COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: June 15, 2022
CT- 2021-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. # 324

Court File No. CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

SECURE ENERGY SERVICES INC.

Respondent

CLOSING ARGUMENT OF THE COMMISSIONER OF COMPETITION

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I OVERVIEW

1. Secure's acquisition of Tervita (the "**Merger**") has resulted in an unprecedented increase in market power for waste disposal services in the Western Canadian Sedimentary Basin ("**WCSB**"). There is a likely substantial lessening of competition ("**SLC**") in as many as 143 local markets. Secure's claimed efficiencies are both overstated and illusory, and neither exceed nor offset the anti-competitive effects of $62 million. An order requiring divestitures of selected facilities will mitigate the harm.

2. Customers directly harmed by the Merger are oil and gas producers ("**Producers**") that operate in an industry that is essential to the Canadian economy. Producers, who compete in the global oil and gas industry, will likely pay higher prices and have no or very few viable alternatives after the elimination of the vigorous rivalry between Secure and Tervita.

3. Prior to the Merger, Secure and Tervita would compete to reduce the disposal costs of Producers at their waste disposal facilities ("**Facilities**") through a combination of price, location, lower wait times, capacity, and service quality.

4. Secure and Tervita's high market shares and margins demonstrate the significant incremental value that their Facilities create for Producers. Secure and Tervita's combined market shares across the local markets in which they competed was 81% for TRDs, 64% for WDs and 75% for landfills. The total weighted average margin across all of Secure and Tervita's Facilities in the relevant markets prior to the Merger was 76%.

5. Secure has eliminated the close and vigorous competition it faced from its closest competitor. Producers will likely experience a total weighted average price increase of 24% at FSTs, 11% at WDs, and 9% at landfills in the relevant markets.

6. No other company comes close to having the network of Facilities that Secure enjoys post-Merger. The only remaining third-party waste Facilities in the WCSB are those of small operators. Producers' own disposal wells, referred to as self-

supply, will not constrain Secure's market power and prevent an SLC. Entry or expansion will be deterred, not only by restrictive regulatory requirements, high capital costs, and reputational barriers, but also Secure's readily accessible excess capacity from the Facilities it intends to close.

7. Secure seeks to shelter behind alleged efficiencies it says arise from the Merger. But Secure's efficiencies defense depends in large part on passing off the closure of 35 profitable Facilities as a benefit to the Canadian economy rather than what they actually are: an anti-competitive effect of the Merger that will deprive Producers of choice and the Canadian economy of value. This is contrary to Parliament's intent and the proper interpretation of the *Competition Act* ("***Act***").

8. Moreover, Secure has not properly shown that its cost savings result in productive efficiency. For Facility closures, costs vary widely from one Facility to another. Secure has not analyzed costs at each Facility to demonstrate that the absorbing Facility can process the volume from the closing Facility at the same or lower cost. Experience from past mergers demonstrates that differences in cost structures can lead to negative efficiencies.

9. In any event, if the Tribunal finds that there are any cognizable efficiencies, they are not greater than, and do not offset the effects from the SLC. Shutting down 35 Facilities will deprive the Canadian economy of $62 million in incremental value that the Facilities generated by more efficiently matching the supply of waste disposal services to the waste disposal needs of Producers through, among other factors, lower transportation costs, greater reliability, capacity availability, improved wait times, the ability to handle a range of waste streams, and more responsive and tailored service.

10. Divestiture of 41 former Tervita Facilities is necessary to remedy the SLC in 143 local markets where market shares are greater than 35% and the likely price effects will be greater than 5%.

II FACTS

A) Waste Disposal Facilities are Differentiated

11. This application turns on the anti-competitive effects that result from Secure shutting down 35 of its Facilities.[1] This section demonstrates how the close competition between Secure and Tervita's differentiated Facilities[2] generated significant value for Producers – value that is now lost to the Canadian economy.

12. Producers are profit-maximizing firms that seek out the best value when they purchase waste disposal services – that is, a Producer will dispose of waste at the Facility that provides it with the lowest cost.[3] Cost refers not just to the price charged by the Facility to dispose of the waste, but also includes Facility-specific factors that impact the Producer's overall cost, including: transportation costs, the Facility's capacity and ability to handle a waste stream, wait times at the Facility, the reputation of the company operating the Facility, and the relationship between Producer and the company operating the Facility.

13. The following subsections demonstrate the different aspects of competition that made each Facility a differentiated option for Producers. The evidence is consistent (whether from Producers or Secure) that competition between Secure and Tervita Facilities on each of these aspects generated incremental value for Producers sending waste to a particular Facility.

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[1] In support of this application, the Commissioner has filed 50 witness statements, including from 13 Producers, and three expert reports. This evidence, and admissions from Secure during discovery and its witnesses during cross-examination, support the facts described through this submission.
[2] Facilities refers to Full Service Terminals ("**FSTs"** which is used interchangeably with Treatment, Recovery and Disposal facilities, or **TRDs**), standalone water disposal facilities ("**SWDs**") and the class II and secure landfills. "**WDs**" refer to water disposal facilities, which are provided at both FSTs and SWDs.
[3] Testimony of Dr. Nathan Miller, Hearing Transcript, Vol 5, pg 761:17–762:7.

1) *Secure and Tervita Competed on Price*

14. Prior to the Merger, Secure and Tervita competed vigorously by adjusting their prices[4] for a Producer at a Facility based on competition from each other.

15. While Secure has a [redacted] price for each service at each Facility, most of the prices charged by Secure are [redacted] [5] Secure has the ability to and does price discriminate at a Facility based on the location the waste is coming from.[6] When negotiating with customers, Secure knows the location where the waste originates.[7] Secure may charge a price based, in part, on its understanding of where the waste is coming from and the Producer's other competitive options for that waste.[8]

16. Secure and Tervita regularly set prices based on competition from each other. Mr. Engel testified that "[redacted] Mr. Engel attaches eight such examples to his affidavit, each of which mentions competition with Secure as justification for lowering rates.[10]

17. Secure regularly adjusted pricing in response to competition from Tervita. According to the project manager for the [redacted] trucking models are "probably the single biggest aid that helps us negotiate as it gives a holistic view of what our customer's costs are to all of the options that are available to them".[11] In

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[4] Throughout this submission, "price" refers to tipping fees charged to dispose of waste into landfills and disposal fees charged to dispose of waste in FSTs or SWDs.
[5] [redacted]
[6] CB-A-681, Commissioner's Read-Ins, Q 121, pg 35:12-17.
[7] Secure and Tervita's data, contained in Exhibit CA-A-310, Backup files of initial report of Dr. Miller, includes a Unique Well Identifier ("**UWI**") for each line of transaction level data. UWI can determine a well's location - Testimony of David Engel, Hearing Transcript, Vol 8, pg 1210:9–18.
[8] CB-A-681, Commissioner's Read-Ins, Q121-122, pg 35:12-23.
[9] [redacted]
[10] [redacted]
[11] [redacted]

its Pricing Playbook, Secure describes the [12]

18. Secure's sales staff paid close attention to Tervita and often sought to win customers from them by adjusting prices at a Facility. For example:

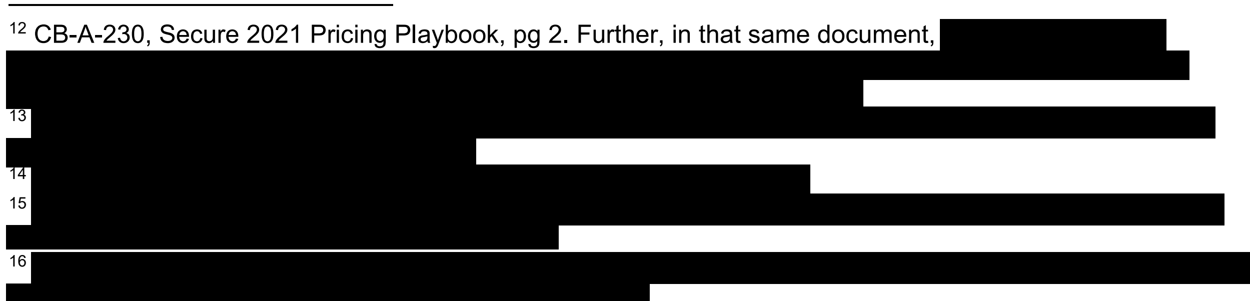
a. When opening a Facility, Secure calculates a trucking differential that is used to estimate the highest tipping fee relative to the next closest alternative. At the price was set with direct reference to the trucking differential calculator.[13]

b. In December 2019, Secure was trying to win work from who had informed it that Tervita was an option. In response, Secure pulled a map from its system showing where waste was coming from in 2015 and 2019. As a result, Secure understood that could not save much money hauling past Secure's Edson Facility which informed its discussion on the price to offer [14]

c. In July 2020, Secure discounted its prices by % for four Producers at its after getting "exact pricing Tervita is charging ;[15]

d. In March 2020, Secure offered a % discount to to "match an offer from Tervita" on their produced water disposal at Secure's [16]

[12] CB-A-230, Secure 2021 Pricing Playbook, pg 2. Further, in that same document,


[13]
[14]
[15]
[16]

e. In January 2021, Secure learned that [redacted] was [redacted] of its Saddle Hills Landfill. Secure's price offer was based in part on the observation that the round trip to Tervita's competing landfill was [redacted] hours farther than to Secure's.[17]

2) *Producers Derive Value from Facility Location*

19. Producers pay the transportation cost to dispose of waste and these transportation costs are a significant component of the overall cost to dispose of waste.[18] The implication is that due to transportation costs, Producers view each Facility differently.[19] Producers' overall disposal costs can be lower using a closer Facility than a more distant Facility.[20]

20. Recognizing the value that location provides, Secure and Tervita competed to build out their facility footprints to more effectively service Producers.[21] In response to a RFP from [redacted], Secure tells [redacted] that Secure has been focused on expanding its facility footprint – citing the tagline "*We go where our customers go*".[22] Secure then tells [redacted] where Secure has added to its footprint and capacities in areas of [redacted] areas of operational focus.[23]

21. Secure built its [redacted] based in part on the opportunity to "upstream" Tervita [redacted] "Upstreaming" means "building a facility closer to your

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[17] [redacted]

[18] 000279, Agreed Statement of Facts, pg 9, para 89; CA-A-012, Witness Statement of Mr. Paul Dziuba - Chevron Canada Resources ("**Chevron Statement**"), pg 6, para 15; CA-A-022, Witness Statement of James Taylor - Crew Energy Inc ("**Crew Statement**"), pg 3, para 9; CA-A-034, [redacted]

[19] CA-A-096, Witness Statement of Jarred Anstett, Murphy Oil ("**Murphy Statement**"), pg 4, para 16; CA-A-021,Witness Statement of Halo Exploration Ltd ("**Halo Statement**"), pg 4, para 10; CA-A-012,Chevron Statement, pg 5, para 12; CB-A-681, Commissioner's Read-Ins, Q 36-37, pg 14:1-14; Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 686:6-20.

[20] CA-A-021, Halo Statement, pg 4, para 11; CA-A-096, Murphy Statement, pgs 4-5, para 17; CA-A-111, Witness Statement of Obsidian ("**Obsidian Statement**") pg 4-5, para 16; CA-A-109, Witness Statement of Nigel Wiebe, TAQA North Ltd. ("**TAQA Statement**") pg 4, para 11; CA-A-022, Crew Statement pg 3, para 9; [redacted]

[21] [redacted]

[22] CB-A-218, Secure's response to [redacted] RFP, pgs 1-2.

[23] *Ibid*, pg 2.

customers than a competitor."[24] A Tervita Management Presentation notes that its TRD & Cavern growth opportunities include "Well-positioned projects near committed customers".[25]

22. While transportation costs are an important component of the value a Producer derives from a Facility, they are far from determinative. Dr. Miller found that Producers often send waste further than the Facility nearest to the well site generating the waste. His analysis showed this occurred for ██% of landfill, ██% of TRD, and ██% of WD transactions.[26] This implies either that a Producer is getting a better price from the more distant Facility or that the more distant Facility is offering a better match of value along one or more of the dimensions discussed below.

3) Secure and Tervita Competed on Wait Times

23. Wait times at a Facility add to the Producer's cost of disposal. Several of the Producers testified that actual or expected wait times can affect their choice of Facility.[27]

24. Secure and Tervita recognize that wait times increase a Producer's cost of disposal and the record demonstrates that both parties competed to provide shorter wait times.[28] In a proposal to ████████ Secure stated it "will track turnaround times for all trucks coming in and out of Secure facilities. Secure will guarantee against any standby time at our landfills and will reimburse against any wait times".[29] In another email exchange between Les Kohle, area manager at Secure, to ████████████ from ████████ Mr. Kohle reminds him that the Facility

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[24] ██

[25] CB-A-836, Tervita Corporation Management Presentation dated August 2019, pg 18.

[26] ██

[27] Testimony of Mr. Hart, CNRL, Hearing Transcript, Vol 5, pg 592:17-593:15 and pg 594:21-596:5; Testimony of Mr. Cain, Halo Exploration, Hearing Transcript, Vol 2, pg 353:12-16; ████ mo█████████████████ ██ Testimony of Mr. McSween, DEL Canada, Vol 2, pg 248:24-249:17.

[28] CB-A-274, Secure email dated January 28, 2018 re: ███████ CB-A-276, Secure landfill quotation for ██████████████ "Special pricing considerations or notes: Secure guarantees against wait times > 30 mins; will reimburse associated charges if turnaround is longer than 30 mins."

[29] CB-A-278, SES response to proposal to ██████ pg 17.

to which he's going has six risers to eliminate wait times.[30] before signing a contract, told Secure that "there continues to be some significant wait time issues cropping up at the facility and we need to get some clarity on this before making the commitment outlined".[31]

25. Secure recognizes that wait times are an important consideration for Producers. For example, in responding to the Secure devotes an entire section to its efforts to reduce wait times. Further in the same proposal, Secure provided estimated average wait times at each of the relevant Facilities.[32]

26. Tervita also recognized the importance of and would compete on wait times. In a 2017 strategy document, Tervita highlighted the importance of wait times to producers, and stated that it was a 'natural strategic fit to offer "no wait time" as an add-on service to our customers'.[33] [34]

27. Secure now attempts to diminish the importance of wait times by characterizing them as a sporadic and random issue unrelated to competition.[35] This ignores the evidence above that wait times matter to Producers and that, prior to the Merger, Secure and Tervita competed on wait times.

28. Secure also tried to minimize the importance of wait times by stating that .[36] However, Mr. Engel's evidence demonstrates that Secure tracks Facility traffic in

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[30] CB-A-298, Secure email exchange with

[31] CB-A-212, Email exchanges between Secure and February 2020, pg 2.

[32] CB-A-214, Secure email exchange re: RFP, which attaches CB-A-218, Secure's response to RFP, pg 1-4.

[33] CB-A-840, Tervita Consolidated Opportunity List dated October 21, 2019, pg 3.

[34]

[35] Secure Opening Statement, Hearing Transcript, Vol 1, pg 122:10-17.

[36] *Ibid*.;

its Secure's [redacted][37] Increased Facility traffic means an increased likelihood of wait times.[38]

29. Secure also argues that there can be no impact from the Merger with respect to wait times because there is "no evidence" that wait times have increased as a result of this Merger. The question of whether wait times have increased while the Merger has been under review is not the relevant one. What matters is that Secure and Tervita competed on wait times, and this competition has now been lost.

30. In any event, and contrary to Secure's assertion, the uncontradicted testimony of [redacted] is that the consolidation efforts undertaken by Secure and the lack of Facilities in certain regions have contributed to increasing wait times.[39] As Mr. Blundell testified, Secure recently reopened the closed [redacted] in an effort to manage the wait times at other Facilities in the area.[40]

31. The testimony from Producers, along with the evidence from Secure, demonstrates that Facilities competed to differentiate themselves on wait times. Wait times, or the risk thereof, affect the value that a Producer derives from disposing of waste at a particular Facility.

4) Capacity of the Facility and Ability to Handle Waste

32. Facilities are also differentiated on the capacity of a Facility and its ability to handle a specific type of waste stream.

33. A Facility's capabilities has value to Producers. For example, TAQA stated in its witness statement that availability and capacity at nearby disposal Facilities is a

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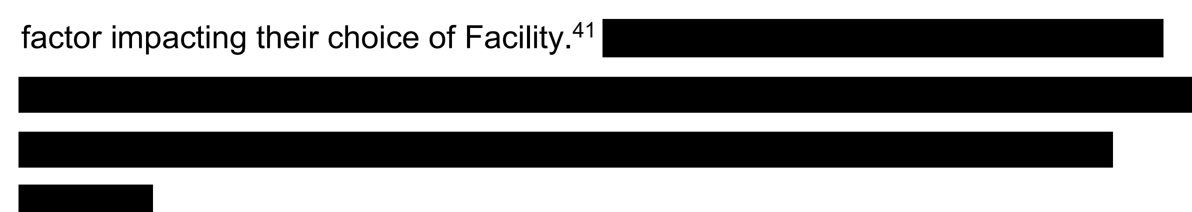
[37] [redacted] CB-A-266, Extract of Facility Traffic Dashboard from [redacted]

[38] CA-A-109, TAQA Statement, pg 4, para 13; Testimony of Mr. Blundell, Hearing Transcript, Vol 14, pgs 2301:20-2302:5[redacted]

[39] [redacted] also testified that post-merger, they are experiencing wait times at the landfills from 7 to 12 hours and the wait times at the full service terminals are also steadily climbing - Te[redacted]

[40] [redacted] He also testified to Secure's plans to build new sites and wells to help reduce volumes and wait times at [redacted]

factor impacting their choice of Facility.[41] 

34. This factor is mirrored in the internal evidence from Secure. In the RFP, Secure states Tulliby Lake FST's daily processing capacity and daily receipt capacity before it raised pricing.[43] Information about water disposal capacity was also of interest to [44]

35. Secure communicates the details of its Facilities when trying to win business. For example, Secure's proposal to provides the maximum available daily capacity, the estimated capacities available, and the number of offload risers.[45] That same proposal notes that Secure's "LaGlace and Emerson both operate injection wells with lower disposal capacity and are more prone to upsets from chemical and other residuals from completions. Their service is steady and reliable but not the best suited for water surges from completions or otherwise."[46] Secure then contrasts this against Rycroft which Secure tells "is a greater distance than the previous 3 however it is strictly operated for surge capacity rather than steady produced water loads."[47]

36. Facility capacity is not only an issue important to Producers, it is also a dimension of competition between Secure and Tervita. There are numerous examples of

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[41] CA-A-109, TAQA Statement, pg 4, para 12. See also, for example, CA-A-034, ConocoPhillips Statement states access to disposal capacity and wait times are factors that are considered, pg 5, paras 15-16, and; CA-A-096, Murphy Statement states current capacity in addition to type of waste, distance to the Facility, disposal fees and waste times as a factor, pg 4, para 16.

[43] CB-A-436, Letter dated September 18, 2020 from Secure to Inc RE: pg 1. After providing capacity, Secure tells that "surge volumes are managed to a series of onsite storage tanks to allow for sporadic high-volume deliveries while best-in-class engineering practice through the Facility can meet high volume processing requirements".

[44] CB-A-214, for 2018-2019 season.

[45] CB-A-304, Water Disposal Services Proposal.

[46] CB-A-304, Water Disposal Services Proposal, pg 3.

[47] *Ibid*.

Secure and Tervita offering dedicated risers so that Producers would be guaranteed access to capacity.[48]

5) Other Dimensions of Competition Differentiate Facilities.

37. Producers often negotiate terms well in advance. A Producer may be trying to forecast not just whether a Facility has capacity and no wait times in the present, but will also consider the likelihood that these issues will arise in the future.[49] Relationships and reputations of the operator of the Facility can matter as a Producer is planning a project. Mr. McSween from DEL Canada testified that he views relationships as intertwined with the other aspects that affect the value a Producer obtains from disposing of waste at a Facility.[50] Catapult's witness statement also reflects that there is competition for relationships.[51]

38. The reputation of the operator of the Facility matters as well. Producers retain responsibility for their waste, even when it is disposed of by third parties, and face significant reputational and legal risk if their waste is not disposed of properly.[52] [redacted] testified that it audits each Facility before sending waste there.[53] Secure recognizes the importance of service and safety in its sales pitches to customers. In an email to [redacted] a Secure representative noted "In recognizing that SECURE is not always the lowest-cost service provider, SECURE takes pride in offering industry-leading service and safety standards".[54]

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[48] [redacted] and CB-A-216, Attachment to Exhibit CB-A-214; [redacted] and CB-A-218, Secure's response to [redacted] RFP, pgs 2-4; See also CB-A-554, Email dated April 9, 2020 between Secure employees, Subject: RE: Fox Creek Produced Water Capacity, pg 4; CB- A-224, Tervita email chain April 2020 re: [redacted] South Wapiti opportunity; CB-A-476, Email dated October 26, 2020 from [redacted] to Nick Giugovaz, Subject: [redacted] Tanks at Wonowon; CB-A-482, Secure Disposal Quotation dated November 25, 2020.

[49] CB-A-216, For example, [redacted] RFP was for disposal capacity over the 2018-2019 year.

[50] Testimony of Mr. McSween, Hearing Transcript, Vol 2, pg 248:24-249:17.

[51] CA-A-132, Witness Statement of Ryan Kaminski, Catapult ("**Catapult Statement**"), pg 6, para 19.

[52] [redacted] CB-R-312, Witness Statement of Chris Hogue, IPC Canada ("**IPC Statement**"), pg 4-5, para 11.

[53] [redacted]

[54] CB-A-500, Email dated May 23, 2019 from Geoff Prieur to Corey Higham, Subject: SECURE Tulliby Lake - Limesludge/TC Solids Waste Processing, pg 2. See also CB-R-153,Engel Affidavit, Exhibit 34, pg 1274; CB-A-222, Secure email dated September 14, 2019 re [redacted] clean up.

39. Secure's internal documents also recognize relationship and service as differentiators of its Facilities. In one deck, in relation to identifying Tervita's Marshall Landfill as a competitor to Secure's Tulliby Lake, the proactive action item from Secure – the way it wants to compete –was "win on relationships/service is all we can do".[55] On the same slide, Secure identifies that its CHFST Facility faces competition from Cancen and Absolute. The proactive action from Secure is "t . In an effort to win business from to its Tulliby Lake FST and SVFST – who Secure identified as a Top Client in the Northeast Region – the action item was "new decision-maker thinks highly of SES; continue to build trust with new contract. Potential to lead to + volumes at SVSFT/Tulliby".[56] Tervita's internal documents also reference instances of customers choosing a waste disposal company based on service and relationships.[57]

6) Secure's Contradictory Approach to Differentiation

40. Secure argues that Facilities are interchangeable "holes in the ground".[58] Yet Mr. Engel, Mr. Blundell, and Mr. Harington have all testified to the differentiation between Facilities and the value this creates for Producers. Mr. Engel argues in his affidavit that some companies prefer Secure because of its "superior services" which are "reliable and better".[59] He also speaks to how pricing is different at a Facility based on its stage in its life cycle and how Secure competes at its Facilities on Service.[60] Mr. Blundell testified that some of the shut Facilities " while

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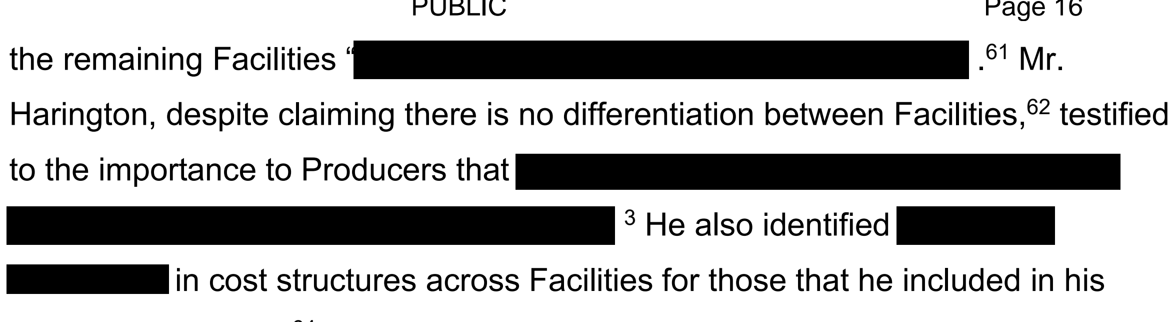
[55] CB-R-153, Engel Affidavit, Exhibit 55, pg 1567.
[56] CB-R-153, Engel Affidavit, Exhibit 55, pg 1566.
[57] For example CB-A-866, OPP's, pgs 1179-1180; CB-A-864, Combined Tervita DOA's , pg 33-34.
[58] Secure Opening Statement, Hearing Transcript, Vol 1, pgs 138:22 – 139:9.
[59] CB-R-153, Engel Affidavit, pg 80. To support para 80, Mr. Engel attaches a deck presented to Secure's board of directors (Exhibit 172 pg 3205 - 3207) that answers the question "What are Clients asking of Secure?" – the answer "Facility location, admin standards, safety culture, knowledge & flexibility, reliability & efficiency, pricing" which are all "#1 priorities". pg 3206 compares Secure's model, based on customer service, reliability and efficiency, with the Tervita Model on pg 3207 based on "poor customer service, inconsistent billing standards, and wait times".
[60]



the remaining Facilities " .[61] Mr. Harington, despite claiming there is no differentiation between Facilities,[62] testified to the importance to Producers that [3] He also identified in cost structures across Facilities for those that he included in his correlation analysis.[64]

41. The evidence described above demonstrates that Secure and Tervita competed at their Facilities to provide the best value to Producers. The best and most valuable "match" for a Producer's waste will depend on the factors described above.

III THE MERGER HAS RESULTED OR IS LIKELY TO RESULT IN A LIKELY SUBSTANTIAL LESSENING OF COMPETITION

42. The Merger has allowed Secure to create, maintain or enhance its ability to exercise market power which has caused an SLC. [65]

43. Market definition can be an important first step to assist in evaluating the harm Secure has caused to competition by the Merger. In this case, the evidence has been focused on issues impacting the assessment of the SLC as opposed to issues of market definition, as Secure appears to generally agree with the relevant market definitions identified by the Commissioner, which are also adopted by Dr. Duplantis in her evidence.

44. The next section briefly describes the relevant product and geographic markets before turning to focus on the evidence that Secure is likely to be able to exercise materially greater market power than in the absence of the Merger.

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[62]

[63] Testimony of Mr. Harington, Hearing Transcript, Vol 16, pg 2658:20–2659:6.

[64]

[65] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 (SCC) ("**Tervita SCC**"), at para 44, Book of Authorities, Tab 15; Merger Enforcement Guidelines (2011) ("**MEGs**") at para 2.1, Book of Authorities, Tab 19.

A) The Relevant Market

45. The purpose of defining markets is to assist the ultimate inquiry of whether there is a substantial lessening of competition.[66] Market definition sets the context for assessing the likely competitive effects of a merger. It is merely an analytical tool to assist in evaluating effects, but not an end in itself.[67] Defining markets is not required by the *Act*, but generally is undertaken.[68]

46. Market definition permits the indirect measurement of market power, by first defining a relevant market and then inferring power within the market by using market shares and other factors.[69] The delineation of the relevant market is a means to the end of identifying the significant market forces that constrain or are likely to constrain the merged entity.[70]

1) Relevant Product Markets are the Supply of Waste Services

47. There are three main relevant product markets for the purposes of this Application: (i) the supply of waste processing and treatment services by FSTs; (ii) the disposal of solid oil and gas waste into industrial landfills; and (iii) the disposal of produced and waste water into water disposal wells owned by third party waste services

[66] *Canada (Director of Investigation and Research) v. Southam Inc,* 1997 CanLII 385 (SCC), [1997] 1 SCR 748 ("**Southam SCC**") at para 79, Book of Authorities, Tab 12.
[67] MEGs, at para 3.2.
[68] MEGs, at para 3.1; *Commissioner of Competition v. Superior Propane Inc*, 2000 Comp Trib 15, 2000 CACT 15 (CanLII), 2000 CarswellNat 3449 ("**Superior Propane I**") at para 56, Book of Authorities, Tab 5: the *Act* does not require that markets be delineated. Delineation of competition markets is one way of demonstrating the likely competitive effects of a merger.
[69] *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd*, 1992 CanLII 2092,1992 CarswellNat 1630 ("**Hillsdown**") at para 24, Book of Authorities, Tab 11.
[70] *Canada (Director of Investigation & Research) v Southam Inc,* 1992 CarswellNat 637 at para 49, Book of Authorities, Tab 13.

providers.[71] Secure agrees that these types of waste services provided at the Facilities fall into separate product markets.[72]

48. The waste services provided by TRDs, landfills and SWDs are not interchangeable[73] and are not functional substitutes for one another.[74] As the parties' own data makes clear, each Facility handles different and largely non-overlapping types of waste.[75]

49. In addition, there are no viable alternatives for customers of these Facilities to dispose of their waste. References in the evidence to alternatives to disposing of solid waste such as bioremediation, risk management, and disposal into sand pits are sparse, demonstrating that these would not constrain a hypothetical monopolist of landfills from imposing a Small but Significant Non-transitory Increase in Price.[76] There are no functional substitutes for the disposal of water down a well or processing of liquid wastes at TRDs.[77] As such, each of the product markets identified by the Commissioner constitutes its own relevant product market.

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[71] The disposal of NORM Waste into landfills permitted to accept this type of solid waste is a fourth relevant product market. Prior to the Merger, Tervita's Silverberry landfill and Secure's Class I Pembina landfill were the only two landfills in the WCSB that can accept this type of waste. NORM contaminated waste can also be disposed of in caverns, provided it is in slurry form (000291 Agreed Statement of Facts, pg 7, para 64, 71). The only two caverns that can accept this type of waste are the Unity salt cavern in Saskatchewan, now owned by Secure, and the Melville salt cavern owned by Plains Environmental. As a result of the merger, Secure now operates three of the four Facilities that can handle NORM waste in WCSB. It operates the only two landfills that can accept this waste. Plains Environmental, the only remaining competitor, testifies that it charges $400/tonne to dispose of bulk waste contaminated by NORMs (CA-A-113, Witness Statement of Plains Environmental, pg 3, para 9). This is 60% more than Secure charges to dispose of solid waste at Pembina at $250/tonne (CB-A-296, Secure Energy Quotation for Westbrick Energy, cell AE152). Dr. Miller's opinion is that a separate analysis of NORM waste would show a price increase. (CA-A-057, Miller Report, pg 17-18, paras 25-26). The Merger has likely caused a substantial lessening of competition for disposal of solid waste contaminated by NORMs.

[72] CB-R-330, Updated Dr. Duplantis Examination in Chief Demonstratives, pg 10.

[73] CB-A-681, Commissioner's Read-Ins, Q 36-37, pg 14:2-14.

[74] CB-A-681, Commissioner's Read-Ins, Q 43-45, pgs 15:25-16:4, 16:20-17:16; CA-A-057, Expert Report of Nathan H. Miller, P.HD dated February 25, 2022 ("**Miller Report**"), pg 34, para 47.

[75] CA-A-057, Miller Report, pgs 34-35, para 48 and pg 35 Exhibit 5, pg 35, para 49 and pg 36 Exhibit 6.

[76] CA-A-122, Witness Statement of RemedX ("**RemedX Statement**"), pg 3, paras 9-10; [redacted] CB-A-681, Commissioner's Read-Ins, Q 95-97, pgs 27:11-28:18; CA-A-111, Witness Statement of Obsidian ("**Obsidian Statement**"), pg 7, para 28; CA-A-096, Murphy Statement, pg 9, para 32.

[77] CA-A-111, Obsidian Statement, pg 3, para 10; CA-A-021, Halo Statement, pg 3, para 7.

50. Secure argues that Producers have a number of options – such as self-supply and buyer power, or competitors such as municipal landfills who exist on the competitive fringe – but as further discussed below the evidence is that these options are not a competitive constraint on the exercise of market power.

2) Relevant Geographic Markets are Local

51. As with the relevant product markets, Secure does not contest the defined customer-based markets based on the aggregation of customers who will face similar competitive conditions defined by Dr. Miller.[78] Two key facts establish that local geographic markets can be defined based on the location of the customer's waste: 1) transportation costs; and 2) the presence of price discrimination.

52. As noted above, transportation costs are a significant component of the overall cost to dispose of waste.[79] Trucking costs include the travel distance plus time required for loading, unloading and standby/wait times.[80] Trucking costs vary due to a number of factors such as truck availability, fuel and maintenance costs and road conditions (amongst other things) but typically range from [redacted] in the WCSB."[81]

53. Transportation costs constrain the ability of Producers to haul waste to disposal Facilities that are distant from the location where the waste is produced.[82] This is demonstrated by Secure's data which demonstrates that on average, most waste travels less than 100 km to a Facility.[83]

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[78] CB-R-330, Updated Dr. Duplantis Examination in Chief Demonstratives, pg 10.
[79] CA-A-096, Murphy Statement, pgs 4-5, para 17; CA-A-111, Obsidian Statement, pgs 4-5, para 16; CA-A-031, Witness Statement of Orphan Well Association ("**OWA Statement**"), pg 9, para 36; CA-A-037, Witness Statement of Petronas Energy Canada ("**Petronas Statement**"), pg 6, para 31; CA-A-109, TAQA Statement, pg 4, para 11; CA-A-122, RemedX Statement, pg 4, para 11; P-A-104, Witness Statement of LB Energy ("**LB Energy Statement**"), pgs 4, para 13; CB-A-098, Witness Statement of Jeffrey Biegel, Sharp 2000 ("**Sharp Statement**"), pg 4, para 11.
[80] CA-A-021, Halo Statement, pg 4-5 paras 10-15; CA-A-096, Murphy Statement, pg 4-5, paras 16-17; CA-A-109, TAQA Statement, pg 4, paras 11-13.
[81] [redacted]
[82] Hillsdown, *supra*, at para 35; MEGs, at para 4.22.
[83] CA-A-057, Miller Report, pg 25, para 31.

54. The presence of price discrimination is not contested. Secure has the ability to and does engage in price discrimination based, in part, on where the waste is coming from.[84] This applies to the waste flowing into all of the Facilities at issue in this application.[85]

55. Secure can engage in price discrimination because manifesting and tracking requirements provide Secure with the location where the waste is coming from.[86] Because transportation costs are high and Secure knows where the waste is coming from, Producers cannot engage in arbitrage with other providers of waste services to take advantage of price differences.[87]

56. Given the presence of price discrimination, it is appropriate to define relevant geographic markets with reference to the location of the customer. [88] Due to price discrimination, the competitive effects of the Merger will vary for different Producers depending on the location of their wells.

57. Given the sheer number of wells impacted, it is not practical to analyze separate geographic markets for each Producer location. Dr. Miller has identified Producer-based geographic markets around a set of Producer well sites that are likely to be similarly impacted by the Merger.

58. Using Secure and Tervita's transaction-level sales data, Dr. Miller determined the area from which each Facility draws 90% of its revenues.[89] Dr. Miller then used the overlapping Facility draw areas to identify distinct sets of Producer well locations that generally face the same competitive conditions.[90] This method identified 271

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[84] CB-A-681, Commissioner's Read-Ins, Q 121, pg 35:12-17; P-A-030, OWA Statement, pg 9, para 38;

[85] CA-A-057, Miller Report, pgs 26-30, paras 33-37.

[86] CB-A-681, Commissioner's Read-Ins, Q 528-529, pgs 136:24-137:7.

[87] CA-A-057, Miller Report, pg 32-33, para 42.

[88] *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp Trib 3, ("**Canadian Waste**"), at para 78, Book of Authorities, Tab 3.

[89] CA-A-057, Miller Report, pg 51, para 77.

[90] CA-A-057, Miller Report, pgs 48-49, para 72.

customer-based markets (the "**Relevant Markets**").[91] Dr. Miller's geographic markets are not contested by Dr. Duplantis.[92]

59. Of the Relevant Markets, the focus of this application is on the 143 markets for which market shares are greater than 35% and price effects are greater than 5%. These markets, as described in greater detail below, will be referred to as the "**Relevant SLC Markets**".

B) The Merger increases Secure's Market Power

60. Both the quantitative and qualitative evidence demonstrates that Producers in the Relevant SLC Markets will pay materially more to dispose of waste over the next two years. Producers will also lose other important aspects of competition, including competition on wait times, and quality of service.

