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February 17, 2020

VIA ELECTRONIC FILING and HAND DELIVERY

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**Re: Duke Energy Progress, LLC Supplemental Rebuttal Testimony
Docket No. E-2, Sub 1204**

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket please find the Supplemental Rebuttal Testimony and DEP Supplemental Exhibit 1 of Duke Energy Progress, LLC's witnesses Barbara A. Coppola and John Halm, and Supplemental Rebuttal Testimony of John Gaynor. The Supplemental Rebuttal Testimony of witnesses Barbara A. Coppola and John Halm contains confidential information that relates to current contractual arrangements that are legally required to be maintained as confidential.

Accordingly, I am filing portions of the Supplemental Rebuttal Testimony under seal; they should be treated confidentially pursuant to N.C. Gen. Stat. § 132-1.2 and protected from public disclosure. The Company will provide a copy of the confidential information to parties to this proceeding upon execution of an appropriate confidentiality agreement. We will deliver fifteen (15) paper copies of the filing to the Clerk's Office by close of business on February 18, 2020.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,

Jack E. Jirak

Enclosures

cc: Parties of Record

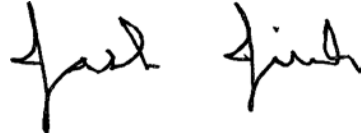
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Feb 17 2020

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Supplemental Rebuttal Testimony, in Docket No. E-2, Sub 1204, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to parties of record.

This the 17th day of February, 2020.



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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1204

In the Matter of)	SUPPLEMENTAL
Application of Duke Energy Progress, LLC)	REBUTTAL TESTIMONY
Pursuant to G.S. 62-133.2 and NCUC Rule)	OF BARBARA A. COPPOLA AND
R8-55 Relating to Fuel and Fuel-Related)	JOHN HALM
Charge Adjustments for Electric Utilities)	FOR DUKE ENERGY PROGRESS,
		LLC

1 **Q. MS. COPPOLA, PLEASE STATE YOUR NAME AND BUSINESS**
2 **ADDRESS.**

3 A. My name is Barbara A. Coppola, and my business address is 400 South Tryon
4 Street, Charlotte, North Carolina.

5 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

6 A. I am employed by Duke Energy Business Services, LLC as Manager, Customer
7 Delivery Capital Investment Strategy. In a previous role, I worked with our Fuels
8 and System Optimization organization and was responsible for administering
9 contracts and arrangements for the acquisition of reagents for our power generating
10 fleets as well as the disposition of certain power generation by-products that can be
11 sold for beneficial reuse.

12 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**
13 **PROFESSIONAL EXPERIENCE.**

14 A. My educational background includes a Bachelor of Science in Mechanical
15 Engineering from Rochester Institute of Technology in Rochester, New York and a
16 Master of Science in Management from North Carolina State University in Raleigh,
17 North Carolina. I joined Progress Energy in 2002 in the Engineering Programs
18 Department and then spent thirteen years in Fuels and System Optimization in a
19 number of roles, including coal procurement, byproducts and reagents management
20 and manager of transportation. I then joined the Distributed Energy Technology
21 department and had responsibility for developing new products and services for our
22 customers in the area of distributed energy technologies. My current role in Customer
23 Delivery is managing Customer Delivery's capital investment strategy. I am a
24 Registered Professional Engineer in the states of New York and North Carolina.

1 **Q. HAVE YOU PREVIOUSLY TESTIFIED OR SUBMITTED TESTIMONY**
2 **BEFORE THE NORTH CAROLINA UTILITIES COMMISSION?**

3 A. Yes. I previously testified before the Commission in this docket.

4 **Q. MR. HALM, PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

5 A. My name is John Halm, and my business address is 400 South Tryon Street,
6 Charlotte, North Carolina.

7 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

8 A. I am employed by Duke Energy Business Services, LLC as Lead Byproducts
9 Marketer - CCP. In my current capacity, I manage the synthetic gypsum
10 commercial activities and day to day operations.

11 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**
12 **PROFESSIONAL EXPERIENCE.**

13 A. My educational background includes a Bachelor of Science in Chemical
14 Engineering from Clemson University in Clemson, South Carolina. I began
15 working for Progress Energy in 2009 in the Fuels and System Optimization
16 Department as a Fuels Engineer.

17 **Q. HAVE YOU PREVIOUSLY TESTIFIED OR SUBMITTED TESTIMONY**
18 **BEFORE THE NORTH CAROLINA UTILITIES COMMISSION?**

19 A. Yes. I previously testified before the Commission in this docket.

20 **Q. WHAT IS THE PURPOSE OF THIS REBUTTAL TESTIMONY?**

21 A. The purpose of this rebuttal testimony is to respond on behalf of Duke Energy
22 Progress, LLC (“DEP” or the “Company”) to the Supplemental Testimony of Public
23 Staff witness Jay B. Lucas in this proceeding.

24

1 I. Summary and Background

2

3 Q. PLEASE PROVIDE AN OVERVIEW OF YOUR TESTIMONY.

4 A. In the interest of customers, the Company has sought opportunities to maximize the
5 beneficial reuse of gypsum produced at its coal generating facilities. Beneficial
6 reuse of gypsum provides numerous benefits to customers, including providing a
7 revenue stream for customers, reducing the volume of material needing to be
8 landfilled, and reducing environmental risk.

9

10 At issue in this proceeding is one such beneficial reuse arrangement pursuant to
11 which the Company entered into a long-term agreement to sell substantial quantities
12 of gypsum from its Roxboro and Mayo plants. Each and every one of the
13 Company's decisions in connection with the agreement in question was prudent
14 and reasonable based on what was known at the time. As a result of the
15 arrangement, the Company was ultimately obligated to pay liquidated damages
16 ("LDs") to the buyer. However, even after taking into account the LD payments,
17 the overall transaction has provided a financial benefit to customers and is likely to
18 continue to provide additional benefit to customers in the future. Witness Lucas
19 recommends disallowance of a portion of the LD payments based on a number of
20 very general data points and generalizations. As we will describe, a closer
21 evaluation of the facts and circumstances demonstrates that the Company made
22 prudent and reasonable decisions given what was known at the time—decisions
23 that provided benefit to customers even after taking into account the payment of the
24 LDs.

1 **Q. PLEASE REITERATE YOUR PRIOR TESTIMONY CONCERNING THE**
2 **BACKGROUND OF THIS TRANSACTION.**

3 A. As we previously testified, the Company began pursuit of a long-term gypsum
4 purchase and sale arrangement in 2002 that was projected to provide substantial
5 benefit to customers based on what was known at that time. The Company was
6 ultimately able to reach an agreement pursuant to which a wallboard
7 manufacturer—CertainTeed Gypsum NC, Inc.¹ (“CertainTeed”)—was to construct
8 a manufacturing facility at Roxboro and make a long-term commitment to purchase
9 substantial amounts of gypsum from the Roxboro and Mayo units. This
10 arrangement secured a long-term revenue stream for customers while avoiding
11 landfill and other costs that would otherwise be incurred to manage the gypsum.

12
13 Over the intervening 15+ year period of time, circumstances changed dramatically.
14 Specifically, due to the decrease in natural gas prices, the dispatch of Roxboro and
15 Mayo coal-fired generating units decreased; and therefore, the amount of synthetic
16 gypsum, produced from coal and limestone, also decreased. The Company pursued
17 all reasonable avenues—including fully litigating a complaint brought by
18 CertainTeed in the North Carolina Business Court (“Court”) and prevailing against
19 CertainTeed’s claim that the Company must deliver gypsum from alternative
20 sources at the Company’s cost for the full remaining term of the Agreement.
21 However, the Company ultimately determined that discontinuing supply under the
22 agreement and paying LDs was the most prudent option for customers.

¹ CertainTeed is the successor-in-interest to BPB NC Inc., which negotiated and executed the 2004 Agreement.

1

2

All of the decisions that the Company made during this chain of events was prudent

3

and reasonable given what was known or reasonably should have been known at

4

the time. From the initial decision to enter into a long-term transaction to sell

5

gypsum and thereby avoid landfill and disposal costs, to the decision to dispatch

6

less expensive natural gas-fired units ahead of Roxboro and Mayo coal-fired units

7

in order to provide North Carolina customers the lowest cost energy, to the decision

8

to contest CertainTeed's interpretation of the agreement in Court and, following the

9

Court's decision, to cease supplying synthetic gypsum to CertainTeed under the

10

Agreement and agree to pay LDs, the Company has made the prudent decisions for

11

the benefit of customers.

12

Q. PLEASE DESCRIBE THE EVOLUTION OF THE AGREEMENT.

13

A. The initial gypsum supply agreement was entered into by the parties in 2004

14

("Initial Agreement"). In 2008, the Initial Agreement was amended ("2008

15

Amended and Restated Agreement") as a result of CertainTeed's decision to delay

16

construction of the wallboard manufacturing facility due to the 2008 economic

17

downturn. In 2012, the parties agreed to further amendments ("2012 Amended and

18

Restated Agreement")² based on the projected commercial operation date of the

19

wallboard manufacturing facility.

20

21

Simply stated, there has been a gypsum supply agreement in place and substantially

22

unchanged since 2004, but the parties have amended the agreement on a number of

² The Gypsum Supply Agreement was amended on two other occasions, but such amendments are not relevant to the issue before the Commission.

1 occasions largely due to the need to accommodate the delay of construction of
2 CertainTeed's production facility and the addition of required operational
3 infrastructure. Therefore, for purposes of our testimony, the entirety of the
4 contractual relationship between CertainTeed and DEP will be referred to in our
5 testimony in some places as the "Gypsum Supply Agreement," but when it is
6 necessary to differentiate the three primary iterations of the Gypsum Supply
7 Agreement, we will use "Initial Agreement," "2008 Amended and Restated
8 Agreement," and "2012 Amended and Restated Agreement," respectively.

9 **Q. HAS WITNESS LUCAS ALLEGED ANY IMPRUDENCE WITH RESPECT**
10 **TO THE COMPANY'S DECISIONS CONCERNING THE INITIAL**
11 **AGREEMENT AND THE 2008 AMENDED AND RESTATED**
12 **AGREEMENT?**

13 A. No. Witness Lucas has alleged imprudence only with respect to the 2012 Amended
14 and Restated Agreement.

15 **Q. WAS A FIRM DELIVERY AND ACCEPTANCE OBLIGATION**
16 **INCLUDED FROM THE BEGINNING OF THE GYPSUM SUPPLY**
17 **AGREEMENT?**

18 A. Yes. From the very beginning of the transaction (i.e., execution of the Initial
19 Agreement), a minimum monthly delivery and acceptance obligation was included
20 (and the monthly obligation effectively imposed an annual delivery obligation).
21 Specifically, the Initial Agreement contained a Minimum Monthly Quantity
22 ("MMQ") delivery (on the part of DEP) and acceptance (on the part of CertainTeed)
23 obligation of 50,000 tons, which effectively resulted in annual delivery and
24 acceptance obligation of 600,000 tons per year (subject to 10% variation). These

1 obligations were carried forward into the 2008 Amended and Restated Agreement
2 and, as found by the Court in the CertainTeed litigation, the 2012 Amended and
3 Restated Agreement.

4 **Q. WHY WAS A FIRM DELIVERY AND ACCEPTANCE OBLIGATION AND**
5 **ASSOCIATED LDs AN ESSENTIAL TERM OF THE TRANSACTION?**

6 A. CertainTeed was investing approximately \$200 million to construct a wallboard
7 production facility that was projected to operate for approximately 20-30 years,
8 which required an assurance of supply of gypsum sufficient to justify construction
9 of the production facility.³ At the time of the Initial Agreement, CertainTeed
10 anticipated significant demand for its products and predicted that it would be able
11 to use a significant portion of the gypsum produced from the Company's Roxboro
12 and Mayo plants. Simply stated, no rational investor would have been willing to
13 make such a substantial investment without having an assurance of cost-effective
14 supply of gypsum that would be necessary to sustain operations. And in order to
15 provide protection in the event that DEP could not fulfill the minimum delivery
16 obligation, there needed to be contractual provisions to incent performance.

17

³ This fact was expressly confirmed in the testimony of CertainTeed witnesses in the trial. *See e.g.*, Transcript at 282. (Direct Examination of CertainTeed witness Peter Mayer: "Q. What were BPB's priorities in looking for a location?

A. Well, since we were building a new plant, and didn't have a plant there, we had three primary objectives: One was security of supply, the other was quality, and then the third, of course, was competitive cost.

Q. What do you mean by "security of supply"?

A. Well, "security of supply" means, if we were going to -- we were owned by a parent company in the UK -- we had to justify, obviously, any kind of plant construction to them, and how to justify that is through the sales of gypsum board, and that was -- obviously, we needed gypsum to have that. So security of supply meant we could guarantee...to have that to deliver a return of investment...So that's what we tried to -- ***we definitely needed to convince our parent company that we had a guaranteed amount of gypsum*** to drive the profits, to pay for a return on the investment."(emphasis added).

1 At the same time, from the Company's perspective, there needed to be provisions
2 limiting the financial risk to the Company in the event it was not able to consistently
3 supply the contractually-required amounts over the longer term. In this case, the
4 Company reasonably limited its risk by providing that, if the Company failed to
5 supply the required amount of gypsum for certain periods specified in the
6 Agreement, or if it discontinued the supply of gypsum altogether, its obligation
7 would be limited to the payment of LDs. The LD provision reduced the Company's
8 and its customers' exposure in the event of a long-term disruption in its ability to
9 deliver gypsum. Finally, the minimum acceptance obligations on part of
10 CertainTeed ensured that the stockpile would not grow to an unsafe or
11 unmanageable level.

12 **Q. WAS A FIRM DELIVERY OBLIGATION A STANDARD COMMERCIAL**
13 **TERM IN SIMILAR TRANSACTIONS IN THE INDUSTRY?**

14 A. Yes, it was common in the industry at that time to have longer-term arrangements
15 with minimum delivery and/or purchase obligations and contractual remedies in the
16 event of failure to satisfy the minimum delivery and/or purchase obligation.
17 Wallboard production facilities require a stable supply and minimum volumes to
18 support continuous operation.

19 **Q. WHY WAS IT IMPORTANT THAT THE AGREEMENT ADDRESS BOTH**
20 **DEP'S DELIVERY OBLIGATIONS AND CERTAINTEED'S**
21 **ACCEPTANCE OBLIGATIONS?**

22 A. When gypsum is produced at Roxboro, it is deposited onto a stockpile on the plant
23 site ("Stockpile"). Gypsum from Mayo was transported via truck and deposited on
24 the Stockpile. CertainTeed was responsible managing the Stockpile generally and

1 for loading the gypsum from the Stockpile onto a conveyor belt and transporting it
2 to CertainTeed's wallboard manufacturing facility. The Stockpile was only able to
3 safely accommodate a finite amount of gypsum (approximately 600,000 tons). If
4 CertainTeed failed to accept gypsum (*i.e.*, remove gypsum from the Stockpile), the
5 Stockpile would grow to a point that it would become unsafe and pose
6 environmental risks. In fact, in the early years, CertainTeed was required to take
7 action on numerous occasions due to its failure to accept the MMQ. The Court
8 noted that CertainTeed incurred over \$32,800,000 prior to March 2012 to take and
9 dispose of gypsum before its plant became operational.⁴

10
11 Therefore, CertainTeed had an interest in ensuring adequate supply from DEP to
12 operate its production facility (including an adequate minimum buffer on the
13 Stockpile to ensure adequate volumes in the event of variations in gypsum
14 production) and DEP needed to ensure that CertainTeed accepted (*i.e.*, removed
15 from the Stockpile) sufficient amounts of gypsum to maintain safety, satisfy
16 environmental requirements, and avoid landfill costs on gypsum tons CertainTeed
17 was unable to use. This is relevant to our discussion regarding the proposed
18 revisions to the Gypsum Supply Agreement offered by CertainTeed in 2012 that
19 we address later in our testimony.

20
21 It is also important to understand the role that the Stockpile played in DEP's
22 obligation to satisfy the MMQ. As described above, gypsum from Roxboro and

⁴ Court's Opinion, Para. 62.

1 Mayo was deposited on the Stockpile and then CertainTeed had the sole obligation
2 of removing it from the Stockpile and transporting it via conveyor belt to its facility.
3 So long as there was sufficient gypsum on the Stockpile for CertainTeed to receive
4 50,000 tons of gypsum, then DEP would be deemed to have satisfied its MMQ
5 delivery obligations because there was sufficient gypsum for CertainTeed to accept
6 the MMQ. For instance, if there were 400,000 tons on the Stockpile, but DEP
7 delivered zero tons of gypsum in a particular month, DEP would still be deemed to
8 have satisfied the MMQ because CertainTeed had the ability to receive 50,000 tons
9 from the Stockpile in that month. This issue is relevant to a later portion of our
10 testimony regarding DEP's short-term gypsum production.

11

12 **II. 2012 Amended and Restated Agreement**

13

14 **Q. ONCE AGAIN, HAS PUBLIC STAFF CHALLENGED THE PRUDENCE OF**
15 **THE COMPANY'S DECISION TO ENTER INTO THE INITIAL SUPPLY**
16 **AGREEMENT OR THE 2008 AMENDED AND RESTATED AGREEMENT**
17 **THAT CONTAINED THE MMQ?**

18 A. No.

19 **Q. WHAT DOES WITNESS LUCAS CONCLUDE WITH RESPECT TO THE**
20 **COMPANY'S DECISION TO EXECUTE THE 2012 AMENDED AND**
21 **RESTATED AGREEMENT?**

22 A. Witness Lucas asserts that it was "unreasonable and imprudent for DEP to enter
23 into the 2012 [Amended and Restated] Agreement as it was written, especially

1 when, as was concluded in the lawsuit, DEP was offered the opportunity to enter
2 into a more flexible arrangement.”

3 **Q. WHAT IS YOUR UNDERSTANDING CONCERNING WITNESS LUCAS’**
4 **POSITION?**

5 A. Witness Lucas offers a very generic assertion that the Company should not have
6 entered into the 2012 Amended and Restated Agreement “as it was written.” But,
7 aside from criticizing the Company’s rejection of an allegedly “more flexible
8 arrangement” offered by CertainTeed, Witness Lucas does not articulate any other
9 aspects of the 2012 Amended and Restated Agreement that he alleges to have been
10 imprudent. Later in our testimony, we will explain how Witness Lucas
11 misinterprets the Court’s findings, which concluded that the changes proposed by
12 CertainTeed in 2012, taken together, were not intended to fundamentally change
13 the annual supply obligation and therefore, did not offer any meaningful flexibility.

14 **Q. WITNESS LUCAS REPEATEDLY STATES THAT COMPANY**
15 **“ENTERED INTO THE 2012 AGREEMENT.” PLEASE COMMENT ON**
16 **THESE STATEMENTS.**

17 A. For the sake of clarity, it is important to remember that at the time of the
18 negotiations in question, the Gypsum Supply Agreement was already in place and
19 that DEP and CertainTeed were negotiating a potential amendment to the 2008
20 Amended and Restated Agreement (which was itself an amended version of the
21 Initial Agreement). And the Gypsum Supply Agreement, from its very inception,
22 contained a 50,000 MMQ (which effectively resulted in a 600,000 ton annual
23 obligation) and an associated LD provision. Thus, the alternative to “entering into
24 the 2012 Agreement” was continued performance under the then-existing

1 agreement—the 2008 Amended and Restated Agreement, which contained
2 substantially the same delivery and acceptance obligations that are included in the
3 2012 Amended and Restated Agreement. Therefore, it is not reasonable to criticize
4 the Company for “entering into the 2012 Amended and Restated Agreement” unless
5 there was a potential contractual arrangement with CertainTeed that was preferable
6 to the existing 2008 Amended and Restated Agreement.

7 **Q. DOES MR. LUCAS PROVIDE ANY DETAIL REGARDING THE**
8 **FLEXIBLE ARRANGEMENT OFFERED BY CERTAINTEED AT THE**
9 **TIME OF THE NEGOTIATION OF THE 2012 AMENDED AND**
10 **RESTATED AGREEMENT?**

11 A. No. Witness Lucas simply asserts that CertainTeed made a proposal to provide
12 “flexibility” but fails to assess or even describe the precise nature of the flexibility
13 offered by CertainTeed. In fact, as we will describe in further detail below and as
14 was stated by CertainTeed during the litigation and ultimately determined by the
15 Court, CertainTeed’s proposal was intended only to provide additional flexibility
16 in the event of month-to-month variations in supply, while preserving the annual
17 supply obligation and imposing more onerous stockpile requirements.

18 **Q. WHY IS THAT FAILURE SIGNIFICANT?**

19 A. In assessing whether or not it was imprudent for DEP to reject the majority of the
20 changes proposed by CertainTeed, it is necessary to understand the precise details
21 of what CertainTeed actually offered and assess whether what CertainTeed offered
22 was better than what was already in effect under the Gypsum Supply Agreement.

