may apply to your clients, Mr. Randolph.

28 MR. RANDOLPH: Possibly, sir. The only reason I say “possibly” is this: United Utilities has also
29 some concerns which it would like to bring before the Tribunal with regard to the Interim
30 Judgment which, as we have all agreed, does not set anything in stone. As the Director is
31 going to be dealing with some of the points, we would hope that some of the points that we
32 have are going to be dealt with by him. Therefore, we would ask for a slight delay after the
33 service of the Director’s submissions, otherwise one would simply be duplicating the work
34 done and obviously the costs incurred.

1 We did set out in our last skeleton argument of 15th January – it is not something
2 I have just dreamt up to try and get us an extra couple of days – in the last paragraph of our
3 skeleton argument we did make it clear that we did wish, or would wish, to make short
4 additional submissions on certain other points raised in the Interim Judgment. We carried on
5 and said, “The President made it clear” ----

6 THE PRESIDENT: Sorry, what date was that, that was the last CMC?

7 MR. RANDOLPH: It was the last CMC and it was our skeleton argument of 16th January.

8 THE PRESIDENT: If you already know what submissions you want to make there is no particular
9 reason why you should not make them now, I would not have thought. Not now, today, but
10 within the next period.

11 MR. RANDOLPH: Some of those submissions will be on, for example, the ECPR, and therefore the
12 same point applies as has been raised before, i.e. there is no point in raising them until we have
13 seen the expert evidence. Also, sir, if we were to put it in now, that is all very well, but it may
14 be dealt with by the Director and we would not need to incur the costs of going down that
15 particular path. It is not going to be anything major, it is just that my client does have certain
16 discrete issues that it would like to address arising out of the Interim Judgment. With a view to
17 proportionality and not excessive costs, it would seem sensible, we would submit, that we
18 should be able to take into account – after all, we are intervening in support of the Director –
19 what the Director says to order our submissions for the best possible assistance of the Tribunal.
20 It would not be long and I would not imagine it would take the Tribunal a great deal of time to
21 digest. Otherwise one risks duplicating issues which would, in our submission, of little
22 relevance.

23 THE PRESIDENT: There is some risk of duplication, but against that risk of duplication is the fact
24 that we do not particularly want to spend three months waiting for your concerns and then find
25 the concerns revealed two days before the hearing. I would have that probably the better
26 course is to try to elaborate what those concerns are now, if you wish to, so that everybody can
27 deal with them appropriately.

28 MR. RANDOLPH: I do think it would be appropriate, with respect, to elaborate that now, as in ----

29 THE PRESIDENT: You must know what you are.

30 MR. RANDOLPH: United Utilities have some concerns in regard to what has been said with regard
31 to, say, ECPR, with regard to, say, margin squeeze. These, it has been agreed, I think, are
32 general issues that cover the whole of, or could impact generally across the water industry.
33 United Utilities as a part of that industry would like to make short submissions on those issues.

1 To effectively limit us now, sir, to say, “You have got to set out your position”, would
2 put us in a less advantageous position, a very much less advantageous position, than, say, the
3 Director. He is being entitled to put forward some salvos – not a broadside, but some salvos –
4 or some points with regard to your Interim Judgment. We feel that, as Interveners, we should
5 be allowed to do the same, specifically given the fact that we raised this issue in January and
6 no one sought to say, “No, no, no, you cannot do that at all”.

7 THE PRESIDENT: It is not a question of you cannot do it, it is a question of how we best organise
8 how it is to be done.

9 MR. RANDOLPH: Absolutely, sir, and we certainly do not want to take anybody by surprise, and
10 I do not think we would be doing that. It may be that, in order to ensure that the timetable is
11 not disrupted, we file at the same time as the Director and simply do it on that basis, but to
12 make us file before the Director would seem to be wrong in principle, with respect.

