

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

IN THE COMPETITION
APPEAL TRIBUNAL

1076/2/5/07

Victoria House
Bloomsbury Place
London WC1A 2EB

19 February 2007

Before:
THE HONOURABLE MR. JUSTICE PUMFREY
(Chairman)

PETER CLAYTON
PAUL STONEMAN

BETWEEN:

E.ON (UK) PLC

Applicant

- v -

THE OFFICE OF RAIL REGULATION

Respondent

Mr. Matthew Cook (instructed by Pinsent Masons) appeared for the Applicant.

Miss Anneli Howard (instructed by Linklaters) appeared for the Respondent.

Mr. Mark Howard QC (instructed by English, Welsh and Scottish Railway Ltd) appeared for the potential Intervener, EWS.

Transcript of the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

1 THE CHAIRMAN: Mr. Cook?

2 MR. COOK: Sir, I do not know how you wish to handle this. First, I must apologise on behalf
3 of Mr. Sharpe, who had hoped to be here today but other commitments have intervened.
4 The matters are laid out in the skeleton arguments. Might I suggest the best thing to do
5 would be to work our way through the agenda item by item, deal with each point in turn?

6 THE CHAIRMAN: How do you want to do this? Either we can take everybody's contributions
7 item by item, or we can each go through it in its entirety. Speaking for myself, I would
8 rather do it item by item. Some will not detain us for very long. Okay, item by item.

9 MR. COOK: Item 1, Sir, I think there is no disagreement between us, England and Wales is the
10 appropriate forum.

11 THE CHAIRMAN: Yes.

12 MR. COOK: Item 2 – I am moving on, Sir, on the assumption that everyone is nodding – is
13 EWS's application for permission to intervene in the proceedings. Sir, there is a slight
14 unusual aspect, if I might say so, to EWS's position here in that it is applying to intervene
15 in a circumstance where it is neither going to be supporting entirely the position of the
16 Applicant or the Respondent – that is somewhat unusual but that may be the state of play.
17 Our only concern about this is that their intervention should not delay matters unduly, other
18 than that it is a matter for you, Sir, and we have no further submissions.

19 THE CHAIRMAN: I think there is certain doubt not only about what EWS is doing, but also
20 about what you are doing, and we will take it in order to this extent: Mr. Howard, we have
21 discussed this and we are presently of the view – subject to what anybody may say by way
22 of submission now – that it is appropriate that you should intervene, but there is going to be
23 no duplication and what we thought might be appropriate is that you give your Notice of
24 Intervention concurrently with the Defence, and then your skeleton argument will address
25 only those matters which are not common between you and the Regulators. What do you
26 say?

27 MR. HOWARD: We have no intention of duplicating. We are obviously acutely interested in
28 the outcome of these proceedings and so what we would suggest – I do not think we differ
29 markedly from what you, Sir, are suggesting – is approaching it in a pragmatic way. First,
30 I would suggest we do not put in anything until we have seen the ORR's defence, and then
31 we can see the extent to which there is anything that we want to supplement in it, and then
32 our skeleton argument would only address anything that we considered appropriate, taking
33 on board your point that we should not duplicate.

34 THE CHAIRMAN: We have worried about the potential waste of time in putting in, as it were, a

1 responsive Notice of Intervention and I will tell you why: at the moment we have in mind –
2 subject to various things which will happen today – a date for hearing of this Appeal in the
3 middle of April. We will get to that when we get to it because that is contingent among
4 certain other matters, but we have discussed a potential date which, as I have said, is the
5 middle of April and we do not want to run up against that date with issues poorly defined.
6 We thought that on the whole it would cause no trouble for you to put in a Notice of
7 Intervention saying what it was you wanted to say in support of the directions in the light
8 of the remainder of the Decision without having to make it responsive to anything in
9 particular.

10 MR. HOWARD: That does not cause any problem if that is the way you want us to proceed. As
11 I say, I actually think it would be better and of more assistance if we were to put in our
12 document once we had seen what the ORR says, but equally when we come to draft our
13 skeleton argument that is obviously going to take account of what the ORR says, so
14 ultimately it is a matter for you.

15 THE CHAIRMAN: Well it may be that you will drop out at that stage; it may be that you will
16 want to partition the duties between you and the ORR in any event.

17 MR. HOWARD: Yes, it could well be that one ends up in a situation in a hearing where we
18 would not necessarily perform a role other than being present and wanting to say
19 something if we felt the ORR was shifting its position or something like that. But as things
20 currently stand it would seem to us that actually our position is likely to be the ORR's but
21 obviously I cannot predict the way in which the ORR might ultimately choose to put
22 things.

23 THE CHAIRMAN: Right. Miss Howard.

24 MISS HOWARD: Thank you, Sir. We had understood that EWS were not actually intervening
25 in support of the Office as such, they were actually intervening in support of their own
26 interests and therefore we would prefer to keep both parties both independent rather than
27 trying to defend the case along two lines. We have no objection to their intervention; we
28 thought that to avoid duplication it would be better for them to put their statement in a short
29 time after our Defence, but we are happy to proceed concurrently if you feel that that is the
30 best way forward.

31 (The Tribunal confer)

32 THE CHAIRMAN: Thank you both. I think what we will make is a minor compromise. We
33 will ask for Notice of Intervention three days after the Defence which would enable you to,
34 as it were, clean it of those aspects which were no longer necessary in light of what the

1 ORR has actually said, if that is all right. Good, thank you very much.
2 I am kindly reminded: you do understand that the intervention will be at your own risk as
3 to costs?

4 MR. HOWARD: Yes.

5 THE CHAIRMAN: Right. In other words, if you are unsuccessful that does not mean that you
6 will necessarily recover your costs.

7 MR. HOWARD: Yes, I understand that and presumably the question of costs will simply be
8 addressed at a suitable moment.

9 THE CHAIRMAN: Yes thank you.

10 MISS HOWARD: On the topic of intervention, just with consequential, could I just confirm we
11 are happy to disclose copies of the pleadings with EWS and copies of correspondence so
12 they are included in the loop.

13 THE CHAIRMAN: Actually, there is also the question of what to do with the fullest version of
14 the Decision. Have you talked about that among yourselves as to what to do with this
15 because E.ON of course is not entitled to it without your consent?

16 MISS HOWARD: We have discussed it internally within the Office, I was going to deal with
17 that under the confidentiality head.

