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DAVE ENGELHARDT

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1 (Superior Court of Person County resumed  
2 session on Monday, July 9, 2018, before the  
3 Honorable James L. Gale.)

10:00 4 THE COURT: Please be seated.

10:00 5 Because she has to take everything down after  
10:00 6 this, I'll start first by saying good morning and thank you  
10:00 7 to our court reporter, the most important person in the  
10:00 8 courtroom. I have to do that first so that she takes  
10:00 9 everything else I say down.

10:00 10 As a reminder, everyone, please put your cell  
10:00 11 phone on silent. You're welcome to use them outside the  
10:00 12 courtroom, but here, just keep them where they don't make a  
10:00 13 noise.

10:00 14 Before I introduce everybody, building logistics.  
10:00 15 Directly behind the courtroom is a men's room and a women's  
10:01 16 room. But if you go all the way down to the end of the  
10:01 17 hallway back down to where it says "Business Court," go down  
10:01 18 that hallway, there are two unisex bathrooms down there in  
10:01 19 terms of doing that and water fountains around and things.

10:01 20 So I'll cover a couple of more logistical  
10:01 21 problems, but let's go ahead and start out by letting you  
10:01 22 introduce everyone.

10:01 23 So, Mr. Phillips, we'll start with you. You're  
10:01 24 the plaintiff here.

10:01 25 MR. PHILLIPS: Your Honor, Jim Phillips on behalf



1 of CertainTeed Gypsum.

2 MS. MARSTON: Kimberly Marston on behalf of

3 CertainTeed Gypsum.

4 MR. PHILLIPS: And go ahead.

5 MS. O'BRIEN: Sharon O'Brien.

6 THE COURT: We saw her happen to bring those books

7 over this morning.

8 MR. PHILLIPS: Sharon is our wonderful paralegal.

9 THE COURT: She is.

10 MR. CARTER: And Keith Carter.

11 THE COURT: Good morning, Mr. Carter.

12 MR. PHILLIPS: Keith knows how to --

13 THE COURT: Yeah, we've seen him before. I told

14 everybody that once before I had to cover for him when our

15 equipment went bad.

16 So for the defendants, Mr. Tucker.

17 MR. TUCKER: Don Tucker for the defendant,

18 Duke Energy Progress, LLC.

19 And if you'll permit me, I'll introduce the rest

20 of our team so they don't all have to stand up.

21 THE COURT: That would be fine.

22 MR. TUCKER: This is my partner Isaac Linnartz.

23 Alison Pollock, our paralegal.

24 And then we have a number of representatives here

25 from Duke Energy: BJ Mandata [ph].

1 THE COURT: Good morning.

2 MR. TUCKER: Brian Weisker; Timika Shafeek-Horton,  
3 who's Energy's general counsel.

4 THE COURT: She changed her name on us since I  
5 knew her. How many years ago was it?

6 MS. SHAFEEK-HORTON: It was a long time, Judge.

7 THE COURT: Long, long time ago.

8 MR. TUCKER: Next is Duke Energy's general  
9 counsel, Julie Janson is behind Timika.

10 And then Paige Sheehan also from Duke Energy.

11 THE COURT: Great.

12 MR. TUCKER: That exhausts the people that I'm  
13 able to introduce.

14 THE COURT: Right. And I think I introduced you  
15 to the folks from the Court last time.

16 Do we just have some observers on the back row?

17 MS. KIMBALL: Yes, Your Honor.

18 THE COURT: Okay. Are you just students or  
19 interested?

20 MS. KIMBALL: Yes. My name is Megan Kimball. I'm  
21 here with the Southern Environmental Law Center.

22 THE COURT: Okay. Good morning.

23 MS. KIMBALL: Good morning.

24 MR. ROSENTHAL: I'm Jonathan Rosenthal. I'm also  
25 here with the Southern Environmental Law Center.

1 THE COURT: Okay. Great.

2 And I don't know whether y'all have met  
3 Matt Linberg in the very back. He's my other law clerk, at  
4 least for a little while. I don't know why I said  
5 Matt Linberg. I just got an email from him. So  
6 Jordan Hilton. That's who he is. They're about the same  
7 height.

8 And you, sir, are?

9 UNIDENTIFIED SPEAKER: Matt Pierson, just  
10 interested. Just interested in the environment.

11 THE COURT: Okay. Great.

12 And I think you met Dillon Saunders.

13 The reason I ask, there may come points in time  
14 during the proceeding where there's some information that  
15 has got proprietary information. I don't know whether it  
16 will come up or not, but I just have to know when that comes  
17 as to how we would deal with that.

18 So I normally don't make you introduce yourself,  
19 but it's just nice to know who's in the courtroom to know  
20 whether we have to do that. Certain people are subject to a  
21 protective order and some people are not, so I just have to  
22 be aware of that. Okay. Great.

23 I have gotten your revised proposed pretrial  
24 order. I made a couple of changes simply to call it a final  
25 and to add a signature line for me above your electronic

1 signatures. If there's no other changes, I'll go ahead and  
2 sign it and we'll just enter it.

3 Okay. Any other changes?

4 MR. PHILLIPS: That's fine with the plaintiff,  
5 Your Honor.

6 THE COURT: Okay. You had asked me about the  
7 schedule. We're starting this morning at 10:00. Again, if  
8 it were a jury, I'd be pretty strict about keeping the  
9 clock. We'll just do it as flexible as we go. But my  
10 target this morning is we'll go to the morning break about  
11 11:30, take a break for about 20 minutes until 11:50, and  
12 then come back. And I think it's better today to take our  
13 lunch hour at 1:00 instead of 12:30, and then we'll come  
14 back. On the other days, I think when we'll start at 9:00,  
15 we'll take our lunch break at 12:30, with a break about the  
16 halfway point in the morning, if that works for you.

17 You had asked about opening statements. I got  
18 your trial briefs since we saw each other. I've read them  
19 at least twice and scanned them more times than that.  
20 Obviously, I've got questions, but that's what the trial is  
21 about. And so I don't see the need to have opening  
22 statements this morning unless y'all wanted to respond to  
23 something the other person said.

24 MR. PHILLIPS: Your Honor, we've spoken and agreed  
25 to waive openings.

1 THE COURT: Okay.

2 MR. TUCKER: Correct.

3 THE COURT: In that regard, as we go forward, as  
4 you well know, for those of you who have argued motions  
5 before me, I tend to share with you questions that come to  
6 mind when they come to mind. I'm going to resist the  
7 temptation to do that as witnesses are on the stand because  
8 I don't want to get in front of your cross-examination and  
9 direct.

10 But at the end, if I have questions, I may ask you  
11 as to whether or not another witness is going to come on a  
12 particular question that may have arisen, but I'll do that  
13 at the end of the testimony.

14 For example, you may have someone that testifies  
15 about what the negotiations were in 2004 that doesn't know  
16 what the negotiations were in 2008, but I want to know what  
17 that person's thing is.

18 So what I don't want to do is to end the trial and  
19 say, "I wish you had told me that when that witness was  
20 here. I could have answered that question for you, Judge."  
21 But I'm going to resist the temptation to interrupt during  
22 the progress.

23 As we go forward, over the weekend I bumped into  
24 something, I don't know what, and ended up getting a bruise  
25 in one of my legs that locks up on me sometimes. So if I

1 stand up during the proceedings, don't take it personally.

2 I'm just trying to get rid of a cramp in my leg.

3 Anything else in terms of logistics?

4 MR. PHILLIPS: Your Honor, I don't think those --  
5 we have a couple of things that we've agreed we were going  
6 to deal with, but they aren't logistical things.

7 THE COURT: Well, okay. What do we need to bring  
8 up, then, to deal with before we call our first witness?

9 MR. PHILLIPS: So, Your Honor, I think three or  
10 four things.

11 First, I wanted to -- I think Don and I both  
12 wanted to tell the Court that one of the issues in this case  
13 or one of the problems in this case or one of the facts in  
14 this case is that the original contracts were signed -- the  
15 original contract was signed between BPB and  
16 Progress Energy.

17 THE COURT: Correct.

18 MR. PHILLIPS: And then BPB became CertainTeed,  
19 and at some point Progress Energy became Duke.

20 At least I can say for myself that at certain  
21 times in this case I will refer to Progress as Duke at a  
22 point in time when it wasn't Duke.

23 THE COURT: That's fine.

24 MR. PHILLIPS: And I will --

25 THE COURT: And I understand. And I certainly



1 understand that y'all stipulated about the successive  
2 interests and that nobody's arguing they're not bound  
3 because of those changes.

4 For clarification, when did Duke become the  
5 successors of the contract?

6 MR. TUCKER: Well, just to be clear, the entity  
7 that is the party to the current version of the contract is  
8 Duke Energy Progress, which is a subsidiary of Duke Energy.  
9 So Jim may say "Duke," but he's referring, I think, to  
10 Duke Energy Progress, not the parent company.

11 THE COURT: Well, I'm going to always assume,  
12 unless you tell me to the contrary, that when you refer to  
13 CertainTeed or refer to Duke, we're referring to the parties  
14 to the contract.

15 If it becomes important that it's some parent or a  
16 subsidiary different than that, point that out to me. But,  
17 otherwise, I'm just going to assume that you're referring to  
18 the people in the contract.

19 MR. PHILLIPS: That is exactly the point I was  
20 trying to make, Your Honor.

21 MR. TUCKER: That's fine.

22 THE COURT: So when did Duke Progress become the  
23 successor to the contract?

24 MR. TUCKER: 2012.

25 THE COURT: Before or after August 1st?



1 MR. TUCKER: After August 1st.

2 THE COURT: Okay. Okay. That's fine. All right.

3 MR. TUCKER: Or was that July? Was it July?

4 MS. SHAFEEK-HORTON: The merger.

5 MR. TUCKER: Okay. Yeah.

6 THE COURT: So the current party defendant was the  
7 signatory to the 2012 agreement?

8 MR. TUCKER: That is -- Duke Energy Progress is  
9 the current signatory.

10 THE COURT: All right. To me, again, I don't know  
11 that -- other than the fact that I don't want to confuse the  
12 record.

13 MR. LINNARTZ: Just to -- the signatory listed in  
14 the second amended agreement, the 2012 agreement, is  
15 Carolina Power & Light doing business as Progress Energy  
16 Carolinas, Inc. But I believe that shortly after that it  
17 changed to Duke Energy Progress.

18 THE COURT: So the August -- the agreement dated  
19 as of August 1st, 2012, was executed before August 1st?

20 MR. PHILLIPS: No.

21 MR. TUCKER: It's a bit confusing --

22 THE COURT: All right.

23 MR. TUCKER: -- Your Honor.

24 MR. PHILLIPS: But what you said, still,  
25 Your Honor, is right.

1 THE COURT: Yeah.

2 MR. TUCKER: I think we're all agreeing.

3 THE COURT: The only reason I'm asking these  
4 questions right now, to the extent you want to clarify the  
5 record because I've said something that confuses it, I'm  
6 always going to assume that "CertainTeed" and "Duke" mean  
7 the parties to the contract.

8 MR. TUCKER: The only -- and the only distinction  
9 I wanted to point out was the difference between the  
10 subsidiary party to the contract and the parent company,  
11 Duke Energy, which is not a signatory.

12 THE COURT: Okay. That's fine.

13 MR. PHILLIPS: Your Honor, the second thing is  
14 that we informed Don on Friday, I think, or Thursday that we  
15 had decided that we are going to play one deposition, the  
16 deposition of John Halm, in our case in chief.

17 And I think Kim has -- I don't know if she's given  
18 it to Kaitlin, but we have the -- what rule, I think, 12.5  
19 requires where --

20 THE COURT: All right.

21 MR. PHILLIPS: -- they've objected to some  
22 portions of that, and so we're prepared to provide the Court  
23 with --

24 THE COURT: The transcript?

25 MR. PHILLIPS: -- the transcript and those

1 objections and --

2 THE COURT: Do you know, Mr. Phillips, when you  
3 expect to call him?

4 MR. PHILLIPS: Late tomorrow, sometime Wednesday.  
5 So we have some time to deal with that. And so Don and I  
6 have talked about that --

7 THE COURT: I usually don't have anything else to  
8 do on Monday nights anyway.

9 MR. TUCKER: And we'll do it at the Court's  
10 convenience, but we were thinking sometime before Jim  
11 introduces that evidence would be an appropriate time for us  
12 to deal with the objections. But we can do it whenever the  
13 Court would like us to do it.

14 THE COURT: Well, how many objections are there?

15 MR. TUCKER: They're a handful. Six or eight.

16 No?

17 MS. MARSTON: There are 18, Your Honor.

18 MR. TUCKER: 18. All right. I was a little  
19 conservative.

20 THE COURT: But they probably fall within two or  
21 three --

22 MR. TUCKER: They fall within two or three  
23 categories.

24 THE COURT: Well, as soon as I've had a chance to  
25 look at it and feel like I'm ready to hear your argument,

1 I'll let you know, and we'll find a time and do it.

2 MR. TUCKER: All right.

3 THE COURT: If we can do it before the end of  
4 the -- before we vacate by the end of the day, we'll do it.  
5 Otherwise, perhaps first thing tomorrow morning.

6 MR. TUCKER: Another mechanics issues that we  
7 talked about, and we'll just take guidance from the Court as  
8 to how you'd like us to do this, and it relates to the  
9 introduction of exhibits. We can either introduce them or  
10 move for the introduction of exhibits as the exhibit is  
11 addressed with the witness, or we can move for the  
12 introduction of all the exhibits used during a particular  
13 examination at the end of the examination. We're prepared  
14 to do it however Your Honor would like us to, but we thought  
15 we would raise that in advance.

16 THE COURT: The only -- the most time efficient is  
17 to do it at the end of the examination of the witness,  
18 unless it's going to be one to which there is a substantial  
19 objection that needs to be heard at the time that the -- if  
20 you have an exhibit that the publication of which would be  
21 over an objection, then obviously we have to deal with the  
22 objection at the time. But otherwise, we'll just have them  
23 all introduced at the end of the examination. Obviously,  
24 you can't introduce something during your opponent's case,  
25 but that works for me.

10:12 1 MR. TUCKER: And then finally --

10:12 2 THE COURT: As long as -- what's most important is  
10:12 3 Ms. Price being able to keep up with what you're doing.

10:12 4 MR. TUCKER: And then finally, Your Honor, we just  
10:12 5 wanted to make sure that when a witness was in the box and  
10:12 6 we were showing an exhibit, that it would be displayed  
10:12 7 automatically and we didn't have to request that you display  
10:13 8 it to the witness the way we would in a jury trial.

10:13 9 THE COURT: The only -- what I probably would  
10:13 10 do -- what typically I would do, Mr. Tucker, is allow your  
10:13 11 opponent to see it before it's published to the witness,  
10:13 12 just so that they can raise an objection if they want to.

10:13 13 If y'all already know what each other's going to  
10:13 14 use and we don't need to do that, I won't. But typically  
10:13 15 what I would end up doing is approving it for you to see,  
10:13 16 and then as soon as -- if Mr. Phillips puts an exhibit, you  
10:13 17 see it on your screen and you nod at me, then it goes up in  
10:13 18 front of the witness.

10:13 19 But to the extent we need to guard against the  
10:13 20 publication of some information or otherwise, but -- we'll  
10:13 21 evolve as we go forward, but I certainly don't need for you  
10:13 22 to go through any elaborate authentication and  
10:14 23 identification or the mechanics of what you would do in a  
10:14 24 jury trial.

10:14 25 MR. TUCKER: And we did agree to a stipulation on





1 Mr. Phillips, does that cover all the matters?

2 MR. PHILLIPS: It does, Your Honor.

3 THE COURT: Anything further from you, Mr. Tucker?

4 MR. TUCKER: No, Your Honor.

5 THE COURT: All right. And for those of you who  
6 are here, feel free -- you can go in and out of the  
7 courtroom without there being an official break, as long as  
8 you do so quietly and come and go. And I just simply ask  
9 that you not bring food or things that make noise into the  
10 courtroom.

11 All right. You may call your first witness,  
12 Mr. Phillips.

13 MR. PHILLIPS: May I go get him, Your Honor?

14 THE COURT: Yes, sir.

15 Don't get lost on the way.

16 Good morning, sir.

17 THE WITNESS: Good morning.

18 MR. PHILLIPS: Your Honor, CertainTeed calls  
19 Dave Engelhardt as our first witness.

20 DAVE ENGELHARDT,

21 having been first duly sworn by the Court, testified as  
22 follows:

23 THE WITNESS: I do.

24 THE COURT: Can I see Mr. Tucker and Mr. Phillips  
25 up here real quick?



1 (Bench conference, not reported.)

2 THE COURT: You may proceed, sir.

3 MR. PHILLIPS: Thank you, Your Honor.

4 DIRECT EXAMINATION by Mr. Phillips:

5 Q. Good morning, Mr. Engelhardt.

6 A. Good morning.

7 Q. Would you state your full name for the record,  
8 please.

9 A. David Dean Engelhardt.

10 Q. And where do you live, Mr. Engelhardt?

11 A. I live in the Tampa, Florida.

12 Q. What do you do for a living?

13 A. I'm retired.

14 Q. How long have you been retired?

15 A. Since December of 2017.

16 Q. And was that a planned retirement?

17 A. It was.

18 Q. How are you spending your time in retirement?

19 A. Well, I'm finally getting a chance to spend time  
20 with my family. So all my kids are located nearby, all my  
21 grandkids. And I have a 31-year-old son with Down's  
22 syndrome that lives with me. And I also have a -- my  
23 youngest daughter has a 2-year-old son, and they live with  
24 us. So family is a big part of our lives.

25 THE COURT: I have to ask, where in Tampa?



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1 your position there?

2 A. My position was senior vice president of  
3 operations.

4 Q. All right. And did there come a time when BPB was  
5 acquired by Saint Gobain?

6 A. Yes, there was.

7 Q. And then you moved to the position of president of  
8 CertainTeed Gypsum?

9 A. Well, at the time that it was acquired by  
10 Saint Gobain, I retained the senior vice president of  
11 operations role.

12 Q. Can you tell the Court a little bit about  
13 CertainTeed?

14 A. Okay. I think the best thing to do is maybe start  
15 at the top.

16 The parent company for CertainTeed is a company  
17 called Saint Gobain. It's located or based in Paris,  
18 France. And it's a large worldwide company; 67 countries,  
19 180,000 employees; three major business groups. One group  
20 is innovative materials, sometimes we call it  
21 high-performance materials; building distribution, which is  
22 primarily in Europe; and in construction products. And  
23 Saint Gobain was the -- is the largest construction products  
24 manufacturer in the world.

25 Now, underneath construction products, that's

1 0 : 2 1 1 where CertainTeed North America as our CertainTeed group  
1 0 : 2 1 2 came in -- comes into play in North America.

1 0 : 2 1 3 And so CertainTeed in North America is made up of  
1 0 : 2 1 4 five business units: Roofing, siding, insulation, gypsum,  
1 0 : 2 1 5 and ceilings.

1 0 : 2 1 6 Q. How -- what products does CertainTeed sell?

1 0 : 2 1 7 A. Well, first of all, CertainTeed primarily services  
1 0 : 2 2 8 the entire construction market, residential and  
1 0 : 2 2 9 nonresidential.

1 0 : 2 2 10 So the roofing products would be roofing tiles and  
1 0 : 2 2 11 shingles, as well as commercial roofing and solar panels.

1 0 : 2 2 12 The siding group produces vinyl siding and also  
1 0 : 2 2 13 produces fence, decking, and railing.

1 0 : 2 2 14 The insulation group produces blow-in wool  
1 0 : 2 2 15 insulation, as well as fiberglass batt.

1 0 : 2 2 16 Ceilings produces the dropped ceiling tiles, like  
1 0 : 2 2 17 you see in this room, and the grid that holds them up.

1 0 : 2 2 18 And then gypsum, we produce wallboard and then the  
1 0 : 2 2 19 things that we need to finish the wallboard, like tape,  
1 0 : 2 2 20 joint compound, and corners.

1 0 : 2 2 21 Q. How many plants and employees does CertainTeed  
1 0 : 2 2 22 have?

1 0 : 2 2 23 A. CertainTeed has around 40 plants and a little over  
1 0 : 2 2 24 3500 employees.

1 0 : 2 2 25 Q. All right. Now, CertainTeed Gypsum, the entity

1 0 : 2 3 1 that you ran, how many plants and employees does it have in  
1 0 : 2 3 2 North America?

1 0 : 2 3 3 A. Okay. CertainTeed Gypsum has in North America  
1 0 : 2 3 4 14 wallboard plants; we have six mines and eight finishing  
1 0 : 2 3 5 plants.

1 0 : 2 3 6 Q. All right. What segments of the market does  
1 0 : 2 3 7 CertainTeed Gypsum service?

1 0 : 2 3 8 A. Back on the last question, I just wanted to add,  
1 0 : 2 3 9 we had over 1500 employees.

1 0 : 2 3 10 Q. Okay.

1 0 : 2 3 11 A. Okay. The markets that CertainTeed Gypsum serves  
1 0 : 2 3 12 is -- really, we broke it up into four segments. The  
1 0 : 2 3 13 largest segment, which was about 45 percent of the market in  
1 0 : 2 3 14 a typical year, was new home construction. The other  
1 0 : 2 3 15 three -- and that would be single-family and multi-family.

1 0 : 2 3 16 The other three segments would be residential  
1 0 : 2 3 17 repair and remodel, and new nonresidential construction. So  
1 0 : 2 3 18 nonresidential could be anything from office buildings to  
1 0 : 2 3 19 churches to stores, hospitals, schools, universities,  
1 0 : 2 4 20 restaurants.

1 0 : 2 4 21 And then the fourth segment would be repair and  
1 0 : 2 4 22 remodel of that nonresidential segment.

1 0 : 2 4 23 But, basically, the driver was new home  
1 0 : 2 4 24 construction. That was usually the leading group, and that  
1 0 : 2 4 25 was the biggest indicator on our business levels. And one

1 of the reasons for that is there is typically a lag factor  
2 when we're building new neighborhoods of homes. The stores,  
3 the restaurants, and things like that tend to follow, and  
4 that tends to create a lag of a few months.

5 Q. So what were your responsibilities as senior  
6 vice president of operations for BPB and later CertainTeed?

7 A. Okay. As senior vice president, my role was just  
8 the operations aspect of the business, which included the  
9 plants. It also included engineering and R&D. I had --  
10 also, at the time when I started with BPB, our ceilings  
11 group was a part of us in North America, so I also had  
12 responsibility for the ceilings plants. And then  
13 additionally I had company-wide responsibilities for areas  
14 like safety and quality.

15 Then in -- when we were acquired at the end of  
16 2005, in early 2006, Saint Gobain determined to -- decided  
17 to spin ceilings off into a separate business unit  
18 worldwide, so those ceilings plants left my area of  
19 responsibility.

20 And it stayed that way until 2009, when I picked  
21 up supply chain, and I also became the general manager of  
22 our finishing business.

23 Q. Tell the Court about your duties and  
24 responsibilities as president of CertainTeed Gypsum.

25 A. Okay. In our business, we use what we call



1 10:25 VMVO -- vision, mission, values, and objectives -- and  
2 10:25 that's the methodology we use to set our goals, long-term  
3 10:25 all the way down to annual goals.

4 10:25 So my role was to literally lead our business in  
5 10:26 accordance with development of those and execution against  
6 10:26 those roles. So I had all the business functions that I was  
7 10:26 responsible for. That would include sales, customer  
8 10:26 service, marketing, operations, R&D, supply chain.

9 10:26 We did have a -- sort of a unique organizational  
10 10:26 structure where our HR and our finance person actually  
11 10:26 reported directly to a CertainTeed-level vice president.  
12 10:26 But the CertainTeed Gypsum head of HR and finance were in  
13 10:26 our group and, effectively, pretty much all of their work  
14 10:26 was with me.

15 10:26 So, basically, my job was to run the business.

16 10:26 Q. Where is CertainTeed headquartered? CertainTeed  
17 10:26 Gypsum headquartered?

18 10:26 A. Malvern, Pennsylvania.

19 10:26 Q. All right. Can you tell the Court a little bit  
20 10:26 about your educational background, Mr. Engelhardt?

21 10:26 A. Yes. My undergraduate is a bachelor's of  
22 10:26 mechanical engineering from General Motors Institute, and  
23 10:27 that became Kettering University about 20 years ago.

24 10:27 And then my master's is in business administration  
25 10:27 from Kaplan University in Columbus, Ohio.









1 distribution. Now, distribution would be made up of what we  
2 call gypsum supply dealers. Those could be on a national  
3 level, regional level, local level. But those are the  
4 dealers that just focus on gypsum, maybe insulation, metal  
5 and wood studs, things like that, just for building walls.

6 We also would sell to companies like lumber yards.  
7 84 Lumber would be a good example or Carter Lumber would be  
8 a good example.

9 And then we also sell to big boxes like Lowe's and  
10 Menards. So from them, their end customers can be anything  
11 from major home builders, major contractors both in  
12 residential and commercial, they can be small contractors,  
13 and it can be with individual employees -- individual  
14 people.

15 Q. So how much inventory is maintained by CTG?

16 A. Well, that's one of the interesting things in the  
17 business and something I had to kind of learn when I entered  
18 this business.

19 The physical product is very large. And the  
20 wallboard industry is a high-volume industry, so we produce  
21 a lot of board in a hurry. If you look at our warehouse,  
22 for example, at our Roxboro plant, if it was empty, you'd  
23 say, "Wow, this should hold a lot of material." It actually  
24 only holds 5 1/2 to 6 days of inventory -- of production in  
25 that location. And the reason for that is the product is



10 : 3 4 1 business is high-volume, pretty standard product. It's  
10 : 3 4 2 either the 1/2 inch product that you put in homes or the  
10 : 3 4 3 5/8ths inch product that typically goes into nonresidential,  
10 : 3 4 4 into commercial buildings. And that product is pretty much  
10 : 3 4 5 the same -- regardless of what the manufacturers say, that's  
10 : 3 4 6 viewed as pretty much the same product by the end users.

10 : 3 4 7 So it really comes down to two things. There's  
10 : 3 4 8 really two differentiators for the bulk of our business.  
10 : 3 4 9 One of those is price, and the other one is delivery.

10 : 3 4 10 And to give you an idea on delivery -- and I  
10 : 3 4 11 mentioned how quickly the product moves and how little  
10 : 3 4 12 inventory we have -- our typical order, our standard order  
10 : 3 4 13 delivery is 48 hours after we receive the order. We have a  
10 : 3 4 14 large percentage of our orders that are next-day shipments,  
10 : 3 5 15 and we always have a percentage of orders every day that are  
10 : 3 5 16 same-day shipments.

10 : 3 5 17 And, basically, if you don't have the product, you  
10 : 3 5 18 don't have the material, you can't deliver it, you lose the  
10 : 3 5 19 order.

10 : 3 5 20 Q. Where have wallboard plants been built  
10 : 3 5 21 historically?

10 : 3 5 22 A. Well, going back through, you know, I guess,  
10 : 3 5 23 decades ago, the historical location would be next to raw  
10 : 3 5 24 gypsum.

10 : 3 5 25 And gypsum is a mineral that's mined out of the



1 ground. So, typically, the plants would be built close to  
2 that supply. Usually next door, if at all possible.

3 And the reason for that is, as I said before,  
4 gypsum makes up 90 percent of wallboard, so that is by far  
5 the primary raw material. And it's very heavy to transport.  
6 And even though there's really not waste in gypsum, it's  
7 still very heavy to transport. So it's very cost-effective  
8 to be located right next to your supply.

9 Now, those supplies are very limited in  
10 North America. In the US, basically there is a seam that  
11 feeds up through the Rockies, a little bit more on the west  
12 side of the Rockies. It sort of moves around a little bit.  
13 There's a second seam that starts in east Texas and  
14 Arkansas, feeds up through Oklahoma and into Iowa. And then  
15 there's a third smaller seam that starts in Indiana and goes  
16 up into northwestern Ohio.

17 So there's really no gypsum of a suitable quantity  
18 or quality in the other parts of the country to be able to  
19 justify plants. So, basically, plants were built in those  
20 areas.

21 And of those areas, there's only the smaller seam  
22 in southern Indiana up through northwestern Ohio, that's the  
23 only one that's actually east of the Mississippi.