13 THE PRESIDENT: My only concern is that you are implying that you have got things you want to
14 tell us and the sooner we know what it is you want to tell us the better. If you do not want to
15 tell us now, but want to wait, that is up to you. It is not very convenient from our point of
16 view.

17 MR. RANDOLPH: Sir, I hear what you say, but that applies with equal force to the Director. He
18 has got some concerns with regard to ----

19 THE PRESIDENT: He is the principal Respondent.

20 MR. RANDOLPH: Yes, sir, we are supporting him.

21 THE PRESIDENT: It all crowds in at the last moment on the Appellants and that is not entirely
22 satisfactory from anyone’s point of view.

23 MR. RANDOLPH: I would very much hope that our concerns mirror possibly the concerns of the
24 Director and may well be covered, so our input into this process would be minimal. We do
25 have concerns. We are interested party, we are a party of this industry, and it is quite clear that
26 issues such as margin squeeze, as set out in the Interim Judgment, and ECPR will impact, or
27 could impact, on the industry as a whole. To that extent, we feel that we are entitled to make
28 submissions, just as potentially officious evidence such as from Professor Yarrow may be
29 heard. So from that point of view, sir, we would submit that if the Tribunal is not of the view
30 that we should be allowed extra time to take into account what the Director says then we
31 should at least be entitled to file our submissions, as we were thinking, on the same date as the
32 Respondent.

33 THE PRESIDENT: Do you have a view on this, Mr. Thompson?

1 MR. THOMPSON: My general view is one of considerable concern that additional costs may be
2 occasioned in this hearing by lengthy submissions being made by Interveners effectively
3 duplicating points which the Director will certainly make on his own behalf. In so far as we
4 seem to be going down that route, that is obviously a matter in this particular case that is of
5 particularly acute concern.

6 Listening to Mr. Randolph and looking again at the diary, I am concerned that my
7 client is effectively being prejudiced by this timetable in that we are being expected to produce
8 our submissions on 3rd May, and then a fortnight is passing for the Director to make his
9 submissions in response, and then there will be, I think, three working days until the hearing
10 starts. Again, I think the position on costs and disparity of resources must be borne in mind.
11 That would bear very heavily on us.

12 Listening to Mr. Randolph I was, I am afraid, completely unpersuaded that there is
13 any reason why he should not say now what his case is and, as he correctly said, that equally
14 applies to the Director. At the moment I cannot see any reason why there should not be
15 exchange of submissions on 3rd May and then any submissions in response to made two weeks
16 later on 17th May. It seems to us that the Director should know what his case is and his
17 concerns, and equally Mr. Randolph and anybody else who is given leave to put in submissions
18 should also know the position.

19 THE PRESIDENT: So your submissions on the 3rd and everybody else's on the 17th?

20 MR. THOMPSON: I cannot at the moment see why we should not all put in our primary
21 submissions on the 3rd and any submissions in response on the 17th.

22 THE PRESIDENT: I see, yes. That is another alternative, is it not? I am sorry this debate is taking
23 some time, ladies and gentlemen, it is probably better to try and sort it out while we are all
24 here.

25 MR. RANDOLPH: Sir, just to respond briefly to Mr. Thompson's point, I am surprised he finds it
26 of concern now, especially given the fact that it was made absolutely clear what our position
27 was on 16th January.

28 THE PRESIDENT: No one is trying to stop you saying anything, Mr. Randolph, it is only when you
29 say it that is being debated.

30 MR. RANDOLPH: Yes. There was no point at that stage of saying, "Oh, well, it has all got to come
31 out now, you have got to tell us now exactly what your position is". From our perspective,
32 I do not think United Utilities would have a problem with setting out its submissions at a
33 potentially earlier stage, but I do not want that to prejudice the timetable for the Director.
34 After all, he is the main Respondent and we are a mere Intervener in support of his case. If it

1 means that the timetable is jeopardised from his point of view then it may be that we have to
2 re-think our position entirely, because of course it is his position that is of importance with
3 regard to us because we are supporting him. I do not want to do anything that undermines his
4 Defence to this Appeal. If that means us sitting down and not saying anything, well, so be it.