23

1 **Q. PLEASE EXPLAIN.**

2 A. The delivery and acceptance obligations of the parties under the Gypsum Supply
3 Agreement were measured in three distinct but related ways: (1) monthly delivery
4 and acceptance quantities, (2) annual delivery and acceptance quantities and (3)
5 minimum and maximum Stockpile quantities. “Flexibility” with respect to a
6 party’s monthly delivery or acceptance obligations may be useful in some
7 circumstances, but if the Company’s obligation to satisfy an annual delivery
8 obligation is unchanged or additional obligations to maintain the Stockpile are
9 imposed, the alleged “flexibility” is, at best, only short-term in nature and does not
10 fundamentally alter either party’s respective obligation.

11 **Q. WHAT WAS THE CONTEXT IN WHICH CERTAINTEED FORMALLY**
12 **OFFERED TO REVISE THE SUPPLY TERMS DURING THE**
13 **NEGOTIATIONS OF THE 2012 AMENDED AND RESTATED**
14 **AGREEMENT?**

15 A. CertainTeed provided to DEP a set of proposed redline changes to the Gypsum
16 Supply Agreement. Those changes were identified in the Court trial as Exhibit 23
17 and are attached as DEP Supplemental Exhibit 1.

18 **Q. HOW WOULD CERTAINTEED’S PROPOSED MODIFICATIONS HAVE**
19 **IMPACTED THE PARTIES’ RESPECTIVE DELIVERY AND**
20 **ACCEPTANCE OBLIGATIONS?**

21 A. The modifications proposed by CertainTeed were intended only to provide for
22 greater monthly variability, but left in place the 600,000 ton annual quantity
23 obligations and introduced new and potentially onerous provisions concerning
24 DEP’s obligation to maintain a minimum Stockpile.

1 **Q. DOES THE COURT’S OPINION CONFIRM THIS CONCLUSION?**

2 A. Yes. The Court’s Opinion and Final Judgment dated August 28, 2018 (“Opinion”)
3 specifically assessed the precise contract modification proposed by CertainTeed.
4 The Court concluded as follows: CertainTeed “intended to allow for greater
5 monthly variations while maintaining an annual quantity obligation and requiring
6 a Stockpile Buffer.”⁵ The Court went on to find that CertainTeed’s “proposed
7 changes must be understood and read in conjunction with all of [CertainTeed’s]
8 revisions, including the addition of a Minimum Annual Quantity term, the inclusion
9 of a Stockpile Buffer, and the deletion of the 10% fluctuations clause.”⁶

10 **Q. IN YOUR OPINION, WHY WOULD CERTAINTEED HAVE BEEN**
11 **INTERESTED IN OBTAINING MORE FLEXIBILITY WITH RESPECT**
12 **TO THE MONTHLY DELIVERY AND ACCEPTANCE OBLIGATIONS?**

13 A. Once again, it is important to remember that volume requirements in the Gypsum
14 Supply Agreement applied to both DEP’s delivery and CertainTeed’s acceptance
15 obligations. During the time period in which CertainTeed’s operations were
16 ramping up, CertainTeed was typically unable to accept enough gypsum to satisfy
17 the MMQ. As described above, due to its contractual acceptance obligations,
18 CertainTeed incurred more than \$32 million addressing gypsum that it was not able
19 to receive and utilize at its facility.

20

21 Our belief is that CertainTeed proposed changes in an effort to provide itself with
22 additional flexibility for those months in which it was unable to accept gypsum in

⁵ Court’s Opinion, Para. 111.

⁶ Court’s Opinion at Para. 110.

1 an amount equal to the MMQ, while still ensuring that it had the ability to obtain
2 the full 50,000 tons required per month under the existing Agreement as demand
3 for wallboard and production capabilities increased. Our belief is confirmed by the
4 Court's Opinion, which expressly found that CertainTeed did not intend to ". . .
5 change the MMQ from the fixed volume of 50,000 net dry tons per month, subject
6 to minor fluctuations, to a new variable MMQ based on DEP's actual production at
7 its Roxboro Plant and Mayo Plant."⁷

8 **Q. WHAT WAS THE MINIMUM STOCKPILE OBLIGATION PROPOSED**
9 **BY CERTAINTEED?**

10 A. CertainTeed proposed that DEP would be obligated to maintain the Stockpile at
11 100,000 tons. While there is some ambiguity in CertainTeed's proposal and in the
12 Court's Opinion⁸ regarding whether the minimum Stockpile size was an absolute
13 obligation (regardless of whether DEP satisfied the minimum annual obligation), it
14 is completely clear that DEP remained obligated to satisfy the 600,000 ton annual
15 delivery obligation.

16 **Q. WOULD IT HAVE BEEN PRUDENT FOR DEP TO AGREE TO**
17 **CERTAINTEED'S PROPOSED REVISIONS TO THE GYPSUM SUPPLY**
18 **TERMS?**

19 A. No. It would have been imprudent of the Company to accept CertainTeed's
20 proposed revisions because the proposal did not offer DEP significant advantages
21 over the existing agreement—that is, it left in place a 600,000 annual delivery

⁷ Court's Opinion at Para. 111.

⁸ Court's Opinion at Para. 98. The Court found that under CertainTeed's proposal: "DEP would be required to maintain at least 100,000 net dry tons of Gypsum Filter Cake in the Stockpile at all times, irrespective of what DEP actually produced at its Roxboro Plant and Mayo Plant."

1 obligation and may have imposed obligations related to the Stockpile that were
2 potentially more onerous than those under the existing agreement.

3 **Q. HYPOTHETICALLY SPEAKING, IF DEP HAD ACCEPTED THE**
4 **PROPOSAL OFFERED BY CERTAINTEED, WOULD DEP STILL HAVE**
5 **FOUND ITSELF IN THE SAME POSITION—UNABLE TO SATISFY THE**
6 **MINIMUM DELIVERY OBLIGATIONS?**

7 A. Yes. Even if DEP had accepted the allegedly more “flexible” terms offered by
8 CertainTeed exactly as proposed, DEP would still be in the exact same situation as
9 it is today. Stated differently, while Witness Lucas seems to imply that accepting
10 the CertainTeed proposal would have allowed DEP to satisfy its supply obligations
11 and avoid the payment of LDs; this is incorrect. DEP would have been unable to
12 satisfy the annual delivery requirements or maintain the minimum Stockpile
13 amounts without incurring substantial additional costs to obtain gypsum from
14 sources other than Roxboro and Mayo, and thus would still have had to exercise
15 the right to discontinue supply and pay the LDs as it did in this case.

16 **Q. PLEASE ADDRESS LUCAS SUPPLEMENTAL EXHIBIT 2.**

17 A. Lucas Supplemental Exhibit 2 was a summary document prepared by CertainTeed
18 during the negotiations of the 2012 Amended and Restated Agreement and
19 submitted as evidence in the trial. We have addressed above the actual redline
20 proposed by CertainTeed. The information presented on Lucas Supplemental
21 Exhibit 2 represented an earlier iteration of CertainTeed’s perspective on
22 possibilities related to delivery obligations. Similar to the actual redline proposed
23 by CertainTeed, these scenarios would have introduced a level of short-term
24 flexibility while imposing firm obligations that were either the same as or more

1 onerous than was currently in effect under the 2008 Amended and Restated
2 Agreement.

3 **Q. DID WITNESS LUCAS ADDRESS ANY OF THESE FACTS IN HIS**
4 **TESTIMONY?**

5 A. No. Once again, Witness Lucas only concluded generally that CertainTeed offered
6 flexibility, but never explored precisely what the flexibility entailed or how it would
7 have affected the monthly, annual, and stockpile supply obligations to provide
8 greater benefits without introducing greater risks.

9 **Q. ONCE AGAIN, AT THE TIME OF NEGOTIATIONS REGARDING THE**
10 **2012 AMENDED AND RESTATED AGREEMENT, DID CERTAINTEED**
11 **ALREADY HAVE CERTAINTY REGARDING SUPPLY?**

12 A. Yes, as a result of the then-effective language in the Gypsum Supply Agreement,
13 CertainTeed had assurance that it would receive 50,000 tons per month and 600,000
14 tons per year (subject to 10% variation). As the Court found, CertainTeed did not
15 intend those terms to change when it made its proposed revisions to the 2012
16 Agreement.⁹

17 **Q. GIVEN THIS PRE-EXISTING SUPPLY CERTAINTY, DO YOU BELIEVE**
18 **THAT THERE IS ANY SCENARIO IN WHICH CERTAINTEED WOULD**
19 **HAVE BEEN WILLING TO RELINQUISH THE SUPPLY CERTAINTY**
20 **THAT IT ALREADY HAD?**

21 A. No. As discussed above, CertainTeed invested \$200+ million in its production
22 facility and there is no reasonable scenario in which CertainTeed would voluntarily

⁹ Court's Opinion at Para. 111.

1 waive its pre-existing minimum delivery rights and risk not being able to fully
2 leverage its investment, particularly in light of the fact that there were no other
3 economically viable sources of gypsum for the facility.

4 **Q. WAS THIS VIEW CONFIRMED IN THE LITIGATION?**

5 A. Yes. CertainTeed testified repeatedly that it would not have voluntarily waived
6 DEP's firm delivery commitments that CertainTeed had already obtained in the
7 Gypsum Supply Agreement.¹⁰ The Court found this testimony persuasive and
8 concluded that CertainTeed did not intend to relinquish its fundamental supply
9 rights when negotiating the 2012 Agreement. The Court further concluded that,
10 while CertainTeed was willing to offer some monthly flexibility, it never intended
11 to change the MMQ from the fixed volume of 50,000 net dry tons per month to a
12 variable MMQ based on DEP's actual production at Roxboro and Mayo. Thus,
13 there is no scenario that is supported by the evidence or common sense to suggest
14 that CertainTeed ever would have relinquished its right to an assured supply of
15 gypsum at the levels provided under the existing agreement.

16

¹⁰ See FN 3. See also Trial Transcript at 136. (Direct Examination of CertainTeed witness Engelhardt: "Q. So, Mr. Engelhardt, what were you contemplating in connection with your thinking about flexibility with regard to the 2008 contract requirement that Duke supply and CTG accept 600,000 tons a year?

A. *I still wanted to preserve the 600,000 tons a year, because that was the -- that was the long-term security and stable supply that we needed.*" (emphasis added); Trial Transcript at 406 (Direct Examination of Robert Morrow: "Q. Mr. Morrow, when you agreed to this provision and executed the 2008 agreement, did you think that Section 3.9 could operate as an excuse to Progress Energy's performance of its delivery obligations?

A. Absolutely not. *We would never have signed an agreement that obligated us to build a factory without a guaranteed supply of gypsum.*"(emphasis added)).

1 **Q. PLEASE SUMMARIZE YOUR TESTIMONY WITH RESPECT TO THIS**
2 **ISSUE.**

3 A. While Witness Lucas asserts that the Company’s rejection of CertainTeed’s
4 proposed “flexibility” was imprudent, the facts, as clearly described in the
5 testimony of CertainTeed’s witnesses and in the Court’s Opinion, make clear that
6 the “flexibility” offered by CertainTeed did not eliminate the annual delivery
7 obligation. Further, as we have discussed, those proposed changes would have
8 potentially imposed a more onerous minimum Stockpile obligation on DEP.
9 Because CertainTeed’s proposal did not fundamentally change the existing supply
10 obligation and potentially imposed more onerous requirements, it was prudent and
11 reasonable for DEP to reject CertainTeed’s proposal. Simply stated, what
12 CertainTeed offered was, at best, no better, and at worst, potentially more
13 burdensome than what was already required in the Gypsum Supply Agreement.
14 Therefore, it was not imprudent for the Company to reject CertainTeed’s proposal.
15 Furthermore, based on CertainTeed’s testimony at trial and the conclusions of the
16 Court, there was no realistic scenario under which CertainTeed would have been
17 willing to agree to terms that would have significantly reduced DEP’s supply
18 obligation, which was a right that CertainTeed had carefully bargained for under
19 all prior versions of the Gypsum Supply Agreement.

20

21

1 arrangement that did not provide assurance of adequate supply, Witness Lucas
2 oversimplifies the complexity of projecting gypsum production and draws a very
3 specific conclusion from very general facts.

4 **Q. PLEASE PROVIDE AN EXAMPLE.**

5 A. Witness Lucas highlights the fact that the capacity factors of the Sutton and H.F.
6 Lee plants were declining in the period of 2010 – 2012 and the Company had in
7 place plans to retire the units. Certainly, there is no doubt that actual coal
8 generation was generally declining over this period (though there were exceptions
9 as is noted below). There is also obviously no dispute that the Company was
10 making disciplined, strategic decisions to retire some of its smaller, less efficient
11 coal-generating units such as Sutton and H.F. Lee. But it is a leap of tremendous
12 proportion to conclude from these facts that the Company had sufficient
13 information to definitively conclude that it would be unable to satisfy its gypsum
14 supply obligation over a 17-year time period.

15
16 It is also not accurate to assume (as Witness Lucas appears to do) that gypsum
17 production bears a linear relationship to capacity factors. There are many factors
18 that influence actual gypsum production in addition to capacity factors. For
19 instance, coal with a 3% sulfur content (*e.g.*, Illinois Basin coal) will produce three
20 times as much gypsum as a 1% sulfur content (*e.g.*, Central Appalachian coal) for
21 the same volume of coal burn with similar heat content. Similarly, limestone purity
22 and SO₂ removal efficiency can have a material impact on the amount of synthetic
23 gypsum produced from a coal-fired unit independent of the unit's capacity factor.

24

1 In fact, during the time period during which the parties were negotiating the 2012
2 Amended and Restated Agreement, DEP was performing testing of various
3 combinations of Illinois Basin coal at Roxboro and Mayo. As discussed above, use
4 of higher sulfur coal would, all things being equal, increase the amount of gypsum
5 being produced.

6 **Q. WHERE ELSE DOES WITNESS LUCAS' RELIANCE ON GENERAL**
7 **FACTORS UNDERMINE HIS ANALYSIS?**

8 A. Lucas Table 2 provides a summary of actual capacity factors and heat rates at
9 Belews Creek, Marshall, Roxboro, and Mayo during the period 2010-2012.
10 Witness Lucas introduces the information to demonstrate the alleged impact of the
11 Joint Dispatch Agreement (“JDA”), which we address further below. However, the
12 chart itself shows that the Roxboro capacity factor actually increased between 2011
13 and 2012. Furthermore, the Company has determined that there was a major
14 scheduled outage at Roxboro Unit 2 in 2011 that would have impacted the capacity
15 factor in 2011. This simply illustrates why it is inappropriate to draw such general
16 conclusions from a narrow scope of information relevant only, and particular to, a
17 short period of time.

18 **Q. WHAT DOES WITNESS LUCAS ALLEGE WITH RESPECT TO THE**
19 **JDA?**

20 A. Witness Lucas alleges that “DEP should have realized at the time of the negotiation
21 and execution of the 2012 Agreement that the Roxboro and Mayo units were likely
22 to be dispatched less due to the JDA.”
23

1 **Q. PLEASE COMMENT ON THIS ASSERTION.**

2 A. We disagree with this assertion. Witness Lucas ignores the practical reality
3 regarding the timing of the merger and approval of the JDA and is incorrect with
4 respect to the impact of the JDA.

5 **Q. EVEN IF THE JDA WAS EXPECTED TO DECREASE THE DISPATCH**
6 **OF ROXBORO AND MAYO, IS IT REASONABLE TO ASSERT THAT**
7 **DEP SHOULD HAVE TAKEN THAT INTO ACCOUNT IN**
8 **NEGOTIATING THE 2012 AMENDED AND RESTATED AGREEMENT?**

9 A. No. The negotiations regarding the 2012 Amended and Restated Agreement
10 commenced in June 2011, well before there was any degree of certainty regarding
11 the outcome of the merger and before important aspects of the JDA were solidified.
12 The parties had largely resolved the major commercial terms of the 2012 Amended
13 and Restated Agreement by February 2012, well before there would have been
14 certainty regarding the merger or the ultimate impact of the JDA. It is, therefore,
15 unreasonable to assert that the Company had sufficient clarity regarding
16 consummation of the merger or the definitive impacts of the JDA that it should
17 have relied on to seek a different commercial arrangement (which, for all of the
18 reasons discussed above, CertainTeed would not have granted).

19 **Q. WERE THE TERMS OF THE JDA FINALIZED PRIOR TO THE**
20 **COMMISSION'S APPROVAL OF THE MERGER ON JUNE 29, 2012?**

21 A. No. While neither of us had any direct role in the merger proceeding or the
22 development of the JDA, we have been advised that it was not possible to have
23 finalized the JDA prior to the Commission's approval of the merger. As DEP
24 witness Mr. Alexander Weintraub states in his initial testimony in the merger

1 proceeding,¹¹ DEC and DEP could not share proprietary information prior to
2 approval of the merger. While the Compass Lexecon Analysis of Economic
3 Efficiencies under Joint Dispatch (Exhibit 4 to the Merger Application) projected
4 total savings from the JDA over a five-year period, it also described the complexity
5 of the JDA and that many issues other than fuel costs had to be considered. Many
6 of these issues could not be resolved until the merger was approved and proprietary
7 information could be shared and analyzed.

8 **Q. ON PAGE 12 OF HIS TESTIMONY, WITNESS LUCAS QUOTES FROM**
9 **MR. WEINTRAUB’S FURTHER SUPPLEMENTAL TESTIMONY IN THE**
10 **MERGER PROCEEDING AND SUGGESTS THAT TESTIMONY**
11 **DEMONSTRATES THAT THE JDA WOULD IMPACT THE DISPATCH**
12 **OF ROXBORO AND MAYO. DO YOU AGREE?**

13 A. No, I do not, and the quote that Witness Lucas uses actually leads to the opposite
14 conclusion. In the testimony quoted by Witness Lucas, Mr. Weintraub states, in
15 part, “Roxboro and Mayo are coal plants and to the extent the operation of the JDA
16 impacts the dispatch of Roxboro and Mayo, PEC...agreed to hold the North
17 Carolina Eastern Municipal Power Agency (“NCEMPA”) harmless from any
18 negative impacts to the JDA.” This was simply an acknowledgment that the
19 NCEMPA has a contractual right to capacity from Mayo and Roxboro and that its
20 economic interests would be protected. Mr. Weintraub did not say that Mayo and
21 Roxboro units were going to be dispatched or used for any purpose other than native
22 load generation. In fact, Mr. Weintraub’s, use of the words “to the extent” certainly

¹¹ Docket Nos. E-2, Sub 998 and E-7, Sub 986.

1 suggests that no decision had been made and that it was possible that no changes
2 would transpire at either Roxboro or Mayo.

3 **Q. IS IT TRUE THAT THE JDA HAS RESULTED IN LESS GENERATION**
4 **FROM ROXBORO AND MAYO?**

5 A. No. The JDA did not reduce the amount of generation at Mayo and Roxboro.
6 Rather, the primary cause of the reduced generation is lower gas prices.

7 **Q. WAS THE IMPACT OF THE JDA ON THE DISPATCH OF MAYO AND**
8 **ROXBORO CONSIDERED IN THE COURT CASE?**

9 A. Yes. DEP witness Eric Grant testified in the Court's proceeding that the JDA had
10 not caused the reduction in dispatch from Roxboro and Mayo. As Mr. Grant
11 testified at the time of the trial, 80% of the megawatt hours had flowed from DEP
12 to DEC under the JDA.¹²

13 **Q. WHAT WAS THE COURT'S CONCLUSION ON THIS ISSUE?**

14 A. The Court agreed with the Company's position. Specifically, the Court rejected the
15 position of CertainTeed in the proceeding that the JDA caused a reduction in DEP's

¹² Trial Transcript at 873-74 ("Q. So the four Roxboro units and the Mayo unit would be run more often if they weren't committed and dispatched collectively with the DEC units?

A. No. I don't think you can make that inference. As I said before, given joint dispatch -- since joint dispatch was put in place, 80 percent of the megawatt hours have -- approximately 80 percent of the megawatt hours have flowed from DEP to DEC. Hence, there would be very little opportunity then for having DEC assets displace DEP assets.

Q. Can you explain that a little bit more?

THE COURT: First of all, had he finished?

Q. Please finish. I apologize for cutting you off.

A. Yeah. So given the fact that we've had that kind of transfer, plus the transfer going from DEP to DEC would allow you to keep units on typically more often and wouldn't have to cycle them off because at night when you have lower minimums on, say, the DEP system and something would have to come off, the fact that you can transfer energy to DEP -- or to DEC would allow you to keep those units on. So you may -- you may actually see an increase in the capacity factors in those units. Again, the primary -- the primary -- my reason for saying this is, again, almost 80 percent of the megawatt hours have flowed, since joint dispatch came into being, from DEP to DEC. So I don't think that materially you would have any reduction in capacity factors for Roxboro and Mayo as a result of joint dispatch.")

