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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1106/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 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 FOUR

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 Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

1 MR. LASOK: Sir, we come to the expert witnesses. Before I kick off I ought to explain that Mr.
2 Beard is not here because he is working on other aspects of the case. Now, the first expert
3 is Professor Ordover, but before he is called to the witness box I understand Mr. Brealey
4 wants to make an application.

5 THE CHAIRMAN: Mr. Brealey, I am led to believe you want to make an application!

6 MR. BREALEY: It is a point we have flagged in our skeleton, and it concerns the admissibility
7 of Professor Ordover's report. What I would like to do is to spend the next 10 minutes
8 explaining why we say it is inadmissible because it is an important point; it is an important
9 point generally for the Tribunal where there are "loss of chances" cases and the claimant
10 produces expert evidence saying what the claimant would have done and what the third
11 party would have done. It may well be that the Tribunal, once it has heard my submissions
12 wants to reserve the position and still hear Professor Ordover and we progress, but I do need
13 to put a marker down as to why we say his report is inadmissible.

14 As I understand it the Tribunal's case management order did reserve the position of the
15 admissibility of the expert evidence to be decided so technically Mr. Lasok still has to apply
16 for the report to be admitted.

17 If I can move swiftly on. The first point is that para. 12.8 of the Tribunal's guide – we will
18 come to the report in a minute – I have copies of the Tribunal guide should they be needed.
19 12.8 says that the Tribunal will have regard to the provisions of the CPR.

20 "... the Tribunal take into account the principles procedures envisaged by Part 35
21 of the CPR, notably that expert evidence should be restricted to that which is
22 reasonably required to resolve the proceedings."

23 12.9 The Tribunal considers that, as under Part 35 of the CPR, it is the duty of the
24 expert to help the Tribunal on matters within his expertise."

25 So we know it overrides any obligation to the person from whom it is receiving instructions.

26 "An expert witness should never assume the role of an advocate and should not
27 omit to consider material facts which could detract from the expert's concluded
28 opinion."

29 That is the starting point that the Tribunal will have regard to the provisions of the CPR Part
30 35. The leading case on the admissibility of expert evidence is the *JP Morgan Chase Bank*
31 case, which is in the case law legislation bundle vol.1, tab 16, if I could just take the
32 Tribunal to passages of that. It is a judgment of Mr. Justice Aikens, as he then was. Page
33 453 at the bottom (p. 553 at the top of the page). The judge sets out the principles relevant
34 to the admissibility of expert evidence.

1 THE CHAIRMAN: Do you want us to read?

2 MR. BREALEY: If you could, Sir, it starts with G – the law relating to the production of expert
3 evidence in civil cases, and just over the page including para. 22.

4 THE CHAIRMAN: (After a pause) Yes, I have read up to para. 22.

5 MR. BREALEY: Thank you. If I can just take the Tribunal first of all to p.553 G, the
6 admissibility, the burden is on the claimant, the person who wants to produce, so for Mr.
7 Lasok to say: “I have an application” does not necessarily get him home, he has actually got
8 to persuade the Tribunal that it is admissible. But the important criteria is at para. 20 and
9 there is one overriding question: is the expert evidence reasonably required to resolve the
10 proceedings? That is the one overriding consideration: is the expert evidence reasonably
11 required to resolve the proceedings?

12 THE CHAIRMAN: It is often a circular argument, is it not? Often one does not know until one
13 has heard the expert evidence concerned.

14 MR. BREALEY: That is true, Sir, but what obviously happens in the Chancery or Commercial
15 Court is that one looks at the report and decides if the expert is going to give evidence on
16 that basis then it is plainly inadmissible, and that is essentially what is happening here, that
17 the judge is looking – even before they have been called – he is deciding whether or not the
18 expert evidence should be adduced by reference to the criteria. The overriding criteria is
19 whether it is required to resolve the proceedings. Then in the passage cited from the
20 Australian case there are two sub-questions.

21 I do not want to take too much time of this, but it is important from our perspective, Sir, and
22 we do submit that on the basis of this criteria there are three reasons why, looking at the
23 report of Professor Ordover, it should be inadmissible.

24 The first is that Professor Ordover’s approach is wrong in law, and I will take the Tribunal
25 to that in a moment. Secondly, his report is based on his own findings of fact, which is
26 something he should not be doing, see para. 21 of that judgment. Thirdly, we say there is
27 no specialist knowledge being brought to the table here; it is a pure “loss of a chance” case,
28 and an economist is no more and no less expert to decide it than the Tribunal or anybody
29 else. So if I could quickly take the Tribunal through those three reasons: wrong in law,
30 findings of fact, and specialist knowledge.

31 When one looks at the report it has got the wrong approach. We start with the *Allied*
32 *Maples* judgment, (vol.1, tab 9) we flagged this in our skeleton argument. There are two
33 passages that I would like to refer to. The first is p.1614:

1 “In many cases direct evidence from the third party will not be available, as in the
2 case of the deceased husbands ...”

3 Then it goes on: it would have to be done by inference. The question is the court is
4 envisaging direct evidence from the third party who is supposed to confer the
5 benefit. More importantly at 1620, we have Lord Justice Hobhouse, at just below
6 B: “He [the trial judge] did not hear evidence from any witness from the vendors,
7 Gillows...”

8 So that is: would they have signed the deal with the protection in it? “Such evidence, if it
9 had been given, might have been highly material to the question of quantification” –
10 obviously and causation. So in other words, when you have a “loss of a chance” case and
11 the question is whether the third party is going to confer the benefit, the evidence from that
12 third party is, and I quote: “highly material.” To put the point more bluntly, the evidence of
13 Mr. Crosland is highly material.

14 Mr. Lasok submitted that very point in his submissions to you, and I will give the Tribunal
15 the reference, which is transcript Day 2, p.62 - where, in the context of the evidence of Mr.
16 White, he said, “Mr. White’s evidence is pretty irrelevant as to what Edison would have
17 done. The real evidence comes from Mr. Crosland”.

18 The essential point to note so far is that the evidence from the third party is highly material.
19 It is essentially based on the subjective views of the third party - what I would have done.
20 The same goes for Mr. Lasok’s Question A. Obviously there is a Question A - what the
21 claimant would have done. So, the claimant comes to court and says, “Well, I would have
22 done this”. It is a subjective test. There is support for the notion of the subjective test in the
23 decision itself at B.91 to 92 at p.257. The question is whether the highly relevant evidence
24 from the third party should be admitted, depending upon the third party’s subjective views.
25 Just to recap what is happening, this is the BE contract that Enron actually got. They did
26 not get the EME one - they got the BE contract. As we see at B91, unlike in the EME
27 section, BE began a tender exercise for its coal haulage requirements from April 2001 upon
28 expiry of its prevailing one year deal and BE was willing to consider end-to-end supply of
29 coal as well as options for procuring coal and coal haulage separately. That is an important
30 distinction, we say, between the EME tender and the BE tender because BE is willing to
31 consider E2E contracts.

32 We then get B92 which we have seen before, where there is the competitive disadvantage
33 because of the May rates.

34 At the bottom of B94,

1 “Despite EWS’ pricing practices Enron was eventually successful”.

2 So, unlike the EME one Enron did get the BE deal. Over the page at B97 and B98 the
3 regulator says that the fact that it was eventually successful in winning the BE business does
4 not prove that it was not placed at a competitive disadvantage. Okay? B98 is important.

5 “Indeed, there is evidence that EWS’ strategy risked undermining Enron’
6 negotiations with BE. The final outcome of the tender process reflects BE’s [and
7 these are the important words] subjective preferences for coal procurement”.

8 In other words, what the regulator is doing there distinguishing between competitive
9 disadvantage and causation, and saying, “Well, they actually got the contract because of the
10 subjective preferences of the generator”. So, again, it emphasises this subjective test.

11 When we come to Professor Ordovery’s approach it is completely contrary in law to the task
12 that the Tribunal has, with respect. If we can go to his report in Bundle E, at para. 80,

13 “Having established the conditions of competition that would have existed but for
14 EWS’ abuse of dominance, I assess in this section what impact EWS’ conduct had
15 on the likelihood that ECSL would have won the bid for EME’s four year contract
16 to deliver coal to the Ferrybridge power station. I do this by considering how
17 EME, as a rational economic decision-maker, would have evaluated tenders for
18 the contract with Enron and EWS in the “but for” world”.

19 That last sentence is absolutely critical, because what he is doing is saying, “I do this by
20 considering how Edison, as a rational economic decision-maker, would have evaluated
21 tenders for the contract.

22 Then, in the footnote one sees,

23 “Mr. Crosland, who was a party to the decision-making process for the invitation
24 to tender in 2000, states in his witness statement that multiple factors led him to
25 conclude that Enron had no chance of winning the four year contract with EME.
26 However, Mr. Crosland’s statement is not sufficiently removed from what actually
27 happened, as required in a “but for” analysis, and therefore, is not informative as
28 to what would have been a rational economic decision in a world but for EWS’
29 abuse of its dominance, which is the relevant inquiry for determining whether
30 Enron suffered anti-competitive injury damages ... I do not consider these non-
31 economic factors in my analysis”.

32 He repeats the point at p.266. This is the joint report. So, no regard to the evidence of Mr.
33 Crosland, apparently, because it is too subjective in this “but for” world. We raised this

1 point in correspondence, saying, “What on earth is going on here?” We get the point
2 repeated at p.266 of the joint report. Professor Ordober says as follows,

3 “The concept of the rational economic decision-maker operating to maximise the
4 net present value of expected profits is a fundamental principle of economic
5 analysis ... A properly constructed “but for” world is essential for isolating the
6 impact from associated damages from the anti-competitive conduct. Reliance on
7 witness statements about how they would have reacted absent the offending
8 conduct are suspect, likely unreliable and not credible because they are speculative
9 and tainted by the witness’ own experience of the world in which the offending
10 conduct took place”.

11 So, that is the basis upon which the report is proceeding - as a rational economic decision-
12 maker having no regard to any of the witness evidence because it is suspect and this “but
13 for” world does not live in the real world.

14 THE CHAIRMAN: Mr. Brealey, can I put an analogy to you? Please say if you think this is an
15 unhelpful analogy. A Home Office pathologist walks into a scene where there is a body and
16 certain other factors demonstrating in a “but for” world, how in his opinion the body may
17 have come to be dead. The pathologist then carries out an entirely “but for” examination
18 and produces a completely objective opinion of what has occurred. The pathologist is
19 thereafter told what various witnesses have said about what happened in the not “but for”
20 world, in the real world in which the death took place. The pathologist then applies his “but
21 for” opinion and expertise to that subjective situation and reaches conclusions in which,
22 using his objective skills, he opines as to what happened. That is certainly, in the world of
23 forensic pathologists, what frequently and normally occurs. What is the difference?
24 Professor Ordober is, is he not, entitled to apply his “but for” analysis? It is for the Tribunal
25 to assess, is it not, (a) whether it accepts his “but for” analysis, or with qualifications; and
26 (b) what difference events make to the weight that the Tribunal attaches to the “but for”
27 analysis.

28 MR. BREALEY: The pathologist brings a body of experience and knowledge – that is certainly
29 within Mr. Justice Aikens’ criteria. The question is whether an economist brings a
30 sufficient body of knowledge to determine whether Enron should have got this contract.
31 That was the third point. If the pathologist has no regard to the witness statements of the
32 people who saw the accident which could have a material bearing on the loss of the chance
33 or on his opinion – to a certain extent, the analogy falls down – if he says, “All I am going
34 to do is apply a rational decision maker analysis to whether the person is dead”, one would

1 say, “So what?” One has to have regard, as Mr. Justice Aikens says to the actual facts
2 which are incontrovertible or the assumed facts.

3 My essential point here is that the whole basis of the report is wrong. What Professor
4 Ordover is doing is saying that Mr. Crosland was irrational because he is adopting this
5 rational economic decision making test. That just goes to credit. Mr. Lasok can put that ----

6 THE CHAIRMAN: Credit of whom?

7 MR. BREALEY: Mr. Crosland. First of all, what is the relevance of the rational economic
8 decision maker test? That is something that Mr. Lasok does not articulate. If it is relevant it
9 can only go to credit. Professor Ordover cannot give evidence to this Tribunal as to what
10 Mr. Crosland would have done. He cannot give evidence, as he tries to do, as to what the
11 claimant would have done.

12 MR. MATHER: Is it not possible for Professor Ordover to address the question about a change of
13 situation in an abusive relationship if he feels that the evidence from Mr. Crosland did not
14 actually cover that in a “but for” world?

15 MR. BREALEY: It depends, sir. Certainly Professor Ordover cannot make findings of fact.
16 That is what Mr. Justice Aikens says. He just cannot make primary findings of fact, he has
17 got to give an opinion on the basis of either assumed facts or controversial facts. Professor
18 Ordover is not doing that. He is, as we will see, making his own findings of fact, which are
19 for the Tribunal to make.

20 I can see that there is some reluctance here.

21 THE CHAIRMAN: No, not at all. It is an interesting point possibly. One approach is to take the
22 approach you are taking; another approach might be, and you have illustrated, in a sense,
23 how easily it can be done, simply to cross-examine Professor Ordover, as it were, from the
24 footnote, and say, “The one thing you have not taken into account, given all your expertise,
25 which is wholly admirable, is what happened in this case, if that is your approach.

26 MR. BREALEY: That is what I will probably have to do. It still does not solve the question of
27 admissibility. The question is, “Does Professor Ordover’s expert evidence give any
28 assistance to the Tribunal?” My first submission is that it cannot give any assistance to the
29 Tribunal because he is, in law, adopting the wrong approach. The Tribunal has to get into
30 the minds of the players in this case, Enron and Edison, and establish what they would have
31 done. Professor Ordover is in no position to give evidence as to what they would have
32 done, let alone give it on an objective basis as some sort of reasonable bystander test, which
33 is what I have tried to say he is doing – this rational economic decision maker is essentially
34 an objective test.

1 I do submit that on that first basis that it gives no assistance to the Tribunal within the
2 criteria set down by Mr. Justice Aikens. Yes, I can cross-examine Professor Ordover, ask
3 him why does he not consider Mr. Crosland to be relevant, tainted by the reality of what
4 happened, but that does not solve the question of admissibility.

5 The second point, just very quickly because I do not want to take up too much time here, is
6 that when one looks at the report – and I have, to a certain extent, flagged this – for
7 example, para.13 of his report, p.5, as the Tribunal knows we have an *Allied Maples* test,
8 question (a), what the claimant would have done, what contract would the claimant have put
9 to Edison, what contract would the claimant have concluded with EWS in the “but for”
10 world; and then we have question (b), what Edison would have done. Here we see at
11 para.13 a summary of his opinion making conclusions of fact. From these conclusions of
12 fact at para.13 that Enron would likely have obtained a performance based contract with
13 EWS, that is a finding of fact which is for the Tribunal. For Professor Ordover to then give
14 his opinion that Enron have lost a substantial chance based on these conclusions of fact,
15 again that is contrary to the guidelines on admissible evidence of experts. That is my
16 second point.

17 My third point is that this is, although it is in the context of a competition case, a standard
18 loss of a chance of a contract between three commercial players. Professor Ordover is
19 undoubtedly an expert in the field of economics, but the specialist body of economics does
20 not assist the Tribunal in determining the sort of factors in play at para.13.

21 It may well be, sir, that we just hold this over and we hear Professor Ordover, and I cross-
22 examine him and the Tribunal can at another stage, when writing a judgment, decide
23 whether or not the report is admissible, having looked at the cases, and we can hold it over
24 *de bene esse*. I throw that out as a possible approach forward so that the Tribunal does not
25 have rule on the admissibility now, but I do have to make the submission, and I do make the
26 submission, that the report is inadmissible because it falls outside the guidelines of expert
27 evidence.

28 THE CHAIRMAN: Thank you. Mr. Lasok?

29 MR. LASOK: Well, sir, it will come as no surprise to the Tribunal to note that we disagree with
30 Mr. Brealey. In our submission this is a very good example of admissible expert’s
31 evidence. Mr. Brealey would be perfectly entitled to say that it was a matter for the
32 Tribunal as to the weight that it gives to the conclusions of the experts in the light of all the
33 evidence, but in our submission there is no sensible objection to the admissibility of the
34 evidence because it goes to the point, the application of economic analysis in the “but for”

1 world that is well established as being a matter within the sphere of expert economic
2 analysis in competition cases.

3 One might have had some sympathy for Mr. Brealey's position if he had started off by
4 withdrawing the report produced by Mr. Biro, because on the face of it what goes for
5 Professor Ordover goes in spades for Mr. Biro; that is not apparently Mr. Brealey's
6 position. It is also right, I suppose, to point out there is a passage in the judgment of Mr.
7 Justice Aikens, which is worthwhile looking at. It is para.22 on p.454 of the bundle I 1.

8 THE CHAIRMAN: (After a pause) Yes, we have all read it.

9 MR. LASOK: In our submission it is not a case in which Professor Ordover is imposing his own
10 subjective views as to what he would, or would not have done in the circumstances as they
11 were, or in the "but for" world. What he does is he applies economic analysis in order to
12 demonstrate what an economically rational operator or operators would have done. In our
13 submission he makes a very valid point that when you look in the "but for" world, you have
14 to look at a world which is purged of all the abusive elements and their impact. Now, that
15 obviously is a point for the Tribunal to take into consideration when it is evaluating the
16 whole body of the evidence before it. In our submission that is a point that substantiates the
17 value of expert economic evidence in circumstances such as the present. So in a nutshell it
18 is not a question of admissibility, it is a question of weight, because just like any other item
19 of evidence that the Tribunal has to take into consideration it has to consider its weight in
20 the context of the general body of evidence before it.

21 Unless there is anything else on which I can assist the Tribunal, those are our submissions
22 on this point.

23 THE CHAIRMAN: I think what we will do is retire, probably fairly briefly. We will give a
24 Ruling but the reasons will be fleshed out somewhat in our judgment in due course.

25 (Short break)

26 RULING

27 THE CHAIRMAN: The Tribunal is grateful for the advance notice that it was given of the point
28 which has been taken this morning by Mr. Brealey. We had the opportunity to ponder the
29 point without, of course, determining it before we ever sat in this case. We have now heard
30 the submissions which have been made principally by Mr. Brealey, but on both sides this
31 morning. Our ruling is that the evidence of Professor Ordover is admissible. We shall give
32 fuller, brief reasons in due course as part of our judgment on the whole of the case. Of
33 course, what weight we give to Professor Ordover's expert evidence is a matter for the

1 Tribunal. Indeed, how we deal with subjective, as opposed to objective, factors in relation
2 to any expert's evidence is a matter for the Tribunal. We shall approach it accordingly.
3 Let us continue. Mr. Lasok, I have concluded that Mr. Williams was a more than adequate
4 substitute in your absence, with which I am sure you would agree. He has just told you the
5 result.

6
7 PROFESSOR JANUSZ A. ORDOVER, Sworn

8 Examined by Mr. LASOK

9 Q Professor Ordover, you should have a number of files behind you. Could you take out
10 Bundle E and turn to Tab 1? This is the expert report of Janusz Ordover. Could you just
11 look at that, and then go to p.34. Is that your report and is that your signature?

12 A Yes, it is.

13 Q Could you go to the end of the volume? After Tab 16 there should be another tab which
14 says 'Joint Experts' Statement'? After Tab 17 you should have something there which is
15 called a 'Statement of Experts' Points of Agreement/Disagreement'.

16 A Yes, I see that.

17 Q Is that the document that you discussed with Mr. Biro?

18 A Yes.

19 Q With your views recorded in one of the columns?

20 A Yes.

21 Q Thank you very much.

22 Cross-examined by Mr. Brealey

23 Q. Good morning. We will be going through a few bundles. We have your report in Bundle
24 E. If you look around you there are some G bundles. You will need to take out Bundles
25 G3 and G2. Taking Bundle G3 first, go to p.852. This is a file note of Edison with EWS. It
26 is the passage at p.853, Point 11 that I would like to ask you some questions about. I do not
27 know if you have seen this. This is a meeting where Edison and EWS are discussing the
28 haulage contract.

29 "Towards the end of the meeting MC [Max Crosland] said, 'It comes down to three things:
30 price, relationship, confidence in the quality of service. It was clear his emphasis was on
31 price".

32 A. Yes. I see that.

33 Q Taking the second one - relationship - do you accept that that is a material consideration?

1 A Well, certainly it's listed here. From an economic perspective - which is the only one I
2 know how to apply - I would like to know a little bit more about exactly what it means. If I
3 may elaborate -- I am not sure what the rules are ----

4 THE CHAIRMAN: We will stop you if you say something you should not be saying. You just
5 carry on.

6 A Well, you should try to stop me before that!

7 Q I will stop you if I cannot read what is in your mind! We can forget things quite easily up
8 here.

9 A Thank you. I appreciate it.

10 MR. BREALEY: Professor Ordover, we are constrained by time.

11 A Right. No, I am just trying to make a comment that I understand the relationship is an
12 important consideration from an economic perspective.

13 Q It is.

14 A Yes, I would believe so. However, I would like to qualify that by saying that some aspect
15 of what might be considered relationship would be beyond something that economics can
16 apply itself to. For example, when the relationship involves a family relationship as an
17 element of the business decision-making, it would be hard for me to comment ----

18 THE CHAIRMAN: This is just common-sense, is it not, Professor? I choose to shop at Macey's
19 because my grandmother always shopped at Macey's, even though there may be the same
20 goods for a cheaper price somewhere else.

21 A Exactly.

22 Q That is a relationship.

23 A That is a relationship.

24 Q It does not need an economist to define a relationship. Sorry. That was a dangerous
25 comment.

26 A Well, I think it comes from almost every saying, but it would be my view that if you were
27 running a business and you were shopping at Macey's because of your grandmother's links
28 to Macey's, that would be something quite different from if you are a private person like
29 you are and you are choosing where to shop as between the variety of alternatives
30 available. So, from the economic perspective, a decision-maker, such as a business that we
31 have here in front of us - say, Edison - would have to consider the implications of the issue
32 of the relationship on its profitability, and also on competitiveness in the marketplace
33 which, in the UK, post deregulation of the electrics, became furiously competitive. So, one
34 would have to say, "Well, how far am I willing to go with that little tweak that was a

1 relationship, given that I have to report to my shareholders, my board and to survive in a
2 brutally competitive environment?”

3 Q Can you go to Bundle G2, p.529? You have listed various e-mails and documents at the
4 end of your report. Can you remember seeing this?

5 A I’ve listed a number of those. I cannot recall, as I sit here, whether I have or have not.

6 Q You do not remember seeing it then.

7 A I remember hearing it discussed, yes, during the last couple of days I was in court.

8 Q In your report you do not refer to the statement of David White. Before we get on to this,
9 do you know why that is? At p.73 of your report you refer to various witness statements,
10 but you do not say that you have read David White’s statement. Is that true? Have you
11 ever read Mr. White’s statement?