61. When determining whether the Merger has caused an SLC, the Commissioner must demonstrate that the relevant markets would be substantially more competitive "but for" the Merger.[93] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both. The evidence must be sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been or is likely to be lessened substantially.[94]

62. The focus of the Tribunal's assessment is whether Secure is likely to be able to exercise materially greater market power than in the absence of the Merger.[95] What constitutes "materially" greater market power will depend on the facts of the case.[96]

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[91] CA-A-057, Miller Report, pg 51, para 78.
[92] CB-R-330, Updated Dr. Duplantis Examination in Chief Demonstratives, pg 10.
[93] Tervita SCC, *supra,* at paras 51 and 54.
[94] *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("**CCS**") at para 232, Book of Authorities, Tab 4; Tervita SCC, *supra*, at para 66.
[95] CCS, at para 367
[96] Hillsdown at para 75. Secure has alleged declines in demand to justify the Merger. These are speculative and irrelevant to whether the Merger has caused an SLC. Even though irrelevant Secure's claim is not supported in the evidence. The testimony of Mr. Rory Johnston demonstrates demand for oil and gas production is expected to increase for at least the next 10 years (Testimony of Mr. Johnston, Hearing

1) Tervita was a Close, Vigorous, and Effective Competitor

63. The Merger has eliminated the competitive rivalry between the two largest suppliers of waste services in the WCSB.[97] The fact section above describes the numerous examples of Secure and Tervita competing on the various aspects for the provision of waste services.[98]

64. Secure and Tervita competed closely on price and service, but this competition extended to where the parties would build Facilities. For example:

   a. Secure tried to get approval to open a landfill in Conklin, Alberta which would have competed directly with Tervita's Janvier landfill in the Fort McMurray region in the oil sands.[99]

   b. Secure considered building a landfill in North Eastern British Columbia in Wonowon in direct competition with Tervita's Silverberry landfill.[100] Once Tervita learned that Secure wanted to build a landfill at Wonowon, it considered giving the Blueberry First Nation "[redacted] .[101]

Transcript, Vol 1, pgs 150:1 - 151:1; P-A-001, Expert Report of Rory Johnston dated February 25, 2022 ("**Johnston Report**"), para 35. This includes an increase in conventional oil production(see pg 15, Chart 6.). Secure's own documents predict increase in demand over the short term (P-R-874, Secure Investor Presentation May 2022, pg 10, 16), and its Oil and Gas Witnesses predict short-term and long-term increases in demand. Testimony of Darren Gee, Hearing Transcript, Vol 10, pg 1547:7 - 1551:21; P-A-315, Peyto's Corporate Presentation dated April 2022, see pgs 5, 12, 45 and 52.

[97] The *Act*, section 93(f). See also Superior Propane I, *supra*, at paras 212-219 .

[98] In addition to the evidence in the II.A.1, there are hundreds of examples in the record of Tervita and Secure competing on price. Tervita created records called Discounted Offer Authorizations ("**DOA**") and Opportunity Approval Requests ("**OPP**") that provided formal authority to discount prices. All of the DOAs produced by Tervita in in this matter are contained in CB-A-864, Combined Tervita DOA's and all of the OPPs are contained in CB-A-866, Combined Tervita Opportunity Approval Requests (OPP). Tervita also tracked customer interactions through Customer Visit Reports – a spreadsheet of which Tervita provided in response to the Commissioner's Supplementary Information Request ([redacted] [redacted]. The CVRs contain a column titled "Competitive Insights". Secure is referenced in this column over 800 times in approximately 1800 rows which have content in this column. (CB-A-206, Tervita CVR Information January 2017-April 2021) CB-A-864, CB-A-866, and CB-A-206 are large and are not live linked to this document.

[99] CB-A-510, Secure Key Messages and Responses dated December 4, 2017, pg 1; CB-A-512, Email dated December 12, 2018 from Alastair Graham to Robert Clarke; Charmaine Bailey; Jason Lok; Chris Walsh; Bevan Howell; Ron Anderson; Mike Pittman, Subject: Notes from RMWB and Economic Development Meetings dated December 12, 2018, pgs 1-2.

[100] CB-A-472, Spreadsheet titled AFE_Estimate_Termplate, tab 'AFE Signoff'.

[101] CB-A-820, Landfill Strategy Meeting Summary dated February 5, 2020.

c. Secure conducted a detailed economic analysis of its proposed landfill at Wonowon that assumes the Wonowon landfill would capture ███% of the Silverberry market and ███% of the Northern Rockies market. The analysis notes that Tervita has "current Landfill monopoly at monopoly pricing".[102]

d. Secure considered purchasing a well from ██████ to use as a SWD in part to prevent Tervita from purchasing the well and setting up an SWD that could steal volumes from Secure's ████████████ SWDs.[103]

65. Finally, records from the bitter litigation arising from the inception of Secure speak to the closeness of competition between the two companies. Secure was founded in 2007 by a number of former Tervita employees.[104] On December 1, 2007 Secure and several of its senior executives who were formerly Tervita employees were named as defendants in a claim by Tervita which alleged the defendants had misappropriated business opportunities, misused confidential information, breached fiduciary duties to Tervita, and conspired. Tervita sought $250 million in damages and disgorgement of all of Secure's profits since its legal inception; in response, Secure filed an $83 million counterclaim.

66. While the litigation was commenced in 2007, it proceeded until the Merger in 2021 and produced a number of records that speak to the close intense rivalry between the two companies.[105] Written interrogatories filed in 2020 spoke to the nature of competition between Secure and Tervita: (1) On July 31, 2020, Tervita provided particulars on its efforts to win business from Secure, specific contracts and jobs that were lost to Secure, and numerous other details related to the nature of competition between Secure and Tervita and its impact on Tervita's business;[106]

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[102] CB-A-506, Wonowon Economics Socialization to BRFN presentation dated May 29, 2019, pg 8.
[103] CB-A-403, Email dated September 18, 2019 from Rene Besler to Corey Higham, Subject: █████ 07-17, pg 2.
[104] CB-R-153, Engel Affidavit, pg 2, para 2 and pg 33, para 76.
[105] The claims were scheduled to proceed to trial in 2022: CB-R-153, Engel Affidavit, pg 555, Exhibit 7 and pg 1675, Exhibit 70.
[106] CB-A-568, Action No. 0701-13328 - Defendant's Written Interrogatories (Damages) dated July 31, 2020, pgs 6-9.

and, (2) on September 4, 2020, Tervita provided a revised chart indicating the Tervita Facilities impacted by competition from Secure.[107]

2) Margins are High at the Relevant Facilities

67. High margins are direct evidence that a firm has market power.[108] Dr. Miller has calculated the variable cost margins for Secure and Tervita's Facilities and found that they are high.[109] The weighted average variable cost margin for Secure is ███% and for Tervita is ███%.[110] Not only are the variable cost margins high, but the majority of Facilities were economically profitable as evidenced by Dr. Miller's deadweight loss ("**DWL**") calculations resulting from the closure of Facilities.[111] Secure's internal records confirm that their margins are in the same range as Dr. Miller's estimates.[112]

3) Secure Engages in Price Discrimination

68. The ability to engage in price discrimination is evidence of market power.[113] Secure knows the location and preferences of its customers and recognizes the incremental value that it generates from them through reduced transportation costs, better range and quality of service, lower wait times, and reliability, among other factors.[114] It can and does use that information to engage in price discrimination.[115] Secure's own economic expert even postulates that Secure and

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[107] CB-A-566, Letter from Stephanie Frazer, Norton Rose LLP, to Jason Wilkins, Dunphy Best Blocksom LLP dated September 4, 2020 re: CCS Corporation v Secure Energy Services Inc, et al. Action No. 0701-13328.
[108] *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.*, 2013 Comp Trib 10, [1997] CCTD No 8, 73 CPR (3d) 1, ("**Tele-Direct**"), at para 286, Book of Authorities, Tab 14.
[109] CA-A-057, Miller Report, pg 115, para 180, pgs 116-118, Exhibits 43-45.
[110] ███ Dr. Miller calculates Secure's margins for FSTs, SWDs, and landfills to be ███%, ███%, and ███%, respectively. Dr. Miller calculates Tervita's margins for TRDs/caverns, SWDs, and landfills to be ███%, ███%, and ███%.
[111] CA-A-057, Miller Report, pgs 114-118, section 7.2, and updated in CA-A-060, Miller Reply, p.46-59, section 7.1.
[112] CB-A-288, Tony Creek Phase II – Facility Expansion, pg 2. "Based on ███% margins, and a slightly conservative pricing structure due to current market pressures."
[113] Tele-Direct, *supra*, at para 297.
[114] *Supra* note 7.
[115] *Supra* note 5.

Tervita having pre-Merger market power is a reason for Secure and Tervita's high margins.[116]

4) Market Shares are High

69. Market shares can be a significant indicator of market power, absent evidence of ease of entry for competitors.[117] Although market shares are not determinative,[118] market share data can give a *prima facie* indication as to whether a merger will enhance market power.[119]

70. Dr. Miller's conservative estimates of market shares for each of the 271 customer-based markets show that the weighted average of Secure's post-Merger market shares for TRDs, landfills, and water disposal wells is respectively 80.5%, 74.8%, and 64.4%.[120] The vast majority of the customer-based markets have market shares that are well in excess of the 35% safe harbour threshold in the Merger Enforcement Guidelines.[121] In VISA, the Tribunal concluded that MasterCard's 30% market share was evidence of market power.[122]

71. Dr. Duplantis does not contest Dr. Miller's market share calculation, relying on them when computing market size for her DWL estimates.[123]

72. The parties' own ordinary course estimates of market shares with respect to third-party disposal competitors support Dr. Miller's conclusion that shares are high.[124] No matter how markets are defined, Secure's market shares are high.

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[116] Testimony of Dr. Duplantis, Hearing Transcript, Vol 11, pg 1800:2-4.
[117] *Commissioner of Competition v Canada Pipe,* 2005 Comp Trib 3, *2005 CACT 3*, at para 140, Book of Authorities, Tab 2; Tele-Direct, *supra*, at para 226; Superior Propane *I, supra,* at para 126 [high market shares "relevant but not determinative"].
[118] Subsection 92(2) of the *Act*, RSC 1985, c C-34 (the "***Act***"), Book of Authorities, Tab 17.
[119] Hillsdown, *supra*, at para 76; Tele-Direct, *supra*, at para 226.
[120] CA-A-057, Miller Report, pg 54 Exhibit 9. Dr. Miller's estimates of market share are conservative, as he attributes all of the competing facilities' revenues as being in the 271 markets. Also see pg 120-121, para 185.
[121] MEGs, *supra,* at para 5.9.
[122] Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated, 2013 Comp Trib 10 at para 267, Book of Authorities, Tab 10.
[123] CA-R-335, Updated Duplantis Report, pg 80, para 167.
[124] CB-A-640, Email dated June 18-22, 2021 between Taryn Roy, Vince Lisch, Kevin Sauer, and others, Subject: April 2021 Year over Year Comparison, pg 5 includes a table of water disposal market share

5) The Merger Will Increase Prices

73. Producers in the Relevant SLC Markets are likely to experience a material price increase in excess of 5% as a result of the Merger.[125] Dr. Miller has conducted a merger simulation to estimate the price effects in the Relevant Markets relying on sales data from 24 market participants, including detailed transaction-level data from Secure and Tervita.[126] Dr. Miller's merger simulation results are driven by Secure's high margins at Facilities and high market shares in the 271 markets. Dr. Miller predicts that the total weighted average price effects for FSTs, landfills, and water disposal of 24.3%, 8.9%, and 11.1% respectively.[127]

74. Dr. Miller's results are conservative for three reasons:

    a. First, Dr. Miller has conservatively assumed that 10% of revenue in a market comes from Producers disposing their waste outside the market. Dr. Miller has made this assumption even in markets where the parties' Facilities comprise the only viable Facilities located in the applicable geographic market. This assumption mechanically underestimates the price impact, and it builds in some competition which constrains price, even in 2 to 1 markets;[128]

    b. Second, when apportioning a competitor's revenue to a geographic market, Dr. Miller has apportioned all of a competitor's Facility revenue to the geographic market, despite the fact that some of that revenue would be earned in markets where the competitor is not competing with Secure

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calculations from January 2020 to April 2021; CB-R-153, Engel Affidavit, pg 1905, Exhibit 98 shows Tervita's estimated market shares in the 'Lindbergh Market'; CB-A-826, Emails dated November 9, 2020 between Mike Husband, Ben Bowes, and others Subject: Market Share Update – August 2020, pg 1-3 includes estimated market shares for water disposal for Tervita, Secure and 'Other' for each of the years 2015 – 2020.

[125] Secure has already increased prices [redacted]% since completing the Merger. [redacted] Secure has forcefully imposed these price increases ([redacted]. Secure maintains that these price increases are due to inflation but has not provided sufficient evidence to justify that none of the [redacted]% price increase is due to enhanced market power from the Merger.

[126] CA-A-057, Miller Report, pgs 139-148, sections 7.7.3-7.7.4.

[127] CB-A-060, Miller Reply, pg 22, Exhibit 1.

[128] CA-A-057, Miller Report, pg 80, para 132.

or Tervita. This approach is conservative because it overstates the competitors' presence in the market.[129]

c. Third, Dr. Miller has included municipal landfills in the relevant market even though the evidence is that they do not handle significant volumes of contaminated soil and other solid waste produced.[130] Dr. Miller has also included several Producers who self-supply disposal wells and have provided such services to other Producers, even if this is only done on an infrequent basis.[131]

75. Secure does not take issue with any of the inputs used nor with how Dr. Miller's merger simulation model was run. Rather, Secure contends, relying on Dr. Duplantis, that the results are not reliable.

76. Dr. Duplantis has two key criticisms of Dr. Miller's price effect estimates.

77. Dr. Duplantis' first criticism of Dr. Miller's model flows from the difference-in-differences ("**DiD**") analysis she conducted. Because the price effects from her aggregated DiD model are lower than those predicted by Dr. Miller, she concludes that Dr. Miller's model must be flawed.[132] She points to the existence of self-supply and buyer power as referenced in certain company records and in Secure's witness testimony to support the lower price effects her model predicts.[133]

78. This first critique rests on the assumption that the results from her DiD are reliable. As set out in section 10)III.B.10 below, Dr. Duplantis' analysis is deeply flawed. In addition, sections III.B.7 and III.B.8 below address the evidence with respect to self-supply and buyer power to demonstrate why it was not a constraining influence during the short period after Tervita's acquisition of Newalta Corporation

[129] CA-A-057, Miller Report, pg 122, para 189.
[130] *Ibid*, pg 44 para 63.
[131] *Ibid*, pg 100, para 171.
[132] CA-R-335, Updated Duplantis Report, pg 10, para 14.
[133] CA-R-335, Updated Duplantis Report, pg 38, para 67.

in 2018 (the "**Tervita/Newalta Merger**") and why it will not be an effective constraint on Secure.

79. Dr. Duplantis' second criticism is that Dr. Miller's results are highly dependent on the share of the market assigned to the outside good.

80. Dr. Miller's model includes an outside good of 10% which allows consumers to substitute away to other options including self-supply. As Dr. Miller explained there are two pieces of economic evidence which indicate that his allocation of 10% to the outside good is conservative.

    a. First, Secure and Tervita's margins are high which would not be the case if self-supply was putting substantial downward pressure on prices.[134]

    b. Second, Dr. Miller agrees with Dr. Yatchew's conclusion that demand for water disposal is relatively inelastic (though he disagrees with Dr. Yatchew's methodology).[135] This is consistent with the testimony described below that it can be economical to drill wells that supply a base level of disposal but then turn to third-party services when this base disposal is exceeded.[136]

81. Finally, Dr. Duplantis demonstrates that even if Dr. Miller's outside good had been larger, it would have to be 40% before the price effects would be considered close to her estimates.[137] This supposition is fundamentally inconsistent with the uncontested evidence that the elasticity of demand for waste disposal services is low.[138]

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[134] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 745:7-16.
[135] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pgs 745:17 – 746:13.
[136] See Section III.B.7
[137] Testimony of Dr. Duplantis, Hearing Transcript, Vol 11, pgs 1775:19 – 1776:8; CB-R-330, Updated Renee Duplantis Examination in Chief Demonstratives, pg 15.
[138] For example, Mr. Engel has testified that Secure and Tervita have lost at least $[redacted] million to self-supply for water for a six year period between 2016-2022.(CB-R-153, Engel Affidavit, pg 18, para 38 and pgs 23-24, para 53.) [redacted]

6) Secure's Market Power not Constrained by Remaining Competitors

82. Remaining providers of waste services will be unable to constrain Secure's exercise of market power.[139] Secure's list of parties it identifies as "competitors" is over-inclusive and self-serving, as evidenced in cross-examination of Mr. Engel.[140] The Commissioner collected information from 17 potential competitors, which were identified either by a Producer during the investigation or by Secure in its pleadings, as well as Producers who Secure alleged also offered water disposal to other Producers and a number of municipal landfills for which data was provided by the AEP.[141] Although the Commissioner does not agree these entities all compete with Secure in the relevant markets, this data is conservatively incorporated into Dr. Miller's merger simulation demonstrating that these remaining competitors will be unable to constrain an exercise of market power by Secure.

83. Witness testimony demonstrates that the remaining competitors are not often considered and will be unable to constrain an exercise of market power.[142] Many of the 'competitors' identified by Secure do not compete in any relevant markets.[143]

84. Secure and Tervita's internal documents also demonstrate that they do not view remaining providers of waste services as effective competitors. For example, in

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[139]72 Section 93(e) of the *Act*: [the Tribunal may have regard to] the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger.

[140]

[141] CA-A-057, Miller Report, pgs 139-148.

[142]

[143] Gibson Energy's Facilities offer some emulsion treating services but do not offer the full suite of processing and disposal Facilities like those owned by Secure. (CA-A-093, Gibson Statement, pgs 2-3, paras 6-10) Aquatera operates a municipal landfill in Grand Prairie and does not consider the Grande Prairie Landfill to be a competitor to the landfills operated by Secure and Tervita.(CA-A-072, Aquatera Utilities Statement, pg 3, para 7.) Municipal landfills tend to be farther away from oil and gas producing regions where Secure and Tervita have landfills. (P-A-030, OWA Statement, pg 7, para 30.) Dragos Water Management shut down its SWD since 2021 (P-A-088, Dragos Statement, pg 2, para 5.)

one slide deck Secure refers to ███ as "more of an ally than a competitor".[144] Relatedly, of the 72 companies identified as competitors in Exhibits 29-32 of Mr. Engel's affidavit, 20 appear on Dr. Duplantis' ███ ███[45]

7) *Secure's Market Power not Constrained by Self Supply*

85. Producers' self-supply of waste services is unlikely to constrain an exercise of market power by Secure. Secure argues self-supply is a competitive constraint for all three Facility types, so the evidence on each is addressed in turn. This evidence should be considered with the evidence on barriers to entry for each Facility type, described in section III.B.9 below.

86. ***Landfills.*** Only the largest Producers generate enough waste to justify owning landfills in the WCSB.[146] Most of the Producers who have testified in this proceeding will not consider building a landfill.[147] Even Producers that do own their own landfills have still relied heavily on Secure and Tervita landfills. [148]

87. ***TRDs.*** Producers cannot credibly threaten to constrain an exercise of market power by Secure by self-supplying or threatening to self-supply the services provided by an FST. Almost every Producer that testified relies on the services provided by Secure's FSTs.[149] While Producers can and do operate infield Facilities to treat emulsions created in production, there is no example of an oil and gas company operating an FST.[150] Further, almost none of the qualitative

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[144] CB-R-153, Engel Affidavit, Exhibit 55, pg 1567.
[145] CB-R-153, Engel Affidavit, Exhibits 29-31, pg 1261-1268; ███ ███
[146] ███ considered building its own landfill because it expected to dispose of over ███ tonnes of solid waste annually over five years. CB-R-153, Engel Affidavit, pg 3182-3183, Exhibit 165. For reference, in 2018 Tervita's Willesden Green landfill accepted ███ tonnes. CA-A-084, AEP Statement, pg 8356, Exhibit F.
[147] CA-A-037, Petronas Statement, pg 12, paras 58-59. ███
[148] See for example, ███ ███
[149] For example, CA-A-096, Murphy Statement, pgs 3-4, para 13.
[150] Mr. Engel refers to two Producers that have approved waste processing facilities in Alberta, which are Baytex Energy and Cenovus Husky (CB-R-153, Engel Affidavit, pg 30, para 70). While Mr. Engel did not provide further details on these facilities, it is possible he's referring to Baytex's Ardmore Waste Processing

evidence with respect to self-supply in Mr. Engel's affidavit relates to services provided by TRDs.

88. ***Disposal Wells.*** Many Producers own disposal wells near their production sites. Producers primarily rely on third party water disposal for surge volumes and in regions where they do not own disposal wells. When production of water surges - often with the drilling of a new well - these volumes are beyond the capacity of the oil and gas companies own disposal wells.[151] This surge volume needs to be disposed of in third party Facilities.[152]

89. Oil and gas producers also operate in certain regions of the WCSB where there are fewer disposal wells due to geological factors. [153] Secure recognizes this is an issue when determining where to develop its own disposal wells. [154]

90. The evidence from Producers who testified on behalf of Secure is consistent with self-supply not being an effective competitive constraint for water disposal. Mr. Gee from Peyto testified that the ability to self-supply is dependent on a Producer having a disposal reservoir that has the capability to accept fluids at high rates.[155] Drilling a new disposal well is more expensive than converting an old one.[156]

91. Mr. Gee from Peyto testified that current economics do not justify the construction of additional wells for the purpose of Peyto's self-disposal.[157] Additionally, its own evidence is that Peyto recycles less as of its most recent ESG Report as compared to 2016.[158]

Facility and Husky's Sunrise Waste Processing Facility in its oil sands operations. (P-A-137, Witness Statement of Tinu Odeyemi, AER, pg 4, para 10 and pgs 17-19, Exhibit B, WasteMgmtFacilities-1party).These facilities are licensed only to take Baytex and Cenovus/Husky's own waste. Further, Secure provided no evidence of Baytex or Cenovus/Husky using these facilities to get lower pricing from Secure or Tervita.

[151] CA-A-132, Catapult Statement, pgs 4-5, paras 13-15.

[152]

[153] CA-A-040, CNRL Statement, pgs 11-12, paras 36-37.

[154] CB-A-488, Secure Summary for Approval dated April 4, 2019, pg 1, para 1.

[155] Testimony of Mr. Gee, Hearing Transcript, Vol 10, pgs 1581:18–1583:3.

[156] *Ibid*.

[157] *Ibid*, pg 1581:–8 - 1581:23.

[158] P-A-316, Peyto's 2021 ESG Report, pg 35.

8) No Effective Countervailing Buyer Power

92. Buyer power will not be an effective constraint of Secure market power for two reasons. First, none of Secure and Tervita's largest customers account for more than ████ of their total revenues.[159] The top 25 customers on average account for less than █ percent of the revenues of Secure and Tervita.[160] According to an exhibit attached to Mr. Engel's affidavit, this is a strength for Secure.[161]

93. Second, buyer power is more easily exercised when the Producer can play one supplier off the other. When the two major suppliers in a market merge, the ability of buyers to bargain is diminished.[162] This theory is supported by the evidence in this case. Chevron testified that it is typically not possible to obtain a substantial discount by leveraging the fact that Chevron is a customer in other areas.[163] When asked by the Tribunal, Mr. Dziuba said this lever was not available to Chevron because Secure owns essentially the only options in all areas where Chevron is most active.[164] Mr. DePauw of the Orphan Well Association ("**OWA**") explained that if waste is in an area where there's no competition, there is no way to leverage other sites to obtain a better rate.[165]

94. Mr. Engel attached documents to support Secure's contention that its customers can exercise buyer power. Six of these examples related to Secure's negotiations with ████. There is a reference in one of these documents that Secure was "a little concerned that continuing to push ████ may result in a loss of work in some areas".[166] Despite this concern Secure pushed through a price increase in a market where it recognized that ████ had "limited access to disposal at some locations if they do not accept new rates, i.e. ████████ .[167]

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[159] ████████████████████████████████████

[160] ████████████████ Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 747:–5 - 748:9

[161] CB-R-153, Engel Affidavit, pg 1674, Exhibit 70.

[162] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 748:10-22.

[163] CA-A-012, Chevron Statement, pg 12, para 24.

[164] Testimony of Mr. Dziuba, Chevron, Hearing Transcript, Vol 2, pg 340:21-341:24.

[165] Testimony of Mr. DePauw, OWA, Hearing Transcript, Vol 4, pg 516:17-518:10.

[166] ██ with reference to CB-R-153, Engel Affidavit, pg 2871, Exhibit 157.

[167] ██

9) Barriers Are High

95. Producers are going to experience the anti-competitive effects caused by the likely SLC from the Merger for more than two years, because barriers to entry are high; accordingly, entry is not likely, timely, or sufficient.[168]

96. The barriers that will prevent entry from constraining Secure's post-Merger dominance include: regulatory and permitting requirements for establishing a waste disposal site; [169] high capital costs and sunk costs; [170] reputational barriers; [171] and limits on the number of available geologically suitable sites for waste disposal.

97. **Landfills.** There are significant capital and regulatory requirements to build an industrial landfill. In Alberta, it would require geological mapping, public consultations, and a formal application to the AER in the case of a first-party landfill or the AEP for a landfill that accepts third party solid waste.[172] In a presentation to the [redacted] Tervita describes the initial investment requirement to be $[redacted] - $[redacted] to build a landfill with additional investments of $[redacted] - $[redacted] investment every two years (depending on volumes).[173] It also notes that it requires [redacted] months to construct (not including siting and regulatory time), up to [redacted] years until operation, and a medium level of regulatory complexity.[174]

98. Secure's attempts to build a landfill in Conklin, Alberta and Wonowon, North Eastern British Columbia demonstrate how long entry can take. Secure abandoned trying to build a landfill in Conklin after seven years, and found only

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[168] CCS, *supra*, at para 217**;** Tervita SCC, *supra*, at paras 70-75; MEGs, *supra*, at paras 7.1-7.2.
[169] Section 93(d) of the *Act*; MEGs, at para 7.9; Canadian Waste, *supra*, at paras 122-126; Hillsdown, *supra*, at paras 109-111 and 115; CCS, *supra*, at para 220.
[170] Superior Propane I, *supra*, at para 172; MEGs, *supra*, at para 7.10.
[171] Superior Propane I, *supra*, at para 157; MEGs para 7.13;
[172] CA-A-084, AEP Statement, pg 5-6, paras 18-23.
[173] CB-A-681, Commissioner's Read-Ins, Q 756, pg 184:2-23; CB-A-798, Fort McMurray presentation dated February 19, 2019, pg 20.
[174] CB-A-798, Fort McMurray presentation dated February 19, 2019, pg 20.

one site out of nine inspected that met its requirements.[175] Secure has been trying to build a landfill in Wonowon, British Columbia since 2013.[176]

99. **TRD/FST.** There are significant capital and regulatory requirements to build a TRD or FST. In Alberta, it would require a local development permit, geological mapping, public consultations, and a formal approval from the AER.[177] Tervita described the initial investment requirement to be $ - $ [178] It also notes that it requires months to construct, years to operation and a high level of regulatory complexity.[179]

100. **SWDs.** There are also significant sunk capital costs to drill a disposal well. Application timelines from drilling approval, drilling, completions, injection application, injection approval, and construction to operations will typically take approximately to months.[180] Disposal wells and associated surface facilities can range in cost from approximately $ to $ million depending mainly on well depth and drilling and completion complexity.[181] Associated surface facilities can also be difficult to site in developed areas.[182] In addition, there are limited areas within Alberta with appropriate geology to construct disposal wells.[183]

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[175] CB-A-510, Secure Key Messages and Responses dated December 4, 2017, pgs 1 and 6; CB-A-681, Commissioner's Read-Ins, Q 716-720, pgs 179:21-181:11.
[176] CB-A-472, Spreadsheet titled AFE_Estimate_Termplate, Tab "AFE Signoff" Rows 10-15; CB-A-681, Commissioner's Read-Ins, Q 659, pgs 166:22-163:11. This evidence is also consistent from Producers who have built their own landfills. Their evidence is that it takes at least two years to build a landfill. (CA-A-012, Chevron Statement, pgs 12-13, para 25;
[177] CB-A-798, Fort McMurray presentation dated February 19, 2019, pg 20.
[178]CB-A-681, Commissioner's Read-Ins, Q's 726-730, pgs 182:8 – 183:25; CB-A-798, Fort McMurray presentation dated February 19, 2019, pg 20.
[179] CB-A-681, Commissioner's Read-Ins, Q's 1521-1522, pg 224:5 – 224:23; CB-A-681, Commissioner's Read-Ins, Q's 1571-1572, pgs 243:17 – 244:11; CB-A-798 presentation dated February 19, 2019, pg 20; CB-A-250, Attachments to exhibit CB-A-248, Tevita proposal to build Kakwa TRD estimates capital expenditure of $ million with a timeline from start to finish of two years.
[180] CB-A-681, Commissioner's Read-Ins, Q 1511, pg 221:6-22; CB-A-341, Secure's RFI Response dated May 17, 2018, pg 24.
[181] CB-A-681, Commissioner's Read-Ins, Q 1513-1514, pgs 221:–3 - 222:13; CB-A-341, Secure's RFI Response dated May 17, 2018, pg 24.
[182] CB-A-681, Commissioner's Read-Ins, Q 1516-1517, pgs 222:–5 - 223:11; CB-A-681, Commissioner's Read-Ins, Q 685-687, pgs 173:–9 - 174:16; CB-A-341, Secure's RFI Response dated May 17, 2018, pg 24.
[183] CB-A-341, Secure's RFI Response dated May 17, 2018, pg 24; CB-A-681, Commissioner's Read-Ins, Q, 1509-1510, pgs 220:–7 - 221:5; CA-A-132,Catapult Statement, pg 4, para 12; Testimony of Mr. Gee, Peyto, Hearing Transcript, Vol 10, pg 1582:14-22.

101. **Reputation**. Nearly every producer who testified cited reputation as an important factor in deciding which Facility to use.[184] Reputation is important because customers retain liability for waste even after the waste has been disposed of.[185] The time to gain a reputation will make profitable entry more difficult and hence delay the competitive impact that an entrant would have in the marketplace.[186]

102. **Excess Capacity.** Secure post-Merger may use its excess capacity to discourage rivals from expanding and constitute an additional barrier in the context of a mature market.[187] Secure intends to fully or partially suspend 35 Facilities in the WCSB. All fully and partially suspended Facilities are "cold shutdowns", which means these operations can be restarted with modest capital expenditure within three to eight weeks.[188] Secure could pre-empt any entry by a competitor in a market proximate to a suspended Facility by reopening.

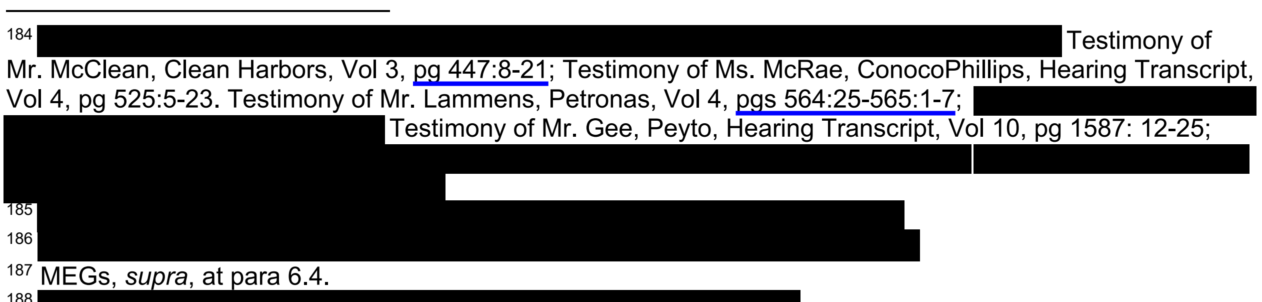
10) Secure's Economic Analysis is Unreliable

103. Dr. Duplantis' report should be given little weight because it is a narrative based on unverified documentary evidence and an unreliable economic analysis.

a. Dr. Duplantis' interpretation of the facts of the industry should be given little weight

104. Dr. Duplantis misrepresents facts, ignores key testimony, and fails to rigorously verify her sources.

105. Dr. Duplantis relies strongly on the self-interested testimony of Mr. David Engel as well as the four Producers called by Secure, but she ignores the testimony of the thirteen Producers called by the Commissioner if it does not support Secure's



[184] Testimony of Mr. McClean, Clean Harbors, Vol 3, pg 447:8-21; Testimony of Ms. McRae, ConocoPhillips, Hearing Transcript, Vol 4, pg 525:5-23. Testimony of Mr. Lammens, Petronas, Vol 4, pgs 564:25-565:1-7; Testimony of Mr. Gee, Peyto, Hearing Transcript, Vol 10, pg 1587: 12-25;

[185]

[186]

[187] MEGs, *supra*, at para 6.4.

[188]

narrative.[189] For example, Dr. Duplantis cites s testimony with respect to how it chooses a Facility,[190] however she ignores s testimony that comes into direct conflict with her understanding of self-supply and buyer power.[191] She completely ignores the testimony by [192] despite relying on several Secure and Tervita records that point to interactions with [193] In fact, testimony contradicts the claim by Dr. Duplantis that self-supply affects Secure and Tervita's pricing behaviour, as Tervita never adjusted its price to [194]

106. Dr. Duplantis points to records produced by Secure and Tervita in support of buyer power and self-supply being constraints, including records produced during the Commissioner's review of the Tervita/Newalta Merger.[195] However, she ignored documents prepared by her client that pointed in the other direction.

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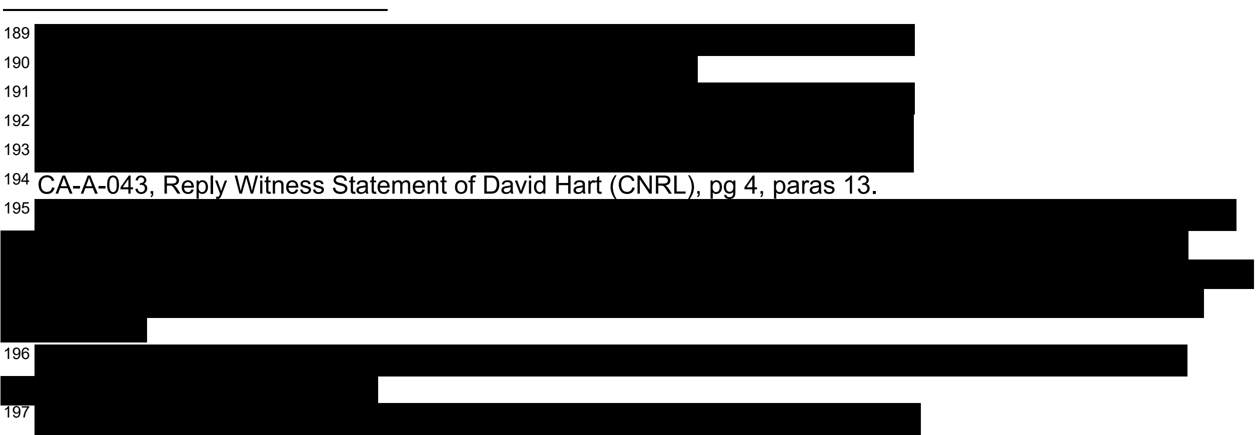
[97] Secure created this document to be accurate and truthful,[198] and Secure's statements to the Bureau directly undercut many claims in Dr. Duplantis' report. Dr. Duplantis does not give a reason why she did not consider this evidence, despite relying on many records created in the time period before this submission was drafted.

107. It was clear in cross-examination that evidence in the record contradicted the conclusions Dr. Duplantis had drawn from Secure's documents and that she did



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194 CA-A-043, Reply Witness Statement of David Hart (CNRL), pg 4, paras 13.

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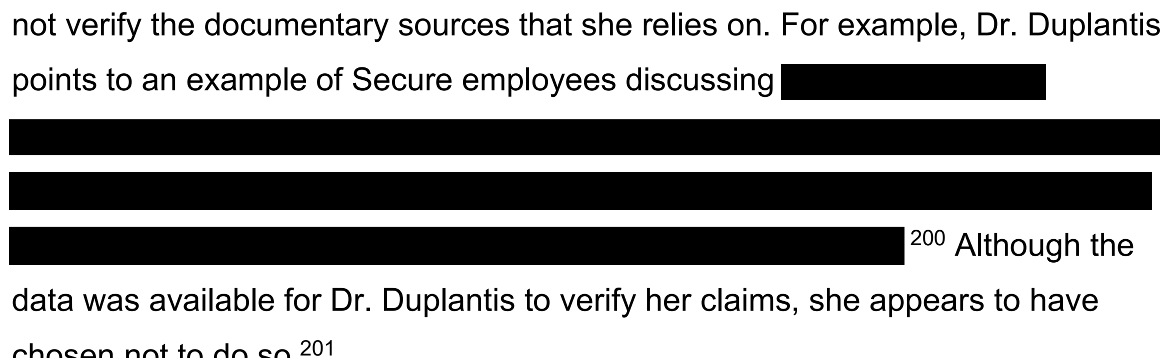
198 CB-A-681, Commissioner's Read-Ins, Q 1500-1507, pgs 218–4 - 220:11.

not verify the documentary sources that she relies on. For example, Dr. Duplantis points to an example of Secure employees discussing



[200] Although the data was available for Dr. Duplantis to verify her claims, she appears to have chosen not to do so.[201]

b. Dr. Duplantis DiD analysis should be given little weight

108. The economic literature that Dr. Duplantis herself references in support of her DiD analysis points to the fatal flaws of her approach.

