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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1106/5/7/08

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

17 September 2009

Before:

LORD CARLILE OF BERRIEW Q.C.  
(Chairman)  
RICHARD PROSSER OBE  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

**ENRON COAL SERVICES LIMITED**  
**(in liquidation)**

Claimant

– v –

**ENGLISH WELSH & SCOTTISH RAILWAY LIMITED**

Defendant

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**HEARING – DAY TWO**

## **APPEARANCES**

Mr. Paul Lasok Q.C., Mr. Daniel Beard and Mr. Rob Williams (instructed by Orrick, Herrington & Sutcliffe (Europe) LLP) appeared for the Claimant.

Mr. Mark Brealey Q.C. and Ms Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

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1 THE CHAIRMAN: Good morning.

2 MR. BREALEY: Good morning, sir. May I call Mr. Crosland?

3 THE CHAIRMAN: Yes. So we need bundle D?

4 MR. BREALEY: We do, sir, we need bundle D, volume 2.

5 Mr. IAN MAXWELL CROSLAND, Sworn

6 Examined by Mr. BREALEY

7 Q Mr. Crosland, there is bundle D2 just about to be handed to you. Could you please go to the  
8 first tab, which is tab 19. You see there, I think, the first witness statement of Ian Maxwell  
9 Crosland.

10 A Yes.

11 Q Can you go to p.178. Is that your signature?

12 A It is, yes.

13 Q If you go right at the end of the bundle to p.486, there is a second witness statement, and if  
14 you then go to p.494, is that your signature?

15 A It is.

16 Q Are there any corrections that you would like to make in either of the statements?

17 A Yes, there's a couple of small details in the first one. Firstly, I am now retained by Welsh  
18 Power as a consultant rather than employed by them. My address has changed to 3  
19 Stainborough Fold, Hood Green, Barnsley. In the final paragraph the timing of the notice to  
20 terminate the contract was around the time Enron went into administration rather than  
21 liquidation, so October/November 2001.

22 Q Subject to those two amendments, can you confirm to the Tribunal that the evidence  
23 contained in your two statements are true to the best of your knowledge and belief?

24 A They are.

25 THE CHAIRMAN: Yes, Mr. Lasok?

26 Cross-examined by Mr. LASOK

27 Q Mr. Crosland, could you go to the beginning of your first witness statement, please, para.2.  
28 As I understand it, you were about two years with EME?

29 A That's correct.

30 Q Then three months with AEP working under Mr. Staley?

31 A Correct.

32 Q When you were with EME your position was Fuels Director?

33 A It was.

34 Q Was that the job's title?

1 A That was the job title.

2 Q And who did you report to?

3 A I reported to Nigel Petrie, who was head of Asset Management.

4 Q What was his position?

5 A Head of Asset Management.

6 Q And who did he report to?

7 A He reported to the European Vice-President.

8 Q And who was he?

9 A At the beginning it was a gentleman called Lyn Williams.

10 Q Was he in that position throughout the whole period?

11 A No, he was superseded by Danny Melitta and then by Willie Heller.

12 THE CHAIRMAN: Danny Melitta?

13 A Yes.

14 MR. LASOK: Can you spell his name?

15 A M E L I T T A.

16 MR. LASOK: We have got two types of pagination here. There is a printed page number at the  
17 bottom right which is the bundle page numbers. Could you turn to p.165, please. I want to  
18 ask you about, effectively, the first two sentences of para.10.

19 A Yes.

20 Q And also in that connection, can you turn to your second witness statement, para.20, p.491.  
21 Would you look at the second sentence of para.20.

22 A Yes.

23 Q When you say, "My superiors at Edison did not see the benefits of the Enron business  
24 model for Edison", over what period of time was that?

25 A Myself and my superiors didn't see the benefits of the Enron business model for Edison on  
26 an ongoing basis past the contracts that were entered into at the acquisition of the power  
27 stations.

28 Q So this occurred to your superiors after the 1999 contracts?

29 A The wish not to continue with end to end contracts preceded my employment with Edison.

30 Q So it goes back to, you do not quite know when, but it is some time before November 1999?

31 A Certainly, it was past the Edison business model to manage its own coal supply chain.

32 Q If you go back to para.10 of your first witness statement on p.165, you say in the second  
33 sentence:

1 “Accordingly, Edison’s initial arrangements for supplying coal ... took the form of  
2 ‘E2E’ contracts ...”

3 Am I right in thinking that what you are saying is that Edison entered into a E2E contract as  
4 a short term holding position while it put in place its own coal management expertise, and  
5 then it would move over to something else?

6 A Yes, that’s correct.

7 Q Over what period of time did they envisage that this short term arrangement would last?

8 A For the duration of the early confirms entered into with Enron.

9 Q I would suggest to you that this is inaccurate and that in fact your superiors did appreciate  
10 the value of E2E arrangements. I take it that you disagree with what I have just said?

11 A I disagree.

12 Q Could you turn to bundle G1 and go to p.97, please. This is an email from a Mr. John  
13 Pellegrini at Edison to Mr. Kearney, and it is dated 26<sup>th</sup> July 1999. If you look at the third  
14 paragraph beginning, “It is my understanding”, he sets out his understanding of the value of  
15 Enron for EME.

16 A Yes.

17 Q Then if you go to the first couple of sentences of the next paragraph, you may just want to  
18 read that because that appears to refer to the index that he is talking about. (After a pause)  
19 If you go to the next page could you read the penultimate paragraph, please?

20 A The one that starts, “I would suggest”?

21 Q That is correct.

22 A (After a pause) Yes.

23 Q Does that cause you to revise your evidence?

24 A No.

25 Q So Mr. Pellegrini was wrong?

26 A Yes.

27 Q About what?

28 A I think certainly for the fact that, or the concept that Enron could provide fuel at better value  
29 than Edison’s team could provide it itself.

30 Q But you are saying you disagree with Mr. Pellegrini?

31 A I do, yes.

32 Q That is not quite what I am getting at, because I am trying to get to grips with your assertion  
33 that nobody in EME believed that E2E deals were of value to EME?

1 A Well, I was interviewed by Mr. Pellegrini's boss, Lori Garrett, who was mentioned here on  
2 the circulation list, and it was made very clear to me at the time of the interview that Edison  
3 wished to manage its own coal supply chain.

4 Q That was when?

5 A That was in – I was interviewed between September and October 1999.

6 Q Did they give you a timescale over which they hoped to arrive at that end result?

7 A Yes, I was told that the Enron contracts had been put in place as a short term measure until  
8 such times as EME could establish its own coal management team.

9 Q And nothing more precise than that?

10 A The intent was very much that when the Enron contracts expired EME would take over co-  
11 procurement.

12 Q Have you seen Mr. Staley's second witness statement?

13 A I believe so.

14 Q If you go to D1 and go to his second statement which starts at 115.1.

15 THE CHAIRMAN: Flag 16A.?

16 A Sorry, could you repeat the page number please?

17 MR. LASOK: Well the page I would like you to look at is 115.14?

18 A Yes, I have the page.

19 Q Could you read para. 34, please?

20 A (After a pause) Yes.

21 Q He is disagreeing with you – what is your reaction?

22 A Well I am not surprised that Stuart Staley does disagree with me, because his belief was that  
23 the Enron business model was the panacea for all generators.

24 Q Paragraph 34, his recollection is that EME had people, and he mentions Mr. Heller, whom  
25 he describes as an "Enronophile"?

26 A I would certainly disagree with that. I have seen correspondence between Mr. Heller and I  
27 think Mr. McClellan would probably disagree with that to some extent.

28 THE CHAIRMAN: Keep your voice up slightly; you are talking to Mr. Lasok understandably,  
29 but we are on the other side.

30 MR. LASOK: Right, so you disagree with that?

31 A I disagree with that.

32 Q Just look at the email exchange to which Mr. Staley is referring, it is actually in that  
33 bundle, but it is also in G4 at p.1187. What I suggest is instead of getting G4 out just keep  
34 with that bundle and go to p.115.23, but for the Tribunal's note and in case it wishes to look

1 at the stuff in the G volumes, it is G4, p.1187. (To the witness) If you have 115.23, in the  
2 middle of it there is an email dated 8<sup>th</sup> March 2001, and the last paragraph of the email,  
3 which refers to discussions with EME, and more particularly Willie Heller. It says:

4 "Heller is Enronophile – no relationship issues at all. He was very complimentary  
5 about Stu's coal group."

6 "Stu" I think is a reference to Mr. Staley?

7 A Yes.

8 Q Are you suggesting that was a misreporting of the views within EME in 2001?

9 A I think to regard Mr. Heller as an Enronophile is somewhat of an exaggeration. I think at  
10 the time there was no reason for Mr. Heller to be unpleasant to Enron.

11 Q What I would suggest to you is at the time in 1999 the E2E deal was struck with Enron  
12 because it was the most advantageous deal to EME at the time. Would you agree or  
13 disagree with that?

14 A I would say it was struck because it was the most expedient deal available to EME at the  
15 time that enabled EME to have coal in the power stations immediately following the  
16 acquisition of those power stations from Powergen.

17 Q Could you look at bundle B1, please? B1 contains the decision of the Office of Rail  
18 Regulation and if you go to p.129, right at the top of the page there is a box and a heading  
19 "Edison Mission Energy" and the ORR finds as follows:

20 "In July 1999, on acquisition of fiddlers Ferry and Ferrybridge from E.ON (then  
21 Powergen) EME invited tenders for the supply of coal. It opted for a one year  
22 E2E deal with ECSL."

23 So what I would suggest to you is that it is clear that at that stage the E2E deal with ECSL  
24 was the most advantageous deal open to EME?

25 A I would still assert that it was the most expedient bearing in mind that Edison did not have  
26 an active coal team in the UK.

27 Q When you say "expedient" you really mean "advantageous" do you not?

28 A I think at the time there was an advantage to Edison entering an E2E agreement because it  
29 did not have the people in the UK to manage the coal supply chain.

30 Q If you turn to your first witness statement, and p.166, you say in para. 16 that shortly after  
31 you arrived at Edison it became clear that the existing contractual arrangements were  
32 unsuitable in a number of respects and it became a priority to try to amend those  
33 arrangements going forward. You say at the beginning of para. 17 that "Edison was  
34 committed to buying too much coal". When exactly was this, that this realisation dawned?

1 A It really became apparent around the end of 1999.

2 Q Can you explain why it was that EME signed new confirmations in December 1999?

3 A Because in December 1999 they still had a generation plan that was exceeding the likely  
4 generation for the following year.

5 Q I do not quite follow that because what you are saying here is that the existing contractual  
6 arrangements were unsuitable in a number of respects. The original arrangements -- Do you  
7 remember them? They covered the period up to, I think it was, May 2000?

8 A Yes.

9 Q Do you remember what the effect of the December 1999 confirmation was?

10 A I don't in detail.

11 Q Well, it is G1. If you could go to p.302. This is Fiddler's Ferry. If you look in the middle  
12 of the page it says 'Term'. "Vessels arriving June 1<sup>st</sup>, 2000 through May 31<sup>st</sup>, 2001." If you  
13 go to p.306 this is Ferrybridge. Again, in the middle of the page the term there is the same -  
14 "Vessels arriving June 1<sup>st</sup>, 2000 to May 31<sup>st</sup>, 2001". Why was it that an extension of that  
15 nature - one year - was agreed?

16 A I can't remember the details of why that was done.

17 Q You see, your evidence is that the idea was to get out of the E2E deal as soon as the coal  
18 procurement team were in place, but what we actually see is that the coal procurement team  
19 was put in place in November, and then immediately - more or less immediately - in  
20 December, the E2E agreement is extended for a period of twelve months. How is that  
21 consistent with the evidence that you have given that the idea was to have the E2E  
22 agreement for a short time only?

23 A My recollection of why this contract was entered into isn't clear. The discussions pertaining  
24 to this contract preceded my employment in November 1999. So, it may well be that there  
25 was some prior commitment.

26 Q Do you remember when you joined the EME in November?

27 A At the beginning of.

28 Q The beginning. You joined at the beginning of November. Presumably you familiarise  
29 yourself with what is going on. You see that there have been discussions about an  
30 extension of the E2E agreement for a period of twelve months until June 2001. You say,  
31 "Great! We will run with that one!" Is that what happened?

32 A My recollection of events around that are unclear as to that contract and the reason for it.



1 Q In paras. 17 to 18 of your witness statement you are talking about Edison's commitment to  
2 buying too much coal. In para. 11(b) on the previous page it says in the second sentence  
3 that the August contract with Enron was a framework agreement.

4 "-- the particular prices and volumes of coal were agreed in specific  
5 'confirmations'".

6 A Yes.

7 Q So, if we move forward again to paras. 17 to 18 it is right to say that the problems did not  
8 lie in the 1999 agreement with Enron because it was a framework agreement. The problems  
9 lay with the confirmations that had been agreed in September and then December.

10 A Yes.

11 Q If we move to the bottom of the page, the last line, you are talking in para. 19 about the  
12 over-supply. At the last line you say,

13 "Within a few months of my starting work at Edison it became clear that  
14 deliveries were greatly exceeding the power stations' capacity to handle the coal".

15 So, within a few months of your starting work. Can you tell us approximately when that  
16 was?

17 A It began around about the end of 1999/early 2000.

18 Q So, when you say 'within a few months' what you mean is 'within a few weeks'.

19 A It's two months.

20 Q Two months. So, you start at the beginning of November. It is only at the end of December  
21 that the realisation dawns that deliveries were exceeding capacity to handle.

22 A Yes.

23 Q I wonder whether you could go to G1 again. At p.197 is a handwritten note, dated 9<sup>th</sup>  
24 November, 1999. This is a note, I think, compiled by somebody in EWS, addressed to  
25 Nigel Jones. It says in the second paragraph,

26 "We have a situation at Fiddler's Ferry developing. Between them, Powergen and  
27 Enron have ordered 101 trains for next week".

28 Then there is a breakdown. After the breakdown it says,

29 "This week (commencing 7<sup>th</sup> November, there are 86 planned. It is evident that  
30 FF [which I think must be Fiddler's Ferry] cannot deal with 86 trains --"

31 If you go to the next page, p.198, and you look at the penultimate paragraph, we have,

32 "PG [Powergen] has an agreement with Edison by which Edison have to take  
33 these trains. Edison are now trawling through their contracts to check this. Mark  
34 Hayward is to call me in the morning".

1 The next line says,

2 "I am waiving [it must be 'wavering'] between the view that (1) Powergen are  
3 specifically getting at us, and (2) Powergen are really hacked off with Edison".

4 So, the problems had already started at least early in November.

5 A Is that a question?

6 Q Yes.

7 A There were delivery problems in November. We were taking the view that delivery  
8 problems were nothing to do with us because both Powergen and Enron were supplying  
9 under E2E contracts and their obligation was to get the coal into the power stations.

10 Q Could you turn to p.200, please? This is a letter from EWS addressed to you, dated 10<sup>th</sup>  
11 November, 1999. If you look at the penultimate paragraph, perhaps you could just read the  
12 second and third sentences? (After a pause) Your reply is on p.202, dated 10<sup>th</sup> November.  
13 Essentially you were washing your hands of the problem?

14 A Yes, we didn't take the view that it was our problem to get trains into the power stations  
15 under the terms of the contracts we had.

16 Q It was rather a negative attitude, was it not, because you had entered into these contracts,  
17 E2E contracts, with both Powergen and Enron. They were obliged to supply, so they had to  
18 make arrangements to put the trains in and you were being told that this meant that some  
19 co-ordination had to be done because of the capacity constraints at the power stations that  
20 you owned, and yet you were not proposing to do anything about it?

21 A We didn't have a contractual obligation to do anything about it.

22 Q These problems, I think, continued, did they not?

23 A They did.

24 Q And they produced complaints?

25 A From?

26 Q From Enron?

27 A They did, yes.

28 Q And the cause of all this lay in the bad calls made by EME in September and December  
29 1999 concerning the amounts that EME required to be delivered?

30 A Yes, I would agree with that.

31 Q Paragraph 20 – I am going back to your first witness statement, so I think you can put that  
32 bundle away – contains effectively the second reason why you say that the existing  
33 contractual arrangements with Enron were inappropriate or unsuitable. Paragraph 20 says:

34 "Second, Edison's contractual arrangements in 1999 were insufficiently flexible."

1 Was the cure for that not to have simply renegotiated within the framework of the E2E  
2 deal?

3 A That would certainly have been a short term fix and that was an avenue we explored.

4 Q Because most of these things are really a matter for negotiation, are they not? It is all  
5 commercial negotiation?

6 A Normally, yes.

7 Q There is nothing intrinsically wrong with an E2E arrangement?

8 A I would disagree with you on that. Edison came into the UK, I believe not fully  
9 understanding the coal market there, and came in with a situation whereby they intended to  
10 run power stations that had probably been operating on 25, 30 per cent capacity at high  
11 levels of generation. The net result of that and the similar tactics by other new generators  
12 meant that there was a significant over-supply of power into the UK market, which had a  
13 negative impact on prices and made it uneconomic to generate for the extended periods that  
14 Edison had anticipated. Consequently, its coal requirements were greatly reduced and  
15 because it had entered into long term E2E contracts it did not have the ability to flex the  
16 volume it was due to take in relation to time.