12 A If I don’t list him I must have not read anything.

13 Q You do not think you will have read it?

14 A I don’t recall reading him, yes.

15 Q He was giving evidence on behalf of EWS. Did you hear him give evidence orally?

16 A I was not here for the first day. I was here for the second and third day. So, I think he
17 testified in the afternoon of the first day.

18 Q Have you ever read the second statement of Mr. Staley?

19 A Yes, but those came in – his and Crosland’s came in after I finished my report.

20 Q And you have read the second statement of Mr. Crosland?

21 A Yes.

22 Q And Mr. Kearney?

23 A Yes.

24 Q And have you read the transcripts of any of the evidence?

25 A To the extent they were available, yes. Unfortunately I had to leave London on Friday
26 afternoon.

27 Q You do say in para.11 of your report that you reserve the right to amend your conclusion or
28 your opinion ----

29 A Yes.

30 Q -- but nothing that you have read in those statements has altered your conclusion?

31 A As I said here, I believe that my report does not need any amending.

32 Q It does not need any amending. This is an email from Enron internally from Tom Kearney
33 and it is discussing the very poor relationship that it is having with Edison, its customer –
34 yes?

1 A Yes.

2 Q To such an extent that they are logging every single incident where Edison is perceived to
3 be obstructing coal delivery to Fiddler’s Ferry and Ferrybridge – yes?

4 A Yes, I read that.

5 Q Go to 563. Do you remember seeing this? This is where they are saying that relationships
6 are starting to get very silly.

7 A Let me put it this way: I do have knowledge of the poor – increasingly poor relationships
8 between Enron and Edison.

9 Q Yes.

10 A Yes, so I have knowledge of that.

11 Q You have knowledge of that. If you go to p.575. Do you see the paragraph beginning, “My
12 London coal team has consistently held the belief, Edison frustrating our attempt to
13 deliver”? Your knowledge that there was a poor relationship, does it stem from that
14 document as well?

15 A It stems from all the documents I’ve reviewed in the last two days and sitting here in the
16 court room. If I may comment, however, there is no question of such poor relationships
17 taking place and progressively worsening from the economic perspective that I applied.
18 The question is, what does that mean for the chances of Enron to win a contract in the “but
19 for” world, and that’s the topic that I addressed and that’s the topic I would like to discuss,
20 if I may.

21 Q We are not here to discuss anything, I am here to ask you questions, with the greatest of
22 respect. Can you put that bundle away and go to bundle D2, which is the bundle of witness
23 statements. I want to refer you to some passages from the witness statements. It is
24 Mr. Crosland’s first statement and it is p.171, para.39.

25 A Paragraph 39, yes, I have it.

26 Q Do you see there that he is giving evidence that this was a deal about the renegotiation,
27 restructuring? Do you remember that restructuring deal?

28 A Yes, I am aware of that and I remember the testimony relating to this, yes.

29 Q “I felt that it left a bitter taste in the mouth”?

30 A Yes.

31 Q “Enron had been unwilling to reopen the existing negotiations at all, negotiations were
32 fairly bad tempered, essentially broke down in the course of these negotiations”. Would
33 you go on to para.52 where he deals with some of the reasons that Enron did not come close
34 to winning June 2000 – para.52, 175 – “did not come close”:

1 “Those reasons were not because of the prices Enron was offering, but because
2 Enron were not offering us sufficient flexibility, they were requiring us to take
3 minimum volumes, they did not have rolling stock of their own, they were an
4 intermediary rather than a haulier ... and because we had had negative experiences
5 with them in the past.”

6 As an economist do you say that these negative experiences are a rational consideration?

7 A I would say that they are rational considerations in the context of what was taking place at
8 that time. My point, simply stated, is had Enron had attractive pricing from EWS or from
9 an alternative haulier and if it had a performance based contract from EWS, then I believe
10 those would have then become a launch pad for the future negotiation as between Enron and
11 Edison. There is clearly a history, but what I am trying to suggest is that the history would
12 become of a lesser importance if it were clear in the “but for” world that Enron would not
13 have been impaired by EWS both on the price side and on the ability to perform its
14 contractual obligations.

15 Q We are going to come to performance and price later on. Can we just concentrate on the
16 poor relations between Edison and Enron. In that context can you go to bundle D1, which
17 is the witness statement of Mr. Staley.

18 A I have it, yes.

19 THE CHAIRMAN: In the conceptualisation of the “but for” world, Professor, does one exclude
20 all negative experiences? I ask the question because, it is in a sense, back to Maceys
21 example. In the real world companies do not always accept the lowest tender. A
22 relationship is conceptually important when it comes to the making of a contract. Do we
23 exclude that factor completely from the “but for” world and, if so, why?

24 A Several points. Number one, of course, not, one should not exclude all of those historical
25 experiences in the “but for” world; (b) one should try to view those historical experiences
26 in this hypothetical world in which some of the factors that may have created experience in
27 the past are being purged. Let us take your Maceys example. You go to Maceys for
28 historical reasons. At some point you begin to notice that the merchandise is shabby and
29 you say to yourself, “Well, should I go to Maceys again?” The answer may be, well, you
30 probably shouldn’t, you’ve had a bad experience. Let’s say in the “but for” world you find
31 out that Maceys was bought by Marks & Spencer, which is known for its excellent
32 merchandise, how would you factor that in? You would say to yourself: “Well, I don’t care
33 any more; I hate Maceys I am never going to set my foot in there again”. On the other hand
34 you might say: “Look, I also shopped at Marks & Spencer, I had a fantastic experience

1 there”, and you may say to yourself “That experience at Marks & Spencer may outweigh in
2 this hypothetical “but for” world the historical factors that I took into account in rejecting
3 Maceys as a shopping venue for me, despite my grandmother’s and my also familial
4 attachment to that place.”

5 THE CHAIRMAN: Thank you, I understand.

6 MR. MATHER: Could I ask, what are the constraints on the change one might contemplate in the
7 “but for” world? My particular interest is, for example, the personnel at Edison, let us say
8 hypothetically that they had been burned by negative experiences, but other things had
9 changed in the “but for” world for EWS, should we assume that things remain static in
10 Edison, or should we contemplate a different environment? How far does this process go?

11 A I understand, that’s a very, very interesting and difficult question. I would say, being here
12 for Mr. Crosland’s testimony which I read, because I couldn’t hear a word he said sitting the
13 other side, but I think one should try to assume to the extent it is feasible that the
14 personalities at some point will not matter really, there becomes an issue of corporate
15 strategy, of corporate profitability, what I would describe as looking at the decisions
16 through the lens of net expected profits over the life of the contract. From that perspective
17 the rational decision maker would try to apply rigorous analysis to the maximum extent
18 possible. Obviously at some point there may be an indifference between A and B, or a close
19 relationship between A and B and at that point a personality may matter. My analysis
20 factors that in by claiming that from the perspective of Enron that would be translated into
21 the willingness to perhaps take lesser of a profit in order to overcome in the “but for” world
22 whatever residual – how do you want to call it – “biases”? Let’s call them “biases”,
23 whatever residual personality issues they may remain in this purged world they will have to
24 be overcome. It all comes down at some point to how much do I have to shave my price,
25 improve my quality, improve my service in order to gain the confidence of people who may
26 have been adversely predisposed towards me as a result of historical experiences over
27 which I may have not had complete control in the first place. I hope that helps.

28 MR. BREALEY: To summarise that answer then, all things being equal, when a customer has
29 had a bad relationship with supplier A and a good relationship or a neutral relationship with
30 supplier B, supplier A, who has had the bad relationship may have to discount the price in
31 order to gain the custom?

32 A It may discount the price or do something else to gain the confidence, absolutely. I think
33 that is just the first rule of business dealings, yes.

1 Q Coming on to the timing and whether this bad relationship, how long it was going on for,
2 can I ask you to go to para. 33 of Mr. Staley's statement, bundle B1, tab 16A, p.115.13?

3 A (After a pause) Yes.

4 Q This is in the context of the poor relations that existed between the parties as a result of the
5 renegotiation. He says:

6 "After letting some time elapse to clear the air following our difficult
7 renegotiation of the initial Enron-EME contract, in March 2001 I suggested ..."
8 - he goes on, that they should basically be saying 'put some feelers out for the E2E
9 business.'?

10 A Yes.

11 Q In that paragraph he is saying that after "letting some time elapse to clear the air following
12 our difficult renegotiation", he put feelers out in March 2001, namely six months after the
13 tender. So if you take that at face value that would suggest that the bad feeling that existed
14 between the parties still existed, and that Enron is taking some time for the air to clear. Do
15 you accept that?

16 A I accept that.

17 Q Do you not consider that that is a material economic fact in deciding whether Enron had a
18 chance of getting the tender in September 2000?

19 A Yes, but I think that I will repeat what I said earlier, which is to say that in the actual world
20 that we are dealing with here, we are talking about what actually happened, we are talking
21 about perhaps why it happened, and I accept Mr. Crosland's statement as being his view of
22 what the reasons were for rejecting Enron.

23 Q But you talk about "purging the factors", what I understand by that is purging the unlawful
24 factors in the "but for" world?

25 A Purging those influences that are linked causally to the anti-competitive behaviour.

26 Q And there is nothing in that paragraph of Mr. Staley's statement, there is nothing in the
27 paragraphs of Mr. Crosland's statement that puts any blame on EWS that needs to be
28 purged?

29 A I think the statements relate to the bad relationship that developed over a time between
30 Enron and Edison Mission and I do believe and I think ORR found it to be the case, that that
31 bad relationship likely stemmed from at least two forces. One was that Edison Mission
32 decided, or chose to purchase too much coal ----

33 Q Stopping you, sorry, I understand you have to do it but they are long answers. Stopping you
34 there, that is nothing whatsoever to do with EWS?

1 A That has nothing to do with EWS other than ----

2 Q Do you accept that it caused a bad relationship between Enron and Edison?

3 A I believe – because I didn’t finish my answer – I believe there is also a second element ----

4 Q Well, can I ----

5 THE CHAIRMAN: Why do you not let him finish his answer and then come back to it, just for
6 the sake of tidiness, Mr. Brealey?

7 MR. BREALEY: So two elements, the volume of coal?

8 A Yes, the volume of coal, and second EWS’s non-performance.

9 Q Non-performance?

10 A The fact that they were not delivering trains on time, they were cancelling trains. There is a
11 long recitation of the issues that have arisen between EWS and Enron. That affected Edison
12 Mission independent of the core issues that stem from the fact that Edison Mission over
13 procured coal.

14 Q Right. So those are the two factors you refer to. In your report you refer to that in a minute,
15 but if the poor performance by EWS is important why have you not referred to the
16 independent problems caused by the volume of coal in your report? Why have you not
17 taken that into account?

18 A Have I not taken that into account in what? I was not asked to comment on the relationship
19 between Edison and Enron.

20 Q Sorry, you are not asked to comment on the relationship?

21 A I was asked to comment on whether or not EWS’s conduct had diminished Enron’s chances
22 of winning the contract that was available.

23 Q Yes. Implicit in that is the issue of causation. Implicit in the issue of causation is whether
24 Enron have caused it themselves. Implicit in that is the question of the relationship between
25 these two large contracting parties. But, I am asking you again, why have you not
26 considered in your report the poor relations between Enron and Edison that were caused
27 independently of EWS?

28 A The primary reason being that my analysis asked the simple question: would Enron’s
29 chances be better if they had a better price and a better performance from EWS?

30 Q I do not apologise, Professor Ordober. We are going to come on to that. I am trying to just
31 tease out from you the question of the poor relations between Edison and Enron and
32 whether you have factored that into your report. If you have not, please say so. If you
33 have, please tell me where.

1 A I have taken that to be a background information. I was looking only at one aspect of the
2 situation -- not all of the aspects.

3 Q So, are you saying that you have not considered in your report the poor relations between
4 Edison and Enron caused by the renegotiation of the agreement concerning the volume of
5 coal?

6 A I took that into consideration as a background knowledge, and I was focusing on something
7 else. That's the best I can tell you how ----

8 Q As background knowledge. But, you have not expressly considered it in your report.

9 A That is true.

10 Q The second element that you referred to is the poor performance of EWS.

11 A Yes.

12 Q Why are you going to purge that?

13 A Why? For the simple reason that if -- If in a "but for" world Enron had a performance
14 contract - a satisfactory performance contract - with EWS, it would have been more secure
15 and so would be its counterparty, i.e. Edison Mission. Whatever issues that may have
16 arisen in the past that were attributable to EWS' poor performance would likely be, as I
17 said, moot or would be mooted out, would be diminished, and therefore the attractiveness of
18 Enron's offer to EME would have been increased.

19 Q With respect, I think that is confusing many things. First, is there anything in the decision
20 which says that EWS' poor performance was an abuse.

21 A No, there isn't, but neither was I saying that.

22 Q So, why would you purge it?

23 A Because in the "but for" world I assumed that ----

24 Q You cannot assume all things lawful -- all things that cause something lawfully. You can
25 only purge something in a "but for" world which is unlawful.

26 A Do let me finish. I assumed, in my analysis, that Enron would have received equal terms on
27 performance as EWS was willing to offer to EME. Therefore, I was conducting analysis
28 with that background assumption. Indeed, I think ORR is quite clear, although it does not
29 find abuse, that there was poor performance. In para. B62 or 65 of its opinion it explicitly
30 comments on a disadvantage that Enron found itself lacking rolling stock and lacking the
31 adequate contractual deal with EWS.

32 Q Do you accept that you should not be purging something which is lawful - you should only
33 be purging something which is unlawful?

34 A I agree to that. Okay. I will stop.

1 Q Thank you. May 2000. There is an issue about the performance contract which you refer to.
2 B60. We are talking about 1999. There is nothing in the decision which says that the
3 failure to agree a performance contract in 1999 was unlawful, is there?

4 A No, but the Commission -- the ORR frequently refers to the performance issues and to the
5 need for a performance-based contract. It simply explicitly says that it was not the cause.
6 They cannot conclude it was a cause of why Enron did not get the contract, but it certainly
7 is an aspect of their analysis of the situation.

8 Q Professor Ordovery, in para. 11 of your opinion you do say that you will amend your opinion
9 if any material fact comes to light. Do you want to in any way amend your opinion to take
10 into consideration the poor relationship between Enron and Edison?

11 A No. As I explained, there is a separate aspect of the situation which was a historic fact and
12 which could have been dealt through the negotiations, and it could have been dealt through
13 actively by Mr. Crosland and Mr. Staley working out a contractual deal that addressed the
14 past issues if they needed to be addressed.

15 Q Do you not accept the evidence of Mr. Staley that the bad feeling lasted some time - so that
16 he waited until March 2001 to clear the air?

17 A He said that? I accept that that is what he said.

18 Q Do you accept as a matter of historical fact that Edison's invitation to tender did not seek
19 coal supplies?

20 A I accept that as written the ITT did not explicitly ask for an E2E tender, but it did say that
21 Edison was open to innovative solutions to its core needs.

22 Q But you accept that the invitation to tender was for haulage only.

23 A Yes, but it is also -- If I recall it had a language that I just stated.

24 Q Let us go there then at G3, p.685. May I suggest that the evidence has been quite clear -
25 that this is an invitation to tender for haulage. What I think you are referring to is para. 6.

26 A Could you direct me in this volume to the page?

27 Q Page 685. Do you accept that this is an invitation to tender for coal haulage?

28 A It is a letter to Mr. Jones and it is an invitation to tender, yes. I would call that an invitation
29 to tender.

30 Q For coal haulage.

31 A Yes.

32 Q The reference at Point 6, which I think you are referring to, is to imaginative solutions in the
33 context of road haulage.

34 A In the context of this letter.

1 Q The claim upon which this case is based is, as you know, a claim that Enron would have
2 been awarded a four year E2E coal supply agreement – correct?

3 A At least would have had a chance of such an award.

4 Q Pardon ?

5 A It would have had a chance of obtaining such an award. That’s how I understand it, yes.

6 Q They had a chance. Would you accept that as a matter of rational economics where there is
7 a disconnect between the offer or the invitation and the bid, there is a disconnect between
8 offer and acceptance, you should be put of a train of enquiry as to why there is a
9 disconnect?

10 A And the disconnect – which disconnect are you particularly referring to?

11 Q The disconnect to the offer was for rail haulage ----

12 A Yes.

13 Q -- and this claim is based on the chance of a successful bid of a coal supply agreement?

14 A Well, to the extent that there is such a disconnect, I believe it’s for the Tribunal to assess
15 that, not for me. The evidence that I’ve heard, such as that what Enron had in mind was to
16 win or to have a chance of obtaining an E2E contract, given that it is established already as
17 well that it was not a rail haulier and therefore had to rely on others to provide the rail
18 hauling service. Thus, it would at best be a re-seller of somebody else’s service, and that
19 was not where its competitive advantage lay in my view.

20 Q The competitive advantage did not lie in the provision of rail haulage services?

21 A Yes, I don’t think it did. It lay in managing the coal supply chain, what we have called E2E
22 service.

23 Q I will come back to the question. There is a disconnect between the invitation to tender
24 submitted by Edison and the claim of the lost contract which is now before the Tribunal –
25 do you accept that?

26 A The way you characterise it, yes.

27 Q Again, it is a question for the Tribunal, as you probably heard me submit, but in your
28 analysis do you not consider that as a material consideration, the disconnect?

29 A I proceeded on the assumption that Enron’s interest in bidding for the right to haul coal was
30 motivated by its over-arching interest, which is to gain an E2E four year contract, and from
31 that perspective it was easy to conduct the analysis that I did.

32 Q That is part of the problem, I would suggest to you: your whole report is only concerned
33 with what Enron wanted. It does not actually consider what Edison wanted. Is that correct?

1 A No. I believe that my report is very clear on this issue, and it simply says, all things being
2 the same and being clear of the anti-competitive impacts from EWS's behaviour, would
3 Enron's chances be enhanced as a result of having faced non-discriminatory pricing and
4 comparable performance that EWS gave to Enron that it would give to – EWS gave to
5 EME, forgive me – it would give to Enron.

6 Q Have you considered in your report the reason why Edison only wanted haulage?
7 A I had the information based on Mr. Crosland's testimony, and so on, why it is that Edison
8 wanted haulage in this ITT. At the same time, the analysis that I conducted was based on
9 the assumption that Enron would have a chance or opportunity to gain an E2E contract,
10 which is where it is comparative or competitive as an advantage right. It did not lie in
11 hauling coal from ports in the UK to the generating stations.

12 Q Again, it comes back to the interests of Enron. You say you have looked at Mr. Crosland's
13 statement. Can we go back to bundle D2, p.170, para.38, which we took Mr. Staley to and
14 he agreed subject to one minor variation. Do you remember this paragraph, 38, when I put
15 this to Mr. Staley? You have read this?

16 A I've read this paragraph, yes.

17 Q You accept that, as a result of the renegotiations, the E2E relationship between Enron and
18 Edison finished?

19 A Yes, to some extent. Enron was still bringing coal to LBT.

20 Q Not an E2E basis?

21 A No.

22 Q Not price stockpile?

23 A Correct.

24 Q As a result of the renegotiation the E2E relationship finished – correct?

25 A Yes.

26 Q As a result of the renegotiation Enron only supplied coal to Fiddler's Ferry? As you would
27 expect, from the E2E relationship finishing, it was Edison that took delivery or
28 responsibility for inland delivery to the two power stations?

29 A This was my understanding.

30 Q You have seen the evidence of Mr. Staley, the deal was a good deal – would you accept
31 that? Have you any knowledge that it was a good deal for both sides?

32 A Well, they had a deal. To the extent it was a deal, it was to the likely benefit of both sides,
33 but I did not provide an independent economic analysis of the profitability to either party.

1 Q After that two things happened according to Mr. Crosland. First, as I say, he took
2 responsibility for delivery, hence the tender?

3 A Right.

4 Q Secondly, if you go to para.55(f) of the statement, this is what he wanted as regards his coal
5 procurement for Ferrybridge. I am reminding you that Enron's coal is now going to
6 Fiddler's Ferry.

7 A Right.

8 Q And (f) on p.177:
9 "To the extent that supplies additional to Powergen were required ..."
10 because remembering that Powergen is now supplying its coal to Ferrybridge –
11 "... Edison had wished simply to supplement its coal supplies on an ad hoc basis
12 (which is what we did) which suited us better because it offered us much greater
13 flexibility."
14 Then he refers to the period after June 2000:
15 "... we had coal supply arrangements in place with a number of different suppliers,
16 including The Scottish Coal Company Limited, Glencore International AG ..."
17 So they are all short term spot contracts. Have you in your report considered Edison's coal
18 purchasing strategy?

19 A I believe I have, yes.

20 Q And where in your report have you considered that?

21 A I think my overall discussion of the benefits of an E2E does not preclude the possibility of
22 having stratified procurement within Edison coal procurement strategy – in other words, it
23 is perfectly plausible or reasonable for Edison to procure some of its coal under an E2E type
24 contract and then supplement as it needed on a short term or spot basis.

25 Q Reading para.55(f), do you consider that there was anything irrational about that decision?

26 A No, I do not believe there was anything irrational at all. As I said, this is a decision of the
27 actual world and not a discussion of the "but for" world.

28 Q In the actual world after a bit of a delay coal prices started heading up, would it have been
29 more rational to anticipate that by having more long term arrangements?

30 A Let me give a short-winded answer. I think that from the standpoint of a generator, the
31 optimal profit maximising strategy, and actually the expected net present value of profits
32 strategy will be driven by its forecast to some extent of what the future coal prices are going
33 to be. From what I know about generators, I have done a fair amount of work for them,
34 they do engage in complex hedging strategies either directly or through financial

1 intermediaries and try to ensure against, or to the extent they can against adverse
2 movements in the price of coal. So if I am Edison Mission and I am thinking that the
3 pricing of coal was going to go up then I will try to hedge it, whatever hedge instruments
4 they can develop, but I would also like to perhaps lock in whatever base demand for coal I
5 forecast through a long term contract. Again, just from the knowledge of generation it is
6 clear that every generator will have different levels of demand. The base level of demand is
7 the one for which, for example, an E2E contract may be most ideal. Then there may be
8 demand that will be geared to short term variance around some projected level and there
9 will be also peaking demand which, in the United States, is generally served by natural gas
10 not by coal. So again, from that perspective Mr. Crosland and his team, working with
11 Enron or whoever would work on designing the profit maximising – or expected profit
12 maximising strategy – for Edison Mission for the four year period they were potentially
13 planning for.