109. First, Dr. Duplantis did not conduct a common-trend analysis to establish comparability between her treatment and control groups.[202] While Dr. Duplantis said she looked at common trends, she conceded on cross examination that in fact she did not include any proof, support or background material in her report that she had taken simple steps, such as plotting price changes over time.[203] This exercise is table stakes when running a DiD model, and Dr. Duplantis did not transparently take these steps.[204]

110. Without accounting for common trends, there is evidence in the record that other differences between the treatment and control groups would lead to biased results. For example, the Tribunal has heard evidence that access to self-supply depends on a number of factors including the geology of the region. The Northeastern British Columbia and Fox Creek areas are regions where Producers or the

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202 CA-R-900, Angrist and Pischke -The Credibility Revolution in Empirical Economics, pg 14, "The most compelling DiD type studies report outcomes for treatment and control observations for a period long enough to show the underlying trends…" and CA-R-900, Hosken Olson and Smith - Do retail mergers affect competition_2012, pg 15 "For this approach to be valid, it must be the case that the change in price of the comparison markets closely approximately the counterfactual change in price that would have occurred in the market affected by the event had the event not occurred" CA-R-335, Updated Duplantis Report, pgs 46-47, fn 109.

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204 Testimony of Dr. Miller, Hearing Transcript, Vol 5, pgs 755:13 – 756:6.

documents demonstrate that access to self-supply in these areas is more difficult.[205] Dr. Duplantis neglected to analyze whether this was a systematic difference between her control and treatment groups.

111. Dr. Duplantis also did not account for differences in competitive conditions between her treatment and control groups as reflected in market shares. If, for example, prior to the merger the 2 to 1 control group split their waste 50-50 with two options, while the 2 to 1 treatment group split their waste 95 to 5 between the two options, there would be a fundamental lack of comparability between the treatment and control groups that would invalidate the results of the DiD analysis. Dr. Duplantis has provided no verification that her analysis is robust to potential differences in competitive conditions between her treatment and control groups.[206]

112. Finally, the time covered in Dr. Duplantis' post-merger period is just eight months long (August 2019 to March 2020).[207] The evidence shows that contracts can extend from months to over a year.[208] Consequently, Tervita could not have immediately implemented a price increase on July 19, 2019.[209] Dr. Duplantis performed no analysis that would assist the Tribunal in determining how this impacts her results.[210] The extent to which Tervita could only increase prices as contracts came up for renewal means a number of prices in her post merger period would not have increased. This would bias her price effects downward.

113. Dr. Duplantis' implementation of her model raises concerns that it is not properly capturing price changes due to a very small sample size.[211] Not only is she working with an unreasonably short time period of eight months, but in an attempt to ensure that her analysis was not tainted by the presence of Secure she

[205] CA-A-132, Catapult Statement, pg 4, para 12; CB-A-488, Secure Summary for Approval April 4, 2019, pg 1; [redacted] and 2319:25-2320:21.
[206] Testimony of Dr. Duplantis, Hearing Transcript, Vol 12, pg 1967:7-14.
[207] CA-R-335, Updated Duplantis Report, pg 49, para 94(d).
[208] CB-R-153, Engel Affidavit, pgs 25-26, para 57.
[209] Testimony of Dr. Duplantis, Hearing Transcript, Vol 12, pg 1969:8–23.
[210] Testimony of Dr. Duplantis, Hearing Transcript, Vol 13, pg 2029:16 - 2032:10.
[211] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 754:8-14.

removed from her analysis all markets where Secure was a competitor. She had to drop 60% of the observations to accomplish this.[212]

114. Dr. Duplantis' results and robustness checks indicate serious problems with the specification of her model. The robustness checks for the 2 to 1 markets alone produced results from [redacted] of varying degrees of statistical certainty.[213] A few of the robustness checks produce the counterintuitive result of customers in a 3 to 2 market seeing a price decrease, while customers in the four or more competitor markets see a price increase.[214]

115. Dr. Duplantis' robustness checks and the implementation issues with her analysis all undermine the reliability of her results. These results should be given little weight.

IV APPROPRIATE REMEDY

116. The Merger has caused an SLC in the Relevant SLC Markets. Subparagraph 92(1)(e)(ii) of the *Act* provides that the Tribunal may, subject to sections 94 to 96, order Secure to dispose of assets designated by the Tribunal in such manner as the Tribunal directs.[215]

117. The appropriate remedy for an SLC is to restore competition to the point at which it can no longer be said to be substantially less than it was before the Merger. At the very least, the remedy must be effective. If the choice is between a remedy that goes farther than is strictly necessary and a remedy that does not go far enough, then the former is to be preferred.[216]

118. The appropriate remedy is divestiture of Facilities listed in Appendix A.

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[212] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 754:8-14.
[213] [redacted]
[214] [redacted]
[215] Subparagraph 92(1)(e)(ii) of the *Act*.
[216] Southam SCC, *supra,* at paras 83-89.

119. To facilitate the Tribunal's evaluation of the Remedy, Appendix B provides a summary of evidence for each requested divestiture Facility. For each Facility, we include the summed DWL for each of Dr. Miller's second score and Bertrand analyses for when the Facility is both a Closest and Relevant Facility. We also include a description of the Facility (pulled directly from evidence in the record), the highest market share and price effect for markets where the Facility is a Relevant Facility, as well as a sample of evidence in the record that demonstrates local market competition.

120. The divestiture of each Facility listed in Appendix A is an appropriate remedy to restore competition in each of the Relevant SLC Markets listed where the Facility faced competition from the identified competing Secure Facilities. If the Tribunal orders divestiture, the Commissioner has included in Appendix C a draft order.

V ANTI-COMPETITIVE EFFECTS OUTWEIGH COGNIZABLE EFFICIENCIES

A) The Exception in Section 96 of the *Act*

121. Subsection 96(1) of the *Act* provides that the Tribunal shall not make an order under section 92 where the merger is "likely to bring about gains in efficiency" that "would not likely be attained if the order were made", and which are "greater than", and "will offset" the "effects" of any lessening of competition.

122. "Efficiency" is an economic concept that relates to the "benefit, value or satisfaction that accrues to society."[217] In the context of a merger, efficiencies are "pro-competitive benefits".[218] Efficiencies, like effects, are intended to be viewed from the standpoint of the economy as a whole and the general public interest.[219]

123. Secure bears the burden under section 96 to establish the extent of the efficiency gains, as well as on the "ultimate issue" of whether the efficiency gains are likely to

[217] Tervita SCC, *supra*, at para 102.
[218] *Ibid*.
[219] Economic Council of Canada Interim Report on Competition Policy (1969) at pg 114, Book of Authorities, Tab 20.

be greater than, and to offset, the effects proven by the Commissioner.[220] To succeed under the efficiencies defence, Secure must demonstrate that the Merger is on balance more beneficial than it is harmful to the economy as a whole.

B) Secure Has Not Established the Claimed Efficiencies

124. Secure's efficiencies defence depends in large part on passing off the closure of 35 profitable Facilities as a benefit to the Canadian economy rather than what they actually are: an anti-competitive effect of the Merger that will deprive Producers of choice and the Canadian economy of value.

125. In order to benefit from section 96, Secure must prove that its cost savings are cognizable efficiencies within the meaning of 96 of the *Act*, in light of the purpose of the *Act* and the jurisprudence.

126. First, and most importantly for this case, Secure must demonstrate that it will achieve increased productive efficiency.[221] As set out further below, Secure has failed to demonstrate that the cost savings it claims amount to productive efficiencies. Second, Secure must also show that the gains are likely to be brought about by the Merger.[222] Third, Secure must demonstrate that the gains do not result from a redistribution of income.[223] Fourth, Secure must demonstrate that the gains will benefit the Canadian economy.[224] Fifth, Secure must prove that the gains would not be attained if the Tribunal were to make an order.[225]

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[220] Tervita SCC, *supra*, at para 122; Canada (Commissioner of Competition) v Superior Propane Inc, 2001 FCA 104 ("**Superior Propane II**"), at paras 157 and 177.
[221] Subsection 96(1) of the *Act*: "…gains in efficiency…"; Tervita SCC, *supra*, at para 102; CCS, *supra*, at para 262 "first screen"; Hillsdown CT, *supra*, at para 130; MEGs, *supra*, para 12.4. Secure does not appear to be alleging any dynamic efficiency or increase to allocative efficiency.
[222] Subsection 96(1) of the *Act*: "…merger… has brought about or is likely to bring about…"; Tervita SCC, *supra*, at para 113; CCS, *supra*, at para 262 "second screen"; Superior I, *supra*, at para 462; Hillsdown CT, *supra*, at paras 133 and 141; MEGs paras 12.13 (second bullet) and 12.20 (first bullet).
[223] Subsection 96(3) of the *Act*; Tervita SCC, *supra*, at para 113; CCS, *supra*, at para 262 "third screen"; Superior Propane I, *supra*, at para 430; Superior Propane III, *supra*, at paras 46 and 142; Hillsdown, *supra*, at footnote 73; MEGs, *supra*, at para 12.20 (third bullet).
[224] Section 1.1 of the *Act*; Superior Propane III, *supra*, at para 196-197; CCS, *supra*, at para 262 ("fourth screen"); MEGs, *supra*, para 12.20 (fourth bullet).
[225] Subsection 96(1) of the *Act*: "…and that the gains in efficiency would not likely be attained if the order were made"; Tervita SCC, *supra*, at para 113; Superior Propane III, *supra*, at para 149; CCS, *supra*, at paras 264 and 267 ("fifth screen"); MEGs, *supra*, paras 12.9, 12.13 (fourth bullet), and 12.20 (second bullet).

127. Any cognizable efficiencies must be properly quantified, to the extent they are quantifiable.[226] This includes quantifying and deducting the “true economic costs” of achieving the claimed gains.[227]

128. Despite the primacy accorded under the *Act* to economic efficiency,[228] Secure uses accounting techniques to show cost savings that will benefit itself, its shareholders and its executives rather than putting forward economic analysis of any benefits to the economy as a whole. While efficiencies can be realized in any merger, the requirement under section 96 of the *Act* is to demonstrate the real value of the efficiencies; where the quantum cannot be measured the burden is not met.[229] Where Secure has not met its burden to properly quantify its claimed efficiencies, those claims should be denied.[230]

1) No Properly Quantified Efficiencies from Facility Closures

129. Even if Secure’s cost savings from Facility closures did not cause a loss in product choice, Secure has not properly demonstrated or quantified the productive efficiency it says it has achieved. Secure has alleged productive efficiencies on the basis that it will reduce its own costs and that its output will remain constant.[231] As demonstrated below, there are significant deficiencies in Secure’s analysis, such that it is not possible to determine what impact the Merger will have on the productive efficiency of the Canadian economy.

130. Productive efficiency is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology.[232] Productive efficiency refers to the creation of a given volume and

[226] Tervita SCC, *supra*, at paras 124 and 147.
[227] Superior Propane I, *supra*, at para 340; MEGs at para 12.19.
[228] Tervita SCC, at para 85; Superior Propane II, *supra*, at para 110.
[229] Superior Propane I, *supra*, dissenting reasons of Member Lloyd at para 485.
[230] Tervita SCC, *supra*, at paras 128-129 and 154; see also Superior Propane I, *supra*, at paras 348 and 352.
[231] Testimony of Mr. Harington, Hearing Transcript, Vol 16, pg 2622:5-20; CA-R-889, Updated Harington Report, pg 35, para 56.
[232] Tervita SCC, *supra*, at para 102.

quality of output at the lowest possible resource cost.[233] Productive efficiency occurs where the cost per unit produced by a firm is at its lowest point.[234]

131. Mr. Harington's methodology and measurement of "productive efficiencies" from Facility closures is flawed. For instance, rather than comparing unit costs at grouped closing and absorbing Facilities to determine the causal impact that throughput changes will have on the Facility's costs, Mr. Harington resorts to a correlation analysis that measures the correlation between individual cost items and output at a narrow selection of Facilities.[235] Despite the significant variation across Facilities, Mr. Harington uses an average value.

132. There is no attempt in Mr. Harington's correlation analysis to account for other factors impacting the observed cost changes in his data sample, such as changes in the underlying costs of the inputs.[236] Mr. Harington's correlation analysis is inadequate for identifying the causal impact that the significant volume changes brought about by the Merger will have on Facility costs. The flaws in this approach are reflected in the fact that many negative correlations identified by Mr. Harington have no sensible economic interpretation.[237]

a. Unproven Assumptions about Secure's Costs

133. Secure has alleged productive efficiencies on the basis that it will reduce its own costs and that its output will remain constant. Secure's efficiencies analysis rests on a series of unproven assumptions that (i) variable costs per unit at absorbing Facilities are equal to or less than those at closing Facilities; (ii) absorbing Facilities will process additional volume without any increase in variable cost per

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[233] MEGs, supra, at paras 12.4, 12.14-12.16.
[234] Tyhurst, John, Canadian Competition Law and Policy (Irwin Law, 2021) at pgs 94-96, Book of Authorities, Tab 21.
[235] CA-R-889, Updated Harington Report, pg 59, para 111(d). For FST/SWDs, for of the integration groupings, there are no Facilities included in Mr. Harington's Appendix G and for more, there are no absorbing Facilities included Of the absorbing Facilities included in Appendix G, 4 are from the compare
[236]
[237] CB-A-905 Expert Report of J. Gregory Eastman, pg 31 para 58.

unit; and (iii) absorbing Facilities will process additional volume without any increase in fixed costs.

134. [238] However, Secure has made no attempt to quantify the variable cost per unit, nor to compare this cost at the closing Facilities and the absorbing Facilities it has identified. Instead, Mr. Harington assumes without basis that at the closing and the absorbing Facility.[239]

135. In the context of the Tervita-Newalta Merger, which involved closure of the same types of Facilities as those at issue in this application, Mr. Harington recognized that one Facility may have "significantly higher variable operating costs" than another, even a proximate one.[240] As a result, a shift in volumes from one Facility to another could result in negative variable cost efficiencies significant enough to wipe out any fixed cost savings from the closing Facility.[241]

136. Variable costs at absorbing Facilities are likely to increase as a result of increased volumes.[242] As a result of the integration, absorbing Facilities may take on volumes that are as much as three times the output for the period when costs are observed.[243] Secure provides no analysis to demonstrate that Secure's remaining Facilities will absorb this massive intake of volume, in both absolute and relative

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[238] CB-A-905 Expert Report of J. Gregory Eastman, pg 28, para 53, and pg 29, para 54; see also, for example, also, see, for example, CA-R-889 Updated Harington Report, Appendix G, pgs 264-265.
[239] Testimony of Mr. Harington, Hearing Transcript, Vol 15, pgs 2558:20 - 2559:10.
[240] CB-A-897 Tervita Newalta – The Brattle Group Efficiencies Report Jun 11, 2018, pg 15, para 35.
[241] Mr. Harington found that closing CB-A-897 Tervita Newalta – The Brattle Group Efficiencies Report Jun 11, 2018 pg76 ;
[242] CB-A-905 Expert Report of J. Gregory Eastman pg 26 para 47.
[243] For example, Mr. Harington looked at costs for Rocky Mountain House between January 2020 and October 2021 . During that period, monthly waste volumes were not greater than By contrast, Secure's integration plans are on the basis that the same Facility will absorb up to more than three times as much. For Nosehill, the highest monthly water volume in Mr. Harington's analysis is whereas Secure management predicted a capacity of see For Edson FST, Mr. Harington looked at costs for months where water volumes were less than whereas according to Secure's management the monthly capacity is more than see Te For examples of landfills absorbing significant additional volumes see

terms, at the same variable cost as the closing Facilities.[244] While Mr. Harington assumes that some "variable" portion of costs he has otherwise assigned as "fixed" will be transferred to the absorbing Facilities, his failure to compare costs at paired closing and absorbing Facilities means this assumption is without foundation.

137. Mr. Harington assumes that Secure will be able to save certain "fixed costs" from no longer operating the closing Facilities.[245] However, other than certain identified capital investments necessary to absorb the volumes in the immediate term, he has not accounted for or measured how the massive step-change in throughput at the absorbing Facilities will accelerate their depreciation, depletion, and change their overall cost structure.[246]

138. For example, water disposal wells are depleting assets that fill up over time and need to be replaced. As Mr. Harington properly recognized in cross-examination, the consequence is that the cost of disposal wells at closing Facilities is not a "savings".[247] Diverted volumes will accelerate depletion at the absorbing Facilities. Mr. Harington has recognized with respect to landfills that such timing differences do not amount to productive efficiencies.[248] The result is that the "Avoided Capital Expenditures" must be subtracted from Mr. Harington's efficiencies.[249]

b. No Measurement of Diversion

139. Secure has performed no analysis to determine whether diversion away from the absorbing Facilities will occur, and to which Facilities.[250] Both Dr. Miller and Dr. Duplantis' reports indicate that Secure's output is, in fact, likely to fall due to

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[245] CA-R-889, Updated Harington Report, pg 51, para 94:

[246] Testimony of Mr. Harington, Hearing Transcript, Vol 16, pgs 2621:–4 - 2622:4.

[247]

CB-R-893 Reply Harington Report, pg 55 para 131; CA-R-889,

[248] CA-R-889, Updated Harington Report, pg 117, para 257(b).

[249]

[250]

diversion[251] and because there is some elasticity of demand.[252] It is this output which should have been used to determine whether there was a decrease in per unit costs of production relative to pre-Merger levels.

c. Capacity to Service Growing Demand

140. Finally, Secure has not demonstrated it will have capacity to service the growing demand for waste disposal services in light of its reduced Facility footprint resulting from the Merger.

141. Secure has made public statements that demand for its services is increasing. In May 2022, Secure reported that "Rising crude oil, liquids, and natural gas prices and producer cash flows driving higher industry activity and demand for SECURE Midstream Infrastructure services".[253] Specifically, Secure said that "Treatment and disposal services for oil & gas by-products continue to be in high demand",[254] water volumes are "increasing at disproportionate rate" relative to oil and gas production,[255] and that Q1 2022 landfill volumes are "back to pre-Covid levels".[256]

142. To the extent Secure's management's forecasts attached to Mr. Blundell's affidavit[257] turn out to be incorrect, which appears to be increasingly likely, the absorbing Facilities will not have capacity to absorb volumes diverted from the closing Facilities.[258] This may result in re-visiting previous plans to close Facilities. For example, [redacted] [259] This

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[251] Both Dr. Miller and Dr. Duplantis estimate a DWL from the Merger.
[252] To the extent volumes are diverted to other absorbing Facilities, this will impact the costs of these Facilities. The extent of the costs diverted to third parties is unknown.
[253] P-A-874, Secure Investor Presentation May 2022, pg 16; see also [redacted]
[254] P-A-874, Secure Investor Presentation May 2022, pg 10.
[255] P-A-874, Secure Investor Presentation May 2022, pg 3 and 10.
[256] P-A-874, Secure Investor Presentation May 2022, pg 13.
[257] These are generally dated August 2021 or January 2022, although much of the forecasts appear to be dated from Q1 2021 or September 2021. The deck for Fox Creek, which is dated February 2022, contains forecasts dated Q1 2021: CB-R-869, Affidavit of Keith Blundell, pgs 234-235.
[258] CB-A-905, Expert Report of J. Gregory Eastman, Table 2, pg 25.
[259] CB-A-720: [redacted]

was prior to implementing its integration plans for the area, which call for reducing the number of Facilities offering water disposal in the area from 10 to 5 thereby decreasing capacity further.[260] A number of the Facility closures are predicted to occur in 2023 or later.[261] As the Supreme Court has noted, the risk of unreliability increases as events are projected further into the future, such that the Facility closures may no longer be considered "likely".[262]

143. Capacity constraints will lead to increased prices, the refusal of service and/or the need to increase capacity, either through additional capacity investments or the re-activation of Facilities that have closed or are planned to close — all of which would negatively impact the productive efficiency of the Canadian economy and reduce the claimed cost savings from the Merger.

2) Labour Cost Savings not Demonstrated

144. Secure has not demonstrated productive efficiencies from labour reductions. While Secure has put forward a spreadsheet with names of terminated employees, it has not measured or included evidence about the output of those employees nor how that output will be maintained by the remaining employees. Secure's efficiencies expert undertook no independent workflow analysis and simply relied on Secure's estimation of which employees are redundant.[263]

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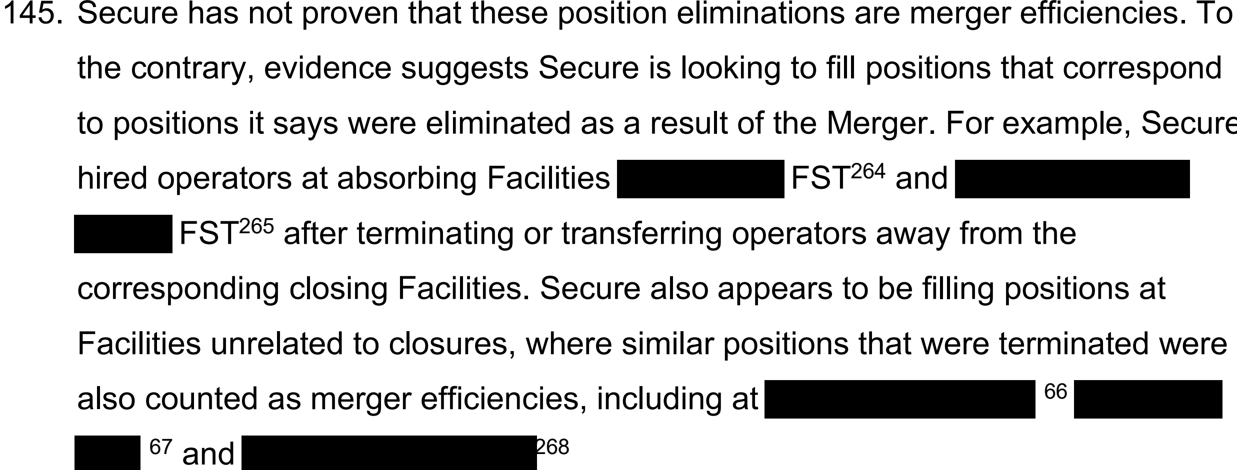
[260] CB-R-869, Affidavit of Keith Blundell, pg 33, para 106.

[261] The closing time for Elk Point is not specified in Mr. Blundell's affidavit (CB-R-869, Affidavit of Keith Blundell, pg 39, para 121,) but Mr. Harington assumes it will not be until the . Likewise, Mr. Blundell does not appear to specify a timeframe for Rycroft FST (CB-R-869, Affidavit of Keith Blundell, pg 36-37, para 113-116), Spirit River LF (CB-R-869, Affidavit of Keith Blundell, pg 39, para 121) or Bonnyville LF (CB-R-869, pg 39, Affidavit of Keith Blundell, para 121), each of which Mr. Harington assumes will be closed
Mr. Blundell identifies the following 6 facilities will close without specifying when within that year: Swan Hills SWD (CB-R-869, Affidavit of Keith Blundell, pg 21-22, para 70); South Grande Prairie FST (CB-R-869, Affidavit of Keith Blundell, pg 22, para 72); Mile 103 (CB-R-869, Affidavit of Keith Blundell, pg 24, para 77); Obed FST (CB-R-869, Affidavit of Keith Blundell, pg 33, para 106(c)); Moose Creek SWD (CB-R-869, Affidavit of Keith Blundell, pg 33, para 106(d)); Boundary Lake FST (CB-R-869, Affidavit of Keith Blundell, pg 37-38, para 117).

[262] Tervita SCC, *supra*, at para 66.

[263]



145. Secure has not proven that these position eliminations are merger efficiencies. To the contrary, evidence suggests Secure is looking to fill positions that correspond to positions it says were eliminated as a result of the Merger. For example, Secure hired operators at absorbing Facilities FST[264] and FST[265] after terminating or transferring operators away from the corresponding closing Facilities. Secure also appears to be filling positions at Facilities unrelated to closures, where similar positions that were terminated were also counted as merger efficiencies, including at [66] [67] and [268]

146. Secure's evidence does not allow any determination that the "eliminated" positions were as a result of "productive efficiency" arising from the Merger.

3) Secure Has Failed to Deduct Costs to Achieve Efficiencies

147. Secure's burden to quantify its efficiencies includes quantifying all costs incurred in order to achieve those efficiencies.[269] Secure has failed to include at least two categories of costs in achieving the efficiencies: (i) bonuses linked to achieving synergies; and (ii) labour spent on achieving synergies.

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[264] For FST operators were transferred out of (closing) FST on January 1, 2022. Both are counted as merger efficiencies: see CB-R-869, Affidavit of Keith Blundell, Exhibit 2 at rows 185-186. of operators is noted as transferring to (absorbing) FST. Secure posted another position at (absorbing) FST on May 20, 2022: P-A-883, Facility Operator - Job Description.

[265] For FST, Secure terminated or transferred operators from the corresponding closing facilities: see CB-R-869, Affidavit of Keith Blundell, Exhibit 2 at rows 147, 156, 158 and 194, including one transfer to (cell Z147). Internal Secure documents appear to contemplate hiring additional operators CB-A-917 row 4, which in addition to the transfer noted in cell Z147, would completely account for the operators counted as merger efficiencies.

[266] Compare P-A-882, Secure career opportunities as of May 2022, pg 5, job posting for "Facility Operator – , with CB-R-869, Affidavit of Keith Blundell, Exhibit 2 row 191 transfer of "Operator" at " FST".

[267] Compare CB-A-917, row 2 and CB-R-869, Affidavit of Keith Blundell, WS Exhibit 2 row 117: termination of "Operator 3" at "Plant 1005-Big Valley".

[268] Compare P-A-882 Secure career opportunities as of May 2022 pg 10, job posting for " posted with CB-R-869, Affidavit of Keith Blundell, Exhibit 2 row 123: resignation of a

[269] Superior Propane I, *supra*, at paras 339-340; MEGs, *supra*, at paras 12.10 and 12.19.

148. Bonuses linked to synergies are properly deducted from efficiencies. Additional compensation provided for additional effort to achieve efficiencies is a "true economic cost" that should be deducted.[270]

149. Mr. Engel testified in discovery that Secure employees may be entitled to a percentage bonus if they hit certain targets or performance indicators.[271] One of the performance targets for Secure's business units would be a synergy target.[272] Each business unit would have a goal of dollar amount of synergies as part of their performance targets.[273]

150. Secure also pays its executives compensation linked to achieving corporate goals and objectives, including closing the Merger and "achieving the synergies identified".[274] Secure paid its executives awards to recognize their "efforts and significant contributions" in completing the Merger.[275] Those awards constitute additional compensation for additional work and for achieving the objectives.[276]

151. Secure has failed to quantify or even estimate this cost.[277] As the Tribunal recognized in *Superior Propane I*, incentive payments for achieving corporate goals represent additional compensation for additional effort. Such payments are therefore a "true economic cost" of achieving efficiencies and are properly deducted.[278] Secure thus failed to meet its burden to properly quantify the net efficiencies from the Merger.

152. The second category Secure has failed to quantify or deduct is internal labour costs towards achieving efficiencies. Secure had an integration team spending a

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[270] Superior Propane I, *supra*, at paras 333-340.
[271] CB-A-681, Commissioner's Read-Ins, Q 1625, 1630 pgs 586:24-587:7, 588:3-7.
[272] Commissioner's Read-Ins, Q 1635, pg 259:25 – 260:3.
[273] CB-A-681, Commissioner's Read-Ins, Q 1642, pg 261:21-25.
[274] P-A-156, Secure Notice of Annual Shareholder Meeting of April 29, 2022, pg 50 and pg 51.
[275] P-A-156, Secure Notice of Annual Shareholder Meeting of April 29, 2022, pg 58.
[276] Testimony of Mr. Harington, Hearing Transcript, Vol 15, pg 2591:14-18.
[277] [redacted] Note that this is also inconsistent with Secure's treatment of bonuses that would otherwise have been paid to terminated employees, which were deducted as merger efficiencies: see [redacted]
[278] Superior Propane I, *supra*, at paras 339-340.

real resource – their time – towards the integration and achieving the alleged efficiencies.[279] As Secure's efficiencies expert properly recognized in the Tervita-Newalta matter, this is deducted from the efficiencies achieved.[280] Secure has also failed to quantify the quantifiable costs, in the form of employee or contractor time, for its claimed "qualitative benefits".[281]

153. These costs, the form of employee salaries or fees paid to subcontractors are readily quantifiable for Secure. Its failure to do so means it has failed to meet its burden to properly quantify any cognizable efficiencies.

4) The Approach to Efficiencies Lost from the Order

154. The Commissioner agrees with Secure that the appropriate starting point for calculating the date of efficiencies likely to be "lost" is the date of the Tribunal's Order. Given that the Merger has already closed, many of the anticipated cost savings will already have started to be realized by the date of the Order and are therefore not "lost".

155. The Commissioner disagrees that any costs Secure incurs to implement the Order should be considered. Mr. Harington has included in the efficiencies "lost" an extra 6 month period of "run rate" costs after the Tribunal's Order.[282] These are properly characterized as the costs of implementing the Order, not efficiencies lost because of it. Similar to "Order Implementation Efficiencies", these are excluded from the trade-off. The results of a merger review under the *Act* should not be driven by the delays required to properly implement a divestiture order from the Tribunal that results from such a review.[283]

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[279] CB-A-636, email dated April 28, 2021 between Heather McCartney (on behalf of John Cooper) and Dean Bissett, Subject: Transaction Update;

[280] CB-A-897, Mr. Harington's expert efficiencies report for the Tervita/Newalta merger, Table 8, pg 44 and pg 49, para 153;

[281] CA-R-889, Updated Harington Report, pgs 94-95, para 202;

[282] CA-R-889, Updated Harington Report, pg 106, paras 228-229.

[283] *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at para 135; Tervita SCC, *supra*, at para 115.

5) Lost Corporate Efficiencies are Overstated

156. While potential divestiture buyers may have to re-hire certain employees, it is likely somewhat less than Secure estimates.[284] At this stage, although the divestiture buyers are not known and needs will vary according to the purchaser and the Facilities to be divested, the efficiencies that would be realized by any acceptable alternative purchaser should not be included in the trade-off.[285]

6) The Alleged Efficiencies are Contrary to Parliament's Intent

157. The Merger is harmful to the Canadian economy and serves none of the purposes intended to be served by section 96 of the Act.

158. Parliament enacted section 96 of the *Act* in recognition of the relatively small size of Canada's domestic market, with the goal of encouraging Canadian companies to operate more efficiently with reference to international competition.[286] Section 96 was intended to achieve the economies of scale which would be necessary to counter foreign competition. This is directly tied to the purpose of the *Act*, which is to promote the efficiency and adaptability of the Canadian economy "in order to expand opportunities for Canadian participation in world markets."[287] Justice Nadon wrote for the Tribunal in *Superior Propane III* that the "primary reason for amending" the *Act* was "the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international competition to which the government was committed and which would ultimately benefit consumers."[288] In other words, the efficiency defence was intended to allow Canadian firms to "compete more effectively with large foreign enterprises at home and abroad."[289]

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[284] CB-A-905 Expert Report of J. Gregory Eastman, pdf pg 41 para 93 and pg 43, Table 4; Testimony of Cam MacLean, Hearing Transcript Vol 3 pg 454:7-479:4; P-A-029 Reply Witness Statement of Clean Harbors, pgs 4-5 paras 12-13.
[285] CCS, *supra*, at para 267.
[286] Tervita SCC, *supra*, at paras 87 and 167.
[287] Section 1.1 of the *Act*.
[288] Superior Propane III, *supra*, at para 81.
[289] Superior Propane III, *supra*, at paras 145-146.

159. The present Merger is a purely domestic one. Secure bought a domestic rival not in order to compete more effectively internationally, but to consolidate its hold on the domestic market. In this case, not only is the efficiencies defense contrary to Parliament's purpose but, as set out above, the statute as drafted also does not support a finding that the defence is available on the facts of this case.

7) Location of Secure's Shareholders

160. As noted above, Secure has the burden to show that its alleged gains will benefit the Canadian economy.[290] The Commissioner has identified evidence in the record in response to the Tribunal's question regarding the location of Secure's largest shareholders.[291] While it is Secure's burden to demonstrate every element of its efficiencies defense, the Commissioner has not otherwise pursued arguments based on the "fourth screen"[292] in this particular case.

C) The Anti-Competitive Effects of the Merger

161. The Commissioner must prove anti-competitive effects.[293] In this case the Commissioner has quantified two sources of anti-competitive effects of the Merger: (1) anti-competitive effects caused by Secure shutting down 35 Facilities; and (2) anti-competitive effects caused by the reduction in output resulting from increased prices to Producers.

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[290] Section 1.1 of the *Act*; Superior Propane III, *supra*, at para 196-197; CCS, *supra*, at para 262 ("fourth screen"); MEGs, *supra*, para 12.20 (fourth bullet).
[291] P-A-156, Secure Notice of Annual Shareholder Meeting of April 29, 2022, pg 72 identifies two shareholders with 10% or more of Secure's outstanding Common Shares: Angelo Gordon & Company LP (15.1%) and Solus Alternative Asset Management LP (12.3%). Angelo Gordon & Company LP describes itself on its website as an "alternative investment firm" with "offices across the U.S., Europe and Asia": <https://www.angelogordon.com/about/, accessed 2022-06-09. Solus Alternative Asset Management LP describes itself on its website as a "SEC-registered, private investment advisor" and lists contact information in New Jersey, USA: <https://www.soluslp.com/global/Firm> and <https://www.soluslp.com/global/ContactUs>, accessed 2022-06-09.
[292] CCS, *supra*, at para 262.
[293] Tervita SCC, *supra*, at paras 122 and 124; Superior Propane I, *supra*, at para 403; Superior Propane II, *supra*, at paras 157 and 177; Canada (Commissioner of Competition) v Superior Propane Inc, 2003 FCA 53 ("**Superior Propane IV**"), at para 35.

162. The Commissioner is not alleging that there are any socially adverse wealth transfer effects from the Merger, so the Tribunal will apply the total surplus standard – which means assessing the DWL.[294]

1) DWL from Facility Closures

163. Secure's closure of 35 Facilities has caused and will cause a DWL to the Canadian economy of $62 million a year. Dr. Miller's DWL from Facility Closures is $72 million but Dr. Duplantis has identified that Dr. Miller included the full facility margin from Facilities that Secure intends to partially close. Dr. Duplantis identifies that taking this into account reduces the $72 million Facility closure effect by up to $10 million.[295]

a. The Tribunal has recognized that DWL can occur as a result of non-price effects

164. This is the first merger challenge where DWL due to both price and non-price effects has been quantified. In this case, the non-price effects relate to the economic efficiency lost due to Facility closures. When a Facility closes, Producers that previously relied on that Facility are forced to select less valuable disposal options.

165. Section 96 refers without limitation to "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger". The word "effects" is interpreted to include all the anti-competitive effects to which a merger in fact gives rise, having regard to all of the statutory purposes of the *Act*.[296] One of the purposes of the *Act* is "to provide consumers with competitive prices and product choices."[297]

166. The Tribunal has recognized that anti-competitive effects can result from the loss of surplus that is produced from buyer substitution to less preferred options, and

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[294] CCS, para. 284.
[295] CA-A-060, Miller Reply, pg 37-45, paras 88-105. Testimony of Dr. Duplantis, Hearing Transcript, Vol 13, pg 2081:8 to 2082:20.
[296] Superior Propane II, *supra*, at paras 90-92 per Evans JA.
[297] Section 1.1 of the *Act*.

which is not recaptured by the seller. In *Superior Propane III*, the Tribunal found that certain services and pricing arrangements that were offered by ICG but not by Superior Propane constituted ways in which ICG had sought to differentiate itself from its competition in selling propane. The Tribunal found that the “effects of reduced choice” brought about by the switch from preferred to a less-preferred arrangement would “entail a loss of efficiency as measured, in principle at least, by the deadweight loss”.[298]

167. The Commissioner has not found any foreign decisions quantifying anti-competitive effects resulting from loss of product choice – this is not surprising given that no other G-7 country permits efficiencies to justify what otherwise is a harmful merger to consumers. Non-price effects tend to be non-quantitative in nature, so agencies generally rely less on formal empirical models and more on qualitative evidence to assess the non-price effects of a merger.[299]

b. DWL from loss of product choice is a well established as an economic concept

168. While this is the first case that quantifies DWL from a Facility closure, DWL caused from being deprived of product choice is a well-established economic concept.[300] This reflects the basic intuition that losing access to a preferred product choice deprives the customer of value even if the customer subsequently buys the same volume of a competing product.