17 Q That has got nothing to do with the E2E nature of the arrangement, has it?

18 A It's a matter of communication. We had no communication with the rail haulier, we had no  
19 communication with the sea freight operator, and we would have no communication with  
20 the coal mine. It may be that by having direct communications we could solve things more  
21 simply than an E2E contract that relied on a number of other contracts backed off against it,  
22 such as the volume commitment to rail hauliers, the volume commitment to freight  
23 operators, the volume commitment to mine operators.

24 Q I think you deal with some of these things in the next paragraphs of your witness statement.  
25 Let us have a look at them. Paragraph 21:

26 "Third, the 1999 E2E arrangements meant that Edison had no direct contract with a  
27 coal haulier. This caused difficulties when the problems of over-supply to  
28 Fiddler's Ferry and Ferrybridge presented themselves."

29 So if you removed the over-supply problem you removed the need to have direct contact  
30 with the haulier – is that not so?

31 A The problem with the market as it developed with power generation was that it was almost  
32 impossible to predict what generation levels were going to be. So the problem with an E2E  
33 contract and indeed any long term contract is that it binds you to taking tonnes over time

1 which reduces the flexibility to adjust the coal shipments to match the power generated in  
2 power stations.

3 THE CHAIRMAN: Can you not have an E2E contract in which the purchaser determines the  
4 volume of coal from time to time?

5 A Essentially because, as I understand it, Enron's business was based on mark to market  
6 accounting, so any contract that they entered into had to be backed off against contracts  
7 with rail operators, sea freight operators, ports and producers, and it would be impossible to  
8 – I think it would be impossible to enter into back to back contracts with all those people  
9 with no volume commitment.

10 MR. LASOK: I think that is your speculation about Enron's business, is it not?

11 A It's my speculation – I think it was a general speculation.

12 Q In this para.21 you also say:

13 "It was frustrating that Edison was not able to speak directly to EWS about these  
14 problems."

15 That is not correct, is it?

16 A We eventually did speak directly to EWS about the problems. I believe EWS were  
17 requested in the early days not to talk to us, and we were requested not to talk to EWS, but  
18 we did go around the outside to speak to EWS to see what could be done to simplify things,  
19 because the train arrivals were causing us problems at the power station because we would  
20 be getting gaps when there were no trains, and we would be getting times when three trains  
21 arrived, and we needed to know – with a power station, if you can unload the train, take the  
22 coal straight to the boilers and burn it, that is a more efficient solution than having to take it  
23 out of stockpile and then reclaim it from stockpile and bring it back. So we were trying to  
24 get the coal supply so it was in a more efficient manner with trains arriving on time and as  
25 expected.

26 Q There was no problem with EME contacting EWS directly to discuss operational matters,  
27 were there?

28 A Ultimately, when the problems had become extreme, then I think it was recognised by all  
29 parties that there was probably some benefit in EME talking directly to EWS.

30 Q Ultimately – when?

31 A Well initially EWS were requested – I understand EWS were requested not to speak to us  
32 and we were requested not to speak to EWS because they were not our contractual party.

33 Q What was that about, was that about operational matters or about other matters?

34 A Generally.

1 Q Generally, not operational matters?  
2 A No, generally.  
3 Q And when was this?  
4 A I guess it would be probably pretty much from the beginning until early 2000, even maybe  
5 even late 1999 when the problems became apparent.  
6 Q Okay we may have to come back to that, let us move on to para. 22. You say in para. 22:  
7 “Dealing with an intermediary, as opposed to directly with a coal supplier ...  
8 proved to be unsatisfactory, inefficient and ineffective, as well as more expensive,  
9 both as regards coal *supply* and *haulage*.”  
10 Then you start off with the coal supply side, and you say:  
11 “If we wanted to delay a particular delivery of coal (or if a particular delivery was  
12 subject to delay ...), communications and negotiations took place via Enron,  
13 rather than directly with the supplier.”  
14 I do not quite follow why that is problematical in the context of an E2E arrangement. After  
15 all, surely, if you have entered into a purchase and sale agreement with a coal supplier for  
16 delivery by a certain point in time, are you not going to have difficulties with the supplier if  
17 you tell him that you do not want the coal?  
18 A Potentially, but there are things we could offer the supplier to defer coal.  
19 Q Offer them to the E2E supplier?  
20 A That relies on the E2E supplier being incentivised to carry that forward to the coal supplier  
21 and to the ship operator in the ports.  
22 Q And why should they not?  
23 A I do not know.  
24 Q It is all a matter of negotiation, is it not?  
25 A It depends if it was to their advantage or disadvantage.  
26 Q Now, the truth is, is it not, that Enron did seek to help EME out with these problems, such  
27 as by helping EME to resell coal?  
28 A It was certainly discussed, yes.  
29 Q It was discussed?  
30 A Yes.  
31 Q And they did not do anything for you?  
32 A Well we are talking sort of eight to ten years ago, I can’t remember whether we sold any to  
33 them or not.

1 Q Well could you turn to G2,p.523. Like all these email strings, the earlier one starts at the  
2 very end, it actually starts at the bottom of p.523, and it dates back to May 2000 – I am  
3 mentioning this by way of example because this is a situation in which you were asking  
4 Enron for assistance in relation to the resale of coal, and you see at the beginning of the  
5 reply email what Enron was doing for you and had done for you?

6 A Yes.

7 Q So they were co-operative, were they not?

8 A They were.

9 Q If we go to para. 23 of your witness statement, this deals with coal haulage problems, and  
10 you say that Edison had no control over the scheduling of trains into the power stations.  
11 Right at the bottom, the last two lines, you say:

12 “... although Edison was the infrastructure owner of the power stations, it did not  
13 have a direct contractual relationship with EWS as the rail haulier so could not  
14 provide directions to EWS as to which trains to deliver and when.”

15 - and you say it was Powergen and Enron who had the right to direct EWS about which  
16 trains to schedule and when. I would suggest to you that the problem you are referring to  
17 here was considered by EWS to be largely Edison’s fault, possibly also Powergen’s fault,  
18 EWS’s complaint was that Edison was not co-ordinating Powergen and Enron. At one  
19 point in time EWS suspected that you were manipulating the situation and for its part Enron  
20 was trying to resolve the problem, not getting any assistance from Edison, Enron was  
21 making helpful suggestions, but in turn you attributed the responsibility for the mess to  
22 EWS. Now, do you think that is a fair summary of the position?

23 A It was certainly Powergen and Enron who had the contractual relationship with EWS, and  
24 the obligation to deliver coal into site. There were issues with EWS as regards excessive  
25 cancellations, but that was something that was common to all UK generators at that period  
26 of time, because basically there was insufficient rolling stock available to carry all the coal  
27 that the UK generators were wanting to be carried.

28 Q Because what I have just said I have taken from some of the contemporaneous documents.  
29 I have already drawn your attention to the handwritten note in November 1999, and the  
30 correspondence between you and EWS, could you also look at G1, p.262. This is a file  
31 note, it appears to have been written by Mr. White of EWS on 25<sup>th</sup> November 1999, and he  
32 is talking about events at Fiddlers Ferry in the week commencing 28<sup>th</sup> November. He deals  
33 in the first bullets with what Enron and Powergen were ordering, and in the sixth bullet he  
34 says:

1 “EWS advised both Enron and Powergen on Wednesday morning that this could  
2 not be done. EWS asked both coal suppliers to reduce their orders; both refused.”

3 Then he says:

4 “EWS advised Edison Mission that for it to reduce the PowerGen order EWS  
5 needed a letter from Edison telling EWS in straight language that Edison would  
6 reject any such trains and EWS, therefore, should not plan them.”

7 A similar message was apparently given to Enron which advised that such a letter was on its  
8 way so EWS could commence planning Enron’s trains, and there is then a reference to the  
9 fact that you were consulting lawyers. Then if you go to the last bullet on that page we  
10 have,

11 “In conversation with Max Crosland, Max had made the (valid) point that if  
12 Powergen had not submitted an order then EWS was free to plan Enron’s trains.  
13 Max openly said he didn’t want the Powergen coal. Max’s view in this  
14 conversation (and in a subsequent conversation) was that Edison would turn away  
15 every train over and above 41. Max wanted EWS to plan each of Enron and  
16 Powergen trains pro rata”.

17 Then if you go to the next page, the second bullet point, that records the fact that Mr. White  
18 advised Powergen that unless an order was placed by twelve noon they would not plan any  
19 Powergen trains because Enron would take the paths.

20 If you go to the second bullet after that, which begins, “Because PG’s revised order --“ and  
21 go to the third line, he says,

22 “- any doubt about it on Wednesday was entirely down to Max Crosland leading  
23 everybody up the garden path”.

24 So, the complaint there is EWS effectively putting the blame on Edison’s failure to  
25 effectively co-ordinate its two suppliers.

26 THE CHAIRMAN: Do you want him to answer that proposition?

27 MR. LASOK: Yes. Were you leading people up the garden path?

28 A I wasn’t contractually able to lead anybody anywhere.

29 Q He is actually saying that part of the problem is attributable to doubts created in people’s  
30 minds by Edison and, more particularly, you.

31 A That may have been his opinion.

32 Q That was his opinion. If you go to G2, p.521, this is something which the Tribunal has  
33 already seen. Could you read very, very briefly through the e-mail please? (After a pause)

1 What he is saying here is that this is a situation again at Fiddler's Ferry -- We have now  
2 moved to April/May 2000. If you go to the fourth paragraph, he says,

3 "Edison refused point blank to tell their coal suppliers to reduce their orders".

4 Then in the next paragraph,

5 "I have told Max that I refuse to reduce our customers' orders".

6 So, what he is saying is that you had told him that you were not going to tell Powergen and  
7 Enron to slacken off their supplies, which they were providing pursuant to the contract. He  
8 has reverted and told you that he is not going to reduce his customers' orders because, of  
9 course, what is happening is that all this is following on from their commitment to supply to  
10 you. Then we have this bit in the penultimate paragraph where he suggests - and this he  
11 derived from a conversation with you - that you wanted EWS to favour Powergen over  
12 Enron. Was that the case?

13 A I think at that time, if we had to take any coal, Powergen would've been the preferred coal  
14 that we would've taken.

15 Q So, you were in a situation in which you had over-ordered the coal. It was a bad call in  
16 September, made even worse in December when you extended the period. What you were  
17 doing at this stage was manipulating, or trying to manipulate, the deliveries so that you  
18 would, as it were, play one supplier off against the other. Is that what you are saying?

19 A No, it's not what I'm saying. I'm saying that I expressed an opinion that if we had to take  
20 one sort of coal rather than the other, Powergen would be the coal that we would take.

21 Q Because?

22 A Because at that time Edison's power generation strategy had changed. It was accepted that  
23 it couldn't burn the amount of coal that it wanted to. Consequently it could burn coal of a  
24 higher sulphur level and so consequently more Powergen -- a higher proportion of  
25 Powergen coal could be burnt.

26 Q Because it was of a higher sulphur ----

27 A Because it was a higher sulphur content.

28 Q Thank you. What I suggested to you also was that Enron had been making constructive  
29 suggestions to try to resolve the problem. This may not be something that is within your  
30 knowledge. But, if you go to G2, p.324, just look at the e-mail on that page from Cornelia  
31 Luptowitsch of Enron to EWS. It sets out a proposal that Enron had put to EWS in January.  
32 Were you aware of these attempts by Enron to sort out the situation?

33 A I was aware that Enron were in discussions with EWS to try and resolve the situation.



1 Q If we go to p.508 in the same bundle -- We move now to April 2000. In this e-mail, if you  
2 look at more or less where the first hole punch is there is a sentence -- This is an e-mail to  
3 you from Stuart Staley.

4 "As per your request, we are willing to explore ways to reduce or delay deliveries  
5 to the plant as long as Enron does not incur any incremental costs".

6 Then he says at the beginning of the next paragraph,

7 "Given that rail deliveries to Ferrybridge are not subject to the same physical  
8 limitations as rail deliveries to Fiddler's Ferry, have you considered delivering  
9 LBT imports to Ferrybridge?"

10 Then he gives some reasons why that might be attractive. You reply at p.507. If you look  
11 at the numbered para. 1 of your reply, you say,

12 "The current stocking situation at FF has arisen as a result of the very high levels  
13 of deliveries ex-LBT (well in excess of our contract commitments) that we have  
14 accepted from you over the last few weeks in order to try and help alleviate your  
15 backlog at LBT. I also re-state our position that this backlog appears to be the  
16 direct result of EWS' inability to efficiently provide and schedule sufficient trains  
17 to meet and fulfil your delivery requirements."

18 Do you remember that incident?

19 A I do, yes. Yes.

20 Q And then if we go to 528, 528 is a letter from you to Mr. Bradley of Enron, and in the  
21 penultimate paragraph you say:

22 "I would add that at Fiddler's Ferry in particular, the matter appears to be  
23 exacerbated by your haulier, EWS, consistently failing to achieve deliveries as  
24 scheduled."

25 Do you remember EWS's poor performance at the time?

26 A Oh, yes, yes.

27 Q I think you can close that bundle up. If you move on in your witness statement to para.25  
28 on p.168, this is a paragraph in which you set out some of the disadvantages of contracting  
29 with an intermediary. When was the last time that you read your witness statement?

30 A Yesterday.

31 Q Is this fresh in your memory or would you like just a moment to read it through?

32 A It's fresh in my memory.

33 Q You say here that an intermediary does not have fiduciary duties and is, by definition,  
34 acting in its own interests. Is that not true also of a coal haulier like EWS?

1 A Yes, I guess it is.

2 Q And it is also true of a seller of coal?

3 A Yes.

4 Q Under any terms?

5 A Yes.

6 Q The whole things boils down to negotiation of the right terms, does it not?

7 A It does, yes, in regard to that.

8 Q Then in para.26 you say this:

9 "Dealing with an intermediary was also inefficient from Edison's perspective when

10 it made arrangements to sell coal it was contracted to accept to another customer."

11 Surely that must have been in, not quite an ideal world, but in the case of a generator

12 operating efficiently it must have been a rather exceptional situation?

13 A I think at that time the market was very unpredictable. For a power generator flexibility is

14 akin to location in the property market. It is the most fundamentally important factor. As

15 you want the opportunity to buy additional coal if you need it, you also need the opportunity

16 to sell surplus coal if you don't need it.

17 Q Look at the next sentence ----

18 THE CHAIRMAN: Before you move on to the next sentence, I am just trying to get the picture

19 of how things operate in a company which is not an E2E contract. Does a company like

20 that have a trading room, or something of that kind, in which ongoing trades are taking

21 place from day to day or hour to hour?

22 A No, not day to day or hour to hour. The normal practice is to enter into – certainly at that

23 period of time when the electricity market was quite volatile – short term, medium term and

24 spot contracts. You had a certain level of generation, effectively the absolute minimum you

25 thought you would do, that would be written.

26 Q So it is diary planning?

27 A It's diary planning and it's a stacking system, so ----

28 Q A spot contract is what?

29 A A spot contract is where you just buy one cargo of coal for ----

30 Q For now?

31 A For now. Short term is where you buy a couple of cargos over a couple of months period.

32 MR. LASOK: Thank you. If we look at the second and third sentences of para.26 you say:

33 "With a direct haulage contract, Edison could divert the coal from its stations

34 directly to the customer. With an intermediary in place, Edison had to negotiate

1 with the intermediary not to deliver the coal to Edison but directly to the other  
2 customer, which added a level of complexity and cost.”

3 Surely it is easier in that situation to be dealing with an intermediary because you can  
4 simply say to the intermediary, “Do not deliver the coal, deliver it directly to the other  
5 customer”, whereas with the direct haulage contract you appear to be faced with a situation  
6 in which you end up with the coal actually delivered to your station, it is sitting there taking  
7 up space, and then you have to make arrangements for somebody else to buy it and for it to  
8 be transported to that other customer?

9 A I would disagree with that because with an E2E contract that would be for coal haulage  
10 delivered to the power station. The point I was making was that if we wanted to divert coal  
11 to another power station, albeit that we wouldn't have a contractual right to do so with  
12 either party, we could have direct communications with the rail haulier rather than us  
13 having negotiations with the E2E supplier, and the E2E supplier then having to have  
14 negotiations with the rail haulier.

15 Q Let us have another look at this, what you are actually saying here is that it is advantageous  
16 to have a direct haulage contract because what you have got is a situation in which the coal  
17 is sitting at your power station and you do not need it. It is advantageous to have that  
18 situation and to be able to find a customer, sell it to that customer and then get arrangements  
19 put in place for the stuff to be carted away. You say that is more advantageous than a  
20 situation where you are dealing with an intermediary with a wide portfolio of customers  
21 with a number of – in the UK there was only one coal haulier at the time that we speak of,  
22 but it has got a wide portfolio of customers, it is necessarily the case that it has a better  
23 ability to switch supplies because it may be able to help you out by simply taking a delivery,  
24 or proposed delivery, and allocating it to another one of its customers; or, as we have seen  
25 from an earlier exchange of emails, it may help you out by reselling the coal. You can go to  
26 it directly, it has got the portfolio of customers, and it has got the haulage contract so it can  
27 sort it out. You are telling us that that is inefficient by comparison with a situation in which  
28 you have to have the coal stuck on your premises until such time as you find a customer to  
29 buy it and put in place haulage arrangements. Is that credible?

