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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI

Case No. 12-51502-659

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In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- - - - -x

REDACTED TRANSCRIPT (HUFFARD TESTIMONY OMITTED)

United States Bankruptcy Court
111 South 10th Street
4th Floor
St. Louis, Missouri

April 30, 2013
9:07 AM

B E F O R E:
HON. KATHY A. SURRETT-STATES
U.S. BANKRUPTCY JUDGE

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Motion to Reject Collective Bargaining Agreements and to Modify
Retiree Benefits Pursuant to 11 U.S.C. 1113, 1114 of the
Bankruptcy Code Filed by Debtor (3214)

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1 P R O C E E D I N G S

2 THE CLERK: Please rise. The United States bankruptcy
3 court for the Eastern District of Missouri now in session, the
4 Honorable Kathy A. Surratt-States presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. This is our continued hearing in the Patriot Coal case
7 on the 1113 and 1114 motion. Let me first start with
8 appearances, please.

9 MR. MOSKOWITZ: Good morning, Your Honor. Elliot
10 Moskowitz of the law firm of Davis Polk & Wardwell representing
11 the debtors. I'm here with a number of my colleagues: Mr.
12 Huebner, Mr. Kaminetzky and others. And as people representing
13 the debtors appear at the podium, they will introduce
14 themselves if that's okay with the Court.

15 THE COURT: That is.

16 MR. MOSKOWITZ: Thank you.

17 THE COURT: Good morning.

18 MR. MOSKOWITZ: Good morning.

19 MR. WILLARD: Good morning, Your Honor. May it please
20 the Court. Greg Willard on behalf of the official unsecured
21 creditors committee together with my co-counsel, Tom Mayer and
22 Stephen Blank.

23 THE COURT: All right. Thank you. Good morning.

24 MR. TURNER: Good morning, Your Honor. Marshall
25 Turner on behalf of Citibank as first out DIP agent. And in

1 the courtroom is lead counsel Andrea S. Saavedra from Weil,
2 Gotshal & Manges.

3 THE COURT: All right. Good morning.

4 MS. TOLEDO: Good morning. Laura Toledo with Lathrop
5 & Gage on behalf of Bank of America as the second out DIP
6 agent. Also in court today is Ana Alfonso of Willkie Farr &
7 Gallagher, lead counsel.

8 THE COURT: Good morning.

9 MR. PERILLO: Good morning, Your Honor. Fred Perillo
10 on behalf of the United Mine Workers of America. With me is my
11 colleague, Yingtao Ho. We'll be joined later today by my other
12 colleague, Sara Geenen. In the courtroom with me as well is
13 Grant Crandall --

14 THE COURT: Good morning.

15 MR. PERILLO: -- the general counsel of the UMWA. And
16 we will be joined by Art Traynor who is a staff attorney from
17 the UMWA.

18 THE COURT: All right. Thank you.

19 MR. PERILLO: Mr. Traynor actually is right here
20 already.

21 THE COURT: Oh, all right. Good morning, Mr. Traynor.

22 MS. LONG: Good morning, Your Honor. Leonora Long on
23 behalf of the United States trustee.

24 THE COURT: Good morning.

25 MR. STRASSER: Good morning, Your Honor. Alan

1 Strasser on behalf of Aurelius Capital Management and
2 Knighthood Capital Management.

3 THE COURT: Good morning.

4 MR. COUSINS: Good morning, Your Honor. Steven
5 Cousins of Armstrong Teasdale here on behalf of Peabody Energy
6 Company. Thank you.

7 THE COURT: Good morning.

8 MR. MARSICO: Good morning, Your Honor. Leonard
9 Marsico on behalf of Ohio Valley Coal and Ohio Valley
10 Transloading.

11 THE COURT: Good morning.

12 MR. MARSICO: Good morning.

13 MR. SCHNABEL: Good morning, Your Honor. Eric Lopez
14 Schnabel, Dorsey & Whitney, on behalf of U.S. Bank as indenture
15 trustee.

16 THE COURT: Good morning.

17 MR. SCHNABEL: Thank you.

18 MR. LEVINE: Good morning, Your Honor. Jon Levine of
19 Andrews Kurth on behalf of Wilmington Trust as indenture
20 trustee.

21 THE COURT: Good morning.

22 MR. GOODCHILD: Good morning, Your Honor. John
23 Goodchild, Morgan Lewis & Bockius, here on behalf of the UMWA
24 Health & Retirement Funds.

25 THE COURT: Good morning. All right.

1 MR. MOSKOWITZ: Your Honor, I apologize. I neglected
2 that I'm also joined by my distinguished colleague from Bryan
3 Cave, Lloyd Palans. Apologies.

4 MR. PALANS: Good morning, Your Honor.

5 THE COURT: Mr. Palans needs no introduction here in
6 this court. Good morning, Mr. Palans.

7 All right. Mr. Moskowitz, it is my understanding that
8 your first witness this morning will be Mr. Huffard.

9 MR. MOSKOWITZ: That is correct, Your Honor.

10 THE COURT: All right. And Mr. Huffard will be
11 discussing some confidential information?

12 MR. MOSKOWITZ: Very much so, Your Honor.

13 THE COURT: All right. And as I indicated yesterday
14 then, I will clear and seal the courtroom then since there is
15 confidential information that will be discussed. Only
16 parties -- well, only counsel that has signed the
17 confidentiality agreement may remain in the courtroom. The
18 feed to 5 South has already been disconnected so, certainly, if
19 people want to go sit down at 5 South, that is available.
20 Likewise, in just a minute, we'll cut the feed to the attorney
21 conference rooms and to the listing room on the fourth floor
22 for these purposes.

23 So at this point, I would ask anyone who has not
24 signed the confidentiality agreement -- yes?

25 MR. MOSKOWITZ: Your Honor, two preliminaries,

1 briefly. Before any retirees leave the courtroom, we would ask
2 that the Court perhaps suggest that the seats that they have
3 now been occupying be reserved for them for when they return.

4 THE COURT: Oh, absolutely, yes. That will be the
5 case. We will hold all of those seats for the retirees and we
6 will send someone to invite them back up after Mr. Huffard's
7 testimony is completed.

8 MR. MOSKOWITZ: Thank you, Your Honor. And secondly,
9 counsel to Aurelius and Knighthead has a statement to make in
10 this regard.

11 THE COURT: All right.

12 MR. STRASSER: Good morning, Your Honor. It's Alan
13 Strasser on behalf of Aurelius Capital Management. And the
14 request I'm about to make is only on behalf of Aurelius Capital
15 Management and that is that we object to the closure of the
16 courtroom for this testimony. It is important testimony on an
17 important issue in the case. And we think it would be better
18 if it were publicly disclosed so that other people could hear
19 it including interested parties in the public.

20 THE COURT: All right. Mr. Huebner or Mr. Moskowitz?

21 MR. HUEBNER: Good morning, Your Honor. For the
22 record, I am Marshall Huebner of Davis Polk & Wardwell on
23 behalf of the debtors.

24 Your Honor, I guess, the first point is we discussed
25 this yesterday and Your Honor indicated your intention to do

1 so, asked for any objections and counsel was sitting right over
2 there in the second row and had nothing to say. So this ship
3 has sailed.

4 But I think the second issue, Your Honor, just so you
5 understand and I'm going to be very careful and not to disclose
6 the content of any conversations. But simply stated, Mr.
7 Strasser has two clients, Aurelius and Knighthead. As you
8 heard, he's making the request only on behalf of Aurelius
9 because Knighthead has signed a confidentiality agreement and
10 is actually working with quite productively and constructively.
11 Aurelius has not done so and, as of yesterday afternoon, as Mr.
12 Strasser knew perfectly well, had not done so. And, in fact,
13 this morning, Mr. Strasser sent me an e-mail confirming that he
14 could remain in the courtroom, which I offered him to do, but
15 that he would share anything he heard only with Knighthead
16 which is subject to the confidentiality agreement and not with
17 Aurelius which simply refuses to sign one that, in our view, is
18 reasonable. And candidly, without getting into content, we've
19 bent over backwards and twisted ourselves into a pretzel to get
20 to a confi with him.

21 So without using any of the words that I got gently
22 tasked for by his partner last week when I was morally outraged
23 at their conduct on their unfounded motion with no evidence, I
24 will simply note that we can now add procedural abuse to
25 substantive abuse that they show up in the morning, after

1 "reaching a deal" on how this will proceed after hearing Your
2 Honor rule on the matter and expressing no objection and having
3 the gumption to stand up at this point and say we object.

4 So we object to their objection. And we ask that, as
5 Elliot (sic) said yesterday, we now have to litigate everything
6 four times in a row and we think that it is really quite
7 surprising and not well founded.

8 THE COURT: All right.

9 MR. STRASSER: Your Honor, I generally don't mind
10 being accused of having gumption. And I knew that there were
11 discussions going on yesterday afternoon between Mr. Huebner
12 and my client. At the end of the day, I didn't know how they
13 turned out. So as to the point that I didn't speak yesterday,
14 I didn't know one way or the other whether Aurelius would be
15 allowed to have counsel present. And as to the content of the
16 conversations, I don't think that would be helpful for the
17 Court for me to explore and I don't plan to do that.

18 THE COURT: All right.

19 MR. STRASSER: Thank you, Your Honor.

20 THE COURT: Under the circumstances, I will stick with
21 my original ruling. I believe that the information is
22 confidential. The declarations have been filed under seal and
23 such. And likewise, I would agree with the debtors that this
24 is confidential information that should not be out for public
25 consumption. So I will stick with my original ruling and we

1 will clear the courtroom then.

2 MR. HUEBNER: Thank you, Your Honor. And to be clear,
3 we are not vengeful so we are very happy to honor our deal with
4 Mr. Strasser, delighted to have him stay and share whatever he
5 learns with Knighthead but most assuredly not with Aurelius
6 unless and until they sign a confi, in which case we would be
7 delighted to add them to conversations we think they would
8 actually find quite useful.

9 THE COURT: All right. Thank you.

10 MR. MOSKOWITZ: And then one other thing to mention,
11 of course goes without saying that the United States trustee
12 can remain with us during this testimony and she has --

13 THE COURT: Correct and not required --

14 MR. MOSKOWITZ: -- of course had access to --

15 THE COURT: -- to sign any --

16 MR. MOSKOWITZ: Of course.

17 THE COURT: -- confidentiality agreement --

18 MR. MOSKOWITZ: Yes, of course.

19 THE COURT: -- of course.

20 MR. HUEBNER: And I'd like the record to reflect that
21 Patriot Coal and its professionals love the United States
22 trustee.

23 THE COURT: Likewise, the Court does.

24 MS. LONG: Your Honor, that may be reflected on the
25 fact that I'm reviewing fee applications. And that's why I'm

1 sitting here in the courtroom.

2 MR. MOSKOWITZ: Your Honor, one other just preliminary
3 matter before we take up the witness. I think, as was
4 discussed yesterday in the opening statements, the union has
5 made a fourth counterproposal prior to the commencement of the
6 trial. This is the Saturday night proposal that we discussed
7 yesterday. That is not yet in the record before the Court.
8 The parties have stipulated that it should be made part of the
9 record and I would offer it into evidence as Exhibit -- Joint
10 Exhibit 290 I believe is where we are up to although Ms. Magnus
11 can correct me on that or any of my colleagues.

12 THE CLERK: Yes. 290.

13 (Union's fourth counterproposal was hereby received into
14 evidence as Debtors' Exhibit 290, as of this date.)

15 THE COURT: 290. All right. Joint Exhibit 290. All
16 right.

17 MR. MOSKOWITZ: May I approach with the --

18 THE COURT: You may.

19 MR. MOSKOWITZ: Thank you.

20 THE COURT: Thank you.

21 MR. MOSKOWITZ: Your Honor, attached to the
22 counterproposal, there was a "Summary of Savings" schedule to
23 quantify what the union believes the concessions were worth
24 that had not been attached to the document. So at an
25 appropriate break, so that we don't delay the proceedings this

1 morning, we'd like to substitute the document that included the
2 "Summary of Savings" --

3 THE COURT: Certainly. That's not a problem.

4 MR. MOSKOWITZ: -- for Exhibit 290.

5 THE COURT: All right.

6 MR. MOSKOWITZ: Perfect. And that time is now because
7 we have the document right here.

8 THE COURT: Oh, all right. So I'll give you that one
9 back and --

10 MR. MOSKOWITZ: Yeah. That would be great.

11 THE COURT: Okay.

12 MR. MOSKOWITZ: Thank you.

13 THE COURT: All right. Ms. Magnus, then mark that --

14 MR. MOSKOWITZ: Actually, no. Why don't you hold onto
15 that one and I'm just going to give you the "Summary of
16 Savings" to add to it.

17 THE COURT: Oh, okay. To add to it. Okay.

18 MR. MOSKOWITZ: Perfect.

19 THE COURT: Great. It's part of 290 there.

20 MR. MOSKOWITZ: Yeah. Please make it part of 290.

21 THE COURT: All right. Anything else then?

22 MR. MOSKOWITZ: Nothing else. We're ready to call Mr.
23 Huffard to the stand.

24 THE COURT: All right. And everybody who's in here is
25 supposed to be in here.

1 MR. MOSKOWITZ: We believe so, on the honor system.

2 THE COURT: All right. Mr. Huffard, if you would stop
3 there first at the podium to be sworn in, please.

4 MR. MOSKOWITZ: Your podium. Go right ahead.

5 (Witness sworn)

6 THE CLERK: Please have a seat in the witness box,
7 sir.

8 MR. MOSKOWITZ: Your Honor, just a preliminary couple
9 of comments about Mr. Huffard. The parties have stipulated
10 with respect to all of the expert witnesses that they will be
11 qualified as experts in the fields that they have put
12 themselves forward as reflected both in their declarations and
13 also in their deposition testimony.

14 With respect to Mr. Huffard, his expertise lies in
15 Chapter 11 corporate restructurings, including in financial
16 analyses, valuation and capital structure issues. And as I
17 said, the UMWA has stipulated to his qualification as an expert
18 witness in this area. And he's also, of course, submitted both
19 an initial and a reply declaration in this matter. Those
20 declarations are admitted as his direct testimony and he will
21 also be one of the two live witnesses for direct testimony who
22 we're representing to the Court. And the testimony that he
23 will give today supplements the live testimony reflected in
24 both his initial and reply declarations.

25 THE COURT: All right.

1 (Huffard testimony redacted)

2 THE COURT: Thank you. All right. It's 1:25. Mr.
3 Moskowitz, you still have Mr. Terry, Mr. Schwartz and Mr. Lucha
4 for today?

5 MR. MOSKOWITZ: We do and we would propose that Mr.
6 Schwartz testify next.

7 THE COURT: All right. And that is cross-examination
8 only?

9 MR. MOSKOWITZ: Correct.

10 THE COURT: Cross-examination only for Terry and Lucha
11 as well?

12 MR. MOSKOWITZ: Also correct.

13 THE COURT: All right. All right. Then we'll be in
14 recess --

15 MR. MOSKOWITZ: And of course, appropriate redirect if
16 necessary.

17 THE COURT: Correct. All right. We'll be in recess,
18 then, until 2:30. Will someone please let the people down at 5
19 South know that that is what we are doing?

20 MR. MOSKOWITZ: Yes.

21 THE COURT: All right. Then we'll be in temporary
22 recess.

23 (Recess from 1:24 p.m. until 2:43 p.m.)

24 THE CLERK: Please rise. Your Honor, we're back on
25 the record.

1 THE COURT: All right. Thank you. Be seated, please.

2 MR. RUSSANO: Good afternoon, Your Honor. Mike
3 Russano from Davis Polk on behalf of the debtors.

4 THE COURT: All right, Mr. Russano. Give me just a
5 second. I need -- I have people on the phone that we didn't
6 have this morning because we had the courtroom sealed. So let
7 get their appearances. Ms. McGreal, you're appearing on behalf
8 of the debtor?

9 MS. MCGREAL: Yes. Good afternoon, Your Honor.

10 THE COURT: Good afternoon. And Mr. Plotko on behalf
11 of the creditors' committee?

12 MR. PLOTKO: That's correct, Your Honor. Good
13 afternoon.

14 THE COURT: All right. Good afternoon. And Ms.
15 Schonholtz on behalf of Bank of America?

16 MS. SCHONHOLTZ: Yes, good afternoon, Your Honor.

17 THE COURT: Good afternoon. And Mr. Meldrum on behalf
18 of Argonaut Insurance?

19 MR. MELDRUM: Yes, Your Honor, thank you.

20 THE COURT: All right, good afternoon. And Kristi
21 Davidson on behalf of Caterpillar?

22 MS. DAVIDSON: Yes, good afternoon.

23 THE COURT: Good afternoon. All right. Are we ready
24 to call our next witness?

25 MR. RUSSANO: Yes, Your Honor. I would like to

1 introduce Seth Schwartz. Mr. Schwartz is the president of
2 Energy Ventures Analysis, Inc., which he co-founded in 1981.
3 EVA is an energy consulting firm that specializes in the
4 analysis of energy markets including coal, oil, natural gas and
5 electric power. Mr. Schwartz has over thirty years of
6 experience in the energy consulting field. His areas of
7 expertise includes analyzing and projecting supply, demand and
8 market prices for coal and alternative energy and evaluating
9 operations and production costs including labor costs and
10 productivity with a particular emphasis on coal mining
11 operations.

12 Mr. Schwartz has prepared both a declaration and a
13 reply declaration in this case. Those are located at joint
14 Exhibit Numbers 135 and 148 respectively. Those declarations
15 constitute Mr. Schwartz' direct testimony. And at this point
16 I'd like to call Mr. Schwartz to the stand for cross-
17 examination.

18 THE COURT: All right. Mr. Schwartz, if you'd step up
19 to the podium first, please to be sworn. Let him stop at the
20 podium first, and we'll swear you in.

21 (Witness sworn)

22 THE CLERK: Please have a seat in the witness box
23 right here.

24 MR. RUSSANO: And Your Honor I would just quickly note
25 for the record that the parties have stipulated to Mr. Schwartz

1 being admitted as an expert declarant in this matter.

2 THE COURT: All right. Thank you. Mr. Ho, do you
3 have some cross-examination for Mr. Schwartz?

4 MR. HO: Your Honor, there was one clarification with
5 regard the stipulating of expertise of Mr. Schwartz. We have
6 stipulated that Mr. Schwartz is a coal-based expert, an expert
7 in coal markets. His declaration also refers to natural gas.
8 We have not stipulated that Mr. Schwartz is an expert on
9 natural gas and natural gas markets.

10 MR. MOSKOWITZ: Apologizes for the interlude, Your
11 Honor. We actually have -- we took the time before Mr.
12 Schwartz testified to reach the precise words of a stipulation.
13 So let me just make sure that what Mr. Ho just described
14 matches exactly what both parties agreed to. Because I want to
15 make sure he didn't misstate anything. I apologize for the
16 interlude. Just give me --

17 THE COURT: Sure, no problem.

18 MR. MOSKOWITZ: Thirty seconds.

19 MR. RUSSANO: Your Honor, why don't we proceed with
20 the examination and we'll revisit this particular point as soon
21 as we find our agreed stipulation?

22 THE COURT: All right. All right, Mr. Ho, you may
23 proceed.

24 CROSS-EXAMINATION

25 BY MR. HO:

1 Q. Good afternoon, Mr. Schwartz.

2 A. Good afternoon.

3 Q. We will start you on your replied declaration, which is
4 Exhibit 148. I will direct you to table 1 of that
5 declaration -- to Exhibit 1 of that declaration, some of which
6 you can find on page 6. Please let me know when you get there.

7 MR. MOSKOWITZ: Your Honor, we've located the e-mail
8 in question, so I'm just going to read into the record what the
9 parties have stipulated to with respect to Mr. Schwartz'
10 qualifications. "Expertise lies generally in the field of
11 energy production including and analyzing and projecting
12 supply, demand and market prices for coal and alternative
13 energy, evaluating operations and production costs including
14 labor costs and productivity, especially for coal mining
15 operations, procurement activities, including negotiation of
16 supply and transportation contracts for coal and natural gas,
17 and the purchase and sale of coal properties." And I don't
18 think there's any dispute about that among the parties, unless
19 someone is going back on stipulation.

20 MR. HO: I'm not sure I would recall --

21 THE CLERK: Mr. Ho, excuse me.

22 THE COURT: I need you at the podium, I'm sorry.

23 MR. PERILLO: I did enter into that stipulation but
24 the part that mentions natural gas, I believe, is in procuring
25 supply contracts.

1 MR. MOSKOWITZ: "Negotiation of supply and
2 transportation contracts for coal and natural gas." That's
3 exactly what it is, so.

4 MR. PERILLO: Yes.

5 THE COURT: All right.

6 MR. MOSKOWITZ: We're stipulating.

7 THE COURT: All right, thank you.

8 Q. In -- are you on Exhibit 1?

9 A. Yes, sir.

10 Q. Okay. Exhibit 1 refers to prices from the Patriot
11 business plan, right?

12 A. Yes.

13 Q. Do you understand there's a difference between priced tons
14 and unpriced tons?

15 A. Yes, I do.

16 Q. In making coal price forecasts?

17 A. No, not in making coal price forecasts. There's a
18 difference between priced tons and unpriced tons in Patriot's
19 business plan.

20 Q. And the prices listed on Exhibit 1 are solely for the
21 unpriced tons, correct?

22 A. These are the market prices which Patriot used from which
23 they calculated the future prices for their unpriced tons.

24 Q. So the priced tons are not reflected in these five-year
25 plan numbers, right?

1 A. The price tons are reflected in the five-year plan.

2 They're not shown on Exhibit 1.

3 Q. That's exactly what I asked you.

4 A. No, it's not.

5 Q. You also list Wood Mackenzie prices on here, correct?

6 A. These prices are from Mr. Akunuri's deposition that he
7 cited from Wood Mackenzie.

8 Q. You mean Mr. --

9 A. His declaration. I'm sorry.

10 Q. So you did not use different types of coal for comparable
11 prices than what Mr. Akunuri used?

12 A. I can only -- as far as the Wood Mackenzie prices, they
13 were only provided to me by Mr. Akunuri for these specific
14 coals that he selected. So I had no ability to look at any of
15 Wood Mackenzie's other price forecasts to see if any of the
16 other coals were more appropriate to use.

17 Q. Were you provided with the categories of Wood Mackenzie
18 coal for southern West Virginia?

19 A. I don't think I understand your question.

20 Q. Were you given a list of the types of coal that Wood
21 Mackenzie performs forecasts for for southern West Virginia and
22 Patriot?

23 A. Not with any specificity to understand what the coal
24 quality or origin -- whether it was real origin or barge-origin
25 or what the heat content or the sulfur content was, no.

1 Q. The actual categories were provided to you, correct?

2 A. No, there were just names that don't tell me enough to
3 select something to make them comparable.

4 Q. What would be an example of these names?

5 A. Names were such as mid BTU Compliance. It didn't specify
6 whether it was barge-origin or rail origin. It didn't specify
7 what the heat content was. Compliance does have a definition
8 in the industry so I knew what the sulfur was for that. But
9 there was very little information provided.

10 Q. The categories were also provided. The same categories
11 were also provided for northern West Virginia Coal, correct?

12 A. I don't think so, no.

13 Q. How about for Illinois -- were the same categories
14 provided for western Kentucky Coal?

15 A. No.

16 Q. In the central West Virginia categories were provided to
17 you by Davis Polk, correct?

18 A. Davis Polk showed me an e-mail on Monday, which I guess
19 was yesterday, that was a forwarded e-mail that said here's a
20 list of names of coals from Wood Mackenzie. But as I
21 testified, there's not enough information there to prepare a
22 table such as I prepared on Exhibit 1. It doesn't specify
23 whether the coal price was for coal, though it originated in a
24 barge versus a railroad, because they're two different prices.
25 It didn't identify what the heat content was. It just used

1 names like Mid BTU and High BTU so I don't know what that is.
2 And it used various names for sulfur of compliance, near
3 compliance and near sulfur. Only compliance would I know what
4 that sulfur was. The others are not specific.

5 Q. Your testimony said that e-mail did not include northern
6 West Virginia Coal?

7 A. It didn't include the coal types for northern West
8 Virginia like it did for southern West Virginia. Not to my
9 recollection, no.

10 Q. Your testimony --

11 A. I don't have the e-mail in front of me. I'm giving you
12 the best of my recollection.

13 Q. I'm just trying to understand what the e-mail said. And
14 your testimony is that e-mail also did not have the Wood
15 Mackenzie categories for Illinois Basin Coal, is that right?

16 A. No, it didn't have the Illinois Basin Coal. It did have
17 West Kentucky. It did not have the same list of sulfurs and
18 heat contents and also didn't specify the origin point. So,
19 again, there's not enough information there to tell what these
20 coals are.

21 Q. Do you know whether the definitions are even available
22 from the Wood Mackenzie service?

23 A. I assume they have to be available. We were provided with
24 a BTU content by Mr. Akunuri for the coals he selected. But we
25 weren't provided a BTU content for the coals he did not select.

1 Nor were we provided s sulfur content. Yet being in the
2 forecasting business, I can tell you that I am certain that
3 Wood Mackenzie would actually have a sulfur content and a BTU
4 content and an origin point for every one of those forecasts.
5 I just didn't see them.

6 Q. And that's -- in your belief, that's actually in the Wood
7 Mackenzie services, based on your knowledge of other services
8 rendering your actual view of what is actually in the Wood
9 Mackenzie service, correct?

10 A. It has to be because I'm in the forecasting business
11 providing forecasts of similar services to clients who
12 subscribe to it. And in order to describe a coal, the price --
13 it matters whether it's FOB rail or FOB barge. It matters what
14 the actual BTU is. Clients don't know if I say mid BTU what
15 that is. So there has to be a number to go along with that.

16 Q. Did you make any attempt to contact Wood Mackenzie to ask
17 what actual BTU and sulfur content are associated with the
18 different categories?

19 A. I didn't do that. As Wood Mackenzie is a competitor of
20 ours, I didn't think it would be appropriate for me to contact
21 them, nor do I think they would answer me if I told them why I
22 was contacting them.

23 Q. SNL is also a competitor of EVA, right?

24 A. I wouldn't consider them to be a competitor, no.

25 Q. But SNL also produces coal price forecasts, correct?

1 A. They only just started producing a coal price forecast
2 last September. And I've talked to the president of SNL, you
3 know, about this. They -- they intend to get in the coal price
4 forecasting business, so I do think, yes, they intend to
5 compete with us. But I, at the present time, would not
6 consider them to be a competitor, no.

7 Q. Over the last month your firm has had contact with SNL
8 concerning this case? Correct?

9 A. Yes.

10 Q. You earlier talked -- I think you used the term heat
11 content? Can you explain to the judge why that makes a
12 difference for coal?

13 A. Yes. The heat content of coal, which is typically
14 measured in units called BTU per pound, that's British Thermal
15 Units per pound of coal, is a measure of how much heat is
16 released on the combustion of coal. Customers typically value
17 coal based upon the delivered price per million BTU, that is
18 the delivered price per unit of heat. So coals with higher
19 heat content have higher value than coals with lower heat
20 content.

21 Q. You also referred to sulfur and specifically mid-sulfur.
22 Does sulfur also make a difference to coal prices?

23 A. I didn't specifically refer to mid-sulfur. That was when
24 you were asking me about what names Wood Mackenzie used. That
25 was one of the names. What I saw was compliance, near

1 compliance and mid-sulfur. So that's how I used it.

2 Q. Let me rephrase the question then. Sulfur does make a
3 difference to coal pricing, correct?

4 A. Frequently, yes.

5 Q. Why is that?

6 A. Because users of coal, typically coal-fired electric
7 powered plants, have emissions limitations that limit the
8 amount of sulfur dioxide which can be emitted after the
9 combustion of coal. So lower sulfur coal either has greater
10 value because it is compliant with the emission limitations or
11 because it is lower cost to remove the sulfur in the combustion
12 process with flue gas desulfurization.

13 Q. Are there certain standardized types of coal for hoist
14 (sic) or market prices?

15 A. There are some, and I've listed them here on Exhibit 1.
16 There are -- the standards generally come from what is known as
17 the over-the-counter market. There are certain typical coal
18 qualities that are traded in the over-the-counter market and
19 I've referenced them here on Exhibit 1.

20 Q. So to the extent there's any difference in heat content
21 between Patriot coal and standard coal that would reflect an
22 actual difference in the pricing of the two types of coal,
23 right?

24 A. All of the things being equal, yes. If the heat content
25 differed, the price would differ also.

1 Q. Similarly, if there's a difference in the sulfur content
2 the price might be different?

3 A. It may be. It's not necessarily as certain as BTU, but
4 yes, it may be.

5 Q. In Exhibit 1, you did not always compare Patriot coal,
6 with coal of exactly the same heat and sulfur content, right?

7 A. No I compared it with the most similar qualities of heat
8 and sulfur that were available from those sources. Most -- some
9 of which were provided by Mr. Akunuri, some of which comes from
10 my own company's forecast. Some comes from the over-the-
11 counter market.

12 Q. Are there ways to market uses to adjust for differences in
13 the heat content?

14 A. There is no standard way the market uses to adjust for
15 heat content. Some people try to do a linear adjustment ratio.
16 The market more typically works in a measure of cents per ton
17 per hundred BTU differential. Customers, and I frequently use
18 this, use a delivered price analysis which include the freight
19 differences in transportation. So there's no standard way to
20 adjust for heat content.

21 Q. In comparing Patriot coal with other coals -- other
22 standardized coals, do you make any adjustments for
23 transportation differences on Exhibit 1?

24 A. Not on this exhibit, no. I was just taking the forecasts
25 as were provided by Mr. Akunuri or as were otherwise available

1 in the market.

