

1 PLACE: Dobbs Building, Raleigh, North Carolina
2 DATE: March 10, 2020
3 DOCKET NO.: E-2, Sub 1204
4 TIME IN SESSION: 10:00 a.m. to 3:12 p.m.
5 BEFORE: Chair Charlotte A. Mitchell, Presiding
6 Commissioner Daniel G. Clodfelter
7 Commissioner ToNola T. Brown-Bland
8 Commissioner Lyons Gray
9
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11 IN THE MATTER OF:
12 Application of Duke Energy Progress, LLC,
13 Pursuant to N.C.G.S. 62-133.2 and NCUC Rule R8-55
14 Regarding Fuel and Fuel-Related Cost Adjustments for
15 Electric Utilities
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18 Volume 3
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1 P R O C E E D I N G S

2 CHAIR MITCHELL: All right. Good morning.
3 Let's come to order and go on the record, please. I'm
4 Charlotte Mitchell, Chair of the Utilities Commission,
5 and with me this morning are my colleagues Commissioner
6 ToNola D. Brown-Bland, Lyons Gray, and Daniel G.
7 Clodfelter.

8 I now call for hearing Docket Number E-2, Sub
9 1204, which is the Application by Duke Energy Progress,
10 LLC, Pursuant to North Carolina General Statute Section
11 62-133.2 and Commission Rule R8-55, Relating to Fuel and
12 Fuel-Related Charge Adjustments for Electric Utilities.

13 On June 11th, 2019, DEP filed an application
14 for fuel and fuel-related cost adjustments, along with
15 supporting testimony and exhibits.

16 The Commission granted interventions in this
17 docket pursuant to petitions filed by the North Carolina
18 Electric Membership Corporation, Fayetteville Public
19 Works Commission, Carolina Utility Customers Association,
20 Incorporated, the Sierra Club, the North Carolina
21 Sustainable Energy Association, and Carolina Industrial
22 Group for Fair Utility Rates. The intervention of the
23 Public Staff is recognized pursuant to North Carolina
24 General Statute Section 62-15(d) and Commission Rule R1-

1 19(e).

2 On June 20th, 2019, the Commission issued its
3 Order Scheduling Hearing, Requiring Filing of Testimony,
4 Establishing Discovery Deadline -- Guidelines, and
5 Requiring Public Notice.

6 The case came on for hearing as scheduled on
7 September 9th and 10th, 2019. The Application, prefiled
8 direct, supplemental, and rebuttal testimonies, and
9 exhibits of DEP's witnesses, and the prefiled direct
10 testimony of the Public Staff's witnesses were received
11 into evidence. No other party filed any testimony.

12 On November 25th, 2019, the Commission issued
13 an Order Approving Interim Fuel Charge Adjustment,
14 Requiring Further Testimony, and Scheduling this Hearing.
15 In summary, the Fuel Order approved DEP's proposed
16 recovery of its fuel cost through a fuel rider effective
17 for service rendered on or after December 1st, 2019.

18 However, the Fuel Order also reserved one issue
19 for further review by the Commission. That issue is
20 DEP's request to recover as a fuel cost liquidated
21 damages that DEP is paying to CertainTeed Gypsum North
22 Carolina, LLC. DEP is paying the liquidated damages as
23 part of a settlement of a breach of contract Judgment
24 obtained by CertainTeed in the North Carolina Business

1 Court in 2018. The breach of contract litigation arose
2 from a contract entered into by DEP to supply synthetic
3 gypsum from DEP's Mayo and Roxboro coal-fired generating
4 stations to CertainTeed for CertainTeed's use in
5 manufacturing wallboard.

6 In the Fuel Order the Commission issued the
7 Public -- the Commission ordered the Public Staff to
8 conduct a prudence review of DEP's actions in entering
9 into the contract with CertainTeed and to file testimony
10 by January 17th, 2020. Further, the Commission ordered
11 DEP to file rebuttal testimony by February 17th, 2020.

12 Finally, the Commission scheduled a hearing for
13 today to receive evidence on the issue of whether DEP
14 should be allowed to recover the liquidated damages from
15 its ratepayers.

16 On January 17th, the Public Staff filed its
17 supplemental direct testimony, and on February 17th,
18 2020, DEP filed its supplemental rebuttal testimony.

19 Pursuant to the State Ethics Act, I remind all
20 members of the Commission of their duty to avoid
21 conflicts of interest, and inquire at this time as to
22 whether any Commissioner has a known conflict of interest
23 with respect to the matters coming before us this
24 morning?

1 (No response.)

2 Please let the record reflect that there appear
3 to be no conflicts, so we'll move forward with this
4 proceeding. I now call on counsel to announce their
5 appearances, beginning with DEP.

6 MR. JIRAK: Good morning, Chair Mitchell,
7 Commissioners. Jack Jirak on behalf of Duke Energy
8 Progress, along with Dwight Allen.

9 CHAIR MITCHELL: Good morning, Mr. Jirak.

10 MS. HICKS: Good morning, Chair Mitchell,
11 Commissioners. Warren Hicks with Bailey & Dixon on
12 behalf of Carolina Industrial Group for Fair Utility
13 Rates.

14 CHAIR MITCHELL: Ms. Hicks.

15 MS. DOWNEY: Good morning, Commissioners.
16 Dianna Downey from the Public Staff, representing the
17 Using and Consuming Public.

18 CHAIR MITCHELL: Good morning, Ms. Downey. All
19 right. Before we begin, any preliminary matters that we
20 need to take up?

21 MS. DOWNEY: Madam Chair, in the Commission's
22 Order of November 25th, 2019, the Commission referenced
23 the filing of the JDAs and exhibit to the Merger
24 Application in Docket Numbers E-2, Sub 998, and E-7, Sub

1 986. I would ask that the Commission take Judicial
2 Notice of all the exhibits attached to the Merger
3 Application in those dockets.

4 CHAIR MITCHELL: Hearing no objection, we will
5 so take Judicial Notice. All right. Any additional
6 matters?

7 (No response.)

8 CHAIR MITCHELL: Okay. Then we will proceed.
9 Ms. Downey, your witness.

10 MS. DOWNEY: Do you need to swear?

11 CHAIR MITCHELL: Oh, we do. Mr. Lucas, let's
12 go ahead and get you sworn in.

13 JAY B. LUCAS; Having first been duly sworn,

14 Testified as follows:

15 DIRECT EXAMINATION BY MS. DOWNEY:

16 Q Mr. Lucas, please state your name, business
17 address, and present position.

18 A My name is Jay Lucas. I'm an engineer with the
19 Public Staff's Electric Division. My business address is
20 430 North Salisbury Street in Raleigh, North Carolina.

21 Q Did you prepare and cause to be filed on
22 January 17, 2020, supplemental testimony consisting of 20
23 pages, an Appendix A, and eight exhibits, some of which
24 were marked confidential, and we'll address the

1 confidentiality issue in just a minute?

2 A That's correct.

3 Q Do you have any corrections or changes to your
4 testimony at this time?

5 A Yes, I do. On my first exhibit I have a
6 spreadsheet. In the lower part of that spreadsheet on
7 the left-hand side I have a number quoted 51,023 average
8 monthly wet tons in 2010. That should not be 2010. That
9 should be 2012. A couple of lines down I say average
10 monthly dry tons in 2010. That should also be 2012. My
11 Supplemental Exhibit Number 7 has the same error. If you
12 go down to the lower left-hand side of the spreadsheet,
13 there's two items where I say 2010. They both should be
14 corrected to say 2012. And those are the only
15 corrections I have.

16 Q With those corrections, if the same questions
17 were asked of you today, would your answers be the same?

18 A Yes.

19 MS. DOWNEY: Why don't we do ahead and address
20 the exhibits. After consultation with counsel, it's been
21 determined that none of Mr. Lucas' exhibits should be
22 marked confidential and should be made public.

23 CHAIR MITCHELL: Okay. We will make that
24 change. Ms. Downey, I'd ask that you please just check

1 with the court reporter following the hearing to make
2 sure that those changes are adequately reflected on her
3 copy as well.

4 MS. DOWNEY: I will, Madam Chair. And at this
5 time I'd move that the supplemental testimony and
6 appendix of Jay B. Lucas be copied into the record as if
7 given orally from the stand, and that his exhibits be
8 premarked as filed except that all of the exhibits should
9 be public and not confidential.

10 CHAIR MITCHELL: Motion is allowed.

11 (Whereupon, the prefiled supplemental
12 testimony of Jay B. Lucas was copied
13 into the record as if given orally
14 from the stand. The confidential
15 portions were filed under seal.)

16 (Whereupon, Lucas Supplemental
17 Exhibits 1 through 8, as corrected,
18 were identified as premarked.)

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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1204

In the Matter of)	
Application by Duke Energy Progress, LLC, Pursuant to G.S. 62-133.2 and Commission Rule R8-55 Regarding Fuel and Fuel-Related Costs Adjustments for Electric Utilities)	SUPPLEMENTAL TESTIMONY OF JAY B. LUCAS PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION

OFFICIAL COPY

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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**DOCKET NO. E-2, SUB 1204****Supplemental Testimony of Jay B. Lucas****On Behalf of the Public Staff****North Carolina Utilities Commission****January 17, 2020**

1 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND PRESENT**
2 **POSITION.**

3 A. My name is Jay B. Lucas. My business address is 430 North Salisbury
4 Street, Dobbs Building, Raleigh, North Carolina. I am an engineer with the
5 Electric Division of the Public Staff – North Carolina Utilities Commission.

6 **Q. BRIEFLY STATE YOUR QUALIFICATIONS AND DUTIES.**

7 A. My qualifications and duties are included in Appendix A.

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. The purpose of my testimony is to present to the Commission the Public
10 Staff's response to the Commission's order in this docket dated November
11 25, 2019 (Order). In that order, the Commission determined that certain
12 costs associated with the settlement of a lawsuit arising out of a gypsum
13 supply agreement dispute with CertainTeed Gypsum NC, Inc.
14 (CertainTeed) are recoverable through the fuel adjustment clause. The

1 Commission directed the Public Staff to conduct an analysis of the prudence
2 and reasonableness of Duke Energy Progress, LLC's, (DEP or the
3 Company) decisions and actions in connection with the Second Amended
4 and Restated Supply Agreement (2012 Agreement), which was the subject
5 of the lawsuit, including an analysis of the effects, if any, of the Joint
6 Dispatch Agreement (JDA) between DEP and Duke Energy Carolinas, LLC
7 (DEC), the consistent decline in natural gas prices, and the conversion to
8 natural gas-fired generation, and to file testimony explaining its analysis and
9 stating its opinion.

10 **Q. HAS THE PUBLIC STAFF PERFORMED RESEARCH AND ANALYSIS**
11 **IN COMPLIANCE WITH THE ORDER?**

12 A. Yes. The Public Staff has performed research and analysis to determine
13 what DEP knew or should have known when it executed the 2012
14 Agreement on August 1, 2012. The Public Staff has gathered data from the
15 following:

- 16 • 2010 Avoided Cost proceeding (Docket No. E-100, Sub 127).
- 17 • 2012 Avoided Cost proceeding (Docket No. E-100, Sub 136).
- 18 • 2012 DEC-PEC Merger proceeding (Docket Nos. E-2, Sub 998 and
19 E-7, Sub 986).
- 20 • The Certificate of Public Convenience and Necessity (CPCN)
21 dockets for the Buck Combined Cycle (CC) (Docket No. E-7, Sub
22 791), Dan River CC (Docket No. E-7, Sub 832), H.F. Lee CC (Docket

1 No. E-2, Sub 960), and Sutton CC (Docket No. E-2, Sub 968) gas-
2 fired generating facilities.

- 3 • DEP's response to data requests sent by the Public Staff and the
4 Fayetteville Public Works Commission, which included exhibits and
5 trial transcripts from the CertainTeed lawsuit.¹

6 **Q. PLEASE PROVIDE SOME BACKGROUND INFORMATION REGARDING**
7 **THE GYPSUM SUPPLY AGREEMENT BETWEEN CERTAINTEED AND**
8 **DEP.**

9 A. According to the Opinion and Final Judgment in the lawsuit (FPWC
10 Harrington Exhibit 3) (Judgment), CertainTeed and DEP first entered into a
11 gypsum supply agreement in 2004. At that time, DEP was planning to install
12 flue gas desulfurization systems (scrubbers) that would produce synthetic
13 gypsum at its Roxboro and Mayo coal-fired plants, and CertainTeed was
14 seeking to build its first wallboard-manufacturing plant in the Southeast
15 United States.² The 2004 Agreement defined the monthly minimum
16 quantity (MMQ) as 50,000 net dry tons of gypsum to be delivered and
17 accepted monthly.³ However, the parties never actually delivered and

¹ *CertainTeed Gypsum NC, Inc., v. Duke Energy Progress, LLC*, Person County Superior Court No. 17 CVS 395. The Opinion and Final Judgment in the case was entered into evidence in this docket as FPWC Harrington Exhibit 3.

² Judgment ¶13. Further details regarding the beginning of the contractual relationship between CertainTeed and DEP are found in paragraphs 35 through 52 of the Judgment.

³ Judgment ¶48.

1 accepted gypsum under this agreement before it was superseded by the
2 agreement executed in 2008.⁴

3 In 2008, the parties executed an amended agreement (2008 Agreement)
4 following CertainTeed's decision to delay construction of its plant because
5 of the 2008 economic downturn.⁵ The trial court found that under the 2008
6 Agreement, CertainTeed was required to accept and DEP was required to
7 deliver the MMQ of 50,000 net dry tons of gypsum.⁶

8 DEP witness Coppola testified during the CertainTeed trial that the
9 scrubbers began coming on line in spring 2007 at Roxboro; every six
10 months an additional scrubber came on line at each of the five units at
11 Roxboro and Mayo, with the final scrubber coming on line in the spring of
12 2009.

13 **Q. PLEASE DESCRIBE THE NEGOTIATION AND EXECUTION OF THE**
14 **2012 AGREEMENT.**

15 A. CertainTeed witness Dave Englehardt testified during the CertainTeed trial
16 that after 2008, CertainTeed changed the design of its plants, specifically
17 the feeding system, and needed to update the agreement to account for
18 those changes. Having observed the way CertainTeed and DEP operated
19 over the previous couple of years, Englehardt had some thoughts on how

⁴ Judgment ¶¶53.

⁵ Judgment ¶3.

⁶ Judgment ¶¶ 87-88.

1 to try to make the agreement more usable and build in some flexibility to
2 cover variations. He had observed that production volumes on DEP's side
3 varied and CertainTeed's market varied. In response to data requests, DEP
4 provided actual production volumes for Roxboro and Mayo for 2008-2012,
5 as reflected in **Lucas Supplemental Exhibit 1**. The actual numbers
6 produced by DEP confirm that production volumes did in fact vary. Mr.
7 Englehardt suggested using the stockpile to absorb variations, and then
8 adjust the annual volumes. Englehardt provided a list of proposed
9 modifications to the 2008 Agreement to DEP witness Coppola, which is
10 attached as **Confidential Lucas Supplemental Exhibit 2**.

11 CertainTeed witness Englehardt sent a draft to DEP on October 20, 2011,
12 in which he proposed changing to an annual production philosophy with the
13 stockpile as buffer, ranging between a low of 100,000 tons to a maximum
14 of 600,000 tons. According to witness Englehardt, approximately a week
15 later, he had a telephone conversation with DEP witness Coppola, and she
16 told him that DEP preferred to stay with the MMQ as it was stated in the
17 2008 Agreement. In an email to Englehardt dated October 24, 2011, witness
18 Coppola stated, "In general, we would like to leave the volume obligation as
19 is." That e-mail is attached as **Confidential Lucas Supplemental Exhibit 3**.

20 On February 20 2012, witness Coppola sent back DEP's changes to
21 CertainTeed's draft. According to witness Englehardt, DEP basically
22 rejected CertainTeed's flexibility proposals, expressing a preference to

1 maintain the supply quantity as it existed. The 2012 Agreement was
2 executed with an effective date of August 1, 2012.⁷

3 The trial court in the Judgment found that on August 17, 2012, witness
4 Coppola emailed her supervisors a summary of the major changes to the
5 2012 Agreement. Coppola stated that there were “[n]o changes to the
6 original intent of the document,” explaining that the “primary changes” made
7 in the 2012 Agreement reflected the parties’ agreement that CertainTeed
8 could install additional equipment in the storage area. The court noted that
9 Coppola repeatedly stated that the volume obligations did not change,
10 concluding that “[n]o changes to Article 3 – Gypsum Sales – this is important
11 because there has been no change to the obligation to deliver material in
12 the original volumes specified” and “[a]gain, the original terms around
13 pricing and volumes remained untouched.”⁸

14 **Q. WHAT HAPPENED AFTER THE EXECUTION OF THE 2012**
15 **AGREEMENT?**

16 A. Several events led to the reduced dispatch of the Roxboro and Mayo plants
17 and, as a result, the decreased production of artificial gypsum below the
18 amounts required in the 2012 Agreement by March 2017. The causes of
19 reduced dispatch of the Roxboro and Mayo plants were: (1) DEP’s JDA with

⁷ See also Judgment ¶¶93-106.

⁸ Judgment ¶116. DEP took the position, and witness Coppola testified at trial, that DEP actually intended to change the MMQ to a variable quantity. The trial court found that this claim was not credible. Judgment ¶119.

1 Duke Energy Carolinas, LLC, (2) low natural gas prices, and (3) the large
2 increase in natural gas-fired combined cycle capacity. I discuss my further
3 research and analysis of these events in more detail later in my testimony.

4 Because of DEP's reduced supply of artificial gypsum, CertainTeed filed a
5 lawsuit against DEP. The court sided with CertainTeed and required DEP
6 to: (1) pay approximately \$1 million, together with interest (the Judgment
7 Payment), (2) deliver approximately 120,000 tons of gypsum within 30 days
8 of the Judgment, and (3) provide a gypsum replenishment plan within 90
9 days of the Judgment. After the Judgment was entered, DEP and
10 CertainTeed reached a settlement in which DEP agreed to pay liquidated
11 damages. **[BEGIN CONFIDENTIAL]** [REDACTED]

12 [REDACTED]

13 [REDACTED] **[END CONFIDENTIAL]**

14 DEP seeks to recover the Judgment Payment and the related annual
15 liquidated damages from ratepayers. DEP proposes to recover the costs as
16 the amounts are paid to CertainTeed. DEP's request in this case, on a
17 system-wide basis, is \$8.4 million for the billing period, or approximately
18 \$5.2 million for its North Carolina retail jurisdiction.

19 **Q. DOES THE PUBLIC STAFF BELIEVE THAT DEP'S SETTLEMENT WITH**
20 **CERTAINTEED WAS THE BEST FINANCIAL OPTION FOR**
21 **CUSTOMERS AFTER THE TRIAL COURT'S RULING?**

1 A. Yes. The settlement was less expensive than for DEP to dispatch the
2 Roxboro and Mayo plants ahead of less expensive operating plants in order
3 to produce more artificial gypsum. The settlement was also less expensive
4 than hauling artificial gypsum from other plants. The Mayo plant is 16 road
5 miles from the Roxboro plant and was able to cost effectively move artificial
6 gypsum to the Roxboro stockpile. However, the next closest power plant
7 with flue gas desulfurization equipment is the Belews Creek plant at 72 road
8 miles away. The increased distance reduced the cost effectiveness of
9 moving artificial gypsum from the Belews Creek plant to the Roxboro
10 stockpile. Also, DEC had committed to the transfer of artificial gypsum from
11 the Belews Creek plant to other entities.

12 **Q. DOES THIS MEAN THAT DEP SHOULD BE ABLE TO RECOVER THE**
13 **JUDGMENT PAYMENT AND LIQUIDATED DAMAGES FROM**
14 **RATEPAYERS?**

15 A. No, that is not the end of the inquiry, and the Commission recognized this
16 in its Order. The Public Staff believes that the Commission should look at
17 what DEP knew, or should have known, at the time DEP entered into the
18 2012 Agreement to determine whether it was reasonable and prudent for
19 DEP to enter into an agreement that committed DEP to furnish 50,000 tons
20 of gypsum a month to CertainTeed over the next 20 years.

1 Q. PLEASE DESCRIBE THE PUBLIC STAFF'S RESEARCH ON THE
2 AVOIDED COST PROCEEDINGS IN MORE DETAIL AND HOW THAT
3 RESEARCH IMPACTS THE PUBLIC STAFF'S ANALYSIS IN THIS
4 CASE.

5 A. DEP provided responses to data requests in the 2010 and 2012 Avoided
6 Cost proceedings, respectively. These responses, in part, provided DEP's
7 planned dispatch of coal-fired units as a percent of total energy production
8 in future years, as shown in Lucas Table 1 below:

Plan Year	2010 Proceeding	2012 Proceeding	Decrease
2011	92		
2012	93		
2013	86	68	18
2014	80	55	25
2015	67	56	11
2016	65	59	6
2017	63	59	4

9 As shown in Lucas Table 1 above, DEP anticipated that coal dispatch would
10 play less and less of a role in meeting energy requirements when it filed its
11 2012 Avoided Cost proceeding data on June 25, 2012, more than two

1 months before signing the 2012 Agreement on August 1, 2012.⁹ In other
2 words, DEP knew that coal plants were going to be dispatched less,
3 resulting in reduced gypsum production, and should have taken that
4 information into account when negotiating and signing the 2012 Agreement.

5 **Q. PLEASE DESCRIBE THE PUBLIC STAFF'S RESEARCH AND**
6 **ANALYSIS ON THE DEC-DEP (FORMERLY PEC) MERGER**
7 **PROCEEDING IN MORE DETAIL.**

8 A. The Public Staff reviewed documents of the merger proceeding to
9 determine what DEP should have known before signing the 2012
10 Agreement.

11 On April 4, 2011, DEC and DEP filed an application with the Commission to
12 merge the two companies under single ownership. Pages 8 and 9 of the
13 application state:

14 The centralized economic dispatch of [DEP's] and DEC's
15 generation assets to serve their Carolinas customers is
16 estimated to reduce the combined company's fuel costs by
17 approximately \$364 million over the five-year period 2012-
18 2016. These savings are the result of using the lower cost
19 generation resources of each company to displace the
20 higher cost resources of the other depending upon the
21 marginal cost of production of each entity's available
22 resources in a given hour. By transitioning to joint dispatch
23 on a real time basis, each utility's available energy can be
24 used to displace the other's higher cost energy whenever
25 such a cost difference exists without regard to the size of
26 the difference.

⁹ Presumably, DEP ran the models that produced these numbers well in advance of filing its 2012 Avoided Cost data.

1 On June 13, 2012, DEP filed the Further Supplemental Testimony of DEP
2 witness Alexander J. Weintraub. On pages 3 and 4 of his testimony,
3 Weintraub states, in part, "Roxboro and Mayo are coal plants and to the
4 extent the operation of the JDA impacts the dispatch of Roxboro and Mayo,
5 PEC has agreed to hold NCEMPA harmless from any negative impacts to
6 the JDA." In the Public Staff's opinion, this statement is evidence that DEP
7 believed that the merger could result in reduced dispatch of the Roxboro
8 and Mayo plants when other plants such as the Belews Creek plant are
9 dispatched. Below is Lucas Table 2 showing the relative capacity factors
10 and heat rates of the baseload units¹⁰ at the Belews Creek, Marshall,
11 Roxboro, and Mayo plants in 2010, 2011 and 2012:

¹⁰ The units shown in Lucas Table 2 are coal-fired baseload units reported by DEC and DEP in the monthly baseload power plant performance reports required by NCUC Rule R8-53.

Lucas Table 2 – Belews Creek, Marshall, Roxboro, and Mayo Capacity Factors and Heat Rates in 2010, 2011, and 2012						
Plant	2010 Capacity Factor (%)	2010 Heat Rate (BTU/KWH)	2011 Capacity Factor (%)	2011 Heat Rate (BTU/KWH)	2012 Capacity Factor (%)	2012 Heat Rate (BTU/KWH)
Belews Creek						
Unit 1	85.9	9,912	82.0	9,251	83.2	9,056
Unit 2	65.4	9,367	82.9	9,186	78.8	9,211
Marshall						
Unit 3	74.4	9,289	68.9	9,456	74.7	9,580
Unit 4	83.2	9,212	70.6	9,336	78.7	9,432
Roxboro						
Unit 2	66.8	8,934	44.6	10,024	71.2	10,158
Unit 3	80.1	10,564	58.9	10,791	60.2	11,324
Unit 4	72.8	11,666	62.2	10,979	66.2	10,269
Mayo						
Unit 1	76.6	10,484	55.1	10,809	55.1	11,174

1 Lucas Table 2 above demonstrates that DEC's coal units maintained a
2 higher capacity factor and lower heat rate than DEP's coal units from 2010
3 through 2012, which indicates they would be economically dispatched
4 before DEP's Roxboro and Mayo units. The benefits of the DEC-DEP
5 merger application, which was filed with the Commission in 2011, relied
6 significantly on reduced fuel costs through joint dispatch of the joint
7 generating fleets. Because DEP's baseload coal units had significantly

1 higher heat rates¹¹ than DEC's coal units (15% or more as shown in Lucas
2 Table 2 above), DEP should have realized at the time of the negotiation and
3 execution of the 2012 Agreement that the Roxboro and Mayo units were
4 likely to be dispatched less due to the JDA.

5 Ordering Paragraph No. 3 in the Commission's order dated June 29, 2012,
6 on the DEC-DEP merger approved the JDA. This order was issued more
7 than two months before DEP signed the 2012 Agreement on August 1,
8 2012.

9 **Q. PLEASE DESCRIBE THE RESULT OF PUBLIC STAFF'S REVIEW AND**
10 **ANALYSIS OF THE CPCN DOCKETS REFERENCED ABOVE.**

11 A. When DEP and CertainTeed executed the 2012 Agreement, DEP had only
12 two operational CC units, both at the Smith Energy Complex. However,
13 DEC had placed its Buck CC in operation in 2011, and its Dan River CC
14 became operational in late 2012. Both of these plants became available to
15 supply DEP when appropriate under the terms of the JDA. Furthermore,
16 DEP completed its H. F. Lee CC (Docket No. E-2, Sub 960) in late 2012
17 and its Sutton CC (Docket No. E-2, Sub 968) in 2013.

18 Specifically with respect to the H.F. Lee CC, the CPCN application filed
19 August 18, 2009 was filed under N.C. Gen. Stat. §62-110.1(h). That statute

¹¹ The heat rate for a coal plant is indicative of the amount of coal that must be burned to generate a kWh of electricity. A unit with a relatively higher heat rate is required to burn more coal to generate the same amount of electricity as a unit with a relatively lower heat rate.

1 allowed an electric public utility to apply for an expedited CPCN if the utility
2 was subject to the Clean Smokestacks Act, N.C. Gen. Stat. §62-143-
3 215.107D(e); the application involves a request to construct a generating
4 unit that uses natural gas as its primary fuel at a specific coal-fired
5 generating site that the utility owns or operates on July 1, 2009; the coal
6 fired-units at the site are not operated with flue gas desulfurization devices;
7 the utility will permanently cease operations of all of the coal-fired
8 generating units at the site on or before the completion of the generating
9 unit that is the subject of the certificate application; and the installation of
10 the generating unit that uses natural gas as the primary fuel allows the utility
11 to meet the requirements of the Clean Smokestacks Act.¹² The
12 Commission granted the certificate on October 22, 2009, subject to the
13 condition that DEP cease operation of the three coal-fired generating units
14 at the facility and that DEP submit a plan to retire additional un-scrubbed
15 coal-fired generating capacity reasonably proportionate to the amount of
16 incremental generating capacity authorized by the certificate above 400
17 MW.¹³ In its plan filed December 1, 2009, in the CPCN docket, DEP
18 outlined a plan to retire all of its coal-fired generating facilities in North
19 Carolina that did not have scrubbers (Sutton, Weatherspoon and Cape
20 Fear) by December 31, 2017. As part of the plan, DEP anticipated filing for

¹² N.C. Gen. Stat. §62-110.1(h) expired on its own terms effective January 1, 2011.