14 Q There is nothing in para. 55F which is irrational.

15 THE CHAIRMAN: I think he has already said that.

16 MR. BREALEY: Mr. Crosland also, in cross-examination – and I will read it out to you rather
17 than go to it, because of the time, it is Day 2, p.9 “The problem with the market as it
18 developed with power generation ...” Do you have a bundle with the transcripts in?

19 A Yes.

20 Q If you go to divider 2, page 9:

21 “The problem with the market as it developed with power generation was that it
22 was almost impossible to predict what generation levels were going to be. So the
23 problem with an E2E contract and indeed any long term contract is that it binds
24 you to taking tonnes over time which reduces the flexibility to adjust the coal
25 shipments to match the power generated in power stations.”?

26 A Yes.

27 Q Do you consider that is a rational statement?

28 A Yes, I believe it is rational in the sense that it focuses on precisely what I have been
29 focusing on which is the net present value of profits. Under a different strategy that a
30 generator can implement to meet its coal demand which, by definition, is likely to be
31 uncertain.

32 Q If it is rational not to want a long term contract, why is it irrational for Mr. Crosland or
33 Edison, not to have taken the four year coal supply agreement that you say should have
34 been taken?

1 A I didn't say it was irrational, I simply said the value of an E2E contract to Mr. Crosland or,
2 more precisely, to his employer would have been enhanced if Enron were able to deliver the
3 coal under the contract at the lowest possible price for any given quality of the delivery
4 service or the highest possible quality for a given price of coal.

5 Q After the renegotiation when Mr. Crosland was considering his coal procurement at
6 Ferrybridge, was it rational for him not to want a long term coal supply agreement?

7 A I believe that Mr. Crosland would have followed a strategy that I described as profit
8 maximisation or net present value profit maximisation, and that would have ----

9 Q Is that an answer to the question? We are trying to work out what happened in September
10 2000. Yes, he wanted to make as much profit as possible; within the confines of that
11 economist model was it rational for him not to want a four year long term contract?

12 A It could have been rational but my analysis tries to point out the very simple fact that if
13 Enron were not disadvantaged, the four year contract would have potential benefits, or
14 sufficient benefits that they might have outweighed the disadvantages of locking yourself
15 into a four year contract; there are both advantages and disadvantages. To the extent there
16 are disadvantages those could be overcome – at least to some extent – by attractive terms of
17 the four year contract. That's all it comes down to, trading off, being locked in versus the
18 attractiveness of the low price. We know that the more you are locked in the lower the
19 price you are likely to ask for in order to give up some of the flexibility that a short term
20 behaviour, or short term contract gives you?

21 Q What is the contract that you say Enron has lost??

22 A I testified in my report that the contract, and the chance of the contract that Enron has lost is
23 the four year E2E contract.

24 Q What, with no commitment to take any coal? Okay, so it says "Four year E2E contract",
25 what are the terms of that?

26 A The terms of the contract have not been negotiated out or there is no ability, I can't say as I
27 sit here, what exactly the parties will have negotiated as the structure of that four year E2E
28 contract. I know that Mr. Crosland did not want to have volume commitments, okay? Well
29 maybe Enron would have said "Okay, no volume commitments, but absent volume
30 commitments is going to cost you that much; but with volume commitments I am going to
31 give you a better price." In fact, those kinds of transactions are familiar. EWS offered the
32 lower price on its haulage of coal, if Edison committed to carry EWS as an exclusive
33 haulier, that is a lock in and there is a price for it. The same thing when it comes to a four
34 year contract that we have been talking about.

1 Q So the contract – we say that Enron has lost is an exclusive contract – locks in Edison to
2 buying coal exclusively from Enron?

3 A I don't think I said that. Enron would have had a greater chance of striking a profitable E2E
4 contract with Edison if its background circumstances were superior to the one that it
5 actually faced in the actual world. In the "but for" world it would have a non-
6 discriminatory price, you would have been able to strike a performance contract with EWS
7 and, as a result of that, would be in a better position to offer attractive terms to Edison.
8 That's all.

9 Q You say that, but where is the analysis in your report that Enron could have offered
10 beneficial terms? Where is the analysis in the report which gives any robust consideration
11 to the benefits of the E2E contract. Looking at the report there is absolutely nothing, I
12 suggest to you ----

13 A I disagree. Let me just summarise what I said in the report and perhaps that will be enough,
14 and just to save time. My analysis is built on the assumption that Enron had a desirable
15 business model. There has been testimony to that effect in this courtroom. I believe that ---

16 Q A business model. Yes.

17 A Yes. It had a superior business model, which was an E2E model. I explained why such
18 superiority might be reasonable to be expected. It came from the scale and scope
19 economies that Enron would have realised from procuring coal from a variety of mines and
20 delivering it through a variety of ports to a large number of potential customers. Okay? So,
21 the scale and scope of Enron's operation is what generated the efficiencies that would have
22 made such an E2E contract desirable.

23 Q Let us just have a look at it. Go to your report at para. 41 at bundle p.16. There you are
24 giving the virtues of the E2E model. When we look at it it is just based on Mr. Staley's
25 statement. Correct? There is no independent analysis as to the benefits of an E2E model, is
26 there?

27 A Well, there's a reference, I believe ... to ORR and there is also the fact that I do have
28 independent knowledge of both coal and coal mining, coal haulage and generation
29 businesses on which I consulted over the last decade at least.

30 Q There is nothing in your report about this. Paragraphs 52 and 53 - again, all you do is rely
31 on Mr. Staley who, as we know, created and developed -- loved this E2E model.

32 A In para. 53 I reference the Staley statement - but, again, to say what I said a second ago: I
33 am quite familiar with many aspects of the generation and coal production and
34 transportation business. So, I brought in at least an element of independent economic

1 analysis, focusing on the so-called scale and scope economies that Enron's model enabled it
2 to realise -- at least for a while, and likely would have been able to realise in the "but for"
3 world.

4 Q You do not refer to para. 17 of Mr. Kearney's statement where he says that on reflection the
5 Enron model did not work as well as they had hoped. Do you remember para. 17 of Mr.
6 Kearney?

7 A I remember Mr. Kearney saying that, yes.

8 Q Yes. And that does not affect your opinion in any way? That another Enron witness may
9 have cast doubt on what Mr. Staley said?

10 A I take that into cognisance, but I would like to understand much better what it is that Mr.
11 Kearney believes caused that model to fail. I pointed out that at least one of the elements
12 was the fact that for the model to work well, and ORR realised it as well -----

13 Q No. The ORR ----

14 A Excuse. May I finish?

15 Q ... alternative model.

16 A Enron needed a haulage supplier on whom it could rely and that would not overcharge for
17 its services. That was an integral component for E2E to work. If that element failed, the
18 whole thing likely would have failed as well.

19 Q You are an independent expert giving evidence in this case. Why is it that you do not refer
20 to Mr. Kearney's statement which doubts whether -----

21 MR. LASOK: Can I just rise? We know that Professor Ordover wrote his report before he had
22 seen a copy of Mr. Kearney's statement, which was produced at a late time. But, we also
23 know that Mr. Kearney was a firm believer in the E2E business model, and described it as
24 being 'brilliant'. Now, that is the defendant's own witness. That means that they are stuck
25 with his evidence on that point.

26 THE CHAIRMAN: The thought that is going through my mind, Mr. Brealey, is a slightly
27 different one. It runs in simple terms along the lines, "We seem to be going round the
28 course again". On the one hand, Professor Ordover is giving his "but for" opinion, which is
29 based on an economic model purged of everything unlawful ----

30 MR. BREALEY: Well, not unlawful, but that is for submission. Yes.

31 THE CHAIRMAN: On the other hand, you are saying that we, as a Tribunal, should take into
32 account the views and opinions held subjectively of witnesses who have given evidence.
33 We will obviously have to weigh what evidence we accept and what evidence we reject. I
34 think your cross-examination - and I am not criticising you for being long-winded by any

1 means, because you have not been -- But, I think really we have that difference clearly in
2 our minds now. I wonder how much further we are going to get by pursuing that difference.

3 MR. BREALEY: My point to the witness was - and I take that point on board sir - is that as an
4 independent expert, saying that there are benefits to the E2E model -- He only refers to the
5 evidence of Mr. Staley. So, either he does not refer to anything -- So, he does not refer to
6 Mr. Staley at all, or Mr. Crosland (and he has his economic "but for" model), but, then,
7 when he does delve into the witness statements he excludes Mr. Crosland, he excludes Mr.
8 Kearney, and the only basis in his report is Mr. Staley, which is not ----

9 THE CHAIRMAN: We and he have got ----

10 MR. BREALEY: -- that point in mind. (To the witness): Go to para. 39 of your report. The last
11 sentence.

12 "The innovation ECSL introduced to the UK was to bundle these services into a
13 single package - its E2E service - to sell to power generators, thus displacing the
14 need for the power generator to self-manage each of these separately purchased
15 services".

16 Can you explain that?

17 A Surely. I don't know which part is not ----

18 Q The last sentence.

19 A Which part is not ----

20 Q Why is it that an E2E service model displaces a DIY model?

21 A What I mean to say by this - and maybe the phrasing is poor - is it is an alternative to the
22 DIY model, and for the generator that chooses to go the E2E route there will be a
23 diminished need for dealing with the coal procurement issues internally. This is basically a
24 make or buy decision. One can buy a part from the supplier. One can make it at home.
25 DIY is the make decision. The E2E is the buy decision. Obviously, if I buy a carburettor
26 from a third party supplier it does not mean that I don't have a person in my automotive
27 division that deals with the carburettor issue. But, the importance of that decision is to shift
28 a huge chunk of economic activity or responsibility out of the house and on to the E2E
29 supplier. That's what I'm saying here.

30 Q To a certain extent this shifting of this huge chunk of economic responsibility is, I think,
31 what you are saying at para. 52 of your statement where you say that,

32 "For an agreed price per tonne, ECSL delivered coal to a power station's
33 stockpile, thereby eliminating the management and other costs that would be

1 incurred by the power generator if it were to procure the coal and necessary
2 associated transportation services itself”.

3 A That’s an elaboration, I think, on the paragraph, yes.

4 Q Surely it would follow that if the generator, having had an E2E model, then appoints its own
5 in-house team, the DIY model, that the DIY model would displace the E2E model?

6 A If the appointment of such a team means that the generator shifts out of E2E to DIY, that
7 would be displacement in the other direction, and if that model proves to be inefficient,
8 competitively inefficient, unattractive, then it is possible that the company would simply lay
9 off all or some of its coal management team and revert to an alternative.

10 Q Because it would be irrational to duplicate costs and you would have to sack the in-house
11 team and then go to the E2E model?

12 A There is a question in the answer. Well, if it proves inefficient and competitively
13 undesirable to manage the coal procurement in-house, needing to incur the internal costs of
14 the management team and the coal procurement team and all that, then, yes, people do get
15 laid off, however unfortunate it might be.

16 THE CHAIRMAN: Professor, in the “but for” world, are you saying that the choice between an
17 E2E contract and an in-house DIY operation is a no brainer in favour of E2E? I do not
18 think you are, are you?

19 A No, heaven forbid, I would never say such a thing, because that would mean over-reaching
20 beyond what an economist can really testify to, in part because of some of the points that
21 Mr. Crosland made. What I am simply saying is that an E2E procurement method has
22 certain advantages stemming from scale and scope economies.

23 Q I understand.

24 A Those advantages stemming from scale and scope economies have to be weighted against
25 whatever considerations that I believe are rational and economic that we can describe in
26 dollars and cents or pounds and pennies in gauging what model will be adopted. The
27 adoption, in my view, would be driven by the terms that an E2E supplier can obtain from
28 the third parties that it needs to construct its business model.

29 MR. BREALEY: Could you please take out bundle G3, p.644. This is an internal Enron email.
30 Can you recollect whether you have seen this? It concerns the Freightliner final term sheet.

31 A As I sit here I don’t recollect this in detail. I do recall the deal that Enron had was FHH.

32 Q It starts, “Please find the final agreed Freightliner Termsheet. The key features are”, and it
33 gives the rates. It says that Enron commits to 1.1 million tonnes. We see there that
34 Freightliner agrees to 95 per cent performance target.

1 A Yes.

2 Q It goes on:

3 "Bottom line:

4 We will introduce real competition in the rail transport of coal for the first time

5 ever.

6 We have effectively frozen or improved our current rates until end 2001."

7 It extols the virtues of the Freightliner bid. Can you go to p.752 and just have a look at that.

8 It starts:

9 "Tom – great job on the Freightliner deal."

10 A Yes, I see that.

11 Q "We signed the Freightliner deal on June 30th ..."

12 It is not July, it is June –

13 "... Enron has introduced real competition in the rail transport [market] ... frozen or

14 improved the [price] ... probably the first rail contract ever with a compound option

15 package ... we are now the only company that can offer this.

16 Main features

17 Redcar – Aire Valley Base Rate stays same as EWS current rate until end 2001 ..."

18 A Right.

19 Q Again:

20 "Freightliner agrees to 95 per cent performance target 15 per cent higher than the

21 industry standard."

22 A Yes.

23 Q Hence the reason that the big boss in Houston says, "Tom, great job on the Freightliner

24 deal".

25 A Indeed.

26 Q Why is it that you do not examine the benefits of this deal in your "but for" world?

27 A First of all, I think I address the issue of FHH in several places in my report, and in

28 particular

29 I ----

30 Q You mention them, but do you mention the benefits that Enron thought they had?

31 A I address the benefits and the costs of the FHH deal in the following sense: the ORR

32 decision found FHH not to be a fully competitive alternative to EWS. Indeed, the ORR

33 found that FHH was only able to serve a limited percentage, 15 per cent, in a year or two of

34 the UK coal demand using its rates. As Mr. Crosland points out FHH was an untried

1 quantity. FHH did not have experience in hauling coal. To the extent that FHH was an
2 alternative, it plainly did not attract Mr. Crosland's full support since he did not even
3 consider negotiating FHH against EWS for the services that it required. So my recollection
4 is that Edison promptly rejected FHH as a supplier, haulier, and thereby would also likely
5 look on someone who is reselling its services to be equally poorly qualified from Edison's
6 perspective.

7 Q The ORR finds that Enron was at a competitive disadvantage. You accept that. My
8 question to you is different. My question to you goes to causation. You are saying that you
9 conclude at para.13 that in the "but for" world Enron would have concluded a deal with
10 EWS – correct?

11 A Yes, I conclude that they would have – I am sorry, can you repeat the question.

12 Q Can you go to para.13 of your ----

13 THE CHAIRMAN: I think he is going to qualify it by saying that he concluded that Enron would
14 have had a chance of concluding a deal with EWS.

15 A Yes, sir, at least that's been my position all along, yes.

16 MR. BREALEY: Let us have a look at para.13 and see if you want to qualify it – paras.12 and 13
17 of your opinion. Paragraph 12 is where you say Enron has suffered "anticompetitive injury
18 because it is in the form of a significant diminution in its chance to win a four year
19 contract"?

20 A Yes.

21 Q Do you know what type of chance it had? You do not actually say what sort of chance it
22 had there?

23 A I proceed on the assumption that it had a positive chance of gaining such a deal. Of course,
24 as I said in our joint statement with Mr. Biro, if Enron never had a chance then it's like a
25 case in which a person died before someone shot him.

26 Q No, it is not quite so, but anyway. Positive chance – are you really suggesting that it was a
27 real substantive chance, just to cut through?

28 A I am not attaching probabilities to the level of the chance, I am saying given the findings I
29 have made about the potential attractiveness of the E2E contract for Edison Mission, given
30 the ability in the "but for" world to offer attractive performance and attractive prices similar
31 to those that EWS was bidding as a haulier to Edison Mission, that would have created an
32 opportunity for Enron to not only offer hauling on the attractive terms, by which I mean
33 terms similar to what EWS was offering, but also to build on that hauling contract a

1 proposal to Edison Mission that would include not only hauling but also coal. I believe that
2 that chance was frustrated by EWS's contact.

3 Q I take it from that answer that your evidence is that they had a chance but you cannot
4 actually qualify the probability of that chance; it had a chance?

5 A I was not asked to ascribe any quantitative numbers to that. I was only asked to explain
6 using economic tools why its chance was diminished as a result of EWS's conduct.

7 THE CHAIRMAN: There is then a word that I have misunderstood when I read your report
8 earlier, which is the word "likely" in the first bullet point of para. 13. What do you mean by
9 "likely"? Because I took that to mean something along the probability curve?

10 A Yes, I mean something along the probability curve, but I am not saying it was 50 per cent
11 chance, or anything of that sort. I am saying that there was an opportunity which was
12 diminished as a result of the conduct that this case is all about. So there was a positive
13 likelihood, as opposed to the alternative story, which I have heard here in the past couple of
14 days, and that is from Mr. Crosland's perspective, there was never any likelihood that Enron
15 was doomed from the start, for whatever reasons it was doomed from the start, and
16 therefore nothing could have happened to make them a potential winner either of hauling or
17 building on hauling an E2E contract.

18 MR. BREALEY: Paragraph 12 is concerned with the chance of winning the four year contract.
19 The basis upon which you say it had a chance is drawn from your conclusions which, as you
20 know, I say is for the Tribunal, but you draw your conclusions at para. 13 and one of the
21 conclusions that you draw is that "Enron likely would have obtained a performance-based
22 contract from EWS". Now, concentrate on the relationship between Enron and EWS, the
23 purpose of me asking you some questions about Freightliner is to try and ascertain from you
24 whether you have considered the benefits of the Freightliner deal in the context of your
25 evidence that Enron would have obtained a contract with EWS. In other words, is it just a
26 chance of the contract with EWS – you cannot say one way or the other? Or, are you able
27 to say whether it would have concluded the deal with Freightliner anyway? Why is it that
28 you say that Enron would have obtained a performance based contract with EWS, that is
29 why I am asking you the question about Freightliner. As I understand it, at the first bullet
30 point you are not saying "likely contract with EWS", you are saying that Enron would have
31 had a chance of obtaining a contract with EWS. Is that correct?

32 A The first bullet of 13 focuses on the relationship between Enron and EWS.

33 Q Yes, so just concentrate, forget Edison, just concentrate on the relationship between Enron
34 and EWS.

1 A I am concentrating!

2 Q Forgive me. (Laughter)

3 A It may not seem that way.

4 THE CHAIRMAN: You are giving every impression of concentrating, Professor, do not worry
5 about that. Barristers sometimes ask questions that take a little time.

6 MR. BREALEY: Not “concentrate”, but “focus” on ----

7 THE CHAIRMAN: Sorry, we have broken your concentration now!

8 MR. BREALEY: -- Enron and EWS, what is your conclusion? Is it that in the “but for” world
9 Enron would have obtained a contract with EWS, or it merely had a chance of obtaining a
10 contract with EWS?

11 A My view regarding the relationship between Enron and EWS is that in the “but for” world,
12 EWS would be willing to give Enron such a contract by virtue of the fact that it would have
13 no incentive to disadvantage Enron as a supplier, either direct or indirect supplier of coal to
14 Edison Mission and I explained in a portion of my report why such analysis is consistent
15 with economics or with industrial organisation economics.

16 Q In the “but for” world, you are assuming that EWS and Enron had concluded a deal. You
17 can assume that but in your “but for” world is it likely or is it you are just merely saying
18 there was a chance of them doing it, because you have the Freightliner deal and in the actual
19 world Enron thought that Freightliner was a very good deal, and what I am trying to
20 establish with you in the report is whether you consider that Enron would likely have gone
21 with Freightliner in any event?

22 A I conclude that if Freightliner were on par with EWS there might have been an incentive for
23 Enron to go with Freightliner, or there might have been an incentive to use Freightliner as a
24 stocking horse to extract extremely favourable deals from EWS. To the extent that
25 Freightliner was not on par the ability to leverage that relationship vis-à-vis EWS was
26 impeded, and it is quite clear I think to everyone that at least for the time being FHH was
27 certainly not on par as a haulier of coal in the UK with EWS, which had 90 per cent plus
28 percentage of coal hauled in the UK.

29 MR. MATHER: This was in terms of capacity and likely capacity of FHH?

30 A Yes, sir, it was capacity, but also Mr. Crosland correctly pointed out that hauling coal may
31 have certain experience elements, that you have to know how to move coal from the port to
32 the generator, or from the coal mine to the generator, so there is an experience element to
33 that, and FHH was never in the coal hauling business, whereas EWS was in fact a

1 monopolist. So there is capacity and there is also experience, ability to manage a
2 substantial amount of very “just in time” flows of the product.

3 Q Turning to EWS they offered, did they, performance contracts to other customers?

4 A Well they offered a performance contract to the customer that we all care about, which is
5 Edison Mission, so they were able to offer a performance based contract, yes.

6 MR. BREALEY: But it is not your evidence that Freightliner did not have the capacity to haul
7 coal on behalf of Enron if it had won the coal haulage agreement, is it?

8 A I believe the only information we have about capacity is on its overall ability to haul coal,
9 which the ORR found to be limited and which I think Mr. Crosland found to be limited. So,
10 there is also a hauling of coal for other generators and therefore there would be an issue of
11 how to allocate the available FHH fleet across all the portfolio of contracts that it may have
12 had at that time which I don’t recall as I sit here.

13 Q I think we had better just go to the decision because I anticipate that this is going to be an
14 issue. Can you go to the decision in B1, p.128? The issue here is that there are certain
15 comments being made as to whether even if Enron had got the coal haulage deal and had
16 used Freightliner, Freightliner had the capacity to haul the coal under the EME deal.

17 THE CHAIRMAN: Paragraph 389, is it not?

18 MR. BREALEY: Yes. I think you were in court, Professor Ordober, when I asked Mr. Lasok to
19 go to the last sentence of para.389.

20 “In considering FHH’s ability to compete on its non-contractually committed
21 capacity and hence provide a full and effective competitive constraint on EWS, it
22 is therefore necessary to consider to what extent it had residual [this is the
23 important bit], (i.e. net of existing contractual obligations) capacity to compete for
24 the full amount of the tonnage put out to tender”.

25 What it does then in para. 390 -- It is looking at FHH as an independent haulier and it is
26 saying in that box that if you take its contractual commitments to BE and its contractual
27 commitments to EME (Edison), then in the short term it would not have had sufficient
28 capacity to do it independently. But, I do not think you are suggesting, are you, that under
29 Freightliner’s obligations under this contract it did not have the capacity to fulfil its
30 contractual obligations?

31 A I am suggesting that FHH had limited capacity, but could have built up capacity over time -
32 which was the fear of EWS - and that there was a concern, I think, separately from Mr.
33 Crosland, that they would not be able to fulfil the requirements ----

34 Q -- as an independent haulier.

1 A As an independent haulier, yes. But, the fact that they had a deal, whereas ECSL did not
2 change the situation at all because ECSL had no rolling stock which was one of the
3 objections that Mr. Crosland had against dealing with Enron to begin with. So, the only
4 thing that Enron could have supplied was a contract, but not the physical assets needed for
5 hauling coal.