1 production of synthetic gypsum, stating as follows: “[t]he Court finds [the position
2 that DEP’s reduced production of synthetic gypsum is, in part, caused by its
3 decision to enter into the Joint Dispatch Agreement with DEC] to be speculative,
4 and that the more probative evidence from [DEP’s witness] suggests that it is more
5 likely that DEP has operated its coal-fired plants more frequently than it would have
6 had it not entered the Joint Dispatch Agreement.”¹³

7 **Q. WITNESS LUCAS ALSO POINTS TO CERTAIN GYPSUM FORECASTS**
8 **OF THE COMPANY. PLEASE RESPOND.**

9 A. Witness Lucas references two forecasts in his testimony, both of which were short-
10 term in nature (one forecast was 12 months and the other was 18 months). While
11 it is true that these two forecasts projected gypsum production levels lower than the
12 MMQ over a short-term period, Witness Lucas fails to take into account two
13 significant factors. First, as discussed above, DEP’s obligation to satisfy the MMQ
14 must be understood in the context of the Stockpile. As discussed above, DEP would
15 be deemed to satisfy the MMQ so long as the Stockpile contained sufficient gypsum
16 to allow CertainTeed to accept (*i.e.*, withdraw) 50,000 tons from the Stockpile.
17 During the 2011-2012 time period, the Stockpile was near the maximum capacity,
18 and therefore, there was no scenario where DEP would be deemed to have failed to
19 provide the MMQ in the short term, even if the actual gypsum production from
20 Roxboro and Mayo was less than 50,000 tons per month. Therefore, the fact that
21 the short-term forecasts show monthly production less than 50,000 tons does not
22 mean that DEP did not have confidence in its ability to satisfy the MMQ in the short

¹³ Court’s Opinion at Para. 182.

1 term (and it is worth noting that actual gypsum production for that period
2 substantially exceeded projections in many of those months).

3
4 Second and more importantly, the issue is not whether DEP would have been able
5 to satisfy its delivery obligation over a single year. Instead, the question is whether
6 DEP could satisfy its delivery obligation over the entire term of the Gypsum Supply
7 Agreement.

8 **Q. PLEASE SUMMARIZE THIS PORTION OF YOUR TESTIMONY.**

9 A. Once again, we disagree with the premise of Witness Lucas that DEP had the ability
10 to alter the existing Gypsum Supply Agreement to eliminate, or materially modify,
11 DEP's fundamental delivery obligations. Nevertheless, even if one were to assume
12 that DEP had the ability to meaningfully amend its firm delivery obligations, DEP
13 did not have sufficient information at the time of the negotiations of the 2012
14 Amended and Restated Agreement to indicate that it would be unable to satisfy its
15 delivery obligations over the long term.

16
17 **IV. Benefit to Customers**

18
19 **Q. TURNING NOW TO THE ACTUAL AMOUNT AT ISSUE: HOW DOES**
20 **WITNESS LUCAS ULTIMATELY ARRIVE AT THE AMOUNT OF HIS**
21 **DISALLOWANCE RECOMMENDATION?**

22 A. While Witness Lucas recommends disallowance of the LDs, he makes an
23 adjustment to account for the fact that "DEP would have had to dispose of gypsum
24 it did not sell to CertainTeed." In other words, had DEP not entered into the

1 Gypsum Supply Agreement and received revenue for synthetic gypsum produced
2 at Roxboro and Mayo, it would have had to incur costs to handle and landfill the
3 synthetic gypsum.

4 **Q. WHAT ANALYSIS FORMS THE BASIS FOR WITNESS LUCAS'**
5 **RECOMMENDED DISALLOWANCE AMOUNT?**

6 A. Witness Lucas utilizes certain hindsight analysis performed by the Company and
7 described in our rebuttal testimony. As we explained in our rebuttal, we have been
8 advised by the Company's counsel that the Commission's standard for determining
9 prudence is whether management decisions were made in a reasonable manner and
10 at an appropriate time on the basis of what was reasonably known or reasonably
11 should have been known at the time the decision was made. Further, we have been
12 advised that the Commission has determined that hindsight analysis is not permitted
13 for purposes of assessing prudence. However, in this case, Witness Lucas is using
14 the hindsight analysis not to assess prudence but instead to assess the amount of
15 disallowance.

16
17 The Company's hindsight analysis that Witness Lucas relied on netted the revenue
18 stream from sales based on actual gypsum production against the LD payments,
19 avoided landfill costs, and avoided stockpile costs. The premise of the analysis is
20 that had the Company not entered into the Gypsum Supply Agreement, it would
21 have had to incur substantial expenses to handle and landfill the gypsum (rather
22 than receiving revenue from CertainTeed).

23

1 **Q. WHAT DID THAT HINDSIGHT ANALYSIS SHOW?**

2 A. The hindsight analysis showed that even after taking into account the LD payments
3 owed by the Company, customers received an approximate \$55 million of benefit
4 as a result of the Gypsum Supply Agreement. That is, after netting out the LD
5 payment, costs to customers were still \$55 million lower than would have been the
6 case without the Gypsum Supply Agreement.

7 **Q. WHAT IS THE IMPORTANCE OF THE ANALYSIS?**

8 A. The hindsight analysis shows that even if the decisions of the Company in
9 connection with the 2012 Amended and Restated Agreement were imprudent
10 (which the Company emphatically denies), customers have not actually been
11 harmed but, instead, have benefited from the Gypsum Supply Agreement.

12 **Q. WHAT ADJUSTMENT DID WITNESS LUCAS MAKE TO THE**
13 **COMPANY'S HINDSIGHT ANALYSIS TO ARRIVE AT HIS**
14 **DISALLOWANCE RECOMMENDATION?**

15 A. Witness Lucas simply decreased the assumed landfill cost for gypsum. By utilizing
16 a lower assumed landfill cost, Witness Lucas changes the outcome of the
17 Company's hindsight analysis from a \$55 million benefit to a \$43 million
18 detriment. Witness Lucas then eliminates the avoided pile management costs to
19 arrive at a total \$46 million detriment.

20 **Q. WHAT WAS THE SOURCE OF WITNESS LUCAS' ASSUMED LANDFILL**
21 **COST?**

22 A. Witness Lucas relied on Business Analysis Package ("BAP") that was prepared in
23 2008 in support of the Company's decisions regarding the conveyor system. In the

1 BAP, DEP identified an estimated cost to landfill of \$6 and \$9 per ton for Roxboro
2 and Mayo gypsum, respectively.

3 **Q DOES WITNESS LUCAS MAKE ANY DETAILED ASSESSMENT OF THE**
4 **LANDFILL COSTS IDENTIFIED IN THE DOCUMENT?**

5 A. No. Witness Lucas did not inquire further regarding the basis or assumptions
6 underlying the estimate.

7 **Q. PLEASE COMMENT ON THE PER TON LANDFILL COSTS**
8 **IDENTIFIED IN THE BAP.**

9 A. It appears that the landfill cost in the BAP only reflected the incremental cost of
10 transporting and placing the gypsum in existing landfills at Roxboro and Mayo.

11 **Q. WHY WOULD THE BAP HAVE ONLY TAKEN INTO ACCOUNT THE**
12 **INCREMENTAL COSTS?**

13 A. Given the context, the Company likely took into account a very conservative,
14 minimal estimate for purposes of assessing the conveyor belt decision.

15 **Q. WHAT WOULD BE NECESSARY TO DETERMINE THE**
16 **HYPOTHETICAL LANDFILL COST OF THE AMOUNT OF GYPSUM**
17 **THAT WAS PURCHASED BY CERTAINTEED UNDER THE GYPSUM**
18 **SUPPLY AGREEMENT?**

19 A. Approximately 4.5 million tons of gypsum were received by CertainTeed under the
20 Gypsum Supply Agreement. Therefore, one would have to attempt to recreate the
21 manner in which 4.5 million tons of gypsum would have been disposed over the
22 period of 2009 – 2018.

23

1 To landfill this amount of gypsum, the Company would have had to construct four
2 new cells at Roxboro/Mayo. The cost of these additional cells (construction costs
3 and capping, water management, labor and infrastructure) all would have been
4 incurred in addition to the costs of loading and unloading. In addition to the costs
5 of construction, DEP would have incurred EHS and post-closure maintenance
6 costs.

7 **Q. DID WITNESS LUCAS' TESTIMONY ADDRESS ANY OF THESE**
8 **FACTORS?**

9 A. No.

10 **Q. WHAT EVIDENCE DOES THE COMPANY HAVE TO CONFIRM THAT**
11 **THE LANDFILL COST IDENTIFIED IN THE BAP WAS A**
12 **CONSERVATIVE, INCREMENTAL-ONLY COST AND NOT THE FULL**
13 **COST?**

14 A. Under the terms of the Gypsum Supply Agreement, when CertainTeed failed to
15 accept the required amounts of gypsum, it was responsible for paying DEP for the
16 cost of disposing of such gypsum. As identified by the Court, in 2009, a separate
17 amendment was executed "pursuant to which CertainTeed agreed to incur the
18 expense to landfill at least 80,000 tons of Gypsum Filter Cake at the DEP on-site
19 landfill."¹⁴ In other words, CertainTeed agreed to pay the actual landfill cost for
20 gypsum at Roxboro.

21

¹⁴ Court's Opinion at Para. 67.

1 Q. WHAT WAS THE APPROXIMATE PER TON PRICE THAT
2 CERTAINTEED PAID TO LANDFILL GYPSUM AT ROXBORO?

3 A. \$26 per ton.

4 Q. HAS THE COMPANY PERFORMED ANY ADDITIONAL ANALYSIS
5 REGARDING THE COST OF LANDFILL?

6 A. Yes, the Company performed additional analysis for purposes of this testimony to
7 assess the current cost of landfilling 4.5 million tons of gypsum (*i.e.*, the
8 approximate amount of gypsum purchased by CertainTeed between 2009 – 2018).

9 Q. WHAT DID THAT ANALYSIS SHOW?

10 A. The current estimated cost to construct and landfill 4.5 million tons of gypsum is
11 approximately \$22 per ton.

12 Q. WHAT OTHER BENEFITS DOES WITNESS LUCAS FAIL TO ACCOUNT
13 FOR IN HIS ANALYSIS?

14 A. As a result of entering into the agreement with CertainTeed, [BEGIN

15 CONFIDENTIAL] [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] [END CONFIDENTIAL]

22 Q. WHAT IS PILE MANAGEMENT AND WHY IS IT IMPORTANT?

23 A. As gypsum is produced at Roxboro, it is deposited in a short-term pile. This short-
24 term pile has a limited capacity; therefore, in order to continue to operate the plant,

1 the gypsum must be moved to the larger Stockpile. Therefore, proper management
2 of the short-term pile is essential for plant operation.

3

4 Once gypsum is placed on the Stockpile (whether from Roxboro or Mayo), there is
5 a substantial amount of work that is needed to manage the pile to ensure safety and
6 compliance with applicable environmental requirements (e.g., fugitive dust
7 suppression) and maximize use of the Stockpile for efficient retrieval of gypsum,
8 which is being beneficially reused. All of these tasks are essential for operation of
9 the plant and sales of the gypsum.

10 **Q. WHO WAS RESPONSIBLE FOR PILE MANAGEMENT UNDER THE**
11 **GYPSUM SUPPLY AGREEMENT?**

12 A. CertainTeed.

13 **Q. WHAT IS WITNESS LUCAS'S POSITION WITH RESPECT TO PILE**
14 **MANAGEMENT COSTS?**

15 A. For purposes of his disallowance recommendation, Witness Lucas eliminates the
16 pile management costs.

17 **Q. DOES WITNESS LUCAS EXPLAIN WHY HE ELIMINATED THE PILE**
18 **MANAGEMENT COSTS?**

19 A. No.

20 **Q. DO YOU BELIEVE IT WAS APPROPRIATE TO ELIMINATE THE PILE**
21 **MANAGEMENT COSTS?**

22 A. No. Pile management is necessary and there is no basis for ignoring those tangible
23 costs or the benefits that customers received due to CertainTeed bearing the cost
24 for those activities, which would otherwise be borne by the Company.

1 **Q. PLEASE SUMMARIZE THIS PORTION OF YOUR TESTIMONY.**

2 A. Even if one were to conclude that the Company's decisions with respect to the 2012
3 Amended and Restated Agreement were imprudent, customers have not been
4 harmed but, instead, have benefited overall from the Gypsum Supply Agreement,
5 including the amendments reflected up to and through the 2012 Amended and
6 Restated Agreement because customers have received a net benefit when costs
7 under the Gypsum Supply Agreement (including the payment of LDs) and avoided
8 landfill and pile management costs are netted against the revenues received by DEP.
9

10 **V. Judgment Payment**

11
12 **Q. WHAT DOES WITNESS LUCAS RECOMMEND WITH RESPECT TO**
13 **THE JUDGMENT PAYMENT?**

14 A. Witness Lucas recommends disallowing the Judgment Payment of \$1,084,216
15 from recovery. Witness Lucas states that "[t]he trial court ordered the Judgment
16 Payment because DEP breached the 2012 Agreement by not delivering the
17 contractual amount of gypsum, and CertainTeed had to purchase gypsum at a higher
18 cost."

19 **Q. WHAT WAS THE JUDGMENT PAYMENT?**

20 A. The judgment payment arose from the fact that the court found that DEP had failed
21 to meet the MMQ in certain months. During those months, DEP supplied gypsum
22 from DEC and CertainTeed agreed to pay the transportation costs, subject to
23 resolution of the court case. DEP incurred actual freight costs on tons of gypsum
24 supplied from DEC. Having invoiced CertainTeed and been reimbursed for these

1 costs, but then compelled by the Court to return that reimbursement, the Company
2 is now in the position of having incurred costs (freight costs) on the sale of a
3 byproduct in the amount of \$1,010,938.20 for which the Company has not yet been
4 granted cost recovery.

5 **Q. IS THERE ANY REASON TO DISTINGUISH THE TREATMENT OF THE**
6 **JUDGMENT PAYMENT FROM THE LDs?**

7 A. No, both the Judgment Payment and the LDs result from the same set of facts (that
8 is, DEP's inability to satisfy the MMQ and the parties' exercise of their respective
9 rights and obligations considering such failure). Therefore, because the Company
10 believes that its decision to enter into the 2012 Amended and Restated Agreement
11 was prudent, both the LDs and the Judgment Payment should be recoverable costs.

12 **Q. PLEASE COMMENT ON THE AMOUNT OF THE JUDGMENT**
13 **PAYMENT RECOMMENDED FOR DISALLOWANCE BY WITNESS**
14 **LUCAS.**

15 A. Witness Lucas recommends disallowance of the entire Judgment Payment
16 (\$1,084,216). However, the NC portion of the Judgment Payment requested for
17 recovery in this case, is only \$619,225.99, which excludes the interest component.

18 **Q. DOES THIS CONCLUDE YOUR PRE-FILED SUPPLEMENTAL**
19 **REBUTTAL TESTIMONY?**

20 A. Yes, it does.

From: Engelhardt, Dave <Dave.Engelhardt@saint-gobain.com>
Sent: Friday, October 21, 2011 10:47 AM
To: Coppola, Barbara
Subject: FW: Revised Agreement draft

Barbara,

These should be unzipped. Let me know if these work.

Dave

From: Engelhardt, Dave
Sent: Thursday, October 20, 2011 5:03 PM
To: 'Coppola, Barbara'
Subject: Revised Agreement draft

Barbara,

Attached are two copies of the Revised Agreement, one is red-lined for ease of seeing all changes we made, and the second is a clean version of same.

While there may appear to be a lot of changes, the items changed are related to:

- Changing to an annual production/annual usage philosophy with the stockpile as buffer, ranging between a low of 100,000 tons and an maximum of 600,000 tons;
- Addresses risks in regulation changes such as metals in wallboard
- Legal clarifications/corrections

Also, we need to add two elements to the specifications as we discussed when we last met. I am trying to obtain the ASTM standard that would be used for measure of each. The first is an issue if limestone with high manganese is used in the desulfurization process; the second is becoming regulatory.

- Mn, water soluble, Maximum of 3 mg/kg
- Hg Maximum of 1.3 mg/kg

Let me know when you wish to discuss further.

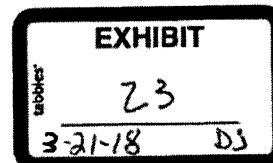
Thanks,

**Dave Engelhardt • Senior VP-Operations & General Manager Finishing • Office 813.286-3905 •
 Mobile 813.505.3212 • Fax 813.286-3990**

CertainTeed Gypsum

www.CertainTeed.com/Gypsum

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SECOND AMENDED AND RESTATED SUPPLY AGREEMENT

This **Second Amended and Restated Supply Agreement** (the "**Revised Agreement**") is made and entered into to be effective as of the ___ day of _____ September, 2011 (the "**Effective Date**"), by and between CertainTeed Gypsum NC, Inc. successor by name-change to BPB Production Inc, f/k/a BPB NC Inc., a Delaware corporation, with its principal business address at 4300 W. Cypress Street, Tampa, Florida 33607 ("**CertainTeed**") and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc., a North Carolina corporation, with its principal business address of 410 South Wilmington Street, Raleigh, North Carolina 27601 ("**Progress Energy**").

BACKGROUND

- A. Progress Energy is a public utility company which owns (in whole or in part) and operates (i) a coal-fired electric power generating plant located near Roxboro, North Carolina (the "**Roxboro Plant**"), consisting of a 385 megawatt nominal rating generating unit known as "**Roxboro Unit 1**", a 670 megawatt nominal rating generating unit known as "**Roxboro Unit 2**", a 707 megawatt nominal rating generating unit known as "**Roxboro Unit 3**", and a 700 megawatt nominal rating generating unit known as "**Roxboro Unit 4**", and (ii) a coal-fired electric power generating plant located near Roxboro, North Carolina (the "**Mayo Plant**"), consisting of a 745 megawatt nominal rating generating unit known as "**Mayo Unit 1**". Each of Roxboro Unit 1, Roxboro Unit 2, Roxboro Unit 3, Roxboro Unit 4 and Mayo Unit 1 are a "**Unit**" and together the "**Units**".
- B. Progress Energy ~~plans to install~~ has installed flue gas desulfurization equipment at its Roxboro Plant and Mayo Plant, which will produce substantial quantities of synthetic gypsum.
- C. CertainTeed is engaged in the business of manufacturing gypsum board and other related products.
- D. Progress Energy desires to sell synthetic gypsum to be produced at its Roxboro Plant and its Mayo Plant, and CertainTeed desires to purchase, accept, and take title to the synthetic gypsum.
- E. Progress Energy and BPB NC Inc previously entered into that certain Supply Agreement dated February 12, 2004 (the "**Original Agreement**") for the purposes set forth above.
- F. BPB NC Inc. later changed its name to BPB Production Inc. with the Delaware Secretary of State.
- G. BPB Production Inc. has acquired from Progress Energy 121.605 acres of land in

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Person County, North Carolina, by Special Warranty Deed dated August 1, 2005, and recorded in Book 547, Page 742, Person County Register of Deeds, which land is also described in Attachment C of this Revised Agreement (the "CertainTeed Site"), on which CertainTeed plans to construct and operate the CertainTeed Manufacturing Plant (as defined below).

~~G.H.~~ On December 20, 2006, BPB Production Inc. changed its name to CertainTeed Gypsum NC, Inc. with the Delaware Secretary of State as a result of the acquisition of the parent company of BPB Production, BPB plc by Saint-Gobain SA.

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~~H.BPB Production Inc. Inc. acquired from Progress Energy 121.605 acres of land in Person County, North Carolina, by Special Warranty Deed dated August 1, 2005, and recorded in Book 547, Page 742, Person County Register of Deeds, which land is also described in Attachment C of this Revised Agreement (the "CertainTeed Site"), on which CertainTeed plans to construct and operate the CertainTeed Manufacturing Plant (as defined below).~~

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- I. Progress Energy and CertainTeed executed the Amended and Restated Supply Agreement effective March 28, 2008 (as subsequently amended the "Amended Agreement") which amended and superseded the Original Agreement.
- J. Progress Energy and CertainTeed desire to further amend the Amended Agreement and supersede and replace the Amended Agreement in its entirety as of the Effective Date set forth above by entering into this Revised Agreement as more specifically set forth below herein.