2 Q. You also did not make any adjustments for heat content in
3 Table 1, correct?

4 A. That's correct. Again, in most cases the heat content is
5 almost exactly the same. But to the extent there were
6 differences, I didn't make an adjustment, I just presented the
7 forecast as they were provided.

8 Q. You also did not make any adjustments for sulfur content
9 in Exhibit 1, right?

10 A. That's correct. Again, the sulfur contents are either all
11 exactly identical or close. In the case of the Wood Mackenzie
12 forecast provided by Mr. Akunuri, he did not provide the sulfur
13 so there was no ability to even compare the sulfur content.

14 Q. But if you take a look at the Illinois Basin, for example,
15 the Patriot coal was at 5.0 in sulfur content, right?

16 A. Yes, it is.

17 Q. And the foreign market price is at 5.2 for sulfur content,
18 right?

19 A. That's correct.

20 Q. You did not make any adjustments for the difference in
21 sulfur content in that table, correct?

22 A. I did not. And there would be no difference in market
23 price between 5.0 pounds sulfur dioxide per million Btu and
24 5.2. That kind of small difference for high sulfur coal would
25 not see any kind of market price difference.

1 Q. In your opinion what would be the type of gap that's
2 required in order to see a price difference?

3 A. It depends on the coal region and the sulfur content. For
4 a high-sulfur coal from the Illinois Basin, you don't typically
5 see any kind of pricing spread with a small difference like
6 that. In central Appalachia what is known as a compliance coal
7 with 1.2 pound sulfur dioxide per million BTU would carry a
8 price premium even for a small difference with a lower sulfur
9 coal like say a 1.5 or 1.6 pounds. The difference may not be
10 much but compliance coal is fairly unusual and there are
11 certain power plants that must have it so it carries a price
12 premium. But it depends on the coal basin and specifically
13 what coals we're talking about.

14 Q. On your chart, it refers to northern Appalachian Patriot
15 Coal. That's specifically referring to the Federal mine,
16 right?

17 A. The only mine Patriot has is the Federal mine and the coal
18 in Patriot's business plan has a similar specifications, but I
19 think the Federal mine quality may be slightly different from
20 what's shown here as the typical specification of the business
21 plan.

22 Q. And the Federal quality would be slightly higher, correct?

23 A. I think the heat content is slightly higher. I think the
24 sulfur content is slightly higher. So I think in both cases
25 there might be a slight price difference.

1 Q. What's the difference in sulfur content?

2 A. I don't know precisely, but I think it's a little bit
3 above the four and a half pound mark. It may be -- it may be
4 about the same. I'm not sure.

5 Q. So if the sulfur content is the same, then the Federal
6 coal, in fact, may come in a small premium when compared to the
7 comparables because of the slightly higher heat content?

8 A. It may have a small premium. It may run a hundred BTU
9 higher, which is like a little bit -- a one percent premium,
10 somewhere in that range.

11 Q. Well do you recall your deposition testifying that 100 BTU
12 is about ninety cents?

13 A. That was for central Appalachia coal, not for the Federal
14 coal. It would be lower -- it would be a smaller difference
15 for Federal.

16 Q. So your testimony is that we go down in heat content per a
17 hundred BTU, the adjustment would be smaller?

18 A. No. No. In my deposition you asked me about what is
19 known as central Appalachia coal, which are two of the other
20 types on here. And in central Appalachia coal, because the
21 market price is higher and the freight cost is higher, the
22 adjustment for heat content is greater. You didn't ask me
23 about the Federal coal from Northern Appalachia. It wouldn't
24 be as high an adjustment as ninety cents per ton per hundred
25 BTU, no.

1 Q. What is the adjustment in northern Appalachia?

2 A. I'm not sure I can give you a number off the top of my
3 head, but it would be more like about fifty cents per ton per
4 hundred, not ninety.

5 Q. Even though it's the same one hundred Btu difference?

6 A. That's correct. It -- if we were talking about Powder
7 River Basin coal in Wyoming it would be a much different number
8 also, even though it's also a hundred BTUs. It matters because
9 on a delivered basis, the coal price is different and the
10 freight is different. So for central Appalachia where the
11 market price is sixty to seventy dollars per ton and the
12 freight is twenty to thirty dollars per ton, each hundred BTU's
13 got a lot more value than does northern Appalachia where the
14 numbers may be fifty dollars and ten dollars.

15 Q. Well according to EVA's numbers, in northern Appalachia
16 the number's about fifty-five dollars per ton. Right?

17 A. I'll look. Yes.

18 Q. Can you walk me through how you calculated the fifty cents
19 given that a price differential between northern and central
20 Appalachia is nowhere near that wide?

21 A. Yes. The -- northern Appalachia coal is produced in
22 northern West Virginia or Pennsylvania or Ohio. The customers
23 for that coal are not far away from where the coal is produced.
24 So the -- typically freight costs in northern Appalachia are
25 about ten dollars per ton to reach the customers. Where in

1 central Appalachia the coal being produced out of east Kentucky
2 or southern West Virginia is typically used in Georgia or South
3 Carolina or North Carolina and the freight costs are closer to
4 thirty dollars. So as I tried to testify previously, it's the
5 delivered price per million BTU that matters, not the mine
6 price per million BTU that matters. So if you were to take
7 central Appalachia coal and say a delivered price of about a
8 100 dollars per ton for 12,500 BTU, if I take a 1 percent
9 difference on that, it's going to be a difference of about 90
10 cents per ton per 100 BTU. Whereas in northern Appalachia that
11 number -- I said fifty cents, it would probably be closer to
12 sixty cents per hundred. But I was just trying to give you
13 something of the top of my head here.

14 Q. But your testimony now is it would be closer to sixty
15 cents?

16 A. I'd say closer to sixty cents than fifty cents, yes. As
17 you asked me to walk through it, I'd increase it a little bit.

18 Q. And according to your comparisons in northern Appalachia,
19 Patriot's projections are conservative compared to every other
20 projection that you used, right?

21 A. For that part particular coal, yes. I thought that
22 Patriot's price forecast was lower than our price forecast and
23 then other price forecasts in the foreign market.

24 Q. And you would take the position that the coal at Federal
25 should be priced at about fifty-five, fifty-six dollars per

1 ton, right?

2 A. In the current market, yes, I would say it should be
3 priced in that range.

4 Q. Did the price for Federal Co ever drop to fifty dollars
5 per ton last year?

6 A. Yes.

7 Q. When was that?

8 A. I think for most of the first half of 2012 it would have
9 been below fifty dollars. You know, I did transactions at
10 forty-nine and change for Federal. So it was -- it was below
11 fifty.

12 Q. But by September it had recovered to closer to fifty-five
13 dollars per ton, right?

14 A. I can't give you a precise month, but yes, in the fall, it
15 increased and I'd say it was closer -- it may have been fifty-
16 three. More like fifty-three. Probably not as high as fifty-
17 five. But it was above fifty.

18 Q. Have you ever done a review of the tonnage and pricing of
19 priced ton -- of priced coal for Patriot for 2013?

20 A. Yes.

21 Q. Okay. Are you aware that Patriot -- that in that October
22 2012 plan Patriot had approximately 1.5 million tons of Federal
23 coal already priced and will be under seventy-five dollars per
24 ton?

25 A. I can't specifically recall those numbers but it wouldn't

1 surprise me. Those would have been older transactions where
2 the coal was sold when market prices were much higher back in
3 2011.

4 Q. And that according to the same plan Patriot had 2.475
5 million tons of unpriced coal at Federal?

6 A. I can't recall the precise numbers. If you have the plan
7 I'd look at it.

8 Q. The only problem is that the plan is not an actual
9 exhibit. We're precluded from offering it to you unless it's
10 evidence. Are you aware -- if we use fifty-five dollars as a
11 reasonable price for the unpriced tons, Patriot's understated
12 its revenue in Federal by over ten million dollars in 2013?

13 A. Well, I doubt that's the case because at this point we're
14 in May of 2013. I would expect they have actually sold the
15 coal for Federal for delivery in 2013. So I don't think you
16 changing the estimate of 2013 market prices at this point would
17 make a difference.

18 Q. But the business plan was prepared in October and any
19 unpriced tons would not have sold before October, right?

20 A. Well, you just told me earlier that there were about 2.4
21 million unpriced tons as of October so I'm assuming no, they
22 weren't sold as of October. But I would think given that we're
23 halfway through 2013, I expect they're sold by now.

24 Q. But after October it would make no sense for Patriot to
25 sell the Federal coal at a price as low as fifty dollars per

1 ton?

2 A. I would assume they'd sell at market prices which, as I
3 say, I think would have been fifty-three to fifty-five dollars
4 since then.

5 Q. What is the adjustment per hundred BTU for Illinois Basin
6 coal?

7 A. That would be lower. It would be in the range of forty-
8 five to fifty cents per hundred BTU.

9 Q. And in Exhibit 1, you -- for the market price forecasts,
10 you compare -- and Illinois Basin called theirs Highland coal,
11 right?

12 A. Yes, it is.

13 Q. You were comparing Highland coal with market price
14 forecasts, which lowers BTU content, right?

15 A. Some of them are. Others are exactly the same.

16 Q. But except for Wood Mack. The EVA SNL forecasts are based
17 on lower heat content coal, right?

18 A. They are, but the ICAP energy forward market prices are
19 for the same coal.

20 Q. And if you take the number 45 to 50 cents per hundred BTU
21 adjustment for 500 BTU would be somewhere around 225 to 250 per
22 ton, right?

23 A. Yes, it would.

24 Q. So you would expect the Patriot coal to be higher priced
25 than the 11,000 BTU coal they used as a comparison stat, right?

1 A. 11,500 BTU would have a higher price than 11,000. But
2 even if you make that adjustment to these forecasts, it's
3 still -- the Patriot price forecast is still not lower than
4 these other forecasts.

5 Q. Let's take SNL for 2013. Where it's at 41.46, right?

6 A. Yes, it is.

7 Q. If you add 225 to that, that becomes 43.71, correct?

8 A. Yes.

9 Q. And that's approximately a dollar a ton higher than the
10 Patriot business plan, correct?

11 A. Yes, it is. For 2013, that's correct.

12 Q. What is the reason for not adjusting for heat content and
13 sulfur content in putting this table together?

14 A. The reason is these were the other price forecasts that
15 were relied on by Mr. Akunuri that he presented as well as the
16 current market price forwards that were available in the market
17 for comparable coals. And given that different -- different
18 analysts may adjust for sulfur or heat content differently. I
19 choose to present them as they were made available rather than
20 get into a debate about what the proper method of adjustments
21 were. All of these coals are very comparable and similar in
22 quality and, I believe, in origin, so they're quite comparable
23 but there are small differences for heat content or sulfur for
24 some of these forecasts, not for others.

25 Q. Are there adjustment methods under which for Illinois

1 basin coal specifically there would be a higher price
2 differential per hundred BTU?

3 A. It -- if it were a customer who were doing the evaluation
4 it would depend on the transportation of the customer. I could
5 have used a higher freight transportation component, come up
6 with a higher differential. But in my experience in the
7 market, at the present time at least, forty-five to fifty cents
8 per hundred is the closest approximation I have.

9 Q. And the price differential depends on the transportation
10 cost of the Highland mine?

11 A. No. The -- the price adjustment in the marketplace is
12 based on the value of the heat content in the marketplace. And
13 that value includes both the mine price and the freight cost to
14 reach a wide variety of customers, not one specific freight
15 cost. But markets balance and equilibrate based upon all of
16 the market participants, including all the mines and the
17 customers. So it's not just the Highland mine. It's not just
18 any specific customer.

19 Q. I'm going to direct you to paragraph 9 of your reply
20 declaration. And read that to yourself. Let me know when
21 you're done.

22 A. Okay.

23 Q. In that paragraph you talk about national gas prices being
24 unusually depressed during 2012 because of the extremely mild
25 winter weather. Correct?

1 A. Yes.

2 Q. Your assumption in that statement is that because the warm
3 weather decreases demand for nature gas that also decreases
4 prices, correct?

5 A. Yes. Generally yes. And what happened was because
6 production continued, storage was filled. And because there
7 was so much gas in storage that depressed prices for natural
8 gas.

9 Q. I'm going to direct you to Exhibit 189, which is Exhibit 6
10 to the Buckner deposition, and I will present to you, and to
11 the Court, that this is a document that Patriot presented to
12 Mr. Buckner during the course of Mr. Buckner's deposition.

13 A. What page?

14 Q. 189.

15 A. I have that exhibit.

16 Q. Isn't it true that according to that document there was
17 higher natural gas usage in January Of 2012, when compared to
18 January of 2013?

19 A. Now, there's only one page here, and it's natural gas
20 generation in the electric power industry, so it's measured in
21 megawatt hours so it's not natural gas consumption. But it is
22 true that there was greater natural gas generation in January
23 of 2012 than there was in January of 2013, but that's not what
24 I was talking about when I was talking about reduced demand for
25 gas in January of 2012; it was for residential home heating,

1 not for electric power generation.

2 So my testimony was that because gas demand for
3 residential home heating was low, therefore the price of gas
4 was lower and that gas was burned for electric power
5 generation, which is why the demand for electric power
6 generation was higher.

7 Q. But isn't it possible for the increase in power generation
8 usage to offset the decrease in home heating usage?

9 A. It didn't in January of 2012. What happened, instead, was
10 natural gas was injected into storage fields in large volumes
11 because there wasn't enough of an increase offsetting the drop
12 in demand for residential home heating. But if you're asking
13 why do you see natural gas generation higher in 2012, it was
14 because there was lower demand for natural gas for residential
15 home heating, which is what really changes with the mild
16 winter.

17 Q. Have you ever been retained by a power company in making a
18 decision whether to switch from coal to natural gas, or vice-
19 versa?

20 A. No. That's not the kind of thing they retain us for.
21 They retain us to model what the economics are of burning coal
22 or burning gas, and we do that on a regular basis for a lot of
23 power companies. They don't ask should we switch our power
24 plant; they're asking us to run an economic dispatch model for
25 their entire system, and that's part of the decision that they

1 -- goes into for what -- what power plants they use for
2 generation.

3 Q. Have you ever participated in a power plant's deliberation
4 of where to use coal or natural gas as their power?

5 A. Yes, although I wouldn't say a power plant's -- the plant
6 doesn't do a deliberation; the company does. So the management
7 is who deliberates, and, yes, I have participated in that.

8 Q. How many companies have you participated in that in?

9 A. Two that I can recall in the last year.

10 Q. If we go back five years, how many companies are we
11 talking about?

12 A. I can't give you a number. I can't recall a specific
13 number; it's the kind of work that we do on a regular basis,
14 and I can recall clients in the last year, yes.

15 Q. And it's that experience you rely on when you stated your
16 reply back oration, that: "power companies consider future
17 earnings and stock prices." Deciding whether to switch from
18 coal to natural gas.

19 A. I'm sorry. Can you say that again?

20 Q. And is it that experience you're relying on when you say
21 in your reply declaration that: "power companies consider
22 future earnings and stock prices in deciding whether to switch
23 from coal to natural gas."

24 A. I didn't say that in my declaration. Can you point me to
25 that?

1 Q. Do you believe that's a correct statement, that power
2 companies rely on future rather than --

3 A. No. You're obviously confusing what I testified about.
4 As far as generation at any hour, companies are looking at the
5 current cash market prices or spot prices for right now. As
6 far as looking forward to the future in terms of, which is what
7 I was addressing here, what the demand for coal will be over
8 time in the future, companies are best informed by what the
9 future's market is for natural gas and coal in the future, not
10 the current spot price. They're two different things we're
11 talking about. But if you're actually asking in any moment,
12 which power plant a company decides to operate, it's based upon
13 market prices then, not the market prices for future delivery.

14 Q. If you go to paragraph 18 of your original declaration --
15 in that paragraph, you make a calculation of what prices coal
16 will be competitive with natural gas as a source of our
17 generation, right?

18 A. No. Just for Central Appalachia Coal, at what prices of
19 natural gas Central Appalachia Coal would be competitive with
20 gas for power generation.

21 Q. So that paragraph would not apply. So the calculations on
22 that paragraph would not apply the lower price in Illinois
23 Basin in Northern Appalachia Coal, correct?

24 A. That's correct.

25 Q. In that paragraph you assume a transportation cost of 10

1 to 30 dollars per ton, right?

2 A. Yes.

3 Q. You did not analyze Patriot's specific transportation
4 costs in Central Appalachia in putting that paragraph together.

5 A. Patriot doesn't have a specific transportation cost.
6 Customers have a specific transportation cost. Patriot's
7 transportation costs are the same as everybody else loading in
8 the same freight districts in the same region. They don't have
9 a different transportation cost. The customers have a range of
10 10 dollars if they're close by, like say, Appalachian Power's
11 power plants in Southern West Virginia, or 30 dollars if
12 they're far away, like say, Orlando Utilities in Florida, or
13 Georgia Power in Georgia. So that's why the range of 10 to 30;
14 it doesn't matter what Patriot -- Patriot doesn't have any
15 transportation costs. The customer has it.

16 Q. Let me rephrase my question. You did not consider a
17 specific transportation cost of Patriot's customers in putting
18 the calculations on that paragraph together, correct?

19 A. Yes, I did. I'm testifying that in the marketplace, in
20 general, their customers have a range of 10 dollars to 30
21 dollars per ton from the nearby customers; like the Amos Power
22 Plant of Appalachian Power which is close to the Hobit Mine, to
23 the far away customers that they sell to, like say, Duke Power
24 or Santee Cooper in North Carolina or South Carolina. That's
25 why I put that range on there.

1 Q. You used the phrase Florida and Georgia, I believe. Is it
2 your testimony that Patriot sells Central Appalachian Coal to
3 those regions?

4 A. Yes.

5 Q. And what specific -- what specific customers?

6 A. In Florida, they sell coal to Gulf Power, which they ship
7 by rail from the Hobit Mine to the port of Mobile, Alabama,
8 which they transfer to barge for delivery to Gulf Power's power
9 plants near Pensacola. In Georgia, they sell coal to Georgia
10 Power. The main power plant would be the Bowen Power Plant in
11 Northwest Georgia.

12 Q. In paragraph 18, your assumption is that natural gas is at
13 four dollars per million BTU, right?

14 A. That's where it had been, yes -- in and around four
15 dollars per million BTU.

16 Q. So that paragraph does not analyze what the competitive
17 price of coal would be if natural gas is at four dollars and
18 fifty-five cents per million BTU, or four dollars and seventy-
19 seven cents, per million BTU, correct?

20 A. No, that's not correct. What I was saying was that
21 natural gas prices would have to be at least four dollars for
22 Central Appalachia Coal to be competitive even at the closest
23 customers. But I am considering in that, that there is a range
24 of customers that go all the way to those which are 30 dollar
25 transportation away, at which point natural gas would have to

1 be over five dollars and fifty cents to be competitive. So,
2 yes, I was considering the range of natural gas prices in the
3 range of customers which have different delivered coal costs.

4 Q. But at four dollars and fifty-five cents, will Central
5 Appalachian Coal, with ten dollar transportation costs, be
6 competitive?

7 A. Yes. At four dollars and fifty-five cents, power plants
8 that are close enough, like the plants located in East Kentucky
9 or Southern West Virginia, that they could dispatch ahead of
10 natural gas plants at four dollars and fifty-five cents.

11 Q. Do you have an idea of what percentage that Patriot's Coal
12 is sold at closer customers, versus farther away customers?

13 A. Very little. As I testified earlier when we were talking
14 about the market price differential for Central Appalachia
15 Coal, based on BTU content, most Central Appalachia coal is
16 shipped to customers in the Southeast United States by rail, in
17 the states of Virginia and North Carolina, South Carolina,
18 Georgia and Florida, which have high transportation costs.

19 Q. And I'm going to direct you to paragraph 10 of your reply
20 declaration. At the very bottom on page 9, there's a phrase
21 that states, "which are not favorable for recovered domestic
22 thermal coal market levels prior to the changes of recent
23 years." Do you see that?

24 A. Yes, I do.

25 Q. What recent years are you referring to there?

1 A. The changes of recent years are most particularly the
2 changes of 2010, '11, and '12. As I refer to later, the
3 development of natural gas from shell formations, from
4 hydraulic fracturing of shell formations, that has created a
5 substantially different outlook for the availability and price
6 of natural gas, as well as the changes in the environmental
7 regulations promulgated by this administration, which has
8 reduced demand for coal in the future.

9 Q. What was the average price of Central Appalachian Coal in
10 2009?

11 A. I don't know an average, but in 2009 it was quite low
12 because we were in the middle of a recession, and the market
13 had bottomed-out because demand had fallen during the
14 recession, and it recovered during 2010. But, 2009, it
15 probably dropped briefly as low as below fifty dollars per ton,
16 but I wouldn't say it averaged that low for the year.

17 Q. But now I'm a little bit confused. So when you say in
18 this paragraph to quite -- I'm assuming the levels you're
19 referring to a price level, right?

20 A. No, quantity levels. I was talking about the volume of
21 coal, which, as recently as 2008, the total national
22 consumption of coal was over one billion tons per year, and in
23 2012 was 200 million tons less than that. So those were the
24 changes from 2008 to 2012 in quantity; that's what I was
25 talking about.

1 Q. So paragraph 10 is not talking about a possible recovery
2 of coal prices? Right?

3 A. That wasn't what I was referring to. I was referring to
4 the market in terms of quantity, at that particular phrase you
5 asked me about.

6 Q. Exhibit 3 presents the change in MX future's prices for
7 Central Appalachian Coal, right?

8 A. You mean Exhibit 3 in my reply declaration --

9 Q. Yes.

10 A. -- on page 10?

11 Q. Yes.

12 A I'm not sure I understood you, but it's NYMEX, which is
13 the Central Appalachia -- NYMEX stands for New York Mercantile
14 Exchange -- future's price at -- I measured in two different
15 dates, in January and April of 2013.

16 Q. Would it be possible to conduct -- to draw a similar graph
17 for Northern Appalachian Coal for the same time period?

18 A. Not from the NYMEX because there are no NYMEX futures for
19 Northern Appalachia Coal. There are over-the-counter markets
20 where you can get future's quotes that would be fairly similar.

21 Q. Would it be possible to draw a similar graph for Illinois
22 Basin and Coal?

23 A. Again, yes, for the over-the-counter markets; no, not for
24 the mercantile exchange.

25 Q. And are you aware that over the coming years, Patriot's

1 projecting the increase in production in Northern Appalachia
2 and Illinois Basin, an increase in its production in Central
3 Appalachia?

4 A. That's not true. They're closing mines in the Illinois
5 Basin; they're projecting lower production in the Illinois
6 Basin; they're projecting Northern Appalachia to be the same,
7 and they're projecting growth of Central Appalachian'
8 metallurgical coal which is the major part of their business
9 plan.

10 Q. But they're also projecting a decrease in Northern
11 Appalachian -- in Central Appalachian, thermal coal, are they
12 not?

13 A. I don't think so. If you show me the plan, I'll look at.
14 But I don't think so, and you're completely wrong about the
15 Illinois Basin. They just shut the Bluegrass Mine and their
16 business plan has them shutting the Dodge Field Mine also, and
17 no, there's no growth in Northern Appalachia. The federal mine
18 is going to keep producing at the level it's been producing.

19 Q. What business plan do you see that it closes the Dodge
20 Field Mine?

21 A. The business plan I was provided, which is the same one
22 was in the data room. It shows the Dodge Field Mine operating
23 in 2013 and then closing. And I think I referred to it in my
24 declaration, as well.

25 Q. In paragraph 18 of your original declaration, it refers to

1 the competitiveness of Central Appalachian thermal coal only,
2 correct?

3 A. That's what I was talking in that paragraph, yes.

4 Q. Similarly, Exhibit 3, is only talking about Central
5 Appalachian thermal coal, right?

6 A. Again, you mean Exhibit 3 of my reply declaration?

7 Q. Yes.

8 A. Yes, that chart is just for Central Appalachia thermal
9 coal.

10 Q. What are the major characteristics of metallurgical coal
11 that affects this pricing?

12 A. There are a number of characteristics. The most important
13 is what's generally known as the coal rank, which is the
14 measure of the degree of coalification that is the
15 metamorphosis of plants into coal. So the higher ranked coals
16 will have lower volatile content, higher reflectance; they will
17 be more expansive and they will make stronger and better coke
18 in a coke oven. So frequently it is referred to by volatility;
19 so frequently people talked about metallurgical coals as being
20 low volatile, or low-vol, mid volatile or mid vol, high
21 volatile or high vol, and then various grades within the high
22 vol categories as well.

23 Q. Let me backup for second here and make better -- make sure
24 the records' clear. Can you explain the major differences
25 between thermal coal and metallurgical coal?

1 A. In some ways there are no differences; they're both coal.
2 Alright, they're both mostly carbon, hydrogen, oxygen. What is
3 the big difference is that metallurgical coal can be used as
4 thermal coal, meaning it can be burned for use for heat in a
5 boiler. But many thermal coals cannot be used as metallurgical
6 coal because they don't have the property of caking, which
7 means they don't swell when heated, and what happens with coke
8 is when it's heated in an oxygen free atmosphere, it swells or
9 agglomerates; it becomes a liquid mass and then when it cools,
10 it is a solid, firm, porous substance that is lightweight, yet
11 almost pure carbon and supports air through it and is strong
12 enough to support the bed in a blast furnace.

13 Q. Are there different classifications of metal coal?

14 A. I think I just answered that. I went through it. The
15 volatile content: low volatile, mid volatile, high volatile A,
16 high volatile B, various grades within that. Those are used in
17 the domestic U.S. market. In the international market, they're
18 referred to as hard coke and coal; semi-hard coke and coal;
19 soft coke and coal, and semi-soft coke and coal.

20 Q. Within each one of those categories, is it possible for
21 coal to have different levels of volatility?

22 A. Yes. It's a continuum of volatility that, generally
23 speaking, a range is defined as low volatile; a range is
24 defined as mid volatile. But even within that range, there can
25 be different qualities within that range.

1 Q. And even if you're talking about coal produced by the same
2 coal mine from the same scene, it's possible there are going to
3 be some differences in volatility, right?

4 A. No, not likely. I wouldn't say that.

5 Q. Are you familiar with the metal that's produced for Rock
6 Lick?

7 A. Generally, yes.

8 Q. And in the EDA forecast, there's also a high volatility A,
9 metal coal, right?

10 A. That's correct.

11 Q. What is the volatility -- how's volatility rated in metal
12 coal?

13 A. I don't understand your question. What do you mean by
14 weighted?

15 Q. Sure. Volatility rating from metal coal or how's --

16 A. There's a --

17 Q. -- volatility measured?

18 A. Volatility is measured by the percentage of the coal on a
19 mineral and moisture-free basis that becomes volatile when
20 heated.

21 Q. And when you're talking about Rock Lick coal, that's in
22 fact a preparation point, I think, for (indiscernible), right?

23 A. Yes, it is.

24 Q. So we're talking about all of the metal coal that is
25 processed at Patriot Rock Lick?

1 A. No. There are various coals processed by Patriot at Rock
2 Lick and they're sold under different brands. The Rock Lick
3 brand that the Patriot sells is from the eagle scene, which is
4 its highest quality high vol A product. But other coals are
5 also processed at Rock Lick and sold and loaded at the Rock
6 Lick loading facility.

7 Q. What is the percentage basis for a high vol A product
8 that's in EDA's projections?

9 A. I don't know what you mean by percentage basis.

10 Q. Well you told me earlier that volatility is measured on a
11 percentage basis.

12 A. Okay. I didn't use the word basis, but that's okay. Yes,
13 volatility is measured by the percentage of coal that is
14 volatile upon heating on a dry basis -- I guess that's where I
15 used the word basis. Measured on a dry basis, that means you
16 measure the coal volatility after you've dried the coals so
17 you're not including the moisture, which is contamination. On
18 a dry basis, the high vol A coal in our forecast would have a
19 volatility between thirty-one and thirty-two percent volatile.

20 Q. Is it possible for the Rock Lick volatile to have a lower
21 volatility?

22 A. Not that I know of. If you have something to show me,
23 I'll look at it, and I mean I suppose anything's possible, but
24 not from my experience, no.

25 Q. Well if you look at Exhibit 1 of your reply declaration --

1 A. I'm looking at it.

2 Q. -- for the most part, for thermal coal, Patriot's
3 projections are less than ten percent higher than the
4 comparators we're looking to, right?

5 A. For the high volatile coal, no, it's a --

6 Q. No, for the thermal products.

7 A. I'm sorry. What were you asking me look at on Exhibit 1?

8 Q. For all the thermal products, Patriot's projections in its
9 business plan are not even ten percent higher than the
10 comparable coals, right?

11 A. That's generally true, yes.

12 Q. And from metal coals, a much higher number than that,
13 right?

14 A. It's not much higher; it's in the ten to fifteen percent
15 higher range.

16 Q. And isn't it possible that it's higher because Rock Lick's
17 a slightly different product?

18 A. No, because that's what I selected. I know what's in our
19 forecast, right, and in our high vol A forecast, you asked me;
20 I told you that's what the Rock Lick high vol coal is. If you
21 look at Patriot's business plan, they have metallurgical coal
22 prices for all of their different grades of metallurgical coal
23 which go all the way down to what's known as a PCI coal, and I
24 know what our forecast is and I know it's comparable to what
25 Patriot produces from the Eagle seam at rock lick, which is the

1 high quality, high vol A product.

2 Q. Have you ever talked to Patriot management about why they
3 projecting the prices to be 18 dollars higher in the EBA
4 forecast, for (indiscernible) 13?

5 A. No, I haven't.

6 Q. So you don't know why that is?

7 A. Obviously, this was prepared some time ago. I didn't talk
8 to Patriot management when they were preparing it, and no, I
9 don't know why it is.