169. While the economic research on lost surplus from product choice focusses on consumer products, the economic literature also demonstrates that the same foundation applies to business-to-business transactions. Dr. Miller’s approach is based on standard consumer theory which has at its foundation a utility function. In

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[298] Superior Propane III, *supra*, at para 240.
[299] Organisation for Economic Co-operation and Development (OECD) – Non-price Effects of Mergers, June 6, 2018, pg 4, para 10: “Because non-price effects tend to be non-quantitative in nature, the Agencies rely less on formal empirical models and more on qualitative evidence to assess the non-price effects of a merger”, Book of Authorities, Tab 22.
[300] CA-A-060, Miller Reply, pg 33, para 79. Even Dr. Duplantis conceded that DWL can be caused from loss of product choice (Testimony of Dr. Duplantis, Hearing Transcript, Vol 12, pg 1851:8-19).

this case, that utility function describes the value (i.e. the profits) that a customer, in this case the Producers, derive from sending its waste to a given Facility.[301]

170. When a Producer loses access to its preferred Facility, it is forced to select a higher cost alternative.[302] If the total surplus that was created from a customer transacting with Facility A is $10 and the total surplus that could be created from transacting with Facility B is $8, and Facility A is no longer available, that $2 differential represents a DWL. It is value lost to society because the customer has to transact with a Facility that it knowingly chose not to transact with.

171. The value created by the Facilities is substantial as demonstrated by their margins, market shares, and the qualitative evidence about the multiple dimensions across which Facilities compete to differentiate themselves in the eyes of Producers.

c. The effects suffered by all Producers whose preferred Facility has been shut down is the appropriate measure of DWL

172. Dr. Miller uses a second-score auction model to quantify the anti-competitive effects from Facility closures. With a second-score auction, the variable profit of a Facility equals the total incremental surplus it creates.[303] This means that DWL from Facility closure can be calculated by summing each closing Facility's variable profit.

173. The DWL resulting from Facility closures is $62 million.[304] This reflects the contribution of these Facilities to total surplus that is lost as a result of their closure. The closure of these Facilities is an anti-competitive effect of the Merger and all the DWL associated with those closures is to be included in the trade-off analysis regardless of whether the DWL occurs in the Relevant SLC Markets or not. Section 96 clearly states that the trade-off is to be effectuated in respect of "the effects of any prevention or lessening of competition that will result or is likely

[301] Testimony of Dr. Nathan Miller, Hearing Transcript, Vol 5, pgs 761–8 - 762:19.
[302] CA-A-034, ConocoPhillips Statement, pg 4, para 13; CA-A-040, CNRL Statement, pg 5, para 15; CA-A-109, TAQA Statement, pg 4, para 11.
[303] CA-A-057, Miller Report, pg 90-91, Exhibit 23 and para 152.
[304] CA-A-060, Miller Reply, pg 37, paras 88.

to result from the merger or proposed merger". No further restriction is placed on the effects that are to be considered in the trade-off.

174. Secure argues that the Facility closure effects should not count because the effects do not result from an increase to market power.[305] The only reason Secure is able to shut down these Facilities is because the shuttered Facilities were close competitors to the absorbing Facilities.[306] Furthermore, the effects depend on the incremental vale of the shuttered Facilities which is dictated by the competition from its next closest competitor.[307] The Facility closure effects would be very different in a market with 100 relatively close alternatives versus a market, such as the case here, where there are relatively few alternatives.[308]

175. If the Tribunal concludes that the effects from the Merger should be restricted to Producers who were in overlapping draw areas, then the DWL applying the second-score model to these areas is $ [309]

176. Dr. Miller has estimated DWL for Producers in overlap markets using a second method involving Bertrand pricing. In the Bertrand model, the Facilities set a price for each competition market, but do not price discriminate among customers within that market.[310] In other words, the Bertrand model does not allow Secure to extract all of the incremental value that it can under the second-score auction model. Using the Bertrand model, the anti-competitive effects from the Merger are $ [311]

d. The limited relevance of the Waehrer observation

177. Dr. Miller's DWL estimates are driven by the realities of the markets at issue and not by specific modeling assumptions.[312] Those realities include: higher shares,

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[305] Secure Opening Statement, Hearing Transcript, Vol 1, pg 106:1-6.
[306] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 741:3-25; Re-examination of Dr. Nathan Miller, Hearing Transcript, Vol 6, pgs 953:–3 - 954:1.
[307] CA-A-057, Miller Report, pgs 90-91, para 152.
[308] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pgs 742–1 - 743:7.
[309]
[310] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pgs 792:1-5.
[311]
[312] CA-A-060, Miller Reply, pgs 4-10, paras 6-22.

high diversions, and low aggregate elasticities.[313] The estimates are supported by the ample evidence in the record that Producers derive significant incremental value from differentiation between Facilities.[314]

178. Secure attempts to cast doubt that this significant competitive harm exists by relying on the observations of Dr. Waehrer that Dr. Miller's second-score auction model does not explain why a profit-maximizing firm would close a Facility.[315] Dr. Waehrer provides a non-exhaustive list of three possibilities, two of which relate to merger-specific increases in total surplus.[316] To make more of Dr. Waehrer's observation fundamentally mis-represents Dr. Waehrer's commentary.

179. The reason why Facility closures cannot be explained by the second-score auction model is that it is not designed to explain or predict Facilities closures – it is designed to measure the impact of Facility closures in the form of DWL. Secure's executives have testified that Secure either has or will close 35 Facilities. Those closures are happening as a result of the Merger and because the absorbing and closing Facilities are close competitors.[317] Indeed, Mr. Harington's opinion relies on an absorption rate of 100% which is a reflection of just how closely Secure's Facilities competed with Tervita.[318] There is no need in this case for an economic model to predict or explain the Facility closures as they are an anti-competitive effect of the Merger and the second-score auction model enables the quantification of that effect.

2) DWL from Output Reduction

180. Both economic experts agree that there will be a DWL resulting from a decrease in volume caused by the Merger. All three expert economists in this case agree that

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[313] CA-A-060, Miller Reply, pg 4, para 7.
[314] As described in sections Secure and Tervita Competed on , Capacity of the Facility and Ability to , and Other Dimensions of Competition Differentiate Facilities.
[315] CA-R-335, Updated Duplantis Report, pg 11, para 17.
[316] P-R-069, 2021, Paper by Dr. Keith Waehrer – Modeling the effects of mergers in procurement: Comment, pg 5.
[317] Testimony of Dr. Miller, Hearing Transcript, Vol 5, pg 741:3-25; Re-examination of Dr. Nathan Miller, Hearing Transcript Vol 6, pgs 953:–3 - 954:1.
[318]

demand for waste services is relatively inelastic. While Secure was critical of Dr. Miller for not using the transaction data to estimate elasticity of demand, Dr. Yatchew's testimony confirmed Dr. Miller's conclusion that the data was not reliable for estimating elasticity.[319] Dr. Yatchew confirmed in answer to Tribunal questions that the bounds of his elasticity were "not the ones constructed using the precise econometric results" but relied on qualitative evidence to support his conclusions on elasticity.[320]

181. Dr. Miller has calculated that the DWL from the reduction in output resulting from the Merger is around $6 million annually.[321]

182. The Tribunal has asked whether it can decide whether the amount of DWL is different from the amounts put forward by the parties.

183. The *Competition Tribunal Act* grants the Tribunal the jurisdiction to hear and dispose of all applications made under Part VII of the *Act*.[322] By virtue of this jurisdiction, the Tribunal has the power to make findings of fact so long as those findings of fact are grounded in the evidence before it.[323] The Tribunal may even raise and decide on a new issue outside the parties' pleadings if the parties have been given a fair opportunity to respond to it.[324]

184. In this case, the Tribunal would not be deciding a new issue as the DWL is a live issue in the proceeding with evidence from both parties. It is open to the Tribunal to make its own findings of fact with respect to the DWL taking into account the evidence as a whole.[325]

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[319] Testimony of Dr. Yatchew, Hearing Transcript, Vol 11, pg 1749:8 – 1750:25.
[320] Testimony of Dr. Yatchew, Hearing Transcript, Vol 11, pg 1751:1-9.
[321] CA-A-060, Miller Reply, pg 45, para 105.
[322] *Competition Tribunal Act,* R.S.C. 1985, c.19 (2nd Supp.), section 8(1), Book of Authorities, Tab 18.
[323] *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28, at para 61, Book of Authorities, Tab 15.
[324] The Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6, paras 166-167, Book of Authorities, Tab 9; citing Tervita Corporation v Commissioner of Competition, 2013 FCA 28, at paras 71-74.
[325] *Apotex Inc. v. Takeda Canada Inc.,* 2013 FC 1237 at para 167, Book of Authorities, Tab 1, is an example of the Federal Court making a finding with respect to parties' rebate calculations that was in between the estimates of the parties' experts.

D) The Approach to the Section 96 Trade-off

185. The Tribunal asked for the parties' position on the trade-off analysis given the asymmetry of which balancing efficiencies lost as a result of the order against the total effects of the Merger.[326]

186. The Tribunal should take an order-based approach to evaluating cognizable efficiencies.

187. Once the Tribunal has decided on the order, then section 96 requires the Tribunal to determine the cognizable efficiencies that would be lost if the Order were made, as set out in section V.A, above.

188. Once the cognizable efficiencies are assessed, the Tribunal will determine whether the cognizable efficiencies are greater than, and will offset, "the effects of any prevention or lessening of competition that will result or is likely to result from the merger".[327] As described in more detail above, this should include effects felt by Producers that are not in overlap markets. This approach is consistent with the language in Section 96 and is the approach taken by the Tribunal in CCS and in Superior Propane.[328]

189. The Commissioner does not suggest that, in the circumstances of this case, the Tribunal take a market-by-market approach to conducting the trade-off. That is, the Tribunal should not determine whether a Facility should be included in the order based on an analysis of the cognizable efficiencies that can be attributed to that Facility against the DWL suffered by customers in markets where the Facility is present. Rather the Tribunal should weigh the total cognizable efficiencies against the total effects from the Merger.

[326] Hearing Transcript, Vol 16, pgs 2813:5 - 2814:8.
[327] Section 96 of the *Act*.
[328] CCS, *supra*, at para 281; Commissioner of Competition v Superior Propane Inc, 2002 Comp Trib 16 ("**Superior Propane III**"), at para 149.

E) Secure Has Failed to Prove that the Good Outweighs the Bad

190. As noted above, Secure bears the burden of proving that the efficiency gains from the Merger will be greater than and offset the socially adverse effects of the lessening of competition, viewed from the standpoint of the economy as a whole and the general public interest.[329] Section 96 is in substance a balancing test intended to balance the potential for good against the potential for harm.[330] The Tribunal's analysis will consider quantitative efficiencies and effects, and qualitative efficiencies and effects, before reconciling the "whole universe" of relevant factors into an ultimate determination.[331]

191. Since Secure must show efficiencies that are both "greater than" and "offset" the proven effects, a failure to show either is fatal to its defense.

1) Secure Has Not Shown Efficiencies are "Greater Than" DWL

192. The DWL from the Merger exceeds the amount of cognizable efficiencies that have been demonstrated by Secure. The term "greater than" suggests a numerical comparison of the magnitude of efficiencies versus the extent of anti-competitive effects.[332] As described above, Dr. Miller has provided three estimates of DWL. Even if the Tribunal finds that Dr. Miller's lowest estimate of $37.13 million is the only DWL from the Merger, this is still greater than Secure's claimed efficiencies of $█████ million that would be lost from the Commissioner's proposed divestiture order.

2) Secure Has Not Shown Efficiencies "Offset" DWL

193. Section 96 of the *Act* also requires that Secure show that its claimed efficiencies "offset" the adverse social effects of the Merger. It has not done so. The "offset"

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[329] *Tervita SCC*, *supra*, at para 89; Superior Propane IV, *supra*, at para 64; Superior Propane II, *supra*, at para 177 and 157; Economic Council of Canada Interim Report on Competition Policy (1969), at pg 114, Book of Authorities, Tab 20.
[330] Tervita SCC*, supra,* at para 90; Superior Propane II, *supra*, at para 75; Economic Council of Canada Interim Report on Competition Policy (1969) at p 112, Book of Authorities, Tab 20.
[331] Tervita SCC, *supra*, at para 147.
[332] Tervita SCC, at paras 144 and 149.

requirement refers to a subjective analysis of the considerations that cannot be compared because they have no common measure (ie. a "balancing of incommensurables").[333]

194. The $76 million in DWL is not offset by Secure's claims that as a result of the Merger it will improve customer service. Little weight should be given to these claims and in fact, as Mr. Harington recognized on cross-examination, these are speculative.[334]

VI RELIEF SOUGHT

195. As set out in the Commissioner's Amended Amended Notice of Application, the Commissioner seeks an Order requiring Secure to dispose of the Facilities listed in Appendix A, and requiring Secure to pay the Commissioner's costs of this proceeding.

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[333] Tervita SCC, at para 144.

[334]

APPENDIX A

DIVESTITURE FACILITIES

Treatment, Recovery and Disposal	Solid Waste Disposal
Boundary Lake	08-09
Brazeau	Kakwa
Buck Creek	Mile 103
Coronation	Moose Creek
Eckville	Swan Hills
Elk Point	
Fort McMurray	**Landfill**
Fox Creek East	Elk Point
Fox Creek	Fox Creek
Gordondale	La Glace
Grande Prairie Industrial	Marshall
Green Court	Silverberry
Gull Lake	South Wapiti
Judy Creek	Spirit River
Kindersley	Willesden Green
La Glace	
Mitsue	
Niton Junction	
Silverberry	
South Taylor	
South Wapiti	**Caverns**
Spirit River	Lindbergh
Stauffer	Unity
Valleyview	
West Edson	

APPENDIX B

LOCAL MARKET EVIDENCE SUMMARY

KEY REFERENCES

CA-A-919, Response to Tribunal Communication 20 May 2022 re Exhibit CAA065

SECURE & TERVITA RECORDS

CB-A-206, Tervita CVR Information January 2017-April 2021

CB-A-864, Combined Tervita DOAs

CB-A-866, Combined Tervita Opportunity Approval Requests (OPP)

CB-A-566, Letter from Stephanie Frazer, Norton Rose LLP, to Jason Wilkins, Dunphy Best Blocksom LLP dated Sptember 4, 2020 re: CCS Corporation v Secure Energy Serivces Inc, et al. Action No. 0701 -13328 – Conf Level B

CB-A-448, July 4, 2018 Price Increase Discussion – Northern Region Presentation – Conf Level B

CB-A-794, 2020 TRD Cavern Strategy dated August 20, 2020

CB-A-774, 2020 Landfill Strategy v.2 dated February 25, 2020 – Conf Level B

CB-A-794, 2020 TRD Cavern Strategy dated August 20, 2020 – Conf Level B

CB-A-800, Facility Landfill Review dated February 13, 2018 – Conf Level B

CB-A-860, Tervita Facility Sales Plan Q3 2020 dated July 15, 2020 – Conf Level B

Exhibits from CB-R-153, Witness Statement of David Engel – Conf Level B

WITNESS STATEMENTS

CA-A-008, Witness Statement of Mr. Joshua Ryan McSween (DEL Canada GP Ltd)

CA-A-012, Witness Statement of Mr. Paul Dziuba (Chevron Canada Resources) – Conf Level A

CA-A-031, Witness Statement of Orphan Well Association - Conf Level A

CA-A-040, Witness Statement of David Hart (Canadian Natural Resources Limited) - Conf Level A

CA-A-096, Witness Statement of Jarred Anstett, Murphy Oil - Conf Level A

CB-A-098, Witness Statement of Jeffrey Biegel, Sharp 2000 - Conf Level B

CA-A-136, Witness Statement of Strathcona Resources Ltd - Conf Level A

CA-A-109, Witness Statement of Nigel Wiebe, TAQA - Conf Level A

CA-A-132, Witness Statement of Ryan Kaminski, Catapult - Confidential Level A

CB-R-869, Witness Statement of Keith Blundell – Confidential Level B

FACILITIES

1. 08-09 SWD
2. Boundary Lake TRD
3. Brazeau TRD
4. Buck Creek TRD
5. Coronation TRD
6. Eckville TRD
7. Elk Point Landfill
8. Elk Point TRD
9. Fort McMurray TRD
10. Fox Creek East TRD
11. Fox Creek Landfill
12. Fox Creek TRD
13. Gordondale TRD
14. Grande Prairie Industrial TRD
15. Green Court TRD
16. Gull Lake TRD
17. Judy Creek TRD
18. Kakwa SWD
19. Kindersley TRD
20. La Glace Landfill
21. La Glace TRD
22. Lindbergh Cavern
23. Marshall Landfill
24. Mile 103 SWD
25. Mitsue TRD
26. Moose Creek SWD
27. Niton Junction TRD
28. Silverberry Landfill
29. Silverberry TRD
30. South Taylor TRD
31. South Wapiti Landfill
32. South Wapiti TRD
33. Spirit River Landfill
34. Spirit River TRD
35. Stauffer TRD
36. Swan Hills SWD
37. Unity Cavern
38. Valleyview TRD
39. West Edson TRD
40. Willesden Green Landfill
41. Willesden Green TRD

KEY FIGURES[1]

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Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

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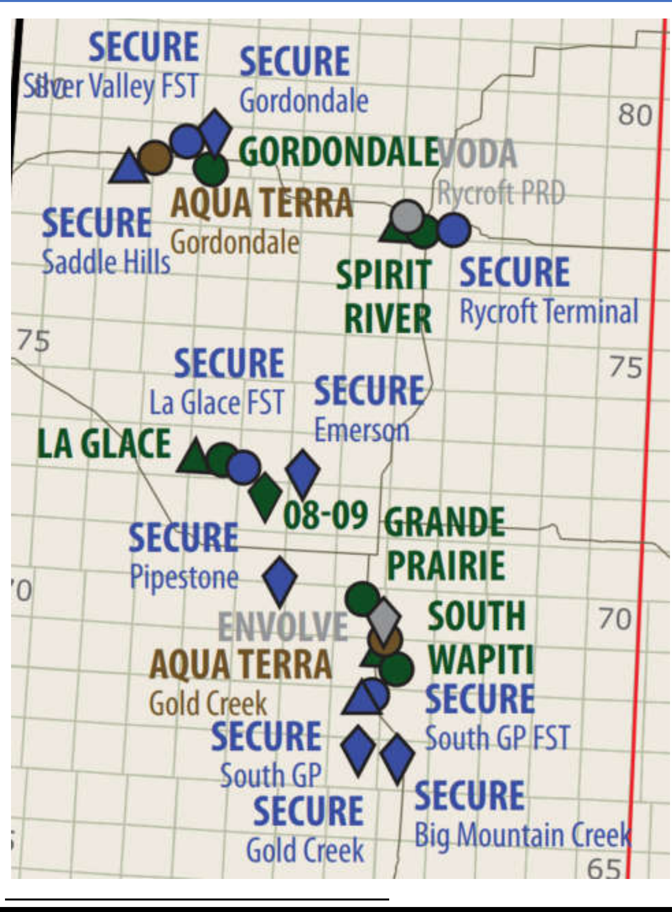

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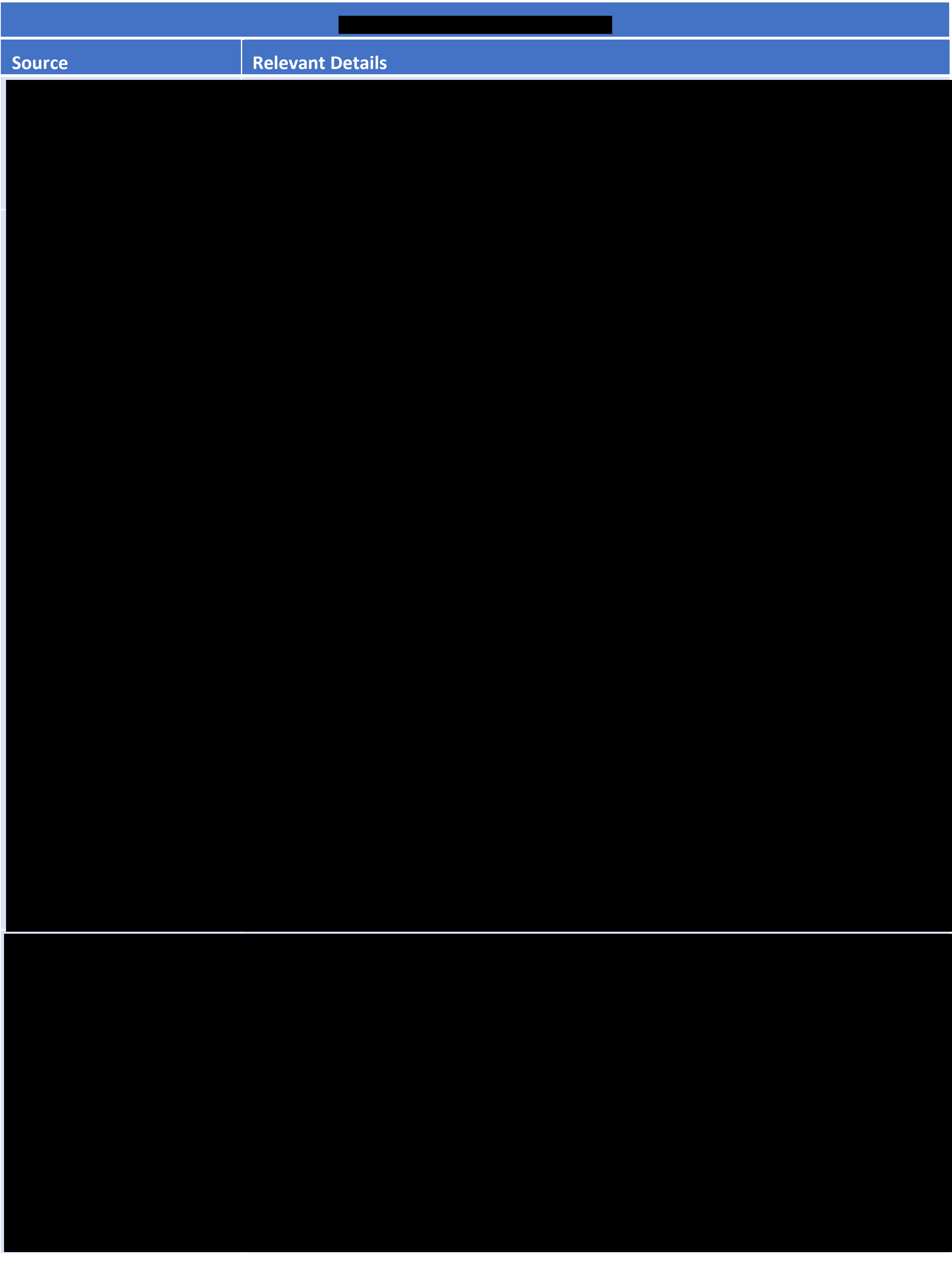

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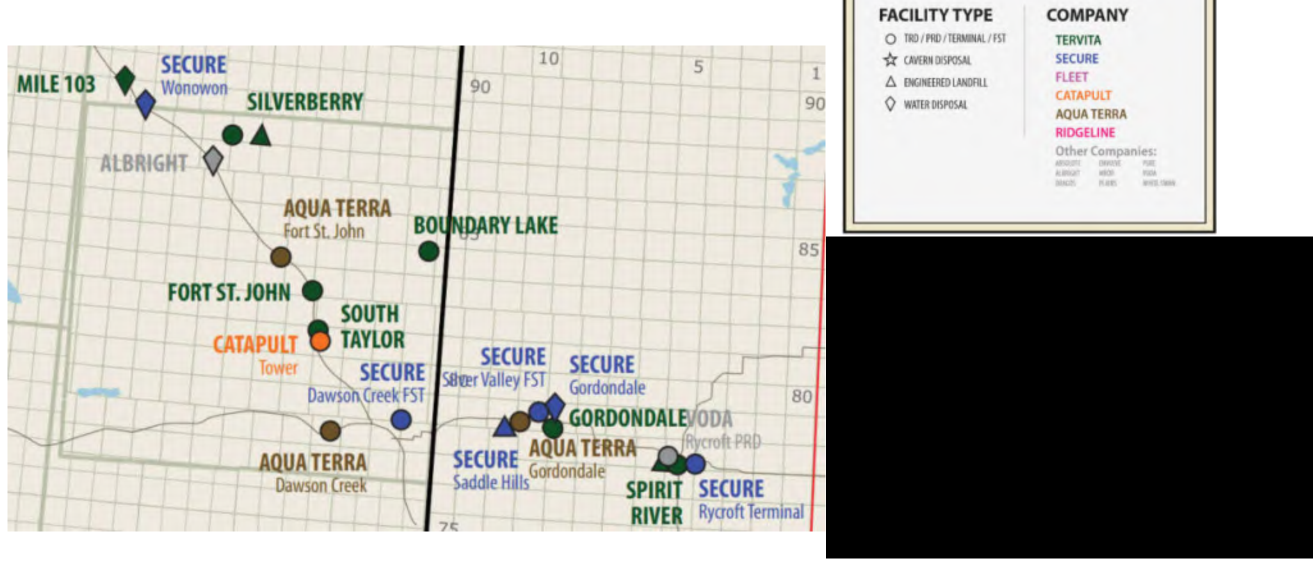

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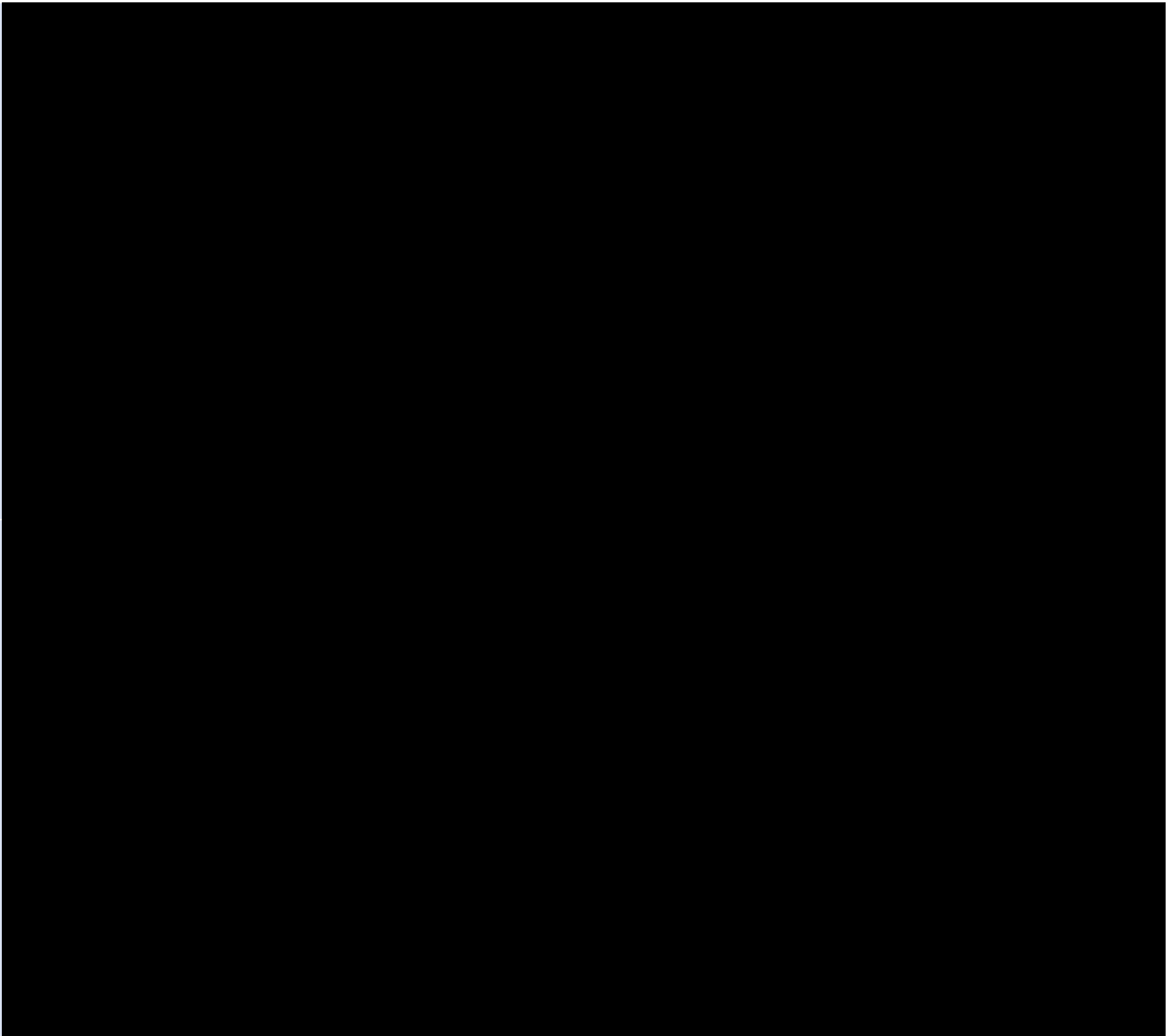

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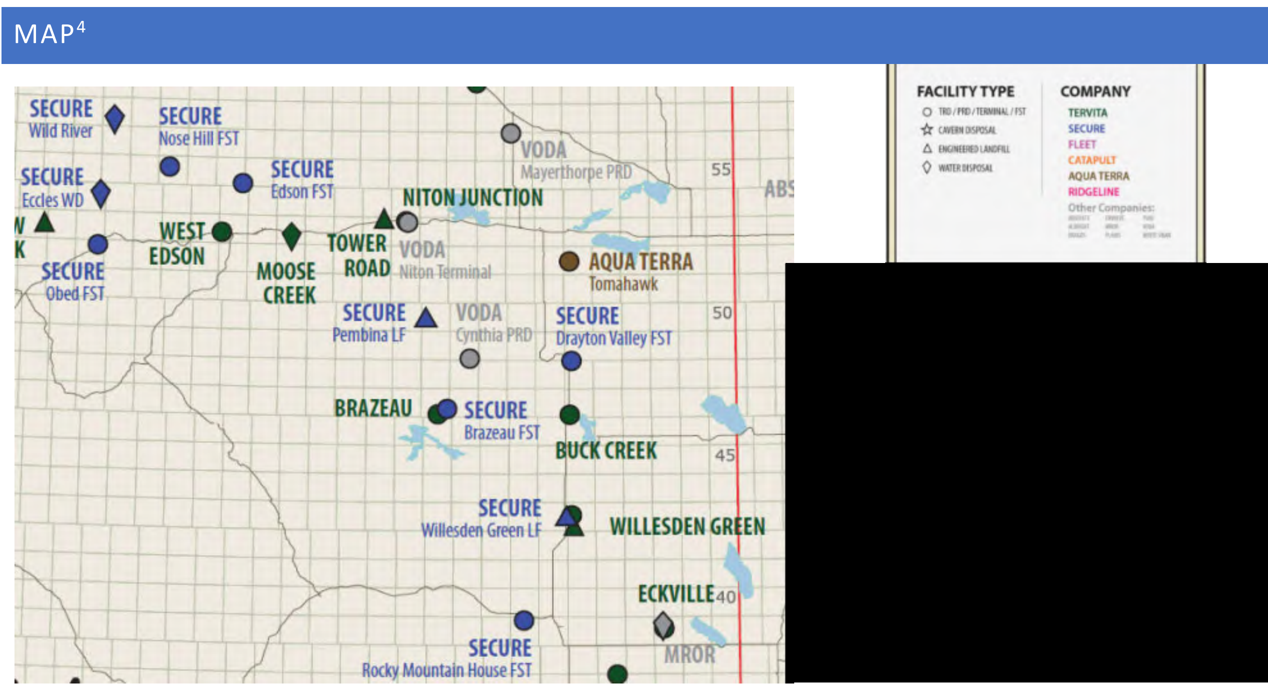

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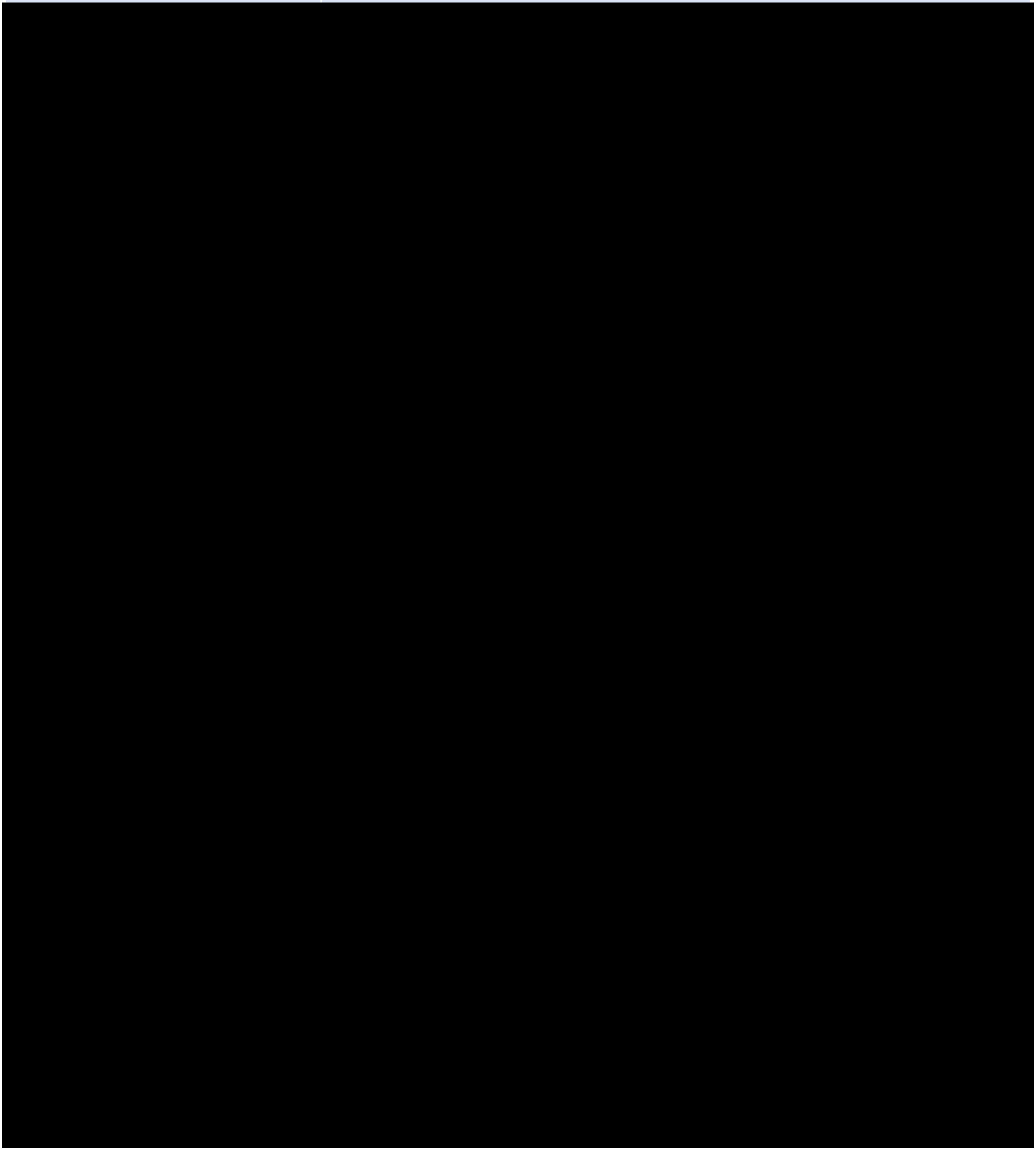

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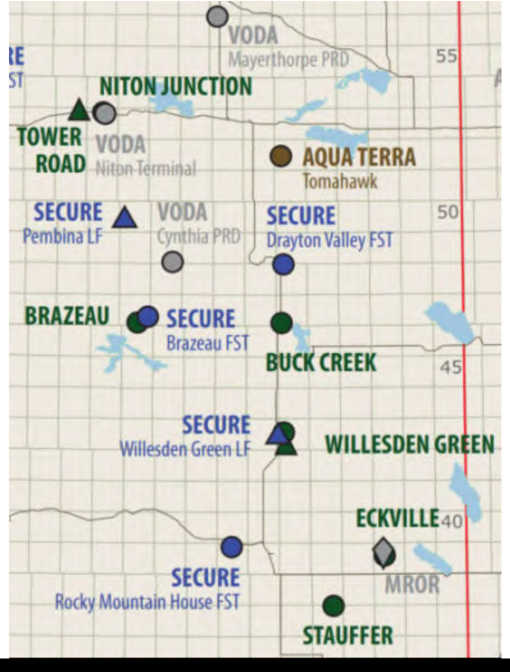

