

10:59

1 sections of the agreement from the very beginning?

11:00

2 A. Well, as it reads here, (a) and (b).

11:00

3 Q. So you're acknowledging that those are separate

11:00

4 provisions, you didn't include it in a single provision

11:00

5 dealing with undersupply, you carved it out in the very

11:00

6 beginning in the two separate sections?

11:00

7 A. No, again, it's all dealing with undersupply. But

11:00

8 perhaps with the ease of reading the section, we probably

11:00

9 broke it up into two.

11:00

10 Q. Now, you recall that Progress Energy didn't like

11:00

11 your first draft of the agreement and told you to go back to

11:00

12 drawing board to fix it.

11:00

13 Do you remember that?

11:00

14 A. Not specifically.

11:00

15 Q. Do you remember that they rejected the first draft

11:00

16 without comment?

11:00

17 A. Not specifically.

11:00

18 Q. Look at Exhibit 91, please.

11:00

19 A. I am there, yes.

11:00

20 Q. This is an email and attached draft agreement

11:00

21 dated May 27, 2003, correct?

11:00

22 A. Uh-huh.

11:00

23 Q. And in this email, Mr. College tells Mr. Johnson

11:01

24 that:

11:01

25 "Hopefully this draft is more to

11:01

1

Progress Energy's liking."

11:01

2

Do you see that language?

11:01

3

A. I do see those words.

11:01

4

Q. Does that refresh your recollection that

11:01

5

Progress Energy didn't like the first draft that BPB sent

11:01

6

over?

11:01

7

A. Again, I think in this case it was John College

11:01

8

speaking to Danny, but after discussing with me for the

11:01

9

draft of the agreement.

11:01

10

Q. Now, let me direct your attention to Section 6.1

11:01

11

of this draft.

11:01

12

A. Okay. I'm there.

11:01

13

Q. At least as far as this section is concerned, the

11:01

14

primary difference in this draft and the prior draft is that

11:01

15

BPB has now added remedies for Progress Energy if BPB fails

11:01

16

to purchase the required quantities or elects not to

11:02

17

continue operating its plant, correct?

11:02

18

A. Correct. But that was from discussion with

11:02

19

Progress Energy; I assume it's Danny Johnson. And we were

11:02

20

just trying to do our best to document what it is that they

11:02

21

were looking for, since it was a draft by our lawyers to

11:02

22

Progress Energy.

11:02

23

Q. And just like in the section that deals with BPB's

11:02

24

remedies, the remedies for Progress Energy are broken out

11:02

25

into an (a) and a (b), correct?

11:02

1 A. Yes.

11:02

2 Q. Look, if you would, at Exhibit 92.

11:03

3 A. Okay. I'm there.

11:03

4 Q. You identified this document as an email that

11:03

5 Danny Johnson of Progress Energy sent to John College of BPB

11:03

6 on July 24th, 2003, with Progress Energy's first revision to

11:03

7 the agreement, correct?

11:03

8 A. Correct.

11:03

9 Q. Let me ask you to look at Section 6.2 of

11:03

10 Progress Energy's draft, beginning on page 9 of the attached

11:03

11 document.

11:03

12 A. Okay. I'm there.

11:03

13 Q. Now, in this draft, Progress Energy has broken the

11:03

14 remedies for BPB even more specifically into two different

11:03

15 sections, correct?

11:03

16 One is designated 6.2 and captioned "Undersupply

11:03

17 by Progress Energy," and the second is designated 6.3 and

11:03

18 captioned "Discontinued Supply by Progress Energy."

11:03

19 A. That's what it says.

11:03

20 Q. And that was the structure that Progress Energy

11:04

21 requested in the very first revision of the agreement that

11:04

22 it sent back to BPB?

11:04

23 A. Again, I was not a recipient of that information,

11:04

24 but -- well, this is a negotiation back and forth. People

11:04

25 put things in, and people take things out. So in this case,

11:04 1 Progress Energy put that in.

11:04 2 Q. And you understand that that's the structure that
11:04 3 remained in the agreement, correct? The signed version is
11:04 4 structured exactly the same way --

11:04 5 A. Yes.

11:04 6 Q. Just so we don't talk over each other if you can
11:04 7 let me finish my question.

11:04 8 A. Sure.

11:04 9 Q. And then I'm happy for you to answer.

11:04 10 A. Sorry about that.

11:04 11 Q. So the structure of this provision in the first
11:04 12 draft with "undersupply" broken into a separate section and
11:04 13 put into 6.2 and "discontinued supply" addressed in a
11:04 14 separate section designated at 6.3, that's a structure that
11:04 15 stayed in the agreement throughout the long course of
11:04 16 negotiations, and, in fact, is the same structure that's in
11:04 17 the signed agreement, correct?

11:04 18 A. Yeah, 6.2 deals with undersupply, and 6.3 deals
11:05 19 with the specific case of severe undersupply.

11:05 20 Q. Now, I understand your testimony today to be that
11:05 21 undersupply is undersupply. And I don't want to misquote
11:05 22 you, but I recall you saying something very similar to those
11:05 23 words during Ms. Marston's testimony.

11:05 24 Is that your testimony today?

11:05 25 A. That undersupply is undersupply?

11:05

1 Q. Is that what you're saying today?

11:05

2 A. Well, undersupply is undersupply, yes.

11:05

3 Q. Now, the undersupply that's the subject of 6.2
4 deals with the real-world business conditions of purchasing
5 gypsum and wallboard where demand and supply can fluctuate
6 from month to month; isn't that right?

11:05

7 A. Yes, that's the primary provision, yes.

11:05

8 Q. And 6.2 deals with the short-term variations that
9 are due to operational issues specific to the business
10 including, for example, if undersupply was caused in a
11 particular lot by plant maintenance.

11:05

12

11:05

13 Do you remember talking about examples like that
14 with Mr. Johnson?

11:05

15 A. Yes.
16 Q. And Section 6.2 provides the remedy for those
17 short-term operational variations; isn't that right?

11:05

18 A. In part, yes.

11:05

19 Q. Well, that's exactly what you told me in your
20 deposition.

11:05

21 Do you recall that?

11:06

22 A. Not specifically, but I'd have to refer back to
23 it.

11:06

24 MR. TUCKER: Let's play that deposition clip
25 beginning at page 51, line 24 to page 52, line 15.

11:06

26 "Q. What was the nature of the distinction?

11:06

27

11:06

28

11:06

29

11:06

30 Q. Well, that's exactly what you told me in your
31 deposition.

11:06

32

11:06

33 Do you recall that?

11:06

34 A. Not specifically, but I'd have to refer back to
35 it.

11:06

36

11:06

37 MR. TUCKER: Let's play that deposition clip

11:06

38 beginning at page 51, line 24 to page 52, line 15.

11:06

39 "Q. What was the nature of the distinction?

11:06 1 "A. One dealt with the real business condition of
11:06 2 producing power and producing synthetic gypsum or
11:06 3 DSG, and our business of producing wallboard from
11:07 4 that gypsum.

11:07 5 "We would size the plant specifically to
11:07 6 accommodate the contract amount of gypsum, but we
11:07 7 knew our business doesn't operate as a very linear
11:07 8 response to supply and demand. So we have higher
11:07 9 demand seasons and lower demand seasons. And we
11:07 10 knew the fluctuations in demand would drive our
11:07 11 needs and vice versa.

11:07 12 "And, in fact, it was out of sync,
11:07 13 Progress Energy would say, you know, our
11:07 14 heating months and our big DSG-producing months,
11:07 15 yet that's one of our lower consumption months.

11:07 16 "So we were trying to provide provision for
11:07 17 those variations beyond the 50,000 tons per
11:07 18 month."

11:07 19 Q. So you were talking about 6.2 in that clip.
11:07 20 Does that refresh your recollection to the
11:07 21 testimony you gave?

11:07 22 A. Yes.

11:07 23 Q. And in contrast to 6.2, which deals with
11:07 24 real-world business-oriented operational issues, 6.3 was
11:08 25 intended to deal with decisions by Duke Energy Progress that

11:08 1 completely cut off supply or that resulted in a substantial
11:08 2 interruption in the supply chain, correct?

11:08 3 A. Correct.

11:08 4 Q. And you understood those kinds of disruptions, the
11:08 5 kind that are addressed in Section 6.3, to be of a different
11:08 6 type than the short-term interruptions covered by 6.2,
11:08 7 correct?

11:08 8 A. Well, not necessarily. I think it has to do with
11:08 9 the option of the non-defaulting party to make a choice.

11:08 10 Q. Do you remember telling me in your deposition that
11:08 11 you understood the types of disruptions covered by 6.2 to be
11:08 12 different than 6.3?

11:08 13 A. Not the specific words.

11:08 14 MR. TUCKER: If I could ask you to play the clip
11:08 15 beginning at page 51, lines 14 through 23.

11:09 16 "Q. And if you look at 6.2 as it's been revised
11:09 17 in this draft, it's now captioned 'Undersupply by
11:09 18 Progress Energy.'

11:09 19 "Do you see that?

11:09 20 "A. Yes, I do.

11:09 21 "Q. And 6.3 is now captioned 'Discontinued Supply
11:09 22 by Progress Energy.'

11:09 23 "Do you see that?

11:09 24 "A. Yes, I do.

11:09 25 "Q. Did you understand that there was a

11:09

1

distinction between those two occurrences?

11:09

2

"A. Yes."

11:09

3

MR. TUCKER: And could I ask you also to play the

11:09

4

clip beginning at page 53, lines 15 through 22.

11:09

5

"Q. 6.3 in contrast deals with decisions by one

11:09

6

party or the other that either completely cut off

11:09

7

supply or result in some sort of substantial

11:09

8

interruption that maybe, as you said, is less than

11:09

9

force majeure but is something more than the kind

11:09

10

of operational fluctuation you would expect that's

11:09

11

dealt with in 6.2?

11:09

12

"A. Correct. That's how it was intended, yes."

11:09

13

Q. Okay. So, Mr. Mayer, does this testimony refresh

11:10

14

your recollection that at the time this contract was

11:10

15

negotiated, you understood that there was a distinction in

11:10

16

the issues covered by 6.2 and the different supply issues

11:10

17

considered by 6.3, and that it was the parties' intent to

11:10

18

address those two things separately?

11:10

19

A. Yes.

11:10

20

Q. Thank you.

11:10

21

Now, BPB even suggested changes to Section 6.3

11:10

22

during the drafting process that were intended to emphasize

11:10

23

the difference in 6.3 from the 6.2 situation.

11:10

24

Do you recall that?

11:10

25

A. No, I don't recall that.

11:10

1 Q. Look at Exhibit 93, if you would, please.

11:11

2 A. Okay. I'm there.

11:11

3 Q. So you recognize this as an email with an attached
4 draft dated August 28, 2003, that Mr. Lontchar, who was the
5 lawyer at BPB, sent to Mr. Johnson of Progress Energy,
6 correct?

11:11

7 You identified this document during Ms. Marston's
8 direct examination.

11:11

9 A. I have August 22nd.

11:11

10 Q. I may have misspoken on the date. If it says
11 August 22nd, I'll accept that as the date of the draft.

11:11

12 A. Yes. Yes.

11:11

13 Q. And Mr. Lontchar, as you said, was a lawyer for
14 BPB; is that right?

11:11

15 A. Correct.

11:11

16 Q. Let me direct your attention to Section 6.3 in
17 Exhibit 93, beginning on page 11. Let me know when you're
18 there.

11:11

19 A. Yes, 6.3, page 11.

11:11

20 Q. And do you see that the word "continuously" has
21 been added in the first section of 6.3? It's underlined in
22 this draft to reflect the change that BPB was requesting?

11:12

23 A. Yes, I see the underlined word "continuously."

11:12

24 Q. And you recognize that the addition of that word
25 was intended by BPB to further differentiate between 6.2 and

11:12

1 6.3, correct?

2 A. Yeah. It represented an extreme condition of
3 undersupply.

4 Q. And that was something that BPB in this draft
5 wanted to emphasize by adding the word "continuously"; is
6 that right?

7 A. Yes.

8 Q. And that was consistent with the idea that 6.3
9 dealt with something other than the short-term shortages due
10 to operational issues that are addressed in 6.2?

11 A. Well, again, to the extent that it dealt with
12 severe undersupply. But, again, the wording, as I said in
13 my testimony, we had "may terminate" in the agreement.

14 Q. We're going to talk about that. Don't worry.

15 A. Okay.

16 Q. Now, you remember some discussion about the
17 liquidated damages formula in Section 6.3, correct?

18 A. Uh-huh.

19 THE COURT: You have to say "Yes" or "No," sir.

20 THE WITNESS: Yes. Sorry.

21 Q. In fact, in the context of negotiating the
22 2004 agreement, you actually calculated the liquidated
23 damages amount to determine what the financial impact would
24 be if either side discontinued, correct?

25 A. Did we do a mathematical calculation? Yes, we

11:13 1 did.

11:13 2 Q. So I want to come back to your testimony about the
11:13 3 words "may terminate."

11:13 4 You mentioned that language and were asked about
11:13 5 it several times on direct exam and you just referenced it
11:13 6 again as confirming, in your view, the optional nature of
11:14 7 the 6.3 remedy; is that right?

11:14 8 A. Correct.

11:14 9 Q. But the truth is, Mr. Mayer, you never focused on
11:14 10 the words "may terminate" at any time during the negotiation
11:14 11 or drafting of this agreement, did you?

11:14 12 A. It probably wasn't -- no, I didn't focus on the
11:14 13 words "may terminate." It was my job to discuss the
11:14 14 business relationship, what we were looking for in terms of
11:14 15 secure supply, looking for in terms of quality, looking in
11:14 16 terms of cost. And, you know, that's why we have lawyers.
11:14 17 Lawyers wordsmith the concepts and come to an agreement with
11:14 18 the respective lawyers.

11:14 19 Q. Well, I want to be clear on this because you've
11:14 20 testified at length today that your opinion that this is an
11:14 21 optional remedy is based on the presence of the words "may
11:14 22 terminate" in this section.

11:14 23 A. Uh-huh.

11:14 24 Q. You just told me --

11:14 25 A. Yes, sir.

11:14 1 Q. You just agreed that you had never focused on
11:14 2 those words during the negotiation of this; is that right?

11:15 3 A. You -- I did not focus on it with Progress Energy.
11:15 4 Did we internally focus on it? Yes, we did.

11:15 5 Q. You told me that you had never even recognized the
11:15 6 presence of those words in this contract until CertainTeed's
11:15 7 lawyers pointed them out to you in connection with this
11:15 8 litigation; isn't that right?

11:15 9 A. Yes, it is.

11:15 10 But I also would say that it's 14 or 15 years ago.
11:15 11 As you review the documents, you do recall more events than
11:15 12 you recognize when you first glance at it.

11:15 13 Q. So are you telling me that your recollection has
11:15 14 improved since I took your deposition?

11:15 15 A. Yes.

11:15 16 Q. So when I deposed you a few months ago, you didn't
11:15 17 remember any focus on those words, and you told me that you
11:15 18 hadn't seen them until the lawyers pointed them out to you.

11:15 19 Are you now saying that you saw -- that you did
11:15 20 see them? You did focus on them?

11:15 21 A. Hold on. As I said -- and what I just said. I
11:15 22 mean, in this process from 14 or 15 years ago, I was asked
11:15 23 in testimony did I review every section carefully. Yes, I
11:16 24 did. And would I have read this? Yes. Would we have
11:16 25 discussed this? Yes, internally. Would we have gone to our

1 parent company and explained to them, here's how this
2 thing's going to work, here's how the thing's going to work
3 in undersupply, in a temporary or a minor variation in the
4 minimum monthly quantity, or what would happen if there was
5 discontinued supply, what were our options. And we would
6 explain that to our parent company to seek funding to
7 actually build the plant, the \$200 million to build the
8 plant.

9 Q. Mr. Mayer, tell me directly, you don't remember
10 any discussion of the alleged optional nature of Section 6.3
11 with anyone from Progress Energy at any time during the
12 negotiation of the 2004 agreement, do you?

13 A. I do not recall talking about the "may terminate"
14 language with Progress Energy, that's correct.

15 Q. Let's forget the "may terminate" language.

16 You don't remember any discussions in which you
17 described Section 6.3 as providing a choice for BPB, do you,
18 to Progress Energy? You don't remember that discussion with
19 anyone from Progress Energy?

20 A. As I said, the specifics, I can't recall.
21 However, our position on the agreement, what was important
22 to us as a business, what was important to us to seek
23 funding for the capital for the plant construction, and the
24 ongoing nature that we were running a gypsum wallboard
25 plant, we need gypsum. And secure supply was upfront the

11:17 1 most important thing for us to secure in this agreement.

11:17 2 Q. I appreciate that. I don't think it's responsive
11:17 3 to my question.

11:17 4 My question to you is whether you do or do not
11:17 5 remember discussing your view that Section 6.3 provides an
11:17 6 optional remedy for BPB, and that if it does not terminate
11:17 7 it could still look to Section 6.2.

11:17 8 Do you recall a discussion like that with anyone
11:17 9 from Progress Energy?

11:17 10 MS. MARSTON: Objection. Asked and answered.

11:17 11 THE COURT: Overruled.

11:18 12 Q. You can answer.

11:18 13 A. Okay. No, I don't recall having a discussion, but
11:18 14 that's not something I would necessarily have a discussion
11:18 15 with Progress Energy on. It was a term that benefited
11:18 16 CertainTeed. And so as long as we were clear with what it
11:18 17 meant to us, then we were satisfied.

11:18 18 Q. Well, in fact, you never even discussed that
11:18 19 interpretation with Mr. Morrow, did you?

11:18 20 A. I said I don't recall.

11:18 21 Q. You don't remember any discussion with Mr. Morrow
11:18 22 about CertainTeed's rights under Section 6.3 or whether
11:18 23 CertainTeed had the ability to choose between remedies, do
11:18 24 you?