30 THE CHAIRMAN: Mr. Lasok, that was an epic question, without sounding critical, but I think  
31 you have got the generality. Answer whichever bit of it you feel you can.

32 A I'll try and give a shorter answer. I am not saying that the situation – Mr. Lasok refers to  
33 where we have coal at the power station and we want to sell it on. Although Edison did

1 look at that at some point, the solution I was referring to, the scenario I was referring to,  
2 was whereby we had inbound shipments of coal coming through the docks.

3 Q So you stop it before it gets to the power station?

4 A So we would stop it before it gets to the power station.

5 Q That is what I understood you to say, yes.

6 A If it gets to the power station you have already paid for that element of haulage.

7 MR. LASOK: But you also get into difficulties with the supply, do you not?

8 A With the supplier of the coal?

9 A Yes.

10 A Not if it's in the UK and we've taken delivery of it.

11 Q And you have paid for it?

12 A And we have paid for it.

13 Q And you are looking around for another customer?

14 A Correct. It would be in stockpile at the docks ready to ship out to whoever we could sell it  
15 to.

16 Q We are now going to come to a section in your evidence ----

17 THE CHAIRMAN: Forgive me for interrupting again, but I just want to be sure I understand  
18 you. What you are saying is that if you were dealing direct rather than through an E2E  
19 contract, you would have the capacity to prevent the haulier from bringing the coal from the  
20 docks?

21 A Yes.

22 Q He would therefore stockpile it at the docks, at whatever demurrage charges you have to  
23 pay - yes?

24 A Well it would be storage charges rather than demurrage.

25 Q And then you would endeavour to sell it, but it would generally not reach the power station  
26 and clog up the power station which is trying to operate a 'just in time' system. Is that a fair  
27 summary?

28 A It is, yes, we would have been endeavouring to sell it in those circumstances probably even  
29 before the ship was loaded at the load port.

30 THE CHAIRMAN: Yes, thank you.

31 MR. LASOK: Is the position really no different as between an E2E arrangement and a DIY  
32 option because you are still left with a situation in which you have bought coal and you  
33 have to find a buyer?

1 A But with an E2E contract we are contractually obliged to take delivery of that coal, and any  
2 variation to that relies on the E2E counterparty affording us that flexibility.

3 Q You have the same problem with a coal supplier who is dealing with you direct?

4 A We have the same problem, but over a much less period of time because we would have  
5 entered into, as we did following the renegotiation, a portfolio of contracts over different  
6 periods so that we were always adding to that and balancing the levels of coal that we had  
7 coming in with the demands of the station.

8 Q We will come to that in due course, but what we are looking at is the relative advantage of  
9 dealing directly with a coal haulier and, as I understand it what we are looking at is you  
10 have a situation in which you have over ordered and you want to resell. I have put to you  
11 the case that if you are dealing with an E2E operator like Enron which has a large portfolio  
12 of customers and which, as we have seen from the documents, is prepared to assist you in  
13 reselling, on the face of it that is a better, more efficient arrangement than one in which you  
14 are faced with paying storage costs for a period of time during which you, yourself, are  
15 going to search for a customer. Do you agree with that or not?

16 A No, I disagree with that, particularly at that time Enron did not have a huge portfolio of  
17 customers, I believe they were dealing with us and possibly just us in the UK at that time, I  
18 can't remember who else they were dealing with, and it just adds an additional layer of  
19 complexity if you are wanting to co-ordinate a number of events through an intermediary.

20 Q Now, we are coming to a section of the witness statement that deals with what you describe  
21 as the particular difficulties with Enron. What I am going to put to you is basically my  
22 interpretation based on the documents of what happened, to see whether or not you agree  
23 with it. My interpretation is this: at the end of 1999, November/December, running through  
24 into the early part of 2000 it was acknowledged that Edison had made a mistake because it  
25 had ordered too much coal. In addition to that there were problems with, for example,  
26 dealing with the deliveries at Fiddlers Ferry, and everybody was blaming everybody else.  
27 Enron had a positive commercial attitude to the situation and was prepared to try and help  
28 out; it was making positive suggestions about how to deal with the problems at Fiddlers  
29 Ferry, we have seen emails about that. It was happy to co-operate with Edison in order to  
30 resell surplus Edison coal; we have seen an email about that. The reality was that Edison  
31 wanted a commercial solution to the problem, and that could only be a renegotiation of  
32 effectively the September and December confirmations. That took place in the ordinary  
33 commercial way. But Edison never had an intention, never, ever, to go for an E2E or  
34 intermediary arrangement at all. Do you agree with that, or not?

1 MR. BREALEY: There are so many facts in that question and it is very, very difficult for the  
2 witness – it just went on for ever.

3 THE CHAIRMAN: I think the real question was the last part, which amounts to: Are you saying  
4 that Edison had excluded making an E2E contract in the future with Enron?

5 A I think you can never say “never”, but Edison had decided they wanted to manage their own  
6 coal supply contract and that included direct relationships with coal suppliers, coal hauliers,  
7 shipping people on occasions, and an E2E contract was not what Edison wanted.

8 MR. MATHER: Can I just ask at that point, when you say “Edison had decided” which level of  
9 management in Edison was that?

10 A Pretty much throughout Edison the European vice-president who was head of the London  
11 office wanted Edison to run its own coal supply chain, Nigel Petrie was between me and  
12 him had the same view. Derek Lumb, who took over from Nigel Petrie as asset manager,  
13 had the same view and Lori Garrett expressed that view in the interview I had with him in  
14 October 1999, so it was always my understanding and belief that Edison had a definite  
15 preference for managing their own coal supply chain.

16 Q So just going back to the confirmations in 1999, how come, if they had that view they  
17 extended something which seemed to be opposite to that view?

18 A I don’t know, I can’t remember the reasons for that.

19 Q How much autonomy did your team have? How often did you report? Could you decide  
20 those confirmations yourself, or would someone else decide them?

21 A No, they would be done as a result of a group decision including my superiors.

22 Q And were you ever overruled on a decision like that?

23 A I had only been in the job a couple of weeks at that time, and these discussions had predated  
24 my employment.

25 THE CHAIRMAN: We might take a very short break, just seven minutes or so.  
26 (Short break)

27 MR. LASOK: I think where we had left it before the short break was that you accepted that  
28 Edison had not closed its mind to a future E2E deal with Enron.

29 A I think what I actually said was that you can’t say ‘never’, but it was not something Edison  
30 wanted to do.

31 Q So, it was never the case that Edison invited Enron to bid on an intermediary basis.

32 Q For coal.

33 A We invited Enron to bid for spot contracts, for CIF deliveries, which are deliveries to the  
34 port.

1 Q Could you go to G3, please, at p.895? This is an internal Enron e-mail dating to August  
2 30<sup>th</sup>, 2000, referring to a request for an offer of a cape -- That would be a cape-sized vessel,  
3 would it?

4 A Yes.

5 Q -- preferably delivered stockpile Ferrybridge with an option for a further cape for January.  
6 If you go to G4 at p.905, if you read the first five lines you will see that that is Enron's  
7 response which, of course, goes to Mr. Alexander at Edison. It is an E2E deal delivered  
8 stockpile Ferrybridge.

9 A Yes.

10 Q So, it is right to say, is it not, that you were open to consider E2E deals throughout 2000?

11 A Yes, obviously so.

12 Q I think you can put that one away. If you go back to your witness statement at p.169, para.  
13 30, in the last sentence you say that Powergen offered you more flexibility than Enron did.  
14 Now, I would suggest to you that that shows that there was nothing intrinsically  
15 objectionable to E2E supplies or E2E arrangements because Powergen was an E2E supplier.  
16 It simply shows that everything turns on what is actually agreed in the course of  
17 negotiations.

18 A Yes. We never managed to agree the amount of flexibility we needed in negotiations with  
19 either party.

20 Q You did not try with Enron, did you?

21 A Well, I believe that is what we were trying to do when we went through the negotiation.

22 Q If you go to p.170 and look down at para. 38A, you are talking about the results of the re-  
23 negotiation. In the third to fourth lines you say that so far as the delivery at Liverpool bulk  
24 terminal is concerned - which I think related to Fiddler's Ferry - the result was 'no longer an  
25 E2E relationship'. It was, nonetheless, an intermediary relationship because Enron  
26 remained responsible for the sourcing of the coal and the transport to the Liverpool bulk  
27 terminal; is that not correct?

28 A That's correct.

29 Q I would like to turn to a different topic - that is, the question of the invitation to tender that  
30 was sent out by Edison in the summer of 2000. This is the one for coal haulage. That  
31 tender was also sent out to Enron, was it not?

32 A It was, yes.

33 Q If you go to p.172 -- What I am going to do is to ask you a couple of questions about the  
34 end of para. 41 - it is the last sentence of para. 41 - and a couple of other passages in the

1 witness statement. You see that in the last sentence of para. 41 you say that you really only  
2 asked Enron to submit a bid. Then you give three reasons. The first one is:

3 “-- in order to try to restore some kind of good relations between us, and [2]  
4 because I felt I should see what kind of proposal they would make in case it was  
5 too good to miss. [3] I was also concerned that ECSL might have sought to  
6 complain if they were aware of the tender and had not been asked to participate”.

7 Then, if you turn to para. 44, I would just ask you to look at the first two sentences. You  
8 refer to the fact that you asked Enron to put in a tender and you say,

9 “It was not a difficult decision to reject Enron’s bid, in view of the difficulties I  
10 have already summarised in this statement which did not make me well disposed  
11 to continuing our contractual relationship with them for haulage”.

12 The next passage I would ask you to look at is para. 45 where you refer to negative  
13 experiences with Enron in the past; the breakdown in the relationship. You felt that Enron  
14 did not understand the meaning of customer focus. You say,

15 “-- we really would not have wanted to contract with Enron at all, unless there had  
16 been no viable alternatives in the tender process”.

17 Just pausing there, we are looking at August 2000. Were there any viable alternatives in the  
18 tender process at that stage?

19 A EWS, obviously, because they were a rail haulage operator with equipment. Freightliner  
20 because they were a new haulage -- they are a haulage operator with the intent to come to  
21 the market with rail haulage equipment. But, at the end of the day there was only EWS who  
22 had the capability to carry out the work we required using their own equipment.

23 Q There were viable alternatives to Enron.

24 A Yes. Definitely.

25 Q Then, in para. 46, in the first sentence you say,

26 “-- in order to have had any chance at all of winning the tender, Enron would have  
27 had to have been offering us at the very least a great deal of flexibility, and no  
28 requirement to take minimum volumes”.

29 Finally, if you go to the next page, to (b) at the top,

30 “Enron’s rates were not sufficiently compelling to have made up for the other  
31 negative aspects of its bid”.

32 Then you refer to reasons why you did not wish to contract with Enron. At the end you say,



1 “It is difficult to put a price on it, but they would have had to have offered prices  
2 at least 50 pence cheaper per tonne than the rates EWS quoted for me even to have  
3 come to the negotiating table”.

4 I know that that is a lot of things that you are saying.

5 A Yes.

6 Q I want to ensure that we go through this in such a way that you understand exactly what I  
7 am putting to you. Are you not saying, in those passages, inconsistent things?

8 A I don't think so.

9 Q Why not?

10 A Because I don't they're inconsistent.

11 Q You are saying in para. 45 that you did not want to contract with Enron unless there were no  
12 viable alternatives. You have told us that there were viable alternatives. You say, for  
13 example, in para. 47(b) that the question was price. If Enron had offered rates that were  
14 sufficiently compelling, that would have made up for the negative aspects of this bid. Are  
15 those not inconsistent things?

16 A I don't think so. I think I said I didn't want to contract with Enron. I didn't say we  
17 wouldn't contract with Enron at all. Similarly, I had a responsibility to my employers that if  
18 there was a compellingly cheaper alternative for rail haulage, then we couldn't ignore it.

19 Q So, you took the view that you had a responsibility to your employers to canvass widely to  
20 see the best deal that you could get?

21 A Yes, the deal that represented the most value.

22 Q If we go back to para.41, there are three reasons that you give there in that last sentence for  
23 asking Enron to submit a bid. The first one is to try to restore some kind of good relations,  
24 and the third one is a concern that ECSL might have sought to complain. The real reason  
25 was a commercial reason?

26 A No, Enron weren't even a rail operator at the time the tender went out.

27 Q Then why did you ask them to put in a tender?

28 A For the reasons I gave out there, to improve the relations between us, to see what sort of a  
29 proposal they would make in any event, and to avoid the risk of any complaint for their non-  
30 participation.

31 MR. MATHER: Did Enron ask to be sent a tender?

32 A I can't remember the circumstances surrounding that. I know Enron announced their  
33 intentions to become a rail haulier with the arrangement with Freightliner. I imagine they  
34 must have expressed some interest in tendering.

1 Q Because you sent it out rather later than the others?  
2 A Yes.  
3 Q So something probably happened in between the process?  
4 A Yes, we would have discussed their entry into the rail market and the invitation to tender  
5 would have been as a result of that.  
6 MR. LASOK: Can I just get this clear: do you actually remember Enron asking you to send them  
7 the invitation to tender?  
8 A I can't remember the precise circumstances that led to Enron being sent the invitation to  
9 tender. As I say, it would have been as a result of some discussions with Enron following  
10 the announcement of their entry into the rail market.  
11 Q You do not remember them requesting it?  
12 A I don't remember whether they requested it or I offered.  
13 Q I think basically we have got to the point at which – sorry, perhaps I ought to retrace my  
14 steps. If you look again at the third reason at the end of para.41, a concern that ECSL might  
15 have sought to complain, if the business relationship with ECSL was over you would not  
16 have been concerned at all about ECSL complaining; and indeed if the business relationship  
17 was over, if you go back to the first reason, you would not have been interested in restoring  
18 good relations, would you?  
19 A The business relationship wasn't over in that Enron were a coal supplier and we did indeed  
20 ask them to participate in tenders from time to time. We had had a fairly acrimonious  
21 negotiation – renegotiation of the contracts, and we still had some time for those contracts  
22 to run. So we didn't want ongoing acrimony for the remainder of the contractual period.  
23 Q Could you look at G3, please, p.846. Have you got that?  
24 A Yes.  
25 Q If you start at 847, that is an email from Mr. Staley, and he suggests a meeting to put  
26 disagreements behind you. The heading of the email at the bottom of p.846 is "The End of  
27 the Tunnel", and then you reply about the middle of the page. Do you agree that you had  
28 reached a new era by the time you got to the sending of the invitation to tender for the coal  
29 haulage contracting or ----  
30 A The new era was the start of the renegotiated contracts where Enron effectively became a  
31 normal CIF coal supplier. We dealt with the ports and the rail haulage. I agree, obviously  
32 we had had a fairly acrimonious negotiation and I think, yes, Stuart and I were holding out  
33 the olive branch to each other to try and ensure improved relationships for the balance of the  
34 contract.

1 Q It was not simply that, of course, because we had seen the invitation to provide a tender for  
2 an E2E deal that was sent out at the end of August?

3 A Yes.

4 Q So it was a new era generally, was it not?

5 A The new era that is referred to in there is the revised contractual arrangements, and we'd put  
6 our past disagreements behind us and we were trying to work amicably.

7 Q This was also before the arrangement between Enron and Freightliner?

8 A Yes, it was, it was before it was announced.

9 Q In your email you refer to a "big picture"?

10 A Yes.

11 Q So it is a new relationship as a whole?

12 A I think it would have been fairly pointless if I had said, "We should put the past behind us,  
13 but it is unlikely we'll ever do any business again".

14 Q That would have been untrue, would it not?

15 A It would, and they were a potential counterparty, as were a number of other coal suppliers  
16 and traders. I would have written to any coal supplier in that sort of tenor.

17 Q I would like to turn to how Edison dealt with the Enron bid for the haulage contract. You  
18 deal with this largely in para.46 of your first witness statement. Could you go to para.46,  
19 and I think you can put away the bundle you have just been looking at. You say at the  
20 beginning of para.46:

21 "... in order to have had any chance at all of winning the tender, Enron would have  
22 had to have been offering us at the very least a great deal of flexibility, and no  
23 requirement to take minimum volumes. Its bid did not offer us either of those  
24 things."

25 Now, to begin with it is right to say, is it not, that the bidding process initiated by the  
26 sending out of the invitation to tender involved an iterative process. People would put in an  
27 opening bid and then that would be followed up by a response probing of the bid and so  
28 forth by Edison in order eventually to evaluate the bid, negotiate down and then reach a  
29 decision?

