

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE

11A

SUPERIOR COURT DIVISION

\* \* \* \* \*

CERTAINTEED GYPSUM NC, INC.,	)	
	)	Person County
Plaintiff,	)	17CVS395
vs.	)	
	)	
DUKE ENERGY PROGRESS, LLC,	)	
	)	
Defendant.	)	

\* \* \* \* \*

TRIAL TRANSCRIPT

Volume III of VII - Pages 251 through 439

Tuesday, July 10, 2018

Honorable James L. Gale, Judge Presiding

\* \* \* \* \*

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21  
22  
23  
24  
25

I N D E X

WITNESSES

PETER MAYER

Direct Examination by Ms. Marston .....279  
 Cross-Examination by Mr. Tucker .....326  
 Redirect Examination by Ms. Marston .....364

ROBERT MORROW

Direct Examination by Ms. Marston .....371  
 Cross-Examination by Mr. Tucker .....408  
 Redirect Examination by Ms. Marston .....433

JOHN HALM (through video deposition)

I N D E X T O E X H I B I T S

<u>DESCRIPTION</u>	<u>MARKED</u>	<u>RECEIVED</u>
Exhibit 5 2004 agreement .....p289	v3	p370 v3
Exhibit 6 (Previously identified)		p256 v3
Exhibit 11 02/05/08 email and draft ...p391	v3	
agreement		
Exhibit 12 11/26/07 email & spreadsheetp439	v3	
Exhibit 15 (Previously identified)		p256 v3
Exhibit 16 12/20/07 letter .....p386	v3	
Exhibit 17 01/18/08 letter .....p388	v3	
Exhibit 18 02/18/08 email and 02/15/08 p396	v3	
draft agreement		
Exhibit 22 (Previously identified)		p256 v3
Exhibit 23 (Previously identified)		p256 v3
Exhibit 24 (Previously identified)		p256 v3
Exhibit 25 (Previously identified)		p256 v3

1	Exhibit 26	(Previously identified)		p256	v3
2	Exhibit 31	02/01/16 email chain	.....p439	v3	
3	Exhibit 32	01/26/17 email chain	.....p439	v3	
4	Exhibit 36	(Previously identified)		p256	v3
5	Exhibit 37	(Previously identified)		p256	v3
6	Exhibit 40	(Previously identified)		p256	v3
7	Exhibit 41	(Previously identified)		p256	v3
8	Exhibit 59	(Previously identified)		p256	v3
9	Exhibit 74	02/09/13 PowerPoint	.....p439	v3	
10	Exhibit 75	August 2013 FOF	.....p439	v3	
11	Exhibit 76	03/03/16 email chain	.....p439	v3	
12	Exhibit 77	08/15/16 business plan	.....p439	v3	
13	Exhibit 82	04/10/17 email chain	.....p439	v3	
14	Exhibit 90	05/12/03 email and attachment	.....p299	v3	p370 v3
15					
16	Exhibit 91	05/30/03 email and attachment	.....p302	v3	p370 v3
17					
18	Exhibit 92	07/24/03 email and attachment	.....p303	v3	p370 v3
19	Exhibit 93	08/25/03 email and attachment	.....p305	v3	p370 v3
20					
21	Exhibit 94	09/23/03 email and attachment	.....p310	v3	p370 v3
22	Exhibit 95	11/07/03 email and attachment	.....p310	v3	p370 v3
23					
24	Exhibit 96	12/31/03 email and attachment	.....p310	v3	
25	Exhibit 97-Rayburn	02/03/04 email and attachment	..p310	v3	p370 v3

1	Exhibit 120 (Previously identified)	p256	v3
2	Exhibit 121 (Previously identified)	p256	v3
3	Exhibit 122 (Previously identified)	p256	v3
4	Exhibit 124 (Previously identified)	p256	v3
5	Exhibit 125 (Previously identified)	p256	v3
6	Exhibit 177 Video deposition of John ...p437 Halm		v3
7			
8			
9			
10			
11			
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1 (Superior Court of Person County resumed  
2 session on Tuesday, July 10, 2018, before the  
3 Honorable James L. Gale.)

08:59 4 THE COURT: Please remain seated. Good morning,  
08:59 5 everyone.

08:59 6 A couple of logistics matters.

08:59 7 Mr. Phillips, with due apologies, I was contacted  
08:59 8 by the Elon staff this morning to say that they're actually  
08:59 9 moving some people in the back room this morning, so I took  
08:59 10 the liberty of moving your witness to the conference room  
08:59 11 immediately down to my office. So instead of going back to  
08:59 12 that -- it did not look to me like you had anybody else in  
08:59 13 that room.

09:00 14 UNIDENTIFIED SPEAKER: We have some water in  
09:00 15 the --

09:00 16 THE COURT: Was that your water? Okay. Well, let  
09:00 17 me get that -- and I saw -- I didn't know whose water it was  
09:00 18 in the filing cabinet.

09:00 19 But the conference room next to the court has an  
09:00 20 outside entrance. So I just closed it so you could have  
09:00 21 access to that back and forth instead of coming -- without  
09:00 22 the need to come to chambers.

09:00 23 MR. PHILLIPS: All right. I don't know where that  
09:00 24 is, but I'm sure --

09:00 25 THE COURT: It's at the very end of the hallway.

09:00 1 MR. PHILLIPS: Okay.

09:00 2 THE COURT: She knows.

09:00 3 MR. PHILLIPS: Our witness did not make a break  
09:00 4 for it, though. That's the thing.

09:00 5 THE COURT: And I was -- and I was telling  
09:00 6 somebody, I suppose that you can walk into somebody he's  
09:00 7 never seen before, but perhaps if he sees a man with a black  
09:00 8 dress comes in, he has some authority, so that's right.  
09:00 9 But -- okay.

09:00 10 And then the -- Ms. Price reminded me, in her role  
09:00 11 as clerk of court, that yesterday we talked about the  
09:00 12 exhibits and we've introduced them, and we talked about what  
09:00 13 we're going to do. I never officially said "Admitted."

09:00 14 So I will say this morning that, without  
09:00 15 objection, the exhibits are admitted.

09:00 16 Today, I think, so you'll know, my goal would be  
09:01 17 to take a break about 10:45 and to take our lunch break at  
09:01 18 12:30. But, again, I'm flexible in that regard.

09:01 19 In light of our discussion yesterday about the  
09:01 20 three trigger points that we said we'd remove from  
09:01 21 confidentiality, we'll leave open as to later and what we do  
09:01 22 about the facts, I'm not sure that there was anything else  
09:01 23 in your trial briefs that required them to be filed under  
09:01 24 seal except those points. I may be wrong. I don't recall  
09:01 25 discussion about price in there, but, you know, you have the

0 9 : 0 1 1 obligation to file something in a nonredacted form within  
0 9 : 0 1 2 the 5 days.

0 9 : 0 1 3 But, frankly, y'all got a lot of things going on  
0 9 : 0 1 4 in the trial. It may very well be that y'all just simply  
0 9 : 0 1 5 file your trial briefs as they were. I think that may have  
0 9 : 0 1 6 changed with the order yesterday. But maybe that will take  
0 9 : 0 2 7 some work off your plate.

0 9 : 0 2 8 All right. I thought, if we could, I'd like to  
0 9 : 0 2 9 spend just a few minutes talking about the deposition and  
0 9 : 0 2 10 the objections.

0 9 : 0 2 11 I went through and read those excerpted parts and  
0 9 : 0 2 12 parts of the overall transcript, et cetera, dealing with the  
0 9 : 0 2 13 proposed deposition testimony of Mr. Halm.

0 9 : 0 2 14 It seems to me that there are about  
0 9 : 0 2 15 four categories that I need to deal with. And, as I  
0 9 : 0 2 16 understand it, he was not involved in the negotiations of  
0 9 : 0 2 17 the contract. He did review the contract at a point in  
0 9 : 0 2 18 time, as part of his job responsibilities, and that later  
0 9 : 0 2 19 ended up -- particularly, I think, when the stockpile looked  
0 9 : 0 3 20 as if it would fall below 250,000 -- consulted with legal  
0 9 : 0 3 21 counsel. And after consultation with legal counsel,  
0 9 : 0 3 22 indicated that he had a different reading of the contract.  
0 9 : 0 3 23 And that's -- that's the essence of the testimony.

0 9 : 0 3 24 I think that it's unclear to me as to whether he's  
0 9 : 0 3 25 reading the contract with general familiarity or whether or

09:03 1 not he actually read the contract and then took actions as a  
09:03 2 manager of Duke in order to carry out his understanding of  
09:03 3 the contract. So that is -- I'll hear from you on that.

09:03 4 But it seems to me, then, that the four areas that  
09:03 5 we may hit that are at issue are:

09:03 6 One is to whether or not his initial opinion, in  
09:03 7 terms of his review of the contract without the assistance  
09:03 8 of legal counsel, is admissible as relevant testimony.

09:03 9 And if so, whether or not the background,  
09:04 10 including the background he had at other companies, is  
09:04 11 relevant to inform that reading.

09:04 12 Third, obviously, there are some obvious  
09:04 13 attorney-client privilege assertions and issues here.

09:04 14 And the fourth is an issue that I kind of raised,  
09:04 15 and that is a redundancy because he says the same thing  
09:04 16 about three or four different times. I certainly understand  
09:04 17 the import of the testimony.

09:04 18 That's my reading of what I've got to deal with.  
09:04 19 And I did not -- I've withheld making actual rulings until I  
09:04 20 had a chance to hear from you. I guess you want me to get  
09:04 21 the rulings to you so you can edit the transcript that you  
09:04 22 want to play. And so if you'll -- if you'll -- once I hear  
09:04 23 from you, I think, at the lunch break, I can turn those  
09:04 24 around pretty quickly and get them to you.

09:04 25 So let me hear from you.



09:04 1 MR. TUCKER: Thank you, Your Honor.

09:04 2 I think you've identified exactly the four general  
09:04 3 categories. And we had really condensed it to maybe two or  
09:04 4 three categories, but they cover the same issues that you've  
09:05 5 just identified.

09:05 6 There were two references in the transcript that  
09:05 7 we had objected to on relevance grounds, that we've now  
09:05 8 withdrawn, but they don't fall into either of the -- any of  
09:05 9 the categories that you've just mentioned.

09:05 10 By far the bulk of our objections relate to  
09:05 11 testimony by Mr. Halm -- who didn't negotiate the  
09:05 12 2012 agreement, didn't even read it until after it was  
09:05 13 signed -- on the grounds that whatever interpretation he  
09:05 14 formed as a layman, reviewing the words in the agreement,  
09:05 15 does not help the Court determine what the intent of the  
09:05 16 parties was at the time the contract was negotiated.

09:05 17 So that is the core basis of all of our objections  
09:05 18 that relate to his interpretation of the contract.

09:05 19 I think the question -- the sections of the  
09:05 20 deposition that have been designated cover interpretations  
09:05 21 related to 3.1, but also certain other provisions of the  
09:06 22 contract --

09:06 23 THE COURT: 2.2.3.

09:06 24 MR. TUCKER: Exactly, Your Honor. And 6.2 as  
09:06 25 well, I think.

09:06 1 But the basis of the objection is the same for all  
09:06 2 of those.

09:06 3 On the testimony that you mentioned regarding what  
09:06 4 he did at US Gypsum 2 decades ago, before he ever worked for  
09:06 5 Duke and whether that informed anything, I think the  
09:06 6 testimony itself is clear. The questions were asked that  
09:06 7 seemed to be -- attempted to establish that somehow what he  
09:06 8 thought while he was at US Gypsum about security of supply  
09:06 9 and other issues is relevant, maybe, to the way CertainTeed  
09:06 10 looked at the same issues in this contract.

09:06 11 And our position on that is just there is no  
09:06 12 connection, nexus, between those two things that would make  
09:06 13 his understanding, 20 years ago, when he worked at  
09:06 14 US Gypsum, relevant to any issues that are in this case.

09:06 15 But those are the essential bases of our  
09:06 16 objections.

09:07 17 MR. PHILLIPS: Your Honor, so let me go back.

09:07 18 I think it sort of breaks down into  
09:07 19 two categories: one, things that he believed about the  
09:07 20 contract, and his work at US Gypsum.

09:07 21 Mr. Halm's job, from 2012 till today, is that he  
09:07 22 has managerial responsibility for this contract. He  
09:07 23 administers it. He's the day-to-day contact with CTG. He  
09:07 24 testified that he went back -- when he took the job, he  
09:07 25 looked at the contract and looked at the volume portions of

09:07 1 the contract; looked at what, you know, triggered -- you  
09:07 2 know, what could get Duke in trouble; and, you know, kept an  
09:07 3 eye on that kind of stuff. He is the guy who is responsible  
09:07 4 for administering this contract for Duke.

09:07 5 From the first time we were together in this  
09:08 6 courtroom, Duke has said that the parties' course of  
09:08 7 performance was a critical component of the analysis of this  
09:08 8 case.

09:08 9 This is Duke's course of performance. How the  
09:08 10 parties act pursuant to a contract is perhaps the most  
09:08 11 important evidence of what they believe the intent of the  
09:08 12 contract was.

09:08 13 And if I may approach, I'd like to hand up a few  
09:08 14 cases.

