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April 20, 2020

VIA ELECTRONIC FILING

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

RE: Duke Energy Progress, LLC's Supplemental Post-Hearing Brief
Docket No. E-2, Sub 1204

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket, please find the *Supplemental Post-Hearing Brief* of Duke Energy Progress, LLC ("DEP"). An electronic copy is being emailed to briefs@ncuc.net.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Jack E. Jirak

Enclosures

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1204

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

NOW COMES Duke Energy Progress, LLC ("DEP" or the "Company"), by and through counsel, and submits this Post-Hearing Brief ("Brief") to the North Carolina Utilities Commission ("Commission") in the above-captioned docket. The sole issue remaining in this proceeding is the Company's proposed recovery through fuel rates of certain liquidated damages ("LDs") due in connection with a gypsum supply agreement. In its November 25, 2019 *Order Approving Interim Fuel Charge Adjustment, Requiring Further Testimony and Scheduling Hearings*, the Commission concluded that the LDs in this case constituted fuel costs under N.C. Gen. Stat. § 62-133.2(a1)(9), but established further proceedings to evaluate the prudence of the Company's actions in connection with the gypsum supply agreement giving rise to such LDs.

I. Summary of Argument

All of the Company's actions in connection with the gypsum supply agreement in question were prudent and reasonable. In the early 2000s, the Company prudently pursued cost-effective beneficial reuse options for gypsum, a byproduct of coal combustion, and entered into a long-term arrangement with CertainTeed Gypsum NC, Inc. ("CertainTeed")[1] that was projected to have substantial benefits for customers based on what was known at that time. Even though the Company was ultimately forced to incur LDs when it was unable to satisfy the minimum deliveries

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

under the gypsum supply agreement, customers still benefitted from the transaction overall, even after taking into account the LD amount.

The imprudence allegation of Public Staff witness Jay Lucas centers on the Company's decision to reject a proposal made by CertainTeed during the negotiations of an amendment to the gypsum supply agreement.[2] The Company's decision in that case was prudent given that CertainTeed's proposal, when understood in its totality, would not have reduced the Company's existing supply obligation and, further, would have imposed an unreasonable and absolute obligation on DEP to maintain the stockpile of gypsum, regardless of the amount of gypsum required by CertainTeed or produced by Roxboro and Mayo. Furthermore, even if the Company had accepted the proposal made by CertainTeed, the Company still would have ended up in the exact same position, unable to satisfy its delivery obligations and therefore required to discontinue supply and pay the same amount of LDs at approximately the same time.

In supporting his allegation, Witness Lucas cherry-picks certain facts and ignores others, including the express findings and conclusions of the trial court regarding the drafting history of the 2012 Amended and Restated Agreement and CertainTeed's intentions regarding its proposed changes. In contrast, the Company's witnesses described and assessed all of the facts and circumstances surrounding the negotiation of the 2012 Amended and Restated Agreement. Their analysis focused on the entirety of what CertainTeed actually proposed and aligns with the findings of the court in the trial. Moreover, the Company's witnesses describe the greater commercial context of the negotiations, which further affirms that CertainTeed was not offering flexibility that

[2] Witness Lucas does not allege any imprudence with respect to the Company's decision to enter into the Initial Agreement (Tr. 37, Line 21 – Tr. 38, Line 1) or the 2008 Amended and Restated Agreement (Tr. 39, Lines 1-5) or the Company's decision to exercise its right to discontinue supply and exercise the relevant contractual remedies (Tr. 20, Line 19 – Tr. 21, Line 11).

would have meaningfully altered the Company's delivery obligations but instead would have imposed more onerous obligations. In summary, the Company's decisions throughout the course of the commercial arrangement with CertainTeed were prudent and, even after taking into account the LD amount, customers have received benefit from the arrangement.

II. Legal Standard

N.C. Gen. Stat. § 62-133.2(d) allows for the recovery of fuel costs that are "prudently incurred under efficient management and economic operations." The Commission has recently affirmed that its "seminal treatment of 'reasonable and prudent' costs is this Commission's order entered in Docket No. E-2, Sub 537."[3] The Commission's Order Granting Partial Increase in Rates and Charges in Docket No. E-2, Sub 537 (referred to herein as the "*1988 DEP Rate Order*") summarized the general standard of prudence as follows:

> [w]hether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at that time (citation omitted)…The Commission notes that this standard is one of reasonableness that must be based on a contemporaneous view of the action or decision under question. Perfection is not required. Hindsight analysis – the judging of events based on subsequent developments – is not permitted.

The *1988 Rate Order* went on to establish that, in addition to showing that a specific decision was imprudent, it also is necessary to "quantify the effects of the specific acts of imprudence by calculating the cost of the prudent alternative and comparing it with the costs incurred by the imprudent act."[4] In its *2018 DEC Rate Order*, the Commission affirmed this requirement, stating that "…actions (even if imprudent) with no economic impact upon customers

[3] *See Order Accepting Stipulation, Deciding Contested Issues and Requiring Revenue Reduction,* Docket Nos. E-7, Sub 1146, E-7, Sub 819, E-7, Sub 1152, E-7, Sub 1110 (June 22, 2018) ("*2018 DEC Rate Order*")
[4] *1988 DEP Rate Order* at 15.

are of no consequence….there must be a demonstration of economic impact."[5]

III. Background of Transaction

The LDs at issue in this proceeding stem from a commercial arrangement that the Company first began pursuing in 2002.[6] At that time, the Company was seeking opportunities for beneficial reuse of the large amounts of gypsum that were projected to be produced from the scrubbers that were to be installed on certain coal generating facilities. The Company was ultimately able to reach an agreement pursuant to which CertainTeed was to construct a manufacturing facility at the Roxboro generating facility and make a long-term commitment to purchase substantial amounts of gypsum from Roxboro and Mayo. This arrangement secured a long-term revenue stream for customers while avoiding landfill and other costs that would otherwise be incurred to manage the gypsum.

The initial gypsum supply agreement was entered into by the parties in 2004 ("Initial Agreement"). After a number of delays, CertainTeed eventually completed construction of the wallboard manufacturing facility in early 2012, investing over $200 million in the construction of a facility (the "Roxboro Wallboard Facility") that was essentially completely dependent on the gypsum production of Roxboro and Mayo.[7]

However, due to decreases in natural gas prices and the Company's obligation to supply least cost energy to customers, the Company dispatched Roxboro and Mayo coal-fired generating less often starting in 2015, resulting in a substantial decrease in the amount of gypsum produced to the point that the Company was not able to satisfy the minimum monthly quantity ("MMQ")

[5] *2018 Rate Case Order*, at 259.
[6] *See generally*, Tr. 165 – 67.
[7] Tr. 168, Lines 6 – 9.

under the agreement. The Company pursued all reasonable avenues—including fully litigating a complaint brought by CertainTeed in the North Carolina Business Court ("Court") and prevailing in the trial ("Trial") against CertainTeed's claim that the Company must deliver the required amount of gypsum from alternative sources at the Company's cost for the remaining term of the agreement. However, the Company ultimately determined that exercising its right to discontinue supply under the agreement and paying LDs was the most prudent option for customers, as that result was significantly less expensive than the alternative remedies for undersupply provided by the agreement (which decision Witness Lucas agreed was reasonable).[8]

As further background, it is important to understand that the agreement was amended on a number of occasions. In 2008, the Initial Agreement was amended ("2008 Amended and Restated Agreement") as a result of CertainTeed's decision to delay construction of the wallboard manufacturing facility due to the 2008 economic downturn. In 2012, the parties agreed to further amendments ("2012 Amended and Restated Agreement") based on the projected commercial operation date of the wallboard manufacturing facility. In other words, there was a gypsum supply agreement in place and substantially unchanged since 2004,[9] but the parties amended the agreement on a number of occasions due to the need to accommodate the delay of construction of CertainTeed's production facility and the addition of required operational infrastructure.

For purposes of this Brief, the entirety of the contractual relationship between CertainTeed and DEP will be referred to as the "Gypsum Supply Agreement," but when it is necessary to differentiate the three primary iterations of the Gypsum Supply Agreement, the Brief uses "Initial

[8] See FN 2.
[9] Opinion, Para. 70 ("The 2012 Agreement superseded the 2004 Agreement and the 2008 Agreement while carrying forward much of the substance of the earlier agreements without changes.").