30 A Yes.

31 Q You say here that Enron's bid was insufficiently flexible because it required minimum  
32 volumes, but was it not the case that EWS also wanted minimum volumes?

33 A It was the case, in the first response.

34 Q Well even later, was it not?

1 A Yes.

2 Q And even after the deal had been effectively concluded in October there was an ongoing  
3 dispute between Edison and EWS about minimum volume requirements?

4 A There was.

5 Q So it was something that had to be negotiated away during the course of the process?

6 A Yes.

7 Q But at an earlier stage in the negotiations you did not have an objection to minimum  
8 volumes?

9 A We did not want minimum volumes.

10 Q Can you look at G3, please? Would you go to p.896? 896 is an internal email, internal to  
11 EWS, and it concerns a meeting with Edison that took place on 25<sup>th</sup> August. What I wanted  
12 to draw your attention to is the last paragraph, the one beginning: "MC understands", "MC"  
13 refers to yourself, and in the second line it says:

14 "He is prepared to accept a 'cap' on the Anglo/Scottish and also commit to  
15 minimum volumes on the flows which he believes are important to EWS".

16 Is that an accurate summary of a part of the discussion at the meeting on 25<sup>th</sup> August?

17 A It is quite likely to have been at that time.

18 Q So 25<sup>th</sup> August, you have no objection to minimum volumes, and then at a later stage you  
19 decide you do not want to go for minimum volumes, but the negotiation of that with EWS  
20 runs on until something like December, did it not?

21 A It did, yes.

22 Q December 2000. Now, if we go back to your witness statement, and para. 46b, you say that  
23 Enron had no rolling stock of its own. You knew that when you sent the invitation to tender  
24 to Enron?

25 A Correct.

26 Q So it cannot have been a factor that weighed with you?

27 A Well with the exception of EWS nobody we sent the tender to had rolling stock of their  
28 own, but it would have been a pretty one-sided tender if we had only asked one party to  
29 submit prices.

30 Q That is not quite accurate, because you were looking forward to the year 2001 and  
31 following, and so the question was whether people other than EWS would have had rolling  
32 stock as from that point in time, is that not so?

33 A It is, but the question is whether people by that time would have had sufficient rolling stock  
34 to do our business, and our view was that it was unlikely.

1 MR. MATHER: Had Freightliner filled you in on their plans to acquire rolling stock?  
2 A They had, yes, we had spoken to Freightliner on a number of occasions.  
3 MR. LASOK: Freightliner, of course, was one of the horses in the two horse race?  
4 A It was.  
5 Q And did you know at that stage that Enron had entered into an agreement with Freightliner?  
6 A Which particular point are you referring to?  
7 Q Oh, I am talking about the time at which you made the decision on Enron's tender?  
8 A Well the time we made the decision on Enron's tender we would have known that Enron  
9 and Freightliner had an agreement because that is why we asked them to tender.  
10 Q Yes. Now, if we look at these reasons, let us go on, 47a: "Enron had only bid for some  
11 volumes on some routes" – have you got 47a?  
12 A Yes.  
13 Q Enron was allowed to do that by the invitation to tender, was it not??  
14 A It was.  
15 Q So that was not an objection, and if we go to "b" we have: "Enron's rates were not  
16 sufficiently compelling", so let us have a look at these reasons. We have "Enron's bid was  
17 not sufficiently flexible" (46 a), "Enron had no rolling stock" (46 b)?  
18 A Yes.  
19 Q 47a is: "Enron had only bid for some volumes on some routes but not others", and the  
20 fourth was Enron's rates were not compelling?  
21 A Yes.  
22 Q Right, with those in mind can we look at G4 at p.999? (After a pause) Have you got p. 999?  
23 A Yes.  
24 Q Could you just tell us where in this document there is a reference to the fact that Enron's bid  
25 was not sufficiently flexible??  
26 A (After a pause) It does not specifically say that Enron ----  
27 Q No, and is there any bit here that refers to the fact that Enron has no rolling stock of its own,  
28 but was an intermediary?  
29 A No, there is nothing there.  
30 Q And what about: "Enron had only bid for some volumes on some routes", is that there?  
31 A No, that is not there.  
32 Q So the only thing that is there is Enron's rates?  
33 A Correct.

1 Q If we go down and look at these key points, the first one is EWS is to be the exclusive rail  
2 haulier. The second bullet is a financial consideration. The third bullet is a financial  
3 consideration. We then have the table of rates, which of course is a financial matter. The  
4 first bullet after the table is basically financial. The bullet after that is performance. The  
5 bullet after that indexation is financial. The one after that is effectively financial.

6 THE CHAIRMAN: Can we just pause at that one, because it happens to be one that I had marked  
7 earlier – the one starting: “Only EWS ...” can you just explain what that means?

8 A There was absolutely no minimum volume commitment.

9 Q Is that an issue of flexibility, or not?

10 A Yes. (After a pause) It means we don’t have the obligation to use -- We have a rail  
11 haulage contract with EWS which we don’t have an obligation to even use if we choose.

12 MR. LASOK: This particular point about volume commitment was in fact dealt with later in  
13 negotiations, was it not?

14 A It must’ve been agreed by then because it’s in the e-mail.

15 Q Was there not a misunderstanding between you and Enron about MAP – sorry. You and  
16 EWS about MAP?

17 A I can’t recollect the timing of those events. I mean, MAPs were introduced at some point in  
18 the negotiations, and we didn’t accept them.

19 Q I think we are looking at 1035 and 1034 perhaps. If you go to 1035 at the top of the page,  
20 that is an e-mail from you. The record of the e-mail actually starts at the previous page. It  
21 is dated 11<sup>th</sup> December, 2000. It is an e-mail that you sent to Mr. White at EWS. The bit in  
22 bold is you saying that the particular clause, which I have referred to as MAP, was akin to a  
23 guaranteed minimum volume. He did not want that. Then, if you look at p.1034, this  
24 starts off with an internal e-mail between different people within EWS. What happens is  
25 that if you go to the penultimate paragraph -- The first sentence starts with,

26 “I don’t think that we actually have any real choice but to give in on the MAP.”

27 I think there are two e-mails there. If you go to the second one, which starts off at around  
28 about the first hole-punch -- There is a second paragraph that says,

29 “For whatever reason, he [yourself] is interpreting references to MAP in previous  
30 correspondence very differently from us. Yesterday he pressed me to concede that  
31 the proposed MAP was only ever meant as effectively a minimum invoicing  
32 amount. I declined at the time on the grounds that I was driving in heavy  
33 traffic ....”

1 Then they go on to discuss this. Clearly, their interpretation was that they did want  
2 minimum volumes. That was in fact so at the time of your communication of 12<sup>th</sup> October.  
3 This was something that in fact was only sorted out afterwards.

4 A I recollect that minimum MAPs were introduced during the course of the negotiations by  
5 EWS and we resisted that introduction.

6 Q Going back to p.999, we have got a situation in which if you actually run through the key  
7 points that are set out in that document, they are virtually all financial.

8 A Yes. That was an e-mail to Sarah Smith, who was the company accountant. So, she  
9 would've been particularly interested in the financial details.

10 Q The price was actually important to you in the deal that you were seeking to reach at this  
11 time.

12 A It was an element of what was important to us in the deal.

13 Q An element? Was it the element that you emphasised?

14 A It was the element I emphasised to EWS in negotiations - or one of the elements I  
15 emphasised.

16 Q We might refresh your memory, I think. If you look at G3, p.852, this is a file note - a note  
17 made of the meeting between EWS and Edison. You are recorded as being present with  
18 Simon Rabone. I think this is an EWS note of the meeting. Go to the next page, to para.  
19 11, it says this,

20 "Towards the end of the meeting, MC [yourself] said, 'It comes down to three  
21 things: price, relationship, confidence in the quality of service'".

22 The writer of the note says,

23 "It was clear that his emphasis was on price".

24 Is that a fair statement of the position?

25 A It would be because we were in a negotiation. I would always maintain that price was an  
26 important factor in the negotiations.

27 Q Yes. So, price was an important factor. We have got relationship and we have also got  
28 confidence in the quality of service.

29 A Yes.

30 Q I think we can put that document away. If we go back to your witness statement we have  
31 got to para. 48 where you say,

32 "The reality was that this was two-horse race between Freightliner and EWS".

33 You refer to Roger Pettit's e-mail of 2<sup>nd</sup> September. That was written before Enron put in  
34 its tender, was it not?

1 A I believe so. I can't remember the date from that document.

2 Q Yes. It is not a trick question. If you look at para. 44 of your witness statement, right up at  
3 the top, you refer to the fact that Enron put in its tender on 15<sup>th</sup> September.

4 A Yes.

5 Q So, is the position this: that on 2<sup>nd</sup> September, when Roger Pettit set out his e-mail, there  
6 was a two-horse race between Freightliner and EWS. By the time you came to formulate  
7 your 12<sup>th</sup> October communication, which is the one we have seen - G4, p.999, with the table  
8 on it - it had become a three-horse race.

9 A There was a third horse in the race, but it was some considerable distance behind the others  
10 in desirability.

11 Q By reference to the three criteria of price, relationship and quality ----

12 A That was a statement made during the course of negotiations. Our prime objectives were  
13 flexibility; price, obviously; ability to do the work.

14 Q Thank you.

15 A I should add to that that we had a preference to deal with principals who operated their own  
16 rolling stock and with whom we could have operational relationships.

17 Q The reality was, was it not, that you had to be able to put a recommendation that could be  
18 justified to the people to whom you reported and ultimately to the board of directors.

19 A I did, yes. That's correct.

20 Q There is no document – no contemporary document, or indeed no document – which  
21 indicates when it was that Enron's bid was rejected. What we have in terms of  
22 contemporaneous documents is the 12<sup>th</sup> October document at G4, p.999, which is your  
23 summary containing the table in which Enron features and you have just said that at that  
24 stage it was the three horse race?

25 A I said there were three horses in the race.

26 Q Let us suppose that Enron had been in a position to offer haulage on terms that, from the  
27 perspective of Edison, were indistinguishable from the terms that EWS was offering, or  
28 indeed were better, because, for example, they offered a lower haulage price or a lower  
29 price if Enron coal were shifted. You would have had to have justified to your superiors  
30 any decision or recommendation to ignore the Enron bid and go for EWS, would you not?

31 A Yes.

32 Q And that would have been difficult to justify, would it not?

33 A No, I don't think so.

34 Q Why not?



1 A Because we'd just had a fairly stormy relationship with Enron on a long term contract basis,  
2 because EWS had all the rolling stock to do the business and were a known quantity and  
3 were a principal, we would have had access to EWS's train planning systems. We would  
4 have dealt with them, we would have discussed things directly rather than by  
5 intermediaries. To put a different concept on it, it represents value rather than price. EWS  
6 to us represented a far greater value than Enron would have done at comparable or even  
7 better prices.

8 Q It is not exactly what you said in para.47(b) of your witness statement, because in 47(b) you  
9 do indicate that if the price had been right you would have gone for Enron – is that not so?

10 A Well, I think what I am saying there is that if they'd have put in an absolutely crazy price  
11 we would at least have had to talk to them. It was not something we wanted to do.

12 Q Are you suggesting that you could have justified that approach to your superiors – I say  
13 “that approach” meaning rejecting an Enron bid that was keen on price below EWS but not  
14 a crazy price? Are you suggesting that you could have justified refusing to go with Enron  
15 on the ground that in the past there had been a fraught relationship?

16 A I don't think I would have had to justify that to my superiors. They were involved in  
17 discussions on the rail haulage contract, and were quite happy with the way things were  
18 going.

19 Q I do not follow that. This is business, is it not?

20 A It is business.

21 Q And in business you get the best deal?

22 A The best value.

23 Q The best value, and if somebody is offering you the best value you go for them, do you not?

24 A If somebody is giving you – well, it depends how you assess value.

25 Q We have got price, we have got relationship and we have got quality. The hypothetical  
26 situation that I am putting to you is one in which, because EWS is not engaging in illegal  
27 abusive conduct it is treating Enron in exactly the same way that it is treating EWS. It is  
28 treating Enron in exactly the same way as it is treating Edison. So Enron is able to come to  
29 you with a bid that is indistinguishable in terms of price, quality, from the EWS bid, save  
30 that Enron has the possibility of offering potentially a lower price because it can associate  
31 the deal with, as it did, a reduction. If you buy Enron coal then it may come to you with a  
32 proposal?

33 A It never specified the reduction. It was 25p a tonne off the price. It never specified what  
34 the price was.

1 Q But you could have found out. Surely the point is that the real problem with the Enron bid  
2 was that it could not offer you something competitive with EWS on the grounds of price,  
3 and it was not able to offer you the quality that EWS was offering you?

4 A I think that's certainly in comparison. Of the two tenders the company submitted, EWS  
5 submitted a tender based on broadly what we wanted; and Enron submitted a tender that  
6 was nowhere near what we wanted. If Enron had come in on the same terms, we would still  
7 have gone with EWS because EWS owned the rolling stock and EWS were a known entity  
8 and we would have been able to deal with them direct. We didn't really want to deal with  
9 Enron.

10 Q That is incorrect, is it not? Your last remark is incorrect, that you did not want to deal with  
11 Enron. That is wrong, is it not?

12 A Why is that?

13 Q Because, firstly, you did actually send them the invitation to tender; and secondly, you  
14 requested them to tender for an E2E deal at the end of August of that year.

15 A We didn't want Enron as our rail haulage operator.

16 Q Let me go back to this: were you prepared to deal with Enron?

17 A We were prepared to deal with Enron on coal purchases, as we would have been prepared to  
18 deal with any other coal supplier or intermediary in the business.

19 Q Were you prepared to enter into an E2E agreement with Enron?

20 A We were certainly prepared – I don't know whether that agreement was ever entered into –  
21 we were certainly prepared to discuss it if it represented value on the occasion for obviously  
22 those individual cargos. We would not have entered into any long term volume related  
23 agreement with anyone.

24 Q The problem with a volume commitment can be sorted out through a negotiation, can it not?

25 A I don't know, can it?

26 Q You can have a framework agreement with call off contracts?

27 A I guess that depends on the negotiation.

28 Q So the reality of the situation is that if you go back to what was happening at this particular  
29 point in time, you had a situation in which you did not actually embark on negotiations with  
30 Enron – that is correct, is it not?

31 Q As you said, it was a three horse race and we considered that Enron's horse was left in the  
32 starting gates.

33 Q Price, and performance?

34 A Price, performance, not all of the routes tendered for ----

1 Q Well, come, come ----

2 A -- not all of the volumes on all of the routes tendered for. We were looking for an optimal  
3 solution, but we recognise that some people may have a preference for elements of that,  
4 particularly as much as anything to facilitate an offer from Freightliner, because we did  
5 need other parties to be tendering for the business in order to have a meaningful tender.  
6 Freightliner's business at that time, I guess you would say they were cherry-picking routes,  
7 and they were looking at businesses that just ran from A to B and back again on a regular  
8 routine basis, whereby they could obtain maximum utilisation from their rolling stock, and  
9 we recognised that may be a possibility on some routes where a specific route could get a  
10 very advantageous price, and we wanted to be made aware of that.

11 THE CHAIRMAN: You mentioned rolling stock on perhaps a dozen occasions at least, maybe  
12 two dozen occasions. How big a factor in your company's mind and in your mind was it  
13 that the rolling stock was available in EWS's hands?

14 A It was a major factor because we could enter into a contract with EWS in the knowledge  
15 that they could perform that contract themselves on day one.

16 Q But why did that matter given that rolling stock can be leased by other companies without,  
17 on the face of it, too much obvious difficulty?

18 A Well partly I guess because of lead time; I can't remember exactly what Freightliner  
19 offered, but it was a build-up over a period of time until they had the rolling stock  
20 available, so we would have had two rail hauliers delivering into one power station which  
21 we were trying to avoid because when we had previously had two rail hauliers, i.e. Enron  
22 and Powergen, delivering into the power station under an E2E contract.

23 Q The would have been falling each other?

24 A It would have been chaos.

25 Q Yes.

26 A And we were trying to restore some order into the proceedings.

27 MR.MATHER: Were you therefore eager to see a competitor like Freightliner, a heavy haulier,  
28 with its own rolling stock, or neutral about that or not particularly bothered?

29 A No I was pleased to see Freightliner enter the market because it gave EWS some  
30 competition and there is no doubts there were benefits to service from Freightliner entering  
31 the market. One of the issues with the Freightliner's people was that they did not have the  
32 infrastructure from day one to do the business with us, but they would very much have been  
33 a contender – a very serious contender – for any subsequent contract to the one we entered  
34 into with EWS.

1 Q And Enron's role in helping Freightliner into the market, how did you see that?

2 A I guess I saw it more as Freightliner helping Enron into the market.

3 Q Because?

4 A Well Freightliner were already in the market with rolling stock, albeit in quite a small way

5 at the time of the tender, and I guess what Enron were looking for was a virtual railway

6 whereby they could offer a delivery service with assets that they did not have to buy or

7 operate.

8 Q So you just thought it was good for them, but was not necessarily great news for everyone

9 else?