11:18 25 MS. MARSTON: Objection. Mr. Tucker is

11:18

1 mischaracterizing Mr. Mayer's testimony.

11:18

2 MR. TUCKER: I'm asking him -- I'm asking him --

11:18

3 THE COURT: Just a moment. You can't both talk at
4 the same time.

11:18

5 Why don't you rephrase your question.

11:18

6 MR. TUCKER: I will.

11:18

7 Q. Mr. Mayer, it's true, isn't it, that you do not
8 remember any discussion with Mr. Morrow about CertainTeed's
9 rights under 6.3 or whether CertainTeed had the ability to
10 choose the 6.2 remedy for an occurrence specified in 6.3?

11:18

11:18

11:18

11:19

11 A. Okay. So the first part of the question, do I
12 recall specific discussions? I testified, no, I did not.
13 But I said I likely would have just because of Rob Morrow's
14 role in the organization.

11:19

11:19

11:19

11:19

15 We also would present a -- we would present the
16 document, the full agreement -- I mean, they would receive
17 it, but that's not what we would present to the parent
18 company for funding. We would have a truncated version with
19 Rob because he was involved in the detailed discussion with
20 Progress Energy. He had to understand what it was that we
21 were actually signing up on. And he would have went through
22 that with me. I just don't recall the specific
23 conversation.

11:19

11:19

11:19

11:19

11:19

11:19

11:19

11:19

11:19

24 But in terms of securing supply of gypsum to
25 operate our plant in an economic way, we -- I can only say

11:19

11:21 1 discussions at all and couldn't confirm that they had
11:21 2 occurred. It directly impeaches his testimony today.

11:21 3 THE COURT: Play your next clip.

11:21 4 "Q. Did you ever have any discussion with
11:21 5 Mr. Morrow regarding the nature of CertainTeed's
11:21 6 rights under 6.3 and whether CertainTeed had the
11:21 7 ability to choose between remedies in the event of
11:21 8 discontinued supply?

11:21 9 "A. I don't think so. Not this agreement, no."

11:21 10 Q. Does that refresh your recollection, Mr. Mayer,
11:21 11 that you never had those discussions with Mr. Morrow?

11:21 12 A. As I said, I didn't recall any specific
11:21 13 discussions.

11:21 14 Q. And you're also not aware of any document
11:21 15 supporting your present interpretation of 6.3 or describing
11:21 16 the 6.3 remedy as optional, correct?

11:21 17 THE COURT: Let me make sure he understands --
11:21 18 excuse me just a minute.

11:21 19 Other than he believes the contract itself
11:22 20 provides that.

11:22 21 Q. Apart from what you believe the contract to say,
11:22 22 you are not aware of any document that supports your
11:22 23 interpretation that BPB has the right to choose between
11:22 24 remedies if there's a 6.3 occurrence, correct?

11:22 25 A. An internal document, or any document?

11 : 2 2

1 Q. Any document.

11 : 2 2

2 A. My understanding, as I testified, is that we would
3 not send them -- I was not involved in seeking funding for
4 the plant and seeking approval to sign the agreement.

11 : 2 2

11 : 2 2

11 : 2 2

5 Rob Morrow had done that and I believe it was probably Rob
6 and Brent Thompson, the president of the company at the
7 time. And I wasn't involved, so I can't tell you

11 : 2 2

11 : 2 2

11 : 2 2

11 : 2 2

11 : 2 2

8 specifically, but I can only imagine there was a sheet of
9 paper somewhere that described what happens in undersupply
10 and what happens in discontinued supply.

11 : 2 2

11 : 2 3

11 Q. So I'm not really interested in what you imagine
12 might have existed.

11 : 2 3

13 A. Sure.

11 : 2 3

14 Q. Have you ever seen a document like that?

11 : 2 3

11 : 2 3

15 A. It's hard for me to recollect because I've done
16 this a number of times. I probably -- I can't be exactly
17 specific, but I can assure you that our company, that's the
18 way we approached it.

11 : 2 3

11 : 2 3

11 : 2 3

19 Q. As you are sitting here today, Mr. Mayer, can you
20 point me to any document other than the contract which you
21 interpret that supports your interpretation of 6.3 as
22 providing an optional remedy to BPB?

11 : 2 3

11 : 2 3

11 : 2 3

23 A. If it wasn't found in the discovery, I can't point
24 to it, no.

11 : 2 3

11 : 2 3

25 Q. And just to confirm again, so your testimony is

1 clear on this point, you never communicated to anyone from
2 Progress Energy that you believed CertainTeed had the right
3 to exercise its 6.2 remedy in the event of a 6.3 occurrence;
4 is that right?

5 A. Again, it's many years ago. I cannot recall
6 specifically. But, again, it wasn't necessarily our
7 objective to explain the rights that Progress Energy had
8 under the agreement.

9 Q. Well, these are critical provisions of the
10 contract; didn't you say that?

11 A. For us, yes, they were.

12 Q. You understood that they were critical to
13 Progress Energy as well, correct?

14 A. That was up to them to decide.

15 Q. You actually didn't think it was important that
16 the parties had a shared understanding of how the remedies
17 provisions worked; isn't that true?

18 A. That is not true.

19 MR. TUCKER: Would you play the clip beginning at
20 page 126.

21 "Q. Do you think it would have been important to
22 communicate to Progress Energy your understanding
23 of how the 6.3 and 6.2 remedies operated and how
24 they related to one another?

25 "A. No.

11 : 24

1

"MS. MARSTON: Objection.

11 : 24

2

"Q. You didn't think it was important that the parties had a shared understanding of how those provisions would operate?

11 : 24

3

11 : 24

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11 : 24

5

"MS. MARSTON: Objection.

11 : 24

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"A. No. We -- of course we talked about them, but the specifics of the interpretation, as I said already, wasn't discussed with them."

11 : 25

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11 : 25

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11 : 25

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Q. All right. Mr. Mayer, you understand that there was an exclusive remedies provision in the various drafts of the 2004 agreement, correct?

11 : 25

10

11 : 25

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11 : 25

12

A. Correct.

11 : 25

13

Q. That concept was included in the agreement from a very early point, right?

11 : 25

14

11 : 25

15

A. In our first draft, I believe, yes.

11 : 25

16

Q. Let me ask you to look at Exhibit 91, please, and if I could direct your attention once you're there. Let me know when you're there.

11 : 25

18

11 : 25

19

A. Sure.

11 : 26

20

Okay. I'm at 91.

11 : 26

21

Q. If I can direct your attention to Section 6.2 of the attached draft, beginning at page 8.

11 : 26

22

11 : 26

23

A. All right.

11 : 26

24

Q. And there's an exclusive remedies provision in this draft of the agreement, correct?

11 : 26

25

11:26

1 A. On page 8, yes. It's Section 6.2.

11:26

2 Q. So even in this very early May 30, 2003, draft
3 from BPB, there was an exclusive remedies provision?

11:26

4 A. Yes.

11:26

11:26

5 Q. And you understood that the purpose of the
6 exclusive remedies provision was to limit the parties'
7 exposure to the things that are described in the different
8 remedy sections, correct?

11:26

11:26

11:26

9 A. Correct.

11:26

11:26

10 MS. MARSTON: Objection. That mischaracterizes
11 Mr. Mayer's testimony.

11:26

11:26

12 MR. TUCKER: He just acknowledged it.

11:26

13 I'll be happy to play his deposition clip,

11:26

14 Your Honor, if there's an issue about that.

11:27

15 THE COURT: Proceed.

11:27

16 Q. And you also remember that Progress Energy
17 expanded the language of the original exclusive remedies
18 provision in the first markup that Mr. Johnson sent back to
19 you, correct?

11:27

11:27

20 A. There were more words and it was in a different
21 spot, yes.

11:27

11:27

22 Q. If I can ask you to look at Exhibit 92, which is
23 Progress Energy's first markup.

11:27

11:27

24 Are you there?

11:27

25 A. Yes.

1 Q. If I can direct your attention to Section 10.3,
2 beginning on page 12 of this draft.

3 A. Yes, I'm on 10 -- oh, sorry. Section 10.3?

4 Q. Yes, sir.

5 And do you see in this draft dated July 24, 2003,
6 that Progress Energy has added a new, broader exclusive
7 remedies provision, correct?

8 A. I wouldn't be able to judge "broader," I just know
9 there's more words.

10 Q. And you told Ms. Marston earlier today that the
11 location in the agreement didn't matter, that you understood
12 the different exclusive remedies provisions to be dealing
13 with the same concept; is that right?

14 A. From a layman's perspective, yes.

15 Q. At the same time that Duke Energy was modifying
16 the exclusive remedies provision in this contract,
17 Progress Energy also added additional protective provisions
18 to the force majeure section of this draft.

19 Do you remember that?

20 A. Not specifically, no.

21 Q. Let me ask you to direct your attention to
22 Article 13 of this draft, the same document, beginning on
23 page 17 and continuing over to page 18.

24 A. Okay. I'm there.

25 Q. Do you see that Progress Energy has added a new

11:29 1 paragraph at the end of this article that begins:

11:29 2 "In construing and interpreting this
11:29 3 Article 13 and other provisions of the agreement"?

11:29 4 A. Yes, I do.

11:29 5 Q. And that paragraph refers to:

11:29 6 "And the parties agree to recognize the
11:29 7 primary mission of the Roxboro and Mayo plants as
11:29 8 described in this paragraph."

11:29 9 Correct?

11:29 10 A. That's what the words say.

11:29 11 Q. And I think you testified that you understood that
11:29 12 this paragraph was a requirement of Progress Energy's
11:29 13 management, correct?

11:29 14 A. That's what Danny Johnson told us.

11:29 15 Q. And, in fact, you understood that it was a very
11:29 16 strong requirement; isn't that right?

11:29 17 A. No. I mean, a strong requirement meaning it was
11:29 18 not -- they couldn't sign the agreement unless that was in
11:30 19 there.

11:30 20 Q. Well, I'm actually using your words, and I'd be
11:30 21 happy to play the clip for you.

11:30 22 But do you recall that you described this
11:30 23 provision as a very strong requirement of Progress Energy?

11:30 24 A. No. If you could play the clip, please.

11:30 25 THE COURT: Well --

11:30

1

MR. TUCKER: Play the clip again.

11:30

2

THE COURT: -- he's acknowledged that they said

11:30

3

they wouldn't sign it without it being in there, as you

11:30

4

can --

11:30

5

MR. TUCKER: Point taken.

11:30

6

Q. Do you remember that Mr. Johnson explained to you

11:30

7

that this provision was essentially a requirement to ensure

11:30

8

low cost power?

11:30

9

A. No.

11:30

10

Q. Now, you're aware that BPB attempted to take out

11:30

11

the primary mission language that Mr. Johnson had added into

11:30

12

Article 12 of this draft, right?

11:30

13

A. Yes. I recall it was brought in and taken out a

11:30

14

few times.

11:30

15

Q. And you recall that it was BPB who tried to have

11:30

16

that language removed from the agreement; is that right?

11:30

17

A. Correct.

11:30

18

Q. Let me ask you to look at Exhibit 93.

11:31

19

I'm going to be asking you to direct your

11:31

20

attention to Article 13, but let me know when you're there.

11:31

21

I don't want to start before you're ready.

11:31

22

A. Thank you.

11:31

23

Page 17, Article 13?

11:31

24

Q. Yes, sir.

11:31

25

In this draft, BPB has struck through the primary

11:31 1 mission language that Progress Energy added in the paragraph
11:31 2 at the end of Article 13, correct?

11:31 3 A. Yes.

11:31 4 Q. And not only did BPB strike through that language,
11:31 5 but BPB added a new paragraph shown here by the underlining
11:32 6 at the end of Article 13, correct?

11:32 7 A. Correct.

11:32 8 Q. And in that new paragraph, BPB sought to expressly
11:32 9 preserve CertainTeed's remedies under Section 6.2 and 6.3 if
11:32 10 Progress Energy could not supply gypsum due to a change in
11:32 11 fuel source, correct?

11:32 12 A. Yes, it shows that -- yes, I agree with that.

11:32 13 Q. And you also agree that a reduction in supply of
11:32 14 synthetic gypsum due to a change from natural gas as a fuel
11:32 15 source to coal as a fuel source would have been within the
11:32 16 scope of this paragraph that BPB was proposing, correct?

11:33 17 A. Yes, so it says that.

11:33 18 Q. You agree that the language is broad enough to
11:33 19 include a scenario as proposed by BPB where there has been a
11:33 20 reduction in supply due to a change from coal to natural gas
11:33 21 as a fuel source. I think I may have flipped it around in
11:33 22 my first question. But you agree that this language is
11:33 23 broad enough to cover that scenario if this had been
11:33 24 accepted, correct?

11:33 25 A. Yes.

11:33

1

We were anticipating, actually, coal -- changing coal supply to a different sulfur coal.

11:33

2

11:33

3

Q. And the language that BPB sought to protect

11:33

4

against that scenario, that was rejected by Progress Energy

11:33

5

during the drafting process, correct?

11:34

6

A. I'd have to look at the next draft.

11:34

7

Q. Look at Exhibit 94, if you would, please.

11:34

8

A. Okay. I'm there.

11:34

9

Q. This is a revised draft of the agreement that

11:34

10

Mr. Lontchar sent Danny Johnson on September 22, 2013,

11:34

11

correct?

11:34

12

A. We're on 94?

11:34

13

Q. Yes, sir.

11:34

14

A. It says "Sent Monday, September 22nd."

11:34

15

Q. Right.

11:34

16

Let me direct your attention to Article 12,

11:34

17

beginning on page 17 and carrying over to page 18.

11:34

18

And in particular, let me direct your attention to

11:34

19

that last paragraph with the strikethrough language.

11:34

20

Does this draft refresh your recollection that the

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21

language BPB had requested, referring specifically to its

11:34

22

remedies under 6.2 and 6.3, was rejected and stricken from

11:35

23

the subsequent draft of the agreement?

11:35

24

A. If there was a subsequent draft, yes, I agree to

11:35

25

that.

11:35 1 Q. Now, ultimately, the primary mission language that
11:35 2 Progress Energy wanted in Article 12 stayed in the
11:35 3 agreement, correct?

11:35 4 A. Yes.

11:35 5 Q. And the protective language that BPB wanted that
11:35 6 we just reviewed, that came out, correct?

11:35 7 A. I'd have to review the --

11:35 8 Q. Let's look at the final version of the agreement,
11:35 9 which is Exhibit 5, I believe.

11:35 10 A. Yes.

11:35 11 Q. And if I could direct your attention to
11:35 12 Article 12.

11:35 13 Let me know when you're there, Mr. Mayer.

11:36 14 A. I'm there. I'm just reading it.

11:36 15 Okay.

11:36 16 Q. So you're looking at the final signed version of
11:36 17 the agreement, correct?

11:36 18 A. Yes.

11:36 19 Q. And Article 12 of the signed agreement includes
11:36 20 the primary mission language that Duke Energy Progress,
11:36 21 Progress Energy proposed and which Progress Energy told you
11:36 22 was important to them, correct?

11:36 23 A. Important for them to be left in the agreement,
11:36 24 yes.

11:36 25 Q. And not only is it left in the agreement, but it's

11:36 1 in exactly the same form that Progress Energy originally
11:37 2 proposed.

11:37 3 Would you agree with that?

11:37 4 A. Yes.

11:37 5 Q. Now, looking at the signed agreement, Exhibit 5,
11:37 6 there is no exception in Article 12 of this signed agreement
11:37 7 that would allow CertainTeed to pursue its remedies under
11:37 8 6.2 or 6.3 for a supply failure that is subject to this
11:37 9 Article 12, is there?

11:37 10 A. Force majeure, correct.

11:37 11 Q. And you told me, and I think you've testified
11:37 12 again today, that BPB was ultimately happy to sign this
11:37 13 agreement in the form that PE had proposed, correct?

11:38 14 A. Yes.

11:38 15 Q. Now, you talked a little bit about source of
11:38 16 gypsum earlier today in response to some of Ms. Marston's
11:38 17 questions.

11:38 18 And you said that source of gypsum, if I
11:38 19 understood you correctly, was not particularly important to
11:38 20 CertainTeed; is that right?

11:38 21 A. Well, in the extent that source of supply,
11:38 22 security of supply, yes.

11:38 23 Q. But you understood from the very beginning of this
11:38 24 contract that Progress Energy intended to supply gypsum from
11:38 25 Roxboro and Mayo, correct?

11:38

1 A. Yes, it was their intent.

11:38

2 Q. And, in fact, you built your plant adjacent to
3 Roxboro to facilitate the transfer of gypsum from that
4 facility to your wallboard facility?

11:38

11:38

11:38

5 A. Well, we built the plant because we had a secure
6 supply contract.

11:38

11:38

7 Q. Now, not only was source of gypsum important to
8 Progress Energy, you understood that it was critically
9 important, correct? You knew that Progress Energy was
10 intending to supply the gypsum under this contract from
11 Roxboro and Mayo?

11:38

11:39

11:39

11:39

12 A. That was the intent, yes.

11:39

11:39

13 Q. You understand the concept of beneficial reuse,
14 correct?

11:39

11:39

15 A. Yes, I do.

11:39

16 Q. And you understand that Progress Energy, as a
17 public utility, is not in the business of going out into the
18 marketplace and buying gypsum to supply other commercial
19 entities. You understand that, correct?

11:39

11:39

20 A. I understand that, but that's why we put a
21 provision in 6.2 to allow for us to procure alternate
22 supplies and then back charge the difference in price from
23 the current price and our handling fee back to -- because we
24 recognized in negotiations that, yeah, it wouldn't be in
25 their interest to secure material for us; but for us, in

11:39

11:39

11:39

11:39

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11:39

11:39

1 terms of secure supply, it was very important, so we
2 included that provision.