24 Q. So has the practice of building plants close to  
25 mines changed over the last few decades?



10:36 1 A. Yes, it has. But before I go there, I think one  
10:36 2 thing I wanted to add, though, there are some plants located  
10:37 3 on the East Coast that use natural rock.

10:37 4 And the reason for that, basically, is the plants  
10:37 5 are built on the coast so they can take ocean freight  
10:37 6 unloading. There is some gypsum in Nova Scotia, and that's  
10:37 7 the primary supply for those plants.

10:37 8 So some of our competitors certainly have plants,  
10:37 9 and we did at one time have a plant on the East Coast.

10:37 10 Q. Thank you.

10:37 11 So has -- what's happened with regard to where  
10:37 12 plants are built over the last few decades?

10:37 13 A. Well, with the Clean Air Acts that Congress passed  
10:37 14 back starting in the '70s and into the '90s, the -- one of  
10:37 15 the key elements of that was requiring coal-fired power  
10:37 16 plants to remove the nitric and sulfuric oxides from their  
10:37 17 emissions. And the technology to do that was a -- what's  
10:37 18 called a scrubbing technology. And that scrubbing  
10:37 19 technology creates a bit of a by-product, a sludge, if you  
10:38 20 will, that with a little bit of additives and engineering  
10:38 21 and treatment can be turned into exactly the same chemical  
10:38 22 compound as natural gypsum, with the little advantage that  
10:38 23 it's got a little higher purity.

10:38 24 So this was actually a big opportunity for the  
10:38 25 wallboard manufacturers, because coal-fired power plants now

1 have this product that they were generating and they had,  
2 but it was a by-product that probably would have required  
3 landfill, and by far the biggest users of this product is in  
4 wall -- in wallboard. So this opened the door for placing  
5 plants adjacent to coal-fired power plants that have  
6 scrubbing systems.

7 Q. And is that by-product from coal-fired power  
8 plants called synthetic gypsum?

9 A. That's called synthetic gypsum, correct.

10 Q. Can you tell me where -- tell the Court where  
11 CertainTeed Gypsum's plants are located around the United --  
12 around the United States and Canada.

13 A. Okay. I'll start with the United States, and I'm  
14 going to go sort of West Coast to East because I like to  
15 read left to right.

16 Starting -- we have a plant in Seattle. We have a  
17 plant in Las Vegas, and another one in Cody, Wyoming. We  
18 have one in Nashville, Arkansas. We have a plant in  
19 Fort Dodge, Iowa. And then we have plants in Carrollton,  
20 Kentucky, which is halfway between Cincinnati and  
21 Louisville. We have a plant in Moundsville, West Virginia,  
22 which is south of Wheeling. And then the Roxboro plant.

23 Across Canada, we're the largest manufacturer in  
24 Canada, and the only company with coast-to-coast plants. We  
25 have a plant in Vancouver, another one in Calgary, a third

1 0 : 3 9 1 one in Winnipeg, a fourth one in Toronto, a fifth one that's  
1 0 : 3 9 2 in Montreal, and a sixth one is in a small town called  
1 0 : 3 9 3 McAdam, which is actually just north of central Maine.

1 0 : 3 9 4 Q. Mr. Engelhardt, let me show you what's -- we  
1 0 : 4 0 5 didn't actually mark these, I don't believe, but what is  
1 0 : 4 0 6 Demonstrative Exhibit 1, Plaintiff's Demonstrative  
1 0 : 4 0 7 Exhibit 1.

1 0 : 4 0 8 I'd ask if that assists you in demonstrating the  
1 0 : 4 0 9 location of the plants around the country.

10 MR. PHILLIPS: Can we put that up? So I think  
11 that should be on --

1 0 : 4 0 12 THE COURT: You like to read left to right. I  
1 0 : 4 0 13 like to read front to center, so Table 1 is Table 3, I see.

1 0 : 4 0 14 Q. So does that reflect the testimony that you gave  
1 0 : 4 0 15 as to the locations of CertainTeed's plants?

1 0 : 4 0 16 A. Yes, it does.

1 0 : 4 0 17 Q. Why are CertainTeed's plants located in those  
1 0 : 4 1 18 places?

1 0 : 4 1 19 A. Well, there's basically two reasons. As I  
1 0 : 4 1 20 mentioned before, the number one need that we have in  
1 0 : 4 1 21 locating a wallboard plant is a supply of gypsum. So  
1 0 : 4 1 22 they're all located -- or almost all of them located right  
1 0 : 4 1 23 next to a supply of gypsum.

1 0 : 4 1 24 So, for example, Cody, Wyom- -- the Cody plant and  
1 0 : 4 1 25 Las Vegas plants, Fort Dodge, and Nashville are all right

1 0 : 4 1 1 beside gypsum mines. And then our three eastern US plants  
1 0 : 4 1 2 are all right beside synthetic gypsum power plants.

1 0 : 4 1 3 Q. And why is that important?

1 0 : 4 1 4 A. That's important because that's our biggest raw  
1 0 : 4 1 5 material, and it's a very heavy raw material to move, and we  
1 0 : 4 1 6 need supply. We really can't make gypsum board without  
1 0 : 4 1 7 gypsum. So from a cost standpoint, it's critical to do  
1 0 : 4 1 8 that.

1 0 : 4 1 9 And the second priority, then, would be access to  
1 0 : 4 1 10 the market. And we do have some plants that are located  
1 0 : 4 2 11 more where there is a big market. If you look across Canada  
1 0 : 4 2 12 and you look at the population, for example, the vast  
1 0 : 4 2 13 majority of the Canadian population is in the cities where  
1 0 : 4 2 14 we have our plants.

1 0 : 4 2 15 So we don't have -- with the exception of  
1 0 : 4 2 16 Winnipeg, we don't have a gypsum mine really close to any of  
1 0 : 4 2 17 those plants, and we bring that in from a longer distance,  
1 0 : 4 2 18 but our competitors also have to do the same.

1 0 : 4 2 19 Q. Is CertainTeed Gypsum's Roxboro plant the only  
1 0 : 4 2 20 manufacturing facility that CertainTeed has in  
1 0 : 4 2 21 North Carolina?

1 0 : 4 2 22 A. No, it's not. CertainTeed Roofing has a plant in  
1 0 : 4 2 23 Oxford, North Carolina, and CertainTeed Siding has a plant  
1 0 : 4 2 24 in Claremont.

1 0 : 4 2 25 Q. All right. Let's talk about the Roxboro plant for

1 a little while, Mr. Engelhardt.

2 When did CertainTeed, or BPB, decide to build the  
3 Roxboro plant?

4 A. Well, actually, it was decided twice.

5 The first time it was decided was in 2004, and  
6 that was actually before I joined the company. I actually  
7 learned of it by looking on the website when I was  
8 investigating the company.

9 So BPB at that time entered into a contract with  
10 Progress -- contract with Progress Energy to build the  
11 plant. Then whenever Saint Gobain acquired BPB, and that  
12 was -- that transaction took place on December 31st of 2005,  
13 it was not a friendly acquisition. So what happened was it  
14 took a while to get our hands around the market, and so  
15 Saint Gobain decided the second time, basically, in 2010,  
16 affirmed that we would be building the plant.

17 Q. Had something happened between 2004 and 2010 that  
18 affected the housing market?

19 A. Yes. I think the big thing that happened was the  
20 housing market just -- the drywall market, especially, just  
21 fell flat in 2007. It was about May of 2007 when things  
22 just stopped.

23 So one of the big concerns that we had, that  
24 Saint Gobain had was, why do we want to bring more capacity  
25 into a market when the market really is already depressed?





10:45 1 A. Would you like me to wait on the screen or -- who  
10:45 2 can see this?

10:45 3 THE COURT: We can all see, if you'll just use  
10:46 4 words.

10:46 5 THE WITNESS: Well, it's not --

10:46 6 MR. PHILLIPS: Is it up there?

10:46 7 THE WITNESS: No, I don't see it. And it's not  
10:46 8 on.

10:46 9 THE COURT: That's my fault.

10:46 10 THE WITNESS: Okay. So your question again?

10:46 11 THE COURT: We'll get it down pat here soon.

10:46 12 Q. Given my --

10:46 13 THE COURT: You know, the reason I'm having to  
10:46 14 adjust is when you've got a jury in the box, I've got to  
10:46 15 take it down every time to make sure -- I'll adjust.

10:46 16 MR. PHILLIPS: Given my technology skills, I'm  
10:46 17 not...

10:46 18 Q. So, Mr. Engelhardt, where is -- in this photo,  
10:46 19 Exhibit 163, where is Duke Energy's coal-fired power plant?

10:46 20 A. That one's the obvious one. I think it's called  
10:46 21 out with the red pointer. So that whole large site there is  
10:46 22 the power plant and its associated support areas.

10:46 23 Q. All right. And where is CertainTeed Gypsum's  
10:46 24 wallboard plant?

10:46 25 A. If you go up to the upper right, you'll see kind

1 of an odd-shaped looking building. And, yes, where the  
2 marker is, that would be CertainTeed Gypsum's wallboard  
3 plant.

4 Q. All right. And you've talked about, I think, a  
5 stockpile. Where is the stockpile?

6 A. If you drop directly below the CertainTeed Gypsum  
7 plant, you'll see sort of a whitish-gray area. And that  
8 would be the stockpile area, as well as the unloading and  
9 conveying area.

10 Q. And what is the stockpile?

11 A. The stockpile is a -- basically, an inventory or  
12 stockpile of gypsum located on the Duke site.

13 Q. Manufactured by Duke to be delivered to CTG?

14 A. That's correct.

15 MR. TUCKER: Objection, Your Honor. Leading.

16 THE COURT: You may proceed.

17 A. That's correct.

18 Q. All right. Can you explain to the Court,  
19 basically, how the gypsum moves around from Duke's power  
20 plant to CTG's plant, in this photo.

21 A. Okay. The -- from the Duke plant, you see the  
22 scrubbers, and I think that's the plumes that are coming up.  
23 And somewhere down underneath that -- I've been in there,  
24 but I don't know -- can't describe exactly where it is -- is  
25 where the sludge is created and the synthetic gypsum is



10:49 1 our loading station is. And so that is where the  
10:49 2 third-party operator or the conveyor will feed the gypsum  
10:49 3 into that, which then feeds it into a conveyor. And that's  
10:50 4 the gray line that goes from that -- to the left side of  
10:50 5 that piece that I just described, goes across the canal,  
10:50 6 across the railroad tracks, and feeds into the gypsum plant,  
10:50 7 jogs a little bit left to feed it directly into where our  
10:50 8 mill is. And so that is -- that is where it goes. And it  
10:50 9 feeds directly into bins that we have inside of our mill.

10:50 10 Q. So that's the -- is that where Ms. Marston has  
10:50 11 drawn the blue line?

10:50 12 A. Yes, the blue line.

10:50 13 Q. Okay. Are there railroad tracks on the site?

10:50 14 A. Yes, there are railroad tracks actually on both  
10:50 15 sides, but the -- along the canal you can see -- it looks  
10:50 16 like there might be even trains -- cars sitting there.

10:50 17 But along the -- between the water and the  
10:50 18 stockpile, you see a rather long gray area -- yes, where  
10:50 19 Ms. Marston is drawing. That would be the railroad tracks  
10:51 20 that bring -- that feed into the Duke Energy plant.

10:51 21 Q. Okay. All right. So explain to the Court, if you  
10:51 22 would -- at the time this photo was taken, did CTG have the  
10:51 23 ability to receive gypsum and put it into its plant from any  
10:51 24 place other than Duke Energy's site?

10:51 25 A. No, we did not.

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MR. TUCKER: Objection, Your Honor. Lack of foundation. I don't think it's been established when this picture was taken.

THE COURT: I was going to ask, can you tell me when the picture was taken, Mr. Phillips?

MR. PHILLIPS: I can't, Your Honor, but I think I can ask another question that I would say "how do you know that."

Q. How do you know that, when this photo was taken?

MR. TUCKER: Same objection, Your Honor.

THE COURT: Well, we can know, I suppose, that it's taken at least before a certain date, right?

MR. PHILLIPS: I'll ask my question a different way, Your Honor.

Q. Mr. Engelhardt, can you tell me whether or not before 2017 CertainTeed Gypsum had the ability to receive gypsum, synthetic gypsum directly to its plant in Roxboro from any site other than the Duke Energy site?

A. No, we did not.

Q. All right. And during 2017, did CertainTeed undertake to try to change that?

A. Yes, we did.

Q. What did you do?

A. Well, basically, after we were informed that we were not going to get the supply, we very quickly put

1 together a shed area and a feeding system that would feed  
2 the gypsum up into our plant.

3           So the reason I can tell that from this picture,  
4 that this picture precedes that, is if you go in that little  
5 open area, if you will, sort of an inverted L on the left  
6 side of our plant -- yes, right there -- you can see that --  
7 if you look closely, that's a parking lot. You can see cars  
8 in that parking lot. That is where the shed is now and the  
9 feeding system that feeds up into the conveyor from that  
10 location.

11           Q.   How many tons of gypsum can that shed hold?

12           A.   We're limited on space there so that gypsum shed  
13 can only hold 10,000 tons, so it's adequate --

14                   [Reporter clarification.]

15           A.   10,000 tons.

16           Q.   Why did CertainTeed Gypsum choose to locate a  
17 plant in Roxboro?

18           A.   Well, the primary reason was that we had a source  
19 of supply. Once we had the agreement that was made with  
20 Progress Energy initially and now with Duke, we had a  
21 long-term -- long-term secure supply, stable supply of  
22 gypsum through the term of the contract.

23                   THE COURT: Can I interrupt just one moment,  
24 Mr. Phillips?

25                   MR. PHILLIPS: Yes, sir, Your Honor.





1 that is what we call the mill. And that's where we feed the  
2 gypsum.

3 The equipment that we use, because of the sheer  
4 volume of gypsum, is very, very large. So that is where we  
5 grind and we heat the gypsum to get it into a form of  
6 stucco.

7 That part of the building is also used for all of  
8 our raw material, receipt and storage. As a matter of fact,  
9 you can see on the end there is something that sticks out a  
10 little bit. That would be where the paper is delivered. So  
11 that is very likely a paper truck that brings in large rolls  
12 of paper into that area. So the dry additives, wet  
13 additives, and paper all come into that part of the  
14 building.

15 Now, we feed -- after we process that stucco, we  
16 feed the material down and there -- through a series of  
17 conveyors, and these dry additives feed into that.

18 And then pretty much underneath, just below -- or,  
19 I guess, right about where that blue line -- that little  
20 piece sticks up on the blue line under the Y, that's pretty  
21 much where our mixer sits. And the paper feed would be to  
22 the -- to our left of that. And that is where we put the  
23 slurry onto the paper.

24 Now, every wallboard plant, you can -- when you're  
25 flying, you always can tell a wallboard plant because we

1 10:56 have unique shapes. And the reason for that is that long  
2 10:56 appendage that goes down to the right, that is basically  
3 10:56 made up of two conveyors.

4 10:56 The first conveyor is this long, single piece of  
5 10:56 board. And it needs to travel basically 3 minutes until it  
6 10:56 gets set hard enough that we can cut the material into  
7 10:57 shorter boards and handle it.

8 10:57 So in this case, we need 1500 feet for -- over  
9 10:57 1500 feet for that to happen, from the mixer to the end.  
10 10:57 And then we transfer the board to a separate conveyor that  
11 10:57 runs parallel coming back up that long area.

12 10:57 And the majority of that section right there is  
13 10:57 actually made up of the dryer. So it's a very long,  
14 10:57 multilayer dryer where we break up the boards and feed them  
15 10:57 through, and they literally creep through. The boards are  
16 10:57 in there for about 45 minutes to completely dry them.

17 10:57 Then, as we come back up into the larger square  
18 10:57 area, that's where the -- that's where we start -- we pull  
19 10:57 off and cut the boards into the lengths that they would be  
20 10:57 sold in, whether it be 8 feet, 10 feet, 12 feet, something  
21 10:57 like that. And we trim the edges, we put end tape on them,  
22 10:58 we stack them.

23 10:58 And then pretty much everything from the mill area  
24 10:58 down toward the bottom is the warehouse. So that -- the  
25 10:58 board then goes into the warehouse.



10:59 1 And the secondary reason is this is our plant to  
10:59 2 service the southeast region. The southeast region is,  
10:59 3 basically, the fastest growing. The most homes are in the  
10:59 4 south -- the most new homes are going into the southeast  
10:59 5 region. So it's just a big, growing area of the country,  
10:59 6 and that's why we built the plant at this location.

10:59 7 Q. Can you describe for the judge the capacity of the  
10:59 8 Roxboro plant and how it compares with CTG's other wallboard  
10:59 9 plants?

10:59 10 A. Okay. The Roxboro plants -- we use a nameplate  
11:00 11 capacity in, sort of in our industry, of nominal capacity.  
11:00 12 This capacity, the plant -- this plant's capacity will  
11:00 13 produce 800 million square feet of wallboard a year.

11:00 14 Now, when I say 800 million and use the term  
11:00 15 "nominal," that's if we just ran the standard 1/2 inch,  
11:00 16 4-foot-wide product. But the reality of it is, we don't  
11:00 17 just run that product. We also run the 5/8 inch product.  
11:00 18 We also run 54-inch-wide product. So there's different  
11:00 19 products that make up our product mix.

11:00 20 So the normal product mix that we would run in  
11:00 21 Roxboro would -- the actual production would be about 725 to  
11:00 22 740 million square feet a year, sort of arguably on the mix  
11:00 23 a little bit.

11:00 24 But because the 5/8 -- 5/8 inch board uses more  
11:00 25 gypsum than 1/2 inch board does, and a 54-inch board -- wide

11:00 1 board uses more than a 48-inch board, even when you do that  
11:01 2 sort of a calculation, you still end up using the same  
11:01 3 amount of gypsum, regardless of the mix.

11:01 4 Q. And how much gypsum does it take to get to  
11:01 5 800 million square feet, or 727,040 with the mix of boards?

11:01 6 A. Yeah, it takes a little over 600,000 tons per  
11:01 7 year.

11:01 8 Q. How does the Roxboro plant compare within  
11:01 9 CertainTeed Gypsum with regard to productivity and  
11:01 10 efficiency?

11:01 11 A. Well, in terms of productivity, this is our -- one  
11:01 12 of our top three plants in the world in Saint Gobain, and  
11:01 13 it's our top plant in North America.

11:01 14 And, basically, productivity is, when we're  
11:01 15 running full, how much board can we produce versus how much  
11:01 16 effort do we put in to do it in terms of man-hours?

11:01 17 In terms of efficiency, it's one of our best in  
11:01 18 North America when we have the gypsum to run and we're  
11:01 19 efficiently running it. And we certainly saw that in 2016  
11:01 20 where we were able to really deliver very good performance  
11:01 21 numbers. So it's one of our top ones in North America.

11:02 22 Q. In 2016, what percentage of CTG's US wallboard  
11:02 23 production came from the Roxboro plant?

11:02 24 A. It was about 20 percent.

11:02 25 Q. When was the Roxboro plant built?



11:02

1 A. It was built in 2012.

11:02

2 Q. And what was the company's plan with regard to the  
3 operation of the Roxboro plant after completion?

11:02

11:02

4 A. Well, we -- our intention, and like we run all of  
5 our wallboard plants, would be 7-days-a-week,  
6 24-hours-a-day production.

11:02

11:02

7 So, typically, in a typical week, we would take a  
8 shift down for maintenance for 8 hours or something like  
9 that. And as we got better with our plants, it might be  
10 that we would do that every other week.

11:02

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11 But at the same time -- but, basically, our  
12 production was scheduled to run 7 days a week, or at least  
13 6 1/2 days a week, round the clock every week.

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11:02

14 Q. All right. So that was the plan.

11:02

11:03

15 Since the plant was completed in 2012, what's been  
16 its operating history?

11:03

17 A. Okay.

11:03

11:03

18 MR. TUCKER: Your Honor, may I just make an  
19 objection for the record here?

11:03

11:03

20 I think probably by way of background, this is  
21 potentially relevant, but to the extent that Mr. Engelhardt  
22 intends to talk about alleged impacts to the plant based on  
23 issues that have arisen in this lawsuit, including any  
24 potential downtime at the plant, as you know from our  
25 motions in limine, we have an objection to that line of

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11:03 1 questioning on the grounds that those impacts are beyond any  
11:03 2 claim in this case, and also are precluded in terms of  
11:03 3 recoverable damages by Section 9.3 of the contract, and we  
11:03 4 do not believe are relevant to any of the contract  
11:03 5 construction issues in this case. So I just wanted to lodge  
11:03 6 that objection at this point.

11:03 7 THE COURT: Okay.

11:03 8 MR. PHILLIPS: Do you want to hear from me,  
11:03 9 Your Honor?

11:03 10 THE COURT: If you would like to go ahead and  
11:03 11 respond now, you may, Mr. Phillips.

11:04 12 MR. PHILLIPS: Your Honor, one of the big issues  
11:04 13 in this case has been course of performance. How this plant  
11:04 14 operated historically, how it operates now I think are  
11:04 15 fundamental to the case. You can't tell the story of this  
11:04 16 contract, the parties' intentions, and their dealings  
11:04 17 without describing what happened on the site. I think that  
11:04 18 all of those things are an integral part of the case. We  
11:04 19 acknowledge we don't seek damages for torts or other things,  
11:04 20 but it is an inherent part of the story.

11:04 21 THE COURT: And -- go ahead.

11:04 22 MR. TUCKER: Your Honor, if I may just add.

11:04 23 I think timing is an issue here if we're talking  
11:04 24 about course of performance. If we're asking about impacts  
11:04 25 after the lawsuit was filed after 2017, that course of

1 performance is not relevant to any issue in this case, and  
2 we would argue, really, that course of performance currently  
3 has nothing to do with any issue in the case either.

4           So we're talking about course of performance that  
5 motivated decisions relevant to the contract; for example,  
6 why the contract was changed in 2012. We think that  
7 potentially is relevant, but the time period makes a  
8 difference. If we're talking about impacts to the plant  
9 presently, it has nothing to do with any contract  
10 construction issue.

11           **THE COURT:** Well, I think the relevance of the  
12 testimony, if it has any, that I think I would hear, is to  
13 the extent that -- the manner in which the plant operates,  
14 depending on its supply, informs what the expectations were  
15 at the time the contract was entered. Then I would consider  
16 it for that purpose.

17           I agree with you that a litigation-induced  
18 strategy that doesn't inform that initial intent of the  
19 parties at the time of the contracting, I can see the  
20 argument.

21           But I think that to the extent this testimony  
22 objectively informs what would have been the expectation of  
23 the parties at the time they entered into an outputs  
24 contract, on both sides, then I -- then I think that  
25 evidence is something that I would consider.

11:06

1

MR. PHILLIPS: Your Honor, you took the words out

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2

of my mouth.

11:06

3

And, also, the parties have already stipulated as

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to the volume of gypsum that CTG received after the lawsuit

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5

was filed. And a part of that was supplied not from the

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6

Roxboro and Mayo plants but was brought in from Duke Energy

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7

Carolinas plants. And so the parties have already

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8

stipulated in part to these operations and the obvious

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9

impact.

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10

THE COURT: Yeah. And to the extent that -- in

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11

addition to that, there's testimony that intends to rebut a

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12

claim that Duke Energy says that the matter in which they

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13

took below the MMQ is indicative of intent. And they say,

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14

no, that it was an alternative.

11:07

15

I understand the limitations that you're dealing

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with here, but I put it in context. And so as we go

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17

through, I would be much more careful how I would do a

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18

limiting instruction if I go to the jury, but I think y'all

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19

know what it is.

11:07

20

I'm intending to hear this and let it fall in its

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21

appropriate place and not be used for other purposes.

11:07

22

MR. TUCKER: Your Honor, just so our record is

11:07

23

protected, may I have a continuing objection to questions

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24

that deal with impacts to the plant so that I don't

11:07

25

constantly have to interrupt Mr. Phillips and the witness?

1 THE COURT: You certainly may.

2 And, again, what I'm looking at is historically  
3 what did the plant do? To the extent a witness on either  
4 side begins to say, "Well, we took this contract because  
5 they did this and our construction of the contract gave us  
6 this right," et cetera, and you're dealing with post-entry  
7 interpretations of the contract, then I'll probably be  
8 restrictive as to whether I would consider the evidence.

9 But your standing objection is noted.

10 MR. TUCKER: Thank you, Your Honor.

11 THE COURT: You may proceed.

12 Q. All right. Mr. Engelhardt, I believe that I had  
13 asked you, since the plant was completed, what has been its  
14 operating history?

15 A. Okay. I think the first phase to talk about is in  
16 2012 to probably 2014. We ran our first board on March 28th  
17 of 2012. So that was the first saleable board, or we didn't  
18 sell it. We have it posted in the -- and signed in the  
19 conference room.

20 THE COURT: Excuse me. Did you say March of 2012?

21 THE WITNESS: March 28th of 2012, yes.

22 A. And at that time, we were starting up our plant  
23 and we were only running one shift, although we were staffed  
24 for two shifts.

25 And the reason we do that is that we need to

11:08 1 commission all the equipment running together, producing  
11:08 2 board. We need to commission each and every product, and we  
11:08 3 had to really train our operators. We had trained our  
11:08 4 operators in other -- in other similar high-speed plants,  
11:09 5 but now they're on their own. So it's a little bit  
11:09 6 different whenever you're running the operation on your own.  
11:09 7 So we basically had both shifts working together for about  
11:09 8 3 weeks, a month in that initial commissioning process.

11:09 9           After that time period, we then separated the  
11:09 10 shifts and ran two shifts. And when I say we ran two  
11:09 11 shifts, that basically meant that we would turn the plant  
11:09 12 on, say, Monday morning and we would run it for --  
11:09 13 continually for 80 hours. So one shift would hand off to  
11:09 14 the other with shifts working 12 hours.

11:09 15           From that point, then we added the third shift in  
11:09 16 October of 2012. And we added the third shift and that  
11:09 17 allowed us then to run around the clock 5 days.

11:09 18           And then we went to a fourth shift in March,  
11:09 19 April -- end of March, beginning of April of 2013, and then  
11:09 20 that allowed us to run a full 7 days. So that was the  
11:10 21 start-up period.

11:10 22           Now, in 2012, we were still in a very, very soft  
11:10 23 market. So the drywall market was still, basically, half  
11:10 24 what it was at, you know, even prebubble levels.

11:10 25           And to give you an idea of that, I said earlier, I



1 talked about new housing starts being our top indicator.  
2 New housing starts in 2012 were about 700,000. The average  
3 new housing starts for the last 2 or 3 decades in the US has  
4 been more like 1.5 million. So just still a little bit  
5 below half of what the normal market size was at that point.

6 One of the things that we did do, though, was once  
7 we had all the products commissioned, we did start to ship  
8 more production from other plants into this plant because  
9 this was our lowest cost plant, and we had -- obviously had  
10 DSG here to use. So we started to do that to the degree  
11 that it was reasonable.

12 In 2013 and 2014, we just continued to develop.  
13 The big thing there was the market continued to grow a  
14 little bit. But even with start-ups and the market starting  
15 to grow, housing starts at the end of -- or in 2014 were  
16 still under a million for the year, so they're still only  
17 two-thirds of what a normal average year would have been for  
18 the past 2 or 3 decades. So we're still dealing with a  
19 pretty soft market overall, but we did continue to increase  
20 our output during those 3 years.

21 When we get into 2015, we started to hit our  
22 stride a bit more. There was a couple of things that was  
23 happening there. One of those things was that we were able  
24 to secure even more business and we started up a plant at  
25 the beginning, we hadn't secured business in the region, but

1 we were securing more business, getting a bigger share in  
2 the region, and the market was responding better as well.

3 So, basically, in 2015 and 2016, we really started  
4 to hit our stride and started to consume quite a bit of  
5 gypsum and run it through, and that's when our efficiencies  
6 really picked up.

7 A board plant runs best when it can run. It runs  
8 more efficiently when you can run it continuously for many,  
9 many days. So that was that period.

10 Then in 2017, things slowed down after, basically,  
11 April, and that was when we were notified by Duke that they  
12 were not going to be supplying the con- -- the amounts in  
13 the contract that we believe were required.