¹³ DEP planned to retire approximately 400 MW of existing coal-fired generating capacity at the Lee site and to construct 950 MW of new natural gas-fired generation at the site.

1 a CPCN to construct 600 MW of natural gas-fired CC generation at Sutton.¹⁴
 2 The plan was approved by order dated January 28, 2010.

3 In the CPCN application for the Sutton CC, DEP asserted that building the
 4 CC units was more cost effective when compared to the cost of continuing
 5 to operate the existing coal units, including the cost of potential
 6 environmental modifications. On June 10, 2010, the Commission granted
 7 the CPCN on the condition that DEP permanently cease operation of the
 8 coal-fired units upon completion of the construction and placement into
 9 service of the CC facility.

10 Thus, well before negotiating and executing the 2012 Agreement, DEP was
 11 aware that it was retiring coal-fired units and replacing them with natural
 12 gas-fired generation. See Lucas Table 3 below showing the capacity factors
 13 of the Sutton and H. F. Lee plants: in 2010, 2011 and 2012:

Lucas Table 3 – Sutton and H. F. Lee Capacity Factors in 2010, 2011, and 2012			
Plant	2010	2011	2012
Sutton	48.1	31.0	24.7
H. F. Lee	65.4	37.7	22.9

¹⁴ DEP did file for, and the Commission approved the CPCN for the Sutton CC in the Sub 968 docket.

1 Q. PLEASE DESCRIBE THE PUBLIC STAFF'S ANALYSIS OF DEP'S
2 RESPONSES TO DATA REQUESTS IN MORE DETAIL.

3 A. In a response to a data request, DEP produced gypsum forecasts for
4 Roxboro and Mayo. In a forecast performed on December 15, 2011, DEP
5 was not forecasting more than 50,000 dry tons per month from Roxboro and
6 Mayo for any month in 2012. That document is attached as **Lucas**
7 **Supplemental Exhibit 4**.

8 DEP provided another gypsum forecast to CertainTeed on May 23, 2012
9 (almost three months before DEP executed the 2012 Agreement). The
10 forecast is attached as **Lucas Supplemental Exhibit 5**.¹⁵ The document
11 shows that as of May 2012, DEP was not forecasting 50,000 tons a month
12 in gypsum production from Roxboro and Mayo through the end of 2013.

13 **Lucas Supplemental Exhibit 1** shows that for 2008, 2009, 2010, and 2011,
14 the highest annual production at both plants combined averaged 37,748 wet
15 tons per month (2010), which equates to about 35,280 dry tons per month.
16 The 2012 Agreement required 50,000 dry tons per month. In 2012, the two
17 plants averaged 51,023 wet tons per month, which equates to 47,686 dry
18 tons per month at a 93.46% wet-to-dry reduction.

¹⁵ The data response indicated that the header on the document is incorrect.

1 These documents demonstrate that in 2012 DEP knew, or should have
2 known, that it was not producing and was not expected to produce 50,000
3 net dry tons of gypsum a month at Roxboro and Mayo.

4 **Q. WHAT DOES THE PUBLIC STAFF CONCLUDE REGARDING WHAT**
5 **DEP KNEW OR SHOULD HAVE KNOWN AT THE TIME IT ENTERED**
6 **INTO THE 2012 AGREEMENT?**

7 A. The events and documents described above should have alerted DEP to
8 the risk of reduced dispatch of the Roxboro and Mayo plants and the
9 resulting decrease in the production of artificial gypsum. Combining the
10 projections of decreased coal unit dispatch and the replacement of coal
11 units with CCs with the DEP gypsum projections, DEP knew or should have
12 known before it entered into the 2012 Agreement that there was a clear risk
13 that it could not meet the 50,000 ton MMQ that it committed to provide. The
14 Public Staff concludes that it was unreasonable and imprudent for DEP to
15 enter into the 2012 Agreement as it was written, especially when, as was
16 concluded in the lawsuit, DEP was offered the opportunity to enter into a
17 more flexible arrangement. Therefore, at least some of the costs arising out
18 of the lawsuit with CertainTeed should be excluded from recovery.

19 **Q. WHAT IS THE PUBLIC STAFF'S RECOMMENDATION?**

20 A. First, the Public Staff recommends excluding the Judgment Payment of
21 \$1,084,216 from recovery. The trial court ordered the Judgment Payment
22 because DEP breached the 2012 Agreement by not delivering the

1 contractual amount of gypsum, and CertainTeed had to purchase gypsum
2 at a higher cost. Ratepayers should not be asked to pay the cost of DEP's
3 failure to provide gypsum that DEP knew or should have known it could not
4 provide, as described above.

5 With respect to the liquidated damages, the Public Staff recognizes that
6 DEP would have had to dispose of gypsum it did not sell to CertainTeed.

7 In 1988, DEP converted the Roxboro plant to dry ash handling and began
8 disposing of coal ash in an on-site landfill. In 2008, DEP determined that
9 placing artificial gypsum in the Roxboro on-site landfill would cost [BEGIN
10 CONFIDENTIAL] [REDACTED]
11 [END CONFIDENTIAL] as shown in Confidential Lucas Supplemental
12 Exhibit 6.

13 Public Staff sent DEP a data request asking for analyses undertaken by
14 DEP related to the CertainTeed contract, and specifically the analysis that
15 DEP contended that showed customers benefitted as a result of DEP's
16 payment of liquidated damages. DEP's response produced the calculations
17 that allegedly showed the settlement provided a net benefit to customers.¹⁶
18 Public Staff has a number of concerns about the assumptions used in DEP's
19 analysis. First, [BEGIN CONFIDENTIAL] [REDACTED]

20 [REDACTED]

¹⁶ These calculations were allowed into evidence at the hearing in this docket as Confidential Lucas Exhibit 1.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] [END CONFIDENTIAL]

7 Subtracting this total detrimental cost from the liquidated damages yields
 8 an amount of [BEGIN CONFIDENTIAL] [REDACTED] [END
 9 CONFIDENTIAL] The Public Staff recommends that the Commission allow
 10 DEP to recover only the amount in the preceding sentence as partial
 11 recovery of liquidated damages.

12 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

13 A. Yes, it does.

APPENDIX A**QUALIFICATIONS AND EXPERIENCE**

JAY B. LUCAS

I graduated from the Virginia Military Institute in 1985, earning a Bachelor of Science Degree in Civil Engineering. Afterwards, I served for four years as an engineer in the U. S. Air Force performing many civil and environmental engineering tasks. I left the Air Force in 1989 and attended the Virginia Polytechnic Institute and State University (Virginia Tech), earning a Master of Science degree in Environmental Engineering. After completing my graduate degree, I worked for an engineering consulting firm and worked for the North Carolina Department of Environmental Quality in its water quality programs. Since joining the Public Staff in January 2000, I have worked on utility cost recovery, renewable energy program management, customer complaints, and other aspects of utility regulation. I am a licensed Professional Engineer in North Carolina.

1 Q Mr. Lucas, do you have a summary of your
2 supplemental testimony?

3 A Yes, I do.

4 Q Please read it at this time.

5 A The purpose of my testimony is to present to
6 the Commission the results of the Public Staff's analysis
7 of the prudence and reasonableness of Duke Energy
8 Progress, LLC's or DEP's decisions and actions in
9 connection with a 2012 Agreement, including an analysis
10 of the effects, if any, of the Joint Dispatch Agreement
11 between DEP and Duke Energy Carolinas, LLC, the
12 consistent decline in natural gas prices, and the
13 conversion to natural gas-fired generation. I am also
14 providing the Public Staff's position on whether DEP
15 should be able to recover the judgment payment and
16 liquidated damages DEP paid to CertainTeed.

17 In 2004, DEP's predecessor, Progress Energy
18 Carolinas, or PEC, signed a contract with CertainTeed's
19 predecessor, BPB, for the future sale of artificial
20 gypsum from the Roxboro and Mayo power plants. PEC sold
21 land adjacent to the Roxboro plant to BPB for
22 construction of a drywall manufacturing facility. In
23 October 2011, CertainTeed offered to make the contract
24 more flexible; however, DEP refused the offer. Both

1 parties signed the contract in August of 2012. This 2012
2 Agreement required DEP to provide 50,000 tons of gypsum
3 per month to CertainTeed and maintain a gypsum stockpile
4 of 250,000 tons.

5 However, at the time of the negotiation of the
6 2012 Agreement, DEP knew or should have known that the
7 Roxboro and Mayo plants most likely would not produce
8 50,000 tons per month.

9 First, in the previous three years, the
10 combined plants had produced nowhere near 50,000 tons of
11 gypsum per month, nor was DEP forecasting that production
12 rate. Second, DEP had projected several years of
13 decreasing coal plant dispatch in its 2012 and -- excuse
14 me -- 2010 and 2012 avoided cost proceedings. Third, DEP
15 and DEC filed a merger request in April 2011 that
16 projected that DEP would dispatch its coal plants less
17 and less. Fourth, in 2012, DEP had two new natural gas-
18 fired plants under construction that could displace
19 generation of the Roxboro and Mayo plants.

20 The Public Staff recommends that the Commission
21 disallow the judgment payment of approximately \$1
22 million. With respect to the liquidated damages, the
23 Public Staff recognizes that DEP would have had to
24 dispose of gypsum it did not sell to CertainTeed and most

1 likely would have had to place it in a landfill.

2 I have determined an amount that DEP would have
3 paid to place the gypsum in a landfill using a per-ton
4 amount provided in documents produced by DEP. I have
5 subtracted the value of actual gypsum sales to
6 CertainTeed in my proposed landfill cost from the
7 liquidated damages payment that DEP paid to CertainTeed
8 to determine my recommended disallowance that the
9 Commission should add to the judgment disallowance.

10 This completes the summary of my testimony.

11 MS. DOWNEY: The witness is available for
12 cross.

13 MR. JIRAK: Thank you.

14 CROSS EXAMINATION BY MR. JIRAK:

15 Q Good morning, Mr. Lucas.

16 A Good morning.

17 Q All right. So as you acknowledged in your
18 summary, the genesis of this commercial arrangement began
19 in 2004, correct?

20 A That's correct.

21 Q And so there was a Gypsum Supply Agreement
22 entered into in 2004 between the parties, correct?

23 A That's correct.

24 Q And that Agreement obligated CertainTeed to

1 construct a wallboard generating -- a wallboard
2 production facility at the Roxboro plant site?

3 A That's correct.

4 Q Okay. And the 2004 Agreement that we're
5 discussing, would you agree, that included a minimum
6 delivery and acceptance obligation, correct?

7 A Yes, it did.

8 Q Okay. So under the terms of the Agreement,
9 from its very inception there was an obligation for Duke
10 to deliver and CertainTeed to accept a minimum volume
11 obligation on a monthly basis?

12 A That's correct, but in October 2011,
13 CertainTeed offered a lower minimum amount. Duke Energy
14 refused to accept that minimum amount.

15 Q Okay. And we'll get to that, but just want to
16 lay the groundwork here. So initial Agreement in 2004
17 had a 50,000 monthly minimum obligation, and just for
18 clarity sake, that's often referred to in the context
19 litigation as the MMQ, correct?

20 A That's correct.

21 Q Okay. And in your prefiled initial testimony
22 or in your supplemental testimony you have not alleged
23 any imprudence with respect to the Company's decision to
24 execute and enter into the 2004 Agreement, correct?

1 A That's correct.

2 Q Okay. So we move forward in time now. The
3 Agreement remains in effect, and the parties decided it
4 was appropriate to amend the existing Agreement in 2008,
5 correct?

6 A That's correct.

7 Q And what was the reason for the delay -- for
8 the amendment in 2008?

9 A BPB wanted to make sure it could acquire the
10 land.

11 Q Would you agree that one of the reasons for the
12 delay -- for the amendment in 2008 was to accommodate a
13 delay in the construction of CertainTeed's wallboard
14 production facility?

15 A Yes. That's correct.

16 Q Okay. So the parties amended the Agreement in
17 2008, and did the -- as the Agreement was amended -- so
18 the 2008, we'll refer to that version as the 2008 Amended
19 and Restated Agreement -- did the 2008 Amended and
20 Restated Agreement include a minimum monthly quantity
21 obligation for delivery and acceptance?

22 A Yes.

23 Q And what was that volume obligation?

24 A It was 50,000 tons per month.

1 Q Okay. And in your prefiled testimony and your
2 supplemental testimony you haven't alleged any imprudence
3 with respect to the Company's decision to enter into the
4 2008 Amended and Restated Agreement?

5 A That's correct.

6 Q Okay. And would you generally agree that much
7 of the substance of the terms of the overall commercial
8 arrangement remained unchanged between the initial
9 Agreement in 2004, the amended Agreement in 2008, and the
10 amended Agreement in 2012?

11 A A lot of things remained the same. There were
12 some changes, though.

13 Q Would you agree that the vast majority of the
14 commercial terms remained the same between the three
15 Agreements?

16 A Yes.

17 Q Okay. And, again, you've confirmed that you
18 have not alleged any imprudence with respect to the
19 Company's decision -- decisions concerning the 2008
20 Agreement, correct?

21 A That's correct.

22 Q Okay. Mr. Lucas, do you know when CertainTeed
23 actually built its drywall production facility?

24 A Well, that facility began operation in March of

1 2012.

2 Q Okay. And subject to check, would you agree
3 commenced construction in 2011?

4 A Yeah. It had to have started before then, yes.

5 Q Okay. So operational drywall production
6 facility in March 2012, and you would agree that was
7 completed prior -- that the facility was completed prior
8 to the execution of the 2012 Amended and Restated
9 Agreement?

10 A That's correct.

11 Q Do know approximately how much CertainTeed
12 invested in that facility?

13 A I've seen a couple of different numbers. One
14 of them is \$100 million and the other one is \$200
15 million.

16 Q Okay. So it represented quite a substantial
17 investment on the part of CertainTeed.

18 A That's correct.

19 Q And do you have any understanding of how
20 quickly CertainTeed ramped up operation of their facility
21 after it achieved commercial operation in March of 2012?

22 A Well, initially, they had difficulty. After
23 the 2008 Agreement, CertainTeed realized it was not going
24 to be able to meet its obligation to Duke Energy

1 Progress. It just wasn't a commitment by Duke Energy
2 Progress to provide gypsum. CertainTeed had an
3 obligation to take on a certain amount of gypsum, and it
4 failed to do so. CertainTeed had to pay roughly \$32
5 million just to get rid of gypsum that it could not
6 accept. In other words, it got burned by its 2008
7 commitment. Duke Energy's gypsum was being placed into
8 the stockpile with nowhere for that gypsum to go, so
9 after -- between the 2008 and 2012 Agreement, CertainTeed
10 had reasons to be cautious.

11 Q And we're going to -- we're going to explore
12 some of the facts you just touched on, but I want to --
13 before we move back to the topic I was asking you, you
14 said that CertainTeed got burned by the Agreement, so you
15 referenced the fact that CertainTeed had an obligation to
16 accept a specific amount of gypsum under the Agreement,
17 correct?

18 A That's correct.

19 Q So when you say they got burned, what you mean
20 is they were forced to accept gypsum, but they didn't
21 have a gypsum production facility to use that gypsum in
22 yet, right?

23 A That's correct.

24 Q So under the terms of the contract they were

1 required to dispose of gypsum on behalf of DEP, even
2 though they didn't have a facility?

3 A That's correct.

4 Q And so when they did that, the benefit to Duke
5 was Duke didn't have to dispose of the gypsum; instead,
6 CertainTeed had to dispose of the gypsum?

7 A That's correct.

8 Q So when you say they got burned, what we really
9 mean is that customers benefited because customers
10 weren't forced to pay the cost of landfill; instead,
11 CertainTeed had to absorb the cost of landfiling that
12 gypsum?

13 A That's correct.

14 Q Okay. So let me go back to the question I
15 asked you. You were referencing the fact that
16 CertainTeed had to accept -- had to accept gypsum prior
17 to the point in time at which its facility was
18 constructed, correct?

19 A It was supposed to, but it had to dispose of it
20 instead.

21 Q Right. It had to accept it, and how it chose
22 -- what it chose to do with the gypsum after it accepted
23 it is up to them.

24 A That's correct.

1 Q If it doesn't have a facility, it can't use it
2 at a facility; it's got to get rid of it some other way?

3 A That's correct.

4 Q Okay. So my question, though, was once the
5 facility was operational, and we agreed it was
6 operational in March 2012 which was prior to the date on
7 which the 2012 Amended Agreement was -- the Amended and
8 Restated Agreement was executed, how quickly after the
9 facility was actually operational did CertainTeed ramp up
10 production at its wallboard production facility?

11 A I don't have that information.

12 Q Okay. Just for ease of reference, I've -- I'll
13 provide you -- do you have a copy of the Court's Opinion
14 in front of you?

15 A I've got a large number of the pages, but I may
16 not have the entire --

17 Q Okay.

18 A -- I don't have the entire Agreement.

19 MR. JIRAK: Chair Mitchell, with your
20 permission, I'll hand up a copy of this. This has
21 already been entered as an exhibit and I've provided a
22 copy of the Opinion for the Commissioners in front of
23 you, but it's Fayetteville Cross Exhibit 3. But for ease
24 of reference, it's -- the bottom document is the Court's

1 Opinion.

2 CHAIR MITCHELL: You may approach.

3 Q If you would, Mr. Lucas, if you turn to
4 paragraph 123 of the Opinion.

5 A I'm there.

6 Q Okay. So you weren't aware, you had no
7 knowledge of how quickly CertainTeed ramped up its
8 operation right around the time of the 2012 Amended and
9 Restated Agreement. If we look at paragraph 123, I'll
10 read it here, it says "The CTG Plant," and that's the
11 wallboard production facility at Roxboro, correct?

12 A That's correct.

13 Q "The CTG Plant became operational on March 28,
14 2012, initially running only one shift for the first
15 month. The CTG Plant gradually increased its production
16 - operating two shifts between May 2012 and October 2012,
17 then increasing to three shifts in October 2012.
18 Ultimately, the CTG Plant began operating four shifts and
19 running at full capacity in April 2013." Do you see
20 that?

21 A I see that.

22 Q So does that help you to recall now the extent
23 to which operations of the plant were ramping up in this
24 time frame?

1 A I see -- the paragraph says what it says. I
2 see that.

3 Q Okay. So you didn't take into account at all
4 the commercial operating realities of the plant at the
5 time of the parties' decisions around the 2012 Amended
6 and Restated Agreement?

7 A What I took into consideration, I wasn't so
8 worried about CertainTeed; I was worried about Duke
9 Energy Progress' commitment. I think Duke Energy
10 Progress overcommitted. I believe it had plenty of
11 information on hand to realize it was not going to be
12 able to meet that 50,000 ton per month minimum month --
13 minimum monthly quantity.

14 First, those two plants combined, Roxboro and
15 Mayo, before 2012, for those previous three years they
16 didn't come nowhere close to making 50,000 tons per
17 month. Also, in the 2010 avoided cost proceeding, Duke
18 Energy Progress predicted that coal-fired plants would be
19 dispatched less and less. In 2010, they predicted that
20 the next year coal dispatch would be about 92 percent of
21 the time, and predicting less and less dispatch until
22 about 2017 when coal dispatch would go down to 63
23 percent.

24 Also, by 2012, natural gas prices had

1 plummeted. They had plummeted around 2009. They stayed
2 low. Duke Energy Progress had two natural gas-fired high
3 efficiency plants under construction at the time that
4 would have -- that could have displaced Roxboro and
5 Mayo's generation. The Joint Dispatch Agreement that was
6 filed by DEP in April of 2011 predicted less and less
7 dispatch of DEP's coal plants. So I can't really talk
8 about what CertainTeed operations were going to be. I
9 know what Duke Energy committed to and it should not
10 have.

11 Q So, again, we spoke of this earlier. Prior to
12 execution of the 2012 Amended and Restated Agreement --
13 well, frame it this way. If Duke had not executed the
14 2012 Amended and Restated Agreement, the effective
15 version of the Gypsum Supply Agreement would have been
16 the 2008 Agreement, correct? Had there been no amendment
17 in 2012 --

18 A Yes, yes.

19 Q -- the 2008 Agreement would have carried
20 forward for 20 more years, correct?

21 A Yes. And -- go ahead.

22 Q And you have not alleged any imprudence with
23 respect to the Company's decision, then, in the 2008
24 Agreement, correct?

1 A That's correct. Like I said earlier, in
2 October of 2011, CertainTeed offered a lower monthly
3 minimum quantity. Duke Energy refused.

4 Q And we're going to explore that momentarily,
5 but you're saying in coming to your conclusions about
6 what was available in 2012, you didn't assess anything
7 about CertainTeed's operations and the impact on reduced
8 gypsum supply on their operations?

9 A No, I didn't.

10 Q Okay. You would agree, would you not, that a
11 wallboard manufacturer needs to have a supply of gypsum
12 in order to know that it can meet its demands of its
13 customers, correct?

14 A That's correct, but also -- CertainTeed also
15 needed to know it wasn't just a minimum delivery; it
16 realized it had a maximum that it could be allowed to
17 take. And like I said earlier, it got into trouble for
18 its commitment, so CertainTeed had to be cautious not to
19 overcommit to accept gypsum as well.

20 Q Okay. And we'll get into some of that in just
21 a bit. Would you agree, generally speaking, that
22 CertainTeed constructed its wallboard facility out of
23 Roxboro because it intended to rely on the gypsum supply
24 from Roxboro --

1 A Yes.

2 Q -- and Mayo?

3 A Yes.

4 Q Okay. Did you, in preparing your testimony,
5 perform any assessment regarding whether there are other
6 sources of supply available for Roxboro?

7 A I talk a little bit about the next closest
8 power plant was Belews Creek that was owned by Duke
9 Energy Carolinas. It also produces artificial gypsum.
10 That plant was further away. I believe it was 76 miles
11 away. Gypsum is kind of a low-cost product, right around
12 -- I think it contracts for around 4 or \$5 per ton, so
13 really the hauling cost was expensive. Also, I believe
14 the Belews Creek plant had already committed its
15 artificial gypsum somewhere else.

16 Q Okay. So you looked at Belews Creek, but did
17 you look at anywhere else to assess if CertainTeed
18 couldn't rely on the Roxboro/Mayo supply, what were their
19 other options?

20 A I mean, there were other power plants in the
21 area, in Virginia and North Carolina, that possibly could
22 have provided artificial gypsum.

23 Q Okay. And do you know at what price and what
24 cost that would have been to CertainTeed?

1 A I might have that buried in the documents.

2 Q Okay. I'll -- for efficiency sake I'll hand
3 out an exhibit here.

4 A Okay, okay.

5 Q It might refresh your memory.

6 MR. JIRAK: Permission to approach?

7 CHAIR MITCHELL: Mr. Jirak, do you want to mark
8 this exhibit?

9 MR. JIRAK: Yes, yes. Thank you, Chair. This
10 will be marked as DEP Lucas Cross Exhibit Number 1.

11 CHAIR MITCHELL: It shall be so marked.

12 MR. JIRAK: And -- thank you.

13 (Whereupon, DEP Lucas Cross Exhibit
14 1 was marked for identification.)

15 MR. JIRAK: And this is a data request filed by
16 -- or submitted by the Company. It's Public Staff Data
17 Request Number 1322.

18 Q Do you recall this data request, Mr. Lucas?

19 A I don't remember all of them, but I believe
20 what it says.

21 Q Okay. So subject to check, this document
22 references a company study that it performed to determine
23 what were the other available supply sources of gypsum
24 for the plant, and identified that the estimated

1 transportation cost only to get gypsum to Roxboro
2 production facility would have been \$60 a ton, correct?
3 And you haven't challenged this -- the findings of this
4 study?

5 A That's correct.

6 Q Okay. So if CertainTeed wasn't able to obtain
7 gypsum from Roxboro at the low negotiated price it had on
8 the Gypsum Supply Agreement, it would have had to have
9 paid \$62 a ton to get its source from another plant,
10 correct?

11 A Yeah, if it wanted to run its factory.

12 Q Okay. Do you know what percentage of
13 CertainTeed's overall profit the Roxboro facility
14 constituted?

15 A No, I don't.

16 Q So would it surprise you to know that the
17 facility constituted 25 percent of the total profit of
18 the entire CertainTeed business?

19 MS. DOWNEY: Objection. Lack of foundation.
20 Facts not in evidence.

21 MR. JIRAK: Permission to approach, Chair?

22 CHAIR MITCHELL: Do you want to respond to Ms.
23 Downey's objection?

24 MR. JIRAK: Yeah. Well, to respond to the

1 objection, we'll introduce an exhibit to lay the
2 foundation.

3 CHAIR MITCHELL: Okay. So we'll sustain the
4 objection.

5 MR. JIRAK: Chair Mitchell, with your
6 permission, we'd like to mark this as DEP Lucas Cross
7 Exhibit Number 2.

8 CHAIR MITCHELL: It shall be so marked.

9 (Whereupon, DEP Lucas Cross Exhibit
10 2 was marked for identification.)

11 Q And for context, this is an exhibit from the
12 trial. It's Exhibit 142. And I'm going to turn your
13 attention to -- it's the -- unfortunately, the
14 presentation as is provided doesn't have page numbers on
15 it. Oh, it does, actually. Page 8 of the presentation.

16 CHAIR MITCHELL: Mr. Jirak, before you begin, I
17 note on the front page there's a confidential marking.

18 MR. JIRAK: Yeah. This document may be entered
19 in the record.

20 CHAIR MITCHELL: It is not confidential?

21 MR. JIRAK: Correct.

22 CHAIR MITCHELL: All right.

23 MR. JIRAK: This was the native format from the
24 trial that --

1 CHAIR MITCHELL: Okay.

2 MS. DOWNEY: Counsel, can you identify which
3 exhibit this was in the trial?

4 MR. JIRAK: Exhibit 142.

5 MS. DOWNEY: Thank you.

6 Q Mr. Lucas, are you on page 8 of the
7 presentation?

8 A Yes, I am.

9 Q Okay. So according to -- this is a
10 presentation provided by CertainTeed. It's CertainTeed's
11 document. And do you see what the total percentage of --
12 the overall profit of CertainTeed as a whole, the Roxboro
13 production facility constituted?

14 A Yes. I see that.

15 Q Okay.

16 MS. DOWNEY: Madam Chair, can I -- I would like
17 to interject an objection here. According to the
18 document, this was a meeting on May 3rd, 2017. I think
19 the relevant evidence is what occurred on or around the
20 negotiation of the 2012 Agreement, and anything stated
21 after 2017 or at this time frame would not be relevant.

22 MR. JIRAK: So may I -- sorry.

23 CHAIR MITCHELL: You may respond, please.

24 MR. JIRAK: What we're attempting to establish

1 here is the extent to which Mr. Lucas understood the
2 overall commercial context for the discussions in 2011,
3 2012, and understood the economic drivers behind what
4 CertainTeed was offering and why they would have been
5 offering flexibility and what they would have been
6 willing to offer. And unless this witness -- and these
7 facts go to understanding the overall economic context
8 for this arrangement.

9 CHAIR MITCHELL: All right. We'll let the line
10 of questions continue, and we'll give the evidence the
11 weight its due. Thanks.

12 Q So, again, you don't have any reason to
13 disagree with the numbers that are presented here with
14 respect to the significant importance of the production
15 of CertainTeed's Roxboro production facility with respect
16 to their overall business?

17 A I have no reason to disagree.

18 Q Okay. Do you know anything about how
19 CertainTeed's Roxboro facility compared to its other
20 facilities in terms of efficiency?

21 A No, I don't, but like I said earlier, that
22 CertainTeed facility at Roxboro did need a certain amount
23 of gypsum to stay in business. They offered a minimum
24 delivery of 25,000 tons, but they had to be careful.

1 They did not want to overcommit to Duke Energy on
2 accepting a certain amount. Like I said, between 2008
3 and 2012 they got in trouble and has paid millions of
4 dollars to dispose of gypsum, so CertainTeed had to keep
5 a balance between a minimum amount and a maximum amount.