18 THE CHAIRMAN: Right, we will deal with it then. Yes, there will be exchange of pleadings in
19 the ordinary course automatically as they are delivered to the Tribunal.

20 MR. COOK: Sir, one point – I apologise, I should have mentioned first – which will obviously
21 inform the Tribunal’s handling of the entire case, it is of course the listing of the Part 8
22 claim.

23 THE CHAIRMAN: I know about that.

24 MR. COOK: In which case you might be more up to date, but just to tell you as I understand the
25 position currently stands is that the listing is for the first available date after 1st March
26 2007.

27 THE CHAIRMAN: With an estimate of a day to a day and half.

28 MR. COOK: A day to a day and a half. The first date the Commercial Court has is 5th March
29 and that is the one that EWS are pushing for; that is not a date when either myself or Mr.
30 Sharpe are available, and consequently we suggest that that is unfair, particularly at this
31 short period of time with two counsel and everything else. Then the Commercial Court
32 has dates on 12th and 19th March, and Mr. Howard cannot make those weeks. As a result,
33 as I understand the position, the first date when the Commercial Court and both parties’
34 counsel are available is actually mid-April. The matter is currently before the Judge as to

1 which date he chooses, and currently EWS are pushing for 5th March and we are strongly
2 opposed to that; we want a date when our counsel are available, but are happy to be fair
3 and say when both are. As I understand the matter it may be being addressed by the Judge
4 as I speak.

5 THE CHAIRMAN: Which Judge?

6 MR. COOK: It is His Honour Judge ----

7 THE CHAIRMAN: It has gone to Judge Mackie?

8 MR. COOK: It has gone to Judge Mackie.

9 MR. HOWARD: I understand that is right, although I suspect the matter actually should have
10 gone to the Judge in charge of the Commercial Court list, but I think Judge Mackie heard
11 the application for a stay and the directions' hearing.

12 THE CHAIRMAN: Was there an order to expedite?

13 MR. HOWARD: Yes, there was.

14 THE CHAIRMAN: I assumed that.

15 MR. HOWARD: And so the matter has been expedited and been ordered to be heard on the first
16 available date and, of course, as your Lordship knows, the normal order of events is then
17 that it is the court's convenience that takes priority and not the convenience of counsel.

18 THE CHAIRMAN: I have been told firmly that the practice in the Competition Appeal Tribunal
19 is that no regard is had at any time to the convenience of counsel. So if I fix this hearing
20 consequent upon today, I will fix it for a given date and that will be it and very little slack
21 will be cut to anybody. In a way it makes things so much easier, but can I deal with that
22 again when we come to deal with what to do about the proceedings generally having
23 regard to the pending application in the Commercial Court.

24 MR. HOWARD: It may be that one could make a telephone call in the course of this afternoon
25 to find out what has happened because, as I think has been said, the matter is currently
26 being considered, and the Judge will either say "Yes, the court can do the 5th", and that is
27 the date or he will choose some other date.

28 THE CHAIRMAN: Has anybody suggested that it might be a good idea to transfer it to the
29 Chancery Division, with a view to my taking it. The reason for asking that is that I could
30 take it **here**, i.e. I could take it after the Tribunal has finished its hearing, I could
31 immediately take the argument on the existing directions. I do not know if anybody has
32 thought of that, and it may be that for various reasons you would think it would be a
33 thoroughly bad idea, but I merely throw it out as a possibility because it would solve a lot
34 of problems from everybody's point of view. It would involve one hearing – or at least one

1 and a half hearings – and it could take place either here or at the RCJ, depending on
2 everybody’s convenience. I have already checked my diary against my first available date
3 in order to see what can be done and I am free for the period which I have in mind.
4 I am not asking you to respond now because that would be unfair, but I take it nobody has
5 thought of this?

6 MR. HOWARD: As far as I am aware nobody has, and we started obviously in the Commercial
7 Court because we thought that was an appropriate place to resolve the issue of the effect of
8 the directions on the contract.

9 THE CHAIRMAN: I have no doubt it is, all other things being equal; all other things, however,
10 are not equal, and I merely throw this out as a suggestion. Of course, if you want to act on
11 it you can and you do not have to act on it if you do not want to, but actually while we are
12 about it, Miss Howard, do you have any views?

13 MISS HOWARD: At face value – I have not discussed it with my clients in detail – it seems a
14 very sensible proposition.

15 MR. COOK: Sir, it is one of those things that we had given some thought to and were not
16 entirely sure of the mechanism for how it would be achieved but certainly we would
17 welcome it as being a very pragmatic and very sensible suggestion.

18 THE CHAIRMAN: I cannot give you an absolute flight plan, but you find in fact the
19 Commercial Court has infinite powers over its own list, and one of the things it can do,
20 quite apart from take other people’s work is give it back! (Laughter) What they will do is
21 they will simply release into whatever the appropriate general list is and in this particular
22 case what you do is liaise with the listing officer to ensure that that is returned to me and I
23 have the Part 8 claim – the first hearing of the Part 8 claim has already taken place so you
24 do not need that – and so you can transfer the hearing straight into my list on a fixed date,
25 and I can make all the necessary directions for that to happen once it has been transferred
26 but I cannot do anything until it has been transferred. So that was just a suggestion; act on
27 it if you want to, I am not asking for any sort of response now. It is just that if you draw
28 Judge Mackie’s order up before you discuss this you will not have an opportunity to do it,
29 because there will be a drawn order and it will all become too complex.

30 MR. COOK: Sir, I believe the order was certainly being drawn up, whether or not it has been
31 stamped is another matter.

32 THE CHAIRMAN: Well that is all right for that one, but if he is now being asked to fix that is
33 another opportunity to consider whether it ought to be transferred, but I just suggest it – he
34 may have his own reasons for not wishing to do so. So Item 4 – who wishes to go first.

1 MR. COOK: 3 we have obviously jumped straight through, Sir, because there is nothing ----
2 THE CHAIRMAN: Yes.
3 MR. COOK: And then item 4, main issues. Sir, I am open to any queries or questions you might
4 have.
5 THE CHAIRMAN: Yes, what is your Appeal about?
6 MR. COOK: Is this coming on to some later points which concern about exactly what we are
7 asking for or ----
8 THE CHAIRMAN: Actually I would like to know exactly what you are appealing against. If
9 you take your notice of appeal and turn to paras. 22 and 23, you seem to be concentrating
10 purely upon clause 4.3(d) in your Agreement, and you say that in that respect: "EWS did
11 indeed abuse its dominant position and consequently did infringe the Chapter II
12 prohibition." In your letter, you say that that is indeed the position, but you say you
13 reserve the right to challenge the reasoning of the ORR. Now what exactly do you mean
14 by "challenge the reasoning"?