14 And since then, through the rest of 2017 while I  
15 was there, we basically were running at partial production  
16 for the rest of the year.

17 Q. At the time you left CertainTeed Gypsum in  
18 December of 2017, what was the status, the operating status  
19 of the plant?

20 A. Well, as I said, we were limping, basically, from  
21 May through the end of the year. We were basically running  
22 about half levels of production. So we had lost business.

23 Our plant profitability, which was our most  
24 profitable plant, basically disappeared completely. We were  
25 running the plant a few days a month, and then we would take







11:17

1 Progress and CTG when you got involved?

11:17

2 A. Yes, it was.

11:17

3 Q. When you got involved in 2009, did you read the  
4 2008 agreement, Exhibit 6?

11:17

5 A. Yes, I did.

11:17

6 Q. So what was the situation on the ground at Roxboro  
7 when you got involved?

11:17

8 A. Well, basically, we had an obligation to take  
9 50,000 net dry tons a month. We did not have a plant to put  
10 it in, and we had to find places to take that gypsum.

11:17

11 Q. Upon what did you base your conclusion that CTG  
12 had a contract obligation to take 50,000 tons a month?

11:17

13 A. Multiple ways. That's what I understood the  
14 contract to say. That is clearly the messages that I got  
15 from internally within CertainTeed Gypsum and also from  
16 Progress Energy.

11:17

17 Q. So what did CertainTeed try to do -- what did  
18 CertainTeed do to try to meet its obligations to take  
19 50,000 tons a month?

11:18

20 A. Well, we worked on a number of things. The  
21 2008 agreement provided for a couple of those things. One  
22 of those was expansion of the stockpile to 650,000 tons at  
23 the cost to CertainTeed of \$1.5 million.

11:18

24 Q. What had the stockpile been before?

11:18

25 A. It was -- I believe it was 250,000 tons in the

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1 2004 agreement.

2 Q. Okay.

3 A. We also were permitted and expanded the rail  
4 loading area. So we added some rail sidings and a rail  
5 loading station, effectively, a rail loading facility at the  
6 end of the stockpile where we could load railcars and haul  
7 them off. So those were the two things we did on site.

8 The third thing that we did was made some changes  
9 in some of our other locations too so we could get gypsum.

10 For example, in Toronto, we acquired land and we  
11 built a rail unloading and gypsum storage site just down the  
12 road from our Toronto plant. Toronto was a DSG plant, a  
13 synthetic gypsum plant, so we knew we could consume the  
14 material there.

15 Another thing that we did was we made  
16 modifications to our Montreal plant. We set up sort of an  
17 ad hoc rail unloading station, which they didn't have  
18 capability of there until then. And we made some  
19 modifications to the feeding system so that we could use DSG  
20 in the process.

21 And I mentioned that one because that was a  
22 challenge. The Montreal plant was a rock plant, and the  
23 equipment to grind rock and feed rock is different from the  
24 equipment that you use for particle sizes as small as  
25 synthetic gypsum. So we were only able to feed a

11:20 1 small percent, but we experimented with how much percentage  
11:20 2 we could feed and then we developed a feed system. So we  
11:20 3 made changes like that.

11:20 4 So, basically, the -- relative to the stockpile in  
11:20 5 those areas, we had paid to expand the stockpile, and we  
11:20 6 wanted to maximize the size of the stockpile. That was one  
11:20 7 place to put gypsum. And at that point, it was getting  
11:20 8 pretty much there, if it wasn't there at maximum.

11:20 9 We -- from the rail loading station at Roxboro, we  
11:20 10 started loading railcars and sending them to our other  
11:20 11 plants.

11:20 12 We also trucked material to our Moundsville plant.  
11:20 13 We didn't really need the gypsum there because we have  
11:20 14 another -- had another contract there, but that was -- that  
11:20 15 was an area that we knew we could get some and get some off  
11:20 16 of the site quickly.

11:20 17 We subsidized sales that had to be set up,  
11:20 18 actually, before I got involved with PE selling to third  
11:21 19 parties. PE would actually make the sale. We paid a  
11:21 20 subsidy, which I understood to be, basically, the  
11:21 21 transportation cost of shipping that product to those  
11:21 22 locations.

11:21 23 And then the last area was we landfilled. And we  
11:21 24 landfilled in both the on-site Progress Energy landfill and  
11:21 25 now the Duke landfill, and we also landfilled off-site to a

11:21

1 Waste Management facility a few miles north of the plant.

11:21

2 Q. How long did those things go on?

11:21

3 A. Well, we -- those started in 2009. And -- I think

11:21

4 it was the earliest in 2009. And we continued those into

11:21

5 2013, until after we had started up our plant.

11:21

6 Q. All right. Mr. Engelhardt, if you would take a

11:21

7 look at Exhibit 59.

11:22

8 Can you identify this document for the Court?

11:22

9 A. Yes. This is the First Amendment to the Amended  
10 and Restated Supply Agreement. In other words, this was an  
11 amendment we made to the 2008 agreement.

11:22

12 Q. And what's the date of this agreement?

11:22

13 A. The date of this one is November 19, 2009.

11:22

14 Q. Is that your signature on the last page of

11:22

15 Exhibit 59?

11:22

16 A. Yes, it is.

11:22

17 Q. Can you explain the substance of this amendment to  
18 the 2008 contract to the Court?

11:22

19 A. Yes. The purpose of this amendment was to remove  
20 80,000 tons of -- off of the stockpile, because the  
21 stockpile had gotten pretty large and PE had concern about  
22 its size.

11:22

23 So the terms were, basically, two in this. The

11:23

24 first term was that CertainTeed was to remove 80,000 tons of

11:23

25 gypsum from the stockpile and place it into the

1 Progress Energy on-site landfill. And the cost for us to do  
2 that was \$49 a ton plus -- \$49 a wet ton, as opposed to a  
3 dry ton, which is more tonnage. And at a -- plus the cost  
4 that was built into the contract for the gypsum. And at  
5 that time, I'm not sure if it was XXXXXXXX, but it's in the  
6 basic agreement.

7 The other condition was that we did not grow the  
8 stockpile above 600,000 tons through the remainder of 2010.

9 Q. How much did it cost CertainTeed to execute on  
10 that 80,000-ton removal from the stockpile?

11 A. The cost of that was a little over \$4 million when  
12 we were all finished.

13 Q. And during the period from 2009 to 2012/'13, you  
14 testified that CTG did a variety of things, from expanding  
15 the stockpile to railroading DSG off-site, to putting it in  
16 landfills, all of the things you mentioned.

17 During that period of time, how much money did CTG  
18 spend to move synthetic gypsum off the Duke site?

19 A. Our total was over \$40 million.

20 Q. Mr. Earnhardt -- "Mr. Earnhardt." It will not be  
21 the last time I do that.

22 Mr. Engelhardt, if you would take a look at what's  
23 marked as Exhibit 36.

24 A. I have it.

25 Q. Are you familiar with this document?



11:26

1 Q. What are you talking about there?

11:26

2 A. Well, what I spoke about earlier was that we were  
3 starting to ship to those locations through the rail loading  
4 stations, primarily Toronto and Montreal in this particular  
5 area.

11:26

6 So what I was basically referring to was, is that  
7 we were -- that we had set up shipments going different  
8 directions, and we were shipping to those plants.

11:26

11:26

9 Q. All right. And, Ms. Coppola, in the email in the  
10 middle of Exhibit 36 on the first page, responds to your  
11 email; is that correct?

11:27

11:27

12 A. That's correct.

11:27

11:27

13 Q. And what does she say to you?

11:27

14 MR. TUCKER: Objection, Your Honor. The document  
15 speaks for itself. The document's the best evidence of what  
16 Mrs. Coppola communicated.

11:27

11:27

17 THE COURT: Are you asking him anything other than  
18 what the content of the email is, Mr. Phillips?

11:27

11:27

19 MR. PHILLIPS: Your Honor, Ms. -- I'll ask the  
20 question again, Your Honor.

11:27

11:27

21 THE COURT: All right.

11:27

22 Q. Ms. Coppola responded to you; is that correct?

11:27

23 A. Yes, she did.

11:27

24 Q. All right. And what did you understand her  
25 response to mean?

11:27



11:27

1

MR. TUCKER: Same objection, Your Honor.

11:27

2

THE COURT: Overruled.

11:27

3

A. Okay. I understood her response to be that

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4

Progress Energy's intent is to work with CertainTeed Gypsum

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5

to put in place a plan to remove CertainTeed's obligation of

11:27

6

50,000 tons per month --

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7

[Reporter clarification.]

11:27

8

A. Okay. Sorry. I'll speak more slowly.

11:27

9

That Progress Energy's intent is to work with

11:28

10

CertainTeed Gypsum to put in place a plan to remove

11:28

11

CertainTeed's obligation of 50,000 tons per month from

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12

Roxboro and Mayo production. And that -- also that PEC has

11:28

13

approved the Waste Management, Incorporated, Amelia site as

11:28

14

an acceptable disposal for the gypsum.

11:28

15

Q. Had you had discussions with Ms. Coppola before

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16

this regarding the possibility of reducing CertainTeed's

11:28

17

50,000-ton-a-month obligation?

11:28

18

A. Yes, I had.

11:28

19

Q. Why did you want to do that?

11:28

20

A. Well, basically, because we had expanded -- we had

11:28

21

paid to expand the stockpile. And the purpose in our view

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22

of expanding the stockpile was to use that as a storage

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23

area.

11:28

24

So to continue to remove the 50,000 tons a month

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25

when we -- and we had room -- would have had room on the



11:30

1           circa 600,000 tons?"

11:30

2           Is that what you asked him?

11:30

3           A.     That is what I asked him.

11:30

4           Q.     All right.  And what did you understand his  
5 response to be?

11:30

6           A.     Okay.  His response basically was that we have an  
7 obligation to remove the 50,000 tons per month; and that  
8 until we prove that we can remove 50,000 tons, then he  
9 doesn't -- he doesn't think that PE would be too interested  
10 in talking about reducing that quantity.  But after that  
11 time, possibly.

11:30

12          Q.     He says at the end:

11:30

13                     "Until we can renegotiate ourselves out of  
14 the Revised and Amended Supply Agreement, the  
15 agreement stands in full."

11:30

16                     What did you understand that to mean?

11:30

17           MR. TUCKER:  Objection, Your Honor.  Lack of  
18 foundation.  Calls for speculation.

11:31

19           THE COURT:  Did you have an understanding at the  
20 time you received the email?

11:31

21          Q.     Mr. Engelhardt, did you have an understanding of  
22 what he meant by that at the time you received this email?

11:31

23          A.     Yes.

11:31

24          Q.     What was that understanding?

11:31

25          A.     Mervyn -- Mervyn was very well aware of the

11:31

11:31 1 purpose of removing -- of -- my approach of 50,000 tons or  
11:31 2 let's keep the stockpile full. So he was very well aware of  
11:31 3 that, and that was why I asked him that question.

11:31 4 We had just done the first amendment 3 weeks  
11:31 5 before this. And in the first amendment, it didn't say  
11:31 6 anything about the 50,000 tons, but it did say that we need  
11:31 7 to keep the stockpile under 600,000 tons, so I was asking  
11:31 8 him what he knew about that.

11:31 9 Now, his response to me -- well, basically, in  
11:31 10 answer to -- in response to your question, it probably isn't  
11:31 11 very surprising with the millions that we were spending in  
11:31 12 removing gypsum at that point, and significant amount of  
11:32 13 effort even getting ramped up to take that 50,000 tons away,  
11:32 14 which Mervyn was definitely involved in, it was -- we were  
11:32 15 very interested in trying to limit our reduction until we  
11:32 16 got the plant built to remove only that -- only the  
11:32 17 production amount, and leave the stockpile at 600,000 tons.

11:32 18 **THE COURT:** All right. Time for the morning  
11:32 19 break.

11:32 20 We'll come back at 10 minutes until 12:00  
11:32 21 according to this clock, which I hope I synced with iPhones  
11:32 22 and time this morning. But this is our official clock.  
11:32 23 10 minutes to 12:00.

11:32 24 **MR. TUCKER:** Your Honor, one point before we  
11:32 25 leave. I have been objecting from my seat, which I don't

1 mean any disrespect to the Court. It's sort of distracting  
2 to pop up.

3 THE COURT: And none was taken.

4 And I go back to the time -- let me -- let me take  
5 this opportunity, if I can, while client representatives are  
6 present, to say what I said when we were together last  
7 Friday.

8 There's a lot of money and very important business  
9 issues at stake for both parties in this case, and counsel  
10 have diligently represented their clients' interests in  
11 doing that. But they've done it, I think -- and people from  
12 Duke have heard me say this before. They did it in what I  
13 consider to be the zenith of professionalism that we're at  
14 risk of losing in the legal arena.

15 And so I don't think that there's a way that you  
16 can have been more respectful to the Court in all respects  
17 before, because we've had a number of conferences. You've  
18 done your job to try to narrow those down for the Court, and  
19 you've been very respectful when I've ruled against each of  
20 you as we were getting to this point.

21 So, Mr. Tucker, certainly no offense was taken  
22 this morning. And quite to the contrary.

23 And I want the clients and people to recognize, I  
24 consider this the textbook example of how to fight hard  
25 within the rules, and y'all are fortunate to have what I

11:34

1 consider to be the cream of the crop of counsel in

11:34

2 North Carolina who have performed admirably.

11:34

3 So feel free to remain seated when you object.

11:34

4 And I agree with you that the popping up is distracting to  
5 us all, sir.

11:34

6 MR. TUCKER: Thank you, Your Honor.

11:34

7 MR. PHILLIPS: Thank you, Your Honor.

11:34

8 THE COURT: We'll be at recess until 10 minutes  
9 till.

11:34

10 (Recess.)

11:50

11 THE COURT: So on a go-forward basis, the same

11:50

12 reason we talked about not popping up as you make

11:50

13 objections, I'll tell Ms. Price to dispense with the opening

11:50

14 of the court each time. She's very disappointed, but she's

11:50

15 okay.

11:50

16 You're still under oath, sir. You may proceed.

11:50

17 MR. PHILLIPS: "Oyez" is always something I enjoy

11:50

18 saying.

11:50

19 THE COURT: I've never -- you know, in that

11:50

20 regard, there's one thing that -- I saw a post that

11:50

21 Rich Leonard, who's -- he says I don't really regret much

11:50

22 anymore not being a judge, but the one thing he very much

11:51

23 misses is administering the oath at a naturalization

11:51

24 ceremony. And they had one on the Fourth of July. And I

11:51

25 had a chance to do the most full "oyez" opening of the court





1 MR. PHILLIPS: Understood, Your Honor.

2 Q. Mr. Engelhardt, are you familiar with Exhibit 120?

3 A. Yes, I am.

4 Q. And what is it?

5 A. This is primarily an email exchange between myself  
6 and David Maganja on the removal of the gypsum, and I  
7 forwarded the end result to our CFO.

8 Q. Who is David Maganja?

9 A. David Maganja was CertainTeed Gypsum's -- and  
10 still is -- supply chain manager. So he's responsible for  
11 actually administering our gypsum contracts, whether they're  
12 synthetic gypsum or rock.

13 Q. All right. Can you tell me the significance of  
14 this Exhibit 120, these emails?

15 A. Well, I think the -- this -- this is pretty  
16 representative of a lot of emails and a lot of conversations  
17 we had relative to the removal of gypsum at Roxboro.

18 Q. And is it accurate that, in his email to you,  
19 Mr. Maganja points to weather being a problem with regard to  
20 the removal of gypsum from Roxboro?

21 A. Yes, he lists a variety of things. This was very  
22 early in my involvement. This would have been early  
23 February, when I got involved, basically, in November. But,  
24 yeah, this was very early on, and we were running into some  
25 challenges.

11:54

1 Q. All right. Take a look, if you would, please, at  
2 Exhibit 121.

11:54

11:54

3 A. Okay.

11:54

4 Q. Can you identify that?

11:54

5 A. Yes. This is an email that I sent to people  
6 internal in CertainTeed Gypsum on the latest forecast I had  
7 received from Progress Energy.

11:54

8 Q. And is the latest forecast you received from  
9 Progress Energy the next page of Exhibit 121?

11:54

10 A. Yes, it is.

11:54

11 Q. Take a look -- and that's a forecast for what  
12 period of time?

11:54

13 A. That's a forecast by month for 2010 without  
14 January being listed.

11:54

15 Q. All right. And so if you look at that forecast,  
16 was Progress -- can you tell me whether or not

11:55

17 Progress Energy was forecasting the production of synthetic  
18 gypsum at the Roxboro -- Roxboro and Mayo plants at or above  
19 50,000 tons for any month in 2010?

11:55

20 A. No, there was no forecast that high. The highest  
21 actually was almost 41,000 tons in August '10. The contract  
22 was for net dry tons, so the highlighting should be the dry  
23 tons total.

11:55

24 Q. And what's the low?

11:55

25 A. And the low was in April of 2010 at 22,6. Then

11:55

11:55

1 all the other numbers were in the 30s.

11:55

2 Q. Can you explain why the production of synthetic

11:55

3 gypsum at a coal-fired power plant would fluctuate month to

11:55

4 month?

11:55

5 A. Well, one of the key things that we understood at

11:55

6 that time -- and still do -- is there are peak seasons.

11:55

7 Generally, their peak seasons of electrical demand is when

11:56

8 the weather is either extremely cold or extremely warm to

11:56

9 drive heating and air conditioning. So that's one of the

11:56

10 factors.

11:56

11 The second factor that is not uncommon is that

11:56

12 they may take a unit down for maintenance over some sort of

11:56

13 an extended time. And, actually, we can see that in this

11:56

14 exhibit.

11:56

15 If you look under April 10th and across at the

11:56

16 Roxboro 2 line, you can see that they're forecasting

11:56

17 nothing, zero synthetic gypsum for that -- for the month of

11:56

18 April. And then March and May are a little bit down, so it

11:56

19 looks like maybe a 6-week shut -- shutdown of that unit,

11:56

20 probably for maintenance.

11:56

21 Q. All right. Take a look at Exhibit 125, if you

11:56

22 would.

11:56

23 Can you identify this document?

11:56

24 MR. TUCKER: Just, again, one moment, Your Honor.

11:56

25 We have a relevance objection to that document. If I can







11:59

1 Q. We're moving through the year.

11:59

2 A. Yes.

11:59

3 Q. Can you identify this exchange?

11:59

4 A. Yes. This is another note that I sent to -- or  
5 email that I sent to David Maganja about removing the  
6 50,000 tons, and his response.

12:00

7 Q. And you asked him, "What would it require to move  
8 50,000 tons per month from Roxboro"; is that right?

12:00

9 A. Yes.

12:00

10 Q. What did you understand his response to be?

12:00

11 A. Well, he's basically saying that we're on track to  
12 do the 50,000 tons in March, but it was a 5-week month. And  
13 then he's saying that trying to ship 50,000 over a 4-week  
14 month is difficult for several reasons, and then he goes on  
15 to list those reasons.

12:00

16 Q. All right. Mr. Engelhardt, please take a look at  
17 Exhibit 124.

12:00

18 A. Okay.

12:00

19 Q. Is this an email from Ms. Coppola to you on  
20 May the 21st, 2010?

12:00

21 A. Yes, it is.

12:00

22 Q. And in that email, Ms. Coppola says:

12:00

23 "Thank you for your time this morning. I  
24 think we're headed in the right direction with  
25 regard to the three-way agreement. One additional

12:00

1 point I wanted to make sure we are clear on is  
2 that the contractual monthly obligation is at  
3 least 50,000 net dry tons per month."

4 Do you see that?

5 A. Yes, I do.

6 Q. What did you understand her to be communicating to  
7 you?

8 A. Just that she was reiterating that our requirement  
9 was at least 50,000 net dry tons per month to be removed.

10 Q. Can you tell me whether CertainTeed understood its  
11 obligation under the 2008 agreement to be 50,000 tons a  
12 month?

13 A. Yes, we did.

14 Q. All right. Take a look at what's marked as  
15 Exhibit 14, please.

16 You've got to change books.

17 A. Okay. I have it.

18 Q. Can you identify this document?

19 A. Yes. This is the second amendment that we made to  
20 the Amended and Restated Supply Agreement, and it superseded  
21 the first amendment we talked about earlier.

22 Q. What's the date of this document?

23 A. The date is June 25th, 2010.

24 Q. And did you have any involvement in -- what was  
25 your involvement, if any, in negotiating this agreement?

12:02

1 A. I was definitely involved in negotiating this.

12:02

2 Q. And Ms. Coppola was on --

12:02

3 A. Ms. Coppola.

12:02

4 Q. -- the other side?

12:02

5 A. Yes.

12:02

6 Q. All right. Can you tell the Court what the

12:02

7 purpose and substance were of this amendment?

12:02

8 A. Okay. The purpose was that there was con- --

12:02

9 still concern over the stability of the stockpile on the

12:02

10 Roxboro site. Well, on the Progress Energy Roxboro site.

12:02

11 THE COURT: What do you mean by the term

12:02

12 "stability"? Do you mind asking?

12:02

13 MR. PHILLIPS: Certainly.

12:02

14 Q. What kind of stability?

12:02

15 A. Yeah, structural stability where the stockpile

12:02

16 might start to slide.

12:02

17 Q. Okay.

12:02

18 A. So that was the purpose.

12:02

19 So this was an amendment to deal with that. And

12:02

20 there were five key areas to the amendment that I think I

12:03

21 can summarize.

12:03

22 The first one was that they, Progress Energy,

12:03

23 would remove but CertainTeed would pay for the removal of

12:03

24 200,000 net dry -- or 200,000 tons off of the stockpile and

12:03

25 place it into the Progress Energy on-site landfill. And the

12:03

1 cost of that removal to CertainTeed was \$28 a ton plus the  
2 cost of the gypsum.

12:03

12:03

3 Then the second part of this was that we would  
4 then retain -- we would keep the stockpile -- we needed to  
5 keep the stockpile down, so the second part of this was that  
6 we would remove only the production through the end of 2010  
7 and of Roxboro and Mayo.

12:03

12:03

12:03

12:03

12:03

8 Q. Can you tell the Court whether or not that is what  
9 you had been asking for?

12:03

12:03

10 A. Yes, that is what I had been asking for, yes.

12:03

11 Q. Okay.

12:04

12 A. The third term was that we work together to  
13 engineer a solution to stabilize the stockpile in good  
14 faith.

12:04

12:04

12:04

15 The fourth term was they provided -- PE provided  
16 an option for an additional removal of 200,000 tons in 2011  
17 from the stockpile that would go into the PE on-site  
18 landfill. And the cost of that was \$30 a ton, but we needed  
19 to take the option by January 15th, I believe, of 2011 to do  
20 so.

12:04

12:04

12:04

12:04

12:04

21 And then the last term was that if we had approval  
22 from Saint Gobain to approve -- to proceed with building the  
23 CertainTeed Gypsum plant, and we had notified them by  
24 August 1st of 2010, then we would be permitted after the  
25 stockpile was stabilized to put 200,000 tons of the gypsum

12:04

12:04

12:04

12:04

12:05 1 that was produced back on to the stockpile in 2011.

12:05 2 Q. Do you know what the size of the stockpile was at  
12:05 3 this point in time in June of 2010?

12:05 4 A. It would have been right around 600,000 tons. I  
12:05 5 don't know exactly.

12:05 6 Q. All right. So can you tell the Court whether or  
12:05 7 not Saint Gobain approved or authorized construction of the  
12:05 8 Roxboro plant in 2010?

12:05 9 A. Yes, they did.

12:05 10 Q. All right. So what was the site -- what was the  
12:05 11 situation on the site at Roxboro in 2011?

12:05 12 A. Well, in 2011 we basically had -- I think the --  
12:05 13 probably the most significant thing was that we were  
12:05 14 building our plant. So it was visible. We were doing  
12:05 15 foundations. We were -- you could see that the plant was  
12:05 16 starting to roll.

12:05 17 The second thing is that we had removed quite a  
12:05 18 bit of material in 2010 from the site. So I think their --  
12:05 19 the confidence level that we were doing that was much better  
12:06 20 established.

12:06 21 The -- in 2011, though, we still removed a lot  
12:06 22 more material, to the tune of about \$11 million that year,  
12:06 23 but we also were able to replenish the stockpile after we  
12:06 24 had stabilized it. So some of the material went onto the  
12:06 25 stockpile at that point.





12:07

1 A. Yes. It was pretty much the mid of 2011.

12:07

2 Q. Why did the parties do that?

12:07

3 A. One of the key things was we had -- in the design  
4 of our plants, since the -- since 2008, we had changed the  
5 feeding system and how that was going to work, especially on  
6 the Progress Energy or Duke side, so we needed to update  
7 that for all of those changes. Things like what the  
8 equipment was, who was going to -- who had responsibility  
9 for maintaining pieces of equipment, exactly where the  
10 ownership of the gypsum changed hands, that sort of thing.  
11 So that was a key part.

12:08

12 And then a second part was I had some thoughts  
13 on -- having observed the way our businesses operated for  
14 the previous couple years, I had some thoughts on how to try  
15 to make the contract more usable and build in some of the --  
16 build in some flexibility to cover the variations.

12:08

17 So it was -- I was looking at the stockpile, using  
18 the stockpile to absorb variations, and then adjusting the  
19 annual volumes, as long as we retained our commitments to  
20 each other.

12:08

21 Q. Who was the leader of these negotiations on the  
22 CTG side?

12:08

23 A. I was.

12:08

24 Q. And who was the leader on the Duke or Progress  
25 side?

12:09

12:09

1 A. Barbara Coppola.

12:09

2 Q. Take a look, if you would, Mr. Engelhardt, at

12:09

3 Exhibit 21.

12:09

4 A. Okay.

12:09

5 Q. Are you familiar with that document?

12:09

6 A. Yes, I am.

12:09

7 Q. Can you explain to the Court what it is?

12:09

8 A. Yes. This is a -- just a listing of proposed

12:09

9 modification to the 2008 agreement that I sent to Barbara.

12:09

10 It was -- I just went through the contract based on what we

12:09

11 had talked about earlier and identified some areas that I

12:09

12 saw that we needed to change.

12:09

13 Q. And where did this fall in terms of the timing of

12:09

14 the negotiations? The beginning? Middle? End?

12:09

15 A. This would be pretty -- I would say this was the

12:09

16 beginning. I think this was the first document that we had

12:09

17 defined anywhere that said that we were -- what we needed to

12:09

18 start changing.

12:09

19 Q. All right. Take a look at page 2 of Exhibit 21,

12:09

20 if you would, please, Mr. Engelhardt.

12:09

21 And --

12:09

22 A. Okay.

12:09

23 Q. -- there's a heading that says "Article 3."

12:10

24 Do you see that?

12:10

25 A. Yes.

12:10

1 Q. And below it, it says "3.1"?

12:10

2 A. Yes.

12:10

3 Q. You wrote:

12:10

4 "Revise for higher volumes available, build  
5 in flexibility."

12:10

6 Do you see that?

12:10

7 A. Yes, I do.

12:10

8 Q. What did you mean by that?

12:10

9 A. Well, I'll take each of those as -- separately.

12:10

10 Revising for higher volumes available. I had seen

12:10

11 some Progress Energy annual forecasts going out where they

12:10

12 were projecting to produce well over 600,000 tons. So what

12:10

13 I was interested in having a conversation about is of

12:10

14 those -- of that excess volume, is there some way we could

12:10

15 lock that in a little bit better.

12:10

16 The contract did provide for excess gypsum and

12:10

17 additional gypsum as it was in 2008, but I just wanted to

12:10

18 explore, was there something else that we could do to lock

12:10

19 in the bigger quantities at that point.

12:10

20 Build in flexibility. That was really trying to

12:10

21 address a number of things. What I had observed was our --

12:11

22 the production volumes on the Duke side varied, our market

12:11

23 varied. And the terms as we had it with 50,000 tons per

12:11

24 month plus or minus 10 percent didn't leave a lot of room

12:11

25 for that variation.

12:11

25 for that variation.

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1 So what I was trying to do was to come up with  
2 a -- come up with a proposal that would allow us to manage  
3 within -- manage those variations, but we still protected  
4 each other in terms of what our commitments were.