11:39

11:39

3 Q. You included that provision in Section 6.2 which
4 you said deals with short-term undersupply, correct?

11:39

11:39

5 A. No, I said it dealt with undersupply.

11:40

11:40

6 Q. There's no provision in 6.3 that allows
7 CertainTeed to require Progress Energy to go out in the
8 marketplace and buy gypsum, is there?

11:40

11:40

9 A. Again, my testimony was that's the reason for the
10 "may terminate" language. And it really -- it's really the
11 default position. If you don't terminate, well, what do you
12 do? And what you do is you default to 6.2.

11:40

11:40

13 Q. Well, one thing CertainTeed could do is choose not
14 to terminate and just continue the contract and accept
15 whatever supply was available, correct?

11:40

11:40

16 A. No. It would be undersupplying. You'd have to
17 invoke remedy 6.2.

11:40

11:40

18 Q. And that's based on your interpretation of the
19 "may terminate" language, which you acknowledged today you
20 did not focus on during the negotiation of the agreement?

11:40

11:40

21 A. Correct.

11:40

11:40

22 Q. Now, is it right that Mr. Morrow was the lead
23 negotiator for the 2008 agreement?

11:40

11:40

24 A. Yes.

11:40

11:40

25 Q. You have limited involvement with the

11:40

11:40

11:40

1 2008 agreement, correct?

11:40

2 A. That's correct.

11:40

3 Q. You weren't involved in negotiating Section 3.9 in
4 the 2008 agreement; is that right?

11:41

5 A. No.

11:41

6 Q. You don't recall any discussion or analysis
7 regarding Section 3.9?

11:41

8 A. Correct. Not specifically.

11:41

9 Q. And you don't recall any discussions, either
10 internally or externally, regarding the Article 6 remedies
11 provisions in connection with the 2008 agreement; is that
12 right?

11:41

13 A. Correct.

11:41

14 Q. You never considered how the exclusive remedies
15 provision in the 2008 agreement might limit or affect either
16 party's rights to pursue a particular remedy, correct?

11:41

17 A. Correct. As I said, I wasn't involved in the
18 2008 agreement.

11:41

19 Q. Now, I want to talk just very briefly about
20 CertainTeed's business circumstances in 2008.

11:41

21 You're still with the company?

11:41

22 A. For 27 years.

11:41

23 Q. And you recall that in the 2008-2009 time period,
24 CertainTeed was swimming in gypsum, correct?

11:41

25 A. The -- we had more gypsum than we could consume.

11:42

1 Q. And you were also aware that this oversupply
2 situation ultimately led to efforts by CertainTeed to
3 renegotiate its contract with Progress Energy.

4 You're aware of that, right?

5 A. I'm aware, yes.

6 Q. In terms of how the agreement was renegotiated or
7 modified, you weren't involved after 2008, so you can't talk
8 about what the parties intended in 2008 when they modified
9 the agreement, and you also are not able to talk about what
10 the parties intended in 2012 when they modified the
11 agreement again; is that right?

12 A. That's correct.

13 MR. TUCKER: Those are all the questions I have
14 for Mr. Mayer.

15 Thank you.

16 MR. PHILLIPS: Can we have a moment, Your Honor?

17 THE COURT: Yes, you may.

18 Let me -- may I ask a question of each of you?

19 I think that I heard him testify that he did some
20 calculations in regard to what the liquidated damages would
21 be.

22 Will there be testimony about that from anybody?

23 MS. MARSTON: I don't believe so, Your Honor.

24 MR. PHILLIPS: I don't believe so.

25 THE COURT: Okay.

11:44

1 MS. MARSTON: Thank you, Your Honor.

11:44

2 REDIRECT EXAMINATION by Ms. Marston:

11:44

3 Q. Mr. Mayer, if you will turn to Exhibit 91, and in
4 particular to page 9.

11:44

5 A. Page 9, you said?

11:45

6 Q. Yes.

11:45

7 A. Yes, I'm there.

11:45

8 Q. And this is the May 27, 2003, draft of the
9 contract.

11:45

10 Is there any provision -- is there any provision
11 there about exclusive remedies that we looked at in some of
12 the later drafts?

11:45

13 A. In Section 9?

11:45

14 Q. That's correct.

11:45

15 A. There's no provision for exclusive remedies here.

11:45

16 Q. So the sole and exclusive remedies provision had
17 not been put in as of May 27, 2003?

11:46

18 A. Yeah. They're still in the 6.2.

11:46

19 Q. Look at Exhibit 92 for me, please.

11:46

20 A. Okay. I'm there.

11:46

21 Q. And this was the July 24, 2003, draft that was
22 sent by Progress.

11:46

23 And is this where Progress added the exclusive
24 remedies provision?

11:46

25 A. Yes, that's where they added it.

11:46

11:46

1

Q. Go back to the remedies section.

11:46

2

Had the "may terminate" language been added yet?

11:47

3

A. No, that wasn't in there yet.

11:47

4

Q. The very next draft is Exhibit 93 --

11:47

5

A. Okay.

11:47

6

Q. -- from BPB on August 25th, 2003. Take a look at

11:47

7

that.

11:47

8

A. Which section again?

11:48

9

Q. 6.3.

11:48

10

A. Yes, I'm there.

11:48

11

Q. Is this where BPB added the "may terminate"

11:48

12

language?

11:48

13

A. Yes. It's a redline version, yes.

11:48

14

Q. So the next draft right after the exclusive

11:48

15

language was put into 10.3, BPB added the "may terminate"

11:48

16

language?

11:48

17

A. It appears so.

11:48

18

Q. Mr. Mayer, you said you didn't have any

11:48

19

discussions with Progress Energy.

11:48

20

Did you think the words "may terminate" needed

11:48

21

explanation?

11:48

22

MR. TUCKER: Objection. He's testified that he

11:48

23

didn't recall thinking about that at the time.

11:48

24

MS. MARSTON: I'll withdraw the question.

11:48

25

Q. Mr. Mayer, did you think that the optional nature

11:48

1 of the remedies as expressed by the lawyers doing the
2 drafting needed explanation?

11:48

11:48

3 A. I think -- I think I know. My conversation with
4 Mark Lontchar were to describe what was --

11:49

11:49

5 Q. I'm not going to ask you to disclose your
6 discussions with your counsel at that time.

11:49

11:49

7 A. I described -- I had requested Mark Lontchar to
8 address the need to secure supply --

11:49

11:49

9 Q. We're going to move on from that question.

11:49

10 If you'd turn to Exhibit 5. I'm going to make you
11 switch notebooks one more time.

11:49

11:49

12 A. Okay. I'm there.

11:49

13 Q. The language that Mr. Tucker pointed out to you in
14 9.4 says:

11:50

11:50

15 "Where a remedy is specified in this
16 agreement for a particular breach or occurrence."

11:50

11:50

17 If you go back to the remedies section in 6.2,

11:50

18 6.2 addresses a breach of the obligation to deliver under

11:50

19 Section 3.1, doesn't it?

11:50

20 A. Correct.

11:50

21 MR. TUCKER: Objection. Calls for a legal
22 conclusion.

11:50

11:50

23 Q. Did you have an understanding --

11:50

24 THE COURT: Just a moment.

11:50

25 You should interpret the question to say what is

11:50

1 your understanding. You obviously cannot express any
2 opinion as to what the legal effect is.

11:50

11:50

3 MR. TUCKER: And I also object, Your Honor,
4 because he's testified that he didn't have any particular
5 understanding of the exclusive remedies provision beyond
6 what he testified to previously, so --

11:50

11:50

11:50

7 THE COURT: Good question for recross.

11:50

11:50

8 MR. TUCKER: Okay.

11:50

9 Q. Mr. Mayer, I'm not asking you about the exclusive
10 remedies provision so much, but what did Section 6.2 and
11 Section 6.3, what was your understanding of what those
12 addressed in terms of providing a remedy to BPB?

11:50

11:51

11:51

13 MR. TUCKER: Objection. Asked and answered.

11:51

11:51

14 THE COURT: Without going back over the ground we
15 had before, I think the question that you're trying to ask
16 is, what is the relationship between 9.4 and 6.2 and 6.3?

11:51

11:51

17 MS. MARSTON: Not entirely.

11:51

18 Q. Mr. Mayer, was it your understanding that both
19 Section 6.2 and 6.3 addressed a breach of the obligation to
20 deliver 50,000 tons of gypsum per month?

11:51

11:51

21 A. Yes.

11:51

11:51

22 MS. MARSTON: No further questions.

11:51

23 MR. TUCKER: No further questions from us,

11:51

24 Your Honor.

11:51

25 THE COURT: You may step down, sir.

11:51

1 May the witness be excused?

11:51

2 MS. MARSTON: Yes. Thank you, Your Honor.

11:52

3 THE COURT: Do I understand that we're going to
4 take the lunch break?

11:52

5 MR. PHILLIPS: Your Honor, that seems to make
6 sense to me. And as we discussed, we'll do Mr. --

11:52

7 THE COURT: Well, come back at 1:30.

11:52

8 MR. PHILLIPS: Okay.

11:52

9 THE COURT: And then, again, to the extent --
10 we'll see where we are when we finish the witness. If we
11 can finish the deposition before shortly after 5:00, but I
12 can't go much past that. And if we recess before 5:00,
13 that's okay too.

11:52

14 MR. PHILLIPS: Thank you, Your Honor.

11:52

15 THE COURT: Let me see the two of you gentlemen up
16 at the bench, if I might.

11:52

17 And y'all are welcome to come as well.

11:52

18 (Bench conference, not reported.)

11:52

19 THE COURT: We'll be in recess until 1:30.

11:52

20 MS. MARSTON: Your Honor, if we may, or we can do
21 it after lunch, we didn't move the exhibits in.

11:52

22 THE COURT: And -- we certainly can do it after

11:52

23 lunch and we'll run off the list. And you've got to decide

11:52

24 what you're going to do on a couple of them you didn't

11:52

25 publish, but you're admitting when there's no redaction.

11:58

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MS. MARSTON: I didn't publish because there had been no redaction.

THE COURT: I know. So when you move for admitting, you're going to have to specify at some point in time what's going to be under seal, and then put a nonredacted copy in.

MS. MARSTON: We will do that when we come back from lunch. Thank you, Your Honor.

(Recess.)

THE COURT: All right. I think you're ready for your next witness; is that right, sir?

MS. MARSTON: Yes, Your Honor, before we start, for Peter Mayer --

THE COURT: We need to do a little exhibit stuff.

MS. MARSTON: Yes.

And plaintiff would move for the admission all of these exhibits under seal: Exhibit 5, 90 --

THE COURT: Whoa, whoa, whoa. The exhibits -- several of these exhibits you showed were shown in the redacted version, so there's no reason for --

MS. MARSTON: Well, there will be -- there should be a version filed under seal that is not redacted, as well as a version that will be filed with redactions for the public record.

THE COURT: Okay. And, again, I have to defer at

OFFICIAL COPY
Mar 20 2020

1 ROBERT MORROW,

2 having been first duly sworn by the clerk of the court,

3 testified as follows:

4 THE COURT: Please be seated. We trick people
5 sometimes. They raise the wrong hand. And then some people
6 use the Quran instead of the Bible.

7 THE WITNESS: Is that what that is, is the Quran?

8 THE COURT: It's just --

9 THE WITNESS: Okay.

10 THE COURT: You may proceed.

11 DIRECT EXAMINATION by Ms. Marston:

12 Q. Good afternoon. Can you state your full name for
13 the record, please.

14 A. Robert John Morrow.

15 Q. Where do you live, Mr. Morrow?

16 A. I live in Toronto, Ontario, Canada.

17 Q. What did you do for a living?

18 A. I run a gypsum consulting business.

19 Q. What is the name of that business?

20 A. Innogyps, Limited.

21 [Reporter clarification.]

22 A. Innogyps, I-N-N-O-G-Y-P-S, L-T-D, period.

23 Q. What is Innogyps, Mr. Morrow?

24 A. It's a consulting business that focuses on
25 providing consulting services to the gypsum industry, either

0 1 : 3 2

1 the suppliers to the industry, the manufacturers, and in
2 some cases, the investors.

0 1 : 3 2

0 1 : 3 2

3 Q. How long have you run Innogyys?

0 1 : 3 2

4 A. I bought the business 5 years ago.

0 1 : 3 2

5 Q. Do you have a science or engineering background?

0 1 : 3 2

6 A. No, I don't. I'm a bachelor of commerce graduate,
7 and I have the equivalent of a CPA designation.

0 1 : 3 3

0 1 : 3 3

8 Q. Prior to starting with Innogyys, you worked for
9 CertainTeed or one of its predecessors?

0 1 : 3 3

0 1 : 3 3

10 A. That's correct. I spent about 23 years with them.

0 1 : 3 3

11 Q. When did you start?

0 1 : 3 3

12 A. In September 1986.

0 1 : 3 3

13 Q. What company was that at the time?

0 1 : 3 3

14 A. That was WestRock, Limited, I believe.

0 1 : 3 3

15 Q. After you started with WestRock, can you briefly
16 run us through the positions you held?

0 1 : 3 3

0 1 : 3 3

17 A. I joined the company as assistant controller. The

0 1 : 3 3

18 company was in the phase of moving from a downsizing to

0 1 : 3 3

19 re-establishing growth, and so I was the first person that

0 1 : 3 3

20 was hired, and about a year later they hired three or four

0 1 : 3 3

21 more people and I moved from the controller's position into

0 1 : 3 3

22 sort of a growth-oriented position called corporate

0 1 : 3 4

23 planning. And I spent probably 10 years going through

0 1 : 3 4

24 economic cycles with that title. About half my time was

0 1 : 3 4

25 focused on annual and strategic planning, and the other half

0 1 : 3 4 1 of my time was doing internal consulting work with the
0 1 : 3 4 2 business, helping operations, marketing, production,
0 1 : 3 4 3 engineering, and helping the executive in the organization
0 1 : 3 4 4 print up and sell projects to the parent company.

0 1 : 3 4 5 Q. And after you did that for 10 years, what was your
0 1 : 3 4 6 next position?

0 1 : 3 4 7 A. We -- we ended up with a new president who had
0 1 : 3 4 8 a -- came from a supply chain background. I'm trying to
0 1 : 3 4 9 think. There's actually a name for that in -- in the
0 1 : 3 4 10 university. It'll come back to me. He restructured the
0 1 : 3 4 11 business and offered me a director's role in the supply
0 1 : 3 5 12 chain supply. Supply chain hadn't existed in the business
0 1 : 3 5 13 as such, so I was given the opportunity to create a supply
0 1 : 3 5 14 chain group and a mandate. And I spent close to 10 years
0 1 : 3 5 15 doing that kind of stuff as the organization grew.

0 1 : 3 5 16 Q. What company was that with?

0 1 : 3 5 17 A. That was still with -- it was still the same
0 1 : 3 5 18 company, but we did change the name to reflect our parent
0 1 : 3 5 19 company, and we changed the name from BPB -- or from
0 1 : 3 5 20 WestRock to BPB Canada.

0 1 : 3 5 21 Q. When did you leave the company?

0 1 : 3 5 22 A. The end of October 2009.

0 1 : 3 5 23 Q. Why?

0 1 : 3 5 24 A. I was told that the company had decided that they
0 1 : 3 5 25 were no longer going to be doing growth initiatives and as

01:35 1 the economy was in such poor shape in both Europe and
01:35 2 North America, my role was no longer required.

01:35 3 Q. During your corporate planning role, did your
01:35 4 responsibilities for growth include looking for the
01:36 5 potential new manufacturing plants?

01:36 6 A. Yeah. I was involved in probably a dozen
01:36 7 acquisitions and divestitures of the company over the years.
01:36 8 2000 was the first large one where we acquired about
01:36 9 10 operating sites in the US from Celotex. And in 2002 we
01:36 10 acquired another six or eight sites from James Hardy. And I
01:36 11 grew the business in North America from about a \$200 million
01:36 12 Canadian business to about a \$1.2 billion North American
01:36 13 business.

01:36 14 Following that, the fellow who was chief executive
01:36 15 of WestRock became chief executive of the whole group. He
01:36 16 came to me said, "Rob, now that we've done this growth, we
01:36 17 need to look at our next phase." And the next phase wasn't
01:36 18 going to involve acquisition, so he said, "Well, where would
01:36 19 we build our next factories?" And so I initiated a project
01:37 20 to identify where those places might be and how we might
01:37 21 take advantage of growth opportunities in that area.

01:37 22 Q. And was this with BPB at that time?

01:37 23 A. Yes, it was.

01:37 24 Q. Were you -- was BPB looking in particular regions?

01:37 25 A. Yeah. We acquired most of the factories in the

0 1 : 3 7 1 west of the Mississippi. There were two factories, one in
0 1 : 3 7 2 Jacksonville and one in Carrollton. That didn't leave us
0 1 : 3 7 3 with much of an ability to service the eastern seaboard of
0 1 : 3 7 4 the US, and so we focused our efforts on looking for
0 1 : 3 7 5 opportunities in that area.

0 1 : 3 7 6 Q. And how was BPB identifying opportunities in that
0 1 : 3 7 7 area?

0 1 : 3 7 8 A. Well, before you can build a gypsum factory, you
0 1 : 3 7 9 have access to gypsum. It's kind of -- it's sort of a -- I
0 1 : 3 7 10 don't know, I guess, a truism. You can't turn gypsum into
0 1 : 3 7 11 gypsum if you don't have it in the first place.

0 1 : 3 7 12 So the eastern half of the US has almost no
0 1 : 3 8 13 natural gypsum. So we started exploring the opportunities
0 1 : 3 8 14 for the synthetic gypsum.

0 1 : 3 8 15 Synthetic gypsum is principally manufactured by
0 1 : 3 8 16 companies that are emitting -- or were emitting sulfur
0 1 : 3 8 17 dioxide as a by-product of the process. One of the ways to
0 1 : 3 8 18 cleanse the sulfur dioxide that's emitted was to mix it with
0 1 : 3 8 19 an reagent called lime or limestone and produce a
0 1 : 3 8 20 by-product, gypsum.