15 MR. COOK: Well the conclusion the Decision effectively comes to is that the agreement
16 involves an infringement, and we are not in any way seeking to step aside from that at all,
17 we accept it does involve an infringement. However, there are 35 paragraphs of reasoning
18 – and we have identified particular areas we have concerns with in the notice of appeal –
19 and a number of those paragraphs of reasoning we consider to be wrong in a number of
20 respects, they do not in the end affect the conclusion there was in fact an infringement,
21 however there are points that we ought to make clear so that the ORR knows and so the
22 Tribunal knows that we have a problem with, and clauses 5.4 and 6.1 are an excellent
23 example of this. You will see this in para.33 of our notice of appeal. In analysing them,
24 the ORR has lumped the two together and made a number of statements which are correct
25 in relation to one clause and wrong in relation to the other, he has simply misunderstood it.
26 Another example is that the ORR has completely failed to analyse the effect of the
27 termination provisions which immediately give freedom to send further blocks of work
28 elsewhere. So all these points, we say, do go towards errors in the Decision. We are
29 focusing very much on the directions, and to make clear so we are not in a position where it
30 is being said we are not challenging those points; we are making clear that we do challenge
31 them and it is in part for that reason that we suggest that all that is required in order to
32 remove the exclusion effect and consequently the only direction that should have been
33 given were the amendments we proposed to 4.3(d).

34 THE CHAIRMAN: But is that not an Appeal in effect against a finding of abuse?

1 MR. COOK: Not in the end. In standard court terms you are not appealing the order so much.

2 THE CHAIRMAN: You are appealing the finding, this Tribunal accepts appeals against findings
3 in that way, it has to because of the nature of the jurisdiction. But what you are doing is
4 appealing the finding of abuse in relation to those clauses, are you not?

5 MR. COOK: For example, in relation to 5.4 and 6.1, as again we said in our letter, the problem
6 with those two clauses – and this is where we agree with ORR – is they entitle the parties
7 to bring additional flows of work within the contract which included 4.3(d) which we think
8 is a problem, so to that extent we are not challenging – certainly in relation to 5.4 and 6.1 –
9 the fact that those are part of the infringement. It is just again all of it ties back, we would
10 suggest, to 4.3(d). Similarly with 4.2 again we would suggest that if you look at 4.2 and
11 4.3 as a whole, although I would suggest, yes, you can describe it being an infringement,
12 but ultimately it all comes back to 4.3(d), so we are to some extent challenging the
13 reasoning and the findings that it is focused on.

14 THE CHAIRMAN: Let us look at your para.32 for a moment – what you are really saying here
15 is that the ORR has dealt with the issue of abuse in the wrong legal context so far as the
16 agreement is concerned, is that not right?

17 MR. COOK: Yes, they have certainly made some assumptions about the way the contract
18 operates which we would suggest are wrong.

19 THE CHAIRMAN: So actually this is not just an investigation of the legal consequences of the
20 findings which the ORR has made, it is a question of whether the ORR has correctly
21 legally framed its analysis of abuse; is that not right?

22 MR. COOK: That is correct, sir.

23 THE CHAIRMAN: So really this is a challenge to the finding of abuse as it appears in the
24 decision. Is that not also correct?

25 MR. COOK: Sir, I am not trying to chop logic here, but certainly in relation to 5.4 and 6.1 – I
26 can come back to that, but we do suggest that actually we do not have a problem with the
27 conclusion it has come to but many of the points made in argument are wrong, so they have
28 gone for the wrong reason in their case but have come, we would suggest, to a point that is
29 right and in some cases based on correct reasoning, but yes, it is right to say we are
30 challenging parts of that reasoning process, and consequently parts of the abuse.

31 THE CHAIRMAN: Are you proposing to advance any point of fact additional to those which are
32 already to be found in the Decision?

33 MR. COOK: No, Sir, other than in a sense there is the contract that ----

34 THE CHAIRMAN: Primary fact?

1 MR. COOK: No, we are not putting any evidence of fact before you. What we are in many
2 cases doing is drawing legal conclusions based on what is in front of you in terms of the
3 contract.

4 THE CHAIRMAN: Okay. Is there any respect in which you wish to challenge the conclusions
5 of the ORR in the Decision over and above what is explicitly set out in the later part of the
6 notice of appeal from para. 24 onwards.

7 MR. COOK: Sir that is currently what we are saying.

8 THE CHAIRMAN: No, not “currently”, at all?

9 MR. COOK: Sir, the only caveat I have to that point is what, if anything, is said by ORR that we
10 might wish to reply to, but other than that, that is currently the challenge that we are
11 making.

12 PROFESSOR STONEMAN: You said you did not have any intentions of putting in evidence of
13 further information; we have to work on what we have here. But at first sight, having
14 looked through these papers here there are two or three things that seem quite material to
15 the Decision. One of these is spot rates, the contention that any new arrangement would be
16 at spot rates. I am wondering whether you intend to support that assertion and, if so, to
17 give us any information on the difference between spot rates and the rates in the contract
18 and how they have changed over time.

19 Secondly, there is some mention in the documents that E.ON actually sells on a fair amount
20 of the capacity that it buys from EWS as a result of selling on power stations in recent
21 history. Do you intend to let us have any information upon the nature of those contracts
22 and how this contract will impinge upon those contracts?

23 This last point really goes to EWS rather than to E.ON, there are some assertions in the
24 documents that there are particular financial advantages to EWS from the exclusivity in the
25 contract. Does anybody propose to raise these issues and to actually provide the court with
26 information relating to these matters?