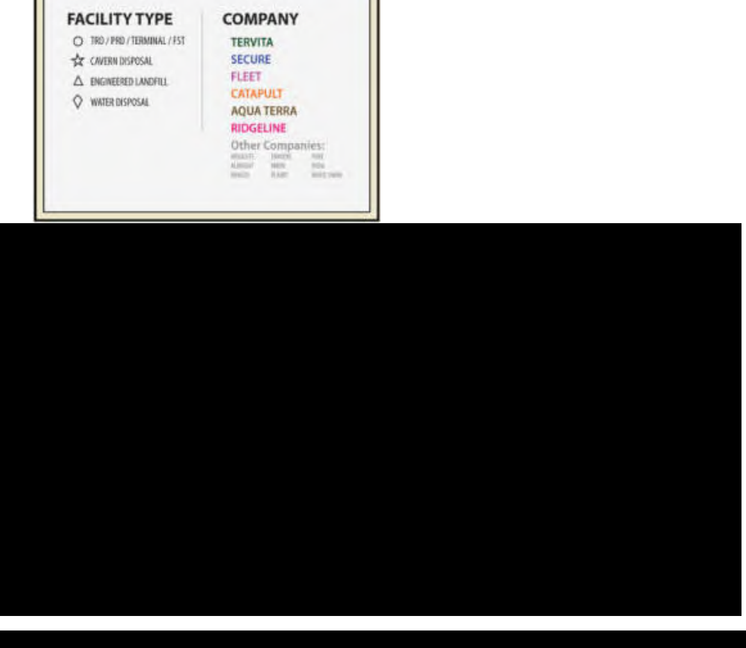

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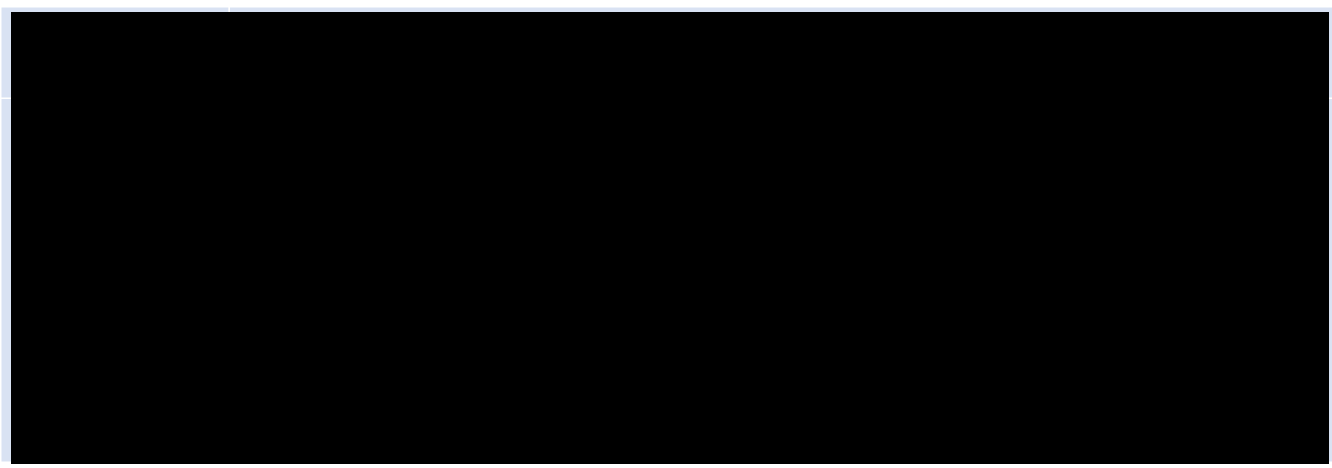

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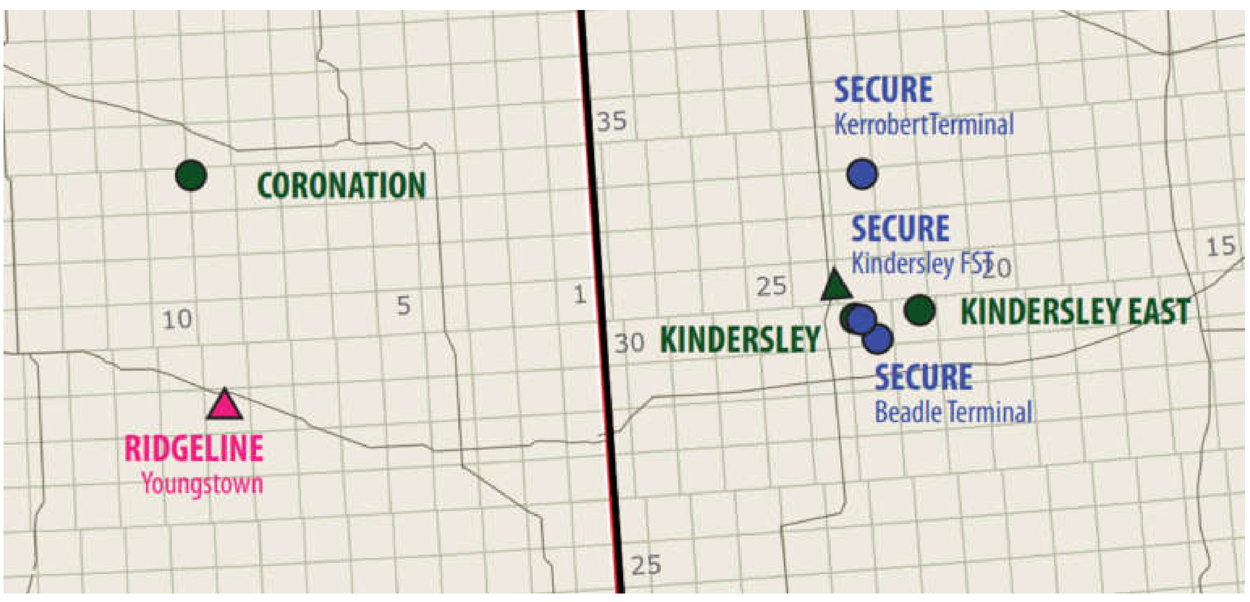

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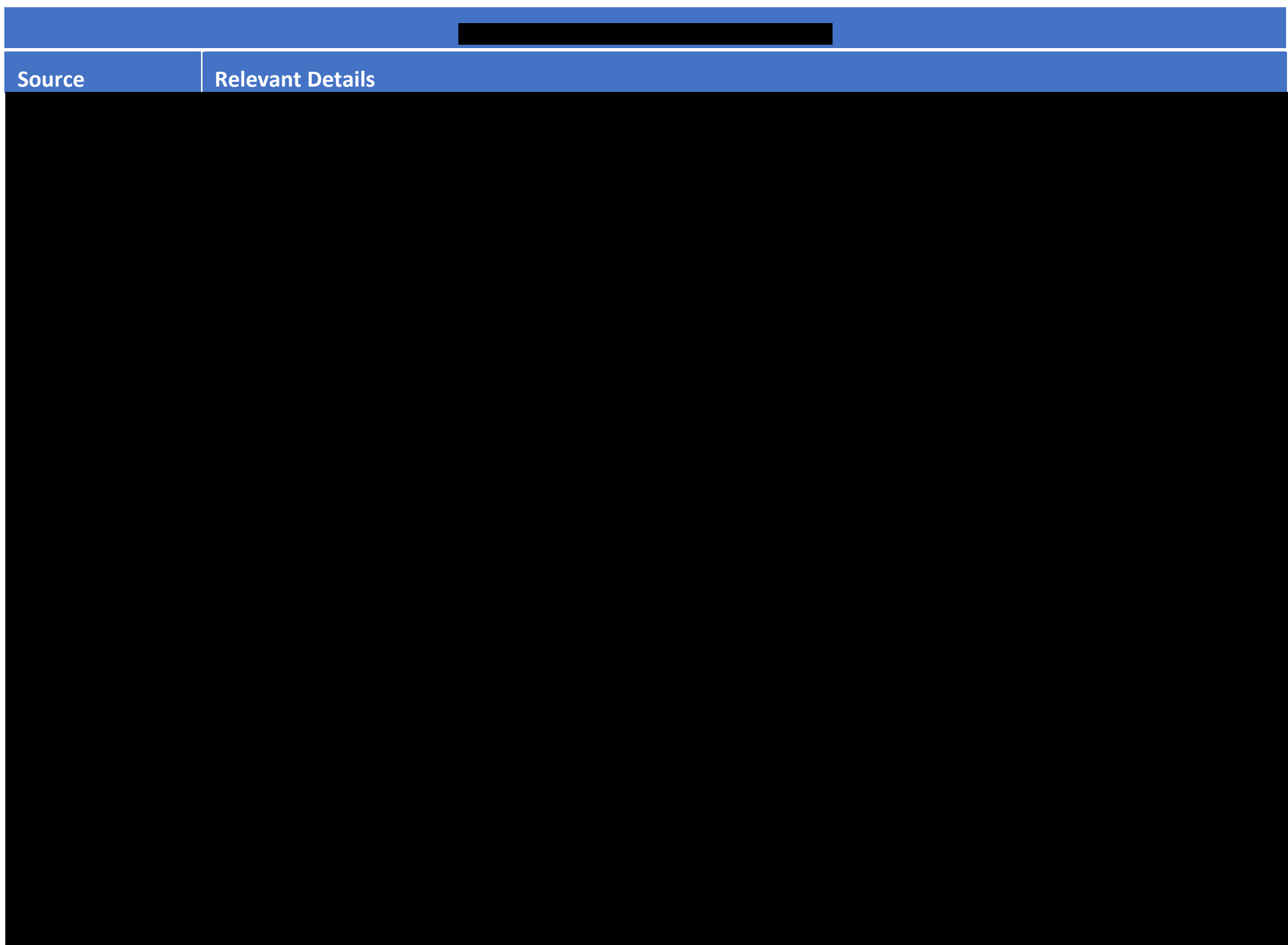

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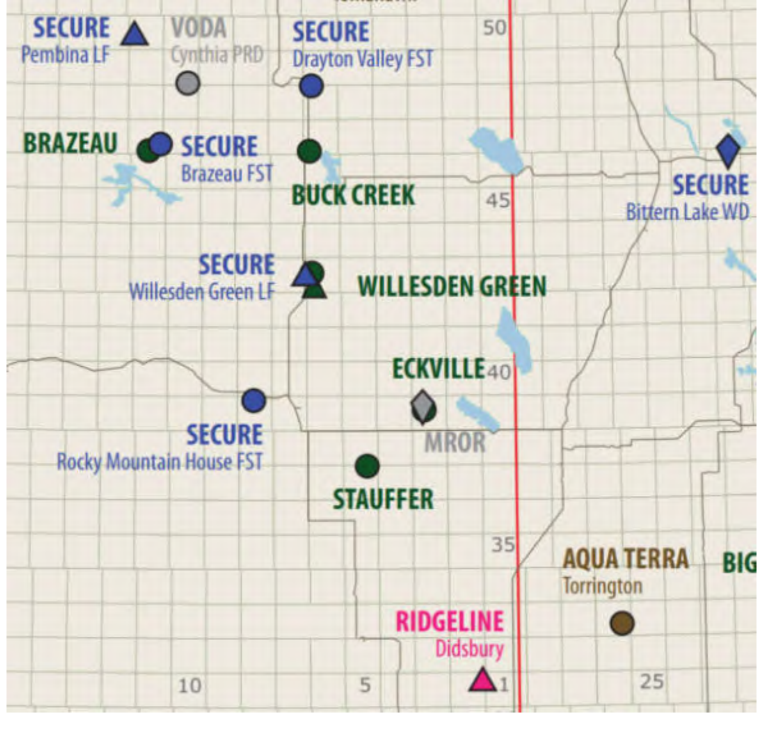

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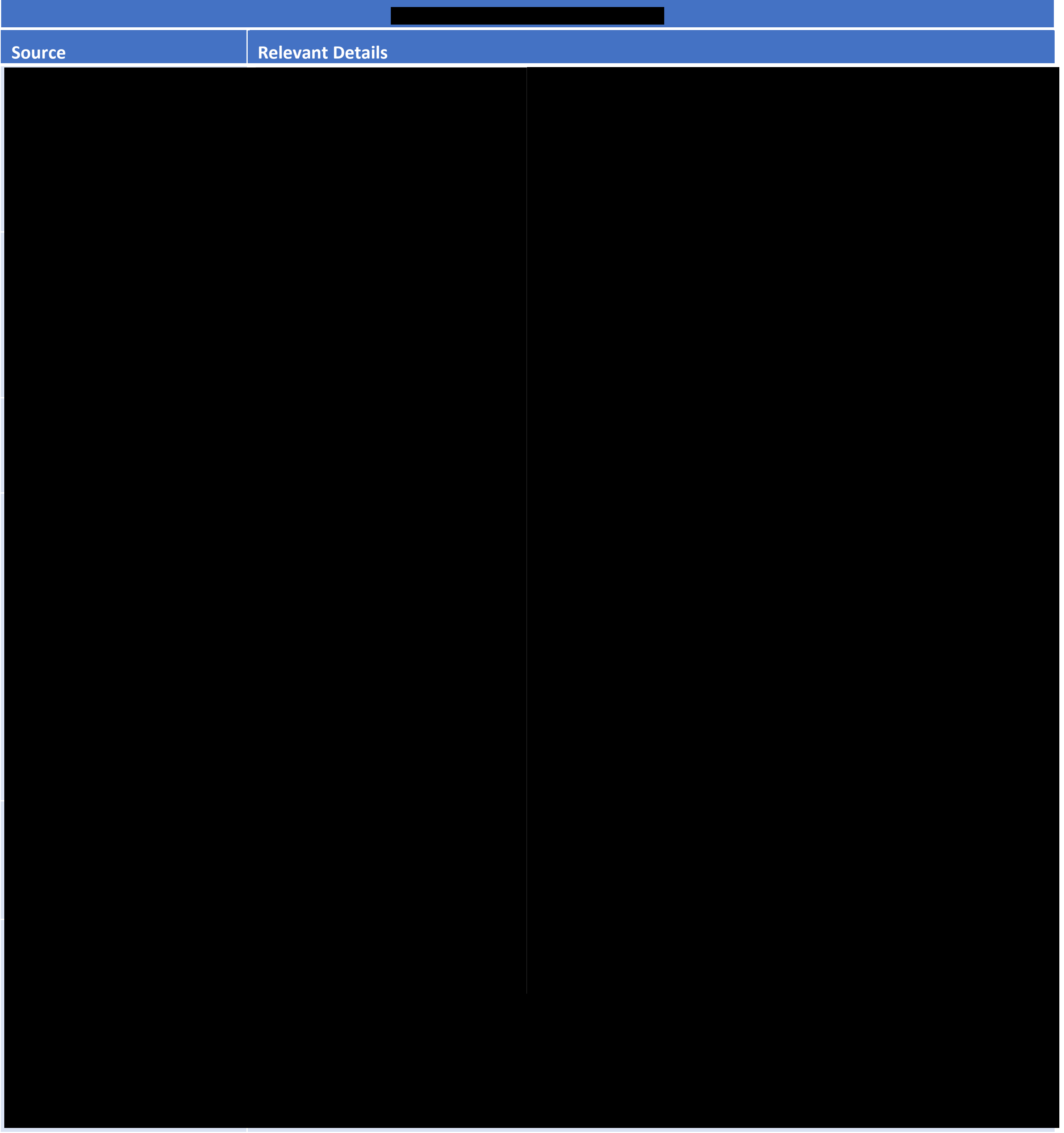

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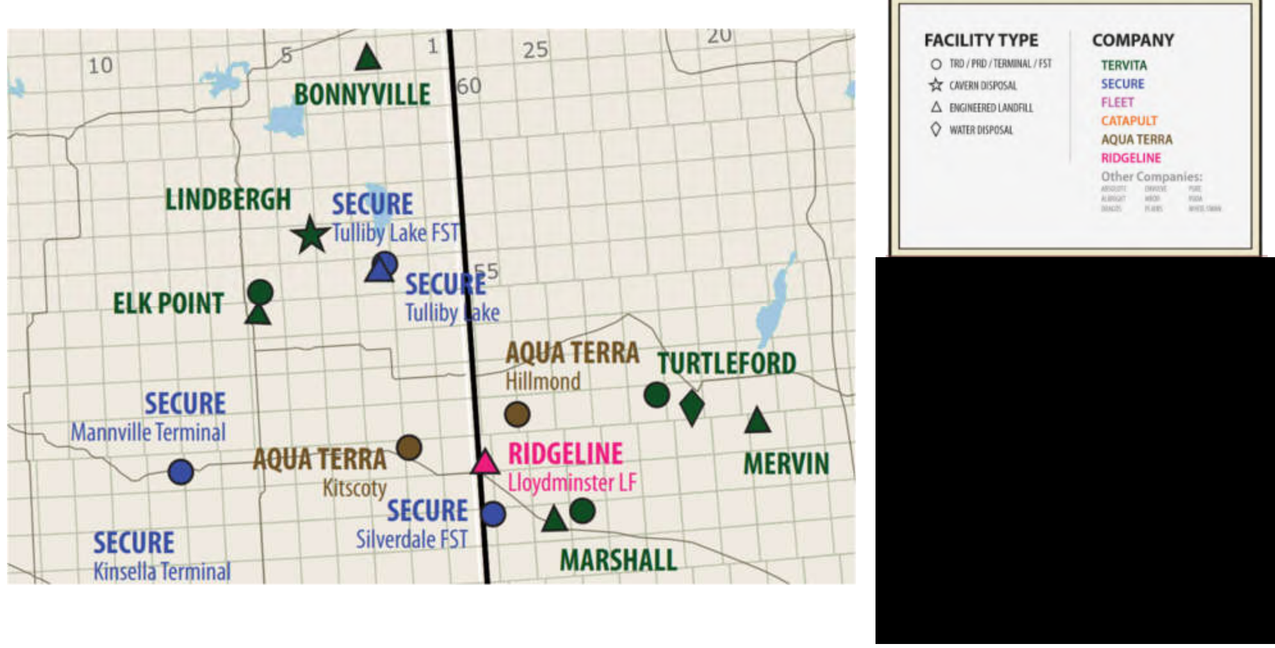

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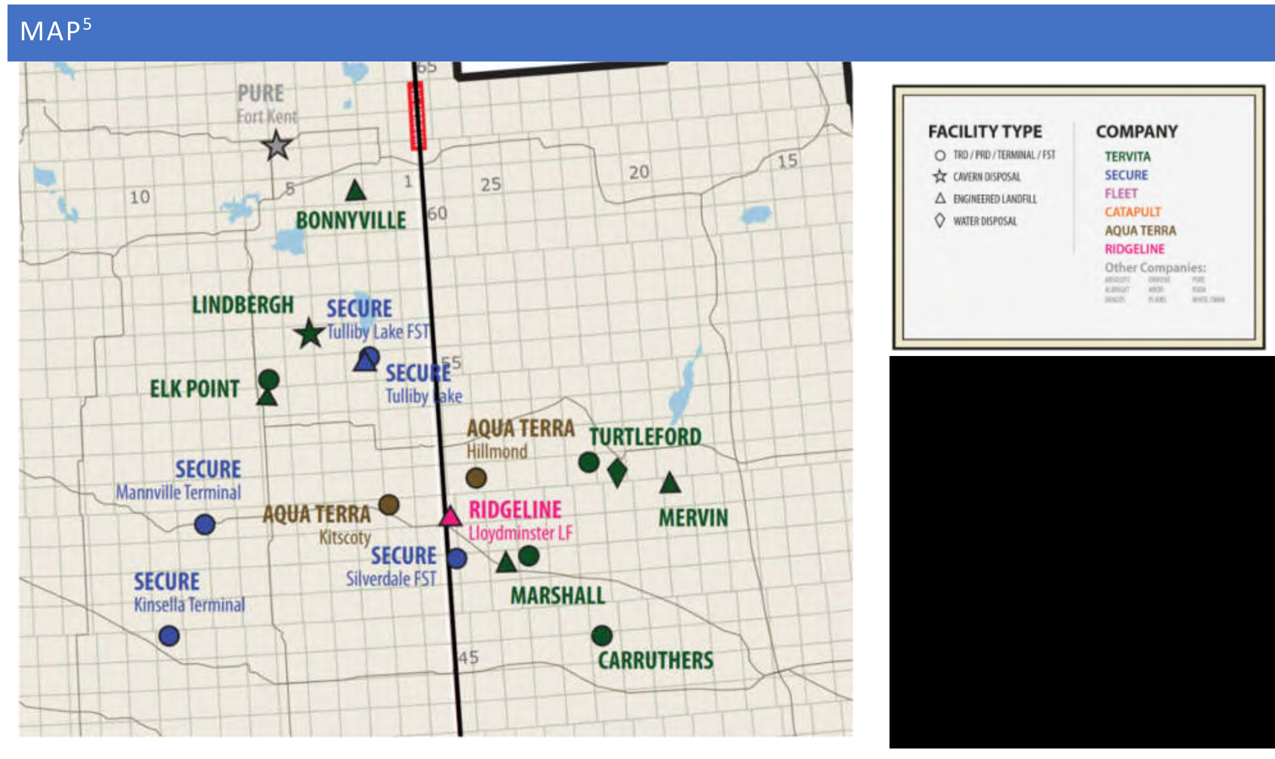

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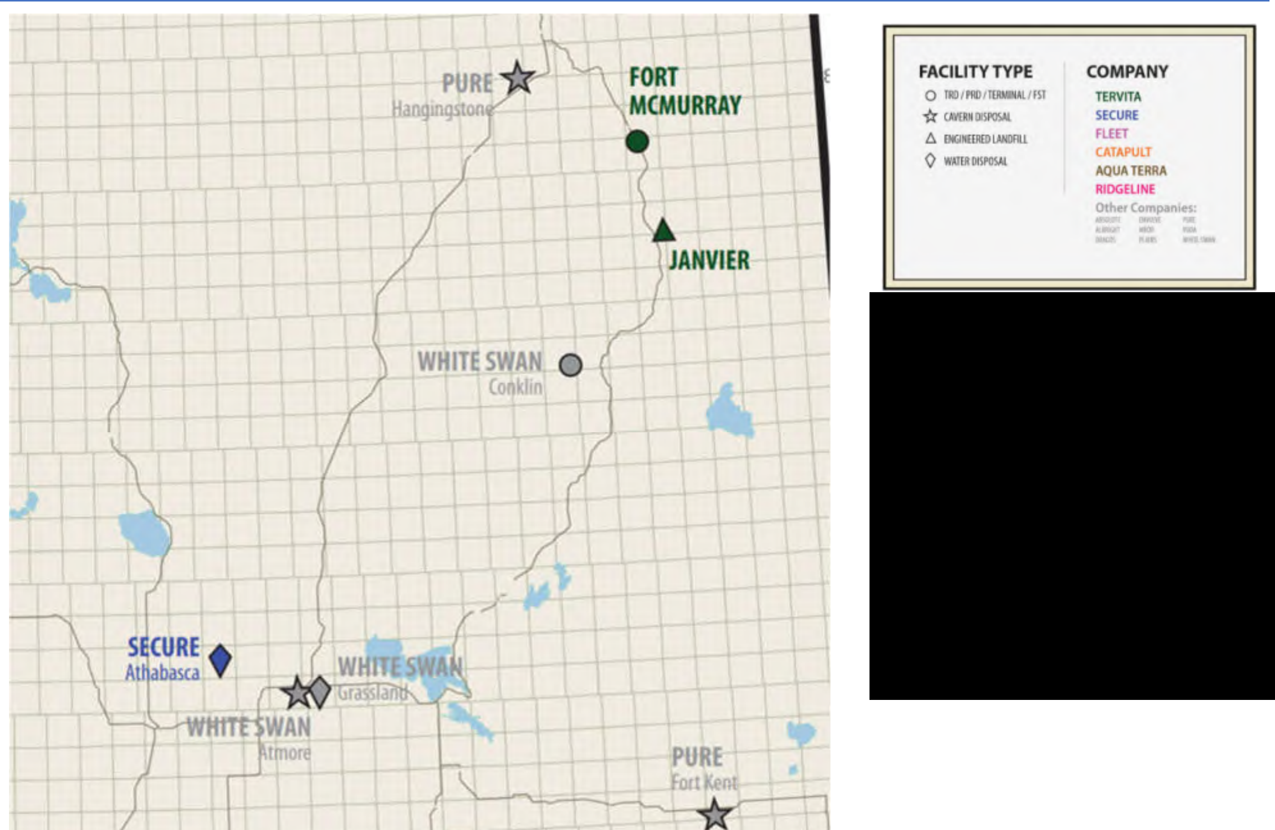

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VALLEYVIEW
VALLEYVIEW WEST
DRAGOS
VODA Swan Hills Terminal
SECURE Fox Creek
FOX CREEK EAST
SECURE Fox Creek FST
SECURE Tony Creek
SWAN HILLS
JUDY CREEK
SECURE Judy Creek FST
SECURE Kaybob
FOX CREEK
CATAPULT Fox Creek
SECURE Kaybob South
CATAPULT Bigstone
GREENCOURT
SECURE Wild River
SECURE Nose Hill FST
VODA Mayerthorpe PRD
SECURE
SECURE

FACILITY TYPE
TRD / PRD / TERMINAL / FST
CAVERN DISPOSAL
ENGINEERED LANDFILL
WATER DISPOSAL

COMPANY
TERVITA
SECURE
FLEET
CATAPULT
AQUA TERRA
RIDGELINE
Other Companies:

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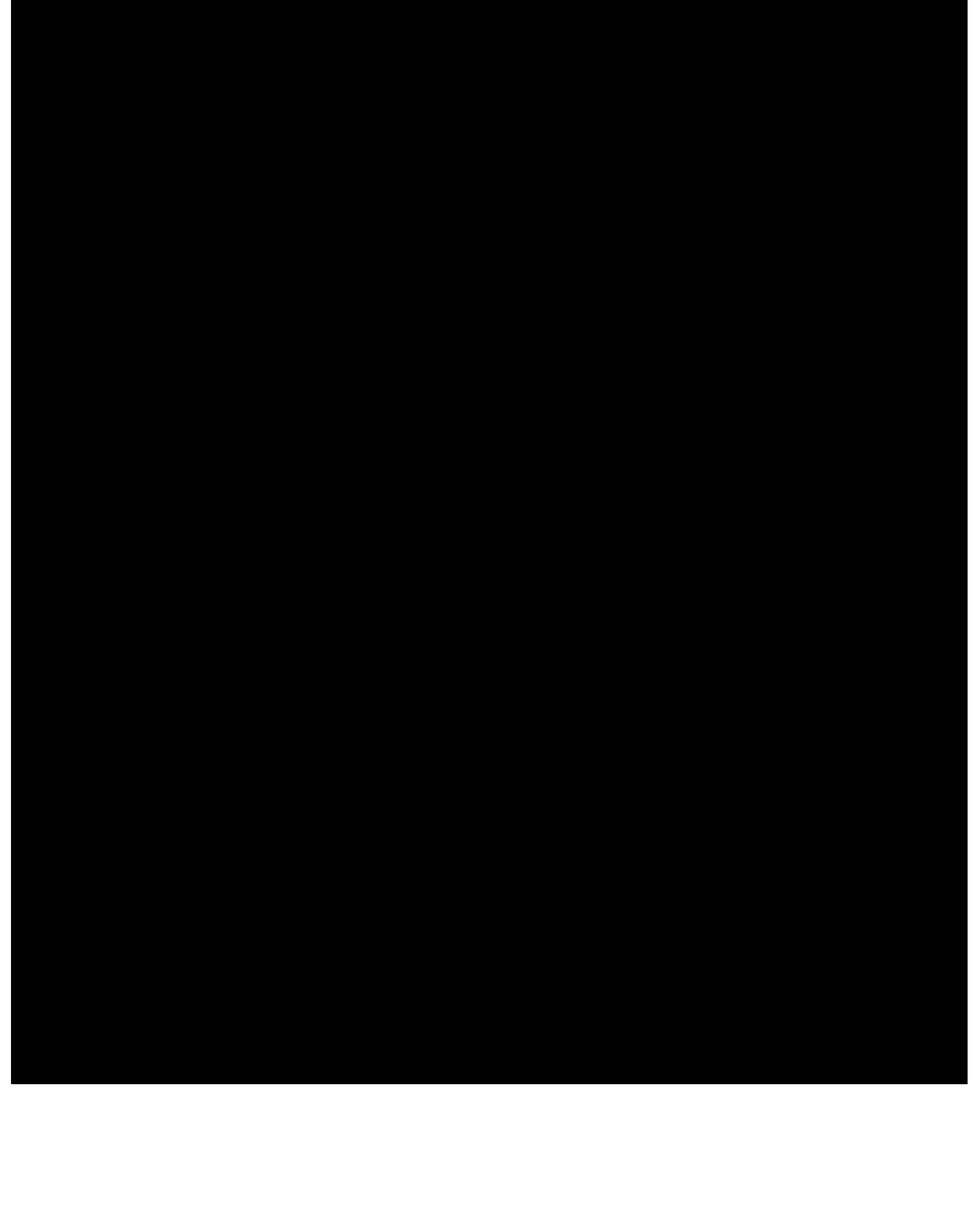

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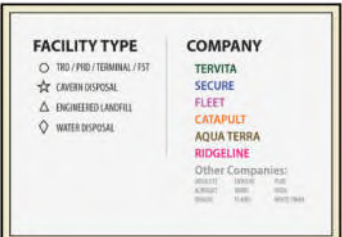

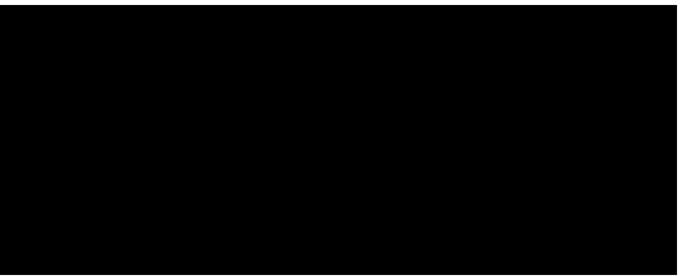

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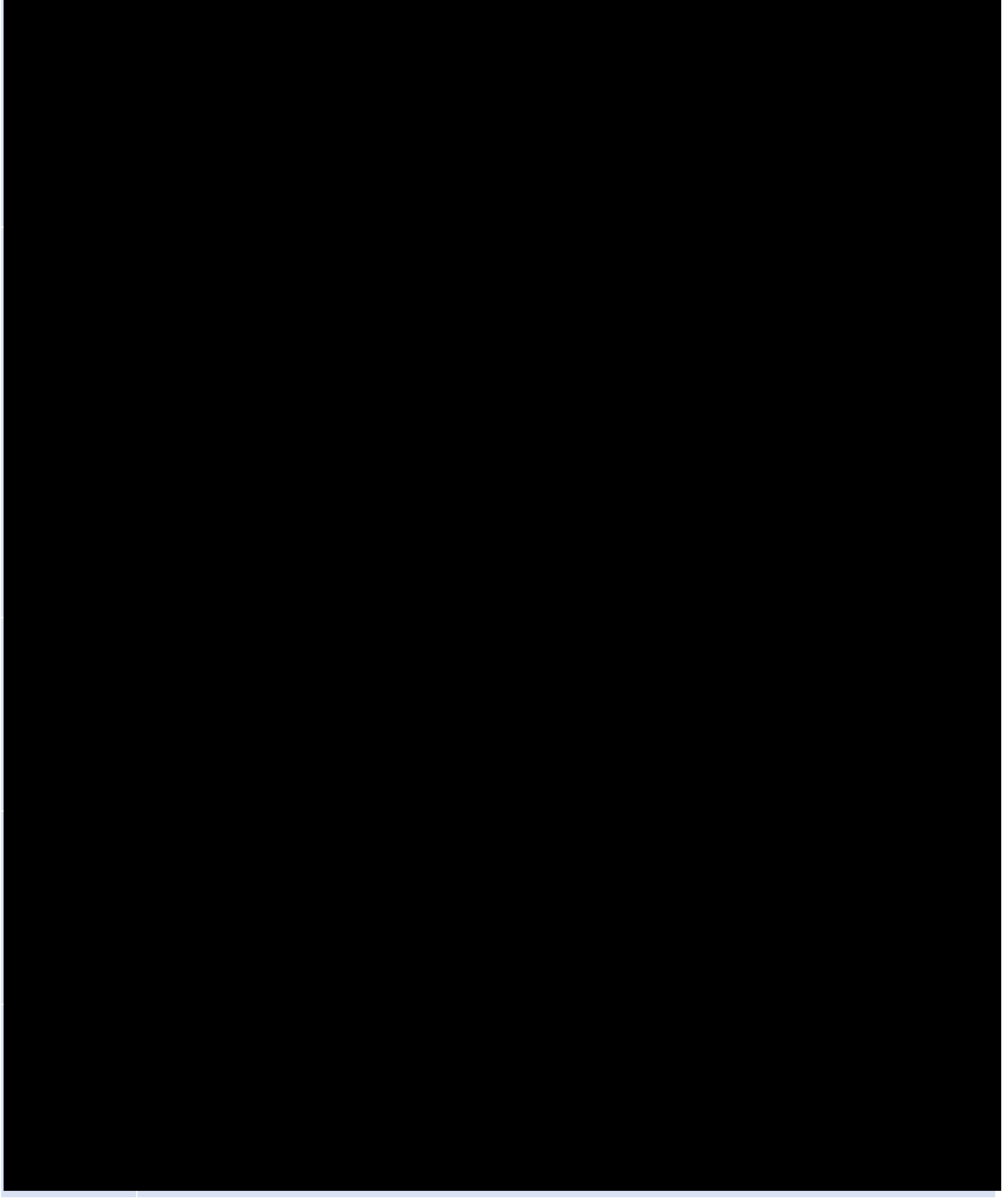

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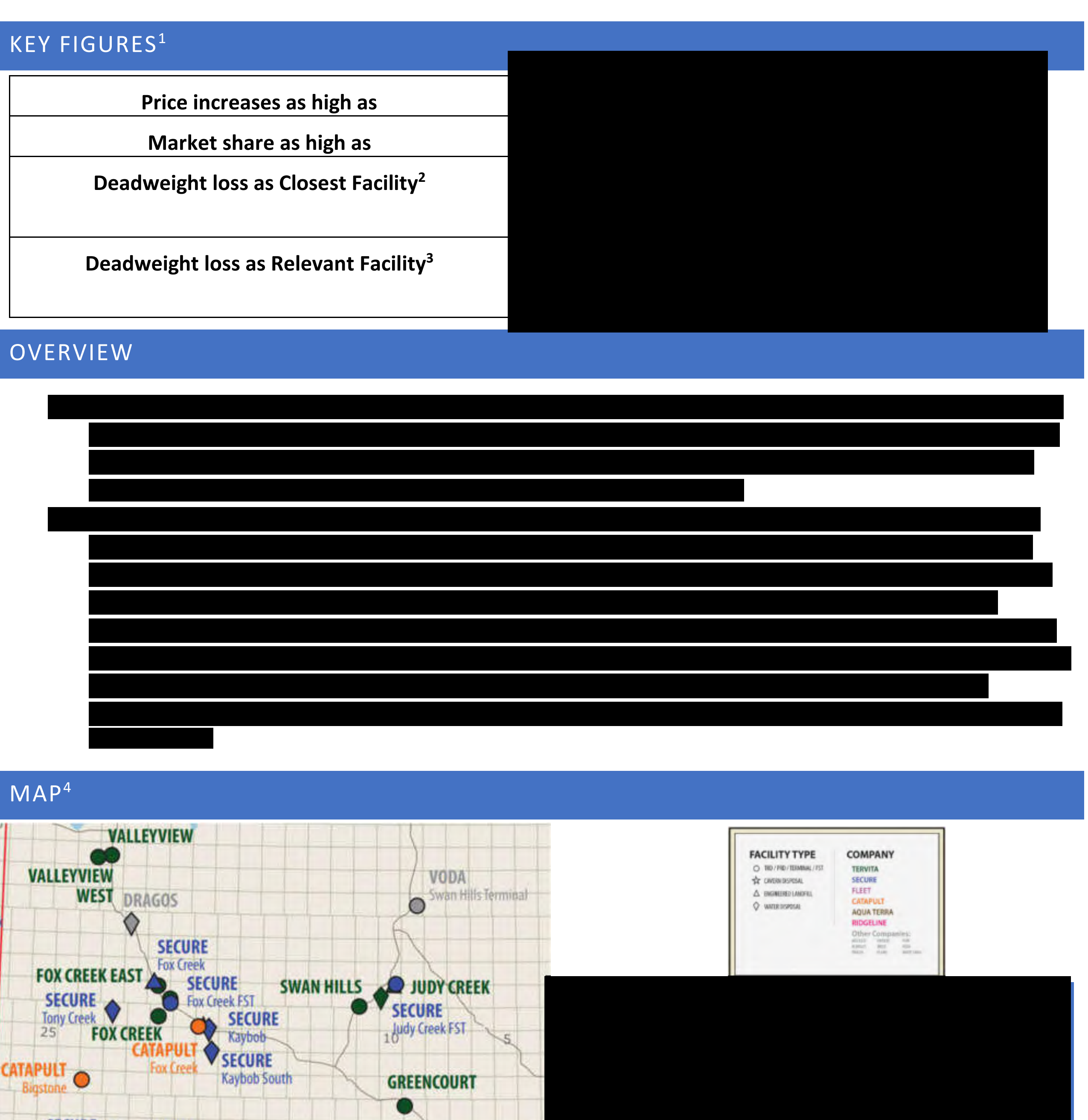