Agreement," "2008 Amended and Restated Agreement," and "2012 Amended and Restated Agreement," respectively.

IV. Argument

a. DEP Prudently Rejected CertainTeed's Proposal Because it Was Not More Favorable than the Existing Agreement and Would Have Imposed on DEP an Absolute, Uncapped Supply Obligation.

The heart of Witness Lucas's position is the allegation that DEP was imprudent in rejecting the proposal of "flexibility" that was made by CertainTeed during the negotiations that led to the 2012 Amended and Restated Agreement.[10] However, Witness Lucas grossly mischaracterizes the alleged flexibility that CertainTeed offered during the negotiations of the 2012 Amended and Restated Agreement. Witness Lucas's position is inconsistent with both the testimony of CertainTeed's witnesses and the findings and conclusions of the Court following a full trial on the evidence. In particular, Witness Lucas offered no testimony that comprehensively assessed the entirety of CertainTeed's proposal, but instead, focused on isolated pieces of the whole. When the entirety of CertainTeed's proposal is considered, DEP's decision to reject is demonstrated to have been reasonable and prudent.

As explained by the DEP witness panel of Barbara Coppola and John Halm ("DEP Rebuttal Panel"), the actual changes to the Gypsum Supply Agreement proposed by CertainTeed were contained in a proposed markup Gypsum Supply Agreement.[11] The substance of such markup

[10] Tr. 30, Lines 13 – 18.

[11] To be clear, the Gypsum Supply Agreement had been in place since 2004 and remained in full force and effect as of the time of the negotiations of the 2012 Amended and Restated Agreement and imposed a 50,000 ton MMQ, which effectively resulted in a 600,000 ton annual obligation. While Witness Lucas repeatedly states in pre-filed supplemental testimony that the Company "entered into the 2012 [Amended and Restated] Agreement," the reality is that, the Gypsum Supply Agreement was already in place and that DEP and CertainTeed were negotiating a potential amendment to the Gypsum Supply Agreement. Thus, the alternative to "entering into the 2012 Agreement" was continued performance under the then-existing agreement—the 2008 Amended and Restated Agreement—which

was an important issue in the Trial and is discussed extensively by the Court in its August 28, 2018 Opinion & Final Judgment ("Opinion"). For purpose of this Brief, CertainTeed's proposed changes, marked in this proceeding as DEP Supplemental Exhibit 1, will be referred to as "CertainTeed's Proposal."[12]

As an initial matter, it should be noted that carefully parsing the hundreds of proposed changes reflected in CertainTeed's Proposal is a complex undertaking. As is explained below, the Company believes that a thorough review of such proposed changes establishes the prudence of the Company's decision to reject CertainTeed's Proposal. However, it should also be noted that many of these same issues were considered in substantial depth by the Court during the extensive Trial. While the Commission is not bound by the Court's conclusion, the Company believes it would be appropriate for the Commission to give substantial weight to the Court's findings on issues that are relevant to this proceeding given the exhaustive record reviewed by the Court. And where Witness Lucas is urging a position that is at odds with or contradicted by the Court's Opinion, the Commission should require a compelling showing sufficient to demonstrate that the Court was incorrect in such finding.

The delivery and receipt obligations in the Gypsum Supply Agreement (*i.e.*, the amount of gypsum that DEP was required to deliver and CertainTeed was required to receive) were primarily established through three inter-related provisions: (1) the monthly amount (*i.e.*, the MMQ), (2) the annual amount and (3) the stockpile obligation. One cannot fully assess the obligations of each

contained substantially the same delivery and acceptance obligations that are included in the 2012 Amended and Restated Agreement. Therefore, it is not reasonable to criticize the Company for "entering into the 2012 Amended and Restated Agreement" unless there was a potential contractual arrangement with CertainTeed, *which CertainTeed was actually willing to accept*, that was more favorable to DEP than the existing 2008 Amended and Restated Agreement.

[12] CertainTeed's Proposal was labeled as Exhibit 23 in the Trial.

party—whether under the various iterations of the Gypsum Supply Agreement or under CertainTeed's Proposal—without first understanding each of the components and their interrelationship. The Court affirmed this when it concluded that CertainTeed's Proposal: "must be understood and read in conjunction with all of [CertainTeed's proposed] revisions, including the addition of a Minimum Annual Quantity term, the inclusion of a Stockpile Buffer, and the deletion of the 10% fluctuations clause."[13]

In contrast with the Court's conclusion, Witness Lucas never offered testimony regarding how all of the pieces of CertainTeed's Proposal fit together. In his pre-filed supplemental testimony, Witness Lucas repeatedly refers to CertainTeed's offer of "flexibility" but never describes in any detail how CertainTeed's Proposal worked overall. At the hearing, Witness Lucas provided slightly more detail, referring repeatedly (and selectively) to CertainTeed's offer to reduce the MMQ.[14] But Witness Lucas never offered comprehensive testimony concerning the overall impact of CertainTeed's Proposal on the delivery and acceptance obligations of DEP and CertainTeed, respectively, including the impact of CertainTeed's proposed addition of defined minimum annual amount (which was not previously included in the Gypsum Supply Agreement) and the substantial changes to the role and function of the stockpile obligations (discussed in greater detail below). Instead, Witness Lucas cherry-picked certain aspects of CertainTeed's Proposal while ignoring others. Given that Witness Lucas failed to offer testimony that demonstrated a comprehensive assessment of the totality of CertainTeed's Proposal—as the Court concluded was necessary—his testimony should be discounted.

[13] Opinion, Para. 110. CertainTeed also affirmed this at Trial, testifying: "As I said, when I went through the scenarios, as I said at the beginning when I talked about the stockpiles being the basis for this, they all work together. You cannot take any one sentence and isolate it. These all have to work together." DEP Supplemental Cross Exhibit 3, at 156.

[14] *See* Tr. 37, Line 12; Tr. 47, Line 1; Tr. 55, Line 20; Tr. 56, Line 2; Tr. 62. Line 21.

Once again, in order to accurately assess CertainTeed's Proposal, it is necessary to review all of the components and understand how all of the pieces worked together to structure the obligations of each party, particularly the role of the on-site stockpile into which gypsum from Roxboro and Mayo was deposited ("Stockpile"). As was explained by the DEP Rebuttal Panel, CertainTeed was solely responsible for removing gypsum from the Stockpile and transporting to its Roxboro Wallboard Facility.[15] As long as the Stockpile contained sufficient quantities to allow CertainTeed to receive the MMQ, then CertainTeed was not harmed if DEP failed to produce the MMQ from Roxboro and Mayo in a particular month.

Though CertainTeed's Proposal reduced the required minimum size of the Stockpile, it also changed crucial provisions related to the Stockpile designed to protect CertainTeed,[16] as is discussed in more detail below. Those changes assured that CertainTeed would always have a constant buffer of 100,000 tons from which it could satisfy its needs for gypsum, regardless of the output from Roxboro and Mayo. With absolute certainty of supply secured through the revised Stockpile obligation, CertainTeed proposed complementary modifications to provide greater flexibility in the amount of gypsum it was required to take on a monthly basis, thus accommodating potential fluctuations in its own demand at various points during the year, without reducing its ability to obtain the full annual requirement of 600,000 tons or more.[17]

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[15] Tr. 169, Line 19 – Tr. 171, Line 10.

[16] Opinion, Para. 93 ("[The CertainTeed employee] testified that he intended to provide both CertainTeed and DEP flexibility consistent with the actual month-to-month and seasonal variations in production, ***but with protections through the Stockpile to ensure that each party would receive the expected benefit of the agreement***.")(emphasis added).

[17] DEP Lucas Cross Exhibit 3, at 134 (The CertainTeed employee stated in discussing the potential variability the parties were discussing that CertainTeed still intended "preserve the 600,000 tons a year. And that level commitment would still be the norm, but what I was trying to do was create movement -- normal movement within that."); at 136 ("Q. …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?