27 MR. COOK: In relation to the two points you have addressed to me: in terms of spot rates what
28 will be before the Tribunal I think perhaps in a slightly informal sense is the draft
29 alternative contract, and that would have been put through as part of the papers that would
30 have been before the court in the Part 8 claim, exhibited to the first witness statement of
31 Mr. Fletcher, so that will be before you and that tells you the rates that EWS are certainly
32 offering. There is not a spot market that one can point to in any abstract sense, it is all a bit
33 too specific for that, but when we say that is what they are doing it is based on those terms
34 they provided us with that allows us to quote the figure of £7 million, for example, that we

1 have used. We can show you those figures; there is nothing else that we are planning to
2 put before you.

3 The second point as about the nature of the alternative contracts. I must confess we had
4 not thought about putting those before you and have not planned to make submissions
5 particularly on them. It is very much a matter for the Tribunal if you feel these are things
6 you would like to see then we would certainly be happy to provide them, but we had not
7 planned to bring particular points on those.

8 PROFESSOR STONEMAN: The concern with respect to spot rates is that you specifically state
9 in your notice of appeal that it will be spot rates and, as an economist, I cannot understand
10 why a contract that will cover 15 per cent. of the market will actually be at spot rates – that
11 is the first issue. I was hoping you would be addressing this.

12 Secondly, the issue of selling on EWS capacity – clearly how changes in the contract
13 impact upon yourselves depend a great deal on the nature of the contract you have with
14 other generators, and also there is the issue of whether the contracts with those other
15 generators abuse a dominant position as well indirectly, and that is raised in the papers but
16 is not actually fully addressed. So personally I would find it, at least of interest, if you
17 were to address these issues, but the advantages of exclusivity to EWS, perhaps we could
18 ask whether EWS intend to give us any information on the financial advantages that have
19 arisen from that?

20 MR. HOWARD: As things currently stand we would not intend to put any information before
21 you in relation to that.

22 THE CHAIRMAN: There was a heavy emphasis on the “before you”?

23 MR. HOWARD: It is part of the legal argument in the Part 8 proceedings that the provisions
24 which the ORR has required to modify – if they are modified or removed so as to remove
25 their exclusionary effect and we say that takes away the exclusivity, that transforms the
26 contract. That is a matter of argument, as a matter of contractual construction as to what
27 the effect is.

28 PROFESSOR STONEMAN: EWS did argue in the documents with ORR – and I can confirm
29 the paragraph if you want, p.178 of the ORR Report, paras. A50, 51 and 52 – that there
30 were distinct financial advantages to EWS from the exclusivity of the contract and ORR
31 then went on to argue that these are raised from the fact that you are reducing risk on the
32 basis of excluding competition and therefore were not acceptable as an excuse for
33 exclusivity. Therefore, it seems to me that there must be some financial advantages to
34 EWS from exclusivity, although if not an excuse for exclusivity?

1 MR. HOWARD: Sir, I think we were talking at cross purposes and I apologise, I misunderstood.
2 EWS is not resiling from that position, the answer is “yes”, we say there are obvious
3 financial benefits from having an exclusive arrangement, but we were not intending to put
4 any further information before you relating to that.

5 PROFESSOR STONEMAN: Once again I would find it useful to have that information and in
6 particular how those benefits are split between yourselves and E.ON.

7 MR. HOWARD: Yes.

8 THE CHAIRMAN: In the context of these directions, which are essentially to achieve a certain
9 result in the public interest, the question of how there is a partition of benefit as between
10 the players may well be relevant as to whether these directions are proportionate or
11 appropriate in any particular case. That may be an issue – that is an issue – as to whether
12 they are proportionate and appropriate, and one of the things it is difficult to work out on
13 proportionality is to work out what is indeed proportionate without having the full
14 information relating to the economic relationship between the parties with the benefit of an
15 exclusive agreement, as opposed to the benefit of a non-exclusive agreement; that is the
16 problem, because keeping one of our eyes open – as ever – to the public interest and that
17 being one of the results which the directions are intended to achieve, that must at least at
18 first cut, or at least at this stage be a relevant consideration. Is that wrong?

19 MR. HOWARD: I am not arguing it is wrong. I think all I can say at the moment is that we have
20 heard the point that the Tribunal has made, and the question was: were we intending prior
21 to this to put anything before you, and the answer was that we had not come along with that
22 intention.

23 THE CHAIRMAN: Well, that is good enough for us at the moment, but understand that we are
24 now in a position to fix a hearing date because we know at the moment nobody wishes to
25 introduce further material. The closer we get to the hearing date the more infinitely
26 difficult it becomes to change the course of our directions, because we take the view that
27 once the hearing is fixed that is the date on which the hearing is going to take place, and to
28 a certain extent at this stage we are engaged in the process of eliminating any factual
29 investigation which will need to take place on this Appeal; that is essentially what we are
30 doing so that we can that we do not need to worry about further disclosure of documents
31 over and above the ones that will be annexed to the various pleadings. We can go straight
32 from that to skeleton arguments a reasonable period before a reasonably quick hearing. So
33 it is important that we are confident that somebody is not going suddenly to change
34 direction at a later stage and say “I want you, Tribunal, in exercising what is essentially

1 your original jurisdiction, to re-open factual investigations, we now want you to consider
2 this; and here, by the way, is a witness statement from an economist". That would be a
3 disaster, and we do not want it to happen.

4 MR. HOWARD: Sir, you will appreciate we are here intervening, we have not ourselves
5 initiated the process so to some extent we are reacting to the E.ON stance and our
6 understanding, and I think it is a correct understanding based upon everything that has been
7 said is that E.ON's arguments are based upon essentially a legal analysis of what the ORR
8 has said and sought to challenge the order in the light of their analysis, and whilst we are
9 obviously content to come along and deal with that point, obviously if they chose to
10 expand things then I cannot see what our position would be, but in relation to things as they
11 currently stand we believe we can adequately deal with the matter based upon the legal
12 submission.

13 THE CHAIRMAN: I understand that you are here entirely innocently to make sure that injustice
14 is not done, and any *inter partes* appearance these proceedings may have is entirely illusory
15 but, at the same time, I do want to make the point about adding material quite clear. We
16 do not make an order unless we are quite satisfied that no material is going to be added
17 fixing a trial date, and so it is important, because everybody is agreed that we ought to get
18 this out as quickly as possible, and so we must know what basis we are doing it on. I am
19 going to take it, subject to anything that Miss Howard may say, that it is going ahead on the
20 existing papers.

21 MR. COOK: The only point I was going to make is if your colleague did want to see those
22 contracts we are very happy to provide them.