10 A I think generally the more competition there is in an arena the better the performance

11 within that arena. Undoubtedly some people chose to use Enron as their rail haulier as a

12 result of that, but they were not our choice.

13 MR. LASOK: I think you said that Freightliner was in the market at that stage. The Office of

14 Rail Regulation put EWS's market share at that stage at 100 per cent, so Freightliner on the

15 basis of the ORR's findings was not a player at that point, it had the future capability?

16 A I can't remember the dates Freightliner specifically became a rail operator, but they

17 certainly had Freightliner Heavy Haul set up and operating. When we went out to tender

18 they had employees, brochures – whether they actually had rolling stock at that specific

19 time I can't remember, but they were certainly up and running as a coal haulage company.

20 Q Did they actually have any coal wagons at that stage?

21 A I really can't remember. I seem to recollect we had brochures of the type of coal wagons

22 they intended to use, I think from memory they were Powell Duffryn wagons, so if they did

23 not have them they must certainly have been ordered and pending delivery.

24 Q Anyway, I think we can probably find those details in the ORR's decision?

25 A They are in the ORR decision, I remember.

26 Q The one thing I am still hazy about is this, it is the reason why the Enron bid was

27 unsuccessful, because in your evidence what you tell us are two classes of factors. There are

28 some factors that you knew about when you sent Enron the invitation to tender. Then there

29 are other factors that you did not know about at that stage but that you did know later on,

30 and those factors are essentially price, the content of the tender itself. At the moment –

31 maybe you can help me out on this – I find it very difficult to understand, why the factors

32 that you knew about beforehand could have been a material influence on the decision that

33 you made to reject the bid, because if those factors had been material you would never have

34 sent the invitation to tender to start off with. So can you help me on that little problem?

1 A Well we would have certainly sent them the invitation to tender; it would have been  
2 irrelevant as to whether we thought they could do the job or not. They were established as a  
3 rail haulage operator, and I suspect the issue of the invitation to tender probably came out of  
4 a conversation between myself and Stuart Staley in which their entry to the rail haulage  
5 market was mentioned and, as I said before, I cannot remember whether in the interests of  
6 goodwill I offered to send them the tender documents, or whether I was asked to send them  
7 the tender documents. I generally try to avoid being antagonistic and I believe in good  
8 relationships wherever possible.

9 THE CHAIRMAN: In August Mr. Staley had suggested you get together for dinner?

10 A Yes.

11 Q And that thereafter your teams should meet, did those things happen, either of them?

12 A Certainly I met Stuart Saley for dinner, I can remember that, and I do believe we had a  
13 team night out.

14 Q Did anything follow the team night out ... (Laughter) ... in terms of negotiation?

15 A No, I think the night out – it had been an acrimonious renegotiation and I do not think it is  
16 unrealistic to say that there was some bad feeling left over, and that was an attempt to clear  
17 the air so our respective teams could work together without trying to score points from each  
18 other in the future.

19 Q So forgive me putting it this way, to “clear the air” you send them an invitation to tender  
20 that you have no intention of treating seriously?

21 A I guess we did not know at that time whether we should take it seriously or not. A rail  
22 operator with no real assets was certainly not what we were looking for.

23 Q But an attractive response would have been considered on its merits?

24 A An attractive response would have been considered on its merits bearing in mind the  
25 relationship we had previously had with Enron.

26 MR. MATHER: You had sent out tenders to people who were not really likely to get the work,  
27 had you not – Mendip Rail and people like that. Was the policy to send it out to everyone  
28 who might be interested?

29 A Pretty much, yes.

30 MR. LASOK: In view of the time, we probably ought to rise for lunch.

31 THE CHAIRMAN: Yes.

32 MR. LASOK: I have probably got about 20 minutes more.

33 THE CHAIRMAN: Do you want to rise now? Just give me one moment, please, Mr. Lasok.  
34 (After a pause) Yes. 2 o'clock or thereabouts.

1 MR. LASOK: I do not know whether the witness has been told that it is customary not to discuss  
2 his evidence.

3 THE CHAIRMAN: Thank you for reminding me. (To the witness) You do not talk to anyone  
4 about the case at all over lunch; it is probably better if you have lunch on your own.

5 A I will keep my own company.

6 (Adjourned for a short time)

7 MR. LASOK: Mr. Crosland, could you take Bundle G4, p.999. You have seen it before. Can you  
8 just confirm that the table there sets out the prices that you used to make the comparison  
9 between the three horses in the race?

10 A So far as I can recollect, it does.

11 Q Thank you. I think we can put that away and move on to the next topic. Did you know that  
12 ECSL or Enron was using the tender for the coal haulage contract in order to angle for a  
13 coal supply contract?

14 A I wasn't aware of that.

15 Q I wonder whether you could look at G3, p.880. This is an internal Enron e-mail from Riaz  
16 Rizvi to Mr. Kearney. In the second line he refers to Edison, which he describes as  
17 'Mission knocking on the door' and refers to a call that he says Max - which I think must be  
18 you - gave him on that day, which was August 23<sup>rd</sup>, inviting offers starting 2001. In the  
19 second paragraph he says,

20 "I'll be getting the details today but I already reiterated our desire to rebuild a  
21 great long-term relationship with them and the fact that we would be happy to  
22 quote both rail and an into the stockpile price including port/freight/coal".

23 Do you remember a conversation with Mr. Rizvi on that occasion?

24 A I don't, but I would've disregarded the last part of that because we weren't looking for an  
25 into stockpile price on anything.

26 Q Would you have told him that he was wasting his time?

27 A Quite possibly.

28 Q It is funny that if you told him that, he does not record it here in this e-mail. Do you not  
29 think that would have been an important thing for him to mention?

30 A I don't know how Mr. Rizvi was thinking, but there was never a coal contract associated  
31 with the rail haulage contract.

32 Q That was not what I was saying. The question I put to you was whether you knew that  
33 Enron was using the opportunity to bid for the coal haulage contract in order to angle for a  
34 coal supply contract?

1 A I don't recall that, but it wouldn't surprise me.

2 Q Thank you. I think perhaps it may be useful, for the sake of completion, to look at G4,  
3 p.940. Could you just read the whole of the letter, just to familiarise yourself with it?  
4 (After a pause) What I would suggest to you is that the third and fourth paragraphs in  
5 particular of that letter show that Enron was using the opportunity to bid for the coal  
6 haulage contract in order to angle for a coal purchasing contract.

7 A I wouldn't say they were trying to angle for it. I think they were just making a statement  
8 that if we wish they can help gain what they believe are additional efficiencies.

9 Q It is a bit more than that, is it not?

10 A Is it?

11 Q Yes. Paragraph 3 at the end:  
12 "Any combination of our haulage, freight and port throughput services will help  
13 Edison Mission to streamline its import activities and minimise costs".  
14 The first sentence of the next paragraph,  
15 "There are many options that can be explored and we would like to meet with you  
16 to discuss how we can optimise your operations by fully taking advantage of the  
17 Enron portfolio".

18 A That probably was their belief - but not ours.

19 Q Did you write back, telling them that they were barking up the wrong tree - that you were  
20 only interested in coal haulage?

21 A I have really got no recollection of how I replied.

22 Q No. If you turn to p.943, just by the first hole punch, we have in bold 'Price Incentive' and  
23 then it says, "All trains carrying Enron coal will be subject to a minimum discount of £0.25  
24 per ton for rail haulage".  
25 Clearly that is an opening bid. The whole thing is an opening bid, is it not? So, what they  
26 were putting to you was the possibility that you would get a reduced rate for haulage if you  
27 were hauling Enron coal.

28 A Which we discounted because we were not looking for E2E arrangements, and there was no  
29 coal contract offered or implied with this tender.

30 Q That is untrue, is it not, because on 30<sup>th</sup> August you invited a tender for an E2E contract?

31 A There was no E2E contract associated with this rail tender.

32 Q It was not associated with this rail tender. What I am putting to you is that Enron was using  
33 the coal haulage contract as an opportunity to angle for a coal purchasing contract. I am not

1 quite sure what your response to that is. Do you read these communications with you as  
2 indicating that, or as indicating something different?

3 A I just read these as it was just something thrown into the pot - like a cherry on the bun.

4 Q Right.

5 A If we chose to use Enron as a rail haulier they would give us a discount of £0.25 per ton for  
6 rail haulage, but it doesn't say – there's no discussion about coal prices or anything else,  
7 and we had no intention of entering into any long term contracts with anyone in association  
8 or not in association with this tender enquiry.

9 Q Did you think that Enron was a coal supplier by way of business or coal haulier?

10 A We regarded Enron as a coal supplier and someone who wanted to become a rail haulier.

11 Q At that stage how realistically could Enron have become a rail haulier?

12 A At this stage to us, very unlikely.

13 Q Very unlikely because it would have to deal with or make an agreement with a rail haulier,  
14 would it not?

15 A I would assume so.

16 Q What I would suggest to you is that the idea of looking at Enron as a rail haulier is a bit  
17 implausible, they were a coal supplier?

18 A Yes, that was our view at the time.

19 Q As a general proposition, do you accept that electricity generators source coal according to  
20 the lowest delivered price?

21 A No.

22 Q Do you accept that they take account both of the cost of the coal and the cost of  
23 transportation?

24 A And other things.

25 Q And the costs associated with the qualities of the coal?

26 A Yes.

27 Q So you dispute the fact that they source coal according to the lowest delivered price?

28 A Yes, we assess things on the basis of value.

29 Q What I have just put to you is a finding of fact made by the Office of Rail Regulation. It is  
30 in bundle B1. If you look at the printed pagination at the bottom right hand corner and go to  
31 p.15, para.55, what I was effectively doing was reading para.55 to you. Now that you see  
32 that what I have just put to you is a finding of fact made by the Office of Rail Regulation do  
33 you still disagree with it?

34 A I do. It doesn't mean that they're right. It doesn't mean that they're right.



1 Q Thank you very much. Ultimately, I would suggest to you, the question is one of  
2 negotiation and business, and the question is whether or not ECSL could have offered a  
3 sufficiently attractive deal in terms of coal purchasing – is that not so?

4 A That’s one of the issues, it’s not the only one.

5 Q What are the other issues?

6 A Whether the package represented the best value to Edison.

7 Q That is basically what I suggested to you, the most attractive deal is the one that satisfies  
8 Edison’s requirements, is it not?

9 A It is, yes.

10 Q You would have had to justify to your superiors, would you not, a decision to go for EWS,  
11 and I am going now to the haulage contract, if Enron had offered you an indistinguishable  
12 bid for haulage and you had had the prospect of a beneficial deal on coal?

13 A I am sorry, could you say that again, please?

14 Q If you were faced with two bids, or two offers: one was haulage from EWS and the other  
15 one was a bid from Enron that was just as good in the eyes of EME – it was just as good as  
16 the EWS offer in the eyes of Edison, but at the same time there was the possibility of  
17 getting a beneficial deal on coal and also you would have on offer, and it could be  
18 negotiated, a reduction in the rates for hauling Enron coal. If you were faced with that  
19 choice, you would have had to put forward to your superiors pretty good arguments to  
20 justify opting for EWS, would you not?

21 A Yes, but there’s the general presumption that we would have preferred not to have to deal  
22 with Enron to take into consideration.

23 Q Where do we get this general presumption from?

24 A Because of the relationship we had had with them with the original coal confirmations,  
25 which had been a disappointing relationship.

26 Q I do not follow the logic?

27 A I suppose we’d been bitten once and we were careful not to be bitten twice.

28 Q When you say “we”, who is “we”?

29 A Edison.

30 Q Are you talking about yourself?

31 A No, I’m talking about Edison.

32 Q How is it that Mr. Heller in one of the emails that we saw this morning was described as an  
33 “Enronophile”. You thought that that was a slight exaggeration, but you did not really  
34 disagree with the thrust of what that email said?

1 A I think Mr. Heller was probably being pleasant, as I said this morning.

2 Q I just want to turn to confirm something. If you go to bundle G4, and look at p.952, this is a  
3 handwritten note of a meeting between EWS and Edison. You see your name, Max  
4 Crosland, at the top on the right, and it took place on 27<sup>th</sup> September 2000, at least the note  
5 is dated 27<sup>th</sup> September. If you look more or less just below the middle of the page, there is  
6 a bit on the left hand side, “MC”, two initials, and what is recorded here is something that  
7 you said to EWS. There are four lines. If you look at the last two, the last two say:  
8 “Needs to have a deal that MC can demonstrate is good for Edison and will be  
9 signed off by senior execs.”

10 Is that a correct reflection of the position?

11 A It’s a negotiating tactic.

12 Q Was it true or was it not?

13 A It’s obviously true. Whoever or whatever the final deal is with, it needs to be demonstrable  
14 to sign off on it.

15 Q A couple of lines above that there is a reference to rates.

16 A Where are you referring to?

17 Q It is at the beginning of the bit with MC on it, the first words.

18 A Sorry, yes.

19 Q It says “Rates”. Among other things, it is in the context of a discussion about prices, but the  
20 main thing is that it says that the deal has to be – I will put my own words on it – it has to be  
21 “sellable” to senior executives. Are you telling us that as part of the sales pitch, if you like  
22 to put it like that, or a series of recommendations, you would have gone to senior executives  
23 and said, in this hypothetical situation I am putting to you, “We have got this deal, we have  
24 got this offer from Enron, if you look at the terms, quality of performance” – I am talking  
25 really about rail haulage – “price, the rates, it is just as good, it may even be better than  
26 EWS’s offer. In addition to that there is a possibility of getting a beneficial deal on coal  
27 purchasing and they are prepared to go for a 25p reduction on the freight rates, but I  
28 recommend that you turn down this offer because a few months ago we had a rather torrid  
29 relationship in which words were exchanged, they were promising flexibility that we had  
30 made a bad deal and were trying to negotiate them out of it. Therefore, because of this  
31 earlier relationship I recommend that you do not take up this offer.” Are you seriously  
32 suggesting that the senior executives would accept your recommendation worded in that  
33 way?

1 A I think the senior officers at Enron were the deal comparable, similar or, as you described,  
2 marginally better in some respects, I do believe the senior management at Enron would  
3 have turned it down.

4 Q You mean the senior management at Edison??

5 A Sorry, at Edison, would have turned it down.

6 Q And why would they have done that?

7 A For the reasons we explained, we had a very acrimonious experience with Enron.

8 Q That was all over, in the past?

9 A And we had noticed, we had had a reluctance for co-operation for resolving the problems  
10 encountered in the contract and we didn't really want to go down that route again.

11 Q Well, can I just pick you up on that, we have seen emails in which, contrary to what you  
12 have just said, Enron was trying to be co-operative. Enron was showing willingness to  
13 acknowledge your problem, it was pointing out that it had its own difficulties because it had  
14 had to enter into arrangements which it would have to renegotiate, but the emails that you  
15 have seen this morning show that Enron was prepared to be co-operative. The situation, I  
16 put it to you, Mr. Crosland, is that Edison had made a serious mistake. It needed to  
17 negotiate itself out of the consequences of that mistake, and it did so successfully. It may  
18 have been that they were strains but it did so successfully, but in business you put that on  
19 one side and you move on. Are you telling me that is not how business is done?

20 A I guess I am telling you that is how we regarded business as being done at Edison.

21 Q Right. If you would go back to your witness statement, and go to p.176 of the bundle, para.  
22 55 says that:

23 "… it does not follow at all that if Enron had been awarded the haulage tender, it  
24 would have also won a contract … to supply additional coal …"

25 and then you give various reasons. Now, I just want to pick up on a number of these  
26 reasons. If we go to "c" on the top of the next page, you start off by saying:

27 "In the event that additional stocks were required for Ferrybridge, whether  
28 imported or indigenous, would depend, in part, on market prices and the  
29 characteristics of the coal."

30 That is not an objection to entering into a coal purchasing deal with Enron, is it?

31 A Not specifically.

32 Q Did you know that EWS had tendered for the coal haulage contract on the basis that these  
33 volumes were of imported coal?

1 A Some of them were imported, some of them were indigenous, as I recollect from the tender  
2 inquiry.

3 Q Did you know that on the basis of our information over 3.5 million tonnes of imported coal  
4 was hauled to Ferrybridge to 2001 to 2004?

5 A I believe that is quite conceivable.

6 Q It is actually, for the Tribunal's note, Mr. Fisher's expert report, it is a table below para.  
7 5.12, bundle E, tab 5, p.116. (To the witness) You suggest in various subparagraphs here,  
8 and more particularly in "f", and it is really "f", just at the end of the first line to the second:  
9 "Edison had wished simply to supplement its coal supplied on an ad hoc basis." Why could  
10 you not have done that with an E2E framework agreement based on call off contracts?

11 A We could have done, but why should we have done?

12 Q Okay. Purchasing on an ad hoc basis of course leaves you a bit exposed to sudden shifts in  
13 market price and exchange rate fluctuations, is that not correct?