In other words, CertainTeed's Proposal provided CertainTeed with the best of both worlds: overall supply certainty on an annual basis and over the long-term (through operation of the new Stockpile requirements), combined with a lower monthly acceptance obligation if its requirements happened to vary in a particular month. CertainTeed was willing to allow for a lower MMQ and lower minimum Stockpile, but only because CertainTeed had the absolute ability to satisfy its full needs through operation of the proposed new Stockpile requirements.[18] The Court emphasized the interrelation of these provisions in its Opinion, finding that the changes contained in the CertainTeed Proposal (including the change to the MMQ) "were subject to the parties also agreeing to [CertainTeed's] proposed Stockpile Buffer."[19] It is not enough to simply note, as Witness Lucas did, that the MMQ and minimum Stockpile amounts were reduced in CertainTeed's Proposal, without further assessing how all of the changes propose by CertainTeed would have worked together to establish DEP's overall delivery obligation. The Court's conclusion after reviewing CertainTeed's Proposal in detail (including the lowered MMQ and minimum Stockpile size) was that CertainTeed's Proposal was never intended to and did not in fact alter the

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. What I was trying to do, though, in addition….Basically, if Duke produced 600,000 tons, we needed to take it; if we needed 600,000 tons, Duke needed to deliver it. So that was basically the starting point. Then from there what I was trying to do is – I knew there would be normal fluctuations, so I was trying to absorb those in our stockpile and still protect our requirements.").

[18] DEP Lucas Cross Exhibit 3, at 141 (The CertainTeed employee stated that "[s]etting the quantity at a minimum of 2 months' supply meant that CertainTeed would never run out, there would always be 2 months. And as long as -- once we hit that 2-month level, then the wording I put into the contract kicked in a remedy to replenish the stockpile. So that was the purpose of the stockpile. And that's a very, very critical underpinning because the rest doesn't work without that.").

[19] Opinion, Para. 111 ("The Court finds that [the CertainTeed employee's] various proposed modifications of the parties' supply and acceptance obligations were subject to the parties also agreeing to [the CertainTeed employee's] proposed Stockpile Buffer….").

fundamental arrangement of the Gypsum Supply Agreement (*i.e.*, CertainTeed's ability to obtain at least 600,000 tons or more of gypsum on an annual basis).[20]

The Stockpile obligation proposed by CertainTeed was fundamentally different than the Stockpile obligation contained in 2008 Amended and Restated Agreement (and the 2012 Amended and Restated Agreement) in two important ways. First, in the 2008 Amended and Restated Agreement, so long as DEP was not withholding gypsum, the remedy for a Stockpile shortfall was the requirement for DEP to provide a "Replenishment Plan." The "Replenishment Plant" concept was not an absolute obligation to restore the Stockpile to the minimum size but instead, merely required DEP to produce a plan to rebuild the Stockpile.[21] This "Replenishment Plan" concept was ultimately retained in the 2012 Amended and Restated Agreement.[22] In contrast, CertainTeed's Proposal completely eliminated the "Replenishment Plan" structure. In replacement, CertainTeed's Proposal imposed an absolute obligation to maintain the Stockpile at a minimum level of 100,000 tons, which gave CertainTeed complete certainty that it would have

[20] Opinion, Para. 93 ("When negotiating the 2012 Agreement, [the CertainTeed employee] proposed not only substantial changes to Section 3.1, but also provisions regarding the Stockpile and other modifications that would allow either party to receive the essential benefit of the supply agreement even if the quantities supplied or accepted from month to month varied to a degree larger than the 10% variances allowed by Section 3.1 of the 2004 Agreement and the 2008 Agreement. [The CertainTeed employee] testified that he intended to provide both CTG and DEP flexibility consistent with the actual month-to-month and seasonal variations in production, but with protections through the Stockpile to ensure that each party would receive the expected benefit of the agreement."); *see also* Opinion, Para. 111 ("The Court finds that the [clause in Section 3.1 of CertainTeed's Proposal referring to the actual production Roxboro and Mayo that the CertainTeed employee] proposed was not, initially or when adopted, intended by either party to change the MMQ from the fixed volume of 50,000 net dry tons per month, subject to minor fluctuations, to a new variable MMQ based on DEP's actual production at its Roxboro Plant and Mayo Plant. Rather, as Engelhardt proposed an alternative monthly quantity, he also proposed an alternative method to determine acceptable fluctuations to substitute for the existing method based on a 10% variation of the fixed 50,000 net dry ton supply obligation. Engelhardt intended to allow for greater monthly variations while maintaining an annual quantity obligation and requiring a Stockpile Buffer.").

[21] 2008 Amended and Restated Agreement, Section 2.2.3(a).

[22] 2012 Amended and Restated Agreement, Section 2.2.3(a).

access to the gypsum it needed.[23] Specifically, Section 2.2.3 of CertainTeed's Proposal imposed an absolute obligation on DEP to maintain the Stockpile at 100,000 tons, thereby providing a constant minimum buffer from which CertainTeed's gypsum demands could be satisfied if they exceeded actual production from Roxboro and Mayo.[24] As the Court concluded, CertainTeed's Proposal would have required DEP to "to maintain an absolute minimum…volume for the Stockpile to protect [CertainTeed's] needs…The minimum would be set at 100,000 net dry tons, assuring that CertainTeed would always have access to at least two months' supply…"[25] This was an enormously important change. In practical terms, it means that under the 2012 Amended and Restated Agreement, DEP was not absolutely obligated to deliver more gypsum when the Stockpile dropped below the minimum amount. Under CertainTeed's Proposal, DEP would have had an absolute obligation to replenish the Stockpile at whatever cost necessary if the Stockpile dropped below the required minimum amount.

Second, under CertainTeed's Proposal, there was no limit imposed on the amount of gypsum that CertainTeed could remove from the Stockpile, including no limitation relative to the actual gypsum production of Roxboro and Mayo. As the Court found: "[u]nder [CertainTeed]'s proposal…DEP would be required to maintain at least 100,000 net dry tons of Gypsum Filter Cake

[23] DEP Lucas Cross Exhibit 3, at 141 (The CertainTeed employee stated that "[s]etting the quantity at a minimum of 2 months' supply meant that CertainTeed would never run out, there would always be 2 months. And as long as -- once we hit that 2-month level, then the wording I put into the contract kicked in a remedy to replenish the stockpile. So that was the purpose of the stockpile. ***And that's a very, very critical underpinning because the rest doesn't work without that***.")(emphasis added).

[24] DEP Supplemental Exhibit No. 1, Section 2.2.3 ("The Progress Energy Gypsum Storage areas stockpile ("The Stockpile") shall be used to buffer the variations in production of Gypsum Filter Cake and CertainTeed requirements, and in no case shall exceed 600,000 Net Dry Tons nor be less than 100,000 Net Dry Tons, unless otherwise agreed in writing by Progress Energy and CertainTeed.")(redline deletions removed for ease of review); *see also* DEP Lucas Cross Exhibit 3, at 145 (In understanding CertainTeed's Proposal, the CertainTeed employee states: "[t]he best place to start is in 2.2.3(c), and that's all about the stockpile. Because if you remember my scenarios, that's really the bedrock of this whole system."); DEP Lucas Cross Exhibit 3 at 154 (CertainTeed employee stating: "But once [the Stockpile] hits 100,000 tons, then we need the gypsum, and [DEP] need[s] to provide it.").

[25] Opinion, Para. 95.

in the Stockpile ***at all times, irrespective of what DEP actually produced at its Roxboro Plant and Mayo Plant***."[26] CertainTeed could draw any amount from the Stockpile and, if it fell below 100,000 tons, DEP had an absolute obligation to bring it back up to that level, regardless of the amount of gypsum being produced at Roxboro and Mayo and even if that meant that DEP had to purchase the required gypsum at a substantially higher cost from an alternative source.

Thus, under CertainTeed's Proposal, CertainTeed could continually draw from the Stockpile to satisfy its requirements and obtain a remedy in the event the Stockpile was not replenished regardless of the actual monthly output of Roxboro and Mayo or whether DEP was satisfying the revised MMQ. Furthermore, CertainTeed's Proposal contained no upper bound on the amount of gypsum that CertainTeed could remove from the Stockpile. Had DEP accepted CertainTeed's Proposal as Witness Lucas recommends, DEP would have been undertaking an essentially unlimited obligation to satisfy CertainTeed's demand for gypsum. Witness Lucas barely acknowledged the Stockpile provision in CertainTeed's Proposal and did not offer any detailed testimony regarding its impact or address the Court's conclusions regarding CertainTeed's Proposal, including the intent and effect of the proposed Stockpile provision that CertainTeed included.[27]

The same concerns that led DEP to reject CertainTeed's Proposal are also relevant with respect to Lucas Supplemental Exhibit 2. Lucas Supplemental Exhibit 2 is a summary document

[26] Opinion, Para. 98 (emphasis added). CertainTeed's proposed right to be able to demand more than 600,000 tons in a year is affirmed by Lucas Supplemental Exhibit 2 (Exhibit 24 from the Trial). In the third scenario, CertainTeed contemplated a right to demand gypsum in excess of 600,000 tons and imposed an obligation on DEP to replenish in that scenario.