23 THE CHAIRMAN: Those will be produced anyway. Miss Howard, do you have anything you
24 want to add?

25 MISS HOWARD: I have kept silent because I am basically with you on keeping the appeal to
26 a confined scope, that is the point that we have been making since 5th February and if there
27 are additional points made that needs to be built into our Defence because we want to be
28 able to answer all these points at one opportunity not to have a constant dribbling and
29 changing of the gateposts. Thank you.

30 MR. CLAYTON: I think the information on the spot rates versus the contract rates if we could
31 have that as was requested, over the period of time. It would also be of interest just how
32 quoted are these spot rates – is there a market in coal carriage? Is this something which is
33 published or is it a very narrow market?

34 MR. COOK: Sir, I obviously misled you inadvertently. There is no spot market in this market,

1 the reality is that most of the market in terms of demand is by people like E.ON who have
2 enormous great big tranches and needs. I mean on our own we are 15 per cent. of the
3 market, there are a number players who are in double figures from the demand perspective
4 from the supply perspective EWS, which is over two-thirds and, I think, two others. So
5 this is not something as well where you quote specific routes based on your capacity, what
6 else you do in that region and everything else. It is not something, as I understand it at the
7 moment – and I will take instructions – where we can say: “Here is a graph showing the
8 spot rates over time”. Up until three or four years ago there was nobody else in the market
9 apart from EWS and they said they did not negotiate with us because we had not a contract
10 that was then in place.

11 MR. CLAYTON: So how was the figure of £7 million calculated in that case?

12 MR. COOK: They have given us an alternative “Heads of Terms” which Mr. Howard may well
13 say is their first shot in negotiations and that is probably true, but their alternative “Heads
14 of Terms”, assume the contract is void, gives rates that are £7 million a year more than the
15 current contractual rates, and those “Heads of Terms” are available.

16 MR. CLAYTON: So this figure is not a spot market really, it is a quote from EWS which has
17 been given a price from EWS. Is there not another market? EWS are not the only people
18 in the market now, so you can go for part of your load at least to other suppliers and get a
19 price from them.

20 MR. COOK: That is certainly right to say, there is nobody in the market who can take our needs
21 off us fully, but there are, yes, other people who could do small parts of that. E.ON is in
22 the process of finding out who will give us better rates on different parts of it, and if
23 material like that can be provided if you find it helpful.

24 MR. CLAYTON: But to be clear there is no spot market?

25 MR. COOK: My clients may be a little concerned given we would say: “It is never going to
26 happen”, but it may happen that there is going to be a negotiation in the future and the last
27 thing we would want to have done is to disclose to EWS the best price we are getting from
28 other people, but we are very happy to give it to the Tribunal.

29 MR. CLAYTON: But there is no spot market?

30 MR. COOK: Not as far as I am aware, sir.

31 PROFESSOR STONEMAN: If I could just mention there that the whole basis of the contract
32 that you are disputing is that the best price you get from other suppliers has to be disclosed
33 to EWS for them to match it. That is the clause that you are arguing against, you are
34 saying that that does not foreclose the market and you have just said it does.

1 MR. COOK: No, if you look and see, we have accepted that the clause that does that is an abuse
2 and the amendments we have proposed, we think, remove any disclosure ----

3 THE CHAIRMAN: Actually, it has to be said my reading of your suggested new clause is the
4 precisely the opposite in that, even as amended, EWS has to be in a position to put up a
5 train movement charge. They cannot put up a train movement charge which gives you a
6 benefit, which is the words written in without knowing what you are being quoted – can
7 they?

8 MR. COOK: Actually, Sir, we would say they can. Simply what would happen is that you
9 would go to them ----

10 THE CHAIRMAN: We are getting ahead of ourselves but it is an interesting point.

11 MR. COOK: There is some confusion here and I think I can solve it in 20 seconds, Sir.

12 THE CHAIRMAN: Right.

13 MR. COOK: The way we would suggest it should happen is if E.ON gets a better price than the
14 contract price it would stay with EWS. If we have got a better price – I am not telling you
15 what it is – for the following demand: “What is your best price?”

16 THE CHAIRMAN: And they would believe you?

17 MR. COOK: Actually there is an audit provision in the contract.

18 THE CHAIRMAN: So you do disclose?

19 MR. COOK: No, we do not, it is disclosed purely to an independent accountant who should not
20 actually tell them what those are, so they simply say: “We have got a better price” and
21 EWS can come up with any number it likes and if it is better we go with them, if it is worse
22 than the alternative then we go with the alternative.

23 THE CHAIRMAN: It sounds like pinning the tail on the donkey, but we will leave that for
24 another time, I think. Right, we are going ahead – subject to the information which has
25 been requested today – with this hearing on the footing that we have all the material
26 documentation and there is not going to be a challenge to the primary facts as found by the
27 ORR. Now, have I got that clear?

28 MR. COOK: Yes.

29 THE CHAIRMAN: There is going to be a direction to that effect so as to make everybody clear
30 what basis the hearing is going ahead on. Next item 6: “Status of the parallel civil
31 proceedings”. Anybody may contribute to this as they please, but it seems to me there is
32 not actually much we can say about this. If the Commercial Court wished to say something
33 then the Commercial Court must be free to do so, it is inconvenient largely because the
34 Commercial Court is going to have to construe the directions in the correct context, but that

1 will no doubt be the function of counsel to describe the correct context to them, and what is
2 being sought to be achieved by the directions including the public interest and all that. It
3 has to be borne in mind, of course, that the suggestion that the ORR have anything wrong
4 at all cannot be raised before the Commercial Court by either side, because errors by the
5 ORR are a matter for the exclusive jurisdiction of this Tribunal. You must take the
6 decision of the ORR as it says. I will hear any submissions on that but it seems to me that
7 that is clear from the provisions of the Act, that we have an exclusive jurisdiction into
8 errors made by the ORR.

9 Does anybody have any observations they want to make about that?

10 MR. COOK: Sir, only to say that that does seem to be the position to us as well and is, of course,
11 the reason why we think it is very important that this goes ----

12 THE CHAIRMAN: There is no point in ventilating matters which have already been ventilated
13 in the Commercial Court. Miss Howard, do you have anything you want to add to that?

14 MISS HOWARD: No.

15 THE CHAIRMAN: Mr. Howard?

16 MR. HOWARD: Sir, of course, you will appreciate the whole basis of our application before the
17 Commercial Court is on the basis of the ORR direction as it is.