6 Q But in this Freightliner contract, which I think you have turned up at 691 -- Have I asked
7 you to do that, or am I in front of myself now?

8 THE CHAIRMAN: I think you are talking to yourself!

9 MR. BREALEY: Bundle G, Volume 3. Page 691. Take out also G4. Page 940. There are two
10 documents I would like to compare. At Bundle G3 we have got the rail haulage agreement
11 at p.691. We have got the Enron bid at p.940.

12 A Yes.

13 Q I take it you have seen both of these documents.

14 A Yes. Go ahead, sir.

15 Q Under the rail haulage agreement between Freightliner, there is a commitment to provide a
16 certain volume of coal. As I understand your evidence you are not suggesting that
17 Freightliner could have failed to meet its commitments under this agreement. In other
18 words, you breach the obligation to provide 1.1 million tonnes if so required.

19 A My understanding was that the volume commitment was from Enron to Freightliner. But,
20 maybe you're asking me something different.

21 Q If you go to the Freightliner agreement at p.693, para. 3.2, this is the 95 percent
22 performance obligation that Enron is so pleased about in the e-mails that I have shown you
23 a moment ago. Do you accept that?

24 A Yes.

25 Q 95 percent compared to 80 percent standard in the industry.

26 "Each quarter the seller shall provide a level of service from loading site to
27 discharge site such that not less than 95 percent of the tonnage is hauled as
28 required by the buyer".

29 A I see that, yes.

30 Q If you look at the bid that Enron actually put in to Edison, where is the equivalent of that
31 performance obligation? In other words, Freightliner are guaranteeing Enron a 95 percent
32 performance target. Where is the 95 percent performance target that Enron is back-to-
33 backing with Edison? It says,

1 “The seller shall ensure that at all times haulage services will be provided with the
2 skill, care and attention of a competent rail freight operator”.

3 The question to you is: has Enron back-to-backed this 95 percent performance obligation?
4 Has it back-to-backed it?

5 A The only 95 percent term that’s mentioned here is on the buyer’s side.

6 Q That is right.

7 A May I just comment? I am sorry. I’m not sure -- I think I’m quite positive that this is a
8 proposal from Enron to EME. That’s how I read this document.

9 Q A bid, yes.

10 A It’s a bid. Right. It’s an opening bid. That would be my understanding - that they are
11 bidding to get that haulage contract. As we know from the evidence in this case, even with
12 EWS, there was always a back and forth. It’s not like one opens up the bidding by saying,
13 “Look, I’m going to give you, you know, twenty cents -- twenty pennies per tonne haulage.
14 I’m going to give you 100 percent delivery quality”. The bidder starts with an offer and the
15 buyer either accepts or rejects and proposes an alternative. So, what we have here is, as I
16 read it, is an opening salvo. Given that it’s an opening salvo, it may be, one might reason -
17 and we have seen that happening with EWS dealing with Edison - that their terms evolved
18 over time. It is my understanding that Enron never had a chance of putting in a second bid.
19 That’s my understanding. I may be wrong on that, but I understand that they were rejected
20 very early in the process and therefore such terms as the delivery quality, and so on and so
21 forth, might have reasonably come up in the next round when Edison would say, “This is
22 not good enough. Give me better terms. This is what I have from my rivals”, assuming they
23 could disclose that.

24 Q Professor, it is our understanding that Enron never had a chance as well, but if you go to
25 clause 4(a) of the Freightliner agreement, the obligations on Enron – clause 4(a) of the
26 Freightliner agreement, the obligation on the buyer. So this is Enron buying services from
27 Freightliner?

28 A May I comment. As I finished my answer, you made an off-hand remark that it is your
29 view that Enron never had the chance.

30 THE CHAIRMAN: I think we have got the point. I expunged it from my memory as it was
31 made.

32 A Thank you, sir, I had it firmly implanted and I wanted to ----

33 Q It was a short moment of inflammatory comment near to half time when the players get
34 tired!

1 A Testifying rugby!

2 THE CHAIRMAN: Choose your moment, Mr. Brealey.

3 A I am not that tired yet.

4 MR. BREALEY: I will finish this point and then I have got 15 minutes after that.

5 A Where do you want me to read?

6 A Paragraph 4(a) on p.694. This is in the Freightliner contract. This is the obligation on
7 Enron as to discharging and loading. What it is agreeing is that it will load and discharge
8 and it has 1.5 hours.

9 A Yes.

10 Q When it comes to the back to back offer to Edison, 942, Edison is only getting 1 hour 15
11 minutes – yes?

12 A Yes.

13 Q And it is quite clear on the face of that, subject to renegotiation, that Enron is taking a bit of
14 a turn on that performance obligation. It is imposing stricter requirements on Edison than
15 Freightliner is imposing on itself. Do you agree with that?

16 A That is just the plain reading of it, yes.

17 Q Again, if you see clause 4(c):
18 “[The Buyer shall] pay an additional charge should the Buyer fail to meet the Total
19 Site Time for loading and unloading in respect of 95p...”

20 A I see that.

21 Q They would have to pay 10p on a plain reading?

22 A Yes.

23 Q So it is not correct to assume that simply because there would have been a performance
24 regime between Enron and EWS in the “but for” world, that Enron would have backed-to-
25 back the same obligations in its relationship with Edison, is it? On the plain reading of this,
26 these two agreements, you cannot safely assume that Enron would have back-to-backed the
27 same performance obligations?

28 MR. LASOK: I hesitate to rise, but of course one of the problems is with the use of the
29 expression “back-to-back”, because the evidence on Friday was that the EME bid was not
30 back-to-backed with the Freightliner bid. So I suspect that the questioning is proceeding on
31 the basis of a false hypothesis and may therefore give an unhelpful answer.

32 MR. BREALEY: That is not the evidence that was given on Friday, and if Mr. Lasok wants to
33 put that evidence in he can do, but it is quite inappropriate for him to get up and say that
34 sort of thing.

1 THE CHAIRMAN: Put your question, Mr. Brealey.

2 MR. BREALEY: From a plain reading of these two documents, it appears that Enron is not
3 passing on the benefits of the performance obligations that it gets in the Freightliner deal –
4 that is correct?

5 A It is correct to say that if these two clauses are linked there is a difference between what
6 Enron is offering to EME and what it is requesting from FHH. There is no question, if we
7 put them back-to-back. I clearly stated that it would be unreasonable for Enron to offer out
8 of the “get go” the best possible terms to its customer. It would get to those terms, or
9 somewhere near those terms, after some negotiation during which it would, in return,
10 perhaps ask for some benefits to itself. So that’s what negotiations are all about, and it
11 would not be who, someone negotiating on behalf of Enron, to come in and say, “This is our
12 best and final offer, it’s all over otherwise”.

13 Q Given Enron’s form on the basis of these two documents, you cannot safely assume that,
14 had there been a performance obligation between EWS and Enron, that Enron would have
15 passed to Edison exactly the same performance obligation?

16 A To the extent that I’m allowed to be assuming things, which I hope I am to some extent ----

17 Q You are being asked to.

18 A -- given the assumption I am asked to make, the answer would be absolutely wrong. I
19 would say that it is safe to assume that in a competitive environment as much of the pass-
20 through would occur as the market place would dictate. So if the alternative to Edison
21 Mission is to purchase the hauling services from, let’s say, either direct or through Enron as
22 reseller and somebody who bundles other stuff with the contract, that head on competition
23 would force the reseller to pass on as much of the benefit as the market place requires
24 because that’s what the market place does, it offers attractive alternatives to the customer.
25 In this particular case which is in front of the Tribunal, there was an impediment of that
26 kind of competition.

27 MR. BREALEY: I will continue after the adjournment.

28 THE CHAIRMAN: Professor, you are not permitted to talk about your evidence to anyone
29 during any adjournment whilst you are giving evidence – do you follow?

30 A I understand that, I’ll take Mr. Crosland’s statement keeping my own company.

31 MR. LASOK: Sir, before you rise, there is a question of timetable because I think we are
32 supposed to deal with all the witnesses in the course of today.

33 THE CHAIRMAN: Yes.

1 MR. LASOK: We have got two expert witnesses, the defence has one. On a basis of equal arms,
2 on the face of it, we ought to have the same crack, or an ability to have a crack, at the other
3 side's expert ----

4 THE CHAIRMAN: You will get it.

5 MR. LASOK: Thank you.

6 (Adjourned for a short time)

7
8 MR. BREALEY: We will go to a couple of the D bundles, the witness statement bundles, and
9 could we start first with D1. This is Mr. Staley's second statement, and the paragraph,
10 please, if you will go to, is para. 29 and it is at p.115.12. It is Mr. Staley's evidence as to
11 the tender for rail services. If you would just read it and then I will ask you a question
12 about it.

13 A (After a pause) Yes.

14 Q It is the last sentence of para. 29 which is important: "... that was our primary objective in
15 tendering to EME;" now, this is the important bit: "the only other benefit would have been
16 to offset partially the tonnage commitments that we had made to Freightliner."

17 A Yes.

18 Q On the basis of Mr. Staley's evidence, I suggest that it is clear that when Enron was
19 tendering to Edison, it was doing so on the basis of the Freightliner agreement, because
20 what he is saying is that there is a tonnage commitment in the Freightliner deal and had they
21 been awarded the contract the Edison deal would have satisfied some of that tonnage
22 commitment?

23 A It would have satisfied some of that tonnage commitment, it would, yes.

24 Q But it would suggest to you, and this is obviously for submissions to the Tribunal, that when
25 Enron bid to Edison it would have been using Freightliner's rates?

26 A This says to me that they would have been using Freightliner's services had they wanted.

27 Q Yes. I will accept that. Now, accepting Freightliner Services would have been on the terms
28 that Freightliner were offering?

29 A They would have paid the rates that Freightliner offered for the traffic, yes.

30 Q So if you put that away and go to bundle D3, and the statement of Mr. Kearney, that is at
31 tab 135?

32 A Yes.

33 Q If you would go to p.841 and read sub-paragraph (c), please?

34 A Yes.

1 Q In particular, the last several lines of (c): “The rate we submitted in the tender were slightly
2 below those that Freightliner had recently agreed with us and I believe we thought it was
3 possible to get Freightliner down to these rates if we had won the tender. The rates were
4 certainly not based on any offer that EWS had made to us in May 2000. Do you see that?
5 A I did, yes.
6 Q That is evidence not in any “but for” world, but what happened, as it were, that is what he
7 actually did?
8 A May I interject, that is what he says was going on. In particular he states that there were
9 reasons why the bid was a non-serious one. I do not take it from Mr. Staley that Enron was
10 submitting a vapour bid, or a bid that had no relevance to them.
11 Q All I am trying to establish with you is the rates that Enron employees, Mr. Staley and Mr.
12 Kearney ----
13 MR. LASOK: Is this a question that treats Professor Ordover as a witness of fact rather than an
14 expert?
15 MR. BREALEY: It is obviously a very sensitive point for Mr. Lasok, that is why he has jumped
16 up. I am going to ask Professor Ordover certain questions about the rates in two seconds – I
17 am just trying to establish whether Professor Ordover can accept, or assume for the present
18 purposes, that the rates used were the rates in the Freightliner bid.
19 MR. LASOK: If my learned friend is putting hypotheses to Professor Ordover, and asking him to
20 express an expert opinion as an economist on the basis of certain hypotheses, I have no
21 objection to that as long as the exercise is relevant. What concerns me slightly is if a
22 question which is essentially a question of fact is put to Professor Ordover or, indeed, as has
23 happened within the last few minutes, if facts are stated as being true when the evidence
24 does not support that. As I said, if Mr. Brealey says: “Let us suppose that the facts are X,
25 what is your expert interpretation?” or something like that – “How does that affect your
26 conclusions?” I have no problem with that.
27 MR. BREALEY: It will become very relevant.
28 THE CHAIRMAN: I am sure you will bear in mind what Mr. Lasok has said, keep it relevant to
29 the expertise of the witness. We have got the point about the rates.
30 MR. BREALEY: Then I will just hammer it home one last time, Professor Ordover. In re-
31 examination of Mr. Kearney, which is day 3, Mr. Kearney said – I do not know if you have
32 read the transcript of Mr. Kearney’s evidence?
33 A No, I have not had a chance to read that unfortunately.

1 Q I asked him the question, “What was the basis upon which you quoted those rates?”. He
2 said at p.74, line 28,

3 “The basis of those rates were on the Freightliner contract. That was the only thing
4 we could go on”.

5 MR. LASOK: If my learned friend is going to do that, he either puts it as a, “Let us suppose” or
6 he directs Professor Ordoover’s attention to Day 3, p.33 at lines 23 to 25.

7 THE CHAIRMAN: I think we are getting into the realms of submissions here, are we not, rather
8 than cross-examination, frankly? Shall we move on?

9 MR. BREALEY: Can you put those witness statements away? Just so that the Tribunal are
10 aware -- The frustration on my part, and probably on the Tribunal’s part as well, is that a lot
11 of the evidence in Professor Ordoover’s report we say is of a factual nature - findings of fact.
12 Therefore, with the report being admitted, we are almost inevitably delving into what
13 Professor Ordoover says happened. There is an absolutely crucial piece of his report, which I
14 know Professor Ordoover is aware of, because it is in the joint report, because in his joint
15 report he uses, in the “but for” world in his analysis, the May 2000 rates. What he does -
16 and we will come on to it in a moment, as I know you are aware - is finds as a fact, not as an
17 assumption -- He says that the May 2000 rates were used by Enron when they bid to Edison.
18 That shows that they would have made a huge loss because the rates that they actually
19 quoted were a lot lower than the May 2000 rates. Then, from that factual scenario, he goes
20 on to conclude that in the “but for” world, had EWS given Enron lower rates - non-
21 discriminatory rates - in the “but for” world, they would have done exactly the same thing
22 and ----

23 THE CHAIRMAN: Isn’t the right process, Mr. Brealey, that -- He uses those rates in his report.
24 You are entitled to put to him a hypothesis based on alternative rates. Then it is left to the
25 Tribunal to determine to what extent it can rely upon his expert evidence. So, why do we
26 not move to that point?

27 MR. BREALEY: So that we are sure what we are talking about -- If we get out Bundle G3 and/or
28 Bundle G4. As far as Bundle G3 is concerned, if we go to p.706 you will see Schedule 2 -
29 the charges.

30 A I see that.

31 THE CHAIRMAN: This is the Freightliner contract.

32 MR. BREALEY: Then at p.943 of Bundle G4 ----

33 THE CHAIRMAN: I had already written the other figures alongside on p.706.

1 MR. BREALEY: Assuming that Mr. Kearney is correct, and assuming that Mr. Staley is correct,
2 and the Freightliner agreement forms the basis of the Enron bid, I would suggest that Enron
3 is making a slight profit on the deal because although it has gone 5 pence less on the
4 Immingham/Aire Valley and 10 pence less on Redcar/Aire, and 10 pence less on Hull -- If
5 you actually add in the 10 pence discount that Enron would get for increased volume, it is
6 likely that it would wash itself out, and, indeed, Enron would make a 5 pence profit. Can
7 we assume that? Yes?

8 A If Enron won at these rates, that would be a reasonable calculation, assuming that the
9 tonnage would be as you stated.

10 Q So, put those bundles away then, please. We will not need to take them out again. Go to
11 your report at Bundle E, p.28 of the court bundle, para. 72. This is where you are
12 concluding (para. 5.3.2) Enron would have been able to make lower price tender in the
13 world but for EWS' price discrimination. So, there is a conclusion there, after your review
14 of the evidence, that in the "but for" world Enron would have made a highly discounted bid.
15 That is correct, is it not?

16 A I suggest that, indeed, Enron would be in a position to make such a discounted - highly
17 discounted - bid off of the rates that was offered.

18 Q Assuming that Mr. Kearney and Mr. Staley are correct and the Freightliner rates were used,
19 it is clear that Enron did not intentionally, or at all, substantially discount the rates in its ----

20 MR. LASOK: That is a question of fact - not expert evidence - based on a false hypothesis as to
21 the evidence that was given.

22 MR. BREALEY: Can you go to para. 76 of your report, please? Can you inform the Tribunal of
23 your reasoning in para. 76, please?

24 A Let me just read it first? (After a pause) Right. Well, the point I'm making in this whole
25 section is that in the "but for" world Enron will have the opportunity to bid off of the FHH
26 rates, had it contracted with them, which it is not clear necessarily that they would, and it
27 would also have the opportunity to bid off of non-discriminatory rates offered by the
28 preferred haulier, which is EWS. In both of these circumstances it would have been in a
29 position to offer a discount of whatever magnitude it could to gain haulage on the condition
30 that it was also expecting or anticipating to obtain the coal traffic to go along with it. My
31 whole calculation or analysis is predicated on that kind of sequence.

32 Q In para.77 you say:

1 “The prices [Enron] tendered to EME suggest that it would have been willing to
2 take a loss on any non-discriminatory rail rates it would have received from EWS
3 in the “but for” world of up to between 65 to 95p ...”

4 That is what your evidence is to the Tribunal, and you refer to the table and the analysis in
5 76. Upon what basis are you saying that Enron would have been willing to take a loss of
6 65p to 95p? What is the basis upon which you are saying that?

7 A These calculations are the discounts off of the rate offered by EWS relative, and the price
8 that Enron quoted. I say specifically here that it would have been possible to accept the
9 discount up to those levels, because that is the level that I have calculated off of the rates
10 that EWS offered. I am not saying that they would take that discount, but they would be
11 willing to go up to that level.

12 Q The way that you have calculated that discount, almost to £1, is because you have taken the
13 very high rate, the May 2000 rate, you have taken the rates that Enron actually bid and you
14 have just taken the difference?

15 A Yes.

16 Q So you have assumed there in that report that Enron would have used the EWS
17 discriminatory rates?

18 A I used those rates as the rate off of which they would have to bid in order to get the
19 business, and I calculated the amount that they actually bid to be the difference between the
20 two. If they had bid off of the FHH rates then of course they would have taken a lower hit
21 on the haulage than if they actually had to contract with the rates – bid on the basis of the
22 rates that they had to pay to EWS.

23 Q So you would expect that if Enron – and assume this is for the Tribunal – used the
24 Freightliner rates it would not have given them a discount of between 65p and 95p?

25 A In the rates that we are observing or the initial – the starting rates, I concluded therefore that
26 in a “but for” world they would have to bid against – they would be able to give the
27 discount off of the lower rates that they were offered by EWS, and they would discount
28 those rates up to the amounts that I calculated in order to get the business predicated on the
29 proposition that they would be able to get convoyed sales of coal, otherwise the whole thing
30 would not make any business sense to them – “them” being Enron of course.

31 Q You have used in your report the May 2000 rates and you felt able to say what discount
32 Enron would have given?

33 A Right.

34 Q Can you do the same analysis using the Freightliner rates?

1 A Well, if you assume that they gave 10p discount, that would be the discount that they would
2 have been willing to offer as an alternative calculation, but that does not mean that they
3 would not have been able or willing to offer a higher discount. The magnitude of the
4 discount that Enron would have been willing to offer is really driven by the spread between
5 what it costs Edison Mission to implement the end to end contract in-house, buying the
6 pieces that they needed, relative to what it would cost to have Enron do it for them. The
7 spread that is being earned is on – let’s just assume for simplicity – coal, and the difference
8 between the cost to Edison Mission and to Enron on the coal component is what really
9 drives the ability of Enron to offer the discount. The haulage cost in the “but for” world
10 would be exactly the same to both parties.

11 Q You have done it with the May 2000 rates. Are you able to say what would have been
12 different had Enron used the Freightliner rates?

13 A What would have been different would be the need to fashion their bid in such a way as to
14 win against the alternative, which could have been the EWS direct bid, and potentially
15 overcome whatever reluctance that Edison had to dealing with Enron up to the competitive
16 advantage that Enron had on the coal component of the deal. They had no competitive
17 advantage, as one would say in the “but for” world, on the haulage component.

18 Q Are you saying that had Edison said to Enron, “You have got the agreement”, they would
19 never have taken a haulage contract?

20 A I am sorry, what?

21 Q Had Edison said to Enron, “Here you are, you can have the haulage contract at those rates”,
22 are you saying that Enron would have walked away, or are you saying that in the “but for”
23 world they would have taken the haulage contract?

24 A I proceeded on the assumption that they would have taken the contract with the background
25 expectation of getting the coal component, which is what they were after. As I said earlier,
26 and repeated many times, I think it is uncontroverted that Enron had no competitive
27 advantage in hauling coal. It was simply a reseller of haulier’s services, and as such had no
28 margin on which to live.

29 Q Professor Ordovery, you have taken the May 2000 rates, you have assumed that there was a
30 65p to 95p discount, and on the back of that in your “but for” world, if I can ask you to go
31 almost to the conclusion of para.84, on the basis of actually using the May 2000 rates you
32 said that Enron would have been willing to accept negative margins with accompanying
33 coal supply up to the size of those that it accepted in the actual world and the lower non-
34 discriminatory rates it would have received from EWS in the “but for” world.

1 “This would have meant that in the but-for world Enron would have bid rates up to
2 £0.95 lower than those offered by EWS, which I note would have meant that
3 [Enron] would have tendered rates below the rate Mr. Crosland said would have
4 been needed for ECSL to have been considered more seriously.”

5 I put to you that when you signed this report you made a basic error, and the basic error was
6 that you used the May rates to conclude that Enron would have bid up to 95p discount? Did
7 you make an error?

8 A I don't believe I made an error. I calculated the discount off of that rate. It could be that the
9 actual discount that Enron would have been willing to accept would have been less than
10 that. I have no evidence. But it is also possible that they could have accepted a bigger
11 discount, and all that depends on what the competitive environment would have been in the
12 “but for” world. That would have depended on the rates that it got from FHH, it would
13 have depended on the rates that EWS were bidding, it would also depend on the spread or
14 the margin that it was going to accept on the coal end, if there was a coal end.

15 Q The whole essence of your report, I suggest to you, is that you are saying that the Enron bid
16 would have been compelling, so compelling, because of this huge discount that
17 Mr. Crosland, as a rational economic decision maker, would have felt compelled to have
18 accepted it. That is the essence of your report, is it not, that with this discount of up to 95p
19 he would have felt compelled, as a rational decision maker, to accept it? Is that not really
20 the essence of your report?

21 A I don't believe that I ever used the word “compelled”. I think I always said it would have
22 been more attractive had it been able to offer a discount off of the rates that it were to get
23 from EWS, which also meant bidding a service from a preferred haulier, as Mr. Crosland
24 described EWS, relative to Freightliner.