[27] While the Court noted generally that CertainTeed's Proposal was, in concept, designed to vary "with the parties' variable business operations" (see Opinion, Para. 71), the Court concluded after a thorough review that CertainTeed's Proposal did not include a true variable supply arrangement but instead was predicated on "maintaining an annual quantity obligation and requiring a Stockpile Buffer." Opinion, Para. 111.

prepared by CertainTeed and provided to DEP at the time of the negotiations of the 2012 Amended and Restated Agreement. As an initial matter, the formal markup provided to DEP (DEP Supplemental Exhibit 1 (Exhibit 23 from the Trial), referred to herein as the CertainTeed Proposal) captures the entirety of what CertainTeed was proposing and reflects the actual terms that CertainTeed was willing to offer.[28] For example, the first scenario in Lucas Supplemental Exhibit 2 references a replenishment plan. As described above, CertainTeed's Proposal removed entirely the concept of a replenishment plan. In contrast, Lucas Supplemental Exhibit 2 (Exhibit 24 from the Trial) contains a mere high level summary description and does not capture every aspect of what CertainTeed proposed. This is confirmed by the fact that the Court exhaustively considers the agreement markup (Exhibit 23) but does not cite Exhibit 24 in its Opinion. More importantly, Exhibit 24 contains the very same problems that led to DEP's rejection of CertainTeed's Proposal. For instance, the very first issue identified by CertainTeed in Exhibit 24 is the need to incorporate an absolute stockpile obligation. This is consistent with the Court's view of what CertainTeed was intended to accomplish and also consistent with the testimony of CertainTeed's witness at the Trial.[29] In another example, the third scenario contemplated that CertainTeed would be permitted to draw more than 600,000 tons on an annual basis and that DEP would be obligated to replenish stockpile back to minimum size.

In summary, DEP reasonably rejected CertainTeed's alternative approach, and particularly the absolute Stockpile replenishment obligation because it would have been imprudent and unreasonable for DEP to agree a provision that imposed an uncapped obligation to satisfy CertainTeed's gypsum demand.

[28] For example, the first scenario in Lucas Supplemental Exhibit 2 references a replenishment plan. As described above, CertainTeed's Proposal removed entirely the concept of a replenishment plan.
[29] Opinion, Para. 95.

b. Witness Lucas's Interpretation of the CertainTeed Proposal Cannot be Reconciled with the Larger Commercial Context of the Transaction.

As discussed above, an in-depth review of CertainTeed's Proposal confirms that while CertainTeed was willing to allow a lower MMQ, it was only willing to do so when such lowered MMQ was paired with an absolute Stockpile obligation. The net impact of this was that CertainTeed was fundamentally not offering to alter the supply certainty that CertainTeed had already obtained.[30] This conclusion is further confirmed when one considers the complete commercial context of the parties' arrangement at the time of negotiations of the 2012 Amended and Restated Agreement. Such broader context, which the Court considered in its Opinion, but which Witness Lucas failed to consider, further confirms that even though CertainTeed offered a lowered MMQ and Stockpile obligation, it had no intention of surrendering the supply certainty it had already obtained and that was in effect under the 2008 Amended and Restated Agreement.

CertainTeed's testimony in the Trial and the Company's extensive and unrebutted testimony in the proceeding provides broader commercial context for the decisions that were being made in connection with the 2012 Amended and Restated Agreement. Certainty of an economical gypsum supply is an essential component of any successful wallboard manufacturing facility.[31]

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[30] Opinion, Para. 93 (("[The CertainTeed employee] testified that he intended to provide both CertainTeed and DEP flexibility consistent with the actual month-to-month and seasonal variations in production, but with protections through the Stockpile to ensure that each party would receive the expected benefit of the agreement.").

[31] *See e.g.*, DEP Lucas Cross Exhibit No. 4, at Pg. 282 ("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 -- [Reporter clarification.]
A. -- to have that to deliver a return of investment."); DEP Lucas Cross Exhibit No. 4, at 377 ("Q. Once BPB identified a potential source of gypsum, what were the most important factors in developing that relationship?
A. Oh, it's security of supply of gypsum, it's quality of the gypsum, and cost.").

CertainTeed's Roxboro Wallboard Facility was constructed in total reliance on gypsum supply from Roxboro and Mayo.[32] In fact, there are no other economic sources of supply of gypsum for CertainTeed's Roxboro Wallboard Facility. DEP Lucas Cross Exhibit 1, which was a comprehensive third-party assessment of other potential sources of gypsum for the Roxboro Wallboard Facility, shows that the transportation cost alone to deliver gypsum to the CertainTeed Wallboard Facility was more than approximately 15 times more expensive than CertainTeed was paying DEP under the Gypsum Supply Agreement.[33] Thus, it was absolutely essential to CertainTeed's $200+ million investment that CertainTeed have certainty regarding gypsum supply from Roxboro and Mayo. Therefore, from the very beginning of the transaction in 2004, the Gypsum Supply Agreement contained a guarantee that CertainTeed would receive 600,000 tons of gypsum per year.[34]

The construction of CertainTeed's Roxboro Wallboard Facility was delayed (during which time CertainTeed incurred tens of millions of dollars in costs to dispose of gypsum produced at Roxboro and Mayo).[35] However, construction eventually commenced in 2011 (prior to the negotiations of the 2012 Amended and Restated Agreement) and was completed in March 2012 (prior to execution of the 2012 Amended and Restated Agreement).[36] Once the Roxboro Wallboard Facility achieved commercial operation, CertainTeed quickly ramped up production, moving to two shifts per day by May 2012, three shifts per day by October 2012 and full capacity by April 2013.[37] Witness Lucas acknowledge that he was not aware of how quickly operation

[32] Tr. 178, Line 17 – Tr. 179, Line 3.
[33] DEP Lucas Cross Exhibit 1 (Company's Response to PSDR 13-22).
[34] Tr. 167, Line 15 – Tr. 168, Line 3.
[35] Opinion, Para. 62.
[36] Opinion, Para. 69.
[37] Opinion, Para. 123.

ramped up[38] and that he did not asses CertainTeed's operations or the impact of reduced gypsum supply on their operations.[39] At full capacity, the Roxboro Wallboard Facility required 600,000 tons annually.[40] The Roxboro Wallboard Facility was a foundational piece of CertainTeed's overall business, constituting 25% of CertainTeed's overall profit.[41] The Roxboro Wallboard Facility was one of CertainTeed's top three facilities in terms of efficiency[42] and CertainTeed was actively attempting to shift production from its other production facilities to the Roxboro Wallboard Facility.[43]

The implication of Witness Lucas's testimony concerning the alleged effect of CertainTeed's Proposal—that CertainTeed was voluntarily relinquishing its guarantee of 600,000 tons per year and effectively proposing to have a guarantee of only 300,000 tons per year—is contrary to the findings of the Court at Trial, the testimony of CertainTeed's witnesses (who indicated that CertainTeed was actually interested in obtaining amounts greater than 600,000 tons per year),[44] and simply cannot be reconciled with the commercial context in which the Proposal