0 1 : 3 8 21 [Reporter clarification.]

0 1 : 3 8 22 A. To produce a by-product that was -- that's gypsum.
0 1 : 3 8 23 It's a very simple exercise. You take an acid and a base
0 1 : 3 8 24 and you mix them together and you end up with a reaction.

0 1 : 3 8 25 We explored all of the companies that had declared

0 1 : 3 8 1 that they were moving this direction. We went to public
0 1 : 3 9 2 sources and identified locations where they were going to
0 1 : 3 9 3 produce, or at least our estimates were that they were going
0 1 : 3 9 4 to produce at least half a million tons of synthetic gypsum.

0 1 : 3 9 5 And we looked for power plants because it was principally
0 1 : 3 9 6 power plants at that point that were expecting to convert.

0 1 : 3 9 7 We identified probably about a dozen of them --
0 1 : 3 9 8 excuse me -- and then one of our team began contacting the
0 1 : 3 9 9 plants to see if they were, A, going to go forward, and, B,
0 1 : 3 9 10 were interested in looking at a partner to consume their
0 1 : 3 9 11 by-product gypsum.

0 1 : 3 9 12 And from that initial conversations, a number of
0 1 : 3 9 13 participants either said no or didn't return our calls, and
0 1 : 3 9 14 others said, yes, we are interested, and that's how we ended
0 1 : 3 9 15 up in the second phase of conversations.

0 1 : 3 9 16 Q. Who at BPB was part of this process?

0 1 : 4 0 17 A. Well, there were a number of us. We had a gypsum
0 1 : 4 0 18 strategy committee and virtually everybody on that committee
0 1 : 4 0 19 had some input. Principally, it was Peter Mayer,
0 1 : 4 0 20 John College, and myself.

0 1 : 4 0 21 Q. Mr. Morrow, did you have any communications with
0 1 : 4 0 22 any of these potential suppliers?

0 1 : 4 0 23 A. I had almost no direct communication with any of
0 1 : 4 0 24 them.

0 1 : 4 0 25 Q. How did BPB identify Progress Energy as a

01:40 1 potential supplier?

01:40 2 A. We followed that process that we discussed and
01:40 3 when -- I believe it was John College made a contact with
01:40 4 the plant and subsequently their corporate office. They
01:40 5 came back and said, yeah, we'd be interested in having a
01:40 6 conversation with you about the future. And from that, we
01:40 7 established a meeting date. Peter and I had put together
01:40 8 sort of a presentation and explanation of who we are and
01:40 9 what we were trying to accomplish, and we went to their
01:41 10 corporate office in North Carolina and had a meeting with
01:41 11 them.

01:41 12 Q. Once BPB identified a potential source of gypsum,
01:41 13 what were the most important factors in developing that
01:41 14 relationship?

01:41 15 A. Oh, it's security of supply of gypsum, it's
01:41 16 quality of the gypsum, and cost.

01:41 17 Q. What do you mean by "security of supply"?

01:41 18 A. The company had a standard rule that if you had a
01:41 19 gypsum line that was supplying your plant, or we had one, we
01:41 20 had to have a proven reserve of a minimum of 20 years going
01:41 21 forward. And that's so that the investment in the plant
01:41 22 could be proved out over a period of time.

01:41 23 And we used that same analogy. We actually went
01:41 24 for longer periods of time when we were in conversations,
01:41 25 but sometimes in the conversations with the power suppliers

01:41

1 they weren't prepared to commit to longer terms.

01:41

2 Q. How much gypsum was BPB looking to secure?

01:41

3 A. We set sort of an arbitrary limit of half a

01:42

4 million tons. The reason for that was there's sort of an

01:42

5 economic size of a factory, and we felt that half a million

01:42

6 tons would give us that economic size.

01:42

7 Some of the participants were considerably short

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8 of that and we didn't end up in any conversations with them.

01:42

9 Others were looking to sell more and so started -- we at

01:42

10 least had a conversation whether we could help them or not.

01:42

11 Q. Did Progress Energy meet the factors that BPB

01:42

12 found to be important?

01:42

13 A. Certainly they ticked off most of the boxes. They

01:42

14 were a company that looked like they'd be interested in

01:42

15 getting rid of their waste gypsum. They were located in an

01:42

16 interesting place. Not located anywhere near a big market,

01:42

17 but they're located with the ability to get access to a

01:42

18 number of big markets around them. And they had sufficient

01:42

19 quantity of gypsum.

01:42

20 The only challenge that we sort of had to overcome

01:43

21 was the fact that it was not located anywhere with access to

01:43

22 water or transportation systems to be able to bring in raw

01:43

23 materials and/or ship out goods. So that was our -- the one

01:43

24 thing that didn't quite tick the box for us.

01:43

25 Q. After your initial meetings, did the parties move

01:43 1 forward to develop an agreement?

01:43 2 A. Yes, they did.

01:43 3 Q. Who were the primary negotiators of that for BPB?

01:43 4 A. John College and then subsequently Peter Mayer
01:43 5 were the two people who were the face of our organization in
01:43 6 negotiating the supply agreement.

01:43 7 Q. What was your role in negotiating the parties'
01:43 8 supply agreement?

01:43 9 A. I was sort of a back-room participant in that. My
01:43 10 other role in connection with this is that, for a project of
01:43 11 this nature, it was my job to communicate and to sell this
01:43 12 project to the shareholders. So I had to be involved in the
01:44 13 design of what we wanted to do and the end result of the
01:44 14 agreement so that I would -- clearly understood what was
01:44 15 going on.

01:44 16 Q. Mr. Morrow, are you familiar with the 2004 supply
01:44 17 agreement between BPB and Progress Energy?

01:44 18 A. I am.

01:44 19 Q. What was the minimum monthly quantity of gypsum
01:44 20 that was going to be delivered under the 2004 agreement?

01:44 21 A. The agreement was structured around 600,000 tons
01:44 22 of annual gypsum, and it subsequently was narrowed down to a
01:44 23 monthly delivery quantity so that there was not a risk of
01:44 24 all the material being delivered in one quarter or something
01:44 25 of that nature. So it was plus or minus variances. The

01:44

1 expectation was it would be 50,000 tons of gypsum.

01:44

2 Q. Per month?

01:44

3 A. Per month.

01:44

4 Q. Are you familiar with the remedies provisions of
5 the 2004 agreement?

01:44

6 A. I am.

01:44

7 Q. What was your involvement in crafting the remedies
8 provisions?

01:44

9 A. Our original concept was that we wanted to deal
10 with a situation where there was less than the 600,000 tons
11 being delivered. And we also wanted to sort of deal with
12 the situation where if, for whatever reason, one of the
13 parties decided they no longer wanted to be in the
14 relationship, how that would work out. Over time and the
15 negotiations between Peter and Progress Energy, it evolved
16 into the two clauses that are in the agreement. And that
17 dealt with, I guess, undersupply and discontinuance of
18 supply.

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19 Q. Did you discuss the remedies provision with
20 Mr. Mayer?

01:45

01:45

21 A. Yes. He -- about the time the agreement was
22 coming to conclusion, he came to me and the two of us, we
23 spent -- I think it was a Friday night, we spent 4 or
24 5 hours going over all the remedies provisions, making sure
25 we understood how they worked so that we could communicate

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01:46

1 internally why we thought they were a good idea. And also
2 we identified a couple of things that we thought maybe we
3 should try and change in the final version of the agreement.

01:46

01:46

01:46

4 Q. If you'll turn to Exhibit 5, which is in one of
5 the notebooks there on the stand.

01:46

01:46

6 A. Okay.

01:46

01:46

7 Q. Exhibit 5, Mr. Mayer has already testified this is
8 a copy of the executed 2004 agreement.

01:46

9 If you'll turn to page 12, please.

01:46

10 A. Okay.

01:46

01:46

11 Q. Before we look at this specifically, can you
12 explain to me what your understanding is about what you --
13 and what you discussed with Mr. Mayer about how the remedies
14 provision would work?

01:47

01:47

15 A. The way the discontinued supply remedy dealt with
16 a situation where less than half of the gypsum was being
17 delivered, as opposed to we're going to cease operating, it
18 left -- it left us in -- I felt -- and I think as Peter and
19 I talked about it, we ended up with a situation saying this
20 doesn't seem to fit with what our original goals were. And
21 so we started looking at six -- the first one being an
22 undersupply, which sort of encompassed a part of what was in
23 the second one. We wanted to make sure that we had the
24 option of choosing between 6.2 and 6.3 in terms of the
25 remedies.

01:47

01:49 1 gypsum to us from another source, or pay us to go and find
01:49 2 the gypsum, or we would have had the option of terminating
01:49 3 the agreement and dismantling the factory and moving
01:49 4 somewhere else.

01:49 5 Q. Can you tell me whether you believed Section 6.2
01:49 6 in this agreement dealt only with short-term undersupply
01:49 7 issues?

01:49 8 A. I think it dealt with undersupply for the life of
01:49 9 the agreement. It wasn't a matter of whether it was
01:50 10 short-term or long-term.

01:50 11 Q. Can you tell me whether you believed that
01:50 12 Section 6.3 here dealt only with long-term supply issues?

01:50 13 A. Yeah, it was aimed to deal with a substantial
01:50 14 change in the way the business was operating.

01:50 15 Q. Why did you believe that Section 6.2 was not meant
01:50 16 to deal only with short-time supply issues?

01:50 17 A. Because it could be all kinds of reasons why the
01:50 18 company could be delivering less than 50,000 tons a month
01:50 19 for a either a period of months or a period of years. And
01:50 20 this comes back to what I talked about a few minutes ago,
01:50 21 and that is that our goal was to make sure we had the
01:50 22 flexibility of deciding whether we had the ability to
01:50 23 continue operating the plant or we would choose to terminate
01:50 24 the arrangement and move somewhere else.

01:50 25 Q. What was your understanding of the types of

0 1 : 5 0 1 breaches that Section 6.2 and Section 6.3 were meant to
0 1 : 5 0 2 address?

0 1 : 5 0 3 A. Failure to supply gypsum.

0 1 : 5 1 4 Q. What was your understanding of the difference
0 1 : 5 1 5 between "undersupply" and "discontinued supply"?

0 1 : 5 1 6 A. Well, discontinued supply is undersupply, but
0 1 : 5 1 7 undersupply is not discontinued supply.

0 1 : 5 1 8 Q. What was your understanding of the difference
0 1 : 5 1 9 between undersupply and failing to supply 50 percent of the
0 1 : 5 1 10 minimum monthly quantity?

0 1 : 5 1 11 A. Failing to deliver 50 percent is just another way
0 1 : 5 1 12 of being undersupply.

0 1 : 5 1 13 Q. What was your understanding of the difference
0 1 : 5 1 14 between undersupply and supplying 300,000 dry tons or less
0 1 : 5 1 15 of gypsum?

0 1 : 5 1 16 MR. TUCKER: Objection to the leading nature of
0 1 : 5 1 17 the question.

0 1 : 5 1 18 MS. MARSTON: I asked Mr. -- I'm sorry,
0 1 : 5 1 19 Your Honor.

0 1 : 5 1 20 THE COURT: I don't think she's limited to the
0 1 : 5 1 21 terms of the contract, and so I'll allow the question.

0 1 : 5 2 22 Q. Do you need me to ask it again?

0 1 : 5 2 23 A. Yes, please.

0 1 : 5 2 24 Q. So, Mr. Morrow, what was your understanding of the
0 1 : 5 2 25 difference between undersupply and supplying 300,000 net dry

01:52 1 tons or less of gypsum?

01:52 2 A. It was a conscious decision on our part to try and
01:52 3 make the less than 300,000 tons and undersupply option so we
01:52 4 could choose to have gypsum supplied that way. So it was
01:52 5 our intention that it be equivalent to undersupply. Or we
01:52 6 would at least have the choice.

01:52 7 Q. After the 2004 agreement was executed, when was
01:52 8 BPB acquired by Saint Gobain?

01:52 9 A. It was a fairly long process. It started, I
01:52 10 think, in August of 2005 and finished in January or February
01:52 11 of 2006.

01:52 12 Q. Did the parties end up renegotiating the
01:52 13 2004 agreement?

01:52 14 A. Yes, they did.

01:52 15 Q. Why?

01:52 16 A. In part, because the economic circumstances
01:53 17 starting in 2007 became -- or 2006 -- 2005, 2006 from the
01:53 18 gypsum industry -- excuse me -- made it challenging for the
01:53 19 organization to try and figure out how they were going to
01:53 20 build a new factory and to -- what was a seriously declining
01:53 21 gypsum demand situation.

01:53 22 Q. When did the parties start discussion about
01:53 23 renegotiating the 2004 agreement?

01:53 24 A. I don't remember the exact date, but it was
01:53 25 sometime in the summer of 2007.

0 1 : 5 3 1 It actually started by a request to me to go down
0 1 : 5 3 2 and find out if they'd be interested, and I flew down and
0 1 : 5 3 3 met with Barbara Coppola and had a conversation. I don't
0 1 : 5 3 4 remember when that actually happened.

0 1 : 5 3 5 Q. Was Progress Energy interested?

0 1 : 5 3 6 A. I don't think they were happy with that. I'm not
0 1 : 5 3 7 sure they were overly surprised either, but they made it
0 1 : 5 4 8 perfectly clear to me that they wanted us to make sure that
0 1 : 5 4 9 under no circumstances were they worse off as a result of
0 1 : 5 4 10 our delay.

0 1 : 5 4 11 [Reporter clarification.]

0 1 : 5 4 12 A. Worse off. They weren't harmed in any way as a
0 1 : 5 4 13 result of the delay.

0 1 : 5 4 14 Q. Mr. Morrow, what was your role in the
0 1 : 5 4 15 renegotiations?

0 1 : 5 4 16 A. I led those on behalf of BPB and CertainTeed.

0 1 : 5 4 17 Q. Who was the lead negotiator on behalf of
0 1 : 5 4 18 Progress Energy?

0 1 : 5 4 19 A. It was Barbara Coppola.

0 1 : 5 4 20 Q. Do you remember when you started exchanging drafts
0 1 : 5 4 21 of a potential amended supply agreement?

0 1 : 5 4 22 A. Yeah. That took place sometime either in the late
0 1 : 5 4 23 summer or early fall of 2007.

0 1 : 5 4 24 Q. Can you turn to Exhibit 16 in your notebook.

0 1 : 5 5 25 A. Okay.

01:56 1 we can load the gypsum onto railcars and ship it to other
01:56 2 places.

01:56 3 Q. Was a rail loading facility always part of the
01:56 4 plan as something that would be built with the plant?

01:56 5 A. No. It was exclusively there to deal with the
01:56 6 consequences of delay.

01:56 7 Q. Who paid for the rail loading facility?

01:56 8 A. CertainTeed did.

01:56 9 Q. If you'll turn to Exhibit 17 and tell me if you
01:56 10 can identify that document, please.

01:56 11 A. Yes. That's the response to Mr. Moses' letter
01:56 12 from Progress Energy.

01:57 13 Q. And it looks like there are 14 items here that
01:57 14 Progress says it wishes to discuss.

01:57 15 Do you recall discussing the items that are listed
01:57 16 in this letter?

01:57 17 A. Yes, I do.

01:57 18 Q. When did those discussions occur?

01:57 19 A. It took place in various forms throughout the fall
01:57 20 of 2007, but the final negotiation of that and the agreement
01:57 21 took place on February 13th and 14th of 2008.

01:57 22 Q. Item 1 here in the letter in Exhibit 17 says that:

01:57 23 "PEC expects that any delay in the
01:57 24 construction and operation of the CertainTeed
01:57 25 plant will result in no additional risks, costs,

0 1 : 5 7 1 or other financial burden to PEC."

0 1 : 5 7 2 What did you understand that to mean?

0 1 : 5 7 3 A. That's essentially a statement of fact, the first
0 1 : 5 8 4 statement they made to us when I talked to them about delay,
0 1 : 5 8 5 is that there would be no additional risks or costs
0 1 : 5 8 6 associated with it. And it also was a rephrasing of
0 1 : 5 8 7 Don Moses' comment at the end of the previous -- on his
0 1 : 5 8 8 letter:

0 1 : 5 8 9 "CertainTeed will work with Progress Energy
0 1 : 5 8 10 to take the necessary steps to ensure that we meet
0 1 : 5 8 11 our obligations to accept gypsum under the supply
0 1 : 5 8 12 agreement, that we do not add additional financial
0 1 : 5 8 13 burden to your organization, and that we do not
0 1 : 5 8 14 impair the operation of the power plants."

0 1 : 5 8 15 Q. Item Number 5 in Exhibit 17 says:

0 1 : 5 8 16 "CertainTeed to expand the storage area in
0 1 : 5 8 17 order to increase the storage capacity from
0 1 : 5 8 18 300,000 tons to 650,000 tons."

0 1 : 5 8 19 A. Yes.

0 1 : 5 8 20 Q. Whose idea was that?

0 1 : 5 8 21 A. I believe that was ours. We were looking at all
0 1 : 5 8 22 kinds of ways to how we could deal with it, one of which was
0 1 : 5 8 23 we looked at the property, and I think it was initially one
0 1 : 5 9 24 of the people that worked for me who came to me said, well,
0 1 : 5 9 25 this property at 300,000 tons hardly looks like it's got

0 1 : 5 9 1 anything on it so can we do an engineering study to see how
0 1 : 5 9 2 much we could put on it? And that was our idea.

0 1 : 5 9 3 Q. Item Number 12 on the second page says:

0 1 : 5 9 4 "CertainTeed is to permit and construct
0 1 : 5 9 5 landfill storage for gypsum filter cake at its own
0 1 : 5 9 6 cost and expense, and PEC to have the right to
0 1 : 5 9 7 deliver excess gypsum filter cake directly to the
0 1 : 5 9 8 CertainTeed landfill storage site."