25 Q Assuming that the Freightliner rates were actually used, would you like to qualify your
26 opinion as to the chances of winning the coal haulage agreement?

27 A I would say that if the rates were actually used, whatever that means, there was only a quote
28 – I don't know what it means they were used, I presume Enron was formulating a bid based
29 on the expectations of the costs that it would incur and profits they were hoping to gain in
30 the hope of winning the bid in some probabilistic sense. So I would say that if it is indeed
31 the case that they were going to bid and they were going to pay the rates to Freightliner,
32 which I do not think has been established, for all of their traffic, then the discount that I
33 have calculated is likely to be too high relative to the discount they were offered in the first
34 round. I want to emphasise in my answer that all we are dealing with are the rates which

1 Enron offered out of the starting gate. There is no evidence how far they would have gone
2 in offering the discount because that is dependent on several other things and there is no
3 evidence that these rates that they were able to offer, or would have been able to offer with
4 the available discounts would not have been, to use your word “compelling” or sufficiently
5 attractive for Mr. Crosland to consider the Enron bid an attractive alternative relative to the
6 other alternatives.

7 Q Assuming that, would you like to qualify your opinion as to the chances of winning the four
8 year agreement on the basis that the rates were not as high as you state in your report?

9 A No, I do not think there is any need to qualify my report on that score because to the extent
10 that in the “but for” world Enron would have equivalent rates to those that EWS was
11 implicitly or explicitly charging itself for providing the service to Enron. They would have
12 received similar quality of service from Enron because it is the courier that Enron wanted to
13 contract with that is a bespoke service from EWS, then I do believe on those dimensions the
14 tender would have been superior to the one it was able to put and that the amount of
15 discount, the maximum amount of discount that Enron would have been willing to offer to
16 gain hauling plus the chance at the four year coal supply contract would have been driven
17 not only off of the rates but also off of the spread or the margin available on call. These are
18 what Edison Mission had to pay itself.

19 Q The only analysis that you make in your report about this alleged spread, as I understand it,
20 is at para. 81, where you give some hypothetical £4 a tonne, the hypothetical £6 a tonne, a
21 hypothetical £10 a tonne and then, with the greatest respect, all you do is have the self-
22 serving figures which say that the Enron bid is favourable?

23 A First, I do not think I would characterise them as self-serving. It is an example of the
24 calculation that I think is sound economic calculation. The model that Enron had was an
25 E2E model which actually lived off of that kind of spread.

26 THE CHAIRMAN: The problem about an argumentative question is that you get an
27 argumentative answer, Mr. Brealey. It does not really help the Tribunal.

28 MR. BREALEY: Well it does not, but I have asked the simple question: where is the economic
29 analysis of this supposed ----

30 THE CHAIRMAN: You will address us on that, will you not?

31 MR. BREALEY: Yes, I will. I am running out of time. I have no further questions.

32 THE CHAIRMAN: Mr. Lasok?

33 MR. LASOK: I have no questions.

1 THE CHAIRMAN: Professor, thank you very much indeed for attending. You are free to leave
2 now if you wish to.

3 (The witness withdrew)

4 MR. LASOK: Sir, we call Mr. Fisher now.

5 Mr. JOHN JAMES NORMAN WALDRON FISHER, Sworn

6 Examined by Mr. LASOK

7 Q Mr. Fisher, you have some files behind you. Could you take bundle E, please? Could you
8 turn to p.82, tab 5? You should have at p.82 the front page of a report?

9 A Indeed.

10 Q If you go to p.135 could you tell us whether that is your signature, and is this your report?

11 A It is, yes.

12 Q And then at I think it is tab 18, p.280, is that a statement of experts setting out your points of
13 agreement/disagreement with Mr. Biro?

14 A Yes, it is, yes.

15 Q Which is signed, I think, on the next couple of pages?

16 A Yes.

17 MR. LASOK: Thank you very much.

18 THE CHAIRMAN: Mr. Brealey?

19 Cross-examined by Mr. BREALEY

20 Q I am conscious of the time. Mr. Fisher, good afternoon. Could you go to para. 3.12 of your
21 report, please, and just identify exactly how you are calculating the loss of contract claim?

22 A Yes.

23 Q “The EME contract was for the delivery of coal to stockpile at EME’s Ferrybridge power
24 station for a four year period commencing in January 2001.” As I understand it you are just
25 here assuming that that is the type of contract?

26 A That’s right, yes.

27 Q The quantification of the EME loss of contract claim requires consideration of, and then you
28 have three factors: the volume of coal, which would have been supplied during the four year
29 period, the price at which the coal would have been supplied, and the profit basically on that
30 supply of coal, in carrying the contract. Just to be clear, in order to calculate the volume
31 what type of contract are we talking about?

32 A I’ve assumed an E2E contract.

33 Q And as far as commitments on tonnage, what are we talking about?

34 A I have assumed, I have done a number of calculations ----

1 Q Sorry, calculate not on the volume carried, but what is the contract? What is the obligation
2 that is alleged to have been breached which then causes the volumes not to be carried?

3 THE CHAIRMAN: Could you reframe the question because I am not sure you asked what you
4 meant to ask?

5 MR. BREALEY: You have been asked to quantify damages for the loss of this contract. You
6 have identified the contract at 3.12 as being for a four year period delivery of coal, but what
7 were the terms as to the volume? Have you considered in your report the terms relating to
8 volume? For example, whether it was a volume based contract? Whether it was an
9 exclusivity contract? Have you considered that at all?

10 A In effect, I have assumed that the start point is that Enron would have sought to deliver coal
11 in the volumes set out in its response to the invitation to tender. I then performed another
12 calculation to say that if they did not do those volumes there would have been a penalty for
13 doing that, and I have provided alternative calculations for that.

14 Q So implicit in that is there is a commitment by Edison to take the volumes of coal that you
15 say have been lost. So, there was a commitment.

16 A Yes.

17 Q Until recently you say there would have been a penalty for failing to comply with that
18 volume; is that correct?

19 A I acknowledge the fact that in the various documents it has been discussed that there may
20 have been a penalty and I provide two different calculations - one showing a penalty and
21 one without the penalty.

22 Q If one goes to the actual volumes, at para. 5.12, one sees the basis upon which you are
23 considering the volumes that would have been delivered. You set out the EME ITT, the
24 response in the MIS database.

25 A Yes.

26 Q Those are the two pieces of information which give you the volumes.

27 A There are three.

28 Q There are three but you have discarded the ITT and you have calculated your damages
29 claim on the basis of the response in the MIS database.

30 A Yes.

31 Q Which of the remaining two - either the response to ITT or the MIS database - would you
32 say is the better one to take for the Tribunal?

33 A I'm afraid I can't really say that, which is why I provided two alternatives. The response of
34 the ITT shows what it was envisaged at the time they were hoping it would be able to

1 deliver. The MIS shows what EWS actually delivered. I look at that, therefore, as a
2 minimum because we know that that amount of coal was actually hauled in those periods.

3 Q Why do you just take it as a minimum? Why do you not take it at face value?

4 A Because it's possible that other coal would have arrived in other ways - by road, for
5 example. In previous years coal had arrived by road.

6 Q This is a contract for rail haulage.

7 A Indeed. But, the MIS is what EWS actually delivered by rail, and what I don't know is
8 whether the difference between what was intended to happen in the ITT and what actually
9 happened is because actually the power plant didn't require as much coal, or whether it was
10 delivered in some other way.

11 Q You are not seriously suggesting that EWS should be paying damages on the basis of coal
12 that was delivered by ----

13 THE CHAIRMAN: I think he is. As I understand it - and correct me if I am wrong, Mr. Fisher -
14 you are suggesting that ECSL's terms could have led to the transference on the grounds of
15 good value from road to rail. Is that it?

16 A Indeed. Yes.

17 MR. BREALEY: And the basis upon which you have calculated that? Is there any factual
18 evidence to suggest that?

19 A No - which is why I haven't put any more sort of definition between the two limits. I have
20 treated the response to ITT as a maximum and the MIS as a minimum.

21 Q I ask the simple question: I suggest to you that the MIS database, being the information as
22 to the coal actually hauled by rail, would be the more appropriate basis upon which to
23 calculate a damages claim.

24 A I don't accept that.

25 Q You do not accept that. So, you think that that database, which actually records actual
26 delivery, is as robust as Enron's hopes in its response?

27 A Could you rephrase that, please?

28 Q The information as to actual delivery in the MIS database - so, information as to actual
29 delivery - is as robust a piece of information as Enron's hopes, aspirations in its response to
30 the tender.

31 A I'm not quite sure what you mean by that, but ----

32 THE CHAIRMAN: Nor am I. I would not answer that question. It really is a very diffuse
33 question. I think we have got the point.

34 A The MIS database ----

1 Q Do not worry.

2 A I did try and establish ----

3 Q Just wait for the next question. Sorry, Mr. Fisher.

4 MR. BREALEY: He has got the point. I will move on. (To the witness): Have you read

5 Professor Ordover's report?

6 A I have, yes.

7 Q You have just listened to the exchange that we have had about the discount - the possible

8 discount - that Enron may have given to Edison on the haulage of coal.

9 A Yes.

10 Q In your calculation have you taken any consideration of the discount that Professor Ordover

11 says may have been necessary to get this contract?

12 A No, because, as I understand it, Professor Ordover's report is looking at whether they would

13 have won the contract. My report assumes -- The start point is that they won the contract.

14 My profitability calculation is based on the gross margins - historic gross margins - which

15 would include -- which would factor in any discount to rail haulage.

16 Q But, your calculation based on 'would have won the contract' is based on a certain

17 argument that there would have been a discount on haulage.

18 A Yes, I understand that, yes.

19 Q So, if there had been a discount on haulage, that is coming out of Enron's pocket into

20 Edison and would reduce the damages claimed.

21 A If I had built up my loss of profits by saying, "Here is the element of rail haulage. Here is

22 the element of the cost of coal. Here are all the various different components", then, yes,

23 but that's not how I've approached it. I've worked out the volumes of coal that I think they

24 would have shipped on two alternate bases, as we've just discussed. Then I have worked

25 out a margin. Inherent in that margin is the -- it builds in the haulage cost.

26 Q It does, but does it build in a discounted haulage cost that Professor Ordover says ----

27 A Not explicitly, no.

28 Q The damages calculation, if one looks at p.512, is based on volumes over four years 2001

29 to 2005.

30 A Yes.

31 Q As you know, Enron would not have got that income because it went into administration at

32 the end of 2001.

33 A Well, I wouldn't say that I know they wouldn't have got that income. The Enron group

34 went into administration.

1 Q You do know that they would not have got ----
2 A The legal entity that we say contracted with this may not have done.
3 Q But it would not have got the income in 2004.
4 A Well, my assumption is that the administrator or liquidator would have sold the contract ----
5 THE CHAIRMAN: It depends what the administrator would have done, does it not?
6 MR. BREALEY: The administrator, you should know, sold the business to AEP on 12th
7 December.
8 A Yes.
9 Q The coal contracts were transferred to AEP. So, it is clear that if the contract had been
10 transferred to AEP -- if this hypothetical contract -- this contract had been transferred,
11 Enron would not be receiving income under that contract in 2004 because the contract
12 would be in the hands of AEP.
13 A Right. So, had the contract been transferred to AEP, would Enron have received income?
14 No. AEP would've done.
15 Q Precisely. So, where in your report have you valued this hypothetical contract on the date
16 of transfer to AEP?
17 A I haven't. What I've done is to value the contract in, if you like, a liquidation-free world.
18 Q Why have you done that?
19 A Because the hypothesis which I refer to is that on liquidation the liquidator would have been
20 able to sell the contract, either to AEP or to have set up a separate vehicle, or kept this
21 particular company afloat in order to realise its value.
22 Q Are you able to assist the Tribunal as to the value of this hypothetical contract in December
23 2001?
24 A Well, my calculations calculate the value of the four years' worth of profits. That is looking
25 at the beginning. There is a slight logical inconsistency in that I look at the contract at the
26 beginning with the four years, and I use historic factual information about what actually
27 happened. Had I been selling the contract in 2001 I would not have known, for example,
28 that the actual haulage could be as low as 346. What I know is that we were planning on
29 shipping 1.7 million tonnes. So I may have valued it even greater.
30 Q Do you know roughly what price per tonne – in your damages calculation essentially the
31 volume that you say has been lost is 3.5 million tonnes – is that correct?
32 A That sounds about right.
33 Q Are you able to say what price per tonne that equates to?

1 A I haven't calculated it in that way. I've calculated a price per tonne on the basis of historic
2 information that I then rolled forward for changes in the coal price index and changes in
3 exchange rates.

4 Q So you have used higher prices in 2004, for example, to calculate the 2004?

5 A If you go to 5.32 of my report, that shows my calculation of the prices.

6 Q Surely in 2001 you would be looking at the prices then when you are selling the contract.
7 You do not know what is going to happen two or three years later. You would be valuing
8 the contract at 2001 prices, maybe with a little bit here and there, but you do not know that
9 it is going to be 2004 prices?

10 A No, I don't, but I'm not a coal expert. I imagine that people have an idea, going forward
11 looking at futures markets and other things, about what the price of coal might do.

12 Q The loss to Enron is, as from December 2001, what it would have received on a transfer of
13 this contract to AEP – you would accept that?

14 A No. Say that again, please?

15 Q The loss to Enron is the loss of value to Enron, market value, the valuation of the contract,
16 on the transfer to AEP in December 2001?

17 A Well, I have said the loss to Enron is the loss of profits they would have made had they
18 fulfilled the contract. I have calculated it without taking into account the insolvency. I have
19 then said that I think the insolvency would not have had a material effect on the overall
20 price because Mr. Kahn says, as I understand it, that a full price was gained for the various
21 other contracts he sold.

22 Q When you prepared your report, did you speak to anybody about the market value of the
23 contracts that were transferred to AEP?

24 A No, I wasn't asked to look at that.

25 Q So you are only giving evidence now as to what you have heard Mr. Kahn say?

26 A What he says in his witness statement, yes.

27 Q So you never asked anybody about the valuation of the contracts that were transferred?

28 A No. My understanding is that many of them are not coal supply E2E contracts. There are
29 port maintenance and various other – port administration contracts, and a whole range of
30 stuff in there that I was not asked to look at, and I haven't.

31 Q Can you quickly, because I know we are running out of time, go to bundle G5, please,
32 p.1312.

33 A Yes.

34 Q This is the sale transfer agreement. At 1323 is the list of the customer contracts.

1 A Yes.

2 Q As I understand your evidence, assuming that this hypothetical contract that we are talking
3 about in this case is listed at number 40, on 1325, you have not attempted to put any market
4 valuation on that contract bar just calculating the volumes and then multiplying that by the
5 prices per each year and working out the margins?

6 A That's correct. To do that properly, what one would have had to do is to take each of these
7 contracts, done an independent valuation of it, compared it with the total price and then
8 somehow worked out of the contracts included in this, how did that compare with the EME
9 contract we are looking at here. Those weren't my instructions. I am quite doubtful about –
10 there's an awful lot of contracts here, there's an awful lot of scope for lacking information,
11 and so forth, whether you could have done it. I took the view that my basis was simpler,
12 given there's inherent uncertainty, that it's all hypothetical anyway, and the most reasonable
13 way in which to value it.

14 THE CHAIRMAN: You are assuming a continuation of business in the hands of whomever?

15 A Exactly.

16 MR. BREALEY: You could have asked, I respectfully suggest, certain questions of various
17 people. For example, if you go to the contracts listed at schedule 1, at 14 is the Master Coal
18 contract between Edison and Enron?

19 A Yes.

20 Q That is a coal supply agreement. You could have quite easily, Freshfields have done it,
21 worked out how many tonnes were to be delivered in the remaining period. I will give it to
22 you as a fact, the remaining tonnes were 1 million. There is a contract which you refer to in
23 your statement, the BE contract, the Eggborough contract. How many tonnes were
24 remaining? Two million. You could have looked at the Kilroot Power Station contract, 2.2
25 million, you could have looked at the Cottam Power Station contract, 1 million. You could
26 have quite easily, I suggest to you, have looked at the contracts and worked out how many
27 remaining tonnes were to be delivered for the years 2002, 2003 and 2004 – yes? Could you
28 have done that?

29 A I don't think it would have been that easy to do that, because you've got, for each of those
30 contracts, to understand the basis of the contract, what are the conditions of them? I don't
31 know if they're all rail supply contracts.

32 Q You do not know because you have not looked at them, but ----

33 THE CHAIRMAN: I may be having one of my bad moments again, but let me try this on you.
34 Either you have a continuing business basis in which you calculate the number of tonnes,

1 and so on, and the profit margin, and you reach your conclusion, or you have a business that
2 has started but then is sold as a contract with due diligence on an assessment of what would
3 occur on a continuing business basis.

4 A Yes.

5 Q Are the two figures likely to be substantially different in the end?

6 A I would assume not. I'm clear that I – I haven't done the sort of calculation that counsel is
7 suggesting and my understanding is that Mr. Kahn – I don't wish to blindly rely on what he
8 says, but the evidence there was that a full price would have been got and that fitted in with
9 my own assessment of what you would expect to happen.

10 Q Obviously, if there was a fire sale then you would have a different set of figures?

11 A Yes.

12 Q Thank you. Perhaps it was not such a bad moment.

13 MR. BREALEY: It is an important point, and I want to finish it very quickly. It is an important
14 point because if you calculate the tonnages that are remaining, and I am just giving you an
15 example of a few contracts and there are over 6 million tonnes remaining to be delivered,
16 the cash consideration was £7 million – yes? We know that because that is in the
17 agreement.

18 A Yes.

19 Q So the clear implication of that is that at the time that these contracts were valued, they were
20 valued at nowhere near the valuation that you now put on this hypothetical contract. Do
21 you accept that?

22 A I accept that this shows a difference, but I do not accept that it shows that my calculations
23 are wrong.

24 Q In other words, if you were to take the Eggborough contract that was sold, at best the
25 consideration was, say, £1 at tonne, whereas you are claiming in 2004 a loss of profit of £6
26 per tonne in these proceedings, and I am suggesting to you that the fair valuation in
27 December 2001 should have been done by reference to the £7 million cash consideration
28 that was paid under this agreement. Do you accept that?

29 A I don't, no. These contracts here were sold as a whole bundle because I understand the
30 value wasn't split out between them. How do I know for example whether all of these
31 things have positive value, there might be things here that are more onerous than not and
32 you persuade someone to take it off your hands, and a few other things – I just do not know.
33 I do not think it is right to simply look at the total number of tonnes, divide it by 7 million

1 and say that that gives you £1 a tonne, let's compare that with our contract; I think that is
2 simplistic, I am afraid.

3 Q Well you do not know – and I do not want to be argumentative – but you do not know
4 because you have not made the investigations and in order to put a fair value on this
5 contract I suggest you do have to make those sort of investigations. You disagree with that?

6 A I disagree with that.

7 THE CHAIRMAN: Mr. Lasok?

8 MR. LASOK: No questions, thank you.

9 THE CHAIRMAN: Thank you very much indeed, Mr. Fisher.

10 (The witness withdrew)

11 THE CHAIRMAN: I think a very short break now probably would be logical as we are moving
12 into a new witness. We will have about seven minutes or something like that.

13 (Short break)

14 Mr. ZOLTAN BIRO, Sworn

15 Examined by Mr. BREALEY

16 Q If you would go to bundle E, and p.186, at p.248 is your signature?

17 A I have them.

18 Q And I understand you have prepared two joint statements, one concerning Professor
19 Ordover, and one concerning Mr. Fisher. With Mr. Fisher your signature is at p.281, and
20 with Professor Ordover your signature is at p.264?

21 A That is correct.

22 Q Do you confirm to the Tribunal that the evidence that you give is to the best of your
23 knowledge and belief?

24 A I confirm.

25 Cross-examined by Mr. LASOK

26 Q Mr. Biro, what I am going to do is to go through your report. I will deal first with the
27 matters that relate to Professor Ordover, and after that I will deal with the matters relating to
28 Mr. Fisher. Could you turn to p.189 of bundle E and if you go to para. 9? As I read that
29 you disagree with Professor Ordover on two grounds. The first is that his economic
30 analysis was predicated on factual assumptions that you found to be incorrect. Is that
31 correct?

32 A Yes.

33 Q And the second one was other important assumptions that you felt were highly
34 questionable?

1 A Yes, that's correct.

2 Q If we turn to the next page, first of all I think in para. 10 you identify two issues, and in
3 para. 11 in (a) and (b) you give the answer that you consider is appropriate for each of those
4 issues, and 13 sets out the reasons for the conclusion in 11(a), is that so?

5 A Yes.

6 Q So if we go to 13, and here you are looking at whether or not EWS's discriminatory
7 behaviour as found by the ORR caused ECSL to lose a real or substantial chance of winning
8 a four year rail haulage contract. We get to sub-paragraph (a) and what I am going to do is
9 to go through this sub-paragraph to split it up into what I think you are saying?

10 A Yes.

11 Q So take (a) and go to the second line, you say:
12 "Professor Ordover is incorrect to conclude that the difficult customer relations
13 issue which ECSL faced with EME at the time of its tender in September 2000
14 was caused largely by EWS providing an unreliable performance to ECSL in
15 delivering coal to Ferrybridge and Fiddler's Ferry."
16 So you dismiss Professor Ordover's opinion on that ground?

17 A Yes.

18 Q That in itself does not substantiate the conclusion that you come to in 11(a)?

19 A No, it is the entirety of 13, it is (a) to (d) combined that is my reasoning.

20 Q Well that little bit of it?

21 A (a) in and of itself, no.

22 Q Have you got p.191, you say in the second line:
23 "Contrary to Professor Ordover's assumption, the reasons for the breakdown in
24 the relationship between EME and ECSL appear largely unrelated to the conduct
25 or previous performance of EWS."
26 That is just an observation that you are making on the facts?

27 A That is my interpretation of the factual evidence that I have read, yes.

28 Q It is not a matter of expert expertise is it?

29 A It is my interpretation of the factual evidence I have read.

30 Q Then you say in the next line: "Moreover ..." and this is a sort of third reason:
31 "... it is not apparent to me that the other relationship difficulties regarding
32 ECSL's inflexible approach to the volumes of contracted coal supplies, and
33 EME's perception that ECSL lacked customer focus would have been resolved in
34 July 2000 when EME and ECSL renegotiated their contract."

1 Again, this is you putting your own interpretation on the facts?

2 A It is. Shall I explain why I have done that?

3 Q Please do.

4 A Because what Professor Ordovery has done in his analysis is to take a view in a world “but
5 for” EWS’s discriminatory conduct, what that world would have looked like, including how
6 EME might have considered a bid from Enron, and in order to take a view on that issue I
7 have to then read, if you like, the factual evidence that is relevant to all of the reasons that
8 the relationship had broken down during the course of 2000.