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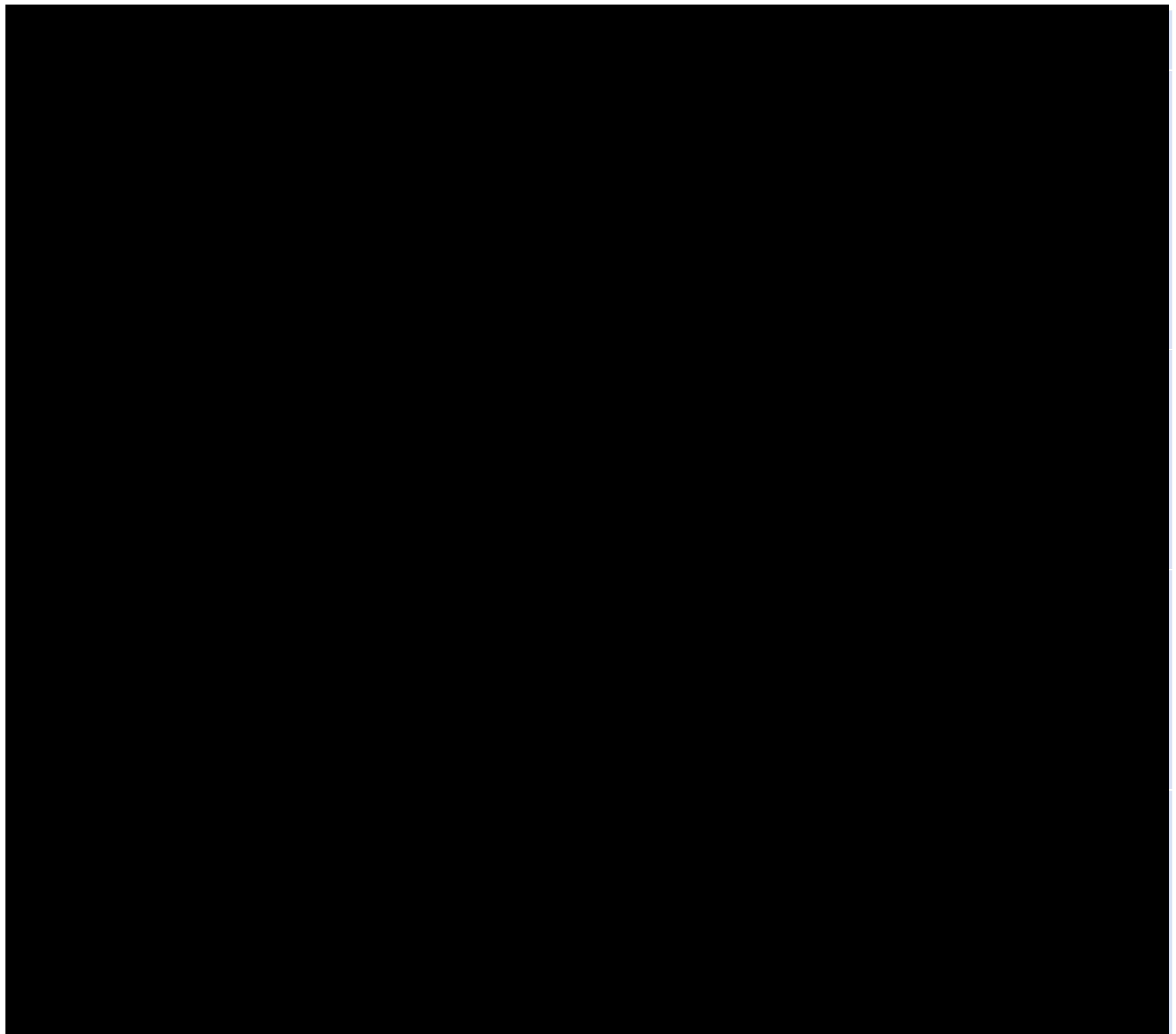

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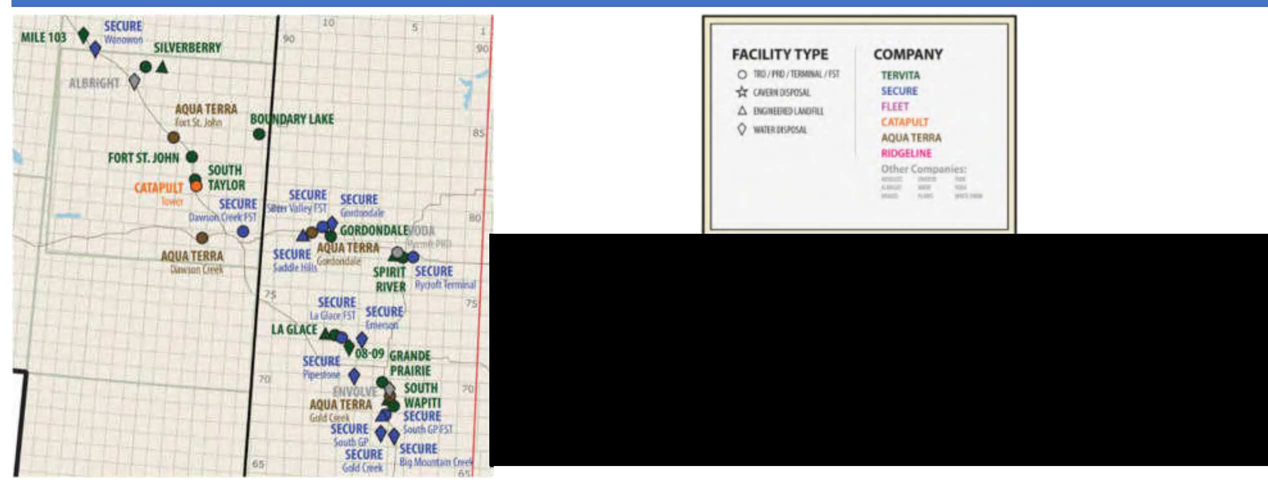

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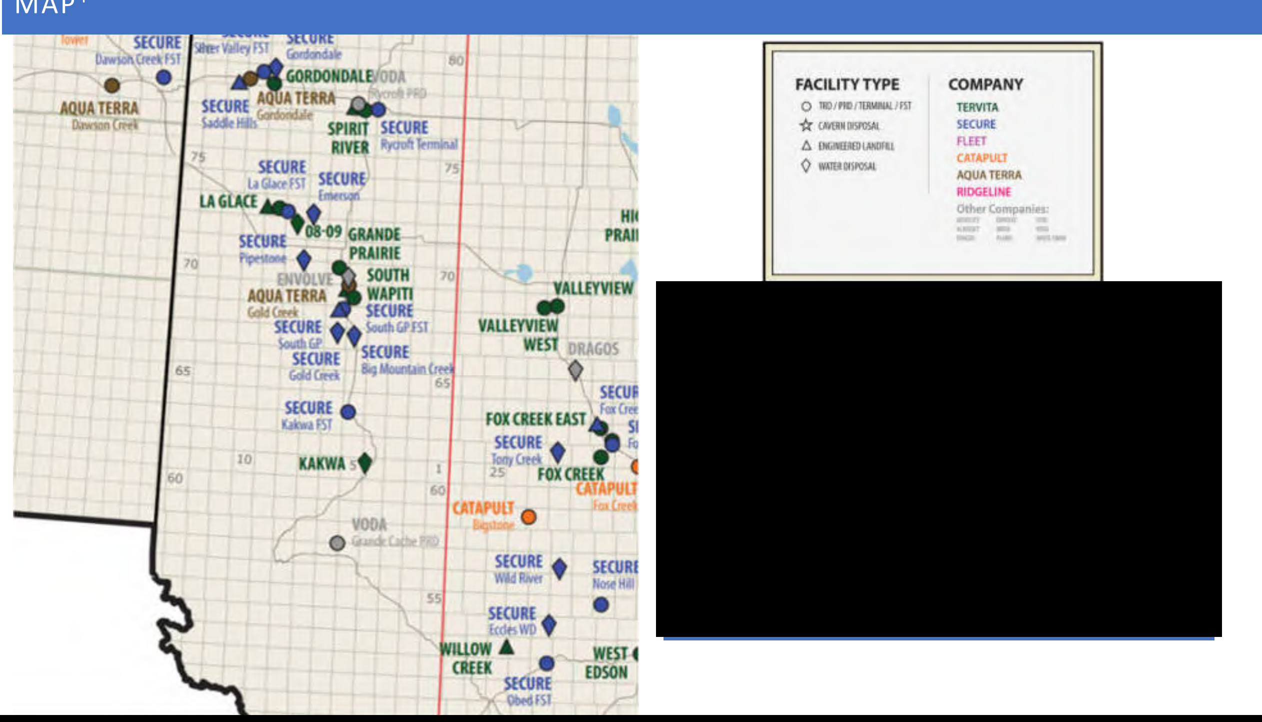

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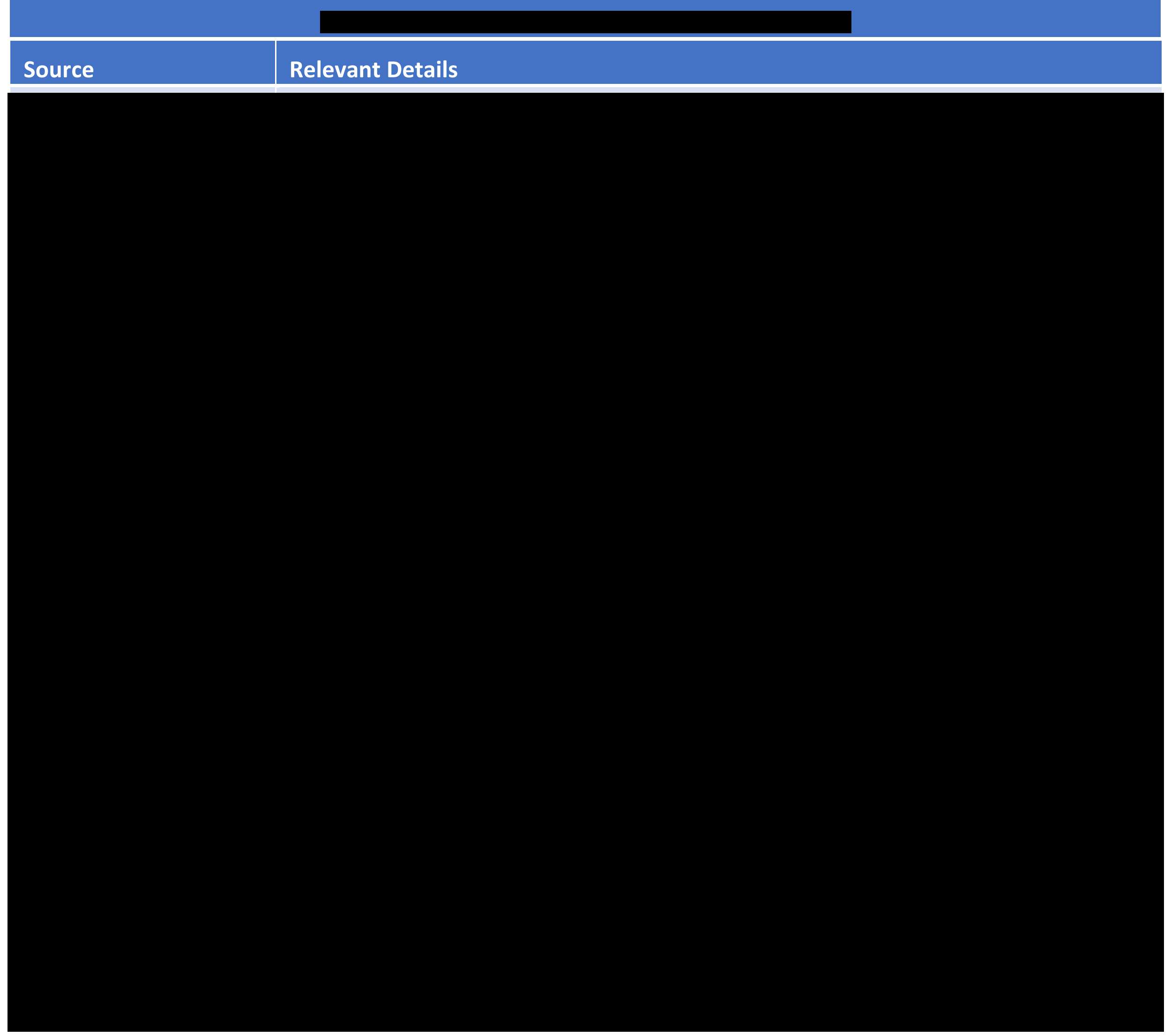

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Deadweight loss as Closest Facility
Deadweight loss as Relevant Facility

OVERVIEW

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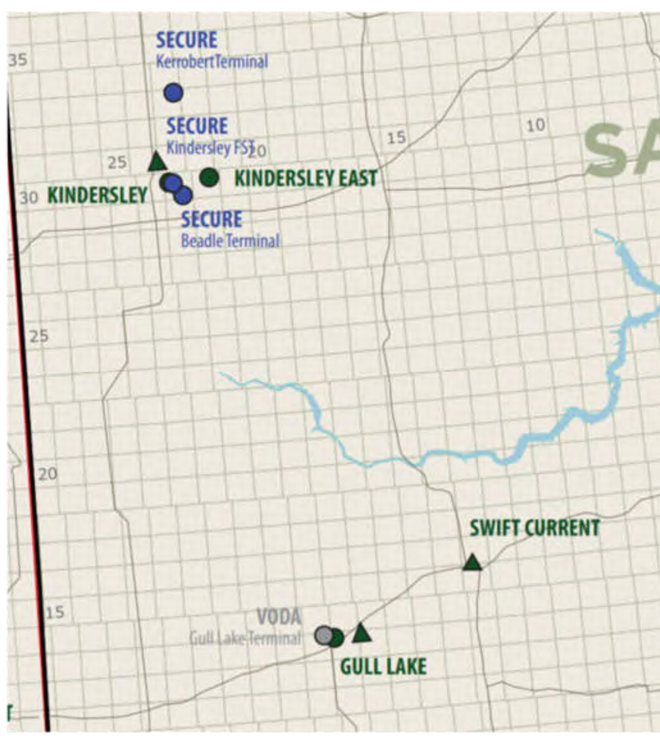

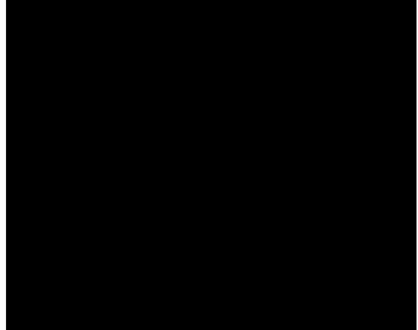

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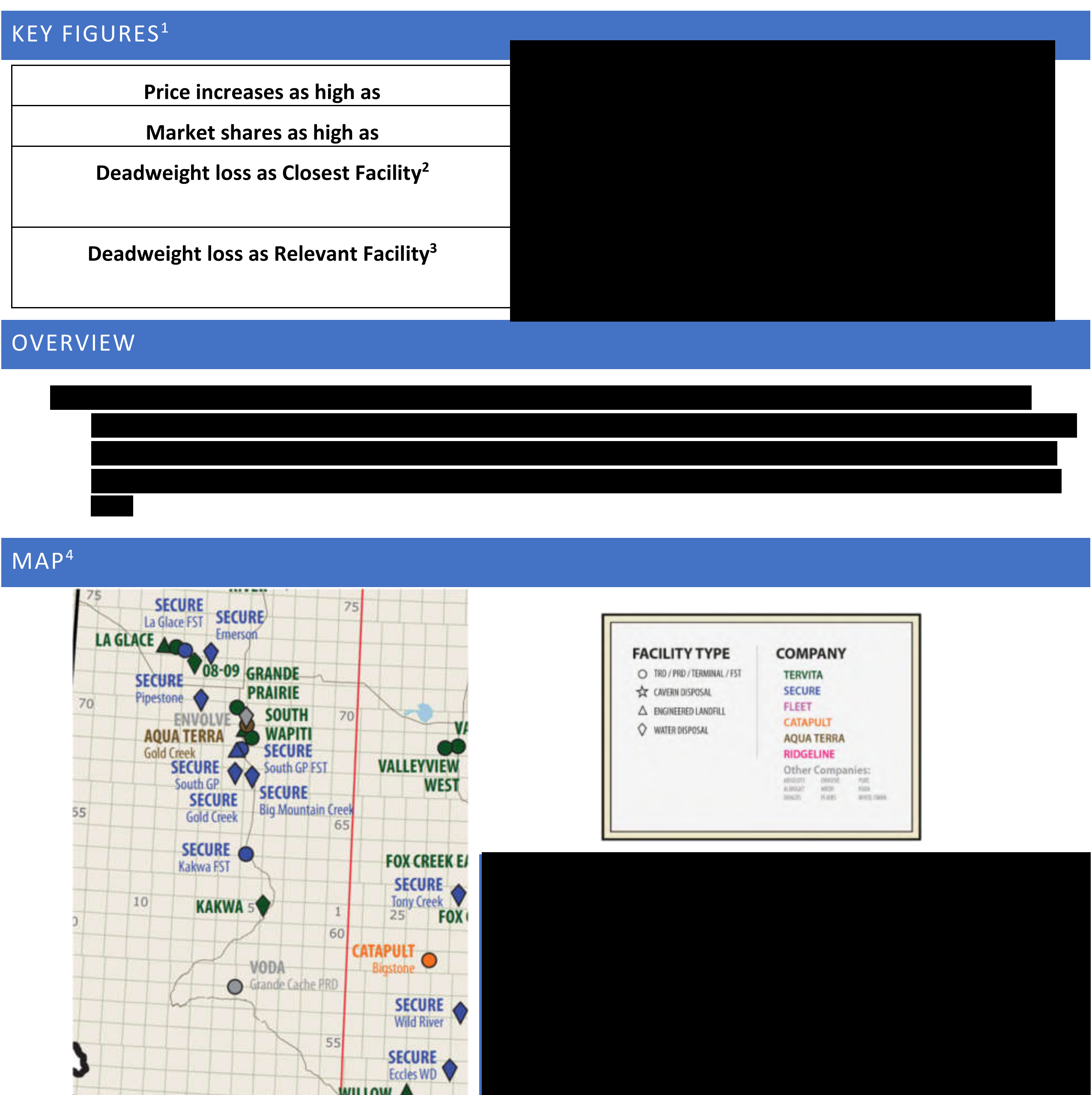

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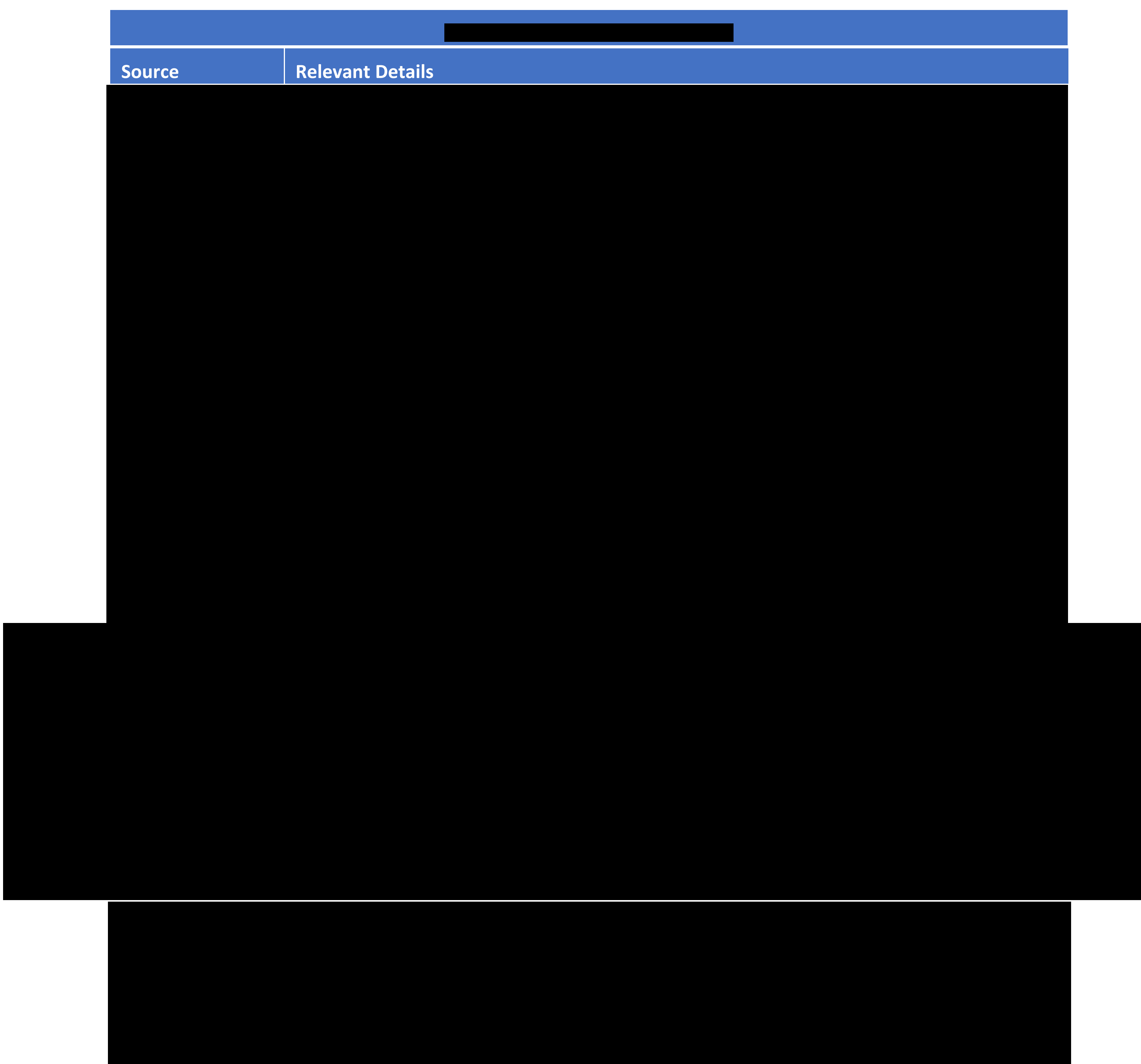

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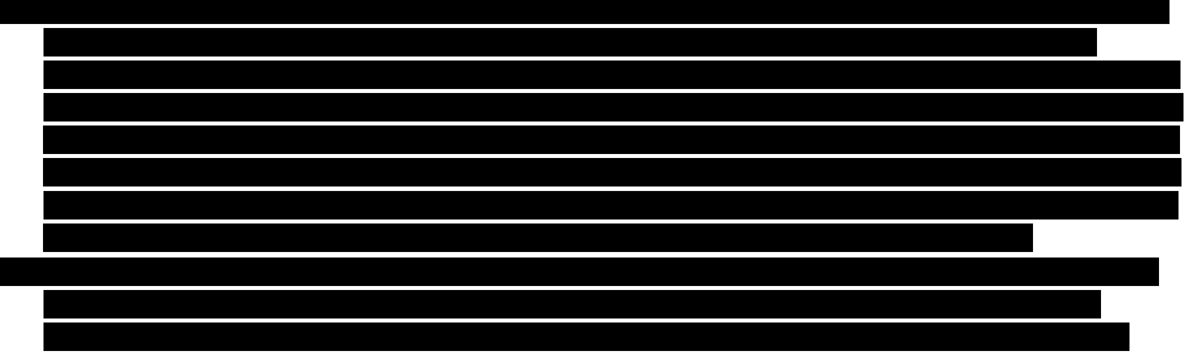

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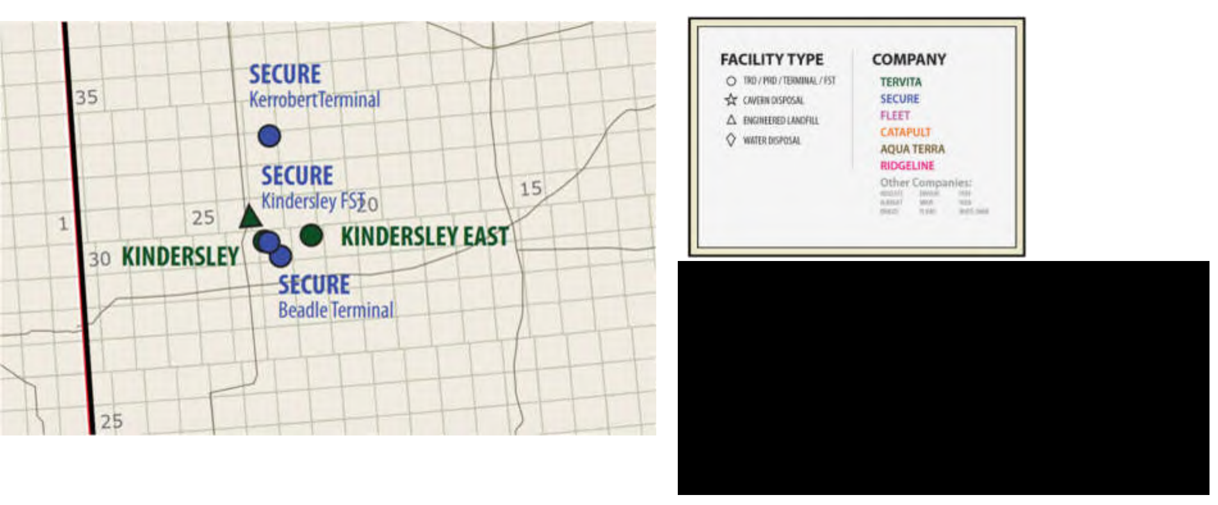

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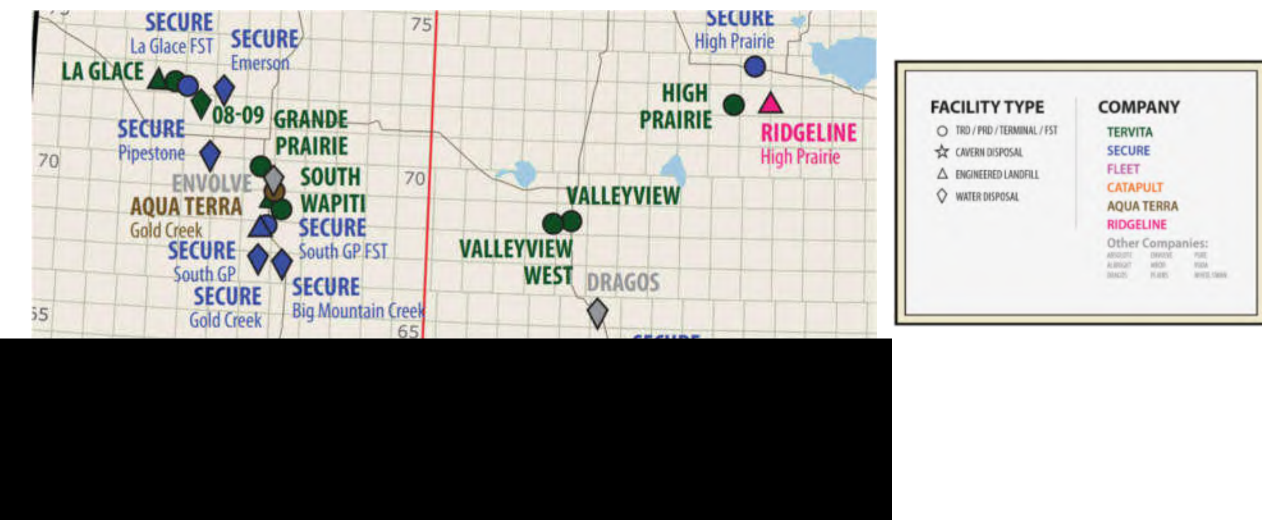

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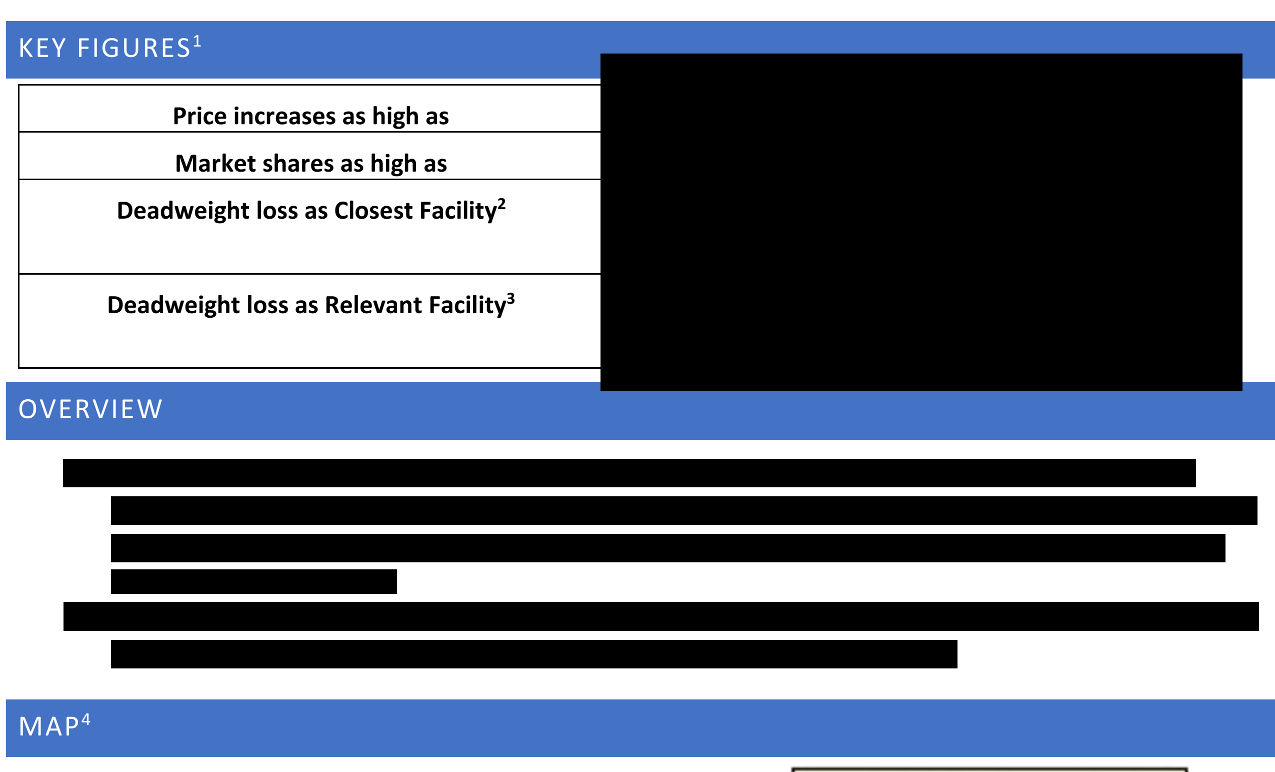

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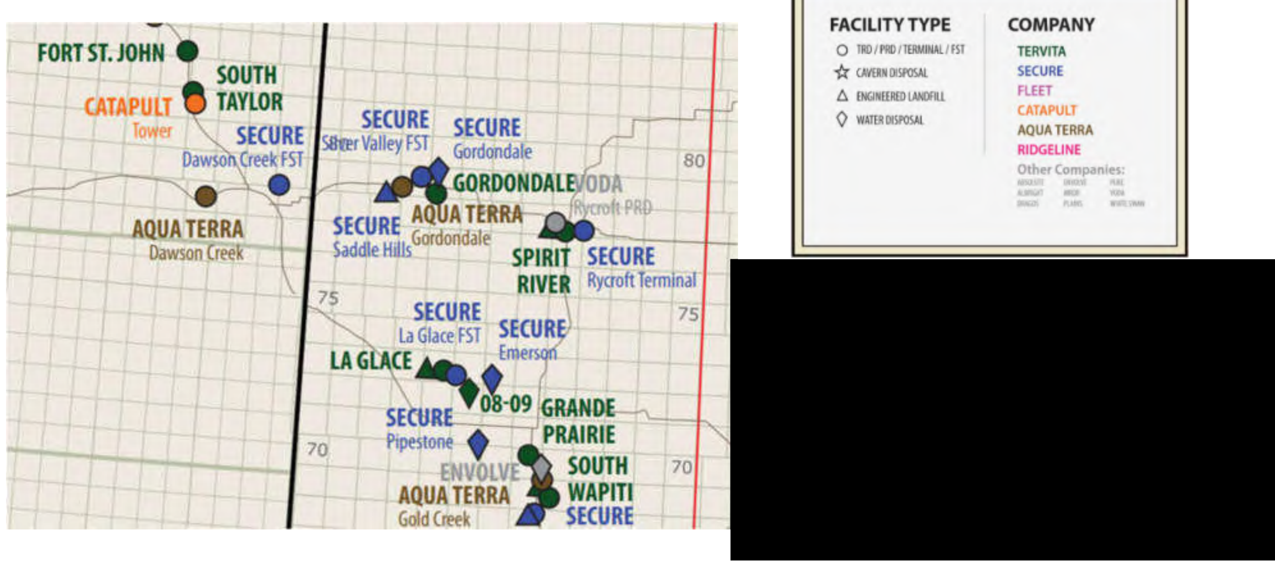

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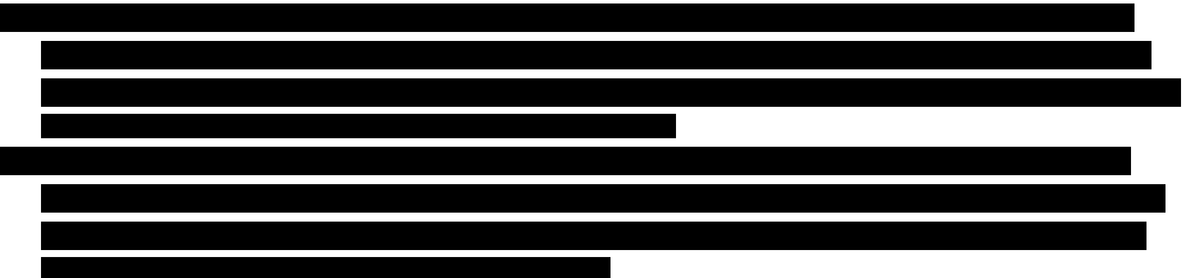

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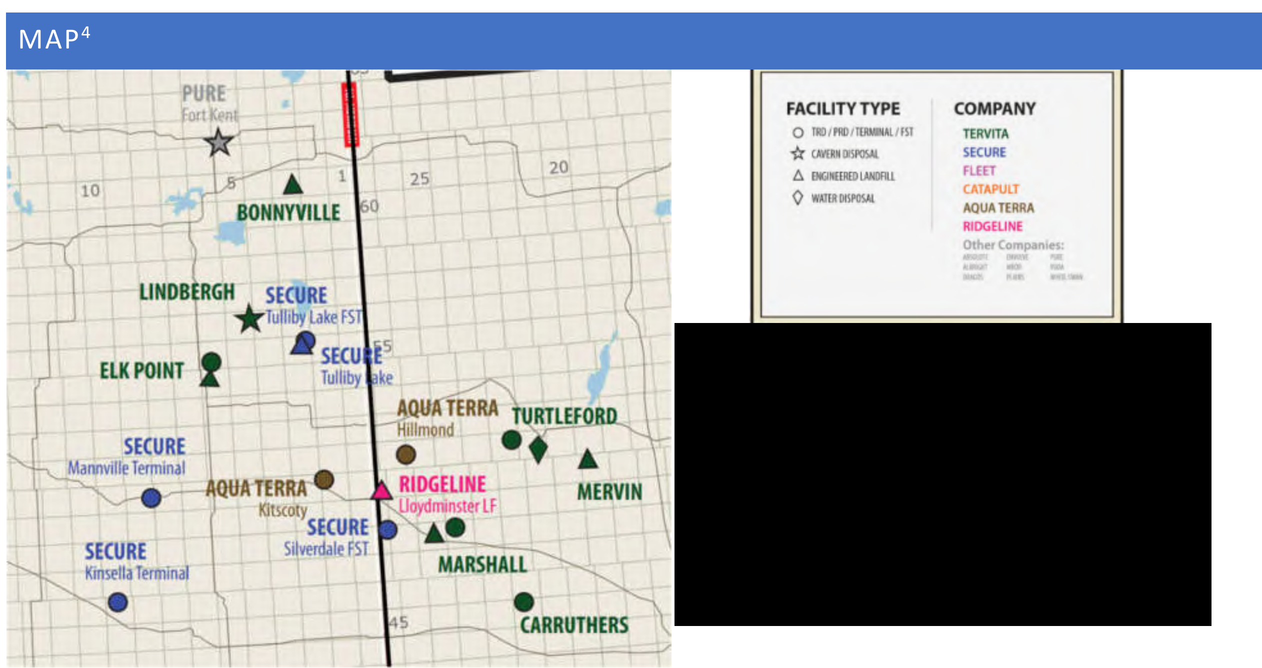