[38] Tr. 43, Lines 4 – 11.
[39] Tr. 47, Line 4.
[40] Opinion, Para. 40.
[41] DEP Lucas Cross Exhibit 2, Page 8 (Exhibit 142 from the Trial)
[42] DEP Lucas Cross Exhibit 3, at 94 ("Q. How does the Roxboro plant compare within CertainTeed Gypsum with regard to productivity and efficiency?
A. Well, in terms of productivity, this is our – one of our top three plants in the world in Saint Gobain, and it's our top plant in North America.').
[43] Opinion, at 66 ("[The CertainTeed employee] testified that CertainTeed expected that it would be able to accept and use the MMQ from DEP once the CertainTeed Plant was fully operational, even if it had an oversupply for other plants, in part because CertainTeed planned to redirect manufacturing from older plants to the new CertainTeed Plant, with its more efficient manufacturing capabilities."); DEP Lucas Cross Exhibit 3 at 101 ("One of the things that we did do, though, was once we had all the products commissioned, we did start to ship more production from other plants into this plant because this was our lowest cost plant, and we had -- obviously had DSG here to use. So we started to do that to the degree that it was reasonable."
[44] DEP Lucas Cross Exhibit 3, at 133 (In discussing proposed changes to the 2008 Amended and Restated Agreement, the CertainTeed employee stated "I had seen some Progress Energy annual forecasts going out where they were projecting to produce well over 600,000 tons. So what I was interested in having a conversation about is of those -- of that excess volume, is there some way we could lock that in a little bit better. The contract did provide for excess gypsum and additional gypsum as it was in 2008, but I just wanted to explore, was there something else that we could do to lock in the bigger quantities at that point.").

was made. That is, to interpret CertainTeed's Proposal in the manner that Witness Lucas has is only possible if one ignores the fundamental commercial facts of a wallboard production facility and CertainTeed's investment decision with respect to the Roxboro Wallboard Facility. To accept Witness Lucas's interpretation of the events is to accept the premise that, after having already obtained supply certainty from Roxboro and Mayo (as was contained in the then-effective 2008 Amended and Restated Agreement) and having invested $200+ million in a wallboard production facility that was effectively entirely dependent on Roxboro and Mayo for gypsum supply, CertainTeed would be willing to voluntarily relinquish that supply certainty and cut its supply rights in half and thereby jeopardize its ability to realize the full economic benefit of its massive capital investment just as that production facility was finally coming online. In fact, Witness Lucas himself acknowledged that in making its investment decision, CertainTeed would have required certainty of supply[45] and that once CertainTeed had constructed its facility, it had an incentive to obtain the amount of gypsum it needed to maximize use of the facility.[46]

Witness Lucas correctly identified that CertainTeed had incurred substantial costs to dispose of gypsum prior to the construction of its Roxboro Wallboard Facility.[47] This was, in fact, a substantial benefit to customers and the very purpose of the Gypsum Supply Agreement. But Witness Lucas fails to recognize the fundamental pivot in CertainTeed's commercial motivation that occurred when the Roxboro Manufacturing Facility was placed into commercial operation in 2012. While Witness Lucas observes that CertainTeed had "reasons to be cautious" between 2008 – 2012 and that CertainTeed "got into trouble for its commitment," he never recognizes that such

[45] Tr. 59, Line 19 – Tr. 60, Line 1.
[46] Tr. 55, Lines 2 – 6; Tr. 54, Lines 17 – 21.
[47] Tr. 40, Line 22 – Tr. 42, Line 13.

"trouble" was solely the result of the fact it had no wallboard production facility at that time to utilize the gypsum.[48] Witness Lucas never acknowledges that after the Roxboro Manufacturing Facility was constructed, CertainTeed's desire for overall supply certainty became paramount.

On redirect, Witness Lucas was asked about testimony from the Trial regarding how the MMQ amount was set.[49] Witness Lucas addressed the fact that in such testimony, the CertainTeed employee in question asserted that DEP determined the MMQ amount.[50] However, the Trial testimony referenced by Witness Luca on redirect related to how the MMQ was set in the Initial Agreement in 2004. No party to this proceeding has alleged any imprudence with respect to the Initial Agreement or that DEP did not reasonably believe it could satisfy the 50,000 MMQ at the time of Initial Agreement. But once the 50,000 MMQ commitment was made in the Initial Agreement as an inducement for CertainTeed to construct the Roxboro Production Facility, it does not follow that DEP would have any leverage to dictate or unilaterally determine the MMQ in future amendments to the Gypsum Supply Agreement. In fact, the commercial context described above establishes the opposite conclusion: that once CertainTeed had obtained the supply certainty and constructed its plant based on such certainty, CertainTeed was not willing to relinquish such certainty of supply and DEP had no leverage to force them to do so.

This greater commercial context is also supported by the testimony of DEP witness John Gaynor.[51] Witness Gaynor has an immense amount of directly relevant experience, having been responsible for developing numerous wallboard manufacturing facilities like the Roxboro

[48] Tr. 41, Line 9; Tr. 47, Line 17
[49] Tr. 130, Line 2.
[50] DEP Lucas Cross Exhibit 4 ("…but [the MMQ amount] was going to come from Progress Energy. They spoke to it mostly in terms of annual tonnage, and they had shown us at the time they were making 600-, but -- much more, actually -- but, again, it was up to them to decide what they were going to -- or willing to provide to us on -- over the life of the agreement.").
[51] *See* Tr. 251-57.

Wallboard Facility. Witness Gaynor testified that a firm delivery obligation would have been an essential piece of CertainTeed's investment decision. And once CertainTeed had obtained such firm delivery commitment and invested in the plant, Witness Gaynor testified based on his extensive industry experience that it defies commercial commonsense to suggest that CertainTeed would have been willing to voluntarily relinquish such supply certainty.

c. Even if DEP Accepted CertainTeed's Proposal, the Company's Unrebutted and Uncontradicted Testimony Confirms that the LDs Would Still Have Been Incurred at Approximately the Same Time and in the Same Amount.

The Commission's well-established precedent requires that in addition to establishing the imprudence of a particular action, a party recommending disallowance must calculate "the cost of the prudent alternative and compar[e] it with the costs incurred by the imprudent act."[52] As the Commission inquired at the hearing, it is essential to know whether there is a "difference between the prudent and the imprudent alternative."[53]

Setting aside the question of whether or not DEP prudently rejected CertainTeed's Proposal, DEP's unchallenged testimony confirms that the DEP would have incurred the exact same LDs at approximately the same time in a hypothetical scenario in which DEP accepted CertainTeed's Proposal.[54] In other words, DEP would have been in the exact same position (*i.e.*, unable to satisfy its delivery obligations and forced to discontinue supply and pay LDs) had DEP accepted CertainTeed's Proposal. The DEP Rebuttal Panel unequivocally testified as follows:

> …while Witness Lucas seems to imply that accepting the CertainTeed proposal would have allowed DEP to satisfy its supply obligations and avoid the payment of

[52] *1988 DEP Rate Order* at 15
[53] Tr. 138, Lines 1-2.
[54] For the avoidance of doubt, DEP never had a right to declare discontinuance event under Section 6.4 of the Gypsum Supply Agreement. *See* Tr. 145; Tr. 146; Tr. 148; Tr. 200 – 01; Tr. 204.

> LDs; this is incorrect. DEP would have been unable to satisfy the annual delivery requirements or maintain the minimum Stockpile amounts [required under the CertainTeed Proposal] without incurring substantial additional costs to obtain gypsum from sources other than Roxboro and Mayo, and thus would still have had to exercise the right to discontinue supply and pay the LDs as it did in this case.[55]

This fact was once again affirmed by Witness Halm at the hearing:

> **Q.** Okay. And last question, just to follow up on questions from Commissioner Clodfelter as well, just to be a hundred percent clear…even if the Company accepted [CertainTeed's Proposal]…your testimony is that the Company still would have been in default…correct?
>
> **A.** Absolutely. We would have ended up in the same place. (Tr. 247, Lines 6-19).

No party to this proceeding challenged this conclusion and there is no meaningful evidence in the record to rebut it. In fact, Witness Lucas himself did not challenge this analysis, conceded that he had not even perform any analysis to counter the DEP Rebuttal Panel testimony on this issue,[56] and acknowledged that he did not know whether DEP would have been in default had it accepted CertainTeed's Proposal.[57]

Witness Lucas received additional questions from the Commission on this issue. Specifically, the Commission inquired whether Witness Lucas had assessed how timing of the

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[55] Tr. 177, Lines 3 – 15.

[56] Tr. 71, Line 23 – Tr. 72, Line 18. ("Q. And did you review the supplemental rebuttal testimony of John Halm and Barbara Coppola?
A Yes.
Q Do you understand that they testified that even if they had accepted the flexibility offered by CertainTeed, they still would have been in substantially the same position, in default under the Agreement at approximately the same time? Do you recall that portion of their testimony?
A No. Can you tell me the page number and line number?
Q Yes. It's page 17 of their testimony, line 3.
A I don't see any exhibits or anything backing up that claim.
Q Right. But you understand –
A I see it. It – you're right, it does say that there, but I don't see any justification for that claim.
Q But you haven't performed any analysis that would counter this?
A No.").