9 Q I would suggest to you that what you are doing is you are not bringing to bear expert
10 economic analysis at this point?

11 A It is my interpretation of facts that is important for me then to take a view on what a “but
12 for” world would have looked like, and how Edison might have considered a bid from
13 Enron in that “but for” world.

14 Q Yes.

15 A And it requires me to understand those facts to take a view on that latter issue.

16 Q So if we look at this sentence, beginning with the word “Moreover” we have a reference to
17 ECSL’s inflexible approach and that presupposes that ECSL was inflexible, does it not?

18 A That was my interpretation from the factual evidence, yes.

19 Q Then we get in the next line a reference to EME’s perception that ECSL lacked customer
20 focus. Does that not pre-suppose that EME had that perception and also that EME regarded
21 that as a material factor?

22 A It’s my interpretation of the factual evidence that that was EME’s view at the time.

23 Q If we look at the reference to July 2000 when EME and ECSL re-negotiated their contract,
24 that is the wrong time period, is it not?

25 A Sorry? What do you mean by ‘the wrong time period’? The Enron bid EME was in
26 September 2000 which post-dated July 2000 by three months. It was shortly afterwards.

27 Q You are talking here about something being resolved in July 2000, at the time of the re-
28 negotiation of the contract.

29 A In July 2000 there was a re-negotiation of the existing contracts, yes. Shortly afterwards -
30 three months later - there was then a rail haulage tender in which Enron participated.

31 Q Did you know that during the contract re-negotiations between the EME and ECSL, EME
32 put in an offer to restructure the contract that included continuing the relationship on an
33 E2E basis?

34 A (After a pause) You would need to point me to that offer.

1 Q Let me rephrase it. Let us suppose -- let us assume -- I am not asking you to make a
2 pronouncement on a question of fact. Let us suppose that during the contract re-
3 negotiations between EME and ECSL, which ended in July 2000 -- Let us suppose that
4 during that exercise EME put an offer to ECSL that was based on the continuation of the
5 relationship with ECSL on an E2E basis. Would that affect your analysis?

6 A Not necessarily because at the time there were existing contractual arrangements that the
7 parties were seeking to re-negotiate. That is the background to having to conclude some
8 other form of deal. I would be surprised if EME put that forward as being something it
9 would look upon favourably, if it put it forward at all, or that one could construe from that
10 that they would welcome, under new contracts which they were entering into post-July 2000
11 -- that they would be putting forward such options.

12 Q Where is the economic analysis in answering that question?

13 A That's my interpretation of what EME have said that they felt in terms of E2E arrangements
14 - their experiences of those, and the difficulties that those cause them. As I say, it's my
15 interpretation of that factual evidence.

16 Q Let us move to para. (b). Could you just read that so that you have got it fresh in your
17 mind? (After a pause) I think that in para. 34 of your opinion you actually say that all that
18 is a matter of law. Is that your view?

19 A There are legal issues which I'm not qualified to comment on as to, firstly, whether the lack
20 of a performance-based contract itself constituted a finding of abuse by the ORR. That's not
21 for me. Secondly, what lawfully, or otherwise, EWS may have offered is again a legal
22 consideration - not an economic one - that is relevant to determining what a "but for" offer
23 might have looked like.

24 Q Can I put another hypothetical to you? Let us suppose that as a matter of law EWS was an
25 undertaking occupying a dominant position.

26 A That was a finding of the ORR.

27 Q Let us suppose that as a matter of law an undertaking occupying a dominant position is
28 legally obliged to refrain from conduct that discriminates between customers in such a way
29 as to put them at a competitive disadvantage. Let us also suppose that it follows that as a
30 matter of law in the "but for" world, EWS could not have made an offer of rail haulage to
31 ECSL that was materially different from the offer that it eventually made to EME.

32 A I'm happy to suppose that. I would like to come back and perhaps just question that
33 assumption in a moment. But, let us pursue the logic for the moment. Then I would like to
34 come back and question the assumption.

1 Q How would that affect your conclusion? I am talking about the conclusion that you reached
2 in para. 11(a)?

3 A Not at all.

4 Q It would not affect it at all?

5 A The key considerations to me were the pricing in a “but for” world (which I deal with under
6 (d)) and whether non-price issues would have mattered above and beyond that (which I deal
7 with under (c)). (a) I think is also an important consideration, but things don’t turn on (a).
8 (b), again, is an important issue because it specifies what a “but for” offer might have
9 looked like. But, certainly my views don’t turn on either (a) or (b) alone.

10 Q Let us move on to (c) on p.191.

11 A Can I come back to the assumption, just to clarify that? For example, the reason I was
12 uncomfortable in determining what a “but for” offer from EWS might have looked like --
13 It’s not only the open question whether the failure, or otherwise, to agree performance terms
14 is an abuse as found by the ORR. It is also not obvious to me that even if that were an
15 abuse, that it’s necessarily correct to assume, as Professor Ordovery did, that a non-abusive
16 arrangement would naturally be whatever EWS ended up offering EME. I can give you an
17 example of that because my understanding is, from looking at the term sheet that Enron
18 sought in terms of performance characteristics from EWS in March 2000, Enron was never
19 actually asking for on-time delivery. So, in a “but for” world, for example, that’s my
20 understanding of what was going on there. So, in a world but for anti-competitive conduct
21 it is entirely plausible that in the summer of 2000 Enron and EWS would have concluded
22 performance terms. They might not have concluded on-time delivery. That would’ve been
23 done without any anti-competitive object or intent at the time. Yet, when the EME bid was
24 put in place by EWS, those on-time delivery terms mattered. It’s not clear that Enron
25 would’ve had a contract with EWS that contained those. Now, that’s just one example of
26 rather difficult thorny issues one needs to grapple with if one needs to specify exactly what
27 this “but for” offer would’ve looked like.

28 Q The hypothesis I am putting to you is that as a matter of law the “but for” offer has to be a
29 contract for haulage that in its terms is indistinguishable in aspects relevant to competition -
30 indistinguishable as between the customer being Enron and the customer being EWS.

31 A You can see why in my report I said this was a legal issue because it was not obvious to me.
32 What I cited was an example of why it’s not obvious. You may be right. I don’t know. But,
33 that’s precisely why this was one issue where all I could do was to question an assumption
34 made by Professor Ordovery, but I felt uncomfortable myself taking a view on the issue.

1 Q I am not asking you to express opinions on matters of law. I was putting this to you as a
2 hypothesis. Now, if we go to (c), as I read that on p.191, this, again, is all about facts and
3 evidence.

4 A Yes. It goes to all of the factor matters that are relevant to determining how Edison might
5 have viewed an offer for the rail haulage contract from Enron in a “but for” world. What of
6 the various criteria that I read in those various factual witness statements seem to matter?

7 Q If we get to (d), here we get to a difference of views between you and Professor Ordover
8 about what would happen in the “but for” world, namely the question of whether or not
9 ECSL would have undercut EWS’s prices by up to the amounts indicated. Let us go
10 through this. In (i) you first set out what Professor Ordover says – okay?

11 A Yes. This is a summary of the conversation that Mr. Brealey was seeking to have with
12 Professor Ordover right at the end of his cross-examination.

13 Q And then in (ii) you say that Professor Ordover incorrectly compares the prices that ECSL
14 bid to EME in September 2000 with the prices that EWS offered to ECSL in May 2000, and
15 you say later in para.(ii) that the documents that you have reviewed indicate that ECSL was
16 in fact intending to rely on rail haulage services from Freightliner to support its September
17 2000 tender to EME. As I understand it, this part of your criticism of Professor Ordover is
18 based upon your conclusion of fact that ECSL was intending to rely on rail haulage services
19 from Freightliner?

20 A Yes. Let me be clear. I was asked to read and comment on the report of Professor Ordover.
21 As Mr. Brealey sought to discuss with Professor Ordover, what Professor Ordover’s report
22 contains is an analysis, in his view, of whether or not Enron was anticipating making a loss
23 when it bid for the EME rail haulage contract. Professor Ordover made the factual
24 assumption that the May 2000 EWS rates underpinned Enron’s bid. What I’ve interpreted
25 from all the evidence I’ve read is that was the wrong factual assumption, and what I do in
26 my report is not only explain that but then go on to explain what I think of the very
27 important implications that follow from that. I could elaborate on those now and explain
28 what those are, if you like.

29 Q We will come to them in due course, but if I could interrupt you for a minute, I would like
30 to put another factual hypothesis to you. I am not asking you to agree with it, I am just
31 asking you to consider it. Let us suppose that ECSL, when compiling or putting together its
32 bid for the EME contract, looked around to see what prices other hauliers were charging,
33 and at that stage let us suppose there were only two hauliers. One of them was EWS and
34 the other one was Freightliner. Let us suppose that the only price information that ECSL

1 had consisted of, firstly, the prices that it had agreed with Freightliner in the Freightliner
2 agreement and prices that EWS had quoted to it in May 2000. Let us suppose also that
3 Freightliner was capacity constrained so that if ECSL won the EME contract it was at risk
4 of having to go back to EWS for all of, or a significant part of, the capacity that it required
5 to perform the EME contract. On those assumptions, or in the light of those assumptions,
6 would you alter your conclusion on the question of whether or not ECSL was expecting to
7 incur losses on rail haulage?

8 A You would need to tell me two other things. You'd need to tell me whether this was a real
9 expectation, a likelihood or just some risk that there's a small probability of that happening,
10 and you would need to tell me whether you are talking about in the early period, say for a
11 few months, or whether you're talking about the full term of the contract which was being
12 priced.

13 Q We are talking about a contract starting in 2001, and there is a material risk ----

14 A I'll assume it is material for the moment.

15 Q There is a material risk that ECSL will have to use EWS for all or a part of the EME
16 contract as from January 2001 and for an indeterminate period of time. I do not mean in
17 perpetuity. What I mean is a time, a period, that they cannot evaluate at that stage, but it
18 would be of several months.

19 A I can give you the answer to that quite clearly. It is a four year contract. The first thing I
20 would do is have a look at what were the anticipated tonnages over those four years. What
21 I'd observe is that 15 per cent of the tonnages are in year one, 85 per cent of the tonnages
22 being in years two, three and four. Then what we'd have is we'd have a material risk of
23 needing to use EWS not Freightliner for some proportion of the 15 per cent of the first year.
24 You said it wasn't the whole of the first year, let's say it's half the first year. So then we've
25 got a material risk that we're now talking about having to turn to EWS for 7 per cent of the
26 tonnages to be hauled under that contract. If I thought that risk was, say, 50/50 you are
27 talking about 3.5 per cent of the tonnages. What I would do is I'd price that contract using
28 96.5 per cent weight to the Freightliner prices and the remaining 3.5 per cent weight to the
29 EWS May 2000 prices, and that would be my best expectation of the costs I'd be incurring.
30 So, as a result of that, I think the conclusions I've drawn in my report would pretty much
31 hold, probably with a footnote to clarify.

32 Q You are saying what you would do. The other thing, of course, we have to bear in mind is
33 that the price that is quoted as an opening bid is a price below the Freightliner agreed rates.

34 A Sorry, by whom, by Enron?

1 Q By ECSL, yes.

2 A Not when you take into account the likelihood of a volume discount applying, which I said
3 in my report was more likely than not. What that actually means is three of the flows were
4 break-even, and there was a 5p profit, I think, on the third of the flows.

5 Q Do you see what I am getting at though, that the Freightliner rate is an agreed rate after
6 negotiation, and in the ECSL tender it was an opening shot. As an expert economist, when
7 a prospective seller quotes a price to a prospective buyer, does the buyer try to negotiate the
8 price upwards or downwards?

9 A The buyer?

10 Q Yes.

11 A The buyer would obviously seek improved terms, and therefore downwards.

12 Q So the expectation would be that the opening salvo would risk going down. It is not going
13 to go up, is it?

14 A The opening salvo we've discussed was break-even with a 5p profit on one flow. If a
15 negotiation had taken place as a serious one, then, yes, one would expect some downward
16 movement, absolutely.

17 Q So you would therefore conclude that in that hypothetical scenario that I have put to you
18 that ECSL was accepting a risk that it would make a loss on rail haulage?

19 A No, that depends on whether, in that negotiation they would in fact have gone further. We
20 do not know that. We do not know if EME had said "Come and negotiate" Enron might
21 have turned 'round and said: "Sorry, I can't, I've got no room for manoeuvre". All you are
22 saying to me is if there really is a negotiation, yes, there will be some movement.

23 Q Now, let us move to (iii). You say:

24 "Professor Ordover should have compared the prices that ECSL bid to EME in
25 September 2000 with the prices that ECSL had previously negotiated with
26 Freightliner."

27 A And that is because all Professor Ordover was asking himself was in the actual world did
28 Enron anticipate making a loss when it bid for the EME run haulage contract, and what
29 Professor Ordover should have done is looked at the cost base that Enron was bidding
30 against; what costs would it have incurred had it actually won. As we have previously
31 discussed that was essentially off the back of a Freightliner contract and therefore that is the
32 relevant comparison, not the EWS May 2000 offer.

33 Q Is Professor Ordover proceeding on the basis that Freightliner was capacity constrained so
34 that there was at the least a risk that ECSL would have to go back to EWS?

1 A He was, but I think he was wrong to do that because his only reference to that effect is the
2 ORR decision, and I think he has misinterpreted the ORR. We can draw on that report and
3 have a look at the relevant sections. What is quite clear is the ORR was looking, as has
4 previously been discussed, at Freightliner's ability to bid as an independent entity above and
5 beyond its existing contractual commitments, and that included its contractual commitments
6 to Enron, so you cannot from that infer that it could not meet Enron's demands.

7 Q Well that was a finding made by the ORR?

8 A That is the only thing that Professor Ordover relied upon in his report so I am answering
9 your question by saying I disagreed with his view.

10 Q So disagreeing with the ORR's report?

11 A No, the ORR may have been right that Freightliner as an independent entity could not have
12 met all of EME's demands, above and beyond taking away what it had already promised
13 Enron. It does not mean that it could not have met all of Enron's demands in bidding for
14 EME.

15 Q Then it would have had to have switched from the BE contract would it not?

16 A No.

17 Q Why?

18 A Because the BE contract does not come until April.

19 Q No, we are talking about the existing BE contract?

20 A The existing BE contract, the earlier one, the first one, was actually served by EWS. There
21 was an EWS/BE contract that ran from Spring 2000 to Spring 2001. EWS served those
22 flows. As of April 2001 Enron would have used Freightliner, but for those first three
23 months, where those capacity issues were relevant, the British Energy contract was not
24 relevant to Freightliner, because EWS was still serving British Energy's needs. None of
25 this can be drawn properly from the ORR decision which is asking itself a very different
26 question, which is above and beyond the contractual commitments already made to people
27 like British Energy and EME: "Could Freightliner independently have done more?"

28 Q I will revert to this shortly. Can we move on to (iv)? If you look at (iv) I was just trying to
29 unpick what you are saying here?

30 A Shall I explain what was in the back of my mind when I wrote this?

31 Q Please do.

32 A Professor Ordover incorrectly in my view took the view that Enron, when bidding for the
33 EME rail haulage contract was anticipating making a loss, that was the 65 to 95p that was
34 mentioned earlier – actually it is 40p to 70p plus a 25 per cent additional amount under

1 certain conditions which we can come back to if need be. What Professor Ordober asked
2 himself was “Why would they do that?” The answer he reached was: well it is natural to do
3 that if Enron would need to win the rail haulage contract in order to then win future coal
4 sales. So as a rational economic agent it makes commercial sense to lose some money on
5 rail if you know, as a result of losing that money, you are going to make profitable cost
6 sales, it is just a loss leader. What I did was I actually looked at the Enron bid and found
7 that they did not make any losses. What I am saying is, as a matter of logic, the exact
8 opposite applies. If you are bidding for a contract not expecting to make any losses the
9 natural assumption is that they did not expect to make any full on coal profits, because if
10 those coal profits really had been there they should have bid harder and bid more, so they
11 did not. So it is just the logical opposite of exactly what Professor Ordober was saying,
12 having recognised that there was, in fact, no loss embodied in their original bid.

13 THE CHAIRMAN: So it was not a loss leader at all?

14 A No, because if you actually recognise it was based on Freightliner and not EWS’s prices
15 there was no loss, there was no loss leading, and the natural conclusion following Professor
16 Ordober’s logic is they were not anticipating making any core profits, otherwise we would
17 have seen some loss leading which in fact we did not.

18 Q So have I got this right: the figures indicate to you that this was a genuine coal haulage bid
19 and one cannot assume that it was a condition of progress that they would win an E2E
20 contract?

21 A It is a bid that would have washed its face on rail alone. There would not have been big
22 profit there – if any. It would not have made a loss, so what we can infer from that is that
23 there was not a natural expectation that there would be follow-on core profits, because had
24 that expectation been there you would have expected a lower price bid with some loss in it
25 that was not there. There was no loss leading and the only conclusion that I would draw
26 from that is that they did not anticipate core profits otherwise we should have seen some
27 loss leading which we did not.

28 MR. LASOK: Can I put another factual hypothesis to you and that is what they did was they
29 looked at the best information they had at what competitors might bid and they shaved off a
30 bit so as to undercut them and that was their opening gambit?

31 A It was an opening gambit which entailed no losses and all I can conclude from that is that
32 there was an opening gambit that does not indicate that there was, if you like, a large
33 amount of core profit. Let me give you some real numbers. Professor Fisher’s report
34 indicates in his view there is around £3 a tonne of coal profit. Actually the rail haulage

1 contract was also roughly for about £3 a tonne – they are broadly equivalent figures. All
2 that suggests is Enron could have given away the rail haulage for free and still made money
3 according to the logic that has been put forward.

4 THE CHAIRMAN: I think what Mr. Lasok was putting to you, and Mr. Lasok will correct me if
5 I have got this wrong, is that a really canny bidder would have bid possibly leaving a profit
6 on the coal haulage, albeit a smaller profit than he anticipated others would be seeking, but
7 would still have in mind an E2E contract. That is roughly what you were putting?

8 MR. LASOK: That is roughly it. The way I was putting it was more or less that, we hypothesise
9 that you get what pricing information that you have as a more or less rough indication of
10 where you think other competitors are going to be. You put in an offer that is below that
11 and then you see what happens.

12 THE CHAIRMAN: That is art not science, is it not?

13 MR. LASOK: Yes.

14 A Can I address that point?

15 THE CHAIRMAN: Yes, please?

16 A My view as to what a canny bidder would have done. A canny bidder, if there really were
17 £3 of coal profit to come, would have thought “I can lose quite a lot of money on rail and
18 still do really nicely here.” What I would not do is put in an opening bid that at best
19 matches the opposition knowing I have perhaps got other competitive disadvantages based
20 on history and poor relationships. I would have to seek to overcome all of that with a
21 proper discounted bid, signalling to that customer “I’m real. I mean business”. That is not
22 what their bid was. The only logical conclusion is because they did not think the coal profit
23 was there otherwise that is what a canny bidder would have done. That my personal view
24 on interpreting what happened.

25 MR. LASOK: Are you not assuming that EME knew the terms of the Freightliner agreement
26 with Enron?

27 A No, what I am saying is Enron would have known the terms of the Freightliner agreement.
28 Enron would’ve known its actual bid had no loss at all. Enron would’ve known its bid was
29 marginally competitive or uncompetitive. In fact, it was shown to be uncompetitive. What
30 it was not was a canny bid, signalling to EME, “I really want to do business with you”,
31 signalling that they actually expect all this coal profit.

32 Q What I would suggest to you is that the way it works is this -- Now, again, we are really
33 looking at the application of economic expertise in a “but for” world. You would price
34 below what you believed your competitors were charging to you because what you are

1 doing is taking their price as a benchmark. So, you shave it a bit so that it comes out below,
2 with the idea that when EME looks at the tenders it says, "Ah! We've got a keen bid from
3 Enron" and follows it up. But, you know when you do that that you are at risk of EME
4 returning to you and saying, "Well, that was a keen bid, but, you know, it's still a bit too
5 high". It is not really rational to just open up a salvo, an opening bid, unless you are going
6 to follow it up, is it?

7 A What is rational is to have an opening salvo that is sufficiently attractive to the customer
8 that they want to bite and bring you to the negotiating table. Yes?

9 Q Yes.

10 A What I'm saying is that that did not happen, despite the fact that according to Mr. Fisher's
11 numbers they had £3 of profit to play with that they didn't put on the table - none of it - not
12 even 50 pence worth. There was not enough put on the table to get EME to actually want to
13 talk and negotiate. Nor, when their bid was rejected, did they come back and say, "Hang on
14 a minute! I can actually do you a much better deal". None of that is consistent with the
15 view that there is all this coal profit to be had - otherwise, that is what they should have
16 done.

17 Q I do not actually quite follow this. Are you saying that they should have put all of the coal
18 profit on the table, or 50 percent?

19 A No.

20 Q How much of it?

21 A As little as possible to get EME to bite - and they didn't even achieve that.

22 Q They did not achieve a bite from EME, but let us go back. Why?

23 A Because what you want to do is to make sure that your opening offer is not so miserly that
24 you lose your £3 per tonne. It has got to be good enough to get you to the negotiating table
25 - and it wasn't.

26 Q The question is whether or not Enron was doing this in the expectation, or at the risk, of
27 making a loss on the coal haulage contract. That is what we are focusing on.

28 A That is the critical question that both Professor Ordovery addressed and that I addressed. The
29 reason that we are asking ourselves that question is because it tells you an awful lot about
30 two things: what your "but for" bid would have looked like, but also about whether or not
31 you were anticipating making follow-on coal sale profits. What Professor Ordovery said is
32 that there was a 65 pence to 95 pence loss. Therefore, (a) in a "but for" world EWS
33 would've been undercut by 65 pence to 95 pence, and that would have looked very
34 attractive. Secondly, he says the obvious reason is because there must have been all that

1 coal profit there. What I have said in my report is that there was not such a loss; their
2 opening offer was not in fact loss-making. What follows from that is the exact opposite of
3 what we have just concluded. So, just to be really clear, it suggests that they would not
4 have undercut EWS on price in a “but for” world, and the reason is because it suggests they
5 weren’t anticipating large coal profits - for exactly the same reasons.

6 Q This is based wholly and entirely on what you consider to be the non-existent margin, or the
7 very narrow margin, between the price in the Freightliner agreement and the price quoted
8 by ECSL in the EME tender. Is that not so?

9 A It’s based on, firstly, Professor Ordovery looking at the margin between the May 2000 EWS
10 offer and the Enron bid and concluding that this was a loss leader; my then looking at the
11 proper cost base and saying, “No”.