09:08 15 THE COURT: You may.

09:08 16 MR. PHILLIPS: The first one is *Davis v. McRee*,  
09:08 17 and there are highlighted portions in the cases.

09:08 18 The bottom of that highlighting on page 3:

09:08 19 "The parties are presumed to know the intent  
09:08 20 and meaning of their contract better than  
09:08 21 strangers, and where the parties have placed a  
09:08 22 particular interpretation on their contract after  
09:08 23 executing it, the courts ordinarily will not  
09:08 24 ignore that construction which the parties  
09:08 25 themselves have given it prior to the differences

09:08 1 between them."

09:09 2 He was the person administering this contract.

09:09 3 What he --

09:09 4 THE COURT: In that regard, that's the reason I  
09:09 5 pointed it out. What was unclear to me is when he was in  
09:09 6 his responsibilities -- and I didn't read line by line the  
09:09 7 whole deposition -- is -- until such time as he had a  
09:09 8 critical component where he believed he was falling below  
09:09 9 250,000 tons, which imposed upon him an obligation, did his  
09:09 10 reading of the contract ever affect what he did, day to day,  
09:09 11 in his administration of the contract?

09:09 12 MR. PHILLIPS: I'm not sure --

09:09 13 MS. MARSTON: Your Honor, there's at least one  
09:09 14 email in the documentary evidence in which he's  
09:09 15 communicating to CertainTeed that they need to take 50,000.

09:10 16 And there will be testimony by CertainTeed  
09:10 17 employees that, even after the 2012 agreement was executed,  
09:10 18 they were feeling the pressure from Duke, which would be  
09:10 19 John Halm, to meet the 50,000 requirement.

09:10 20 THE COURT: Well, it's -- because, as I  
09:10 21 understand -- and I'm also guided by the form of law that  
09:10 22 each of you have made, is that, "Judge, once you hear any  
09:10 23 extrinsic evidence, you better hear it all." And I don't  
09:10 24 intend to create any reversible error in that regard.

09:10 25 To the extent you have somebody that's at Duke or

09:10 1 at CTG that has some casual connection to the contract and  
09:10 2 they're reading "this is what I thought," I don't know that  
09:10 3 that has much impact at all, to the extent someone says, "I  
09:10 4 have the role to implement the contract and carry it out."

09:10 5 And so to the extent Mr. Halm had to read it, make  
09:10 6 a decision as a manager of Duke as to what we're going to  
09:10 7 do, then I would consider that, along with other matters.

09:10 8 To the extent I find that there was intent entered  
09:11 9 into and his reading was wrong, I don't think that overcomes  
09:11 10 if there's clear evidence to the contrary. But to the  
09:11 11 extent it goes into the overall nexus, I'll hear it in that  
09:11 12 regard.

09:11 13 I think, as far as the background, US Gypsum is  
09:11 14 concerned -- frankly, I think that it's not difficult for  
09:11 15 the Court to understand and accept that if you've got a  
09:11 16 quick inventory turnover procedure, is that any company  
09:11 17 likes to have some understanding of what their supply is in  
09:11 18 order for planning purposes.

09:11 19 I don't know that his particular experience at  
09:11 20 US Gypsum informs that, one way or the other, but, I mean, I  
09:11 21 certainly heard the testimony on the stand, and I expect  
09:11 22 I'll hear others.

09:11 23 So to the extent you want to put it in, I'm  
09:11 24 basically going to make sure that I have an open door,  
09:11 25 unless there's a clear basis to preclude something, because

09:12 1 I don't want to create any appellate error on the fact that  
09:12 2 I've heard some extrinsic evidence and not others. That's  
09:12 3 the context in which I accept this testimony.

09:12 4 So to the extent that he had management  
09:12 5 responsibility and he directed people "We're going to  
09:12 6 implement the contract this way, because this is a  
09:12 7 commitment that we've made" as a manager, and then later he  
09:12 8 believes that he was in error, I'll take all of that into  
09:12 9 consideration.

09:12 10 MR. PHILLIPS: Your Honor, if I hear you  
09:12 11 correctly, I think that you're saying what I think ought to  
09:12 12 be the appropriate path forward here; which is, you can give  
09:12 13 this whatever weight you want to give it, but I think it's  
09:12 14 relevant and --

09:12 15 THE COURT: Yeah. If this was a jury trial, I  
09:12 16 would come up with a pretty severe limiting instruction on  
09:12 17 some of this testimony. In a nonjury trial, I don't.

09:12 18 But I guess what I'm saying to you is -- I haven't  
09:12 19 read the cases you just handed me, Mr. Phillips, but, based  
09:12 20 on my experience, I would say that course of performance is  
09:12 21 relevant testimony when it is from someone who actually had  
09:13 22 the responsibility for the performance of the company; it is  
09:13 23 not particularly informed if it's a casual reading that  
09:13 24 doesn't affect managerial responsibility.

09:13 25 MR. PHILLIPS: And that is exactly the argument

09:13 1 that I am making. That is exactly the position Mr. Halm was  
09:13 2 in, and you can hear --

09:13 3 THE COURT: And I did not have the documents and  
09:13 4 the exhibits that she's referring to, but as I listen to the  
09:13 5 testimony, before I give it weight I'll be asking myself the  
09:13 6 question, was this a casual reading, or was this a decision  
09:13 7 that he was making as a manager of the -- in order to  
09:13 8 implement the contract. And even then, I've got to take  
09:13 9 into consideration how it affects the --

09:13 10 MR. PHILLIPS: Your Honor, I think his past work  
09:13 11 for US Gypsum is a life experience against which he -- you  
09:13 12 know, which matters in his analysis.

09:13 13 THE COURT: Right.

09:13 14 MR. PHILLIPS: Your Honor, I think the last big  
09:13 15 thing that Duke --

09:13 16 THE COURT: I think that, generally, there's parts  
09:13 17 of this in terms of, you know, casual things, and the fact  
09:13 18 that he negotiated other supply contracts in general. The  
09:13 19 details of what those contracts were, I'm not sure if that's  
09:14 20 important for us.

09:14 21 MR. PHILLIPS: Your Honor, the one thing I would  
09:14 22 say about that is that Mr. Tucker asked Mr. Engelhardt if he  
09:14 23 had ever negotiated a gypsum supply contract.

09:14 24 THE COURT: He said he did.

09:14 25 MR. PHILLIPS: Both parties are dealing with that.

09:14 1 Either you have a lot of experience doing it or you don't.

09:14 2 THE COURT: Right.

09:14 3 MR. PHILLIPS: And that could come into play.

09:14 4 THE COURT: I just want to say, I -- but did it  
09:14 5 get into the point that Duke wanted to go into the  
09:14 6 agricultural industry, wanted to go into those industries,  
09:14 7 that gets beyond the point.

09:14 8 So, like I say, I think there's some details here  
09:14 9 that go a little bit past what you need.

09:14 10 MR. PHILLIPS: I don't disagree with that specific  
09:14 11 point, Your Honor.

09:14 12 The final thing is, it seems to me some of what  
09:14 13 Duke is objecting to is the timing of when Mr. Halm changed  
09:14 14 his opinion. And, you know, I think that is a very relevant  
09:14 15 fact, that only when there was a crisis on the Duke side did  
09:14 16 Duke change the way that it was implementing the contract.

09:14 17 So I'm happy to be heard further --

09:15 18 THE COURT: No, I think --

09:15 19 Again, I think what you want to do is -- go,  
09:15 20 Mr. Tucker --

09:15 21 MR. TUCKER: Yeah. Just a couple of points,  
09:15 22 Your Honor.

09:15 23 I think that the distinction that the Court is  
09:15 24 drawing is one that we, in large part, agree with. I might  
09:15 25 phrase it a little bit differently.



09:15 1 Course of performance --

09:15 2 THE COURT: I'll swap chairs with you.

09:15 3 MR. TUCKER: You're far more experienced than I  
09:15 4 am, so --

09:15 5 THE COURT: I'm teasing you. I'm teasing you.  
09:15 6 I'm not, though.

09:15 7 MR. TUCKER: The course of performance, I think  
09:15 8 the actions of the party are relevant to course of  
09:15 9 performance. The interpretation that an individual witness,  
09:15 10 who was not involved in negotiating the contract, gives a  
09:15 11 particular provision, reading it on his own, even if that's  
09:15 12 in the course of his responsibilities for managing the  
09:15 13 contract --

09:15 14 THE COURT: That's -- I was saying the same thing:  
09:15 15 That is, to the extent he reads the contract, forms an  
09:15 16 interpretation, and then takes action in -- you know, on the  
09:15 17 basis of that interpretation, that becomes relevant.

09:15 18 To the extent he has a casual interpretation that  
09:15 19 he doesn't do anything with, I'm not sure of its relevance.

09:15 20 MR. TUCKER: Yeah. And his interpretation, even  
09:16 21 if he acts upon it -- and I think the Court recognized  
09:16 22 this -- can be the wrong interpretation if it's not informed  
09:16 23 by discussions with the people who negotiated the contract,  
09:16 24 his own direct involvement, his understanding of the intent  
09:16 25 at the time.

09:16 1 And I think we all recognize that what the Court  
09:16 2 really is trying to figure out here is what the parties mean  
09:16 3 when they entered into this; not what some later witness,  
09:16 4 who had no involvement in the contract, thought about it,  
09:16 5 right or wrong. That's not relevant to the question of  
09:16 6 intent. And that's the distinction that we tried to draw.

09:16 7 THE COURT: And it's a distinction that I  
09:16 8 understand that you're making, and I understand the  
09:16 9 respective arguments of counsel. And so I'm going to let  
09:16 10 the evidence come in.

09:16 11 Y'all, I think I -- I think you're all pretty  
09:16 12 close in tune as to what the legal guidelines is as to what  
09:16 13 I'm doing. But at this point in time, in the nonjury  
09:16 14 environment, I'm going to be relatively liberal to what I  
09:17 15 let in.

09:17 16 Are there points -- there's a lot of colloquy in  
09:17 17 here.

09:17 18 Did we ever get to the point where you believed  
09:17 19 that the attorney-client privilege was, in fact, invaded? I  
09:17 20 mean, the testimony is clear that when he got to the point  
09:17 21 of where he believed that the stockpile was going to go  
09:17 22 below 250,000 tons, he went and asked legal advice.

09:17 23 As a result of the legal advice and discussions  
09:17 24 with counsel, perhaps with others, he came to an  
09:17 25 interpretation of his reading that was different than it was

09:17 1 before. And that's clear.

09:17 2 I don't believe I saw where he was ever asked to  
09:17 3 give testimony about what the legal advice was that he  
09:17 4 received.

09:17 5 MR. TUCKER: I think he was asked, but we  
09:17 6 objected, and he didn't answer it.

09:17 7 THE COURT: I mean, there is no answer that I'm  
09:17 8 aware of, and I --

09:17 9 MR. TUCKER: That's right.

09:17 10 THE COURT: -- and Ms. Marston went through a  
09:17 11 series of questions when she says, "You'll not get a chance  
09:17 12 to talk to everybody because... while I make the record."  
09:18 13 But I don't believe he ever came out and gave testimony that  
09:18 14 you believe --

09:18 15 MR. TUCKER: I think that's right, Your Honor. So  
09:18 16 we are not objecting to any of the portions of the  
09:18 17 transcript that he's designated on the grounds that it  
09:18 18 discloses attorney-client privileged information. The  
09:18 19 objections were made, he testified.

09:18 20 And in terms of timing, we're not objecting if the  
09:18 21 Court wants to hear the timing issue. I think we would  
09:18 22 stipulate that the company's present interpretation is based  
09:18 23 on its legal review and interpretation of the language in  
09:18 24 the contract informed by the testimony of intent from the  
09:18 25 parties who negotiated it.

09:18 1 So the timing, really, is not relevant to that.  
09:18 2 The interpretation of Mr. Halm was either right or wrong  
09:18 3 before he went to legal counsel to ask for assistance in  
09:18 4 interpreting the contract. And whether it was right or  
09:18 5 wrong will be determined based on the testimony of  
09:18 6 Mr. Engelhardt and Mrs. Coppola, who has not testified yet,  
09:19 7 about what was intended at the time.

09:19 8 THE COURT: Right. I think the real question is  
09:19 9 whether or not I'm going to agree with Duke's counsel. I  
09:19 10 mean, that's what it gets down to. Okay.

09:19 11 Because, I mean, all of us had said that the  
09:19 12 language -- and what I ruled was that obviously both of you  
09:19 13 read it in two different ways, and I understand where it  
09:19 14 comes from, and I've got to figure out what's the right way  
09:19 15 to do that.

09:19 16 Well, I'll leave it to you, Ms. Marston, as to how  
09:19 17 much of the colloquy of counsel you need to leave in the  
09:19 18 transcript when you play it. If it's -- if it doesn't take  
09:19 19 long and editing will take longer.

09:19 20 But essentially, Mr. Tucker, I believe I'll  
09:19 21 overrule all the objections with the understanding that I  
09:19 22 appreciate the legal significance that you're leading to it,  
09:19 23 and I think you've indicated -- I've indicated to you the  
09:19 24 lines of relevance that I'm drawing around it. But I  
09:20 25 believe, under this context, I'm going to allow the

09:20 1 testimony to be presented.