[57] Tr. 70, Lines 21 – 24. ("Q But when you say less risk, you don't know -- you don't know when and if Duke would have been in default had they accepted the flexibility?
A I don't know.").

supply shortfall and thus the settlement would have changed if DEP had accepted CertainTeed's Proposal. Once again, Witness Lucas confirmed that he not performed such analysis.[58] In fact, while CertainTeed's Proposal contained a 100,000 absolute minimum Stockpile obligation, Witness Lucas was not even aware whether or not the Stockpile had, in fact, dropped below 100,000 tons.[59] In contrast, Witness Halm was able to respond definitively with respect to a question from the Commission concerning the fact that the Stockpile had, in fact, dropped below 100,000 tons.[60]

[58] Tr. 137, Line 16 – Tr. 139, Line 1 ("Q And if there had been a breach, let's say right now we don't know how to quantify the delay, the difference in time between those two breaches, let's say for right now put that to one side because we don't know. If there had been a breach, though, CertainTeed would have had the same rights as they, in fact, exercised to declare the breach, to seek recovery, and damages would have been awarded and liquidated damages would have kicked in. In that scenario, if that's correct, then there is no difference between the prudent and the imprudent alternative, is there?
A Well, give me just a moment. Let me find something in my -- in my notes here. Well, a few things happened. One thing there was a settlement, so it sort of blurred -- you're right, there were liquidated damages in the contract, and I believe Duke Energy entered into the settlement to sort of avoid the full liquidated damages. So, yeah, that's right, there were liquidated damages potential in the contract.
Q Faced, though, with the pile dropping below 100,000 for an extended period of time sufficient to give CertainTeed rights to trigger a claim for damages and for discontinuance, there would have been a lawsuit, a judgment would have been awarded, and then we can assume there might have been the same settlement of that lawsuit. It just might have happened at a different time?
A It might have happened at a different time, but –
Q Okay.
A -- by minimizing Duke Energy's commitment, I just think that lower risk, lower liability would have benefited Duke Energy. ***You're right, I haven't quantified that***.")(emphasis added).

[59] Tr. 135, Lines 15- 19 ("Q We don't know whether it ever fell below 100,000. You don't know. Excuse me. Maybe the Company knows, but -- I'm going to ask them, but do you know whether it ever fell below 100,000?
A No."). Tr. 139, Line 2 ("Q And the Commission has to quantify for purposes of this proceeding. So, again, I want to come back to it. I mean, doesn't it really -- isn't it really, really material for us to know whether or not the pile ever fell below 100,000?
A It could be.
Q Because if the pile did not -- I mean, I understand you think there's evidence that it may have. We don't know. I don't know.
A Yeah. I don't know, either."). *See also*, Tr. 134, Line 15 – Tr. 135, Line 1 ("Q I'm talking about the quantification of the difference. And so let me ask you a factual question. Did the Public Staff ever conduct any investigation to determine whether the stockpile, in fact, fell below 100,000 tons at any point in time during the period up until the notices were given and breaches were being talked about?
A Well, I feel like it must have because --
Q Well, not what you feel like. Did you conduct any investigation?
Q No….").

[60] Tr. 219, Line 2 – Tr. 220, Line 9.

Witness Lucas frames the issue incorrectly when he focuses on the 25,000 MMQ included in CertainTeed's Proposal.[61] The question in the end is not whether Duke could have satisfied a 25,000 MMQ but whether Duke could satisfy its overall delivery obligation when considering all of the components of CertainTeed's Proposal. The simple answer is no—when all of the components are assessed together, the unchallenged evidence in this proceeding is that DEP would still have been in the same situation.

Witness Lucas asserted on redirect that the amount of LDs would have been lower had DEP accepted CertainTeed's Proposal due to the lowered MMQ.[62] This is absolutely incorrect. As an initial matter, it is worth noting that earlier in the hearing under cross by DEP counsel, Witness Lucas had confirmed that he had performed no analysis to counter DEP Rebuttal Panel's testimony that the same LDs would have been due under CertainTeed's Proposal. Furthermore, Witness Lucas did not articulate any basis for this apparently revised position, nor did he identify any provision in the agreement to establish this assertion. No basis was given because the position is not supported by the terms of CertainTeed's Proposal. Witness Lucas appears to be conflating the terms and conditions of two separate versions of the Gypsum Supply Agreement: CertainTeed's Proposal and the 2012 Amended and Restated Agreement. In both versions, the relevant methodology for determination of LD is set forth in Section 6.3. In the 2012 Amended and Restated Agreement, the LD amount is calculated based on the MMQ (*i.e.*, the monthly amount). However, in CertainTeed's Proposal, the LD calculation ***is not based on the MMQ but instead is based on the Minimum Annual Quantity of 600,000 tons***.[63] This is a crucially

[61] Tr. 45, Lines 10-13 ("I believe it had plenty of information on hand to realize it was not going to be able to meet that 50,000 ton per month minimum month -- minimum monthly quantity.")
[62] Tr. 127, Lines 3 – 7.
[63] DEP Supplemental Exhibit 1, CertainTeed's Proposal, Section 6.3 (changing "Minimum Monthly Quantity" to "Minimum Annual Quantity").

important difference and contradicts the apparent premise of Witness Lucas's testimony on this issue. To reiterate this point, the amount of LDs was based on MMQ in the 2012 Amended and Restated Agreement but it was based on the Minimum Annual Quantity (600,000 tons) in CertainTeed's Proposal. This fact confirms that had DEP accepted CertainTeed's Proposal as Witness Lucas recommends, the same amount of LDs would have been due because the LD amount would have been calculated based on the 600,000 ton Minimum Annual Quantity and not the MMQ.

In summary, even if the one were to conclude that the Company's rejection of CertainTeed's Proposal was imprudent (which it was not), the unrefuted evidence establishes that DEP would have found itself in the exact same position—unable to satisfy its delivery obligations and forced to discontinue supply and pay LDs. In accordance with the Commission's prudence standard, because the Company's action in rejecting CertainTeed's Proposal "had no economic impact upon customers," there is no basis for a disallowance. Witness Lucas failed to satisfy this clear and unambiguous evidentiary burden to support his disallowance recommendation.

d. At the Time of the Negotiations of the 2012 Amended and Restated Agreement, DEP Still Reasonably Believed it Would be Able to Satisfy the 50,000 MMQ.

Witness Lucas further alleges that DEP should have known at the time of the negotiations of the 2012 Amended and Restated Agreement that it would not be able to satisfy the 50,000 ton MMQ. As discussed above, the reality is that CertainTeed's Proposal did not offer any meaningful change to DEP's supply obligation and, in fact, it would have defied commercial commonsense for CertainTeed to do so. However, putting aside the flawed premise of the allegation, Witness Lucas's testimony on this issue ignores any inconvenient evidence, oversimplifies the complexity

of projecting gypsum production and draws very specific conclusions that are not supported by the very general facts on which he relies.

i. Witness Lucas ignores inconvenient facts and inappropriately focuses on short term forecasts rather than long term forecasts.

The Court relied on uncontroverted testimony from the Trial that, at the time of the negotiations of the 2012 Amended and Restated Agreement, DEP forecasted that it would produce at least 600,000 tons per year at Roxboro and Mayo.[64] At the hearing, Witness Coppola elaborated on these projections, describing the Company's plans at that time to switch to higher sulfur coal, which would substantially increase the amount of gypsum being produced even if capacity factors remain unchanged.[65] The DEP Rebuttal Panel further addressed this dynamic, describing the many factors that can impact gypsum production and the testing that the Company was performing at the time of the negotiations of the 2012 Amended and Restated Agreement to utilized higher sulfur coal at Roxboro and Mayo.[66] Witness Lucas never addresses the Company's fuel switching plans in any way.