10 Q. And if we go higher -- go further in time, the difference
11 actually -- states 18 dollars, even goes higher than 18 dollars
12 for 2016, right?

13 A. Stays 18 dollars, is that what -- I couldn't quite
14 understand you.

15 Q. If you compare the business -- the Patriot plans to EVA,
16 March of 2013 forecast, the differential is 18 dollars or more
17 for each year between 2013 and 2016, right?

18 A. No. It is close to 18 dollars in most years. Yeah, it's
19 plus-or-minus a dollar off of 18 dollars.

20 Q. Where is it less than 18 dollars?

21 A. In 2013.

22 Q. Are you aware that on average Patriot's priced tons are
23 priced higher than its unpriced tons, when you look at their
24 five year business plan?

25 A. I would think that would be the case, yes.

1 Q. Therefore, if you were -- if you do a forecast of
2 Patriot's (indiscernible) revenues, assuming that the price
3 tons are priced at the level of the unpriced tons, do they end
4 up understating the revenue the Patriot realizes?

5 A. Well that would be a bad forecast, wouldn't it? I
6 wouldn't make that assumption and I didn't make that assumption
7 in my work.

8 Q. But if somebody else made that assumption, that would
9 result in a undervaluing on Patriot's revenue.

10 A. You mean that's one of the criticisms I have of Mr.
11 Akunuri, that he did that. Yes, --

12 Q. Yes.

13 A. -- that would be -- that would be the result of doing
14 that.

15 Q. Would be under that -- would be understating Patriot's
16 revenue.

17 A. Oh, for that component of their sales, yes.

18 Q. Right. What percentage of a sales price of coal be paid
19 of royalties?

20 A. It varies by mine and by property. For a Patriot -- and
21 typically royalties vary anywhere from zero to twelve and a
22 half percent. Looking at Patriot's royalties, I would say they
23 averaged about five or six percent of their sales price across
24 all mines, but some mines, the royalties, I think, are zero and
25 other mines are in the range of eight to nine percent.

1 Q. In your reply declaration, you have a footnote that 2012
2 was a unusual year in terms of heat content for Patriot. You
3 remember that?

4 A. Can I turn to that?

5 Q. I'm not (indiscernible) away from that.

6 A. I'll find it if you give me a second. Yes.

7 Q. What is the difference in heat content from a normal in
8 2012?

9 A. Well in the case of the federal mine, the average heat
10 content which Patriot reported in 2012 was about 13,180, where
11 as in normal years, the heat content is close to 13,000. So
12 2012 was unusually high, relative to both history and what I
13 would expect for the future for federal.

14 Q. So you would expect federal to be at about 13,000?

15 A. Yes.

16 Q. BTUs? Okay, and we earlier -- we earlier talked about in
17 during Appalachian a price premium, per hundred BTU, is about
18 60 cents per ton, right?

19 A. Yes.

20 Q. Which means if there's a 500 BTU difference, that would be
21 about three dollars?

22 A. No, but we aren't talking about 500 BTU; we're talking
23 about 180 BTU.

24 Q. Well if you go back to Exhibit 1 of your reply declaration
25 -- no, scratch that.

1 A. Okay.

2 Q. All of the forecast as done by you, Mr. Akunuri, assumes
3 there's a 13,000 in BTU coal at federal, right?

4 A. No, that's not what Mr. Akunuri assumes. He assumes
5 there'll be a 13,180 BTU coal at federal.

6 Q. And was there approximate price differential between
7 13,180 and 13,000?

8 A. It would be a little over a dollar per ton.

9 Q. Are there any other differences in heat content between
10 2012 and a normal year at Patriot Coal?

11 A. Not that I (indiscernible) off the top of my head.

12 Q. So will you go to Exhibit 5 of your declaration -- of your
13 reply declaration? Their chart shows that for 2015 and 2016
14 their SNL with MacKenzie forecasts are higher in the total
15 revenue than Patriot's business forecast, right?

16 A. Yes, they do, using the adjustments that Mr. Akunuri made.
17 That's what they show, and I've corrected for his error, both
18 in the unpriced tons, which you asked -- or the priced tons,
19 which you asked me about, as well as for the application of
20 sales taxes -- or production taxes, I should say.

21 Q. And in his calculations, Mr. Akunuri adjusted for heat
22 content on a percentage basis, right?

23 A. Yes, he did.

24 Q. That is something that other coal sulfur and producers
25 use, right? That is a methodology.

1 A. I have seen some people use it, yes.

2 Q. Do you disagree with the sulfur comment Mr. Akunuri made?

3 A. Yes.

4 Q. And how do you disagree with it?

5 A. He characterized coals from Patriot's Logan County
6 operation, Rock Lick Operation, as compliance thermal coals. I
7 would disagree with that. I don't think Patriot sells any
8 coals, a compliance thermal product, and therefore I think he
9 used the higher price for those coals than is appropriate.

10 Q. And would you say then your compliance labels the
11 appropriate one for him?

12 A. I'm not going to testify about what MacKenzie means by
13 near compliance. That's not a term I would use.

14 Q. Now are you aware that in the MacKenzie forecast, the
15 difference between compliance and near compliance is eight
16 cents per ton?

17 A. No.

18 Q. Do you disagree with any other adjustments Mr. Akunuri
19 made in his calculations?

20 A. I wouldn't have made the BTU adjustments the way he did,
21 as I testified. I would use a market price per hundred BTU, or
22 the affect of transportation customers, which is what I
23 normally do. So I wouldn't do a percentage basis; so I
24 disagree with that also.

25 Q. Anything else?

1 A. That's what I can think of at the present time.

2 Q. Okay, do you know whether the entire 42 million dollar
3 number and the 47 million dollar number for 2015 and the 34
4 million and 13 million dollar number for 2016 will be wiped
5 away if we do the adjustments the way you will do them, versus
6 how Mr. Akunuri did them?

7 A. I don't know that, but I suspect a significant part of it
8 would be reduced, yes.

9 Q. But not all of it, right?

10 A. I don't know.

11 Q. If you go to page 39 of your original declaration.

12 A. Yes.

13 Q. You should see a listing of Illinois basin mines, correct?

14 A. Illinois basin deep mines.

15 Q. Which of these mines are in western Kentucky?

16 A. The ones that say "State, Kentucky."

17 Q. Are there any longwall operations in the Kentucky mines
18 listed on this page?

19 A. No. None of the Kentucky mines use longwall mining,
20 because the geology is generally not suited for it.

21 Q. Page 39 does include four mines from four sites, right?

22 A. Yes.

23 Q. Are those longwall mines?

24 A. Three of the -- well, one of them was a longwall mine in
25 all three years shown here. The next to Sugar Kemp -- that's

1 the Williamson -- excuse me -- that's the Williamson mine. The
2 Sugar Camp and Hillsboro mines had longwalls installed during
3 2012. The Shay (phonetic) is not a longwall mine. It's a
4 continuous mine operation.

5 Q. What is the difference between a longwall mine and a
6 continuous operation mine?

7 A. Okay. It's a little bit of a long explanation, but I'll
8 try and make it --

9 Q. I want to lay a little bit of background for the Judge.

10 A. I'll try and be -- a continuous miner is a mining machine
11 that uses a rotating drum with teeth, bits in it, that cut the
12 coal, and then it gets pushed down on a conveyor belt on the
13 back.

14 A longwall operates as a shearer. If you think about it,
15 almost like a slicer in a delicatessen, going back and forth
16 across a long face of coal, as much as 1000 feet long, and the
17 shearer cuts the coal, it drops onto a conveyor belt, and then
18 is conveyed out of the mine.

19 Q. So if you look at paragraph 8P of your reply declaration?
20 Would the average for the Illinois basin include for the
21 foresight mines?

22 A. Yes.

23 Q. Okay. So that would include some longwall operation,
24 right?

25 A. In 2011, it would include one foresight longwall mine in

1 that number, yes.

2 Q. In general, a longwalling operation is more efficient than
3 continuous miner operation, all else being equal, right?

4 A. Yes.

5 Q. Why is there such a wide range of productivity in the
6 mines on page 39 of your original declaration?

7 A. The one mine, the Williamson mine that creates the very
8 wide range, is an efficient longwall mine in very thick coal
9 that's very conducive to longwall mining, and it is the highest
10 productivity of any underground mine in the country.

11 If you take that out, the remaining range in productivity
12 here generally reflects a range of mining conditions that tend
13 to go to different geological factors. In general, the
14 equipment for the continuous miner operations is all pretty
15 similar.

16 Q. The mining conditions may be different from mine to mine,
17 right?

18 A. Yes.

19 Q. And the mining condition differences, in many cases,
20 explain difference in productivity, right?

21 A. Mining conditions are a very important measure, you know,
22 influence on productivity, yes.

23 Q. Would it be correct that longwall equipment has been used
24 for the last 30 years in American mines?

25 A. Yes, although I would -- well, yes, I would say longwall -

1 - the longwall mining system really became perfected more
2 during the 1980's, certainly for the last 20 years, efficient
3 longwall mining has been used in many places in the United
4 States.

5 Q. And more than one company manufactures longwall equipment,
6 right?

7 A. There are only two that manufacture longwall equipment
8 that's used in the United States.

9 Q. Are there different qualities and pricing levels in
10 longwall equipment?

11 A. Not really. I mean, there's different size sheers. I
12 think the two companies would each consider their equipment to
13 be better, but I think they're pretty comparable. You know,
14 the Joy 4LS shear has been pretty much the standard in the
15 United States. But when you say longwall equipment, there's a
16 shear, there's shields, and there's what's called a face
17 conveyor. Those are the three main components of a longwall
18 face. I think they're pretty comparable, and companies shop
19 around and get -- you know, do deals with both companies.

20 Q. And has longwall equipment become efficient over time?

21 A. Somewhat. As I say, it really came from being not very
22 efficient in the early 1970's to by the late 1980's, it really
23 had become pretty efficient, when used in geology that's
24 conducive to longwall mining, which is not everywhere.

25 Q. So if you use the same longwall equipment, the geology is

1 different, you may get a different productivity, right?

2 A. Yes.

3 Q. Would longwall equipment become less efficient as they get
4 older?

5 A. Not particularly. I mean, all companies have a regular
6 maintenance policy, and they send it back for rebuilds, and
7 eventually it ages and gets replaced. But it's not so much a
8 matter of efficiency as it is a matter of maintenance costs and
9 breakdowns.

10 Q. Who is the manufacturer of the longwall equipment used at
11 federal?

12 A. Boy, I don't know specifically, but I'm going to guess it
13 was Joy. Joy was pretty much the standard at the time. The
14 competitor, DBT, you know, has come on more recently. It got
15 bought out by Bucyrus-Erie. But in any case, I don't know, but
16 I'd guess it would be Joy Manufacturing.

17 Q. Okay. If we said a standard at the time, what time period
18 are we talking about?

19 A. Throughout the 1980's and 1990's Joy, you know, was the
20 premier manufacturer of longwall shears in the United States.

21 Q. What is the model number of the longwall company that you
22 used at Federal?

23 A. I don't know.

24 Q. What is the age of that equipment?

25 MR. MOSKOWITZ: Your Honor, we -- I object to this

1 line of questioning. This is way beyond the scope of anything
2 in Mr. Schwartz's declaration, reply declaration. We've given
3 some leeway on this, but I think he should wrap this up.

4 MR. HO: Your Honor, in his declaration, Mr. Schwarz
5 refers to the Federal longwall equipment as modern longwall
6 equipment. I'm merely establishing whether he has knowledge of
7 what is actually being used at that mine.

8 THE COURT: All right. I'll overrule the objection,
9 but let's not spend a lot of time on the equipment.

10 A. I said I didn't know the model number. I'm sorry; was
11 that the last question?

12 Q. Yes.

13 A. I don't know.

14 Q. Do you know what the age of the equipment is?

15 A. I don't know specifically, no. But as I say, every
16 company has to change out its longwall shears after a certain
17 number of tons, typically after you've run about two -- you
18 know, after you've run a long panel like at Federal, you'll
19 change the shears, send it back for a rebuild, get a new one.
20 I don't know the current status there.

21 Q. One last question on this. Did you do any analysis of how
22 well maintained the longwall equipment at Federal was?

23 A. No.

24 Q. In the chart -- page 37 of your original declaration.
25 This is a comparison of Northern Appalachian Mines using

1 longwall equipment, right?

2 A. No, it's a comparison of Pittsburgh Seam Mines using
3 longwall equipment. It is in Northern Appalachia, but it's not
4 all of Northern Appalachia.

5 Q. Did you do anything to control for the quality of the
6 longwall equipment in putting this chart together?

7 A. No.

8 Q. Did you do anything to control for how longwall equipment
9 interacts with the geology of the mine in putting this chart
10 together?

11 A. I don't know what you mean by the question.

12 Q. Well, earlier we talked about with different geological
13 conditions, the same longwall equipment may have different
14 efficiencies, right?

15 A. Yes.

16 Q. Did you do anything to account for any geological
17 differences in putting this chart together?

18 A. The reason why I selected this chart geologically is all
19 of these mines are in the same seam. They all have similar
20 geology. There are some differences in thickness or partings
21 that I can talk about if you want to go through each of the
22 mines. But in general, the geology is fairly similar. That's
23 why I did this comparison to show an apples-to-apples
24 comparison among all of these mines in the same seam and
25 similar geology.

1 Q. But there are some differences in geology, right?

2 A. There would be some differences in geology among these
3 mines, yes.

4 Q. And you did not account for those differences in geology
5 in putting this chart together, correct?

6 A. I considered the differences in geology. I considered
7 them and decided I didn't need to show them on the chart, so
8 yes, I feel I did account for them, but I did not do a
9 presentation of the geology at the different mines, but I can
10 talk through that, if you would like.

11 Q. You also did not make any mathematical adjustments for any
12 differences in geology in putting this chart together, correct?

13 A. I did not.

14 Q. Are you aware that --

15 MR. HO: Hold on, scratch that.

16 Q. If there is a delay in moving longwall equipment, would
17 that affect the productivity of a mine?

18 A. Yes.

19 Q. Why is that?

20 A. Because that increases the amount of time that the
21 longwall is not operating. Since the longwall itself is the
22 primary production unit, it would mean that the mine would
23 produce fewer tons, the more time period in which the longwall
24 equipment was not operating.

25 Q. We were talking about tons per hour worked. Are there

1 factors that affect productivity other than the equipment and
2 geology?

3 A. Yes.

4 Q. What are the other factors?

5 A. The factors would include the workforce, management, the
6 haulage distance and method of haulage. We already mentioned
7 geology. Geology covers a lot of things, but it would include
8 roof and floor conditions, methane gas, water. There can be
9 other factors. But in general here, where I was comparing
10 everything in the Pittsburgh Seam, I think as I testified
11 earlier, the geology is pretty similar among these mines.

12 Q. And all the differences we talked about are things that
13 can differ from mine to mine, right?

14 A. They can.

15 Q. Okay. We go back to exhibit -- to the table on page 37.
16 Do you see the Powhatan Mine listed in that table?

17 A. Yes, I do.

18 Q. Would you agree that in 2010, the Powhatan Mine was more
19 efficient than several nonunion mines listed on that table?

20 A. Yes, I would.

21 Q. Would you agree that the Powhatan mine, in general, has a
22 more difficult geology?

23 A. From my experience, generally, it has a little bit more
24 difficult geology because the seam height's a little thinner.

25 Q. Do you have any explanation for why the Powhatan Mine was

1 more efficient in 2010 when compared to the several nonunion
2 mines?

3 A. No.

4 Q. Would we be also correct that productivity may change
5 substantially from year to year, if you look at the chart on
6 page 37?

7 A. There could be changes from year to year based on events
8 that may happen at the mine in a particular year, yes.

9 Q. Give me examples of some of those events that can affect
10 productivity?

11 A. Well, there could be major equipment outages; that could
12 be one of the events. There can be -- I mean, all kinds of
13 things go wrong in mining, especially in underground mining.
14 There are events sometimes of combustion. There are methane
15 gas -- you know, times when methane gas levels get high that
16 mining equipment has to be idled for gas. There are equipment
17 failures. There are failures of planning or management,
18 whereby panels may not be developed in a timely fashion. There
19 can be lots of things that may affect any particular year.

20 The point of this chart was to show that over a long
21 period of time of four years, over a very large and robust
22 sample of 310 million tons of coal produced over four years,
23 there was a large and statistically significant continuous
24 difference in productivity between the UMWA operated mines and
25 the nonunion mines in the Pittsburgh Seam.

1 Q. But again, in making that comparison, you did not consider
2 the actual quality of the longwall equipment as used in those
3 mines, correct?

4 A. No, because again, in a large statistical sample like
5 this, any individual mine's particular equipment isn't
6 relevant.

7 Q. Well, we're talking about a sample of thirteen mines,
8 right?

9 A. That's a large sample. Thirteen very large mines
10 producing over seventy-five million tons per year. It's a
11 significant share of total production in the United States.

12 Q. So if we're talking about a standard of thirteen, wouldn't
13 the substandard equipment in two or three mines make a major
14 difference?

15 A. I wouldn't think so, no.

16 Q. Are you familiar with how the tons per hour statistic is
17 calculated?

18 A. Yes.

19 Q. Okay. Are absent employees counted in that calculation?

20 A. Generally no, although each company can report its own
21 way, and so there's no guarantee. The way the statistic is
22 calculated is from quarterly reports filed by the operators to
23 the Mine Safety and Health Administration on Form 7000-2.

24 It is -- the instructions on the form ask for hours
25 worked, because the Mine Safety and Health Administration is

1 trying to measure the degree of exposure, in order to calculate
2 accidents and incidents rates. They're not trying to calculate
3 the number of employees on the payroll who are not there.

4 Now, I can't guarantee that every company follows those
5 instructions, but that's the intent of the form.

6 Q. So in practice, how tons-per-hour is calculated may differ
7 from company to company. Would that be a fair statement?

8 A. It's possible that reporting may differ from company to
9 company, but as I say, that's not what the form asks for.

10 Q. So an absenteeism policy would not directly affect the
11 tons per hour stat, right?

12 A. I didn't understand your question. Can you repeat that?

13 Q. So an absenteeism policy would not directly affect the
14 tons per hour statistic, right?

15 A. Policy?

16 Q. Right. A policy that's used to control --

17 A. Oh.

18 Q. -- attendance would not directly affect the tons per hour
19 stat?

20 A. No, I think it would.

21 Q. How would it affect it?

22 A. It would affect it because mines that have high degree of
23 absenteeism mean that they are operating without a full
24 complement of workers on a unit shift, which will reduce
25 production and productivity. And so mines with high degree of

1 absenteeism are going to, on in general, have lower
2 productivity because you can't fill in for the absent workers,
3 and it affects the operation of the entire mine.

4 Q. Were you --

5 A. So, no, I would expect absenteeism to have a major impact
6 on productivity.

7 Q. Would your answer be different if the mine has additional
8 employees for the specific purpose of filling in for the absent
9 employees?

10 A. No, absenteeism is a major problem for productivity at
11 mines in the United States -- any company will tell you that.
12 Absenteeism is very important.

13 Q. And the tons-per-hour will be affected even if the mine
14 has enough replacement employees replace the absent employees?

15 A. Yes.

16 Q. And the reason for that is?

17 A. The reason for that is mining is teamwork, all right.
18 Each section -- I mean, I know the guys in the back are going
19 to agree with me on this, all right. Each section has got a
20 group of men who are working together -- men or women, but
21 mostly men, all right, who are working together, and they each
22 have an assigned job, and they depend on each other to do their
23 job.

24 If enough people are not showing up on a section, it is
25 going to affect the productivity of the entire mine, and it

1 doesn't just fill in with having replacement workers around.

2 MR. HO: One second, Your Honor.

3 (Pause)

4 Q. How is the tons-per-hour stat calculated when -- in mine
5 use of contractors?

6 A. It depends. Again, it depends on reporting by the
7 companies. But contractor hours are supposed to be reported by
8 the companies -- underground hours -- it depends on the
9 categories of contractors. For example, if surface mines
10 contracted out reclamation work, those hours would not be
11 included in the reporting. Underground mines with underground
12 contractors are supposed to be reporting the hours of the
13 contractors.

14 Q. If you look at Exhibit 106, which is Exhibit 4B of the
15 Lucha declaration?

16 A. 106?

17 Q. Yes.

18 (Pause)

19 A. I have it.

20 Q. Okay, have you seen it -- have you seen this type of
21 calculations before?

22 A. These type of calculations?

23 Q. Yes.

24 A. I'd have to look at the whole exhibit.

25 Q. Go ahead.

1 A. I've seen some of these types of calculations, yes.

2 Q. Okay, in this exhibit, in which Patriot quantifies the
3 savings for a subcontractor proposal, Patriot is not claiming
4 that contractors work more efficiently than its union
5 employees, right?

6 A. I don't know. I've just briefly looked at this exhibit.
7 I haven't had a chance to study this.

8 Q. Is there anything in this exhibit that claims that, as far
9 as you can tell?

10 A. I don't know.

11 Q. Okay. And are you aware of Patriot ever claiming that its
12 contractors work more efficiently than its union employees?

13 A. I've never talked to Patriot about that issue. I don't
14 know one way or the other.

15 Q. Okay. In your reply declaration, you make a comparison of
16 Patriot's surface mines with other surface mines, right?

17 A. Yes, I do.

18 Q. Okay. Are you aware that one of the work rules in dispute
19 between the parties is the helper rule?

20 A. I'm sorry; say it again?

21 Q. Are you aware that one of the work rules in dispute
22 between the parties is concerning whether Patriot should be
23 required to use helpers in its operations?

24 A. Yes.

25 Q. Are you aware there are no helpers used at Patriot's

1 surface mines?

2 A. I am aware of that. I think the helpers, we're talking
3 about, continuous miner helpers, those are underground miners.
4 The roof bolter helpers are underground mines, not surface.

5 Q. Are you aware that similarly, that the hot-seat rule does
6 not affect surface mines?

7 A. I am aware of that.

8 Q. But did you do any analysis to isolate what is the
9 difference between Patriot surface mines and other surface
10 mines as caused by the attendance policy?

11 A. No.

12 Q. Did you do anything to isolate what are the difference in
13 productivity in Patriot surface mines, other surface mines
14 supervisors are allowed to work -- are allowed to perform union
15 work?

16 A. I don't see how that would matter.

17 Q. So you're not here to testify that in terms of the actual
18 difference in surface mine efficiency that is caused by any
19 work or that Patriot is actually seeking to change in this 1113
20 proposal, right?

21 A. I can't -- I have not tried to calculate the effect of an
22 individual work rule in Patriot's surface mines. Patriot's
23 done that analysis and I think they'll testify to that. What
24 I'm testifying is to as regards to all of the industry
25 statistics and the industry averages that Patriot's surface

1 mines, the UMWA represented surface mines in southern West
2 Virginia, are less efficient than the competitors that they
3 compete with in the industry.

4 Q. Or you cannot testify to is that implementing the 1113
5 proposal will improve the efficiency of Patriot's surface
6 mines --

7 MR. RUSSANO: Your Honor --

8 Q. -- correct?

9 MR. RUSSANO: -- objection. Mr. Schwartz isn't here
10 to testify about --

11 THE COURT: At the podium, please.

12 MR. RUSSANO: Mr. Schwartz isn't here to testify about
13 specific proposals in the 1113 proposals. He doesn't even know
14 what they are, Your Honor. This is beyond -- well beyond the
15 scope of what's contained in his declarations.

16 MR. HO: Well, why don't I ask him that?

17 Q. Do you know what work rule proposals were made in the
18 company's 1113 proposal?

19 A. I know what were made as of last October or November. I
20 saw the analysis of those proposals at the time. I understand
21 that there have been various proposals and counterproposals
22 since then and I'm not familiar with those various proposals
23 since then.

24 Q. In other proposals that you're aware of, are you aware of
25 a specific impact on surface mine efficiency that will result

1 from changing those work rules?

2 A. Well, certainly the attendance policy would have an impact
3 because it would affect the attendance and productivity of the
4 surface mines and therefore its efficiency.

5 I would think also the schedules on paid time off and
6 vacation days and scheduling is going to effect production and
7 productivity at the surface mine. So those are certainly two
8 of the areas. But I haven't -- I haven't sat here and
9 performed a study of it to quantify each part of the proposal.
10 That's not what I was asked to do. But just to answer your
11 question, those are two that come to mind.

12 Q. In terms of the attendance rule, you're assuming the rule
13 will actually be effective in reducing absenteeism, right?

14 A. I'm assuming that's why Patriot is proposing is they think
15 it will be effective.

16 Q. In your reply declaration, you also compare the average
17 union tons per hour in central Appalachia versus the average
18 nonunion per hour in central Appalachia, right?

19 A. For surface mining and deep mining separately, yes, that's
20 correct.

21 Q. In the case of deep mining, are there some continuous --

22 MR. HO: Scratch that.

23 Q. Are there other some longwall operations in central
24 Appalachian deep mines?

25 A. There are three longwall operations in central Appalachia

1 deep mines that I'm aware of.

2 Q. Which are?

3 A. Which are Patriot's Panther mine, Arch's Mountain Laurel
4 mine and Cliff's Pinnacle mine.

5 Q. Are any of those union mines?

6 A. Yes.

7 Q. Which one is that?

8 A. Cliff's Pinnacle mine.

9 Q. In comparing the average productivity of union and
10 nonunion mines in central Appalachia, you did not exclude the
11 continuous operation mines, right?

12 A. No, I didn't.

13 Q. If you go to paragraph 32 of your reply declaration -- go
14 ahead and read the entire paragraph. Let me know when you're
15 done.

16 (Pause)

17 A. Okay.

18 Q. According to the stats in that paragraph, Patriot's --
19 sorry -- Consol net coal operation per ton produced is
20 naturally cheaper than thermal coal cost per ton produced,
21 right?

22 A. It's high-vol metallurgical coal segment is lower cost
23 than its thermal coal because the high-vol metallurgical coal
24 is only the Bailey and Enlow Fork mines which are the same
25 mines that are included in the thermal segment. But they're

1 nonunion more efficient mines and that's what Patriot is
2 competing with in the marketplace.

3 Q. Therefore it is not always true that the thermal mines
4 will have lower operating costs than metallurgical mines,
5 right?

6 A. Generally, it is true. These mines are what would be
7 called a high-vol C metallurgical coal which means it's not
8 really metallurgical coal at all but because its sulfur content
9 is so high and its rank is so low, if Consol sells it at a deep
10 enough price discount, there are some customers who will take
11 it and blend it. But most of the coal from those two mines are
12 sold as a thermal coal. It's the same coal, just sold to two
13 different customers. But with regards to just overall in the
14 industry, yes, metallurgical coal mines are significantly more
15 expensive than thermal coal mines.

16 Q. But we're going to add up all of the northern Appalachian
17 cost per ton in 2012 and that's about forty-five dollars per
18 ton, right?

19 A. I'm sorry. We can do what?

20 Q. If we would do through the average of the production per
21 ton for the entire northern Appalachian region in 2012, that's
22 going to be about forty-five dollars per ton.

23 A. I don't remember off the top of my head but that number
24 sounds reasonable.

25 Q. In February of 2012, it was about forty-four dollars per

1 ton, right?

2 A. That's true. It was \$44.27. But all of northern
3 Appalachia includes a number of higher cost metallurgical coal
4 mines like those in western Maryland and central Pennsylvania
5 not the Pittsburgh scene mines that they actually compete with.
6 The ones they compete with do not have costs at that range. I
7 showed you the ones they compete with have costs more like
8 thirty-eight to forty dollars per ton.

9 Q. But that's only for Consol, right?

10 A. That's like saying -- it's like saying it's only for
11 Exxon. There -- Consol produces sixty-five percent of the coal
12 in the Pittsburgh scene. That is their main competitor in the
13 Pittsburgh scene.

14 Q. But you couldn't --

15 A. So it's like --

16 Q. Sure.

17 A. if you'd only for Consol, like, well, you know -- no. I
18 showed you on that chart by productivity that the mines for
19 Murray Energy and Alliance and Alpha also have produ -- well,
20 especially Murray Energy and Alliance have productivity similar
21 to Consol. So you're going to have costs similar to Consol's.
22 So, no, it's not just Consol. But Consol is the biggest share
23 of the market alone and we have hard evidence of what Consol's
24 costs are. And they are about, as you can see, five dollars or
25 more per ton less than Patriot's Federal mine. That's what

1 Patriot has to compete with in the marketplace.

2 Q. But for the other companies, you could not make a
3 statistically significant comparison in tons per hour with the
4 Federal mine, right?

5 A. The other companies didn't publish in their public
6 financial data segment financial data that would show their
7 Pittsburgh scene costs. So Alpha only publishes -- just like
8 Patriot, only publishes its average cost for all of Appalachia.
9 The only reason I know Federal number 2's costs is we have
10 access during this case to the private information from
11 Patriot. If Alpha published their information, I would use it.
12 If Alliance had the public information for their Pittsburgh
13 scene operations, I would use it.

14 Q. Are you aware that even under Patriot's business plan,
15 it's projecting to sell as coal at Federal in 2013 for about
16 fifty-five dollars per ton?

17 A. I'm not aware of the precise number. That wouldn't
18 surprise me.

19 Q. But would that -- compare that to the operating cost of
20 Federal. Would that make federal a profitable mine? I mean,
21 just on a mine-level cash flow basis?

22 A. On a mine-level cash flow, not counting for capital or
23 retiree medical costs, yes, I would expect on a, you know, on a
24 EBITDA basis, it would be a profitable mine.