5 So, you know, going back on what -- and -- but  
6 still preserve the 600,000 tons a year. And that level  
7 commitment would still be the norm, but what I was trying to  
8 do was create movement -- normal movement within that.

9 So back on the Duke side of the business, the  
10 variation, you know, clearly they had months that they were  
11 producing a lot less -- we just looked at an exhibit with  
12 that -- and they had months that they were certainly  
13 forecasting to produce more.

14 So my thought there was they have variation based  
15 on seasonality, they have variation based on maintenance,  
16 and they may have some other variations as well that I  
17 wasn't fully aware of.

18 On our side, CertainTeed Gypsum's side, I know we  
19 had variations in the market size even within a year. For  
20 example, if we did a price increase, typically distributors  
21 would hurry up and buy stuff for a month or two before the  
22 price increase, and then our volumes would drop off the  
23 couple of months after that. And since our warehouse wasn't  
24 very big, we couldn't absorb that in our warehouses, so we  
25 had those sort of things. We had maintenance issues that we

1 would sometimes take a plant down for. And I thought, over  
2 the life of the contract, that would be logical.

3 So looking at those things, one of the pieces that  
4 jumped out at me was it was very likely that Duke's up and  
5 downs and our up and downs were not going to be in perfect  
6 sync. So my thought was to use the stockpile to absorb  
7 these ups and downs and be able to -- and still have a good  
8 viable contract where we both got what we needed.

9 Q. What were you contemplating with regard to the  
10 2008 contract requirement that Duke supply and CTG accept  
11 600,000 tons a year?

12 A. I want to be really clear about this. I still  
13 wanted to maintain --

14 THE COURT: Hold on.

15 MR. TUCKER: I'd like an objection, Your Honor. I  
16 believe that mischaracterizes the 2008 contract requirement,  
17 to the extent you're referring to an annual obligation.

18 THE COURT: Well, let me, in that regard, ask this  
19 question.

20 I saw the pretrial stipulations, and I also read  
21 the trial briefs. Is it contested that the 2008 agreement  
22 was 50,000 per month for the MMQ?

23 MR. TUCKER: It is not, Your Honor. This is more  
24 of a technical objection, that the obligation is stated in  
25 terms of a monthly obligation, not an annual obligation.

12 : 14

1 But we certainly will do the math.

12 : 14

2 MR. PHILLIPS: May I proceed, Your Honor?

12 : 14

3 THE COURT: Yes, you may.

12 : 14

4 Q. So, Mr. Engelhardt, what were you contemplating in  
5 connection with your thinking about flexibility with regard  
6 to the 2008 contract requirement that Duke supply and CTG  
7 accept 600,000 tons a year?

12 : 14

8 A. I still wanted to preserve the 600,000 tons  
9 a year, because that was the -- that was the long-term  
10 security and stable supply that we needed. What I was  
11 trying to do, though, in addition to the -- so basically --  
12 let me explain that a little bit more.

12 : 14

13 Basically, if Duke produced 600,000 tons, we  
14 needed to take it; if we needed 600,000 tons, Duke needed to  
15 deliver it. So that was basically the starting point.

12 : 14

16 Then from there what I was trying to do is -- I  
17 knew there would be normal fluctuations, so I was trying to  
18 absorb those in our stockpile and still protect our  
19 requirements.

12 : 15

20 Q. All right. Take a look, if you would, at  
21 Exhibit 22.

12 : 15

22 A. Okay.

12 : 15

23 Q. Are you familiar with this document?

12 : 15

24 A. Yes.

12 : 15

25 Q. Can you identify it for the Court, please.

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A. Yes. This is -- this is the first draft that  
Barbara sent to me. And I'm --  
Q. So what's the first page of Exhibit 22?  
A. The first page is a cover letter -- a cover email  
that basically says -- starts at the bottom with Barbara  
saying that this is their -- she didn't say "draft," but  
that was certainly the intention. It was a marked-up copy  
and so forth of what their views were for the supply  
agreement. And then I forwarded it internally to our group.  
Q. All right. And this was -- she forwarded this to  
you on September the 9th, 2011, correct?  
A. That's correct.  
Q. All right. Take a look at Exhibit 40, if you  
would, please, Mr. Engelhardt.  
A. Okay. I have it.  
Q. What is Exhibit 40?  
A. Exhibit 40 is a redline version that I did. It's  
a -- of the supply agreement, and it was based on the draft  
that Barbara gave us. So I worked on that one. And this  
was just a redline draft that I did, and I was sending it  
internally to get internal people to help me review this.  
Q. All right. So do -- so Ms. Coppola sent you  
their first draft of a revised supply agreement on  
September the 9th, 2011, right?  
A. That's correct.

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12 : 17

1 Q. And then the date of Exhibit 40 is October

12 : 17

2 the 10th, 2011?

12 : 17

3 A. Yes.

12 : 17

4 Q. So you circulated a revised version against Duke's  
5 version to your internal team at that point?

12 : 17

6 A. That's correct.

12 : 17

7 Q. All right. And is the version that you circulated  
8 to your team attached to the email on Exhibit 40?

12 : 17

9 A. Yes.

12 : 17

10 Q. All right. In this agreement, or in this -- in

12 : 17

11 the email to Ms. Bildfell, Mr. Maganja, Mr. McCown, you say:

12 : 17

12 "I have also included a summary sheet to show  
13 some -- some -- how some scenarios would be  
14 handled."

12 : 17

15 Do you see that?

12 : 17

16 A. Yes.

12 : 17

17 Q. So did you send something else besides the draft  
18 agreement with this Exhibit 40?

12 : 17

19 A. Yes, I did.

12 : 17

20 Q. What did you send?

12 : 17

21 A. I had worked out a sheet that explained different

12 : 18

22 scenarios on the different supply quantities and volumes,

12 : 18

23 and what would happen under those under my proposal. And I

12 : 18

24 needed that because it was very difficult to get the wording

12 : 18

25 into the agreement.

12:18

1 Q. All right. Did Exhibit 40 -- did you believe that  
2 Exhibit -- or can you tell me whether or not you believed  
3 Exhibit 40 reflected your proposed changes related to  
4 flexibility in the contract?

12:18

5 A. It did, to the best I could get the wording in  
6 there at that time, yes.

12:18

7 Q. All right. Take a look at Exhibit 24, please.

12:18

8 A. Okay.

12:18

9 Q. What is Exhibit 24?

12:18

10 A. Exhibit 24 is the scenarios that I sat down and  
11 played out with to deter- -- to define what I was trying to  
12 put into the wording.

12:19

13 Q. Into the wording?

12:19

14 A. Into the wording in the redlined agreement in  
15 terms of the volumes and the stockpile.

12:19

16 Q. All right. And did you share Exhibit 24 with  
17 Ms. Coppola?

12:19

18 A. Yes, I did.

12:19

19 Q. All right. Take a look at Exhibit 41, if you  
20 will.

12:19

21 MR. PHILLIPS: Your Honor, if you're looking at  
22 Exhibit 24, we're going to talk about that in some substance  
23 in a minute.

12:19

24 THE COURT: I'm trying to keep up with you.

12:19

25 Q. All right. Have you got Exhibit 41 in front of

1 2 : 1 9

1 you, Mr. Engelhardt?

1 2 : 1 9

2 A. I do.

1 2 : 1 9

3 Q. What is Exhibit 41?

1 2 : 1 9

4 A. Exhibit 41 was my first attempt at putting this

1 2 : 1 9

5 together, putting my scenarios together. I started to sit

1 2 : 1 9

6 down with sort of a box format and -- to try to lay this

1 2 : 1 9

7 out. But I was having difficulty saying what I wanted to

1 2 : 2 0

8 say in this one so, basically, I abandoned it. It was still

1 2 : 2 0

9 in my computer file, but I abandoned it, and I replaced it

1 2 : 2 0

10 with the scenarios because I felt I had to write them out to

1 2 : 2 0

11 explain them.

1 2 : 2 0

12 Q. Did you share Exhibit 41 with Ms. Coppola?

1 2 : 2 0

13 A. No, I did not.

1 2 : 2 0

14 Q. All right. Let's look back at Exhibit 24.

1 2 : 2 0

15 A. Okay.

1 2 : 2 0

16 Q. So that document is headed "Roxboro Stockpile

1 2 : 2 0

17 Scenarios"; is that correct?

1 2 : 2 0

18 A. That's correct.

1 2 : 2 0

19 Q. All right. Can you walk through and explain to

1 2 : 2 0

20 the Court what you were thinking in terms of these scenarios

1 2 : 2 0

21 and how -- what they would mean to the parties' contract.

1 2 : 2 0

22 A. Yes. So my first assumption was that the

1 2 : 2 0

23 stockpile would serve as a buffer for variations in your

1 2 : 2 0

24 produc- -- in PE's production and CertainTeed's usage. And

1 2 : 2 0

25 on the stockpile I set a maximum limit of 1 year's

1 requirement, which was also the 600,000 tons that PE had  
2 approved and we were set for for the stockpile. And then I  
3 also set an absolute minimum on the stockpile of a 2-month  
4 supply on the pile.

5 So the key here is, is we're using the stockpile  
6 to absorb the variations, but there's a max limit, and  
7 there's a lower limit that we would never go outside of.  
8 And the purpose of that is that with the max limit, Duke is  
9 protected that they never have too much gypsum on their  
10 pile.

11 So in other words, if they got to 600,000 tons, we  
12 would have to take it off, or treat it as excess gypsum,  
13 depending on the month, or more on the quantities that year.

14 Setting the quantity at a minimum of 2 months'  
15 supply meant that CertainTeed would never run out, there  
16 would always be 2 months. And as long as -- once we hit  
17 that 2-month level, then the wording I put into the contract  
18 kicked in a remedy to replenish the stockpile.

19 So that was the purpose of the stockpile. And  
20 that's a very, very critical underpinning because the rest  
21 doesn't work without that. Okay.

22 Q. All right. And then you have four scenarios under  
23 there; is that right?

24 A. Yes. That's correct.

25 Q. Can you walk the Court through those?

1 A. Okay. The -- obviously, the ideal scenario is the  
2 600,000 tons of DSG per year that -- what PE produces and  
3 delivers and that's what we use. So that's the ideal.  
4 That's how the contract was basically written.

5 But I was expanding it to an annual quantity  
6 because I felt that a monthly quantity was too small and  
7 tight to absorb the variations.

8 Then the next scenario is what if Progress Energy  
9 produces less than 600,000 tons a year? And there's really  
10 two scenarios there.

11 One scenario is if CertainTeed requires 600,000  
12 tons, then we would draw whatever additional we needed from  
13 their production from the stockpile. So if the stockpile  
14 contains at all times above 100,000 tons, then it's okay.  
15 So if they make, for example, 500,000 tons, we need  
16 600,000 tons, the stockpile's got 400,000 tons on it, the  
17 stockpile just drops to 300,000 tons, we're good. We would  
18 absorb the fluctuation and that's fine. But if the  
19 stockpile drops below 100,000 tons, then PE needs to define  
20 and implement a replenishment plan to rebuild that to keep  
21 it above 100,000 tons.

22 The other scenario is that if the -- if PE is  
23 producing less than 600,000 tons in a year -- this is B --  
24 and the market is soft or for some other reason that we at  
25 CertainTeed do not need the full 600,000 tons a year, that

1 2 : 2 3

1 we need to use at least the volume produced by

1 2 : 2 4

2 Progress Energy and the stockpile remains flat. Okay?

1 2 : 2 4

3 Q. Okay. What's the next scenario?

1 2 : 2 4

4 A. Now, the next scenario is if Progress Energy

1 2 : 2 4

5 produces more than 600,000 tons a year. In that case, we

1 2 : 2 4

6 have to use 600,000 tons a year per the agreement. Then --

1 2 : 2 4

7 but and -- a quantity over 600,000 tons gets treated in the

1 2 : 2 4

8 contract, as it already is, as excess gypsum, which means

1 2 : 2 4

9 that it would be made available to us to buy, but we didn't

1 2 : 2 4

10 need to buy that and they could sell it on the open market.

1 2 : 2 4

11 And, of course, with that -- I say -- the next

1 2 : 2 4

12 scenario said, "By mutual agreement, some or all the

1 2 : 2 4

13 quantity exceeding 600,000 tons annual minimum quantity may

1 2 : 2 4

14 be placed on the stockpile." So -- "any such additions

1 2 : 2 4

15 would have no effect on future yearly requirements."

1 2 : 2 4

16 So, for example, if Progress Energy made 700,000

1 2 : 2 4

17 tons, we only needed 600,000 tons, they could put that extra

1 2 : 2 4

18 100,000 tons on the stockpile, unless it was already at

1 2 : 2 5

19 600,000 tons, in which case then it was treated as excess

1 2 : 2 5

20 gypsum, and something had to be done with it. So that was

1 2 : 2 5

21 the cap.

1 2 : 2 5

22 The next scenario is what if we consume over

1 2 : 2 5

23 600,000 tons a year. So the first option within that is if

1 2 : 2 5

24 Progress Energy is producing at least 600,000 tons, the

1 2 : 2 5

25 preferred option is likely treating it at as additional

1 gypsum, which says that we want more, or excess gypsum,  
2 which means that they have more.

3 But the agreement covers both of those with any  
4 balance from that added to or drawn from the stockpile,  
5 unless the stockpile's at the upper or lower quantity  
6 limits, where we can no longer add to, or we have to  
7 replenish.

8 And then I'm saying here if we're consuming more  
9 than 600,000 tons a year and Progress Energy is producing  
10 less than 600,000 tons a year, then we will draw down the  
11 stockpile. But once we get to 100,000 tons, if the  
12 replenishment plan kicks in, then Progress has to rebuild  
13 the stockpile above 100,000 tons.

14 Q. All right. There's no scenario for CT consumes  
15 less than 600,000 tons per year?

16 A. That's correct. And that's really the inverse in  
17 B above. The scenarios there are actually embedded in these  
18 scenarios, so I didn't need to make a fourth one. It would  
19 just be duplication of words.

20 Q. All right. Take a look at Exhibit 23, if you  
21 would, please, Mr. Engelhardt.

22 A. Okay.

23 Q. What is Exhibit 23?

24 A. The cover -- the cover email, it's when I sent  
25 the -- my recommended changes to the 2008 agreement back to



1 Barbara.

2 Q. And what is the agreement that's attached to that  
3 email?

4 A. Well, this would be the Second Amendment and  
5 Restated Supply Agreement that we were modifying the term  
6 into the 2012 agreement later on.

7 Q. And does that exhibit reflect the changes that you  
8 were proposing in the agreement?

9 A. Yes, it does.

10 Q. All right. Can you show the Court where you tried  
11 to include in Exhibit 24 the concepts -- excuse me. Can  
12 you --

13 Can you show the Court where in Exhibit 23, the  
14 draft agreement, you tried to include the concepts that you  
15 articulated in Exhibit 24, your scenarios?

16 A. Yes. Okay. The best place to start is in  
17 2.2.3(c), and that's all about the stockpile. Because if  
18 you remember my scenarios, that's really the bedrock of this  
19 whole system.

20 Q. What page is that on?

21 A. That would be on page --

22 Q. 8?

23 A. -- 8. Yes. On page 8. So the middle of page 8.

24 And my wording is that:

25 "The Progress Energy gypsum storage area

1 stockpile shall be used to buffer the variations  
2 in production of gypsum filter cake and  
3 CertainTeed requirements, and in no case shall  
4 exceed 600,000 net dry tons, nor be less than  
5 100,000 net dry tons, unless otherwise agreed in  
6 writing by Progress Energy and CertainTeed."

7 So that established -- that's where I established  
8 the limit. And I put it there because that's where the  
9 stockpile information was in a prior agreement.

10 Now, the second place to look is in 6.2.  
11 6.2 starts on the bottom of page 19.

12 **MR. TUCKER:** Your Honor, I need to raise an  
13 objection. Section 6.2 includes some pricing-related  
14 information which has been treated as confidential in the  
15 case.

16 So to the extent there's going to be discussion of  
17 that, we need to discuss a mechanism to protect that, or if  
18 it's going to be displayed on the screen briefly.

19 **MR. PHILLIPS:** Your Honor, unless Mr. Engelhardt  
20 decides to talk about something I don't expect him to, I  
21 don't expect him to talk about the pricing information.

22 **MR. TUCKER:** It may be on the screen, nonetheless.  
23 So if at least the screen could be turned off.

24 **THE COURT:** Ms. Marston says that she's not going  
25 to display the screen.



1 And for those members of the public there, again,  
2 the Court is remaining very responsive to the public's right  
3 of access to the court.

4 MR. TUCKER: Thank you, Your Honor.

5 Q. All right. Mr. Engelhardt, I think you had  
6 pointed the Court to Section 2.2.3, and then said that the  
7 next place we should go is Section 6.2 on the bottom of  
8 page 19; is that right?

9 A. That's correct.

10 So, basically, what I put in this one, to  
11 paraphrase it, and I could read the words, but, basically,  
12 what I did was I used the existing remedies that were  
13 already in the agreement, but I applied that -- the  
14 terminology that says in the event Progress -- this is near  
15 the beginning:

16 "In the event Progress Energy is unable to  
17 deliver to CertainTeed the minimum annual  
18 quantity" -- and I changed the "annual" as you'll  
19 see in a little bit -- "quantity in any year  
20 during the term of the revised agreement, the  
21 stockpile -- and the stockpile falls below 100,000  
22 net dry tons, CertainTeed may, at its election by  
23 written notice to Progress Energy within 30 days  
24 after the end of the period in which the  
25 deficiency occurred, either instruct

1 Progress Energy in writing to deliver within  
2 30 days of Progress Energy's sole expense to the  
3 point of delivery the quantity of gypsum filter  
4 cake to rebuild the stockpile to 100,000 net dry  
5 tons, or purchase on the open market on a  
6 commercially-reasonable basis for delivery to  
7 CertainTeed's site the amount of gypsum filter  
8 cake necessary to satisfy" --

9 [Reporter clarification.]

10 THE COURT: The amount of gypsum filter cake  
11 necessary to satisfy.

12 THE WITNESS: Yes.

13 Q. So you inserted here that if the stockpile -- if  
14 they failed to deliver the minimum annual quantity and the  
15 stockpile dropped below 100,000 tons, CertainTeed, in 6.2,  
16 had a remedy to require Duke to produce it in the next month  
17 or CertainTeed could go out and cover; is that right?

18 A. That's correct. It is the same remedy over in 6.2  
19 prior.

20 Q. Now, one thing you changed in the second line on  
21 page 20 in Exhibit 23, Mr. Engelhardt, is you changed the  
22 word "month" to "period."

23 A. Yes.

24 Q. Can you explain why you did that?

25 A. Yes. With the minimum quantity on the stockpile

1 at 100,000 tons, and that if that would occur, like, the  
2 second day of the month, and then to go through another  
3 month and then to notify, that would be way too long and we  
4 would be out of gypsum.

5 So I defined it at the end of -- as an end of a  
6 period, which could be any time period, was my expectation.  
7 So that would be based -- my intention was, basically, when  
8 the stockpile hit 100,000 tons, then that triggered the  
9 notification.

10 Q. Mr. Engelhardt, you made those two changes to deal  
11 with the stockpile.

12 What did you change in Section 3.1 of the draft of  
13 the 2012 agreement?

14 A. Okay. I guess I'll summarize the changes first.

15 The first thing I did was I changed from a monthly  
16 quantity to an annual quantity.

17 Q. Keep speaking up, if you would.

18 A. Okay. I changed the quantity from a monthly  
19 quantity to an annual quantity. And the purpose of that was  
20 to absorb the variations that couldn't be regularly absorbed  
21 in a tighter monthly window.

22 The second thing I did was I would -- I put in  
23 language that said, well, what would be the minimum in any  
24 given month? And I put in the language saying that the --  
25 CertainTeed agrees to purchase and accept from PE --

1 [Reporter clarification.]

2 A. Sorry.

3 THE COURT: There's a saying, it started out when  
4 you had lawsuits dealing with medical issues, that if it  
5 wasn't in the medical records, it didn't happen. And if the  
6 court reporter doesn't take your testimony down, it didn't  
7 happen.

8 A. I apologize. Where do we need to --

9 Q. Let me ask you this: What did you set -- you  
10 proposed a new minimum monthly quantity in Section 3.1,  
11 correct?

12 A. Yes.

13 Q. What would the -- what was that amount that you  
14 used?

15 A. The minimum monthly quantity for a given month was  
16 25,000 tons.

17 Q. All right. What was your thinking with regard to  
18 that?

19 A. My thinking with regard to that was I was thinking  
20 what is the worst case that could happen over the life of  
21 this contract where CertainTeed would accept less.

22 And the worst case I could imagine is that we  
23 would take our plant down for 2 weeks for a major piece of  
24 equipment replacement. So that was what I was establishing  
25 with that, but still within the 600,000 total for the year.



1 And the other logic for that is if we only took  
2 25,000 in one month, then, in our view, we -- that wouldn't  
3 happen more than once in a year -- maybe -- maybe more than  
4 once in the life of this contract -- we would still have the  
5 rest of the year to hit the 600,000 tons.

6 Q. All right. I think you were basically going  
7 through and quickly identifying the topics that you had  
8 changed.

9 What was the next one?

10 A. The next one is I had talked about the -- let me  
11 get the wording correctly.

12 Q. Let me ask you this: There's a sentence that  
13 begins, "In order to accommodate minor fluctuations" at the  
14 bottom of the page 13.

15 A. Yes. Yes. That's what I was --

16 Q. Do you see that?

17 A. -- looking for, the beginning of that, yes.

18 So as far as the minor fluctuation language, I was  
19 revising that to say:

20 "In order to accommodate minor fluctuations  
21 in volumes actually delivered and accepted,  
22 et cetera, it shall be deemed to be satisfied  
23 provided that the average monthly quantity of  
24 gypsum filter cake delivered and accepted under  
25 this revised agreement over any 12-month period

1 after the beginning of commercial operation shall  
2 be approximately 50,000 net dry tons, or the  
3 actual gypsum filter cake net dry ton production  
4 over the same period, whichever is less."

5 Q. Okay. What were you thinking there?

6 A. Okay. My thought on that was there's really no  
7 minimum established in this contract in terms -- that would  
8 be reasonable. And it goes back to what I showed you on the  
9 scenarios.

10 If Duke is producing less and CertainTeed is  
11 producing less, there's no -- there's no practical way in  
12 the contract to address that. So what I was looking for  
13 here was, first of all, it would be a minor fluctuation, so  
14 not dropping all the way.

15 But, secondly, and more importantly, is if they  
16 were producing less and we needed less, why did we have to  
17 do 50,000 tons? I didn't want us needing to hold each  
18 other.

19 So it -- when that case existed, when they were  
20 producing less and we were producing less, then we at least  
21 had to hold each other -- we had to be able to get what we  
22 needed.

23 And that circles back to the stockpile, which says  
24 that if they're producing 30,000 tons a month and we need  
25 40,000 tons a month or 50,000 tons a month, as long as that

1 stockpile is not down to 100,000 tons, that's okay. But  
2 once it hits 100,000 tons, then we need the gypsum, and you  
3 need to provide it.

4 Q. And what happened to the plus or minus 10 percent  
5 from the minimum monthly quantity provision in your draft?

6 A. Well, I took that out because I thought that the  
7 plus or minus -- in my proposal I took that out because I  
8 thought that the plus or minus 10 percent was part of the  
9 problem. It was too tight for normal fluctuations that I  
10 had seen that we were already doing.

11 So -- so I also didn't want to apply it, plus or  
12 minus 10 percent, to an annual quantity because that got to  
13 be just way too big. If you apply plus or minus 10 percent  
14 over a year, then -- if you look at the full year, that's  
15 okay. But if you look at 3, 4, 5 months in, you could be  
16 way off of what you needed to provide. So I felt that that  
17 also didn't make sense.

18 So I tried to make it -- the language in a manner  
19 that was more representative and tied to the stockpile mins  
20 and max that it would work.

21 Q. You changed the last sentence of Section 3.1, or  
22 you added a sentence, I think. What was the purpose of  
23 that?

24 A. The purpose of that was acceptance. And we had  
25 established a rail station since -- since the 2008

12:40

1 agreement, and we were transferring to other facilities by  
2 truck as well as by rail. We had transferred to third  
3 parties.

12:40

12:40

12:40

4 So what I was saying is acceptance, if we needed  
5 to take 50,000 tons a month, we didn't need to take it all  
6 at our Roxboro and use it in our Roxboro plant. We could do  
7 some of these other things that we already established that  
8 we could do.

12:40

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12:40

9 Q. So in your scenarios, Mr. Engelhardt, and to the  
10 extent those scenarios are reflected in Exhibit 23, can you  
11 tell me whether your thinking was that these were a package  
12 and interdependent, or did they stand on their own --

12:40

12:40

12:40

12:40

13 MR. TUCKER: Object --

12:40

14 Q. -- the various proposals?

12:40

15 MR. TUCKER: Object to leading, Your Honor.

12:41

16 THE COURT: I think until such time as you gave  
17 him an option between to two, it was leading. The option,  
18 perhaps, is not.

12:41

12:41

19 MR. PHILLIPS: That was my thinking, Your Honor.

12:41

20 THE COURT: So I think the question would be,  
21 what's the relationship between the two -- between the  
22 various clauses.

12:41

12:41

23 Q. What's the relationship between the various  
24 clauses in Exhibit 23?

12:41

12:41

25 MR. PHILLIPS: I take good advice when I receive

12:41

12:41

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1 it. Thank you.

2 A. As I said, when I went through the scenarios, as I  
3 said at the beginning when I talked about the stockpiles  
4 being the basis for this, they all work together. You  
5 cannot take any one sentence and isolate it. These all have  
6 to work together.

7 This is effectively a material supply system. And  
8 it's very commonly used in discrete manufacturing in  
9 other -- in other places.

10 THE COURT: Mr. Phillips, perhaps again, just for  
11 clarification, I think what you've established from this  
12 witness, to make sure I understand, that if CertainTeed was  
13 consuming and Duke was producing less than 50,000 per month,  
14 and the stockpile remained at 100,000 constant, then the  
15 minimum annual quantities for that year would be the  
16 production?

17 MR. PHILLIPS: I believe that's right, Your Honor.

18 THE COURT: Or would it be a minimum -- always a  
19 minimum of 25,000?

20 MR. PHILLIPS: The minimum amount annual quantity  
21 is there, Your Honor, but if you look at --

22 THE COURT: Again, I'm not asking you for the  
23 argument. I just want to make sure I understood what the  
24 testimony was for clarification purposes.

25 Q. You heard what Judge Gale said, Mr. Engelhardt.

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1 What -- did you understand it?

2 A. Yeah, I'd like you to repeat that because I think  
3 you're creating a little different scenario.

4 THE COURT: Well, what -- again, I'm asking this  
5 only so I can understand where we're going.

6 I have understood your testimony that it was  
7 critical for CertainTeed to have access to 100,000 tons in  
8 any given month from the stockpile, that would always give  
9 you the guarantee of a 2-month supply.

10 The contract, before you began the renegotiation,  
11 everyone agreed was 50,000 tons per month subject to certain  
12 fluctuations. And you can vary it as to whether it was a  
13 monthly or annual quantity, but it was 50,000.

14 I'm asking now, in those situations of where both  
15 Duke produced less than 50,000 a month or 600,000 over the  
16 year, and CertainTeed consumed less than that amount, and  
17 the stockpile remained at 100,000, effectively has the  
18 minimum annual or minimum monthly quantity been reduced to a  
19 variable quantity?

20 A. For that -- for that year, yes, so long as we had  
21 supply, because that was the floor of the 100,000, yes.

22 THE COURT: That's what I had understood the  
23 testimony to be.

24 MR. PHILLIPS: I think that's right, Your Honor.

25 Q. All right. So you sent Exhibit 23 to Ms. Coppola

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1 in October of 2011, correct?

2 A. That's correct.

3 Q. And what happened after that?

4 A. Well, we -- I had sent her the scenarios as well.  
5 And we had a call -- I don't remember exactly -- maybe a  
6 week later, to discuss the scenarios page that I had sent  
7 her.

8 And from then, there wasn't a lot of activity  
9 going back and forth. They were reviewing the contract.

10 Barbara did tell me when we reviewed the scenarios  
11 that she preferred to stay with the contract -- the minimum  
12 monthly requirements and those numbers as they were stated  
13 in the 2008 agreement.