09:20 2 MR. PHILLIPS: Your Honor, my instinct is that it  
09:20 3 would probably take longer to edit. It's about an hour and  
09:20 4 20 minutes.

09:20 5 THE COURT: I'll leave it to you.

09:20 6 MR. PHILLIPS: An hour and 40 minutes.

09:20 7 THE COURT: I'll leave it to you.

09:20 8 MR. PHILLIPS: You know, there's 3 or 4 minutes of  
09:20 9 it that's that.

09:20 10 THE COURT: All right. And, of course, it's  
09:20 11 always interesting in the nonjury cases to say, "Maybe I  
09:20 12 should exclude it because I've already read it and know what  
09:20 13 I think about it."

09:20 14 But -- and so, yeah, it's -- that's the nice thing  
09:20 15 about ruling on an objection in a nonjury trial is, how do  
09:20 16 you unring the bell once you've just read all this?

09:20 17 But that being the case, I'm just going to --  
09:20 18 instead of go through line by line, based on our  
09:20 19 interpretation, I'm going to overrule the objections. I  
09:20 20 would have been much more sensitive if there really were a  
09:20 21 privilege issue.

09:20 22 MR. PHILLIPS: Understood.

09:20 23 A couple of other things, Your Honor.

09:20 24 First, tomorrow -- I think tomorrow -- we will  
09:20 25 have a couple of witnesses who are on the stand who will be,

09:21 1 I think, testifying out loud about issues, some of which  
09:21 2 Duke believes are proprietary and trade confidential, and  
09:21 3 some of which we do.

09:21 4 So I don't know how the Court wants to deal with  
09:21 5 that, but I wanted to raise that in terms of who is in the  
09:21 6 courtroom.

09:21 7 I think that with regard to -- it would be  
09:21 8 Ms. Bildfell and Mr. Rayfield. With Mr. Rayfield, it will  
09:21 9 probably be every bit of 30 seconds. With Ms. Bildfell,  
09:21 10 we're trying to work out a stipulation where we don't have  
09:21 11 to talk about pricing on the witness stand. Maybe we can  
09:21 12 avoid that.

09:21 13 But I just wanted to give the Court a heads-up  
09:21 14 that --

09:21 15 THE COURT: Well, in that regard, there's --  
09:21 16 Mr. Phillips, I think there are two things: One is, it's  
09:21 17 possible that there will not even be anybody in the  
09:22 18 courtroom --

09:22 19 MR. PHILLIPS: Right.

09:22 20 THE COURT: -- but that doesn't protect your  
09:22 21 transcript.

09:22 22 And, ultimately, if you end up having an appeal,  
09:22 23 that's where we go, and the transcript is made available.

09:22 24 So I suppose, irrespective of whether someone's in  
09:22 25 the courtroom, we have to talk about whether the transcript

09:22 1 is placed under seal. And, once again, it's my  
09:22 2 understanding it is -- in order to do that, I've got to make  
09:22 3 factual findings, including that I considered every  
09:22 4 alternative other than that.

09:22 5 And so we'll just deal with it when we get to it.

09:22 6 If you have a stipulation that you don't have to  
09:22 7 talk about a price, that may go a long way to taking care of  
09:22 8 it.

09:22 9 I would think that the matters that you are -- so  
09:22 10 far been protecting, it seems to me that the public,  
09:22 11 including the people like the Environmental Coalition and  
09:22 12 others, would not have a particular vested interest in  
09:22 13 needing to know that in order to understand the subject  
09:23 14 matter of the lawsuit.

09:23 15 So as long as you're being restricted, I think  
09:23 16 we'll be able to find a way to deal with it. But you will  
09:23 17 need to make a record so I can make my findings.

09:23 18 **MR. PHILLIPS:** Okay. Secondly -- I think you  
09:23 19 mentioned this in the pretrial conference, an issue that  
09:23 20 could come up. But we may -- we're in a little bit of an  
09:23 21 unusual situation. Tomorrow we'll play the de bene esse  
09:23 22 deposition of our expert, Gisele Rankin.

09:23 23 **THE COURT:** Yes.

09:23 24 **MR. PHILLIPS:** She gave testimony, and among her  
09:23 25 opinions were opinions rebutting or responding to the

09:23 1 defendant's expert witness. And so -- and at that point,  
09:23 2 she had been deposed. Their witness will come live to the  
09:23 3 stand.

09:23 4 I've raised this with Mr. Tucker, but I think I  
09:23 5 may want to put into evidence -- not play, but just put into  
09:23 6 evidence -- the deposition of their expert, Ms. Smith, so  
09:24 7 that it's clear what Ms. Rankin was responding to when she  
09:24 8 responded, if that makes sense.

09:24 9 MR. TUCKER: Your Honor, we're --

09:24 10 THE COURT: I understand what you're saying.

09:24 11 MR. TUCKER: -- we're happy to consider that, talk  
09:24 12 with Mr. Phillips about it. And we've struggled with it a  
09:24 13 little bit because there's not a procedure available under  
09:24 14 the rules that I'm familiar with that would allow him to  
09:24 15 offer, as part of his case, a deposition of one of our  
09:24 16 witnesses in its entirety, apart from what has been  
09:24 17 designated or counter-designated as part of our process.

09:24 18 And her testimony, we think, is clear enough, the  
09:24 19 way the questions were asked so that the Court will be able  
09:24 20 to discern what it is she was responding to.

09:24 21 But we are thinking about that. That's the issue  
09:24 22 that we are struggling with. We generally do not like the  
09:24 23 idea of just introducing deposition transcripts as a whole  
09:24 24 if they have not been pre-designated and counter-designated.

09:24 25 THE COURT: Yeah. And I guess the other



0 9 : 2 5 1 alternative is to reserve those portions of the deposition  
0 9 : 2 5 2 to put in on a redirect case. We've got multiple ways of  
0 9 : 2 5 3 dealing with it. And, of course, having read the motions  
0 9 : 2 5 4 in limine, I'm familiar with what you're talking about.

0 9 : 2 5 5 MR. PHILLIPS: Thank you, Your Honor.

0 9 : 2 5 6 THE COURT: And the other way is to hear the  
0 9 : 2 5 7 testimony, with the understanding that it's only relevant if  
0 9 : 2 5 8 it is, in fact, rebuttal to testimony yet to be given. So,  
0 9 : 2 5 9 I mean, there's -- again, I'll be a partner with you in  
0 9 : 2 5 10 trying to work out a solution.

0 9 : 2 5 11 And I think we have a -- just -- I'm not going to  
0 9 : 2 5 12 do it, but y'all -- I'm going to leave to you to figure out  
0 9 : 2 5 13 who it is in the courtroom. There's another person here  
0 9 : 2 5 14 today.

0 9 : 2 5 15 Are you just here as an observer today?

0 9 : 2 5 16 MS. TURNER: Yes, sir.

0 9 : 2 5 17 MR. PHILLIPS: She is one of our summer  
0 9 : 2 5 18 associates.

0 9 : 2 5 19 THE COURT: Well, welcome.

0 9 : 2 6 20 MR. PHILLIPS: Stephanie --

0 9 : 2 6 21 THE COURT: Where are you in school?

0 9 : 2 6 22 MS. TURNER: I'm at Duke.

0 9 : 2 6 23 THE COURT: At Duke. All right. All right.

0 9 : 2 6 24 MR. PHILLIPS: Stephanie Turner. Thank you. I  
0 9 : 2 6 25 knew Stephanie, but I didn't know Turner. I'm sorry for

09:26 1 that.

09:26 2 THE COURT: And it could be that -- could be that  
09:26 3 years from now we say, "Where are you?"

09:26 4 And you say, "Well, I'm under candidacy for the  
09:26 5 Supreme Court." It seems that Duke is sending people up  
09:26 6 there that way, so good luck.

09:26 7 MR. PHILLIPS: And she is --

09:26 8 UNIDENTIFIED SPEAKER: That would be okay with  
09:26 9 you, right?

09:26 10 MS. TURNER: I would not complain.

09:26 11 THE COURT: You know, it's interesting, to tell  
09:26 12 you a little story and waste some time, but I think y'all  
09:26 13 know I have a little, small cabin up in the mountains. And  
09:26 14 down the road is a cabin, and there's a guy that's -- has  
09:26 15 retired now, but was in the Naval Intelligence Service, and  
09:26 16 he had a son who was at Duke Law School, who was also going  
09:26 17 to go clerk for Allyson Duncan.

09:26 18 And then I got invited by the dean and others to  
09:26 19 go and sit on a panel at Duke to talk about applying for  
09:26 20 clerkships. And I was under a program with  
09:26 21 Justice Barbara Jackson. And they would send in about  
09:27 22 30 students at a time, and they would have to introduce  
09:27 23 themselves.

09:27 24 And so when it came to him, who I had never met,  
09:27 25 he said, "My name's So-and-so."

09:27 1 And I said, "Well, let me tell you a little bit  
09:27 2 about yourself."

09:27 3 But his greatest disappointment now is he tried to  
09:27 4 get a clerkship with Chief Justice Roberts after having  
09:27 5 clerked for both Allyson Duncan and the DC Circuit. But now  
09:27 6 he's going to go and take a year's fellowship at the  
09:27 7 solicitor general's office, which I know is what Justice --  
09:27 8 Judge, perhaps to be Justice -- Kavanaugh did before going  
09:27 9 to clerk for Justice Kennedy.

09:27 10 So good luck to you.

09:27 11 MS. TURNER: Thank you, Your Honor.

09:27 12 THE COURT: All right. Okay. Anything else?

09:27 13 Do you need for me to tell you where I put your  
09:27 14 witness?

09:27 15 MS. MARSTON: If I can just go open doors,  
09:27 16 Your Honor, and I'll find him.

09:28 17 THE COURT: It's easier to go down this hallway  
09:28 18 down here.

09:28 19 MS. MARSTON: This way. Thanks.

09:28 20 THE COURT: Did you bring Robby in overnight to  
09:28 21 get the -- to get your transcript?

09:28 22 MR. TUCKER: I told Isaac afterwards -- he was  
09:28 23 bemoaning that we couldn't make that clip run.

09:28 24 I said, "If that's the only thing that happens  
09:28 25 during this trial" --

09:28 1 THE COURT: Then you'll be all right.

09:28 2 MR. TUCKER: -- "that we have a technological  
09:28 3 failure, it'll be all right."

09:28 4 THE COURT: Well, for a small fee, Mr. Phillips  
09:28 5 will consult with you on technology.

09:28 6 MR. PHILLIPS: Yes. A very small fee.

09:28 7 I went home on Sunday -- my wife went out of town  
09:28 8 for most of the week. I went home for, like, 45 minutes on  
09:28 9 Sunday. I tried to turn on the television; I could not turn  
09:28 10 on the television. I called her and said, "How do I turn on  
09:28 11 the television?" It would not work.

09:28 12 THE COURT: Well, if it makes you feel any better,  
09:28 13 I went home yesterday, and Noreen says, "I don't know what's  
09:28 14 wrong with the TV."

09:28 15 And I said, "I think I probably do. It's because  
09:28 16 you hit the wrong button. It changes the input from -- you  
09:29 17 now have about five different ways to get your signals, and  
09:29 18 you hit the wrong button."

09:29 19 MR. PHILLIPS: Yeah. The cable guy came last  
09:29 20 week, and now I'm flummoxed.

09:29 21 MR. TUCKER: Well, you shouldn't be watching TV.

09:29 22 MR. PHILLIPS: I was trying to watch the end of  
09:29 23 the Cardinals/Giants game.

09:29 24 MS. MARSTON: Your Honor, CertainTeed calls  
09:30 25 Peter Mayer to the stand.

1 PETER MAYER,  
2 having been first duly sworn by the Court, testified as  
3 follows:

4 THE WITNESS: I do.

5 THE COURT: Please be seated.  
6 Do you have water there?

7 THE WITNESS: I do.

8 DIRECT EXAMINATION by Ms. Marston:

9 Q. Good morning. Could you please state your full  
10 name for the record.

11 A. My name is Peter Mayer.

12 Q. Okay.

13 A. Is that loud enough?

14 Q. Yes, it is. Great.

15 THE COURT: We can hear you.

16 THE WITNESS: Thank you.

17 Q. Where do you live, Mr. Mayer?

18 A. I live in Tampa, Florida.

19 Q. Are you currently employed?

20 A. I am.

21 Q. What do you do?

22 A. I am the --

23 THE COURT: I asked you -- I asked the former  
24 person, so I'll ask you too: Where in Tampa do you live?

25 THE WITNESS: I live in Tampa, Florida, but close

09:30 1 to Clearwater.

09:30 2 THE COURT: Okay. I lived on Bay to Bay for a  
09:30 3 while, so I --

09:30 4 THE WITNESS: Oh, it's very nice. It gets flooded  
09:31 5 sometimes.

09:31 6 Q. Where are you currently employed, Mr. Mayer?

09:31 7 A. I'm employed with CertainTeed Gypsum, Inc., out of  
09:31 8 Malvern, Pennsylvania.

09:31 9 Q. Okay. And what is your title?

09:31 10 A. My title is vice president of sustainability and  
09:31 11 quality assurance.