25 Q. Would your answer be the same for Highland given its costs

1 and --

2 A. Not necessarily, no. Highland's -- Highland would be --
3 have trouble making a profit even on a cash-only basis.

4 Q. You're aware that average sales price at Highland for 2013
5 is in the high forties?

6 A. Yes.

7 Q. All right. And its operating costs is around -- it's in
8 the low forties. Isn't that --

9 A. Yeah, I think it was around forty-three, forty-four cash
10 only. But again, you're not counting in that -- you're not
11 even counting -- and those numbers don't even include the
12 contribution to the 1974 Pension fund which for Highland is
13 going to be costing you about a buck-fifty a ton --

14 (Phone recording interrupts proceeding)

15 A. -- so it doesn't -- you don't include in that even the
16 cash costs for the contribution to the 1974 Pension fund; you
17 don't include any allowance for replacement capital which
18 typically is going to run about four dollars per ton to replace
19 your mining equipment and keep it maintained over time. So
20 just on a cash basis right there, I think Highland would have
21 trouble even just breaking even on cash. And, obviously, if
22 you only break even on cash, you're going to be out of business
23 because someone's got to pay for the capital.

24 Q. If you go to Exhibit G of that equity committee
25 declaration.

1 A. Is there an exhibit number for that, sir?

2 Q. I'm going to just ask you the questions, if you remember
3 off the top of your head. Isn't it true that the average
4 operating cost per ton in central Appalachia changed from about
5 forty dollars per ton in 2005 to about eighty dollars per ton
6 in 2012?

7 A. I'm not sure I can remember the numbers off the top of my
8 head, but certainly has been a large increase in average in
9 central Appalachia. I'd say high seventies, I'm not sure it
10 would be eighty, but it would be high seventies.

11 Q. If you go to Exhibit 144?

12 A. I'm sorry; what number?

13 Q. 144.

14 A. Yes, sir.

15 Q. Go to page 3 of that exhibit. That's showing that in the
16 third quarter of 2012, the average operating cost in central
17 Appalachia was \$80.83 per ton?

18 A. In that quarter, yes. You asked me about the whole year.
19 I think the whole year would probably be in the high seventies,
20 but, yes, that's what it shows for that quarter.

21 As you can see, that average includes a wide variety of
22 operations everywhere from, you know, thermal coal mines
23 running at cost in the range of 58 to 60 dollars, to very high-
24 cost metallurgical coal mines of 120 to 140 dollars per ton.

25 Q. And would it be correct, that most -- if you look at the

1 increase in central Appalachia production costs from 2005 to
2 2012, most of that is not due to an increase in labor costs?

3 A. No, I don't think I would say that.

4 Q. Does the labor cost increase by twenty or thirty dollars
5 per ton during that time period?

6 A. When you're talking about the average for central
7 Appalachia, yes. The reason is what's happening is you're
8 seeing a change in the mix of production from being
9 predominantly thermal coal to predominantly metallurgical coal.
10 So the labor costs per ton for metallurgical coal mines are
11 much higher because they're much less efficient than the
12 thermal coal mines.

13 So one of the factors in that change in that period of
14 time is the change in the mix so you can see here when you've
15 got mines with cash costs over a hundred dollars per ton, those
16 mines are going to have labor costs that are over forty dollars
17 a ton or fifty dollars per ton. So, yes, could the average
18 labor cost go up by fifty percent of that amount? Yes, it
19 could.

20 Q. So the biggest driver of that increase would be a decrease
21 in productivity, right?

22 A. The decrease in average productivity, yes.

23 Q. But the actual labor cost per hour in central Appalachia
24 has not increa -- the actual labor cost per hour in central
25 Appalachia has not increased by nearly -- anywhere near forty

1 dollars per hour, for example, right?

2 A. Per hour?

3 Q. Right.

4 A. No. The average labor cost has not increased by forty
5 dollars per hour, no.

6 Q. Or even by twenty dollars per hour that you are aware of?

7 A. No, it hasn't increased by that much. No.

8 Q. In your analysis, you did not believe the data was
9 available to do a fair comparison of -- in terms of the
10 production costs per ton for Patriot's central Appalachia mines
11 and other central Appalachia mines, correct?

12 A. That's correct. It's because the type of coal being mined
13 and the conditions vary so widely as opposed to the other
14 comparisons I did in the Pittsburgh Seam and the Illinois Basin
15 where I thought they were directly comparable.

16 Q. Have you ever been asked by Patriot to review its coal
17 price forecast?

18 A. No.

19 Q. Is EVA projecting a decrease in national gas usage for
20 power generation between 2012 and 2013?

21 A. Yes, because the -- we've had a much colder winter this
22 year which means the gas that's produced is now being used more
23 for home heating. There's less surplus available for power
24 generation so the amount of gas burned for power generation in
25 2013 will be less than it was in 2012 which was an unusual year

1 as I testified earlier.

2 Q. And EVA is also projecting that when compared to 2012
3 usage levels, in each year between 2013 and 2015, there'll be
4 more coal used in power generation, right?

5 A. Yes. 2012 was a disaster, all right. It -- hopefully,
6 certainly in our forecast, 2013 to 2015 should be better than
7 2012.

8 Q. And when we're talking about thermal coal pricing in 2012,
9 was that affected by thermal coal demand in that year?

10 A. Yes.

11 Q. Are there many regions in the country where there are both
12 coal and natural gas power plants potentially available for
13 use?

14 A. Yes.

15 Q. Based on your experience, prior to deciding to switch from
16 coal to natural gas or vice versa, would a power company do its
17 own due diligence and see what makes sense for the company?

18 A. No, it's not a matter of due diligence. They own these
19 plants. They -- when you say "switch", they run both plants
20 every hour of the day all the time. The issue is which one do
21 they run more; it's not a matter of due diligence. They have
22 their operating costs because this is their normal course of
23 business. They decide to dispatch each plant on its economics
24 on a variable cost basis every hour of the day.

25 Q. If you'll look at paragraph 19 of your original

1 declaration?

2 A. Okay.

3 Q. When you say four-ten-per-million-BTU (sic) by the end of
4 2014, that's in 2014 dollars, right?

5 A. That's correct.

6 Q. Would you agree with me that paragraph 19 has
7 underestimated increases in the futures market since you
8 prepared this declaration?

9 A. No. The paragraph 19 was accurately what the futures
10 market was at the time I prepared my declaration. Has the
11 futures market changed since then? Yes.

12 Q. The futures market for natural gas has gone up since then,
13 right?

14 A. No. It has for short-term prices but for long-term
15 prices, it's gone down.

16 Q. By "long-term" you're talking about three to four years in
17 the future, right?

18 A. Yes.

19 Q. By "short-term" you're talking about 2014, right?

20 A. Ah, well, mostly I'm talking about 2013, like this month
21 and next month, is higher now than it was three months ago,
22 yes, because we've had much colder weather. But as far as the
23 longer term future, 2015, '16, '17, actually prices fell on --
24 they didn't go up.

25 Q. But isn't natural gas prices projected to be in the mid-

1 four's by 2014? During periods of 2014?

2 A. Well, again, the futures market's not a projection, right.
3 It is what it is now, meaning you can transact and buy gas now
4 for delivery in 2014 at a specified price. No, I wouldn't say
5 it's in the mid-four's except in the winter months. Natural
6 gas prices vary seasonally; they're higher in the winter and
7 lower in the summer.

8 So in some months, yes, but not on average, no.

9 Q. Is the futures price always an accurate predictor of where
10 the actual spot prices will be at that time?

11 A. No, of course not. It's never an accurate predictor. The
12 futures market is what you can transact for today for delivery
13 in the future. It's not intended to be a predictor of what
14 it -- the price will be in the future if you want to transact
15 in the future.

16 Q. In your original declaration, you talk about many
17 environmental regulat -- new environmental regulations, right?

18 A. I think so. Can you point me to where?

19 I'm not arguing with you; it's just getting -- I've been
20 up here a while and now I'm trying to react to what you're
21 asking. I'm trying to make sure it's correct.

22 Q. First, have a look at page 15 of your declaration.

23 A. Yes.

24 Q. And also page 17 of your declaration.

25 A. Yes. Fif -- page 15 are environmental regulations; page

1 17 are mining regulations.

2 Q. Would all these regulations combined have a net effect of
3 a slight increase in coal pricing?

4 A. Well, the two have two different effects. The
5 environmental regulations on power plants would have a negative
6 effect on coal demand and prices. The regulations on coal
7 production would drive up mining costs and therefore drive up
8 prices. They wouldn't drive up profitability; it would
9 decrease profitability because it would increase cost. But by
10 increasing cost, it would force prices up as well but not by as
11 much.

12 Q. I'm going to end on page 55 of your original declaration.

13 A. I don't have a page --

14 Q. Sorry --

15 A. I don't have a page 55.

16 Q. Sorry; paragraph 55.

17 A. Oh, sorry.

18 Q. I'm sorry; if you go to page 33 of your declaration?

19 A. Did you want me to read paragraph 55 or not?

20 Q. No.

21 A. Oh. Yes, I'm looking at page 33.

22 Q. Where's the data for this page coming from?

23 A. The data from (sic) this page comes from a combination of
24 several different files provided by Patriot. One is its entire
25 labor records for 2012 that show for each person each job

1 classification, the hours worked both for straight time, for
2 time-and-a-half, for double time, the hours for vacation,
3 holiday, sick, all the different hours-worked categories that
4 came from one file. The costs for each worker and each mine
5 came from a separate file; I don't recall the name at the top
6 of my head. And I analyzed both of them. And I think the
7 costs for the retiree healthcare even came from a third file,
8 if I recall correctly.

9 But these were all documents, you know, from Patriot's
10 data room.

11 Q. Would this document show their higher incentive and other
12 compensation for Patriot's non-union employees when compared to
13 its union employees?

14 A. Yes. The category I call Incentive and Other Compensation
15 includes the -- incentive compensation is what Patriot calls as
16 a bonus on its record. The bonuses are higher for the non-
17 represented workers than for the UMWA workers. It also
18 includes -- what I call Other Compensation includes such things
19 as clothing allowance, tools allowance, various sets of, you
20 know, other payments beyond direct pay. They tend to be a
21 little bit higher for the UMWA workers than for the non-
22 represented.

23 Q. So if we were just going to look at incentive payments
24 alone, you're going to see an even bigger gap between the union
25 and non-union employees?

1 A. For 2012, I would think a little bit bigger, yes.

2 Q. Those are my questions.

3 THE COURT: Mr. Russano, if you have some brief --

4 MR. RUSSANO: I have some very brief redirect.

5 Your Honor, I have an exhibit that was sent after the
6 binders were prepared. If I could approach the witness and the
7 bench?

8 THE COURT: All right. And Mr. Ho and Mr. Perillo
9 have seen this exhibit?

10 MR. RUSSANO: Yeah, they referred to it in their
11 direct. This is actually a docket entry on the file, in the
12 docket, docket number 3862-1.

13 THE COURT: All right.

14 Somebody's got their phone off mute. Please mute it.
15 Thank you.

16 REDIRECT EXAMINATION

17 BY MR. RUSSANO:

18 Q. Mr. Schwartz, do you recognize this e-mail as the document
19 that counsel was referring to earlier in your direct testimony,
20 that you were shown by me?

21 A. Yes, it is.

22 Q. And do you have an understanding of what "mid-sulfur"
23 means in this document?

24 A. No.

25 Q. Do you have an understanding of what "near compliance"

1 means in this document?

2 A. No.

3 Q. Do you have an understanding of what "super compliance"

4 means in this document?

5 A. No.

6 Q. Do you see any indications about whether or not these

7 various Wood Mackenzie coal forecasts are rail or barge?

8 A. For the southern West Virginia coals, those would be rail
9 not barge. The reason why I can tell is it talks about CSX or
10 NS. Those are two different railroads which means that none of
11 these forecasts are for barge-origin coal which would be
12 similar, for instance, to Patriot's coal from the Midland Trail
13 operations which loads FOB barge on the Kanawha River.

14 For what they call northwest Virginia and western
15 Kentucky, there's no way to tell if this is FOB rail, FOB
16 barge, FOB mine, FOB truck. It matters what the loading point
17 is because there are transportation costs incurred to get to
18 that transaction point.

19 In -- when I -- when we prepare our forecast, we define
20 the transaction point. If you were to go to the over-the-
21 counter futures market, or the NYMEX, it defines the
22 transaction point because that's the point at which the seller
23 sells and the buyer takes possession. Prices are different if
24 it's FOB rail or FOB barge, and sometimes different -- which
25 river it's on, for instance; if it's FOB barge in the Ohio

1 River or FOB barge in the Kanawha River.

2 There's no information like that on this. I can't tell
3 what coal on this would be comparable to the Federal mine.
4 There's no way to tell. I can't tell what coal would be
5 comparable to Highland Mine or to virtually any of Patriot's
6 mines.

7 Q. So looking at the information provided on this e-mail, is
8 there any way for you to determine whether or not any of these
9 Wood Mackenzie forecasts are comparable to coal products
10 produced by Patriot in its various mines?

11 A. There's no way to tell. And not only that, I'm confident
12 there are a lot more coal products in Wood Mackenzie's
13 forecasts that are not listed here, some of which may in fact
14 be the ones I would have looked at or selected to be the coal
15 products that would be comparable to mines like Federal or
16 Highland or Midland Trail. And it's just not shown on here.
17 So I think there's probably more information from Wood
18 Mackenzie I don't even see here.

19 Q. Thank you. You can put that aside. If you could turn to
20 Exhibit 1 of your reply declaration; that's on page 6.

21 A. Can you tell me the exhibit number again? I lost it.

22 Q. Yes. It is -- the reply is 148.

23 A. Thank you. And again, what page number or paragraph?

24 Q. It's page 6, Exhibit 1.

25 A. Yes, sir.

1 Q. You fielded a number of questions earlier today on this
2 particular exhibit, right?

3 A. Yes, I did.

4 Q. Do you recall discussing how Northern Appalachian Coal, it
5 appears that that the forecasted prices, in general, tend to be
6 lower than -- or, I'm sorry, higher than the forecasted coal
7 prices in the Patriot business plan. Do you see that?

8 A. Yes, I do.

9 Q. Do you know what percentage on a revenue basis of Northern
10 Appalachian Coal, what percentage that represents for Patriot?

11 A. From Patriot's total business plan, it would be maybe
12 about ten percent of its total business.

13 Q. If you now look at the bottom of that exhibit, met coal,
14 do you see that?

15 A. Yes, I do.

16 Q. And there it -- this exhibit shows that the forecasted
17 prices are lower than the forecasted prices contained in
18 Patriot's business plan, do you see that?

19 A. Yes. It shows that our -- my company's price forecast for
20 this quality of coal is lower than Patriot forecast in its
21 business plan.

22 Q. And what percentage of Patriot's total revenues are
23 represented by met coal?

24 MR. HO: Objection, Your Honor. That exhibit is only
25 talking about met coal from Rocklick. It's not for all met

1 coal.

2 THE COURT: I need you at the podium, Mr. Ho, please.

3 MR. HO: I said the bottom of Exhibit 1 is solely
4 talking about Rocklick met coal, not all met coal. That is an
5 unfair question for that reason.

6 THE COURT: Mr. Russano?

7 MR. RUSSANO: Your Honor, I don't think it's an unfair
8 question to ask him what percentage of Patriot's revenues are
9 encompassed by metallurgical coal. It's clearly within the
10 scope of his testimony. I don't really even understand the
11 objection.

12 MR. HO: No, but the insinuation of that question is
13 that the bottom of page 1 is talking about all of Patriot's met
14 coal and that's an unfair insinuation.

15 THE COURT: Mr. Russano, I guess that's my question.
16 My question then to you is: are you saying that that shows all
17 of Patriot's metallurgical coal, or that's just a portion of it
18 that's showed on the exhibit?

19 MR. RUSSANO: Not at all, Your Honor. But I'm happy
20 to ask a couple of additional foundational questions --

21 THE COURT: All right.

22 MR. RUSSANO: -- if that would be helpful.

23 THE COURT: That would be.

24 BY MR. RUSSANO:

25 Q. Mr. Schwartz, Exhibit 1 is just for the Rocklick

1 operation, correct?

2 A. Yes, it is. Or at least the prices shown -- let me see if
3 I can explain briefly. The -- my company publishes a market
4 price forecast for what we call high-vol A metallurgical coal.
5 That is the metallurgical coal of the grade produced at
6 Patriot's Rocklick operation, which is its largest and most
7 significant metallurgical coal operation. But it does have
8 others, and it has different grades at different prices. We
9 don't publish a price for each one of those grades. So the
10 only one I showed on this comparison was the one that was
11 comparable to the price forecast that we published. I don't
12 have a price forecast to show comparable to the various other
13 metallurgical coal grades that Patriot produces.

14 Q. Thank you. Now putting that exhibit aside, do you know
15 what percentage of Patriot's revenues are encompassed by met
16 coal sales?

17 A. Yes.

18 Q. Can you tell us what that is?

19 A. It's about fifty percent of the company's total revenues,
20 and it's forecasted to grow in its business plan to over sixty-
21 five percent of its total revenues.

22 Q. If you could turn to page 37 of your original declaration?

23 A. Yes.

24 Q. And I'm referring to the chart at the bottom of the page
25 that you were questioned about earlier. Do you see that?

1 A. Yes.

2 Q. Can you just explain for the Court briefly how you
3 selected the various mining operations that are included within
4 this chart, and why you think that it's a fair comparison to
5 look at this selection?

6 A. Yes, I can.

7 Q. Please do.

8 A. This selection, Your Honor, is every coal mine operating
9 in the Pittsburgh seam with a longwall mining operation. So the
10 Pittsburgh seam is a large contiguous seam of coal that spans
11 Northern West Virginia, Southwestern Pennsylvania, and Eastern
12 Ohio. And it's by far the largest single source of coal in
13 Northern Appalachia. And this is the largest source of
14 underground coal production in the entire United States. All
15 of these mines have very similar mining conditions, being in
16 the same seam, and are using the same mining technology, which
17 is longwall mining. So in my opinion, this is a comprehensive
18 sample of a very, very large source of coal, including every
19 mine, not excluding anybody for any purposes of trying to prove
20 a point. This is a complete look at all of these mines, and I
21 think it's a very fair comparison, and encompasses all -- a
22 statistically significant measure of all of the different
23 factors that go into coal mining and coal mine productivity.

24 Q. Do you recall being asked about the Powhatan Mine in
25 particular?

1 A. Yes, I do.

2 Q. What mine on this list operates under the most similar
3 mining conditions as the Powhatan Mine?

4 A. The Century Mine, which is the other mine in Ohio, also
5 owned and operated by the same parent company, Murray Energy.

6 Q. And where is that mine located?

7 A. The Century Mine is adjacent to the Powhatan Mine. They
8 mine contiguous coal reserves in virtually identical mining
9 conditions.

10 Q. And is the Century Mine more productive than the Powhatan
11 Mine?

12 A. Yes, it is. On average, over this period, it is.

13 Q. Is the Century Mine a UMWA-operated mine?

14 A. No, it's not.

15 Q. Does the fact that the Powhatan Mine has higher
16 productivity than some of the other UMWA mines on this list,
17 does that change your overall conclusions as reflected in this
18 chart?

19 A. No, it doesn't.

20 Q. And why is that?

21 A. I understand that productivity may vary for any one given
22 mine, due to a number of factors. My purpose here was to do a
23 comprehensive analysis of all of the operations, all operating
24 in similar conditions with the same technology. And as you can
25 see, the results are shown at the bottom of that exhibit. The

1 total production and productivity for the non-union mines, the
2 productivity is substantially higher than for the UMWA mines in
3 every year over this period. And I think the conclusion is
4 relevant, even if one mine shows a different result.

5 Q. If you could now turn to your reply declaration, page 13.
6 Do you see Exhibit 5?

7 A. Yes, I do.

8 Q. And again, you were asked a number of questions about this
9 exhibit earlier today, correct?

10 A. Yes.

11 Q. I believe you testified that this exhibit corrects for two
12 of the errors that you identified in Mr. Akunuri's analysis, is
13 that right?

14 A. Yes.

15 Q. Did it correct for all of the errors in Mr. Akunuri's
16 analysis?

17 A. No. But these were, by far, the largest two issues.

18 Q. And you've discussed in your testimony earlier some other
19 adjustments that you did not correct for, including how BTU
20 adjustments were made, is that right?

21 A. That's correct. Both how they were made and what the BTU
22 would be over time.

23 Q. Does Exhibit 5 assume historical heat content on a going-
24 forward basis for the Federal Mine?

25 A. Yes. Mr. Akunuri, in this analysis, took the actual

1 average heat content in 2012 and assumed that that would be the
2 same heat content for the future years; the forecast.

3 Q. And correcting for that, would that have some impact on
4 this analysis?

5 A. Yes, it would.

6 Q. What other -- what other aspects of this analysis are you
7 critical of?

8 A. Well, I'd say the biggest thing is this is only half the
9 company. I mean, the other half of the company is the
10 metallurgical coal half of the company. So there's no analysis
11 here on whether or not Patriot's metallurgical coal price
12 forecast is reasonable. As you can see, I think it was
13 somewhat optimistic. So that's one difference.

14 Another difference is that the sulfur contents that Mr.
15 Akunuri assumed in terms of selecting what sulfur would not be
16 what I would have done. But the truth is he didn't provide
17 enough information from Wood Mackenzie forecast he relied on
18 for me to actually tell, you know, what coal might be
19 comparable for Wood Mackenzie's forecast and what I would have
20 elected. But at least, based on the words he used, I wouldn't
21 have used the word compliance coal for these mines.

22 Q. Do you have an understanding of the -- of when the Wood
23 Mackenzie forecast that Mr. Akunuri relied on was issued?

24 A. Yes, I do.

25 Q. And when was that?

1 A. In November of 2012.

2 Q. Would that have any impact on the numbers contained within
3 this document?

4 A. Yes.

5 Q. And can you elaborate for the Court what you mean by that?

6 A. Well, I think, as you can see there at the bottom, the
7 Wood Mackenzie forecast was substantially more optimistic in
8 terms of prices than the Patriot business plan for the years
9 2013, 2014. But the difference in their thermal coal forecast
10 by 2016 is really quite small.

11 I would think that Wood Mackenzie -- the fact is that Wood
12 Mackenzie's forecast is old -- it's six months old. I very
13 much doubt whether Wood Mackenzie would forecast these prices
14 for 2013 and 2014 today, given that we have actual experience
15 now for half of 2013, and the market price during 2013 for
16 these thermal coals is nowhere close to what Wood Mackenzie's
17 forecast was in November of 2012.

18 Q. And just to sum this up, do you agree with the analysis in
19 Exhibit 5, and the conclusions that Mr. Akunuri draws from
20 them?

21 A. No.

22 Q. One of your answers to a question posed to you today, you
23 mentioned that 2012 was a disaster for thermal coal. Do you
24 recall that?

25 A. Yes.

1 Q. Could you just describe for the Court what you meant by
2 that?

3 A. I mean, Your Honor, the demand for coal burned for
4 electricity in the United States fell by over one hundred
5 million tons from 2011 to 2012. The effect of that was that
6 customers who had already bought the coal, because they buy
7 coal in advance, had nowhere to burn the coal, and they stored
8 the coal everywhere they could. So there was excess coal
9 stored in inventory, both at the mine, at the power plants, and
10 then resold and shipped into the export market. It had a
11 significant negative effect on the coal industry. Producers
12 were forced to shut mines, cut production, and you know, it
13 was -- you know, it was, as you can see with Patriot, a
14 significant financial strain on many producers in the industry
15 who have had to reorganization their operations around a
16 smaller industry and a smaller future.

17 Q. Last two questions. Do you recall counsel asking you
18 whether or not the various environmental regulations and mining
19 regulations contained within your declaration had the effect of
20 increasing coal prices? Do you recall that question?

21 A. Yes, I do.

22 Q. Let me ask you, have increased environmental regulations
23 and mining regulations -- have they had a positive impact on
24 coal companies?

25 A. No. They've had a severely negative impact on coal

1 companies. The increased mining regulations have increased
2 costs and reduced profitability. Obviously, you've had the
3 experience here with Patriot with selenium, you know, that
4 you've heard in this case. But it's across the board. This
5 Administration has proposed and promulgated a whole set of new
6 regulations on coal mining which have increased production
7 costs, not just for Patriot, but for a number of companies.
8 And although, yes, that does mean, as I answered Mr. Ho, coal
9 prices will have to go up as a result, it means coal -- profit
10 margins of coal companies have been squeezed, and they're less
11 profitable as a result, not more profitable.

12 Q. Thank you, Mr. Schwartz.

13 MR. RUSSANO: Your Honor, I have no further questions
14 at this time.

15 THE COURT: All right.

16 Mr. Ho, did you have anything else for this witness?

17 MR. HO: Yes. A few questions, Your Honor.

18 THE COURT: All right. Briefly.

19 RE-CROSS-EXAMINATION

20 BY MR. HO:

21 Q. I'm going to start on the same exhibit Mr. Russano just
22 handed you. Would it be correct that the first time you saw
23 this document was yesterday?

24 A. Yes.

25 Q. Even though the document was dated and e-mailed on April

1 20th? Right?

2 A. Yes.

3 Q. Are you aware that throughout the course of this
4 bankruptcy, there has been numerous information requests going
5 back and forth between the union and the debtor?

6 A. I --

7 MR. RUSSANO: Your Honor --

8 A. I would not be --

9 MR. RUSSANO: Your Honor --

10 A. -- aware. I don't know what you're talking about.

11 THE COURT: Just a second, Mr. Schwartz.

12 Yes, Mr. Russano? You have an objection?

13 MR. RUSSANO: Your Honor, clearly, questions about
14 what has been exchanged in discovery is well beyond the scope
15 of his declarations. Well beyond the scope of my redirect.

16 MR. HO: Your Honor, this is a setup for the following
17 question.

18 THE COURT: All right. I'll overrule the objection.
19 Move along.

20 A. I wouldn't know, sir.

21 Q. Did Patriot make up the information requests of the union
22 concerning the meaning of these Wood Mackenzie categories?

23 A. I have no idea.

24 Q. You're not aware of that being done, right?

25 A. I said I don't know.

1 Q. Sitting here today, are you sure there are any other
2 Southern West Virginia products for which Wood Mackenzie
3 provides a price forecast?

4 A. Yes.

5 Q. What other products are there for which to provide a
6 forecast?

7 A. They have to provide a price forecast for the NYMEX spec
8 coal FOB barge because I can't imagine that subscribers would
9 subscribe to their forecast if they didn't have one. It's the
10 most commonly-traded coal in the United States.

11 Q. But you have never seen the Wood Mackenzie product, right?

12 A. I don't get their product, no. They're a competitor and
13 we don't exchange products.

14 Q. So you have no first-hand knowledge of what category is
15 actually in the Wood Mackenzie product, right?

16 A. No, I don't. I'm telling you that I'm in the same
17 business. I wouldn't be in business if I didn't provide a
18 forecast of NYMEX prices. They wouldn't be in business if they
19 didn't provide it. It's got to be there.

20 Q. You testified that Rocklick is the company's most
21 important met coal mine, is that right?

22 A. Yes.

23 Q. Are you aware that the company shut down Rocklick in 2013?

24 A. Well, Rocklick isn't the mine, it's a preparation plant.
25 All right? It's the coals that get shipped to Rocklick can

1 also get shipped to Wells. So the -- both -- you know, the
2 mines -- the mines can be -- can be washed at either place and
3 loaded at either place.

4 Q. I see that you are not aware of what percentage of the
5 company's met coal production comes from Rocklick. Right?

6 A. I think that's in my declaration, if you wanted me to come
7 up with an answer.

8 Q. All right.

9 A. The -- a little less than a million tons per year goes
10 through the Rocklick plant. The Rocklick, though, is a brand
11 name they have for the Eagle seam coal. I think some of the
12 coal going through the Wells preparation plant would also be of
13 that same brand. So as much -- I'd say in the range of a
14 million and a half to two million tons, and Patriot does about
15 eight million tons of metallurgical coal. Well, let me check.
16 I said eight -- 6.3 million tons total. So it might be about a
17 third to a quarter -- a quarter to a third of their total
18 production.

19 Q. Are you aware that according to --

20 THE COURT: Mr. Ho.

21 MR. HO: Sure.

22 THE COURT: The podium, please.

23 Q. Are you aware that according to the October 2012 forecast,
24 the actual number is 1.48 million tons?

25 A. That's pretty close to the one and a half million I just

1 said. I think I'll accept 1.48 instead of one and a half.

2 Q. And the company's total production is somewhere a little
3 bit under seven million tons, right?

4 A. Yeah, I think I said it was 6.3 million tons of
5 metallurgical coal in 2012, so --

6 Q. Well, but in 2013, you're not aware of what the number is?

7 A. Well, 2013 is not over yet. I don't know what it's going
8 to be, but, you know, six- to seven-million tons of
9 metallurgical coal, in that range, I would think that'd make
10 sense.

11 Q. Do you know whether there is a difference in the quality
12 and age of the longwall equipment between the Century mine and
13 the Powhatan mine?

14 A. No.

15 Q. And in Exhibit 1 of your reply declaration, one of the
16 forecasts you list are the S & L forecast, right?

17 A. Yes. I list it because that was provided by Mr. Akunuri.

18 Q. Are you aware that that's a 2013 forecast, right?

19 A. I believe it was, if my memory is right, I believe he said
20 that was a February of 2013 forecast. I know that S & L puts
21 out a forecast every month on its Web site because we get S &
22 L's work, so I know they've come out with two forecasts since
23 then, but this was the February forecast.

24 Q. Are you aware that all the coal selections in the S & L --
25 in the S & L comparison analysis were approved by Patriot

1 management?