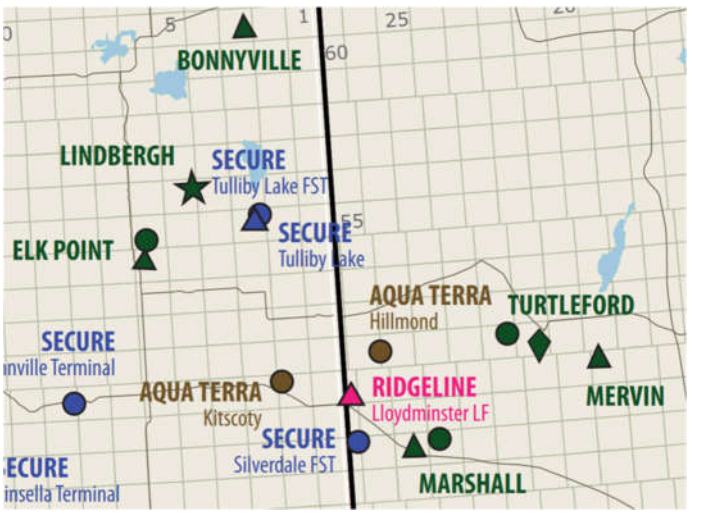
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market shares as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]



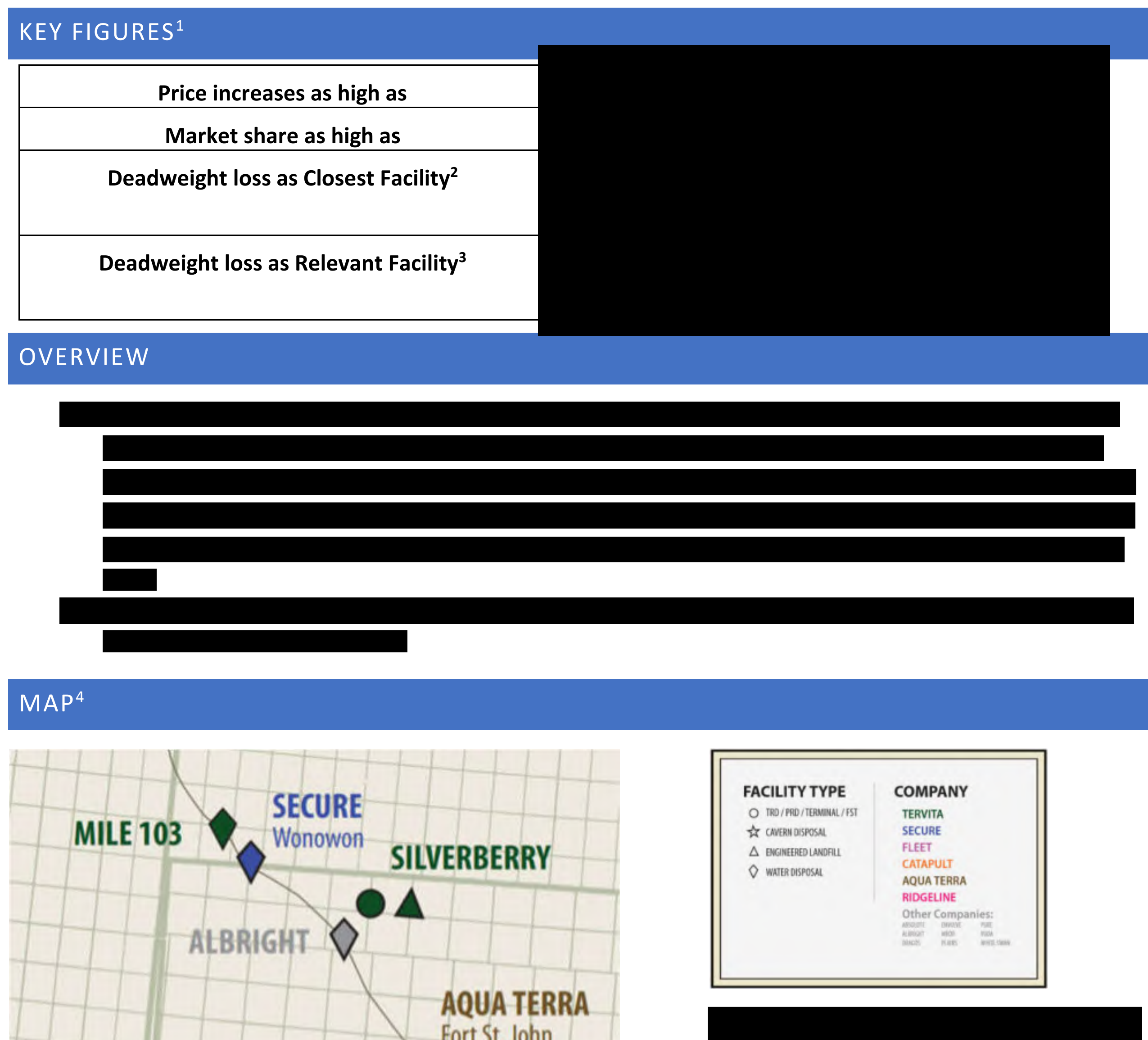
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as
Market share as high as
Deadweight loss as Closest Facility[2]
Deadweight loss as Relevant Facility[3]

OVERVIEW

MAP[4]



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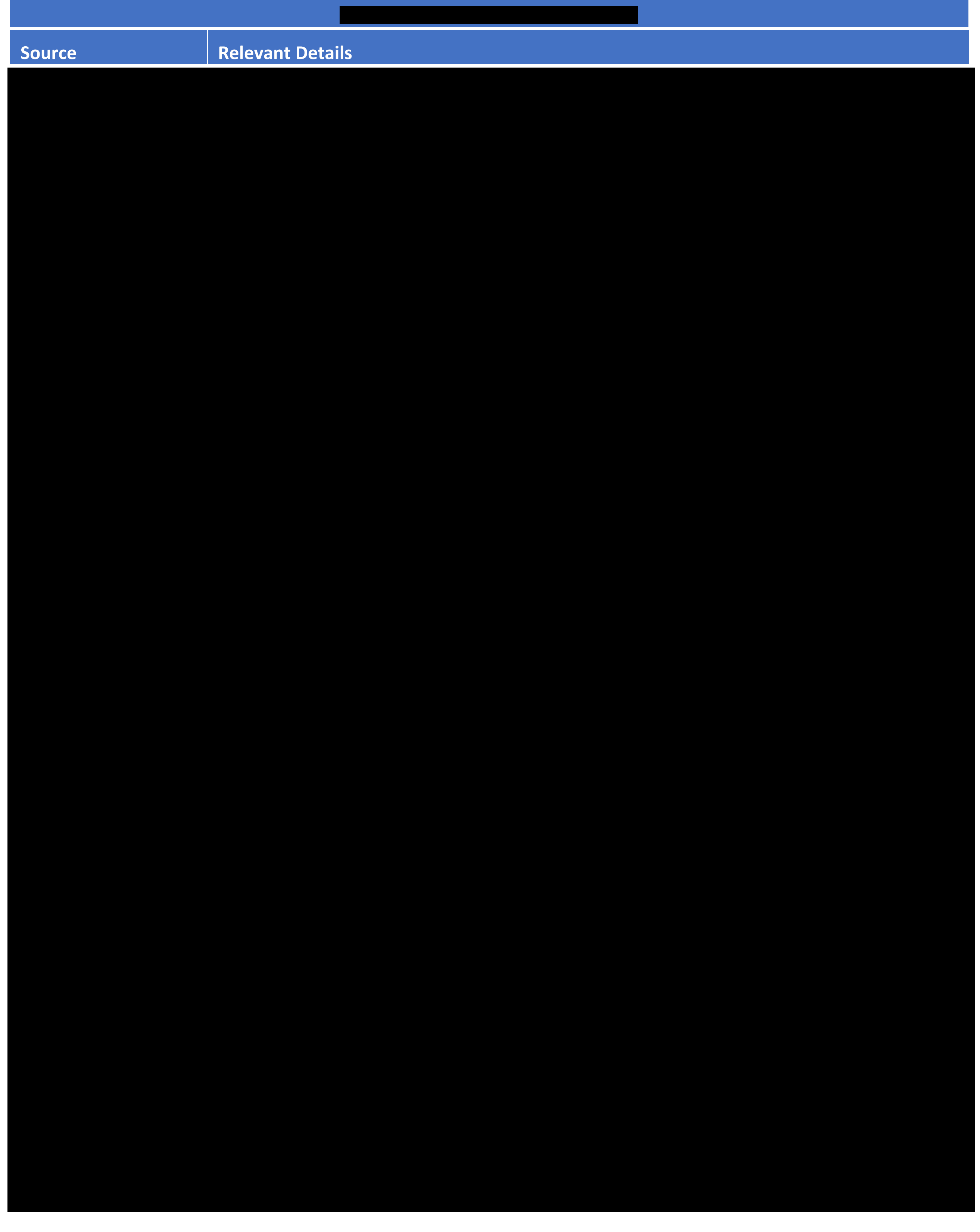

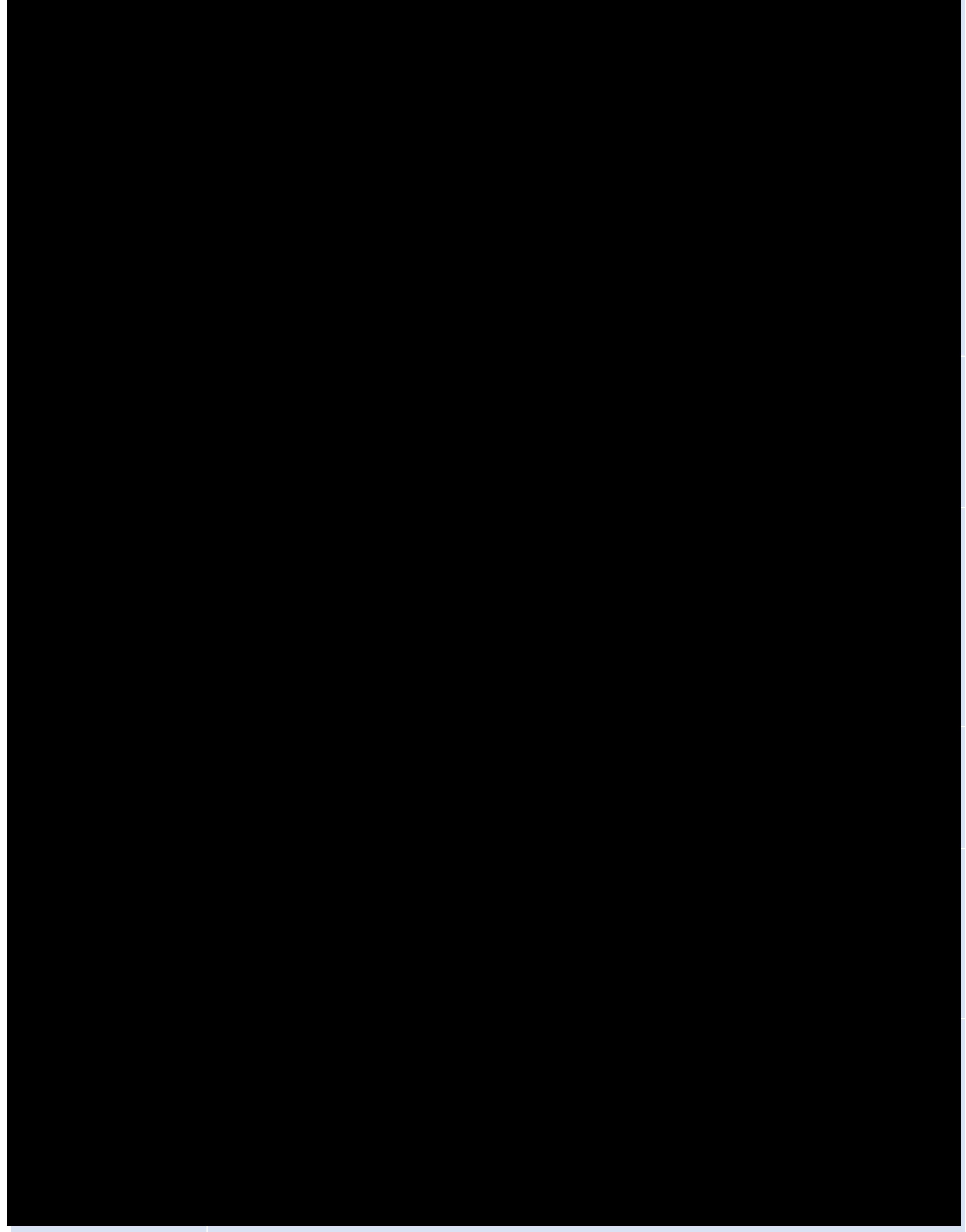

KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

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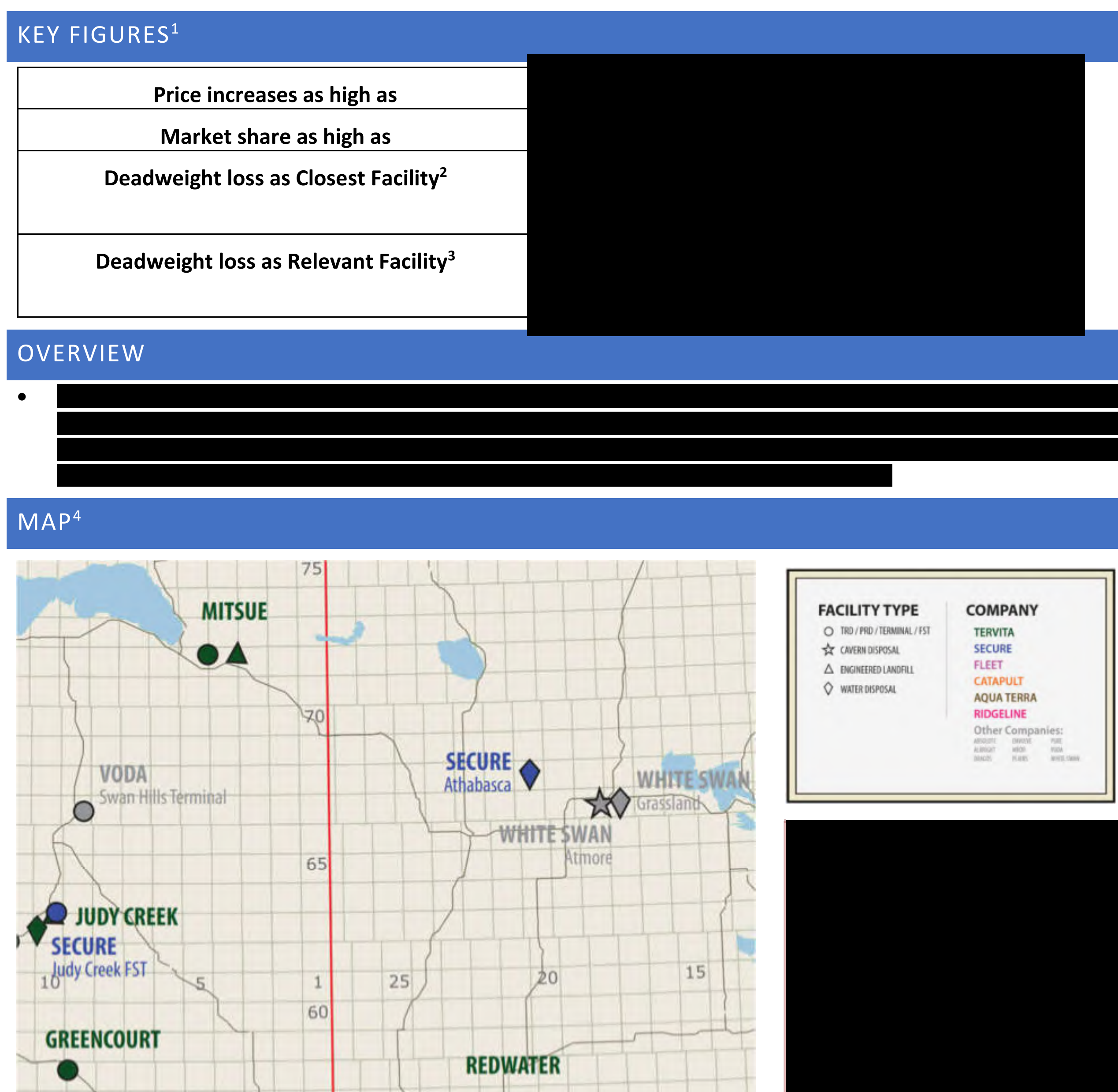
MAP[4]



Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

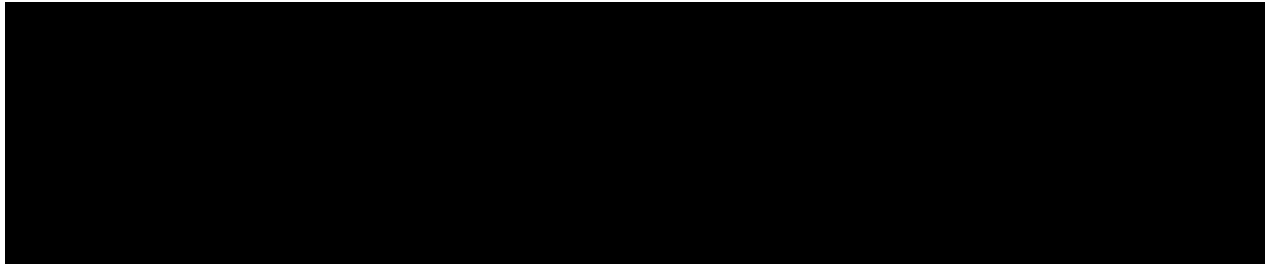
MAP[4]

Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW



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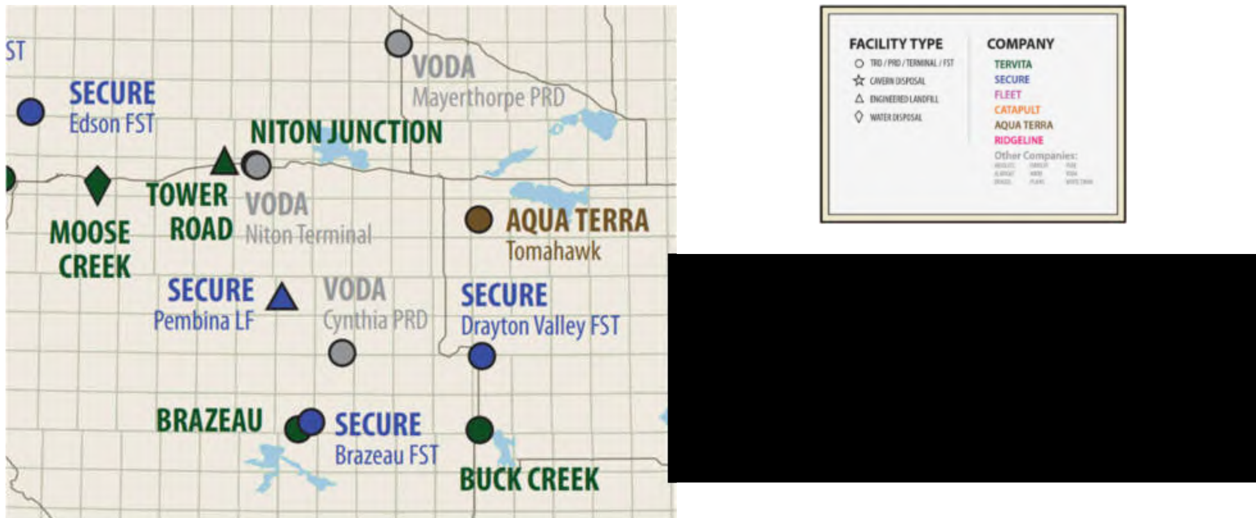


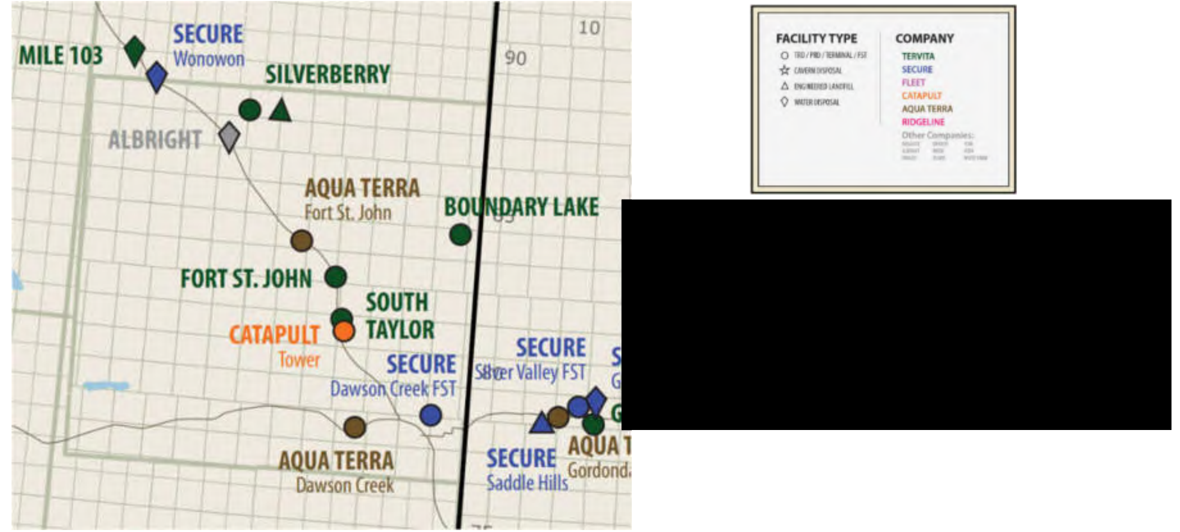
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market shares as high as	
Deadweight loss as Closest Facility	
Deadweight loss as Relevant Facility	

OVERVIEW

MAP[2]



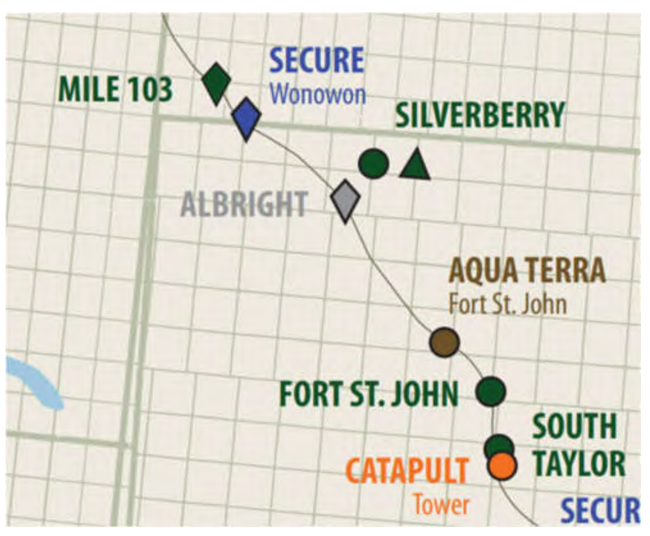
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as
Market shares as high as
Deadweight loss as Closest Facility[2]
Deadweight loss as Relevant Facility[3]

OVERVIEW

MAP[4]



Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]

FACILITY TYPE
TRD / PRD / TERMINAL / FST
CAVERN DISPOSAL
ENGINEERED LANDFILL
WATER DISPOSAL

COMPANY
TERVITA
SECURE
FLEET
CATAPULT
AQUA TERRA
RIDGELINE
Other Companies:

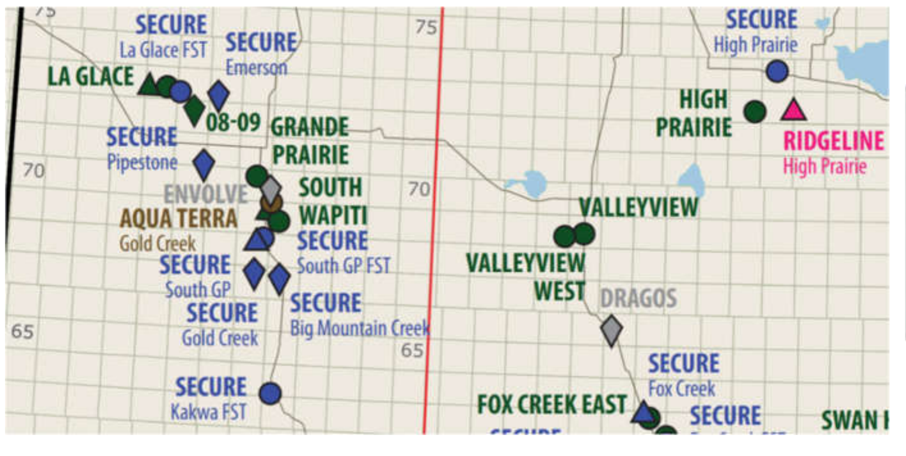
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as
Market share as high as
Deadweight loss as Closest Facility[2]
Deadweight loss as Relevant Facility[3]

OVERVIEW

MAP[4]



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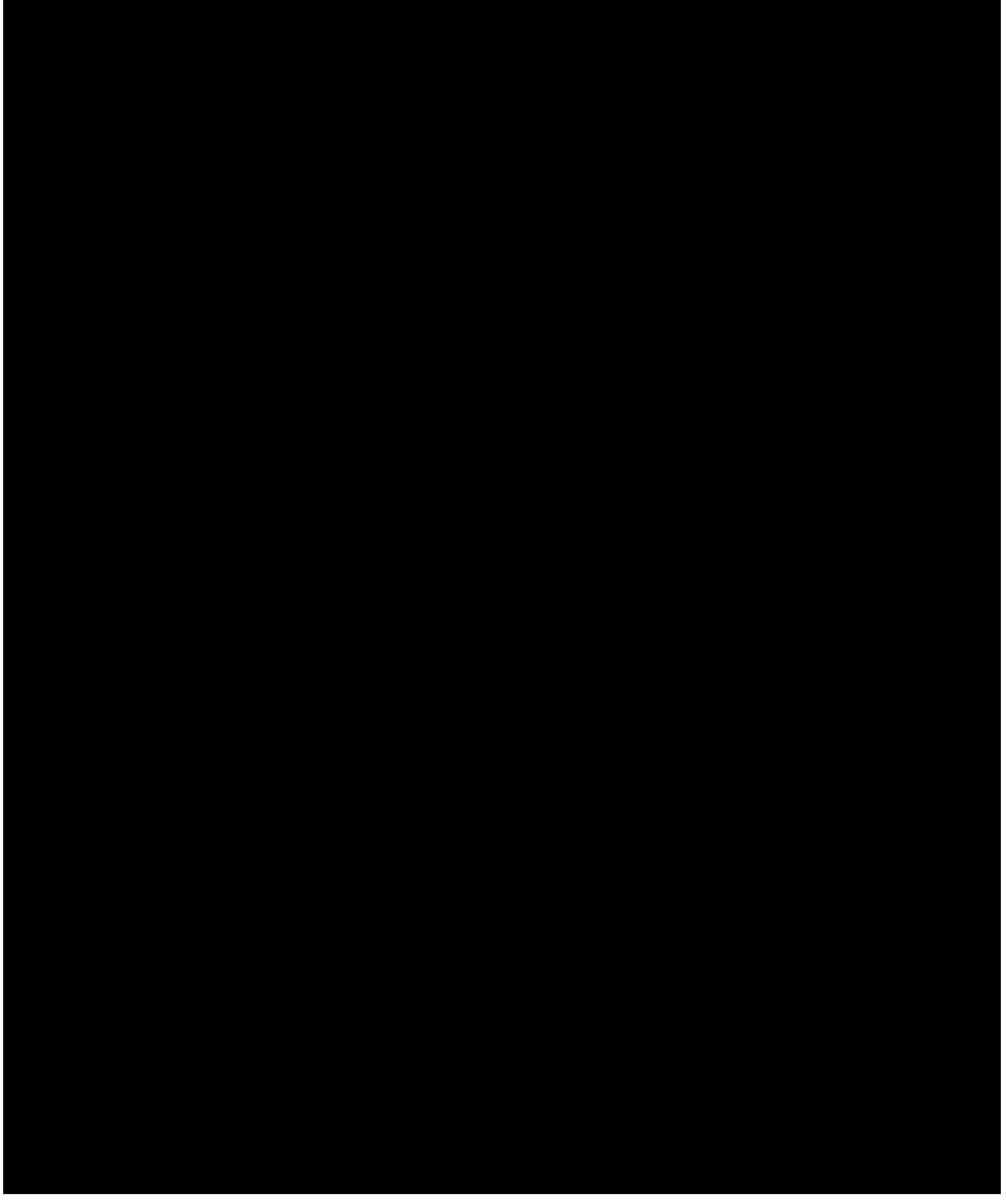
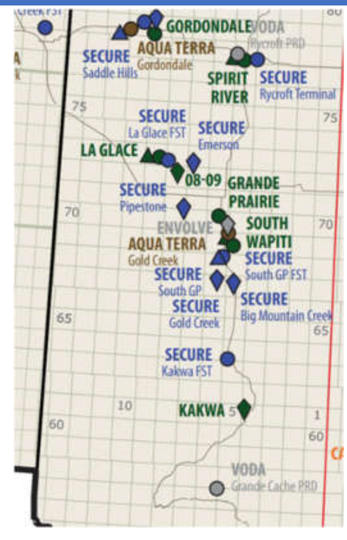


KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]



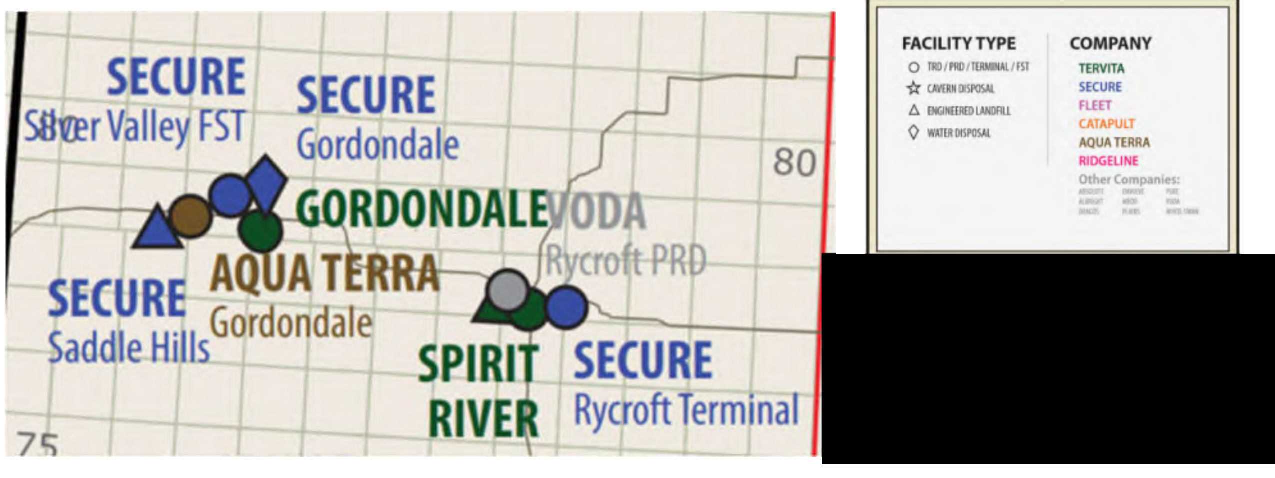
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility	
Deadweight loss as Relevant Facility[2]	

OVERVIEW[3]

MAP[4]



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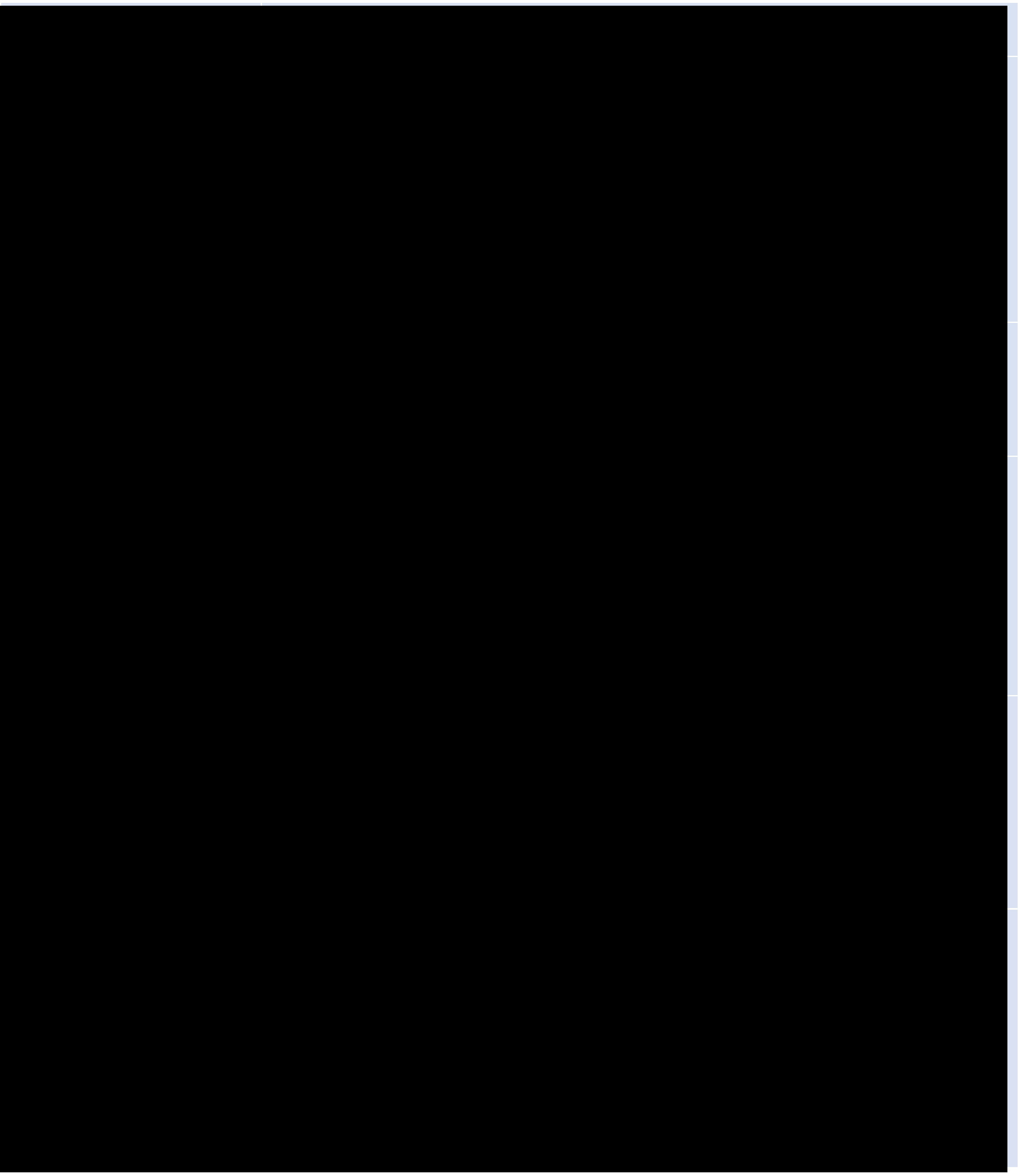
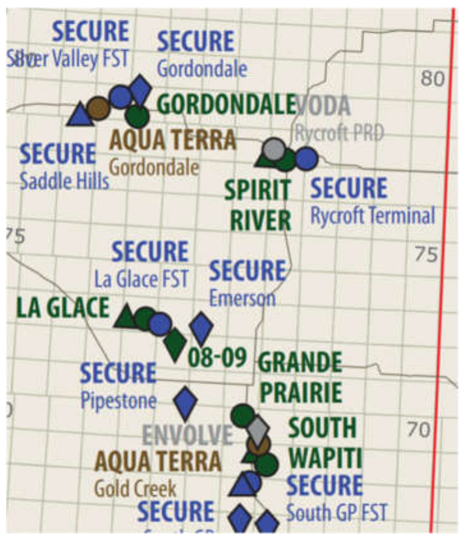


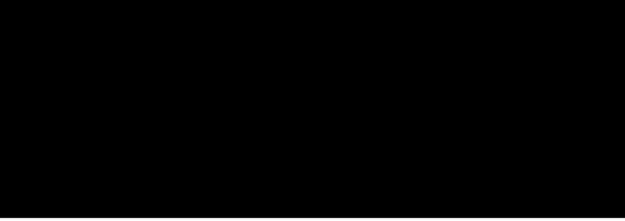
KEY FIGURES[1]

Price increases as high as	
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]