14 A That's correct.

15 Q And you could have smoothed those with a more sophisticated – shall we say –  
16 arrangement?

17 A We could have done, we could have done it ourselves as well with hedging.

18 Q If you go to G5, could you go to p.1276.1?

19 A Yes.

20 Q This is a copy of a confirmation dealing with the E2E agreement that was entered into  
21 between British Energy and Enron. The agreement had been a little earlier, this one is dated  
22 I think 17<sup>th</sup> September 2001. If you just look down it we have the seller: Enron, the buyer:  
23 British Energy. We have the term which was 2001 to 2004. The term could be extended to  
24 March 2006 on the buyer's option. We have in the contract quantity section the firm  
25 delivery, and a few lines below that we have got options, so the buyer has the right but not  
26 the obligation to purchase additional tonnage. If you look, going further down, the  
27 penultimate heading: "Applicable contract price", we have reference to "base Applicable  
28 Contract Price", adjustment by mechanism based on points, accumulated for non-generic  
29 coals, and then there is a non-generic coals section. On the next page we have "Generic  
30 Specification Discount", then the next heading is "Applicable Foreign Exchange Rate" and  
31 we see that the exchange rate for payment expressed in dollars per pound will be set as an  
32 average of spot rates – three-month forward points. There is a further reference to the  
33 optional tonnages below. On the next page, after the first heading, which is "Foreign  
34 Exchange Base", there is another one: "Calculation of Payment For Firm Optional and

1 Rolled Tonnage”, and you see in the first line a reference to the invoice price being adjusted  
2 to reflect the change in international market prices. The next paragraph, in the first line  
3 deals with an index average being the 12 week mean average of the index. A couple of  
4 paragraphs down from there we have what is described as ‘the following formula’ setting  
5 out a model for calculating amounts payable, and then formulae are set out. If you go  
6 further down the page to the second hole punch you have got replacement index provision,  
7 which deals with an alternative if the index changes in material respects. At the bottom you  
8 have got rolling tonnage commitments - “Buyer will have the right to postpone delivery”,  
9 and so forth.

10 Now, what I would suggest to you is that that is an illustration of the fact that you can  
11 negotiate a flexible contract that covers the kind of issues that you have been describing in  
12 your witness statement, adding in problems like shifts in market prices, in exchange rates.  
13 That is a commercial realistic option open to an electricity generator in the position of  
14 Edison. Do you agree or not?

15 A I’m sure it suited British Energy at the time to enter into that sort of contract. Certainly  
16 there are things in there that we would not have accepted, such as the generic coals. We  
17 wanted to know detailed analysis of the specific mines ... that the coal was coming from  
18 because in energy sources oil is pretty much oil, gas is pretty much gas, but coal qualities  
19 vary significantly, and you can have what the ... terms were on these generics, but you can  
20 have a coal that looks identical to the others in most of the specification, but if it has an  
21 excessive of iron oxide or something in it, you are going to get slightly ... but the analysis  
22 could be indistinguishable from another comparative coal. We wanted to test coals, identify  
23 specific coals that suited our power stations and to buy those coals. There is also a firm  
24 delivery tonnage of 2.3 million tonnes, plus or minus 3 percent, which is far more than we  
25 would have wanted to contract for. Certainly most of the contracts we had were with a  
26 variety of suppliers for coals of known quantity for relatively small tonnages in comparison  
27 to that.

28 Q Can I take you up on the points that you have been making there? If you go to your witness  
29 statement which starts in Bundle D2, p.486 -- Could you go to p.489? At para. 12 you deal  
30 with this point about flexibility in terms of coal. You say five lines from the bottom that,  
31 “Edison’s preference as far as imported Colombian coal was concerned, was to burn only  
32 lower sulphur Colombian Drummond ‘Local authority Loma’ coal [jumping over the bit in  
33 brackets] as opposed to the variety of Colombian coals that ~Enron was trading in at the  
34 time”.

1 Is it not right to say that in fact Enron did supply Edison with Drummond 'La Loma' coal  
2 and was at all material times able to do so?

3 A It is.

4 Q So, what is the point about this point?

5 A Well, it's picking up on one specific coal which is the Drummond 'La Loma' coal, but it's  
6 our preference, as far as imported Colombian coal is concerned -- We were also looking at  
7 South African coal and possibly others at the time. And possibly the Colombians. The  
8 Enron methodology was to offer, as in the British Energy contract, coals identified as  
9 Colombian 1, Colombian 2, Colombian 3, etc., which were quality based. They didn't  
10 identify the mine that it came from. We didn't have any confidence that if we had a  
11 Colombia 2 ... and then we had another Colombia 2 ----

12 THE CHAIRMAN: La Loma is a mine, is it?

13 A La Loma is a mine, yes. We weren't certain that the Colombia 2 will always be coal from  
14 the same mine. It may be Colombian coal with a similar specification from a different  
15 mine.

16 MR. LASOK: Can I just ask you about this because if you go to G1, p.160, the middle of the  
17 page, under the heading 'Contract Prices', there is a bit in bold, 'Prices for firm delivery'.  
18 The first item is Drummond La Loma. So, what was the problem?

19 A There was no problem.

20 Q There was no problem.

21 A I was commenting on the British Energy type of contract.

22 Q The British Energy type of contract was one in which there was no requirement and there  
23 was also to take coals other than the primary type, and flexibility was built into the contract  
24 in that respect. The point, of course, at issue is - and I think you would probably agree with  
25 this - that it all boils down to negotiation.

26 A I think negotiation and preference.

27 Q Preference?

28 A We always had a preference to deal, where we could, with principles. We would prefer to  
29 deal direct with Drummond rather than to deal with Drummond through an intermediary.  
30 Both Drummond and ourselves found it irritating that we weren't able to talk to each other  
31 contractually.

32 MR. MATHER: What sort of difference would it make in operational terms being able to talk  
33 directly to the coal mine?

1 A If we'd've wanted to defer or accelerate any tonnes, if we'd been able to talk directly with  
2 the coal mine about doing that -- similarly, directly with the freight company if we were  
3 doing the freight, and directly with the port company if we were importing the coal  
4 ourselves. I suppose it is the comfort of knowing that you are getting the information from  
5 the horse's mouth..

6 Q Did you find that they would be more flexible than an intermediary and, if so, why?

7 A Our experience was that they could be more flexible. As to why, I would imagine that was  
8 because of Enron's mark to market contracting philosophy whereby when they entered a  
9 contract with us, everything else was backed off again down the line with third party  
10 contracts which reduced their -- rather, I assumed it would reduce their flexibility, but it  
11 will certainly make the negotiating process unnecessarily complicated.

12 Q You would be a smaller purchaser than Enron presumably.

13 A We would undoubtedly, but I don't think that would've represented any material  
14 disadvantage.

15 MR. LASOK: Mr. Crosland, would you agree that the views that you have just expressed  
16 actually reflect your experience of the E2E agreement that was negotiated with Enron in  
17 1999?

18 A Yes, I think so.

19 Q The problem with that agreement was that you had agreed to take quantities, that is what  
20 you wanted, and you had not negotiated the flexibility that you later concluded you needed  
21 -- is that not so?

22 A I would agree with that as well.

23 Q Yes, and the BE agreement, it is not necessarily an agreement that EME would have wished  
24 to go into in the same terms, is an illustration that it all boils down to negotiation?

25 A Yes, I assume that's correct.

26 MR. LASOK: Thank you very much.

27 THE CHAIRMAN: Mr. Brealey?

28 Re-examined by Mr. BREALEY

29 Q Mr. Crosland, just one question: Mr. Lasok has referred to a contract. Can we go to G4,  
30 p.905. You have said to Mr. Lasok and to the Tribunal on several occasions that there are  
31 spot contracts and long term contracts. Can you explain to the Tribunal what sort of  
32 contract this is at p.905?

1 A That's a spot contract. It is for one – does it mention the ship size? I can't see where it  
2 mentions the ship size in the first paragraph but the tonnage would indicate it's either two  
3 panamax shipments or one Cape sized shipment.

4 Q After the renegotiation of the 1999 Master Agreement, what type of contract were you  
5 looking for for imported coal at Ferrybridge?

6 A Spot, short and some medium term. By "medium term", not longer than a year, and not  
7 material to ages. We were operating mainly on spot and medium term contracts – spot and  
8 short term contracts, sorry.

9 Q And if someone had offered you a four year contract whereby you had to take all your  
10 requirements of coal from that person, what would your reaction have been?

11 A We wouldn't have accepted that. We'd already had experience of long term volume  
12 contracts and the inflexibility that that presents, and we preferred to go down a much more  
13 flexible short term fuel profile.

14 MR. BREALEY: Thank you very much, Mr. Crosland, I have no questions. I do not know  
15 whether the Tribunal have any questions.

16 THE CHAIRMAN: Just bear with us if you would, please. (After a pause) Thank you very  
17 much, Mr. Crosland.

18 A Thank you.

19 (The witness withdrew)

20 THE CHAIRMAN: Yes?

21 MR. BREALEY: The next witness, I call Mr. White.

22 Mr. DAVID IAN WHITE, Affirmed

23 Examined by Mr. BREALEY

24 Q What you will need is bundle D, volume 3. At tab 79, p.496, can you see there is a  
25 statement?

26 A Yes.

27 Q Can you just flick through it and go to p.530, is that your signature?

28 A That is my signature.

29 Q Can you confirm to the Tribunal that this evidence is true to the best of your knowledge and  
30 belief.

31 A Yes, I do.

32 Cross-examined by Mr. LASOK

33 Q Mr. White, you have got bundles behind you. Could you look at B1, please, p.4. At the  
34 bottom of p.4 there is a para.15?



1 A Yes.

2 Q And it refers to ORR's findings – this is the decision of the Office of Rail Regulation – that  
3 types of infringing conduct form part of a continuing strategy to seek to exclude or restrict  
4 EWS's potential competitors' participation in the market for coal haulage.

5 A Yes.

6 Q And if you go to the next page, the first two lines of this:  
7 "ORR has not found it necessary to make a finding as to the precise level from  
8 which that strategy emanated."  
9 I wonder whether you can help us on this. Were you one of the people who devised this  
10 unlawful strategy?

11 A I was a reasonably middling manager.

12 Q Did you carry it out then?

13 A I worked as diligently as I could.

14 Q To do what? Come back to unlawful activity.

15 A I worked as diligently as I could following the principles and the guidance set out before  
16 me.

17 Q By?

18 A Set out under role and responsibility statements and discussions from time to time with my  
19 superiors.

20 Q So you were carrying out orders?

21 A No. Well, quite clearly if I was asked to do something I would do it unless it was  
22 something that I couldn't do or I needed to debate.

23 Q Are you loyal to your employer?

24 A I'd like to believe so.

25 Q If you were asked to turn a blind eye to a scam that your employer was perpetrating that is  
26 what you would do?

27 A No, I would not do anything which I consciously felt to be wrong.

28 Q I wonder whether you could turn to B2, p.571.

29 A I have it.

30 Q Could you read paras.502 to 503, please.

31 A (After a pause) Yes.

32 Q This appears to show that you were involved in the continued concealment of a scam  
33 perpetrated by your employer – is that true?

34 A I used some intemperate language.

1 Q But it was a scam, was it not, if you look at what was happening as reported in paras. 502 to  
2 503?

3 A No, I do not think so.

4 Q Oh, you do not think so. Why do you not think it was a scam?

5 A Because I think I misinterpreted what we were seeking to do.

6 Q Well why did you call it “a scam”?

7 A Because I used some intemperate language.

8 Q “Intemperate” or accurate?

9 A Intemperate.

10 Q But something caused you to be intemperate?

11 A I have no recollection of the particular moment when I wrote that.

12 Q Could you move now to para. 27 of your witness statement. (After a pause) Have you got  
13 para. 27?

14 A Yes, I have.

15 Q The last sentence of it refers to rates agreed with Enron in July and August 1999 which  
16 were the rates which EWS charged Enron for all haulage ----

17 A Yes.

18 Q -- from July 1999 onwards. Do you agree that those rates were considerably higher than the  
19 rates charged by EWS to comparable customers?

20 A It depends which rates.

21 Q Well let us look at G5, if you go to p.1454.

22 THE CHAIRMAN: Just before the witness answers the next question, Mr. Lasok, Mr. White, it  
23 might be helpful to you if you bear in mind that this Tribunal, all three of us, have read the  
24 ORR Report and putting it in its broadest terms we are bound by its findings. Do you  
25 understand?

26 A Yes, I do.

27 Q You might like to bear that in mind when you are answering questions. We are not re-  
28 litigating whether ORR were right or wrong, and it will not be a productive debate.

29 A Thank you.

30 MR. LASOK: Have you got p.1454?

31 A I have.

32 Q This is a handwritten note signed by one “Nigel” who I think is Nigel Jones, and in the  
33 middle, we have at the first bullet under the heading “Commercial”: “Enron are still angry  
34 at the prices agreed for this winter’s deliveries.” We can date that to 1999. “They know

1 they are higher than comparable prices in other contracts although they can't prove it." and  
2 then there is a bit in brackets: "Enron's prices are 30% higher than others)".

3 A Yes.

4 Q Does that ring a bell?

5 A I am sure I can recollect reading this before, yes.

6 Q But the 30 per cent figure, do you think that is right?

7 A On Anglo/Scottish coal almost certainly, the others I would have to have reference to the  
8 numbers.

9 Q Then we have in the next bullet on the second line – again it is a comment on the  
10 relationship with Enron: "There is a Traffic Agreement and the traffic passes under our  
11 Standard Conditions of Carriage. No commitment in capacity, no commitment on  
12 performance." There is an underlined bit: "This is deliberate". Then it says: "We would  
13 strongly prefer to deal direct with Edison Mission and want to treat Enron with a long  
14 spoon." Is that a correct reflection of the thought processes inside EWS?

15 A Well it is quite clearly a reflection of what Nigel wrote at the time.

16 Q Do you disagree with it?

17 A I can't recall enough to know whether I disagree with that or not.

18 Q Okay. Could you go back a page, please? At the top of that page there is a word "Staley",  
19 can you see that?

20 A Yes, I can.

21 Q It is a reference to Mr. Staley, and there is a comment: "No real contact with him. Appears  
22 quiet and very competent". Have you any reason to disagree with that view of Mr. Staley?

23 A No, I don't think so.

24 Q If you would go back another page, this is where we can see that the date of this is before  
25 April 2000 because para. 2 refers to "Enron's role is until April/May 2000". If you go  
26 down to the bottom, there is a word "Kearney"?

27 A Yes.

28 Q "Slippery. Superficially friendly, but untrustworthy. Sharp, able, determined. Our main  
29 contact, has opened up links to Susan Norton & Jim ..." it looks like "Lundbar"?

30 A "Jim Ludburn" I suspect that is.

31 Q "... which he will exploit/misuse. We need care in handling Tom. He "accidentally"  
32 mis-recorded our commercial deal, for example." Have you any reason to disagree with  
33 that view of Mr. Kearney?

34 A I felt I always got on with Tom quite well, personally.

1 Q Right, we can put that bundle away, I think. Could you go back to your witness statement  
2 and go to para. 30?

3 A Yes.

4 Q You are dealing here now with the period around about the end of January 2000, para. 29  
5 has dates 2<sup>nd</sup> June, 23<sup>rd</sup> November, 5<sup>th</sup> January 2000, 28<sup>th</sup> January, and then you say in para.  
6 30:

7 “We took these request for quotes from Edison to be a sign that Edison wanted to  
8 move away from an E2E supply model, and instead arrange haulage on a DIY  
9 basis by contracting with us directly rather than through an intermediary.”

10 - and that is what you inferred from Edison’s conduct at the time?

11 A Yes.

12 Q You then set out reasons. Now, these appear to be reasons that you have for not being  
13 surprised about what you thought Edison was doing?

14 A Yes.

15 Q Is it not right to say that this is actually just speculation on the part of you personally  
16 perhaps, about what the reasons might have been?

17 A We did not know definitively what they were going to do.

18 Q I was actually asking you a different question, which was: these reasons, where do they  
19 come from? It is just your speculation, is it not?

20 A Yes, they would have been my speculation, yes.

21 Q And if we went briefly through them, the first one is that Edison did not have a UK coal  
22 procurement team, so it made sense to put a short term E2E arrangement in place while it  
23 recruited a team. But it is true, is it not, the fact that you have your own coal procurement  
24 team does not necessarily mean that you would go for a DIY arrangement as opposed to an  
25 E2E arrangement?

26 A Not necessarily, no, but from observation customers with their own procurement teams do  
27 tend to pursue a DIY option.

28 Q Like British Energy?

29 A British Energy was one that did not, but even British Energy have tended to go towards a  
30 DIY option in recent years.

31 Q Does it not all just depend on the deal that you get?

32 A I think it depends what their wider corporate strategy is. Some customers quite clearly see a  
33 benefit of having the coal suppliers that arrange the haulage. I think some customers see the  
34 benefit of having a mix of supply arrangements. Others like to segment their supply

1 arrangements so that they can see precisely what the value in the different parts of the chain  
2 are.