6 Q And when you say they got in trouble between
7 2008 and 2012, would you not agree the reason they were
8 in trouble from a supply perspective was because they
9 didn't have a gypsum production facility between 2008 and
10 2012, correct? There was no production facility in 2008?

11 A But it had committed to accept gypsum --

12 Q That's right.

13 A -- earlier, in 2008.

14 Q Right. So they couldn't use gypsum because
15 they didn't have a production facility in 2008, correct?

16 A That's correct.

17 Q Once the facility became operational, would you
18 not agree that CertainTeed had an incentive to maximize
19 the use of that production facility?

20 A They had to maximize to -- they had an
21 incentive to maximize use of that facility, but the
22 production of gypsum by Duke Energy is a different story.
23 Those two --

24 Q So --

1 A Those two don't always match up.

2 Q Would you not agree that CertainTeed had an
3 incentive once the facility was operational to obtain the
4 amount of gypsum it needed to maximize production at its
5 facility?

6 A That's correct.

7 Q And prior to -- prior to the 2012 Amended and
8 Restated Agreement they had a guaranteed supply of
9 600,000 tons per year, correct?

10 A That was in 2008, but that was before they even
11 started building the factory. They had this Agreement on
12 a piece of paper where Duke Energy would deliver 50,000
13 tons per month. I'm sure that factory was under
14 construction in 2011 and they were getting closer and
15 closer to starting to accept gypsum. They started
16 accepting in March of 2012.

17 It seems in October of 2011, once they were
18 getting closer and closer to actually building a
19 facility, they realized they might not want 50,000 tons
20 per month. They offered Duke Energy a lower minimum
21 monthly quantity of 25,000 tons per month.

22 Q But your testimony does not include any
23 analysis of long term what CertainTeed intended to use in
24 its facility in order to maximize the production of the

1 facility?

2 A Well, I do know they -- in October 2011, they
3 offered to reduce the minimum monthly quantity from
4 50,000 tons per month to 25,000 --

5 Q And we'll get to the specific -- what they
6 specifically offered, but you don't have any assessment
7 regarding what amount of gypsum they would have needed to
8 maximize production in their facility long term and
9 maximize return on their investment?

10 A Seems like it was 25,000 tons per month --

11 Q Okay.

12 A -- if that's what they were requesting as --

13 Q All right.

14 A -- a minimum monthly quantity.

15 Q We'll explore that language momentarily. I
16 want to spend just a little more time about -- regarding
17 what CertainTeed's business plans were for this plant, so
18 do you know who Peter Mayer is?

19 A Yes. I believe he's the employee of Duke
20 Energy that first negotiated the contracts, I think
21 somewhere around 2002, 2004 time frame.

22 Q Correct. Thank you. And so have you reviewed
23 the trial transcript of his testimony?

24 A I have reviewed some of it. I can't recall it

1 from memory.

2 Q Okay.

3 MR. JIRAK: Permission to approach, Chair
4 Mitchell. Chair Mitchell, I've already provided you all
5 with Volume II and Volume III from the trial transcript.
6 And with your permission, I would like to mark those as
7 DEP Lucas Cross Exhibits Number 3 and 4 respectively.

8 CHAIR MITCHELL: They will be so marked.

9 (Whereupon, DEP Lucas Cross Exhibits
10 3 and 4 were marked for
11 identification.)

12 MS. DOWNEY: I feel like I need to make this
13 clear for the record. I think Mr. Mayer was a
14 CertainTeed employee.

15 THE WITNESS: Okay.

16 MS. DOWNEY: Is that right? I think you
17 misspoke.

18 MR. JIRAK: Yeah. Thank you for that
19 correction.

20 Q Okay. In the interest of efficiency, we'll
21 just -- both of these trial transcripts have been entered
22 into evidence. We'll look at just two quick examples
23 from the trial transcript to look at and examine what the
24 CertainTeed witnesses and CertainTeed employees were

1 considering with respect to certainty of supply at their
2 production facility. So if you would turn to Volume III,
3 page 282, line 23.

4 A I'm sorry. You said Volume III --

5 Q Volume III, page 282, line 23. Do you see the
6 -- let me know when you're there.

7 A Okay. Page 282, line --

8 Q Twenty-three (23).

9 A -- line 23.

10 Q Question beginning "What were BPB's
11 priorities." Do you see that?

12 A I see that.

13 Q Okay. And, again, BPB is the successor --
14 predecessor in interest to CTG, correct?

15 A Yes.

16 Q Okay. All right. So the question is directed
17 to the CertainTeed witness, "What were BPB's priorities
18 in looking for a location?" And the answer provided by
19 Mr. Mayer, "Well, since we were building a new plant, and
20 didn't have a plant there, we had three primary
21 objectives: One was security of supply, the other was
22 quality, and the third, of course, was competitive cost."
23 Question, "What do you mean by 'security of supply'?"
24 Answer, "Well, 'security of supply' means if we were

1 going to -- we were owned by a parent company in the UK
2 -- we had to justify, obviously, any kind of plant
3 construction to them, and how to justify that is through
4 the sales of gypsum board, and that was -- obviously, we
5 needed gypsum to have that. So security of supply meant
6 we could guarantee to have that to deliver a return of
7 investment."

8 A I see that and, of course, that was when they
9 were planning on building the facility. The initial plan
10 -- that was around 2002, 2004 time frame -- that was
11 before the great recession. That started around 2007,
12 2008. So later on the potential to sell wallboard
13 greatly decreased. CertainTeed delayed construction of
14 the plant, and because of its 2008 commitment to Duke
15 Energy, it was having to pay to dispose of it, so
16 security of supply was one issue, but overcommitment
17 should have also been a concern, and that's what
18 certainly CertainTeed suffered for.

19 Q But you would agree that a rational economic
20 actor making an investment of between 100 and \$200
21 million in a production facility would want to have a
22 certainty of supply that ensured it can maximize the
23 investment, especially when the next closest available
24 gypsum is going to cost \$62 per ton to transport there?

1 A That's correct.

2 Q Okay. And, again, we'll skip over most of
3 these issues. I want to just direct your attention to
4 one more example of testimony from a CTG witness on this
5 issue of security of supply. Do you know who David
6 Englehardt is?

7 A Yes. He's an employee of CertainTeed who
8 managed some of this contracting.

9 Q Okay. And he was, in fact, involved in
10 negotiation of the 2012 Amended and Restated Agreement,
11 correct?

12 A That's correct.

13 Q Okay. Would you please turn to Volume I (sic)
14 of the transcript, page 136.

15 CHAIR MITCHELL: Mr. Jirak, do you mean Volume
16 II?

17 MR. JIRAK: Thank you. Yes. Volume II. Thank
18 you.

19 A I'm sorry. Give me that page number again,
20 please.

21 Q Volume II, page 136. This is line 4.

22 A Okay. I'm there.

23 Q Okay. The question begins "So, Mr.
24 Englehardt." Do you see that?

1 A I see that.

2 Q So the question is directed to Mr. Englehardt
3 who is a CertainTeed employee. "Mr. Englehardt," -- when
4 you were -- "what were you contemplating in connection
5 with your thinking about flexibility with regard to 2008
6 contract requirement that Duke supply and CertainTeed
7 accept 600,000 tons a year?" Answer from CertainTeed
8 witness Mr. Englehardt, "I still wanted to preserve the
9 600,000 tons a year, because that was the -- that was the
10 long-term security and stable supply that we needed." Do
11 you see that testimony?

12 A I see that.

13 Q Okay. Would you agree that this statement from
14 Mr. -- from Witness Englehardt who was, in fact, involved
15 in the 2012 Amended and Restated Agreement negotiations,
16 indicates that it was critical from their perspective
17 that they had access to 600,000 tons per year?

18 A Well, this is what he said in 2008. After the
19 gypsum supply ran out and CertainTeed had to pay extra
20 money to bring in gypsum from the outside --

21 Q If I could interrupt you. This is testimony
22 from trial, the trial occurring in 2017.

23 A I'm sorry. It was 2017?

24 Q Yeah.

1 A This says trial transcript Monday, July 9th,
2 2018. Is there another date on here? Have I got the --
3 I've got the front --

4 Q This is the transcript from the trial, the
5 CertainTeed litigation, which you're familiar with,
6 correct?

7 A Yes.

8 Q Okay. I don't have the exact --

9 A Okay. It was -- well, I don't know -- I don't
10 know the date he said that.

11 Q Well, subject to check, if it was at the trial,
12 it was after -- after the 2012 Amended and Restated
13 Agreement had been executed?

14 A It was after, and it was -- I mean, this
15 business court case occurred because Duke Energy ran out
16 of gypsum to supply, and CertainTeed got in trouble,
17 again, from the opposite perspective. It did not get
18 enough gypsum that it needed, so, I mean, he had an
19 incentive to say at this time we wanted 600,000 tons per
20 year, but that's not what he proposed to Duke Energy back
21 in October of 2011. He proposed a minimum monthly
22 quantity of 25,000 tons per month, which is 300,000 tons
23 per year.

24 Q Okay. So let's -- if we can move on --

1 A Yeah.

2 Q -- for the sake of efficiency. Would you at
3 least concede that in the trial, all of the CertainTeed
4 witnesses have made statements asserting that security of
5 supply for this plant was a critical component of their
6 investment decision in this CertainTeed production
7 facility?

8 A Please give me a moment. Let me just read this
9 again.

10 Q Sure.

11 A (Reviewing document.) Yeah. Later on, on
12 that same page, it's page 136, start on line 13,
13 "Basically, if Duke produced 600,000 tons, we needed to
14 take it; if we needed 600,000 tons, Duke needed to
15 deliver it." So like there's some flexibility there.

16 Q What's the page you're referencing?

17 A I'm sorry. I'm on that -- you were talking
18 about page 136. That's what you read from starting on
19 line 4?

20 Q Uh-huh.

21 A That's where you started?

22 Q We started on 136, line 4, correct.

23 A Okay. Just going down to line 13, it says,
24 "Basically, if Duke produced 600,000 tons, we needed to

1 take it; if we needed 600,000 tons, Duke needed to
2 deliver it." Of course, he's saying this in 2017. This
3 is after Duke Energy ran out of gypsum to supply, so
4 CertainTeed was in trouble by this time by lack of supply
5 of gypsum, and Duke Energy had charged CertainTeed extra
6 money to deliver gypsum from an outside supply. So he
7 had an incentive to -- at this time, by 2017, he had an
8 incentive to reverse course than what he said in October
9 of 2011.

10 Q So Mr. Englehardt here is the CertainTeed
11 employee, and he's describing the flexible arrangement he
12 had contemplated at the time of the 2011 negotiations for
13 the 2012 Amended and Restated Agreement, correct?

14 A Yes.

15 Q And what he says, and you just pointed to it,
16 if Duke -- if we needed 600,000 tons, Duke needed to
17 deliver it, so does that not suggest to you that he
18 understood the flexibility being offered, that if they
19 had that demand for 600,000 tons, Duke had to meet it?

20 A Well --

21 MS. DOWNEY: Objection. Asked and answered.
22 We've been going over this for a while now.

23 MR. JIRAK: I'm --

24 CHAIR MITCHELL: Mr. Jirak?

1 MR. JIRAK: I don't -- I have not asked that
2 question before. Mr. Lucas just read that testimony. I
3 haven't had a chance to ask him what he understood that
4 to mean.

5 CHAIR MITCHELL: All right. I'll let the
6 question proceed. Please ask the question again and, Mr.
7 Lucas, do your best to answer his question.

8 Q So this is Mr. Englehardt describing the
9 flexibility that he offered at the time of the 2012
10 Amended and Restated Agreement, and he is stating that as
11 he understood it, if they needed 600,000 tons, Duke would
12 have had a firm obligation to deliver it. That's what
13 that says, correct?

14 A Yes. And he had an incentive to say that
15 because CertainTeed got in trouble a second time.
16 Between 2008 and 2012 they got in trouble, had to pay \$32
17 million because they couldn't take what Duke Energy said
18 it had to. But the reverse happened by 2017. All of a
19 sudden, CertainTeed did not have enough gypsum, so he had
20 the incentive to say --

21 Q And what was -- what was the key difference
22 between 2008 and 2017? Why was it that they didn't need
23 gypsum in 2008 and suddenly they needed a full supply in
24 2017?

1 A Well, it's subject to debate what a full supply
2 was. That's why this whole business court case arose.
3 After 2012, CertainTeed, like you said, they did ramp up
4 production --

5 Q But would you agree in 2008 there was not a
6 gypsum production facility --

7 A Yes --

8 Q -- so they had no use for the gypsum?

9 A But CertainTeed had committed to take it --

10 Q Correct.

11 A -- and they were having to pay a lot money to
12 dispose of it.

13 CHAIR MITCHELL: All right. Gentlemen, please
14 don't talk over one another --

15 MR. JIRAK: Sorry.

16 CHAIR MITCHELL: -- so the court reporter can
17 get the transcript down. Thank you.

18 THE WITNESS: I'm sorry.

19 A Go ahead.

20 Q So the key factual difference is in 2008, when
21 they were having problems having to dispose of gypsum
22 they had no need for, the reason they had to dispose of
23 gypsum was because they didn't have a gypsum production
24 facility to use it at, correct?

1 A Well, that was the contract in 2008. I think
2 the trouble occurred a little -- a year or two later --

3 Q Sure. In 2010, there was no gypsum production
4 -- there was no wallboard production facility, correct?

5 A That's correct.

6 Q And in 2016/'17, which you were just
7 describing, there was a gypsum -- a wallboard
8 manufacturing facility, correct?

9 A Yes. But like I said earlier, the Roxboro/Mayo
10 plants never produced 50,000 tons per month. Duke Energy
11 should have been aware of that. They were produ--- they
12 -- from -- all through 2009, 2010, 2011 through 2012,
13 they were never producing 50,000 tons per month, so Duke
14 Energy knew it couldn't provide that amount.

15 Q So the question is -- and we're going to go and
16 look at the flexibility that you've described in just a
17 second, but the question is, as a rational economic
18 actor, after CertainTeed had incurred 30 or \$40 million
19 to dispose of gypsum prior to the point in time at which
20 it constructed its facility, it incurred \$34 million to
21 hold on to that right to build that facility, and it had
22 certainty of supply from day one of this arrangement, and
23 then the very moment they constructed their facility,
24 under your testimony you're suggesting they were all of a

1 sudden willing to give up the security of supply that
2 they had spent \$40 million to retain over a four- or
3 five-year period. And the question is, does it -- how do
4 you align the suggestion that CertainTeed would have be
5 willing to give up certainty of supply at the very moment
6 when they finally had a production facility that was
7 ready and online to be used? And not only was it ready
8 to be used, it was the most efficient plant in their
9 whole system and accounted for 25 percent of the profit
10 of their entire company? Why would they give up the
11 certainty of supply at that very moment of time?

12 A They did not give up complete certainty. They
13 reduced it from 50,000 tons per month to 25,000 tons per
14 month.

15 Q Okay. So, again, we will get to the language
16 in just one second. I want to ask one final question.
17 So you state in your testimony, page 18, that "The Public
18 Staff concludes that it was unreasonable and imprudent
19 for DEP to enter into the 2012 Agreement as it was
20 written, especially when, as was concluded in the
21 lawsuit, DEP was offered the opportunity to enter into a
22 more flexible arrangement."

23 A That's correct.

24 Q Okay. And this flexible arrangement you're

1 referring to is -- was what was offered by CertainTeed in
2 the context of the 2011 negotiations that led to the 2012
3 Amended and Restated Agreement, correct?

4 A I'm sorry. Say your question again.

5 Q You reference a flexible arrangement. That's a
6 specific offer that was made by CertainTeed to Duke,
7 right?

8 A Yes.

9 Q Okay. And in your prefiled supplemental
10 testimony did you include any analysis to assess whether
11 if hypothetically Duke had accepted that flexibility
12 exactly as it was offered, so everything about what they
13 offered Duke wrote into the contract, did you perform any
14 assessment to determine whether or not Duke would have
15 been in the exact same situation after execution of the
16 2012 Amended and Restated Agreement?

17 A It would have been a lot safer. It would have
18 taken on a lot less risk on reducing the commitment from
19 50,000 tons per month to 25,000 tons per month. Duke
20 Energy certainly had some reason to believe it was much
21 more likely. And, also, that's shown in the interim
22 Agreement where this --

23 Q Pause you there for one minute. If you're
24 going to speak to the Interim -- commercial terms of the

1 Interim Supply Agreement are confidential --

2 A Okay.

3 Q -- so --

4 A Okay. Well, let me back up. Let me just say
5 Duke Energy had every reason to believe it could not meet
6 that 50,000 tons ever. It never had any indication it
7 could have met its commitment and had indications that
8 dispatch of Roxboro and Mayo were going down, so it had
9 every reason to at least lift a finger to not commit
10 itself to 50,000 tons per month.

11 Q But you really didn't answer my question, which
12 is if Duke had of accepted the flexibility offer by
13 CertainTeed exactly how they offered it, and then we
14 rolled the tape forward and CertainTeed started drawing
15 what they drew off the pile and demanding as much gypsum
16 as they could, do you know when Duke would have been in
17 default under the terms of the Agreement with that
18 flexibility in it?

19 A I don't know exactly, but if it had taken those
20 better terms, it would have had a lot less risk to do so.

21 Q But when you say less risk, you don't know --
22 you don't know when and if Duke would have been in
23 default had they accepted the flexibility?

24 A I don't know.

1 Q And you haven't performed any analysis to
2 determine when Duke would have breached it had they
3 accepted that flexibility?

4 A No, but it's obvious it would have been a lot
5 less likely. If Duke had reduced its commitment from
6 50,000 tons per month down to 25,000 tons per month, it's
7 a lot less likely it would have defaulted.

8 Q But you haven't -- you think it's a lot less
9 likely, but you haven't assessed how much -- for
10 instance, you don't have any idea how much gypsum
11 CertainTeed was using in 2013, 2014, 2015, 2016, so you
12 haven't assessed when they would have defaulted. You're
13 just stating that as a general matter you think it would
14 be less likely, but you don't know when the default would
15 have occurred.

16 A Well, that would have been hindsight analysis.
17 With my analysis, I put myself in the shoes of Duke
18 Energy Progress and what it knew in late 2011 and 2012,
19 what information did Duke Energy have on hand to
20 determine how much it could commit, and there was every
21 indication that Duke Energy could not meet that
22 commitment of 50,000 tons per month.

23 Q And did you review the supplemental rebuttal
24 testimony of John Halm and Barbara Coppola?

1 A Yes.

2 Q Do you understand that they testified that even
3 if they had accepted the flexibility offered by
4 CertainTeed, they still would have been in substantially
5 the same position, in default under the Agreement at
6 approximately the same time? Do you recall that portion
7 of their testimony?

8 A No. Can you tell me the page number and line
9 number?

10 Q Yes. It's page 17 of their testimony, line 3.

11 A I don't see any exhibits or anything backing up
12 that claim.

13 Q Right. But you understand --

14 A I see it. It -- you're right, it does say that
15 there, but I don't see any justification for that claim.

16 Q But you haven't performed any analysis that
17 would counter this?

18 A No.

19 Q Okay. All right. Now, we've talked about it a
20 lot. Let's actually turn to what was specifically
21 offered by CertainTeed with respect to flexibility.
22 Okay. I'm going to -- in order to think about what it
23 was that was actually offered by CertainTeed with respect
24 to flexibility, I want to turn -- would you agree that

1 the Court's Opinion in this case is a good source of
2 information for assessing what was actually offered by
3 CertainTeed?

4 A Yes.

5 Q Okay. I want you to turn your attention to
6 paragraph 94 of the Court's Opinion. I'm sorry. Did I
7 say page? Paragraph 94 of the Court's Opinion.

8 A I see that.

9 Q And would you agree that the Court's Opinion
10 did go into great detail considering what was offered by
11 CertainTeed at the time of the 2012 Amended and Restated
12 Agreement?

13 A I see that.

14 Q Okay. And would you agree -- well, we've
15 already addressed who Mr. Englehardt is. He's a
16 CertainTeed employee, correct?

17 A That is correct.

18 Q Okay. And are you familiar with this portion
19 of the Order?

20 A Yes, I am.

21 Q Okay. So would you agree that this portion of
22 the Order is describing what it is that the CertainTeed
23 employee, David Englehardt, offered at the time of the
24 negotiated 2012 Amended and Restated Agreement, and this

1 is the very flexibility that you described, correct?

2 A Yes.

3 Q Okay. So I'm going to read this, and then
4 we'll talk about it. "First, Englehardt proposed a shift
5 from a monthly emphasis to an annual term, with any
6 default to be measured against that annual quantity."

7 And I'll skip over the parenthetical which includes the
8 actual redline markup of those portions of the Agreement.

9 "Englehardt also proposed a new MMQ of 25,000 net dry
10 tons per month, which would be an absolute minimum amount
11 the parties could deliver and accept each month, but the
12 primary focus would be satisfying the annual
13 obligations." Do you see that?

14 A I see that, and you should not have left out
15 the parenthetical because right near the end of the
16 parenthetical phrase it talks about "Term of this Revised
17 Agreement and the" -- stock -- if -- "the stockpile falls
18 below 100,000 net dry tons." He made that offer, but
19 Duke Energy agreed to a higher amount. They offered to
20 keep the stockpile higher at 250,000 tons, so that also
21 put Duke Energy at risk for nonperformance for the
22 contract.

23 Q Could you -- well, let me point to one other --
24 we'll talk about it, but I want to look at one other part

1 of the Court's Opinion where, again, the Court is looking
2 at what was actually offered. Can you turn to paragraph
3 110, please?

4 A Yes.

5 Q Okay. Paragraph 110 says "The Court finds that
6 Englehardt's proposed changes must be understood and read
7 in conjunction with all of his revisions, including the
8 addition of a minimum annual quantity term, the inclusion
9 of a stockpile buffer, and the deletion of the 10 percent
10 fluctuations clause." So would you agree the Court here
11 is saying that it's not appropriate to just look at
12 25,000 MMQ per month; you must understand the entirety of
13 what Englehardt was proposing, correct?

14 A That's correct.

15 Q And the entirety of it is not just 25,000.
16 It's also an annual quantity requirement. Do you know
17 what the minimum annual quantity was?

18 A It doesn't say.

19 Q It doesn't say in the Agreement?

20 A Well, you just had me read from paragraph 94.
21 It doesn't say.

22 Q But you don't know what was offered by
23 Englehardt with respect to minimum annual quantity?

24 A Well, I think he offered -- well, he does. Go

1 back to Duke Energy's supplemental exhibit. That's where
2 he --

3 Q Yeah. So subject to check, would you agree
4 that was 600,000 tons, was the minimum annual quantity?

5 A No. Let me read that.

6 Q Okay.

7 A This is DEP's Supplemental Exhibit Number 1,
8 paragraph 3.1. "Progress Energy agrees to sell and
9 deliver to CertainTeed and CertainTeed agrees to purchase
10 and accept from Progress Energy at least 600,000 net dry
11 tons of gypsum filter cake per year or the quantity of
12 gypsum filter cake produced by Duke Energy during said
13 year, whichever is less," so --

14 Q Right.

15 A -- it also said whichever is less.

16 Q But if we go back to parag--- oh, sorry. I
17 didn't mean to interrupt you.

18 A And also it goes on to say later in that same
19 paragraph "The minimum monthly quantity of gypsum filter
20 cake that PE, Progress Energy, agrees to sell and deliver
21 to CertainTeed and that CertainTeed agrees to purchase
22 and accept from Progress Energy in any given month shall
23 be 25,000 net dry tons."

24 Q Right. So -- but going back to the Court's

1 Opinion, paragraph 110 which I just said, the Court has
2 emphasized the importance of reading all three
3 requirements together, right? And so the three
4 requirements are what's the monthly minimum quantity,
5 what's the annual term, and what's the stockpile
6 requirement, correct?

7 A Yes. And the annual term was 600,000 tons or
8 the production of the plant, whichever was less.

9 Q And if we turn to the stockpile buffer, what
10 did the Court find with respect to the stockpile
11 requirement?

12 A Give me a moment. Now, this is paragraph 98 of
13 the Judgment. And the last sentence in that paragraph 98
14 says "In turn, DEP would be required to maintain at least
15 100,000 net dry tons of gypsum filter cake in the
16 stockpile at all times, irrespective of what DEP actually
17 produced at its Roxboro plant and Mayo plant." And
18 that's what Englehardt offered. Duke Energy agreed to a
19 higher amount of 250,000 tons to maintain the stockpile,
20 even though it knew that Roxboro and Mayo plants will be
21 dispatched less and less.

22 Q But in the current Agreement is DEP's
23 obligation to maintain 250,000 minimum tons, irrespective
24 of what DEP actually produced at Roxboro or Mayo, or if

1 it met the MMQ under the current Agreement?

2 A Well, the first part of your question talks
3 about the 2012 Agreement, and in that first part of your
4 question, Duke Energy does agree -- both parties agree to
5 maintain that -- that Duke Energy has to maintain that
6 stockpile of 250,000 tons. And can you restate the
7 second part of your question?

8 Q So under the current Agreement, if Duke had
9 been delivering the MMQ, 600,000 tons per year, but the
10 stockpile falls below 250,000, has Duke breached the
11 Agreement?

12 MS. DOWNEY: Would counsel please clarify what
13 he means by "current Agreement"?

14 MR. JIRAK: I'm sorry. The 2012 Amended and
15 Restated Agreement.

16 MS. DOWNEY: Thank you. Which is not the
17 current Agreement.

18 MR. JIRAK: Thank you.

19 MS. DOWNEY: Thank you.

20 A Well, the 2012 Agreement set a -- hang on. Let
21 me go back to that Agreement. Well, here -- this was the
22 heart of the disagreement between Duke Energy and
23 CertainTeed. On page 15 of that 2012 Agreement, this is
24 paragraph 3.1, this was the final Agreement. I've been

1 talking about the draft offered by CertainTeed earlier.
2 There's one long and confusing sentence. It's nine lines
3 long. I'm not going to read the whole thing into the
4 record, but there are certain phrases in here that appear
5 to conflict with each other, but Duke Energy agreed with
6 it anyway, but it says the average monthly quantity of
7 gypsum filter cake essentially will be 50,000 net dry
8 tons. Have I answered your question, or if you want to
9 restate it?

10 Q Well, I want to go back to the fundamental
11 point here, which is you've repeatedly cited the 25,000
12 MMQ, but you agreed that the Court's Opinion says you
13 have to read all three pieces of what CertainTeed
14 proposed together, right? There's a monthly --

15 A Yes.

16 Q -- obligation, there's an annual obligation,
17 there's a minimum stockpile.

18 A Yes. That's the 2012 Agreement, as written and
19 signed by both parties.

20 Q No, no. I'm referring to the proposal that was
21 made by CertainTeed, the flexibility that you think Duke
22 should have accepted.

23 A I think -- well, let me read that again.

24 Q It's paragraph 110.

1 A Well, I was reading from the actual proposal.

2 Q Yeah. Turn back to paragraph 110.

3 A Okay.

4 Q Let me know when you're there.

5 A Okay. I'm at 110.

6 Q Okay. Again, recognize, this is -- it's a
7 little in the weeds of contract terms, a little hard to
8 follow, but this paragraph is discussing what Englehardt,
9 what CertainTeed proposed, the flexibility that they
10 proposed, right?

11 A That's correct.

12 Q Okay. And would you agree that it's important
13 -- the Court is stating here that the proposed change
14 must be understood and read in conjunction with all the
15 revisions, so it was -- there was a change to the MMQ,
16 there's a change to the annual quantity requirement, and
17 there was a change to the stockpile requirement, correct?

18 A That's correct.

19 Q And you pointed us to paragraph 94 just a
20 minute ago --

21 A Well, you did that, but -- I did. That's
22 right. I'm sorry. Yes.

23 Q I'm sorry. You pointed out paragraph 98.

24 A Oh, yeah. Okay. Ninety-eight (98).

1 Q And, again, this is talking about what
2 CertainTeed offered.

3 A That's correct.

4 Q And this statement says DEP would be required
5 to maintain at least 100,000 net dry tons at all times,
6 irrespective of what DEP actually produced. So if
7 CertainTeed demand--- under this understanding of the
8 stockpile, if CertainTeed pulled 800,000 tons off the
9 pile and the stockpile dropped below 100,000, does Duke
10 have an obligation to meet that demand? If it's an
11 absolute obligation, does Duke have an obligation to meet
12 CertainTeed's demand?