18 THE CHAIRMAN: In context?

19 MR. HOWARD: In context, of course the context has to be properly understood. I think it is
20 fair to say – I do not know whether you ----

21 THE CHAIRMAN: I am amazed that the Commercial Court thinks it can read that Decision in
22 time for a day and a half hearing, I am really impressed actually.

23 MR. HOWARD: The point I was going to make to you – in the bundles I do not think you have
24 had, but correct me if I am wrong, the statement that was recently served in the commercial
25 court by E.ON?

26 THE CHAIRMAN: Yes, I have. They are “back at the ranch” if I may put it that way, but I have
27 certainly read it. For some reason there is yet another copy of the Decision now sculling
28 around (one tree every go) and we have it here. This is Mr. Paciorek’s exhibit.

29 MR. HOWARD: Well his statement is what I was referring to.

30 THE CHAIRMAN: Let me find it. (After a pause) Yes.

31 MR. HOWARD: The only point I wanted to make is that the issue that E.ON is raising before
32 the Commercial Court and part of the argument the Commercial Court will be considering
33 is: What is the effect of the direction? They are saying before the Commercial Court, just
34 as they are arguing before you, that the ORR direction only requires this modification that

1 they put forward. That is the only point. I am not saying whether that is appropriate or
2 not, I merely want it to be clear that that is the basis on which the matter is coming before
3 the Commercial court.

4 THE CHAIRMAN: If the Commercial Court thinks that is arguable, it has to come back to us,
5 has it not? Because the one thing the Commercial court cannot do is decide that it is.

6 MR. HOWARD: Sorry, decide what is?

7 THE CHAIRMAN: Decide that this direction is the appropriate one.

8 MR. HOWARD: The issue before the Commercial Court will be what is the effect of the current
9 Direction on the contract.

10 THE CHAIRMAN: That may be a hypothetical question. You see the problem is this: the only
11 thing that worries me about this in this particular clash of jurisdictions is that they are not
12 concurrent (the two jurisdictions are not concurrent) because if somebody says that the
13 correct direction which ought to be made is **this** one, and the Commercial Court agrees that
14 that is arguable, the Commercial Court can say no more about it.

15 MR. HOWARD: I think we are at cross purposes. As I understand it, what E.ON is seeking to
16 argue before the Commercial Court is the direction that is being given which is, in other
17 words for this purpose, a correct direction can be satisfied in the following way.

18 THE CHAIRMAN: Oh, I see what you mean, by making that amendment to the ----

19 MR. HOWARD: In other words, if they are right about that you never need to come to this
20 Tribunal because they say that all the ORR direction requires is this modification and
21 therefore we can comply with the ORR direction by modifying the contract in that way –
22 that is step one. Step two, they say therefore their argument is that this does not have a
23 major effect on the contract.

24 THE CHAIRMAN: If they are saying alternatively the direction is too vague to be enforced, if it
25 does not require us to do this or, alternatively, the direction needs to be modified in any
26 respect, and if the Commercial Court thinks that is arguable it has to come back to us.

27 MR. HOWARD: I entirely follow that. I think the position before the Commercial Court, both
28 parties have to take this position the direction is the direction and the question is that the
29 Commercial Court simply has to deal with it on the basis of what does it mean how do you
30 give effect to it, and once the court has decided that it can go on to decide what is the effect
31 on the contract.

32 THE CHAIRMAN: Has it occurred to anybody again that it might be a good idea to do this by
33 way of an interim declaration? The only reason I ask that is that if you make the
34 declarations you are seeking, one view is that the agreement will die, regardless of what

1 happens hereafter here, and the only way of getting over that would be to appeal the
2 Commercial Court's decision. Assume the Commercial Court is in your favour – the
3 agreement dies. The declaration at the moment is subject to this strange: "It has been void
4 since last Tuesday" or whatever it was, which you are currently asking for. If that
5 declaration is granted that is going to be the position. Now, if that is done by way of an
6 interim declaration – interim until the CAT has decided whether or not that was the right
7 direction to make, then it has this advantage that if the CAT changes the direction, then the
8 interim declaration can be removed just by a quick application to the Commercial Court. It
9 does not need an approach to the Court of Appeal. If, on the other hand, a final form of
10 declaration is made, bringing the contract to an end (which is what it will do) the only way
11 to cure that is by a subsequent appeal on the basis of what the CAT has decided. Now the
12 word "shambles" springs to mind only to be manfully repelled, but the truth is it is a bit of
13 a shambles if we do it that way, and if you do it by way of an interim declaration it may
14 just save a lot of general sweat. Again, that is a suggestion. I do not mean it to be anything
15 other than an idea at this stage, but I think it is worth thinking about.

16 MR. HOWARD: Can I leave it on this basis, obviously we will consider that if the matter is
17 coming on in the Commercial Court, as currently we anticipate, on 5th and 6th March, and
18 no doubt when we come to make our submissions both parties EWS and E.ON make their
19 submissions they will consider whether that analysis is one they should bear in mind and
20 put before the court.

21 THE CHAIRMAN: Certainly. As I say, it is purely an idea, but I was a little worried about the
22 proliferation of proceedings which was one of the things we are trying to avoid. Is there
23 anything anybody else wants to say about Item 6 now?

24 MISS HOWARD: The only item we have is the impact on the timetable, but you may want to
25 deal with that later.

26 THE CHAIRMAN: There is now no impact on the proposed timetable I think, but we will come
27 to it in just a moment.

28 MISS HOWARD: Yes, thank you.

29 THE CHAIRMAN: Now item 7 we may have taken, more or less, in passing, have we not,
30 because there is no additional material now that we need to consider, subject only to the
31 additional information that we require. Does anybody have anything else they want to say
32 about 7? The same for 8 – only this: what about the full copy of the Decision for E.ON?

33 MISS HOWARD: Sir, E.ON has asked for a full copy of the Decision. The scope of the
34 Decision that is granted may actually be reduced in view of the fact that they are not going

1 to be contesting any of the primary facts. We were suggesting that we could produce a
2 shortened version of it, the material elements of the introduction and Part 2A and I will
3 explain why: it is simply because there are background documents to the Decision that you
4 may want to see to understand the underlying reasoning, but a lot of those documents are
5 third party documents. The majority of them, it must be said, come from EWS and E.ON,
6 but they have confidential redactions in them, and the whole process of trying to go
7 through the Decision with a toothcomb to get parties' consent to produce a
8 non-confidential version will take several weeks, so I was trying to cut down the scope of
9 the task in hand to produce the really relevant extracts from the Decision that you would
10 need.