14 Q. Take a look, if you would, at Exhibit 25, please,  
15 Mr. Engelhardt.

16 A. Okay.

17 Q. And are you familiar with this document?

18 A. Yes.

19 Q. And is this a series of emails between you and  
20 Ms. Coppola?

21 A. Yes, it is.

22 Q. And in the email -- there's an email -- the first  
23 email at the bottom of the page is dated October 24, 2011.  
24 Do you see that?

25 A. That's correct.

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1 2 : 4 6

1 Q. That's 2 weeks after you sent her --

1 2 : 4 6

2 A. Yes.

1 2 : 4 6

3 Q. -- your draft; is that right?

1 2 : 4 6

4 A. That's correct.

1 2 : 4 6

5 Q. And does she make a statement in this agreement

1 2 : 4 6

6 about what Duke would like to do with regard to the volumes?

1 2 : 4 6

7 A. Yes. She said:

1 2 : 4 6

8 "In general, we would like to leave the

1 2 : 4 6

9 volume obligation as is. We can discuss."

1 2 : 4 6

10 Q. All right. When did Duke respond to your October  
11 2011 draft?

1 2 : 4 6

12 A. They sent a draft back in February of 2012.

1 2 : 4 6

13 Q. And after you had a conversation with Ms. Coppola  
14 in October about your scenarios, can you describe the level  
15 and nature of communication between Duke and CTG about this  
16 contract?

1 2 : 4 7

17 A. There really wasn't any -- any significant  
18 communications. We really never sat down and discussed any  
19 further -- after the scenarios discussion, we didn't really  
20 discuss anything further. There might have been one or two  
21 phone calls in there on "where are you," "where do we stand  
22 on this," but that would have been the extent of it.

1 2 : 4 7

23 Q. All right. Take a look, please, at what's marked  
24 as Exhibit 26.

1 2 : 4 7

25 A. Okay.

1 2 : 4 7 1

Q. Can you identify that?

1 2 : 4 7 2

A. Yes.

1 2 : 4 7 3

Q. All right. Go ahead.

1 2 : 4 7 4

A. Yes. This is the -- where Barbara sent back to me

1 2 : 4 7 5

their -- their revisions based on what I had sent to them.

1 2 : 4 8 6

Q. And that's on February the 10th, 2012?

1 2 : 4 8 7

A. That's correct.

1 2 : 4 8 8

Q. Did you review this?

1 2 : 4 8 9

A. Yes, I did.

1 2 : 4 8 10

THE COURT: Mr. Phillips, on the -- at the top

1 2 : 4 8 11

page there, the recipients of his email, is that legal

1 2 : 4 8 12

counsel's office?

1 2 : 4 8 13

MR. PHILLIPS: Yes, sir. Well, one of the people

1 2 : 4 8 14

there is a lawyer.

1 2 : 4 8 15

Q. What was your understanding when you reviewed

1 2 : 4 8 16

Duke's draft, Exhibit 26, as to how Duke had dealt with or

1 2 : 4 8 17

responded to your proposals to create flexibility in the

1 2 : 4 8 18

agreement?

1 2 : 4 8 19

A. They basically rejected them. They left one

1 2 : 4 8 20

phrase in; but outside of that, they rejected them in 3.1,

1 2 : 4 8 21

2.2.3(c), and 6.2.

1 2 : 4 8 22

Q. Did you have any conversations after this with

1 2 : 4 8 23

Ms. Coppola or anyone else at Duke about why they chose that

1 2 : 4 9 24

course?

1 2 : 4 9 25

A. Not really because from my -- when I went over the

1 scenarios, I pretty much got the message they wanted to keep  
2 things as they were, so I really didn't pursue that much  
3 further.

4 Q. What was your reaction to that?

5 A. Well, I was disappointed because I thought that we  
6 could do something better to give us a little bit of room to  
7 administrate the agreement.

8 But outside of that, my -- I felt that I could  
9 live with it because I knew from back in -- when I sent her  
10 my draft in October and we had the call maybe in early  
11 November, that I kind of knew where she was coming from.

12 But the important thing was that -- was the  
13 security of supply was still there, the minimum -- the  
14 50,000 tons minimum monthly quantity was still there, the  
15 plus or minus 10 percent language had been reinserted.

16 Q. Did you read closely the draft that Ms. Coppola  
17 sent in Exhibit 26?

18 A. Yes.

19 Q. All right. Tell the judge exactly what you  
20 understood Section 3.1 to mean in this draft, Exhibit 26.

21 A. I understood that 3.1, we were back to the minimum  
22 monthly quantity of at least 50,000 tons a month, and that  
23 was subject to minor fluctuations of plus or minus  
24 10 percent, which means that the monthly quantity could be  
25 45,000 to 55,000, in that range. So those were the key --

1 2 : 5 0 1 those were the key overall volume elements that were very  
1 2 : 5 0 2 critical.

1 2 : 5 0 3 Q. So did that set an upper limit and a lower limit?  
1 2 : 5 0 4 Or can you tell me what upper limit and lower limit, if any,  
1 2 : 5 0 5 you understood Section 3.1 to set on the monthly minimum  
1 2 : 5 0 6 quantity?

1 2 : 5 0 7 A. For the monthly minimum quantity, the fluctuations  
1 2 : 5 0 8 were plus or minus 10 percent. So the minimum could be  
1 2 : 5 0 9 40 -- was no lower than 45,000 tons a month. The maximum  
1 2 : 5 1 10 was no more than 55,000 tons a month.

1 2 : 5 1 11 Q. All right. Now, Duke left in some language that  
1 2 : 5 1 12 you had proposed in the "minor fluctuation" sentence at the  
1 2 : 5 1 13 bottom of Section 3.1.

1 2 : 5 1 14 A. Yes.

1 2 : 5 1 15 Q. Or the aggregate -- and they added a little bit.

1 2 : 5 1 16 "Or the aggregate actual gypsum filter cake  
1 2 : 5 1 17 net dry tons produced by the Roxboro and Mayo  
1 2 : 5 1 18 plant over the same period, whichever is less."

1 2 : 5 1 19 Do you see that?

1 2 : 5 1 20 A. Yes, I do.

1 2 : 5 1 21 Q. What did you understand that to mean when you read  
1 2 : 5 1 22 it?

1 2 : 5 1 23 A. Well, I understood that that would probably bring  
1 2 : 5 1 24 the 45,000 tons a little bit more into play when we look at  
1 2 : 5 1 25 the plus or minus language because that -- that is subject

1 to the plus or minus 10 percent. So the 10 percent -- plus  
2 or minus 10 percent is still established. This is subject  
3 to that.

4 So, basically, what I took that to understand is  
5 it's the minimum, but it may be more likely to be 45,000  
6 tons a month or 540,000 tons a year over that time period.  
7 We might see a little bit more of that.

8 Q. Why did you agree to that?

9 A. There was a couple of reasons. One is we really  
10 didn't have much of a provision in this agreement for going  
11 a little bit lower, so this did provide that if the market  
12 is soft between now and 2029 or that time in 2029. So I was  
13 okay with that.

14 The other piece is that in 2011, basically, our  
15 market converted to lightweight board. And lightweight  
16 board requires about, in our case, roughly 20 percent less  
17 gypsum at that time.

18 And so dropping the quantity -- the minimum  
19 monthly quantity to 45,000 tons with us producing  
20 lightweight board, I could still put out the same volume or  
21 even a little bit more than what we had -- we had when we  
22 originally did the 2008 agreement, '4 agreement.

23 Q. All right. Since this lawsuit began,  
24 Mr. Engelhardt, have you formed a belief as to whether the  
25 quantity term for most of the contract term in the

1 2012 agreement is missing from the 2012 supply agreement?

2 MR. TUCKER: Objection, Your Honor, to the  
3 relevance of any belief he formed after the lawsuit was  
4 filed about allegedly missing quantity terms.

5 THE COURT: What was the question again,  
6 Mr. Phillips?

7 MR. PHILLIPS: Let me go back for a second,  
8 Your Honor.

9 Q. Take a look at Exhibit 4 -- or excuse me --  
10 Exhibit 15, please, Mr. Engelhardt.

11 A. Okay.

12 Q. Is that the executed 2012 supply agreement between  
13 CTG and Duke?

14 A. Yes, it is.

15 Q. As you sit on the witness stand today, have you  
16 formed a belief as to whether the quantity term for the bulk  
17 of that contract, the length of that contract, is missing  
18 from that agreement?

19 MR. TUCKER: Again, Your Honor, I object to the  
20 relevance of that. Unless he had that understanding at the  
21 time the contract was negotiated, I don't know how he  
22 informs the Court at all on the contract construction issue.

23 THE COURT: Mr. Phillips, does this question  
24 cover, what you're asking for is, does the executed contract  
25 conform with your understanding of what the minimum quantity

1 2 : 5 4

1 was in 2012? Is that your question?

1 2 : 5 4

2 MR. PHILLIPS: I think it is, Your Honor.

1 2 : 5 4

3 Q. Does the executed contract conform -- does that

1 2 : 5 4

4 contract you have in front of you conform with what you

1 2 : 5 4

5 understood the minimum monthly quantity to be in 2012?

1 2 : 5 5

6 A. Not precisely.

1 2 : 5 5

7 Q. Why not?

1 2 : 5 5

8 A. Because the first sentence in 3.1 is not exactly

1 2 : 5 5

9 correct.

1 2 : 5 5

10 Q. All right. And is there a minimum quantity in the

1 2 : 5 5

11 2012 agreement after the start-up period?

1 2 : 5 5

12 MR. TUCKER: Objection to the extent it calls for

1 2 : 5 5

13 a legal conclusion.

1 2 : 5 5

14 Q. Do you understand there to be a quantity term for

1 2 : 5 5

15 the balance of the contract?

1 2 : 5 5

16 THE COURT: Let me make sure for foundation

1 2 : 5 5

17 purposes.

1 2 : 5 5

18 MR. PHILLIPS: Yes, sir.

1 2 : 5 5

19 THE COURT: He reviewed this agreement at or about

1 2 : 5 5

20 the time it was executed; is that correct?

1 2 : 5 5

21 MR. PHILLIPS: He has already testified to that,

1 2 : 5 5

22 yes, sir.

1 2 : 5 5

23 THE COURT: And you're talking about what his

1 2 : 5 5

24 understanding was at that time?

1 2 : 5 5

25 MR. PHILLIPS: Yes, sir.



1 THE COURT: All right.

2 MR. PHILLIPS: Well, in all fairness, Your Honor,  
3 I think we're talking about what his understanding is at  
4 this time, as to whether that comports with his  
5 understanding at that time.

6 MR. TUCKER: And that's precisely the reason for  
7 my objection, Your Honor.

8 THE COURT: Subject to, as I indicated to you, I  
9 will -- I will restrict matters to whether they're  
10 appropriate. I'll allow that question to be in the record,  
11 and then I'd also ask you to ask the question as to whether  
12 he thought about it at the time in 2012.

13 MR. PHILLIPS: Your Honor, I'd love to take our  
14 lunch break right now and I'll ask these questions better  
15 when we come back.

16 THE COURT: Why don't we do this. Why don't we do  
17 that. Let's go ahead and come back at 2:30.

18 MR. PHILLIPS: Thank you.

19 THE COURT: We'll be in recess until 2:30. At  
20 ease.

21 (Recess.)

22 THE COURT: Whatever name you're called, you're  
23 still under oath.

24 THE WITNESS: Yes.

25 THE COURT: You may proceed.

02:30

1 Q. All right. Mr. Engelhardt, I'm going to try this  
2 again.

02:30

02:30

3 Would you take a look at Exhibit 15, please.

02:30

4 A. Yes, I have it.

02:30

5 Q. All right. And is that the final executed version  
6 of the 2012 contract?

02:30

7 A. Yes, it is.

02:30

8 Q. And who signed that contract --

02:30

9 A. Kim Bildfell.

02:30

10 Q. -- on behalf of CTG?

02:30

11 A. Kim Bildfell.

02:30

12 Q. Who authorized her to sign that contract?

02:30

13 A. I did.

02:30

14 Q. What actions did you take with regard to the  
15 contract before you authorized her to sign it?

02:30

16 A. I read it very completely.

02:30

17 Q. At the time you read and authorized Ms. Bildfell

02:31

18 to sign the 2012 contract, did you believe the contract

02:31

19 contained -- can you tell me whether or not you believed the

02:31

20 contract contained a volume obligation that Duke was

02:31

21 required to deliver and CTG was required to accept for the

02:31

22 entire 20-year period of the contract?

02:31

23 A. Yes, I did.

02:31

24 Q. Where did you think that was, that volume

02:31

25 provision was in the contract?

02:31

0 2 : 3 1

1 A. I thought that it was in the opening statement of  
2 paragraph 3.1.

0 2 : 3 1

0 2 : 3 1

3 Q. When you say "the opening statement," do you mean  
4 the first sentence?

0 2 : 3 1

0 2 : 3 1

5 A. The first sentence, yes.

0 2 : 3 1

6 Q. And what did you understand that volume obligation  
7 to be at that time?

0 2 : 3 1

0 2 : 3 1

8 A. 50,000 tons.

0 2 : 3 1

9 Q. All right. Let's take a look at Section 3.1 of  
10 the 2012 exhibit -- or agreement, Exhibit 15.

0 2 : 3 1

0 2 : 3 1

11 So that first sentence reads:

0 2 : 3 2

12 "Commencing on May 1, 2009, and continuing  
13 until the earlier of (1) the commercial operation

0 2 : 3 2

14 date, or (2) October 1, 2012, Progress Energy

0 2 : 3 2

15 agrees to sell and deliver to CertainTeed and

0 2 : 3 2

16 CertainTeed agrees to purchase and accept for

0 2 : 3 2

17 Progress Energy at least 50,000 net dry tons of

0 2 : 3 2

18 gypsum filter cake per month. Subject to the

0 2 : 3 2

19 allowance for -- subject to the allowance for

0 2 : 3 2

20 fluctuations and volumes actually delivered and

0 2 : 3 2

21 accepted under this revised" -- excuse me, I lost

0 2 : 3 2

22 my place -- "subject to the allowance for

0 2 : 3 2

23 fluctuations as set forth in this paragraph and

0 2 : 3 2

24 except as may otherwise be excused by the terms of

0 2 : 3 2

25 this revised agreement (the volume obligations set

0 2 : 3 2

1           forth herein may be referred to as the minimum  
2           monthly quantity)."

3           Except for my stumble, did I read that accurately?

4           A.    Yes, you did.

5           Q.    All right.  Based upon your review of the  
6 contract, what did you understand the commercial operation  
7 date as referred to in the first sentence of Section 3.1 to  
8 be in 2012?

9           A.    Okay.  The commercial operation date is defined  
10 earlier.  It's defined in Section 1.9.  And then right above  
11 it, it defines "Commercial Operation."

12          Q.    All right.  Does Section 1 -- can you tell me  
13 whether or not Section 1.9 puts an outside date on the  
14 latest that the commercial operation date can occur?

15          A.    Yes.  The latest --

16          Q.    What is that date?

17          A.    The latest date was February 1st, 2013.

18          Q.    All right.  So looking back at Section 3.1:

19                   "Commencing on May 1, 2009, and continuing  
20                   until the earlier of the commercial operation  
21                   date" --

22                   And what's the latest the commercial operation  
23 date can be?

24          A.    February 1st, 2013.

25          Q.    -- "or October 1, 2012, Progress Energy agrees to

1 sell and deliver to CertainTeed."

2 Did I read that correctly?

3 A. Yes.

4 Q. Looking at the first sentence, what period of time  
5 do you understand it to cover?

6 A. It would start May 1st, 2009, and then the earlier  
7 of the commercial operation date or October 1st, 2012.  
8 Since the commercial operation date was after that, it would  
9 be May 1, 2009, through October 1, 2012.

10 Q. Please point me to any other provisions in this  
11 contract that you understood at the time you authorized  
12 Ms. Bildfell to sign it that said a volume obligation to be  
13 delivered by Duke or accepted by CertainTeed.

14 A. I don't know of any others.

15 Q. Okay. All right. Mr. Engelhardt, we've talked a  
16 lot about Section 3.1. Let's look at some other portions of  
17 the contract.

18 MR. PHILLIPS: Your Honor, may we approach for a  
19 second?

20 THE COURT: You may.

21 (Bench conference, not reported.)

22 MR. PHILLIPS: Can we turn on the screen,  
23 Your Honor, if it's not on?

24 Q. All right. Staying with Exhibit 15 --

25 A. Okay.

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Q. -- take a look at Section 3.9 of the agreement.

A. Okay.

Q. Was Section 3.9 in the parties' 2008 agreement?

A. Yes, it was.

Q. Were -- did you understand any substantial changes to be made in Section 3.9 in the 2012 version of the agreement?

A. No.

Q. Can you tell me whether or not, when you read the agreement in preparation for the negotiations in 2012, you read Section 3.9 carefully?

A. Yes, I did.

Q. What did you understand it to mean?

MR. TUCKER: I'll object, Your Honor. This is after-the-fact testimony. It was negotiated as part of the 2008 agreement, and he just testified that it was rolled forward without any substantive change, so what he understood it to mean after the fact is not relevant evidence or relevant to any construction issue.

THE COURT: I understand your objection. I'll consider it only to the extent it informs what negotiation had as to other sections of the 2012 agreement.

I agree he cannot to testify what the expectations were at the time the negotiations were in 2008.

He personally had no expectations in 2008, but

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0 2 : 3 8 1 I'll accept what his understanding was as to why he did or  
0 2 : 3 8 2 did not ask for a modification of 3.9 when negotiating the  
0 2 : 3 8 3 2012 agreement.

0 2 : 3 8 4 Q. So in going through the 2012 negotiations, what  
0 2 : 3 8 5 did you understand Section 3.9 to mean?

0 2 : 3 9 6 THE COURT: Mr. Phillips, obviously implicit in  
0 2 : 3 9 7 that is, I'm asking what -- and I think your question was,  
0 2 : 3 9 8 what did -- what was his thinking when he began to  
0 2 : 3 9 9 anticipate -- negotiate.

0 2 : 3 9 10 I'm not asking him or allowing him to testify as  
0 2 : 3 9 11 to what he -- it's considered to be now that he's prepared  
0 2 : 3 9 12 to litigate.

0 2 : 3 9 13 MR. PHILLIPS: And, Your Honor, the question that  
0 2 : 3 9 14 I asked to set this up was, did you review this at the time  
0 2 : 3 9 15 you began your negotiations.

0 2 : 3 9 16 THE COURT: And we're talking about at that time.

0 2 : 3 9 17 MR. PHILLIPS: Right.

0 2 : 3 9 18 MR. TUCKER: And just for the record, may I have  
0 2 : 3 9 19 another objection --

0 2 : 3 9 20 THE COURT: You may.

0 2 : 3 9 21 MR. TUCKER: -- to this question?

0 2 : 3 9 22 THE COURT: You may.

0 2 : 3 9 23 Q. So what did you understand it to mean at that  
0 2 : 3 9 24 point in time, Mr. Engelhardt?

0 2 : 3 9 25 A. Well, basically it described to me that we



02:39

1 couldn't tell them basically how to run the business, and  
2 there was three key things in here that we couldn't instruct  
3 Progress Energy not to do.

02:39

4 THE COURT: Did I say -- did I hear you say you  
5 were instructed by others?

02:39

6 THE WITNESS: No.

02:39

7 THE COURT: Okay.

02:39

8 THE WITNESS: No. That this -- no. I apologize.

02:40

9 THE COURT: I apologize for interrupting. I  
10 thought that's what I heard.

02:40

11 Fine. Why don't you ask it again.

02:40

12 Q. So at the time that you began to negotiate the  
13 2012 agreement, after you had reviewed the 2008 agreement,  
14 what did you understand Section 3.9 to mean?

02:40

15 MR. TUCKER: Same objection, Your Honor.

02:40

16 THE COURT: You've got a standing objection.

02:40

17 MR. TUCKER: Thank you.

02:40

18 A. Okay. I understood that we could not require  
19 Progress Energy to do the things that are listed in the last  
20 half of this section, which were we could not obligate  
21 Progress Energy to attempt to maximize their production of  
22 synthetic gypsum, or operate any one or more of its units,  
23 or to change any of its processes under the product in order  
24 to produce synthetic gypsum or gypsum filter cake at all.

02:40

25 Q. At that time, what did you understand the first

0 2 : 4 0 1 part of Section 3.9 to mean, the part before the boldface  
0 2 : 4 1 2 "Primary Purpose" there in Section 3.9?

0 2 : 4 1 3 A. I read that just to be pretty much the preface of  
0 2 : 4 1 4 saying what you cannot -- we cannot tell them to do in the  
0 2 : 4 1 5 latter part. So to me, it was just language that said,  
0 2 : 4 1 6 "This is our -- we get to run our own business."

0 2 : 4 1 7 Q. This lawsuit was filed while you were the  
0 2 : 4 1 8 president of CertainTeed Gypsum; is that correct?

0 2 : 4 1 9 A. That's correct.

0 2 : 4 1 10 Q. Can you tell me whether or not you understand this  
0 2 : 4 1 11 lawsuit to be seeking a remedy that would require Duke to  
0 2 : 4 1 12 maximize its production of synthetic gypsum?

0 2 : 4 1 13 A. No.

0 2 : 4 1 14 MR. TUCKER: Objection. Calls for a legal  
0 2 : 4 1 15 conclusion, Your Honor.

0 2 : 4 1 16 THE COURT: I think his question at this point in  
0 2 : 4 1 17 time is, is his purpose in the lawsuit to seek that remedy,  
0 2 : 4 1 18 and I'll allow that.

0 2 : 4 1 19 Q. What was your response?

0 2 : 4 1 20 A. My response was --

0 2 : 4 1 21 THE COURT: Which was different than the contract.

0 2 : 4 1 22 A. My response was "No."

0 2 : 4 1 23 Q. Can you tell me whether or not you understand the  
0 2 : 4 2 24 remedy CTG is seeking to require Duke to run Mayo and  
0 2 : 4 2 25 Roxboro more than it wants to?

0 2 : 4 2 1 A. No.

0 2 : 4 2 2 Q. Do you understand this lawsuit -- can you tell me  
0 2 : 4 2 3 whether or not you understand this lawsuit to seek a change  
0 2 : 4 2 4 in Duke's processes or the way that they burn coal?

0 2 : 4 2 5 MR. TUCKER: Your Honor, objection, again, just to  
0 2 : 4 2 6 the relevance of this. How he understands the purpose of  
0 2 : 4 2 7 the lawsuit does not add anything to any of the construction  
0 2 : 4 2 8 issues.

0 2 : 4 2 9 MR. PHILLIPS: I'll change that question,  
0 2 : 4 2 10 Your Honor, to say:

0 2 : 4 2 11 Q. Do you understand the remedy that CTG is seeking  
0 2 : 4 2 12 to change the process by which -- any of Duke's processes or  
0 2 : 4 2 13 the way in which they burn coal?

0 2 : 4 2 14 MR. TUCKER: Same objection, Your Honor.

0 2 : 4 2 15 THE COURT: I'll allow the question, subject to  
0 2 : 4 2 16 the objection.

0 2 : 4 2 17 A. I'm not clear on what you mean by "remedy," but my  
0 2 : 4 3 18 view is this is a supply agreement.

0 2 : 4 3 19 Q. What is CTG seeking in this action?

0 2 : 4 3 20 A. We're seeking gypsum. We're seeking for Duke to  
0 2 : 4 3 21 supply the gypsum that we believe are required in the  
0 2 : 4 3 22 contract.

0 2 : 4 3 23 Q. Take a look at Section 6.2 of the agreement.

0 2 : 4 3 24 Article 6 is entitled "Remedies," isn't it,

0 2 : 4 3 25 Mr. Engelhardt?

0 2 : 4 3

1 A. Yes, it is.

0 2 : 4 3

2 Q. And I want to focus on Section 6.2 to 6.5.

0 2 : 4 3

3 Can you tell me whether or not, when you prepared

0 2 : 4 3

4 to negotiate this contract in 2012, you read Article 6

0 2 : 4 3

5 closely?

0 2 : 4 4

6 A. Yes, I did.

0 2 : 4 4

7 Q. And were there any substantive amendments to

0 2 : 4 4

8 Section 6.2 through 6.5 in the 2011 -- in the

0 2 : 4 4

9 2012 agreement?

0 2 : 4 4

10 A. No. That was -- I testified earlier that I had

0 2 : 4 4

11 attempted to put in something on the stockpile at that

0 2 : 4 4

12 point, but that was stricken. And there was a couple things

0 2 : 4 4

13 on how payments would be made later on, and that was both in

0 2 : 4 4

14 6.2 and 6.4, but it didn't change the remedies.

0 2 : 4 4

15 Q. All right. At the time you read the remedies

0 2 : 4 4

16 article in 2011 in preparation for your negotiation of the

0 2 : 4 4

17 2012 contract, how did you understand Section 6.2 to

0 2 : 4 4

18 operate?

0 2 : 4 4

19 MR. TUCKER: Objection for the record, Your Honor.

0 2 : 4 4

20 THE COURT: You may answer.

0 2 : 4 4

21 A. Okay. My understanding was that in any given

0 2 : 4 4

22 month, if Progress Energy or Duke did not supply the minimum

0 2 : 4 5

23 monthly quantity, then our options -- CertainTeed had

0 2 : 4 5

24 options.

0 2 : 4 5

25 And the first option was that we could -- by

0 2 : 4 5 1 written notice to Duke within 30 days after the end of that  
0 2 : 4 5 2 month in which the deficiency occurred, we can instruct them  
0 2 : 4 5 3 to deliver the quantity of gypsum that was necessary to  
0 2 : 4 5 4 satisfy that month's minimum monthly quantity. Or  
0 2 : 4 5 5 CertainTeed could go out and purchase on our own the  
0 2 : 4 5 6 equal -- that amount to satisfy that and then we would  
0 2 : 4 5 7 charge back to Duke.

0 2 : 4 5 8 Q. Did you understand whether there was a notice  
0 2 : 4 5 9 requirement before CertainTeed exercised that remedy?

0 2 : 4 5 10 A. There was a notice to -- yes, there was a notice.

0 2 : 4 5 11 Q. What happened if CertainTeed didn't give the  
0 2 : 4 5 12 notice?

0 2 : 4 5 13 A. Then we would waive it for that particular month.

0 2 : 4 5 14 Q. What did you understand, at the time in 2011 when  
0 2 : 4 5 15 you were preparing to negotiate, Section 6.3 to provide for?

0 2 : 4 6 16 MR. TUCKER: Objection.

0 2 : 4 6 17 THE COURT: You may answer.

0 2 : 4 6 18 A. Okay. I understood 6.3 to be if Progress Energy,  
0 2 : 4 6 19 or now Duke, did anything that was so pervasive --

0 2 : 4 6 20 THE COURT: Hold on just a second.

0 2 : 4 6 21 Let me see you.

0 2 : 4 6 22 (Bench conference, not reported.)

0 2 : 4 8 23 THE COURT: And, Mr. Tucker, feel free to go in  
0 2 : 4 8 24 the conference room if you'd like.

0 2 : 4 8 25 MR. TUCKER: Thank you.

0 2 : 4 8

1 THE COURT: Ladies and gentlemen, we'll just be at  
2 ease for a few moments.

0 2 : 4 8

0 2 : 5 1

3 (Pause in proceedings.)

0 2 : 5 5

4 THE COURT: Ladies and gentlemen of the jury --  
5 audience, just to keep you advised as to what it is, as I've  
6 indicated to you, that the contract includes certain  
7 information that is confidential.

0 2 : 5 5

0 2 : 5 5

0 2 : 5 5

0 2 : 5 5

8 And there was a redaction in the public record,  
9 some of which will be maintained, some of which is not, and  
10 we're showing the provision of the contract where we're  
11 excluding only the pricing information that would be  
12 valuable to a competitor to Duke Energy.

0 2 : 5 5

0 2 : 5 5

0 2 : 5 5

0 2 : 5 5

13 And so we're simply taking the time to do that so  
14 when we publish, the only information that's not going to be  
15 publicly displayed is the pricing term of the contract.