13 A Well, it has to be taken into light of what
14 Duke Energy committed to and what the business court
15 found, that Duke was obligated just to provide 50,000
16 tons per month. And I know we've been going over this.
17 One thing I have to say, this -- I mentioned that one
18 long, confusing paragraph, and the Court found, and this
19 is from paragraph 76 in the Judgment, it says "Prior to
20 trial, the Court found, and again now finds, that the
21 language of Section 3.1 is ambiguous." And that's what
22 we're arguing over. And the Court found it was ambiguous
23 and I think it is, too. We can argue a lot about what
24 that paragraph says. But I believe in October 2011 that

1 CertainTeed offered a lower amount that Duke Energy would
2 be obligated to provide.

3 Q And that's -- the Court's finding is with
4 respect to the ambiguity of the 2012 Amended and Restated
5 Agreement, correct?

6 A Yes.

7 Q And what we're discussing right now is what was
8 offered by CertainTeed; not what is in the Agreement,
9 what was offered by CertainTeed, correct?

10 A Yes.

11 Q And so my question relates to what would have
12 happened had Duke accepted the flexibility offered by
13 CertainTeed. And I asked you this earlier, and you said
14 you had not analyzed whether or not Duke would have been
15 in default, even it had accepted those -- that flexible
16 arrangement, correct?

17 A Well --

18 Q And so the --

19 A -- isn't that -- okay. Sorry. Go ahead.

20 Q So my question is as we look at paragraph 98 --
21 MS. DOWNEY: Objection. Counsel keeps
22 interrupting the witness.

23 CHAIR MITCHELL: Mr. Jirak, please ask him a
24 question.

1 Q And we'll move on, on this subject, but I'll
2 try it one more time. Under the proposal made by
3 CertainTeed that had an absolute obligation to maintain
4 the stockpile at 100,000 that, as stated in paragraph 98,
5 was irrespective of what DEP actually produced, wouldn't
6 that have imposed -- if Duke had accepted that, which it
7 didn't, but had it accepted that, would that not have
8 imposed on Duke the obligation to meet CertainTeed's
9 demand for gypsum, no matter what the amount was?

10 A Well, no. The offer was in two pieces, like we
11 just said in that Judgment, paragraph 94. It was keep
12 the stockpile at 100,000 tons and a minimum monthly
13 quantity of 25,000 tons. Like your hypothetical, what if
14 CertainTeed wanted 800,000 tons a year or 2 million tons
15 a year? I mean, of course, the supply of gypsum wasn't
16 infinite. I mean, all the parties were reasonable. They
17 knew Duke Energy Progress couldn't provide an infinite
18 amount of gypsum.

19 Q But if the Agreement -- if the proposal made by
20 CertainTeed imposed an absolute obligation to maintain a
21 minimum stockpile with no caveat, no ties to how much
22 Duke had produced or what could be used, wouldn't you
23 agree that created an onerous requirement on Duke?

24 A Yes, if you just -- if it was just 100,000

1 tons. And Duke Energy didn't agree to that, but another
2 piece of the Agreement was the minimum monthly quantity.

3 Q But the -- sorry.

4 A Duke Energy had an opportunity in October of
5 2011 to renegotiate the contract. It was opened up by
6 CertainTeed. I believe Duke Energy should have lifted a
7 finger at least somewhat to protect itself. It didn't do
8 that at all. In fact, Duke Energy, in an email -- I've
9 got that in one of my exhibits -- agreed to not change
10 the contract at all. Like you're just saying, if Duke
11 Energy had a bottomless commitment, that would have been
12 a poor choice by Duke Energy. It should have taken some
13 steps to protect itself when it knew it could nowhere
14 meet -- nowhere near meet 50,000 tons per month
15 commitment.

16 Q Okay. We'll move on from that for now. All
17 right. I want to turn to your specifics of your
18 disallowance recommendation. Now, under the Agreement
19 that was reached, Duke is obligated to pay a total LD
20 amount in connection with this Agreement of 88.9 million,
21 correct?

22 A That's correct.

23 Q But you're not recommending a disallowance of
24 the entire amount, correct?

1 A Yes.

2 Q And the reason why you're not recommending a
3 full disallowance of the amount is because you recognize
4 that there were avoided landfill costs as a result of
5 this Agreement, correct?

6 A Yes. And, also, Duke did sell some gypsum to
7 CertainTeed and made some money on that.

8 Q Right. So all the tons that were disposed of
9 under the terms of the Gypsum Supply Agreement
10 constituted avoided landfill costs, correct? In other
11 words, if the --

12 A They were avoided landfill costs on the part of
13 CertainTeed.

14 Q Right. For every ton of gypsum produced at
15 Roxboro/Mayo that Duke was not responsible for
16 landfilling, that's an avoided landfill cost, correct?

17 A Yeah. On the part of Duke Energy.

18 Q Right. Okay. And so the way you went about
19 reaching your disallowance recommendation was to utilize
20 the Company's analysis, correct?

21 A I used -- yes. I used some of the Company's
22 analysis.

23 Q Changes in presumptions, we'll talk about that
24 in just a second. So --

1 MR. JIRAK: Chair Mitchell, permission to
2 approach.

3 CHAIR MITCHELL: You may. Mr. Jirak, let's get
4 the exhibit marked, please.

5 MR. JIRAK: Thank you, Chair Mitchell. With
6 your permission we'd like to mark this as DEP Lucas Cross
7 Exhibit Number 5.

8 CHAIR MITCHELL: It shall be so marked.

9 (Whereupon, DEP Lucas Cross Exhibit 5
10 was marked for identification.)

11 Q Mr. Lucas, you're familiar with this document,
12 correct?

13 A Yes, I am.

14 Q Okay.

15 A This was Duke Energy's response to Public Staff
16 Data Request 13-2.

17 Q Correct. And Mr. -- DEP Witnesses John Halm
18 and Barbara Coppola described this analysis previous in
19 their testimony, correct?

20 A Yes.

21 Q And you understand that under this analysis,
22 based on the Company's assumptions, which I know you
23 disagree with and we'll talk about that in just a second,
24 but under the Company's analysis and using the Company's

1 assumptions, this shows that even after taking into
2 account the liquidated damages payments, when this
3 transaction is looked at as a whole, customers are still
4 better off at \$55 million, correct?

5 A Yes. That's Duke Energy's claim.

6 Q Okay. And just for ease of reference, I'll
7 call this the Company's net benefit analysis. And before
8 we delve into this, would you agree this analysis, these
9 benefits don't take into account the customer savings
10 that have resulted from lower natural gas prices that
11 were one of the key contributors to the Company's
12 inability to meet the gypsum supply under the Agreement?

13 A No. And that's not the premise of my
14 testimony, is not the lower dispatch. It's not the
15 overall customer savings by lower natural gas prices.
16 The premise of my testimony is the fact that Duke Energy
17 knew that natural gas prices had dropped and should have
18 realized that Roxboro and Mayo would be dispatched less
19 and less.

20 Q And I didn't ask that question very well. Do
21 you recall that John Halm and Barbara Coppola described a
22 second piece of analysis that showed how much customers
23 have saved from lower natural gas prices between the
24 period of 2016 and 2018?

1 A Can you tell me the page numbers? Was that
2 in --

3 Q That was in their --

4 A -- supplemental rebuttal or rebuttal?

5 Q That was in their initial rebuttal testimony,
6 and that's in their rebuttal testimony page 17, line 6.

7 A Give me a moment. Let me just read that real
8 quick.

9 Q Sure.

10 A Yeah. I see that, where it says "The analysis
11 showed that customers saved approximately 134 million in
12 fuel costs."

13 Q Right. So you see that. And you recall that
14 portion of their testimony?

15 A Yes.

16 Q And I guess it's a simple question. All I'm
17 asking is you just -- you agree that that -- this \$55
18 million doesn't even take into account those -- that
19 other analysis the Company has performed that shows cost
20 savings due to lower natural gas prices?

21 A That's correct. And I say the same thing in my
22 testimony.

23 Q Okay. So let's just talk real briefly about
24 this analysis to make sure we know how it works. It's

1 actually a relatively simple piece of analysis in the
2 end. And let me just affirm that you agree this is how
3 it works. So all we're doing here is looking at the tons
4 that were purchased by CertainTeed under the Agreement,
5 correct?

6 A Okay. That's the first part of your analysis.
7 Okay.

8 Q Right. Then that's added with the avoided
9 landfill cost, and the Company has an assumption about
10 what it would have cost to landfill that amount of
11 gypsum, correct? That's an assumption you disagree with,
12 but we'll talk about that in a second.

13 A Okay. We're just going down through the Lucas
14 Cross Number 5.

15 Q That's right.

16 A Okay.

17 Q Just want to make sure we understand how this
18 works.

19 A Yes, yes.

20 Q All right. So the Company took the total tons
21 purchased by CertainTeed multiplied by the price, avoided
22 landfill costs on assumed landfill costs, avoided pile
23 management costs -- these are costs that for which
24 CertainTeed is responsible in the Agreement -- and then

1 netted that against the total amount of liquidated
2 damages paid. Do you see that?

3 A I see that.

4 Q And that's how the Company got to its total of
5 \$55 million of net benefit.

6 A I see that.

7 Q Okay.

8 A I'd like to note, this has been another part of
9 the disagreement between the Public Staff and the
10 Company. It shows there was \$26 per ton disposal cost,
11 and you had directed me to page 17 of Duke Energy's
12 rebuttal. If you look to the very next page, down near
13 the bottom -- it will be page 18 of Duke Energy's
14 rebuttal -- starting about line 19 it says "Based on
15 these considerations," --

16 Q Sorry. You're moving too fast for me, Mr.
17 Lucas.

18 A Okay. I'm sorry.

19 Q You're in the rebuttal testimony of --

20 A Yeah. We were just there. You were --

21 Q And which page are you on?

22 A You were asking me about page 17. The very
23 next page, page 18, of rebuttal.

24 Q And what's the question you're --

1 A Well --

2 Q -- what line?

3 A Well, one problem I see with your analysis, you
4 use that number of \$26 per ton of disposal. Going back
5 to the Company's rebuttal, it will be page 18, starting
6 on line 19, "Based on these considerations, the cost of
7 disposal could have ranged from about \$10 per ton to \$30
8 per ton." We have documents saying \$5 per ton. We have
9 other documents that Duke gave us that say 6 to \$9 per
10 ton. That's been a problem, of Duke having documentation
11 for lots of varying amounts for dollars per ton for
12 disposal cost in the landfill.

13 Q Right. Would you agree that assessing the
14 costs retrospectively for landfilling, it can be affected
15 by a lot of different ways in how you -- what you assume
16 about how you do it and what you assume about the
17 applicable environmental requirements, so it's -- would
18 you agree that that's one of the reasons why there can be
19 different amounts that are determined?

20 A Well, that's not what Duke Energy says in its
21 estimates. When it's estimating \$5 per ton, it just --
22 it says that's what the disposal cost is, and it isn't
23 qualified any way or say this is just a partial cost.
24 The same when it had estimates of 6 to \$9 per ton for

1 disposal cost. It doesn't qualify it saying, well, this
2 is only part of the cost of disposal. It says here's the
3 disposal cost and here are the numbers.

4 Q So what are you -- I'm sorry. I'm not clear
5 what you're referring to.

6 A Well, you were just having me go through Lucas
7 Cross Exhibit Number 5. We went through it line by line.
8 And the second line shows \$26 per ton disposal cost.
9 Duke Energy's disposal costs have a wide range -- there
10 are lots of documents with conflicting amounts that Duke
11 Energy has provided to the Public Staff. If I had used
12 Duke Energy's documents saying disposal cost was \$5 per
13 ton, my recommended disallowance would have been even
14 higher. I was a little bit conservative. I used \$6.55.
15 I used a weighted average between the 6 and \$9 per ton.
16 That's how I developed --

17 Q And --

18 A I'm sorry. I haven't finished.

19 Q Oh, sorry.

20 A That's how I developed my recommended
21 disallowance.

22 Q And where did you get that \$5 per ton?

23 A This is the Executive Summary of the BPB Gypsum
24 Supply Contract, whichever this came from, and in the

1 business court case this was Exhibit 111, and this was
2 part of a 2004 email, and this is Duke Energy's number 2
3 paragraph, the last sentence in the second paragraph,
4 "Onsite landfill storage is estimated to cost \$5 per
5 ton."

6 Q And you -- have you reviewed the supplemental
7 rebuttal testimony of Barbara Coppola and John Halm?

8 A Yes, I have.

9 Q And you're aware that their conclusion is that
10 was an incremental cost, meaning the placement cost only
11 for landfill, correct?

12 A Can you show me the page number and line number
13 of that?

14 Q Sure. Beginning on page 30, line 20.

15 A No. That's -- well, this is my -- where I use
16 6 to \$9 per ton. That's what they're talking about, that
17 business analysis package. I'm reading from the BPB
18 Gypsum Supply Contract Executive Summary. But anyway,
19 the last sentence in that second paragraph, "Onsite
20 landfill storage is estimated to cost \$5 per ton." It
21 doesn't qualify it. It doesn't say this is only a
22 partial number.

23 Q Okay. Well, let me frame the question to you
24 this way. Understanding that parties can think about

1 landfill costs in different ways, so would you agree that
2 when it comes to landfilling material, there are a lot of
3 -- the cost of landfilling is comprised of a number of
4 different components, correct?

5 A That's correct.

6 Q So one could look at what it would cost to
7 simply place the material in the landfill, correct?
8 That's one cost.

9 A Yes.

10 Q There's also a cost to design a new landfill,
11 correct?

12 A Yes.

13 Q There's also a cost to construct a new
14 landfill, correct?

15 A That's correct.

16 Q There's also a cost to cap a new landfill once
17 it's full?

18 A That's correct.

19 Q There's a cost to maintain a landfill going
20 forward, correct?

21 A That's correct.

22 Q Okay. Did you perform any assessment to
23 determine how many new cells would have been required --
24 what we're talking about is a hypothetical situation

1 where Duke landfilled 4.5 million tons of gypsum over the
2 course of 9, 10 years. Did you perform any analysis to
3 assess what the full all-in construction, maintenance,
4 capping cost for a landfill of that size would be?

5 A No. I just used the documents that Duke Energy
6 gave me. I just used -- like you said from the court
7 case --

8 Q Okay.

9 A -- Exhibit 111, that \$5 per ton. We sent out
10 data requests. Let's see. This was Public Staff Data
11 Request 19-1. Duke Energy provided information, and I'll
12 read the sentence, "Any gypsum not marketable to CTG or
13 other users will be disposed of in a landfill on the
14 Roxboro site at an estimated cost of \$6 and \$9 per ton
15 for Roxboro and Mayo respectively."

16 I mean, I've got two documents here that say
17 here's the cost. There's no qualification, opening
18 cells, closing cells, whatever. These are documents that
19 -- well, this last one I read is one that Duke Energy
20 gave me directly --

21 Q Right. But you understand Duke's position is
22 that that -- that number in there was an incremental
23 placement only cost?

24 A That's what -- I understand that's what Duke

1 Energy is claiming.

2 Q Okay. And you didn't ask any questions about
3 where that 6 or \$9 came from or what was assumed in that
4 analysis?

5 A Well, we asked for the information and Duke
6 Energy gave it. I mean, we just took the information.
7 We asked -- we sent a data request, asked a question,
8 Duke Energy responded, and we used Duke Energy's numbers.

9 Q Okay. But Duke has provided other numbers
10 other than the 6 and \$9.

11 A Oh, yeah.

12 Q Duke has shown you extensive analysis showing
13 you the actual landfill costs all in now are far in
14 excessive of \$6 per ton.

15 A Yeah. Duke has provided lots of different
16 numbers.

17 Q Okay. So would you agree that looking to see
18 what actually was paid to landfill gypsum during this
19 time period is an important data point to assess what the
20 real-world, all-in landfill costs would have been?

21 A I would have to see that information to give my
22 opinion on it.

23 Q Well, I'm not offering any information. I'm
24 just saying if we could go back and look and see what did

1 one person pay to landfill tons in this time frame in the
2 real world, don't you think that would be an important
3 data point in assessing what the actual landfill costs
4 would have been?

5 A It could be. I mean, if you have -- if you're
6 paying a company to landfill gypsum, it's hard to tell
7 what their profit margin is going to be. I don't know if
8 they'd want a 50 percent profit margin or a 400 percent
9 profit margin. So having a contract with a company to
10 dispose of gypsum isn't necessarily the cost, the true
11 cost of what it takes to put that gypsum in the landfill.

12 Q But you would agree that it's an important data
13 point, would you not, to say, okay, what did somebody
14 actually pay to landfill material during this time frame?

15 MS. DOWNEY: Objection. Asked and answered.

16 MR. JIRAK: Well, I'll move on.

17 CHAIR MITCHELL: Okay.

18 A Well -- okay.

19 Q So let's take -- let's go back to an exhibit I
20 handed out earlier. It's DEP Lucas Cross Exhibit Number
21 3.

22 A And can you just name it, please?

23 Q This is Exhibit 142 from the trial. It's DEP
24 Lucas Cross Exhibit Number 3 (sic).

1 A Okay. We've got the -- this is the transcript?

2 Q No. I'm sorry. This is -- Exhibit 142 is the
3 CTG presentation.

4 MS. DOWNEY: It's 2.

5 MR. JIRAK: Two (2). I'm sorry. Thank you,
6 Dianna.

7 A I'm sorry. I've had to jump around a lot
8 today. Okay. I've got it.

9 Q Okay. So we've talked about this a number of
10 times, the fact that CertainTeed, for a period of time
11 before their gypsum production facility was operational,
12 for a period of time they were having to dispose of
13 gypsum. Do you remember that discussion?

14 A That's correct.

15 Q And were you aware that in some cases they were
16 taking the gypsum and disposing it, landfilling it
17 themselves, correct? Were you aware of that fact?

18 A They were having to pay for disposal. I don't
19 think they were operating a landfill.

20 Q Yeah. I didn't say they were operating a
21 landfill, but they paid to actually have gypsum
22 landfilled themselves.

23 A Yes, I believe they did. And they may have
24 hauled some of it offsite for use at other wallboard

1 manufacturing facilities. Some of it might have been
2 landfilled. I can't remember exactly.

3 Q Okay. So you don't know what CertainTeed
4 actually paid on a per-ton basis to landfill gypsum
5 during the precise time period we're thinking about here?

6 A I don't have that number right in front of me.

7 Q And you don't think knowing what a real party
8 paid to landfill an actual ton of gypsum during this time
9 frame was relevant to your assessment in determining the
10 prudence disallowance that you've made here?

11 MS. DOWNEY: Objection. Asked and answered.

12 MR. JIRAK: Okay. I'll move on.

13 Q Let's turn to page -- it doesn't have a page
14 number, but I think it's approximately page 10. It's a
15 slide that says "CertainTeed honored our obligation to
16 the contract." It's got a little stair step picture. I
17 think you might have just passed it.

18 A I'm sorry. Which -- this is the Lucas Cross
19 Number 2, what page?

20 Q It doesn't have a page number on it. It wasn't
21 paginated in the native format, but it's -- the heading
22 on it -- it's about page 8 or 9. It's the heading that
23 says "CertainTeed honored our obligation to the
24 contract." It's right after the one we were looking at

1 earlier.

2 A Yeah. I see. That's right after page 8.

3 Q Yeah.

4 A I see the stair step.

5 Q Yeah. Again, this is -- okay. And this is a
6 document provided -- produced by CertainTeed, and I want
7 to turn your attention to the year 2010. Do you see
8 that?

9 A I see that.

10 Q And under 2010, it says "220,000 tons by truck
11 to landfill at \$8.4 million." Do you see that?

12 A I see that.

13 Q So we talked earlier about the fact that
14 CertainTeed was having to dispose of gypsum itself. In
15 this document, CertainTeed is identifying what it
16 specifically paid in the real world to landfill gypsum in
17 this time frame, and do you know what 220,000 tons at
18 \$8.4 million equals on a per ton basis?

19 A I can do that right now. Let's see, \$38 per
20 ton, but I need to qualify this. I can't remember who
21 disposed of that gypsum for CertainTeed. It might have
22 been Charah. I can't remember. But by 2010, CertainTeed
23 was in trouble. It had committed to dispose of Duke
24 Energy's gypsum by whatever means, so whatever contractor

1 CertainTeed hired, that contractor knew that CertainTeed
2 was in trouble and could have very easily increased its
3 price to whatever it wanted. CertainTeed was over a
4 barrel, it had to get rid of gypsum, and the contractors
5 all knew that, so CertainTeed may have paid a very
6 inflated price for that disposal.

7 Q Do you know how many contractors CertainTeed
8 had available to them to landfill gypsum?

9 A I don't know.

10 Q So you're speculating that some particular
11 contractor had them over a barrel? On what basis are you
12 making that statement?

13 A Because CertainTeed was in trouble. It had
14 thought it was going to be able to take gypsum, and it
15 couldn't. It had to dispose of gypsum. CertainTeed
16 didn't own any landfills. It had no way to get rid of
17 the gypsum. It had no factory to take the gypsum and
18 turn into wallboard. It had to do something to get rid
19 of gypsum from Roxboro, North Carolina.

20 Q So you don't think CertainTeed, as a rational
21 economic actor, would have gone out in the marketplace
22 and found the cheapest opportunity available to landfill
23 gypsum?

24 A Well, one thing is CertainTeed had to act

1 quickly.

2 Q Well, on what basis -- where have you testified
3 about the timing of --

4 MS. DOWNEY: Objection.

5 MR. JIRAK: Sorry.

6 MS. DOWNEY: Madam Chair, he keeps interrupting
7 the witness.

8 MR. JIRAK: My apologies.

9 CHAIR MITCHELL: All right, Mr. Jirak --

10 MS. DOWNEY: Argumentative, also.

11 CHAIR MITCHELL: -- please let the witness
12 answer. Mr. Jirak, please let the witness answer.

13 A. CertainTeed had to get rid of gypsum, but had
14 no way to do so on its own. Had no landfills. Everybody
15 knew. It was obvious that CertainTeed was in trouble.
16 It was unable to take the gypsum that Duke Energy had
17 committed to producing. And these plants were running.
18 Roxboro and Mayo were running in 2010. They were
19 producing gypsum and was growing the stockpile.

20 Q I'm sorry. Are you finished?

21 A Yes. I'm finished.

22 Q When you say "everybody knew," who is
23 everybody?

24 A Well, it was obvious. They've got this pile of

1 gypsum sitting right beside the Roxboro plant. You've
2 got this company that makes wallboard, they turn gypsum
3 into wallboard, but there's no operating factory on the
4 site. It should have been obvious CertainTeed was in
5 trouble. We've got this big -- there's this pile that's
6 growing and growing. The -- Roxboro and Mayo are getting
7 dispatched. They're creating artificial gypsum. It's
8 getting put on the pile. The pile is growing. It should
9 have been obvious to any contractor that CertainTeed was
10 in trouble and could not meet its commitment.

11 Q So I'll ask you one more time. Do you not
12 think that CertainTeed would have been motivated to go
13 out in the market and find the cheapest per-ton disposal
14 option that was available to it?

15 A I can't put myself in CertainTeed's shoes, but
16 I -- I just -- I can -- like I said earlier, CertainTeed
17 was in trouble, and it should have been obvious, so there
18 would have been some incentive for a contractor to take
19 that into account when developing a bid.

20 Q The question was if you were CertainTeed and
21 there was a \$6 per ton landfill option available to you,
22 and someone else was offering to landfill the gypsum for
23 you at \$38 a ton, which one would you select?

24 MS. DOWNEY: Objection. We keep going over the

1 same thing.

2 MR. JIRAK: I'll move on.

3 Q Let's look at another example briefly. Let's
4 look in 2011. Do you see there where it says 120,000
5 tons by truck to landfill at 4.5 million?

6 A I see that.

7 Q And what's the per-ton cost that CertainTeed
8 actually paid in the real world to landfill a ton of
9 gypsum in 2011?

10 A It was about the same, \$37.50 per ton.

11 Q And that's fairly consistent. Seems like
12 that's consistent with the price they paid in 2010,
13 correct?

14 A Well, still, CertainTeed was in trouble. That
15 factory was not operating in 2011. Roxboro and Mayo
16 power plants were getting dispatched. They were having
17 to operate flue gas desulfurization. That pile was
18 growing. CertainTeed had to pay. And when I say
19 CertainTeed was in trouble, here's where they are,
20 they're paying to dispose of their raw materials.
21 They're paying somebody to take some kind of raw product
22 they needed to make wallboard, and instead of being able
23 to make wallboard with it, they had to pay somebody to
24 haul it away. It was a very -- it was very problematic

1 for CertainTeed.

2 So these payments CertainTeed had to make were
3 certainly a harm to their business, and it would have
4 been obvious to a contractor seeing those plants running,
5 seeing the Roxboro plant running just a few hundred feet
6 away, seeing that pile growing, that there could have
7 been incentive for a contractor to move up its price.

8 Q And, again, the context for this discussion is
9 we're looking at this hindsight analysis that shows \$55
10 million benefits, and we're thinking about what is the
11 right assumption for a per-ton landfill cost, and the
12 question is what would Duke have had to pay in the real
13 world to landfill gypsum in this time period in order to
14 -- if it had not had a Gypsum Supply Agreement in place,
15 correct?

16 A Well, you're talking about something different,
17 because we were looking at this stair step 2010, 2011.
18 That's taking gypsum offsite, hauling it by truck offsite
19 I don't know how many miles. The Roxboro power plant had
20 an onsite landfill, so that's very different. What
21 you're seeing here in this page 9 of this Lucas Cross
22 Number 2, that's hauling landfill from far away. You
23 look down at the first stair step, 2009, they're hauling
24 it by rail all the way to Toronto, Canada. Duke's costs

1 were not relevant. What was available to Duke Energy
2 Progress at the time was its onsite landfill just a
3 couple hundred feet away from the power plant, which
4 would have decreased cost considerably. In my
5 calculations I use Duke Energy's numbers. I'm using the
6 numbers that Duke Energy provided in data requests.

7 Q And so were you aware that CTG actually did
8 landfill gypsum at the Roxboro plant site and was
9 actually charged the actual cost for landfilling that
10 gypsum?

11 A I'm not sure how much they were charged. I
12 don't know how much Duke Energy charged. Duke Energy
13 knew that CertainTeed was in trouble and unable to
14 dispose of gypsum from the stockpile.

15 Q You don't know what was charged for landfilling
16 gypsum at Roxboro?

17 A I can't remember, but I've got Duke's estimates
18 that it provided \$5 per ton and another estimate saying 6
19 to \$9 per ton.

20 Q Okay. So if we look in 2012, we see 61,000
21 tons to Duke landfill at \$1.9 million. I'll spare you
22 the math and just tell you it's \$31 per ton. So you
23 weren't aware that Duke had actually charged CertainTeed
24 for landfill -- for the actual cost of landfilling, the

1 all-in landfill cost?

2 A That might have been the document -- that's
3 what Duke Energy charged CertainTeed. Duke Energy could
4 have charged them more if Duke Energy had seen these
5 other contracts. Duke Energy certainly knew that
6 CertainTeed was in trouble and could have undercut taking
7 the gypsum to an offsite landfill. I mean, Duke Energy
8 -- it doesn't say here that Duke Energy charged only its
9 cost to dispose at a landfill. That's what Duke Energy
10 charged CertainTeed. So -- and Duke Energy might have
11 made a profit on that, so --

12 Q But CertainTeed did not have to use the Roxboro
13 landfill, correct? They could have -- they can do
14 anything they want with the gypsum once they've accepted
15 it.

16 A Well, they had to take it somewhere if they
17 didn't have a factory to use. They had to do something.

18 Q Right. And they would have done the most
19 economic thing, from their perspective, with that land --
20 with that gypsum, correct?