0 1 : 5 9 9 What was that about?

0 1 : 5 9 10 A. As I recall, they were seeking sort of an outlet
0 1 : 5 9 11 where they could take the gypsum if, for whatever reason, we
0 1 : 5 9 12 failed to take the material fast enough, they didn't need to
0 1 : 5 9 13 go and ask permission or go and seek an alternative source.
0 1 : 5 9 14 So that's what I think that was all about.

0 1 : 5 9 15 Q. Did that ultimately happen?

0 2 : 0 0 16 A. Not while I was working there.

0 2 : 0 0 17 Q. Item Number 10, Mr. Morrow, on Exhibit 17 says:

0 2 : 0 0 18 "CertainTeed to increase its purchase
0 2 : 0 0 19 obligations above 600,000 tons to a level at or
0 2 : 0 0 20 near the CertainTeed plant's capacity."

0 2 : 0 0 21 Whose request was that?

0 2 : 0 0 22 A. That from Progress Energy.

0 2 : 0 0 23 Q. What did you understand that request to mean?

0 2 : 0 0 24 A. They were trying to get us to commit to take more
0 2 : 0 0 25 gypsum, to make sure that we would take all that we were

02:00

1 obligated to and possibly even take more.

02:00

2 Q. Mr. Morrow, after these letters in Exhibits 16 and
3 17 were exchanged, how did the parties work to revise the
4 supply agreement?

02:00

5 A. Sorry. Can you ask that again, please.

02:00

6 Q. Sure.

02:00

7 After these letters were exchanged, what was the
8 next step in the renegotiation process?

02:00

9 A. Oh. We set up a meeting in Raleigh on February
10 the 13th and 14th, and we set those 2 days aside to
11 negotiate. We negotiated the supply agreement.

02:01

12 Q. Can you take a look at Exhibit 11 in your notebook
13 for me, please.

02:01

14 A. Okay. I've got it.

02:01

15 Q. Do you know what this document is?

02:01

16 A. Yeah. This is a copy of an email with an
17 attachment from Pam Larger. My understanding was Pam was an
18 in-house attorney for Progress Energy, and this was a draft
19 of the supply agreement that she sent to us in advance to
20 the February 13th, 14th meeting.

02:01

21 Q. And this was sent to Larry Rayburn, Sandy Wyckoff,
22 Barbara Coppola, and you.

02:01

23 Are those the people who were at the meeting in
24 Raleigh you mentioned?

02:02

25 A. Yeah, that's who was there.

02:02

0 2 : 0 3 1 this clause. The first substantial change was the
0 2 : 0 3 2 elimination of the start-up period because there was not
0 2 : 0 3 3 expected to be a start-up period.

0 2 : 0 3 4 The start-up period that was originally drafted in
0 2 : 0 3 5 the 2004 agreement was to deal with the time frame where
0 2 : 0 3 6 Progress Energy was starting up the scrubbers on the power
0 2 : 0 4 7 plant.

0 2 : 0 4 8 So the first thing was to eliminate that
0 2 : 0 4 9 section of -- at least -- I'm putting words into their
0 2 : 0 4 10 thought process, but that's what it looked like to me.

0 2 : 0 4 11 MR. TUCKER: Your Honor, to the extent the witness
0 2 : 0 4 12 is putting words into my client's thought process --

0 2 : 0 4 13 THE COURT: He just acknowledged what he's talking
0 2 : 0 4 14 about is what his understanding was. He can't say about
0 2 : 0 4 15 them. He clarified that in his answer.

0 2 : 0 4 16 Q. So, Mr. Morrow, your understanding was the
0 2 : 0 4 17 start-up period was removed?

0 2 : 0 4 18 A. Yes. And that's to reflect the fact that there
0 2 : 0 4 19 was no -- not going to be a start-up period.

0 2 : 0 4 20 Q. Okay.

0 2 : 0 4 21 A. Secondly, they -- the definition of "minimum
0 2 : 0 4 22 monthly quantity" that was in the definition section of the
0 2 : 0 4 23 agreement migrated into this clause.

0 2 : 0 4 24 And, thirdly, they introduced a comment -- the
0 2 : 0 5 25 concept of commercial operation of the loading facility and

1 commercial operation of the plants.

2 And I guess the fourth thing they changed is the
3 fact that the minimum monthly quantity for the period of
4 time following commercial operation of the plant moved from
5 50,000 tons a month to 55,000 tons a month.

6 Q. You mentioned a change in the definition.

7 What exactly did they do to change that definition
8 that you just referred to?

9 A. You mean -- you're referencing the fact that it
10 was moved or -- the --

11 Q. Yes.

12 A. They just moved it from one place to the other,
13 but at the other -- at the same time, the quantity
14 definition changed from 50,000 tons a month to 55,000 tons a
15 month.

16 Q. Let's look first at the moving.

17 If you look in the definition section, what did
18 they do there?

19 A. They deleted the reference to the fact that it was
20 50,000 tons a month and referenced the definition as being
21 in Section 3.1.

22 Q. And then I think you said -- what other change did
23 they make in Section 3.1?

24 A. Oh, in 3.1, then they changed the definition of --
25 or the minimum monthly quantity number from 50,000 to

02:07 1 agreed in the first place.

02:07 2 Q. So, Mr. Morrow, what did you think ultimately was
02:08 3 in the agreement with respect to what the minimum monthly
02:08 4 quantity would be after the commercial operation date?

02:08 5 A. I'm certain that we all agreed that the minimum
02:08 6 monthly quantity was to be 50,000 tons a month.

02:08 7 Q. In this draft, were there any changes to the
02:08 8 sentence that starts "In order to accommodate minor
02:08 9 fluctuations"?

02:08 10 A. I don't recall there being a change between this
02:08 11 and the 2004 agreement, no.

02:08 12 There probably should have been one. And that is
02:08 13 that they -- this sentence holds over, the definition of the
02:08 14 start-up period, or reference to a start-up period, that was
02:08 15 deleted in the top section of this proposed agreement.

02:08 16 Q. Can you turn to Exhibit 18.

02:09 17 A. Yes.

02:09 18 Q. Can you identify this document?

02:09 19 A. This is an email sent by Pam Larger on Monday,
02:09 20 following the Thursday and Friday negotiations we had, with
02:09 21 her post-changes included in the agreement.

02:09 22 Q. And Ms. Larger says:

02:09 23 "Attached is a clean copy of the draft."

02:09 24 A. That's correct.

02:09 25 Q. Between the time of your meeting on February 13th

02:09 1 and 14th, and this email on February 18th, Mr. Morrow, do
02:09 2 you recall seeing any other drafts of the 2008 agreement?

02:09 3 A. No, I didn't see any other drafts.

02:09 4 Q. Do you recall ever seeing a redline that compares
02:09 5 this clean copy to the February 5th draft that you used in
02:09 6 your meeting?

02:09 7 A. No.

02:10 8 Q. If you'll turn to Section 3.1 in Exhibit 18.

02:10 9 What does Exhibit 18 say the minimum monthly
02:10 10 quantity is?

02:10 11 A. It defines it only for the period of time between
02:10 12 November 1, 2008, and November 1, 2011. And the minimum
02:10 13 monthly quantity post that period of time is not clearly
02:10 14 defined.

02:10 15 Q. Can you explain what you mean by that?

02:10 16 A. There -- there was a fairly long sentence in here
02:10 17 that talked about post-November 1, 2011, the minimum monthly
02:11 18 quantity in the last draft had 55,000 tons in it. That
02:11 19 55 -- that clause should still be in here with the
02:11 20 50,000-tons-a-month number that we agreed at the meeting.

02:11 21 Q. Did you appreciate this at the time you executed
02:11 22 the 2008 agreement?

02:11 23 A. No, I did not.

02:11 24 Q. If you'll compare Exhibit 11 Section 3.1, which is
02:11 25 the February 5th draft, and Exhibit 18 Section 3.1, which is

0 2 : 1 1 1 a clean draft, is this what a redline would like look like
0 2 : 1 1 2 if one had been sent?

0 2 : 1 1 3 MR. TUCKER: I object to the extent that calls for
0 2 : 1 1 4 speculation.

0 2 : 1 1 5 Is that what it would have looked like if it had
0 2 : 1 2 6 been done that way?

0 2 : 1 2 7 THE COURT: Okay. I understand the question to be
0 2 : 1 2 8 is, is this exhibit a fair representation of the sentence
0 2 : 1 2 9 that was eliminated, and that it's nothing more than a
0 2 : 1 2 10 comparison between the earlier draft and the final showing
0 2 : 1 2 11 what was eliminated.

0 2 : 1 2 12 MR. TUCKER: Okay. I object as to lack of
0 2 : 1 2 13 foundation and calls for speculation testimony.

0 2 : 1 2 14 THE COURT: Overruled.

0 2 : 1 2 15 My understanding is he's just simply saying does
0 2 : 1 2 16 this redline sentence represent what was taken out of the
0 2 : 1 2 17 last draft.

0 2 : 1 2 18 A. Yes, it does.

0 2 : 1 2 19 Q. No one caught that deleting the sentence with
0 2 : 1 2 20 55,000 tons left you with no minimum monthly quantity for
0 2 : 1 2 21 most of the agreement, did they?

0 2 : 1 2 22 A. That's correct.

0 2 : 1 2 23 Q. Did the parties intend that?

0 2 : 1 2 24 A. I don't believe that they intended that at all.
0 2 : 1 2 25 I'm absolutely convinced when we left that meeting that all

02:12 1 we were doing was reverting back to the agreement at
02:13 2 50,000 tons per month for the life of the -- 20-year life of
02:13 3 the agreement.

02:13 4 Q. Take a look at Exhibit 6, please.

02:13 5 THE COURT: The objection -- I think -- didn't
02:13 6 give me a chance to rule on it.

02:13 7 The objection is overruled and I'll allow the
02:13 8 answer.

02:13 9 Q. Take a look at Exhibit 6, please.

02:13 10 A. Yes.

02:13 11 Q. Can you tell us what this is?

02:13 12 A. This is the signed version of the Amended and
02:13 13 Restated Supply Agreement.

02:13 14 Q. And is the Section 3.1 in this final version of
02:13 15 the 2008 agreement the same as what we looked at in the
02:13 16 clean copy in Exhibit 18?

02:13 17 A. Yes, it is.

02:13 18 Q. Mr. Morrow, do you have any idea why you didn't
02:13 19 catch the fact that as it's written here, the 2008 agreement
02:14 20 does not set a minimum quantity for the time between
02:14 21 commercial operation until the end of the term of the
02:14 22 agreement?

02:14 23 A. I think it was a combination of the number of
02:14 24 changes that were made into this clause.

02:14 25 And, secondly, the fact that all the time I had

0 2 : 1 4 1 been dealing with the agreement for the past number of
0 2 : 1 4 2 years, the minimum monthly quantity was in the definitions
0 2 : 1 4 3 and not into this section of the clause. So the fact that
0 2 : 1 4 4 it wasn't there didn't trigger a question for me to think
0 2 : 1 4 5 about. That's my explanation for why I missed it.

0 2 : 1 4 6 Q. Part of the sentence -- and I think you alluded to
0 2 : 1 4 7 this earlier, in Section 3.1 of the final 2008 agreement.
0 2 : 1 5 8 Part of the sentence that starts with "In order to
0 2 : 1 5 9 accommodate minor fluctuations" says:

0 2 : 1 5 10 "The average monthly quantity of gypsum
0 2 : 1 5 11 filter cake delivered and accepted under this
0 2 : 1 5 12 amended agreement over any 12-month period after
0 2 : 1 5 13 the start-up period shall be approximately
0 2 : 1 5 14 50,000 net dry tons."

0 2 : 1 5 15 What was that a reference to in the
0 2 : 1 5 16 2008 agreement?

0 2 : 1 5 17 A. That referenced the original 3.1 in the
0 2 : 1 5 18 2004 agreement that talked about the time frame from the
0 2 : 1 5 19 start of operating the scrubbers for a 6-month period.
0 2 : 1 5 20 Progress Energy had a release in their obligation of the
0 2 : 1 5 21 quantity of gypsum they had to deliver for that period of
0 2 : 1 5 22 time, and that was defined as the start-up period. And
0 2 : 1 5 23 since we were now going to be on -- I think this agreement
0 2 : 1 6 24 was now going to start effectively beyond the start-up
0 2 : 1 6 25 period, there's no need for it to even exist anymore.

0 2 : 1 6 1 Q. Was there any intent to have a different minimum
0 2 : 1 6 2 monthly quantity between the time when the plant started and
0 2 : 1 6 3 any time thereafter during the contract under the
0 2 : 1 6 4 2008 agreement?

0 2 : 1 6 5 A. In the draft that was sent to us before we
0 2 : 1 6 6 renegotiated, there was the period of time between -- in
0 2 : 1 6 7 2008 and 2011 it was to be at 50,000 tons, and their request
0 2 : 1 6 8 was it would move up to 55,000 tons. We agreed it was going
0 2 : 1 6 9 to move back to 50,000 tons.

0 2 : 1 6 10 So I'm not sure, does that answer your question?

0 2 : 1 6 11 Q. Was the intent to have the minimum monthly
0 2 : 1 6 12 quantity under the 2008 agreement be 50,000 tons the entire
0 2 : 1 6 13 time?

0 2 : 1 6 14 A. Yes, it was.

0 2 : 1 6 15 Q. "Start-up period" in this "in order to accommodate
0 2 : 1 6 16 minor fluctuation" sentence here is capitalized.

0 2 : 1 6 17 If you look in the definition section of the
0 2 : 1 6 18 2008 agreement, is "start-up period" defined?

0 2 : 1 7 19 A. No, it's not.

0 2 : 1 7 20 Q. If you look back at Exhibit 5, which was the
0 2 : 1 7 21 2004 agreement, is "start-up period" defined there?

0 2 : 1 7 22 A. Yes, it is.

0 2 : 1 7 23 Q. Sorry for making you jump around, but looking back
0 2 : 1 7 24 into Exhibit 6, which is the 2008 agreement, and looking at
0 2 : 1 7 25 Section 3.1 there, the sentence that starts "In order to

0 2 : 1 7 1 accommodate minor fluctuations," did you intend for that
0 2 : 1 8 2 sentence to provide the quantity term for the entire
0 2 : 1 8 3 agreement?

0 2 : 1 8 4 A. No, that was not our intention.

0 2 : 1 8 5 Q. Mr. Morrow, do you remember any discussions with
0 2 : 1 8 6 Progress about the sources from which they would supply
0 2 : 1 8 7 gypsum when you negotiated the 2008 agreement?

0 2 : 1 8 8 A. No.

0 2 : 1 8 9 Q. Do you recall any discussions about the definition
0 2 : 1 8 10 of "gypsum filter cake" under the 2008 agreement?

0 2 : 1 8 11 A. No.

0 2 : 1 8 12 Q. To your knowledge, were the definitions of "gypsum
0 2 : 1 8 13 filter cake" and "FGD systems" intended to limit the source
0 2 : 1 8 14 of gypsum from which Progress Energy could be obligated to
0 2 : 1 8 15 supply?

0 2 : 1 8 16 MR. TUCKER: Well, objection to the extent he just
0 2 : 1 8 17 said he doesn't recall any discussions about those
0 2 : 1 8 18 provisions.

0 2 : 1 8 19 Calls for speculation.

0 2 : 1 9 20 THE COURT: Do I understand his testimony to be he
0 2 : 1 9 21 simply did not address that one way or the other in these
0 2 : 1 9 22 negotiations?

0 2 : 1 9 23 MS. MARSTON: Your Honor, I think his testimony
0 2 : 1 9 24 was he didn't discuss it, and I'm asking separate and apart
0 2 : 1 9 25 from any discussions whether he had an understanding of the

0 2 : 1 9 1 definitions being eliminated, the definition.

0 2 : 1 9 2 THE COURT: So what understanding, if any, did you
0 2 : 1 9 3 have when you were negotiating the 2008 as to the meaning of
0 2 : 1 9 4 "gypsum filter cake"?

0 2 : 1 9 5 A. My understanding is that the -- it was to be
0 2 : 1 9 6 gypsum that was produced and delivered to CertainTeed. And
0 2 : 1 9 7 I believe there was another question in there, wasn't there,
0 2 : 2 0 8 about where it would be sourced from.

0 2 : 2 0 9 Q. Let me --

0 2 : 2 0 10 A. And I -- my understanding was that gypsum could be
0 2 : 2 0 11 sourced from the power plants that Progress Energy produced
0 2 : 2 0 12 or any other place they were going to bring gypsum from.

0 2 : 2 0 13 Q. Mr. Morrow, can you turn to Section 3.9 of the
0 2 : 2 0 14 2008 agreement in Exhibit 6.

0 2 : 2 0 15 A. Yes.

0 2 : 2 0 16 Q. Was this section included in the 2004 agreement?

0 2 : 2 0 17 A. No, it was not.

0 2 : 2 0 18 Q. Do you know who added this section?

0 2 : 2 0 19 A. It was added by Progress Energy in one of the
0 2 : 2 0 20 drafts of the discussion, for discussion of the
0 2 : 2 0 21 renegotiation in 2008.

0 2 : 2 0 22 Q. What do you recall about discussions about
0 2 : 2 1 23 Section 3.9?

0 2 : 2 1 24 A. They said that they wanted to make it clear that
0 2 : 2 1 25 their job was to produce and sell power and that -- I said

0 2 : 2 1 1 back to them, I said, well, I understand that completely.
0 2 : 2 1 2 We never entered this arrangement with you under the
0 2 : 2 1 3 obligation that we were going to obligate you to produce
0 2 : 2 1 4 gypsum.