Witness Lucas also inappropriately focuses on short-term forecasts, highlighting only two short-terms forecasts in his pre-filed Supplemental Testimony. As observed by the DEP Rebuttal Panel, the Stockpile at the time of the negotiation of the 2012 Amended and Restated Agreement was at or near the maximum size of 600,000 tons.[67] Therefore, the short-term forecasts were largely irrelevant given that the size of the Stockpile provided assurance that CertainTeed could

[64] Opinion, Para. 117.
[65] Tr. 206, Line 8 – Tr. 208, Line 16.
[66] Tr. 182, Line 16 – Tr. 183, Line 5.
[67] Tr. 187, Line 7 – Tr. 188, Line 7.

receive the 50,000 ton MMQ.[68] In other words, the size of the Stockpile at that time provided DEP with the assurance that it could satisfy the MMQ for the proceeding few years even if Roxboro and Mayo did not produce 50,000 tons per month. But over the longer-term, the Company had confidence that it could satisfy and even surpass the 50,000 MMQ.

ii. Witness Lucas relies on general facts that, by themselves, do not rebut the Company's evidence showing that it would be able to satisfy the 50,000 ton MMQ.

Witness Lucas's testimony is also flawed in that it draws a very specific conclusion based on very general facts that are not sufficient to support such conclusions. For instance, Witness Lucas provides a summary of actual capacity factors and heat rates at Belews Creek, Marshall, Roxboro, and Mayo during the period 2010-2012.[69] Witness Lucas introduces the information to demonstrate the alleged impact of the Joint Dispatch Agreement ("JDA"), which is addressed in more detail below. However, the chart itself shows that the Roxboro capacity factor actually increased between 2011 and 2012. Furthermore, there was a major scheduled outage at Roxboro Unit 2 in 2011 that impacted the capacity factor in 2011.[70] These examples simply illustrate why it is inappropriate to draw such specific conclusions from a narrow scope of information relevant only, and particularly to, a short period of time. Furthermore, a simple evaluation of capacity factors alone is also not sufficient given that gypsum production is influenced by many factors and thus does not necessarily bear a linear relationship to changes in capacity factors.[71] The amount of gypsum production can be substantially influenced by numerous factors such as sulfur content,

[68] *Id; see also,* Tr. 209, Lines 14-18 ("This contract ran for 20 years, and so we're looking also at the long-term forecast because it wouldn't be prudent to terminate a contract now and then be landfilling material that we were producing in five years, have that turned away or turned down.").
[69] Tr. 25.
[70] Tr. 183, Lines 13 – 15.
[71] Tr. 182, Lines 16 – 23.

limestone purity and SO2 removal efficiency. There is no evidence that Witness Lucas considered any of these factors.

Witness Lucas also highlights the fact that the capacity factors of the Sutton and H.F. Lee plants were declining in the period of 2010 – 2012 and the Company had plans to retire the units. There is no argument that coal generation was generally declining over this period (though there were exceptions as noted above). There is also no dispute that the Company was making disciplined, strategic decisions to retire some of its smaller, less efficient coal-generating units such as Sutton and H.F. Lee and that DEP and DEC were adding more efficient combined cycle units. But all of those facts were taken into account by the Company as it considered its gypsum supply strategies and the Company had sufficient evidence that it could satisfy the 50,000 MMQ. It is not reasonable to base a recommendation on these general facts because the Company was aware of these facts and took them into account in its decision making.

iii. The actual impact of the JDA was reversed from what Witness Lucas alleges was the forecasted impact.

Witness Lucas alleges that at the time of the negotiation of the 2012 Amended and Restated Agreement, DEP should have understood that Roxboro and Mayo were likely to be dispatched less as a result of the JDA. The first and most important flaw in this position is that the actual impact of the JDA was precisely the opposite from what Witness Lucas alleges should have been an obvious fact. In other words, Witness Lucas alleges that DEP should have known the JDA was going to have a particular impact, but that particular impact did not occur.

The testimony of DEP's witnesses from the Trial confirmed that that the JDA did not, in fact, result in a reduction in dispatch from Roxboro and Mayo.[72] From the date of the JDA's

[72] Tr. 186, Lines 3 – 12.

implementation until the time of the Trial, 80% of the energy flowed from DEP to DEC, meaning that the output of the DEP generating resources was not being reduced by the JDA.[73] The Court specifically considered this issue in the Trial and expressly sided with the Company, rejecting the position that the JDA caused the reduced dispatch of Roxboro and Mayo and concluding that "it is more likely that DEP has operated its coal-fired plants more frequently than it would have had it not entered the Joint Dispatch Agreement."[74] While Witness Lucas asserts that the Commission is not "bound" by the the Court's finding in this respect, Witness Lucas has not introduced any evidence to support a different conclusion. Therefore, the uncontradicted evidence in this proceeding establishes that the JDA had the opposite impact from what Witness Lucas alleges the Company should have assumed at the time of negotiation of the 2012 Amended and Restated Agreement.

iv. DEP did not have sufficient clarity on the resolution of the merger proceeding or the impact of the JDA at the time of negotiation of the 2012 Amended and Restated Agreement.

Putting aside the fact that CertainTeed had no commercial motivation to voluntarily surrender the supply certainty it had already obtained, Witness Lucas also glosses over important timing issues related to the merger approval and the JDA. The negotiations regarding the 2012 Amended and Restated Agreement commenced in June 2011, well before there was any degree of certainty regarding the outcome of the merger and before vitally important aspects of the JDA were solidified. In fact, CertainTeed and DEP had largely resolved the major commercial terms

[73] Tr. 186, FN. 12.
[74] Opinion, Para. 182 ("[t]he Court finds [the position that DEP's reduced production of synthetic gypsum is, in part, caused by its decision to enter into the Joint Dispatch Agreement with DEC] to be speculative, and that the more probative evidence from [DEP's witness] suggests that it is more likely that DEP has operated its coal-fired plants more frequently than it would have had it not entered the Joint Dispatch Agreement.").

of the 2012 Amended and Restated Agreement by February 2012, well before there would have been certainty regarding the consummation of the merger or the ultimate impact of the JDA.

Importantly, the terms of the JDA were not finalized prior to the Commission's approval of the merger on June 29, 2012 because, in fact, it was not possible to have finalized the JDA prior to the Commission's approval of the merger. As was stated by Company's witness in initial testimony in the merger proceeding, DEC and DEP could not share proprietary information prior to approval of the merger.[75] While the Compass Lexecon Analysis of Economic Efficiencies under Joint Dispatch projected total savings from the JDA over a five-year period that was projected to result, in part from increased operation of DEC's coal-fired generating units, it also described the complexity of the JDA and that many issues other than fuel costs had to be considered.[76] Many of these issues could not be resolved until the merger was approved and proprietary information could be shared. The cost savings resulting from joint dispatch were substantial but did not materialize in the precise manner projected in the Compass Lexecon study.

e. Witness Lucas's Recommended Disallowance Amount Relies on Flawed Assumptions.

For all of the reasons explained in Sections II(a), II(b), and II(d) of this Brief, the Commission should reject Witness Lucas's allegation that the Company was imprudent for rejecting CertainTeed's Proposal. Furthermore, as explained in Section III(c), there would have been no difference in outcome had the Company accepted CertainTeed's Proposal that Witness Lucas believes to have been the prudent alternative.

Nevertheless, the Company desires to address the framework and assumptions underlying Witness Lucas's disallowance recommendation in his pre-filed supplemental testimony. Witness

[75] Tr. 184, Line 19 – Tr. 185, Line 7).
[76] *Id.*

Lucas does not recommend disallowance of the total amount of the LDs. Instead, Witness Lucas makes an adjustment to account for the fact that "DEP would have had to dispose of gypsum it did not sell to CertainTeed." In other words, had DEP not entered into the Gypsum Supply Agreement and not received revenue for gypsum produced at Roxboro and Mayo, it would have had to incur costs to handle and landfill the gypsum.

To arrive at his recommended disallowance, Witness Lucas utilizes certain hindsight analysis provided by Company.[77] While the Commission has repeatedly confirmed that hindsight analysis is not permitted for purposes of determining prudence, the Company nevertheless has produced hindsight analysis that was not intended to demonstrate the Company's prudence but instead, shows that even if the Company's actions in entering the Gypsum Supply Agreement were deemed to be imprudent, the overall transaction benefitted customers even after netting the LDs.