12 Q What do you mean by ‘the proper cost base’?

13 A Enron’s anticipation that the bulk of the costs it would’ve incurred would’ve been payments
14 to Freightliner, and when you recognise that, their opening offer was not in fact loss-
15 making.

16 Q That is a question of fact. Let us move away to the question of the application of economic
17 expertise - because I am a bit troubled about the hypothesis that a rational economic
18 operator is going to put in an opening bid in an iterative process with no intention of being
19 prepared to negotiate on that price.

20 A It might’ve been prepared to negotiate some ----

21 Q I know that. Viewing it in terms ----

22 A Sorry. I was trying to answer the question.

23 Q ... (overspeaking) ... analysis.

24 A Yes. As an economist, you put in an opening offer and thereafter if there is going to be
25 negotiation there is going to be some room for manoeuvre somewhere. That is all you can
26 conclude. In certain bids certain suppliers might actually discount quite deeply. In other
27 situations there may be very little room for manoeuvre and they cannot move very much at
28 all. As an economist one cannot infer any more or any less from that situation.

29 MR. MATHER: Mr. Biro, are we operating here solely on hypotheses, or do you have
30 independent knowledge of the amount of money Enron tended to make on coal supply
31 contracts?

32 A What is going on is that nobody quite knows -- or, at least the question that we’ve been
33 seeking to address is whether they would’ve made any coal sales at all and whether they
34 would’ve made profits from those had they won the rail haulage contract. The conversation

1 is all about seeking to make inferences about whether those coal sales would've been
2 forthcoming and whether they would've been profitable from their bid. So, we are sort of --
3 If you like, the logic is going the other way. If we knew those coal sales were there, or not,
4 and if we knew whether they were profitable or not, we wouldn't have to be having this
5 conversation because, if you know, we know the answer to the exam question.

6 Q But there is no comparative material around? They did not have other such similar
7 contracts or you do not have information available as to what they would have made if they
8 were?

9 A What we have is Mr. Staley saying that of course he thought there was coal because
10 otherwise would he be bothered at all? We have Mr. Crosland saying that there wouldn't
11 have been any. Then we have certain factual and accounting information which Mr. Fisher
12 and I comment on on, generally speaking, what margins in the Enron coal business
13 would've looked like. That is really all there is to go by. Given that that is all there is to go
14 by, what certainly Professor Ordover and I were doing was asking ourselves the additional
15 question - whether one can infer something about coal sales and coal profits from Enron's
16 bidding behaviour. It's an open question to yourselves whether that economic analysis is
17 one that you would attach a lot of weight to. It is, if you like, an economic approach to the
18 question.

19 Q Let me go back. I am not sure that I fully understand the position regarding Freightliner and
20 the BE contract. I think your view is that the intention was to use EWS for the BE contract
21 with Enron.

22 A There was a pre-existing contract that began, I think, in the Spring of 2000 that had EWS as
23 the rail haulage supplier. Then what happened is that as of, I think, April 2001 the intention
24 was that Freightliner then served those needs. That's my understanding. Sorry, just very
25 quickly -- The April 2001 contract is the one that was negotiated in October 2000, but the
26 pre-existing contract, which was already in place, and which was still to be served up until,
27 sort of, Easter 2001 had EWS as the supplier. Forgive me if I have got that wrong, but that
28 was my understanding.

29 Q I will put that to one side for the moment.

30 A I was in court last week. If I recall, there was a table with British Energy volumes which
31 was put to a factual witness.

32 Q That is right.

1 A One of the things I noted was in my mind was that it was not clear to me that that was the
2 right table to have put to that witness because it was in fact the previous contract which
3 EWS was serving. I obviously was not in a position to comment on that at the time.

4 Q This is what I was trying to find, and I could not remember where it was. I think it is the
5 one at B1, p.129.

6 A The ORR report?

7 Q Yes. If you go to p.129, it is the bit after the paragraph that says, "In July 1999", because
8 you have then got the EME ITT, but then you have got the details of the Freightliner
9 commitments to supply ECSL, and it was commenced in January 2001. Then you have got
10 the Drax contract, that haulage was not required for Drax until April 2001.

11 A Exactly.

12 Q So for the first three months of the year FHH was only effectively committed to ECSL?

13 A Yes.

14 Q Then you have got the reference to the fact that if the only contractual commitments were
15 the ECSL minimum and the Drax tonnage, then FHH could not have hauled all EME's
16 requirements until November 2001, but the problem is that not merely did the BE contract
17 with ECSL set out a minimum commitment, but BE had options to increase its demands,
18 and already that contracted tonnage exhausted Freightliner's obligation to haul coal for
19 Enron. That was all 6.5 of the Freightliner contract. I have probably put this to you in a
20 rather confused way, but you have a combination of factors. You have got the fact that
21 under the Freightliner contract clause 6.5 limited Freightliner's obligations to, I think it was,
22 120,000 tonnes per month. Under the BE contract ECSL was obliged to supply a base
23 figure of 120,000 tonnes a month.

24 A Under the BE contract?

25 Q There were options that BE could exercise requiring ECSL to deliver more, but the upshot
26 was that in those circumstances ECSL could not turn round to Freightliner and simply say
27 to it, "You are going to haul coal for us"?

28 A I think the time line – I am not sure whether we are agreeing or disagreeing on this – is that
29 in January 2001 – somewhere in the ORR report actually there's a table of Freightliner's
30 capacities – table 7, is it, I can't remember the page of it now – that sets out the time line for
31 that year month by month, and maybe it's helpful if we open that. Forgive me, I can't
32 remember what page that would be on. It is all relevant under the heading of "Dominance",
33 but I can't remember where that table is now.

34 Q There is a table 17 on p.143 – is that the one that you're thinking of?

1 A I thought it was table 7. If I misremember table 7, I think we should just do without the
2 table, because I don't want to waste too much time.

3 THE CHAIRMAN: It may be in the confidential version.

4 A Ah, possibly, let's leave the table, I don't want to waste time. If we go through the time
5 line, my understanding is that as of January 2001, had Enron won the EME tender, those
6 EME flows would have been the only flows that Freightliner would have needed to serve in
7 that month.

8 Q In which month?

9 A January 2001; ditto February 2001; ditto March 2001. In April 2001 suddenly Freightliner
10 would have needed to do a lot more, because at that point in time commitments to Drax
11 would have come in and commitments to British Energy, commitments they would have
12 been aware of six months previously when they had signed the October 2000 arrangement
13 with British Energy. What we know is towards the end of that year, by November,
14 Freightliner had more than enough capacity to serve whatever Enron might have asked for.
15 So there is a question about quite what happens in April 2001, and whether all the numbers
16 add up, or whether for a few months during the course of 2001 Freightliner might not have
17 been able to do it all.

18 MR. LASOK: That is right, that is the problem.

19 A When you say it is the problem, this conversation is relevant to whether this was a loss
20 leading bid by Enron, and I come back to, year one is 15 per cent of the tonnages. I come
21 back to, we are talking about some proportion of that 15 per cent as being, if you like, the
22 relevant months, and what we are talking about is Freightliner not being able to do it all. So
23 it's, if you like, some proportion of a proportion. What we're really talking about, I think, is
24 Enron pricing a bid to EME where for the overwhelming majority of all anticipated
25 tonnages it would not have needed, and wouldn't have expected to have used EWS. Where
26 we're right is, there might have been a sticking point for a few months beginning April
27 2001 where, for a very temporary period, some tonnages, some top-up, there may have been
28 demand for EWS to top up what Freightliner could have done.

29 THE CHAIRMAN: So it would have remained a profitable contract?

30 A Yes, because we're talking about top up tonnages from EWS.

31 Q Without dependence on E2E coal supply?

32 A Yes.

33 MR. MATHER: Even if EWS had extracted a penal rate for topping up the capacity?

1 A Well, if you'd chosen those March 2000 rates I think it would have washed its face. If EWS
2 had not even offered the March 2000 rates and made up heaven knows what number, then I
3 think one would have to look at that hypothetical world. If you take those May 2000 rates
4 as being the last numbers on the table, then yes.

5 Q But Enron was also seeking other contracts which it might have used Freightliner for at the
6 same time?

7 A I think they were only effective later in the year when Freightliner's capacity had really
8 ramped up. The Freightliner capacity issue was for the first part of 2001.

9 Q So there were no other contracts which would have risked a further shortfall?

10 A I think later in the year the other stations, Cottam, if I recall, may also have been relevant.
11 Forgive me, I don't have the full list, but they come in later and there is a planning process
12 by which one can procure wagons and Freightliner could have, if you like, flexed that
13 capacity. The issue is a lead time one. What Freightliner could not have dealt with is large
14 amounts, step changes in business at short notice. What they could have done is, if they had
15 known the business was forthcoming with the months to come, they could have planned
16 their capacity accordingly.

17 Q So Enron was not at a great risk. A prudent business could have taken that risk of a
18 shortfall?

19 A That's my view, and that's my view of why ultimately the conclusions I drew about having
20 to look at the profitability of the Enron bid by reference to the Freightliner cost base is
21 broadly right, but I did say there may be a footnote explaining the capacity issues because
22 they would have been relevant for some marginal tonnages and then, if you like, to a
23 marginal amount for that cost base.

24 MR. LASOK: Could you turn to (v) on p.193.

25 A Are we back to my report?

26 Q Yes, we are back to your report. It is really the first sentence. The gist of it is in the third
27 line:

28 "ECSL would not be expected to have reduced the prices that it offered to EME
29 below the prices that EWS offered to EME."

30 A Yes.

31 Q Let us get this straight. This is the "but for" world, and this is the world in which EWS is
32 offering ECSL a non-discriminatory contract – that is to say, prices that are equally as
33 acceptable to Edison as the prices that EWS actually offered to Edison?

1 A Yes, and the reason I reached that conclusion is because if you like the non-abusive prices,
2 the ones that EWS offered to Edison are very close to the prices that Enron had concluded
3 with Freightliner, they are almost identical – there is 5p here or there maybe, but they are
4 very similar. So if you like the Freightliner bid is actually very close to what a non-abusive
5 EWS price offer would have looked like.

6 Q So the hypothesis is this, and again it is a hypothesis that we are starting off with, that ECSL
7 wanted to win the contract for rail haulage in order to lead the way to a coal purchasing
8 contract. It has an indication from EWS or perhaps it has in the hypothetical “but for”
9 world, a contract with EWS that is on terms that are materially indistinguishable from the
10 contract that EWS is offering to EME?

11 A Yes.

12 Q And so in order to structure its bid and put in something winning, what does it do in the “but
13 for” world, if it is an economic operator acting rationally?

14 A I think its pricing of its bid would have been identical to the actual; it would have offered
15 the same rates as in the actual world on price. What it might have done though is signal to
16 EME that “I am basing this off coal haulage services from EWS which has historically been
17 your supplier and I am not basing this off Freightliner who you are nervous about for all the
18 reasons Mr. Crosland cites.” But you would not have priced it differently for all the reasons
19 we have been discussing for the last three quarters of an hour.

20 Q Let us be more precise about this. Are you saying that Enron would have priced at exactly
21 the same level as EWS?

22 A Subject to whether there is a 5p or whatever it is difference here or there between what
23 EWS offered EME, and the Freightliner contract with Enron. I don’t have those tables
24 before me; I can’t say they are identical those rates, I said they are broadly the same, and as
25 a consequence the answer is yes, broadly.

26 Q And as an operator acting rationally more particularly a coal supplier, not a coal haulier,
27 would it have in those circumstances sought to sweeten the bid?

28 A If there was an anticipation of coal sales, they would have sought to have done that, not
29 only in the “but for” world but also in the actual world. The point I made earlier is because
30 they did not do it in the actual world to me shows they did not actually think those sales and
31 those profits were forthcoming, otherwise they would have – not only in the “but for”
32 world, but also in the actual world and they did not in the actual world.

33 Q I think we have your point about the actual world, and it is a point that we will just have to
34 disagree with. So you are carrying this through to this other version of the “but for” world

1 and you are simply saying that on the basis of what you observed in the real world you
2 would not have expected to see ECSL in the “but for” world putting in a competitive bid?

3 A If you are not going to make a loss leading offer in the actual world there is no reason why
4 you would do it in the “but for” world. So “yes”, is the answer.

5 Q So this is all based on the hypothesis that the bid ECSL put in in the real world was not a
6 competitive bid?

7 A It was based on the hypothesis – more than a hypothesis, the view I have taken, in the real
8 world Enron’s actual bid was not loss leading.

9 Q Okay, so I think we have your point on that.

10 A Professor Ordover and myself have actually both adopted the same logic here. All we are
11 doing is we are using different cost bases vis-à-vis the Enron bid to reach different
12 conclusions about whether we have thought, as a matter of fact, their bid would have been
13 loss making, and then therefore we reached very different conclusions but essentially the
14 logic we are both adopting is identical, so the difference between us is really which cost
15 base are we using and therefore what do the numbers look like.

16 Q Well with respect I do not think it is. I think that you and Professor Ordover are taking a
17 different view of the facts of what happened in the real world, and you are transposing those
18 to the “but for” world?

19 A With identical economic logic is what I am saying. We are starting from different factual
20 places, and therefore ending in very different positions in terms of our conclusions, with the
21 same logic.

22 Q Yes.

23 A That’s what’s happening.

24 Q So if we move to para.14 of your opinion, these are the reasons that you give for the
25 conclusion that you set out in para. 11(b)?

26 A Yes.

27 Q I read para. 14 as being wholly based on your interpretation of the evidence?

28 A 14(a) is, 14(b) slightly more than that. What I am observing is that part of the 65p to 95p
29 loss leading that Professor Ordover found in my view is not real loss leading, because it was
30 an additional 25p which was off the back of a coal press that was yet to be specified and
31 therefore in my view was not meaningful if you are thinking about this as a loss leading bid.
32 There was not any genuine loss entailed with it.

33 Q Can I put it another way? My reading of para. 14 and of the relevant section of your report
34 is that it does not include any economic analysis. Would you accept that?

1 A Other than how to interpret the 25p from an economic perspective, I would agree with that.
2 But the 25p I think is an economic issue. Would you like me to elaborate on what I am
3 saying on the 25p or is that clear to you?

4 Q Well I very well understand the time, and we need to get on, but let us deal with the 25p
5 issue, because I have to say that it was not something that I spotted as being an issue of
6 economic analysis?

7 A It is about interpreting how, as a commercial entity, if you were in receipt of that offer how
8 you might actually think about that offer. Effectively what it is saying is: “If I am going to
9 do business with you I will give you 25p off. What I am not going to do is tell you 25p off
10 what”. The question is: as a customer receiving that offer should you take that as a genuine
11 offer with loss leading associated with it, or should you be sceptical about how meaningful
12 that 25p is without knowing the price it is attached to.

13 Q I do not quite understand this. Why is the customer concerned to know whether or not it is
14 a loss leader? Surely the customer just looks at it as a deal?

15 A Well the question is – okay, well I should perhaps put that more accurately. What it does
16 depend awfully on is whether, in Enron’s mind, that 25p would have been a genuine
17 discount of what otherwise would have been an identical coal bid but for the discount.

18 Q You have lost me there completely.

19 THE CHAIRMAN: Can I try and help? It is 25p per tonne off the price of some coal or other
20 you are saying, but we do not know what coal, and we do not know the price of that coal,
21 and we do not know how the price of that coal would relate to other coal which might be
22 equally useful for running a power station, for example?

23 A Yes, but I am saying “yes” but slightly more than that. Let us say for the moment I were
24 Enron and I had won the rail haulage contract, and I am now bidding hypothetically for
25 some coal sales, but I have already offered the customer 25p off if they buy the coal from
26 me. What I would do is say: “Ultimately what can I get away with on coal?” Then I’d
27 think: “Hang on a minute, I’ve already offered 25p off, so I’m going to have to knock that
28 up by 25p to get me back to where I was.” That is how a rational bidder would have priced
29 their coal bid. So it is not a real 25p because there was no commitment associated with that
30 in terms of money towards any real price.

31 MR. LASOK: And you would not have said that viewing it in terms of rational economic
32 behaviour it was something that was intended to lead to something else?

33 A It is sending a signal of some sort, what I am saying is it is not a meaningful economic
34 commercial signal because if I were the recipient of that offer as a customer I’d say: “So

1 what?" It is not meaningful to me. This person is not actually promising me anything, and
2 you should think about the signal in those terms.

3 THE CHAIRMAN: But what is being put to you, I think, is that it is a signal to lead to further
4 negotiations and the person who receives the signal might say: "Now let's define what we
5 are talking about, for example, is it like for like coal sales"?

6 A It could lead to that, yes. What I am saying is that is all it is, it is a signal. It is not actually
7 a discount, it is not a commitment of any real form and therefore when one is looking at
8 whether this was a loss leading bid I do not think it is appropriate to say there was an
9 anticipation of losing 25p.

10 MR. LASOK: I think we are probably getting into matters of submission.

11 THE CHAIRMAN: I think we are, and I think we understand what is being said as well.

12 MR. LASOK: Shall we then move on – I think everybody heaves a sigh of relief at that point?

13 THE CHAIRMAN: A tonne of relief!

14 MR. LASOK: Yes. (To the witness): Your commentary on Professor Ordovery's report starts at
15 p.197. But, I do not think that I have got any -- Yes. If you go to p.208 we have got the
16 appropriate "but for" counterfactual. Then we get to p.210 where we have the heading
17 'Whether a performance-based contract with EWS would have remedied of all EME's
18 concerns'. Then we get to p.212. Now, thus far, so far as I can see, we have simply arrived
19 at a situation in which you were discussing the evidence.

20 A That's correct. There's a reason for that. Ever so briefly, that's because I was asked to
21 review Professor Ordovery's report. Professor Ordovery reaches conclusions about loss of
22 chance. For me to then comment on those I have no choice but to review the relevant factual
23 information and see whether I agree with the way it's been characterised by Professor
24 Ordovery. But, yes, it is a review of the factual evidence.

25 Q If we go to para. 40 on p.212, you say that Professor Ordovery does not explain how the
26 three non-price issues would've been remedied by the existence of a performance-based
27 contract with EWS. You then say that his conclusion is controversial in relation to each of
28 those issues, the first one being the one identified in (a). Here you quote Mr Crosland:
29 ECSL's bid was not sufficiently flexible because it required minimum volumes from EME
30 to avoid penalty payments. Now, the importance of this is purely a question of fact, is it
31 not?

32 A Well, what happened when I read Professor Ordovery's report was that I quite quickly
33 reached a statement that says, "In the 'but for' world [by which he means Enron has, from
34 EWS, a performance-based contract identical to the offer that EWS made to EME] all

1 performance issues are moot". I then went and had a look back at what Mr. Crosland was
2 saying about what in fact it was about the Enron offer that he may have liked or not liked,
3 and I asked myself whether any of those are likely to have been affected by the rail haulage
4 terms that Enron would've concluded with EWS in a "but for" world. In relation to (a),
5 which is the one we're looking at, I reached the view, no, I didn't see a causal link between
6 what was put on the table here and what that "but for" offer might have looked like. So,
7 this, I would say, is a clause that Enron would have put in its bid in the "but for" world just
8 as much as it did in the actual.

9 Q Of course, the difficulty there is that EWS might have done so as well. In fact, EWS
10 originally wanted minimum volumes, but they were negotiated away. So, what would have
11 happened in the "but for" world is that EWS would have offered to Enron a haulage
12 contract that was on terms in all relevant respects indistinguishable from the ones that were
13 eventually offered to EME. The question is: as a rational economic operator would Enron,
14 knowing that EWS was trading on the basis of those terms and had to comply with its
15 obligations under Chapter 2 and Article 82 of the EC treaty -- So, it would have to be non-
16 discriminatory in what it was offering. Would Enron, as a rational economic operator,
17 improve its bid, or not?

18 A All I was saying was that in the actual world they didn't. They never got to the negotiating
19 table. So, we don't really know.

20 Q I am asking you about the "but for" world.

21 A In the "but for" world it all depends on how Enron would have actually viewed the risks and
22 rewards of the contract. You cannot say.

23 Q Would it not simply depend on ----

24 A You have nothing to go by.

25 Q Would it not simply depend on whether Enron wanted the contract?

26 A It depends on what terms. They may not have been willing to have entered into the contract
27 on those terms.

28 Q If Enron wanted the contract -- I am putting this forward as a factual hypothesis. Enron
29 wants the contract. Enron know that EWS, as an undertaking occupying a dominant
30 position, has got to treat all its customers in a non-discriminatory way. It has got an
31 agreement with EWS that sets out certain terms and is performance-related, this, that, and
32 the other. I am asking you, as an expert economist, whether or not it would be
33 economically rational for Enron to better EWS' terms because it wants to get the contract.

1 A If it really wanted the contract and if it needed to drop this clause in order to win the
2 contract, and it would still have been profitable for Enron to have then made that offer, then
3 the answer is quite clearly, "Yes". All I'm saying is what we know about what happened in
4 the actual world doesn't allow you to answer any of those questions, including how much
5 they really wanted the contract, which was the prerequisite for the question.

6 Q That is a question of fact, is it not?

7 A Well, no, it's not just that. We spent a long time discussing whether this was a keen, loss-
8 leading offer that showed a real appetite and a desire to win the business, and when we
9 looked at the actual bid we had a long conversation about how nothing to do with the actual
10 bid gives you any such indication. What we talked about - or certainly my view was - was
11 that their actual bid doesn't convey a real desire to win this business. If there was all this
12 coal profit there to be had, they would've put in a more competitive offer.

13 THE CHAIRMAN: I think Mr. Lasok is right in the sense that it is a question of fact, but subject
14 to the evidence you have given -- if the Tribunal accepts that analysis.

15 MR. LASOK: Yes.

16 THE CHAIRMAN: You have made your position very clear to us.

17 A Thank you. Yes.

18 MR. LASOK: I think the other issues - (b) and (c) - are also matters of fact and evidence.

19 A Can I, ever so quickly -- I don't know if this is answers the question. (b), I think, yes, it is a
20 factual matter. Absolutely. But, it's quite obvious as a matter of fact that a performance
21 contract on rail would have no bearing on (b) one way or the other. It's a factual matter how
22 important (b) is, and Mr. Crosland is obviously the right person to speak to that. But, I am
23 commenting on Professor Ordovery's report, who quite clearly said, "All performance issues
24 are moot in a 'but for' world". That's the context for me having actually made these
25 comments - because I disagree.

26 Q I remember the phrase 'moot', but I can't remember exactly what the context was. Is he not
27 referring to performance issues in the past?