0 2 : 2 1 5 We entered this arrangement with Progress Energy
0 2 : 2 1 6 on the basis that we would have a long-term, secure supply
0 2 : 2 1 7 of gypsum, but it was never our intent that we were going to
0 2 : 2 1 8 obligate them to burn coal or burn coal with lots of sulfur
0 2 : 2 1 9 in it.

0 2 : 2 1 10 The reason we -- we had set up the agreement in
0 2 : 2 1 11 such a way that we were going to have a supply of gypsum is
0 2 : 2 1 12 we knew we didn't have any of source of supply. And so if
0 2 : 2 2 13 they were going to have us invest tens or maybe hundreds of
0 2 : 2 2 14 millions of dollars in the factory, they needed to
0 2 : 2 2 15 understand that they had to make sure that we were going to
0 2 : 2 2 16 be able to operate that factory for the 20-year time we had
0 2 : 2 2 17 identified.

0 2 : 2 2 18 Q. Who do you recall discussing that Section 3.9 with
0 2 : 2 2 19 at Progress Energy?

0 2 : 2 2 20 A. I specifically remember that conversation when we
0 2 : 2 2 21 were meeting on the 13th or 14th. I think it was the 14th.

0 2 : 2 2 22 Q. Do you remember talking to Dan Mottola about
0 2 : 2 2 23 anything in the 2008 agreement?

0 2 : 2 2 24 A. No, I don't remember any conversations with Dan.

0 2 : 2 2 25 Q. Who did you speak to more, Ms. Coppola or

0 2 : 2 2 1 Mr. Mottola?

0 2 : 2 2 2 A. Dan -- or not Dan -- Barbara led the conversation
0 2 : 2 2 3 from their side. Sandy and Pam had input at various points
0 2 : 2 2 4 in time, but principally it was Barbara.

0 2 : 2 3 5 Q. If Mr. Mottola were to say that he spoke with you
0 2 : 2 3 6 extensively about this agreement, would you agree with that?

0 2 : 2 3 7 A. No, I would not.

0 2 : 2 3 8 Q. Mr. Morrow, did you agree that Progress Energy had
0 2 : 2 3 9 a duty to produce economic and reliable electric power for
0 2 : 2 3 10 public consumption in accordance with federal, state, and
0 2 : 2 3 11 local laws?

0 2 : 2 3 12 A. Yes, I did.

0 2 : 2 3 13 Q. What did you understand Section 3.9 to mean?

0 2 : 2 3 14 A. That we acknowledged that we could not force
0 2 : 2 3 15 Progress Energy to produce gypsum. That did not change the
0 2 : 2 3 16 fact that they still had an obligation to deliver it. And
0 2 : 2 3 17 that's why we had in places in the agreement that they could
0 2 : 2 3 18 deliver gypsum from other places.

0 2 : 2 3 19 Q. If you --

0 2 : 2 3 20 A. If I may, just to continue on with that.

0 2 : 2 3 21 We wanted Progress Energy to factor into its
0 2 : 2 3 22 decision-making about whether they wanted to cease producing
0 2 : 2 4 23 gypsum, the cost of keeping us whole, and that was part of
0 2 : 2 4 24 the economic analysis that they would go through to make
0 2 : 2 4 25 that decision.

0 2 : 2 4 1 And we also looked at it from the other side,
0 2 : 2 4 2 which is if, for whatever reason, we needed to cease
0 2 : 2 4 3 producing products from gypsum, that we would have to factor
0 2 : 2 4 4 in the economic analysis of the consequence of that decision
0 2 : 2 4 5 in our decision-making.

0 2 : 2 4 6 Q. If you'll turn to Exhibit 11, which is the
0 2 : 2 4 7 February 5, 2008, draft.

0 2 : 2 4 8 A. Yes.

0 2 : 2 4 9 Q. Looking at the end of Section 3.9 here, there's a
0 2 : 2 4 10 comment there that is struck through.

0 2 : 2 5 11 A. Yes.

0 2 : 2 5 12 Q. Do you know who made that comment?

0 2 : 2 5 13 A. No, I don't remember who made that comment.

0 2 : 2 5 14 Q. Did you share the concern in this comment?

0 2 : 2 5 15 A. No, I did not.

0 2 : 2 5 16 Q. Why not?

0 2 : 2 5 17 A. Because I thought we were just restating the
0 2 : 2 5 18 obvious, and that is that it's our belief that they have the
0 2 : 2 5 19 right to choose whether they produce gypsum or not; it
0 2 : 2 5 20 doesn't negate their obligation to deliver it.

0 2 : 2 5 21 Q. Mr. Morrow, when you agreed to this provision and
0 2 : 2 5 22 executed the 2008 agreement, did you think that Section 3.9
0 2 : 2 5 23 could operate as an excuse to Progress Energy's performance
0 2 : 2 5 24 of its delivery obligations?

0 2 : 2 5 25 A. Absolutely not. We would never have signed an

0 2 : 2 5

1 agreement that obligated us to build a factory without a
2 guaranteed supply of gypsum.

0 2 : 2 5

0 2 : 2 5

3 Q. Did anyone at Progress during the negotiations
4 ever indicate to you that this could excuse them from
5 delivering gypsum if they switched to a different type of
6 energy production?

0 2 : 2 5

0 2 : 2 5

0 2 : 2 6

0 2 : 2 6

7 A. No, they did not.

0 2 : 2 6

0 2 : 2 6

8 Q. Mr. Morrow, once the 2008 agreement was executed,
9 did you continue to have responsibility for the relationship
10 and the performance of that agreement?

0 2 : 2 6

0 2 : 2 6

11 A. Yes, I did.

0 2 : 2 6

0 2 : 2 6

12 Q. Did CertainTeed meet its obligations while you
13 were still involved?

0 2 : 2 6

14 A. It met some of the months, but not every month.

0 2 : 2 6

15 Q. Why not?

0 2 : 2 6

16 A. We were struggling with the declining volumes of
17 sales in the gypsum industry, and places that we had
18 expected to ship the gypsum to were operating at a much
19 lower level of demand. We also had challenges with getting
20 rail cars loaded and shipped. We had all kinds of
21 operational challenges.

0 2 : 2 6

0 2 : 2 6

22 Q. And remind me when you left the company.

0 2 : 2 6

23 A. October 2009.

0 2 : 2 6

0 2 : 2 6

24 Q. Thank you, Mr. Morrow.

0 2 : 2 6

25 MS. MARSTON: I have no further questions.

02:27

1 THE WITNESS: Okay.

02:27

2 THE COURT: You may cross-examine.

02:27

3 CROSS-EXAMINATION by Mr. Tucker:

02:27

4 Q. Thank you and good afternoon, Mr. Morrow.

02:27

5 Now, you said you were -- you left CertainTeed in
6 2009 after the 2008 agreement was finalized, correct?

02:27

02:27

7 A. Yes.

02:27

8 Q. And to be clear, you were let go by CertainTeed.

02:27

9 It was not a voluntary decision on your point -- on your

02:27

10 part to leave the company, was it?

02:27

11 A. That's correct.

02:27

12 Q. And you got a severance package and you signed a
13 release; is that right?

02:27

02:27

14 A. That's correct.

02:27

15 Q. And then for approximately 4 years after you left
16 CertainTeed, you were essentially unemployed; is that right?

02:27

02:27

17 A. I was on salary continuance with a very tough
18 provision that basically prohibited me from working in the
19 gypsum industry for the first 2 years.

02:27

02:27

20 And then following that, I was actually enjoying
21 seeing my family a bit, so I was doing a little bit of
22 consulting while I was looking for new work.

02:27

02:27

02:28

23 Q. So is the answer that you were essentially

02:28

24 unemployed for that 4-year period?

02:28

25 A. I was -- well, yes. I was getting paid for

0 2 : 2 8 1 2 years of it, and then 2 years of it I was unemployed.

0 2 : 2 8 2 Q. But you now do some consulting work or other work
0 2 : 2 8 3 for CertainTeed or its affiliates, right, as part of your
0 2 : 2 8 4 current business?

0 2 : 2 8 5 A. Yeah. We've had -- supplied -- basically,
0 2 : 2 8 6 one-third of our business is in testing and analysis;
0 2 : 2 8 7 one-third of our business is in research and development;
0 2 : 2 8 8 and one-third is on the kind of work that I do, which is
0 2 : 2 8 9 consulting on how the industry operates and marketing and
0 2 : 2 8 10 financial analysis and helping potential shareholders think
0 2 : 2 8 11 about how they might participate in the industry. And we've
0 2 : 2 8 12 done work with CertainTeed in identifying suppliers of
0 2 : 2 8 13 equipment and doing some testing and analysis work.

0 2 : 2 8 14 Q. And you've gotten paid for that; is that right?

0 2 : 2 8 15 A. That's correct.

0 2 : 2 9 16 Q. Now, from the date you left CertainTeed in 2009
0 2 : 2 9 17 until March of 2018, you didn't see any documents related to
0 2 : 2 9 18 the Progress Energy supply agreement, correct?

0 2 : 2 9 19 A. Just give me the second date, please.

0 2 : 2 9 20 Q. Yeah.

0 2 : 2 9 21 For the 9-year period, between the date you left
0 2 : 2 9 22 CertainTeed in 2009 and until approximately March of 2018
0 2 : 2 9 23 when you were contacted about this litigation --

0 2 : 2 9 24 A. Yes.

0 2 : 2 9 25 Q. -- you didn't see any documents related to the

0 2 : 2 9 1 Progress Energy supply agreement; is that right?

0 2 : 2 9 2 A. That's correct.

0 2 : 2 9 3 Q. You would have been gone from CertainTeed before
0 2 : 2 9 4 the second amendment to the 2008 agreement was made in 2010;
0 2 : 2 9 5 is that right?

0 2 : 2 9 6 A. If there was one, yes.

0 2 : 2 9 7 Q. So you don't even know whether there was one?

0 2 : 2 9 8 A. I'm not sure I could attest to that, that's for
0 2 : 2 9 9 sure.

0 2 : 2 9 10 Q. And during this 9-year period that you were -- you
0 2 : 2 9 11 had nothing at all to do with CertainTeed or
0 2 : 3 0 12 Progress Energy, you didn't talk to any CertainTeed
0 2 : 3 0 13 representatives about the contract, correct?

0 2 : 3 0 14 A. I didn't talk to them with or without the
0 2 : 3 0 15 contract.

0 2 : 3 0 16 Q. You didn't talk to them about the subject matter
0 2 : 3 0 17 of the contract?

0 2 : 3 0 18 A. No. I had a phone call from Dave Engelhardt at
0 2 : 3 0 19 one point in time, and I frankly don't remember the date,
0 2 : 3 0 20 and he asked me if I could give him -- I'm not sure if the
0 2 : 3 0 21 word was "advice" or "comments" -- and I said Don -- or
0 2 : 3 0 22 "Dave, I can't remember. I've looked at this agreement in
0 2 : 3 0 23 its various forms. So without having an agreement in front
0 2 : 3 0 24 of me, I couldn't give you any comments." And at that
0 2 : 3 0 25 point, he said "Thanks very much" and I didn't speak to him

0 2 : 3 0 1 again.

0 2 : 3 0 2 Q. But you remember an awful lot about the contract
0 2 : 3 0 3 today, don't you?

0 2 : 3 0 4 A. I've spent a lot of time looking at it and reading
0 2 : 3 0 5 it and trying to remember what happened, yes.

0 2 : 3 0 6 Q. Now, you had no involvement in negotiating the
0 2 : 3 0 7 2012 agreement, did you?

0 2 : 3 0 8 A. That's correct. I don't know anything about that.

0 2 : 3 0 9 Q. You never saw that document until CertainTeed's
0 2 : 3 1 10 lawyers showed it to you in this case; is that right?

0 2 : 3 1 11 A. That's correct.

0 2 : 3 1 12 Q. And so let's talk about the 2004 agreement while
0 2 : 3 1 13 you were with CertainTeed.

0 2 : 3 1 14 You said earlier in response to Ms. Marston's
0 2 : 3 1 15 questions that you were a background participant, I think
0 2 : 3 1 16 those were your words; is that accurate?

0 2 : 3 1 17 A. Yeah, I think that's the right way to phrase that.

0 2 : 3 1 18 Q. You weren't involved directly in negotiating the
0 2 : 3 1 19 2004 agreement at all, were you?

0 2 : 3 1 20 A. That's correct. I didn't have any communication
0 2 : 3 1 21 with anybody in Progress Energy's side.

0 2 : 3 1 22 Q. And even internally, you acknowledged that
0 2 : 3 1 23 Mr. Mayer at CertainTeed was the lead negotiator and the
0 2 : 3 1 24 party who was most responsible for negotiating the
0 2 : 3 1 25 2004 agreement, correct?

02:31

1 A. That was true. The one point I would, I think,
2 restate is that I was in reasonably constant contact with
3 Peter because I was going to be the one that had to
4 communicate the nature of the agreement and sell it to the
5 parent company.

02:31

02:31

02:32

02:32

02:32

6 Q. Are you aware that Mr. Mayer has testified in
7 court today?

02:32

02:32

8 A. Yes.

02:32

02:32

9 Q. Did you know that Mr. Mayer testified that he did
10 not have any discussions with you regarding any of the
11 drafts of the agreements that were being exchanged during
12 the 2004 negotiation?

02:32

02:32

02:32

13 MS. MARSTON: Objection. That's mischaracterizing
14 Mr. Mayer's testimony.

02:32

02:32

15 THE COURT: His testimony, he had no recollection
16 of having had such a meeting.

02:32

02:32

17 MR. TUCKER: I'll accept that and rephrase it.

02:32

18 A. Peter and I talked about the concepts and we
19 specifically talked about the remedies section. Those are
20 the two things I remember he and I talking about.

02:32

02:32

21 To say that I didn't see any of the drafts, I
22 don't remember seeing any of the drafts.

02:32

02:32

23 Q. So the drafts that you spent so much time
24 commenting on this morning are not drafts that you recall
25 reviewing during the negotiation process?

02:32

02:32

02:32 1 MS. MARSTON: Objection. Mr. Morrow didn't look
02:32 2 at a single draft other than the final version.

02:33 3 A. That's correct.

02:33 4 Q. You don't recall reviewing any of the drafts of
02:33 5 the document during the negotiation process; is that right?

02:33 6 A. That is correct.

02:33 7 Q. Now, you agree, don't you, Mr. Morrow, that the
02:33 8 benefit of the CertainTeed supply agreement to
02:33 9 Progress Energy was to provide a disposal source for the
02:33 10 gypsum that was going to be produced at the Roxboro and Mayo
02:33 11 plants, correct?

02:33 12 A. That's correct. The way that -- my understanding
02:33 13 is how that would work is in order to put in the scrubber
02:33 14 and start producing gypsum, Progress Energy would have had
02:33 15 to have permitted and constructed a significant number
02:33 16 of years of landfill capability. That was their only other
02:33 17 option. So they would have had to invest -- or our analysis
02:33 18 used \$25 a ton as a cost that they would have had to incur
02:34 19 up front to start up. And so having us lined up with a
02:34 20 supply agreement averted many millions of dollars of upfront
02:34 21 costs that they would have had to incur.

02:34 22 Q. By entering into the supply agreement with
02:34 23 CertainTeed and establishing a home for gypsum from the
02:34 24 Roxboro and Mayo plants, Progress Energy was able to avoid
02:34 25 the costs that it otherwise would have incurred to landfill

0 2 : 3 4 1 that gypsum, correct?

0 2 : 3 4 2 By selling the gypsum to CertainTeed,
0 2 : 3 4 3 Progress Energy avoided the need to landfill the gypsum and
0 2 : 3 4 4 pay the costs associated with that; is that right?

0 2 : 3 4 5 A. By entering into a supply agreement with
0 2 : 3 4 6 CertainTeed, they were able to demonstrate that they didn't
0 2 : 3 4 7 need to have landfill. So, yes, that I agree to.

0 2 : 3 4 8 Q. Now, every public utility supply contract that
0 2 : 3 5 9 you're familiar with that CertainTeed had, including the
0 2 : 3 5 10 Progress Energy contract, specified the plants from which
0 2 : 3 5 11 the gypsum would be supplied, correct?

0 2 : 3 5 12 A. Most of the agreements that we had in place for
0 2 : 3 5 13 the supply of this were for facilities that were already in
0 2 : 3 5 14 existence. The -- Roxboro was unique to us in North
0 2 : 3 5 15 America. It's the first time we were constructing a
0 2 : 3 5 16 wallboard plant that was going to be co-located with a
0 2 : 3 5 17 producer and supplier of gypsum in a place where there was
0 2 : 3 5 18 no other alternative supply.

0 2 : 3 5 19 So the fact that we didn't specify which factory
0 2 : 3 5 20 it was being delivered from was, I think, dictated by the
0 2 : 3 5 21 fact that the obligation was on Progress Energy to supply,
0 2 : 3 5 22 not on Progress Energy to produce.

0 2 : 3 5 23 Q. Perhaps you misunderstood my question.

0 2 : 3 6 24 I asked you whether it was true that every public
0 2 : 3 6 25 utility supply contract that CertainTeed had that you're

0 2 : 3 6

1 familiar with specified the plants from which the gypsum
2 would be supplied --

0 2 : 3 6

0 2 : 3 6

3 A. Yes, they did.

0 2 : 3 6

4 Q. -- is that true?

0 2 : 3 6

5 A. Yes.

0 2 : 3 6

6 Q. And in 2004, when the first Progress Energy

0 2 : 3 6

7 contract was being negotiated, you were not aware of any

0 2 : 3 6

8 plans by Progress Energy to supply gypsum to CertainTeed

0 2 : 3 6

9 from any source other than Roxboro and Mayo, were you?

0 2 : 3 6

10 A. No. I had no idea whether they had to plans to do

0 2 : 3 6

11 that or not.

0 2 : 3 6

12 Q. Progress Energy never provided CertainTeed

0 2 : 3 6

13 forecasts of production from any plants other than Roxboro

0 2 : 3 6

14 and Mayo in 2004, correct?