0 2 : 5 5

0 2 : 5 6

0 2 : 5 6

0 2 : 5 6

16 MR. TUCKER: Thank you, Your Honor.

0 2 : 5 6

0 2 : 5 6

17 THE COURT: And I've accepted, without further  
18 evidentiary determination subject to any objection, the fact  
19 that I think there's been adequate showing of the  
20 confidential and proprietary nature of the pricing  
21 information in the contract that is sufficient to satisfy  
22 the redaction in the public forum.

0 2 : 5 6

0 2 : 5 6

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0 2 : 5 6

23 MR. PHILLIPS: And we have no objection,  
24 Your Honor.

0 2 : 5 6

0 2 : 5 6

25 You're going to let Ms. Marston -- because we're

0 2 : 5 6

0 2 : 5 6 1 about to do this.

0 2 : 5 6 2 THE COURT: That's correct. Once she tells me  
0 2 : 5 6 3 she's got it, I will...

0 2 : 5 7 4 MS. MARSTON: Your Honor, I can publish to you.

0 2 : 5 7 5 THE COURT: I'm going to go ahead and make that...  
0 2 : 5 7 6 The witness should be able to see it, the lawyers  
0 2 : 5 7 7 should be able to see it, but not yet the audience.

0 2 : 5 7 8 MR. PHILLIPS: I'm sorry. Take a look.

0 2 : 5 9 9 THE COURT: I've got y'all -- let me know when  
0 2 : 5 9 10 you've got it ready.

0 2 : 5 9 11 MS. MARSTON: Judge, almost there.

0 2 : 5 9 12 THE COURT: I want you to go back, Mr. Tucker, and  
0 2 : 5 9 13 tell Robby how impressed you are.

0 2 : 5 9 14 MR. TUCKER: Very impressed.

0 2 : 5 9 15 THE COURT: He had a partner who did similar  
0 2 : 5 9 16 things when he tried a case down in Charlotte.

0 2 : 5 9 17 MR. PHILLIPS: I tried a case up in Henderson,  
0 2 : 5 9 18 North Carolina, Vance County, where, on the overhead  
0 2 : 5 9 19 projector, I actually made my iPad work, going to the  
0 2 : 5 9 20 records of the state while cross-examining witnesses. It  
0 2 : 5 9 21 was a 50/50 proposition, but it did, in fact, work.

0 3 : 0 0 22 THE COURT: Counsel and the witness can see it,  
0 3 : 0 0 23 but not yet published.

0 3 : 0 0 24 MR. PHILLIPS: I think we're only going to deal  
0 3 : 0 0 25 with page 22 of the agreement. So we can...



03:01

1

MS. MARSTON: I have a redacted that they're okay with, I believe, on page 22.

03:01

2

03:01

3

THE COURT: That's okay?

03:01

4

MR. TUCKER: Yes, Your Honor.

03:01

5

THE COURT: Ms. Marston, I'll ask you, if you would, at the conclusion, some point in time, you probably ought to somehow or another take what you've got and put it out as part of the record, identify it so that your record will show what's actually -- I don't know whether you want to mark this as -- perhaps you make it Exhibit 15A and just print this page?

03:01

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12

MR. PHILLIPS: Sure.

03:01

13

MR. TUCKER: That's fine with us, Your Honor.

03:02

14

MS. MARSTON: We could just redact and replace the exhibits. That's a lot of exhibits, though.

03:02

15

03:02

16

THE COURT: I don't need for it to be done now, just as long as you can take this page and get it on your -- as an Exhibit 15A.

03:02

17

03:02

18

03:02

19

MS. MARSTON: Yes, Your Honor.

03:02

20

MR. PHILLIPS: Are we ready to go, Don?

03:02

21

MR. TUCKER: I think we are.

03:02

22

THE COURT: You may proceed.

03:02

23

MR. PHILLIPS: Thank you, Your Honor.

03:02

24

Q. All right. Mr. Engelhardt, let me direct your

03:02

25

attention to Section 6.3 on page 22 of the 2012 agreement.



0 3 : 0 4

1 agreement.

0 3 : 0 4

2 Q. And if those two things happened, what did you  
3 understand CertainTeed's remedy to be?

0 3 : 0 4

4 A. CertainTeed's remedy -- if CertainTeed chose to  
5 terminate the agreement, it would be liquidated damages. If  
6 CertainTeed chose not to terminate the agreement, then the  
7 agreement still stands, and the only other remedy is it  
8 would go back to 6.2.

0 3 : 0 4

9 Q. How would you compare --

0 3 : 0 4

10 THE COURT: Let me -- for purposes of the record  
11 and the objection, let me just ask, and this would be a  
12 yes/no question, I hope.

0 3 : 0 4

13 At the time of preparing for the negotiations, did  
14 you review any documentation contemporaneous with the  
15 negotiations of 6.3, which I believe goes back to earlier  
16 provisions of the contract?

0 3 : 0 4

17 So in other words, was your -- was your  
18 understanding based on your reviewing the contract as it had  
19 been negotiated?

0 3 : 0 5

20 THE WITNESS: Yes.

0 3 : 0 5

21 THE COURT: You had not gone back to review any  
22 documentation contemporaneous when it was negotiated the  
23 first time?

0 8 : 0 5

24 THE WITNESS: No, I had not.

0 8 : 0 5

25 MR. TUCKER: Those are issues which we'll get into

0 3 : 0 5 1 on cross, Your Honor.

0 3 : 0 5 2 THE COURT: I just -- I told you I was going to  
0 3 : 0 5 3 hold back, but I wanted to do it basic -- as a basis of the  
0 3 : 0 5 4 ruling that I made of the objection.

0 3 : 0 5 5 MR. PHILLIPS: Understood, Your Honor.

0 3 : 0 5 6 Q. So at the time, back in 2011, when you read the  
0 3 : 0 5 7 2008 agreement and were preparing to negotiate, how did you  
0 3 : 0 5 8 compare, if at all, 6.2 and 6.3 with 6.4 and 6.5 in this  
0 3 : 0 5 9 remedies section?

0 3 : 0 5 10 A. Even though the exact trigger points aren't the  
0 3 : 0 5 11 same, 6.4 is essentially a mirror image of 6.2. 6.4 is if  
0 3 : 0 6 12 CertainTeed under-accepts, and 6.5 is if -- if CertainTeed  
0 3 : 0 6 13 does something so pervasive, that is a major event, in its  
0 3 : 0 6 14 acceptance. So that was similar to -- 6.5 was basically the  
0 3 : 0 6 15 mirror of 6.3.

0 3 : 0 6 16 Q. What was your understanding in 2011 with regard to  
0 3 : 0 6 17 what would happen if one of the things in 6.5 -- one of the  
0 3 : 0 6 18 triggers in 6.5 occurred and Duke chose not to terminate the  
0 3 : 0 6 19 agreement? What were Duke's remedies then? What did you  
0 3 : 0 6 20 understand?

0 3 : 0 6 21 A. My understanding if they chose not to terminate is  
0 3 : 0 6 22 the agreement still stood, and that would put us back to  
0 3 : 0 6 23 6.4.

0 3 : 0 6 24 Q. Mr. Engelhardt, still talking about 2011, the time  
0 3 : 0 6 25 when you were preparing to and negotiating the contract.

0 3 : 0 7 1 When you read the agreement, where did you  
0 3 : 0 7 2 understand that the gypsum supplied by Progress to CTG's  
0 3 : 0 7 3 Roxboro plant was going to come from?

0 3 : 0 7 4 MR. TUCKER: Objection to this line as well,  
0 3 : 0 7 5 Your Honor, to the extent it calls for an after-the-fact  
0 3 : 0 7 6 interpretation of the contract.

0 3 : 0 7 7 THE COURT: His question is, did he have an  
0 3 : 0 7 8 understanding when he began to negotiate, and the question  
0 3 : 0 7 9 should be limited to that understanding.

0 3 : 0 7 10 A. Yes. My understanding was in Section 3.1, it says  
0 3 : 0 7 11 that it would primarily, or something like that, would come  
0 3 : 0 7 12 from Roxboro and Mayo plants, but it wasn't limited to that.

0 3 : 0 7 13 Q. Is the source of -- did you understand in 2011 --  
0 3 : 0 7 14 Did you have an understanding in 2011 of where --  
0 3 : 0 7 15 of whether any other section of this agreement addressed  
0 3 : 0 7 16 where gypsum could come from?

0 3 : 0 7 17 A. The only other place that I remember that being  
0 3 : 0 8 18 addressed is in 6.2, and that's not a direct reference to  
0 3 : 0 8 19 somewhere else, but it basically says -- 6.2 -- it basically  
0 3 : 0 8 20 says that if -- if Duke is undersupplying, then the  
0 3 : 0 8 21 requirement by our written notice to Progress or Duke, they  
0 3 : 0 8 22 were to supply from -- supply us the minimum quantity.

0 3 : 0 8 23 And if they're not supplying it at Roxboro and  
0 3 : 0 8 24 Mayo, this certainly implies, they would have to be getting  
0 3 : 0 8 25 it somewhere else.

03:08 1 MR. TUCKER: Objection to what the witness  
03:08 2 believes the contract implies.

03:08 3 THE COURT: Again, I'll allow the testimony to the  
03:08 4 extent that it shows the mindset in negotiating the 2012  
03:08 5 agreement, that he's -- I'm not allowing him to interpret.  
03:08 6 I think his understanding is what I'm allowing.

03:09 7 Q. Mr. Engelhardt, take a look at Section 2.2.3(a) of  
03:09 8 the 2012 agreement, which is on page 9.

03:09 9 A. Okay.

03:09 10 Q. At the time that you negotiated this agreement in  
03:09 11 2011, did you have an understanding of what obligation Duke  
03:09 12 had -- and I know that you proposed some different things  
03:09 13 about the stockpile and the flexibility language that you  
03:09 14 proposed, but when that came back and you reviewed the  
03:09 15 contract, before it was finally signed and you authorized  
03:09 16 Ms. Bildfell to sign it, did you have an understanding of  
03:09 17 what obligation Duke had with regard to maintaining a  
03:09 18 stockpile?

03:09 19 MR. TUCKER: Objection for the record.

03:10 20 A. Yes.

03:10 21 THE COURT: You may answer.

03:10 22 A. Yes. My understanding was that Duke was required  
03:10 23 to use commercially reasonable efforts to maintain at least  
03:10 24 250,000 tons on the stockpile.

03:10 25 Q. And did you have an understanding about whether

08:10

1 the 2012 agreement defined "commercially reasonable  
2 efforts"?

08:10

08:10

3 MR. TUCKER: Objection, Your Honor. That calls  
4 for a legal conclusion.

08:10

08:10

5 THE COURT: Again, only to the extent that he  
6 believes he had an understanding as the negotiator, I'll  
7 allow him to answer.

08:10

08:10

8 MR. PHILLIPS: And I'll re-ask that question,  
9 Your Honor.

08:10

08:10

10 Q. At the time -- same question I asked you before.  
11 When you got this question back --

08:10

08:10

12 When you got the agreement back from Duke, they  
13 had taken out your changes; you were reviewing it in order  
14 to allow Ms. Bildfell -- authorize her to sign it. Did you  
15 have an understanding of whether "commercially reasonable  
16 efforts" were defined?

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17 A. My understanding is it describes it right below  
18 that, where it says that:

08:10

08:11

19 "Progress Energy will be deemed to be using  
20 commercially reasonable efforts to maintain the  
21 required volume. To the extent that their monthly  
22 production of gypsum filter cake is used to  
23 fulfill the minimum monthly requirement  
24 obligations as set forth herein, and the excess  
25 gypsum is being utilized to replenish the

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0 3 : 1 2 1 obligation to provide the minimum monthly quantity?

0 3 : 1 2 2 A. No, I did not.

0 3 : 1 2 3 Q. And during 2017, did you understand Duke to be  
0 3 : 1 2 4 providing to CTG excess gypsum as identified in -- well, say  
0 3 : 1 3 5 the last half of 2017, was Duke providing to CTG excess  
0 3 : 1 3 6 gypsum as that's defined under the contract?

0 3 : 1 3 7 A. No, they were not.

0 3 : 1 3 8 MR. TUCKER: Objection. Calls for a legal  
0 3 : 1 3 9 conclusion.

0 3 : 1 3 10 He's asking for a definition, Your Honor, in the  
0 3 : 1 3 11 contract, which I don't believe, as a layman, that  
0 3 : 1 3 12 foundation has been established that he's able to answer  
0 3 : 1 3 13 that question.

0 3 : 1 3 14 THE COURT: My understanding of the question would  
0 3 : 1 3 15 be: Had Duke generated more than 50,000 tons per month and  
0 3 : 1 3 16 given that to CTG. And I think if you'd ask the question  
0 3 : 1 3 17 that way.

0 3 : 1 3 18 I believe that he's asking you to interpret what  
0 3 : 1 3 19 the contract says.

0 3 : 1 3 20 MR. PHILLIPS: Fair enough, Your Honor. Thank  
0 3 : 1 3 21 you. I didn't want to get into a debate about what the  
0 3 : 1 3 22 minimum monthly quantity was.

0 3 : 1 3 23 Q. But --

0 3 : 1 4 24 THE COURT: But you know what his position is.

0 3 : 1 4 25 Q. In the last half of 2017, had Duke used gypsum in

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1 excess of 50,000-ton quantity to put on the stockpile?

2 A. No, they were not.

3 THE COURT: I'm sorry. Did he have any  
4 understanding as to whether Duke generated more than  
5 50,000 per month at the time?

6 MR. PHILLIPS: I think -- I think that I had asked  
7 him that question before. Well --

8 Q. During 2017, are you aware of whether Duke --

9 THE COURT: Mr. Phillips, all I'm asking for is  
10 are you making any contention that Duke had gypsum that  
11 would have been available for CTG to get from somebody else.

12 MR. PHILLIPS: Not from Roxboro and Mayo. No,  
13 sir. Thank you.

14 Q. All right. After you received the Duke draft in  
15 February 2012, how did finalization of the 2012 exhibit --  
16 or 2012 agreement, Exhibit 15, proceed?

17 A. Okay. After I received Barbara's draft in  
18 February, I knew at that point that I was moving to the  
19 president's role, so we were starting that transition, so I  
20 handed it off to Kim Bildfell to finish the contract, but I  
21 was still remaining involved.

22 Q. Did you have communication with Ms. Bildfell about  
23 the contract after you handed it off to her?

24 A. Yes. I had an initial communication basically  
25 that, at a high level, went over the changes, where they







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1 those, and there will be no need to give paper copies to the  
2 clerk of court. Is that everybody's understanding?

0 3 : 4 0

3 MS. MARSTON: Yes, Your Honor.

0 3 : 4 0

4 MR. TUCKER: Yes, Your Honor.

0 3 : 4 0

5 THE COURT: All right. You may cross-examine,  
6 Mr. Tucker.

0 3 : 4 0

7 CROSS-EXAMINATION by MR. TUCKER:

0 3 : 4 0

8 Q. Good afternoon, Mr. Engelhardt.

0 3 : 4 0

9 A. Good afternoon.

0 3 : 4 0

10 Q. So at the very first part of your testimony this  
11 morning, Mr. Phillips asked you some questions about how  
12 gypsum was transferred from the Duke Energy Progress  
13 stockpile to CertainTeed's wallboard facility adjacent to  
14 the plant.

0 3 : 4 0

0 3 : 4 0

15 Do you recall that?

0 3 : 4 0

16 A. Yes.

0 3 : 4 0

17 Q. And you testified that gypsum was taken from the  
18 stockpile, placed on a conveyor belt, and the conveyor belt  
19 ran from the stockpile across a canal to the CertainTeed  
20 facility; is that right?

0 3 : 4 0

0 3 : 4 0

21 A. Yeah, generally, yep.

0 3 : 4 0

22 Q. And in terms of how the gypsum gets from the  
23 stockpile to the conveyor belt, that's done by a third  
24 party, correct?

0 3 : 4 0

0 3 : 4 0

25 A. That's correct.

0 3 : 4 0

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1 Q. Charah?

0 3 : 4 1

2 A. Charah.

0 3 : 4 1

3 Q. And Charah is -- manages the stockpile under  
4 CertainTeed's direction pursuant to a contract, correct?

0 3 : 4 1

0 3 : 4 1

5 A. Yes. When we set that up, it's a three-way  
6 agreement, so they're actually responsive to both Duke, or  
7 Progress Energy, and CertainTeed. CertainTeed pays for the  
8 Charah contract.

0 3 : 4 1

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0 3 : 4 1

9 Q. And you understand that under the 2012 agreement  
10 as signed, CertainTeed is the party that's responsible for  
11 managing the stockpile, correct?

0 3 : 4 1

0 3 : 4 1

0 3 : 4 1

12 A. I believe that's what it says, yes.

0 3 : 4 1

0 3 : 4 1

13 Q. So CertainTeed tells Charah how much synthetic  
14 gypsum to take off the stockpile and put on the conveyor  
15 belt, right?

0 3 : 4 2

0 3 : 4 2

16 A. We tell Charah what we need and we -- I don't  
17 remember exactly how that control works, but we have bins.  
18 And as the bins fill, they would let them know not to put  
19 more on.

0 3 : 4 2

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0 3 : 4 2

20 Q. Under the definition in the contract, gypsum is  
21 accepted by CertainTeed once it hits the conveyor belt to go  
22 to your plant, correct?

0 3 : 4 2

0 3 : 4 2

0 3 : 4 2

23 A. That's correct.

0 3 : 4 2

0 3 : 4 2

24 Q. So if there's 50,000 tons available on the  
25 stockpile, for example, but you direct Charah to put only

0 3 : 4 2

0 3 : 4 2 1 25,000 tons on the conveyor belt, 25,000 tons is the amount  
0 3 : 4 2 2 deemed delivered and accepted under the contract?

0 3 : 4 2 3 A. Yes.

0 3 : 4 2 4 Q. Now, I'm going to shift gears and talk to you a  
0 3 : 4 2 5 little bit about the 2004 agreement.

0 3 : 4 2 6 You didn't have any role or involvement in the  
0 3 : 4 3 7 negotiation of that agreement, correct?

0 3 : 4 3 8 A. That's correct.

0 3 : 4 3 9 Q. You didn't review the agreement at all in 2004 or  
0 3 : 4 3 10 at any time prior to 2009?

0 3 : 4 3 11 A. That's correct.

0 3 : 4 3 12 Q. And you've never gone back to try to understand  
0 3 : 4 3 13 the history of the 2004 agreement or how particular  
0 3 : 4 3 14 provisions in that agreement were negotiated?

0 3 : 4 3 15 A. Not -- no, not -- I did not.

0 3 : 4 3 16 Q. And you told me at your deposition that you could  
0 3 : 4 3 17 not say what the original intent of the parties was with  
0 3 : 4 3 18 respect to any provision of the 2004 agreement; is that  
0 3 : 4 3 19 right?

0 3 : 4 3 20 MR. PHILLIPS: Objection.

0 3 : 4 3 21 THE COURT: The question is, is that what his  
0 3 : 4 3 22 deposition testimony was. So are you asking him that's what  
0 3 : 4 3 23 his testimony was in deposition or asking him --

0 3 : 4 3 24 MR. TUCKER: I'll ask it more broadly.

0 3 : 4 3 25 Q. Mr. Engelhardt, you cannot say what the original

0 3 : 4 3

1 intent of the parties was with respect to any provision of  
2 the 2004 agreement, can you?

0 3 : 4 3

0 3 : 4 3

3 A. What their intent?

0 3 : 4 4

4 Q. That's right.

0 3 : 4 4

5 A. No, I could not say that. I can only -- I could  
6 only say what I can read.

0 3 : 4 4

0 3 : 4 4

7 Q. And that includes the remedy provisions that you  
8 spent a lot of time talking to Mr. Phillips about that were  
9 carried forward from 2004 to 2008 and then were carried  
10 forward again to 2012.

0 3 : 4 4

0 3 : 4 4

11 To the extent those remedy provisions originated  
12 in the 2004 agreement, you have no personal knowledge  
13 regarding the intent of the parties at the time those  
14 provisions were put into the agreement?

0 3 : 4 4

0 3 : 4 4

15 A. That's correct.

0 3 : 4 4

0 3 : 4 4

16 Q. And you also were not involved in any way in  
17 negotiating the 2008 agreement, right?

0 3 : 4 4

0 3 : 4 4

18 A. That's also correct.

0 3 : 4 4

19 Q. You're aware that a new provision, Section 3.9,  
20 was added to the 2008 agreement, correct?

0 3 : 4 4

0 3 : 4 4

21 You testified about that today?

0 3 : 4 4

22 A. Yes.

0 3 : 4 4

23 Q. And you've seen drafts of the 2008 agreement in  
24 which CertainTeed commented on the addition of the new  
25 Section 3.9, haven't you?

0 3 : 4 4

0 3 : 4 4

0 3 : 4 5

1 A. The only draft I saw was in our deposition.

0 3 : 4 5

2 Q. Let me ask you to look at Exhibit 10 in your  
3 exhibit binder, please.

0 3 : 4 5

4 THE COURT: You're doing it from your table,  
5 right?

0 3 : 4 5

6 MR. LINNARTZ: Yes.

0 3 : 4 5

7 MR. TUCKER: We are.

0 3 : 4 5

8 Q. Mr. Engelhardt, do you have Exhibit 10 in front of  
9 you?

0 3 : 4 5

10 A. Yes, I do.

0 3 : 4 5

11 Q. And the cover of this exhibit is an email that  
12 indicates that it's forwarding an attached draft sent to  
13 Ms. Coppola of Progress Energy by Rob Morrow of CertainTeed,  
14 correct?

0 3 : 4 5

15 A. That's correct.

0 3 : 4 5

16 MR. PHILLIPS: Your Honor, I'll object to this to  
17 the extent that Mr. -- this is not a document that  
18 Mr. Engelhardt sent or received. He's testified that the  
19 only thing that I believe Mr. Tucker is about to ask him  
20 about he saw for the first time in his deposition. So I  
21 would object.

0 3 : 4 5

22 THE COURT: I don't know what the next question  
23 coming is. Where are you going, Mr. Tucker?

0 3 : 4 6

24 MR. TUCKER: Mr. Engelhardt testified at length in  
25 response to questions by Mr. Phillips about his

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1 MR. TUCKER: Let me ask the following questions  
2 and I can perhaps cut this off.  
3 THE COURT: He testimony was "I haven't seen  
4 anything except showed to me at the deposition." It wasn't  
5 identified as to what was showed to him in his deposition, I  
6 don't think.  
7 MR. PHILLIPS: Fair enough.  
8 Q. So, Mr. Engelhardt, you have Exhibit 10 in front  
9 of you. And we've identified this as a draft of the  
10 2008 agreement that was sent by Rob Morrow of CertainTeed to  
11 Barbara Coppola of Duke Energy Progress. And the attached  
12 draft is dated November 22nd, 2007, correct?  
13 A. I'm sorry, I don't see the note.  
14 THE COURT: On the first page at the upper top,  
15 you can see, the right-hand side.  
16 A. Oh, yes. I'm sorry, yes.  
17 Q. So you see in the lower right-hand corner of the  
18 first page of this document the letters CTG and then  
19 followed by a number?  
20 A. Correct.  
21 Q. And so do you understand that this is a document  
22 produced from CertainTeed's files?  
23 A. Yes.  
24 Q. Have you seen this document, other than in the  
25 context of your deposition?

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03:49

1 Q. I won't limit it to that. In North America.

03:50

2 A. By gypsum oversupply, are you referring to the  
3 marketplace or are you referring to the raw material gypsum?

03:50

4 Q. Have you seen internal CertainTeed documents that  
5 describe the problem as a "mountain of excess gypsum"?

03:50

6 A. Yes, I saw that also at our deposition.

03:50

7 Q. Are you testifying that until I showed you the  
8 document that we're talking about at your deposition, you  
9 were not aware of any CertainTeed documents that described  
10 an oversupply situation involving synthetic gypsum?

03:50

11 A. I may have been at that meeting. I don't really  
12 recall. And I believe I said that in the deposition, I  
13 don't really recall.

03:50

14 Q. Let's look at Exhibit 35 since you've said now  
15 that you believe you may have been at that meeting.

03:50

16 THE COURT: I'm just leaving your screen hot, so  
17 it's up to you to make sure you don't put anything  
18 confidential on the screen.

03:50

19 MR. TUCKER: Got you. Thank you, Your Honor.

03:51

20 Q. All right. Do you have Exhibit 35 in front of  
21 you, Mr. Engelhardt?

03:51

22 A. Yes, I do.

03:51

23 Q. And on the first page of this document, it  
24 reflects that this is a presentation prepared as of March --  
25 or dated as of March 6, 2009.

03:51

03:51

03:51

0 3 : 5 1

1 Do you see that?

0 3 : 5 1

2 A. Yes, I do.

0 3 : 5 1

3 Q. And the caption of the presentation is "Roxboro

0 3 : 5 1

4 and Moundsville Excess DSG, A Mountain of DSG."

0 3 : 5 1

5 Do you see that?

0 3 : 5 1

6 A. Yes, I do.

0 3 : 5 1

7 Q. And DSG refers to synthetic gypsum; is that

0 3 : 5 1

8 correct?

0 3 : 5 1

9 A. That is correct.

0 3 : 5 1

10 Q. So this presentation is talking about excess

0 3 : 5 1

11 gypsum at the locations where CertainTeed receives synthetic

0 3 : 5 1

12 gypsum from a public utility, correct?

0 3 : 5 1

13 A. With two of those, yes.

0 3 : 5 1

14 Q. And Moundsville is a location in West Virginia

0 3 : 5 1

15 where CertainTeed receives synthetic gypsum from AEP?

0 3 : 5 1

16 A. That's correct.

0 3 : 5 1

17 Q. And at the time this document was prepared in

0 3 : 5 2

18 early 2009, CertainTeed was still very much feeling the

0 3 : 5 2

19 consequences of the downturn in the housing market, correct?

0 3 : 5 2

20 A. That's correct.

0 3 : 5 2

21 Q. And under its public utility gypsum supply

0 3 : 5 2

22 contracts with Progress Energy and with AEP, CertainTeed was

0 3 : 5 2

23 obligated to take more gypsum than it needed or have the

0 3 : 5 2

24 present ability to use in 2009; isn't that right?

0 3 : 5 2

25 A. That's correct.



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1           A.    That's correct.

2           Q.    And apart from this document, you were involved in  
3 internal discussions at CertainTeed in 2009 where concerns  
4 were expressed about CertainTeed's ability to satisfy its  
5 minimum purchase obligations under its utility contracts,  
6 weren't you?

7           A.    I started when I got involved in -- in November of  
8 2009.

9           Q.    You started having those conversations where  
10 concerns were expressed about your ability to meet your  
11 minimum acceptance obligations in 2009; is that what you're  
12 saying?

13          A.    This wasn't an area of my responsibility, so -- I  
14 had plenty of other things to concentrate on, so, no, I  
15 wasn't active in this area.

16          Q.    You told me at your deposition, didn't you,  
17 Mr. Engelhardt, that the most critical issue facing the  
18 company in early 2009 was what to do with excess gypsum, not  
19 the possibility that CertainTeed might not have enough  
20 gypsum?

21          A.    At that time period, that would certainly be the  
22 bigger -- I don't know -- I may have misspoke being the most  
23 critical issue.

24          Q.    You don't remember telling me it was the most  
25 critical issue?

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0 3 : 5 5 1 A. I think, in looking at this document, I probably  
0 3 : 5 5 2 would have -- should have said the more critical issue  
0 3 : 5 5 3 relative -- I agree that it was more critical, that we had  
0 3 : 5 5 4 more DSG available than what we were going to consume. I  
0 3 : 5 5 5 really don't think it was the most critical issue in our  
0 3 : 5 5 6 company at that point.

0 3 : 5 5 7 Q. Now, after you got involved in 2009, you began  
0 3 : 5 5 8 revisiting the Progress Energy contract to see whether it  
0 3 : 5 5 9 could be modified from a fixed supply obligation to one that  
0 3 : 5 5 10 was based on production, correct?

0 3 : 5 5 11 A. My focus was -- we had built the stockpile and  
0 3 : 5 5 12 paid to expand that to 650,000 tons. So my focus was to  
0 3 : 5 5 13 utilize that stockpile fully and not haul away or landfill  
0 3 : 5 5 14 gypsum that we didn't need to. So the debate came down to  
0 3 : 5 5 15 the 250 -- or the 50,000 tons a month versus having  
0 3 : 5 5 16 650,000 tons on the stockpile.