21 A Yes. And they landfilled it.

22 Q Okay. So that's one of the assumptions -- you
23 have stated that should be a lower per-ton cost. We've
24 discussed that issue. The other assumption that you

1 changed was you removed the avoided pile management cost.

2 A Yeah. If Duke Energy had not signed a contract
3 with CertainTeed it had to landfill its own gypsum, there
4 would have been no stockpile to manage.

5 Q Okay. So just for context here, there are --
6 would you agree that there are -- there's a short-term
7 pile at the plant site, correct?

8 A Yeah. Duke Energy sprung that on us after I
9 filed my testimony. There was only talk of a stockpile
10 -- and in our last data request -- well, Duke Energy --
11 well, in its supplemental rebuttal it says, well, there's
12 some other smaller stockpiles, but it seems to conflict
13 with what Duke Energy said in response to earlier data
14 requests. In response to Public Staff Data Request 26-12
15 -- and this is where there -- this is where the Public
16 Staff asks about this, and here's the Public Staff's
17 question, "Assuming there were no contract to sell gypsum
18 at Roxboro and Mayo and DEP would have to landfill the
19 gypsum, why would it be necessary to have a stockpile for
20 the gypsum?" And Duke Energy goes on to explain it, but
21 in the second sentence it says "It is conceivable that
22 the Company could have pursued an arrangement in which
23 gypsum produced at Roxboro is immediately loaded and
24 transported to a landfill, in which case minimal or no

1 stockpile management costs may have been incurred." So
2 these are Duke's words. I mean, it could have
3 immediately --

4 Q If I could just interrupt. If you wouldn't
5 mind reading the whole response. I don't have it in
6 front of me, but --

7 A Sure. I'll read the whole --

8 Q Okay.

9 A I'll read the whole thing.

10 Q Thank you.

11 A "It is not possible to predict with certainty
12 the manner in which DEP may have elected to handle gypsum
13 in a hypothetical scenario in which DEP chose to forego
14 all opportunities to beneficially reuse gypsum, but
15 instead chose to landfill all such gypsum." Well, that
16 sentence right there, you're trying to get me to opine on
17 what Duke Energy could have done or should have done, but
18 right here in Duke's own words, "It is not possible to
19 predict with certainty the manner in which DEP may have
20 elected to handle gypsum in a hypothetical scenario in
21 which DEP chose to forego all opportunities to
22 beneficially reuse gypsum, but instead chose to landfill
23 all such gypsum. It is conceivable that the Company
24 could have pursued an arrangement in which gypsum

1 produced at Roxboro is immediately loaded and transported
2 to a landfill, in which case minimal or no stockpile
3 management costs may have been incurred. However, in
4 order to implement such an arrangement, the Company would
5 have to invest substantially in equipment in order to
6 ensure sufficient transportation capacity at peak
7 operational periods, given that failure to have
8 sufficient transportation capacity could force the plant
9 to shut down. Alternatively, in the hypothetical
10 scenario posited, the Company may have determined that it
11 was more cost effective to maintain a larger stockpile in
12 order to lower the fixed cost of maintaining
13 transportation capacity, in which case some stockpile
14 management costs would have been incurred, in addition to
15 more limited equipment investment."

16 So Duke Energy is playing with some
17 hypotheticals here, but like I read in the very first
18 sentence, "It is not possible to predict with certainty
19 the manner in which DEP may have elected to handle gypsum
20 in a hypothetical scenario in which DEP chose to forego
21 all opportunities to beneficially reuse gypsum."

22 So, I mean, we are going down this hypothetical
23 road, but you've already said that it's not possible to
24 predict.

1 Q Right. And -- okay. Let's step back a second.
2 This whole thing, this whole analysis is a hypothetical
3 scenario. We're saying what cost would have been
4 incurred had we landfilled all of our gypsum from day one
5 instead of pursuing this beneficial reuse relationship,
6 right?

7 A Yes.

8 Q So that necessitates a hypothetical exercise in
9 what would have occurred, because this is not what
10 occurred, right?

11 A Well, you're saying it's not possible to
12 predict with certainty.

13 Q Right. So let's talk about that for a second.
14 What we've said in this analysis is that there would have
15 been some cost associated with managing the pile.
16 Whether it's a large pile or a small pile, there will be
17 some cost associated with it, correct?

18 A That's correct.

19 Q And you have said there will be zero cost
20 associated with managing the pile --

21 A No.

22 Q -- because you remove that amount totally from
23 the analysis?

24 A No. I'm not saying that. I'm taking Duke's

1 numbers that Duke Energy gave us in response to data
2 requests where whenever they say \$5 per ton to dispose of
3 gypsum, another area where they use 6 to \$9 per ton for
4 disposal.

5 Q So pause that for a second. We've talked
6 extensively about the cost of landfilling, and we've left
7 that behind now. We're talking now about the line that
8 says avoided pile management cost. That's a separate
9 cost bucket, correct?

10 A Yes.

11 Q Okay. You -- whereas with landfill cost you
12 assumed a lower value, correct?

13 A That's correct.

14 Q For avoided pile management cost you assumed
15 zero dollars. You removed it entirely.

16 A Yeah. It would not have had to maintain a
17 stockpile, yes.

18 Q Okay. So you have come to the conclusion that
19 there would have been no need for Duke to maintain any
20 sort of pile at the plant in this hypothetical scenario
21 where Duke had landfilled all of this gypsum, correct?

22 A Well, I'm talking about the stockpile, the big
23 stockpile that has hundreds of thousands of tons on it.
24 We were not aware there were some other -- two small

1 piles until we saw the supplemental rebuttal testimony.

2 They were much smaller.

3 Q So you didn't know anything about how Duke
4 manages its gypsum output at its other plants where it
5 landfills gypsum?

6 A Well, the only place it landfills is the
7 Roxboro plant. It had -- it maintained a large stockpile
8 for CertainTeed. And what I see in supplemental rebuttal
9 testimony there's some -- a much smaller pile, a
10 temporary pile.

11 Q So let's back up a second. Duke produces
12 gypsum at Roxboro, correct?

13 A Yes.

14 Q And we're in a hypothetical scenario where Duke
15 is just landfilling all that gypsum.

16 A Yes.

17 Q And we're trying to determine would there be
18 any management cost associated with managing the piles of
19 gypsum that are produced at the plant in this
20 hypothetical scenario.

21 A Going back to Lucas Cross Exhibit Number 5, the
22 third line is avoided pile management cost of \$12
23 million. Duke doesn't say is this the large stockpile
24 that has 100,000 tons in it. It doesn't say if it's a

1 small pile, temporary pile. It doesn't say if it's a
2 small pile at Mayo. It just doesn't distinguish any of
3 it. And I don't think Duke intended to mislead -- I
4 mean, I say -- read that line, "Avoided pile management
5 cost 2007 through 2008," and there's a note 3. "Note 3.
6 CertainTeed paid Charah approximately a thousand dollars
7 per month to manage gypsum on Duke property prior to
8 sale." It looks like Duke Energy is just talking about
9 the large stockpile that CertainTeed used to draw from
10 and run its wallboard factory.

11 I'm sorry. I'm sorry. Yeah. That note number
12 3, avoided pile management, it's talking the certain --
13 Duke Energy indicates it's a CertainTeed pile. It
14 doesn't indicate there's this other smaller pile that has
15 nothing to do with CertainTeed.

16 Q I'm sorry. Which pile are referencing that
17 doesn't have anything to do with CertainTeed?

18 A Well, that's part of the confusion that Duke is
19 now interjecting. Back when Duke Energy provided this
20 information to Public Staff, it talks about avoided pile
21 management cost, period, as if there's -- it doesn't say
22 piles, it says pile management, so Public Staff was
23 familiar with that big stockpile that CertainTeed draws
24 from. And after that, it's got a Note 3. Note 3 says

1 "CertainTeed paid Charah approximately a thousand dollars
2 per month to manage gypsum on Duke property prior to
3 sale." It reads like it's just this one pile that
4 CertainTeed uses to draw gypsum from.

5 Q Put aside Footnote 3 which obviously doesn't
6 reference a stockpile. It says to manage gypsum on the
7 Duke property, but we'll leave that aside. You have
8 recommended disallowance of pile management cost, and you
9 have not added in any amount of costs that Duke would --
10 again, we're in a hypothetical scenario -- would Duke
11 have incurred some cost to manage the gypsum on its
12 property? That's kind of a simple question. In a
13 hypothetical scenario where Duke is landfilling all the
14 gypsum, would there have been any cost associated with
15 managing gypsum on the site?

16 A Well, in what I just read from the response to
17 Data Request 26-12, Duke Energy says, well, we could have
18 had trucks to take gypsum immediately to the landfill,
19 and it would not have had any pile management cost then.

20 Q And would those trucks have a cost?

21 A Yes.

22 Q And how many trucks would Duke have to invest
23 in, in order to keep the plant running at full operation?

24 A I don't know, but what I do have is what Duke

1 Energy told me and told the Public Staff, is that it
2 would take -- one place, like I've said many times
3 already, \$5 per ton to put that in a landfill. It
4 doesn't talk about pile management. That's what the
5 landfill cost would have been.

6 Q Okay. So you've just acknowledged that Duke
7 would have had to have some equipment to manage the
8 stockpile -- I mean, gypsum being produced at the site,
9 but you have no idea how many trucks or what those would
10 have cost, correct?

11 MS. DOWNEY: Objection. Asked and answered.

12 MR. JIRAK: I don't believe I've asked that
13 specific question. I can rephrase it.

14 CHAIR MITCHELL: All right. Ask the question
15 one more time. Mr. Lucas, do your best to answer it and
16 then we'll move on.

17 Q Did you assess how many trucks and how much
18 those trucks would cost for Duke to manage gypsum and
19 take it immediately to a landfill from Roxboro?

20 MS. DOWNEY: Objection. You asked that exact
21 question about a number of trucks.

22 MR. JIRAK: Okay.

23 CHAIR MITCHELL: Mr. Jirak, I'll let the
24 question stand. Mr. Lucas, please answer it and we're

1 moving on.

2 A Well, I'm taking the information that Duke
3 Energy gave me when we asked how much did it cost to
4 dispose of in the landfill. Duke Energy provided a
5 document that says \$5 per ton. It doesn't say, well,
6 that doesn't include trucks, that does not include cell
7 closure or cell opening; it just flat out says \$5 per
8 ton. Duke Energy staff, in reports to Duke's own senior
9 management, took this document -- I'm assuming that Duke
10 Energy staff used correct numbers when it tried to
11 justify this whole project to Duke Energy's higher-level
12 management. And --

13 Q You still haven't answered the question about
14 -- if you could just give me a direct answer --

15 A Well, yeah. Did --

16 Q -- did you assess that issue?

17 A No.

18 Q Okay.

19 A We asked --

20 Q That's --

21 A We asked Duke for the number and Duke Energy
22 provided dollars per ton period. It doesn't qualify it
23 in any particular breakdown at all.

24 MR. JIRAK: Okay. No further questions.

1 CHAIR MITCHELL: Redirect, Ms. Downey.

2 MS. DOWNEY: I'm going to have a couple of
3 redirect exhibits.

4 REDIRECT EXAMINATION BY MS. DOWNEY:

5 Q First, Mr. Lucas, let me ask you before we
6 start with these exhibits, on that data response, the 26-
7 12, did Duke Energy Progress try to quantify any of those
8 hypotheticals in that response?

9 A No. They did not assign any number for any
10 cost at all.

11 Q Okay. And in your cross examination you
12 referenced an Exhibit 111, did you not?

13 A Yes, I did.

14 Q And if you look at the Judgment on page -- on
15 paragraph 37 --

16 A I've got that.

17 Q -- isn't it true that the Court references a
18 per-ton amount to landfill of synthetic gypsum at \$5 per
19 ton and references the Exhibit 111 we've talked about,
20 right?

21 A Yes, it does.

22 MS. DOWNEY: I'd like to offer in -- these are
23 marked as cross exhibits, but let's mark them as redirect
24 exhibits, please. And I guess we need to mark this

1 Public Staff Lucas Redirect Exhibit 1.

2 CHAIR MITCHELL: All right. The exhibit will
3 be so marked.

4 (Whereupon, Public Staff Lucas
5 Redirect Exhibit 1 was marked for
6 identification.)

7 Q Now, Mr. Lucas, you recognize this as the
8 Exhibit 111 referenced in the Court Judgment, do you not?

9 A Yes, I do.

10 Q And if you look on --

11 CHAIR MITCHELL: Ms. Downey, I'm going to stop
12 you.

13 MS. DOWNEY: I'm sorry.

14 CHAIR MITCHELL: The document is identified as
15 confidential.

16 MS. DOWNEY: I don't believe it's confidential,
17 is it? It was an -- it was -- what was confidential
18 about the exhibit? Was it --

19 MR. JIRAK: Yeah. No. It's not confidential.

20 MS. DOWNEY: Right. It's not confidential.

21 CHAIR MITCHELL: So Ms. Downey, please work
22 with the court reporter after the hearing to get that --

23 MS. DOWNEY: I will.

24 CHAIR MITCHELL: -- adequately identified.

1 MS. DOWNEY: Thank you.

2 CHAIR MITCHELL: Thank you.

3 MS. DOWNEY: Sorry.

4 Q Okay. Mr. Lucas, let's look at -- and this is
5 called an Executive Summary; isn't that right?

6 A Yes, it is.

7 Q And on paragraph 2 there, it says, does it not,
8 onsite landfill storage is estimated to cost about \$5 a
9 ton?

10 A That's correct.

11 Q And if you look at the following page where it
12 says under Remedies, Short Term Under Acceptance by BPB,
13 what does it say there under Remedies?

14 A "Short Term Under Acceptance by BPB. Progress
15 Energy may landfill the material and BPB will pay the
16 cost of disposal plus the lost revenue on this material
17 plus a processing fee. Approximate value of this is \$10
18 to \$25 per ton."

19 Q Okay. And I've got another exhibit. I believe
20 you referenced this in your testimony.

21 MS. DOWNEY: I guess we need to call it Public
22 Staff Lucas Redirect Exhibit 2. And, again, I don't
23 believe this is --

24 CHAIR MITCHELL: The document will be so

1 marked.

2 (Whereupon, Public Staff Lucas
3 Redirect Exhibit 2 was marked for
4 identification.)

5 MS. DOWNEY: Right. And I don't believe this
6 is confidential, either, even though it says so at the
7 top. I will let -- because it --

8 MR. JIRAK: Could you -- was this an exhibit
9 from the trial, Ms. Downey?

10 MS. DOWNEY: No. This is a document you
11 produced in discovery.

12 MR. JIRAK: May I have one moment, Chair?

13 MS. DOWNEY: And for reference, you produced
14 this in response to Data Request 19-2.

15 MR. JIRAK: One more minute. I'm sorry.

16 CHAIR MITCHELL: All right. We're going to
17 take a recess. Let's go off the record, please. We'll
18 go back on at 12:10.

19 (Recess from 11:58 a.m. to 12:11 p.m.)

20 CHAIR MITCHELL: All right. Let's go back on
21 the record, please. All right. Mr. Jirak, what is the
22 final word on whether this Public Staff Lucas Redirect
23 Exhibit 2 is confidential?

24 MR. JIRAK: This does not need to be marked

1 confidential.

2 CHAIR MITCHELL: Okay.

3 MS. DOWNEY: Thank you.

4 Q So looking at Lucas Redirect Exhibit 2, Mr.
5 Lucas, would you agree this appears to be an email chain
6 involving a Mr. Johnson and a Ms. Dixon who are both
7 employees of Progress Energy?

8 A Yes.

9 Q And if you look at the bottom, which is the
10 bottom of the first email in the chain of emails, he is
11 asked if he had an estimate of the net value of the deal,
12 right?

13 A At the very bottom, read that statement?

14 Q Yes. Go ahead.

15 A This is an email from Sally Dixon with Duke
16 Energy Progress, and she says, "Danny, Per telecon,
17 here's what I've gleaned primarily from newspaper
18 articles for Mike's backup. Do you have an estimate on
19 the net value of this deal to us? Or the value of the
20 avoided disposal costs? Thanks!"

21 Q And then what does he answer immediately above
22 that about the annual avoided disposal costs, the per-ton
23 number?

24 A It has annual avoided disposal cost is \$3

1 million or 6,000 -- excuse me -- 600,000 tons at \$5 per
2 ton.

3 Q So if you look at both Lucas Exhibit 1 --
4 Redirect Exhibit 1 and Redirect Exhibit 2, Mr. Johnson
5 does not use the word incremental or otherwise qualify
6 his estimate, does he?

7 A No, he doesn't.

8 Q And as an employee of Duke Energy, presumably
9 he would know and understand what that word means,
10 doesn't he, incremental?

11 A Yes.

12 Q And let's look at the exhibit attached to your
13 testimony which is the -- let me find it -- Lucas Exhibit
14 6.

15 A Okay. I'm there.

16 Q And this --

17 CHAIR MITCHELL: Ms. Downey, and this exhibit
18 is identified as confidential?

19 MS. DOWNEY: I think we identified this at the
20 beginning of the hearing, that it is, in fact, not
21 confidential. None of Mr. Lucas' exhibits are
22 confidential.

23 CHAIR MITCHELL: Mr. Jirak, is that correct?

24 MR. JIRAK: We agree with that.

1 CHAIR MITCHELL: Okay.

2 Q Okay. Are you there, Mr. Lucas?

3 A Yes, I am.

4 Q All right. So we're in your Exhibit 6, which
5 is an exhibit -- which was a document that was provided
6 by Duke and I believe was also an exhibit at trial,
7 right?

8 A Yes. It was in response to the Public Staff's
9 Data Request 19-2.

10 Q And in that -- maybe I misspoke, but certainly
11 it was provided by Progress Energy or Duke Energy
12 Progress, right?

13 A Yes.

14 Q Okay. So in that, where you've got that blue
15 arrow pointing, tell us what that says in that -- where
16 the blue arrows --

17 A In that one sentence it says "Any gypsum not
18 marketable to CTG or others will be disposed of in a
19 landfill on the Roxboro site at an estimated cost of \$6
20 and \$9 per ton for Roxboro and Mayo respectively."

21 Q And, again, that number is not qualified in any
22 way, is it?

23 A No, it's not.

24 Q So there was a lot of discussion about what CTG

1 was offering versus what Duke Energy accepted and that
2 sort of thing, so let's see if we can clear that up a
3 little bit, because I think -- so let's go to paragraphs
4 94 and 95 of the judgment.

5 A I'm there.

6 Q Okay. And in paragraph 94, doesn't the Court
7 conclude, and I think we've -- you've said this multiple
8 times, that Englehardt proposed a new MMQ of 25,000 net
9 dry tons per month, right?

10 A That's correct.

11 Q All right. And then in paragraph 95, the Court
12 identifies a minimum and maximum volume for a stockpile,
13 right?

14 A That's correct.

15 Q And what did he -- what did the Court find in
16 terms of the minimum and the maximum?

17 A Well, the second sentence in paragraph 95 says
18 "The minimum would be set at 100,000 net dry tons,
19 assuring that CTG would always have access to at least
20 two months' supply, and the maximum would be set at
21 600,000 net dry tons, with CTG required to remove any
22 excess."

23 Q Okay. So that's what, according to the Court,
24 what CTG offered, right? What Englehardt offered?

1 A That's correct.

2 Q Okay. In the 2012 Agreement, what is the
3 minimum stockpile amount?

4 A In the Agreement, Duke --

5 Q And I'll point you to Section 2.2.3(a).

6 A Okay. Let me get there. In that part of the
7 Agreement where Duke Energy finally signed on the dotted
8 line, the minimum stockpile is increased to 250,000 tons.

9 Q So that's more than double what CertainTeed
10 offered; isn't that right?

11 A That's correct.

12 Q Now, you're aware, and it's been introduced in
13 this hearing, that there's an Interim Agreement that
14 CertainTeed and Duke has entered into, right?

15 A That's correct.

16 Q Have you got it --

17 A I believe he said it as confidential.

18 Q It is confidential.

19 A Okay.

20 Q And I'm going to try to avoid -- if you look at
21 the Interim Agreement, let's look at Section 3.1(d).

22 A I'm there.

23 Q And would you agree that that amount spelled
24 out in 3.1(d) is the amount that CertainTeed is currently

1 accepting under the Interim Supply Agreement?

2 A Yes.

3 Q Now, if Duke Energy Progress had accepted the
4 lesser minimum monthly quantity of 25,000 tons per month,
5 wouldn't that have affected and essentially lowered its
6 liquidated damages, too, in the event of a default?

7 A Yes.

8 Q Okay. Let's look at the transcripts. Let's
9 start with Mr. Englehardt, and that's Lucas Cross Exhibit
10 3. And I think we're going to project some of this on
11 the screen. So there were a lot of questions about what
12 Mr. Englehardt and what CTG were looking for in the
13 contract, right?

14 A That's correct.

15 Q Okay. Let's look at page 140. Am I on 140?

16 A I'm there.

17 Q Okay. Hold on. I think I got the wrong one.
18 Yep. I do. Sorry. On page 140, beginning on line 14,
19 Mr. Englehardt is being asked about Exhibit 24.

20 A That's correct.

21 Q And Exhibit 24 is the same as your Lucas
22 Exhibit 2, which we have since learned is not
23 confidential, right?

24 A Let me just double check that.

1 Q Okay.

2 A That is correct.

3 Q Okay. And that's the Roxboro stockpile
4 scenarios; isn't that correct?

5 A Yes.

6 Q And down in his testimony he's asked to explain
7 the scenarios, right?

8 A Yes.

9 Q Take a quick look at page 141, lines 1 through
10 21.

11 A I'm there.

12 Q And I'm going to paraphrase this, but you can
13 tell me if I'm right or you could just read it out. It
14 doesn't matter to me. But doesn't he essentially say
15 that the 600,000 ton max is intended to protect Duke, and
16 the 100,000 minimum was intended to protect CertainTeed?

17 A So on page 141. Can you give me the line
18 number?

19 Q Sure. Start with line 5. Go ahead and read
20 it.

21 A Okay. "So the key here is, is we're using the
22 stockpile to absorb the variations, but there's a max
23 limit, and there's a lower limit that we would never go
24 outside of. And the purpose of that is that with the max

1 limit, Duke is protected that they never have too much
2 gypsum on their pile." Want me to read the next
3 paragraph?

4 Q Yes.

5 A "So in other words, if they got to 600,000
6 tons, we would have to take it off," we being
7 CertainTeed, "or treat it as excess gypsum, depending on
8 the month, or more on the quantities that year."

9 Q Keep going.

10 A "Setting the quantity at a minimum of 2 months'
11 supply meant that CertainTeed would never run out, there
12 would always be 2 months. And as long as -- once we hit
13 that 2-month level, then the wording I put into the
14 contract kicked in a remedy to" replen--- let me finish
15 that last phrase -- "then the wording I put into the
16 contract kicked in a remedy to replenish the stockpile."

17 Q Okay. Thank you. Now, let's go to page 151.
18 Beginning on line 9, counsel asked him you proposed a new
19 minimum monthly quantity, correct? And what does he
20 answer there?

21 A He says yes.

22 Q And then what was that amount you used, and
23 what does he say?

24 A Says "The minimum monthly quantity for a given

1 month was 25,000 tons."

2 Q Okay. Thank you. Okay. Let's go to Lucas
3 Cross Exhibit 3, which was Mr. Mayer's testimony. And
4 let's talk about some sections that counsel did not talk
5 to you about. Let's start at page 293.

6 A I'm there.

7 Q Beginning on line 15, and this Mr. Mayer, now,
8 this is -- we're talking about the original contract,
9 right?

10 A Yes.

11 Q The 2004 contract?

12 A Yes.

13 Q Okay. So he's asked "How did the parties
14 decide on a 50,000-ton-per-month minimum monthly
15 quantity?" Some objections. The counsel rewinded. And
16 what's the answer beginning on line 25?

17 A "Again, I mentioned that we were looking for
18 some volume, but that volume was going to come from
19 Progress Energy. They spoke to it mostly in terms of
20 annual tonnage, and they had shown us at the time they
21 were making 600, but -- much more, actually -- but,
22 again, it was up to them to decide what they were going
23 to -- or willing to provide to us on -- over the life of
24 the Agreement." Read the next paragraph?

1 Q You can.

2 MR. JIRAK: Can I pause? What page are we on,
3 just for clarity?

4 THE WITNESS: 294.

5 MS. DOWNEY: 294. It's up on the screen as
6 well.

7 MR. JIRAK: Gives us one minute, if you don't
8 mind.

9 THE WITNESS: Sure.

10 MS. DOWNEY: Sure.

11 MR. JIRAK: 294, and what line was that?

12 A Okay. I'm going to start the next paragraph
13 which begins on line 7. "And so really 600 is just the
14 -- what we were talking about. The 50,000 tons was
15 really the practical term on what we are going to deliver
16 on a monthly basis."

17 MS. DOWNEY: That's all I have.

18 CHAIR MITCHELL: Questions from the Commission?
19 Commissioner Clodfelter.

20 EXAMINATION BY COMMISSIONER CLODFELTER:

21 Q Mr. Lucas, I want to start with your theory of
22 the quantification of the imprudence. So as I understand
23 the Public Staff's position, it was imprudent for the
24 Company to have entered into the 2012 modification as

1 written, correct? That's the position.

2 A As the contract is written.

3 Q As written.

4 A And signed by both parties, yes.

5 Q And the Public Staff's position is that the
6 Company had a prudent alternative that it failed to
7 pursue, that prudent alternative being the redline
8 tendered by Mr. Englehardt to the Company?

9 A Yes.

10 Q That is the Public Staff's position?

11 A Yes.

12 Q So the difference between prudence and
13 imprudence is the difference between performance under
14 the actual Agreement, as executed, and performance under
15 the alternative that you contend was prudent, correct?

16 A Yes, yes.

17 Q All right. Now, I'm having some difficulty
18 following your computational analysis because -- and I'll
19 just go straight to the bottom line and then you can
20 unpack it for me. As I think about that, the difference
21 is relatively straightforward and very simple. The
22 difference between the prudent course of action and the
23 imprudent course of action equals the amount of the
24 judgment plus the liquidated damages, provided the

1 following things are true: Provided that had the Company
2 executed the prudent draft, the alternative, it would
3 have still sold the same quantities of gypsum, it would
4 have sold its output, it would have performed the same
5 way on that subject that it performed under the imprudent
6 contract you say it executed. It would have sold its
7 output. That's what it did. There would have been no
8 difference on that subject, correct?

9 A Yes.

10 Q Right. So -- and under the prudent alternative
11 the Public Staff's contends for, the pile would have
12 still been managed just as it was, in fact, managed under
13 the imprudent alternative. It would have been managed by
14 CertainTeed under the contract, right? There would have
15 been no difference there?

16 A That's correct.

17 Q The difference, the only difference, provided,
18 again, the Company sold all of its output to CertainTeed,
19 which it did, and provided the stockpile never fell below
20 100,000 tons at any point up to the date CertainTeed
21 declared a breach, the only difference would have been
22 the amount of the judgment plus the liquidated damages.
23 Why isn't that correct?

24 A Well, in the contract the minimum stockpile was

1 250,000 tons, and that's what triggered Duke Energy
2 having to notify CertainTeed on that date. It was March
3 9th of 2017, Duke Energy sends a letter to CertainTeed
4 saying the stockpile is now below 250,000 tons. If the
5 stockpile had only had to have been 100,000 tons, it
6 could have delayed -- and I'm not sure of the detail --
7 it was May, just two months later, May of 2017, Duke
8 Energy began not delivering 50,000 tons. If that
9 commitment was only 25,000 tons, those problems might
10 have been delayed.

11 Q Right. Exactly right, Mr. Lucas, but you're
12 talking now about the fact of breach, whether there would
13 or would not have been a breach.

14 A Yes.

15 Q I'm talking about the quantification of the
16 difference. And so let me ask you a factual question.
17 Did the Public Staff ever conduct any investigation to
18 determine whether the stockpile, in fact, fell below
19 100,000 tons at any point in time during the period up
20 until the notices were given and breaches were being
21 talked about?