2 A. I wasn't aware of that, but I didn't have any
3 disagreements with the S & L coal selections.

4 Q. Are you aware that all the adjustments for S & L were
5 pursuant to recommendations made by Patriot management?

6 A. No.

7 MR. RUSSANO: Objection, Your Honor.

8 THE COURT: Just a minute, Mr. Schwartz.

9 MR. RUSSANO: This line of questioning is beyond the
10 scope of my redirect examination.

11 MR. HO: Well, the redirect question was Wood
12 Mackenzie. I'm asking about S & L because S & L's numbers are
13 actually better than Wood Mackenzie for the years that we're
14 talking about. I think it's directly responsive to the
15 redirect.

16 MR. RUSSANO: Your Honor, I didn't even use the words
17 S & L.

18 THE COURT: I'll sustain the objection. It's outside
19 the scope.

20 Q. For 2016, your Exhibit 1 shows that Wood Mackenzie is less
21 favorable than other forecasts, right?

22 A. I am not quite sure what you mean by less favorable.

23 Q. Well, not for Exhibit 1. Look at Exhibit 5.

24 A. Okay. And your question was what?

25 Q. Wood Mackenzie is less favorable in 2016 than other

1 forecasts in that table.

2 A. I am not sure what you mean by favorable. There's --

3 Q. There's lower revenue overall.

4 A. Well, it's -- according -- first of all, this is Mr.

5 Akunuri's calculation, which I corrected for two kind of large

6 errors. But for just Patriot's thermal coal, this was showing

7 that Wood Mackenzie's price forecast was a little bit higher

8 than the Patriot business plan, and a little bit lower than the

9 S & L forecast. That's all it's comparing it to.

10 Q. And by a little bit lower, you're talking about twenty-one

11 million dollars, right?

12 A. Yes, out of a billion. And that's only the thermal coal.

13 Out of two billion, if I include the metallurgical coal. So,

14 yeah, it's one percent difference. If you think anybody's

15 price forecast, including ours, is accurate within one percent

16 of revenue for four years from now, you haven't spent much time

17 in the forecasting business.

18 Q. You also talked about excess inventory in redirect

19 testimony, right?

20 A. Yes, I did.

21 Q. That is something you'd expect the coal price forecast

22 already take into account, correct?

23 A. I would think so, yes.

24 Q. You talked about tighter profit margins based on the

25 environment regulations.

1 A. I was specifically referring to coal mining environmental
2 regulations.

3 Q. Do you know whether those factors were already taken into
4 account in Patriot's five-year plan, especially for the years
5 2016 and beyond?

6 A. No.

7 MR. HO: That's all I have.

8 THE COURT: All right. All right, Mr. Schwartz, thank
9 you. You may step down.

10 All right, Mr. Moskowitz, who is next?

11 MR. MOSKOWITZ: Mr. Tom Terry is next

12 Would it make sense just for a moment to pause and
13 have like a scheduling -- a brief scheduling note about what
14 remains for today, and tomorrow, and all? And I would just
15 note in that context that the parties did decide to divide the
16 time evenly for the hearing. And while it makes sense, of
17 course, that the union will be consuming more time with their
18 cross-examining our witnesses, they are dominating the time
19 clock so far. And I'm starting to become a little bit
20 concerned about the fact that, because of that, we may not
21 actually end up in a situation where the debtors are getting
22 equal time, given the tremendous imbalance so far. So it's in
23 that context that I start asking about what we have left for
24 today and how long the Court wishes to sit for today. Because
25 what we had intended to do was to call both Tom Terry and Dale

1 Lucha to the stand today. But if we are -- if we're in for
2 multiple, multiple hours of cross-examination, I start to fear
3 about our ability to do that.

4 THE COURT: Well, you know, we left it up to you guys
5 to kind of divvy up that time. Mr. Perillo, Mr. Ho, how long
6 do you -- how much cross-examination do you think you're going
7 to have of Mr. Terry?

8 MR. PERILLO: I will have --

9 THE COURT: At the podium so that my ECRO will be
10 happy with me.

11 MR. PERILLO: I apologize, Your Honor.

12 THE COURT: No problem.

13 MR. PERILLO: I think I can hold the Terry cross-
14 examination to under an hour.

15 THE COURT: All right. And then how long for Mr.
16 Lucha?

17 MR. PERILLO: Also approximately an hour. That's a
18 lot, but should we still -- because we'll, obviously, have --
19 with an hour of cross-examination of these witnesses, there's a
20 fair bit of potentially redirect, so but we would like to get
21 it done today. I think it would be good for the schedule if we
22 can get it done today.

23 THE COURT: Well, I think we ought to get Mr. Terry on
24 the stand and see how far along we can get with him.

25 MR. MOSKOWITZ: Okay. And Your Honor, the reason why

1 I raise the hours issue is --

2 THE COURT: We can maybe --

3 MR. MOSKOWITZ: -- just because I don't want to be put
4 in the position of being a bad guy, you know, sometime on
5 Thursday, telling the union that, "Oh, you know, you've run out
6 of time." I'm trying for us to be sort of playful about that.
7 But I think we're headed towards that, if we continue to have
8 sort of multiple hours of cross-examination per witness.
9 That's why I flag the issue now for the record.

10 MR. PERILLO: Well, Your Honor, if we have the same
11 amount of time on Thursday as we have today, and the company
12 and the union both hold themselves to the three hours of
13 direct, and we split halfway through Wednesday, won't the time
14 by definition be equal?

15 MR. MOSKOWITZ: It will not, because as I understand
16 it, we're splitting, literally -- we're keeping track of how
17 much time people are actually at the podium. And so although
18 we may pass the podium at a certain point in the day on
19 Wednesday, I don't agree with that characterization. I think
20 it very well might be that the union may have, at some point on
21 Thursday, more hours than the debtors. So I don't mean to be
22 petty about this. I'm just flagging an issue so that I'm not
23 seen as a bad guy on Thursday when I say we're out of balance
24 and the union is starting to run out of time. I want to bring
25 that up now.

1 THE COURT: Well, again, you know, I tasked you all
2 with that. You know, I'm keeping track of the time on closing
3 arguments of the other parties. But other than that, we're on
4 our own. And certainly, I think that Ms. Magnus indicated
5 today it might kind of be our long day, and then Thursday might
6 be our other really long day. So I think it will average out.

7 MR. MOSKOWITZ: We will continue to confer on the
8 time, Your Honor. Thank you.

9 THE COURT: All right. Thank you.

10 MR. MARTIN: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. MARTIN: For the record, Jonathan Martin from
13 Davis Polk for the debtors.

14 We are calling as our next witness Mr. Thomas Terry.
15 Mr. Terry is the president and founder of T. Terry Consulting,
16 and he holds a bachelor's degree in math and physics from Tufts
17 University, and a master's of actuarial science from the
18 University of Michigan.

19 Mr. Terry currently serves as the president elect of
20 the American Academy of Actuaries. He also serves as vice
21 chair of the Pensions and Employee Benefits Committee of the
22 International Actuarial Association

23 Mr. Terry's expertise lies generally in the field of
24 employee benefits, including in researching and consulting in
25 the design and financing of employee benefit programs,

1 monitoring trends in all areas of employee benefits. I'm
2 losing my breath explaining his expertise. Monitoring
3 trends -- you're right, just stop, right? He's an expert.
4 Including healthcare for both active employees and retirees

5 Mr. Terry submitted an expert declaration on March
6 14th, 2013. I offer that as his direct testimony and will
7 tender him to Mr. Perillo for cross-examination.

8 THE COURT: All right. Mr. Terry, if you'd step up to
9 the podium first, please, to be sworn.

10 (Witness sworn)

11 THE CLERK: Please have a seat in the witness box,
12 sir. There is a step up.

13 CROSS-EXAMINATION

14 BY MR. PERILLO:

15 Q. Good afternoon, Mr. Terry.

16 A. Good afternoon.

17 Q. This is your very first proceeding that arises under
18 Section 1114, is it not?

19 A. I don't know how to answer that question.

20 Q. Well have you ever been involved in a proceeding that
21 arises under Section 1114 of the Bankruptcy Code before today?

22 A. I thought your question was with respect to this process
23 here; whether this was the first proceeding with respect to
24 1114 here. And I don't know the answer to that, but I've not
25 been involved in an 1114 matter in a testifying manner before.

1 Q. Before the Patriot case?

2 A. That's right.

3 Q. Thank you, sir. And you have no experience with VEBA
4 administration, isn't that true?

5 A. I have experience with employee benefit plan
6 administration, but not directly with VEBA administration,
7 although I have consulted to several organizations that run
8 VEBAs.

9 Q. And you have no experience in quantifying the
10 administrative costs of a VEBA, isn't that also true?

11 A. That's not something that I have done, although it's not
12 far afield from other administrative costing work that I have
13 done, given that my organization has done benefit
14 administration in the past.

15 Q. You do not know whether or not you have an opinion whether
16 the Patient Protection and Affordable Care Act will provide a
17 viable healthcare alternative to retirees, isn't that true?

18 A. Well, because the Patient Protection and Affordable Care
19 Act --

20 Q. Sir, is it true or not?

21 A. What I'm -- well, it is true in that -- it is true in that
22 the implementation of the Affordable Care Act is in front of
23 us, and that there are a lot of details to work out, and a lot
24 of -- a lot of important facts to be worked out by governments
25 across the land, as well as the federal government. And to the

1 extent that those details are not yet known, no one can predict
2 exactly what's going to -- what's going to happen. But the
3 intent, of course, is that there be a large number of
4 affordable healthcare options available that haven't been
5 available before.

6 Q. But you, sir, cannot even guess as to the order of
7 magnitude of the premium that might be required under a plan
8 under PPACA, isn't that true?

9 A. Well, that's not exactly true, either. One of the -- one
10 of the aspects of the Affordable Care Act is the invitation for
11 state governments to expand eligibility for their Medicare --
12 Medicaid programs -- excuse me -- Medicaid programs. And the
13 premium support for those kinds of programs is reasonably well
14 known. And thus, one can -- one can pretty easily infer the
15 type of premiums that would be charged for Medicaid coverage,
16 or the type of premium support that would be made available to
17 individuals for Medicaid coverage.

18 Q. You recall that I took your deposition earlier in this
19 matter, do you not?

20 A. Yes. Thank you.

21 Q. Mr. Terry, I just handed you a copy of your deposition
22 transcript. I'd like you to turn to page 151. Are you there,
23 sir?

24 A. I am.

25 Q. You see that in the middle of that page I asked you a

1 question: "But you don't know how much it will cost them to
2 participate in the exchanges." Do you recall that you
3 answered: "I've already answered that question that I don't
4 know, nor does anybody know right now." Do you see that was
5 your question -- my question and your answer --

6 A. Yes.

7 Q. -- to it, sir?

8 A. Yes.

9 Q. And you agree with that today, correct?

10 A. I do. My response to your previous question, though, had
11 to do with another aspect of the Affordable Care Act which was
12 to promote the expansion of Medicaid. This question was with
13 respect to another aspect of the Affordable Care Act that would
14 also affect and, hopefully, improve the situation for retirees.

15 Q. Well, let's go to the previous page. I asked you: "Do
16 you have any estimate as to what a typical premium that would
17 be charged to someone in the position of a Patriot retiree
18 might be under the exchanges."

19 A. Yes.

20 Q. And you answered: "I don't have that." And I asked you:
21 "Even by order of magnitude?" And you answered: "I don't have
22 that." Do you see those questions and answers?

23 A. Yes, I do.

24 Q. Those remain true today, do they not, sir?

25 A. They do. And my response earlier, just to make it clear,

1 was that's one -- the exchanges are one aspect of the
2 Affordable Care Act that affect retirees. There are other
3 aspects.

4 Q. You recalled that you submitted a declaration in this
5 matter, correct?

6 A. Yes.

7 Q. The declaration is found at tab 158, if you wish to refer
8 to it. In your declaration, you listed various features of the
9 proposed Patriot VEBA that would provide certain benefits to
10 retirees, do you recall that?

11 A. I do recall.

12 Q. Do you wish to consult the declaration?

13 A. If you're going to ask me questions about it, I think I
14 should.

15 Q. I'll ask you to turn to paragraph 72, and the paragraphs
16 that follow in your declaration. It's tab 158, sir.

17 (Pause)

18 THE COURT: It might be one of the ones that's already
19 opened, because --

20 THE WITNESS: Yeah, that's what I'm thinking.

21 THE COURT: -- because it's one Mr. Schwartz was
22 looking at.

23 THE WITNESS: I think I found it. Okay, I'm there.

24 Q. Now, these features that are shown here in paragraph 72 --

25 A. Oh.

1 Q. -- and the paragraphs that follow, these are actually
2 features of any VEBA, correct?

3 A. Yes, that's right.

4 Q. And they're not peculiar to what Patriot has proposed.
5 It's just what a VEBA is, isn't that correct, sir?

6 A. Yes.

7 Q. You mentioned in your declaration that there are 7,800
8 VEBAs in the United States, approximately?

9 A. Yes. That's right.

10 Q. Do you recall that?

11 A. Yes.

12 Q. And do you know how many of those VEBAs relate to the
13 replacement of an employer-provided retiree healthcare?

14 A. In the context that's been proposed here, I don't know.

15 Q. Thank you, sir.

16 Do you have an opinion about what is a reasonable
17 expenditure for a retired person to pay for healthcare?

18 A. I -- well, of course, the word reasonable is a -- I am not
19 sure what you mean by reasonable, but I don't have an opinion
20 about it that was outside the scope of what we looked at for
21 purposes of this analysis.

22 Q. So you do not then, sir. You do not have an opinion about
23 what is a reasonable expenditure of a retired person for
24 healthcare?

25 A. I do not.

1 Q. And it's your opinion generally that there is wide over-
2 utilization of healthcare in the United States, is that true?

3 A. I don't know that I'd say that it's wide over-utilization.
4 I will say that most, if not all healthcare experts understand
5 and agree with the notion that over-utilization of aspects of
6 the healthcare system is part of the problem of the healthcare
7 crisis in our nation today.

8 Q. I would ask you then to turn to page 75 and 76 of your
9 deposition transcript. Are you there, sir?

10 A. I am.

11 Q. Do you recall that I was questioning you about the
12 tradeoff between wages and what employees or retirees would put
13 aside for healthcare?

14 A. Yes.

15 Q. And I asked you for employees, generally, wasn't it an
16 equivalent tradeoff, and you answered that I think it is more
17 complex than that. I asked you why, and you said: "Well, for
18 the reasons stated with my second reason, in general -- well,
19 let me state my second reason. That employees are seeking to
20 encourage greater responsibility for healthcare choices, and
21 what the reason speaks to is the widely understood phenomenon
22 that over-utilization of healthcare, of the healthcare system,
23 can be reigned in, in part, by greater participation, financial
24 participation by the covered individuals." Do you see those
25 questions and those answers?

1 A. Yes.

2 Q. And do you still believe that today?

3 A. Yes, I do.

4 Q. Did you tell me in the course of our conversation that we
5 had approximately two weeks ago, or roughly, that it's hard for
6 you to pick out a group that needs healthcare more than other
7 groups. Do you recall that testimony?

8 A. Yes.

9 Q. You also know from your familiarity with the proposals in
10 this case that the active essential element and retiree health
11 plans of Patriot are similar in content, correct?

12 A. Could you -- the active employee -- just run that by me
13 again, if you could.

14 Q. Sure. The active employee healthcare plan, and the
15 retiree healthcare plan at Patriot that exists today --

16 A. Today.

17 Q. -- are similar in content?

18 A. Yes. I believe that's right.

19 Q. You evaluated the employer's proposals as of December
20 2012, do you remember that?

21 A. Yes.

22 Q. And have you updated your evaluation of the proposals?

23 A. Well, my evaluation, I think, is included in my
24 declaration.

25 Q. So you have not made adjustments to anything that was said

1 in your declaration based on the fact that there have been more
2 proposals since December of 2012?

3 A. No, I have not.

4 Q. Thank you.

5 A. And --

6 Q. When you obtained this -- go ahead, sir.

7 A. No, I didn't -- I am not aware of anything in the
8 subsequent proposals that would have caused me to change
9 anything in my opinions.

10 Q. I think that's the answer you just gave me.

11 A. Yes.

12 Q. Because they're keeping track of my time, I'd like you to
13 not repeat your answers. No filibustering, Mr. Terry.

14 MR. MARTIN: Your Honor, I'd like the witness to be
15 able to answer his questions, too.

16 MR. PERILLO: I agree with that. I just don't want
17 him to do it twice.

18 THE WITNESS: Well, the reason I clarified --

19 MR. PERILLO: Or three times.

20 THE WITNESS: The reason that I clarified is because I
21 didn't want to leave you or the Court with the impression that
22 somehow I overlooked something. I wanted to establish the fact
23 that I was aware -- that I wasn't aware of anything in
24 subsequent proposals that would have changed my opinion.

25 THE COURT: All right.

1 MR. PERILLO: Thank you, sir.

2 THE COURT: Duly noted.

3 Q. You knew when you obtained this assignment that one of
4 your -- one of your assignments was to offer opinions that was
5 in support of the company's motion to terminate its liability
6 for retiree healthcare, is that true?

7 A. Yes.

8 Q. When you adopted this, or took on this assignment, did you
9 analyze the population of miner retirees to see what the
10 incidence of disease was in that population?

11 A. I did not.

12 Q. And you did not consider the proportion of them that are
13 pre-Medicare-age-eligible retirees?

14 A. Not the proportion, other than to note that there were
15 both pre-Medicare-eligible retirees, as well as Medicare-
16 eligible retirees in the population.

17 Q. You know that some exist, but you don't know how big or
18 large the group is.

19 A. I have a general sense, but not a specific sense. That
20 wasn't relevant to my formulating my opinion.

21 Q. And you told me in our earlier conversations that you
22 thought the incidence of disease in the population was relevant
23 to managing the plan, but not to the comprehensiveness of
24 coverage. Do you remember that testimony?

25 A. Well, if you want to steer me to the testimony, I'd be

1 happy to take a look at it and verify that I said that. What I
2 would say now is -- I wouldn't use those exact words,
3 necessarily, unless you're quoting me, in which case I'd like
4 to explain them.

5 Q. Why don't we go to page 44 of your deposition, sir.

6 A. I'm there.

7 Q. You can see that down at the bottom I asked you did you
8 also study the disease incidence in the population, and you
9 say, "No, I did not. That's not part of our review." My next
10 question was: "Would that be relevant to the question whether
11 the benefits were more or less generous?" And you replied,
12 "That question is certainly relevant for many purposes. But
13 for the purpose of my evaluation, it's the comprehensive nature
14 of the coverage overall that is most relevant." Do you see the
15 question and the answer?

16 A. Yes, I do.

17 Q. That was your testimony?

18 A. Exactly.

19 Q. It's still your opinion today?

20 A. Yes.

21 Q. Now, you would agree that the higher incidence of disease
22 among a particular population makes their healthcare more
23 costly, correct?

24 A. All else being equal across all other factors being held
25 alone, if there's a pop-up in incidence of a disease, yes.

1 Q. And then it follows it will require more money to provide
2 a particular level of coverage for that population, correct?

3 A. All else being equal, yes.

4 Q. Did you study the effects of a lifetime of working in the
5 mines on the incidence of disease in the miner population?

6 A. No, I did not.

7 Q. Did you familiarize yourself with the Mercer and GAO
8 studies that are part of the record in this case, sir?

9 A. I am familiar with the existence of both studies. I did
10 not review the studies in depth. I've read, most recently, the
11 GAO study.

12 Q. Do you have any basis to disagree with the conclusion in
13 the GAO study that the UMWA benefits are generally comparable
14 to unionized benefits in heavy industry?

15 A. No reason to disagree with that.

16 Q. And do you have any basis to disagree with the conclusion
17 in the Mercer study -- this is the Mercer 2009 study -- that
18 the illness burden for retirees in the UMWA plans, it's about
19 thirty-two percent higher than for the average Medicare-
20 eligible retiree.

21 A. Well, first of all, I haven't looked at that study, so
22 I'll have to accept on the face of it that you've depicted it
23 accurately. But I would have no reason to refute that.

24 Q. Thank you, sir. Do you have an opinion of whether the
25 VEBA funding that is proposed by the employer in this case is

1 sufficient to pay the annual costs of providing retiree
2 healthcare to the covered group?

3 A. Well, I do have a view. I'm not sure exactly what you're
4 asking me because the company's proposal for VEBA funding has a
5 number of elements to it.

6 Q. Let me sharpen it up for you.

7 A. Yes.

8 Q. Do you understand what the annual cost is?

9 A. I have a -- I am told, and I believe generally, that there
10 is an annual cost in the seventy-five to eighty-million-dollar
11 range.

12 Q. Do you have an opinion whether the VEBA funding proposed
13 is sufficient to pay seventy-five million dollars per year?

14 A. The VEBA funding proposal has several elements in it, and
15 the elements all in are intended to maintain a plan that can be
16 a viable alternative for retirees -- Patriot retirees.

17 Q. Let's take some of those elements and see how they stack
18 up, sir. You know there's a cash component to fifteen million
19 dollars?

20 A. Yes.

21 Q. That's clearly insufficient to pay seventy-five million
22 dollars a year, true?

23 A. On its own, yes, that's right.

24 Q. And you know that some of that has got to be put toward
25 administration, isn't that correct, sir?

1 A. That would be up to the trustees to determine how they're
2 going to use that money.

3 Q. Well, administration isn't free, correct?

4 A. That's right.

5 Q. And so when the VEBA is initially created with the
6 fifteen-million-dollar estate, some of that money has to be
7 used for the administration by definition, isn't that true?

8 A. I'll accept that the administration is not free, and so
9 that's a reasonable conclusion, yes.

10 Q. And in fact, you were of the opinion a few weeks ago, or a
11 couple of weeks ago, that maybe none of it would go to pay
12 benefits, isn't that true?

13 A. Well, the premise of the funding proposal is that there be
14 several sources of funding. If it was -- if it was deemed to
15 be the right thing to do by the trustees, to deploy the money
16 differently, that would be up to them. I would presume that
17 the trustees would responsibly look at all the resources
18 available to them currently and going forward and make the best
19 judgment they could.

20 Q. Well, let's go to your deposition at page 121, if you
21 would please. Let me know when you're there.

22 A. I am there.

23 Q. If we go to the first question on the page. I said:
24 "Taking the fifteen million dollar initial funding for the
25 proposed VEBA here, some of that money will be used to pay for

1 benefits, and some will necessarily have to be used for costs
2 of administration. Do you agree with that?" And you said:
3 "You know, not necessarily. The VEBA, I suppose, could retain
4 the full fifteen million and deploy it toward its
5 administrative function." And then I asked: "So you're saying
6 zero might be paid toward benefits?" And your answer was: "If
7 a responsible administrator or trustee concludes that it wants
8 to maintain the fifteen million for purposes of administration,
9 I suppose they could." Do you see the questions and answers?

10 A. Yes, I do.

11 Q. Still your opinion today?

12 A. Yes, it is.

13 Q. Thank you, sir. You also have no opinion about the
14 reasonableness of the company-provided funding to the VEBA,
15 isn't that true?

16 A. Well, we were -- we talked about this, I believe. I was
17 retained not to dig into the financials with respect to the
18 VEBA. I was retained, among other things, to offer comments
19 about the appropriateness of the VEBA as a vehicle for delivery
20 of retiree health benefits going forward.

21 Q. Well, let's go to page 128 of your deposition and see if I
22 can remind you of your earlier testimony.

23 A. I'm there.

24 Q. The bottom of that page I asked you: "Is it reasonable,
25 in your estimation, to have retirees, through paying premiums,

1 fund the cost of the VEBA after the initial fifteen million
2 dollars was exhausted?" Mr. Martin objected. I don't know if
3 he wants to press that objection. I guess not. You answered:
4 "I believe that the proposal anticipates funding from a variety
5 of sources. And so to suggest that it's -- I'm not rendering
6 an opinion on the reasonableness of the emergence of the
7 company source funding." Do you see that question and answer?

8 A. Yes, I do.

9 Q. Still your opinion today?

10 A. We did not talk about that as part of our assignment.

11 That was not part of anything that we looked at. And so, yes,
12 that's right, I did not render an opinion about that.

13 Q. And you believe today that, without retirees making co-
14 premium payments into the VEBA, that the VEBA just can't
15 sustain the seventy-five million dollars a year cost, isn't
16 that true?

17 A. Well, let me see, can you unwind that question again? Say
18 it again.

19 Q. Sure.

20 A. It --

21 Q. Without retirees making copayments to the premium, sharing
22 the premium, in other words, you do not believe that the VEBA
23 can pay the costs of the seventy-five million dollars of annual
24 expense.

25 A. I believe that retiree premiums will be an essential

1 element, yes.

2 Q. Now, sir, it's true that Patriot has not actually
3 established what the level of benefits will be in the VEBA, is
4 that correct?

5 A. Yes.

6 Q. And that is because some other group is going to have to
7 do that, correct?

8 A. That's right.

9 Q. That's going to have to be the trustees that are appointed
10 to the VEBA, correct?

11 A. That's right.

12 Q. And those people are going to have to -- those trustees,
13 rather, are going to have to make decisions about how to make
14 the costs of providing the healthcare fit within the funding of
15 the VEBA, true?

16 A. That's right.

17 Q. And they have some techniques to do that, that you've
18 discussed in your declaration, correct?

19 A. That's right.

20 Q. And one of those is making decisions about eligibility,
21 isn't that correct?

22 A. That's right.

23 Q. As a practical matter, since all of the retirees that are
24 in the covered group now by definition are covered, the only
25 way to control the cost would be by reducing the covered group,

1 isn't that true?

2 A. There are other ways to reduce the costs, other than
3 controlling the covered group.

4 Q. Well, for the eligibility factor, the only way to reduce
5 the --

6 A. Oh, okay.

7 Q. -- cost --

8 A. You're talking just -- okay. That wasn't clear in your
9 question. So you're talking about eligibility. I think that
10 would be up to the trustees to really take a close look and see
11 where -- where they might be able to affect coverage decisions
12 by changing eligibility, that's right.

13 Q. And to change eligibility to reduce costs, that means
14 excluding someone who is covered now?

15 A. Completely up to the trustees as to whether they want to
16 include the whole group, or they want to change that.

17 Q. Sir, you can't reduce the costs by adding people, can you?

18 A. There are many, many factors that go into adjusting the
19 cost of the program, and that is one of them. I doubt if we're
20 going to add anybody, however, of course, because everybody is
21 in right now. So in that --

22 Q. Well, what about --

23 A. -- respect, you're right, yes.

24 Q. What about current employees who are working who may
25 become eligible to retire?

1 A. There's a good -- there's a good example, okay?

2 Q. And that would increase the cost by adding them into the
3 plan, would it not?

4 A. It would down the road, yes.

5 Q. And do you know how many of those people are eligible to
6 retire right now today?

7 A. I don't know.

8 Q. Did you look?

9 A. I think I may have looked, but I've forgotten.

10 Q. Yeah. Could it be two-thirds of the active miners are
11 eligible to retire?

12 A. I don't know.

13 Q. That would greatly increase the cost of the plan, wouldn't
14 it?

15 A. Well, on the surface of it, everything else being equal,
16 yes.

17 Q. Another thing that you mentioned is the plan design. Do
18 you recall that that is a technique you listed in your
19 declaration as a way to control costs?

20 A. Yes, I did.

21 Q. And as a practical matter, that means covering either more
22 or fewer conditions, correct?

23 A. Not correct. Plan design encompasses a great deal of
24 factors, including copayments, and coinsurance, and things of
25 that nature. It also includes, you know, the means by which we

1 might access or steer employees or retirees towards different
2 providers. There's a variety of plan design features that
3 could come into play.

4 Q. Let's go through those things. If we cover more
5 conditions, that tends to drive up the cost, correct?

6 A. Everything else being equal, yes.

7 Q. If we have lower co-pays, that tends to drive up the cost,
8 correct?

9 A. That's correct.

10 Q. If we have a more generous prescription drug program, that
11 tends to drive up the cost, correct?

12 A. Well, if what you mean by more generous, adjusting the co-
13 pays on the prescription drug, well then yes.

14 Q. Well, charging people more would be less generous,
15 wouldn't it?

16 A. That's right.

17 Q. Yes. How about raising the deductible?

18 A. That's another cost factor, yes.

19 Q. And how about having a lifetime maximum?

20 A. That's another factor, yes.

21 Q. And in all of the things that I just mentioned, in order
22 to reduce the cost, we would have to make the benefit less
23 generous than it exists today.

24 A. In general, that's right; everything else being equal.

25 Q. All right. Now, sir, do you have any idea how much the

1 benefit would have to be reduced in order to fit seventy-five
2 million dollars of costs into fifteen million dollars of cash?

3 A. Well, your question makes a presumption that -- I think
4 you're heading towards some mathematical presumption. I'm not
5 sure I buy your presumption in your question. If you're asking
6 the question how much does fifteen million fund of a seventy-
7 five million cost, then we can do the math, and we can figure
8 out the fraction, and it's, you know, one-fifth or something,
9 let's say.

10 Q. Well, I do realize that fifteen is one-fifth of seventy-
11 five, but the question that I asked you, however, which I think
12 is important, is did you look to see how much you have to cut
13 the benefit to reduce the cost down to just fifteen million?

14 A. No, I did not.

15 Q. You did not, sir.

16 A. I did not.

17 Q. You did not look, correct?

18 A. I did not.

19 Q. Thank you. Now, one of the main advantages that you
20 listed in your declaration that a VEBA provides is the
21 advantage of being in a group. Do you recall that testimony?