0 3 : 5 6 17 Q. Let me direct your attention to page 5 of this  
0 3 : 5 6 18 presentation that we've been reviewing called "A Mountain of  
0 3 : 5 6 19 Gypsum."

0 3 : 5 6 20 Read the third bullet under Roxboro into the  
0 3 : 5 6 21 record, if you would, please.

0 3 : 5 6 22 A. The bullet said:

0 3 : 5 6 23 "Obtain agreement to take a production rate,  
0 3 : 5 6 24 not obligation rate."

0 3 : 5 6 25 Q. Let me ask you to look at Exhibit 37, please.

03:56

1 A. I have it.

03:56

2 Q. Now, this is a document that I believe you

03:56

3 testified about during Mr. Phillips' examination. This is

03:56

4 an email from Mervyn Hayes to you dated December 7, 2009,

03:56

5 correct?

03:56

6 A. That's correct.

03:56

7 Q. And Mr. Hayes told you in this email that:

03:56

8 "Until we can renegotiate ourselves out of

03:56

9 the Revised and Amended Supply Agreement, the

03:56

10 agreement stands in full."

03:57

11 Do you see that?

03:57

12 A. Yes, I do.

03:57

13 Q. And the Revised and Amended Supply Agreement

03:57

14 refers to the 2008 agreement, correct?

03:57

15 A. That's correct.

03:57

16 Q. And in 2010, CertainTeed sought to amend the

03:57

17 2008 agreement so that it only had to take 2010 actual

03:57

18 production levels, and not the 600,000 tons required by the

03:57

19 contract.

03:57

20 Do you remember that?

03:57

21 A. That's correct.

03:57

22 Q. Let me ask you to look at Exhibit 39.

03:57

23 Tell me when you have it, Mr. Engelhardt.

03:57

24 A. I have it.

03:57

25 I think that -- I do want to reiterate on that

0 3 : 5 7 1 last line of questioning. My conversations with  
0 3 : 5 7 2 Barbara Coppola from the beginning was, "Look, we built this  
0 3 : 5 7 3 stockpile." My position was, "Why do we need to take  
0 3 : 5 7 4 50,000 tons a month as long as we have room on the  
0 3 : 5 8 5 stockpile?" because all we were doing is putting the excess  
0 3 : 5 8 6 basically in the ground if it was beyond what we couldn't  
0 3 : 5 8 7 use.

0 3 : 5 8 8 So, yes, that was our position.

0 3 : 5 8 9 Q. And the document I just asked you about was dated  
0 3 : 5 8 10 from 2009. You weren't talking to Ms. Coppola about  
0 3 : 5 8 11 revising the supply agreement in 2009, were you?

0 3 : 5 8 12 A. Yes, I was -- no, I was talking with her about the  
0 3 : 5 8 13 take. I wasn't talking to her about revising the supply  
0 3 : 5 8 14 agreement. I was talking to her about revising the take to  
0 3 : 5 8 15 only the production level as long as we could maintain the  
0 3 : 5 8 16 stockpile at its maximum.

0 3 : 5 8 17 Q. So let me ask you to look at Exhibit 37.

0 3 : 5 8 18 THE COURT: 39?

0 3 : 5 8 19 MR. TUCKER: I'm sorry, I misspoke. 39.

0 3 : 5 8 20 Q. So this is an email from Keith Campbell of  
0 3 : 5 8 21 CertainTeed to Robert Panero, Edouard Chartier, and others,  
0 3 : 5 8 22 correct?

0 3 : 5 8 23 A. That's correct.

0 3 : 5 8 24 Q. And this is -- you remember that we reviewed this  
0 3 : 5 8 25 document in your deposition, I'm sure, right?



03:58

1 A. Yes, I do.

03:58

2 Q. And the email that is Exhibit 39 reports on a  
3 meeting that you and Mr. Campbell had with Progress Energy,  
4 correct?

03:59

5 A. That's correct.

03:59

6 Q. And the purpose of that meeting was to try and  
7 negotiate issues relating to the 2008 supply agreement, a  
8 modification that CertainTeed was seeking in 2010, correct?

03:59

9 A. The purpose of this timing was to renegotiate  
10 the -- or to negotiate the second amendment that we talked  
11 about earlier today.

03:59

03:59

12 Q. That was Exhibit 14, right?

03:59

13 A. Yes.

03:59

14 Q. And the first paragraph of this email identifies  
15 two specific issues. Let me direct your attention to that,  
16 please.

03:59

03:59

17 A. Okay.

03:59

18 Q. The first issue is whether CertainTeed was going  
19 to be held to handling synthetic gypsum equal to  
20 Progress Energy's rate of production or the contract  
21 600,000 tons, correct?

03:59

03:59

22 A. That's correct.

03:59

23 Q. And then the second issue referenced here is the  
24 potential for a lower cost disposal option by using  
25 Progress Energy's landfill.

03:59

03:59

03:59

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A. That's correct.

Q. And let me ask you to look at the third bullet appearing in the middle of the page of the first page of Exhibit 39.

A. Okay.

Q. So one of the things that Mr. Campbell says in this bullet is that:

"We have moved the cost of using PE from the highest cost disposal option to likely our second lowest (after PE sales to USG)."

Do you see that?

A. Yes.

Q. Did I read that correctly?

A. Yes.

Q. And then Mr. Campbell says:

"Progress Energy cannot be made aware of this situation as we still portrayed to PE that the \$28 cost would be our highest cost disposal option."

Correct?

A. That's correct. That's what this says.

Q. Now, you've already testified that ultimately the 2008 agreement was amended in 2010 to address certain of the issues discussed in this email, that's Exhibit 14, right?

A. Let me double check. I believe that was Exhibit 14.

0 4 : 0 1 1 Yes.

0 4 : 0 1 2 Q. And when I took your deposition in this case, you  
0 4 : 0 1 3 acknowledged to me that the 2010 amendment was based in part  
0 4 : 0 1 4 on the representations that CertainTeed had made to  
0 4 : 0 1 5 Duke Energy regarding its disposal cost.

0 4 : 0 1 6 Do you remember that?

0 4 : 0 1 7 A. Yes, we had that discussion.

0 4 : 0 1 8 Q. All right. Let's talk about what became the  
0 4 : 0 1 9 2012 agreement.

0 4 : 0 1 10 A. Before -- are we moving on from this topic?

0 4 : 0 1 11 Q. I am.

0 4 : 0 1 12 A. Okay. Before we leave, I want to finish up that  
0 4 : 0 1 13 conversation that we had at the deposition.

0 4 : 0 1 14 Q. I think on cross-examination I have the right to  
0 4 : 0 1 15 ask you the questions and you can answer those. If you gave  
0 4 : 0 1 16 me a question -- an answer that you think is incomplete or  
0 4 : 0 1 17 incorrect in some way, you can correct it.

0 4 : 0 2 18 A. Can I explain the answer that I gave you before?

0 4 : 0 2 19 Q. I think Mr. Phillips can do that on redirect if he  
0 4 : 0 2 20 wants, but not during my cross-examination.

0 4 : 0 2 21 A. All right.

0 4 : 0 2 22 MR. PHILLIPS: Your Honor, I think he's entitled  
0 4 : 0 2 23 to explain his answers, but I'm happy to address this on  
0 4 : 0 2 24 redirect.

0 4 : 0 2 25 THE COURT: I'll let y'all do it on redirect. If

0 4 : 0 2 1 it's an incomplete answer or an incorrect answer, you can do  
0 4 : 0 2 2 it. If it's simply explaining the answer, I believe I'll  
0 4 : 0 2 3 save that for redirect.

0 4 : 0 2 4 MR. PHILLIPS: Okay. Thank you.

0 4 : 0 2 5 Q. All right. So, Mr. Engelhardt, you acknowledged  
0 4 : 0 2 6 that you were the person at CertainTeed who was primarily  
0 4 : 0 2 7 responsible for developing the proposed revisions to the  
0 4 : 0 2 8 2012 agreement and for negotiating that agreement, correct?

0 4 : 0 2 9 A. That's correct.

0 4 : 0 2 10 Q. And the 2012 agreement, you told me at your  
0 4 : 0 2 11 deposition, was the only gypsum supply contract that you  
0 4 : 0 2 12 negotiated while you were with CertainTeed; is that right?

0 4 : 0 2 13 A. Yes, the only gypsum -- synthetic gypsum supply  
0 4 : 0 3 14 contract, that's correct.

0 4 : 0 3 15 Q. Now, at the time the negotiations around the  
0 4 : 0 3 16 2012 agreement began in 2011, CertainTeed was taking less  
0 4 : 0 3 17 than the contractually required 50,000 tons a  
0 4 : 0 3 18 month/600,000 tons a year, right?

0 4 : 0 3 19 A. In 2011, we were, I believe. In 2010, we actually  
0 4 : 0 3 20 did hit that number.

0 4 : 0 3 21 Q. And you told me at your deposition that part of  
0 4 : 0 3 22 CertainTeed's motivation for revising --

0 4 : 0 3 23 MR. PHILLIPS: Your Honor, objection. I don't  
0 4 : 0 3 24 want --

0 4 : 0 3 25 THE COURT: The rules are such is that you ask a

0 4 : 0 3

1 question today, if he doesn't give you the testimony you  
2 want, you refer to his deposition to impeach him. I've  
3 given you -- again, this is a nonjury trial, I've given you  
4 latitude. But you're technically correct. Under the rules,  
5 you're supposed to ask him which --

0 4 : 0 3

6 MR. TUCKER: I'm happy to do it the other way.

0 4 : 0 3

7 MR. PHILLIPS: I just want to make sure that we're  
8 goose and gandering this, I suppose.

0 4 : 0 3

9 THE COURT: And I'm letting both my ducklings --

0 4 : 0 4

10 MR. TUCKER: I will ask it without reference to  
11 his deposition. And then if he doesn't acknowledge it, I'll  
12 play his deposition clip. That's fine with me.

0 4 : 0 4

13 Q. All right. So, Mr. Engelhardt, let me restate it.

0 4 : 0 4

14 Part of CertainTeed's motivation for revising the  
15 agreement in 2012 was to allow it to take less than  
16 600,000 tons a year if CertainTeed did not need that much  
17 gypsum, correct?

0 4 : 0 4

18 A. Is this -- you're referring to the 2012 agreement  
19 negotiations?

0 4 : 0 4

20 Q. I am.

0 4 : 0 4

21 A. Yes. With the -- with the qualification that we  
22 satisfied Duke's requirements and they satisfied ours.

0 4 : 0 4

23 Q. Now, under the 2008 agreement, CertainTeed was  
24 obligated to take a fixed amount of 600,000 tons annually  
25 plus or minus 10 percent. You've testified about that,

0 4 : 0 4

0 4 : 0 4 1 right?

0 4 : 0 4 2 A. That's correct.

0 4 : 0 4 3 Q. So you didn't need to amend that portion of the  
0 4 : 0 5 4 agreement to ensure security of gypsum supply when you were  
0 4 : 0 5 5 renegotiating the contract in 2012, did you?

0 4 : 0 5 6 A. That's correct. I wanted to leave that as it was,  
0 4 : 0 5 7 that's correct.

0 4 : 0 5 8 Q. If you had wanted only to secure your gypsum  
0 4 : 0 5 9 supply, you could have left the supply provisions in the  
0 4 : 0 5 10 2012 agreement exactly as they were in the 2008 agreement,  
0 4 : 0 5 11 correct?

0 4 : 0 5 12 A. I could have. But as I explained earlier, there  
0 4 : 0 5 13 were other -- there was another scenario that I was trying  
0 4 : 0 5 14 to also accommodate.

0 4 : 0 5 15 Q. Now, you acknowledged that a fixed supply  
0 4 : 0 5 16 obligation has negative consequences for CertainTeed when  
0 4 : 0 5 17 its needs are less than the required minimum; isn't that  
0 4 : 0 5 18 right?

0 4 : 0 5 19 A. Not so much once we had a plant there. And so  
0 4 : 0 5 20 what I was trying to negotiate up to that point was just to  
0 4 : 0 6 21 take the production until our plant was built. Once we had  
0 4 : 0 6 22 a plant there, that was far less of a problem.

0 4 : 0 6 23 Q. If you have to pay for gypsum that you don't need  
0 4 : 0 6 24 because there's a fixed obligation in the contract, that  
0 4 : 0 6 25 affects CertainTeed's profits, doesn't it?

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1 A. Yes, but we could just determine what to do with  
2 that gypsum.

3 Q. You were aware of the potential negative  
4 consequences of a fixed obligation when your needs were less  
5 than 50,000 tons a month when you went into the  
6 2012 negotiation, weren't you, Mr. Engelhardt?

7 A. I was aware of that potentiality.

8 Q. Now, your initial draft revision of the  
9 2008 agreement included significant revisions to the  
10 quantity obligations in Section 3.1 of the agreement.

11 Mr. Phillips showed you Exhibit 40, and we went  
12 through the changes to several of the provisions that you  
13 made: 2.2.3, Section 3.1, and Section 6.2.

14 Do you recall that testimony?

15 A. I believe so, but did you say 2008 or 2012 at the  
16 beginning?

17 Q. I said your initial revision of the  
18 2008 agreement.

19 A. Yes.

20 Q. But I'm talking about the negotiations in 2011 and  
21 2012.

22 A. That's correct.

23 Q. I'm not going to ask you to look back at those  
24 since we have a redaction issue with some of that language,  
25 but I will ask you to look at Exhibit 41, please.

0 4 : 0 7

1 A. Okay.

0 4 : 0 7

2 Q. This is a document that you prepared, isn't it?

0 4 : 0 7

3 A. This is a document that I started and abandoned.

0 4 : 0 7

4 Q. This is -- you said you abandoned it.

0 4 : 0 7

5 You didn't tell me you abandoned it when I asked  
6 you about this document at your deposition, did you?

0 4 : 0 7

7 A. I said that I created a second scenario document  
8 that I went -- that I used to explain, and you chose not to  
9 present that document to me.

0 4 : 0 8

10 Q. And this document that you now say you abandoned,  
11 that was included as one of the attachments to Exhibit 40  
12 that you sent around to your internal team, wasn't it?

0 4 : 0 8

13 A. Yes. Internally only, yes.

0 4 : 0 8

14 Q. So you abandoned it for one purpose, but not for  
15 another purpose?

0 4 : 0 8

16 A. Well, my thought was, I was asking them to review  
17 my plans. And if they had ideas on how to put this together  
18 in a box form or whatever, that's fine, because I explained  
19 my scenarios on the other sheet.

0 4 : 0 8

20 Q. You showed them both scenarios, though, didn't  
21 you, Mr. Engelhardt?

0 4 : 0 8

22 A. Yes, I did.

0 4 : 0 8

23 Q. And this document illustrates several different  
24 supply scenarios and how they would be addressed under your  
25 proposed changes to the contract, right?

0 4 : 0 8





0 4 : 0 9

1 Q. Let me ask you to look at Exhibit 42, please.

0 4 : 0 9

2 A. Okay.

0 4 : 1 0

3 Q. This is an email that you sent to Mr. Campbell and  
4 others at CertainTeed on October 12th, 2011, correct?

0 4 : 1 0

5 A. That's correct.

0 4 : 1 0

6 Q. Just 2 days after you sent your redline draft  
7 around -- your first redline draft around internally at  
8 CertainTeed?

0 4 : 1 0

9 A. That's correct.

0 4 : 1 0

10 Q. And what you told your CertainTeed negotiation  
11 team at this point in time was:

0 4 : 1 0

12 "I am trying to restructure the agreement to  
13 limit our usage to whichever is less, 50,000 tons  
14 a month or Progress Energy's actual production."  
15 That's what you told your team, correct?

0 4 : 1 0

16 A. That's what I told them, again, immediately  
17 following the documents that I sent out. This was  
18 effectively shorthand. I didn't feel that I needed to go  
19 through the full explanation of scenarios again.

0 4 : 1 0

20 Q. Now, the benefit to CertainTeed of the structure  
21 that you were describing in this email was that CertainTeed  
22 could avoid having to dispose of gypsum it didn't need if  
23 Progress Energy was producing less than 50,000 tons,  
24 correct?

0 4 : 1 1

0 4 : 1 1

0 4 : 1 1

25 If you only had to take production and they were

0 4 : 1 1 1 producing less than 50,000 tons, that got you off the hook  
0 4 : 1 1 2 for gypsum that you would have had to take under the old  
0 4 : 1 1 3 version of the agreement and pay to dispose of.

0 4 : 1 1 4 A. Yes. But my -- I explained that in my scenarios  
0 4 : 1 1 5 document where I said that -- that we basically each had to  
0 4 : 1 1 6 satisfy each other. So if we needed more, they needed to  
0 4 : 1 1 7 provide it. If they made more and it was under  
0 4 : 1 1 8 600,000 tons, we needed to take it, unless there was room on  
0 4 : 1 1 9 the stockpile to place it.

0 4 : 1 1 10 Q. Let me ask you to look at Exhibit 23, please.

0 4 : 1 1 11 A. I have it.

0 4 : 1 1 12 Q. This is an email that you sent to Barbara Coppola  
0 4 : 1 2 13 on October 20th, 2011, correct?

0 4 : 1 2 14 A. That's correct.

0 4 : 1 2 15 Q. And this attaches CertainTeed's revised agreement  
0 4 : 1 2 16 which you had been reviewing internally with your team up  
0 4 : 1 2 17 until the point you sent it to Ms. Coppola?

0 4 : 1 2 18 A. That's correct.

0 4 : 1 2 19 Q. And what you say in the first bullet of the email  
0 4 : 1 2 20 to Ms. Coppola is that the changes reflected -- the changes  
0 4 : 1 2 21 in the document are related to:

0 4 : 1 2 22 "... changing to an annual production/annual  
0 4 : 1 2 23 usage philosophy with the stockpile as a buffer  
0 4 : 1 2 24 ranging between a low of 100,000 tons and a  
0 4 : 1 2 25 maximum of 600,000 tons."

0 4 : 1 2

1 Did I read that correctly?

0 4 : 1 2

2 A. That's correct.

0 4 : 1 2

3 Q. Now, you were the one that developed the language  
4 in this proposed draft that was intended to accomplish the  
5 purpose described in your email, right?

0 4 : 1 2

6 A. I was.

0 4 : 1 2

7 Q. I ask you to look at Section 3.1 in Exhibit 23,  
8 beginning on page 13 and carrying over to page 14 of this  
9 exhibit.

0 4 : 1 3

10 THE COURT: Which page are we on, sir?

0 4 : 1 3

11 MR. TUCKER: Same exhibit, page 13, carrying over  
12 to page 14. I can give you the page numbers if you need  
13 them, Judge.

0 4 : 1 3

14 THE COURT: No, I've got them right here.

0 4 : 1 3

15 Q. Okay. So I'd like to direct your attention to the  
16 underlined language in the second part of 3.1 that  
17 Mr. Phillips has already reviewed to you. It's in the  
18 sentence that begins "In order to accommodate minor  
19 fluctuations." And the language that I want to ask you  
20 about is the language that begins "or the actual gypsum  
21 filter cake net dry tons over the same period, whichever is  
22 less."

0 4 : 1 3

0 4 : 1 3

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0 4 : 1 3

0 4 : 1 3

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0 4 : 1 3

23 Do you see that?

0 4 : 1 3

24 A. That's correct.

0 4 : 1 3

25 Q. That was your language, correct?

0 4 : 1 3

1 A. Yes. That's correct. That's correct.

0 4 : 1 3

2 Q. And you recognize, don't you, that this is the  
3 clause that is at the heart of the parties' dispute over the  
4 meaning of MMQ in this lawsuit?

0 4 : 1 4

5 A. Yes, I do.

0 4 : 1 4

6 Q. And it's true, isn't it, that this clause was  
7 intended to mirror the proposed revision to the first  
8 sentence of Section 3.1 that changes it from a fixed  
9 obligation of 50,000 tons a month to a variable obligation  
10 of 600,000 tons a year, or the quantity of gypsum filter  
11 cake produced by Progress Energy during the year, whichever  
12 is less?

0 4 : 1 4

13 When you drafted that language in the second part  
14 of this paragraph, you were trying to carry forward the same  
15 concept that's reflected in the very first paragraph where  
16 you changed from a fixed obligation to a variable  
17 obligation, correct?

0 4 : 1 4

0 4 : 1 4

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0 4 : 1 4

18 A. I'm not understanding when you say "fixed" versus  
19 "variable."

0 4 : 1 4

0 4 : 1 4

20 Q. An obligation that was fixed at 50,000 tons,  
21 compared to an obligation that was 600,000 tons or the  
22 actual production from Duke Energy Progress plants,  
23 whichever is less, which is the way your language reads in  
24 the first part of 3.1.

0 4 : 1 5

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0 4 : 1 5

25 A. Okay. I understand that. So that's -- that is

0 4 : 1 5 1 true. The fixed -- I use the same terminology. The minimum  
0 4 : 1 5 2 monthly quantity, I converted to minimum annual quantity.  
0 4 : 1 5 3 So that was the intent.

0 4 : 1 5 4 Then all of this is still provided with backstop  
0 4 : 1 5 5 of the minimum 100,000 tons on the pile.

0 4 : 1 5 6 So all these -- all these changes in Article 3.1  
0 4 : 1 5 7 need to be tied in with changes I made in 2.2.3(c) and 6.2.  
0 4 : 1 5 8 This all works together as a system.

0 4 : 1 5 9 Q. Let's talk about that.

0 4 : 1 5 10 You proposed other changes, 2.2.3 and 6.2, that  
0 4 : 1 5 11 were intended to protect CertainTeed if it needed more than  
0 4 : 1 5 12 50,000 tons a month and Duke Energy was not producing that  
0 4 : 1 6 13 amount, correct?

0 4 : 1 6 14 Isn't that what you just said?

0 4 : 1 6 15 A. It was to protect us to get the gypsum -- not  
0 4 : 1 6 16 necessarily more than 50,000 tons a month but to get our  
0 4 : 1 6 17 requirements up to 50,000 tons a month.

0 4 : 1 6 18 Q. Those changes would have required Progress Energy  
0 4 : 1 6 19 to maintain at least 100,000 tons in the stockpile and  
0 4 : 1 6 20 replenish the stockpile if it fell below that amount, right?

0 4 : 1 6 21 A. That's correct.

0 4 : 1 6 22 Q. Let me ask you to look at Exhibit 26, please.

0 4 : 1 6 23 A. May I have just a second.

0 4 : 1 6 24 Q. Mr. Engelhardt, do you have Exhibit 26?

0 4 : 1 6 25 A. Yes, I do.



0 4 : 1 8

1 A. Yes.

0 4 : 1 8

2 Q. And you see that Progress Energy rejected the

0 4 : 1 8

3 language that you had added to Section 6.2 which would have

0 4 : 1 8

4 required Progress Energy to maintain a stockpile of at least

0 4 : 1 8

5 100,000 tons, correct?

0 4 : 1 8

6 A. That's correct.

0 4 : 1 8

7 Q. That language came out?

0 4 : 1 8

8 A. That's correct.

0 4 : 1 8

9 Q. And Progress Energy also rejected the concept of

0 4 : 1 8

10 the 100,000-ton minimum that you added to Section 2.2.3 of

0 4 : 1 8

11 this draft agreement, correct?

0 4 : 1 8

12 A. That's correct.

0 4 : 1 8

13 Q. Now, if you could look at Section 3.1 of this

0 4 : 1 8

14 draft document.

0 4 : 1 8

15 I think it's fine to put that up.

0 4 : 1 8

16 It begins on page 14.

0 4 : 1 8

17 A. I have it.

0 4 : 1 8

18 Q. So directing your attention to Section 3.1, you

0 4 : 1 8

19 see that Progress Energy has rejected some of the new

0 4 : 1 8

20 language that you have proposed in this section, correct?

0 4 : 1 9

21 A. That's correct.

0 4 : 1 9

22 Q. The language that you've described as an

0 4 : 1 9

23 integrated whole, which was intended to accomplish the

0 4 : 1 9

24 purpose that you described to Mr. Phillips?

0 4 : 1 9

25 A. That's correct.



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1 Q. But the key clause in 3.1 that ties the minimum  
2 monthly quantity to actual --

3 THE COURT: 3.1?

4 MR. TUCKER: 3.1.

5 THE COURT: I think you said 2.1.

6 MR. TUCKER: Forgive me if I did.

7 Q. The clause in Section 3.1, the second half of  
8 3.1 that we just reviewed a moment ago that ties the minimum  
9 monthly quantity to actual production, that was left in with  
10 some additions, correct?

11 MR. PHILLIPS: Objection. I think that  
12 mischaracterizes his testimony to the extent that it's tied  
13 to the minimum monthly quantity.

14 MR. TUCKER: I'll rephrase it.

15 Q. Mr. Engelhardt, do you see the language in the  
16 second half of Section 3.1 that begins "or the aggregate  
17 actual gypsum filter cake net dry tons produced by the  
18 Roxboro plant and the Mayo plant over the same period,  
19 whichever is less"?

20 A. Yes, I do.

21 Q. And do you recognize and agree that that language,  
22 with certain minor modifications reflected in this draft, is  
23 the language that you originated and included in your prior  
24 version of this agreement?

25 A. Yes, it was.

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Mar 20 2020

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1 Q. Do you know why that language was left in the  
2 contract?

3 A. I'm not really sure from the Progress Energy  
4 perspective. I can explain from my perspective.

5 Q. Do you remember telling me at your deposition that  
6 you could not explain why the clause in 3.1 was left in?

7 A. I don't recall saying that relative to me.  
8 I left it in because I thought it might be a  
9 reminder of the one scenario.

10 MR. TUCKER: Let's play that deposition clip, if  
11 you would, please. Beginning at page 178, line 17 through  
12 page 179, line 3.

13 Q. I'll have to do this the old-fashioned way,  
14 Mr. Engelhardt. Our technology is failing us. If we can  
15 play this clip live, we will. In the meantime, I'm going to  
16 read you your deposition.

17 THE COURT: Does he have a copy in front of him?

18 MR. LINNARTZ: I can pull up a copy  
19 electronically.

20 MR. PHILLIPS: And I can hand him the  
21 Min-U-Script, if you'd like.

22 THE COURT: Just whatever is easier. I think the  
23 witness is entitled to have it in front of him.

24 MR. PHILLIPS: If may I approach, Your Honor?

25 THE COURT: You may. I don't need a copy.

0 4 : 2 2 1 Mr. Tucker, he has a copy of the transcript in  
0 4 : 2 2 2 front of him.

0 4 : 2 2 3 MR. PHILLIPS: 178, 17.

0 4 : 2 2 4 THE COURT: He's got a copy of the transcript.

0 4 : 2 2 5 Q. All right. So, Mr. Engelhardt, I'm going to read  
0 4 : 2 2 6 you my questions and the answer, beginning at line 17 on  
0 4 : 2 2 7 page 178, and then ask you whether or not that refreshes  
0 4 : 2 2 8 your recollection about the testimony you gave at your  
0 4 : 2 2 9 deposition.

0 4 : 2 2 10 So at line 17 I asked you:

0 4 : 2 2 11 "So my question really is, what does this new  
0 4 : 2 3 12 clause that we're focusing --"

0 4 : 2 3 13 And you interrupted, said, "Okay."

0 4 : 2 3 14 "-- on do to the existing obligation? How  
0 4 : 2 3 15 does it provide any flexibility or make any  
0 4 : 2 3 16 difference to what the existing obligation and the  
0 4 : 2 3 17 existing permitted variations were?"

0 4 : 2 3 18 And your answer was:

0 4 : 2 3 19 "The reality of it is, it doesn't. This  
0 4 : 2 3 20 doesn't do anything. It's still plus or minus  
0 4 : 2 3 21 10 percent."

0 4 : 2 3 22 Then I asked you:

0 4 : 2 3 23 "Why was it included?"

0 4 : 2 3 24 And you answered:

0 4 : 2 3 25 "They didn't remove it; I didn't remove it.

0 4 : 2 3

1 I can't tell you beyond that."

0 4 : 2 3

2 Do you see that?

0 4 : 2 3

3 A. Yes.

0 4 : 2 3

4 Q. Does that refresh your recollection that at least  
5 during your deposition you didn't have any explanation for  
6 why that clause was left in the contract?