Accordingly, in consideration of the mutual covenants and agreements set forth below, CertainTeed and Progress Energy agree as follows:

ARTICLE 1 – DEFINITIONS

- 1.1 "Additional Gypsum" shall mean Gypsum Filter Cake used at the CertainTeed Manufacturing Plant or any Gypsum Delivery Site(s) in excess of the Minimum Monthly Quantity.
- 1.2 "Affiliate" shall mean with respect to a Party, any other entity that directly or indirectly controls, is controlled by, or is under common control with the Party. For purposes of this definition, "control" shall mean the possession directly or indirectly of the power to direct or cause the direction of the management or policies of such Party, or direct or indirect ownership of, or direct or indirect power to vote more than fifty (50%) percent of the outstanding voting securities or voting equity interest of such Party.
- 1.3 "Annual Meeting" shall have the meaning set forth in Section 7.1.
- 1.4 "CertainTeed Conveyor" means the new conveyors connecting to the Diverter Tower known as "G3A" and "G3B" to be constructed by CertainTeed hereunder, together with

all of the conveyor known as "G4" leading to the CertainTeed Site, all as more specifically shown in Attachment ___ attached hereto and incorporated herein by reference.

1.5 "CertainTeed Manufacturing Plant" shall mean the gypsum storage facility, gypsum board manufacturing facilities, distribution facilities, and all ancillary equipment and facilities located at the CertainTeed Site.

1.6 "CertainTeed Site" shall have the meaning set forth in paragraph H G of the recitals.

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1.7 "Commercial Operation" with respect to the CertainTeed Manufacturing Plant means the commencement of production and sale of gypsum wallboard from the CertainTeed Manufacturing Plant and the consistent utilization at the CertainTeed Manufacturing Plant of at least ~~30,000~~ 25,000 Net Dry Tons of Gypsum Filter Cake per month and with respect to the Loading Facility means the commencement of loading of Gypsum Filter Cake into railcars at a rate that would allow for the loading of at least the Minimum Monthly Quantity of Gypsum Filter Cake into such railcars. For the avoidance of doubt, CertainTeed acknowledges that the definition of Commercial Operation with respect to the CertainTeed Manufacturing Plant shall, in no way be construed to reduce CertainTeed's obligation to take and pay for the Minimum Monthly Quantity as provided in Section 3.1 hereof.

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1.8 "Confidential Information" shall have the meaning set forth in Section 11.1.

1.9 "Construction Milestone(s)" shall have the meaning set forth in Section 2.3.1.

1.10 "Construction Milestone Due Date(s)" shall have the meaning set forth in Section 2.3.1.

1.11 "Contract Year" shall mean each period of time beginning on January 1 and ending on the immediately following December 31, inclusive; provided, however, the first Contract Year shall begin on the Original Effective Date and end on the immediately following December 31, inclusive.

1.12 "CT Storage Contractor" has the meaning set forth in Section 2.2.3(b) hereof.

1.13 "Defective Material" shall mean a filter cake of calcium sulfate dihydrate not meeting the Specifications.

1.14 "Diverter Tower" has the meaning set forth in Section 2.2.3(a).

1.15 "Effective Date" shall mean the date first set forth above.

1.16 "Excess Gypsum" shall mean Gypsum Filter Cake produced at the Mayo Plant and the Roxboro Plant in excess of the Minimum ~~Annual~~ Monthly Quantity.

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1.17 "Extension Term" shall have the meaning set forth in Section 8.2.

- 1.18 "FGD System(s)" means the Flue Gas Desulfurization system(s) that were installed and are owned (in whole or in part) and operated by Progress Energy at the Mayo Plant and the Roxboro Plant.
- 1.19 "Force Majeure" shall have the meaning set forth in Article 12.
- 1.20 "Gypsum Conveyor System" means individually and collectively, as applicable, the CertainTeed Conveyor and the Progress Conveyor.
- 1.21 "Gypsum Delivery Site(s)" shall mean any CertainTeed or third-party owned gypsum storage facility(ies), gypsum board manufacturing facility(ies), distribution facility(ies), or any other facility (including, without limitation, landfill(s)) at a location(s) other than the CertainTeed Site.
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- 1.22 "Gypsum Filter Cake" shall mean a filter cake of calcium sulfate dihydrate, being a byproduct of the FGD Systems, which conforms to the Specifications, and which is sometimes referred to as "synthetic gypsum."
- 1.23 "Initial Notice" shall have the meaning set forth in Section 16.11.
- 1.24 "Initial Term" shall have the meaning set forth in Section 8.1.
- 1.25 "Loading Facility" shall mean the permanent railroad loading facility, including but not limited to the apron feeder, conveyor to the railroad tracks, weigh scale and loading chutes, that was constructed by CertainTeed on Progress Energy property at the Roxboro Plant near the Progress Energy Gypsum Storage Area to provide for the loading of Gypsum Filter Cake and Other Gypsum into rail cars for transport to one or more Gypsum Delivery Site(s).
- 1.26 "Loading Point of Delivery" shall mean the point at which Gypsum Filter Cake or, if applicable, Other Gypsum, is transferred by Progress Energy to CertainTeed from the Progress Energy Gypsum Storage Area at the Loading Facility; more specifically, when the Gypsum Filter Cake, or, if applicable, Other Gypsum, is pushed into the Loading Facility apron feeder.
- 1.27 "Losses" shall have the meaning set forth in Section 10.1(a).
- 1.28 "Mayo Plant" shall have the meaning set forth in paragraph A of the recitals.
- 1.29 "Measuring Equipment" shall have the meaning set forth in Section 5.1.
- 1.30 "Minimum Annual Quantity" shall have the meaning set forth in Section 3.1 hereof.
- 1.31 "Minimum Monthly Quantity" shall have the meaning set forth in Section 3.1 hereof.

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- 1.321 "Net Dry Ton" shall mean 2000 pounds of Gypsum Filter Cake or Other Gypsum, after being corrected to Zero percent (0%) free moisture.
- 1.332 "Operating Agreement" means the Operating Agreement for Gypsum Loading Facility dated March 28, 2008.
- 1.343 "Original Agreement" shall have the meaning set forth in paragraph E of the recitals.
- 1.354 "Other Gypsum" shall mean a filter cake of calcium sulfate dihydrate for which the Parties mutually agree in advance prior to delivery will not comply with the Specifications. "Other Gypsum" does not include any filter cake of calcium sulfate dihydrate that is subsequently discovered after delivery to, and before acceptance by, CertainTeed not to comply with the Specifications in breach of the warranty set forth in Section 3.2, unless CertainTeed agrees to accept such non-compliant calcium sulfate dihydrate.
- 1.365 "Nonperforming Party" shall have the meaning set forth in Article 12.
- 1.376 "Party" shall mean CertainTeed or Progress Energy, as the context may require, and in the plural form shall mean CertainTeed and Progress Energy.
- 1.387 "Plant Point of Delivery" shall mean once the Gypsum Filter Cake or Other Gypsum, as applicable, touches the CertainTeed Conveyor for delivery to the CertainTeed Site, regardless of whether such product is direct conveyed from the Progress Conveyor, or loaded from the Diverter Tower or the reclaim feeder apron) (i) in the event that the Parties agree to deliver and receive the Gypsum Filter Cake or Other Gypsum that is produced by the Mayo Plant directly to the CertainTeed Manufacturing Plant in accordance with the provisions of Section 3.3.1 hereof, or (ii) in the event the Gypsum Conveyor System is unusable for a period of time such that the Parties agree to take any or all or the Gypsum Filter Cake directly at the CertainTeed Manufacturing Plant, (in any case referred to as the "Direct Gypsum"), ~~than~~ ~~then~~ with respect to such Direct Gypsum the Plant Point of Delivery shall be when the Direct Gypsum is offloaded from the trucks at the location as mutually agreed between the Parties at the CertainTeed Site.
- 1.398 "Point of Delivery" shall mean generally the location where Progress Energy shall deliver Gypsum Filter Cake or Other Gypsum to CertainTeed. As used in this Revised Agreement, the Point of Delivery shall be used either to refer collectively to the Loading Point of Delivery and the Plant Point of Delivery or to refer individually to either the Loading Point of Delivery or the Plant Point of Delivery, as the context requires.
- 1.4039 "Pollution Control Plan" shall have the meaning set forth in Section 2.6.
- 1.410 "Primary Purpose" has the meaning set forth in Section 3.9.

- 1.421 "Progress Conveyor" means all of the conveyor system leading directly from the Roxboro Plant known as "G2" together with the conveyor known as "G3" (as shown on Attachment).
- 1.432 "Progress Energy Gypsum Storage Area" means the uncovered gypsum storage area located at the Roxboro Plant, which was expanded to hold up to 600,000 Net Dry Tons by agreement of the parties under the terms of the Amended Agreement.
- 1.443 "Progress Energy Property" shall have the meaning set forth in Section 14.5(b).
- 1.454 "Revised Agreement" will have the meaning set forth in the first sentence of the opening paragraph hereof.
- 1.465 "Roxboro Plant" shall have the meaning set forth in the paragraph A of the recitals.
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- 1.476 "Specifications" shall mean the Gypsum Filter Cake specifications in Attachment B.
- 1.487 "Unit(s)" shall have the meaning set forth in paragraph A of the recitals.

ARTICLE 2 – FACILITIES

- 2.1 Progress Energy FGD Systems. Progress Energy has built and currently operates an FGD System covering each Unit of the Roxboro Plant and the Mayo Plant.

CertainTeed and Progress Energy hereby acknowledge completion of the FGD Systems and therefore, if Progress Energy is unable to supply the Minimum Monthly Quantity of Gypsum Filter Cake after the CertainTeed Manufacturing Plant is complete and ready in all aspects to begin Commercial Operation, then CertainTeed shall be entitled to the remedies so forth in Section 6.2 of this Revised Agreement subject to the provisions of this Revised Agreement.

- 2.2 Storage, Handling and Delivery.

2.2.1 Gypsum Conveyor System. Progress Energy has installed, and will continue to own, operate, and maintain the Progress Conveyor. CertainTeed, or Progress Energy, as applicable, have installed the CertainTeed Conveyor and CertainTeed will operate and maintain the CertainTeed Conveyor; provided, however, title to and all ownership interest to the CertainTeed Conveyor and all equipment, fixtures and appurtenances thereon and related thereto except for the Belt Scales (as defined in the immediately next sentence) will remain vested in Progress Energy). CertainTeed shall install, own, operate and maintain belt scales at the end of the CertainTeed Conveyor on the CertainTeed Site (the "**Belt Scales**").

CertainTeed agrees to reimburse Progress Energy for all costs incurred by Progress Energy to maintain the Progress Conveyor in operating condition until the CertainTeed

Manufacturing Plant commences Commercial Operation.

2.2.2 Loading Facility. CertainTeed has constructed and installed the Loading Facility. CertainTeed will continue to own, operate and maintain the Loading Facility and its related belt scales and other equipment in accordance with the terms and conditions of this Revised Agreement and the Operating Agreement referenced in Article 18.

2.2.3 Progress Energy Gypsum Storage Area.

(a) Subject to the provisions below in this Section 2.2.3, CertainTeed will construct, install, and operate a diverter tower at the Progress Energy Gypsum Storage Area that connects with the Gypsum Conveyor System and the Loading Facility (the "**Diverter Tower**"). Progress Energy will have the right to review and approve the design and construction of the Diverter Tower, including without limitation, all related equipment, the interface between the Progress Conveyor and the CertainTeed Conveyor, and lockout-tagout procedures for all equipment relating to the Conveyor System, the Diverter Tower and the Loading Facility. The Parties agree to amend the Operating Agreement for the purposes of the construction and operation of the Diverter Tower and the operation of the Gypsum Conveyor System. CertainTeed will be responsible for all costs to construct, install, and operate the Diverter Tower and related equipment and fixtures, including all taxes, personnel and required permits; provided, however no permit application will be submitted in the name of Progress Energy or otherwise without the prior review and approval of Progress Energy and Progress Energy's express consent to submit such permit application as written. CertainTeed will further be responsible to provide all electrical power necessary to operate the CertainTeed Conveyor and the Diverter Tower, including the obligation to install breakers and lines, if necessary, and all costs and expenses associated therewith. Progress Energy agrees to review the design and construction of the Diverter Tower and all permit applications, if any, and to make commercially reasonable efforts to expedite such review. Title to and ownership of the Diverter Tower and all equipment, fixtures and appurtenances thereon and related thereto will at all times remain vested in Progress Energy, notwithstanding its construction, installation and subsequent operation by CertainTeed.

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(b) Subject to the provisions of Section 2.2.3(c) and 2.2.3(d), CertainTeed will be responsible to manage the Progress Energy Gypsum Storage Area and all costs and expenses associated therewith including without limitation providing all equipment and manpower that is necessary, if any to blend the gypsum in order to meet the Specifications, control fugitive dust emissions, and to reclaim the Gypsum Filter Cake and Other Gypsum, as applicable and load it into the apron feeder for the CertainTeed Conveyor or the Loading Facility for delivery to CertainTeed. Progress Energy is responsible to manage the gypsum storage area at the Mayo Plant. For the avoidance of doubt, however, if any Gypsum Filter Cake and/or Other Gypsum is transported from the Mayo Plant to the Progress Energy Gypsum Storage Area then CertainTeed is responsible for the management of its storage, and reclaiming, and all costs associated therewith as provided herein. CertainTeed may engage a third-party contractor (the "**CT Storage Contractor**") to manage the Progress Energy Gypsum Storage Area on its behalf; provided that any such CT Storage Contractor must meet or exceed the

minimum safety, security and credit requirements that would be required by Progress Energy for a contractor performing similar services on its behalf, including without limitation the requirement to meet a Progress Energy internal contractor safety rating of "green" or equivalent or otherwise be acceptable to Progress Energy as determined in Progress Energy's sole discretion reasonably exercised. Progress Energy will not be responsible for blending any of the gypsum, or for pushing any Gypsum Filter Cake and Other Gypsum as applicable, into the Loading Facility apron feeder for delivery to CertainTeed. CertainTeed is solely responsible for all blending of the gypsum, if any, and subsequent delivery of the Gypsum Filter Cake or Other Gypsum, as applicable, that was placed into the Progress Energy Storage Area, to the applicable Point of Delivery. For the avoidance of doubt, Progress Energy will be deemed to have met its obligation hereunder to deliver its Minimum Annual Monthly Quantity to the extent that Progress Energy has delivered at least an aggregate total quantity of Gypsum Filter Cake at least equal to the Minimum Annual Monthly Quantity (i) directly to the CertainTeed Site via the Gypsum Conveyor System, (ii) and/or to the Progress Energy Gypsum Storage Area, and/or (iii) directly to the CertainTeed Site by truck if mutually agreed upon.

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~~(c) The stockpile capacity has been expanded to 600,000 tons under the Amended and Revised Supply agreement. The stockpile. The PEGSA Progress Energy Gypsum Storage Area Stockpile ("The Stockpile") shall be used to buffer the variations in production of Gypsum Filter Cake and CertainTeed requirements, and in no case shall exceed 600,000 Net Dry Tons, nor be less than 100,000 Net Dry Tons, unless otherwise specifically agreed by in writing by Progress Energy and CertainTeed.~~

(de) If during any eContract y Year one or more month(s) during the Term of this Revised Agreement CertainTeed (i) fails to accept delivery and take ownership of (in accordance with the provisions of Section 3.3.1 hereof) Gypsum Filter Cake in an amount at least equal to the Minimum Annual Monthly Quantity, (ii) declines to purchase any Additional Gypsum or Other Gypsum as provided in Sections 3.5 and 3.6, respectively (including any failure to respond to an offer by Progress to sell such Additional Gypsum or Other Gypsum within the respective deadline specified therein), then notwithstanding the provisions of Section 2.2.3(b) and Article 18 Progress Energy may load the Gypsum Filter Cake, or Other Gypsum, as applicable for delivery to one or more third party customers in amounts as determined in Progress Energy's sole discretion, provided that Progress Energy otherwise meets its Minimum Annual Monthly Quantity obligation in the month following the month of such third party delivery. Progress Energy may load the gypsum using its own employees and equipment, or Progress Energy may contract with any third party for such services including the CT Storage Contractor, in which case the CT Storage Contractor will separately bill Progress Energy for all labor, costs and expenses arising out of and relating to loading any gypsum for delivery to any third party Progress Energy customers. For the purposes hereof Progress Energy and/or its contractor, as applicable will have access to and the use of all gypsum loading and related equipment, including without limitation the Loading Facilities. Progress Energy and/or its contractor, as applicable will have access to and the use of

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~~all gypsum loading and related equipment, including without limitation the Loading Facilities.~~

(ed) CertainTeed acknowledges and agrees that operation of the Diverter Tower and the CertainTeed Conveyor, and/or the interface with the Progress Conveyor by CertainTeed is and will at all times be subject to any and all applicable reliability standards of compliance imposed by the North American Electric Reliability Corporation ("NERC") and restrictions imposed by the Department of Homeland Security Critical Infrastructure Program ("CIP"). If, at any time during the Term of this Revised Agreement Progress Energy becomes aware or has a good faith reason to believe that CertainTeed's operation of the Diverter Tower may (i) result in a notice of violation of non-compliance of any NERC or CIP standard of reliability or restriction or (ii) place Progress Energy in non-compliance with any NERC or CIP standard or reliability or restriction, then upon written notice to CertainTeed, Progress Energy may terminate CertainTeed's right to operate the Diverter Tower. Upon such termination Progress Energy must provide one or more employees or contractors, as determined in Progress Energy's sole discretion, to operate the Diverter Tower with the costs for such employee or contractor (to include all labor and benefits) to be reimbursed by CertainTeed). Furthermore, if Progress Energy determines, in its sole discretion, reasonably exercised that CertainTeed's operations and/or management of, or failure to operate or manage, as applicable, any of the Progress Energy Gypsum Storage Area, any part of the Gypsum Conveyor System, the Diverter Tower, and/or the Loading Facility unreasonably interferes with Progress Energy's Primary Purpose or the generation of electrical power at the Roxboro Plant and/or Mayo Plant in general (the "Business Interference"), then Progress Energy will have the sole and exclusive right to temporarily suspend CertainTeed's operation of the Progress Energy Gypsum Storage Area, any or all of the Gypsum Conveyor System, the Diverter Tower and/or the Loading Facility until such time as Progress determines that the issue causing the Business Interference has been resolved or has otherwise ceased to exist. In exercising such right of suspension Progress Energy may override any system or electronic commands or directions given to any such equipment or facilities by CertainTeed or its contractor(s). It is the responsibility of Progress Energy to educate, timely and regularly advise CertainTeed and the CT Storage Contractor of all applicable rules, and regulations, and restrictions pertaining to reliability standards of NERC and restrictions of CIP, including without limitation timely notification and training of any revisions CertainTeed T and CT Storage contractor personnel.

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2.3 CertainTeed Manufacturing Plant.

2.3.1 CertainTeed shall build, own, maintain, operate, and secure the CertainTeed Manufacturing Plant. Time is of the essence in the construction and subsequent Commercial Operation of the CertainTeed Manufacturing Plant. CertainTeed shall build the CertainTeed Manufacturing Plant in order to substantially meet the following Construction Milestones by no later than the applicable Construction Milestone Due

Date:

"Construction Milestone Due Date"	"Construction Milestone"
August 31, 2010	Building foundations begun
October 31, 2011	PEC primary switchgear completed
February 28, 2012 - 2nd quarter 2012	Diverter tower constructed & completed Building ready for commissioning
May 1, 2012	Operational start-date (slurry paper and begin to consume DSG) 100% production & 30,000 tpm DSG consumption
October 1, 2012	Commercial production begun
August 16, 2011	Foundations started for diverter tower
2nd quarter, 2012	Diverter tower constructed & completed

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Furthermore, subject to the occurrence of unexpected, verifiable delays in construction not caused by CertainTeed ("**Construction Delays**") which affect one or more of the Construction Milestone Due Dates, or delays in performance by Progress Energy, the CertainTeed Manufacturing Plant shall begin Commercial Operation by no later than ~~October 1, 2012~~. CertainTeed is expressly obligated to take all commercially reasonable steps to mitigate and remedy any and all Construction ~~delays~~ Delays as soon as reasonably practicable, including without limitation by the taking of any contractual recourse and/or legal action available to CertainTeed against any contractor causing such Construction Delays. CertainTeed shall keep Progress Energy apprised of any actions CertainTeed is taking with respect to any Construction Delays. Notwithstanding any Construction Delays and/or the provisions of this Section 2.3.1, failure by CertainTeed to have the CertainTeed Manufacturing Plant in Commercial Operation by no later than ~~February 1, 2012~~ will constitute a material default under this Revised Agreement, subject to the remedies set forth in Section 2.3.2(c) hereof.