22 A Well, I feel like it must have because --

23 Q Well, not what you feel like. Did you conduct
24 any investigation?

1 A No, but the facts indicate that they couldn't
2 deliver 50,000 tons per month because -- well, the
3 stockpile -- if the stockpile was, say, 90,000 tons in
4 May of 2017, Duke Energy could have delivered 50,000
5 tons. They could have taken out of that 90,000 tons
6 stockpile, taken 50,000 tons and give it to CertainTeed.

7 Q But we don't know the facts because you didn't
8 do the investigation to determine what the stockpile
9 level actually was during that period. We knew from the
10 -- we know at least from Judge Gale's opinion that at
11 some point it fell below 250.

12 A Yes.

13 Q That's under the imprudent version.

14 A Yes.

15 Q We don't know whether it ever fell below
16 100,000. You don't know. Excuse me. Maybe the Company
17 knows, but -- I'm going to ask them, but do you know
18 whether it ever fell below 100,000?

19 A No.

20 Q Okay.

21 A I think I'm answering your question correctly.
22 In May of 2017, Duke Energy said Duke Energy was unable
23 to deliver 50,000 tons to CertainTeed. That indicates
24 the pile was way below -- seems like the pile was less

1 than 50,000 tons. If that pile had 90,000 tons on it,
2 they could have scooped out 50,000 tons to give to
3 CertainTeed in May of 2017, but they couldn't.

4 Q Well, if that's the case, then -- Mr. Lucas,
5 stay with me on that. If that's the case, and I'm --
6 I'll follow your line of reasoning for this; I'm not sure
7 whether I ultimately get there where you are, but I'll
8 stay with you for the moment. If that's the case, then
9 is it then your testimony that there would have been a
10 breach anyway under the prudent contract? I'm calling it
11 the prudent contract.

12 A Yes. If that stockpile went below 100, right.
13 If the stockpile --

14 Q So there would have been a breach anyway?

15 A The breach might have been later, yes, but,
16 see, there's another piece of my premise, is that also
17 the minimum, the quantity was only 25,000 tons. I mean,
18 those two things were together, the minimum stockpile and
19 the minimum monthly quantity.

20 So another premise of my testimony is I tried
21 to put myself in the shoes of Duke Energy Progress back
22 in 2012, and if it had taken prudent action, the risk
23 just would have been a lot less.

24 Q Well, I've got to quantify the risk based upon

1 the --

2 A Okay.

3 Q -- the alleged prudent alternative.

4 A Okay.

5 Q And so that's where I'm exploring with you now.

6 A Okay.

7 Q Okay. And so stay with me for a moment, then.

8 Maybe if they'd taken -- I'll call it for shorthand the
9 prudent contract --

10 A Yes.

11 Q -- the prudent offer, there might -- as I
12 understand it from you, there might still have been a
13 breach at some point down the road, perhaps later than it
14 actually happened.

15 A Yes.

16 Q And if there had been a breach, let's say right
17 now we don't know how to quantify the delay, the
18 difference in time between those two breaches, let's say
19 for right now put that to one side because we don't know.
20 If there had been a breach, though, CertainTeed would
21 have had the same rights as they, in fact, exercised to
22 declare the breach, to seek recovery, and damages would
23 have been awarded and liquidated damages would have
24 kicked in. In that scenario, if that's correct, then

1 there is no difference between the prudent and the
2 imprudent alternative, is there?

3 A Well, give me just a moment. Let me find
4 something in my -- in my notes here. Well, a few things
5 happened. One thing there was a settlement, so it sort
6 of blurred -- you're right, there were liquidated damages
7 in the contract, and I believe Duke Energy entered into
8 the settlement to sort of avoid the full liquidated
9 damages. So, yeah, that's right, there were liquidated
10 damages potential in the contract.

11 Q Faced, though, with the pile dropping below
12 100,000 for an extended period of time sufficient to give
13 CertainTeed rights to trigger a claim for damages and for
14 discontinuance, there would have been a lawsuit, a
15 judgment would have been awarded, and then we can assume
16 there might have been the same settlement of that
17 lawsuit. It just might have happened at a different
18 time?

19 A It might have happened at a different time,
20 but --

21 Q Okay.

22 A -- by minimizing Duke Energy's commitment, I
23 just think that lower risk, lower liability would have
24 benefited Duke Energy. You're right, I haven't

1 quantified that.

2 Q And the Commission has to quantify for purposes
3 of this proceeding. So, again, I want to come back to
4 it. I mean, doesn't it really -- isn't it really, really
5 material for us to know whether or not the pile ever fell
6 below 100,000?

7 A It could be.

8 Q Because if the pile did not -- I mean, I
9 understand you think there's evidence that it may have.
10 We don't know. I don't know.

11 A Yeah. I don't know, either.

12 Q But it may have. But if it did not, then the
13 difference between the prudent alternative and the actual
14 contract is equal to the amount of the damages plus the
15 settlement, right -- the amount of the judgment, plus the
16 settlement.

17 A I'm sorry. Can you say your question again? I
18 need to -- one more time. I'm sorry.

19 Q If the -- if, in fact, the stockpile never fell
20 below 100,000 tons and the Company had entered into what
21 the Public Staff contends is the prudent alternative
22 contract, then the difference between what would have
23 happened under that contract and what happened under the
24 contract it actually entered into would be equal to the

1 amount of the judgment plus the amount of the settlement?
2 Again, because under the prudent contract you would have
3 been maintaining a stockpile, you wouldn't have been
4 landfilling any gypsum, you would have been selling all
5 the output and getting the revenue -- the Company, that
6 is, not you --

7 A Yes.

8 Q -- but the Company would have --

9 A Yes.

10 Q -- excuse me for saying that -- the Company
11 would have been getting the revenue from all of its
12 production that CertainTeed took, in fact, it wouldn't
13 have been landfilling, and there would have been the same
14 pile maintenance costs as, in fact, occurred. So isn't
15 the difference in that scenario equal to the amount of
16 the judgment, plus the amount of settlement?

17 A I'm sorry. I can't answer your question.

18 Q Okay. On the other hand -- that's fair. On
19 the other hand, if, in fact, the Company had entered into
20 the prudent version, the prudent alternative, but the
21 stockpile fell below 100,000 tons -- let's assume along
22 the way they never sold their production to anybody else;
23 let's just make the assumption that all the output of
24 synthetic gypsum from those two plants was put on the

1 pile available for CertainTeed to take -- as long as they
2 did that and -- but the stockpile at some point fell
3 below 100,000 sufficiently over an extended period of
4 time to trigger CertainTeed's contractual rights to
5 declare a discontinuance and a termination, then we might
6 have had a timing difference about when a breach
7 occurred, but a breach would have occurred under that
8 scenario, right?

9 A It's hard to tell because -- hard to tell if
10 the later dispatch of those power plants might have made
11 -- might have avoided that slight dip. And now that
12 you've said that question, I do understand --

13 Q Yeah.

14 A -- your previous question.

15 Q Yeah. Okay.

16 A Under the contract that Duke Energy did sign
17 that the Public Staff is calling imprudent, yeah, what
18 Duke Energy has had to pay out, it's had to pay out
19 liquidated damages, it's had to pay out a judgment
20 payment, and it's had to meet the terms of the settlement
21 and Interim Agreement, whatever those costs are, too.
22 Does that answer your previous question?

23 Q Let's leave it there.

24 A Okay.

1 Q I understand you.

2 A I'm sorry. I was trying -- okay.

3 Q No. I understand you. I guess the point of
4 the second question, and I'll leave it alone for now, is
5 that is it or is it not, in your view, material to know,
6 for purposes of quantifying the loss -- potential loss,
7 whether or not the stockpile ever fell below 100,000
8 tons?

9 A It is. And there's another factor, like I just
10 mentioned, that the dispatch of the Roxboro/Mayo power
11 plants varies month to month, so, yeah, there was -- this
12 dip occurred starting March of 2017 when the first breach
13 of contract occurred. If later dispatch of the plant
14 might have prevented a breach of 100,000-ton contract,
15 yeah, maybe the output of those plants may have been able
16 to ride out a smaller contract obligation, so that would
17 be material.

18 Q Okay. Let me shift. Thank you.

19 A Sure.

20 Q Thank you for staying with me on that. You
21 were asked some questions on redirect about the --
22 Supplemental Exhibit Number 2 to your testimony.

23 A Yes.

24 Q Yeah. And that saved some time for me. One

1 question I don't think you were asked was do you know
2 from discovery or from other evidence what the date of
3 that document was, when it was generated? It doesn't
4 bear a date on its face. Your testimony was that it was
5 provided by Mr. Englehardt to Ms. Coppola, and that was
6 Mr. Englehardt's testimony that we saw on the screen here
7 a minute ago. I'm just interested in knowing whether --
8 what was the date that that occurred, the document was
9 generated and delivered?

10 A Let's see.

11 Q Do you know, or should I ask some other
12 witness?

13 A No. I don't know the date.

14 Q Do you know whether it was generated and
15 provided to Ms. Coppola before the date of the redline
16 version that Mr. Englehardt provided the Company? Do you
17 know if it was provided before or after that time?

18 A I don't know, but just the wording there looks
19 like around the same time. It contains some of the same
20 limits, like the 100,000-ton stockpile. That was new. I
21 mean, the 2004 Agreement and the 2008 Agreement I don't
22 think -- I'll have to check whether it had that 100,000-
23 ton limit or not.

24 Q Okay.

1 A And it looks -- because I think these were
2 scenarios presented by CertainTeed, I think, in 2011.

3 Q I'll ask another witness. I just -- you're the
4 first one I get a chance at, so I asked you first. Let
5 me shift for a minute. Do you have the business court
6 Judgment in front of you? It's Fayetteville Public Works
7 Exhibit Number 3.

8 A I've got it.

9 Q In paragraph 182, Judge Gale found as a fact
10 that it was speculative as to the effect of the Joint
11 Dispatch Agreement on Duke Progress' ability to generate
12 synthetic gypsum from the Roxboro and Mayo plants, that
13 the effect of the JDA was speculative and that the more
14 probative evidence, he says, suggests that it is more
15 likely that Progress has operated its coal-fired plants
16 more frequently than it would have had it not entered the
17 Joint Dispatch Agreement. Is it the Public Staff's
18 position that the Commission is not bound by Judge Gale's
19 finding on that fact?

20 A Let me just read that one paragraph, that
21 paragraph 182.

22 Q Okay. Please.

23 A (Reviewing document.) I don't think the
24 Commission is bound by this paragraph in the Judgment.

1 Q In the Public Staff's view, the Commission
2 could reach a different conclusion about the impact of
3 the Joint Dispatch Agreement on the generation of
4 synthetic gypsum at the Roxboro and Mayo plants?

5 A Yes.

6 Q Mr. Lucas, did the Public Staff conduct any
7 investigation into whether Duke Progress had an option in
8 2011 to declare a discontinuance event under Section 6.5
9 of the then existing Agreement?

10 A Of the Agreement that was in --

11 Q Of the Agreement --

12 A -- that was effective in 2008?

13 Q Of the 2008 Agreement. Did the Public Staff --
14 Section 6.5 of the 2008 Agreement, it didn't change
15 between 2008 and 2012. It was the same. Did the Public
16 Staff conduct any investigation whether the Company had
17 an option on the facts as they existed in 2011 to declare
18 a discontinuance event under Section 6.5?

19 A Certainly, Duke Energy had the option. I guess
20 hypothetical, if CertainTeed had built that factory much
21 earlier and continued to purchase gypsum under the 2008
22 Agreement, Duke Energy could have -- could have had
23 nonperformance and then reverted back to the
24 nonperformance. Am I interpreting your question

1 correctly?

2 Q Well, I guess my question -- let me ask it a
3 slightly different way to see if I get it. Section 6.5
4 of the 2008 Agreements spells out certain factual events,
5 that if they occur, Duke Progress would have had the
6 right to declare a discontinuance event and then pursue a
7 number of different remedies that were identified. Did
8 the Public Staff conduct an investigation to determine
9 whether those conditions existed that would have then
10 allowed Duke to invoke Section 6.5?

11 A No, we didn't, but I just have to say Duke
12 Energy did want to get rid of gypsum. I mean, it had put
13 in that flue-gas desulfurization equipment. So if there
14 was some faltering by CertainTeed, Duke Energy had some
15 incentive not to just tell them to go away completely. I
16 think Duke Energy would have wanted to still find a buyer
17 for that gypsum.

18 Q Would you agree with me that if the factual
19 conditions had existed in 2011 that would have entitled
20 Duke to declare a discontinuance event under Section 6.5,
21 that might have given Duke some negotiating leverage when
22 it came time to talk about a modification to the
23 contract?

24 A Oh, yes. It certainly would have.

1 Q All right. Would you look, Mr. Lucas, at
2 paragraph 124 of Judge Gale's opinion? And, again,
3 that's Fayetteville Public Works Exhibit Number 3. Well,
4 I've got them out of sequence, so bear with me for a
5 minute while I find the page. I've got the pages mis-
6 sequenced.

7 A And I'm sorry. What's the paragraph number?

8 Q 124.

9 A 124.

10 Q And I'll just --

11 A Okay. I'm there.

12 Q I'll just read it out loud so we all know what
13 we're focusing on here. He found that "CertainTeed
14 increased its acceptance of gypsum filter cake from 2012
15 through 2014, but was still not regularly accepting
16 50,000 net dry tons per month," and he cites to a Factual
17 Stipulation on the parties. He then finds that "From
18 March 2012 through July 2015, over two years after the
19 plant became operational, CertainTeed had only accepted
20 as much as 45,000 net" -- tons -- "dry tons of gypsum
21 filter cake during three months."

22 And so my question, after reading that, is did
23 the Public Staff conduct any investigation under the 2012
24 Agreement of whether or not the conditions existed after

1 2012 at any point in time that would have entitled Duke
2 to declare a discontinuance event under Section 6.5 of
3 the 2012 Agreement?

4 A No. And I would like to add something. There
5 were facts that I had pointed out in testimony, are the
6 cheap price of natural gas, the new combined-cycle plants
7 that might have resulted in lower dispatching of
8 Roxboro/Mayo, so if CertainTeed was reducing or had a
9 lower acceptance than 50,000 tons per month, it might not
10 have created a problem for Duke Energy if Roxboro/Mayo
11 are being dispatched less and the stockpile wasn't
12 growing. If CertainTeed took a smaller amount of gypsum,
13 it might not have created a problem.

14 Q It might not have created a practical problem.
15 Would you agree with me that if after 2012 CertainTeed's
16 performance under the 2012 Agreement had satisfied the
17 conditions that were necessary to allow Duke to declare a
18 discontinuance event under 6.5, Duke's ability to do that
19 would have given Duke some additional negotiating
20 leverage with the Company about performance going
21 forward?

22 A Yes.

23 Q Yeah. But the Public Staff didn't conduct any
24 investigation about whether those conditions did or did

1 not exist?

2 A No, we didn't.

3 COMMISSIONER CLODFELTER: Mr. Lucas, give me
4 just a second to look at some notes. Thank you, Mr.
5 Lucas. That's all I have. Thank you.

6 THE WITNESS: Okay.

7 CHAIR MITCHELL: All right. Mr. Lucas, I have
8 a few questions for you.

9 EXAMINATION BY CHAIR MITCHELL:

10 Q Just for purposes of the record and
11 clarification of the record, there's been some discussion
12 today about an interim Agreement.

13 A Yes.

14 Q To your knowledge, is that -- is the interim
15 Agreement the same document as the Settlement and Release
16 Agreement that was introduced during the first phase of
17 this evidentiary hearing and was marked as Fayetteville
18 Public Works Commission Hearing Exhibit 4?

19 A There is a direct relationship between the
20 Settlement and the Interim Supply Agreement. I believe
21 one was part of the other. They've both got the exact
22 same date. But I can't tell you exactly what that
23 relationship is. I don't know offhand. I think the
24 Interim Supply Agreement was part of the settlement --

1 Q Okay.

2 A -- if that answers your question.

3 Q Okay. Thank you. And I believe you just
4 responded to this question by Commissioner Clodfelter. I
5 just want to make sure I understand your testimony. You
6 do -- do you know the date on which the scenarios that
7 are identified in your Supplemental Exhibit 2 were
8 provided to Duke Energy Progress?

9 A I don't have the exact date. I think it was --
10 it's sometime in 2011.

11 Q Okay. Sometime in 2011. Okay. And I think
12 we've established -- want to make sure -- again, I want
13 to make sure I understand your testimony. We've
14 established that the 2008 Agreement required DEP to
15 maintain a stockpile of 250,000 tons; is that correct?

16 A Yes. That's paragraph 2.2.3 of the 2008
17 Agreement where they have to maintain a 250,000-ton
18 stockpile.

19 Q Okay. And the scenarios discussed in 2011 with
20 an eye towards amending the contract, there was
21 discussion of reducing that stockpile requirement from
22 250,000 tons to 100,000 tons; is that correct?

23 A That's correct.

24 Q Okay. Is there -- based on the analysis that

1 you and the Public Staff have conducted, was there any
2 reason for Progress to believe or take the position back
3 in 2012 that it wouldn't be able to satisfy the 100,000-
4 ton minimum?

5 A I can't opine on that exact amount, but some of
6 the indicators that I've mentioned, the lower price of
7 natural gas, the fact that the combined Roxboro/Mayo
8 output never reached 50,000 tons per month -- if it had,
9 it might have done it for one month -- but it definitely
10 was unsustainable -- the fact that Duke Energy Progress
11 had two high-efficiency natural gas plants under
12 construction that could have reduced dispatch from
13 Roxboro and Mayo, I mean, there were some indicators that
14 that stockpile could not maintain 250,000 tons per month.
15 It's possible it could not have met 100,000 tons per
16 month.

17 Q Okay. So it's your testimony that at that
18 point in time, in 2011, 2012, when amendments to the
19 contract were being contemplated by the Company and CTG,
20 those factors that you've just identified, the natural
21 gas prices, plants are under construction, the factors to
22 which you have just testified would have been known or
23 should have been known to the Company?

24 A Oh, yes.

1 Q Okay.

2 A Natural gas prices plummeted between 2008 and
3 2009.

4 Q Right. And is it -- again, just want to make
5 sure I'm clear on your testimony. Is the Public Staff's
6 position that the prudent alternative to what you have
7 testified to as the imprudent contract would have been to
8 accept the scenario in which the minimum monthly quantity
9 was reduced to 25,000 tons and stockpile minimum quantity
10 was reduced to 100,000 tons?

11 A Yes.

12 CHAIR MITCHELL: All right. Any additional
13 questions by the Commission?

14 (No response.)

15 CHAIR MITCHELL: Questions on the Commission's
16 questions?

17 MS. DOWNEY: I have just a couple --

18 CHAIR MITCHELL: Okay.

19 MS. DOWNEY: -- please, Madam Chair.

20 EXAMINATION BY MS. DOWNEY:

21 Q Mr. Lucas, look at your exhibit -- Supplemental
22 Exhibit 1.

23 A Okay.

24 Q And those are the Roxboro/Mayo gypsum

1 productions, actual productions, from 2008 to 2012?

2 A That's correct.

3 Q And would you agree -- and that's wet tons,
4 right?

5 A That's wet tons.

6 Q Okay. Would you agree that this provides some
7 indication as to what Duke could produce --

8 A Yes.

9 Q -- potentially?

10 A Yes.

11 Q Okay. Commissioner Clodfelter asked you about
12 paragraph 182 in terms of the JDA and what the Commission
13 should or should not do. Let's go back to that.

14 A Okay. I'm there at paragraph 182.

15 Q Okay. So what would you think that the
16 Commission should conclude about what was known about the
17 JDA and the merger at the time? What would you say to
18 the Commission about what they should have known?

19 A The JDA allowed Duke Energy Carolinas power
20 plants essentially to compete with Roxboro and Mayo.
21 Actually, when Duke Energy Progress and Duke Energy
22 Carolinas filed that request for merger, it was April of
23 2011, there was an Exhibit 4 in there that predicted that
24 Duke Energy Carolinas' power plants would be dispatched

1 ahead of Duke Energy Progress' because Duke Energy
2 Carolinas had more efficient coal plants.

3 MS. DOWNEY: Since you mentioned that study,
4 I'd like to, if I might, introduce a redirect exhibit,
5 please. And I guess we need to mark this Lucas Redirect
6 Exhibit 3.

7 CHAIR MITCHELL: The document will be so
8 marked.

9 (Whereupon, Public Staff Lucas
10 Redirect Exhibit 3 was marked
11 for identification.)

12 Q So Mr. Lucas, is this the Exhibit 4 you were
13 just referencing?

14 A Yes, it is.

15 Q Okay. And this is the -- an Exhibit 4 to the
16 Merger Agreement, right?

17 A Yeah. It was the merger application.

18 Q Right. And it's an Analysis of Economic
19 Efficiencies under Joint Dispatch; isn't that correct?

20 A Yes.

21 Q Let's turn to page -- were you aware or are you
22 aware of the fact that this study showed that Progress
23 Energy coal plants would be dispatched less under the
24 JDA?

1 A Yes.

2 Q And let's look at page 6 at the bottom.

3 A Okay.

4 Q Would you read the bottom of page 6 --

5 A Starting with exhibit --

6 Q -- through the top of page 7, please?

7 A Okay. Start -- "Exhibit No. 1 shows the
8 projected monthly utilization of the companies'" -- and
9 that's companies plural, both companies, "large and small
10 coal-fired units, gas-fired combined cycle units, and
11 gas/oil-fired combustion turbine units before and after
12 the merger for the years 2012 and 2015. Beginning with
13 2012, Exhibit No. 1 (page 1 of 8) shows that the DEC
14 large coal-fired generating units' utilization increases
15 across the majority of months. During the hours when
16 DEC's high efficiency coal-fired generators have excess
17 production capability, they can provide lower-cost energy
18 when compared to PEC's somewhat less efficient large
19 coal-fired generators." Do you want to read the next
20 paragraph?

21 Q No, that's not necessary.

22 A Okay.

23 MS. DOWNEY: That's all I have.

24 CHAIR MITCHELL: Okay. I think at this point

1 we are --

2 MS. DOWNEY: Madam Chair, I think I need to
3 move exhibits --

4 CHAIR MITCHELL: Please do.

5 MS. DOWNEY: -- as does Mr. Jirak. I'd like to
6 move our exhibits into evidence, both the ones on direct
7 and on redirect.

8 MR. JIRAK: And Chair Mitchell, we'd like to do
9 the same and move all of our redirect (sic) exhibits into
10 the record.

11 CHAIR MITCHELL: All right. Both motions will
12 be allowed. Well, just to be clear, Mr. Jirak, your
13 motion is that your cross examination exhibits of Mr.
14 Lucas be admitted?

15 MR. JIRAK: Correct.

16 CHAIR MITCHELL: Okay. And your motion is
17 allowed.

18 (Whereupon, Lucas Supplemental
19 Exhibits 1 through 8, DEP Lucas
20 Cross Exhibits 1 through 5, and
21 Public Staff Lucas Redirect
22 Exhibits 1 through 3 were admitted
23 into evidence.)

24 CHAIR MITCHELL: All right. At this point I

1 believe we're done with Mr. Lucas. So Mr. Lucas, you may
2 step down.

3 (Witness excused.)

4 CHAIR MITCHELL: We are going to take a recess
5 for lunch. We will be back on the record at 2:00. Thank
6 you.

7 (Recess take from 1:00 p.m. to 2:02 p.m.)

8 CHAIR MITCHELL: All right. Let's go back on
9 the record, please. I believe Duke, we are with your
10 witnesses.

11 MS. DOWNEY: Madam Chair, as a preliminary
12 matter -- I'm sorry, Mr. Jirak -- I believe Madam Chair
13 asked for the date of Exhibit 20, and during the break I
14 was able to ascertain and confirm with Mr. Jirak that the
15 date of that document was April 14th, 2008.

16 CHAIR MITCHELL: And that is, Ms. Downey, help
17 me, Exhibit 20?

18 MS. DOWNEY: That's correct. You asked about
19 that. And that's the business package, business whatever
20 they call it -- business analysis package --

21 CHAIR MITCHELL: Okay.

22 MS. DOWNEY: -- that Mr. Lucas attached to his
23 testimony.

24 CHAIR MITCHELL: Okay. And that's attached to

1 Mr. Lucas' testimony as Supplemental Exhibit 2?

2 MS. DOWNEY: Let me make sure that's correct.

3 No. That's Exhibit 6.

4 CHAIR MITCHELL: Okay. Okay. Thank you, Ms.
5 Downey.

6 MS. DOWNEY: You're welcome.

7 CHAIR MITCHELL: All right. Duke, call your
8 witnesses.

9 MR. JIRAK: Thank you, Chair Mitchell. At this
10 time I would call to the stand the Panel of Barbara
11 Coppola and John Halm on supplemental rebuttal.

12 CHAIR MITCHELL: Good afternoon. Let's go
13 ahead and get you all sworn in.

14 BARBARA COPPOLA, Having first been duly sworn,

15 JOHN HALM; Testified as follows:

16 DIRECT EXAMINATION BY MR. JIRAK:

17 Q All right. I'll begin with you, Ms. Coppola.
18 Please state your name and title for the record.

19 A (Coppola) Yes. My name is Barbara Coppola, and
20 my title is Manager of Capital Investment Strategy.

21 Q Mr. Halm, please state your name and title for
22 the record.

23 A (Halm) John Halm. I'm a Manager of Byproducts
24 Marketing.

1 Q Ms. Coppola, along with Mr. Halm did you
2 prepare and cause to filed in this proceeding rebuttal
3 testimony -- excuse me -- supplemental rebuttal testimony
4 consisting of 36 pages of testimony and one exhibit?

5 A (Coppola) Yes.

6 Q Mr. Halm, did you assist in the preparation of
7 this testimony?

8 A (Halm) I did.

9 Q Do either of your have any changes that you
10 need to make to your testimony at this time?

11 A (Coppola) No.

12 A (Halm) No.

13 Q And Mr. Halm, if I were to ask you the same
14 questions contained in your testimony today, would your
15 answers remain the same?

16 A Yes.

17 Q Ms. Coppola, if I were to ask you the same
18 questions contained in your testimony today, would your
19 answers remain the same?

20 A (Coppola) Yes.

21 MR. JIRAK: Chair Mitchell, at this time I
22 would request that the prefiled supplemental rebuttal
23 testimony and exhibit of the Panel Barbara Coppola and
24 John Halm be copied into the record as if given orally

1 from the stand.

2 CHAIR MITCHELL: Motion will be allowed.

3 (Whereupon, the prefiled supplemental
4 rebuttal testimony of Barbara
5 Coppola and John Halm was copied
6 into the record as if given orally
7 from the stand. The confidential
8 portions were filed under seal.)

9 (Whereupon, DEP Supplemental Exhibit
10 1 was identified as premarked. The
11 confidential portion was filed under
12 seal.)

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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 **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.

1 BY MR. JIRAK:

2 Q Ms. Coppola, have you prepared a summary on
3 behalf of the Panel?

4 A Yes.

5 MR. JIRAK: Chair Mitchell, with your
6 permission, I would ask that Ms. Coppola proceed with the
7 summary.

8 CHAIR MITCHELL: Please do.

9 A Good afternoon, Chair Mitchell and
10 Commissioners. Our testimony responds to the
11 disallowance recommendation of Public Staff Witness Jay
12 Lucas in his supplemental testimony in this proceeding.
13 Mr. Lucas does not allege any imprudence with respect to
14 DEP's initial decision to enter into a long-term supply
15 Agreement with CertainTeed which resulted in
16 CertainTeed's construction of a wallboard manufacturing
17 facility at Roxboro for the beneficial reuse of gypsum
18 from the Roxboro and Mayo generating stations. Instead,
19 Mr. Lucas asserts that the Company was imprudent in
20 failing to accept supply volume flexibility that was
21 allegedly offered by CertainTeed at the time of the
22 negotiation of an amendment to the Agreement.