The Company's hindsight analysis, on which witness Lucas relied, netted the LDs against revenue from sales based on actual gypsum production, avoided landfill costs, and avoided stockpile costs. The premise of the analysis is that had the Company not entered into the Gypsum Supply Agreement, it would have had to incur substantial expenses to handle and landfill the gypsum (rather than receiving revenue from CertainTeed). The hindsight analysis showed that even after taking into account the LDs owed by the Company, customers received an approximate $55 million benefit as a result of the Gypsum Supply Agreement. That is, after netting out the LDs, costs to customers were still approximately $55 million lower than would have been the case without the Gypsum Supply Agreement. The hindsight analysis shows that even if the decisions of the Company in connection with the 2012 Amended and Restated Agreement were imprudent

[77] Such analysis was contained in Lucas Supplemental Exhibit 8.

(which the Company emphatically denies), customers have not actually been harmed but, instead, have benefited from the Gypsum Supply Agreement.

Witness Lucas utilized this hindsight analysis but made two adjustments. First, witness Lucas utilized a lower assumed landfill cost, which changed the outcome of the Company's hindsight analysis from a $55 million benefit to a $43 million detriment. Witness Lucas then eliminated the avoided pile management costs to arrive at a total $46 million detriment.

In his pre-filed supplemental, Witness Lucas utilized an assumed landfill cost taken from a Business Analysis Package ("BAP") that was prepared in 2008 in support of the Company's decisions regarding the conveyor system. At the hearing, Witness Lucas pointed to another document, which was an Executive Summary prepared in the early 2000s in connection with the consideration of the CertainTeed arrangement. Both documents contained an estimate of landfill cost (ranging from $5 - $9 per ton) but provided no explanation or description regarding such estimates.

The Company's position, as explained by DEP Rebuttal Panel in its Supplemental Rebuttal Testimony, is that because the estimates cited by Witness Lucas are so far outside the range of actual landfill costs, it is reasonable to assume that those estimates included in those particular documents were conservatively set to represent only the incremental cost of transporting and placing the gypsum in existing landfills at Roxboro and Mayo.[78] Incremental costs represent a conservative approach to valuation but do not come close to capturing the full cost of landfilling material. The all-in cost of landfilling includes not only the cost of placement but also the substantial cost involved in landfill cell design, engineering, construction costs, water management

[78] Tr. 190, Line 20 – Tr. 192, Line 6.

and capping.[79] In order to landfill the amount of gypsum produced at Roxboro and Mayo during this timeframe, the Company would have had to construct four new cells.[80]

The fact that the per ton cost identified in the BAP and the Executive Summary was only an incremental cost is confirmed by the immense amount of evidence in this proceeding showing the actual, all-in landfill cost exceeded the incremental cost identified in the BAP by many orders of magnitude. Once again, Witness Lucas picked one piece of evidence while ignoring the greater weight of evidence that would have led to a different conclusion and never offering any cogent explanation why landfill costs actually paid during the relevant time period were not was not the best evidence to establish the cost.[81]

There are a number of pieces of evidence showing the actual, real-world cost of landfilling gypsum during this time period. For instance, CertainTeed was obligated to accept gypsum beginning in 2009, well before it had begun construction of its Roxboro Wallboard Facility. Therefore, CertainTeed was required to dispose of the gypsum it was unable to utilize at Roxboro and, as Witness Lucas conceded, would have been incented to identify the most cost-effective manner to do so.[82] One of the options that CertainTeed elected was to directly landfill gypsum at a third party landfill site. CertainTeed did so on at least two separate occasions according to records produced in the Trial. In 2010, CertainTeed paid $8.4 million to landfill 220,000 tons at a price of $38 per ton and in 2011, CertainTeed paid $4.5 million to landfill 120,000 tons at a price of $37 per ton.[83] On another occasion, CertainTeed elected to directly pay DEP to landfill gypsum on CertainTeed's behalf. The price voluntarily paid by CertainTeed to DEP for landfilling gypsum

[79] Tr. 192, Lines 2 – 4.
[80] Tr. 191, Line 15 – Tr. Tr. 192, Line 6.
[81] Tr. 94, Line 22 – Tr. 95, Line 7.
[82] Tr. 107, Lines 18 -21.
[83] DEP Lucas Cross Exhibit No. 2, Pg. 9.

was $49 per ton.[84] The Court also made findings on this issue in its Opinion, determining that CertainTeed had incurred $32 million to dispose of gypsum prior to the commercial operation of its Roxboro Wallboard Facility. [85]

All of this evidence demonstrates two points. First, the overwhelming weight of evidence based on actually incurred landfill costs during the relevant time period supports the Company's position regarding landfill costs and confirms that the landfill costs in the BAP and Executive Summary that was relied on by Witness Lucas was an incremental cost only. These data points of actual prices paid during the relevant time period should be given far more weight than the evidence relied on by Witness Lucas. CertainTeed would certainly have been incented to identify the most cost-effective landfill option and had it been possible to landfill gypsum during this time period at $6 ton (or a price anywhere close to that amount), CertainTeed would have availed itself of that opportunity. Second, this extensive evidence highlights once again that Witness Lucas simply picks the narrow data points that best suit his position and fails to acknowledge data points that are not consistent with his narrative. In this case, Witness Lucas did not appear to evaluate the other data points concerning per ton landfill costs nor did he even attempt to draw on his extensive experience and testimony in pending rates cases concerning landfilling and related costs.

In arriving at his recommended disallowance amount, Witness Lucas makes two other errors. First, he eliminates the cost of Stockpile management. Under the Gypsum Supply

[84] DEP Lucas Cross Exhibit 2, at 109 ("Q. Can you explain the substance of this amendment to the 2008 contract to the Court?
A. Yes. The purpose of this amendment was to remove 80,000 tons of -- off of the stockpile, because the stockpile had gotten pretty large and PE had concern about its size.
So the terms were, basically, two in this. The first term was that CertainTeed was to remove 80,000 tons of gypsum from the stockpile and place it into the Progress Energy on-site landfill. And the cost for us to do that was $49 a ton plus -- $49 a wet ton, as opposed to a dry ton, which is more tonnage.").
[85] Opinion, Para. 62.

Agreement, CertainTeed is responsible for managing the Stockpile and therefore bears those costs. As the DEP Rebuttal Panel explained, pile management is necessary and there is no basis for ignoring those tangible costs or the benefits that customers received due to CertainTeed bearing cost that would otherwise be borne by the Company. Second, Witness Lucas assigns no value to the incremental sales that have been made to CertainTeed subsequent to the termination of the Gypsum Supply Agreement and that will likely continue to be made in the future. The benefit of these additional sales (and avoided landfill and pile management costs) is many millions of dollars.

f. Witness Lucas Provides No Basis for His Recommended Disallowance of the Judgment Payment.

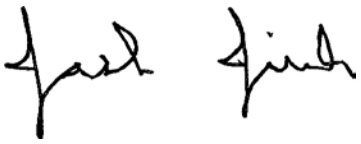
The judgment payment arose from the fact that the court found that DEP had failed to meet the MMQ in certain months. During those months, DEP supplied gypsum from DEC and CertainTeed agreed to pay the transportation costs, subject to resolution of the court case. DEP incurred actual freight costs on tons of gypsum supplied from DEC. Having invoiced CertainTeed and been reimbursed for these costs, but then compelled by the Court to return that reimbursement, the Company is now in the position of having incurred costs (freight costs) on the sale of a byproduct in the amount of $1,010,938.20 for which the Company has not yet been granted cost recovery. both the Judgment Payment and the LDs result from the same set of facts (that is, DEP's inability to satisfy the MMQ and the parties' exercise of their respective rights and obligations considering such failure). Therefore, because the Company believes that its decision to enter into the 2012 Amended and Restated Agreement was prudent, both the LDs and the Judgment Payment should be recoverable costs.[86]

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

V. Conclusion

In light of the foregoing, the Company respectfully requests that the Commission find the LDs and the Judgement Payment to have been reasonably and prudently incurred by DEP and approve DEP's recovery of such costs in the in the manner proposed by the Company in this docket as reflected in the Company's Application and the direct testimony of Dana Harrington, adjusted as necessary pending the timing of the Commission's decision.

Respectfully submitted this 20th day of April, 2020.



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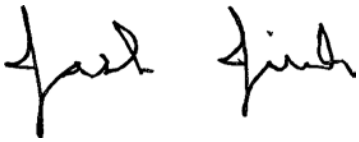
CERTIFICATE OF SERVICE

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

This the 20th day of April, 2020.



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