22 A. Yes, I did.

23 Q. That is an advantage that the retirees already have
24 because they are in a group now, correct?

25 A. That's right.

1 Q. So the VEBA does not get them something that they don't
2 already have, correct?

3 A. The VEBA is a device that functions as a transition such
4 that the retirees could maintain that advantage, yes.

5 Q. Patriot is currently the sponsor of the group, correct?

6 A. Yes, that's right.

7 Q. Patriot has some market power as a result of having a
8 large group, you know, of both retirees and actives, to shop on
9 the market for insurance coverage, correct?

10 A. Whether it's large or not, they do have some influence as
11 an employer of some size, yes.

12 Q. And that's because there's a significant group of
13 retirees; more than ten thousand, correct, sir?

14 A. That's right.

15 Q. And a significant group of actives; approximately four
16 thousand plus their dependents, correct, sir?

17 A. Yes, that's right.

18 Q. And can you think of a reason why an insurance company
19 would offer cheaper coverage to a VEBA than it currently offers
20 to Patriot for the same covered group?

21 A. First of all, an insurance company --

22 Q. Sir, the question is can you think of a reason --

23 A. Yes.

24 Q. -- why --

25 MR. MARTIN: Your Honor --

1 A. Yes.

2 MR. MARTIN: Your Honor, please, he's got to be able
3 to answer the questions that Mr. Perillo is asking. He can
4 conduct his examination however he likes and we'll unpack it,
5 once I get up here, in a lot of ways. But he's got to be able
6 to at least answer the questions.

7 MR. PERILLO: Well, as long as he does answer the
8 question rather than to give me a narrative that slips off the
9 question, Your Honor.

10 MR. MARTIN: He can answer the question in a
11 responsive way, and Mr. Perillo can wait and ask his follow-up
12 questions.

13 MR. PERILLO: Well, I'd just like to remind the
14 witness --

15 Q. The question is can you think of a reason why an insurance
16 company would offer a VEBA cheaper coverage than it offers the
17 Patriot now for the same group? Can you think of a reason or
18 not, sir?

19 A. Well, first of all, I'm assuming that this is not a fully-
20 insured plan. The group is large enough such that the costs
21 that would be associated -- the cost attributable to the group
22 would really be a function of the claims paid. So now your
23 question gets to whether, in fact, the union -- or the UMWA
24 funds, or the union, or whoever the trustees are, has the
25 capacity to be more clever with respect to negotiating price

1 differentials and price advantages with different provider
2 networks, different hospitals, and the like. It's a very
3 complex -- a very complex arrangement. And so I don't -- I
4 hesitate to say that it's merely a function of the size of the
5 covered people.

6 Q. Does that mean you can think of a reason, or that you
7 cannot think of a reason?

8 A. Well, you suggested that it's the insurance company. What
9 I'm suggesting is, is that the -- I don't see how the insurance
10 company comes into it.

11 Q. Do you know whether the benefits are insured today, sir?

12 A. I believe we have an ASO arrangement, which means
13 administrative services only. I'm not certain of that, but
14 given the size of the group, it is through an insurance
15 company, but it's not what I would call an insured arrangement
16 in the way you may be meaning it.

17 Q. Let me try it this way, sir. Isn't it true that the VEBA
18 has the same market power as Patriot in order to get a deal on
19 healthcare costs?

20 A. It is a very complex matter. They -- the VEBA does have
21 influence because it is a group. Any group provider has the
22 ability to go to market, talk to providers, negotiate discounts
23 and therefore, exert some influence. To say that it's --

24 Q. Let's go to page --

25 A. -- to say that it's more or less is going to be a judgment

1 call based on any particular situation.

2 Q. Let's go to page 142 of your deposition, sir. Let me know
3 when you're there.

4 A. I'm there.

5 Q. Down at the bottom of that page I asked you:

6 "Q. Do you view the VEBA as having market power to do the
7 sorts of things you just suggested; negotiate discounts with
8 providers?

9 "A. Yes.

10 "Q. Where are they going to get that market power from?

11 "A. Well, from representing the interests of several thousand
12 retirees.

13 "Q. That's the same market power that Patriot has today for
14 the same population to negotiate discounts?

15 "A. It's similar; yes."

16 Do you see those questions and answers?

17 A. Yes.

18 Q. Is that still your opinion today?

19 A. Yes, I said that it was similar. You asked me earlier
20 whether it was the same and I do agree that it's similar. I
21 just want to draw the distinction that it's a very complex
22 matter. Similarity, I think is different from the same and I
23 just hesitate to suggest that it's the same.

24 Q. But can you think of -- well, will the VEBA be better able
25 to do it than Patriot?

1 A. It could be. I would hope that the trustees would be
2 cleverer and be able to somehow have a better handhold on the
3 market places in which these retirees live, such that they can
4 be smarter about the discounts that they might be able to
5 provide. There's a variety of factors that go into that.

6 Q. Why don't we go down to the very next question and answer
7 in the transcript, sir. I asked you:

8 "Q. Patriot, in fact, because it has a larger population of
9 non-union retirees and active employees may even have greater
10 market power; wouldn't it?

11 "A. You know, I'm not familiar with Patriot. The array of
12 Patriot benefits and the means by which they go to the market
13 to purchase require healthcare."

14 Do you see that question and answer, sir?

15 A. No, I don't. Could you steer me? You started reading
16 before I got to where you were.

17 Q. It's right in the -- it's the very next question from the
18 area we left off.

19 A. You have to tell me what page. Just tell me what page
20 we're on.

21 Q. 143 again, sir.

22 A. Okay.

23 Q. Go ahead and take a look at it.

24 A. Could you -- while you read it earlier, I was still
25 gazing. I didn't see it. Could you just tell me where you

1 were reading?

2 Q. Sure, look down at line 9.

3 A. Thank you. Okay.

4 Q. And is that question and answer still true today, sir?

5 A. In the context in which it was asked and answered, yes.

6 Q. And that is that you are not familiar enough with
7 Patriot's array of benefits to be able to tell us whether the
8 VEBA will have more or less market power; is that correct?

9 A. Yes.

10 Q. Part of your charge to the -- to your assignment here with
11 Patriot was to compare the Patriot active benefit plan to other
12 plans; is that correct?

13 A. Yes, that's right.

14 Q. And you chose to compare the plans to all employer
15 provided plans in the United States; isn't that correct?

16 A. Yes.

17 Q. And you chose to do that regardless of industry,
18 regardless of public and private sector and regardless of light
19 versus heavy and so on; correct?

20 A. Yes.

21 Q. I asked you during your earlier examination why you did
22 not focus on a study in the coal mining industry; do you recall
23 that?

24 A. I recalled you asked me that question; yes.

25 Q. And you told me that you thought an industry related study

1 would provide almost no useful information whatsoever; do you
2 remember that?

3 A. I remember the question. The answer was for purposes of
4 my analysis; it would provide almost no useful information,
5 that's right.

6 Q. And that's because you believed that any established
7 company in an industry of benefit programs that are already
8 consistent with industry practices; correct?

9 A. That's right.

10 Q. That's still your belief today?

11 A. Yes, it is.

12 Q. Did you confirm that Patriot's plan is, in fact,
13 consistent with industry practice today?

14 A. I have not made that determination.

15 Q. So you don't know whether or not it is.

16 A. I don't know.

17 Q. But you assume that it is.

18 A. I don't make an assumption.

19 Q. Well, can you tell me again what the reason is why you
20 didn't compare it, if you didn't expect it to be the same?

21 A. The starting point for our analysis was really to survey
22 the providers of healthcare -- the primary providers of
23 healthcare in the United States and that's the workforce. The
24 workforce is the primary means through which healthcare is
25 provided. We chose to scan as broad as possible so that we

1 could provide the Court with an evaluation, a helpful
2 evaluation as to where these Patriot Coal Healthcare proposals
3 stacked up against national norms.

4 Q. And you chose to do that even knowing that Patriot's group
5 of employees is exposed to a greater incidence of disease and
6 risk because of their dangerous occupation.

7 A. That's a -- that's touching on an important consideration,
8 of course, and part of our evaluation was to assure that the
9 coverage was comprehensive and covered what it needed to cover.
10 And our evaluation looked at that.

11 Q. And my question to you is you chose not to do an industry
12 specific study even knowing that the group you were looking at
13 would not have the same incidence of disease and risk because
14 of Patriot's employees dangerous mining occupation; is that
15 true or not?

16 A. Those are unrelated facts. They are true but they're
17 unrelated facts. What's really important here is the fact that
18 the coverage is comprehensive and the incidence of a particular
19 medical condition which of course is important to the
20 individuals and to the cost of the program is factored into the
21 fact that we have comprehensive coverage.

22 Q. And, in fact, one of the things you told me is that there
23 would be no purpose in doing a study in fact if all you were
24 trying to do was confirm that the plans were consistent with
25 industry practices.

1 A. For purposes of providing meaningful information in this
2 proceeding, I think that's right. I think that what really
3 matters is that in the United States, the employers are the
4 primary providers of healthcare programs and to provide
5 meaningful information to evaluate the proposals, I felt
6 absolutely that it was appropriate and most appropriate to look
7 as broad as possible.

8 Q. Now the Court begins each one of these sessions by
9 reminding us that she has read more than the 800 some-odd
10 letters that are on the docket. Have you read any of them,
11 sir?

12 A. I have not.

13 Q. I think you also told me in our previous discussion that
14 you can't accept -- your words -- can't accept that benefits in
15 heavy industry tend to be more generous than in the employer
16 population at large; is that true?

17 A. That's true.

18 Q. And when I asked you why you thought heavy industry has or
19 why one industry would have better benefits than another, you
20 told me that the primary driver is unionization; correct?

21 A. Yes, that's right.

22 Q. I asked you whether another reason is the greater
23 incidences of disease in a particular population that has an
24 onerous job and you told me that you didn't think that was
25 related; correct?

1 A. That's right. And I still don't. I think the key driver
2 is really again the comprehensiveness of the coverage. The --
3 I have no reason to expect that any particular industry group
4 carves out a particular medical condition and suggests they're
5 not going to cover it because of the nature of the people in
6 that industry group.

7 Q. And so as you stand here today, you don't acknowledge that
8 miners in a dangerous occupation who suffer Black Lung and
9 these other diseases have a greater need for healthcare than
10 general employees in the general population?

11 A. Well that's an interesting statement. What I do believe
12 is that across the land, employer provided healthcare is almost
13 universally a high priority of employers regardless of
14 industry. And I believe that that's because the value of human
15 life is valued everywhere and so healthcare protection is a key
16 essential part of the employment relationship across all
17 industries.

18 There are certainly industries where certain medical
19 conditions appear more frequently and that appears across all
20 industries. That's why in the United States, employer based
21 healthcare tends to be as comprehensive as it is. It covers
22 all conditions, even those where there's a high incidence.

23 Q. And so one more time, sir, it's your opinion, you're
24 telling the Court today, that people in this occupation with
25 this incidence of disease and exposure to these conditions have

1 no need for a more generous healthcare plan than the one that
2 is the average one nationwide?

3 A. The generosity of the benefits is more a function of
4 things like premiums and co-payments and co-insurance. I very
5 much want to make it clear that the comprehensiveness of the
6 coverage in assuring that all these conditions are
7 appropriately covered is an essential piece of any benefit plan
8 including the coal industry benefit plan and my belief is also
9 that the company's proposal is comprehensive in that regard and
10 continues to cover all of the important medical conditions that
11 are important to coal miners.

12 Q. That was wonderful. Now I want to know, do you believe
13 that this population with this incidence of disease exposed to
14 these conditions deserves a more generous healthcare plan or
15 not? It's a simple question, sir.

16 A. And I -- the premise of it shows up a confusion that
17 commonly appears with employee benefit plans which is why I am
18 addressing this. The generosity of the plan falls into two
19 very completely different buckets; one is, the conditions
20 covered. That's critically important to this population.
21 There's no question whatsoever.

22 The other is with respect to co-share -- co-payments, co-
23 insurance and premiums, and that's just as important to any
24 population, this population as it is to any other population.
25 It's about the dollars and cents; they may have to pay for it.

1 But again over here, if you're talking about generosity in
2 this context, it's very important for this population.

3 Q. Thank you, sir. The VEBA funding sources, we talked about
4 cash. I forgot to go back and cover the others with you and I
5 want to do that now. At the time that you rendered your
6 opinion, there was also a profit sharing component to the VEBA
7 funding; correct?

8 A. Yes, that's right.

9 Q. And you have no opinion as to the profit sharing
10 component; correct?

11 A. I do not, not specifically. If you mean no opinion about
12 it, I think it's a fortunate and positive part of the proposal.

13 Q. You have no opinion about what benefit it will produce for
14 the VEBA?

15 A. It would be speculation and I don't have a sense that's
16 right; I don't have a sense of the numbers and how they would
17 shake out. That was not part of what I took a look at.

18 Q. You hadn't quantified it?

19 A. That's right.

20 Q. And you had no idea whether it will be adequate to fund
21 the annual expense?

22 A. Well, the funding of the plan, I think the VEBA is a
23 viable vehicle regardless of whether that profit sharing
24 emerges or not.

25 Q. Because you believe that co-payments by the retirees will

1 be a major source of funding; correct?

2 A. No, it's really retiree premiums. Co-payments are not a
3 source of funding. It would be retiree premiums.

4 Q. Excuse me for the --

5 A. In addition to other sources of funding.

6 Q. You mean the retirees paying out of their pocket part of
7 the premium cost?

8 A. That would be an important part of the funding; yes.

9 Q. With regard to the monetized claim that existed at the
10 time you rendered your opinion, you also had no opinion as to
11 the value of that item.

12 A. That's right.

13 Q. Or as to when it will be produced?

14 A. That's right.

15 Q. Or whether it will be adequate.

16 A. Well, I -- that's right --

17 Q. Thank you.

18 A. -- however you choose to define adequacy.

19 Q. Now in your declaration, you recall that you cited a
20 survey by Watson.

21 A. Yes.

22 Q. In the Watson survey, you noted or made a -- I guess you
23 observed a tabulation; is that the proper word -- a tabulation?

24 A. If you could direct me to your reference.

25 Q. Well, the --

1 A. They conducted a survey. It was Towers Watson. They're a
2 prominent national consulting firm and they routinely do
3 surveys of healthcare programs; yes.

4 Q. Okay. And in particular, when you cited the Watson survey
5 in your declaration, it was to show that employers are telling
6 new hires today what to expect about their future retiree
7 benefits when they retire; do you recall that?

8 A. Yes, that's correct.

9 Q. And I think the purpose is you said there was a tabulation
10 that showed employers are telling these new hires that seven
11 percent of them will ultimately have retiree coverage upon
12 retirement. Would you like to look at it?

13 A. Yes, I would.

14 Q. Would you go to figure 5 in your declaration?

15 A. I'm there.

16 Q. Figure 5 is on page 16; correct, sir?

17 A. Yes.

18 Q. And what figure 5 shows us if I understood it correctly is
19 that twenty percent of current retirees have full premium
20 support?

21 A. Yes, that's right.

22 Q. And the other eighty percent means they're part of their
23 retiree healthcare out of their own pocket either in whole or
24 in part.

25 A. That's right.

1 Q. And what the Watson -- is it a survey or a tabulation,
2 sir?

3 A. Well, it is a survey --

4 Q. That tells --

5 A. -- from which results are tabulated.

6 Q. Okay. That tells us that employees are telling new hires
7 today that by the time they retire, seven percent of them only
8 will have fully paid retiree healthcare.

9 A. Well, I want to be clear about that. My interpretation of
10 this is not quite the same as yours. My interpretation of this
11 is that it gets to the employers themselves, not an employer
12 announcing to its workforce that seven percent of them will get
13 free -- will get premium support and ninety-three won't. My
14 point is that I believe this was an employer by employer
15 survey; just to clarify.

16 Q. And that only seven percent of those employers will
17 provide the fully paid healthcare.

18 A. Yes.

19 Q. When new hires today --

20 A. Retire in the future; yes, that's right

21 Q. Which could be forty years down the road.

22 A. That's right.

23 Q. Because they're -- new hires presumably are generally
24 younger than people close to retirement; correct?

25 A. That's right.

1 Q. You have no idea if that tabulation will ever come to
2 fruition in the lifetime of the retirees that are covered here,
3 do you?

4 A. Oh, not at all.

5 Q. Now --

6 A. It may actually be less than seven percent by the time
7 forty years rolls around.

8 Q. The spiral effect, sir, can you describe that to the
9 Court?

10 A. The spiral effect -- and I'll refer to it as the so-called
11 spiral effect -- is a theoretical means by which in a system --
12 in a healthcare system where the participants in the system pay
13 a substantial portion of the premium that individuals drop out
14 of the system that are composed in such a way that the premium
15 for the remaining participants in future years would drive
16 up -- potentially driving more people out of the program.

17 Q. So the way this works is as the premium increases so that
18 people can no longer afford it and they drop out of the plan,
19 the group becomes smaller and the premium gets even bigger and
20 then more people have to drop out, until finally there's very
21 few people left in the plan.

22 A. That's the theory.

23 Q. Do you observe that in real life, that phenomenon?

24 A. I've never seen it and I must say that it is a theory and
25 it's a theory that is probably going to disappear pretty

1 quickly with the advent of the Affordable Care Act.

2 Q. And how many VEBAs again have you actually administered?

3 A. I personally haven't administered any VEBAs.

4 Q. Zero.

5 A. I have worked with -- I have worked with several large
6 companies that have run VEBAs and am familiar with several of
7 them; yes.

8 Q. In your declaration, you gave the opinion that Patriot
9 retirees are better off than the average retiree in the United
10 States because they have access to a group plan; do you recall
11 that?

12 A. I think that's an -- I'm not sure that you've got that
13 right. What I think I said in here, and you can correct me
14 because you've got the words in front of me (sic) that you're
15 referring to -- in front of you, the proposal -- the company's
16 proposal puts them kind of squarely in the middle of the pack
17 as it relates to retiree health. The so-called access only
18 program kind of puts the Patriot proposal kind of right in the
19 middle of the pack.

20 Q. Now I want to understand what you mean by that. Roughly
21 fifty percent of the employers today provide some premium
22 support and fifty percent provide none.

23 A. That's right.

24 Q. Is that right?

25 A. That's right.

1 Q. And so when you say Patriot is in the middle of the pack,
2 you mean that if they gave a dollar, even like one dollar to
3 the VEBA, the group would shift into the fifty percent that has
4 some support. And if they took the dollar away, they would
5 fall into the other fifty percent where there's no support.

6 A. That's right.

7 Q. That's the sense in which you mean it.

8 A. Yes, and what makes the proposal position Patriot retirees
9 better than the middle of the pack is the contingent funding
10 that would come from the company from the various sources that
11 we've -- that has been mentioned here but haven't been
12 described in detail.

13 Q. You did a survey to see how Patriot's benefit plan stack
14 up against employers generally.

15 A. Yes.

16 Q. Did you do any survey or conduct any research to see how
17 Patriot's proposed VEBA stacks up versus other employers who
18 are shedding their responsibility to provide fully paid
19 healthcare?

20 A. That wasn't part of my analysis. That was not part of our
21 look at the appropriateness of the VEBA as a funding vehicle
22 for retiree health; so, no.

23 Q. So you don't know how Patriot's proposed VEBA compares to
24 other employers who are transitioning their healthcare
25 responsibility to a VEBA?

1 A. No, I'm not sure it's relevant.

2 MR. PERILLO: Did I come in under an hour, Your Honor?

3 THE COURT: Yes.

4 MR. PERILLO: Thank you.

5 THE COURT: All right. Thank you. Mr. Martin, how
6 many -- about how long is this going to take?

7 MR. MARTIN: I will do it very efficiently, Your
8 Honor.

9 THE COURT: All right.

10 MR. MARTIN: I will aim for fifteen, twenty minutes.

11 THE COURT: All right.

12 REDIRECT EXAMINATION

13 BY MR. MARTIN:

14 Q. Mr. Terry, do you have a view on whether what may happen
15 to retirees as part of this proceeding is a good thing or a bad
16 thing?

17 A. Whether what's happening to retirees is a good thing or a
18 bad thing?

19 Q. Is that part of what you were asked to consider in
20 submitting your declaration?

21 A. No.

22 Q. You were asked to evaluate the proposed healthcare plan
23 for retirees that is being proposed by the company; is that
24 correct?

25 A. That's right.

1 Q. And do you have a view on how retirees of Patriot will
2 compare to retirees generally in the country if the proposal is
3 implemented?

4 A. Yes, I do.

5 Q. What's that view?

6 A. I think that retirees of Patriot, if the proposal is
7 implemented, will be right about in the middle of the pack and
8 potentially better than national norms for retirees in this
9 country.

10 Q. And why is that when you say in the middle of the pack?

11 A. Well, I say the middle of the pack is because fully half
12 of retirees in the country don't have access to group coverage,
13 regardless of who pays, whether the retiree pays or the
14 employer pays; fully half of retirees in the country don't have
15 access to group coverage.

16 Q. Let's pause there for a second if we can. Why is access
17 important?

18 A. Well, it's very important. If I am not part of a group
19 plan, my only choice right now in general is to go to the
20 individual insurance market. The individual insurance market
21 is a tough market. I will be forced to submit to a physical,
22 submit medical histories and the insurance companies have the
23 ability to deny me coverage or to significantly charge me an
24 exorbitant premium. And so it's having access to group
25 coverage; you're in.

1 Q. And you said approximately half of all retirees in the
2 country don't even have access to group health insurance; is
3 that correct?

4 A. That's right.

5 Q. And the proposal with respect to Patriot's retirees would
6 potentially position them even better than that middle of the
7 pack position that you just posited; is that correct?

8 A. Absolutely. The retirees that -- the Patriot retirees
9 have the potential for some significant funding coming in from
10 the company. That potential positions them better than -- you
11 know, better than the norm.

12 Q. Well explain for the Court exactly what you mean by that.
13 What will that funding mean for the retirees that are
14 beneficiaries of the VEBA if implemented?

15 A. Well, the trustees of the VEBA, of course they have their
16 work to do. They have to roll up their sleeves and they have
17 to design the benefit programs, they have to negotiate
18 arrangements with carriers and providers and so forth. But
19 most importantly, they have the opportunity to set premium
20 requirements and the funding that comes in from the company,
21 permits them obviously to mitigate any premium and mitigate,
22 you know, the retiree premiums that would have to be paid. So
23 it becomes a very important factor.

24 Q. And you discussed a little bit or tried to in your cross-
25 examination, some of the other tools that the trustees of the

1 VEBA would have at their disposal in managing the VEBA; is that
2 correct?

3 A. Yes, that's right. That's right. Some -- the VEBA
4 trustees, I would expect if they're doing their jobs, are going
5 to look very closely at alternative arrangements that they
6 might provide for retirees that could substantially mitigate
7 costs. The most important of which is of course existing
8 Medicaid programs, but also expanded Medicaid under the
9 Affordable Care Act, as well as the availability of very
10 affordable coverage under the healthcare exchanges.

11 So, people who opt-out of the VEBA would do so -- they
12 would do so presumably because they can find better, cheaper
13 coverage elsewhere which is a whole new wave of expectation
14 that comes with 2014 when the implementation of the Affordable
15 Care Act is upon us.

16 Q. You had a brief exchange with Mr. Perillo about
17 eligibility as a factor that the trustees might consider in
18 managing the VEBA; do you recall that?

19 A. I do.

20 Q. And Mr. Perillo was suggesting that cutting people off
21 from eligibility means that you're depriving them of
22 healthcare; is that -- do you -- is that your view?

23 A. Not at all. People who would leave the VEBA would
24 presumably leave the VEBA to find another form of insurance
25 that was cheaper and/or better.

1 Q. Where --

2 A. And it --

3 Q. -- where would --

4 A. -- and it may well be that there's -- that those options
5 will exist and even more so going forward under the Affordable
6 Care Act.

7 Q. And it would also include Medicare; correct?

8 A. Absolutely.

9 Q. Mr. Perillo asked you a couple of questions about the
10 VEBA's market power; do you recall that?

11 A. Yes.

12 Q. And he suggested that you didn't investigate well enough
13 whether Patriot had a certain market power or didn't have a
14 certain market power and whether it would equate to what the
15 VEBA's market power would be; do you recall that?

16 A. Yes.

17 Q. Do you know how many retirees the UMWA Funds currently
18 provide healthcare benefits to?

19 A. Several thousand.

20 Q. Would it surprise you to learn that it's 36,000?

21 A. It's a little bit larger than I was anticipating.

22 Q. And if the UMWA Funds were administering the VEBA here,
23 what's your estimate given your experience in the industry of
24 their market power in securing benefits for these
25 beneficiaries?

1 A. Well, that's a sizable group and I would think that they
2 would have substantial market power.

3 Q. More market power than Patriot?

4 A. If we go by the numbers, yes.

5 Q. You were also asked some questions about the generosity of
6 a health plan and whether a plan should be more generous when
7 the population may have a higher incidence of disease; do you
8 recall that?

9 A. Yes.

10 Q. And you explained that there are two ways to look at the
11 generosity of a plan; can you just explain those very quickly
12 for the Court?

13 A. Yeah, and I think this is important; I hope I made it
14 clear before. But the generosity of the plan as it relates to
15 the severity of a healthcare condition or the higher incidence
16 of a healthcare condition relates totally to the
17 comprehensiveness of the coverage and that's a means by which
18 we can look at the generosity of a plan. And from what I have
19 discerned from the company's proposals is that the company's
20 proposals are fully generous in every way with respect to the
21 coverage.

22 A wholly separate matter that sometimes is referred to as
23 generosity is -- are the attributes like the co-pays and the
24 co-insurance and retiree premiums, out-of-pocket limits and
25 things of that nature; those are also often times referred to

1 as generosity. It's this first generosity though that I think
2 was critical to explaining that the company's proposal is going
3 to handle the kind of situations that were asked of me, which
4 is these -- you know, these high incidence medical conditions.

5 Q. Do you have a view on whether the proposed health plan for
6 actives -- for active workers is sufficient to cover diseases
7 that might arise in the population?

8 A. Yes and it will. It is an excellent plan.

9 Q. You were asked a couple of questions about the fact that
10 you did not focus on the coal industry in particular in
11 evaluating Patriot's health plan; do you recall that?

12 A. Yes.

13 Q. And you were explaining that there are reasons why you
14 wouldn't look to other companies in the coal industry in
15 conducting the kind of comparison and evaluation that you were
16 performing as part of your declaration; do you recall that?

17 A. That's right; yeah.

18 Q. And what is that reason?

19 A. Well, for purposes of providing an understanding in this
20 proceeding about how the plans stack up, again the workforce is
21 the primary means by which healthcare is delivered in this
22 country and we want to look as broad as possible so that we get
23 the most credible results and we don't sort of prejudge the
24 answer by looking at any particular industry. That's not to
25 say that that kind of a study isn't relevant for some other

1 purpose but for purposes of the Court here having an
2 understanding of how the proposal stacks up, I believe the
3 broadest possible group is what should be used.

4 Q. And you understand that the proposed healthcare plan for
5 union workers is basically the same plan that non-union miners
6 currently have; is that correct?

7 A. That's right.

8 Q. And if you were to look at what the health plans are at
9 other coal companies, would you expect them to be similar to
10 Patriot's plan or dissimilar?

11 A. I would expect them to be similar.

12 Q. Why is that?

13 A. It's just the way things work in the business, if you
14 will. I know, and from my experience, that if you look within
15 an industry, you tend to see clusters of similar sorts of
16 features within benefit plans. You can look from one industry
17 to the next and to the next and you tend to see the same
18 patterns of plan design elements. And so I am pretty confident
19 that I could look at any particular industry, look at one
20 player and know that they're not going to be too far out of
21 line with the rest of those players in the industry.

22 Q. One of the questions that Mr. Perillo put to you was
23 designed, I think to suggest that if this VEBA is set up,
24 eventually it's going to just spiral out of control and because
25 nobody can afford the healthcare and it's just going to

1 disappear; do you recall those questions?

2 A. I do.

3 Q. Do you share that view?

4 A. I don't.

5 Q. Why?

6 A. Well, first of all, I think the spiral -- first of all,
7 the notion of a spiral of that sort is what I would refer to
8 and others in the industry refer to as sort of an old paradigm.
9 It's a good theory. It might have in observable fact years ago
10 but going forward, I fully expect that if we see a spiral,
11 we'll see a spiral up in this plan. I do see that if we lose
12 participants among the retiree groups, it will be participants
13 who will go elsewhere for coverage that they deem to be either
14 cheaper and/or better and that will leave, quite honestly, more
15 money for the remaining retirees. So, we may see a spiral up
16 rather than a spiral down. It could be a good thing.

17 Q. Does the Affordable Care Act play into that at all?

18 A. Absolutely.

19 Q. How so?

20 A. Well, beginning in 2014, both state and federal
21 governments are pushing a lot of money into healthcare and that
22 money is going to reveal itself in terms of tax subsidies,
23 premium subsidies, extended coverage of state sponsored
24 Medicare program -- Medicaid programs. And suddenly, a whole
25 population -- I mean the whole reason the Affordable Care Act

1 was passed was because we had so many people in this country
2 with not affordable healthcare options.

3 That largely is addressed by this legislation. So, that
4 beginning in 2014, affordable healthcare will be made available
5 to populations that have hereto for not had access to it. And
6 so it's a -- I think it's of a huge benefit to every retiree
7 group, regardless of industry, regardless of employment
8 situation in this country.

9 Q. And do you have a view on what effect, if any, the
10 Affordable Care Act will have on medical cost trends over time?

11 A. You know, I don't know. There's speculation about that.
12 There is speculation in both directions but there's certainly
13 speculation that the intent of this legislation, at least in
14 part is to attempt to what's been called then the cost curve in
15 this country. And so, yes, there's a substantial view that
16 says that we should start to get a handle on cost escalation in
17 the United States as a result of this act.