23 Mr. Lucas' position in this respect is
24 contradicted by the business court's opinion, the record

1 in the trial, the statements of CertainTeed's witnesses
2 in the trial, and commercial common sense, as is affirmed
3 DEP witness John Gaynor. As clearly stated in the
4 Court's Opinion, CertainTeed's proposal included an
5 annual minimum delivery obligation that was the same as
6 already a fact under the Gypsum Supply Agreement. Simply
7 stated, even if the Company had accepted the proposal
8 made by CertainTeed, the proposal that Mr. Lucas alleges
9 the Company should have accepted, the Company would have
10 found itself in the exact same supply shortfall situation
11 and responsible for the same payment of liquidated
12 damages.

13 And while the Company emphatically disagrees
14 with the imprudence allegation of Mr. Lucas, the
15 hindsight analysis developed by the Company and relied on
16 by Mr. Lucas shows that customers have received overall
17 benefit from the CertainTeed transaction, even after
18 taking into account the liquidated damages. The reason
19 for this is that in the absence of the CertainTeed Gypsum
20 Supply Agreement, the Company would have had to incur
21 landfill costs to dispose of the gypsum. Based on a
22 reasonable assumption regarding the per-ton cost of
23 landfilling the 4.5 million tons of gypsum that were
24 actually sold to CertainTeed under the Agreement,

1 customers received \$55 million of benefit as a result of
2 the Agreement. And such benefit does not consider the
3 substantial fuel savings that the customers have
4 experienced due to lower natural gas prices, which was
5 the cause for shortfall in gypsum.

6 Mr. Lucas spends a substantial portion of his
7 testimony examining what the Company knew about its coal
8 generation and gypsum forecast at the time of the
9 negotiation of the 2012 Amended and Restated Agreement.
10 Because CertainTeed did not offer and would not have been
11 willing to materially alter the supply certainty that it
12 had already obtained under the Gypsum Supply Agreement,
13 such information is not relevant to a prudence
14 determination in this proceeding.

15 Nevertheless, even if one were to conclude in
16 contradiction of the Court's Opinion and commercial
17 common sense that CertainTeed would have voluntarily
18 relinquished its supply certainty after having invested
19 200-plus million dollars in a wallboard manufacturing
20 facility, the Company still had sufficient evidence to
21 indicate that it would be able to satisfy and, in fact,
22 exceed the delivery obligation in the Gypsum Supply
23 Agreement.

24 Witness Lucas focuses on very general facts

1 concerning the Company's generating fleet and
2 oversimplifies issues related to the JDA and what would
3 have been known about its impact on the dispatch of
4 Roxboro and Mayo at the time of the negotiations of the
5 2012 Amended and Restated Agreement.

6 In conclusion, we stand behind the decisions
7 made by the Company in connection with the CertainTeed
8 Gypsum Supply Agreement, decisions that were reasonable
9 and prudent based on what was known at the time and that
10 provided millions of dollars of benefit to customers,
11 even after taking into account the liquidated damages.

12 MR. JIRAK: Chair Mitchell, that concludes the
13 summary.

14 CHAIR MITCHELL: Ms. Downey?

15 MS. DOWNEY: I have no questions.

16 CHAIR MITCHELL: All right. Questions by the
17 Commission? Commissioner Clodfelter.

18 EXAMINATION BY COMMISSIONER CLODFELTER:

19 Q My questions are for whichever one of you wants
20 to jump in on them. When CertainTeed suggested in 2011
21 that you consider a modification to the 2008 version of
22 the Agreement, at that time did the Company consider
23 whether or not it had grounds for declaring a
24 discontinuance event under Section 6.5, based on

1 CertainTeed's performance up to that point?

2 A (Coppola) We did not.

3 Q Did not even consider the question?

4 A The circumstances it cited in Section 6.5 --

5 Q Right.

6 A -- had not been effectuated, so that wasn't a
7 consideration.

8 Q Okay. So you did consider it --

9 A Oh.

10 Q -- and you concluded that the circumstances
11 were not satisfied?

12 A That's correct.

13 Q Okay. And your consideration consisted of
14 looking at CertainTeed's actual deliveries and --

15 A Yes.

16 Q -- and acceptances --

17 A Yes.

18 Q -- over the period of time that would have been
19 required --

20 A Yes.

21 Q -- to be analyzed under Section 6.5?

22 A Yes. We were very interested in continuing our
23 partnership with CertainTeed --

24 Q Right.

1 A -- and so they were as well, but those
2 circumstances were not in effect then.

3 Q Just for curiosity, was the information about
4 the actual deliveries and acceptances in the period
5 between 2008 and 2011, was that put into the record in
6 the business court case?

7 A I believe it was, as far as the number of times
8 they accepted 50,000 tons.

9 Q Or the actual deliveries and acceptances.
10 Regardless of whether they hit a particular target or
11 not, the actual amounts delivered and accepted, that
12 information was put in the record in the trial record?

13 A I believe so, subject to check, yes.

14 Q Do you know if it was an exhibit? Do you
15 remember it being an exhibit that you might have prepared
16 or that someone else at the Company might have prepared?
17 I'm really not trying to go anywhere special with this.
18 I just want to look at it.

19 A Yeah. I don't recall.

20 Q And if it's in the trial record, I'm going to
21 ask your counsel --

22 A Yeah.

23 Q -- to produce the trial record.

24 A Okay.

1 A (Halm) I can say I do have that data.

2 Q You do?

3 A I don't have it with me. The period from
4 August 2012 to January of 2018 was part of my affidavit
5 in the court case.

6 Q All right. That's the subsequent --

7 A Yes. That was after.

8 Q -- time period. I'm going to ask you about
9 that in just a minute, so hold your answer on that, but
10 I'm right now really focused on the '08 to '11 or 12 time
11 period. You think that might have been in the record.
12 I'll ask your counsel about that.

13 A (Coppola) I think it may have been in the
14 record --

15 Q Okay. All right. Well --

16 A -- but I do know that it was less than, you
17 know, six -- only about six times that CertainTeed
18 accepted the 50,000 tons between that --

19 Q That they accepted 50.

20 A -- between that 2008 and 2012 time frame.

21 Q I think with Mr. Lucas I had pointed his
22 attention to some findings by Judge Gale that suggested
23 that they had never hit the 50,000 acceptance up until
24 the time of the renegotiation in 2011. Is that

1 consistent with your recollection?

2 A My recollection is that they did take 50,000
3 tons --

4 Q On a couple occasions.

5 A -- on a couple of occasions, but I know one of
6 them may have been -- I know in one month, in January of
7 2010, for example, they landfilled 80,000 tons of gypsum
8 off our stockpile in our onsite landfill because the
9 stockpile was full, it was overfull, and so we had to get
10 that material off for environmental and safety reasons.

11 Q Well, let me then ask you, same line of
12 questions, and I am going to shift now to the period
13 after the 2012 modified Agreement was executed. Did the
14 Company at any point thereafter look at whether or not
15 the conditions under 6.5 for a discontinuance, if it had
16 been satisfied?

17 A (Halm) After they began operations, we would
18 look at that. Under 6.5 they would have to fail to take
19 50 percent of that material --

20 Q Right.

21 A -- and they were able -- that never happened.

22 Q That never happened.

23 A No.

24 Q So over a two-year period, they never fell

1 below 50 percent over a two-year period?

2 A Not after the plant began operations.

3 Q Okay. That's fine. And you indicated, I
4 think, earlier that perhaps that information was put --
5 the actual acceptances were put into an affidavit in the
6 trial court record?

7 A Yes. I have it right here.

8 Q Okay. But it is part of the trial court
9 record?

10 A Yes.

11 Q Great. Do the two of you have there in front
12 of you Judge Gale's Opinion?

13 A (Coppola) Yes.

14 Q It should be marked as Fayetteville Public
15 Works Exhibit Number 3. And I wanted to ask you a couple
16 of questions about some things from Judge Gale's Opinion.
17 I think we just covered one of them. Can you find
18 paragraph 124? Mr. Halm, I think your answers may have
19 covered that, but let's just be absolutely sure what I
20 want to ask you about that.

21 Judge Gale found that from the period March
22 2012 through July 2015, over two years after the plant
23 became operational, they had accepted as much as 45,000
24 net dry tons during three months. That was pursuant to a

1 Stipulation. But notwithstanding that finding, it's your
2 testimony that they still maintain the 50 percent
3 requirement over the two-year period?

4 A (Halm) Yes, sir.

5 Q Okay. Thank you. Ms. Coppola -- you go
6 Coppola not Coppola, right?

7 A (Coppola) Coppola is fine.

8 Q Okay. I want to get it right. This is for
9 you, and it's paragraph 100 in Judge Gale's opinion. And
10 he's discussing your negotiations with Mr. Englehardt
11 leading up to the 2012 Agreement modification.

12 A Uh-huh.

13 Q And he says -- at the last sentence in that
14 finding he says at that time -- that's the time of the
15 negotiations with Mr. Englehardt in 2011, early 2012 --
16 he said you were aware -- you were aware that the
17 Company, Progress, was projecting that for the next
18 several years, its Roxboro plant and Mayo plant would
19 produce gypsum filter cake in excess of 600,000 tons per
20 year. And I want to ask you several questions about
21 that. You were in the hearing room earlier and you heard
22 Mr. Lucas testify, did you not?

23 A Yes.

24 Q And Mr. Lucas testified, and I believe he has

1 an exhibit that shows that up until that point in time,
2 maybe only on one occasion had the Mayo and Roxboro
3 plants generated as much as 600,000 tons a year on an
4 annualized basis. So I'm really interested in exploring
5 -- he has a chart showing the actual production figures,
6 so I'm interested in exploring what was the evidence that
7 led Judge Gale to conclude that you were aware that the
8 Company was projecting production at those two plants in
9 excess of 600,000 tons a year?

10 A Yeah. So we had -- we had different scenarios
11 for our projections and -- but also we had a very solid
12 strategy around our fuel switching to higher sulfur coal,
13 so the higher the sulfur in the coal, the more gypsum you
14 produce. That's just a part of the whole scrubbing
15 process. And so we were anticipating that we were going
16 to be moving to the Illinois Basin coal as our scrubbers
17 came online. 2008 through '10 was really a period of
18 time when we were trying to get our scrubbers up and
19 operational, highly efficient, effective, you know,
20 continuing to produce wallboard grade synthetic gypsum.
21 But in anticipation of what was going on in the coal
22 industry and the Illinois Basin with longwall miners
23 coming into production and a very strong market there, we
24 knew we could burn those higher sulfur coals and they

1 were cheaper, cheaper on a delivered-cost basis --

2 Q So --

3 A -- so that was our -- that was our plan.

4 Q So at the same level of dispatch you'd be
5 generating more gypsum?

6 A That's correct.

7 Q And was that documented, and was that
8 documentation put into the record before Judge Gale?

9 A I don't know that that documentation was put in
10 front of --

11 Q But you provided testimony to Judge Gale
12 similar to what you just offered here about why --

13 A Yes.

14 Q -- it was that you anticipated production in
15 excess of 600,000 tons per year?

16 A Yes.

17 Q These projections that were looking at the use
18 of higher sulfur coal, did they consider any other
19 variables in the course of making the projection? Was
20 that the only thing looked at? Was that the only thing
21 analyzed, was the change in the sulfur content? Did the
22 projections consider other variables that might have
23 affected the generation of gypsum?

24 A Yes. There were other operational

1 characteristics that were considered, the basic, you
2 know, operations of the plants, the forecasted economic
3 dispatch --

4 A (Halm) There's multiple. We have a short-term
5 forecast that we use for fuel procurement, and then we
6 have a long-term forecast that's more used over a 20-year
7 time frame that's used for more plant construction and
8 planning.

9 In the long-term forecast they also took into
10 account such things as potential CO2 legislation, how
11 much coal would be burned if you had CO2 legislation, how
12 much if you didn't have. So a lot of the efforts here
13 are focused on the short-term data in the 2010 to 2012
14 time frame. This contract ran for 20 years, and so we're
15 looking also at the long-term forecast because it
16 wouldn't be prudent to terminate a contract now and then
17 be landfilling material that we were producing in five
18 years, have that turned away or turned down.

19 Q Well, at that time in 2011 when you were trying
20 to sort of look ahead and figure out what you were going
21 to do with CertainTeed, did you consider the Compass
22 Lexecon analysis of the Joint Dispatch Agreement?

23 A (Coppola) Yeah. That wasn't made available to
24 us. In fact, this Agreement was -- the final

1 negotiations were settled late 2011, early 2012, and the
2 certainty about the merger closing was not even -- you
3 know, we weren't even certain whether it was going to
4 close or not. And this information about the JDA was
5 proprietary, so it was not shared with us, and there was
6 no information that was shared that we could perform
7 analysis on. So I think the timing of the JDA, the
8 timing of the merger closing, the timing of the Agreement
9 being executed -- finalized and executed did not make
10 that information available to us.

11 Q You didn't have access to it during the time
12 you were negotiating?

13 A No.

14 Q Right. Okay. Let me -- I want to stay focused
15 on the time period for a minute. I had asked Mr. Lucas
16 about what is Exhibit 2 to his testimony. You may or may
17 not have that in front of you. You're probably familiar
18 it. It's this undated document called Roxboro Stockpile
19 Scenarios that Mr. Englehardt prepared.

20 A Yes. I'm familiar with that document.

21 Q You're probably familiar with it. Again, I'm
22 just interested in trying to find out generally when that
23 was generated and given to you. And most especially, was
24 it given to you before or after you got the redline

1 markup from Mr. Englehardt?

2 A Okay. There's no date -- you can confirm
3 there's no date on the document.

4 Q There is no date on the copy that I have.

5 A I don't have it in front of me.

6 Q And that's really what the question is, is --

7 A Right.

8 Q -- there's a set of scenarios that appear to be
9 outlining how Mr. Englehardt thought the new arrangement
10 might work. And then at some point either before that or
11 after that he sent you a redline, and we have that as an
12 exhibit, also.

13 A Right.

14 Q I'm just trying to get the sequence of the two
15 documents.

16 A Yeah. There were numerous discussions around
17 flexibility in the contract. And I know that the Exhibit
18 23, the redline copy was dated October 21st, 2011. I
19 would have think it -- I would think that it would be
20 around the same time. I can't say for sure. We had an
21 annual management meeting every year with CertainTeed
22 between DEP and CertainTeed. It usually occurred in
23 December. I seem to recall, but can't necessarily
24 confirm, that that document was discussed at -- may have

1 been discussed at the annual management meeting.

2 Q That's as good as it gets.

3 A Yeah.

4 Q Thank you. I appreciate it. I'll take that.

5 A Okay.

6 Q In your testimony you characterize Mr.
7 Englehardt's proposal relative to the stockpile, his
8 initial proposal, not what you finally ended up agreeing
9 on, but the initial proposal as being potentially more
10 onerous. And I read the 2008 Agreement. It says you're
11 going to use reasonable efforts to keep 250,000 tons in
12 the stockpile, and then he proposes that you keep a
13 minimum of 100,000. What was more onerous about that
14 proposal?

15 A Yeah. So there certainly was a potential for
16 100,000-ton stockpile to be a requirement with damages.
17 It's hard to say because we didn't get down to that level
18 of granularity in the negotiations because we took a
19 different path, the path that we finally ended up with in
20 the 2012 Agreement, but could have been more onerous than
21 just a requirement to supply a replenishment plan for the
22 250,000-ton pile in the 2008 Agreement.

23 Q Well, at the time did you consider it more
24 onerous? At the time?

1 A Yes, because we did not accept -- we did not
2 accept that flexibility criteria.

3 Q I understand you didn't accept it, but what was
4 it about it that made it more burdensome than having to
5 keep a 250,000-ton stockpile?

6 A (Halm) I can --

7 A (Coppola) Okay.

8 A (Halm) With a 250,000-ton stockpile minimum,
9 the action that was required at that point when we
10 reached that was to develop a replenishment plan. There
11 was no other action to force us to do anything other than
12 provide them a plan. And the 100,000 ton, it does say
13 absolute limits, and that was viewed right now as a
14 breachable event so it would cause a breach of contract,
15 whereas the 250,000-ton pile did not create a breach.

16 Q Well, that's, again, what takes me back to
17 Exhibit Number 2, the undated description by Mr.
18 Englehardt of his proposal. As I read that, it says --
19 and, again, I'm sorry -- do you have it in front of you
20 by any chance?

21 A (Coppola) I don't.

22 Q It's --

23 A Oh, yes, we do.

24 Q -- Exhibit 2, if you have it, to Mr. Lucas'

1 supplemental testimony.

2 A (Halm) Is this from Jay Lucas'?

3 A (Coppola) It's Exhibit 24 from the proceeding.

4 Q Exhibit 24, correct --

5 A Okay.

6 Q -- from the trial. Because, again, I'm looking
7 at that, and he's got a scenario there down at the bottom
8 under the last entry. He says, "If Progress Energy is
9 producing less than 600,000 tons, CertainTeed will draw
10 down the stockpile." And then this is what I want to
11 focus on. He says, "Replenishment plan will be initiated
12 when stockpile is projected below 100,000 tons within
13 three months." Isn't that exactly where you were with
14 the 250,000-ton provision in the 2008 Agreement?

15 A (Coppola) Yes.

16 Q The consequence of --

17 A Yes, it is.

18 Q The consequence of falling below the minimum
19 was you had to replenish. Same consequence.

20 A Yes.

21 Q And so he's offering you to say you don't have
22 to replenish now; you can fall as low as 100 before you
23 have to replenish. Right now, I've got you at 250 and
24 you've got to replenish.

1 A Uh-huh.

2 Q What was onerous about that change?

3 A I don't know that we thought -- I don't know
4 that I thought about this as particularly onerous at that
5 time, but most likely we thought the 250,000 pile was
6 adequate based on, you know, what we were producing. And
7 that also gave us an additional buffer, so there was
8 really -- I don't recall the exact discussions or
9 negotiations that occurred with CertainTeed to get us
10 back to the 250,000-ton number in the 2012 Agreement.

11 Q Well, you were at that point, as I understood
12 testimony a minute or so ago, projecting that you were
13 going to be able to meet the 50,000-ton a month target,
14 600,000 a year target, in part, largely because you were
15 going to convert to the higher sulfur coals, so why would
16 you have a concern about having to maintain a smaller
17 stockpile if you were actually projecting you were going
18 to have a good chance of meeting the 600,000-ton annual
19 production? Why would you have concern about a smaller
20 stockpile?

21 A I don't recall the exact thinking on that at
22 the time.

23 A (Halm) And I'll add that the only thing that
24 I'm seeing is that the language in Exhibit 2 appears

1 softer than what was in the proposal, I believe. I was
2 looking for where it was in the proposal and I can't put
3 my fingers on it now, but I believe that that was stating
4 the word absolute 100,000.

5 Q All right.

6 A And, again, that was assumed as an additional
7 consequence of dropping below 100,000 tons.

8 Q Bear with me just a second.

9 A So I don't know which one of these, as we say,
10 happened first.

11 Q All right. Well, something in the Agreement --
12 in the draft Agreement, the redline Agreement, caused you
13 to think, though, that the condition was more absolute
14 than what is suggested in Exhibit 2?

15 A (Coppola) That's my general recollection, yes.

16 Q Okay.

17 A And, you know, our position is that regardless
18 if we would have accepted any of these options absolute,
19 we did accept some of their language, but not all of
20 their language. We did change the language in Section
21 3.1 to be 50,000 tons a month or the aggregate production
22 of gypsum from Roxboro/Mayo, whichever was less, but
23 still that certainty of the 600,000 tons a year, so -- I
24 mean, that's what CertainTeed had signed up for

1 originally in the 2004 Agreement. The 2008 Agreement
2 preserved that. They continued -- even though they chose
3 to delay the construction of the plant due to the
4 economic downturn, they chose to honor the obligation in
5 the 2008 Agreement by incurring additional expenses to
6 beneficially reuse in other locations or landfill the
7 gypsum in order to secure -- to continue to secure that
8 supply when their plant came into operation.

9 Q In the course of your discussions with Mr.
10 Englehardt, did he ever tell you that the redline draft
11 he sent you on October the 11th, 2011, didn't get it
12 right in terms of what he really intended? Did he tell
13 you, oh, I made a mistake in what I sent you? I didn't
14 mean what the words --

15 A I don't recall those exact words from --

16 Q Don't ever recall him doing that?

17 A No. I don't recall those exact words from Dave
18 Englehardt, but I know that there was a lot of
19 discussions around the language, the proposals and the
20 language, for how we wanted to consider that going
21 forward, and we essentially kept the volumes the same.

22 Q Were there other drafts other than the redline
23 one that we have October 11, 2011? Before the final
24 version that you signed, were there other drafts along

1 the way?

2 A Yes. We'd have to check the record. There was
3 -- there were some drafted documents. I remember in
4 February of 2012, February 14th of 2012, we actually had
5 a lockdown because we were very interested in finalizing
6 this Agreement, because the plant was coming online and
7 there was a lot of operational changes that needed to be
8 documented in the new Agreement. That was the essence of
9 the 2012 Amended and Restated Agreement, was to document
10 the additional capital infrastructure and operational
11 requirements that would be needed once the plant came
12 into operation. So time was of the essence, and we had a
13 lockdown, so there could have been drafts that were
14 produced in the proceeding from around that time frame.

15 Q Between October 11 and the one you finally
16 signed?

17 A Yes.

18 Q And your recollection is that those would
19 likely be in the trial record as exhibits?

20 A Yes.

21 Q Got it.

22 A If they exist, they would be in the proceeding
23 records.

24 Q If they exist, they would be in the trial

1 record. Okay. Let me jump ahead a minute, then, and go
2 back to the stockpile issue. Did there come a point in
3 time between 2012 and the time you got crossways with
4 CertainTeed -- let's call it when they gave you the
5 notice that you weren't maintaining the 250,000 and
6 things were starting to go downhill -- did there come a
7 time during that interval where your stockpile ever fell
8 below 100,000 tons?

9 A Yes.

10 Q It did?

11 A (Halm) Yes.

12 Q Talk to me about that. Tell me how that
13 happened and how long it continued.

14 A That occurred in 2017. We were able to -- we
15 conducted a physical survey on the stockpile between the
16 first and second week of May of 2017, and then was able
17 to back into those numbers and confirm that we did drop
18 below the 250,000 ton number approximately about the time
19 that we were notifying them. And on May 27th of 2017,
20 the pile was essentially zeroed, you know, at that point.
21 And so that became -- everything below that was deemed to
22 be not specification material, and CertainTeed was
23 refusing it, and that's when we got into the breach, you
24 know, for not supplying. That's when we began

1 replenishing the pile and building that back up. But for
2 a period of at least three or four -- well, one, two,
3 three, four, looks like five months we were below 100,000
4 tons.

5 Q For a period of approximately five months in
6 2017 you were below 100,000 on the stockpile of usable
7 material --

8 A Yes.

9 Q -- of acceptable material? What was the source
10 of the replenishment?

11 A The production from Roxboro and Mayo, and we
12 also did an affiliate sale transfer from DEC, and that
13 material came from Belews Creek.

14 Q From Belews Creek?

15 A Yes, sir.

16 Q Okay. Mr. Halm, the next question is going to
17 be for you, and it's related to the same topic that we've
18 been talking about here for a minute. I'm back to Judge
19 Gale's Opinion, if you've got it.

20 A Okay.

21 Q And I'm going to look at paragraphs 128 and
22 129. And I'll let you read them to yourself for a
23 minute. Let me know when you've read those two
24 paragraphs.

1 A (Reviewing document.) Yes, sir.

2 Q Okay. In 128 he's talking about -- Judge Gale
3 makes a finding that relates to January 2016. That's a
4 year before the time period we were just discussing. He
5 indicated that at that point you had made some kind of
6 determination that the production at the Roxboro and Mayo
7 plant would not be adequate to satisfy 600,000 tons per
8 year. Is that the first time the Company made any
9 projection or determination that you wouldn't be able to
10 meet the 600,000 ton a year requirement?

11 A No, sir.

12 Q Okay.

13 A I guess what -- the way I interpret paragraph
14 128 is that was my understanding of what the obligation
15 was. Okay. I'm sorry. I apologize.

16 Q He says in the last sentence --

17 A Reading the second to last.

18 Q Yes. I'm reading -- toward the end he says you
19 noted that while CertainTeed has actually required lesser
20 amounts than the 50 a month or 600 a year, that you -- I
21 assume that "he" is you --

22 A Right.

23 Q -- projected that Progress faced a future
24 production shortage that would not meet the minimum

1 monthly quantity. And I'm really focused on is that the
2 first time you really had an alarm bell go off that you
3 weren't going to be able to keep it at 50,000 a month?

4 A That was the first time frame where it became
5 very visibly obvious that we had issues that would be
6 developed. Prior to that we had the production month by
7 month where we sometimes -- some months we would make
8 more than 50,000, some less, and then the same for
9 CertainTeed's usage, some months more, some months less.

10 The pile or the stockpile reached maximum
11 capacity in approximately September of 2015, and then we
12 were having a mild winter during this time frame, and the
13 pile began shrinking fairly dramatically during this
14 period.

15 Q So you had been living off the fluctuations and
16 the accumulated cushion in the pile, but by January 2016
17 you could look ahead and say, oops, we're going to run
18 out of headroom?

19 A Well, and I think that that was initiated
20 specifically by plant management had asked the question
21 if this continues, what's the outcome?

22 Q Okay. And I really am focused on whether there
23 had been anything like this prior to that point. We're
24 back in 2011, Ms. Coppola is negotiating with Mr.

1 Englehardt, and her projections are that based on the
2 operational projections for how the plant is going to be
3 run and what fuel sources you're going to have, you're
4 going to be able to stay above 50 a month or 600 a year,
5 and then we get to 2016, 2017, and you're beginning to
6 see the problem. In the interval -- I'm really trying to
7 identify did anything in the interval surface that would
8 cause you, the Company, to think that, no, we're not
9 going to make the requirement?

10 A The issues that we were dealing with at the
11 time, say, between 2013 through --

12 Q Right.

13 A -- the end of 2015, was that the pile was
14 getting larger and larger and larger, to the point it was
15 getting virtually impossible -- well, it was getting very
16 difficult to manage. We were starting to have
17 discussions with CertainTeed on where they were going to
18 be taking that material. And that happened, to my -- the
19 best of my memory, as late as the summer of 2015. To
20 Barbara's point, we had an annual meeting where we would
21 sit down and discuss what our long-term plans were.

22 Q But even though they were not taking as much as
23 they needed to take to keep the pile stable, they still
24 were meeting the 50 percent requirement to avoid a

1 discontinuance event?

2 A They were. And in 2015 they began starting to
3 take 50,000 tons a month, you know, at the same time, so
4 as our production was starting to drop off more
5 noticeably, their wallboard production was beginning to
6 increase to the point that they took the 50,000 minimum
7 at least several times during 2015.

8 Q After you hit the time in 2017 where you had
9 trouble maintaining 100,000 minimum and you started
10 having to replenish, did there come a point after that
11 five-month period you described earlier where you were
12 able to get the pile back up above 100,000 tons on a
13 consistent basis from production from Roxboro and Mayo?

14 A Well, we discontinued transfer of material in
15 late 2018, and since then the pile has continued to grow.
16 They are continuing to use material under the new
17 Agreement.

18 Q Under the Interim Agreement.

19 A And now there is well above 100,000 tons, you
20 know, on the pile.

21 Q Well, what about the time, though, between
22 roughly May of 2017, when you started replenishing with
23 purchases from the Belews Creek plant, to the end of
24 2018? What was happening with the pile during that

1 period? Were you able to keep it above 100,000?

2 A It was balancing in the 100,000-ton range,
3 dependant on the seasonality of wallboard production and
4 the seasonality of coal burn. So we were able to get it
5 above 100,000 by September and October, and then we
6 entered what is our maintenance period or shoulder
7 months, what we would term, or lower power output
8 periods, and it dropped down below 100,000 and then was
9 approximately 100,000 at the start of 2018.

10 Q Were you able to keep it at that level in the
11 second half of 2017 and into 2018 from Roxboro and Mayo
12 production, or were you still having to bring it in from
13 Belews Creek consistently?