09:31 12 Q. Do you work in Tampa? Or I think you said  
09:31 13 Pennsylvania.

09:31 14 A. Yes, my office is in Pennsylvania, but I work out  
09:31 15 of my office in Florida, and so I travel there quite often.

09:31 16 Q. And how long have you worked at CertainTeed or one  
09:31 17 of its predecessors?

09:31 18 A. I -- I've worked for the company for 27 years, so  
09:31 19 since 1992.

09:31 20 Q. What did you -- what company was that that you  
09:31 21 started with?

09:31 22 A. The company was called WestRock Industries  
09:31 23 Limited.

09:31 24 Q. And what did you do when you started there?

09:31 25 A. I was the project coordinator.

09:31

1 Q. Are you a scientist or an engineer?

09:31

2 A. I consider myself a scientist, I guess.

09:31

3 Q. What's your degree in?

09:31

4 A. I have a degree in -- bachelor of science in  
5 chemistry specialization.

09:32

6 Q. Where did you get that degree?

09:32

7 A. University of Waterloo in Ontario.

09:32

8 Q. When did you graduate?

09:32

9 A. In 1989.

09:32

10 Q. What -- since you started as a coordinator at  
11 WestRock, can you briefly run us through the positions  
12 you've held?

09:32

13 A. Sure. So after the project coordinator, I quickly  
14 became technical manager for the organization that was  
15 responsible for process.

09:32

16 And then in 2002, I was promoted to vice president  
17 of technical services, which included engineering, product  
18 development, but also looking at opportunities for new  
19 wallboard construction and DSG supplies.

09:32

20 [Reporter clarification.]

09:32

21 A. And then in 2010, I became vice president of  
22 process technology.

09:32

23 And then, in 2015, my current role.

09:32

24 Q. As the vice president of technical services, what  
25 were your responsibilities?

09:33

09:33 1 A. Well, as I mentioned already, I had responsibility  
09:33 2 for looking for opportunities for BPB at the time to look  
09:33 3 for DSG plants or partners to get DSG supply for building  
09:33 4 new wallboard plants.

09:33 5 Q. Is that how you came to be involved in the  
09:33 6 relationship between BPB and Progress Energy?

09:33 7 A. Yes.

09:33 8 Q. When did BPB begin looking for opportunities for  
09:33 9 new plants?

09:33 10 A. We started probably in the 2002-2003 range.

09:33 11 Q. And what, in particular, was BPB looking for at  
09:33 12 that time?

09:33 13 A. Well, I think -- I mean, it's important to  
09:33 14 recognize that in 2000 we made an acquisition of an American  
09:33 15 business, Celotex, and in 2002 we purchased another business  
09:33 16 in the US, James Hardie Gypsum.

09:33 17 And what happened -- well, not what happened. We  
09:34 18 were trying to get a national footprint in terms of our  
09:34 19 market, and we had some gaps. So after those acquisitions,  
09:34 20 we still had some gaps. So we red-circled some areas,  
09:34 21 including the southeast, and I was tasked with looking for  
09:34 22 plants or supplies in that area.

09:34 23 Q. What were BPB's priorities in looking for a  
09:34 24 location?

09:34 25 A. Well, since we were building a new plant, and



09:34 1 didn't have a plant there, we had three primary objectives:  
09:34 2 One was security of supply, the other was quality, and then  
09:34 3 the third, of course, was competitive cost.

09:34 4 Q. What do you mean by "security of supply"?

09:34 5 A. Well, "security of supply" means, if we were going  
09:34 6 to -- we were owned by a parent company in the UK -- we had  
09:34 7 to justify, obviously, any kind of plant construction to  
09:34 8 them, and how to justify that is through the sales of gypsum  
09:34 9 board, and that was -- obviously, we needed gypsum to have  
09:34 10 that. So security of supply meant we could guarantee --

09:34 11 [Reporter clarification.]

09:34 12 A. -- to have that to deliver a return of investment.

09:35 13 Q. If you can try and slow down, Mr. Mayer, that  
09:35 14 would be great.

09:35 15 A. Sure.

09:35 16 So that's what we tried to -- we definitely needed  
09:35 17 to convince our parent company that we had a guaranteed  
09:35 18 amount of gypsum to drive the profits, to pay for a return  
09:35 19 on the investment.

09:35 20 Q. What did you mean by "quality"?

09:35 21 A. Well, quality is FGD systems produced gypsum, but  
09:35 22 not necessarily wallboard-grade gypsum. And so what -- we  
09:35 23 needed to make sure that the utility that we were partnering  
09:35 24 with understood specifically what was required in terms of  
09:36 25 wallboard-grade gypsum.

09:36

1 Q. Who at BPB was part of the process at this time?

09:36

2 A. I was involved in the process; a colleague of  
3 mine, John College. Of course, there was many others, but  
4 they were the primary ones.

09:36

09:36

5 Q. Was Rob Morrow involved in this?

09:36

6 A. Rob Morrow was involved in the background, yes.

09:36

7 Q. How did you come to identify Roxboro,

09:36

8 North Carolina, as a potential location?

09:36

9 A. As I mentioned already, it was trying to fill our  
10 market gap we had. And so we looked for companies in that  
11 area, utilities that we could -- we talked to and had  
12 certain volumes expected of synthetic gypsum.

09:36

09:36

13 Q. How did you initiate contact with Progress Energy?

09:36

14 A. Probably -- I think it was John College that made  
15 the first contact and, you know, there were -- this was a  
16 very busy time for the utility industry. They were just  
17 dealing with the Clean Air Act and producing -- or  
18 installing scrubbers to manage their emissions. And so  
19 there were conferences that were held, and John College  
20 probably sought out Progress Energy at the time and met  
21 Danny Johnson at one of those conferences.

09:36

09:36

09:37

09:37

09:37

09:37

09:37

09:37

22 Q. Once BPB had made contact with Mr. Johnson, how  
23 did you start the relationship with Progress Energy?

09:37

09:37

24 A. Well, I think we followed a prescribed script in a  
25 sense. We talked to them about, you know, just, in a high

09:37

09:37 1 level, what their intent was, what they were looking for; we  
09:37 2 described to them what we were looking for; and then,  
09:37 3 really, just started the process to see if initially there  
09:37 4 was some interest for both parties.

09:37 5 Q. Did you learn anything particular about what  
09:37 6 Progress was looking for?

09:37 7 A. Yeah, I think they were clear. They said they  
09:37 8 were making -- going to make gypsum. They had a limited  
09:37 9 landfill, at least on a current site, and they had some PR  
09:38 10 opportunity, they wanted the beneficial use of the gypsum,  
09:38 11 and they were looking for a partner to work with.

09:38 12 Q. What did you learn about the Roxboro plant?

09:38 13 A. Oh, the Roxboro plant, we already knew a little  
09:38 14 bit because of our research, in terms of how much gypsum it  
09:38 15 would produce. But we also knew, from Andy and others --  
09:38 16 you know, it was a relatively new plant for them. It was a  
09:38 17 large plant; it was base loaded. It had -- you know, it was  
09:38 18 in the right spot.

09:38 19 Q. What does "base loaded" mean?

09:38 20 A. "Base loaded" means it is the first on and the  
09:38 21 last off, at least for the coal-fired plants for them. So  
09:38 22 it really meant for them, you know, a plant that would run  
09:38 23 often, at least from our perspective.

09:38 24 Q. What was the importance of that to BPB?

09:38 25 A. Well, you know, if you -- I -- you know, it was

09:38 1 just -- it made us feel good that -- that helped us convince  
09:38 2 our parent company, that, look, this is a base-loaded plant,  
09:39 3 it will be the first one of their -- for their units to come  
09:39 4 on stream; therefore, a higher probability of making the  
09:39 5 gypsum that we needed.

09:39 6 Q. When did BPB make the decision to move forward to  
09:39 7 negotiate a supply agreement?

09:39 8 A. It probably happened in 2003.

09:39 9 Q. And how long of an agreement was BPB looking to  
09:39 10 enter?

09:39 11 A. Well, we wanted a long-term agreement. We knew  
09:39 12 there was some standards in the industry, 20, 25 years, but  
09:39 13 also had the -- you know, the way we were looking at things,  
09:39 14 wallboard plants are built to run for 40, 50 years, and so  
09:39 15 our idea was, okay, we'll have to probably accept the lower  
09:39 16 term, like 20 years, 25 years, but ultimately our goal was a  
09:39 17 much longer term.

09:39 18 Q. How much gypsum were you looking to have supplied?

09:39 19 A. Well, this is a case of chicken and the egg. The  
09:39 20 utility -- really, it was up to them to tell us what they  
09:40 21 could provide over the life of the term.

09:40 22 The way our plants run gypsum, we run them  
09:40 23 essentially to full out, meaning we run at full capacity all  
09:40 24 the time. That's how you get the economic benefit of the  
09:40 25 size.

09:40 1 So there is -- you do it through business models,  
09:40 2 but the idea is that, you know, if you have a certain amount  
09:40 3 of gypsum, you can get a certain cost and be competitive in  
09:40 4 that marketplace.

09:40 5 So, again, we were waiting for the utility to tell  
09:40 6 us how much they could guarantee over the life of the  
09:40 7 agreement.

09:40 8 Q. How much did Progress tell you they could  
09:40 9 guarantee?

09:40 10 A. It was 600,000 tons per year or 50,000 tons per  
09:40 11 month.

09:40 12 Q. In 2003, did Progress have scrubbers installed?

09:40 13 A. No, they did not.

09:40 14 Q. Had BPB taken steps to start constructing the  
09:40 15 wallboard plant?

09:40 16 A. No, we did not.

09:40 17 Q. Mr. Mayer, why, if there were no scrubbers and no  
09:40 18 plant, did you seek to enter a long-term agreement for  
09:40 19 gypsum before either of those things had happened?

09:41 20 A. Well, again, I think we were building a new plant,  
09:41 21 so in order for us to secure funding for that new plant, we  
09:41 22 had to have -- convince our parent company that we had  
09:41 23 security of supply, so that's what the agreement was  
09:41 24 primarily meant to do.

09:41 25 But also there were, as I mentioned, dynamic

09:41 1 conditions in the marketplace. We were trying to -- other  
09:41 2 gypsum companies were talking to other utilities, and we  
09:41 3 were trying to, you know, secure the supply before anyone  
09:41 4 else could get it.

09:41 5 And I guess, to some extent, Progress Energy was  
09:41 6 pushing for the same thing. They didn't have an outlet, at  
09:41 7 least a beneficial use of material, and they were looking  
09:41 8 for a wallboard company to partner with.

09:41 9 Q. When was the 2004 -- the supply agreement between  
09:41 10 BPB and Progress Energy signed?

09:41 11 A. In February of 2004, yes.

09:41 12 Q. Who was involved in the drafting and negotiation  
09:41 13 of that for BPB?

09:41 14 A. Well, the -- myself, I mentioned John College, and  
09:41 15 of course we had legal. And there were more people  
09:41 16 involved, but those were the primary ones.

09:42 17 Q. Who was involved for Progress Energy?

09:42 18 A. Progress Energy, our main contact was  
09:42 19 Danny Johnson. But again, I suspect that there -- and there  
09:42 20 were others, Gary Tonnemacher from the plant and things like  
09:42 21 that. But he was the face of the company for us.

09:42 22 Q. As we sit here today in 2018, Mr. Mayer, do you  
09:42 23 remember particular conversations or discussions that you  
09:42 24 had related to the 2004 agreement?

09:42 25 A. Well, you know, it's a long time ago. I -- of

0 9 : 4 2 1 course, I understand -- you know, I don't understand or  
0 9 : 4 2 2 recall specific discussions, but, you know, the -- what we  
0 9 : 4 2 3 were trying to do, what was important to us, you know, what  
0 9 : 4 2 4 Progress Energy was looking for, we -- I think we had, you  
0 9 : 4 2 5 know, at least from my recollection, a pretty good idea.

0 9 : 4 2 6 Q. Can you take a look at Exhibit 5 for me.

0 9 : 4 2 7 A. Sure. Where is it?

0 9 : 4 2 8 Q. It should be in the notebook up there.

0 9 : 4 2 9 A. This one?

0 9 : 4 2 10 Q. It's going to be a larger one.

0 9 : 4 3 11 A. This one.

0 9 : 4 3 12 Okay. I have it.

0 9 : 4 3 13 Q. Can you identify this document for us?

0 9 : 4 3 14 A. Yes. It's the 2004 agreement -- final, executed  
0 9 : 4 3 15 agreement.

0 9 : 4 3 16 MS. MARSTON: And, Your Honor, if I may publish to  
0 9 : 4 3 17 the witness stand?

0 9 : 4 3 18 Thank you.

0 9 : 4 3 19 Q. What was the minimum monthly quantity of gypsum to  
0 9 : 4 3 20 be delivered and accepted under the 2004 agreement?

0 9 : 4 3 21 A. Under the 2004 agreement, the minimum monthly  
0 9 : 4 3 22 quantity is 50,000 tons per month.

0 9 : 4 3 23 Q. And where was that set forth in the agreement?

0 9 : 4 4 24 A. I think we turn to Section 3, 3.1 specifically.

0 9 : 4 4 25 Q. And how was Section 3.1 structured?