18 Q. So if the act has the intent its -- has the effect it is
19 intended to have, it will bend the cost curve down over time;
20 is that correct?

21 A. Yes, I should have said that; it would bend it down, bring
22 the trend down.

23 Q. And you were asked some questions about -- assuming that
24 the benefits provided here have a yearly cost of 75 million
25 dollars or so; do you recall that?

1 A. Yes.

2 Q. If the cost curve is bent down as a result of the
3 Affordable Care Act or as a result of any other factor, what
4 would be the impact on that 75 million dollar figure?

5 A. Well, that -- it certainly wouldn't grow as fast as it
6 might have grown in the past and it would certainly start to
7 come down. I would expect to see that number come down, going
8 forward for -- primarily because of the availability of so many
9 attractive options under the Affordable Care Act.

10 Q. Would the number come down if the VEBA is administered in
11 a more cost-effective and efficient way?

12 A. Yes.

13 Q. What if the benefits are modified from where they are
14 currently?

15 A. In all likely -- well, yes, absolutely.

16 MR. MARTIN: And just a couple of more questions, Your
17 Honor.

18 Q. You were asked to consider -- well, you were asked whether
19 you had considered how you would fit seventy-five million
20 dollars worth of benefit claims into fifteen million dollars;
21 do you recall that?

22 A. I do recall.

23 Q. Are you aware of any proposal that has been exchanged
24 between the parties that would suggest that the VEBA here would
25 be funded with fifteen million dollars and fifteen million

1 dollars alone?

2 A. I am aware that an amended proposal has been put forth
3 that calls for additional funding.

4 Q. Even the proposal that you reviewed in December had
5 additional funding sources; correct?

6 A. Oh, yes, absolutely; yeah.

7 Q. And so there was never any proposal that you reviewed
8 where the sole funding to this VEBA was fifteen million
9 dollars.

10 A. Never.

11 Q. Correct?

12 A. Never.

13 MR. MARTIN: No further questions, Your Honor.

14 THE COURT: All right. Mr. Perillo, anything else for
15 this witness?

16 MR. PERILLO: Just a few. Thank you, Your Honor.

17 RE-CROSS-EXAMINATION

18 BY MR. PERILLO:

19 Q. Mr. Terry, we had a discussion about what the premiums
20 might be in the Affordable Care Act; do you recall that?

21 A. I think we did talk about that.

22 Q. Do you have any idea or have you even looked at the
23 question whether retirees' incomes would be able to afford
24 those premiums?

25 A. Under the Affordable Care Act?

1 Q. Or otherwise available in the marketplace today.

2 A. Well, let's talk about the Affordable Care Act because
3 that's what you asked about. Yes, I do. Effectively, there
4 are -- there will be premium support for a worker or anybody
5 who chooses to leave whatever system they're in and to avail
6 themselves of these brand new 2014 insurance exchanges. You
7 know, I as a participant can approach the exchange and buy
8 insurance and my premium is assured of not being greater than a
9 percentage of my income. In other words, there will be premium
10 support that will step in and kind of dampen any premium, so
11 that it truly will be affordable.

12 Q. And the option that you just discussed concerns those
13 people who do not have access to minimum creditable coverage;
14 correct?

15 A. Employee-based coverage, yes; employment-based coverage.

16 Q. And that presumes that the VEBA coverage would have fallen
17 to the point that it would be below minimum creditable
18 coverage.

19 A. No, I think there's a -- I don't think that that applies
20 to the VEBA. I think that members of the VEBA would be able to
21 avail themselves of the exchanges without regard to that
22 limitation.

23 Q. Do you recall when Mr. Martin was questioning you about
24 industry patterns --

25 A. Yes.

1 Q. -- for healthcare? And you said there were clusters of
2 similar features in an industry?

3 A. Yes.

4 Q. Will the VEBA be able to afford clusters of similar
5 features, similar to the mining industry?

6 A. Well, I guess I'd have to take a look at what clusters are
7 peculiar to the mining industry to understand or to be able to
8 answer that question.

9 Q. You didn't do that; did you?

10 A. What -- here's what I am getting at. Here's what I am
11 getting at. In certain industries, for example, wellness or --
12 wellness programs have become particularly prevalent in that
13 industry and once one member of the industry covers it, it
14 ripples through the rest of them.

15 MR. PERILLO: Okay. Your Honor, I think my question
16 was did he look at what clusters of similar features were in
17 the mining industry and I got an answer about wellness
18 programs. Let me try one more time.

19 Q. Did you look at the clusters of similar features available
20 in the mining industry?

21 A. Not --

22 Q. Either you did or you didn't.

23 A. -- not per se. Not per se.

24 Q. Thank you. So the answer is no. Now I have one more
25 question for you. You talked about the spiral up that these

1 lucky retirees would be jumping out of the VEBA to go out there
2 and get that cheaper, better coverage out in the marketplace;
3 do you remember that?

4 A. I want to be very clear about this. The spiral is a
5 financing phenomenon, not a -- which has been theorized as
6 being something that the VEBA managers or the trustees will
7 have to contend with in the out years and it's in that context
8 we're talking about the spiral.

9 Q. If cheaper, better coverage is available out in the market
10 place, why doesn't Patriot drop its demand for concessions and
11 just go buy that coverage?

12 A. Well, you would have to ask Patriot that question but the
13 relevance of that --

14 Q. Thank you, sir.

15 A. -- the relevance of that question is is if that something
16 that --

17 MR. MARTIN: Let him finish talking.

18 A. -- employers across the land are actually thinking about.

19 MR. PERILLO: That's all I have, Your Honor, thank
20 you.

21 MR. MARTIN: Your Honor, to show the witness a little
22 bit of respect, I'll ask if he has anything more to add to that
23 answer.

24 REDIRECT EXAMINATION

25 BY MR. MARTIN:

1 A. All right. Yes, it's just that the Affordable Care Act,
2 in fact, opens up many, many doorways. Every employer that I
3 am familiar with is examining it closely and with great
4 expectation expecting that they will tailor their benefit
5 programs going forward to reflect the new options available
6 under the Affordable Care Act that is widely expected that we
7 will see many, many changes across the land in both active and
8 retiree coverage.

9 MR. MARTIN: Nothing further, Your Honor.

10 THE COURT: All right. Thank you. You may step down,
11 Mr. Terry. All right.

12 Mr. Moskowitz, we'll take a brief recess and then
13 we'll put Mr. Lucia on the stand. We'll be in recess until
14 6:40; twenty minutes.

15 (Recess at 6:18 p.m., until 6:45 p.m.)

16 ECRO OPERATOR: Your Honor, we're back on the record.

17 THE COURT: All right. Thank you. Be seated, please.
18 All right. Mr. Moskowitz?

19 MR. MOSKOWITZ: Good evening, Your Honor. We call --
20 the debtors call Dale Lucia to the stand. Mr. Lucia is the
21 vice president of human resources of Patriot Coal Services. He
22 has been actively involved in the development of the 1113
23 proposal and actively involved in the negotiations. He
24 submitted an initial declaration and a reply declaration as his
25 direct testimony and I now tender him for cross-examination.

1 THE COURT: All right. Mr. Lucha, if you would step
2 up to the podium first please to be sworn.

3 (Witness Sworn)

4 THE CLERK: Please have a seat in the witness box.
5 There is a step up.

6 CROSS-EXAMINATION

7 BY MS. GEENEN:

8 Q. Good evening, Mr. Lucha. Before we get started, I am
9 going to ask you some questions that will probably relate back
10 to your declaration. I want to give you a heads up that that
11 is that Joint Exhibit 97 at tab 97.

12 A. Is that what's in front of me?

13 Q. If you'd like, you could close the other binders and move
14 them.

15 A. Pardon?

16 Q. We'll only be in that binder, so you could close the other
17 ones.

18 A. Okay, thanks.

19 Q. Mr. Lucha, isn't it correct that you were actively
20 involved in the development of Patriot's 1113 and 1114
21 proposals?

22 A. Yes.

23 Q. And isn't it correct that your involvement began when
24 Patriot's financial advisors asked you to develop and propose
25 savings from union contracts?

1 A. Yes.

2 Q. At the time they asked you to develop and propose savings
3 from union contracts, it's correct that they did not ask you to
4 identify a specific level of savings?

5 A. That's true.

6 Q. In the course of developing and proposing savings, you
7 determined that non-union wages were reasonable; isn't that
8 correct?

9 A. Yes.

10 Q. Patriot relied upon your initial recommendations in
11 developing their 1113 and 14 proposals; correct?

12 A. I believe that's true.

13 Q. The first 1113 proposal sought wage reductions, overtime
14 changes, reductions in paid time off, holidays and vacation, as
15 well as cost sharing in healthcare benefits for active
16 employees, among other things; isn't that correct?

17 A. It is.

18 Q. It additionally included work rule changes; isn't that
19 right?

20 A. Yes, ma'am.

21 Q. Do you have a background in finance or accounting?

22 A. No, I don't.

23 Q. With your declaration, you provided a number of exhibits.
24 Do you recall that?

25 A. Yes.

1 Q. Specifically do you recall Exhibits 1(a) through 1(d) of
2 your declaration which identified the wage rate reductions?

3 A. Yes.

4 Q. Those are at Joint Exhibit 98? They begin at Joint
5 Exhibit 98?

6 A. Do you want me to look at them?

7 Q. Did you prepare the -- did you prepare this exhibit, 1(a)?

8 A. Yes, I prepared it. I don't know that I did the actual
9 formatting, but I prepared the exhibit; yes.

10 Q. The document provides for straight time at 2,080 hours and
11 overtime at 170 hours. Where does that come from?

12 A. That was an assumption because each of our mines work
13 different hours and different schedules but I believe I assumed
14 forty hours straight time and every other Saturday, which is
15 approximately eight hours times twenty-five Saturdays,
16 thereabouts -- twenty-six Saturdays.

17 Q. Did you account for holidays or -- for holidays or other
18 paid time off?

19 A. Did I account for it how? In --

20 Q. Did you account for those within the 2,080 hours?

21 A. No. Well, I -- holidays will fall within the 2,080 hours
22 if it's a weekday holiday, if that's your question.

23 Q. So if it's a weekday holiday -- we'll leave it at that.

24 Exhibits 1 through (a) (sic) account annually for all of
25 the union employees whose wages are being affected by the 1113

1 proposals?

2 A. Could you say that again, please.

3 Q. Sure. Exhibit 1(a), for instance, shows all of the
4 employees who are being affected -- and I say 1(a), I should
5 say 98, I suppose, it shows all of the employees -- union
6 employees whose wages are being affected by Patriot's 1113
7 proposal in 2013?

8 A. I believe that's correct; yes.

9 Q. And are you aware that some union employee's wages are
10 going to be cut by seven dollars an hour?

11 A. Yes.

12 Q. In your declaration, you also suggested that some
13 employees would receive a wage increase; isn't that correct?

14 A. Yes.

15 Q. Do you know how many employees will receive a wage
16 increase?

17 A. If I recall during the declaration, you pointed out to me
18 the classification that would receive a wage increase and I
19 believe it was four people at that time.

20 Q. So it was four people out of 1,600 some-odd number?

21 A. Yes.

22 Q. If we look at Exhibit 1(d) which is Exhibit 101 --

23 A. It's this --

24 Q. -- if you turn to the fourth page.

25 A. Is that the 2016 rate schedule?

1 Q. It is the 2016 rate schedule.

2 A. All right.

3 Q. I'm sorry, the fourth page. If you look down, it's the
4 eighth line. There's a Drake Line groundsman. And if you look
5 over -- does this document show that some employees like the
6 Drake Line groundsman will be making nine dollars -- less than
7 9.50 than they would be under the current NBCWA agreement
8 that's in effect?

9 A. You want me to look on page 4? Is that what you said?

10 Q. Yes, I'm sorry, it's the surface mine tab.

11 A. All right. I see the surface mines; yes.

12 Q. Does it show that some employees, including the Drake Line
13 groundsman will be making 9.50 less per hour than they would be
14 if the NBCWA remained in effect?

15 A. Yes, it does.

16 Q. Isn't it also true that the current proposal would reduce
17 employees' wages that they're receiving now to 2012 levels?

18 A. Ask me that again, please.

19 Q. Sure. With respect to the union employees whose wages are
20 going to be modified or reduced -- all but the four union
21 employees who are going to receive wage increases, the
22 remainder of those would receive a wage reduction back to the
23 2012 levels?

24 A. Yes. Well, no, I think I got confused with your question.
25 If you ask it again, I'll attempt to answer again.

1 Q. The 1113 proposal that's currently in place provides for
2 paying UMWA employees at the levels -- paying UMWA employees
3 for 2013 at the levels that were in effect for 2012; isn't that
4 correct?

5 A. That's correct for underground employees.

6 Q. Who is not correct for?

7 A. Well, if I understood your question, I think our proposal
8 for surface and preparation plants is to reduce those wages
9 even lower than they were in 2012. Did I misunderstand you?

10 Q. That's fine. I don't -- I think that's fine.

11 The current proposal or the 1113 proposal doesn't
12 contemplate reducing Highland employee's wages beyond the 2012
13 levels initially; correct?

14 A. I believe that's true; yes.

15 Q. But the wages they'll receive in the future will put them
16 behind the schedule they would be otherwise under the Highland
17 bargaining agreement?

18 A. Yes.

19 Q. The bargaining agreement also requires significant --
20 requires modifications to the overtime provisions; isn't that
21 correct?

22 A. Yes.

23 Q. Specifically it provides that the employer will pay time
24 and a half only for hours worked beyond forty; correct?

25 A. Yes.

1 Q. And you provided an exhibit that illustrates those cost
2 savings.

3 A. I believe I did.

4 Q. Did you prepare that exhibit?

5 A. Can you direct me to the exhibit exactly?

6 Q. Certainly, it's the next exhibit in order, so it's 102.

7 A. I summarized -- this is my summary; yes.

8 Q. What about -- if you flip the page to the next page -- I'm
9 sorry, it would be the third page. It's a quantification of
10 union benefits; did you prepare that document?

11 A. I don't think I prepared it but I reviewed it.

12 Q. And with respect to the summary you just indicated you
13 provided relating to the overtime after forty, did you
14 review -- from where did you obtain the information?

15 A. From the business controllers at each of our mining
16 operations.

17 Q. They were responsible for providing you the information?

18 A. Yes.

19 Q. If you flip to the fourth page in that exhibit, it's
20 Apogee backup calculations. There's -- if you look down past
21 the first box off to the right, there's a section that says
22 "Annual Savings Per Employee." Now is this loss of income to
23 an employee under the -- under Patriot's overtime proposal, the
24 3,609 dollars in 2013?

25 A. I don't see that figure. I must not be looking at the

1 right page. It's the fourth page, counting the front and the
2 back?

3 Q. I'm sorry, the first page is the page that says Exhibit
4 1(e).

5 A. Okay.

6 Q. The second page is your summary.

7 A. All right.

8 Q. The third page is the quantification of union benefits
9 page.

10 A. Yes, ma'am.

11 Q. And I'm on the next page -- on what -- the document that
12 immediately follows.

13 A. Okay. And what is your question, please?

14 Q. Assuming the calculations are correct, the box that says
15 "Annual Savings Per Employee," and then reads 3,609 dollars in
16 2013, is the total loss of income to an employee?

17 A. Yes, I believe that's correct.

18 Q. Mr. Lucha, I've just been -- could you speak up? I think
19 we're having trouble hearing you.

20 A. Yes.

21 Q. Thank you. Did you review these overtime calculations?

22 A. Yes, I did.

23 Q. How did you review them?

24 A. I looked at them and made sure I understood the logic and
25 the methodology involved.

1 Q. The 1113 proposal additionally calls for the reduction of
2 time off by up to nineteen days for an employee with twenty
3 years of service; isn't that correct?

4 A. Yes.

5 Q. So that's almost four weeks of time off that a twenty-year
6 employee will lose?

7 A. It is. That's reducing forty-seven paid days off to
8 twenty-eight.

9 Q. And active employees will additionally lose their benefit
10 to lifetime healthcare; correct?

11 A. That's the proposal that -- well, the proposal is that
12 Patriot won't provide it.

13 Q. The active employees will also be required to provide or
14 to share the cost of healthcare?

15 A. Yes.

16 Q. Do you know -- if we look at Exhibit 2 to your
17 declaration -- I'm sorry, it's Exhibit 2 to your declaration,
18 Exhibit 103 -- Joint Exhibit 103.

19 A. Okay.

20 Q. Flip to the fourth page, on the top left hand corner it
21 says, "Patriot Coal Projected 2013 Rates."

22 A. I see it.

23 Q. Under the proposed plans on the far right column, the
24 employee will pay \$68.58 per month for individual coverage;
25 isn't that correct? Where it says the 2013 proposed plans

1 employer rate?

2 A. That's correct.

3 Q. That column indicates the cost of the premium to the

4 employee on a monthly basis?

5 A. That's right.

6 Q. And if we flip back to the previous page where it says

7 "Patriot Coal Medical Premium Savings," there's a little box, a

8 small box on the left hand side. It says, "Category Rate and

9 Annual Amount." That annual amount is the cost to the employee
10 of the premium?

11 A. Yes, it is.

12 Q. And in addition to paying the premium, the employees will

13 be required to pay co-insurance and higher deductibles; isn't

14 that correct?

15 A. That's correct.

16 Q. The proposal additionally calls for withdrawal from the

17 pension plan. As a result of that proposal, isn't it true that

18 employees who are not fully vested as of the date of -- I'm

19 sorry -- employees -- if Patriot withdraws from the pension

20 plan under any proposal, isn't it true that employees who are

21 not fully vested as of the date of withdrawal will not be

22 entitled to a pension benefit?

23 A. They would not be entitled to a pension benefit at the

24 date of withdrawal. They may continue to work somewhere and

25 gain additional time and vest at a later period.

1 Q. By work somewhere, do you mean work at Patriot or work
2 somewhere else that participates in the pension plan?

3 A. Somewhere else that participates in the pension plan.

4 Q. And so an employee who chooses to stay with Patriot loses
5 their -- and is not vested as of the date Patriot withdraws, if
6 it withdraws, that employee loses their entitlement to a
7 pension -- a pension from the 74 Plan?

8 A. That's my understanding.

9 Q. For vested miners, who -- the value of the pension is
10 determined by years of service; isn't that correct?

11 A. Yes.

12 Q. So, if Patriot withdraws from the plan, for miners that
13 are vested who remain with Patriot, they'll no longer accrue
14 years of service?

15 A. They would no longer accrue years of service as credit
16 towards additional pension.

17 Q. And that will reduce -- that limits the value of their
18 pension every month for the rest of their lives once they
19 started receiving a pension?

20 A. It would and we propose to offset that by six percent
21 contribution into a 401(k) plan on the gross wages.

22 Q. Patriot also proposes certain work rule modifications,
23 among them, a proposal to eliminate roof bolter helpers and
24 continuous miner helpers; isn't that correct?

25 A. It is.

1 Q. And that would result in the elimination in ten positions
2 Patriot-wide?

3 A. Yes.

4 Q. At paragraph 55 of your declaration, you talked about
5 technological advances that make helpers no longer necessary on
6 roof bolter machines and continuous mining machines. Do you
7 know if Patriot utilizes those technologies?

8 A. One of those in the past, continuous mining machines had
9 onboard cabs where the operator sat in a cab and work controls,
10 push buttons and now they have remote control devices, so that
11 they're not on the machine and we utilize that technology.

12 Q. Did we also discuss at your deposition a proximity device?

13 A. We did.

14 Q. And during your deposition, did you state that whether or
15 not Patriot uses proximity device was not a concern of yours
16 when you eliminated the helper's positions?

17 A. I think that I did; yes.

18 Q. And you just mentioned that the cabs -- that the employees
19 are no longer in the cabs and instead they use remote controls
20 to operate the machines; is that correct?

21 A. Yes.

22 Q. The crush accidents that were of concern when those
23 machines had on-deck operators can still occur; correct?

24 A. I'm sorry, would you say that again?

25 Q. Certainly. Can crush accidents that were of concern when

1 those machines had an on-deck operator still happen?

2 A. I'm confused by saying it was a concern when it had an on-
3 deck operator.

4 Q. Sure. You just mentioned that one of the technological
5 advances was the use of a remote control; correct?

6 A. Yes.

7 Q. And that allows the driver to -- I'm sorry, that allows
8 the machine operator to not be in a cab in the machine but
9 rather stand a bit away from it; is that correct?

10 A. Yes.

11 Q. Despite the fact that the machine operator stands a bit
12 away from the machine, he can still be crushed in an accident
13 caused by this machine.

14 A. He can be if he places himself in the area between the
15 machine and a rib wall and then activates the machine and
16 basically crushes himself, yes.

17 Q. Would a proximity device prevent that kind of crush
18 injury?

19 A. I believe that's what it's designed to do.

20 Q. But you don't know if Patriot uses the proximity device.

21 A. When you asked me that in the deposition, I told you I
22 didn't know and now I do know.

23 Q. And what do you know?

24 A. I know that we use it at one operation and that all of our
25 newly purchased continuous mining machines, now all of our

1 rebuilt continuous mining machines will be equipped with
2 proximity devices.

3 Q. What mine do you currently use that at?

4 A. Blue Creek.

5 Q. Is it on a -- is that a union or a non-union mine?

6 A. It's non-represent.

7 Q. And does it have the proximity devices on all machines?

8 A. On the continuous mining machine.

9 Q. Okay. There's only one --

10 A. I think that's --

11 Q. -- at that mine?

12 A. -- I think that's right, yes.

13 Q. In your reply declaration, you stated that employees can
14 have ten absences a year without repercussions. But that's not
15 true; is it?

16 A. I believe it is true.

17 Q. Doesn't the bargaining agreement -- so if I was absent for
18 ten days in a row and I was a miner at Patriot, I could show up
19 on the eleventh day and there would -- nothing would be an
20 issue?

21 A. No.

22 Q. What would the case be?

23 A. You would be terminated.

24 Q. Even at a Patriot mine, at a unionized mine?

25 A. Yes.

1 Q. So, under -- so what's the justification for your
2 statement that employees can have ten absences a year without
3 repercussions?

4 A. The current absentee policy provides that if you're absent
5 three unexcused absences in thirty days or six in 180 days,
6 then you go into an absentee program. And once you're in that
7 program as a result of having three unexcused absences in
8 thirty days or six in 180 days, then you have to work another
9 180 day period without another unexcused absence. If you have
10 yet another in that 180 day period, you go into a third 180 day
11 period. Then eventually you may become terminated if you
12 continue to have unexcused absences but by the limitation that
13 you can have -- you only go into that program when you have
14 your sixth unexcused in 180 days, you can have five in 180 days
15 with no repercussion. 180 days is six months, so if you double
16 that into a year, you can have ten days off in a year just
17 because you woke up and decided you didn't want to come to work
18 that day or had a hangover or whatever reason.

19 Q. But it's untrue that that -- but it's overly broad to say
20 that you can have any ten absences -- ten unexcused absences
21 without repercussions.

22 A. No, it's not overly broad, it's true.

23 Q. Under some circumstances.

24 A. Under the circumstance that you do that; yes.

25 Q. Patriot's additionally proposing changes to the

1 absenteeism policy. You included a document with those
2 policies at Joint Exhibit 105. It's Exhibit 4(a) to your
3 declaration.

4 A. Okay.

5 Q. Did you prepare this document?

6 A. I prepared this summary.

7 Q. And someone else prepared the analysis?

8 A. That's right, the controllers at each mining operation.

9 Q. And your sole basis for the belief that a new attendance
10 policy would reduce the absenteeism rates is the fact that --
11 I'm going to strike that.

12 During your deposition, you stated that you didn't know
13 the specific absenteeism rate; is that correct?

14 A. That's correct.

15 Q. Did you determine the reductions sought through the
16 absenteeism policy?

17 A. I don't understand the question.

18 Q. Sure. The policy seeks for a certain level of reduction
19 in absenteeism rates. Did you determine that rate?

20 A. What rate does it speak of?

21 Q. Fifty percent.

22 A. I think that was an assumption that the controllers were
23 working from that -- when they did their calculations, they had
24 to use an assumption and I believe the assumption was it would
25 reduce by fifty percent.

1 Q. Are you familiar with the bases of their assumption?

2 A. I am familiar with it; yes. I can give you an example of
3 how this may work. At the Federal mine, the unexcused
4 absenteeism rate which I found out the rates since you deposed
5 me and I didn't know, so I determined I needed to find out.
6 The unexcused absenteeism rate at Federal, for example, is just
7 under two percent. They have 400 employees. So, just under
8 two percent is over seven employees a day who just don't show
9 up for work for no reason. That's significant. That's almost
10 a whole section of a coal mine.

11 Q. All right.

12 A. Just unexcused.

13 Q. You proposed those modifications to the bargaining
14 agreement, to the absentee policy before you knew the rates of
15 absenteeism though; isn't that correct?

16 A. Before I knew the rates, but I knew that it was a serious
17 problem. I just couldn't tell you the exact rate.

18 Q. Patriot does not pay employees whose absences are
19 unexcused; isn't that correct?

20 A. Does not pay, is that what you said?

21 Q. Right, for unexcused absences.

22 A. That's true. We don't pay the employee who was unexcused.

23 Q. Patriot's 1113 proposal also contemplates allowing
24 subcontracting at three union facilities; isn't that correct?

25 A. I think it proposed allowing subcontracting at all

1 facilities.

2 Q. Did it -- was the cost savings expected at all facilities?

3 A. There were cost savings that we quantified at three of the
4 facilities. We didn't quantify savings at the other
5 facilities.

6 Q. At Exhibit 4(b) to your declaration, it's Joint Exhibit
7 106, I'm looking at the fourth page and I just have one quick
8 question -- maybe two. I'm looking at the document that says
9 "Apogee backup calculations, use of contractor."

10 A. Okay.

11 Q. Did you prepare this document?

12 A. No.

13 Q. Did you review -- do you know who did prepare this
14 document?

15 A. It was prepared by the controller at Apogee and I did
16 review it.

17 Q. On the right hand side, there's a box that says "Captive
18 Cost Per Hour."

19 A. Yes.

20 Q. And is that the cost -- that box represents the costs it
21 would be to Patriot if it had its own employees perform the
22 work; isn't that correct?

23 A. Yes.

24 Q. And the labor cost is listed as 116 and the equipment cost
25 is 141 and 115; isn't that correct?

1 A. Yes.

2 Q. So if we total the equipment cost, it's about -- it's over
3 250? I understand there's additional numbers out there but
4 it's -- actually, I think that hours, so it's probably not.
5 It's 250?

6 A. It's 256.

7 Q. And if we looked at the contractor costs per hour on the
8 left hand side in the box that says, "Wyan" (ph.), the
9 contractor cost per hour is 250 dollars; isn't that correct?

10 A. Yes.

11 Q. So, Patriot's equipment costs are -- equipment costs alone
12 are equal to the total cost if a contractor perform the work?

13 A. A little higher.

14 Q. Did Patriot consider reducing the cost for that equipment?

15 A. I don't know how you can do that.

16 Q. You don't know how the equipment costs could be reduced?

17 A. I don't know how it could be reduced.

18 (Telephonic Recording interruption)

19 Q. Patriot's original proposals -- the original proposal, the
20 November 15th proposal included non-economic modifications;
21 isn't that correct?

22 A. Which proposal?

23 Q. The very first one, November 15th.

24 A. No, I think they're all economic proposals.

25 Q. The proposal included -- the very first proposal included

1 some items that did not have a quantifiable dollar value
2 associated with them?

3 A. There were some that did not have a dollar value
4 associated but there's still value there. We just were unable
5 to quantify it.

6 Q. Right. Among them is the -- a provision that would allow
7 supervisors to perform bargaining unit work?

8 A. Yes.

9 Q. And that proposal is -- remains in the current 1113
10 agreement -- in the 1113 proposal?

11 A. Yes.

12 Q. And the union has agreed during the course of negotiations
13 that the -- the union has proffered in negotiations a similar
14 supervisory work performance provision?

15 A. They have but in their most recent, it was not included.

16 Q. Most recent, you mean the one from over the weekend?

17 A. Yes.

18 Q. The bargaining -- I'm sorry, the proposal also would
19 extend the bargaining agreement for 2018; isn't that correct?

20 A. Yes.

21 Q. And the NBCWA expires at the end of 2016, so Patriot's
22 seeking two additional years of cost -- two additional years
23 before it needs to negotiate with the union?

24 A. Yes.

25 Q. As a result of the extension of the modifications, does

1 Patriot expect to receive millions of dollars in savings?

2 A. Yes.

3 Q. But those statements aren't shown any of your -- on any of
4 the exhibits you tendered with your declaration?

5 A. You confused me with your previous question. You asked as
6 a result of the proposals, did we expect to receive savings and
7 I said yes. And those savings are shown on all the documents
8 and all the exhibits.

9 Q. The savings for 2017 and 2018?

10 A. No, they're not shown.

11 Q. So, in 2017, according to the employer's proposal, the
12 employees will receive a fifty cent per hour increase; isn't
13 that correct?

14 A. Yes.

15 Q. And we were just talking though that some employees will
16 be down hourly wages nine dollars an hour less than they would
17 be under the NBCWA. So, they'll be down even further in
18 comparison? I'm sorry. Let's --

19 In 2017, they'll still be in some cases eight dollars
20 below where they would have been under the NBCWA?

21 A. I believe in some cases that's true.

22 Q. In your declaration, you also discuss -- you have an
23 Exhibit 9 which addresses some -- an increased production
24 provision. Are you aware that the UMWA withdrew its
25 incremental production proposal?

1 A. Yes. Ask me that again, please. I may change my answer.

2 Q. Your Joint Exhibit 9 -- I'm sorry, it's Joint Exhibit 114,
3 it's Exhibit 9 to your declaration, shows -- it was a revised
4 document from Patriot costing the union's -- one of the union's
5 early proposals to increase production; correct?