11 THE CHAIRMAN: Everybody goes into any hearing on the same copies of the same
12 documents. I cannot have one party working on redacted or altered documents. The way
13 to do it, I think, with respect, is to do it by way of a confidentiality club. Surely we can
14 agree a confidentiality club without the Tribunal having to get involved in that? If
15 necessary we will have to extend the confidentiality club to one representative of the client
16 but only on the lawyer's application. I see no reason at the moment why the client should
17 not be happy with the published version of the Decision and if there is a real need to
18 disclose anything then an application can be made for the purpose. We could nominate one
19 representative of the client to see it – somebody who is not in a position to use and go from
20 there. This is familiar stuff – do we need to trouble any more than that about it? But I will
21 not have the lawyers going in with a Tribunal who knows more about the Decision than
22 those who are appearing in front of it; that is out of the question. Any other points?

23 PROFESSOR STONEMAN: Just to clarify, you were suggesting that only some of the
24 redactions are put back in?

25 MISS HOWARD: For example, E.ON is not challenging market definition and dominance
26 which is a whole section of the Decision so I thought we do not really need to go there.
27 Similarly, they are not challenging discrimination and predation so we could cut those
28 sections out.

29 THE CHAIRMAN: Well, just a moment, market definition and dominance do have quite a
30 serious impact on what exactly the directions were intended to achieve. Speaking entirely
31 for myself – I have not discussed this with the other members of the Tribunal – but it seems
32 to me that in principle one does not edit the document in that way ----

33 PROFESSOR STONEMAN: That was where I was coming from.

34 THE CHAIRMAN: -- because the whole of the document is material to the purpose which the

1 directions are intended to achieve is material. So as at present advised I am reluctant to
2 make a Direction to this effect, but I will give you a clear indication that:

3 (i) we are going to be working on the unredacted copy of the Decision together
4 with the supporting documents.

5 (ii) if, and insofar as it may be necessary, it will be dealt with by a confidentiality
6 club, 'liberty to apply' – to use a non-CAT phrase – to everybody if any
7 particular set of clients wished to see any document which is otherwise
8 confidential.

9 Can we deal with it like that?

10 MISS HOWARD: Could I just ask for clarification on how the Office should deal with third
11 parties, because during the administrative procedure there was no disclosure of the
12 Decision or the documents to wider parties other than EWS, so third parties have put this
13 information in – should we notify them ----

14 THE CHAIRMAN: No, lawyers only, confidentiality club – no sight by the clients of any third
15 party documents or anything else alleged to be confidential without the permission of the
16 Tribunal, and when the Tribunal is asked for permission it will decide whether in all the
17 circumstances it is appropriate to give notice to the third parties and, if so, what to do about
18 it. But this should be capable of being dealt with by a confidentiality club in the usual way
19 I would have thought. Any other problems with that? I think you may need to take
20 instructions.

21 MISS HOWARD: Yes, could I take instructions?

22 (The Tribunal confer)

23 MISS HOWARD: That is acceptable, we can work towards that.

24 THE CHAIRMAN: Indeed it is! (Laughter)

25 MISS HOWARD: Is there any point in referring to provisions in the White Book to control use
26 of the document, or is that really going over the ----

27 THE CHAIRMAN: I make quite a lot of these orders now; normally I rely on ----

28 MISS HOWARD: Commonsense.

29 THE CHAIRMAN: -- commonsense, and for the solicitors to get it together and to get a sensible
30 proposal for a confidentiality club going straight away. I also think it is helpful to indicate
31 that they may find that the easiest way to do it is plainly to mark everyone of the sensitive
32 documents with a stamp saying "confidential" and possibly with an optional number, so
33 that there is no dispute about the terms upon which individual documents go across. That
34 is merely a suggestion, but the other thing is that if any third party complains that their

1 interests have not been safeguarded one can point to the stamp and say conclusively that
2 they have, because this has been lawyers only.

3 When it comes to the hearing we will probably not need to refer to the vast majority of
4 these documents anyway as we all know, and if a third party document, or otherwise
5 confidential document becomes a real bone of contention which, as at present advised, I
6 think is pretty unlikely, then we will have to deal with it as it comes, decide whether to go
7 into camera or whatever. But at the moment I would be much happier if we could deal
8 with it in the way I have indicated.

9 Does anybody have any other problems with that? No, good, thank you. Actually we have
10 formulated it so carefully now it may as well be a direction in the order, so that is the next
11 one.

12 We have dealt with item 9. 10 - oral evidence – no – correct? Written evidence – no?

13 PROFESSOR STONEMAN: Can I just go back to 10?

14 THE CHAIRMAN: Yes, of course.

15 PROFESSOR STONEMAN: “Any further documents” – does that include documents in support
16 of the ORR report?

17 THE CHAIRMAN: They are annexed to it, are they not?

18 MISS HOWARD: Not in the bundles that you have at present.

19 THE CHAIRMAN: No, but they would be. Does the ORR’s complete report annex any
20 documents?

21 MISS HOWARD: No, it is just the decision.

22 THE CHAIRMAN: Well we are going to have to compile the documents referred to, I am afraid,
23 or the documents founding – are you going to let them off this?

24 MR. COOK: Sir, the only point that occurs to me is that based on previous experience we are
25 going to be talking about hundreds and hundreds of pages of documents, and that can
26 become very unwieldy ----

27 THE CHAIRMAN: Why are we doing this blind? Once you have seen an unredacted version of
28 the Decision, you will probably know straight away whether there is any particular area in
29 which you need to see – I cannot at the moment on this notice of appeal see that there is
30 going to be, but you will know immediately if there is anything that you need to see the
31 supporting material for, and then you come back perhaps?

32 MR. COOK: Sir, I would be very happy with that approach.

33 MISS HOWARD: There are probably documents which will feature again and again which are
34 both parties’ responses to the Rule 14 notice and the statement of objections. Now both of

1 those the Office may want to rely on them in the Defence but they are redacted at the
2 moment, and whether the parties want to maintain ----

3 THE CHAIRMAN: Those will probably have to go into the club probably if the parties will not
4 agree, but those you will want because I understand that one of your points is going to be a
5 question of a small change in position, but leaving that aside let us go back on it and say:
6 “No supporting documents to begin with other than the ones you want to put in” and you
7 can then apply for further if you really think it is necessary.