0 2 : 3 6

15 A. That's correct. They also never provided us with

0 2 : 3 6

16 forecasts that showed that they would be producing less than

0 2 : 3 6

17 they were obligated to deliver.

0 2 : 3 6

18 Q. And you never requested forecasts from any plants

0 2 : 3 6

19 other than Roxboro and Mayo either, did you?

0 2 : 3 6

20 A. No.

0 2 : 3 6

21 Q. Now, I want to talk to you a little bit about the

0 2 : 3 7

22 remedies provisions that you testified about at length

0 2 : 3 7

23 today.

0 2 : 3 7

24 With respect to the 2004 agreement when those

0 2 : 3 7

25 provisions were first negotiated, you don't remember having

0 2 : 3 7

1 conversations with anyone at Progress Energy regarding
2 provisions in Article 6, the remedies section, do you?

0 2 : 3 7

0 2 : 3 7

3 A. That's correct.

0 2 : 3 7

0 2 : 3 7

4 Q. The only conversations you recall were internal at
5 CertainTeed, and the only person you recall speaking to
6 about the remedies was Peter Mayer; is that right?

0 2 : 3 7

0 2 : 3 7

7 A. Yeah, I think I -- I might have testified in the
8 deposition that I wasn't sure if there were others in that
9 room at that time. But the only one I remember talking to
10 is Peter.

0 2 : 3 7

0 2 : 3 7

11 Q. And that's still true today?

0 2 : 3 7

12 A. That is true today.

0 2 : 3 7

0 2 : 3 7

13 Q. Now, are you aware that Mr. Mayer testified today
14 that he does not remember any discussion with you related to
15 the remedies provisions in Article 6 or how they operated?

0 2 : 3 7

0 2 : 3 8

16 A. I was not aware.

0 2 : 3 8

0 2 : 3 8

17 Q. And you testified in response to Ms. Marston that
18 you recall a 4- to 5-hour discussion with Mr. Mayer about
19 the remedies section, correct?

0 2 : 3 8

0 2 : 3 8

20 A. I do, yep.

0 2 : 3 8

0 2 : 3 8

21 Q. You don't have any explanation for why Mr. Mayer,
22 who was the lead negotiator of the agreement, can't recall
23 that discussion; is that right?

0 2 : 3 8

0 2 : 3 8

24 A. I have no explanation for that.

0 2 : 3 8

25 I can visualize the room we sat in, I can

0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 8
0 2 : 3 9
0 2 : 3 9
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0 2 : 3 9
0 2 : 4 0

1 visualize the board, and I can visualize the calculations we
2 did. I absolutely vividly remember this.
3 Q. Now, you admit that you do not know who prepared
4 the initial draft of Article 6, right?
5 A. I have no idea who drafted that.
6 Q. You do remember that you did not have any
7 responsibility for drafting the remedies provisions,
8 correct?
9 A. That is correct.
10 Q. And you acknowledge that Section 6.2 and
11 Section 6.3 originally were intended to deal with two
12 different situations; is that right?
13 A. I'm not sure I can attest to that.
14 MR. TUCKER: If you would, Mr. Morrow's deposition
15 beginning at page 68, line 15.
16 -- our objectives for the relationship --
17 Q. Let me restart.
18 "Q. Did you have an understanding of what the
19 purpose of 6.3 was?
20 "A. Yes. That was when we sat down and mapped
21 out what our objectives for the relationship
22 were -- first off, I should back up a little bit.
23 Our expectation was that the contract was mutual,
24 so that it didn't matter which party was backing
25 out of the supply agreement. The goal was to

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02:40 1 provide provisions that would make the other party
02:40 2 whole.

02:40 3 "So we established two scenarios. One
02:40 4 scenario was, A, operating conditions that
02:40 5 required -- that provided less than the total
02:40 6 amount of gypsum being supplied. And the other
02:40 7 one was a decision by a party -- one party or the
02:40 8 other -- to abandon the relationship. And the
02:40 9 difference between 6.2 and 6.3 were initially
02:40 10 intended to deal with those two different
02:40 11 situations."

02:40 12 Q. So, Mr. Morrow, does that refresh your
02:40 13 recollection that at least at one point in the negotiations,
02:40 14 you understood that Section 6.2 was intended to address an
02:40 15 undersupply situation that resulted from operating
02:40 16 conditions? Do you recall that now?

02:41 17 A. I was trying in my deposition to explain the
02:41 18 principle upon which Peter and I discussed how the
02:41 19 negotiations should go.

02:41 20 I think the question you asked me -- and maybe I
02:41 21 didn't answer it properly in that deposition -- we discussed
02:41 22 the concept of the two different scenarios, undersupply and,
02:41 23 effectively, a termination relationship.

02:41 24 6.3, by the time it was drafted and I had a chance
02:41 25 to have a look at it, didn't quite meet those two

0 2 : 4 1 1 conditions. And that wasn't a criticism. It was just a
0 2 : 4 1 2 fact.

0 2 : 4 1 3 So to the extent that you asked the question were
0 2 : 4 1 4 they intended to deal with two different situations, in the
0 2 : 4 1 5 outline of how we thought the negotiation should go, the
0 2 : 4 1 6 answer is no.

0 2 : 4 1 7 The way they were drafted -- sorry.

0 2 : 4 2 8 There was to be two different situations. One was
0 2 : 4 2 9 an undersupply and the termination. The way it was drafted,
0 2 : 4 2 10 it didn't quite fit into that category. So I can see how I
0 2 : 4 2 11 gave you two different answers to the question.

0 2 : 4 2 12 Q. Well, now, you are familiar with the signed
0 2 : 4 2 13 agreement. You've looked at that today, correct?

0 2 : 4 2 14 A. Yes.

0 2 : 4 2 15 Q. And although you didn't -- you acknowledge that
0 2 : 4 2 16 you didn't see any drafts during the negotiation process, at
0 2 : 4 2 17 least none that you remember?

0 2 : 4 2 18 A. That's correct.

0 2 : 4 2 19 Q. And in the final version, there are two separate
0 2 : 4 2 20 provisions in Article 6 that deal with supply issues on the
0 2 : 4 2 21 Progress Energy side, correct? There's 6.2 that deals with
0 2 : 4 2 22 undersupply?

0 2 : 4 2 23 A. Yes.

0 2 : 4 2 24 Q. It's captioned "Undersupply by Progress Energy,"
0 2 : 4 2 25 right?

0 2 : 4 2

1 A. That's correct.

0 2 : 4 2

2 Q. And then --

0 2 : 4 2

3 A. Well, by both parties, I guess.

0 2 : 4 2

4 Q. 6.2 deals with undersupply by Progress Energy.

0 2 : 4 2

5 6.4 deals with underacceptance by CertainTeed, which I'm not
6 asking you about right now.

0 2 : 4 3

7 A. Okay.

0 2 : 4 3

8 Q. So you acknowledge that the final agreement
9 preserves a distinction between undersupply, which is

0 2 : 4 3

10 addressed in 6.2, and discontinued supply and other

0 2 : 4 3

11 long-term supply interruptions that are specified in

0 2 : 4 3

12 Section 6.3; that's the structure of the final agreement,

0 2 : 4 3

13 correct?

0 2 : 4 3

14 A. That's what it looks like, yes.

0 2 : 4 3

15 Q. Now, you testified in response to some of

0 2 : 4 3

16 Ms. Marston's questions about the words "may terminate" in

0 2 : 4 3

17 Section 6.3 as evidencing, in your view, the optional nature

0 2 : 4 3

18 of the remedy and your right to choose, if you wanted to, to

0 2 : 4 3

19 pursue a remedy under 6.2; is that right?

0 2 : 4 3

20 A. Yes.

0 2 : 4 4

21 Q. It's true, isn't it, Mr. Morrow, that you never

0 2 : 4 4

22 expressed or communicated the alleged understanding that

0 2 : 4 4

23 these sections provided for optional remedies to anyone at

0 2 : 4 4

24 Progress Energy?

0 2 : 4 4

25 A. I didn't have any communication with

0 2 : 4 4

0 2 : 4 4 1 Progress Energy.

0 2 : 4 4 2 Q. You didn't tell Progress Energy that you thought
0 2 : 4 4 3 CertainTeed could choose between the 6.3 and 6.2 remedies in
0 2 : 4 4 4 connection with the 2004 agreement, true?

0 2 : 4 4 5 A. That's correct.

0 2 : 4 4 6 Q. You also didn't tell Progress Energy that you
0 2 : 4 4 7 thought CertainTeed could choose between the 6.3 remedy and
0 2 : 4 4 8 the 6.2 remedy in the 2008 agreement where you were the lead
0 2 : 4 4 9 negotiator, correct?

0 2 : 4 4 10 A. To my knowledge, there was no conversation on that
0 2 : 4 4 11 at all.

0 2 : 4 5 12 Q. And still today, the only person you remember
0 2 : 4 5 13 discussing the supposedly optional nature of 6.3 is with
0 2 : 4 5 14 Peter Mayer at CertainTeed; is that right?

0 2 : 4 5 15 A. That's correct.

0 2 : 4 5 16 Q. Are you aware that Mr. Mayer testified under oath
0 2 : 4 5 17 today that he does not recall any discussion with you
0 2 : 4 5 18 regarding CertainTeed's supposed right to choose between
0 2 : 4 5 19 remedies in 6.2 and 6.3?

0 2 : 4 5 20 MS. MARSTON: Asked and answered.

0 2 : 4 5 21 THE COURT: You may answer again.

0 2 : 4 5 22 A. You told me earlier that Peter doesn't remember
0 2 : 4 5 23 having that meeting and conversation with me, so I'm not
0 2 : 4 5 24 sure how I'm supposed to answer what he does and doesn't
0 2 : 4 5 25 remember.

02:45

1

Q. Mr. Mayer is still employed with CertainTeed; is that right? To your knowledge?

02:45

2

02:45

3

A. I think so, yes. I'm just trying to remember whether he worked with Saint Gobain or CertainTeed. But certainly at that organization.

02:45

4

02:45

5

02:46

6

Q. The company kept him when they let you go?

02:46

7

A. That's an interesting way of phrasing it, but I guess that's one way to look at it, yes.

02:46

8

02:46

9

Q. Now, you're aware now that both the 2004 agreement and the 2008 agreement included exclusive remedies provision in Section 9.4 of the document, correct?

02:46

10

02:46

11

02:46

12

A. So I'm told, yes. It's been pointed out to me.

02:46

13

Q. Before I ask you about Section 9.4...

02:46

14

Other than the final version of the contract that you have interpreted for Ms. Marston today, you're not aware of a single written document that confirms your understanding of the optional nature of the remedies in Section 6.2 and 6.3, are you, Mr. Morrow?

02:46

15

02:46

16

02:46

17

02:46

18

02:46

19

A. No, I don't think so.

02:46

20

Q. You've never seen any document, even any internal document, at CertainTeed that says CertainTeed has the right to choose 6.2 as a remedy for a 6.3 occurrence?

02:47

21

02:47

22

02:47

23

A. I would agree with that.

02:47

24

Q. So going back to Exhibit [sic] 9.4, the exclusive remedies provision. You don't recall any discussion about

02:47

25

02:47

1 that provision in connection with the 2004 agreement or the
2 2008 agreement, correct?

02:47

02:47

3 A. I don't remember having any conversations about
4 that clause at all.

02:47

02:47

5 Q. You don't know who drafted 9.4, correct?

02:47

6 A. That's correct.

02:47

7 Q. In fact, I think you told me you've never heard
8 the term "exclusive remedy" before I asked you about it in
9 your deposition.

02:47

02:47

10 A. That's likely true.

02:47

11 Q. And you certainly didn't consider the impact of
12 Section 9.4 on the parties' right to choose or elect between
13 remedies in the agreement, correct?

02:47

02:47

14 A. I have no idea how it would be -- I don't
15 understand how that would work.

02:48

02:48

16 Q. All right. Let's talk a little bit more about the
17 2008 agreement.

02:48

02:48

18 For that one, I think you said you were the lead
19 negotiator, correct?

02:48

02:48

20 A. That's correct.

02:48

21 Q. And just to be clear again, in connection with the
22 2008 agreement, you don't remember any discussion at all
23 related to any of the remedies provisions in the contract,
24 correct?

02:48

02:48

25 A. We focused on the 14 points that were in the

02:48

02:48

1 Sasha Weintraub letter. I'm sure that's all we focused on
2 for that renegotiation.

02:48

02:48

3 Q. So is the answer that you do not recall any
4 discussion about the renegotiation?

02:48

02:48

5 A. Yeah. I'm sorry. I don't recall any discussion
6 at all on that.

02:48

02:48

7 Q. Now, you're aware that the 2008 agreement added a
8 new provision in Section 3.9, which you've talked about
9 today, called the "primary purpose provision," correct?

02:48

02:48

10 A. Yep.

02:48

02:48

11 Q. Let's look at Exhibit 6, please, which is the
12 signed copy of the 2008 agreement.

02:49

02:49

13 A. Okay. I have it.

02:49

14 Q. And if I can direct your attention to section --

02:49

15 MR. TUCKER: Yes. If we can display that,

02:49

16 Your Honor.

02:49

17 THE COURT: Well, I turned it off when the
18 deposition was still up. Sorry.

02:49

02:49

19 MR. TUCKER: Thank you.

02:49

20 Q. If I can direct your attention, Mr. Morrow, to
21 Section 3.9 beginning on page 14 and carrying over to
22 page 15.

02:49

02:49

23 A. Okay.

02:49

02:49

24 Q. This is the provision in 3.9 that you talked about
25 with Ms. Marston, correct?

02:49

02:49

1 A. Yep.

02:49

2 Q. And that provision was proposed by

02:49

3 Progress Energy, right?

02:49

4 A. That's correct.

02:49

5 Q. And you were shown a draft of the 2008 agreement
6 that included a comment at the end of Section 3.9 expressing
7 a concern that the provision not upset Progress Energy's
8 supply obligation.

02:49

9 Do you remember that?

02:49

10 A. Yes, I do.

02:49

11 Q. And you said you didn't know who made that

02:49

12 comment?

02:50

13 A. That's correct. I do not remember who made that
14 contact.

02:50

15 Q. But you do know that that was a comment made by
16 someone at CertainTeed; that was in the CertainTeed draft,
17 correct?

02:50

18 A. Yeah, I believe so. I don't know why
19 Progress Energy would have made that comment.

02:50

20 Q. Let me ask you to look at Exhibit 10, please.

02:50

21 Actually, this is the document that contains the
22 comment that we just talked about, so I'll ask you to look
23 at the next version of the draft agreement, which is
24 Exhibit 11.

02:50

02:50

25 Do you have that document?

02:50

0 2 : 5 0

1 A. Yeah.

0 2 : 5 0

2 Q. This is an email that Pam Larger of

0 2 : 5 0

3 Progress Energy sent to Larry Rayburn of CertainTeed with a

0 2 : 5 1

4 copy to you on February 5, 2008, correct?

0 2 : 5 1

5 A. Yep.

0 2 : 5 1

6 Q. And Larry Rayburn was in-house counsel at

0 2 : 5 1

7 CertainTeed; is that right?

0 2 : 5 1

8 A. That's correct.

0 2 : 5 1

9 Q. And this email attaches Progress Energy's draft of

0 2 : 5 1

10 the agreement dated February 5, 2008?

0 2 : 5 1

11 A. Yes.

0 2 : 5 1

12 Q. Let me direct your attention to Section 3.9 on

0 2 : 5 1

13 page 15 of this attached draft.

0 2 : 5 1

14 A. Yep.

0 2 : 5 1

15 Q. Do you see that Progress Energy has struck through

0 2 : 5 1

16 the comment that CertainTeed included in the earlier draft

0 2 : 5 1

17 of Section 3.9?

0 2 : 5 1

18 A. I see that, yes.

0 2 : 5 1

19 Q. And is it correct that the only discussion you

0 2 : 5 1

20 remember with anyone at Progress Energy related to

0 2 : 5 1

21 Section 3.9 was at a meeting with Progress Energy that

0 2 : 5 1

22 occurred in Raleigh on February 14th and 15th?

0 2 : 5 1

23 A. I think it was 13th and 14th. I don't think we

0 2 : 5 1

24 met on Saturday.

0 2 : 5 2

25 Q. You only recall -- you recall discussing it at one

0 2 : 5 2 1 meeting over a 2-day period with CertainTeed and with
0 2 : 5 2 2 Progress Energy?

0 2 : 5 2 3 A. That's correct.

0 2 : 5 2 4 Q. And you don't recall discussing 3.9 on any other
0 2 : 5 2 5 occasion with Progress Energy?

0 2 : 5 2 6 A. No.

0 2 : 5 2 7 Q. And at that meeting, you were asked whether
0 2 : 5 2 8 Section 3.9 was acceptable. And what you said was you
0 2 : 5 2 9 didn't see anything in the provision that was inconsistent
0 2 : 5 2 10 with your views.

0 2 : 5 2 11 Isn't that what you said?

0 2 : 5 2 12 A. That's correct.

0 2 : 5 2 13 Q. And you don't remember beyond that the substance
0 2 : 5 2 14 of the conversations that you had with anyone at
0 2 : 5 2 15 Progress Energy regarding what Progress Energy thought
0 2 : 5 2 16 3.9 meant; is that right?

0 2 : 5 2 17 A. I don't remember them giving any -- any
0 2 : 5 2 18 explanation for it at all.

0 2 : 5 2 19 Q. It's true, isn't it, Mr. Morrow, that you don't
0 2 : 5 3 20 even know whether the CertainTeed representatives who signed
0 2 : 5 3 21 off on the 2008 agreement were aware of Section 3.9?

0 2 : 5 3 22 A. I'm quite certain that they weren't, other than
0 2 : 5 3 23 unless they read the agreement. I didn't provide them with
0 2 : 5 3 24 any feedback on this. I concluded that this clause only
0 2 : 5 3 25 restated the fact that they're in the power business and

0 2 : 5 3 1 we're in the gypsum business.