09:44 1 A. Well, it's a lot of words, but I think it's best  
09:44 2 as described as four distinct sections: There was a  
09:44 3 start-up period, there was a minimum monthly quantity  
09:44 4 section, there was a fluctuations part of it, and then there  
09:44 5 was source of supply.

09:44 6 Q. What was the start-up portion?

09:44 7 A. Well, the start-up portion is at the beginning,  
09:44 8 and it really deals with -- when the wallboard plant is  
09:44 9 being constructed, we -- even though I mentioned we can --  
09:44 10 we want to run it at full capacity, at the beginning you  
09:44 11 can't turn it on and it doesn't go to full capacity, so it  
09:44 12 may take some time to run the plant and get it conditioned  
09:45 13 and started up.

09:45 14 So, in this case, there was a provision for lower  
09:45 15 than minimum monthly quantity of 30,000 tons and -- for  
09:45 16 3 months. And then for the following 3 months, also a  
09:45 17 minimum of 30,000 tons, but with an objective to get to the  
09:45 18 50- -- that monthly quantity in the contract.

09:45 19 Q. What was the minimum monthly quantity for the rest  
09:45 20 of the term after the start-up period?

09:45 21 A. So in the document, it says here, sort of a little  
09:45 22 north of halfway down the page, after the start-up period,  
09:45 23 it defines that's -- it's "Minimum Monthly Quantity."

09:45 24 Q. Right there?

09:45 25 If you can, yeah.



09:45 1 A. Yeah. I can't highlight it, though.

09:45 2 Q. I'll do that.

09:45 3 There's no number provided in this sentence.

09:45 4 What was the minimum monthly quantity?

09:45 5 A. Well, if you look at the words themselves, they're  
09:45 6 capitalized -- and capitalized terms are defined -- and it's  
09:45 7 defined in the definitions.

09:45 8 Q. And what was the definition of "Minimum Monthly  
09:45 9 Quantity"?

09:46 10 A. The specific -- you want me to read it?

09:46 11 Q. Yes, please.

09:46 12 A. So it's 1.23.

09:46 13 "Minimum monthly quantity shall mean  
09:46 14 50,000 net dry tons of gypsum filter cake to be  
09:46 15 delivered on a monthly basis in accordance with  
09:46 16 Section 3.1."

09:46 17 Q. You mentioned a "Minor Fluctuations" provision.  
09:46 18 Where is that in Section 3.1?

09:46 19 A. So this is more than halfway down the page on  
09:46 20 page 7, where it starts with "In order to accommodate minor  
09:46 21 fluctuations."

09:46 22 Q. Okay. And what is -- how does this portion work?

09:46 23 A. Well, I think it's another term like the start-up,  
09:46 24 a practical term. You know, it's difficult to imagine that  
09:46 25 Progress Energy would supply us exactly 50,000 tons in a

09:46 1 month and we would accept 50,000 tons.

09:46 2 So this was a way to work, you know, in a  
09:46 3 practical way, to say, "Look, you won't be in default if  
09:47 4 you're at 49-," or, actually, in this case, it's 10 percent  
09:47 5 above or below the monthly minimum quantity.

09:47 6 Q. There's a reference here to "gypsum filter cake to  
09:47 7 be delivered."

09:47 8 What is that a reference to?

09:47 9 A. Well, it's a reference to both periods: the  
09:47 10 start-up period of 6 months and 30,000 tons; and also the  
09:47 11 remainder of the contract, the 6 months plus the 19 years,  
09:47 12 for 50,000 tons per month.

09:47 13 Q. What are the acceptable variations under  
09:47 14 Section 3.1 of the 2004 agreement?

09:47 15 A. Well, there are two parts to it. You have to --  
09:47 16 you have to meet both. One is, I mentioned already, the  
09:47 17 10 percent plus or minus, so 5,000 tons less or 5,000 tons  
09:47 18 more.

09:47 19 But there's also -- it says here:

09:47 20 "And shall be deemed satisfied, provided that  
09:47 21 the fluctuations up or down do not exceed  
09:47 22 10 percent and provided that the average monthly  
09:47 23 quantity of gypsum filter cake delivered and  
09:48 24 accepted on this agreement, or any 12-month period  
09:48 25 after the start-up period, shall be approximately

09:48 1 50,000 dry tons."

09:48 2 It's a mouthful, but essentially what it's trying  
09:48 3 to say is that you can't short us. You have 50,000 tons per  
09:48 4 month minimum, you can move up and down, but on the average,  
09:48 5 the monthly average per month has to equate to 600,000 tons  
09:48 6 for the annual acceptance and production.

09:48 7 Q. What is this reference here to "after the start-up  
09:48 8 period"?

09:48 9 A. In green?

09:48 10 Okay. So after the start-up period, it's because,  
09:48 11 when you do the math, if you -- if you're looking at the  
09:48 12 initial period of 30,000 tons, the math doesn't work out on  
09:48 13 average. So if you had 30,000 tons, you wouldn't reach the  
09:48 14 50,000-ton minimum quantity -- average minimum quantity.

09:48 15 Q. How did the parties decide on a  
09:48 16 50,000-ton-per-month minimum monthly quantity for this  
09:48 17 agreement?

09:48 18 MR. TUCKER: Objection to the extent it calls for  
09:48 19 speculation as to how Progress Energy decided on it.

09:49 20 THE COURT: I think you can ask him about any  
09:49 21 negotiations that led to that term.

09:49 22 MS. MARSTON: I'll clarify the question.

09:49 23 Q. Did you have any discussions about what to set the  
09:49 24 minimum monthly quantity at?

09:49 25 A. Again, I mentioned that we were looking for some

09:49 1 volume, but that volume was going to come from  
09:49 2 Progress Energy. They spoke to it mostly in terms of annual  
09:49 3 tonnage, and they had shown us at the time they were making  
09:49 4 600-, but -- much more, actually -- but, again, it was up to  
09:49 5 them to decide what they were going to -- or willing to  
09:49 6 provide to us on -- over the life of the agreement.

09:49 7 And so, really, 600- is just the -- what we were  
09:49 8 talking about. The 50,000 tons was really the practical  
09:49 9 term on what are we going to deliver on a monthly basis.

09:49 10 Q. Do you recall, Mr. Mayer, any discussions about  
09:49 11 where the gypsum to be supplied was going to come from?

09:50 12 A. Well, I mean, again, we identified Roxboro, so we  
09:50 13 expected it to come from Roxboro, but we quickly learned  
09:50 14 Mayo was also included, another plant several miles down the  
09:50 15 road.

09:50 16 But we also knew that in the -- in the agreement,  
09:50 17 I think Progress reserved the right to get material from any  
09:50 18 other source to satisfy their obligations.

09:50 19 And in the remedies section, it talks about  
09:50 20 alternate sources, so I assume it's -- well, it has to be  
09:50 21 from somewhere else.

09:50 22 Q. Did you have any understanding that those plants  
09:50 23 were meant to be the exclusive source of gypsum under this  
09:50 24 agreement?

09:50 25 A. No. As I mentioned, it's -- you know, there

09:50 1 were -- Progress Energy was obligated to supply us the  
09:50 2 gypsum.

09:50 3 [Reporter clarification.]

09:50 4 A. Where it came from it was -- okay, it was  
09:50 5 important, but in the context of the agreement not relevant.

09:50 6 Q. Do you recall any discussions about the definition  
09:51 7 of "gypsum filter cake" under the 2004 agreement?

09:51 8 A. Not particularly, no.

09:51 9 Q. To your knowledge, were the definitions of gypsum  
09:51 10 filter cake and FGD system under the 2004 agreement intended  
09:51 11 to limit the sources of gypsum that Progress could be  
09:51 12 obligated to deliver from?

09:51 13 MR. TUCKER: Well, again, objection to the extent  
09:51 14 it's asking about Progress Energy's --

09:51 15 THE COURT: I think the question was did he have  
09:51 16 an understanding.

09:51 17 MR. TUCKER: I thought she asked it more  
09:51 18 generally, but...

09:51 19 Q. Did you have an understanding that those  
09:51 20 definitions were meant to limit the source of gypsum?

09:51 21 A. No.

09:51 22 Q. What are some other names in the industry,  
09:51 23 Mr. Mayer, that are used to describe synthetic gypsum?

09:51 24 A. Yeah, it's a -- was a source of contention early  
09:51 25 on. The people were using many different terms: FGD

09:51 1 gypsum, DSG, desulfur gypsum --

09:52 2 [Reporter clarification.]

09:52 3 A. -- desulfur gypsum, DSG, FGD gypsum, gypsum filter  
09:52 4 cake.

09:52 5 Q. Is "gypsum filter cake" a term that you came up  
09:52 6 with specifically for this agreement?

09:52 7 A. No, I mentioned it's a generic term. And, I mean,  
09:52 8 it's a more technical term that describes a point in the  
09:52 9 process.

09:52 10 Q. Mr. Mayer, were you involved in negotiating the  
09:52 11 remedies provision under the 2004 agreement?

09:52 12 A. Yes, I was.

09:52 13 Q. What do you recall generally about how the parties  
09:52 14 intended to structure that?

09:52 15 A. Well, I think the parties were trying to make sure  
09:52 16 that the -- you know, that there was remedies to  
09:52 17 undersupply.

09:52 18 So in the case of, you know -- and, well, just  
09:53 19 undersupply.

09:53 20 And I think the other thing is, they were  
09:53 21 constantly trying to provide each other control and, in a  
09:53 22 sense, wholeness to the other parties, but not defaulting  
09:53 23 party.

09:53 24 In other words, if you're going to decide to do  
09:53 25 something, let's make sure that the non-defaulting party is

09:53 1 kept whole in terms of the agreement.

09:53 2 Q. If you'll turn to the remedies section, which is  
09:53 3 Article 6, that starts on page 8 of Exhibit 5.

09:53 4 A. All right.

09:53 5 Q. What were the remedies under 6.2, 6.3, 6.4, and  
09:53 6 6.5 meant to address?

09:54 7 THE COURT: Can you stop just a moment?

09:54 8 MS. MARSTON: Yes, Your Honor.

09:54 9 THE COURT: You're talking about Exhibit 5?

09:54 10 THE WITNESS: It's the wrong number.

09:54 11 MS. MARSTON: Did I give you the wrong page  
09:54 12 number?

09:54 13 THE WITNESS: Yeah.

09:54 14 MS. MARSTON: I apologize. I'm looking at a  
09:54 15 different exhibit.

09:54 16 THE WITNESS: Yeah.

09:54 17 MR. PHILLIPS: I think it's page 11.

09:54 18 THE WITNESS: Yeah. It's page -- starts at page  
09:54 19 10 -- 11. Sorry.

09:54 20 MS. MARSTON: It is page 11. I apologize,  
09:54 21 Your Honor.

09:54 22 THE COURT: I just wanted to make sure I had the  
09:54 23 right agreement. And then the one you had on the screen had  
09:54 24 the article definition at the top of the screen so -- okay.  
09:54 25 Got it.

09:54

1

MS. MARSTON: This is the correct --

09:54

2

THE COURT: Correct. There we go.

09:54

3

MS. MARSTON: -- version.

09:54

4

Q. Let me ask the question again, Mr. Mayer.

09:54

5

In the final version, which is Exhibit 5, that

09:54

6

starts on page 11, what were the remedies under 6.2, 6.3,

09:54

7

6.4, and 6.5 meant to address?

09:54

8

A. Okay. And, again, first of all, there are

09:54

9

undersupply conditions. They're meant to address, in the

09:55

10

one sense, a short-term variation or under- --

09:55

11

[Reporter clarification.]

09:55

12

A. -- short-term situations --

09:55

13

THE COURT: I think perhaps what ends up happening

09:55

14

is you get a little bit close to the mic and it blurs out on

09:55

15

her. It's not only just speed; I think you're also blurring

09:55

16

just a little bit, so if you'll just back away from the mic

09:55

17

just a little bit.

09:55

18

MR. PHILLIPS: Or move the mic back a little bit.

09:55

19

THE COURT: Any way you want to...

09:55

20

THE REPORTER: Thank you.

09:55

21

THE COURT: Or pull it up in the air.

09:55

22

THE WITNESS: There.

09:55

23

THE COURT: That's better.

09:55

24

A. Okay. So now I'm -- okay.

09:55

25

Could you repeat the question, please?



09:55 1 Q. Section 6.2, -3, -4, and -5 --

09:55 2 A. Yeah.

09:55 3 Q. -- what were those meant to address?

09:55 4 A. So all of them were undersupply conditions. The  
09:55 5 idea here was that you could have an undersupply condition  
09:56 6 that was short term, something like a power outage from an  
09:56 7 equipment failure of a gypsum plant, something going down,  
09:56 8 and provided for a makeup of the minimum monthly quantity on  
09:56 9 a monthly basis. So it obligated either party to deliver  
09:56 10 what they said they were obligated to do in Section 3.1.

09:56 11 But there was other provisions. If there was an  
09:56 12 extended outage, there was less than 50 percent, for  
09:56 13 example, and for a long period of time, I think 2 years, we  
09:56 14 would then recognize that was a severe condition.