2.3.2 If CertainTeed fails to (x) substantially meet any of the Construction Milestones by the applicable Construction Milestone Due Date, (y) ~~begin Commercial Operation of the Diverter Tower by no later than~~, or (z) begin Commercial Operation at the CertainTeed Manufacturing Plant upon the later of (i) ~~October 1, 2012~~ (or ~~February 1, 2013~~ if due to Construction Delays (as defined in 2.3.1 above) and Progress Energy is able and willing to deliver the Minimum Annual ~~Monthly~~ Quantity then CertainTeed, shall take either of the following actions as determined in the discretion of Progress Energy:

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(a) CertainTeed shall begin taking delivery of Gypsum Filter Cake for use at a Gypsum Delivery Site(s) in accordance with the terms of Section 6.6 of this Revised Agreement, in which case CertainTeed shall not be obligated to pay liquidated damages or reconvey the CertainTeed site and CertainTeed Manufacturing Plant to Progress Energy as specified below in Section 2.3.2(b) except as otherwise provided in Section 2.3.2(c): or

(ab) CertainTeed shall pay liquidated damages to Progress Energy in an amount equal to ~~one-twelfth~~ of the Minimum Annual Monthly Quantity times the sum of the current price of Gypsum Filter Cake then in effect under this Agreement plus the then current transportation and disposal cost per ton of the Gypsum Filter Cake in any landfill, for each month or partial month until CertainTeed commences Commercial Operation of the CertainTeed Manufacturing Plant, or for six (6) months, whichever occurs first. If after the expiration of six (6) additional months (during which liquidated damages are paid by CertainTeed) the CertainTeed Manufacturing Plant still has not commenced Commercial Operation, then Progress Energy may terminate this Revised Agreement, and if this Revised Agreement is terminated pursuant to this section, CertainTeed shall, at the option of Progress Energy, either (i) pay to Progress Energy an amount equal to 20 years x 600,000 tons/year x (current price of Gypsum Filter Cake then in effect under this Revised Agreement + the then current disposal cost of one (1) ton of Gypsum Filter Cake in a permitted third party landfill), or (ii) if CertainTeed is not taking delivery of any Gypsum Filter Cake in accordance with Section 2.3.2(ba) below, (subject to the provisions of Section 2.3.2(c) hereof), simultaneously transfer the CertainTeed Site and the CertainTeed Manufacturing Plant, including any related improvements, on an as-is, where-is basis, to Progress Energy at no cost. If the CertainTeed Site and CertainTeed Manufacturing Plant are transferred to Progress Energy, title to the CertainTeed Site and CertainTeed Manufacturing Plant shall be transferred free and clear of all liens, claims and encumbrances of any kind except items of record in existence immediately prior to the time CertainTeed took title to the CertainTeed Site, ad valorem taxes for the current year if not then due, and easements and other rights of record granted to third parties for the benefit of the CertainTeed Manufacturing Plant. Progress Energy shall give CertainTeed written notice of which option is selected within ten (10) days after the second six month period expires, and CertainTeed shall make payment or deliver the appropriate closing documents to Progress Energy (as applicable) no later than ninety (90) days from receipt of such notice; or

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~~(b) CertainTeed shall begin taking delivery of Gypsum Filter Cake for use at a Gypsum Delivery Site(s) in accordance with the terms of Section 6.6 of this Revised Agreement, in which case CertainTeed shall not be obligated to pay liquidated damages or reconvey the CertainTeed site and CertainTeed Manufacturing Plant to Progress Energy as specified above in Section 2.3.2(a) except as otherwise provided in Section 2.3.2(c).~~

(c) Notwithstanding the provision of Section 2.3.2(ba) above, in the event that CertainTeed has not constructed the CertainTeed Manufacturing Plant and brought the CertainTeed Manufacturing Plant into Commercial Operation by no later than February 1, 2013 (the "CertainTeed Plant Operation Deadline Date"), then notwithstanding whether CertainTeed has been taking delivery of the Gypsum Filter Cake for use at other Gypsum Delivery Sites in accordance with the provisions of Section 2.3.2(ba) prior to the CertainTeed Plant Operation Deadline Date, the provisions of Section 2.3.2(ba) hereof, shall no longer be applicable and for the failure by CertainTeed to take delivery of the Gypsum Filter Cake as provided in Section 2.3.2(a) hereof CertainTeed shall be obligated to either pay liquidated damages to

Progress Energy or transfer the CertainTeed Site and CertainTeed Manufacturing Plant and all related improvements as provided in Section 2.3.2(ab) hereof.

- 2.4 Deed of Trust. In order to satisfy a condition precedent to Progress Energy's obligation to perform any of its obligations under the Amended Agreement and to secure the obligations of CertainTeed under the Amended Agreement, as the same may be renewed, extended, novated, or modified, which CertainTeed acknowledges and agrees expressly includes this Revised Agreement, CertainTeed has executed and delivered to Progress Energy a Deed of Trust in favor of Progress Energy a copy of which is attached as Exhibit ___ hereto. Such Deed of Trust secures the CertainTeed Site and any and all fixtures and improvements thereto, if any, including without limitation, if applicable, the CertainTeed Plant (collectively the "**CertainTeed Assets**"). CertainTeed hereby acknowledges, agrees, represents and warrants that such Deed of Trust (a) secures CertainTeed's payment obligations to Progress Energy hereunder including without limitation with respect to the payment of liquidated damages pursuant to Section 2.3.2(ab) and/or Section 6.5 hereof to the extent of the value of the CertainTeed Assets, (b) secures Progress Energy's interest in the CertainTeed Assets in the event of an election by Progress to require CertainTeed to transfer such CertainTeed Assets to Progress Energy in lieu of the payment of damages in accordance with the provisions of Section 2.3.2(ab) and/or Section 6.5 hereof and (c) no liens, claims or other encumbrances have been granted or have been placed upon the CertainTeed Site after the Deed of Trust was recorded. CertainTeed further acknowledges and agrees that it is a condition precedent to the effectiveness of this Revised Agreement and the obligations of the Parties hereto that Progress Energy receives a title update with respect to the CertainTeed Site that is satisfactory to Progress Energy. CertainTeed further agrees to amend or revise, as applicable, and record any amendments or revisions to the Deed of Trust, if any, to the extent reasonably necessary to perfect Progress Energy's interest as described herein with respect to this Revised Agreement. ~~Beginning on the tenth anniversary of this Revised Agreement and continuing each year thereafter, CT may seek the release or satisfaction of the Deed of Trust.~~
- 2.5 Zoning, Permits, Licenses and Approvals. The CertainTeed Manufacturing Plant, the Loading Facility the Gypsum Conveyor System and the Diverter Tower shall be in compliance with all applicable federal, state and local laws, rules and regulations including, without limitation, obtaining any necessary environmental operating permits. Each Party, at its cost and expense, shall be responsible for obtaining all permits, licenses, and approvals associated with construction and operation of their respective facilities. The Parties shall cooperate and provide necessary assistance in obtaining such required permits, licenses and approvals.
- 2.6 Pollution Control. For ongoing operations, CertainTeed shall develop and follow a written plan (the "**Pollution Control Plan**") relating to: (a) air emissions and air quality, including emissions of steam (dryer and calciner), fugitive dust from plant stacks, roadways, spillage, NOx, CO, and CO₂; (b) storage and disposal of solid waste, including board waste and paper waste; and (c) waste water run-off and recovery for the CertainTeed Site. CertainTeed shall consult with Progress Energy in the

development of the Pollution Control Plan and to the extent any portion of the Pollution Control Plan involves any discharge into Progress Energy's intake canal, CertainTeed shall obtain Progress Energy's written approval, which may contain conditions to assure Progress Energy's compliance with permits and regulations, for such discharge prior to commencing construction of the CertainTeed Manufacturing Plant, such approval not to be unreasonably withheld, delayed or conditioned. CertainTeed shall exercise all reasonable efforts to discharge into Hyco Lake instead of Progress Energy's intake canal. Approval of the written plan by Progress Energy shall not constitute a waiver of any right or remedy under this Revised Agreement or otherwise and shall not form a basis for any liability to CertainTeed or any other party whether arising in contract, tort (including negligence), strict liability or any other legal theory.

- 2.7 Water, Septic, Utilities and Rail. CertainTeed shall be solely responsible for the water and septic needs of the CertainTeed Manufacturing Plant. Progress Energy shall provide at no additional cost to CertainTeed the necessary easements to the intake canal in locations mutually agreed to by the Parties to accommodate the water and sewer needs of the CertainTeed Manufacturing Plant. CertainTeed shall be required to obtain any permits necessary to withdraw water from and discharge water into the intake canal. CertainTeed anticipates its water consumption requirements to be approximately 300 to 600 gallons per minute for the operation of the CertainTeed Manufacturing Plant. Progress Energy shall provide at no additional cost to CertainTeed all easements reasonably required by CertainTeed for (a) rail access to the CertainTeed Manufacturing Plant subject to the provisions of Article 18 and (b) utilities servicing the CertainTeed Manufacturing Plant, including without limitation, easements for gas and electric services at locations that do not interfere with the operation of the Roxboro Plant, or the use of the adjoining property by Progress Energy.

ARTICLE 3 - GYPSUM SALES

- 3.1 Delivery of Gypsum. Commencing on May 1, 2009 and continuing until the earlier of (i) the date the CertainTeed Manufacturing Plant commences Commercial Operation or (ii) ~~October~~ November 1, 2012~~1~~, Progress Energy agrees to sell and deliver to CertainTeed and CertainTeed agrees to purchase and accept from Progress Energy at least ~~50,000~~ 600,000 Net Dry Tons of Gypsum Filter Cake per year ~~month~~, or the quantity of ~~Gypsum Filter Cake produced by Progress Energy during the said year, whichever is less, subject to the Gypsum in a Stockpile in the PEGSA Progress Energy Gypsum Storage Area not exceeding 600,000 Net Dry Tons, and subject to the allowance for fluctuations as set forth in this paragraph, and except as may otherwise be excused by the terms of this Revised Agreement. (The volume obligations set forth herein may be referred to as the "Minimum Annual Monthly Quantity".) The Minimum Monthly Quantity accepted of Gypsum Filter Cake that PE agrees to sell and deliver to CertainTeed and that CertainTeed agrees to purchase and accept from PE in any given month is shall be 25,000 Net Dry Tons. In order to accommodate minor fluctuations in volumes actually delivered and accepted under this Revised Agreement, any quantities of Gypsum Filter Cake to be delivered under this Revised Agreement shall be deemed to be satisfied provided that such fluctuations (up or down) do not exceed ten percent~~

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~~(40%), and provided that the average monthly quantity of Gypsum Filter Cake delivered and accepted under this Revised Agreement over any twelve (12) month period after the Start-up Period beginning of Commercial Operation shall be approximately 50,000 Net Dry Tons, or the actual Gypsum Filter Cake Net Dry Ton production over the same period, whichever is less. Progress Energy's expectation is to supply Gypsum Filter Cake primarily from the Roxboro Plant and Mayo Plant, but retains the right to supply Gypsum Filter Cake from any source. Acceptance will include Gypsum Filter Cake conveyed to the CertainTeed plant, loaded into rail or trucks for transfer to other CertainTeed facilities, transferred to third parties, or added to the sStockpile providing the sStockpile does not exceed 600,000 tons.~~

3.2 Quality. Progress Energy represents and warrants that each delivery of Gypsum Filter Cake shall not be above or below, as applicable, the Specifications set forth in Attachment B at the time the Gypsum Filter Cake is delivered to CertainTeed at the Point of Delivery. The Parties shall in good faith consult with each other to understand ~~the other Party's testing protocols used to determine whether the Gypsum Filter Cake~~ complies with the Specifications. Each Party may from time to time perform quality tests on the ~~Gypsum Filter Filter Cake.~~ In such event, the testing Party agrees to provide a summary of its respective testing results within a reasonable time after the results are available. No warranty shall apply to Other Gypsum, which is delivered on an "AS-IS" basis. The foregoing warranty shall expire with respect to any Gypsum Filter Cake used in any product produced at the CertainTeed Manufacturing Plant, any Gypsum Delivery Site(s), or any other manufacturing facility of any kind, whether or not owned by and/or affiliated with CertainTeed, in whole or in part or any third party (the "**Other Facility**") twenty-four (24) hours after such product comes off the production line for such CertainTeed Manufacturing Plant, Gypsum Delivery Site, or Other Facility, as applicable. CertainTeed shall and shall cause any third party manufacturers of product utilizing the Gypsum Filter Cake or Other Gypsum to stamp the date and time of production on each unit of gypsum product subject to the limitations as set forth in Section 3.3.2 ~~3-1-2.~~ The sole and exclusive remedy for breach of this warranty is set forth Section 6.1 of this Revised Agreement. Any deterioration, damage, or contamination of the Gypsum Filter Cake after delivery to CertainTeed at the Point of Delivery that is not attributable to Progress Energy shall not be the responsibility of Progress Energy.

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3.3 Delivery of Gypsum Filter Cake.

3.3.1 Ownership (title) of the Gypsum Filter Cake, Other Gypsum and any risk of loss or damage to the Gypsum Filter Cake and Other Gypsum transfers from Progress Energy to CertainTeed at the Point of Delivery. Upon mutual agreement of the Parties the Gypsum Filter Cake and Other Gypsum, if applicable, that is produced by the Mayo Plant or any alternate source may be delivered directly to the CertainTeed Site.

3.3.2 CertainTeed shall not sell, deliver, convey or otherwise transfer title to the Gypsum Filter Cake or Other Gypsum, if applicable to any third party without the prior written consent of Progress Energy, which consent shall not be unreasonably withheld or delayed, provided, however, in making such decision Progress Energy may take into

account the intended end use for the Gypsum Filter Cake and any potential legal, environmental and/or other liability Progress Energy reasonably believes it could potentially incur arising out of or relating to such sale or transfer and any end use resulting therefrom. CertainTeed shall specifically insert language in any of its contracts with third party purchasers that provides that any manufacturers utilizing the product shall stamp the date and time of production as provided in Section 3.2, if and to the extent that it is ordinary and customary in the industry for such manufacturers to stamp their manufactured product with a date and time of production.

- 3.4 Payment for Gypsum Filter Cake. CertainTeed shall pay Progress Energy for all Gypsum Filter Cake and Other Gypsum supplied by Progress Energy to the Point of Delivery, as more specifically provided in Article 4 and Section 3.6. Any taxes levied for the handling, transportation, use and transfer of title of Gypsum Filter Cake and Other Gypsum under this Revised Agreement shall be paid by CertainTeed.
- 3.5 Excess Gypsum. In the event Progress Energy desires to remove and dispose of Excess Gypsum, CertainTeed shall have the right of first refusal to purchase such Excess Gypsum. CertainTeed shall pay Progress Energy for such Excess Gypsum at the price set forth in Attachment A then in effect pursuant to this Revised Agreement. Progress Energy shall give CertainTeed written notice of the availability of Excess Gypsum. CertainTeed has fourteen (14) days to notify Progress Energy in writing of its election to purchase the Excess Gypsum. Progress Energy may dispose of Excess Gypsum not purchased by CertainTeed at its discretion, including sale to a third party. Any Excess Gypsum purchased by CertainTeed pursuant to this section shall be included in the price calculation set forth in Attachment A but shall not relieve either Party of its respective obligations under Section 3.1.
- 3.6 Other Gypsum. In the event Progress Energy desires to remove and dispose of Other Gypsum, CertainTeed shall have the right of first refusal to purchase such Other Gypsum upon mutually agreed pricing and terms. Progress Energy shall give CertainTeed written notice of the availability of Other Gypsum. CertainTeed has fourteen (14) days to notify Progress Energy in writing of its election to purchase the Other Gypsum upon mutually agreed pricing and terms. Progress Energy may dispose of any Other Gypsum not accepted by CertainTeed at its discretion, including sale to a third party. Any Other Gypsum accepted by CertainTeed pursuant to this section shall be excluded from the price calculation set forth in Attachment A but included in the quantity obligation under Section 3.1.

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- 3.7 Additional Gypsum. In the event CertainTeed requires Additional Gypsum, CertainTeed shall first notify Progress Energy in writing about its need for Additional Gypsum. If after being contacted by CertainTeed Progress Energy has such Additional Gypsum ready for removal and disposal, and provided that Progress Energy does not expect that the sale of Additional Gypsum will adversely affect or interfere with Progress Energy's ability to ~~maintain the minimum sStockpile quantity~~, supply the Minimum ~~Annual Monthly~~ Quantity in current or future years ~~months~~ at 100,000 Net Dry Tons, and/or Progress Energy's other agreements with one or more third parties for

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the purchase and sale of gypsum, then Progress Energy shall be obligated to sell such Additional Gypsum to CertainTeed and CertainTeed shall pay Progress Energy the price for such Additional Gypsum as set forth in Attachment A then in effect pursuant to this Revised Agreement. Progress Energy will have fourteen 14 days after receipt of written notice from CertainTeed of its need for Additional Gypsum to respond to CertainTeed in writing with whether or not Progress Energy has such Additional Gypsum for sale to CertainTeed, consistent with the criteria set forth above. In the event that Progress Energy has no Additional Gypsum ready for sale, CertainTeed may seek third party sources of Additional Gypsum. Any Additional Gypsum purchased by CertainTeed from Progress Energy pursuant to this section shall be included in the price calculation set forth in Attachment A and shall not relieve either Party of its respective obligation under Section 3.1. Notwithstanding the foregoing, CertainTeed may, without notice to or the consent of Progress Energy purchase up to a maximum of five percent (5%) of the actual Gypsum Filter Cake requirements for the CertainTeed Manufacturing Plant in each Contract Year from any one or more third party(ies) for the purposes of testing and evaluation purposes only, subject to CertainTeed's continuing obligation to purchase its Minimum Monthly Annual Requirement of Gypsum Filter Cake hereunder.

- 3.8 Delivery by Alternate Supplier. In the event CertainTeed purchases Gypsum Filter Cake for the CertainTeed Manufacturing Plant from a supplier other than Progress Energy, such material must be transported directly to the CertainTeed Site. In no event will any gypsum from any source other than Progress Energy be placed into the Progress Energy Gypsum Storage Area.
- 3.9 Primary Progress Energy Duty. CertainTeed acknowledges and agrees that Progress Energy's obligations hereunder are subject to Progress Energy's overriding and primary duty to produce economical and reliable electric power for public consumption in accordance with federal, state and local laws (the "Primary Purpose") and nothing in this Revised Agreement shall, in any way, be interpreted or construed so as to obligate Progress Energy to attempt to maximize its production of synthetic gypsum, including without limitation, Gypsum Filter Cake and/or to operate any one or more of its Units and/or the FGD Systems and/or to change any of its processes in order to produce such synthetic gypsum or Gypsum Filter Cake at all or of a particular quality and/or form.

ARTICLE 4 -- GYPSUM PRICE AND PAYMENT

- 4.1 Price. The price of Gypsum Filter Cake sold and delivered to the Point of Delivery pursuant to this Revised Agreement is set forth in Attachment A attached hereto and incorporated herein, and shall be based on a Net Dry Ton. The price of Other Gypsum sold and delivered to the Point of Delivery shall be as mutually agreed between the Parties from time to time. The formula to convert the quantity of Gypsum Filter Cake and, if applicable, the Other Gypsum, delivered to CertainTeed to a Net Dry Ton is set forth in Attachment A.
- 4.2 Price Revision. The Parties agree to renegotiate in good faith the price of Gypsum

Fitter-Filter Cake every five (5) years and negotiations shall occur during the relevant Annual Meeting. Each Party acknowledges that the objective of price negotiations and any related price adjustments is to price Gypsum Filter Cake at a competitive price based on the then current market conditions and available pricing forecasts for the following five (5) year period. If the Parties cannot mutually agree on price adjustments during the Annual Meeting or by using the dispute resolution procedures outlined in Section 16.11 hereof (but without initiating litigation), the price per Net Dry Ton of Gypsum Filter Cake paid by CertainTeed for the next five (5) year period shall be adjusted by the percentage increase or decrease in the United States Department of Labor, Bureau of Labor Statistics Producer Price Index for gypsum products WPU 137 (not seasonally adjusted) during the previous five (5) year period, but in no event shall any price adjustment using the Producer Price Index for gypsum products WPU 137 be greater than five percent (+/-5%) per adjustment period, and fifteen (+/-15%) in the aggregate from the price in effect during the first Contract Year.

Example:
 Producer Price Index ("PPI") for Gypsum Products

Year	Annual Index
1997	170.8
1998	177.6
1999	208.0
2000	201.4
2001	156.4
2002	168.5

Contract signed in 1998.