3 Q If we turn to the next page, (b) is effectively a repetition of that point so far as I can see.  
4 When we get to (c) you refer to the problems at Fiddler's Ferry. At the end of (c) you say,  
5 "Essentially Edison's lack of a direct relationship with a party that was actually hauling the  
6 coal meant it had no real ability to control haulage or resolve these problems".  
7 But, that was not what was thought at the time, was it?

8 A Sorry. Could I ask, what do you mean 'at the time'?

9 Q At this time.

10 A At the end of 1999?

11 Q The end of 1999 onwards. That was not your view -- or, rather, not EWS' view.

12 A To the best of my recollection I think it was.

13 Q You think it was.

14 A Yes.

15 Q Could you look at Bundle G1, please? Page 197 is a handwritten note addressed to Nigel,  
16 dated 9<sup>th</sup> November, 1999. Do you happen to know who may have written this?

17 A Yes. I did.

18 Q You did. The second line says, "We have a situation at Fiddler's Ferry developing".  
19 You talk about the number of trains being ordered. Just below the first hole punch where  
20 there is a reference to, "This week (commencing 7<sup>th</sup> November) --" you say, "It is evident  
21 that Fiddler's Ferry cannot deal with 86 trains --" If you turn the page, you say this,  
22 "Powergen have deliberately engineered this situation".  
23 You refer to the fact that the terms of Powergen's contract with EWS and you note that  
24 there was not a similar obligation in the contract with Enron.

25 A Yes.

26 Q So, at that stage you thought that Powergen was engineering the situation.

27 A At that stage, yes, I clearly did.

28 Q If you go to p.200 -- This is not your letter. It is Nigel Jones' letter, dated 10<sup>th</sup> November,  
29 1999 in which he starts off by saying that he has been asked to put in writing EWS' position  
30 with regard to requests for trains to Fiddler's Ferry for the following week. Could you read  
31 the penultimate paragraph, please - the one starting, "Consequently we are only able to  
32 sensibly plan --" (After a pause) So, the real problem, as you thought it, or, rather, as Nigel  
33 Jones thought it, was the fact that Edison was not co-ordinating Enron and Powergen.

34 A Yes. That was part of the problem.

1 Q Your reply, of course, comes on p.202. But I do not think we need to deal with that. If  
2 you go to p.262 -- I think the Tribunal has actually seen pp.262 to 263. I wonder whether  
3 you could read the whole document in silence, please? (After a pause): We have a lot of  
4 things in this, such as Max Crosland leading everybody up the garden path. But, what we do  
5 not actually have in this document is something that reflects what you describe the position  
6 to have been in your witness statement. Have you got any explanation for that?

7 A (No audible response)

8 Q Could you put that bundle away and go to Bundle G, Volume 2, p.521. It is just the first e-  
9 mail - an e-mail sent by you on 2<sup>nd</sup> May, 2000. Can you read that in silence, please? (After  
10 a pause) Again, we have got a number of things in this e-mail. If you look at the fourth  
11 paragraph we have,  
12 “Edison refuse point blank to tell their coal suppliers to reduce their orders --”  
13 In the penultimate paragraph, beginning, “However, if Fiddler’s bottle it” We have got  
14 what appears to be an explanation that you have uncovered that effectively the system is  
15 being gamed by Edison?

16 A I’m speculating to try and understand what’s going on and why it’s happening.

17 Q Yes, and it is based in part upon the relative values at different periods of domestic and  
18 imported coal, because you can see that you refer to the fact – it is the last line of the  
19 paragraph that by manipulating things in that way then Edison can save money and they can  
20 store up imported coal in their bunkers, as they can, for next winter.

21 A I wouldn’t ----

22 Q I am just wondering – what I find very strange is this: at the time you have got all this, and  
23 when I say “at the time”, we started off in 1999 and we are now in May 2000, but I do not  
24 find this explanation given by you in your witness statement. You clearly believed what  
25 you were saying here. Why is it not in your witness statement?

26 A Sorry, can you just remind me what it is that you think should be in there.

27 Q It is simply the fact that you talk about the problems that were happening and you attribute  
28 them to Edison’s lack of a direct relationship with the party that was actually hauling the  
29 coal. We have just been going through a number of contemporaneous documents, two of  
30 which at least have been created by you ----

31 Q Yes.

32 Q -- which completely different explanations have been provided. Why do these explanations  
33 not figure in your witness statement?

1 A To the best of my recollection at the time, going from November 1999 onwards, I certainly  
2 felt that one of the problems that we had was because we were unable to – because of the  
3 situation, because we had a number of coal suppliers seeking to supply large quantities of  
4 coal into the one station with no necessarily direct relationship between us and the station  
5 owner, who appeared unable to be able to manage this situation for reasons that we didn't  
6 necessarily always understand at the time and could only speculate on, there were coal  
7 suppliers who – I think because of their own interests, and I think we said this at the time, it  
8 appeared to be the case – were unwilling to moderate their orders.

9 Q What you are doing is selectively taking out from a complicated situation one explanation in  
10 order to advance a theory or an argument, the theory being that Edison had decided not to  
11 enter into E2E agreements. That is the truth, is it not?

12 A The only thing that we could respond to at the time were the facts, I think, as they were  
13 before us at the time, and the facts were at the time that we were receiving orders on the  
14 Tuesday and Wednesday of each week which exceeded the ability of the station to handle.  
15 We were left with a position where in some weeks we had a power station that, with a fair  
16 wind, might be handle 86 trains and we were receiving orders well in excess of 86 trains.  
17 Following consistent and persistent requests through our customers and ultimately direct  
18 with Edison Mission, we were trying to get some common sense into play to get those  
19 orders moderated and managed out. At the time I think we took it as a symptom, as an  
20 example, of the problems of not being able to deal directly with a principal and the  
21 problems that occur when competing contracts are put in place where we've no mechanism  
22 for reconciling conflicts or differences. One of the things I will just add is that I can  
23 remember a discussion with Edison Mission in July, early July, at their offices, and I think  
24 with a guy called David Grylls, where I'm sure we asked this very question, "What happens  
25 in the event of a conflict?" I'm sure I can remember being assured that there would not be  
26 one.

27 Q Thank you very much, but what I would like to do is, I am afraid, to press you a little bit on  
28 this one. The question I am asking you about is why your witness statement is phrased in  
29 the way it is. I am not asking you specifically about your understanding of events back in  
30 1999/2000, because you have given an explanation and we have seen the documents. The  
31 point that I am putting to you is that the explanation that we find in the documents,  
32 including indeed the way you have put it just now, does not appear in your witness  
33 statement, and I suggesting to you that the reason why it does not appear is because the  
34 witness statement is selective, it is designed as a piece of advocacy in order to convey a

1 particular message, namely that Edison had decided to abandon E2E agreements. Your  
2 witness statement is not designed to tell the whole truth?

3 A My witness statement is what I said about what I could recall about what happened at that  
4 time having regard to the documents, and so forth, that I had. That is my witness statement.

5 MR. MATHER: Mr. White, could you help us clarifying the phraseology about “lancing the  
6 boil”. You have got this position of all these trains turning up and Edison threatening to  
7 turn them away and you hoped they would not “bottle it” and that they would turn some  
8 away. What do you think the consequences of that would be?

9 A What I think we would have liked is for a common sense resolution to what had become a  
10 farce, and “lancing the boil”, I think what was meant was, here is a festering problem and it  
11 quite clearly was going on in November from the evidence that we have, and I think there’s  
12 evidence here that it’s still going on later on in the spring, and I think “lancing the boil”  
13 refers to trying to find a means of common sense so that we weren’t being put in the  
14 envisaged position of being asked to send more coal into a power station than it was  
15 physically able to receive.

16 Q What would your ideal way of resolving that in a common sense way be if you had had a  
17 meeting after a few trains had been turned round and everyone had banged their heads  
18 together? What should have happened?

19 A I honestly can’t remember what I thought at the time other than thinking – what I think  
20 should have happened and what would have happened elsewhere is that the station owner  
21 would have taken ownership, or would have been able to take ownership of the problem.

22 Q And would have got a grip on the quantities somehow?

23 A Yes.

24 Q Were you neutral about how they would have done that?

25 A I believe so, yes.

26 THE CHAIRMAN: Mr. Lasok, choose a moment for a break?

27 MR. LASOK: If this is a convenient moment for the Tribunal that will be fine.

28 THE CHAIRMAN: We will break until half past.

29 (Short break)

30 MR. LASOK: If you could look at your witness statement, please. Have you got p.507 of the  
31 bundle?

32 A I have.

33 Q Sub-paragraph (e):



1 “We at EWS also found our involvement effectively as a sub-contractor to Enron  
2 and Powergen, and the lack of a direct relationship with Edison as the  
3 infrastructure owner, frustrating.”

4 You are saying this in the context of the reasons that you are giving for why Edison was  
5 wanting to move away from an E2E model. Why was EWS’s sense of frustration a reason  
6 why Edison might want to move away from the E2E model?

7 A Sorry, can you repeat the question?

8 Q Yes. Why was EWS’s sense of frustration a reason why EME might want to move away  
9 from the E2E model?

10 A I think that can only be a sense of shared frustration that we were unable to deal with the  
11 situation at Fiddlers Ferry where we were being asked to send in more trains than the station  
12 could handle, operate, and I believe that Edison also found the situation frustrating, or found  
13 it difficult to deal with, they could not rationalise it.

14 Q Yes, it was their own fault?

15 A It was a shared frustration.

16 Q It was their own fault?

17 A Yes.

18 Q They had made a bad call on the quantities to be delivered?

19 A A bad call had been made.

20 Q Yes, but here you are talking about EWS’s sense of frustration?

21 A Yes.

22 Q Now, if we go to the next page at (f) you say: “... we [EWS] observed the relationship  
23 between Edison and Enron deteriorating ...” According to you EWS was responsible for  
24 getting Enron out of Fiddlers Ferry and Ferrybridge, is that not so?

25 A No, I think that would be presumptuous on the part of a haulier to say that it had the power  
26 to decide what a power generator was going to do and who it was going to contract with.

27 Q Could you look at G3, please, and could you turn to p.624? At the top of p.624 we have an  
28 email from yourself to a Mr. Allen Johnson and in the second paragraph we have: “We did  
29 the deal with Edison Mission yesterday morning for LBT-Fiddlers.” In the second line you  
30 say: “Enron are now off our hands so far as Edison are concerned”, and at the end of the  
31 paragraph you say: “But we have got them out of Fiddlers and Ferrybridge – a big step  
32 forward”?

33 A I don’t think I meant what was suggested there, that we have been able or had the power to  
34 decide who Edison Mission were going to contract with. I think what I meant there was that

1 the situation so far as we were concerned had been resolved and we were dealing directly  
2 with the principal.

3 Q What you are actually saying is that EWS was instrumental in getting Enron out of Fiddlers  
4 Ferry and Ferrybridge, that is what you are actually saying?

5 A No, I don't believe that is what I was saying.

6 Q Why say it?

7 A I don't think that is what I meant. What did I mean? I believe that what I meant was that we  
8 were now dealing directly with Edison Mission. I don't believe I meant anything more. I  
9 don't think I meant anything pejorative.

10 MR. LASOK: Well why does it say: "We have got them out"?

11 A I don't believe I meant the "we" as in "We have done this", I believe what I meant was  
12 "we" as in the sense that they have gone, they are not there.

13 Q "We" as in the sense of "they"?

14 THE CHAIRMAN: I must say, Mr. White, I am a little troubled that every document that you  
15 have written that you have looked at so far you have said does not mean what it said.  
16 Maybe it is time to bite the bullet. Just have another look at it and tell us what was behind  
17 this.

18 A I don't think I can say anything more, what it says on the document is what it says.

19 MR. LASOK: Right, shall we move now further down page 508, and if we go to the heading:  
20 "Coal haulage to Fiddler's Ferry and Ferrybridge from June 2000 to October 2000". So we  
21 are now entering the period, in fact the period has already started of EWS's sustained and  
22 deliberate campaign to exclude Enron from the market. At this stage it is all in progress.  
23 That is so, is it not?

24 A Yes.

25 Q Now, when we get to the next page we have another page: "Edison tender process". We  
26 have a series of paragraphs that run down to forty-three. Is it fair to summarise them as  
27 follows: what they really say is this: Edison put out its invitation to tender in June 2000.  
28 EWS provided an opening bid in July. There were then negotiations and a deal in October.

29 A Yes, I believe that to be correct.

30 Q If we move on to p.512 we have got here the section 'The reasons why Enron says it did not  
31 win the Edison tender'. We have got para. 44, all the way down to para. 53. Is it right to  
32 say that basically, with a couple of exceptions, all that this section says is what at the time  
33 EWS believed?

34 A It was just belief.

1 Q I just want to pick up on one or two things though. At the end of para. 45 we have got,  
2 "Our bid offered Edison the kind of flexibility and direct contract that they wanted  
3 and they knew we had the capacity to deliver".  
4 That was not true, of course, of the opening EWS bid, was it?  
5 A No. No, because I think we'd asked for a minimum annual payment.  
6 Q In fact, the negotiations went through a number of iterations before Edison got the kind of  
7 flexibility it wanted. Is it right to say that even after the deal had been struck there was  
8 continued disagreement about the MAP - minimum annual payment?  
9 A I can recall there were discussions which went on after 5<sup>th</sup> October. I honestly can't recall  
10 being involved. I probably was involved, but I've no recollection of being involved in those  
11 discussions.  
12 Q Okay. Fair enough. Can we go to the end of para. 46? The last sentence there:  
13 "It was clear from those meetings that capacity and service levels were  
14 particularly important to Edison".  
15 A Yes.  
16 Q Can I suggest to you that the particular emphasis was on price?  
17 A A particular emphasis --? Edison were always very careful at meetings to press the issue of  
18 price. But, they didn't negate or neglect other items either. Was there a particular -- I  
19 honestly can't remember the meetings to say when the emphasis moved from one to the  
20 other.  
21 Q Could you look at G3, please? Page 852. That is a file note of a meeting between EWS and  
22 Edison. You are down there as being present. If you look at those present in the left hand  
23 column, the last entry is you. If you go to the next page, para 11 says,  
24 "Towards the end of the meeting MC said,  
25 'It comes down to three things: price, relationship, confidence in the quality of  
26 service'.  
27 It was clear that his emphasis was on price".  
28 A Yes.  
29 Q Does that correspond to your recollection?  
30 A I can remember a meeting of the CSDC which must've been on 10<sup>th</sup> August. I honestly  
31 can't remember much at all of what was discussed at the meeting.  
32 Q I want to move on now back to the witness statement at p.513, para. 48.  
33 "We didn't believe that Enron ever had any chance of maintaining its involvement  
34 in Edison's coal haulage after the expiry of the Edison/Enron E2E contract in June

1                   2000. As I have already explained, I did not believe that Edison wanted to  
2                   continue with an E2E model and Edison confirmed that this was the case”.

3   A    Yes.

4   Q    You go on to say,

5                   “I therefore did not believe that Enron had any chance of entering into another  
6                   E2E arrangement with Edison”.

7   A    I believe that.

8   Q    Do you know, or do you not know, whether that was a commonly held belief within EWS?

9   A    I held to that belief. I think David Griffiths, who I work with, held to that belief. At the  
10           time -- I think it was held by the people who I immediately worked around. I couldn't say  
11           whether or not anybody further up the chain would've held that belief.

12   Q    So far as BE is concerned, can you remember what your belief was around about the same  
13           time in April 2000 -- of what BE was up to?

14   A    In April 2000? I think by April 2000 - and there may be documents which prove or  
15           disprove my memory - I believe that at that time BE had already decided to enter into an  
16           agreement with Enron.

17   Q    I suppose it might actually have been a bit of an unfair question. Have you got Bundle G2?  
18           Turn to p.500, please. This is a file note. It is a note of a meeting with a Mr. John Sheddon  
19           of British Energy. The note is dated 12<sup>th</sup> April. It was copied to you and Mr. Jones. If you  
20           look at the penultimate paragraph, the one beginning, “The arrangements with Enron --“,  
21           the second line says,

22                    “It is a flexible arrangement but clearly BE intend to do their own coal and  
23                    logistics resourcing after April 2001. We went into talk about the forward  
24                    position after April 2001 when BE will be managing their own sourcing of coal”.

25   A    Yes.

26   Q    At that stage at any rate BE was thinking about a DIY arrangement.

27   A    Yes.

28   Q    But I think ultimately they went for an E2E arrangement.

29   A    Yes, they did.

30   Q    So, basically what was happening at that stage of the period was that all that the generators  
31           were telling you was what was happening when the existing commitments that they had had  
32           were coming to an end, many of which reflected the arrangements that had been put into  
33           place at the time of, or shortly after, divestment and privatisation.

34   A    Yes.

1 Q Do you think that if they were considering E2E as a possibility they were likely to  
2 discourage you by saying so?

3 A I have no recollection of any generator saying one way or the other.

4 Q Go back to your witness statement, and could you turn to p.514. We have got at the bottom  
5 of the page immediately before para.54, the heading “*EWS’s refusal to enter into an*  
6 *appropriate contract with Enron*”?