09:56 15 I mentioned already, our plants get their economic  
09:56 16 benefit by running at full capacity. So at 50 percent  
09:56 17 capacity, you're now affecting that severely. And we wanted  
09:56 18 to reserve the right to do something different. And that  
09:56 19 was meant to deal with either termination, but also to  
09:56 20 provide us some time to fix what was -- what was -- what we  
09:57 21 were now being faced with.

09:57 22 Q. Can you turn to Exhibit 90 and identify that for  
09:57 23 us.

09:57 24 A. Okay. This is a -- looks like a -- quite an early  
09:57 25 version, maybe the first one, of the agreement that was

09:57 1 drafted by us, sent by John College, a BPB employee, to  
09:58 2 Danny Johnson of Progress Energy.

09:58 3 Q. If you turn to page 8 in this Exhibit 90, where  
09:58 4 the remedies section is, why did you only include remedies  
09:58 5 for BPB?

09:58 6 A. Well, again, I think we know what we wanted, so it  
09:58 7 was -- it was our attempt to describe to Progress Energy  
09:58 8 what it was -- was critical to us in terms of the remedy  
09:58 9 language.

09:58 10 We very well knew that they probably would come  
09:58 11 back with their own requirements. But I think in here you  
09:58 12 look for what we're looking for, plus some timing.

09:58 13 Q. In here it says -- in 6.1(b), it lists out some of  
09:58 14 the conditions, and then it says:

09:59 15 "Progress Energy shall provide to BPB with  
09:59 16 2 years' advance written notice prior to taking  
09:59 17 such action" --

09:59 18 A. Yes.

09:59 19 Q. -- "shall pay to BPB as liquidated damages."

09:59 20 What was the purpose of that 2-year-notice  
09:59 21 provision?

09:59 22 A. Well, again, it goes to our business -- a question  
09:59 23 of our business. We were building a wallboard plant to  
09:59 24 satisfy a gap in our footprint in North America. And the  
09:59 25 idea here was now we built a plant, we wanted to continue

09:59 1 running that plant, we had built relationships with our  
09:59 2 customers, had a business that we developed.

09:59 3 You know, without supply of gypsum from the  
09:59 4 Roxboro plant, we probably -- we could not supply  
09:59 5 economic-price wallboard to that -- in that region.

09:59 6 So the 2 years was really -- if, in this case, the  
09:59 7 defaulting party was Progress Energy deciding not to or  
09:59 8 discontinue supplying, it really gave us time to think about  
09:59 9 it, to do -- to find a remedy of how to actually service the  
10:00 10 market.

10:00 11 But again, it's the -- this is all about the  
10:00 12 what-ifs. And it really depends on many things in terms of  
10:00 13 where it -- when it happens, is it the first year of the  
10:00 14 contract or the last year.

10:00 15 It's this whole idea that we wanted control of our  
10:00 16 own fate. So if Progress Energy decided to discontinue  
10:00 17 supply, well, we then needed to -- at least to the best of  
10:00 18 our ability, have the ability to decide how to go forward  
10:00 19 for ourselves.

10:00 20 Q. There's also a provision in here, in Section 6.2,  
10:00 21 called "Sole and Exclusive."

10:00 22 What was the purpose of that section in this  
10:00 23 draft?

10:00 24 A. Well, I think it's a common term in the agreements  
10:00 25 that I've looked at. It really is there to limit what can

1 do to remedy the defaulting party, as outlined in Section 6.

2 Q. Mr. Mayer, if you'll turn to Exhibit 91 and  
3 identify that for us, please.

4 A. Sure. This is another back-and-forth -- in this  
5 case, May 27th -- so a couple of weeks later than the last  
6 one. It's also a version from John College from BPB to  
7 Danny Johnson of Progress Energy.

8 Q. If you'll turn to page 7 of the -- which is the  
9 remedies section again.

10 What changes did you make to the remedies  
11 section here?

12 A. Let me get to it first.

13 I think what you can see here is an underlined  
14 version, and we added this language. It's really the  
15 reciprocal. So in the case of Progress -- remedies for  
16 Progress Energy, we didn't change anything in our comments,  
17 but we added this underlined material on page 7, in response  
18 to conversations with Progress Energy.

19 Q. Why was the remedy for discontinuing the wallboard  
20 plant the right -- for Progress, Progress's remedy -- the  
21 right to purchase the plant from BPB?

22 A. Why? Well, I don't know why. I mean, it's -- but  
23 we thought it was an odd thing to include. We didn't  
24 understand -- at least initially we thought, well, you know,  
25 I don't see Progress Energy getting into the wallboard

10:02 1 business.

10:02 2 But, you know, when we thought about it a little  
10:02 3 bit more, I think we realized it just emphasized the -- in  
10:02 4 the reciprocal case, it emphasized how important it was for  
10:02 5 Progress Energy to have a beneficial outlet for their gypsum  
10:02 6 supply.

10:02 7 So it really -- to us, that's how we -- that's how  
10:02 8 we sort of rationalized it in our head. We didn't ever  
10:03 9 think they would -- we would hand the plant over to  
10:03 10 Progress Energy.

10:03 11 Q. Did Progress Energy ask for that remedy?

10:03 12 A. Yes, they did.

10:03 13 Q. If you'll look at Exhibit 92.

10:03 14 A. Yes.

10:03 15 Q. What is this document?

10:03 16 A. So as it reads here on the email, it's another  
10:03 17 version, I believe, of the agreement, now on July 24th, from  
10:03 18 Danny Johnson of Progress Energy to John College of BPB.

10:03 19 Q. You're not on this email, Mr. Mayer.

10:03 20 Did you ever see this draft?

10:03 21 A. I'm quite certain I would have seen the draft. I  
10:03 22 mean, John was sharing everything with me during this  
10:03 23 process.

10:03 24 Q. In Section 6.5 of this draft, Progress put a  
10:03 25 number in their liquidated damages.

1 A. Yes, I see that.

2 Q. To preserve confidentiality, I won't ask you the  
3 specific number out loud, but do you know where that number  
4 came from?

5 A. No. No.

6 Q. If you'll turn to Section 10.3 of this draft in  
7 Exhibit 92 --

8 A. Yes, I see it.

9 Q. -- was this added by Progress?

10 A. Well, I mentioned already it was a draft from  
11 Danny Johnson, so I think in the way these -- the  
12 underlining works, the author of the draft represents the  
13 underlined materials. So, yes, I would say that came from  
14 Danny Johnson.

15 Q. Do you recall any discussion about this provision?

16 A. Not particularly.

17 Q. We looked earlier at a "Sole and Exclusive" clause  
18 that was in Article 6.

19 Is that still in Article 6 of this draft in  
20 Exhibit 92?

21 MR. TUCKER: Objection, Your Honor. I don't  
22 believe we did look at that. If we did, then I --

23 MS. MARSTON: We looked --

24 THE COURT: She made quick reference to it.

25 MR. TUCKER: Okay. Thank you.

10:05 1 A. As I -- as I --

10:05 2 THE COURT: I think the testimony was it was there  
10:05 3 to limit the remedies to those provided in Article 6.

10:05 4 A. Okay. Yes, I see it on page 11 of this version.

10:05 5 Q. Did you understand there to be any difference  
10:05 6 between what is in draft of Exhibit 92 between what's in  
10:06 7 6.6 and what is here in 10.3?

10:06 8 A. No, I don't -- I didn't see a difference.

10:06 9 Q. Can you turn to Exhibit 93, Mr. Mayer?

10:06 10 A. I would just like to add, actually, in -- these  
10:06 11 were -- I mean, sole and exclusivity, I mean, I understood  
10:06 12 the concept, but the specific wording was going to come from  
10:06 13 the lawyers.

10:06 14 So, I mean, I would have been aware, but, you  
10:06 15 know, what the words specifically chosen and -- I wouldn't  
10:06 16 have seen reason to have it in both spots. I don't think  
10:06 17 that should survive in both spots.

10:06 18 So, sorry, again, which one?

10:06 19 Q. Exhibit 93, please.

10:06 20 THE COURT: In another book.

10:06 21 THE WITNESS: Yeah. I guess we didn't get a big  
10:06 22 enough binder.

10:06 23 MS. MARSTON: I don't think they make them that  
10:06 24 large.

10:07 25 A. Okay. I'm here.

10:07 1 Q. Can you identify Exhibit 93, please.

10:07 2 A. Yes. So this is dated August 22nd, 2003. It was  
10:07 3 now another version, a back-and-forth version, from, in this  
10:07 4 case, our lawyer, Mark Lontchar, to Danny Johnson of  
10:07 5 Progress Energy.

10:07 6 Q. And Mr. Lontchar mentions conversations in Raleigh  
10:07 7 on August 15th.

10:07 8 Do you recall anything about those conversations?

10:07 9 A. As I mentioned already, it was a long time ago.  
10:07 10 And, no, I don't recall any of those conversations.

10:07 11 Are you okay?

10:07 12 THE COURT: I'm fine.

10:07 13 MS. MARSTON: Are the exhibits okay?

10:08 14 THE COURT: It was a different notebook.

10:08 15 MS. MARSTON: Excellent.

10:08 16 Q. In this email, Mr. Lontchar also mentions  
10:08 17 discussing the real estate agreement.

10:08 18 Do you know what he's referring to there?

10:08 19 A. Yeah, we were purchasing land from Progress Energy  
10:08 20 to build a wallboard plant.

10:08 21 Q. If you'll look at the remedies section again, and  
10:08 22 specifically on page 11.

10:08 23 A. Yes.

10:08 24 Q. There is a number put into Section 6.3. Again,  
10:08 25 for confidentiality reasons, I'd ask we not say it out loud,



10:08 1 but do you know where this number came from?

10:08 2 A. No, I don't. Not specifically.

10:08 3 Q. Was it tied to the amount BPB expected to spend on  
10:08 4 its plant?

10:09 5 A. No. That -- the math doesn't work out properly  
10:09 6 for that.

10:09 7 Q. Looking at Section 6.3, Mr. Mayer, what was the  
10:09 8 purpose of adding this language that BPB may terminate this  
10:09 9 agreement?

10:09 10 A. Well, again, I think you have to go back to -- I  
10:09 11 think it used to say "shall." It's "BPB shall terminate."  
10:09 12 And, you know, again, this speaks to having control as to  
10:09 13 what would happen, and depending on the specific situation.

10:09 14 So this language was added to provide flexibility  
10:09 15 or options for us. So we necessarily didn't want to  
10:09 16 terminate. We wanted -- we -- as I said, we had a business,  
10:09 17 we built a plant. We may want to continue running the plant  
10:09 18 and seek gypsum from Progress Energy instead of terminating.

10:10 19 Q. Did you have any discussions with Progress about  
10:10 20 the inclusion of this "may terminate" language?

10:10 21 A. We had lots of discussions, likely internally, to  
10:10 22 make sure we understood what that meant. But from -- we  
10:10 23 never discussed it with Progress Energy specifically.

10:10 24 Q. Did Progress accept the addition of the "may  
10:10 25 terminate" language in the final version of the

1 2004 agreement?

2 A. Yeah. Yes, they did. And it's also in their  
3 6. -- 6.5, under "Acceptance by BPB."

4 Q. Mr. Mayer, can I ask you to identify for us what  
5 Exhibit --

6 THE COURT: Can I ask you a clarification? I --  
7 because I'm not sure I heard.

8 Did he say there had been an earlier provision  
9 that said "shall terminate"?

10 MS. MARSTON: I believe he --

11 THE WITNESS: Correct.

12 MS. MARSTON: -- said there was "shall" language  
13 in there.

14 THE COURT: In what? What was that reference to?

15 THE WITNESS: An earlier version.

16 Q. Well, Mr. Mayer, you can actually see it here.  
17 Tell me if this is correct, based on your understanding of  
18 the redlining, that it had said that if these conditions  
19 occur, then Progress Energy shall pay to BPB as liquidated  
20 damages?

21 A. I -- I'm not seeing -- where are you?

22 Q. We're right on the screen in 6.3, which is --

23 A. Yes.

24 Q. -- Exhibit 93.

25 And you can see where BPB added the "may terminate

1 this agreement" language.

2 Before that, the version before that would have  
3 been based on this redline, that if these -- where it says:

4 "or less gypsum filter cake in 2 consecutive  
5 contract years, Progress Energy shall pay to BPB  
6 as liquidated damages upon written request."

7 Is that what the earlier versions would have said?

8 A. Yes.

9 Q. Let's go back to Exhibit 92 and confirm that.

10 A. Oh, the other book.

11 Q. I apologize.

12 THE COURT: Let me make sure you understood,  
13 Ms. Marston, what my question was. I had picked up that  
14 6.3, in the earlier draft, said "shall pay liquidated  
15 damages."

16 I was trying to clarify whether you said there had  
17 been language that said "shall terminate" that was changed  
18 to "may terminate."

19 MS. MARSTON: I see.

20 THE COURT: That's what I could not -- I thought  
21 that he had said the language had been "shall terminate" and  
22 was changed to "may terminate." And if so, I wanted you to  
23 point that out to me.

24 Q. Mr. Mayer, are you aware of any drafts that said  
25 "shall terminate"?

10:13 1 A. I mean, I'd have to look through them in detail to  
10:13 2 find those exact words. But, I mean, it was a -- in a  
10:13 3 sense, you know, no choice. I mean, if you didn't -- if you  
10:13 4 had a long-term undersupply, we would have to term- --  
10:13 5 "shall" means have to terminate, and we didn't want --  
10:13 6 necessarily want to do that. We may, but we didn't  
10:13 7 necessarily want to do that.