Average PPI for the initial five (5) years of the contract (1998-2002) 182.38 % increase in the value of gypsum = $(182.38 - 177.6)/177.6 \times 100 = 2.69\%$

- 4.3 Invoicing and Payment. Within fourteen (14) days after the end of each month, CertainTeed shall deliver to Progress Energy an invoice with a certified statement of the quantity of Gypsum Filter Cake and Other Gypsum, if applicable, delivered to the Point of Delivery during the preceding month. Each invoice shall set forth in reasonable detail CertainTeed's calculation of the amount due from CertainTeed and shall be accompanied by information reasonably sufficient for Progress Energy to determine the accuracy of such invoice. CertainTeed shall pay the invoice within thirty (30) days of issue.

ARTICLE 5 — GYPSUM WEIGHING AND TESTING

- 5.1 Measuring Equipment. All Gypsum Filter Cake and Other Gypsum shall be measured by the Belt Scales or other mutually agreed upon weighing system after the Point of Delivery ("**Measuring Equipment**"). All such Measuring Equipment will be owned, operated, maintained and used by CertainTeed as necessary to permit an accurate

determination of the quantity of Gypsum Filter Cake and Other Gypsum delivered to CertainTeed by Progress Energy. CertainTeed shall provide all output signals from the Measuring Equipment to Progress Energy. CertainTeed shall exercise reasonable care in the maintenance and operation of the Measuring Equipment so as to assure to the extent reasonably practicable an accurate determination of each such quantity delivered to CertainTeed.

- 5.2 Testing. The accuracy of the Measuring Equipment, as specified by the manufacturer, shall be tested as determined by CertainTeed, at CertainTeed's cost and expense, but in no event less than twice per year. Progress Energy shall have the right to be present whenever CertainTeed repairs, tests, calibrates, or adjusts the Measuring Equipment. CertainTeed shall give at least two (2) business days prior notice to Progress Energy in advance of taking any of such actions. Testing, including initial calibration, shall be conducted in the presence of both Parties if they shall so desire. If either Party desires to challenge the results of the test, the Parties shall cooperate to secure a prompt verification of the accuracy of such equipment by a mutually acceptable third party. If Progress Energy requests a testing of the Measuring Equipment, Progress Energy shall bear the cost of such testing. In the event the Parties disagree on any testing results, subsequent testing shall be conducted by a mutually acceptable third party or the manufacturer of the Measuring Equipment at the joint cost of the Parties and whose those results shall be binding on the Parties.
- 5.3 Accuracy Errors. If after testing, the Measuring Equipment is found to be accurate or to be in error by not more than plus or minus 5%, previous recordings of such equipment shall be considered accurate in computing deliveries of Net Dry Tons of Gypsum Filter Cake or Other Gypsum hereunder, but such equipment shall be promptly adjusted to record correctly. If the Measuring Equipment shall be found to be in error by an amount exceeding plus or minus 5%, such equipment shall be promptly adjusted to record to an accuracy specified by the manufacturer of the equipment and any previous recordings by such equipment shall be corrected to zero error. If no reliable information exists as to the period over which the equipment registered inaccurately, it shall be assumed for correction purposes that the inaccuracy began at a point in time midway between the testing date and the last previous date on which the equipment was tested and found to be accurate.
- 5.4 Adjustments. If upon testing the Measuring Equipment is found to be in error by more than plus or minus 5%, any payments made by CertainTeed since the previous test of the Measuring Equipment shall be adjusted to reflect the corrected measurement determined pursuant to this Article. If the difference between the payments actually made by CertainTeed and the payment that should have been made is a positive number, the difference shall be credited by Progress Energy against future payments due from CertainTeed. If the difference is a negative number, the difference shall be paid by CertainTeed to Progress Energy along with the next payment due to Progress Energy.
- 5.5 Books and Records. CertainTeed shall keep accurate records and books of accounts showing the quantities of Gypsum Filter Cake and Other Gypsum delivered by Progress

Energy, the dates of delivery, the identities and locations of the certified scales where such material was weighed, the conversion to dry tons, and the dates on which such weighings were performed. Upon reasonable advance written notice, Progress Energy or its agents shall have the right, at Progress Energy's expense and without disruption to CertainTeed's manufacturing operations, to audit, inspect and test during normal working hours at the CertainTeed Manufacturing Plant, all records and data maintained by CertainTeed supporting (a) amounts paid by CertainTeed, including without limitation the test of weighing scales, and (b) the quality of Gypsum Filter Cake and Other Gypsum supplied by Progress Energy. All records shall remain the property of CertainTeed. CertainTeed shall maintain these records for not less than five (5) years. Any agent being used by Progress Energy to perform the inspection and audit must first execute and deliver a non-disclosure agreement in form and substance reasonably satisfactory to CertainTeed.

- 5.6 Process Changes. In the event Progress Energy elects or is required to (a) change fuel sources to a fuel other than North American bituminous coal, (b) make a process change that is known by Progress Energy to affect the particle size of particulate matter collected by the FGD Systems, ~~or (c) make a process change that is known by Progress Energy to affect the metals collected by the FGD Systems, or (d) make a change to in the materials added into the FGD process (e.g. limestone).~~ Progress Energy shall give written notice to CertainTeed of such election at least ninety (90) days prior to implementing such change. Nothing in this Section 5.6 shall limit Progress Energy's right to switch fuels or to make process changes, provided, however, that at all times the Gypsum Filter Cake must meet or exceed the Specifications set forth in Exhibit B herein.

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ARTICLE 6 – REMEDIES

- 6.1 Defective Material. In the event Progress Energy delivers Defective Material to CertainTeed and provided that (i) CertainTeed provides notice to Progress Energy of such Defective Material within the warranty period specified in Section 3.2 and (ii) CertainTeed has made a reasonable good faith effort to utilize such Defective Material to the extent practicable, the Parties agree to work together to decontaminate the affected delivery and production facilities including without limitation the Gypsum Conveyor System, the Diverter Tower, the Loading Facility and the production line or lines with a goal of minimizing the impact to either Party's business and operations, provided that Progress Energy's total liability shall be no more than \$10,000 per occurrence. Any amounts owed by Progress Energy under this section shall be credited to CertainTeed on CertainTeed's next monthly invoice.

- 6.2 Undersupply by Progress Energy. Subject to the quantity variations permitted under Section 2.3.2 and 3.1, in the event Progress Energy is unable to deliver to CertainTeed the Minimum Annual Monthly Quantity in any year month during the Term of this Revised Agreement and the sStockpile quantity falls below 100,000 Net Dry Tons, ~~such failure is not excused under the terms and conditions of this Revised Agreement.~~

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CertainTeed may, at its election, by written notice to Progress Energy within thirty (30) days after the end of the ~~period~~ month in which the deficiency occurred, either (a) instruct Progress Energy in writing to deliver within thirty (30) days at Progress Energy's sole expense to the Point of Delivery the quantity of Gypsum Filter Cake necessary to ~~rebuild the s~~Stockpile to 100,000 Net Dry Tons, ~~satisfy the Minimum Monthly Quantity~~, or (b) purchase on the open market on a commercially reasonable basis for delivery to the CertainTeed Site, the amount of Gypsum Filter Cake necessary to satisfy the ~~Minimum CertainTeed's commercial requirements~~, ~~stockpile level of 100,000 Net Dry Tons~~. ~~Monthly Quantity~~. If CertainTeed elects to purchase an alternate supply of Gypsum Filter Cake, CertainTeed shall credit to CertainTeed's own account on the next invoice an amount equal to the difference between ~~one-twelfth of the Minimum Annual Monthly Quantity~~ and the actual quantity delivered by Progress Energy to CertainTeed for such month multiplied by the positive difference, if any, between the price of Gypsum Filter Cake charged by an alternate supplier and the price of Gypsum Filter Cake then in effect under this Revised Agreement at the time of undersupply, ~~plus a handling fee of [REDACTED]~~ of the deficiency quantity. Failure by CertainTeed to give written notice of the delivery deficiency within thirty (30) days after the end of the month in which the deficiency occurred shall constitute a waiver of the default. Any quantity purchased from an alternate supplier pursuant to this section shall be included in the price calculation set forth in Attachment A.

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6.3 Discontinued Supply by Progress Energy. If Progress Energy (a) elects to discontinue altogether supplying Gypsum Filter Cake to CertainTeed; (b) takes any action that prevents or will prevent Progress Energy from supplying at least fifty percent (50%) of the Minimum Annual Monthly Quantity each month over a five (5) year period, or (c) takes any other action that causes Progress Energy to supply 300,000 Net Dry Tons or less Gypsum Filter Cake per year in two (2) consecutive Contract Years, CertainTeed may terminate this Revised Agreement, and if this Revised Agreement is terminated pursuant to this Section, Progress Energy shall pay to CertainTeed as liquidated damages upon written request annual payments for the remainder of the Initial Term or the remainder of any term extension under Section 8.2 of this Revised Agreement equal to the Minimum Annual Monthly Quantity multiplied by the current price of Gypsum Filter Cake then in effect under this Revised Agreement plus [REDACTED] multiplied by the number of years, including ~~prorated proration for any partial year months in that year~~ remaining in this Revised Agreement.

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6.4 Under Acceptance by CertainTeed. Subject to the provisions of Section 6.6 and subject to the quantity variations permitted under Section 3.1, in the event CertainTeed fails to accept from Progress Energy the Minimum Annual Monthly Quantity in any year

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~~month during the Term of this Revised Agreement and such failure is not excused under the terms of this Revised Agreement (e.g. Gypsum Filter Cake can be placed on the sStockpile so long as the Stockpile can accept and remains at less than 600,000 Net Dry Tons).~~ Progress Energy may, at its election by written notice to CertainTeed within thirty (30) days after the end of the ~~year~~ month in which the deficiency occurred, require CertainTeed to pay Progress Energy the price of the Gypsum Filter Cake then in effect under this Revised Agreement for the shortfall quantity plus the cost to transport and dispose of the shortfall quantity of Gypsum Filter Cake necessary to satisfy the ~~Minimum Annual Monthly Quantity~~ plus an additional handling fee of [REDACTED]. CertainTeed shall credit to Progress Energy's account on the next invoice the following: the shortfall amount multiplied by the sum of the price of Gypsum Filter Cake in effect under this Revised Agreement at the time of under acceptance plus the actual transportation and disposal cost per ton of Gypsum Filter Cake plus a fee of [REDACTED] of the shortfall amount. Failure by Progress Energy to give written notice of the acceptance deficiency within thirty (30) days after the end of the ~~year~~ month in which the deficiency occurred shall constitute a waiver of the default.

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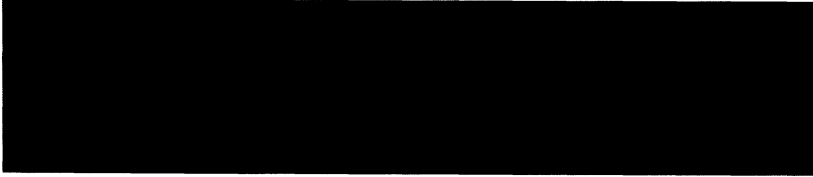
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6.5 Discontinued Acceptance by CertainTeed. Subject to the provisions of Section 6.6, if CertainTeed (a) elects to discontinue altogether receipt of Gypsum from Progress Energy after Commercial Operation of the Loading Facility, (b) takes any action that prevents or will prevent CertainTeed from accepting at least fifty percent (50%) of the ~~Minimum~~ ~~Minimum(?)~~ Monthly ~~Annual~~ Quantity each month-year over a five (5) year period or (c) takes any other action that causes CertainTeed to accept 300,000 Net Dry Tons or less Gypsum Filter Cake per year in two consecutive Contract Years, Progress Energy may terminate this Revised Agreement, and if this Revised Agreement is terminated pursuant to this Section CertainTeed shall, at Progress Energy's option either (x) pay to Progress Energy as liquidated damages upon written request annual payments for the remainder of the Initial Term or the remainder of any term extension under Section 8.2 of this Revised Agreement equal to the ~~Minimum Annual Monthly~~ Quantity multiplied by the number of years, including ~~prorated~~ proration for any ~~partial year~~ months remaining in this Revised Agreement multiplied by [REDACTED] or (y) transfer the CertainTeed Site and CertainTeed Manufacturing Plant and related facilities to Progress Energy or its designee as-is, where-is at no cost and grant to Progress Energy the rights to use all intellectual properties owned or transferable by CertainTeed and necessary to operate the CertainTeed Manufacturing Plant as a conventional gypsum board plant. If option (y) is chosen by Progress Energy, title to the CertainTeed Manufacturing Plant shall be transferred free and clear of any and all liens, claims and encumbrances of any kind except items of record in existence immediately prior to the time CertainTeed took title to the CertainTeed Site, ad valorem

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taxes for the current year if not then due and easements and other rights of record granted to third parties for the benefit of the CertainTeed Manufacturing Plant. Progress Energy shall give CertainTeed prompt written notice of which option is selected, and CertainTeed shall make payment or deliver the appropriate closing documents to Progress Energy (as applicable) no later than ninety (90) days from receipt of such notice.

- 6.6 Alternative Means of Compliance. Notwithstanding anything to the contrary in this Revised Agreement, but subject to the provision of Section 2.3.2(c), at any time during the term of this Revised Agreement, as an alternative means of compliance with CertainTeed’s obligations under this Revised Agreement (including, without limitation, those obligations set forth in Sections 2.3, 6.4 and 6.5) to take delivery of Gypsum Filter Cake for any purpose, CertainTeed shall have the right, but not the obligation, with no less than forty-eight (48) hours prior written notice to Progress Energy to take delivery of Gypsum Filter Cake at the Loading Point of Delivery for use at or sale to ~~one or more Gypsum Delivery Site(s) in such quantities as CertainTeed elects to satisfy~~ its obligations and avoid a default under this Revised Agreement; provided that CertainTeed (a) has brought the CertainTeed Manufacturing Plant into Commercial Operation by no later than the CertainTeed Plant Operation Deadline Date as provided in Section 2.3.2(c) hereof and (b) continuously maintains the CertainTeed Manufacturing Plant in commercial operation during the term of this Revised Agreement.

ARTICLE 7 - ANNUAL MEETINGS

- 7.1 Annual Meetings. The Parties shall meet annually (each an “Annual Meeting”) in good faith to discuss among other things: (a) CertainTeed’s anticipated consumption capability for the next year, (b) Progress Energy’s anticipated generation of Gypsum Filter Cake by the Roxboro Plant and Mayo Plant for the next year, (c) adjustments to the Minimum Annual Monthly Quantity, (d) after every fifth year of this Revised Agreement, adjustments to the purchase price of Gypsum Filter Cake, provided, however that the first adjustment will be no earlier than five (5) years after the Commercial Operation Date of the CertainTeed Plant; (e) the status of the Progress Energy Gypsum Storage Area including sStockpile volumes, and (f) the respective operating plans for each Party, as applicable, with respect to the Loading Facility, the Diverter Tower, the production of Gypsum Filter Cake, the CertainTeed Manufacturing Plant and use of the haul road across the CertainTeed Site; ~~and (g) regulatory issues affecting either of the Parties.~~
- 7.2 Other Meetings. The Parties shall meet from time to time as mutually agreed to discuss operational, quality, quantity, regulatory, and other issues affecting either of the Parties as such issues arise.

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ARTICLE 8 — TERM OF REVISED AGREEMENT

- 8.1 Initial Term. The initial term of this Revised Agreement shall expire twenty (20) years

from the date on which CertainTeed accepted the first delivery of Gypsum Filter Cake from Progress Energy (“**InitialTerm**”) which the Parties agree was May 1, 2009. (Barbara, let’s discuss).

- 8.2 **Extension Options.** CertainTeed and Progress Energy may extend this Revised Agreement for two (2) additional periods of ten (10) years each (each an “**Extension Term**”) upon mutual written agreement at least one hundred eighty (180) days before the end of the Initial Term or the Extension Term as applicable.

ARTICLE 9 - LIMITATION OF WARRANTY AND DAMAGES

- 9.1 **Limitation of Warranty.** FOR GYPSUM FILTER CAKE, THE WARRANTY SET FORTH IN SECTION 3.2 IS IN LIEU OF ALL OTHER WARRANTIES AND REPRESENTATIONS WHETHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
- 9.2 **Warranty Disclaimer.** ALL OTHER GYPSUM IS DELIVERED “AS-IS” AND WITH ALL FAULTS. NO WARRANTY SHALL APPLY TO OTHER GYPSUM WHETHER EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND WHETHER ARISING BY COURSE OF DEALING, USEAGE OF TRADE, OR OTHERWISE.
- 9.3 **Limitation of Liability.** EXCEPT WITH RESPECT TO ANY INDEMNITIES SET FORTH IN THIS REVISED AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER ANY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, WARRANTY OR CONTRACT CLAIM OR ANY OTHER THEORY FOR ANY LOSS OF PROFIT OR REVENUES, LOSS OF USE OF ANY FACILITY OR ANY ASSOCIATED EQUIPMENT, COST OF CAPITAL, DOWN TIME, LOSS OF PRODUCT, LOSS OF SALES, OR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES, LOSS OF PROFIT, REVENUE OR BUSINESS WHETHER SUCH PARTY WAS INFORMED OR AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE. HOWEVER, THIS LIMITATION OF DAMAGES PROVISIONS SHALL NOT AFFECT OR OTHERWISE DIMINISH ANY SPECIFIED REMEDY OR LIQUIDATED DAMAGES THAT MAY BE SPECIFIED IN THIS REVISED AGREEMENT.
- 9.4 **Exclusive Remedies.** Where a remedy is specified in this Revised Agreement for a particular breach or occurrence, the remedy specified shall be the sole and exclusive remedy for the breach or occurrence, whether arising in contract, tort (including negligence), strict liability or otherwise.

ARTICLE 10 – INDEMINITY AND INSURANCE

10.1 CertainTeed Indemnification.

(a) CertainTeed agrees to indemnify, defend and hold harmless Progress Energy and any entity with an ownership interest as of the Effective Date in either the Roxboro Plant or the Mayo Plant, as applicable, and each of their respective officers, directors, employees, subsidiaries, affiliates, successors and assigns (collectively the "**Plant Entities**") from and against any and all liabilities, claims, penalties, forfeitures, damages, losses, suits, costs and expenses, including costs of defense, settlement and attorneys' fees, ("**Losses**") asserted against the Plant Entities, based in whole or in part, on an allegation that any Gypsum Filter Cake, Additional Gypsum, Other Gypsum, Defective Material or Excess Gypsum or any use, processing, storage, handling or any end product manufactured using such materials has caused (a) death or injuries to any person, or destruction or damage to any property, or (b) contamination or adverse effect on the environment, or (c) violates any patent, trade secret or other intellectual property right of any kind. CertainTeed's indemnification obligations under this Section 10.1(a) shall survive indefinitely.

(b) Progress Energy may employ counsel, at its own expense, to assist Progress Energy with respect to any such claims, provided that if such counsel is necessary because of a conflict of interest with CertainTeed or its counsel, or because CertainTeed does not assume the control of defense of a claim for which CertainTeed is obligated to indemnify Progress Energy hereunder, CertainTeed shall bear such expense. CertainTeed shall not enter into any settlement that affects Progress Energy's rights or interests without Progress Energy's prior written approval, which shall not be unreasonably withheld. Progress Energy shall provide such assistance and cooperation as is reasonably requested by CertainTeed or its counsel in connection with such indemnified claims, at CertainTeed's expense.

- 10.2 Insurance. Each Party shall keep its properties and business insured at all times against such risks for which insurance is usually maintained by reasonably prudent persons engaged in a similar business including, without limitation, insurance for Force Majeure events and other hazards, property insurance, commercial general liability insurance and insurance under all applicable workers' compensation laws. The insurance maintained shall be in such amounts with such limits and deductibles carried by persons in the same or a similar business. Upon written request, each Party shall furnish one (1) copy of a certificate of insurance from each respective insurance carrier stating that such policies of insurance are in effect and giving the requesting Party thirty (30) calendar days prior written notice of any cancellation or material change in such policies. Either Party may self-insure all or any part of its insurance obligations described herein.

ARTICLE 11 – CONFIDENTIALITY

11.1 Confidential Information.

11.1.1 CertainTeed and Progress Energy agree to use the same degree of care, but no less than a reasonable degree of care, as such Party uses with respect to its own similar information to maintain in strict confidence (a) the terms and conditions of this Revised

Agreement, (b) any information or data relating hereto exchanged or obtained by the Parties during negotiation and performance of this Revised Agreement that is clearly designated in writing as proprietary and confidential, (c) any specific information related to the types, quantities and prices of coals used at the Roxboro Plant or Mayo Plant, and the outage schedules for the plants, (d) any information related to Gypsum Filter Cake and Other Gypsum pricing and CertainTeed's consumption requirements at the CertainTeed Manufacturing Plant or any CertainTeed Gypsum Delivery Site(s), and (e) any documents, instruments, certifications, information and data relating to CertainTeed's business, operations, and/or financial condition, including without limitation, any information regarding the CertainTeed Manufacturing Plant or any CertainTeed Gypsum Delivery Site(s) and the manufacturing processes, testing protocols and intellectual property employed therein ("**Confidential Information**"). Except as otherwise provided below herein and in Section 11.1.2, neither Party shall disclose any Confidential Information to any third party (except that either Party may make such disclosure to its parent, subsidiaries, affiliates, outside advisors and consultants and with respect to Progress Energy, to any entity with an ownership interest in either the Roxboro Plant or the Mayo Plant) or any governmental entity without prior written consent of the other Party, except where it may be required or advisable to make such disclosure under applicable laws or regulations or in connection with a judicial or administrative proceeding involving a Party hereto, in which event the Party intending to make such disclosure shall advise the other in advance and cooperate in minimizing the disclosure to the extent possible.