0 2 : 5 3 2 Q. You were the person at CertainTeed responsible for
0 2 : 5 3 3 ensuring that management had a full and complete view of the
0 2 : 5 3 4 important provisions in this agreement?

0 2 : 5 3 5 A. That's correct.

0 2 : 5 3 6 Q. And you recognized that Section 3.9 was a new
0 2 : 5 3 7 provision that had been added for the first time to the
0 2 : 5 3 8 2008 agreement?

0 2 : 5 3 9 A. That's correct.

0 2 : 5 3 10 Q. And you also recognized that someone at
0 2 : 5 3 11 CertainTeed had raised a concern that it could affect the
0 2 : 5 3 12 supply obligation, right?

0 2 : 5 3 13 A. That's correct.

0 2 : 5 3 14 Q. But you didn't bring it to management's attention
0 2 : 5 3 15 when you summarized the agreement for them?

0 2 : 5 3 16 A. That's right.

0 2 : 5 4 17 Q. Now, ultimately, when the 2008 agreement was
0 2 : 5 4 18 signed, Section 3.9 was accepted in the same form originally
0 2 : 5 4 19 proposed by Progress Energy, right?

0 2 : 5 4 20 A. That's correct.

0 2 : 5 4 21 Q. And let me ask you, if you would, to look at the
0 2 : 5 4 22 signed version of the 2008 agreement.

0 2 : 5 4 23 MR. TUCKER: Exhibit 6, please. Can you put that
0 2 : 5 4 24 on the screen?

0 2 : 5 4 25 Q. So you talked a little bit about what you thought

0 2 : 5 4 1 this meant in response to Ms. Marston's questions. And what
0 2 : 5 5 2 I heard you say was that you thought it meant that
0 2 : 5 5 3 CertainTeed could not require Progress Energy to burn any
0 2 : 5 5 4 particular amount of coal or any particular type of coal
0 2 : 5 5 5 like high sulfur coal.

0 2 : 5 5 6 Is that essentially what you said?

0 2 : 5 5 7 A. That's correct.

0 2 : 5 5 8 Q. Now, if you look at the very first sentence of
0 2 : 5 5 9 Section 3.9, that sentence says:

0 2 : 5 5 10 "CertainTeed acknowledges and agrees that
0 2 : 5 5 11 Progress Energy's obligations hereunder are
0 2 : 5 5 12 subject to Progress Energy's overriding and
0 2 : 5 5 13 primary duty to produce economical and reliable
0 2 : 5 5 14 electric power for public consumption in
0 2 : 5 5 15 accordance with federal, state, and local laws."
0 2 : 5 5 16 And then it goes on.

0 2 : 5 5 17 Do you see that?

0 2 : 5 5 18 A. Yes.

0 2 : 5 5 19 Q. And there's nothing in that section that carves
0 2 : 5 5 20 out or limits any obligations in the agreement that are
0 2 : 5 5 21 subject to that overriding and primary purpose, is there?

0 2 : 5 5 22 A. I'm not sure I understand the question.

0 2 : 5 5 23 Q. Do you see any limitation in the language of
0 2 : 5 6 24 Section 3.9 that says this provision could not apply to any
0 2 : 5 6 25 obligation under the agreement?

02:56

1 A. I understand what you said.

02:56

2 I guess that's true, yes.

02:56

3 Q. Now, shifting gears a little bit.

02:56

4 In your testimony earlier today, you went through
5 a series of drafts related to the 2008 agreement. And if I
6 understood you correctly, you expressed the opinion that
7 there was a quantity term in Section 3.1 that had been
8 omitted after the introductory sentence that establishes
9 50,000 tons as the MMQ for a specified period.

02:56

10 Did I hear your testimony correctly on that?

02:56

11 A. I think that's what I said, yes.

02:56

12 Q. Now, this omission that you talked about, that was
13 pointed out to you by CertainTeed's counsel in connection
14 with this litigation, correct?

02:57

15 A. Yes.

02:57

16 Q. You spent a lot of time negotiating the
17 2008 agreement, you said, and carefully reviewed all the
18 provisions, correct?

02:57

19 A. Yep. That's correct.

02:57

20 Q. And you were assisted by others at CertainTeed in
21 that process, including legal counsel?

02:57

22 A. That's correct.

02:57

23 Q. We saw Mr. Rayburn's name. We know he was
24 involved, correct?

02:57

25 A. Yes.

0 2 : 5 7 1 Q. But prior to discussion with CertainTeed's
0 2 : 5 7 2 litigation counsel in connection with this case, you were
0 2 : 5 7 3 completely unaware that there was any alleged error or
0 2 : 5 7 4 omission in the 2008 agreement; is that right?

0 2 : 5 7 5 A. That's correct.

0 2 : 5 7 6 Q. And now that you've gone back and looked at the
0 2 : 5 7 7 2008 agreement, you agree that there is not -- to use your
0 2 : 5 8 8 words -- good clarity with respect to other provisions of
0 2 : 5 8 9 the 2008 agreement, correct?

0 2 : 5 8 10 Do you remember telling me that you thought the
0 2 : 5 8 11 definition of gypsum filter --

0 2 : 5 8 12 MS. MARSTON: Objection. The witness hasn't
0 2 : 5 8 13 answered yet.

0 2 : 5 8 14 A. I'm struggling with "other provisions." I think I
0 2 : 5 8 15 was referencing one when I made that statement.

0 2 : 5 8 16 Q. Let me ask it specific to what you were
0 2 : 5 8 17 referencing.

0 2 : 5 8 18 What were you referencing?

0 2 : 5 8 19 A. I think it was clause 3.1.

0 2 : 5 8 20 Q. It was the definition of "gypsum filter cake" in
0 2 : 5 8 21 the agreement, wasn't it?

0 2 : 5 8 22 A. I don't remember that. Sorry.

0 2 : 5 8 23 Q. Do you remember telling me at your deposition that
0 2 : 5 8 24 you thought one could conclude that "gypsum filter cake"
0 2 : 5 8 25 means gypsum filter cake produced by the scrubbers at the

02:58

1 Roxboro and Mayo plants?

02:59

2 A. I remember us having that conversation, so, yes, I
3 could have said that.

02:59

02:59

4 Q. Now, just to close the loop on your involvement.

02:59

5 I think you've admitted already that you didn't

02:59

6 have any involvement whatsoever in the 2012 agreement,

02:59

7 right? You were gone from CertainTeed?

02:59

8 A. I think I take umbrage to the word "admitted,"

02:59

9 but, no, I had no involvement in 2012.

02:59

10 Q. Well, I won't argue about with you about that.

02:59

11 You acknowledge, if you would --

02:59

12 A. Yes.

02:59

13 Q. -- that you had no involvement whatsoever in the

02:59

14 2012 agreement?

02:59

15 A. That is correct.

02:59

16 Q. So you can't say what either parties' intent was

02:59

17 with respect to Section 3.1 in that agreement; is that

02:59

18 right?

02:59

19 A. I guess the answer to that question is "correct."

03:00

20 Q. You don't know, for example, if there were any

03:00

21 omissions in Section 3.1 of the 2012 agreement or not?

03:00

22 A. I have absolutely no idea.

03:00

23 Q. And if there was an omission, you can't say

03:00

24 whether it was intentional or not?

03:00

25 A. That's correct.

08:00 1 MR. TUCKER: I think that's all I have for

08:00 2 Mr. Morrow, Your Honor.

08:00 3 THE COURT: Any redirect?

08:00 4 MS. MARSTON: Yes. Thank you, Your Honor.

08:00 5 REDIRECT EXAMINATION by Ms. Marston:

08:00 6 Q. Mr. Morrow, if you'll look back at Section 3.9 in
08:00 7 Exhibit 6, which is the 2008 agreement.

08:00 8 A. Yes.

08:00 9 Q. Mr. Tucker asked you to look at the first sentence
08:00 10 of Section 3.9.

08:00 11 Do you recall that?

08:00 12 A. Yes.

08:00 13 Q. How many sentences are there in Section 3.9?

08:00 14 A. There is only one.

08:00 15 Q. And I want to make sure I have this clear,
08:00 16 Mr. Morrow.

08:00 17 When Ms. Larger, counsel for Progress, sent
08:01 18 Exhibit 18, which is the February 18th draft, she didn't
08:01 19 send a redline, right?

08:01 20 A. That's correct. She did not.

08:01 21 Q. She only sent a clean version?

08:01 22 A. That's right.

08:01 23 Q. No one at Progress caught that there was a missing
08:01 24 sentence there either, did they?

08:01 25 MR. TUCKER: Objection. Lack of foundation.

0 8 : 0 1

1 THE COURT: Overruled.

0 8 : 0 1

2 I think the question would be: Did anyone at
3 Progress Energy bring that to your attention. That's as
4 much as you can say.

0 8 : 0 1

5 A. The words came right out of your mouth. That's
6 exactly what I was going to say. Nobody brought it to our
7 attention there was anything that was missing.

0 8 : 0 1

8 I'd also point out that they didn't figure out
9 that they had missed the deletion of the words -- I'm trying
10 to make sure I get it right -- on the start-up period.

0 8 : 0 1

11 Clearly, that was something that carried over that they
12 didn't catch either.

0 8 : 0 1

13 Q. Mr. Morrow, you traveled down to Charlotte for
14 your deposition a few months ago, didn't you?

0 8 : 0 1

15 A. I did.

0 8 : 0 1

16 Q. And you've traveled down to Greensboro for this
17 testimony?

0 8 : 0 1

18 A. I did.

0 8 : 0 2

19 Q. Are you being compensated to be here?

0 8 : 0 2

20 A. No, I'm not.

0 8 : 0 2

21 Q. So why are you taking the time to review, be
22 deposed, and testify here today?

0 8 : 0 2

23 A. I invested a lot of time and energy in the growth
24 of that company, and I was very proud of what I had done.
25 And I am here to help them get the agreements to where they

0 8 : 0 2

0 8 : 0 2

0 8 : 0 2

0 8 : 0 2

1 were intended to be.

0 8 : 0 2

2 MS. MARSTON: No further questions.

0 8 : 0 2

3 MR. TUCKER: I don't have anything further.

0 8 : 0 2

4 THE COURT: You may step down.

0 8 : 0 2

5 Is the witness excused?

0 8 : 0 2

6 MS. MARSTON: Yes, he is, Your Honor.

0 8 : 0 2

7 THE COURT: I think we'll take our afternoon break

0 8 : 0 2

8 now.

0 8 : 0 2

9 What do you think -- your deposition is how long,

0 8 : 0 2

10 sir?

0 8 : 0 2

11 MR. PHILLIPS: An hour and 43 minutes.

0 8 : 0 2

12 THE COURT: So if we started at 3:20, we'd finish

0 8 : 0 2

13 at 5:00?

0 8 : 0 2

14 MR. PHILLIPS: Bingo.

0 8 : 0 2

15 MS. MARSTON: 5:03, yes.

0 8 : 0 2

16 THE COURT: All right. Have it queued up and

0 8 : 0 2

17 ready to go at 3:20.

0 8 : 0 2

18 MS. MARSTON: Thank you, Judge.

0 8 : 0 8

19 (Recess.)

0 8 : 2 0

20 THE COURT: Back on the record.

0 8 : 2 0

21 It's my understanding that I've ruled on all the

0 8 : 2 0

22 objections as to the testimony of the deposition of Mr. Halm

0 8 : 2 0

23 that's being -- ready to be presented.

0 8 : 2 0

24 I've been advised that there were certain

0 8 : 2 0

25 documents that were identified as exhibits during that

0 3 : 2 0 1 deposition to which there are objections based on the same
0 3 : 2 0 2 basis that I ruled on this morning.

0 3 : 2 0 3 And so the agreement is, in addition to the
0 3 : 2 0 4 objections to the testimony that have been preserved, the
0 3 : 2 0 5 objections to all of the documents are being preserved, but
0 3 : 2 1 6 that the Court will accept them to be introduced over those
0 3 : 2 1 7 objections as we proceed.

0 8 : 2 1 8 MR. TUCKER: Thank you, Your Honor.

0 8 : 2 1 9 MS. MARSTON: Your Honor, before we start with
0 3 : 2 1 10 respect to exhibits, may I move four exhibits that we
0 3 : 2 1 11 addressed with Mr. Morrow into evidence?

0 3 : 2 1 12 THE COURT: You may.

0 3 : 2 1 13 MS. MARSTON: Those are Exhibits 11, 16, 17, and
0 3 : 2 1 14 18. And as I think we'll discuss more tomorrow, we'll
0 3 : 2 1 15 request that Exhibits 11 and 18, which are drafts of the
0 3 : 2 1 16 agreement, be sealed and redacted copies be filed.

0 3 : 2 1 17 THE COURT: And, again, for the record, the
0 3 : 2 1 18 understanding that the Court has had is that, at the
0 3 : 2 1 19 appropriate time, the parties are going to indicate to me
0 3 : 2 1 20 specifically which categories of information are to be kept
0 3 : 2 1 21 under seal; that the Court has instructed the parties that
0 3 : 2 1 22 that will be kept to an absolute minimum to protect the
0 3 : 2 1 23 information; that either party would be allowed to present
0 3 : 2 1 24 testimony if they challenged the designation by the other;
0 3 : 2 1 25 and that I will look for the least-restrictive alternative

0 3 : 2 2 1 necessary to protect the confidential and proprietary
0 3 : 2 2 2 protection of the parties against the competitors. Subject
0 3 : 2 2 3 to that subsequent showing, they're going to agree that
0 3 : 2 2 4 ultimately there will be a public version of the
0 3 : 2 2 5 documents -- exhibits with minimum redactions, and a
0 3 : 2 2 6 separate set of the full documents that are under seal.

0 3 : 2 2 7 All right. You may call your next witness.

0 3 : 2 2 8 MR. PHILLIPS: Your Honor, the plaintiff would
0 3 : 2 2 9 like to present the testimony of John Halm via video
0 3 : 2 2 10 deposition.

0 3 : 2 2 11 THE COURT: You may proceed.

0 3 : 2 2 12 (Video playing.)

0 3 : 2 3 13 THE COURT: Can you stop just a second.

0 3 : 2 3 14 I failed to note also that the parties have agreed
0 3 : 2 3 15 that the court reporter need not transcribe the deposition
0 3 : 2 3 16 that is being played, and that a disk will be submitted
0 3 : 2 3 17 later to be kept as part of the record.

0 3 : 2 3 18 MR. TUCKER: Your Honor, before she starts back,
0 3 : 2 3 19 may I make one comment?

0 3 : 2 3 20 THE COURT: Yes.

0 3 : 2 3 21 MR. TUCKER: We are quickly going through this --
0 3 : 2 3 22 I think both of us are doing this -- to just ensure that
0 3 : 2 3 23 there is no portion of the deposition testimony that raises
0 3 : 2 3 24 any of the confidentiality issues that we're concerned
0 3 : 2 3 25 about, we've identified one section that deals with future

0 3 : 2 8 1 forecasts which falls under the category of information that
0 3 : 2 3 2 we've been concerned about. So I wanted to alert the Court
0 3 : 2 3 3 that we may raise our hand very quickly --

0 3 : 2 3 4 THE COURT: Well, first of all, is that testimony
0 3 : 2 3 5 necessary --

0 3 : 2 3 6 MR. PHILLIPS: I don't know, Your Honor.

0 3 : 2 3 7 MR. TUCKER: We'll -- can we let you know where it
0 3 : 2 3 8 is?

0 3 : 2 3 9 MR. PHILLIPS: If he can just hand me --

0 3 : 2 4 10 THE COURT: All right. So the two options, if you
0 3 : 2 4 11 don't need the testimony, then we simply won't play it. If
0 3 : 2 4 12 you're going to publish it and ask that the courtroom be
0 3 : 2 4 13 cleared, then we've got other things we have to do.

0 3 : 2 4 14 All right. Proceed.

0 3 : 2 4 15 (Video playing.)

0 4 : 5 3 16 MS. MARSTON: Your Honor, Exhibit 87 was
0 4 : 5 3 17 Mr. Halm's affidavit. By agreement, the parties did not
0 4 : 5 3 18 include those as exhibits because we did not --

0 4 : 5 3 19 THE COURT: That will be fine. I just want to let
0 4 : 5 3 20 you know this notebook does not have it.

0 4 : 5 4 21 Go ahead.

0 4 : 5 4 22 MR. TUCKER: And, Your Honor, I think there are a
0 4 : 5 4 23 couple of others that you will probably notice as this
0 4 : 5 4 24 continues that are not in your booklet for the same reason.

0 4 : 5 4 25 THE COURT: Okay. That's fine.

0 4 : 5 4

1

(Video playing.)

0 4 : 5 4

2

THE COURT: That concludes the playing of the

0 5 : 0 7

3

deposition?

0 5 : 0 7

4

MR. PHILLIPS: It does, Your Honor. And I know

0 5 : 0 7

5

you have to leave. If we can move to admit exhibits in the

0 5 : 0 7

6

morning, we'll get our ducks in a row and --

0 5 : 0 7

7

THE COURT: That will be fine.

0 5 : 0 7

8

MR. PHILLIPS: -- get you out of here.

0 5 : 0 7

9

THE COURT: That would be fine. I've got time to

0 5 : 0 8

10

do it today maybe, but it's easier to do it -- and anyway,

0 5 : 0 8

11

you can double check and we'll do it in the morning.

0 5 : 0 8

12

All right. We'll start in the morning at 9:00.

0 5 : 0 8

13

MR. PHILLIPS: Thank you, Your Honor.

0 5 : 0 8

14

MR. TUCKER: Thank you, Your Honor.

15

(Court recessed on Tuesday, July 10, 2018,

16

until Wednesday, July 11, 2018, at 9:00 a.m.)

17

(Volume III of VII)

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