10:13 8 Q. Let's turn to Exhibit 94.

10:13 9 Can you tell us what this document is?

10:14 10 A. Sure. This is now a September 22nd version of the  
10:14 11 back-and-forth, but this is a version that -- Mark Lontchar  
10:14 12 of BPB to Danny Johnson of Progress Energy.

10:14 13 Q. Let's turn to Exhibit 95.

10:14 14 A. Okay. I'm there.

10:14 15 Q. Can you tell us what this document is?

10:14 16 A. So this is a version now from Danny Johnson of  
10:14 17 Progress Energy to John College, myself, and Mark Lontchar  
10:14 18 of BPB.

10:14 19 Q. And Exhibit 96, please.

10:14 20 What is that document?

10:15 21 A. This is a December version of the agreement from  
10:15 22 Danny Johnson to myself, Mark Lontchar, and John College of  
10:15 23 BPB.

10:15 24 Q. And then finally we get to Exhibit 97.

10:15 25 If you can tell us what that is, please?

1 A. Sure.

2 Q. And this is 97-Rayburn, that was marked in the  
3 Rayburn deposition.

4 A. So this is another version. In this case -- and  
5 it's the final version, February of 2004, from Mark Lontchar  
6 of BPB to Danny Johnson of Progress Energy.

7 MS. MARSTON: And just to point out for the record  
8 and Your Honor, there are two Exhibit 97s that were marked  
9 in deposition, so this has been titled 97-Rayburn for  
10 clarification purposes.

11 THE COURT: Okay. Thank you.

12 Q. If you look to the remedies section here,  
13 Mr. Mayer --

14 A. Sorry. Which version are we talking about?

15 Q. We are looking at 97-Rayburn. It starts on  
16 page 11.

17 A. All right.

18 Q. Specifically, turning one more page to Section 6.3  
19 of this version, what changes did you make to the Remedies  
20 here?

21 A. I think -- let me -- just want to clarify, read it  
22 here.

23 So looking at the underlined language, you know,  
24 it's starting with, "BPB may terminate this agreement." We  
25 added, "and if the agreement is terminated pursuant to this

10:16 1 section." So we added that change to this remedy.

10:17 2 Q. Did you agree to give Progress a similar option?

10:17 3 A. I believe so. Let me check that.

10:17 4 MR. TUCKER: Just objection to the form of that.  
10:17 5 I'm not sure I understand what she's asking.

10:17 6 Q. What language did you add to Section 6.5,  
10:17 7 Mr. Mayer?

10:17 8 A. We added the exact same words in Section 6.5,  
10:17 9 which is "discontinued acceptance by BPB."

10:17 10 Q. And the same words are?

10:17 11 A. The same words are "may terminate this agreement"  
10:17 12 and "if this agreement is terminated pursuant to this  
10:17 13 section."

10:17 14 Q. What was your understanding if the agreement was  
10:17 15 not terminated pursuant to Section 6.3 or 6.5 by one of the  
10:17 16 parties?

10:17 17 A. Well, I think -- I mean -- and again, it's -- the  
10:17 18 whole purpose of the agreement was security of supply,  
10:17 19 quality, and cost.

10:17 20 So if we didn't terminate, we were left with the  
10:18 21 option of securing, on a monthly basis, shortfalls of the  
10:18 22 minimum quantity from Progress Energy or seeking out our own  
10:18 23 sources and getting Progress Energy to pay the difference in  
10:18 24 cost between the current price and the procured price, plus  
10:18 25 a handling fee of a dollar.

10:18 1 Q. Did you believe you had any other options?

10:18 2 A. No. It's -- I mean, that's the "sole and  
10:18 3 exclusive" wording in here, in the agreement.

10:18 4 Q. Did you discuss the remedies provision with  
10:18 5 Mr. Morrow?

10:18 6 A. I -- look, again, I probably did discuss it with  
10:18 7 Rob, I mean, in his role, but I don't remember specifically  
10:18 8 talking about it.

10:18 9 Q. What was Rob's role in the company at that time?

10:18 10 A. So Rob was the vice president of supply chain, so  
10:18 11 his responsibility was to procure raw materials and also the  
10:19 12 distribution of wallboard.

10:19 13 But he also had another role and, I guess another  
10:19 14 role from my perspective, which was to, you know, really  
10:19 15 review documents such as this to make sure that they made  
10:19 16 sense, there weren't any logic breaks, so it really said  
10:19 17 what we said we wanted to do.

10:19 18 Q. Before you signed this agreement in 2004, did you  
10:19 19 read it carefully?

10:19 20 A. Yes, I did.

10:19 21 Q. Did you read every provision?

10:19 22 A. Yes, I did.

10:19 23 Q. If we look at -- go back to Exhibit 5. I think  
10:19 24 I'm going to make you change notebooks again.

10:19 25 A. Uh-huh. Okay.

1 Okay. I'm here.

2 Q. So, Mr. Mayer, under the final version of the  
3 2004 agreement in Exhibit 5, what was your understanding of  
4 CertainTeed's remedy if Progress failed to supply the  
5 minimum monthly quantity?

6 A. Well, there's -- first of all, there's a start-up  
7 period.

8 So in the first case, if Progress Energy failed to  
9 supply during the start-up period and after the start-up  
10 period, we could ask Progress Energy to supply us alternate  
11 materials to meet up the minimum quantity shortfall as  
12 described in -- or as talked about in Section 3.1.

13 These were really meant to be, as I said,  
14 short-term variations, things that happened that, you know,  
15 we couldn't predict through the life of the agreement, but  
16 one of the big provisions that there was no change in  
17 business position. What I mean by that is, if they wanted  
18 to continue to supply, we wanted to continue to accept.

19 The -- there is other provisions where it was more  
20 severe. If we had a case where you were dropping to very  
21 low levels or continued to short us materials, we would then  
22 have to think about what was going on, had to think about  
23 what Progress Energy was up to, and start thinking for  
24 ourself about, well, what could we do to make up these  
25 differences.



1 As I said, we were running our gypsum plants full  
2 out. That was the intent. And if we weren't getting the  
3 supply, we had to get it from somewhere. And remedies  
4 provide us with doing that.

5 But to the extent that we had options, we could  
6 also terminate and seek liquidated damages if that made  
7 sense for us.

8 Q. Could you terminate the agreement if Progress  
9 failed to deliver the minimum monthly quantity for just a  
10 few months?

11 A. No, that wasn't possible. I mean, they could make  
12 up the difference. It needed to be an extended outage and  
13 severe outage.

14 Q. So, Mr. Mayer, did Sections 6.2 and 6.3, looking  
15 at BPB's remedies, did those deal with different kinds of  
16 supply problems?

17 A. They both dealt with undersupply but under  
18 different circumstances.

19 Q. Was there a limit to how long or often you could  
20 invoke the remedies under 6.2 for undersupply?

21 MR. TUCKER: Well, objection. Calls for a legal  
22 conclusion. It's not framed in terms of an understanding.

23 THE COURT: Did he have any understanding?

24 Q. Did you have any understanding that you were  
25 limited in how long or how often you could invoke the remedy

10:28 1 under 6.2?

10:28 2 A. In the way I read it, it doesn't limit us at all.

10:28 3 THE COURT: I think the question, sir, is, at the  
10:28 4 time you entered the contract, did you have an  
10:28 5 understanding?

10:28 6 Q. You may answer that question.

10:28 7 A. No. Again, it's the security of supply. We  
10:28 8 needed gypsum, and this was really the only mechanism for us  
10:28 9 to obtain it and -- as described in the agreement.

10:28 10 Q. Mr. Mayer, what did you think CertainTeed's  
10:28 11 options would be if Progress stopped supplying gypsum under  
10:28 12 this agreement?

10:28 13 A. Well, again, I think our option was, as described  
10:28 14 in the "Discontinued Supply by Progress Energy," it was the  
10:28 15 option of termination with liquidated damages or -- because  
10:24 16 the language says "may terminate," so the idea would be,  
10:24 17 well, if we're not going to terminate, what does that leave  
10:24 18 us to do?

10:24 19 And to us, the understanding was to invoke  
10:24 20 "Undersupply" in 6.2, which would let us the ability to ask  
10:24 21 Progress Energy to deliver material, alternate material to  
10:24 22 us; or for us to procure and, again, get them to pay the  
10:24 23 difference and the dollar handling fee.

10:24 24 Q. Where does it say in Section 6.3 that you can  
10:24 25 exercise the 6.2 remedy?

1 A. Well, again, it's -- my interpretation of the word  
2 and my understanding or recollection of the concept was we  
3 needed to have the ability to decide if we wanted to  
4 continue or not. And if we wanted to continue, we had the  
5 mechanism "sole and exclusive remedy" was in Section 6.2.

6 The words "may terminate" suggests there must be  
7 something else.

8 Q. Did you have an understanding that -- whether  
9 Progress had the same option if CertainTeed stopped  
10 accepting gypsum?

11 A. Yes, they have "may terminate" in their words as  
12 well.

13 Q. Mr. Mayer, did you in 2004 believe that  
14 Section 6.2 dealt only with short-term undersupply issues?

15 A. Well, no. 6.2 dealt with undersupply. It says  
16 "undersupply."

17 Q. Did you believe in 2004 that Section 6.3 dealt  
18 only with long-term supply issues?

19 A. It -- well, it dealt with severe undersupply,  
20 which would mean long term. So in a sense, yes. But there  
21 were provisions, of course, in there to deal with -- again,  
22 options for us to deal with it in the way we chose.

23 Q. If you'll turn to Article 12 of the  
24 2004 agreement.

25 A. Yes, "Force Majeure."

1 Q. Were you involved in discussions about this  
2 provision of the contract?

3 A. As I mentioned, I was involved in all of it. So,  
4 yes, I would be -- would have been, yes.

5 Q. Do you -- what's your understanding of "force  
6 majeure"?

7 A. Well, again, "force majeure" is a term used in  
8 many, many agreements -- most agreements, if not all -- that  
9 deal with the -- something -- an event uncontrolled by  
10 either party that prevents them from fulfilling their  
11 obligations.

12 Q. Did you have that understanding in 2004 when you  
13 were negotiating this agreement?

14 A. Yes. I didn't mention it, but prior to working on  
15 this agreement I worked on other supply contracts.

16 Q. Was this section a focus of yours during the  
17 negotiations?

18 A. No, this -- I mean, again, this is a legal term.  
19 I understood the concept; I knew it was in there. But that  
20 was left to the prospective lawyers to hash out.

21 Q. The last paragraph here of Article 12, do you  
22 recall any discussions about that?

23 A. I'm not sure it was much of a discussion. There  
24 was an awareness of it, yes.

25 Q. What was your understanding of the meaning of this

10:27 1 paragraph?

10:27 2 A. Well, it -- we didn't really understand why it was  
10:27 3 in here. We were told that if -- it had to be in the  
10:27 4 agreement, it was a requirement for Progress Energy before  
10:28 5 they would sign the agreement.

10:28 6 But, you know, from our perspective -- you know,  
10:28 7 again, it was reviewed by Rob, it was reviewed by our parent  
10:28 8 company in the UK at the time, and, you know, we didn't feel  
10:28 9 it really had any meaning to our ability to secure supply  
10:28 10 for gypsum.

10:28 11 Q. Did BPB agree to the inclusion of this language?

10:28 12 A. Yeah. As I mentioned, it wouldn't have been  
10:28 13 signed without it in there.

10:28 14 Q. In 2004, did you have any understanding that  
10:28 15 Article 12 could potentially excuse Progress's performance  
10:28 16 of the agreement?

10:28 17 A. Well, as -- Article 12 is force majeure. So, as I  
10:28 18 mentioned, there could be events, things that could happen  
10:28 19 out of their control which would prevent them from being  
10:28 20 able to supply us.

10:28 21 Q. Did you think that it could excuse Progress Energy  
10:28 22 if they stopped producing DSG but still had the ability to  
10:29 23 deliver it from somewhere else?

10:29 24 MR. TUCKER: Objection. Leading.

10:29 25 THE COURT: Well, it is a leading question, but I

1 think the witness knows what it is, so I'll allow that.

2 A. So -- I mean, no. I mean, this is a supply  
3 contract. And if, in this case, Progress Energy decided to  
4 do something that would prevent them from supplying from any  
5 one particular source, that's up to them.

6 I mean, we had gone into this arrangement with a  
7 very clear need to get security of supply. So, in our  
8 understanding, it did not prevent them from supplying us  
9 gypsum from any other source.

10 Q. So, Mr. Mayer, to recap your understanding of the  
11 2004 agreement, what was the parties' intent with respect to  
12 the obligations for the sale of gypsum?