- 11.1.2 On January 10, 2011 Progress Energy, Inc. ("**PGN**") and Duke Energy Corporation ("**Duke**"), announced a definitive merger agreement to combine the two companies (the "**Merger**"). The companies and their respective subsidiaries have begun integration planning in connection with the anticipated Merger. Therefore, for the avoidance of doubt, Progress Energy may disclose this Revised Agreement and the terms and conditions hereunder to Duke and its subsidiaries (collectively the "**Duke Entities**"), and any regulatory agency having jurisdiction over PGN, Progress Energy, the Duke Entities and/or the Merger; provided that, such Duke Entities are advised of the confidential nature of this Revised Agreement and (b) agree to keep such information confidential.
- 11.1.3 The obligations contained in this Section 11.1 impose no obligation upon a Party with respect to Confidential Information which (a) was known to such Party before receipt from the disclosing Party, (b) is or becomes publicly available through no fault of the receiving Party, (c) is rightfully received by the receiving Party from a third Party without a duty of confidentiality, (d) is disclosed by the disclosing Party to a third Party without imposing a duty of ~~imposing a duty of~~ confidentiality on the third party, (e) is independently developed by the receiving Party without a breach of this Revised Agreement, or (f) is disclosed by the receiving Party with the disclosing Party's prior written approval. If a Party is required by a government body or court of law to disclose Confidential Information, then to the extent it is permitted or otherwise able to do so such Party agrees to give the other Party reasonable advance notice that the other Party may seek a protective order or otherwise contest the disclosure.

- 11.1.4 Notwithstanding anything herein to the contrary, any Party to this Revised Agreement (and any employee, representative, or other agent of any Party to this Revised Agreement) may disclose to its agent, advisors representatives and governmental authorities the tax treatment and tax structure of the transactions contemplated by this Revised Agreement and all work papers and other materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure; provided, that any such information shall be kept confidential to the extent required to comply with any applicable federal or state securities laws.
- 11.2 Employees, Agents and Representatives. Each Party represents and warrants to the other that it has adopted policies and procedures with respect to the receipt and disclosure of confidential or proprietary information, such as the Confidential Information, with its employees, agents and representatives. Each Party represents and warrants to the other Party that it shall exercise reasonable efforts to cause each of its employees, agents and representatives to maintain and protect the confidentiality of the other Party's Confidential Information. Such reasonable efforts shall include, without limitation, requiring each outside advisor or consultant to sign and deliver a non-disclosure agreement containing confidentiality obligations at least as stringent as the confidentiality obligations set forth in this Revised Agreement.
- 11.3 Term and Enforcement. The confidentiality obligations set forth in this Revised Agreement shall be observed during the Initial Term or any Extension Term of this Revised Agreement and for a period of two (2) years following the termination of this Revised Agreement. Each Party acknowledges that a breach of any of the terms of this Article 11 may cause the non-breaching Party irreparable damage, for which the award of damages would not be adequate compensation. Consequently, the non-breaching Party may institute an action to enjoin the breaching Party from any and all acts in violation of those provisions, which remedy shall be cumulative and not exclusive, and shall be in addition to any other relief to which the non-breaching Party may be entitled at law or in equity.
- 11.45 Return of Confidential Information. Upon the termination, cancellation or expiration of this Revised Agreement all Confidential Information in tangible form shall, upon written request, be returned to the disclosing Party, or at the receiving Party's discretion destroyed by the receiving Party. Notwithstanding the foregoing, any Confidential Information that is found in reports, analysis or other materials that are prepared by, for or on behalf of a Party may be retained at the sole discretion of the receiving Party; provided that all such Confidential Information so retained is kept confidential subject to the terms of this Revised Agreement.

ARTICLE 12 - FORCE MAJEURE

- 12.1 Neither Party shall be responsible or liable for or deemed in breach of this Revised Agreement for any delay or failure in the performance of its respective obligations

under this Revised Agreement to the extent such delay or failure is due to circumstances beyond the reasonable control of the Party experiencing such delay or failure (such Party referred to herein as the “**Nonperforming Party**”), including but not limited to acts of God or nature; earthquake, flood, drought, tornado or other severe weather conditions; war or warlike circumstances (whether or not the United States is a party); acts of terrorists, terrorism or of the public enemy, whether threatened or actual; strikes, lockouts, labor disputes, sabotage, embargo, riots, federal, state or municipal legal or regulatory requirements, restrictions or limitations or compliance therewith; Government Interference (as defined below); fire; and accident, explosion, temporary operation malfunction or interruption or damage to or breakdown of necessary facilities or equipment, including without limitation equipment breakdowns occurring despite normal and prudent equipment maintenance (such causes hereinafter called “**Force Majeure**”); provided that

- (a) The Nonperforming Party gives the other Party written notice within five (5) business days of the occurrence, with details to be supplied within fifteen (15) business days further describing the particulars of the occurrence;
- (b) the suspension of performance is of no greater scope and of no longer duration than is attributable to the Force Majeure;
- (c) the Nonperforming Party uses its reasonable efforts to remedy its inability to perform;
- (d) when the Nonperforming Party is able to resume performance of its obligations under this Revised Agreement, that Party shall give the other Party written notice to that effect; and
- (e) the Force Majeure was not caused by any negligent or intentional wrongful acts, errors or omissions, or failure to comply with any law, regulation or order, or any breach or default of this Revised Agreement by the Nonperforming Party.

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- 12.2 If the Environmental Protection Agency or any other governmental or regulatory agency having jurisdiction over any of Progress Energy, or CertainTeed, the calcium sulfate dehydrate produced by the Progress Energy FGD System(s) (“**Gypsum Product**”), the Gypsum Filter Cake and/or the product to be manufactured by CertainTeed, determines or otherwise classifies the Gypsum Product the Gypsum Filter Cake or coal combustion products in general as a “hazardous waste”, determines that it they contains “hazardous constituents” that would render it unusable in gypsum wallboard, or classifies it-them as a Regulated Substance as defined in this Revised Agreement or any similar classification or determination, it will constitute an event of Force Majeure with respect to the Party whose business, operations or product, as applicable is subject to such new or changed regulation or re-classification as applicable (any such occurrence being referred to as a “**Government Interference**”). Notwithstanding the provisions of Section 12.1 or 12.3, but subject to the provisions of Sections 17.1 and 17.2, the Party affected by an event of Force Majeure due to a

Government Interference may terminate this Revised Agreement without liability to the other Party by providing at least thirty (30) days written notice of such termination to the other Party. If the affected Party believes that a shorter notice period is required, it must so advise the other Party and give specific reasons for such shorter notice period.

- 12.3 In no event shall any condition of Force Majeure extend this Revised Agreement beyond its then-existing term. If any condition of Force Majeure is of such magnitude as to delay a Party's performance for a time period greater than sixty (60) days, the Party not claiming Force Majeure may, at any time thereafter, terminate this Revised Agreement effective upon thirty (30) days' advance written notice to the Nonperforming Party or agree to extend the Initial Term or Extension Term, as applicable, of this Revised Agreement at its sole discretion for a period equal to the duration of the Force Majeure. Upon the effective date of a termination, if any, neither Party shall have any further liability to the other under this Revised Agreement ~~except with respect to liabilities that arose prior to such termination.~~
- 12.4 In construing and interpreting this Article 12, and other provisions of this Revised Agreement, the Parties ~~shall recognize that the primary mission of the Roxboro Plant and the Mayo Plant shall be the safe and efficient production of reliable electrical power on an economic basis.~~

ARTICLE 13 – SECURITY

- 13.1 CertainTeed and CertainTeed's employees and contractors who are provided with access to Progress Energy Property shall comply with the security practices and procedures prescribed by Progress Energy to over that Progress Energy Property, CertainTeed shall advise its employees and contractors of these practices and procedures and shall instruct them to abide by the procedures. Progress Energy will make a copy of these practices and procedures available to CertainTeed upon request.
- 13.2 Progress Energy and Progress Energy's employees and contractors who are provided with access to the CertainTeed Site shall comply with the security practices and procedures prescribed by CertainTeed to cover the CertainTeed Site. Progress Energy shall advise its employees and contractors of these practices and procedures and shall instruct them to abide by the procedures. CertainTeed will make a copy of these practices and procedures available to Progress Energy upon request.

ARTICLE 14 - LAWS AND PROJECT RULES

- 14.1 Compliance with Environmental Laws.
- a) In performing its obligations pursuant to this Revised Agreement, Progress Energy and CertainTeed shall comply with all Environmental Laws.
 - b) CertainTeed may obtain from Progress Energy any public records and other information which Progress Energy deems relevant to CertainTeed's compliance

with Environmental Laws. Progress Energy does not warrant the accuracy or completeness of such records and information, and CertainTeed shall determine independently how to conform its activities to the requirements of Environmental Laws.

14.2 Releases.

- a) CertainTeed shall not Release any Regulated Substance on Progress Energy Property.
- b) In the event CertainTeed Releases any Regulated Substance on Progress Energy Property, CertainTeed shall immediately notify Progress Energy and remediate the Release pursuant to all applicable Environmental Laws and to Progress Energy's direction and reasonable satisfaction. Progress Energy's costs in supervising, directing, inspecting and/or assisting CertainTeed to respond to the Release shall be subject to indemnification under Section 14.3 hereof.
- c) If following a Release by CertainTeed, CertainTeed fails to comply with the terms of Section 14.2(b), Progress Energy may in its discretion remediate the Release and otherwise perform CertainTeed's obligations. Progress Energy's costs in performing CertainTeed's remedial activities shall be subject to indemnification under Section 14.3.

14.3 Environmental Indemnity. CertainTeed shall indemnify Progress Energy, (including its parent, subsidiary and affiliate companies), from any Claim or loss in property value arising in any way from CertainTeed's Management of any Regulated Substance or CertainTeed's failure to comply with the terms of this Article 14.

14.4 Environmental Audits. Progress Energy shall have the right upon reasonable advance notice and during normal business hours to conduct an on-site environmental review of the CertainTeed Site to verify CertainTeed's compliance with federal, state and local statutes, regulations and ordinances related to any discharge into Progress Energy's intake canal. Progress Energy shall minimize disruption to CertainTeed's operations during such audit and shall promptly repair any damage caused by Progress Energy during any audit.

14.5 Definitions.

The definitions below only are applicable to this Article 14 except as otherwise provided herein.

- a. "Claim" means any (1) administrative, regulatory or judicial action or cause of action, suit, liability, judgment, penalty, damages, directive, order, claim relating in any way to any Environmental Law, the Management of any Regulated Substance, the presence of any Regulated Substance in the environment or any alleged injury or threat of injury to health, safety, property or the environment and (2) cost or expense (including, without limitation, any attorneys', experts' and consultants

fees' and expenses) which is or may be necessary, in Progress Energy's sole discretion, to comply with any Environmental Law, to respond to and defend against any action listed in clause (1), to protect the health or safety of any person or to permit or facilitate any lawful use of real property.

- b. "Progress Energy Property" means any property, facility or equipment owned, leased or under the control of Progress Energy wherever located, including land, buildings, structures, installation, boats, planes, helicopters and other vehicles.
- c. "Environmental Law" means any federal, state or local law, statute, ordinance, rule, judicial or administrative order now in effect or hereafter enacted relating to (1) the regulation or protection of human health, safety, occupational safety and health, the environment or natural resources or (2) any Regulated Substance.
- d. "Indemnify", with respect to any Claim or cost, means (1) to indemnify, save and hold harmless, reimburse and make whole on an after-tax basis, the designated indemnitee and its affiliates and their respective officers, directors, employees, partners and agents from any Claim or cost imposed on or incurred by the indemnitee, or asserted by any third party against the indemnitee; (2) to defend any suit or other action brought against the indemnitee on account of any Claim and (3) to pay any judgment against and satisfy any equitable or other requirement imposed on, the indemnitee resulting from any such suit or action, along with all costs and expenses relative to any such Claim, including, without limitation, attorney's consultant's and expert witness fees.
- e. "Manage" or "Management", with respect to any substance or material, means the manufacture, processing, distribution, use, possession, generation, transportation, labeling, identification, handling, removal, treatment, storage, disposal, Release or threatened Release thereof.
- f. "Regulated Substance" means any chemical, material, substance or waste the exposure to, access to or Management or which is now or hereafter prohibited, limited or regulated by any law or governmental unit.
- g. "Releas(s)", with respect to any substance or material, means any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing or disposing of such substance into the environment, or any other act or event the occurrence of which would require containment, remediation, notification or similar response under any law.

ARTICLE 15 - TERMINATION OF REVISED AGREEMENT

15.1. Termination for Cause.

- (a) The following actions by either Party shall give the other Party the right to terminate this revised Agreement after thirty (30) calendar days' written notice in

reasonably sufficient detail to the defaulting Party describing the nature of the default, provided that the defaulting Party fails to cure the default within such thirty (30) day period or in the event the default is not capable of being cured within thirty (30) calendar days, the defaulting Party within such thirty (30) day period fails to present a written plan to the non-defaulting Party that is reasonably acceptable to the non-defaulting Party and is designed to cure the default as soon as practical, or thereafter fails to diligently and in good faith execute the plan until completion:

- (i) A Party fails to comply in all material respects with applicable laws, regulations or ordinance applicable to the performance of this Revised Agreement; or
- (ii) A Party materially breaches the terms of this Revised Agreement.

(b) The following actions with respect to a Party shall give the other Party the right to terminate this Revised Agreement after five (5) calendar days' written notice:

- (i) A Party makes a general assignment for the benefit of its creditors.
- (ii) A Party becomes insolvent or has a receiver appointed because of insolvency; or
- (iii) A Party files bankruptcy or has a petition for involuntary bankruptcy filed against it.

In the event of termination by either Party under this subsection 15.1, 1 the non-defaulting Party shall be entitled to exercise all remedies specified in Section 6.3 and 6.5.

ARTICLE 16 - MISCELLANEOUS PROVISIONS

16.1 **Relationship of the Parties.** Nothing contained herein shall be construed to imply a partnership or joint venture relationship between the Parties. The Parties shall not be entitled to create any obligations on behalf of the other Party. The Parties shall not enter into any contracts with third parties in the name of the either Party.

16.2 **Notices.** Any notice or demand required by this Revised Agreement shall be in writing and deemed properly given if delivered in person to, mailed, postage prepaid and return receipt requested to, delivered to a nationally recognized overnight courier or sent by facsimile to the respective Parties as follows. Parties may change designates with thirty (30) days written notice.

If to Progress Energy:	Progress Energy Carolinas, Inc. 1700 Dunnaway Road Semora, NC 27343 Facsimile Number: 336-597-6257 Attention: Roxboro Plant Manager
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With a copies to: Progress Energy Carolinas, Inc.
 410 S. Wilmington Street, FEB 17
 Raleigh, NC 27601
 Attention: Pam Leonard, Associate General Counsel
 Facsimile Number: 919.546.3805

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Progress Energy Carolinas, Inc.
 100 E. Davie Street, TPP9
 Raleigh, NC 27601
 Attention: Manager-Coal, By-Products & Reagents
 Facsimile Number: 919.546.4837

~~If to CertainTeed: CertainTeed Gypsum NC, Inc.
 4300 W. Cypress Street, Suite 500
 Tampa, FL 33607
 Attention: Vice President Operations, Technical Services
 Facsimile Number: 813.286.3993~~

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With copy to: ~~CertainTeed Gypsum NC~~ Saint-Gobain Corporation, Inc.
 4300 W. Cypress Street, Suite 500
 Tampa, FL 33607
 Attention: ~~General~~ Division Counsel
 Facsimile Number: 813.283.3993

- 16.3 Assignment. This Revised Agreement may not be assigned by either Party hereto without the prior written consent of the other Party, such consent not to be unreasonably withheld. Notwithstanding the foregoing, either Party may assign this Revised Agreement to an Affiliate; provided, however, that no assignment or transfer in whole or in part of any Party's interest in this Revised Agreement shall relieve such Party of its obligations hereunder without the express prior written consent of the other Party.
- 16.4 Governing Law. This Revised Agreement shall be construed under and in accordance with the laws of the State of North Carolina without regard to conflicts of laws principles.
- 16.5 Severability. Every provision of this Revised Agreement is intended to be severable. If any term, or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Revised Agreement provided the essential purposes of this Revised Agreement are not frustrated.
- 16.6 Counterparts. This Revised Agreement may be executed by facsimile and in any

number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

- 16.7 Legal Fees and Costs. If a legal action is initiated by any Party to this Revised Agreement against another, arising out of or relating to the alleged performance or nonperformance of any right or obligation established hereunder, or any dispute concerning the same, any and all fees, costs and expenses reasonably incurred by each successful Party or their legal counsel in investigating, preparing for, prosecuting, defending against, or providing evidence, producing documents or taking any other action in respect of, such action shall be the obligation or and shall be paid or reimbursed by the unsuccessful Party.
- 16.8 Waiver and Remedies. No waiver of any breach of this Revised Agreement shall be held to be a waiver of any other breach.
- 16.9 No Third-Party Beneficiaries. This Revised Agreement shall not create any rights in favor of any third party.
- 16.10 Entire Agreement. This Revised Agreement and the letter agreement between the Parties dated _____, February 12, 2004, as such may be modified and /or amended (the "Guaranty Agreement") or, if applicable, any agreement that supersedes and replaces the Guaranty Agreement (the "Replacement Guaranty"), the Deed of Trust, the Operating Agreement and the other documents referenced herein, constitute the entire understanding of the Parties hereto with respect to the subject matter hereof, and no amendment, modification or alteration of the terms hereof shall be binding unless the same is set forth in writing, dated subsequent to the date hereof and duly approved and executed by each Party. This Revised Agreement supersedes and replaces in its entirety the Amended Agreement as of the Effective Date first set forth above.
- 16.11 Dispute Resolution. As a matter of course the Parties shall bring problems or potential problems to the attention of each other as soon as practical and discuss them. The Parties shall attempt to resolve any dispute arising out of or relating to this Revised Agreement promptly by good faith negotiations between the appropriate representatives of the Parties. The disputing Party shall initiate negotiations by giving the other Party written notice of the dispute ("Initial Notice"). Within ten (10) business days after receipt of the Initial Notice, the receiving Party shall submit to the disputing Party a written response. Both the Initial Notice and the response shall include: (a) a statement of the Party's position and a summary of the relevant facts supporting that position and (b) the name, title, fax number, telephone number and email address of a management representative of the Party authorized to settle the dispute. The management representatives shall confer within thirty (30) days of receipt of the Initial Notice, in person at a mutually acceptable time and place if reasonable or by telephone, at least once and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt in good faith to resolve the dispute. If the dispute is not resolved within fifteen (15) days after the first meeting of the management

- representatives, either Party may initiate litigation to resolve the dispute. All negotiations and communications pursuant to this Section 16.11 shall be treated and maintained by the Parties as Confidential Information and shall be treated as compromise and settlement negotiations for the purposes of the Federal and North Carolina Rules of Evidence.
- 16.12 Taxes. CertainTeed shall be responsible for any taxes imposed upon the purchase of Gypsum Filter Cake, Additional Gypsum, Excess Gypsum, Other Gypsum, or Defective Material (collectively "Gypsum"), or any other CertainTeed activities in all such cases where such purchases are for use for CertainTeed's use.
- (a) Each Party will use reasonable efforts to administer this Revised Agreement and implement the provisions of this Revised Agreement in accordance with the intent to minimize taxes. Progress Energy will be solely responsible for all taxes relating to the production, sale, use, loading and delivery of the ~~gypsum-Gypsum~~ Gypsum to ~~CertainTeed or in any way accrued or levied prior to the transfer of title and ownership to the gypsum-Gypsum~~ CertainTeed. If either Party is exempt from taxes, it will provide the other Party with a certificate of exemption or other reasonably satisfactory evidence of such exemption. Each Party will use reasonable efforts to obtain and cooperate with the attempts by the other Party to obtain any pass through, exemption from or reduction of any taxes. CertainTeed will be solely responsible for all taxes relating to the ~~gypsum-Gypsum~~ Gypsum accrued or levied at or after the transfer of title and ownership to the ~~gypsum~~ Gypsum to CertainTeed. Each Party hereby agrees to indemnify, release, defend and hold harmless the other Party from and against any and all taxes with respect to the ~~gypsum~~ Gypsum that are the responsibility of the other Party as provided in this Section 16.12(a).
- (b) The price of the Gypsum Filter Cake and Other Gypsum set forth herein does not include applicable taxes which are the responsibility of the respective Party as provided in Section 10.1 hereof except that with respect to any applicable North Carolina sales tax ("**Sales Tax**"), Progress Energy will add such Sales Tax to the amounts on the invoice and collect the Sales Tax from CertainTeed unless prior to the delivery of any ~~gypsum~~ Gypsum to which such invoice relates CertainTeed has provided Progress Energy with a valid NC Direct Pay Permit, or other applicable valid exemption certificate.
- 16.13 Survival. Notwithstanding anything to the contrary in this Revised Agreement the following sections shall survive the expiration, cancellation or termination of this Revised Agreement: 2.3, 3.2, 3.4, 4.1, 4.3, 5.5, 6.1, 6.3, 6.4, 6.5, 6.6, 9.1, 9.2, 9.3, 9.4, 10.1, 11.1, 11.2, 11.3, 11.4, 14.2, 14.3, 14.4, 14.5, 16.4, 16.7 and 16.11.
- 16.14 Public Announcements. Neither Party shall publicly announce the existence of this Revised Agreement or any of the transactions contemplated hereby without the prior consent of the other Party. The Parties agree to cooperate in good faith to coordinate all announcement activities.