0 4 : 2 3

7 A. That's still valid. They didn't remove it; I  
8 didn't remove it. So, yes.

0 4 : 2 3

9 Q. And you can't say any more beyond that?

0 4 : 2 3

10 A. Other than -- other than it's a minor fluctuation  
11 that fits within the plus or minus 10 percent, which I said  
12 partway through the piece that you just read. So that sets  
13 the floor at minus 10 percent, basically.

0 4 : 2 3

0 4 : 2 4

14 Q. So just so I'm clear, are you saying, then, it is  
15 not essentially meaningless, as you told me at your  
16 deposition?

0 4 : 2 4

0 4 : 2 4

17 A. There's minor -- there's minor meaning to it. The  
18 plus or minus 10 percent was still -- was in the earlier  
19 contract. It is also in this contract. The meaningfulness  
20 of this is it might drive a little bit more towards the  
21 minus side of the plus or minus 10 percent, but it still  
22 can't be lower than minus 10 percent.

0 4 : 2 4

0 4 : 2 4

0 4 : 2 4

23 Q. Now, prior to 2017, when this dispute arose, you  
24 didn't tell anyone that you thought this clause was  
25 meaningless, did you?

0 4 : 2 4

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1           You never told Duke Energy that you thought the  
2 clause that ended up in the final agreement was meaningless,  
3 did you?

4           A.    I don't believe that we ever had a discussion  
5 about this clause, this paragraph.  So, no, I did not.

6           Q.    You handed off negotiations for the 2012 agreement  
7 to Kim Bildfell sometime in February 2012 before the  
8 agreement was signed and finalized; is that right?

9           A.    That's correct.

10          Q.    Now, you've seen a memo that Ms. Bildfell prepared  
11 after she took over from you which includes notes from her  
12 review of the draft 2012 agreement; is that right?

13          A.    That's correct.

14          Q.    Let me ask you to look at Exhibit 46.

15          A.    I have it.

16          Q.    If I could focus you on the portion of the memo  
17 that begins in item 8 and is 8A.

18          A.    Yes.

19          Q.    Now, in this document, Ms. Bildfell focused on the  
20 clause in Section 3.1 that we've been discussing, and she  
21 asked whether it meant that Progress Energy was not  
22 responsible if it produced less than 50,000 tons  
23 consistently, correct?  Isn't that what this memo says?

24          A.    That's correct.

25               MR. PHILLIPS:  Your Honor, I object to the extent

0 4 : 2 6

1 that there's no record evidence that the witness saw this  
2 before his deposition or at the time it was made.

0 4 : 2 6

0 4 : 2 6

3 THE COURT: Go ahead and ask the foundation  
4 questions.

0 4 : 2 6

0 4 : 2 6

5 Q. Had you seen this memo, Mr. Engelhardt, before it  
6 was shown to you at your deposition?

0 4 : 2 6

0 4 : 2 6

7 A. I don't recall whether I did or not, and I still  
8 don't recall.

0 4 : 2 6

0 4 : 2 6

9 Q. So it's possible that you did see it, correct?

0 4 : 2 6

10 A. It's possible that I did.

0 4 : 2 6

0 4 : 2 6

11 Q. You do recall talking to Ms. Bildfell as part of  
12 the handoff process about the contract, right? You  
13 testified to that earlier today.

0 4 : 2 6

0 4 : 2 6

14 A. Yes.

0 4 : 2 6

0 4 : 2 6

15 Q. And as far as the question that Ms. Bildfell asked  
16 in 8A of this document, you don't remember discussing that  
17 question with her, do you?

0 4 : 2 7

0 4 : 2 7

18 A. I said earlier I discussed -- I had a broad  
19 discussion with her on the contract initially. And I asked  
20 her to go through the contract, and this looks this was a  
21 result of that. I asked her to put her own eyes to it  
22 because she was at that time managing both the Moundville  
23 contract and the Carrollton contract for synthetic gypsum.  
24 And so I asked her to do that and come back to me with what  
25 items she saw because this was still in negotiations.

0 4 : 2 7

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0 4 : 2 7

1 Q. As part of that --

0 4 : 2 7

2 THE COURT: Whoa, whoa, whoa, whoa.

0 4 : 2 7

3 MR. TUCKER: Sorry, apologize.

0 4 : 2 7

4 THE COURT: Wait. Were you finished?

0 4 : 2 7

5 Q. I'm sorry, sir. Did you finish your answer?

0 4 : 2 7

6 A. No. Yeah, that was part of the process of handing  
7 it off to her. I wanted her to kind of own it. But I also  
8 wanted her, with her expertise, to look at this.

0 4 : 2 7

9 Q. And do you think this memo, then, reflects her  
10 bringing her expertise to her review of the contract after  
11 you asked her to take a look at it?

0 4 : 2 7

12 A. Certainly. There's pieces here where she's asking  
13 questions; she's saying we should add, there's things that  
14 are confusing, she wanted to talk through this area, which  
15 we did.

0 4 : 2 8

16 Q. Do you remember talking to Ms. Bildfell about the  
17 clause in the second part of Section 3.1 that we've been  
18 discussing?

0 4 : 2 8

19 A. I'm absolutely certain that we did because I  
20 remember that she understood it after I explained it to her.

0 4 : 2 8

21 Q. You don't remember any specific discussions with  
22 her about the question that she raises in this document, do  
23 you?

0 4 : 2 8

24 A. Ms. Bildfell reported to me. I talked to her  
25 regularly. We probably had meetings of some -- or

0 4 : 2 8

0 4 : 2 8

1 conversations weekly. So, clearly, there's ample  
2 opportunity to have conversations about this. I don't  
3 remember any specific meeting that we set up to do this  
4 necessarily.

0 4 : 2 8

5 MR. TUCKER: I ask you to play the deposition clip  
6 beginning at page 193, line 22, through page 194, line 14.

0 4 : 2 9

7 MR. PHILLIPS: Your Honor --

0 4 : 2 9

8 THE COURT: Whoa, whoa, whoa. Stop.

0 4 : 2 9

9 MR. PHILLIPS: I think he just stated at the end  
10 of his answer he did not specifically remember a  
11 conversation with her about this.

0 4 : 2 9

12 MR. TUCKER: I think he implied that he had  
13 addressed the issue with her in some way, and I believe that  
14 testimony is inconsistent with the way he answered the same  
15 question in his deposition.

0 4 : 2 9

16 THE COURT: Well, I'll have to see, and I'll  
17 consider whether, in fact, it impeaches. I think  
18 Mr. Phillips is correct, he does not remember a specific  
19 conversation, but he said, "I believe I had an opportunity  
20 to discuss the matters with her."

0 4 : 2 9

21 Go ahead.

0 4 : 2 9

22 "Q. Do you specifically recall discussing Ms.  
23 Bildfell's questions as reflected in 46 about  
24 Section 3.1?

0 4 : 2 9

0 4 : 2 9

25 "A. I don't specifically recall having a



0 4 : 2 9 1 conversation. I will tell you that whenever Kim  
0 4 : 2 9 2 asked a question, I would always answer.

0 4 : 2 9 3 "Q. Then this question is reflected in a memo.

0 4 : 2 9 4 "Do you recall if you ever prepared any  
0 4 : 2 9 5 written response to Ms. Bildfell regarding her  
0 4 : 2 9 6 questions concerning the operation of Section 3.1

0 4 : 2 9 7 "MS. MARSTON: Objection.

0 4 : 2 9 8 "A. I don't believe I prepared a written  
0 4 : 2 9 9 response."

0 4 : 3 0 10 Q. All right. I'm going to turn away from  
0 4 : 3 0 11 Section 3.1 for a minute, Mr. Engelhardt, and I want to ask  
0 4 : 3 0 12 you about some of the other provisions in the 2012 agreement  
0 4 : 3 0 13 that Mr. Phillips asked you about.

0 4 : 3 0 14 Now, you talked at length -- you gave your  
0 4 : 3 0 15 understanding of the remedies section in the 2012 agreement.

0 4 : 3 0 16 Do you remember that in response to questions that  
0 4 : 3 0 17 Mr. Phillips asked you?

0 4 : 3 0 18 A. Yes.

0 4 : 3 0 19 Q. During negotiation of the 2012 agreement, you  
0 4 : 3 0 20 didn't have any discussions with Progress Energy about the  
0 4 : 3 0 21 remedies provision in the agreement, did you?

0 4 : 3 0 22 A. That's correct.

0 4 : 3 1 23 Q. Those provisions were carryovers from the  
0 4 : 3 1 24 2004 agreement, which were not changed in any substantive  
0 4 : 3 1 25 way, right?

0 4 : 3 1

1 A. That's correct.

0 4 : 3 1

2 Q. And you've already testified today that you didn't  
3 have any involvement in the 2004 agreement, you can't say  
4 what the parties intended when those provisions were added  
5 to the contract?

0 4 : 3 1

6 A. That's correct.

0 4 : 3 1

7 Q. Now, you're aware that the 2012 agreement includes  
8 an "Exclusive Remedies" provision in Section 9.4, correct?

0 4 : 3 1

9 A. Yes.

0 4 : 3 1

10 Q. Mr. Phillips didn't ask you about that provision.

0 4 : 3 1

11 You didn't discuss the "Exclusive Remedies"

0 4 : 3 1

12 provision with Duke Energy Progress during the negotiation

0 4 : 3 1

13 of the 2012 agreement, did you?

0 4 : 3 1

14 A. That's correct.

0 4 : 3 1

15 Q. And you have no knowledge or information regarding

0 4 : 3 1

16 the history or intent of the parties with respect to

0 4 : 3 1

17 Section 9.4?

0 4 : 3 1

18 A. That's correct.

0 4 : 3 1

19 Q. You do know -- strike that.

0 4 : 3 1

20 Let me ask you to turn back to Exhibit 15, which

0 4 : 3 1

21 is the signed agreement, the 2000 -- the signed version of

0 4 : 3 2

22 the 2012 agreement, and if I can direct your attention to

0 4 : 3 2

23 Section 3.1, please, at the very end.

0 4 : 3 2

24 A. 3.1?

0 4 : 3 2

25 Q. 3.1.

0 4 : 3 2

0 4 : 3 2

1 A. Okay.

0 4 : 3 2

2 Q. Now, you were asked a question whether you believe  
3 that Duke Energy Progress could be required to supply gypsum  
4 from sources other than Roxboro and Mayo.

0 4 : 3 2

5 Do you remember that on your direct examination?

0 4 : 3 2

6 A. Yes.

0 4 : 3 2

7 Q. And you pointed out to the language at the very  
8 end of Section 3.1 which refers to Progress Energy's  
9 intention to supply primarily from Roxboro and Mayo, but  
10 then the sentence "Allows Progress Energy," it says that  
11 Progress Energy may supply gypsum from other sources,  
12 correct?

0 4 : 3 2

13 A. That's correct.

0 4 : 3 2

14 Q. Now, you understand that that is an option --

0 4 : 3 2

15 MR. PHILLIPS: Objection.

0 4 : 3 3

16 Q. -- available to Progress Energy, not a  
17 requirement, correct?

0 4 : 3 3

18 A. That's correct.

0 4 : 3 3

19 Q. In fact, the "may" language there is the same sort  
20 of "may" language that you focused on to say that  
21 CertainTeed had the option to elect between remedies in  
22 other provisions of the contract?

0 4 : 3 3

23 A. That's correct.

0 4 : 3 3

24 MR. TUCKER: I think that's all I have for  
25 Mr. Engelhardt, Your Honor.

0 4 : 3 3

0 4 : 3 3

0 4 : 3 3

1 THE COURT: Any redirect, Mr. Phillips?

0 4 : 3 3

2 MR. PHILLIPS: Yes, sir, Your Honor.

0 4 : 3 3

3 Can I have one minute?

0 4 : 3 3

4 THE COURT: Yes, you may.

0 4 : 3 3

5 MR. PHILLIPS: Actually more than one, probably.

0 4 : 3 3

6 THE COURT: We'll just stay at ease. That'll be  
7 fine.

0 4 : 3 4

8 (Court at ease.)

0 4 : 3 5

9 REDIRECT EXAMINATION by Mr. Phillips:

0 4 : 3 5

10 Q. All right. Mr. Engelhardt, just a few questions  
11 for you.

0 4 : 3 5

12 Mr. Tucker was asking you about the last sentence  
13 in Section 3.1.

0 4 : 3 5

14 A. Yes.

0 4 : 3 5

15 Q. And he referred to "may" language. That sentence  
16 actually reads:

0 4 : 3 5

17 "Progress Energy's expectation is to supply  
18 gypsum filter cake primarily from the Roxboro  
19 plant and the Mayo plant, but retains the right to  
20 supply gypsum from any source."

0 4 : 3 5

21 Is that right?

0 4 : 3 5

22 A. That's correct.

0 4 : 3 5

23 Q. All right. And this is in a paragraph,

0 4 : 3 6

24 Section 3.1, that has what title?

0 4 : 3 6

25 A. "Delivery of Gypsum."

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1 Q. And what is the name of this agreement that we're  
2 talking about that's signed in 2012?

3 A. This is the Second Amended and Restated Supply  
4 Agreement.

5 Q. All right. So if Duke Energy -- can you tell me  
6 whether or not CertainTeed --

7 Could you tell me whether or not if Duke Energy  
8 supplied CertainTeed the volume of gypsum that it was  
9 required to supply, and it met the specifications in the  
10 contract, did CertainTeed care where it came from?

11 A. No, we didn't.

12 Q. Mr. Tucker asked you several questions about the  
13 language that you used in your revisions in October 2010  
14 when you sent the contract back to Ms. Coppola. I believe  
15 that's Exhibit 23.

16 A. October 2011?

17 Q. Whatever I said, that's what I meant.

18 A. Yes.

19 Q. Exhibit 23.

20 A. Okay.

21 Q. After you sent that language, can you tell me how  
22 many times you and Ms. Coppola sat down and hammered out  
23 that language, talked about how it ought to read?

24 A. We didn't sit down and talk about it at all. The  
25 only call that I remember of any substance was when I went

0 4 : 3 7 1 through the scenarios, explaining what my language was  
0 4 : 3 7 2 intended to be.

0 4 : 3 7 3 But the language we put in 2012 is basically  
0 4 : 3 7 4 around equipment, and what I put in basically around the  
0 4 : 3 8 5 different scenarios or different way to do this. There  
0 4 : 3 8 6 really wasn't a lot of other changes to the 2012 agreement.

0 4 : 3 8 7 Q. The language that you added in Section 3.1 and  
0 4 : 3 8 8 it's reflected in Exhibit 23, after you sent it to  
0 4 : 3 8 9 Ms. Coppola, how many times are you aware that lawyers from  
0 4 : 3 8 10 Duke and CTG sat down together and negotiated that language,  
0 4 : 3 8 11 vetted it, tried to improve it?

0 4 : 3 8 12 A. Zero.

0 4 : 3 8 13 Q. All right. Let's take a look at Exhibit 42.

0 4 : 3 8 14 A. Okay.

0 4 : 3 8 15 Q. And this is a document Mr. Tucker asked you --  
0 4 : 3 8 16 well, it's not 42.

0 4 : 3 9 17 Sorry, I was actually right. I just can't read.

0 4 : 3 9 18 Looking at Exhibit 42, Mr. Tucker asked you some  
0 4 : 4 0 19 questions about your email at the top of Exhibit 42 where  
0 4 : 4 0 20 you described what you were trying to do with the agreement.

0 4 : 4 0 21 And you sent this to Greg McCown, right?

0 4 : 4 0 22 A. Yes.

0 4 : 4 0 23 Q. What involvement had Mr. McCown had with any of  
0 4 : 4 0 24 the proposals that -- with the proposal that you had been  
0 4 : 4 0 25 working on related to flexibility?

0 4 : 4 0 1 A. First of all, Greg McCown was our plant manager at  
0 4 : 4 0 2 the Roxboro site, very skilled in, I would say, supply chain  
0 4 : 4 0 3 management, understanding planning and so forth.

0 4 : 4 0 4 And because of the changes that were made in this  
0 4 : 4 0 5 agreement, both in terms of the conveyors and the operating  
0 4 : 4 0 6 system, but also in terms of the supply changes, I had Greg  
0 4 : 4 0 7 in the loop.

0 4 : 4 0 8 As a matter of fact, I gave Greg a contract  
0 4 : 4 0 9 earlier of Barbara's agreement. I asked him to go through  
0 4 : 4 0 10 and provide to me what he saw as things to change. So he  
0 4 : 4 1 11 had been in the loop all the way through this.

0 4 : 4 1 12 Q. All right. Looking at Exhibit 40, when you had  
0 4 : 4 1 13 shared a draft of the agreement internally with your team --

0 4 : 4 1 14 A. Yes.

0 4 : 4 1 15 Q. -- Mr. McCown is one of the people who received  
0 4 : 4 1 16 that, wasn't he?

0 4 : 4 1 17 A. That's correct.

0 4 : 4 1 18 Q. And you also sent Exhibit 42 to Dave Maganja; is  
0 4 : 4 1 19 that right?

0 4 : 4 1 20 A. Yes. Dave Maganja, yes.

0 4 : 4 1 21 Q. And he also received Exhibit 40, your internal  
0 4 : 4 1 22 draft?

0 4 : 4 1 23 A. That's correct.

0 4 : 4 1 24 Q. And when you sent the internal draft -- if you  
0 4 : 4 1 25 look at the Bates numbers, starting on Exhibit 40,







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1 of using PE is likely our second lowest cost for disposal of  
2 gypsum; is that correct?

3 A. That's correct.

4 Q. Do you agree -- you agree --

5 Did you agree with that at that time?

6 A. At the time that this was done?

7 Q. Yes.

8 A. No.

9 Q. Why not?

10 A. Because I was the one making decisions of where  
11 the DSG would go, and I was the one that tracked the costs.  
12 And so what I looked at was the net cost. So it may have  
13 cost us more to ship, for example, to Toronto, but it was  
14 replacing other gypsum that was -- that was at a higher  
15 cost. So the dollar was significantly below the \$28. It  
16 was also sig- -- in Montreal it was exactly the same case,  
17 it was significantly below the \$28.

18 Q. Finally, take a look at Exhibit 35, the "Mountains  
19 of Gypsum" presentation.

20 A. Okay.

21 Q. Mr. Tucker pointed you to page 5 that said -- he  
22 pointed you to page 5, the third bullet point towards the  
23 top of the page.

24 Do you see that?

25 A. Yes, I do.

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Q. And it says:  
"Obtain agreement to take at production rate,  
not obligation rate."  
A. That's correct. Yes.  
Q. And this is from March of 2009, correct?  
A. That's correct.  
Q. And, in fact, you entered into an agreement that  
allowed you to do that in the middle of 2010?  
A. That's correct.  
Q. But only for the remainder of 2010?  
A. The remainder of 2010.  
Q. All right. So take a look at Exhibit 15.  
A. Okay.  
Q. So let's look at the sentence Mr. Tucker asked you  
some questions about that begins, "In order to accommodate  
minor fluctuations" --  
THE COURT: Which paragraph?  
MR. PHILLIPS: I'm sorry. 3.1.  
A. Okay.  
Q. It says:  
"In order to accommodate minor fluctuations  
in volumes actually delivered and accepted under  
this revised agreement, any quantities of gypsum  
filter cake to be delivered under this revised  
agreement shall be deemed satisfied."

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Mar 20 2020





0 4 : 5 1 1 delivered under this revised agreement shall be  
0 4 : 5 1 2 deemed to be satisfied provided that such  
0 4 : 5 1 3 fluctuations up or down do not exceed 10 percent."  
0 4 : 5 1 4 So that was the first condition.

0 4 : 5 1 5 "And provided that the average monthly  
0 4 : 5 1 6 quantity of filter gypsum cake [sic] delivered and  
0 4 : 5 1 7 accepted under this revised agreement over any  
0 4 : 5 1 8 12-month period after the commercial operation  
0 4 : 5 1 9 date shall be approximately 50,000 net dry tons,  
0 4 : 5 1 10 or the aggregate actual gypsum filter cake net dry  
0 4 : 5 1 11 tons produced by Roxboro plant and Mayo plant over  
0 4 : 5 1 12 the same period, whichever is less."

0 4 : 5 1 13 So two conditions had to be met, and the plus or  
0 4 : 5 1 14 minus 10 percent set the range. The rest of it had to be  
0 4 : 5 1 15 within that range.

0 4 : 5 1 16 MR. PHILLIPS: No further questions, Your Honor.

0 4 : 5 1 17 MR. TUCKER: I don't think we have anything  
0 4 : 5 2 18 further, Your Honor.

0 4 : 5 2 19 THE COURT: All right. Can the witness be  
0 4 : 5 2 20 excused?

0 4 : 5 2 21 MR. PHILLIPS: He may, Your Honor. Thank you.

0 4 : 5 2 22 THE COURT: Yes, sir.

0 4 : 5 2 23 You're free to go, sir.

0 4 : 5 2 24 MR. PHILLIPS: Thank you, Mr. Engelhardt. You are  
0 4 : 5 2 25 excused to go to Tampa.

0 4 : 5 2 1 THE COURT: Good luck on finding a direct flight.

0 4 : 5 2 2 THE WITNESS: Yeah. I've learned that.

0 4 : 5 2 3 MR. PHILLIPS: I've said many times, Your Honor,  
0 4 : 5 2 4 that when I die, no matter where they send me, I've got to  
0 4 : 5 2 5 go through Atlanta.

0 4 : 5 2 6 THE COURT: Some people say it like "can't get to  
0 4 : 5 2 7 heaven or hell without going through Atlanta."

0 4 : 5 2 8 MR. PHILLIPS: Your Honor, can I move in some  
0 4 : 5 2 9 exhibits?

0 4 : 5 2 10 THE COURT: You may. And -- yes, you may.

0 4 : 5 2 11 MR. PHILLIPS: Your Honor, plaintiff would move  
0 4 : 5 3 12 admission of Exhibits 6 -- and I would say that if I miss  
0 4 : 5 3 13 anything that you all checked in between, please tell me.  
0 4 : 5 3 14 6 --

0 4 : 5 3 15 THE COURT: Your intent is to introduce exhibits  
0 4 : 5 3 16 identified in the direct examination?

0 4 : 5 3 17 MR. PHILLIPS: Examination, that's correct,  
0 4 : 5 3 18 Your Honor.

0 4 : 5 3 19 6, 14, 15, 21, 22, 23, 24, 25, 26, 36, 37, 40, 41.

0 4 : 5 3 20 THE CLERK: Did you skip 35?

0 4 : 5 3 21 Oh, he didn't do that. 36, 37 --

0 4 : 5 3 22 MR. PHILLIPS: 40, 41, 59, 120, 121, 122, 124,  
0 4 : 5 3 23 125. And I think the photograph at the beginning was  
0 4 : 5 4 24 also --

0 4 : 5 4 25 THE COURT: That's demonstrative.

0 4 : 5 4 1 MR. PHILLIPS: Was that a demonstrative?

0 4 : 5 4 2 THE CLERK: 163.

0 4 : 5 4 3 MR. PHILLIPS: Okay. So that was just a  
0 4 : 5 4 4 demonstrative. Okay.

0 4 : 5 4 5 THE CLERK: Well, it was Exhibit 163.

0 4 : 5 4 6 MR. PHILLIPS: Yeah. I thought it was your  
0 4 : 5 4 7 Exhibit 163. So 163.

0 4 : 5 4 8 THE COURT: The overhead?

0 4 : 5 4 9 MR. PHILLIPS: The aerial photo.

0 4 : 5 4 10 And as you stated, Your Honor, our intent with  
0 4 : 5 4 11 regard to those would be to provide the clerk with two thumb  
0 4 : 5 4 12 drives, one with clean copies and one with redacted copies  
0 4 : 5 4 13 for the Court to conclude to determine whether the  
0 4 : 5 4 14 redactions are appropriate.

0 4 : 5 4 15 MR. TUCKER: Your Honor, a question about the  
0 4 : 5 4 16 exhibits that we asked the witness about during our cross,  
0 4 : 5 4 17 which were not asked about during the direct. And this is  
0 4 : 5 4 18 really just for what is more convenient for the Court.

0 4 : 5 4 19 I understood one of your comments earlier to be  
0 4 : 5 4 20 that you would not expect us to introduce during cross any  
0 4 : 5 5 21 exhibits into evidence. We do want these --

0 4 : 5 5 22 THE COURT: I think that's what the rule is.

0 4 : 5 5 23 MR. TUCKER: Yeah. So that may be the rule, and  
0 4 : 5 5 24 we're happy at the beginning of our case to move in the  
0 4 : 5 5 25 exhibits that were identified by the witness. Some of these



0 4 : 5 5 1 can only be identified through CertainTeed's witness, so we  
0 4 : 5 5 2 have no other basis to qualify it -- for example, 35 --  
0 4 : 5 5 3 other than through CertainTeed.

0 4 : 5 5 4 So I just wanted to alert the Court that we will  
0 4 : 5 5 5 intend to introduce those in at the appropriate time, and  
0 4 : 5 5 6 I'm happy to wait to do that until our case.

0 4 : 5 5 7 THE COURT: Well, just the rules, as I understand  
0 4 : 5 5 8 them, are that you can't introduce evidence during his --  
0 4 : 5 5 9 unless -- I suppose, he could agree to the contrary, but  
0 4 : 5 5 10 that's not typically the situation. But I certainly don't  
0 4 : 5 5 11 object to you introducing those exhibits once your case has  
0 4 : 5 5 12 begun.

0 4 : 5 5 13 MR. TUCKER: And --

0 4 : 5 5 14 MR. PHILLIPS: I expected you to do it.

0 4 : 5 5 15 MR. TUCKER: Okay. That's fine. We will do it  
0 4 : 5 5 16 later.

0 4 : 5 5 17 THE COURT: And then I suppose my understanding is  
0 4 : 5 6 18 that there is no exhibit by which there's a debate as to  
0 4 : 5 6 19 authenticity.

0 4 : 5 6 20 MR. TUCKER: That is correct, Your Honor.

0 4 : 5 6 21 MR. PHILLIPS: And no objections with regard to  
0 4 : 5 6 22 any of the things that we proposed today, as I understand  
0 4 : 5 6 23 it.

0 4 : 5 6 24 MR. TUCKER: Not that we didn't resolve as part of  
0 4 : 5 6 25 the production.

0 4 : 5 6 1 THE COURT: Okay. All right. Okay. So do you  
0 4 : 5 6 2 think you'll get to the deposition tomorrow?

0 4 : 5 6 3 MR. PHILLIPS: Maybe. I think it's the third --  
0 4 : 5 6 4 the deposition is the third witness, Your Honor.

0 4 : 5 6 5 THE COURT: Okay. I will do my best to then give  
0 4 : 5 6 6 you a ruling on the objections if I can get to it overnight.

0 4 : 5 6 7 MR. PHILLIPS: All right. And we're prepared, I  
0 4 : 5 6 8 think, if you wanted to -- actually if you wanted to hear us  
0 4 : 5 6 9 on those, then --

0 4 : 5 6 10 THE COURT: I'll be prepared, then, tomorrow  
0 4 : 5 6 11 morning at 9:00, if I can, just to address it so you can.  
0 4 : 5 6 12 If you want to go ahead and tell me in advance what the -- I  
0 4 : 5 6 13 have not looked at any of the testimony, but if you feel  
0 4 : 5 6 14 like you can summarize it into about three different  
0 4 : 5 6 15 substantive areas, and you want to go ahead and address  
0 4 : 5 7 16 those to me before I read it and you think that would be  
0 4 : 5 7 17 useful, if you want me to read it and you address them after  
0 4 : 5 7 18 I read it, whatever y'all think is most appropriate.

0 4 : 5 7 19 MR. TUCKER: I think it might be most efficient  
0 4 : 5 7 20 for us to do it after you've read it. I think you'll see  
0 4 : 5 7 21 that virtually all of the objections overlap the objections  
0 4 : 5 7 22 that you heard and ruled upon today, so I don't expect your  
0 4 : 5 7 23 ruling to be different tomorrow.

0 4 : 5 7 24 THE COURT: I hope I can be consistent.

0 4 : 5 7 25 MR. TUCKER: But we'd be happy to address them