14 A We continued bringing it in from Belews Creek
15 until, I believe, September of 2018.

16 Q So during that time period, really, there
17 wasn't a really good consistent production from Mayo and
18 Roxboro sufficient on a sustained basis to keep it above
19 100,000?

20 A To -- my records that I documented only go to
21 January of 2018. That information would be available.

22 Q Is it available in the trial record? Your
23 lawyer knows where I'm going with this, so I have to ask
24 you, though.

1 A I would say not.

2 Q Not. Okay.

3 A Because this was the period when the trial was
4 going on.

5 Q I see.

6 A So the exhibits, you know, are -- this was
7 produced at -- I believe in February, you know, prior to
8 the trial which started, I believe, in April, concluded
9 or Judgment was in August.

10 Q Of 2018?

11 A 2018.

12 Q Right.

13 A I --

14 Q Give me just a second. You had -- did you have
15 something you wanted to add? You sounded like you
16 started.

17 A I was just going add, all of this information
18 is available. It's not in the record, but we've
19 maintained that and shared that with CertainTeed ever
20 since.

21 COMMISSIONER CLODFELTER: Folks, I think that's
22 it for me. Thank you.

23 EXAMINATION BY CHAIR MITCHELL:

24 Q Can you all tell me, what is the Company's

1 position with respect to the 2008 contract and the
2 minimum stockpile requirement?

3 A (Coppola) The 2008 Agreement, 250,000 tons.

4 Q 250,000 tons. Okay. And that wasn't -- the
5 Company interpreted that term to require an absolute
6 minimum of 250,000 tons on the stockpile?

7 A It was 250,000 tons. Once it reached 250,000
8 tons, we were required to supply a replenishment plan.

9 Q Got it. Okay. And that -- the 250,000-ton
10 requirement was carried forward into the 2012 Agreement,
11 correct?

12 A Correct.

13 Q Okay. So the discussion that you all were just
14 having with Commissioner Clodfelter about -- regarding
15 the stockpiles being diminished to 100,000 tons and
16 during certain periods of time below 100,000 tons, is it
17 the Company's position that it was in breach of that
18 material term of the Agreement?

19 A The 2012 Amended --

20 Q Yeah.

21 A -- and Restated Agreement, that --

22 Q Yes. That's correct.

23 A -- we were in breach of the 250,000 ton?

24 Q Yes.

1 A (Halm) We --

2 Q So let me ask the question a different way.

3 A (Coppola) No. That wasn't our -- that wasn't
4 our -- I would say that that wasn't our position, that we
5 were in breach of that, because we did supply a
6 replenishment plan.

7 Q Okay.

8 A (Halm) It wasn't the Court's position, either.
9 We weren't found in breach of not maintaining the plan.
10 We were found in breach of not supplying 50,000 tons a
11 month under specific months.

12 Q Okay. So you were able to -- so the 100,000 --
13 I just want to make sure I'm clear on the Company's
14 position with respect to 100,000 and 200,000-ton
15 obligation related to the stockpile. So when the
16 stockpile was diminished below 250,000 tons, the Company
17 activated its replenishment plan to maintain compliance
18 with or otherwise satisfy the demands of CTG at those
19 points in time?

20 A That's correct. We developed and provided them
21 the plan.

22 Q Okay. Okay. It's your testimony, both in your
23 supplemental testimony that you filed with us recently as
24 well as it's indicated in the Opinion of the business

1 court, that the -- you went through this some with
2 Commissioner Clodfelter, but I'm going to ask you again
3 just to make sure I'm clear, that the proposal of CTG
4 related to reducing that -- the stockpile -- your
5 stockpile obligation to 100,000 tons was potentially
6 onerous. Help me understand why 100,000 tons is onerous.

7 A (Coppola) Yes. I don't recall the exact
8 details of, you know, what occurred during the
9 negotiations of that specific parameter. I just know
10 that the proposals that were made by CertainTeed and that
11 were discussed in negotiations were more complex than
12 just a stockpile size and the volume requirement, so, you
13 know, as far as the 100,000 tons being more onerous, I
14 think that, you know, that was in combination with other
15 negotiations that I don't specifically recall the details
16 of.

17 Q Okay. So I'm just -- so looking at your
18 testimony filed, the supplemental rebuttal testimony on
19 page 16 and the top of page -- on pages 16 and the top of
20 page 17, you all testify that CertainTeed's proposed
21 revisions did not offer DEP significant advantages over
22 the existing Agreement, left in place 600,000 annual
23 delivery obligation, may have imposed obligations related
24 to the stockpile that were potentially more onerous.

1 What do you mean by that testimony?

2 A (Halm) It's as I said prior, just that that
3 would be a breachable event, where the 250,000 ton, going
4 below that was not a breachable event.

5 Q Okay. And then when you all testified that the
6 obligations, the total volume -- I'm paraphrasing now --
7 the total volume obligations from 2008 to 2012 really did
8 not -- didn't change, help me understand exactly what you
9 mean by that.

10 A (Coppola) So is your question -- let me just
11 clarify your question. So you said -- can you please
12 repeat your question?

13 Q Yes. So it's your testimony that the total
14 volume obligation didn't change between 2008 and 2012.
15 What exactly do you mean by that?

16 A So our position going into the proceeding was
17 that the volume obligation in Section 3.1 did have
18 additional flexibility, and that the monthly requirement
19 was 50,000 tons per month or the aggregate production.
20 But we believe that CertainTeed's position, through the
21 testimony of their witnesses, through commercial common
22 sense, the fact that they had just built a \$200 million
23 plant, supported by and confirmed by our expert witness
24 John Gaynor, was that they were not willing to give up

1 that certainty of 600,000 tons per year.

2 And while we tried to present that position of
3 flexibility in the proceeding, the Court found that the
4 minimum monthly volume obligation was 50,000 tons a
5 month.

6 Q Okay. But the Company's position -- was the
7 Company, was DEP focused on the 600,000 or the 50,000 a
8 month?

9 A The 50,000 tons per month.

10 Q Okay.

11 CHAIR MITCHELL: Okay. Any additional
12 questions by the Commission? Commissioner Clodfelter.

13 FURTHER EXAMINATION BY COMMISSIONER CLODFELTER:

14 Q Mr. Halm, I think I found what I couldn't find
15 when we were looking for it earlier, was the provision
16 that you were thinking may have made the 100,000 a little
17 more onerous. I think I may have found it, and I want to
18 see if it's what you were thinking about.

19 A (Halm) Okay.

20 Q Do you have the redline in front of you? That
21 was Exhibit Number 1 to your supplemental testimony.

22 It's --

23 A (Coppola) Is that Exhibit 23 in the proceeding?

24 Q Well, from the trial -- let me get to the front

1 of it. Yes. Well, no. It's --

2 MR. JIRAK: If I may, Commissioner, I can
3 probably help.

4 COMMISSIONER CLODFELTER: Yeah.

5 MR. JIRAK: It's Exhibit 1 to your testimony
6 and it is Exhibit 23 from the trial.

7 Q But it's really the -- not the first page, but
8 the actual redline text which starts on the second page.
9 Look at Section 5. -- no -- 6.2 of the redline, 6.2.

10 A (Halm) Okay.

11 Q And I think that is -- my question to you,
12 really, is that refers to the minimum stockpile and the
13 obligations of the Company with respect to the minimum
14 stockpile. Is that the provision you were referring to
15 that you thought was more onerous or more stringent than
16 had been the case in the prior Agreement?

17 A That would have been one of them, that this
18 would end up causing a termination of the Agreement, you
19 know, due to breaching.

20 Q As I read it, it says that if you fall below
21 100,000, they can give you a notice, and then you've got
22 a period of time to get it back up to 100,000.

23 A Or they have the right to --

24 Q Or --

1 A -- buy it and send us a bill for the
2 administrative fee.

3 Q Or they buy it and send you a bill. Well, now,
4 how did that really differ from the 250,000 trigger?

5 A That portion did not. It's just -- really, it
6 gets down to whether we just had to provide a plan or
7 whether we had to get that up at any cost.

8 A (Coppola) A time -- a time restriction.

9 A (Halm) When we failed on a monthly basis -- he
10 only had the right to go out and buy more material when
11 we failed on a monthly basis. So he's shifting to an
12 annual basis and shifting more towards the -- focusing on
13 the pile instead of what we're supplying on a monthly
14 basis.

15 Q So, again, under the 2008 Agreement where your
16 minimum pile was 250, what did you have to do if you got
17 to 249,000?

18 A Had to provide a plan.

19 Q A plan to do what?

20 A A plan to replenish to get it above 250, but
21 there was -- there's nothing in that contract that --
22 there's no remedies for him if I don't do that.

23 Q All right.

24 A All right. That's just the way it is.

1 Q Thank you.

2 A Thank you.

3 CHAIR MITCHELL: Any additional questions by
4 the Commission?

5 (No response.)

6 CHAIR MITCHELL: Questions on Commission's
7 questions?

8 MS. DOWNEY: I just have a couple, maybe.

9 EXAMINATION BY MS. DOWNEY:

10 Q Do you have -- and this is to help Commissioner
11 Clodfelter with the stockpile scenarios timing. Do you
12 have Mr. Englehardt's testimony in front of you that was
13 introduced as Lucas Cross Exhibit 4?

14 A (Coppola) We do not.

15 A (Halm) No.

16 Q Let me help you out here. I'll refer you to
17 page 158 -- 157.

18 CHAIR MITCHELL: Which page, Ms. Downey?

19 MS. DOWNEY: Page 157, beginning of page 157.
20 It's Exhibit 2, I believe, isn't it? Look at the front
21 of it. I believe it's --

22 COMMISSIONER GRAY: Volume II?

23 WITNESS COPPOLA: Exhibit Number 4, DEP Lucas
24 Cross Exhibit Number 4.

1 Q Okay. And it's Volume II, right? The front.

2 A (Halm) Yes.

3 MR. JIRAK: Yes.

4 A (Coppola) Yes.

5 Q Okay.

6 CHAIR MITCHELL: All right. Volume 2. Let's
7 make sure we're all looking at the same document here.
8 Ms. Downey, start over.

9 MS. DOWNEY: I'm sorry.

10 Q Would you please look at Volume II of the trial
11 transcript which has been introduced as a cross exhibit
12 that is the testimony of Mr. Englehardt? Do you have
13 that in front of you?

14 A Yes.

15 Q Okay. Let's go to the bottom of page 157. Are
16 you there?

17 A Yes.

18 Q And in that place counsel asked if "you sent
19 Exhibit 23 to Ms. Coppola in October of 2011," right? He
20 asked you that? He asked Mr. Englehardt that?

21 A Yes.

22 Q And what did he say?

23 A "That's correct."

24 Q And Exhibit 23 is your DEP Supplemental Exhibit

1 1, correct?

2 A Yes.

3 Q Okay. And then counsel asked "And what
4 happened after that?" And what was his answer?

5 A "Well, we -- I had sent her the scenarios" --
6 so -- "as well. And we had a call -- I don't remember
7 exactly -- maybe a week later, to discuss the scenarios
8 page that I had sent her. And from then, there wasn't a
9 lot of activity going back and forth. They were
10 reviewing the contract. Barbara did tell me when we
11 reviewed the scenarios that she preferred to stay with
12 the contract minimum monthly requirements and those
13 numbers as they were stated in the 2008 Agreement."

14 Q Okay. Now, I'm curious about your answer to
15 Commissioner Clodfelter about the availability of the
16 Compass Lexecon Agreement. Now, that was filed in this
17 Commission's docket, isn't that correct, the exhibit?

18 A That's my understanding, based on the testimony
19 this morning.

20 Q So at a minimum, this was available to DEP
21 management, even if it wasn't directly made available to
22 you; isn't that right?

23 A Yes.

24 MS. DOWNEY: That's all I have.

1 EXAMINATION BY MR. JIRAK:

2 Q All right. Just want to redirect on a couple
3 issues. Let's talk about the JDA briefly just before --
4 since that was the last topic addressed by Commissioner
5 Clodfelter and by Ms. Downey. If you turn to your
6 testimony, page 24, and direct you lines 12 and on, what
7 is your recollection with respect to how the timing of
8 what was going on with respect to the merger and the JDA
9 overlapped with the negotiations of this Agreement?

10 A Yeah. So as it says here "The parties had
11 largely resolved the major commercial terms of the 2012
12 Amended and Restated Agreement by February 2012, well
13 before there would have been certainty regarding the
14 merger the ultimate impact of the JDA. It is, therefore,
15 unreasonable to assert that the Company had sufficient
16 clarity regarding consummation of the merger or other
17 definitive impacts of the JDA that it should have relied
18 on to seek a different commercial arrangement (which, for
19 all of the reasons discussed above, CertainTeed would not
20 have granted)."

21 Q So part of the issue is a timing one. While
22 they generally overlap, we didn't have -- you all -- did
23 you all have full certainty about how the JDA would
24 actually work in practice at the time you were

1 negotiating, or even whether the merger was going to
2 occur?

3 A No.

4 Q Okay. And if you'll go on to the next page,
5 25, where -- you referenced earlier proprietary
6 information. I see on line 1 there's a discussion of
7 proprietary information. Could you refresh your memory
8 about your testimony on that issue?

9 A Line 1 there, "DEC and DEP could not share
10 proprietary information prior to approval of the merger.
11 While the Compass Lexecon Analysis of Economic
12 Efficiencies under Joint Dispatch (Exhibit 4 to the
13 Merger Application) projected total savings from the JDA
14 over a five-year period, it also described the complexity
15 of the JDA and that many issues other than fuel costs had
16 to be considered."

17 Q So the parties couldn't share proprietary
18 information prior to the merger, correct?

19 A That's correct.

20 Q Okay. And so there wasn't a -- there wasn't an
21 ability to know definitively how the merger was going to
22 impact, how the JDA was going to impact dispatch prior to
23 the time at which the 2012 Amended and Restated Agreement
24 was executed, correct?

1 A That's correct.

2 Q Okay.

3 A As a matter of fact, as Eric Grant testified in
4 the proceeding, 80 percent of the megawatt hours actually
5 transfer from DEP to DEC as a result of the JDA.

6 Q Right. So one issue is what -- timing wise,
7 did Duke have the ability to take into account what the
8 impact of the JDA was going to be at the time they're
9 negotiating? The next question is what actually
10 transpired under the JDA after the JDA was put into
11 place? And I think you addressed that in your testimony.
12 I'll turn your attention to page 26, starting on line 7.

13 A Yeah. So what -- "Was the impact of the JDA on
14 the dispatch of Mayo and Roxboro" -- and our response was
15 "DEP witness Eric Grant testified in the Court's
16 proceeding that the JDA had not caused the reduction in
17 dispatch from Roxboro and Mayo. As Mr. Grant testified
18 at the time of the trial, 80 percent of the megawatt
19 hours had flowed from DEP to DEC under the JDA."

20 Q So Mr. Grant testified to a specific fact about
21 the amount of megawatt hours flowing. Are you aware of
22 anyone having rebutted that in the context of the trial?

23 A I am not.

24 Q Are you aware of anyone having rebutted that

1 fact in the context of this proceeding?

2 A No.

3 Q Okay. Mr. Halm, a couple questions for you.

4 There was some discussion from Commissioner Clodfelter,

5 questions regarding sort of short-term versus long-term

6 decision making around the Gypsum Supply Agreement. And

7 just to clarify, at the time you were making decisions

8 with respect to the 2011 -- to the 2012 Amended and

9 Restated Agreement, how big was the stockpile at that

10 time?

11 A (Halm) The stockpile, by our records, was right

12 at 600,000 tons.

13 Q And did the stockpile, the size of the

14 stockpile at that time, give you sufficient confidence

15 that whatever happened in the short term, there was going

16 to be enough supply there to meet CertainTeed's demands?

17 A Yes.

18 Q And as you looked out long term -- or Ms.

19 Coppola, as you looked out over long term, were you

20 confident that over the long term Duke would be able to

21 satisfy the delivery obligations in the 2012 Amended and

22 Restated Agreement?

23 A (Coppola) Yes.

24 Q Okay. Now, there's been a number of questions

1 about the stockpile, and I want to revisit that issue
2 with the two of you as well. So, again, Mr. Halm, your
3 testimony with respect to the current -- to the stockpile
4 obligation in the 2012 Amended and Restated Agreement,
5 that is, the Agreement that the parties signed, okay,
6 your testimony was that the 250,000 stockpile was not an
7 absolute obligation, correct?

8 A (Halm) Correct.

9 Q So just if you could reiterate what happened if
10 it dropped below 250,000.

11 A We were required to provide a replenishment
12 plan.

13 Q Okay. And so your testimony discusses the fact
14 that the proposal of Mr. Englehardt, as reflected in
15 Exhibit 23, was a potentially more onerous obligation.
16 Do you recall that part of your testimony?

17 A Yes.

18 Q Okay. I want to turn your attention --
19 Commissioner Clodfelter pointed us to 6.2 -- helpfully
20 pointed us to 6.2 in the -- well, let me back up a
21 second. Exhibit 24 was the scenarios laid out by David
22 Englehardt for purposes of discussion, correct?

23 A Yes.

24 Q Okay. But when the rubber hit the road, the

1 actual changes he was asking for were reflected in a
2 redline Agreement, correct? Exhibit 23.

3 A Yes.

4 A (Coppola) They were representative of.

5 Q Okay. So would you agree that the Exhibit 23
6 reflected a more fully detailed proposal from
7 CertainTeed, more so than just the scenario document?

8 A Yes.

9 A (Halm) Yes.

10 Q So he had really sharpened the pencil and
11 started making the edits he really wanted in the
12 Agreement when he sent that over to you, correct?

13 A (Coppola) Yes.

14 Q Okay. Commissioner Clodfelter had pointed us
15 to Section -- do you have that in front of you, Exhibit
16 23?

17 A Yes.

18 Q If you will turn to Section -- and it's -- I
19 had to do this to everyone here, but we have to look at
20 the redline and it's kind of painful, but let's look at
21 Section 2.2.3. And it's -- again, I'll apologize in
22 advance for the amount of redline. Let me know when
23 you're there. So I'm going to direct you past Section B
24 on page 7 down to the next page, and there's -- after the

1 initial paragraph on page 8, there's a paragraph with a
2 lot of redline right there in the middle of the page. Do
3 you see that?

4 A Yes.

5 Q Okay.

6 A It was the old Section C.

7 Q Right. And this -- again, this is the -- this
8 is the exact set of modifications that David Englehardt
9 was asking you to accept, correct, Mr. Halm?

10 A I --

11 Q This is the redline that they sent over for
12 your review, correct, Ms. Coppola?

13 A (Coppola) Yes.

14 A (Halm) Yes.

15 Q Okay. And I want to read this, and it's,
16 again, hard to read, but it says "Progress Energy gypsum
17 storage area stockpile, the stockpile, shall be used to
18 buffer the variations in production of gypsum filter cake
19 and CertainTeed requirements and in no case shall exceed
20 600,000 net dry tons, nor be less than 100,000 net dry
21 tons, unless otherwise agreed in writing by Progress
22 Energy and CertainTeed."

23 A (Coppola) Yes.

24 Q Did it concern you that there was absolutely no

1 caveats on this absolute stockpile requirement?

2 A I would say that's true.

3 Q Now, the Court, in their Opinion, actually
4 spent a good bit of time considering Exhibit 23, correct?

5 A Yes.

6 Q Let's turn your attention to paragraph 95 of
7 the Decision. Let me know when you're there. The first
8 sentence -- are you there?

9 A Yes.

10 Q Okay. The first sentence says "Englehardt
11 proposed that the parties agree to maintain an absolute
12 minimum and maximum volume for the stockpile to protect
13 their respective needs." In your view, does that confirm
14 the concerns you had about that stockpile obligation
15 being potentially more onerous?

16 A (Coppola) Yes.

17 A (Halm) Yes.

18 A (Coppola) As the way it's stated in Section C.

19 Q Does Section 2.2.3 in Exhibit 23 say anything
20 about a maximum or minimum that CertainTeed could demand
21 with respect to their annual demands?

22 A It does not.

23 Q It's silent with respect to that issue,
24 correct?

1 A It doesn't talk about the option for a
2 replenishment plan, either.

3 Q So do you think it would be reasonable to
4 conclude that you would be in a breach if the stockpile
5 dropped below 100,000, no matter how much gypsum they
6 were taking off the pile?

7 A Yes.

8 A (Halm) Yes.

9 Q Okay. And so is that one of the reasons you
10 considered that provision to be potentially more onerous?

11 A (Coppola) That's one of the provisions, yes.

12 Q Okay. Now, two more lines of cross and be done
13 here, or redirect. Excuse me. There was some discussion
14 about -- questions from Commissioner Clodfelter about
15 whether or not the pile had dropped below 100,000 and how
16 often it was kind of maybe poking back above 100,000 and
17 going back down. Do you recall those questions?

18 A (Halm) Yes.

19 Q In the end, the Company's decision, it chose to
20 exercise its right to discontinue supply under the
21 Agreement, correct?

22 A Correct.

23 Q And in doing so, the Company did not determine
24 that it could not necessarily satisfy the -- its

1 commitments over the short term, but instead it was
2 looking over the long term and saying which of these
3 options is my cost-effective option; should I discontinue
4 supply or continue to try to ride the contract out,
5 correct?

6 MS. DOWNEY: Objection. Counsel is leading
7 these witnesses.

8 MR. JIRAK: Okay.

9 CHAIR MITCHELL: Do you want to restate the
10 question, Mr. Jirak?

11 MR. JIRAK: Sure.

12 Q How did the Company go about deciding whether
13 or not to elect to discontinue supply under the Agreement
14 at the time it did so?

15 A We evaluated the long-term forecast, the short
16 and long-term forecast, and it did not appear that we
17 would be making enough material to satisfy the Agreement
18 and that it would drop to substantially lower numbers,
19 drop well below 50 percent of the obligation, and that we
20 had reviewed what the cost would be associated with
21 getting alternate material from other sources, we looked
22 internally and externally, and found that material would
23 not be available consistently enough and the price was --
24 exceeded our other options that we had per, I believe,

1 Section 6.2

2 Q Okay. And so that was the decision that you
3 concluded was the most cost effective from an overall
4 cost perspective, correct?

5 A Correct.

6 Q Okay. And last question, just to follow up on
7 questions from Commissioner Clodfelter as well, just to
8 be a hundred percent clear, when we talk about
9 CertainTeed's proposal, as reflected in Exhibit 23, that
10 is, their redline Agreement that fully described the
11 flexibility they were willing to offer -- you remember
12 that document; we just looked at it -- it's your
13 testimony that even if the Company had accepted it, and
14 we've described the reasons why you thought it was more
15 onerous, but even if the Company accepted it, your
16 testimony is that the Company still would have been in
17 default under that Agreement, correct?

18 A Absolutely. We would have ended up in the same
19 place.

20 Q And the remedies that were available to
21 CertainTeed in that scenario were essentially the same
22 remedies that are available -- ended up being available
23 in the 2012 Amended and Restated Agreement?

24 A (Coppola) Yes.

1 A (Halm) Correct. And they were consistent
2 throughout all of the Agreements. The remedies never
3 changed.

4 MR. JIRAK: I have no further questions.

5 CHAIR MITCHELL: Okay. Mr. Jirak, I'll
6 entertain a motion.

7 MR. JIRAK: Thank you. At this time I would
8 like to move in the testimony and exhibit of John Halm
9 and Barbara Coppola into the record.

10 CHAIR MITCHELL: Hearing no objections, your
11 motion will be allowed.

12 (Whereupon, DEC Supplemental Exhibit
13 1 was admitted into evidence. The
14 confidential version was filed under
15 seal.)

16 CHAIR MITCHELL: All right. You all may step
17 down and be excused.

18 (Witnesses excused.)

19 MR. JIRAK: Chair Mitchell, at this time, with
20 your permission, I'd like to call to the witness stand
21 John Gaynor on behalf of DEP.

22 CHAIR MITCHELL: Good afternoon, Mr. Gaynor.
23 Let's get you sworn in, please.

24 JOHN GAYNOR; Having first been duly sworn,

1 would request that the prefiled supplemental rebuttal
2 testimony of Mr. John Gaynor be copied into the record as
3 if given orally from the stand.

4 CHAIR MITCHELL: Motion is allowed.

5 (Whereupon, the prefiled supplemental
6 rebuttal testimony of John Gaynor was
7 copied into the record as if given
8 orally from the stand.)

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Mar 20 2020

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.

1 BY MR. JIRAK:

2 Q Mr. Gaynor, have you prepared a summary of your
3 testimony?

4 A Yes.

5 MR. JIRAK: Chair Mitchell, with your
6 permission, I would ask Mr. Gaynor to proceed with the
7 summary.

8 CHAIR MITCHELL: Please proceed.

9 A Good afternoon, Chair Mitchell and
10 Commissioners. As previously stated, my name is John
11 Gaynor. I have close to 39 years in the wallboard
12 industry working for USG. USG is the largest
13 manufacturer and marketer of gypsum wallboard and gypsum
14 products in North America.

15 My professional experience touched on virtually
16 every aspect of the synthetic gypsum market and wallboard
17 manufacturing process. I had direct in-depth involvement
18 in the development of three new greenfield wallboard
19 manufacturing facilities and understand every aspect of
20 the planning, financing, and economics of such
21 facilities.

22 As part of my responsibilities for USG, I was
23 responsible for making some of the exact same decisions
24 on behalf of USG that are at issue at these proceedings

1 -- this proceeding. My testimony in this proceeding
2 covers two specific issues. First, based on my review of
3 the Court's Opinion and the various revisions of the
4 CertainTeed Gypsum Supply Agreement, including the
5 specific revisions proposed by CertainTeed, my conclusion
6 is the flexibility offered by CertainTeed at the time of
7 the negotiations of the 2012 Amended and Restated
8 Agreement would not have excused DEP from satisfying the
9 annual delivery obligation that was already in effect at
10 that time.

11 Second, based on my extensive experience
12 managing and making decisions with respect to wallboard
13 production facilities, my testimony is that it was
14 consistent with industry practice for CertainTeed to have
15 obtained a firm delivery commitment for a new wallboard
16 manufacturing facility. And once CertainTeed had
17 obtained that firm delivery commitment and constructed
18 the wallboard manufacturing facility, I do not believe
19 that CertainTeed would have proposed or accepted contract
20 modification that would have materially reduced its long-
21 term certainty of supply.

22 CHAIR MITCHELL: Ms. Downey?

23 MS. DOWNEY: No questions.

24 CHAIR MITCHELL: Questions from the Commission?

1 (No response.)

2 CHAIR MITCHELL: All right, Mr. Gaynor. Looks
3 like you're going to get off easily.

4 (Witness excused.)

5 CHAIR MITCHELL: All right. I believe that
6 brings us to the end of the afternoon. Any additional
7 matters for our consideration?

8 MR. JIRAK: None from Duke.

9 MS. DOWNEY: No --

10 CHAIR MITCHELL: Okay.

11 MS. DOWNEY: -- not from us.

12 CHAIR MITCHELL: All right. We will accept
13 post-hearing filings, briefs, proposed orders as soon as
14 you'd like to get them in, but we'd ask them to be filed
15 within 30 days of the notice of mailing of the
16 transcript.

17 With that, unless there is any additional
18 matters to come before the Commission, we'll be
19 adjourned. Thank you.

20 (Proceedings adjourned.)

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STATE OF NORTH CAROLINA

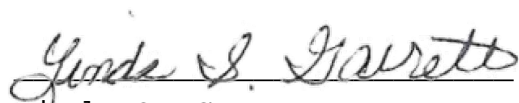
COUNTY OF WAKE

C E R T I F I C A T E

I, Linda S. Garrett, Notary Public/Court Reporter, do hereby certify that the foregoing hearing before the North Carolina Utilities Commission in Docket No. E-2, Sub 1204, was taken and transcribed under my supervision; and that the foregoing pages constitute a true and accurate transcript of said Hearing.

I do further certify that I am not of counsel for, or in the employment of either of the parties to this action, nor am I interested in the results of this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 19th day of March, 2020.



Linda S. Garrett

Notary Public No. 19971700150