16.15 Representations and Warranties. On the Effective Date ~~Certain Feed-the-Parties~~ each represents and warrants to ~~Progress-Energy~~ the other that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
- (b) it has all regulatory and corporate authorizations necessary for it to legally perform its obligations under this Revised Agreement;
- (c) the execution, delivery and performance of this Revised Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (d) this Revised Agreement and each other document executed and delivered in accordance with this Revised Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any equitable defenses.
- (e) it is not bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Revised Agreement;
- (g) it is acting for its own account, has made its own independent decision to enter into this Revised Agreement and as to whether this Revised Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Revised Agreement;
- (h) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code;
- (i) it has entered into this Revised Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of all products referred to in this Revised Agreement;
- (j) it is a producer, processor, commercial user or merchant handling the product, and it is entering into this Revised Agreement for purposes related to its business as such; and

- (k) the material economic terms of this Revised Agreement were subject to individual negotiation by the Parties.

ARTICLE 17 — REGULATORY CHANGES

- 17.1 Hazardous or Toxic Waste. Upon the occurrence of a Governmental Interference that would prohibit use of the Gypsum Filter Cake in gypsum wallboard or otherwise makes it unusable in CertainTeed’s production process, and provided that proven processes are generally available to make the Gypsum Filter Cake produced at the Roxboro Plant and Mayo Plants useable, which (a) do not adversely affect the reliability, efficiency, and environmental compliance of the Units or FGD Systems in any material way, ~~and (b) can be fully implemented for a total aggregate cost not to exceed \$20,000,000, then at Progress Energy’s sole discretion, and (b) will not direct or redirect mercury or other elements or materials into the Gypsum Filter Cake in an effort to meet new clean air admission standards, or for other reasons or as a result of any acts or omissions of Progress Energy’s Roxboro or Mayo plant operations, and (c) can be fully implemented for a total aggregate cost not to exceed \$20,000,000, then at Progress Energy’s sole discretion.~~ Progress Energy shall make such process changes to the affected Units and/or FGD Systems. Progress Energy shall promptly notify CertainTeed of its decision to make or not make such process changes. If Progress Energy notifies CertainTeed of its election to make such process changes then CertainTeed shall not be entitled to terminate this Revised Agreement due to an extended period of Force Majeure as provided in Article 12 hereof, and (c) can be fully implemented for a total aggregate cost not to exceed \$20,000,000. Progress Energy shall make such process changes to the affected Units and/or FGD Systems. Progress Energy shall promptly notify CertainTeed of its decision to make or not make such process changes. If Progress Energy notifies CertainTeed of its election to make such process changes then CertainTeed shall not be entitled to terminate this Revised Agreement due to an extended period of Force Majeure as provided in Article 12 hereof.
- 17.2 CertainTeed Option to Remedy Before Termination. In the event Section 17.1 is triggered and Progress Energy elects not to or is unable for any reason to change its process mitigate the impact of the Government Interference such that the Gypsum Filter Cake is no longer hazardous, containing “hazardous constituents”, or otherwise unusable, CertainTeed shall have sixty (60) days after receiving notice from Progress Energy as set forth in Section 17.1 or such longer period of time mutually agreed to by the Parties to consider technical changes to its production process at the CertainTeed Manufacturing Plant to mitigate the impact of the Government Interference such that the Gypsum Filter Cake is no longer hazardous, containing “hazardous constituents”, or otherwise unusable, before either Party may terminate this Revised Agreement. If CertainTeed ~~certain~~ elects to take deliveries of the Gypsum Filter Cake and/or any gypsum product after the effective date of any Government Interference, CertainTeed will be responsible to indemnify Progress Energy for any and all claims arising out of and/or relating to use of the Gypsum Filter Cake or other gypsum product pursuant to this Revised Agreement, including without limitation under Section 14.3 hereof.

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ARTICLE 18 – USE OF FACILITIES ON PROGRESS ENERGY PROPERTY
LOADING FACILITY

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- 18.1 Operating Agreement for Loading Facility. The Parties have negotiated and entered into the Operating Agreement which is incorporated herein by reference for the operation of the Loading Facility.

- 18.2 Removal of Facilities. If this Revised Agreement and the Operating Agreement are terminated as a result of a default by Progress Energy (the “**Progress Default Termination**”), the Operating Agreement property will nonetheless revert to Progress Energy as provided therein but the Loading Facility and its associated assets, fixtures and improvements made upon such Operating Agreement property and the Diverter Tower, any related additional equipment and the Diverter Tower’s associated assets, fixtures and improvements will not become the property of ~~Progress~~ Progress Energy except as otherwise provided in the last sentence of this Section 18.2. CertainTeed shall have 180 days from the date of the Progress Default Termination to dismantle and remove the Loading Facility, ~~the Diverter Tower~~, and any associated assets, fixtures and improvements that were constructed by CertainTeed on the Operating Agreement property for purposes of the Loading Facility or in connection with the Diverter Tower that reasonably can be removed without damage, harm or waste to the Operating Agreement property or other PE property. Upon such removal CertainTeed shall return the Operating Agreement property to its original condition prior to such removal, ordinary wear and tear excepted. Any and all such assets, fixtures and improvements, which are not removed by CertainTeed within 180 days as provided herein will become the property of Progress Energy. Upon the expiration of the Term of this Revised Agreement (including any extensions or renewals thereof), CertainTeed may, at its option, remove all or any of the Diverter Tower, any related additional equipment and the Diverter Tower’s associated assets, fixtures and improvements.

- 18.3 Use of Railroad Tracks. Progress Energy shall provide CertainTeed with railroad access to the CertainTeed Manufacturing Plant over Progress Energy’s railroad tracks north of the Progress Energy canal at the Roxboro Plant, provided, CertainTeed acknowledges and agrees that CertainTeed’s rail operations are secondary to critical Progress Energy rail operations connected with the delivery of coal, ammonia and limestone and any other necessary product to the Roxboro Plant and that CertainTeed’s rail operations shall be subject, from time to time, to temporary interruptions while such critical rail operations are being performed. Notwithstanding the foregoing, Progress Energy and CertainTeed will work together in good faith to minimize, mitigate, and schedule for any such railroad service interruptions to the CertainTeed Manufacturing Plant. Prior to the expiration of the Operating Agreement, Progress Energy shall grant to CertainTeed a non-exclusive easement for railroad purposes across Progress Energy’s property at the Roxboro Plant in an easement agreement mutually agreeable to both Parties. CertainTeed agrees to pay its pro-rata share of the operation and maintenance costs of the railroad tracks utilized by CertainTeed. The Parties will work together to mutually agree upon a method of allocation for the sharing of such costs.

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ARTICLE 19 – HAUL ROAD

19.1 CertainTeed Haul Road. CertainTeed agrees to grant Progress Energy and its contractors a license to haul Limestone, ammonia and Gypsum Filter Cake between the Roxboro Plant and the Mayo Plant on and across the CertainTeed Site, by utilizing a haul road to be constructed by CertainTeed using a route to be agreed on by the Parties (the “**Haul Road**”). ~~Notwithstanding the foregoing, Progress Energy acknowledges that during construction of the CertainTeed Manufacturing Plant there will be a period of excavation lasting approximately five (5) to seven (7) months (the “Excavation Period”) and that during such Excavation Period Progress Energy will not be able to utilize the Dirt Road as provided above in this Section 19.1. CertainTeed agrees that (i) it will make any upgrades and/or improvements to the Dirt Road as reasonably requested by Progress Energy, at CertainTeed’s cost and expense, so as to make such Dirt Road usable by Progress Energy’s fully loaded highway truck traffic and (ii) it will use its best efforts to minimize the duration of the Excavation Period (i.e. the duration of time during which the Dirt Road is unavailable for use by Progress Energy’s or its contractors’, as applicable, trucks).~~

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- (i) This Haul Road shall be maintained by Progress Energy in good and usable condition during the Term of this Revised Agreement.
- (ii) Such license and access for Progress Energy and its contractors shall continue through the Term of this Revised Agreement.
- (iii) Progress Energy and its contractors agree to abide by all CertainTeed safety rules and regulations, including but not limited to speed limits, stop signs, time constraints, traffic patterns, ~~emergency response plans~~ and other reasonable requirements regarding the use of the Haul Road submitted in writing to Progress Energy previously or during the term of this Revised Agreement.
- (iv) Progress Energy shall develop and follow a written plan (the “**Pollution Control Plan**”) relating to fugitive dust and spillage etc, resulting from the transportation of materials on the CertainTeed Site. ~~This plan must be reviewed and approved by CertainTeed.~~
- (v) The Parties will work together to develop an emergency response plan in the event of an ammonia spill or release during transportation.
- (vi) Gate access, security and control at the Progress Energy-CertainTeed property boundary on the Haul Road will be maintained and controlled by Progress Energy.

IN WITNESS WHEREOF, the Parties hereto have each caused this Revised Agreement to be executed by its duly authorized representative as of the day and year first above written.

CAROLINA POWER & LIGHT COMPANY

CERTAINT TED GYPSUM NC, INC.

d/b/a PROGRESS ENERGYCAROLINAS, INC.

By: _____

By: _____

Print Name: _____

Print Name: _____

Its: _____

Its: _____

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1204

In the Matter of)	SUPPLEMENTAL
Application of Duke Energy Progress, LLC)	REBUTTAL TESTIMONY
Pursuant to G.S. 62-133.2 and NCUC Rule)	OF JOHN GAYNOR
R8-55 Relating to Fuel and Fuel-Related)	FOR DUKE ENERGY PROGRESS, LLC
Charge Adjustments for Electric Utilities)	

1 **Q. MR. GAYNOR, PLEASE STATE YOUR NAME AND BUSINESS**
2 **ADDRESS.**

3 A. My name is John Gaynor, and my address is 972 Harvest Drive, Antioch, IL 60002.

4 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**
5 **PROFESSIONAL EXPERIENCE.**

6 A I graduated from the University of Illinois at Urbana-Champaign in 1979 with a
7 Bachelor of Science degree in Chemical Engineering. In 1984, I received a MBA
8 degree from Roosevelt University in Chicago, IL.

9
10 I started working at United States Gypsum Company (“USG”) in 1979 in their
11 Research and Development Center in Des Plaines, IL. USG was, and continues to be,
12 the largest manufacturer and marketer of gypsum wallboard and gypsum products in
13 North America. I worked on multiple projects related to synthetic gypsum and was
14 awarded 4 patents related to making synthetic gypsum usable for wallboard. I was
15 eventually promoted to Manager of the Gypsum Processing Laboratory. In 1990, I
16 left USG to work for Westinghouse Savannah River in their Systems Engineering
17 group.

18
19 In 1991, I returned to USG as Manager of Alternate Materials in the Chicago
20 Corporate Office and I remained with the company for approximately 28 years.
21 Therefore, in total, I have 39 years of experience in work related to synthetic gypsum
22 and its uses. During those 39 years, I gained in-depth, real world experience in
23 virtually every aspect of the synthetic gypsum market and wallboard manufacturing
24 process. My responsibilities included development of synthetic gypsum and other

1 waste gypsum sources for use in USG products. I held multiple positions at USG
2 including Director of Synthetic Gypsum and Director of Gypsum Supply for the
3 company. In these positions, I was responsible for procuring over 3 million tons per
4 year of synthetic gypsum purchased by USG and I oversaw every detail regarding the
5 procurement process, including contractual terms, pricing, etc. My work in synthetic
6 gypsum procurement included developing new supply sources and agreements with
7 power companies in connection with the development of three new greenfield
8 wallboard plants designed to run 100% synthetic gypsum and I have in-depth
9 familiarity with the economics and strategies related to capital investment in new
10 wallboard manufacturing facilities. I retired from USG in December of 2019.

11 **Q. HAVE YOU PREVIOUSLY TESTIFIED OR SUBMITTED TESTIMONY**
12 **BEFORE THE NORTH CAROLINA UTILITIES COMMISSION?**

13 A. No.

14 **Q. WHAT IS THE PURPOSE OF YOUR SUPPLEMENTAL REBUTTAL**
15 **TESTIMONY?**

16 A. The purpose of this rebuttal testimony is to respond on behalf of Duke Energy
17 Progress, LLC (“DEP” or the “Company”) to limited portions the Supplemental
18 Testimony of Public Staff witness Jay B. Lucas in this proceeding.

19 **Q. PLEASE DISCUSS THE SCOPE OF YOUR REVIEW.**

20 A. I have reviewed the pre-filed Supplemental Testimony of Witness Lucas. I have
21 also reviewed certain portions of the initial gypsum supply agreement that was
22 entered into by the parties in 2004 (“Initial Agreement”), the amended agreement
23 executed in 2008 (“2008 Amended and Restated Agreement”) and the amended
24 agreement executed in 2012 (“2012 Amended and Restated Agreement,” and the

1 entirety of the contractual relationship is also referred to herein as the “Gypsum
2 Supply Agreement”). I have also reviewed certain portions of a redline agreement
3 containing changes proposed by CertainTeed Gypsum NC, Inc.¹ (“CertainTeed”)
4 at the time of the negotiation of the 2012 Amended and Restated Agreement
5 (attached to the pre-filed Supplemental Rebuttal Testimony of Barbara A. Coppola
6 and John Halm as DEP Supplemental Exhibit 1) and Confidential Lucas
7 Supplemental Exhibit 2. Finally, I have also reviewed the Opinion and Final
8 Judgment of the North Carolina Business Court (“Court”) dated August 28, 2018
9 (“Court’s Opinion”). Through this review, I have become familiar with the basic
10 details of the nature and history of the commercial arrangement between DEP and
11 CertainTeed regarding which Witness Lucas has testified, including specifically the
12 facts and circumstances of the negotiation and execution of the 2012 Amended and
13 Restated Agreement.

14 **Q. WHAT HAVE YOU CONCLUDED?**

15 A. I have determined that:

- 16 1. The flexibility offered by CertainTeed in the context of the negotiations of the
17 2012 Amended and Restated Agreement would not have excused DEP from
18 satisfying the annual delivery obligation that was already in effect and would
19 potentially have imposed an absolute minimum stockpile obligation.
- 20 2. Based on my in-depth understanding of the gypsum supply market and potential
21 alternative sources of gypsum and my personal experience developing
22 wallboard manufacturing facilities, the financial viability of the CertainTeed

¹ CertainTeed is the successor-in-interest to BPB NC Inc., which negotiated and executed the 2004 Agreement.

1 manufacturing facility at Roxboro would have been highly dependent on an
2 adequate supply of gypsum from the Roxboro and Mayo. Therefore, it is
3 reasonable and consistent with industry practice for similar situations that
4 CertainTeed would have obtained a firm monthly or annual delivery
5 commitment from DEP in order to ensure that CertainTeed could maximize the
6 use of its wallboard manufacturing facility. And once CertainTeed had
7 obtained such firm delivery commitment, as it did under the Initial Agreement
8 (and carried forward into the 2008 Amended and Restated Agreement) and
9 actually constructed the wallboard manufacturing facility, I do not believe that
10 CertainTeed would have proposed or accepted any contract modification that
11 would have materially reduced its long-term certainty of supply.

12 **Q. WHAT REVIEW DID YOU UNDERTAKE TO ASSESS THE**
13 **FLEXIBILITY THAT WAS OFFERED BY CERTAINTEED DURING THE**
14 **NEGOTIATIONS OF THE 2012 AMENDED AND RESTATED**
15 **AGREEMENT?**

16 A. I reviewed the actual changes to the relevant section of the Gypsum Supply
17 Agreement that were proposed by CertainTeed. These changes were contained in
18 Trial Exhibit 23 and described in detail in the Court's Opinion.

19 **Q. PLEASE EXPLAIN YOUR UNDERSTANDING THE FLEXIBILITY**
20 **OFFERED BY CERTAINTEED AT THE TIME OF THE NEGOTIATION**
21 **OF THE 2012 AMENDED AGREEMENT.**

22 A. Based on my review of the Court's Opinion and the actual proposed changes, my
23 opinion is that CertainTeed appeared to desire more flexibility with respect to the

1 monthly delivery and acceptance obligations under the Gypsum Supply Agreement.

2 But CertainTeed's proposal still included a firm annual delivery obligation of
3 600,000 tons and potentially imposed an obligation on DEP to maintain a minimum
4 stockpile of 100,000 tons.

5 **Q. IS THIS VIEW CONFIRMED BY THE COURT'S OPINION?**

6 A. Yes. The Court's Opinion states that CertainTeed "intended to allow for greater
7 monthly variations while maintaining an annual quantity obligation and requiring
8 a Stockpile Buffer." The Court went on to state that under CertainTeed's proposal,
9 "DEP would be required to maintain at least 100,000 net dry tons of Gypsum Filter
10 Cake in the Stockpile at all times, irrespective of what DEP actually produced at its
11 Roxboro Plant and Mayo Plant."²

12 **Q. WHAT IS THE PRACTICAL EFFECT OF OFFERING MONTHLY
13 FLEXIBILITY BUT RETAINING A FIRM ANNUAL OBLIGATION?**

14 A. Monthly flexibility can allow parties to accommodate the inter-month variability
15 that can occur at either the generating facility or the wallboard manufacturing
16 facility. But since the annual delivery obligation remained at 600,000 tons in
17 CertainTeed's proposal, DEP's ultimate obligation to deliver gypsum over the term
18 of the Gypsum Supply Agreement would not have been fundamentally changed.

19 **Q. PLEASE PROVIDE COMMENT REGARDING THE MINIMUM
20 STOCKPILE SIZE OBLIGATION.**

21 A. CertainTeed's proposal included a 100,000 ton minimum stockpile obligation that
22 appeared to be potentially an absolute obligation, irrespective of the production at

² Opinion at Para. 99.

1 Roxboro and Mayo and irrespective of whether DEP was satisfying the annual
2 delivery obligation. Any absolute minimum stockpile obligation would have been
3 an untenable and commercially unreasonable arrangement for DEP.

4 **Q. DID CERTAINTEED HAVE ASSURANCE OF ADEQUATE SUPPLY**
5 **PRIOR TO THE 2012 AMENDED AND RESTATED AGREEMENT?**

6 A. Yes. CertainTeed had assurance that it would receive a monthly amount of 50,000
7 tons (which equated to an annual amount of 600,000 tons), subject to a 10%
8 variation. This assurance of supply was likely the primary factor that induced
9 CertainTeed to invest a substantial amount of capital in a new wallboard
10 manufacturing facility.

11 **Q. IN YOUR OPINION, WOULD IT HAVE MADE COMMERCIAL SENSE**
12 **FOR CERTAINTEED TO VOLUNTARILY SURRENDER ITS**
13 **ASSURANCE OF SUPPLY?**

14 A. No. Given that CertainTeed had invested in wallboard plant that was heavily if not
15 completely dependent on supply from Roxboro and Mayo, it would not make
16 commercial sense for CertainTeed to voluntarily surrender the assurance of supply
17 that it already had in placed prior to the negotiations of the 2012 Amended and
18 Restated Agreement.

19 **Q. DOES THIS CONCLUDE YOUR PRE-FILED SUPPLEMENTAL**
20 **REBUTTAL TESTIMONY?**

21 A. Yes, it does.