5 THE PRESIDENT: Yes, thank you. On this timetable that we are trying to work through, and not
6 without difficulty, the evidence is actually going to be complete on 7th April. So one would
7 have thought that there may be ways of getting in which the major written submissions can
8 come in at some point earlier than the 17th. I think Mr. Thompson's last suggestion,
9 Mr. Anderson, was that everybody should put in their submissions simultaneously at the
10 beginning of May and then allow a time that gives people time to respond before the hearing,
11 which would save a bit of time, would it not?

12 MR. ANDERSON: We do not think that will be, in fact, a productive way of addressing the issues
13 in a helpful way for the Tribunal at the oral hearing. We are content with the timetable that has
14 been set out. We believe that, given that our evidence will have been served, the most
15 important evidence, by 20th March and our supplementary witness statement, which we do not
16 think will give rise to any need to be addressed particularly, on the 27th, through to 3rd May,
17 that effectively gives Albion ample time to produce its evidence and submissions. If it can
18 produce its submissions earlier then no doubt we could produce our submissions earlier, but we
19 believe that the most effective way to respond to the Appellants' case as Respondents in the
20 light of the Interim Judgment is to put in our written submissions once we have had time to
21 consider Albion's written submissions. We do not believe that that timetable needs to be
22 derailed as a result of the submissions to be put in by the Interveners.

23 We could no doubt indicate to the Interveners some form of appropriate co-operation
24 to minimise the prospects of duplication, but, in our submission, we believe that, in order to
25 preserve the timetable, if preserving the timetable is a matter of paramount importance – and
26 I am bound to say that we, for our part, would not feel in the overall context adding on another
27 couple of weeks from 22nd May is actually that critical given that the Decision was taken on
28 24th May 2004 – for the sake of Albion to respond properly to anything that is put in by the
29 Director and the Interveners, a slightly later date than the 22nd May might be another way of
30 addressing these problems. That said, we would have thought the price of duplication is a
31 better price to pay than derailing the timetable.

32 THE PRESIDENT: (After a pause while the Tribunal conferred) I think the answer, Mr. Thompson,
33 to crowding in the period just before the hearing is actually to think about Mr. Anderson's
34 suggestion and put the hearing back and start the hearing on 30th May, but stick to the other

1 elements of the timetable – that is to say the Director and the Interveners by the 17th. That
2 should give everybody enough room for manoeuvre. We have lost a week but everybody can
3 be getting on with all sorts of things in the meantime. I think that is where we are. We will
4 saying that the hearing is on the 30th. Just to recap, that Albion’s evidence on the 7th, a
5 provisional CMC on the 24th, Albion’s submissions on the 3rd, Director and Interveners’
6 submissions on the 17th, and hearing commences on the 30th, the 29th being the May Bank
7 Holiday.

8 MR. O’REILLY: Sir, is Aquavitae is entitled to make submissions?

9 THE PRESIDENT: Of course it is, Mr. O’Reilly, I am sorry.

10 MR. O’REILLY: The same date as Albion?

11 THE PRESIDENT: The same date as Albion would be very convenient, yes, thank you very much.

12 I thought you were going to derail the whole operation for a moment there, but fortunately not!

13 Is there anything else that we need to discuss or any other applications that people
14 want to make?

15 MR. THOMPSON: Do I take it that if we wish to put in a short written response to the Director we
16 are entitled to do so, presumably during the extra week?

17 THE PRESIDENT: Yes, let us keep these types of things to a minimum, but let us be sensible. If it
18 is judged to be critical, in principle, yes.

19 MR. THOMPSON: We would aim to put in by, say, the 24th.

20 THE PRESIDENT: Yes. Thank you all very much.

21 (The hearing concluded at 5.03 pm)

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