6 A. 114 -- Exhibit 114?

7 Q. Exhibit 114; correct.

8 A. And it is what?

9 Q. You're aware that the union has withdrawn the proposal
10 that that document purports to quantify?

11 A. No, I am not. If it was part of the proposal we got late
12 Saturday night, I haven't had time to study it and if it's
13 withdrawn, I just don't recall that right now.

14 Q. As the VP of human resources, do you have any
15 responsibilities related to responding to mine safety incidents
16 and injuries?

17 A. No.

18 Q. Are you made aware of such incidents and injuries?

19 A. Not all.

20 Q. Are you aware that Patriot has suffered -- Patriot miners
21 have suffered two fatalities this year?

22 A. I am.

23 Q. And that those two fatalities -- and you're also aware
24 that those two fatalities occurred at non-union mines?

25 A. Yes.

1 Q. One of the fatalities involved a roof bolter; isn't that
2 correct?

3 A. Yes.

4 Q. And that's one of the machines we propose eliminating --
5 it's one the machines Patriot proposes eliminating helpers for?

6 A. Yes. There were two people on that machine when the
7 fatality occurred.

8 Q. You also discussed some safety rates in the declaration
9 and you prepared a document to identify those safety rates but
10 your calculations don't include incidents by ton; do they?

11 A. By what?

12 Q. By ton of coal produced?

13 A. By tons? No.

14 Q. Do prep plants have a lower safety incident rate than
15 mines?

16 A. Generally, not always.

17 Q. In your reply declaration, you also take issue with the
18 UMWA's characterization of Patriot's non-union mines,
19 specifically the hourly to salaried ratio; isn't that correct?

20 A. It is correct.

21 Q. But with respect to that ratio, the union used -- I'm
22 going to look at your reply declaration at page 25. Your reply
23 declaration is Joint Exhibit 112.

24 A. Which page?

25 Q. I'm sorry, page 9. At paragraph 21 you said that based on

1 your review of the records, and it continues -- and it ends,
2 "The UMWA concluded that all salaried employers are
3 supervisors." That was the case though for both the
4 calculations of union hourly -- for the calculations of
5 salaried to hourly at both and non-union mines; isn't that
6 correct?

7 A. I'm confused by your question. Are you saying that the
8 UMWA confused it twice?

9 Q. No, I'm -- when you reviewed the UMWA's salaried to hourly
10 numbers, the union used salaried to hourly numbers for both
11 non-union facilities, as well as union facilities.

12 A. I think the union used -- yes. Yeah, I believe that's
13 right.

14 Q. In your declaration, you also make some -- one last point
15 on that; you performed some additional -- if the union's hourly
16 -- salaried to hourly numbers are -- did you -- on the numbers
17 that the union presented, and then your subsequent numbers that
18 you performed looking at the supervisor to hourly, in either
19 case, the non-union mines are staffed more heavily than the
20 union mines?

21 A. Non-union mines are not necessarily staffed more heavily
22 than union mines; no.

23 Q. But didn't your document show -- the union's calculation
24 of salaried to hourly showed that non-union mines had more
25 salaried personnel than union mines; correct?

1 A. What the union presented to us was an assertion that that
2 was the case, what you just stated and when I asked for the
3 basis of that assertion, they cited a survey that they had
4 purchased and I asked for the survey and they were unable to
5 give it to me. Told me I had to buy it myself and I did and I
6 did my own calculations from that. And the union never gave me
7 anything to look at. They only told me that they believed the
8 case was we had more salaried to hourly people at our non-union
9 mines than our union mines. So, I had to determine myself
10 whether that was true based on the survey that they provided.

11 Q. And so you looked at a national survey to determine
12 Patriot's staffing?

13 A. No.

14 Q. What --

15 A. No.

16 Q. -- why did you look at the national survey?

17 A. Because that was their basis of claiming that we were
18 staffed with a ratio of salaried to hourly hire at non-union
19 than at union.

20 Q. I didn't ask about the national comparison. I asked about
21 Patriot's mines. The --

22 A. Oh, I'm sorry, ask again and I'll try to be responsive.

23 Q. Sure. At paragraph 21 of the reply declaration, the union
24 says that -- now, the union mines have a ratio of one to 4.3
25 supervisors to workers. Now we know that that supervisors'

1 number is incorrect -- the supervisors' wording is incorrect
2 and that that's supposed to be salaried.

3 A. Okay.

4 Q. And then that non-union employees' ratio is one to 2.9.
5 If that's the case and it refers to salaried employees,
6 Patriot's headcount at non-union mines with respect to salaried
7 employees is higher than it is at non-union -- at union mines;
8 isn't that correct?

9 A. That's correct but there are a lot of reasons for that.

10 Q. In your reply declaration, you also make some comparisons
11 to the Gateway bargaining agreements; do you recall making
12 those comparisons?

13 A. Yes.

14 Q. There are some significant differences between the NBCWA
15 conforming agreements and the Gateway agreements; correct?

16 A. Yes.

17 Q. Among those agreements include higher wages for Gateway
18 Eagle employees and -- all Gateway employees, not just Gateway
19 Eagle.

20 A. No.

21 Q. At the time the Gateway Eagle agreement was entered into
22 in January of 2011, the Gateway employees received 3.50 dollars
23 per hour more than the coal wage agreement employees?

24 A. Yes.

25 Q. That number now over time has gone down and it's now one

1 dollar an hour above the CWA numbers.

2 A. That's right.

3 Q. You also discussed some issues about the union's
4 contention that -- I guess in addition to -- let me start --
5 back up just a bit. In addition to higher wages, Gateway Eagle
6 employees received six dollars per hour contributions in lieu
7 of health and pension benefits; isn't that correct?

8 A. Yes. Can you point me to that here, so I can follow with
9 you.

10 Q. Oh.

11 A. Tell me where it is, please.

12 Q. In your declaration, it's at paragraph 14, page 8. I'm
13 sorry, the reply --

14 A. In the reply declaration; all right, I see it.

15 Q. Now the 2011 Gateway agreement at Gateway Eagle was the
16 first bargaining agreement at that mine with the UMWA --

17 A. Yes, it was --

18 Q. -- and Patriot.

19 A. -- it was a new mine. Well, between the UMWA and Gateway
20 Eagle, not with Patriot.

21 Q. Thank you for the clarification.

22 A. You're welcome.

23 Q. The Gateway Eagle workers came from Rivers Edge Mining, a
24 Patriot mine that closed; isn't that correct?

25 A. Some of them.

1 Q. And were you involved in the negotiation of that original
2 agreement?

3 A. Yes.

4 Q. And do you recall that the purpose of negotiating that
5 agreement was to facilitate the employment of experienced
6 miners?

7 A. Yes.

8 Q. In your deposition, you mentioned that half of non-union
9 hourly employees were taking some concessions during the
10 bankruptcy; isn't that correct?

11 A. I said that fifty percent of non-union hourly experienced
12 hourly wage cuts.

13 Q. And do you recall also telling me that some salaried
14 employees took a 2.5 percent pay decrease?

15 A. All salaried employees did.

16 Q. They still remain eligible for incentive payments?

17 A. Who?

18 Q. Salaried employees?

19 A. Some, not all but we don't have any incentive plans in
20 place. If we put them in place, then they would be eligible.

21 Q. During the course of negotiations, Patriot rejected the
22 union's proposals for a snapback provision that would allow
23 union members to return to -- or that would have Patriot return
24 some concessions to union members if and when Patriot became
25 profitable?

1 A. I won't say we rejected it, we just didn't include it in
2 our counterproposals.

3 Q. Patriot also -- the union also proposed a provision that
4 would restrict Patriot's ability to increase the wages of
5 managerial and salaried employees under some circumstances;
6 isn't that correct?

7 A. We did not include that in our counterproposals.

8 Q. I don't have any more questions for you, Mr. Lucha, thank
9 you.

10 A. Thank you, ma'am.

11 THE COURT: Mr. Moskowitz, brief redirect?

12 MR. MOSKOWITZ: This will not be extensive, Your Honor
13 but it will be a few minutes.

14 REDIRECT EXAMINATION

15 BY MR. MOSKOWITZ:

16 Q. Mr. Lucha, I'm just going to skip around to a few
17 different topics and I hope that you will be able to bear with
18 me.

19 Ms. Geenen asked you about your involvement in the
20 development of the proposal; do you recall that?

21 A. Yes.

22 Q. Would you say that your involvement was more on the 1113
23 side or the 1114 side?

24 A. Much more on the 1113 side.

25 Q. And was there others who were tasked with developing the

1 1114 aspects of the proposals?

2 A. Yes.

3 Q. Do you recall being asked a series of questions about wage
4 decreases, particularly seven dollar an hour wage decreases,
5 maybe even larger than that; do you recall that testimony?

6 A. Yes.

7 Q. Mr. Lucha, do you know why Patriot proposed a wage
8 modification of such magnitude for certain job titles?

9 A. We looked at our non-union hourly rates and people who
10 were coming to work for those rates every day and thought that
11 was reasonable for the most part but some classifications that
12 are experiencing that seven dollar cut which would take them
13 from approximately twenty-seven dollars down to twenty dollars
14 are non-union people like raw truck drivers who are making
15 eighteen dollars an hour, so we didn't cut them nine dollars,
16 we cut them approximately seven dollars; not all the way down
17 to the non-union rates.

18 Q. Just so your testimony is clear, with respect to some of
19 the seven dollar an hour wage cuts that you testified about,
20 for some people who are experiencing a wage cut of that
21 magnitude, they still will be better off than non-union workers
22 doing the exact same jobs?

23 A. Yes.

24 Q. Mr. Lucha, do you recall being asked a series of questions
25 about your role in this process with respect to identifying

1 savings?

2 A. Yes.

3 Q. How would you compare your role to the role that the
4 financial advisors played as part of the process?

5 A. Well, my job was to analyze the UMWA contract and look at
6 all the costs associated with wages and benefits and work
7 rules. And then provide options that would provide savings
8 above the cost of those wages, benefits and work rules. So, I
9 provided options to the financial team and from that -- those
10 options, they decided what should be included as part of the
11 plan, the mining plan.

12 Q. And this was in advance of the company's delivery of the
13 first proposal to the union?

14 A. Oh, yeah.

15 Q. Mr. Lucha, do you recall being asked a series of questions
16 about active employee healthcare premiums, et cetera?

17 A. Yes.

18 Q. Mr. Lucha, under the company's proposal, how would the
19 active employee healthcare for union active employees compare
20 to the active employee healthcare program for the company's
21 non-union employees?

22 A. It would be the same program.

23 Q. Mr. Lucha, do you recall being asked a series of questions
24 about time off?

25 A. Yes.

1 Q. Can I ask you to turn to page 23 of your original
2 declaration?

3 A. If I knew where it was.

4 Q. How about I find it for you? Let me know when you have
5 it; page 23, figure 3 in particular.

6 A. Which tab is it, Elliot?

7 THE COURT: 97.

8 MR. MOSKOWITZ: Thank you, Your Honor.

9 THE COURT: Um-hum.

10 A. Page 23?

11 Q. Yes, sir, page 23, and I'm directing your attention in
12 particular to figure 3.

13 A. I see it.

14 Q. Okay. Mr. Lucha, can you describe what that figure shows
15 with respect to paid time off of union employees under the
16 company's proposal versus non-union employees?

17 A. I think I can. This is broken into three sections; length
18 of employment for less than five years, length of employment at
19 ten years and length of employment at twenty years. Then there
20 are sub-columns that show the amount of holidays, regular
21 vacation, graduated vacation, floating vacation, personal and
22 sick days for UMWA currently, non-UMWA and the 1113 proposal.

23 What it shows is that currently, UMWA with less than five
24 years has up to thirty-three paid days off compared to twenty
25 for the non-union. Our proposal for less than five years of

1 service would be twenty-three paid days off for the UMWA which
2 is three greater than the non-union.

3 For ten years of service, UMWA would have thirty-nine --
4 currently has thirty-nine paid days off, non-union twenty-five.
5 We propose twenty-eight for UMWA in the 1113 proposal which is
6 three greater than the union.

7 And with twenty years of service, current UMWA has forty-
8 seven days or greater than nine weeks of paid time off, non-
9 UMWA currently has twenty-five days or five weeks. We propose
10 for the UMWA twenty-eight days, which is three greater.

11 Q. So, Mr. Lucha, is it fair to say that according to this
12 chart in almost every single circumstance, even if the
13 company's proposals are implemented, union employees will have
14 more paid time off still than non-union employees?

15 A. Yes.

16 Q. Thank you, Mr. Lucha.

17 Do you recall Ms. Geenen asking you a series of questions
18 about the rationale for the company seeking concessions through
19 2018; in other words, including 2017 and 2018?

20 A. Yes.

21 Q. Mr. Lucha, were you here in court this morning when there
22 was extensive testimony from Mr. Huffard of Blackstone
23 regarding that issue?

24 A. Yes.

25 Q. Would you consider that to be more his responsibility in

1 terms of making a judgment or your responsibility?

2 A. That would be all his responsibility and none of mine.

3 Q. Mr. Lucha, do you recall Ms. Geenen asking you about what
4 the wages might be in 2017 compared to the NBCWA?

5 A. Yes.

6 Q. Do you know when the NBCWA that currently exists is --
7 expires?

8 A. December 31, 2016.

9 Q. So do we know today whether the wages that are reflected
10 in Patriot's proposal are going to be the same, greater,
11 higher, lower than the wages that will be in that new NBCWA to
12 be negotiated in the future?

13 A. No.

14 Q. Do you recall being asked a series of questions about the
15 Gateway complex?

16 A. Yes.

17 Q. Is it fair to say that the Gateway complex is staffed
18 exclusively with experienced miners?

19 A. It is.

20 Q. Is it fair to say that the Gateway complex is staffed
21 exclusively with miners who have vested retiree benefits
22 already?

23 A. No, that's not true.

24 Q. Let me ask you a few questions about that helper's topic
25 that Ms. Geenen asked you about. Just first a preparatory

1 question, in your opinion, Mr. Lucha, will Patriot's helpers'
2 proposal, the proposal to eliminate helpers, compromise the
3 safety of its employees in any way?

4 A. No.

5 Q. And did Patriot consider the safety of its employees when
6 developing the 1113 proposal?

7 A. It did. Safety's always the first thing on our mind when
8 we develop or propose or consider anything is how does this
9 affect safety?

10 Q. You described in your testimony at least briefly about the
11 cab situation and about whether an employee is located in a cab
12 or not. Do you recall that testimony?

13 A. Yes.

14 Q. Can you just explain in some detail how it is that things
15 have changed over time with respect to cabs and why that makes
16 a difference with respect to helpers?

17 A. Yes. In the past, when you operate the continuous mining
18 machine, there was an onboard cab or an operator stationed
19 where they sat actually on the machine and worked levers,
20 pushed buttons to control the machine. Now there is a remote
21 control device that hangs around the operator's neck. He
22 basically uses a joystick and pushes some buttons, so he can
23 stand anywhere he chooses to operate the machine and he's not
24 on the machine. His visibility isn't as limited.

25 Q. Mr. Lucha, do you know whether Patriot's non-union mines

1 have helpers?

2 A. No, they do not.

3 Q. And do you know whether any union mines already operate
4 without helpers?

5 A. The Gateway mines operate without helpers.

6 Q. Do you know what the MSHA is?

7 A. I do.

8 Q. What is that?

9 A. It's the Mine Safety and Health Administration. It's a
10 division of the Department of Labor. It's a regulatory agency
11 for mines and it functions specifically for mines in the way
12 that OSHA functions to regulate nearly all other industry in
13 America.

14 Q. Do you know what an MSHA safeguard is?

15 A. Yes.

16 Q. What is it?

17 A. If an MSHA inspector is at a mine and he sees a condition
18 that he believes to be unsafe but he doesn't have a specific
19 regulation, he may create a safeguard or a rule that the
20 company has to comply with and he can enforce that rule at that
21 mine.

22 Q. To your knowledge, has the MSHA ever issued a safeguard to
23 Patriot in connection with not having a helper?

24 A. They have not.

25 Q. And has it ever issued a violation to Patriot in

1 connection with not having a helper?

2 A. It has not.

3 Q. And Mr. Lucha, are you familiar at least generally with
4 Patriot's safety records?

5 A. Yes.

6 Q. How does Patriot evaluate the safety of its operations?

7 A. It has two basic criteria; one, we call an incidence rate
8 and it's an incidence of reportable injuries. MSHA requires
9 that two types of injuries be reported to MSHA; one is an
10 injury that results in lost time or the injured employee's
11 inability to report and work on a scheduled shift. And the
12 other type of reportable injury is one that requires medical
13 attention. So, we evaluate per 200,000 man hours, the number
14 of reportable injuries and you get a factor for that.

15 The other way we evaluate safety is violations per
16 inspection day. So, we do a ratio of violations written
17 compared to the number of inspectors at the mine.

18 Q. Mr. Lucha, are you familiar with Patriot's safety records
19 at Patriot's union and non-union mines?

20 A. Yes.

21 Q. And have you compared the rates at Patriot's union and
22 non-union mines?

23 A. Yes, I have.

24 Q. And what did that analysis show?

25 A. It showed that the rates were better, more favorable, in

1 both categories at non-union mines compared to union mines.

2 Q. Mr. Lucha, you were asked a series of questions about the
3 unexcused absence policy that is part of Patriot's 1113
4 proposal; do you recall that?

5 A. Yes.

6 Q. Now, Mr. Lucha, I believe you testified that it is your
7 belief that the proposed policy will make a significant
8 difference in unexcused absences at Patriot's union facilities
9 if it is implemented; correct?

10 A. That's right.

11 Q. And what did you base that conclusion on?

12 A. Well, as I explained, the absentee policy when Ms. Geenen
13 was asking the question, and comparing the absenteeism rates, I
14 gave the example of Federal, which has just under a two percent
15 unexcused absentee rate which resulted in over seven people per
16 day just not showing up for work. When I compare that to other
17 mines like Dodge Hill which is non-union, has effectively a
18 zero unexcused absenteeism rate and our other non-union mines
19 which is in the neighborhood of .2, .3, it's much more
20 favorable.

21 So, by not having the absenteeism policy that allows
22 people to miss two days in thirty with no consequence or ten
23 days in a year with no consequence, I think we can reduce the
24 unexcused absenteeism rate; have people show up for work more
25 often and significantly reduce cost and improve efficiency.

1 Q. How many times -- do you know how many times higher the
2 unexcused absent rate is at union mines versus non-union mines?

3 A. About four times higher, I think.

4 Q. Do you recall Ms. Geenen asking you a question that --
5 about whether Patriot pays employees who don't show up for
6 work?

7 A. I do.

8 Q. Does Patriot suffer financially when employees don't show
9 up for work?

10 A. Oh, yes. When people are not showing up for work, several
11 things cost us money; one is, we may have additional people on
12 the payroll in an attempt to offset that absenteeism or you
13 made us not fill in for the absenteeism, which means you're
14 non-productive and you have equipment parked or you may work
15 somebody on time-and-a-half to double over onto another shift
16 or some combination of the above.

17 So, absenteeism is a huge factor and as someone else
18 testified today, even if you can fill in on a crew, that crew
19 works as a team and you put different people on a team and it
20 doesn't function as well and could indeed become less safe.

21 Q. Mr. Lucha, just two more topics and then we'll be done.
22 Do you recall being asked questions about supervisors
23 performing bargaining work?

24 A. Yes.

25 Q. And just so we're clear, that's no longer part of the

1 union's proposal; is that your testimony?

2 A. That's what I believe; yes.

3 Q. So --

4 A. I don't think I saw it in the most recent proposal.

5 Q. In any event, you were asked -- do you know whether there
6 are any savings associated with the proposal that supervisors
7 perform bargaining work?

8 A. I believe there are. What our proposal intends to do,
9 currently supervisors are prevented from performing bargaining
10 or classified work which means if I have someone working on a
11 piece of machinery and I need somebody to help him for just a
12 few minutes, hand him tools, hold this while I do that; that
13 supervisor is not allowed to do that. He has to go get someone
14 else who is performing another function, bring him over, let
15 them assist and while they're assisting, even if it's for a
16 short period of time of three or four or five minutes, then
17 what they were doing is not being accomplished.

18 There are lots of tasks in the mine where a supervisor
19 could take a hose off this pump and put it on that pump to
20 start pumping from a different area that they're not allowed to
21 do. So, while it's hard to quantify that, there's savings
22 involved. They're not huge but they're significant.

23 Q. Mr. Lucha, final topic, do you recall being asked a series
24 of questions about the staffing ratio analysis?

25 A. Yes.

1 Q. And Mr. Lucha, you've reviewed the analysis that Mr.
2 Mandarino performed; correct?

3 A. Yes.

4 Q. And Mr. Lucha, do you know whether the union counted
5 secretaries as supervisors for purposes of that analysis?

6 A. I believe they did. They counted all salaried people;
7 yeah.

8 Q. Do you know if they counted HR people as supervisors for
9 purposes of that analysis?

10 A. They did.

11 Q. How about information technology personnel, do you know if
12 they counted those individuals as supervisors for purposes of
13 this analysis?

14 A. They did.

15 Q. They counted anyone who was collecting a salary; correct?

16 A. Yes.

17 Q. Now, Mr. Lucha, if the union changes its position from
18 what was in Mr. Mandarino's declaration originally and suggests
19 that it's not a supervisor's issue but it's a salaried employee
20 versus hourly employee issue, do you believe that the union has
21 a valid criticism that Patriot's union -- non-union mines are
22 staffed poorly compared to Patriot's non-union mines?

23 A. No, they're not staffed poorly. There are many
24 differences that result in that small difference in ratio. As
25 an example, there's a job called a fire boss and that's an

1 individual who does inspections at the mine. In the UMWA
2 mines, those are hourly employees. At our non-union mines,
3 they're on the salary side of the equation and there are forty-
4 five to fifty of those. So that would shift the balance.

5 At the non-union mines, we have many electricians who are
6 salaried while at the union mines, they're hourly employees.
7 At the non-union mines, we have somewhere between one and 200
8 contractors who perform hourly work that are not our employees.
9 That makes a difference. The configuration, the size of the
10 mine, how far underground you go, how many seals you had to
11 inspect, how much belt line you had to inspect; many things
12 factor into that.

13 So it's -- I disagree with the assertion that we're
14 heavily staffed and I've heard the word bloated before and
15 that's just not the case at all. That's -- I think we're
16 staffed as lean as we can be to operate safely and efficiently
17 and we've looked at staffing and continue to look at staffing
18 and we want to reduce headcount all we can and still operate
19 safely.

20 Q. Thank you, Mr. Lucha.

21 A. You're welcome.

22 THE COURT: Ms. Geenen, did you have anything else for
23 this witness?

24 MS. GEENEN: Just a minute, please, Your Honor.

25 THE COURT: Um-hum.

1 (Pause)

2 MS. GEENEN: I don't have any further questions.

3 THE COURT: All right. Thank you. Mr. Lucha you may
4 step down.

5 Mr. Moskowitz, what's the plan for tomorrow? You have
6 one witness left, Mr. Hatfield?

7 MR. MOSKOWITZ: That is correct, Your Honor.

8 THE COURT: He'll be --

9 MR. MOSKOWITZ: He will testify live on direct and
10 then we'll turn him over -- he's one of our two witnesses we're
11 doing that for. Each side has been given that option for two
12 witnesses. It's going to be great testimony.

13 THE COURT: Okay.

14 MR. MOSKOWITZ: He --

15 THE COURT: I didn't know --

16 MR. MOSKOWITZ: It's going to be riveting.

17 THE COURT: I didn't think we were having anybody live
18 on --

19 MR. MOSKOWITZ: No. And let me just --

20 THE COURT: -- direct.

21 MR. MOSKOWITZ: Let me clarify. There are two -- each
22 side decided that it will be helpful for the Court, maybe the
23 Court disagrees, but it will be help -- bear with me -- it will
24 be helpful for the Court to at least get a taste of live direct
25 testimony from two important witnesses; for the debtors that

1 was Mr. Huffard and it will be Mr. Hatfield for the union. It
2 will be Mr. Mandarino and Mr. Buckner, to the extent his
3 testimony is not stricken.

4 And the agreement was that each side would limit their
5 presentations in total to three hours. We've used about a
6 little less than an hour-and-a-half with Mr. Huffard, so we
7 would propose to use not more than an hour-and-a-half with Mr.
8 Hatfield and the union would have similar protocols with
9 respect to their two star witnesses.

10 THE COURT: All right. Mr. Perillo, how much cross-
11 examination are you going to have with Mr. Hatfield?

12 MR. PERILLO: I'm going to try and it to hold that
13 hour.

14 THE COURT: Okay. Then we appear to be on track then
15 to pass the baton. Mr. Perillo, who are you all going to be
16 calling then tomorrow?

17 MR. PERILLO: Subject to one caveat, I believe that
18 after we cross the mid-point, the debtor is going to move to
19 strike Mr. Buckner's declaration and I think probably both
20 sides will present argument to the Court as to whether or not
21 that should be done.

22 THE COURT: Do I have -- is that what I have the
23 written motion on? No, I have a motion on something else, an
24 exhibit. Okay.

25 MR. PERILLO: Then we would present Mr. Traynor as a

1 witness. He's not one of our witnesses we would do on direct.
2 We would present Mr. Traynor and make him available for cross,
3 as was done with Mr. Robertson.

4 THE COURT: Okay.

5 MR. PERILLO: And then we would present Srinivas
6 Akunuri, who is our coal pricing expert, the counterpart to Mr.
7 Schwartz and I think that would be a day.

8 The caveat that I mentioned, Your Honor, is we're not
9 certain -- at least I am not certain, others in the courtroom
10 may be certain, as to what has happened with Mr. Stover. I
11 thought the Fund and Davis Polk -- Patriot, rather, was trying
12 to sort out whether they could stipulate to Mr. Stover's
13 testimony and obviate the calling of him as a witness,
14 presenting him for cross but I don't know what's happened to
15 that. And I could see that Mr. Moskowitz is chomping at the
16 bit to say what has happened to that.

17 MR. MOSKOWITZ: Don't get your hopes up, Fred. The
18 matter is still under discussion between the debtors and the
19 Funds. We're trying to work it out but sometimes they're not
20 so easy with negotiation. So, we're going to try to work it
21 out and hopefully we will but if not, we are reserving the
22 right to cross Mr. Stover on his declaration.

23 MR. PERILLO: And if that were the case, then I
24 believe Mr. Stover would be available -- Mr. Stover would be
25 available tomorrow for that.

1 THE COURT: Okay. I'll put him on.

2 MR. MOSKOWITZ: Although I should add to that I --

3 THE COURT: I'll put him on my list with a question
4 mark.

5 MR. MOSKOWITZ: I wouldn't put him on for tomorrow.
6 We would ask that he be made available for Thursday because
7 that's when the person on our end who would be questioning him
8 would be available to question him. And I understand that he's
9 available all week if necessary. Hopefully it won't be
10 necessary and hopefully we'll actually be able to reach a
11 resolution with the Funds long in advance of that but it's an
12 open issue at this hour.

13 THE COURT: Okay.

14 MR. PERILLO: Your Honor, we haven't addressed the
15 question of when we will commence tomorrow. May I suggest we
16 commence at 10:00?

17 THE COURT: My law clerk is saying 9:00 is the hour.
18 We can --

19 MR. PERILLO: That answers the question then.

20 MR. MOSKOWITZ: Fine for me.

21 THE COURT: Yes, 9 o'clock. That's plenty of time for
22 us to get back here, isn't it?

23 MR. MOSKOWITZ: I agree.

24 THE COURT: No you don't, Mr. Moskowitz, you're just
25 saying that. Okay. Yes, Ms. Magnus says we need to be here at

1 9 o'clock to stay on track. So, she keeps me on track. All
2 right. We'll be here at 9 o'clock then.

3 Oh, Mr. Perillo, I'm sorry. Sit down. Sit down. One
4 more question. You have a live witness that we need to seal
5 the courtroom for? That would be on Thursday? Is that what we
6 anticipate that person would be?

7 MR. PERILLO: We would do that on Thursday with Mr.
8 Mandarino.

9 THE COURT: Mandarino; first thing, we believe is when
10 we would be looking for him, kind of like we did with Mr.
11 Huffard this morning?

12 MR. PERILLO: I think it would be after the first
13 break.

14 THE COURT: So in the afternoon?

15 MR. PERILLO: He would not be the first witness we
16 would present that day. Mr. Buckner would be.

17 THE COURT: Second; okay. All right.

18 (Pause)

19 THE COURT: That sounds like something I don't want to
20 hear anything about. Okay. All right, then. We'll be in
21 recess until tomorrow morning at 9:00 a.m. Thank you.

22 (Whereupon these proceedings were concluded at 7:58 PM)

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I N D E X

E X H I B I T S

DEBTOR	DESCRIPTION	ID.	EVID.
290	Union's fourth counterproposal	---	22

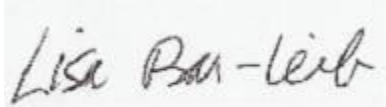
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.



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UNITED STATES BANKRUPTCY COURT
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Fourth Floor
St. Louis, MO 63102

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12-51502 -A659

CHAPTER 11

Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction

To: All Persons of Record at Hearing

A transcript of the proceeding held on April 30, 2013 was filed on May 3, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: May 10, 2013. Personal data identifiers **include: social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice: May 24, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no *Statement of Transcript Redactions* is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: June 3, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: August 1, 2013, unless extended by court order. However, during this 90-day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244-4801.

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 5/3/13

Copies Mailed To:

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