7 A Yes.

8 Q I want to take this in two stages. First of all, I want to look at the period before May 2000.  
9 Can you cast your mind back to that period?

10 A It was a long time ago, but ----

11 Q I know. The absence of a performance contract was a deliberate act on the part of EWS,  
12 was it not?

13 A Was it a deliberate act? Sorry, could you repeat the question again, please?

14 Q The fact that there was no performance contract between EWS and Enron ----

15 A Yes, we were reluctant to enter into a performance based contract until we understood what  
16 it was that we were committing to.

17 Q So it was deliberate?

18 A Deliberate – yes.

19 Q So far as the period from May 2000 is concerned, we are now entering into the period  
20 during which EWS was engaged in the deliberate campaign to exclude Enron from the  
21 market – right?

22 A From May 2000?

23 Q From May 2000, and do you accept that EWS held back a performance based contract so as  
24 to put Enron at a disadvantage when tendering to power generators?

25 A My answer to that is, no, we didn’t.

26 Q Could you look at bundle G4, please, p.1028. If you look at the bottom you have got an  
27 email from Tom Kearney to yourself, in which he says:

28 “Following up on our recent discussions, attached please find a term sheet for a  
29 contract between Enron and EWS. We have drastically simplified the performance  
30 regime to allow both flexibility and easy monitoring.”

31 A. Yes.

32 Q Then if you move above that you get to an email that you sent on 28<sup>th</sup> November to Pamela  
33 Bingham and Alan Johnson, and you say in the second paragraph:

1 "I think we should respond positively – but can't of any urgent reason why it  
2 should be done quickly, but some reasons for leaving it until we have settled  
3 Eggborough."

4 A That's what it says, yes.

5 Q This, of course, was November 2000 after the contractual opportunity with EME was lost,  
6 but at that stage you were deferring implementation of this until you had seen what had  
7 happened at Eggborough, and that was the BE deal, was it not?

8 A Yes, it would have been.

9 Q Why did you do that?

10 A I have no recollection of this email, sorry.

11 Q Given the fact that as from May 2000, indeed if not before, but certainly as from May 2000,  
12 EWS was engaged in this deliberate campaign to exclude Enron from the market. There  
13 was no prospect at all of EWS offering Enron a haulage contract on terms that were the  
14 same as the terms EWS was prepared to offer, for example, Edison – that is true, is not?

15 A No, it's not true.

16 Q It is not true?

17 A No. The reason I would say that's not true is that we had a series of discussions certainly  
18 with Enron, and I think there's evidence here, and they proposed performance based  
19 contracts in November. There were further discussions, as I recall, that went on in January  
20 and I believe we responded at the end of January with similar terms to both Edison and  
21 Enron.

22 Q I am looking at the period May to October 2000. Just focus on that.

23 A Yes.

24 Q This is the period in which EWS is engaged in this cynical campaign to exclude Enron from  
25 the market. I will put my question again: given that that was what EWS was doing, it was  
26 deliberate, it was intended to disadvantage Enron, it was intended to impose a competitive  
27 disadvantage on Enron – in those circumstances will you agree with me that there was no  
28 chance at all of EWS offering to Enron a contract for haulage that in relation to things such  
29 as price, performance, things of importance to a customer, was the same as or similar to the  
30 terms that EWS was prepared to offer to Edison? I know that is rather long and complex,  
31 but do you understand the question?

32 A I understand the question and I disagree with it. There was a series of discussions which  
33 went on through the spring of 2000, immediately prior to May 2000, in which there was –  
34 and they made reference to offers that we made to both Edison and Enron, I think on the

1 same day actually, towards the end of January 2000, and there was a series of offers and  
2 counter-offers. So I disagree.

3 Q Are you actually saying that in the period May to October 2000 EWS was prepared to offer  
4 Enron a haulage contract that was effectively the same in terms of price, rates and  
5 performance as what it offered EME in October 2000?

6 A I can't say what – what we did is a matter of record. What happened, happened. All I can  
7 say is that there was a series of offers and ideas and counter-offers and ideas in the spring of  
8 2000 leading up to May 2000. We made a proposal and counter-proposal on 12<sup>th</sup> May, and  
9 we never heard anything further back. To the best of my recollection and knowledge  
10 nothing further happened in the relationship between EWS and Enron in terms of a  
11 performance based contract, I can't say otherwise because I genuinely can't remember what  
12 else we talked about. But in terms of performance based contracts between May and  
13 October the facts are the facts, but I can't remember anything further being discussed.

14 Q Was the situation not very, very simple, and that was that Enron was faced with a dominant  
15 undertaking that was not prepared to offer it haulage on, I would use the term: "reasonable  
16 terms" and therefore it was forced to go elsewhere?

17 A Sorry, could you repeat the question?

18 Q Well, I will rephrase it. I think that when I put my question your answer was not a direct  
19 answer, if you will forgive me for saying so, to the question, because what you started  
20 talking about was the exchanges, the negotiations that were going on. The point that I am  
21 putting to you is that given that EWS was engaged in this deliberate campaign it simply was  
22 not going to offer Enron a deal on haulage which was equivalent to the deal it was prepared  
23 to offer EME, it just was not going to do it?

24 A We did not, there was no more discussion after 12<sup>th</sup> May. I honestly don't know what we  
25 would have done or could have done at the time.

26 THE CHAIRMAN: Mr. White, it is a given that in a closely written and reasoned, if somewhat  
27 repetitive report amounting to several hundred pages ORR found that EWS was taking  
28 careful anti-competitive practices against Enron, what was the point of those anti-  
29 competitive practices?

30 A The point of those anti-competitive practices, well, insofar as I – I haven't read all of that  
31 document, I understand the point they were making was ----

32 Q You are lucky!

33 A I understand the point they made was that we deliberately pursued a policy of trying to  
34 exclude Enron from the market.

1 Q So there was very little likelihood of EWS and Enron doing business at that time in the way  
2 that Mr. Lasok has been suggesting to you?

3 A Yes.

4 MR. LASOK: May I have a moment?

5 THE CHAIRMAN: Yes, of course. (After a pause) Mr. Lasok, during the very short adjournment  
6 we had in mid-afternoon, I and my colleagues were discussing this evidence, obviously, and  
7 the issue of causation rather than credibility I think is troubling all of us, and we wonder  
8 how you link your cross-examination, which certainly goes to the issue of credibility and, if  
9 I may say, quite effectively, to causation?

10 MR. LASOK: Well so far as Mr. White is concerned, my submission is that most o f his evidence  
11 is not particularly relevant because as he himself says it is really for Mr. Crosland to give  
12 evidence as to what EME's position is. What I was seeking to do with the cross-  
13 examination of Mr. White was to deal with some of these satellite points because, to be  
14 quite blunt, I would put it in this way, that Mr. White's evidence is crafted so as to support  
15 and corroborate Mr. Crosland on certain point – and I use the verb “craft” deliberately.

16 THE CHAIRMAN: You have made that point very effectively, if I may say so, by your  
17 questions, but your approach to this witness and to the last witness falls short of suggesting  
18 that they were in cahoots at the time, does it not?

19 MR. LASOK: I am not suggesting that they were.

20 THE CHAIRMAN: No, just so it is clear, it relates to the causation issue?

21 MR. LASOK: Yes.

22 THE CHAIRMAN: Thank you, yes. I thought it might just help you if you knew our concerns.

23 MR. LASOK: Thank you very much, yes. Now, Mr. White, do you accept that a performance  
24 contract was quite important for somebody taking rail haulage?

25 A No.

26 Q No?

27 A No.

28 Q Why was it not important?

29 A We have a number of customers, and a number of significantly large customers over time,  
30 who have shown no interest in performance based contracting.

31 Q So are you saying that it was of no importance whatsoever to somebody bidding for a  
32 haulage contract offered by Edison that they had or had not a performance contract with, let  
33 us say, EWS?



1 A No, that is not what I am saying. What I am trying to say is that some customers would see  
2 it as important and some customers would not.

3 Q But in the present context we are looking at people supplying coal to power generators, it  
4 was important?

5 A No, even in the context of power generators not all customers at all times see it as  
6 important.

7 Q Edison saw it as important?

8 A Yes, I agree Edison did.

9 Q So Edison saw it as important and therefore if you wanted to compete for a haulage contract  
10 with Edison you also had to be able to offer a performance contract?

11 A Yes.

12 Q And if you did not have the ability to offer a performance contract then you were at a  
13 competitive disadvantage?

14 A Yes.

15 Q Thank you. Well could you look at G5 and turn to p.1456. This is part of the note made by  
16 Nigel Jones at some point before April/May 2000. If you have 1456 in front of you?

17 A I have.

18 Q Could you look (by the second hole punch) he says this: "I believe Enron are very exposed  
19 especially to Edison Mission where they need to deliver/manage us to get a long term  
20 role."?

21 A Yes.

22 Q Do you agree with that?

23 A Yes.

24 MR. LASOK: No further questions.

25 THE CHAIRMAN: Thank you very much. Mr. Brealey.

26 Re-examined by Mr. BREALEY

27 Q Can you just take up bundle G2?

28 A Yes.

29 Q You were asked some questions about a performance based contract. What I would like to  
30 do is go through certain documents leading up to May relating to performance based terms,  
31 if I can put it that way, and then ask for your comments on them, and give your evidence to  
32 the Tribunal. The first page is 424. Just have a look at that document. These are all going  
33 to be on the performance based negotiations up to May 12<sup>th</sup>. This is a note from Tom  
34 Kearney with a copy to Staley. These are the term sheet. Then we go to p.425. You

1 identify what performance obligations or terms are being sought; whether they are  
2 reciprocal; on whose side. Take your time. You may not have seen these documents.  
3 Where does the Tribunal get any performance-related obligations?

4 MR. LASOK: I am terribly sorry, but -- Surely the Tribunal can read the document for itself. It  
5 does not need a witness to tell us what is in the document.

6 THE CHAIRMAN: I do not think the witness is going to be able to shed more light on the  
7 document than it sheds on itself, is he?

8 MR. BREALEY: If the Tribunal does not need any assistance as to the meaning of the  
9 performance based terms ----

10 THE CHAIRMAN: The performance based terms have words like 'performance' against them,  
11 do they not?

12 MR. BREALEY: Then I shall take it more quickly. This is a term sheet proposed, or sought, by  
13 Enron. Can I then go to p.464?

14 THE CHAIRMAN: Do not be put off from asking anything you think is important, Mr. Brealey.

15 MR. BREALEY: I am grateful. (To the witness): This is 9<sup>th</sup> March, which I do not believe is in  
16 the note. For the Tribunal's note, we have been handed a note on performance. I do not  
17 believe this document is in Enron's note on performance. You may want to slot this  
18 reference in. This is a message to Tom Kearney which refers to, "Since our meeting at your  
19 London office on 24<sup>th</sup> February --" It refers to certain things. This is 9<sup>th</sup> March. What Mr.  
20 Kearney has done is to leave a voicemail - an e-mail of 9<sup>th</sup> March. It is said there, "I now  
21 understand you no longer wish to pursue the incentive scheme". Can you explain what that  
22 means?

23 A I believe that was a reference to a tiered rate structure which had been proposed for coal to  
24 be moving between Liverpool bulk terminal and Fiddler's Ferry. I think it was tiered in  
25 such a way that the price per tonne that we were paid increased with the number of tonnes  
26 that we moved each week - I think.

27 Q Can you remember how that changed from previous drafts?

28 A Not at that particular point.

29 Q Can you then go to p.466. As a result of that e-mail exchange of the 9<sup>th</sup> and the voicemail  
30 Mr. Kearney sends a further term sheet, which is contained at pp.466 and 467. Are you able  
31 to tell the Tribunal if it differs and the extent to which it differs from the previous term  
32 sheets?

33 MR. LASOK: I am terribly sorry. This again seems to be a comparison of documents. If my  
34 learned friend wants to put in a note similar to our note about the chronology dealing with

1 the performance contact, and drawing comparisons between the different documents, then I  
2 would respectfully suggest that that is an efficient way of dealing with it. But, asking the  
3 witness to draw comparison between documents in the file that the witness has not really  
4 seen seems to be a rather time-wasting way of doing something which involve reading the  
5 English language.

6 MR. BREALEY: I have been listening, since about 10.30, Mr. Lasok asking questions about  
7 various documents and what the witnesses think about various documents. They are term  
8 sheets that have been exchanged between the parties and I am merely asking this witness  
9 whether there is a difference between the two term sheets insofar as ----

10 THE CHAIRMAN: Mr. Brealey, I think probably if you were to put your questions in more  
11 leading form, there will be no objection from us. Let us see if there is. That might be the  
12 compromise.

13 MR. BREALEY: (To the witness): In the draft that Mr. Kearney sends on p.466 is there an  
14 obligation for an on-time performance?

15 A Not that I can see.

16 Q As compared to the draft.

17 THE CHAIRMAN: I was just looking at p.468 actually. It is not easy to ascertain from p.468  
18 whether the premise of your question is right or not.

19 MR. BREALEY: If one goes to p.425 there is an obligation on on-time performance. There is  
20 then a voicemail and e-mail from Mr. Kearney as a result of which a further term sheet is  
21 prepared by him which appears at p.468 not having a time ----

22 THE CHAIRMAN: Is that right? I am looking at p.468 and 'discharge incentive' and 'penalty'.  
23 The previous document as a thirty minute time window. I may have this wrong. I can see  
24 Miss Lester shaking her head in consternation.

25 MR. BREALEY: It may be we have to do this in submissions. 'Discharge' is essentially the  
26 obligation on the generator to discharge in time. That benefits the haulier.

27 THE CHAIRMAN: I understand. Thank you, Miss Lester.

28 MR. MATHER: There is another element which figures 'Programme Performance' on p.467  
29 which has the programme period, which may further confuse things.

30 MR. BREALEY: Yes. We will try and get to the nub of it. There is some to-ing and fro-ing here.  
31 What I am trying to ascertain is whether there is an obligation for on-time performance -  
32 that is to say, the train has got to be delivered on time. There is at p.425 a note, 'How does  
33 this deal with power station loading failure?' It is dropped in the draft at p.466/467/468. In

1 other words, Mr. Kearney is no longer seeking on-time performance. Can you shed any  
2 light on that, Mr. White, by looking at these two documents?

3 A It had obviously ceased to be important.

4 THE CHAIRMAN: I think this might best be left to submissions, Mr. Brealey.

5 MR. BREALEY: Very quickly then. Can you go to p.475. You see there, the fourth bullet point:

6 "EWS agreed to the concept of performance incentive penalties."

7 Can you recollect why that was so?

8 A Yes, because, as I recall, we had a meeting at Enron's offices and we agreed the principle of  
9 a performance contract, and I think we agreed some particular points. There were other  
10 points outstanding but we agreed to some particular points.

11 Q Lastly, 559, these are main rates, and at 560 we see, "Points agreed at meeting of 16<sup>th</sup>  
12 March".

13 A Yes.

14 Q We see the points that you have agreed?

15 A Yes.

16 Q Can you shed any light on the obligations there?

17 A "Programme period/base train plan", that probably referred to we would agree a train plan  
18 for a period of time with a base schedule of trains. "Indicative programme", that probably  
19 meant that they would give us an idea a year out, six months out, three months out, as to  
20 what it was that they were going to ask us to do and how that would relate to a programme  
21 period and base train plan. "Programme notification time", that probably relates to the time  
22 that they agreed to order the trains, typical industry processes in terms of the delivery  
23 schedules, train schedules are put together, Tuesday/Wednesday of one week, for the  
24 following week. So what we are doing there I think is agreeing schedule notification time.  
25 I believe at some point it was discussed bring that forward, so instead of it being the week  
26 before it was two weeks before. "Programme schedule", I think that basically just relates to  
27 what the delivery schedule is. "Programme performance", that would suggest to me that  
28 what we are seeking to agree is what performance we were going to agree to have against  
29 those delivery schedules. Under "Performance penalty", I believe that that would  
30 effectively be like a cancellation fee, so if we didn't run trains we would pay them a sum of  
31 money. If they cancelled trains from a programme, I think we would have expected to have  
32 got some compensation for that. "Base Train Plan deficit penalty", I suspect that what that  
33 related to was , whatever the base train plan period was, whether it was a month or a  
34 quarter, I think we had long debates over what that should be. If we failed to deliver our

1 obligations say during a quarter, if we'd agreed to move 100,000 tonnes during a quarter  
2 and we were 10,000 tonnes short, then we'd pay a penalty. That would be in addition to, as  
3 I recall, the specific penalty relating to a week, if the train cancelled during a week.

4 Q These were the points that were agreed and still agreed by this time?

5 A Yes.

6 Q Can we go back to 558, "Proposed Rate Structure", the first offer. This is the first offer on  
7 the rate structure. Did you ever hear back from Enron after this?

8 A No.

9 THE CHAIRMAN: Thank you very much.

10 We will adjourn until ten o'clock tomorrow in court 38 at the Royal Courts of Justice, when  
11 we hope the technology will work, but I'll believe it when I see it!

12 (Adjourned until 10 am on Friday, 18<sup>th</sup> September 2009)

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