28 A No. He was saying -- I can be quite clear. We can get this document out if you like. It's
29 quite clear. I remember it ever so clearly. What he's saying is that in a "but for" world, if
30 Enron had bid for the EME business all performance issues associated with its bid would've
31 been moot. All I'm saying is I've read the evidence and I don't know where that comes
32 from.

1 Q Can I put it, again, in a hypothetical to you? In a “but for” world Enron would be
2 contracting with EWS on terms that were materially indistinguishable from the terms that
3 EWS was offering to EME.

4 A Yes, but that doesn’t mean that all performance issues are moot. It means that all
5 performance issues to do with the rail haulage services being offered to Enron are moot.

6 Q Okay.

7 THE CHAIRMAN: We have it. I put a question to Professor Ordovery about, “What are the
8 proper components of a “but for” world?”, some of which I suggested to him may be
9 subjective. We have to assess whether that is right or not.

10 A There’s an element of subjectivity. You’re absolutely right. There’s another conversation
11 we’re having which is that there’s a lot more to performance than just, if you like, the rail
12 haulage services that Enron was providing ----

13 Q It is certainly a question of fact.

14 A -- and those are factual matters, the ones that Mr. Crosland has laid out.

15 MR. LASOK: For the sake of the record, paras. 42 and 44 raise matters that are covered in the
16 joint experts’ statements. I will come to them shortly. It seems to me that those are matters
17 that are raised in the context of Issue 2 in the joint experts’ statement. It is also in the same
18 volume at pp.266 and 268.

19 A I do recall discussing this and writing this up in the context of the joint report. I think
20 you’re correct to say issue two summarises certainly my view on those issues, yes.

21 Q I think actually there are cross-references in your commentary under issue two to paras.42,
22 46 to 58 as well.

23 A Sorry, I was just having to check the answers, yes.

24 Q Can we go to para.45. It is the first sentence of para.45, where you say:
25 “Ultimately, the question of whether there was a loss of chance depends on the
26 competitiveness of both the ‘price’ and the ‘non-price’ elements of ECSL’s offer to
27 EME in a but for world.”

28 It is also, is it not, the relevance of the “non-price” elements?

29 A Well, yes, both “price” and “non-price” matter, and the relative weight one should attach to
30 those is a factual matter that certainly Mr. Crosland is probably best to speak to.

31 Q Can we go to p.218. Sir, I have just noticed the time.

32 THE CHAIRMAN: Yes, what do you want to do? We are willing to sit on, say, to five o’clock,
33 if you want to?

34 MR. LASOK: I know it is putting pressure both on the witness and on the Tribunal ----

1 A If I have the ability, I'd rather stay as long as possible because I wasn't scheduled for
2 tomorrow morning, so the less time I have tomorrow morning, the better, if my diary is an
3 issue.

4 THE CHAIRMAN: Your diary can certainly come into the issue, Mr. Biro.

5 MR. LASOK: I am quite happy to carry on for as long as is convenient for Mr. Biro and the
6 Tribunal.

7 THE CHAIRMAN: I think we may have to finish about five o'clock. We have shorthand writers
8 and there is a limit to what one can expect of them.

9 MR. LASOK: I am trying to get through this as quickly as I can.

10 THE CHAIRMAN: I know you are. There is no pressure. Do you have to be on the other side of
11 the world tomorrow?

12 A No, I am going to have a few unhappy people as I pull out of various matters, but I'll be
13 here.

14 Q If necessary we can start a little early tomorrow. That might make things worse for you.

15 A Don't do it round me, but I'm happy to come earlier if that helps everybody else.

16 Q Let us carry on until about five o'clock, no pressure, Mr. Lasok. If necessary, we will
17 continue in the morning.

18 MR. LASOK: Can you turn to p.218 of your report, please. Under the heading, "Whether
19 ECSL's tender to EME was based on EWS's offer to ECSL", in para.50(a), the third line,
20 you say that Professor Ordover:

21 ".... does not provide a description of the reasons for the rates contained in ECSL's
22 September 2000 offer, the reasons why ECSL did not undercut EWS and offer
23 EME lower rates, and the rail haulage costs that ECSL would actually have
24 incurred ..."

25 Most of this is a matter of fact, but as to the reason why ECSL did not undercut EWS and
26 offer EME lower rates, have I missed something?

27 A Let me start with the background to this (a) and (b), because this is really quite important.
28 The single biggest thing that Professor Ordover does in his report, and this was the
29 conversation Mr. Brealey was having with Professor Ordover right at the end of his cross-
30 examination, is to look at the actual bid that Enron made to EME, ask itself whether it was
31 loss leading and then make inferences about how Enron would have priced it in a "but for"
32 world. What he did in order to conduct that analysis was assume that the bid was based on
33 the EWS May 2000 offer, and we have talked about whether that is, as a matter of fact,
34 correct or not. What I am saying is, if his whole conclusions turned on that issue, all I'm

1 saying is I find it quite surprising that there's absolutely no discussion in his report at all
2 about the basis for conducting the comparison – why he conducted the comparison on that
3 basis, when all the evidence I read suggested that Enron was, in fact, seeking to use
4 Freightliner. It's quite a big point ----

5 Q There is a difference of views, I think, between us on a question of fact that the Tribunal
6 will have to resolve, which is the extent to which Enron was actually intending to use
7 Freightliner. What I wanted to focus in on is something else. You say, "The reasons why
8 ECSL did not undercut EWS and offer EME lower rates ..."

9 A Shall I explain that one then? What I mean by that is if, as the claimants suggest, there was
10 coal profits to be had, then according to Professor Ordovery's own logic, as we discussed
11 earlier, one would naturally have expected Enron in the actual world to have made a more
12 competitive offering and would have actually priced its actual bid lower than it did. There
13 is no discussion by Professor Ordovery about why it did not do that, why it put in an ITT that
14 failed and what that really means about whether or not there were coal sales and coal profits
15 to be had. Yes, that's the obvious question he should have asked himself given his
16 economic logic, and he doesn't.

17 Q What puzzles me is why you raise this?

18 A Because the whole claim is about whether there are coal sales.

19 Q You say, "the reasons why ECSL did not undercut EWS and offer EME lower rates".

20 A The obvious question you ask yourself is, if they didn't do that, that must be because they
21 didn't anticipate making coal sales and coal profits for the very reason – we can turn to
22 Professor Ordovery's report. He was talking about all these coal profits being there and the
23 rational bidder being prepared to give them away.

24 Q Are you not making an assumption that Enron actually knew what EWS's prices offered to
25 EME were? How could it have undercut EWS's rates if they did not know what they were?

26 A They had a good feel for what market rates were generally by reference to their negotiations
27 with Freightliner. They may not have known to the nearest decimal point. What I'm saying
28 is if there was £3 of coal profit to be had there, you wouldn't be shaving 2p here or there
29 and then losing. It just doesn't make economic sense.

30 Q Not even by way of an opening bid?

31 A No, because they lost. They shouldn't have lost if all that profit was there. Why would you
32 put in a bid with all that profit to be had and it just loses.

33 MR. MATHER: Might they have thought EWS's prices were significantly higher than they
34 turned out to be?

1 A They'd just concluded a deal with Freightliner which was a competitive deal, which should
2 have made them question that they'd got that quite right if that's really the world. There's
3 always a chance they just got it wrong, I agree. I can't tell you what actually happened.
4 What I can do is make inferences from what happened about the likelihood of there being
5 large coal profits, and the inferences I'm making are what I think are the rational obvious
6 economic inferences. To answer your question, that is a factual matter, one would actually
7 have to speak to Mr. Staley or Mr. Kearney about what was actually going through their
8 minds, and that I can't do.

9 MR. LASOK: Could you turn to p.220, para.51. This again is you embarking on fact finding – is
10 that not right?

11 A Fact finding that both Professor Ordover and I need to do to actually offer the economic
12 analysis that we've offered. Again, it's my explanation that I started from a different set of
13 facts and reached a very different conclusion to Professor Ordover as a consequence.

14 Q Are you not confusing here two things: the rates that one would use as a benchmark for
15 putting in a tender and the question of who would actually haul the coal for you?

16 A The key issue is what would you have expected – sorry, the key question we are all asking
17 ourselves is, would Enron have expected to have made losses off the back of its actual bid?
18 The relevant question to that is, how did you price the bid? Basically the key issue is, who
19 did you expect would actually haul those tonnages for you, because if you had actually won
20 the bid what would your actual costs have been? That is how one would then have gone
21 round pricing matters.

22 Q I think we are going round in circles on this.

23 A I think we're repeating conversations we've had before, that's clear.

24 Q I am just looking through my notes and I think that the rest of the report that deals with
25 Professor Ordover has already been covered or raised as a matter of fact again. Shall we
26 move to p.262 and the joint statement. Issue one both of you agreed. There was some
27 minor disagreement about the extent of the relevance of economic analysis, but that relates
28 to other issues.

29 A That is covered in issue 2.

30 Q Yes. Go to issue 2, that was something that you agreed in principle, but there seems to be a
31 disagreement with you concerning Professor Ordover's comment. His column is more or
32 less in the middle and if you look at the end of the second paragraph under issue 2 he talks
33 about "tainted by the witness's own experience in the world in which the offending conduct
34 took place." Then just to the right of that you have your comment: "Moreover, Mr.

1 Crosland’s statement sets out the criteria that EME employed”, and towards the bottom you
2 say: “I have no reason to consider these to be either irrational or non-economic in nature”.
3 The question I want to put to you is this: do you accept that in the “but for” world what you
4 have to factor out is not only unlawful conduct but the effects that that unlawful conduct
5 may have on the frame of mind of relevant individuals?

6 A The “but for” world clearly should factor out any consequences that would have followed,
7 or did follow – I should have said – from the unlawful conduct.

8 Q If we go on to the next page – I think we have probably covered that in your answer.

9 A This next page, 268, we are still under issue 2, I think this goes back to an awful lot of what
10 we have just been discussing about whether the Enron bid entailed losses and what one
11 infers from all of that, I think that covers that same bit.

12 Q We have a lot in the discussion we have had, it is largely a question of ----

13 THE CHAIRMAN: It seemed to me, when I looked much earlier – before today – at this
14 schedule, that the real difference between the two economists, Professor Ordovery and Mr.
15 Biro, is as to the extent to which you take into account factual matters in the “but for”
16 world, or the extent to which the “but for” world applies when considering factual matters,
17 which may be two different ways of expressing the same thing.

18 A Can I offer a thought on that?

19 Q You can, it was not really a question, but please feel free to answer it.

20 A I think there is some difference there. I think there is also just a difference, and perhaps this
21 is what you were suggesting, about having viewed all the evidence, and perhaps different
22 people attach different weights, if you like, to different bits of evidence. What we have then
23 ended up doing is starting, if you like, from different factual positions for our economic
24 analysis. Then we have conducted essentially similar thought trains but from different
25 starting points.

26 MR. LASOK: If you are on p.268, if you go down to the bottom in your column, you say:

27 “I disagree with Professor Ordovery’s conclusion that E2E suppliers are naturally
28 more efficient than stand-alone providers of rail haulage and coal supply services
29 and so would logically be expected to win business from power generators.”

30 Then you give various cross references. I have looked at those cross-references, but as far
31 as I can see they are all references to what other people have been saying. Do you want
32 pages references for the cross-references?

33 A No, forgive me, I have just missed the beginning – which issue are we on again, I remember
34 the issue?

1 THE CHAIRMAN: Issue 3, at the bottom of p.268.

2 A We can go through the cross references, or I can just speak to the point if you like.

3 MR. LASOK: The point is what is the economic analysis because as far as I can see all that you
4 do in the paragraphs that you cross-refer to, is refer to witness statements and so forth?

5 A Okay, I can be very brief. There are two things I am doing here. I am referring to the
6 factual evidence and whether this is just the natural conclusion one would reach from the
7 factual evidence. I would supplement that with and maybe the cross reference is not there,
8 with the conversation we have spent a lot of time having about whether Enron was putting
9 in a loss making bid, and all the implications that follow from that, including, and again I
10 come back to the whole E2E discussion falling with in that category, and that is more of an
11 economic matter. It is, if you like, interpreting whether an E2E contract would have been
12 likely and whether people would have naturally preferred one, from about what we know
13 about Enron's actual bid.

14 Q I think the problem is you do not actually address Professor Ordovery's analysis of E2E
15 contracts, you simply cross-refer to the evidence drawn from witness statements?

16 A There is no analysis in Professor Ordovery's report at all. All he does is cite the ORR report
17 and Mr. Staley, and what I do is I do the same but cite the other witnesses too.

18 Q But you do not add any analysis?

19 A Sorry, on referring to factual matters, yes? Then what we both do is make inferences about
20 the value if E2E contracts from Enron's actual bid and we both do that.

21 Q All right, let us move on. If you go to p. 273, this is issue 9 where the experts differ, and
22 that takes us back to the role of FHH rail haulage capacity constraints, and you say at the
23 top:

24 "The conclusions that I reached in my report regarding the question of ECSL's
25 loss of chance do not turn on the capability or otherwise of FHH."

26 Then you say:

27 "The capability of FHH is of potential relevance to these proceedings if ECSL
28 chose to rely on FHH".

29 But I think what you then do is to say that you conclude that ECSL did intend to use FHH,
30 so capability became of relevance, and what I wondered was where in your report we found
31 any analysis of the capacity constraints?

32 A Can I deal with that in two parts? First, I re-read this yesterday as well, and I thought this
33 was probably the bit of the joint report that I wrote that was least clear to me upon re-
34 reading. What I am trying to do is to distinguish between two issues. There is an issue

1 about whether, as a result of the abuse Enron did business with Freightliner where it
2 otherwise would not have and, if that were the case, and if it were the abuse that led them to
3 do business with Freightliner, where they would not have in a “but for” world, then you do
4 need to look at the capabilities of Freightliner to talk about competitive disadvantage and
5 what that competitive disadvantage might have looked like. What I then go on to say is
6 there is a wholly separate issue about loss of chance, it is additional to that. It is in relation
7 to my conclusions on loss of chance that the capabilities of Freightliner do not really come
8 in. The key issue, as we have been discussing is whether the Enron bid was loss leading or
9 not.

10 Q What you say in the second paragraph on that page is: “The capability of FHH is of
11 potential relevance ... if ECSL chose to rely on FHH.” Then you say in the next sentence:
12 “The documents that I have reviewed indicate that ECSL was intending to rely on rail
13 haulage services from FHH.” So the capability of FHH was of relevance?

14 A Possibly but it depends on whether that would have happened anyway, or whether Enron
15 was driven to FHH as a result of the abuse ----

16 Q Not to analyse the capability of FHH?

17 A Sorry, can I just answer the question. What I was asked to do was address Professor
18 Ordovery’s conclusions about loss of chance, and the subsequent paragraph does explain why
19 I actually disagree on loss of chance irrespective of the capabilities of FHH or otherwise.

20 Q You just did not consider the capability of FHH?

21 A I didn’t need to to reach the conclusions I reached. That’s what I’m trying to explain here.
22 I did begin this line of questioning with an apology because I thought this was perhaps the
23 least clear bit of the joint report - certainly from the bits that I penned. So, I can see why
24 that wasn’t coming through upon a first read.

25 Q Right. Can we go back to your report then, please? Could you go to p.194 of the bundle?
26 This is under the heading ‘Expert Report of Mr. Fisher’. Have you got it?

27 A I do.

28 Q At para. 17, at around about the second hole punch, there is a sentence where you say,
29 “However, Mr. Fisher provides no support for these assumptions, which, as I have
30 explained in relation to Professor Ordovery’s report, are contradicted by the
31 available facts”.

32 So, you have two points here: Mr. Fisher does not support assumptions; and the
33 assumptions are contradicted by the available facts. Of course, Mr. Fisher’s function was to
34 deal with quantification - not with finding facts.

1 A Quantification of what?

2 Q He was asked to quantify the claim.

3 A The claim. Exactly. That's my point. He was asked to quantify the claim. So, the starting
4 point is to ask yourself, "What is it that Enron may have lost?" What I am saying is that
5 there is no questioning of that. There is an assumption that it is an ET contract, including
6 coal supplies, for every single tonne that Edison bought from 2001 to 2004 without
7 question.

8 Q Is this not getting a bit argumentative?

9 A Sorry. I feel strongly about this.

10 THE CHAIRMAN: That is one of your shortest questions, Mr. Lasok, but I am not sure it gets us
11 anywhere.

12 MR. LASOK: The point I am making is that Mr. Fisher expressly stated that he was just
13 concerned to deal with valuation.

14 THE CHAIRMAN: I absolutely take your point.

15 A Forgive me. I really didn't mean ----

16 THE CHAIRMAN: Mr. Fisher's role, as I understand it - and I will be corrected if I am wrong -
17 was not to decide the question of causation, but to assume 100 percent causation and then
18 assess what 100 percent of the damages would've been, leaving it to the Tribunal, if it found
19 there was a loss of a chance, to start discounting if appropriate on its estimation of what
20 percentage should be removed from the chance. Is that a fair summary, Mr. Lasok?

21 MR. LASOK: Yes. But, sadly, you have put it longer than I did!

22 THE CHAIRMAN: There is a first time for everything! Touché!

23 A Sir, can I respond to that? If that really was Mr. Fisher's instruction then some of my
24 criticisms here perhaps should not have been addressed to him and it was inappropriate of
25 me to do so. I actually read his instructions slightly differently, and I thought these were
26 relevant questions he should have asked himself, but -- I may have done that in error.

27 Q So, he is flattered.

28 A I may have done that in error, and if I did, I apologise.

29 MR. LASOK: Could you go to p.236? At para. 84 - this is where you differ from a finding made
30 by the ORR. The first sentence of para. 84 ----

31 A No. I think one needs to read this in the context of actually what is a lengthy description of
32 what I took from the ORR report in response to Professor Ordovery's report. Let me just
33 very quickly point you to the relevant section. Section 2.4 of my report, within which I do
34 provide a full summary of what I took from the ORR report at para.70(a).

1 Q Could you go to p.237, please? This is headed ‘Inconsistency with Professor Ordovery’s
2 economic analysis’. Does this relate back to paras. 60 to 66 of your report?

3 A It does relate to previous paragraphs. Let me just check the numbers. If it is helpful, I can
4 explain the thinking. (After a pause) It’s paras. 60 to 66 that should be read alongside
5 paras. 87 to 89, yes.

6 Q If you go to para. 60, that records in that paragraph, at least in the first two-thirds of it, a
7 point on which you did agree with Professor Ordovery, at least in relation to a matter of
8 economics.

9 A Yes. As I said earlier, I think we’re both adopting the same economic logic, albeit to
10 different interpretations of the relevant facts, and therefore reaching different conclusions.

11 Q Paragraph 61, the first sentence. You say,
12 “Professor Ordovery’s economic analysis immediately begs the question as to why
13 ECSL simply chose broadly to match EWS’ prices to EME rather than offer EME
14 the type of price reductions that Professor Ordovery considers would have been
15 sufficient to lead EME to award the rail haulage contract to ECSL”.

16 Of course, we have already dealt with this, I suspect. This is based on the false hypothesis
17 that ECSL was aware of EWS’ prices. But, I think you have accepted that they were not
18 aware.

19 A Sorry. Can I just take this in turn? This is something we did just discuss a few minutes ago
20 under the heading of Professor Ordovery not inquiring what the cost base was that
21 underpinned the Enron bid, and the conversation we had about why they didn’t undercut
22 EWS’ offer. We talked about, in my view, the most obvious conclusion one would draw
23 from that - that large coal profits weren’t actually anticipated by Enron at the time -
24 otherwise I would’ve expected them to put in a better offer. I think it’s coming back to that
25 conversation.

26 Q Then when we get to the end of para. 61 and get into para. 62 we are still in this scenario
27 which appears to be based -- Your conclusion that ECSL did not pursue a strategy of trying
28 to get the rail haulage contract is based simply upon the fact that the prices it put into its bid
29 were close to the Freightliner agreed prices. That is all it is based on.

30 A An offer that was not seen to be largely attractive to EME and was immediately rejected by
31 EME when there was an awful lot of scope, if those profits really were there, to have put
32 something better on the table. It comes back to that observation.

33 Q So, you are saying that Enron should have anticipated that its bid would be rejected by EME
34 and therefore have put in a lower bid.

1 A What I'm saying is that if you've got £3 per tonne of coal profits sitting there, then all you
2 need to do is win the rail haulage contract to tap into that. Yes? I certainly would've put in
3 in those circumstances the more attractive initial offer. I think it's the rational thing to have
4 done - if that really were the case.

5 Q Can I put it in a slightly different way? As an expert economist - and I am not asking you
6 for your personal opinion about what you would do - would you agree that deciding where
7 exactly to pitch the price in an opening bid is a tricky exercise?

8 A Yes, that is absolutely correct, and because it is tricky, what I would be very nervous about
9 is giving away £3 per tonne of coal profit because I'm trying to save tuppence on the rail
10 haulage element.

11 Q Essentially what you are saying is that you personally disagree with the way the individuals
12 in Enron pitched the price.

13 A No. What I'm doing is questioning whether they did in fact anticipate large coal profits
14 from actually observing what they bid.

15 Q No. I am trying to get to your expert economic analysis ----

16 A No. As an expert economist, I would say that if there were not large coal profits in their
17 minds at the time, their bid looks entirely rational. What I am saying is that their bid does
18 not look rational if they really thought there was a lot of coal profit to be had. If the coal
19 profit was not there, that's exactly the bid you should put in.

20 Q What is the bid?

21 A One where you wash your face based on your Freightliner costs - yes? - without either
22 losing money on the bid, nor marking it up. That's a competitive bid if you're into rail
23 haulage only. If you think coal profits are coming, you should actually have discounted that
24 and loss led, and they didn't.

25 THE CHAIRMAN: This is in the mere foothills of economics, is it not? This is about loss
26 leaders and whether you put in a realistic loss leader or not. If you think you are going to be
27 able to build the house you build the garden shed for next to nothing?

28 A Absolutely, and we did not see that happening, is my point.

29 Q That is what you are saying?

30 A Yes.

31 MR. LASOK: I see that it is five o'clock. I think I have probably still got about half an hour's
32 worth of questions.

33 THE CHAIRMAN: In that case I think we will adjourn. You may have some re-examination in
34 due course.

1 MR. BREALEY: At the moment nothing.

2 THE CHAIRMAN: Do you mind if we sit at ten o'clock tomorrow morning. Bearing in mind
3 that we have staff and the Tribunal, and particularly shorthand writers, I think we should
4 stop now. We are half an hour beyond our normal finishing time. Ten o'clock, or would
5 you rather 10.30? You can choose.

6 A I would prefer ten, that would help me, thank you.

7 THE CHAIRMAN: Ten o'clock.

8 (Adjourned until 10.30 am on Tuesday, 22nd September 2009)

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