13 MR. TUCKER: Objection. Overbroad. Ambiguous. I  
14 don't know what she's asking.

15 MS. MARSTON: Well --

16 THE COURT: Is your question for him to summarize  
17 the essential nature of the contract as regards to supply?

18 MS. MARSTON: Yes, Your Honor.

19 THE COURT: Go ahead, sir.

20 A. Okay. To summarize, the purpose of the agreement  
21 was to require both the reciprocal arrangement where  
22 Progress Energy would supply, BPB would accept gypsum. That  
23 meant the quality specifications. The amount would be  
24 50,000 tons per month, minimum monthly quantity, with some  
25 fluctuations, 10 percent above, 10 percent below. But in

1 aggregate over the year we would receive a minimum of  
2 600,000 tons.

3 Q. Where did the -- where did you understand the  
4 parties would supply gypsum from, under the 2004 agreement?

5 MR. TUCKER: Objection. Asked and answered.

6 THE COURT: You may answer.

7 A. We -- we thought it would come from Roxboro, but,  
8 again, the provision's in the agreement that allows material  
9 to come from anywhere.

10 Q. And, Mr. Mayer, what was your understanding of the  
11 intent with respect to the remedies provisions and how those  
12 would be applied?

13 MR. TUCKER: Again, objection to the extent that  
14 it requests that he speculate as to Progress Energy's  
15 intent.

16 MS. MARSTON: I asked his understanding.

17 THE COURT: I thought your objection was going to  
18 be asked and answered.

19 MR. TUCKER: I'll make that objection as well.

20 The question was, broadly, what is his  
21 understanding of intent. It was not limited to what his  
22 understanding of CertainTeed's intent was.

23 MS. MARSTON: Your Honor, with respect to his  
24 understanding of the parties' intent, the relevant inquiry  
25 is whether the parties reasonably understood one another.

1 So his understanding of their intent is relevant.

2 THE COURT: I think my question is, are you asking  
3 him to give you any answer he hasn't already given you?

4 MS. MARSTON: No, Your Honor.

5 MR. TUCKER: I'll make that objection as well.

6 Thanks.

7 THE COURT: I understood his prior testimony.

8 MS. MARSTON: Okay. I'll withdraw the question.

9 Q. Mr. Mayer, after the agreement was executed in  
10 2004, what was your involvement with the parties'  
11 relationship?

12 A. So after the agreement was signed and celebrated,  
13 we had -- you know, we heard from -- there was -- both  
14 plants were being constructed. So initially Progress Energy  
15 had given us notice that their schedule for construction was  
16 going to be somewhat delayed. I was still involved in sort  
17 of having those discussions with them.

18 But in 2007, our industry -- I think in general  
19 the industries were experiencing a downfall in the  
20 economics, and we had then made motions to ask for the delay  
21 in our construction of the wallboard plant.

22 Q. Were you involved in discussions about the  
23 2008 agreement?

24 A. I had very little to do with that. I mean, I  
25 probably kicked it off and sort of handed it over to, in



1 this case, Rob Morrow, who took over for me. I had a  
2 different project that I was leading. It was actually  
3 another DSG plant construction in West Virginia.

4 Q. Was that the Moundsville plant?

5 A. That was the Moundsville plant, yes.

6 MS. MARSTON: Mr. Mayer, I have no further  
7 questions.

8 Thank you.

9 THE COURT: All right.

10 Mr. Phillips and then Mr. Tucker, let's talk about  
11 where -- 10:45 was my target. I understand, after this  
12 witness, you're going to play the deposition?

13 MR. PHILLIPS: No, Your Honor. We have one other  
14 witness. Mr. Morrow is going to testify.

15 THE COURT: Okay. So what are you predicting,  
16 then, to do your cross-examination?

17 MR. TUCKER: I will take significantly longer than  
18 15 minutes, I believe, with this witness. So if it's okay  
19 with the Court, we would prefer --

20 THE COURT: I'd just as soon not start  
21 cross-examination for 10 minutes and interrupt. We'll come  
22 back at 10 minutes until 11:00 on that clock, and then we'll  
23 see where we are at the end of cross-examination whether to  
24 start your next witness and be flexible.

25 Do y'all have -- have y'all got firm plans for

10:34 1 lunch being delivered at a given time?

10:34 2 MR. TUCKER: We do.

10:34 3 THE COURT: All right. So we'll just see where we  
10:34 4 are. My guess is not --

10:34 5 Be at ease. You will remain under oath, sir, but  
10:34 6 you may step down.

10:34 7 (Recess.)

10:50 8 THE COURT: Talk about confidence building. When  
10:50 9 I was getting sworn in back in 2011, it was right down  
10:50 10 there, whatever like this, and so my wife puts the robe on  
10:50 11 and you look for those initial words of encouragement, and  
10:50 12 her first words were, "Are they going to give you a booster  
10:50 13 seat?"

10:50 14 MR. PHILLIPS: Your Honor, if I may. I'd just  
10:50 15 like to introduce Mike Julio just joined us. Mike is the  
10:50 16 general counsel of CertainTeed Gypsum --

10:50 17 THE COURT: Great.

10:50 18 MR. PHILLIPS: -- here from Malvern, Pennsylvania.

10:50 19 THE COURT: From Pennsylvania. Didn't let him  
10:50 20 live Tampa and work over there.

10:50 21 Let me take a moment to -- be seated, sir -- a  
10:50 22 personal privilege.

10:50 23 I've been around for a while, even got a seven in  
10:50 24 front of my name now. As you get there, you talk about it  
10:50 25 being the new 50, which I kind of like those kind of words.

10:51 1 But the -- I started in the law practice in North Carolina  
10:51 2 here a long, long time ago. And many of us that have gotten  
10:51 3 to where we are, including those in the courtroom, have  
10:51 4 gotten here because we stand on the shoulders of people that  
10:51 5 have come before us.

10:51 6 You often hear me talk about Judge Dupree that I  
10:51 7 clerked for and what influence he continues to have on me.  
10:51 8 I certainly consider Colonel McClendon, Mr. Leonard at  
10:51 9 Mr. Phillips' firm to be giants of the profession.  
10:51 10 Jim Blunt, I'm not sure there's ever been a better trial  
10:51 11 lawyer in the history of the world. And, of course,  
10:51 12 McNeil Smith and Byron Hunter from my firm were kind of  
10:51 13 institutions. And at a funeral for McNeil Smith, I remember  
10:51 14 one of the people that started the sit-in demonstrations at  
10:51 15 the Woolworths said "A giant tree has fallen today."

10:52 16 But I just want to, for the moment, stop and  
10:52 17 remember who I think it was among the great trial lawyers in  
10:52 18 North Carolina, but Dick Ellis passed away last night.

10:52 19 MR. PHILLIPS: Did he really?

10:52 20 THE COURT: And I just got the word over the  
10:52 21 break, but it was a type of passing I think that -- that's a  
10:52 22 blessing because things had deteriorated to a point in time  
10:52 23 where that's the -- that's the natural consequence, and it  
10:52 24 came -- came comfortably, as I understand it. But just I  
10:52 25 want to take a moment, personal privilege for a minute,

1 because I know y'all remember, and remember him. I can't  
2 remember, Jim, you're in the American College, aren't you?

3 MR. PHILLIPS: No, sir.

4 THE COURT: You're not yet, so -- even though you  
5 deserve to be.

6 MR. PHILLIPS: -- keeps telling me to fill out  
7 forms.

8 THE COURT: But I just heard that from Leslie.  
9 But thank you for taking a moment to do it. And I wanted  
10 to -- the record to say that it was someone who had a  
11 significant influence on my career that I acknowledge in  
12 passing.

13 You may proceed, Mr. Tucker.

14 CROSS-EXAMINATION by Mr. Tucker:

15 Q. Mr. Mayer, almost good afternoon, but good  
16 morning. Nice to see you again.

17 I'd like to ask you some questions about your  
18 involvement with the 2004 agreement in particular.

19 And you've testified today that you were the  
20 designated lead negotiator for CertainTeed with respect to  
21 the CP&L contract that was signed in 2004, correct?

22 A. Yes.

23 Q. And so you are the better person as between you  
24 and Mr. Morrow, who is scheduled to testify later today, to  
25 talk about negotiations related to the 2004 agreement; is

10 : 5 3

1 that right?

10 : 5 3

2 A. I would agree, yes.

10 : 5 3

3 Q. And you know that Rob Morrow was not directly

10 : 5 3

4 involved in negotiating the 2004 agreement, right?

10 : 5 3

5 A. Correct, not directly involved.

10 : 5 3

6 Q. He didn't assume responsibility for the Progress

10 : 5 3

7 Energy relationship until sometime in 2008, approximately,

10 : 5 3

8 correct?

10 : 5 3

9 A. Correct.

10 : 5 4

10 Q. And Ms. Marston showed you a number of different

10 : 5 4

11 drafts of the 2004 agreement during the course of her

10 : 5 4

12 examination.

10 : 5 4

13 You recall those, right?

10 : 5 4

14 A. Yes.

10 : 5 4

15 Q. Mr. Morrow was not copied on any of those initial

10 : 5 4

16 drafts, to your knowledge, was he?

10 : 5 4

17 A. Not to my recollection, no.

10 : 5 4

18 Q. And you don't recall any specific conversation

10 : 5 4

19 with Mr. Morrow about any of the drafts in the

10 : 5 4

20 2004 agreement?

10 : 5 4

21 A. Well, I think what I said was I don't recall

10 : 5 4

22 specific conversation. But given his duty, I would have --

10 : 5 4

23 I did talk to Rob on many things of that nature, so I

10 : 5 4

24 expect -- I just couldn't recall a specific conversation.

10 : 5 4

25 Q. Now, on the CP&L/Progress Energy side, you

10:54 1 remember that Danny Johnson was the lead negotiator for  
10:54 2 CP&L, correct?

10:54 3 A. Correct.

10:54 4 Q. And he's the person that you had the most contact  
10:54 5 with during the negotiation process?

10:54 6 A. Yes.

10:54 7 Q. And so you agree that he would be the best person  
10:54 8 to discuss the negotiations from the CP&L side?

10:55 9 A. Yes.

10:55 10 Q. And, in fact, you remember that you discussed  
10:55 11 various provisions of the contract with Mr. Johnson,  
10:55 12 correct?

10:55 13 A. Well, I remember -- again, specific conversations,  
10:55 14 no. But the fact that he was the face of the company, I  
10:55 15 remember, yes, talking to him.

10:55 16 Q. Now, you testified earlier in response to some of  
10:55 17 Ms. Marston's questions about the general concept that the  
10:55 18 contract was structured to keep each side whole.

10:55 19 Do you remember that --

10:55 20 A. Yes, I do.

10:55 21 Q. -- testimony?

10:55 22 Let me ask you to look back at Exhibit 5 in your  
10:55 23 binder, which is the signed 2004 agreement.

10:55 24 THE COURT: Are you intending to put that on the  
10:55 25 screen?

10:55 1 A. Okay. I'm there.

10:55 2 Q. And if you would turn to Section 9.3 of the  
10:55 3 contract on page 14. It's captioned "Limitation of  
10:56 4 Liability."

10:56 5 Do you see that?

10:56 6 A. Yes, I do.

10:56 7 Q. Now, you testified that you had reviewed all of  
10:56 8 the provisions of this document carefully before you signed  
10:56 9 it, so I'm assuming from that you reviewed the Limitation of  
10:56 10 Liability section, correct?

10:56 11 A. Probably, yeah.

10:56 12 Q. And you recognize that in this section, the  
10:56 13 parties are expressly agreeing to eliminate a whole variety  
10:56 14 of potential remedies, correct?

10:56 15 A. Can I just take time to read it?

10:56 16 Q. Sure.

10:57 17 A. Okay.

10:57 18 Q. So by agreement of the parties, to the extent any  
10:57 19 of the excluded losses in 9.3 were necessary to make a party  
10:57 20 whole, the parties agreed that those would not be  
10:57 21 recoverable; isn't that right?

10:57 22 A. Correct.

10:57 23 Q. So let's talk a little bit more about the remedies  
10:57 24 provisions.

10:57 25 You recognize that from the very beginning of the

10 : 57 1 drafting process, there were separate remedies provided for  
10 : 57 2 undersupply and for discontinued supply, correct?

10 : 57 3 A. Well, represented undersupplying in all cases, but  
10 : 57 4 there was an extreme case of discontinued, which is really  
10 : 57 5 zero supply.

10 : 57 6 Q. There wasn't a single remedy provision called  
10 : 57 7 "undersupply" that listed all the different undersupply  
10 : 57 8 scenarios, correct?

10 : 57 9 A. Not that I'm aware of, no.

10 : 57 10 Q. And that's true from the very beginning of the  
10 : 57 11 contract?

10 : 57 12 A. Correct.

10 : 57 13 Q. Look at Exhibit 90, please.

10 : 58 14 MR. TUCKER: Your Honor, may we publish that to  
10 : 58 15 the screen?

10 : 58 16 THE COURT: Yes, you may.

10 : 58 17 Q. Let me know when you're there, Mr. Mayer.

10 : 58 18 A. Yes. I'm back to 90.

10 : 58 19 Q. Okay. You testified about this document on  
10 : 58 20 direct. And this is an email and attached draft supply  
10 : 58 21 agreement that Mr. College of BPB sent to Danny Johnson on  
10 : 58 22 May 12th, 2003, correct?

10 : 58 23 A. Correct.

10 : 58 24 Q. And I think you said that, to the best of your  
10 : 58 25 knowledge, this might be the very first draft of the