8 MR. COOK: I would be very satisfied with that position.

9 THE CHAIRMAN: Right, can we cancel our previous message and substitute that one. Thank
10 you very much. No oral evidence, I take it – no? No written evidence, I take it – other than
11 the material which we have asked for.

12 Now, timetabling: At the moment I understand that the Defence is due on 1st March. I
13 think, although I am very tempted to abridge that I think it is too late to do so, and so the
14 Defence will be in on that date, and 1st March is a Thursday. I think the Notice of
15 Intervention could conveniently be in on the following Monday, by close of business – that
16 is really you, Mr. Howard, but I cannot think there is anything additional needed there.
17 That means the only thing that it remains for me to do is to fix the hearing date. As at
18 present advised our feeling is that this is a two-day Appeal; we do not see that we need to
19 extend the Appeal beyond that and so we look at a convenient date from the Tribunal’s
20 point of view for a hearing and we alight upon 19th April. For skeleton arguments we will
21 back up three weeks from that and we will ask for concurrent (not consecutive) skeleton
22 arguments.

23 Does anybody have any observations about that.

24 MR. COOK: Sir, the only observation I would make would be that if you were to proceed with
25 your plan successfully certainly from my client’s point of view we are very keen on having
26 you hear the Part 8 claim thereafter ----

27 THE CHAIRMAN: Do not worry about the Monday, because the two days I have given you –
28 Thursday, Friday – the following day is the Monday.

29 MR. COOK: So you would be available on the Monday. Thank you, Sir.

30 THE CHAIRMAN: Well I cannot give you a solemn and binding undertaking to that effect but
31 the reason I have approached this in this way is with that in view, yes.

32 MR. COOK: Thank you, Sir.

33 THE CHAIRMAN: Mr. Howard, anything to say?

34 MR. HOWARD: No, Sir.

1 THE CHAIRMAN: Miss Howard?

2 MISS HOWARD: We did not have a time line for the submission of extra materials by E.ON
3 and if we were to take those into account in the Defence, we might need a timetable for
4 then.

5 THE CHAIRMAN: Our immediate reaction to this is it probably will not give rise to anything in
6 the Defence, but is this not something you can sort out ----

7 MISS HOWARD: Take account of in the skeleton?

8 THE CHAIRMAN: Yes. To the extent that it needs to be sorted out it can be sorted out in the
9 skeletons. I have a particular view about the function of skeletons, I do not want them used
10 too much as a pleading in this case, and I can understand that there are cases in which they
11 have been used very effectively as pleadings, which I do not think is entirely satisfactory.
12 But, on the other hand here I cannot see any harm in dealing with a well-defined area in
13 that way. Can you sort it out that way?

14 MISS HOWARD: We will, thank you.

15 THE CHAIRMAN: I am reminded, you may have seen the Court of Appeal are unhappy about
16 the length of some of our Decisions. One of the ways of dealing with that is to take out all
17 that stuff about the parties' submissions. At the same time, the general public is entitled to
18 know what the framework for one of these Decisions is, and the obvious way to do it is to
19 put the skeleton arguments in a redacted form, if necessary, on to the website. Then we do
20 not have to have that great section in the Decision, which nobody really reads, headed:
21 "The Parties' Submissions" and we can, if not cut to the chase, at least reduce the hanging
22 around. So what we would like to do is to have the skeleton arguments in a form which it
23 is acceptable for electronic publication straight away. Any confidential material could
24 conveniently be put in an appendix which will not go on to the website, and we would hope
25 that that, as it were, fulfils our public information obligation while, at the same time,
26 making it easier for us, among others, to write the resulting decision. Now, you are not
27 required to comment on the length of the Decisions, but is that acceptable to everybody? It
28 would be very convenient.

29 MR. COOK: Certainly from our point of view, Sir, and in this case it is probably going to be one
30 of the easiest ones for the Tribunal to just that. There is not going to be much confidential.

31 THE CHAIRMAN: Miss Howard?

32 MISS HOWARD: No objections.

33 THE CHAIRMAN: Anything else?

34 MISS HOWARD: There was issue 5, which we leap-frogged ----

1 THE CHAIRMAN: Did we gloss over it?
2 MISS HOWARD: It may not be necessary now, I do not know whether you have particular
3 concerns.
4 THE CHAIRMAN: Ah, yes, all right. Well I have told you what the position so far as the
5 Commercial Court is. The only other thing I can do is to suspend the directions – either the
6 Tribunal can do that or, as it happens, I can do it on my own – but nobody has applied for it
7 and it is quite a drastic step to take without a request. You were about to say?
8 MISS HOWARD: We have not made a request because we felt that our letter, where we forbore
9 from enforcing them, was equivalent to a suspension and therefore it would not be
10 necessary and we have discussed this internally and we are happy for you to suspend them
11 if you felt that was more appropriate. I do not know if the parties have a view?
12 THE CHAIRMAN: Mr. Howard may not like that – I will come to that. (To Mr. Cook): You, I
13 take it would not object?
14 MR. COOK: No, Sir, and the reason we have not is the thought we might be wasting your time
15 by essentially applying for something you could conclude we already had, but there is
16 obviously, we would say, a difference ----
17 THE CHAIRMAN: There is a difference between a refusal to prosecute, from a suspension of
18 the order of which it will not be a breach, even if the illegal conduct continues it will not be
19 a breach of the direction not to have done anything, that is the effect. However, Mr.
20 Howard may have something to say about this because one of the effects, I suspect, of
21 suspending it will be that there is no effective order and that, of course, does have a knock
22 on effect so far as the Commercial Court is concerned. What do you say?
23 MR. HOWARD: We would say no one is applying to suspend the order ----
24 THE CHAIRMAN: And I should not take the ball home now?
25 MR. HOWARD: Precisely, and that is really my short point.
26 THE CHAIRMAN: Yes, all right. I think that is a fair point. I am not going to suspend the
27 directions, given that there has been no application to do so. Well thank you all very much,
28 everybody.

29 (The hearing concluded at 3.15 p.m.)