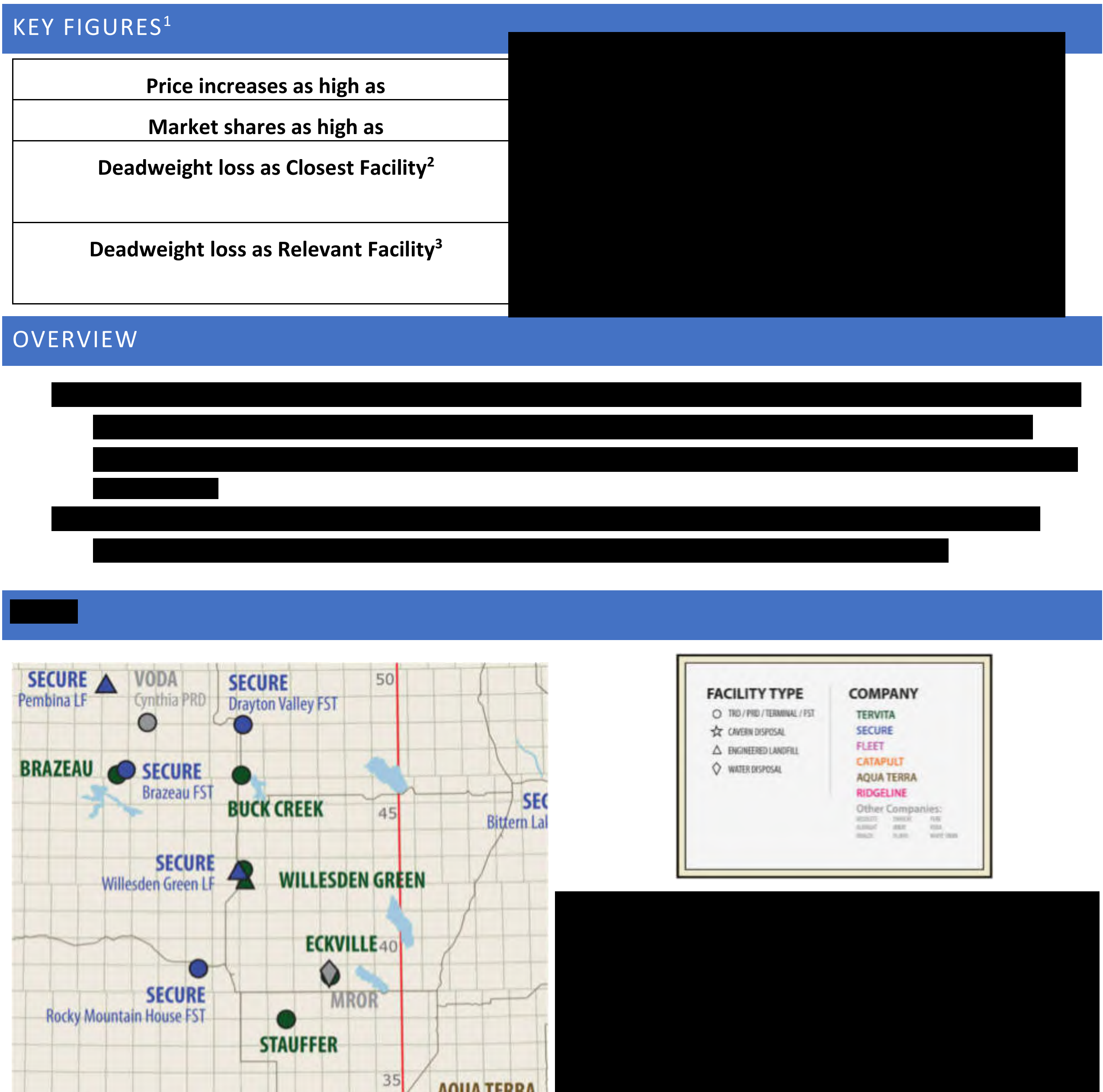


Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market shares as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW



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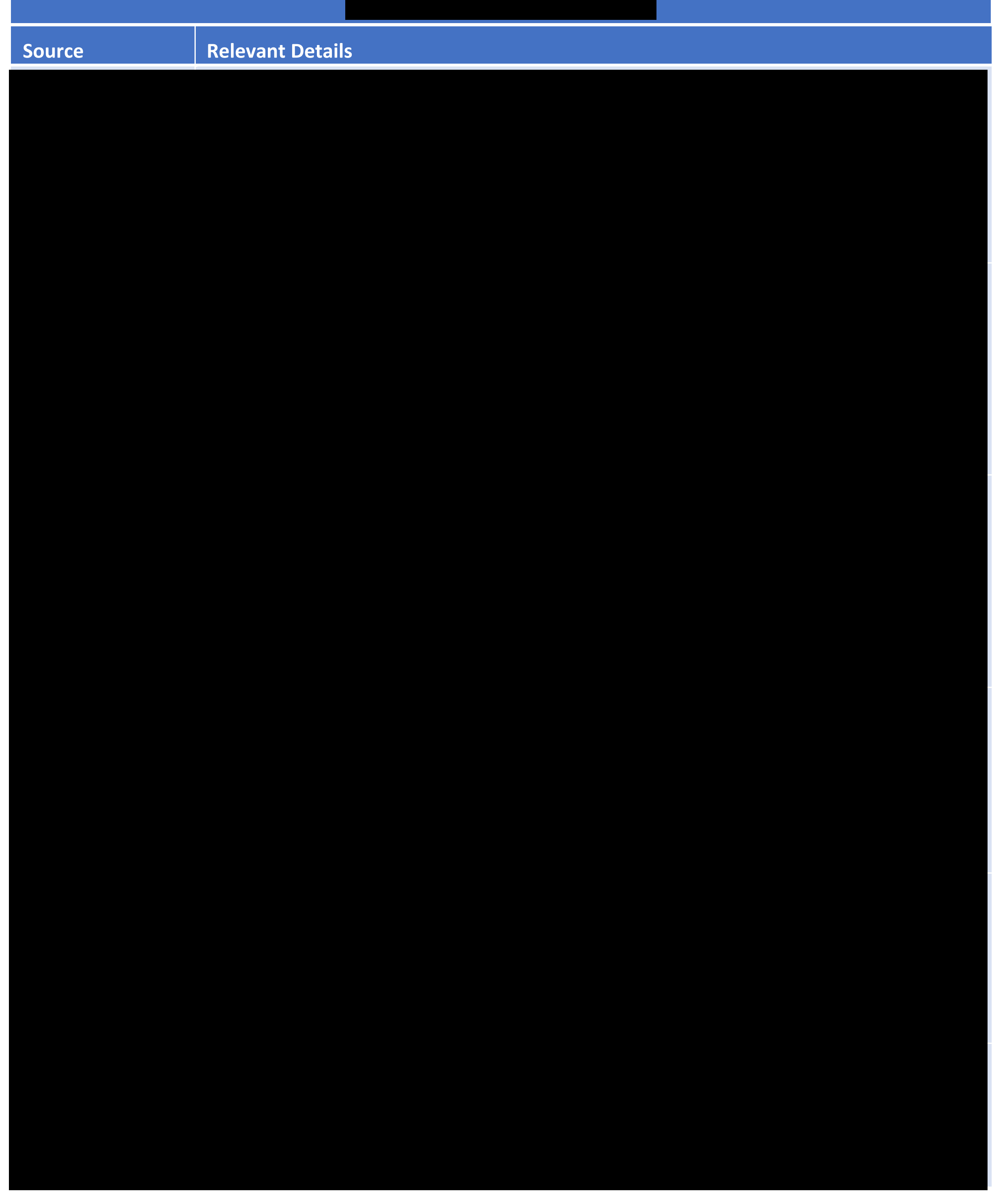

KEY FIGURES[1]

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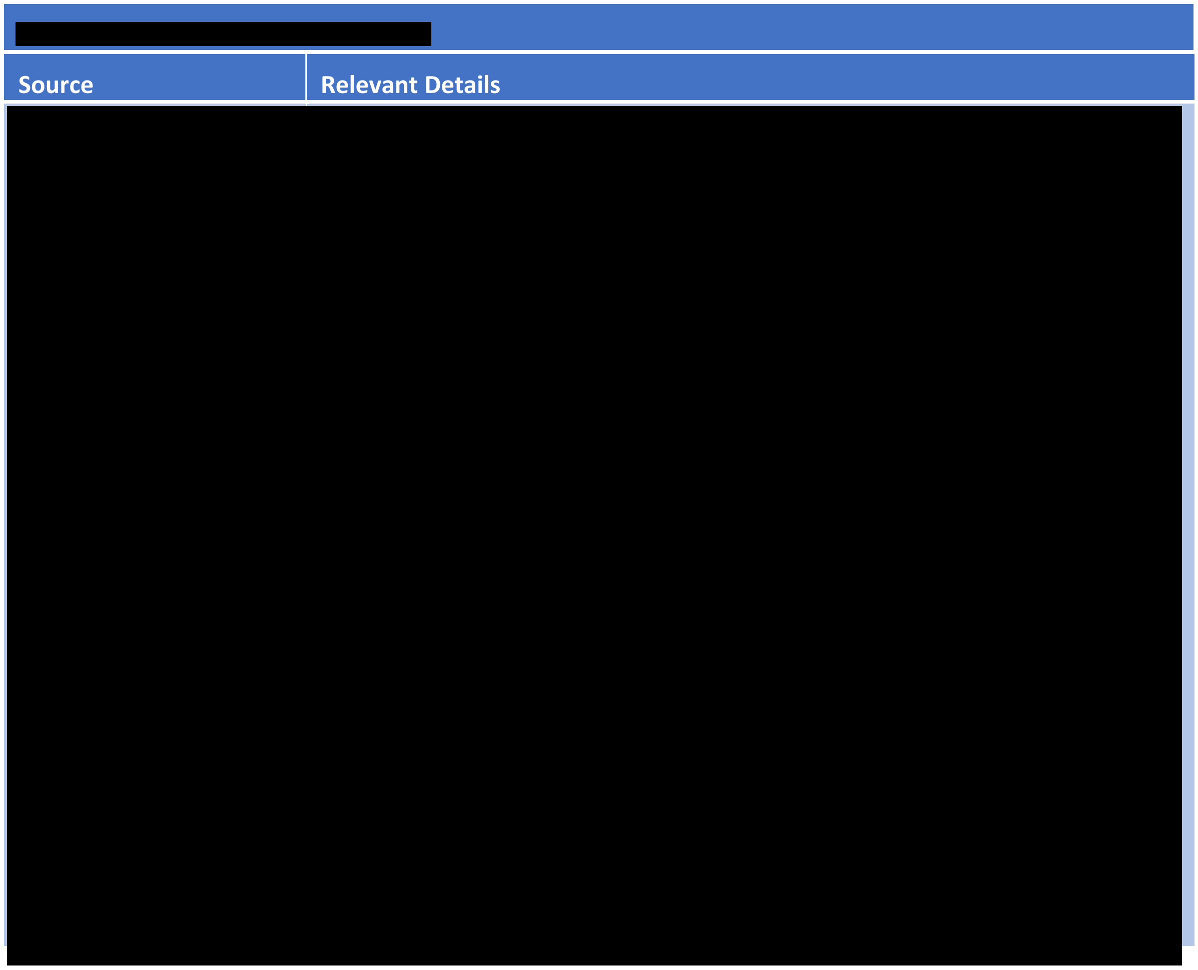
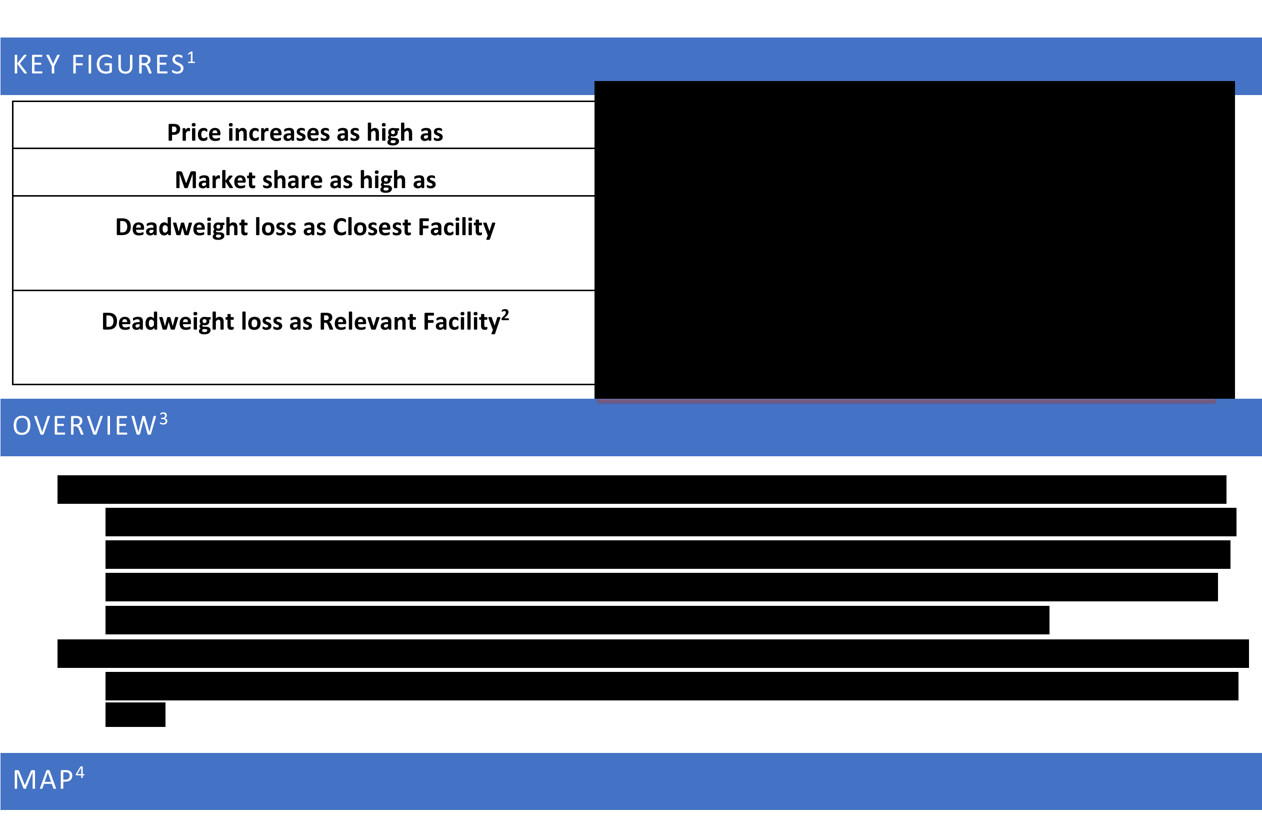
Market share as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]

Source	Relevant Details





KEY FIGURES[1]

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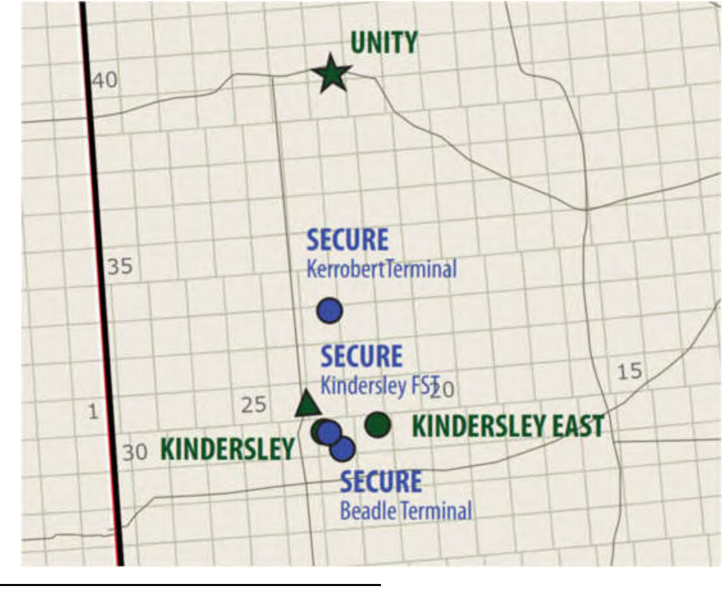
Market share as high as	
Deadweight loss as Closest Facility	
Deadweight loss as Relevant Facility[2]	

OVERVIEW[3]

MAP[4]



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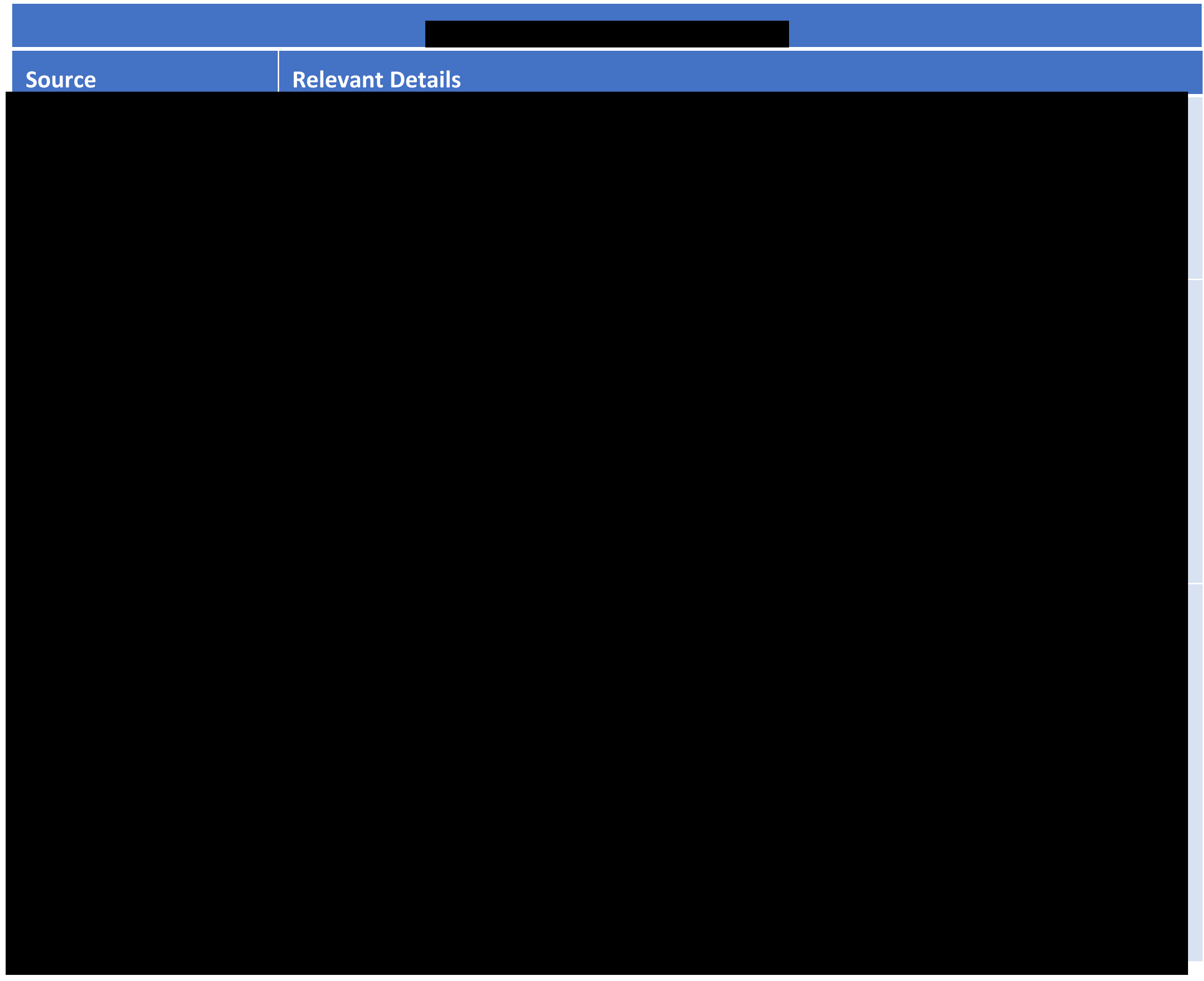
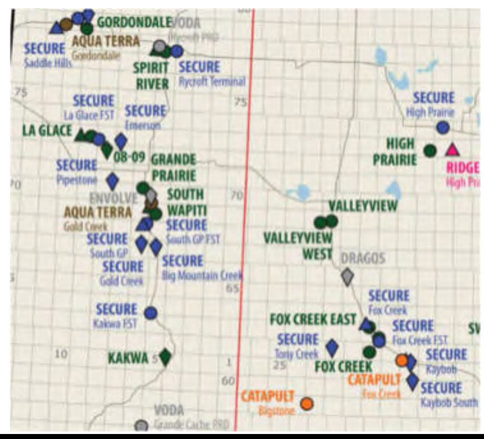


KEY FIGURES[1]

Price increases as high as
Market share as high as
Deadweight loss as Closest Facility[2]
Deadweight loss as Relevant Facility[3]

OVERVIEW

MAP[4]



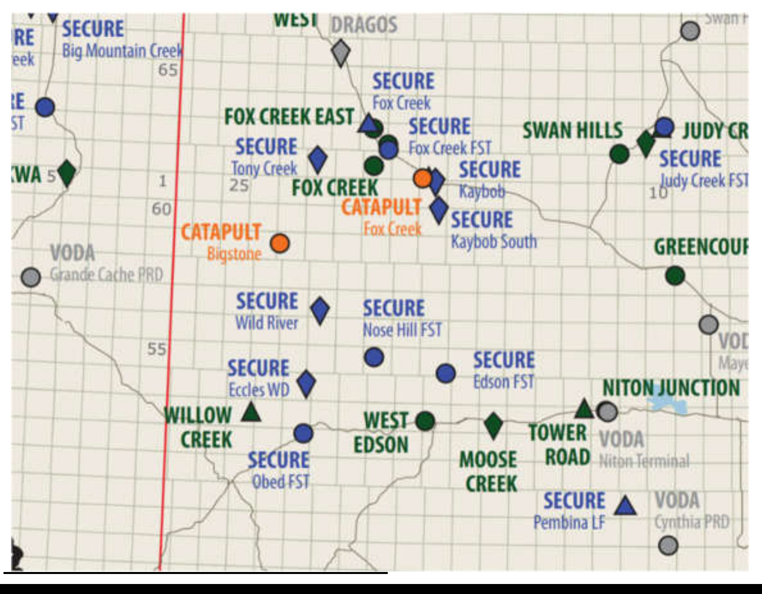
Source	Relevant Details

KEY FIGURES[1]

Price increases as high as	
Market shares as high as	
Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]



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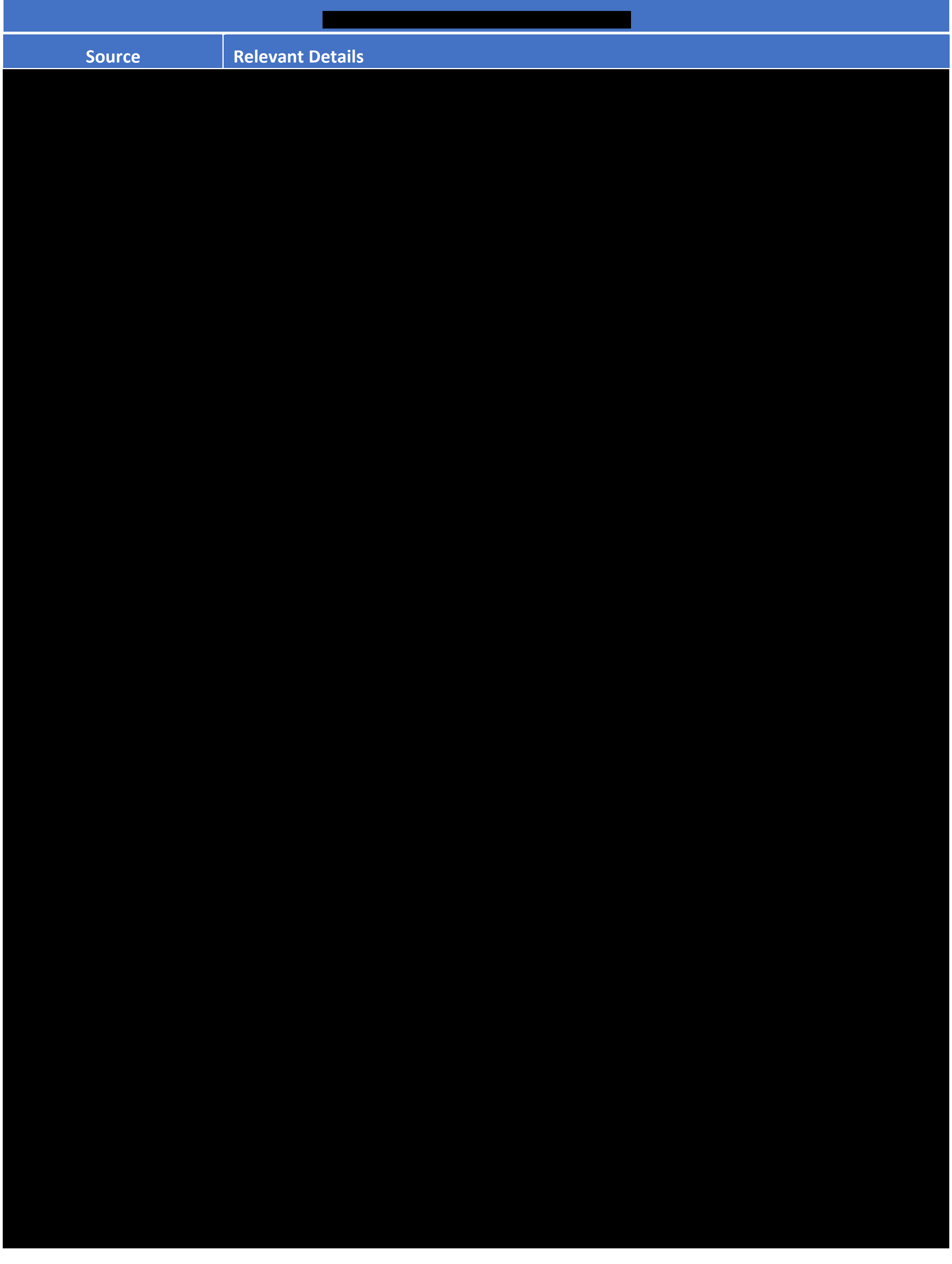

KEY FIGURES[1]

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Deadweight loss as Closest Facility[2]	
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]

Source	Relevant Details

KEY FIGURES[1]

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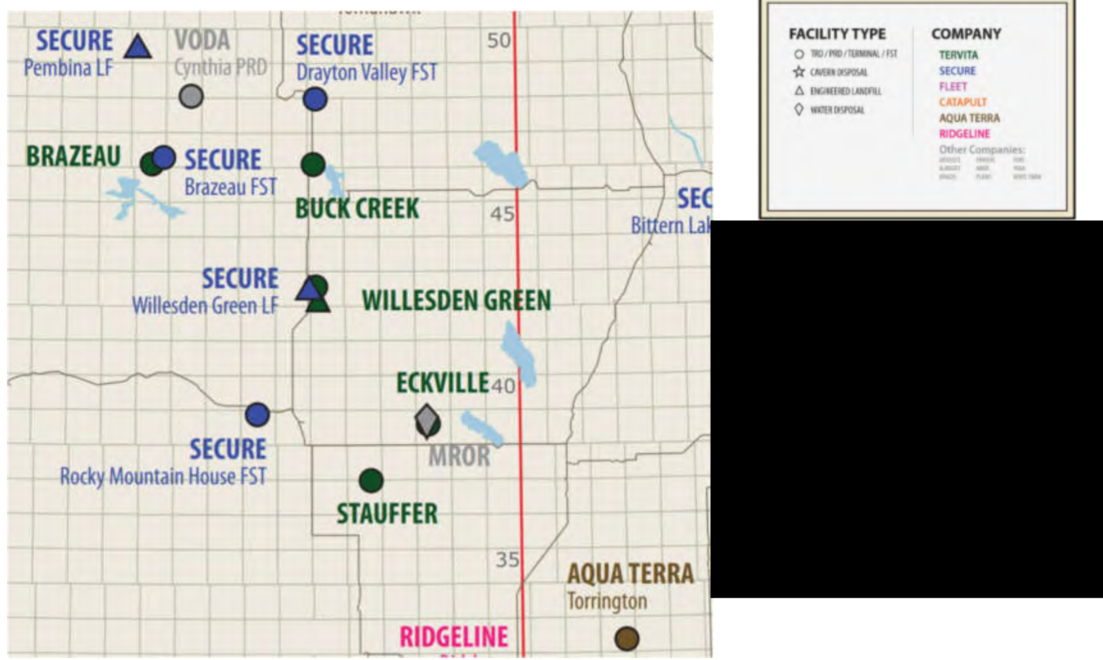
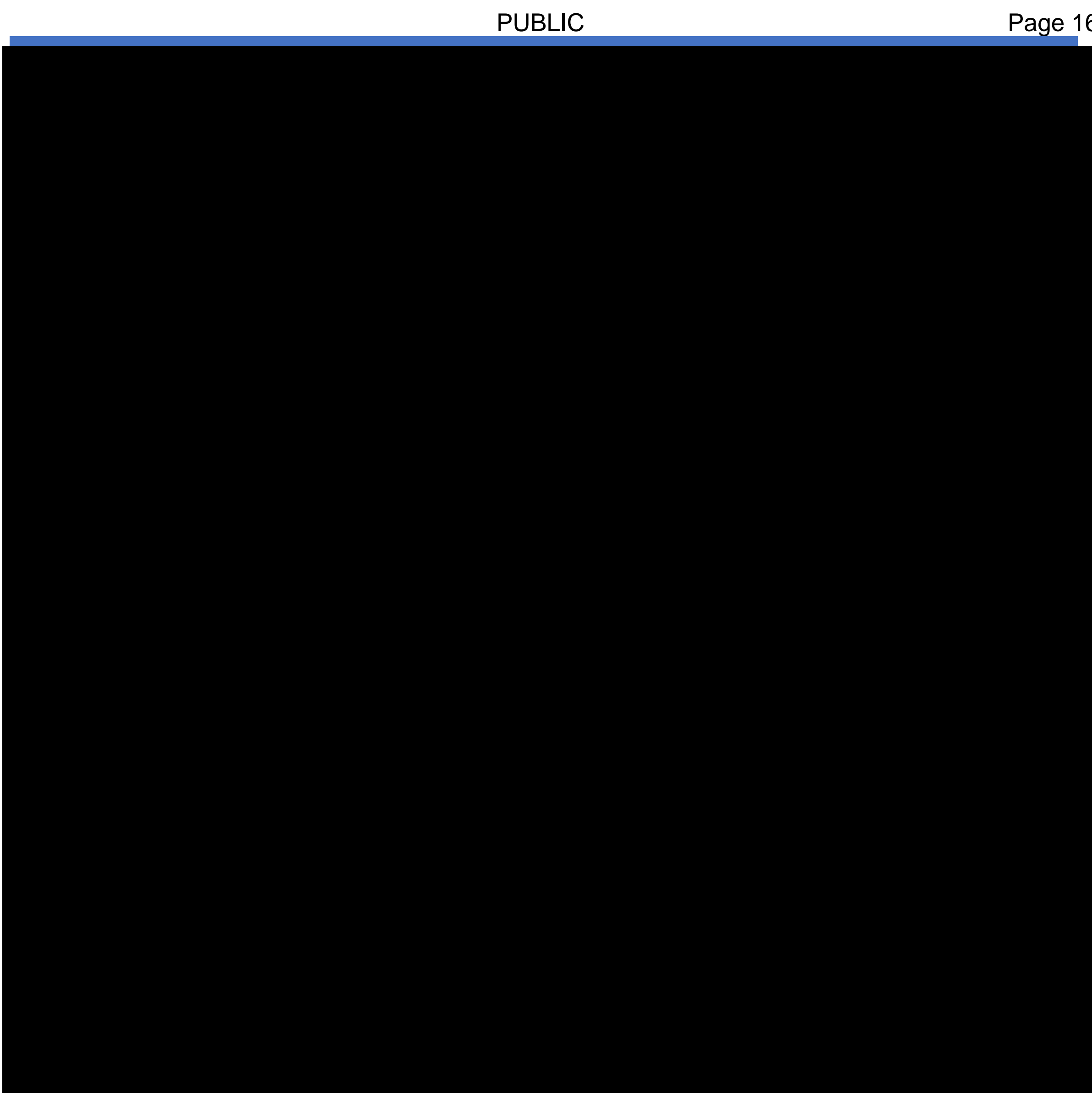
Deadweight loss as Relevant Facility[3]	

OVERVIEW

MAP[4]





APPENDIX C

COMPETITION TRIBUNAL

File No. CT-2021-002

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

SECURE ENERGY SERVICES INC.

Respondent

DIVESTITURE PROCEDURE ORDER

WHEREAS:

A. Secure Energy Services Inc. ("Secure") acquired all the issued and outstanding shares of Tervita Corporation ("Tervita") on July 2, 2021 (the "Transaction").

B. The Commissioner of Competition ("Commissioner") commenced an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

C. Upon hearing counsel for the Commissioner and counsel for Secure, the Tribunal orders that:

I. DEFINITIONS

[1] Whenever used in this Divestiture Procedure Order, the following words and terms have the meanings set out below:

(a) **"Act"** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

(b) **"Affiliate"** has the meaning given to it in subsection 2(2) of the Act;

(c) **"Business Day"** means a day on which the Competition Bureau's Gatineau, Quebec office is open for business;

(d) **"Commissioner"** means the Commissioner of Competition appointed under the Act and includes the Commissioner's authorized representatives;

(e) **"Confidential Information"** means competitively sensitive, proprietary and all other information that is not in the public domain, and that is owned by or pertains to a Person or a Person's business, and includes, but is not limited to, manufacturing, operations and financial information, customer lists, price lists, contracts, cost and revenue information, marketing methods, patents, technologies, processes, or other trade secrets;

(f) **"Divested Business"** means the business carried on at the facilities listed in Schedule **[A]**;

(g) **"Divestiture"** means the sale, conveyance, transfer, assignment or other disposal of the Divestiture Assets to a Purchaser or Purchasers pursuant to this Divestiture Procedure Order and with the prior approval of the Commissioner, such that Secure will have no direct or indirect interest in the Divestiture Assets;

(h) **"Divestiture Agreement"** means a binding and definitive agreement between Secure and a Purchaser to effect the Divestiture pursuant to this Divestiture Procedure Order and subject to the prior approval of the Commissioner;

(i) **"Divestiture Applicant"** means Secure during the Initial Sale Period or the Divestiture Trustee during the Divestiture Trustee Sale Period;

(j) **"Divestiture Assets"** means all of the right, title and interest in, to and under, or relating to, the tangible assets, Intangible Assets, property and undertaking owned or used by Secure or held by Secure for use in, or relating to, the Divested Business;

(a) **"Divestiture Procedure Order"** means this order, including the schedules hereto, and references to a "Part", "Section", "Paragraph" or

"Schedule" are, unless otherwise indicated, references to a part, section, paragraph or schedule of or to this Divestiture Procedure Order;

(b) **"Divestiture Process Agreement"** means the agreement described in Section **[6]** of this Divestiture Procedure Order;

(c) **"Divestiture Trustee"** means the Person appointed pursuant to Part **[III]** of this Divestiture Procedure Order (or any substitute appointed thereto) and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;

(d) **"Divestiture Trustee Sale"** means the Divestiture to be conducted by the Divestiture Trustee pursuant to Part **[III]** of this Divestiture Procedure Order;

(e) **"Divestiture Trustee Sale Period"** means the 6 month period commencing upon expiry of the Initial Sale Period;

(f) **"Effective Date"** means the date of this Divestiture Procedure Order;

(g) **"First Reference Date"** shall have the meaning set out in Paragraph **[22(d)]** of this Divestiture Procedure Order;

(h) **"Initial Sale Period"** means the period that commences on the Effective Date and ends 3 months after the Effective Date;

(i) **"Intangible Assets"** means intellectual property of any nature and kind, including:

(i) patents, copyrights, trademarks and software;

(ii) trade dress, industrial designs, distinguishing guises, trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;

(iii) rights to obtain and file for patents and registrations thereof; and

(iv) rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

(j) **"Monitor"** means the Person appointed pursuant to Part **[X]** of this Divestiture Procedure Order (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor, provided that if no Monitor is appointed, other than in Part **[X]** of this Divestiture Procedure Order Monitor means the Commissioner;

(k) **"Monitor Agreement"** means the agreement described in Section **[34]** of this Divestiture Procedure Order;

(l) **"Person"** means any individual, corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(m) **"Purchaser"** means a Person that acquires Divestiture Assets pursuant to this Divestiture Procedure Order and a Divestiture Agreement;

(n) **"Records"** means records within the meaning of subsection 2(1) of the Act;

(o) **"Second Reference Date"** shall have the meaning set out in Paragraph **[22(e)]** of this Divestiture Procedure Order;

(p) **"Secure"** means Secure Energy Services Inc. and its Affiliates and their directors, officers, employees, agents, representatives, successors and assigns;

(q) **"Third Party"** means any Person other than the Commissioner, Secure or a Purchaser;

(r) **"Transaction"** means the transaction described in the first recital to this Divestiture Procedure Order; and

(s) **"Tribunal"** means the Competition Tribunal established by the *Competition Tribunal Act,* R.S.C. 1985, c.19 (2nd Supp.).

II. OBLIGATION TO COMPLETE DIVESTITURE

[2] Secure shall use commercially reasonable efforts to complete the Divestiture.

[3] During the Initial Sale Period, Secure shall use commercially reasonable efforts to complete the Divestiture in accordance with the provisions of this Divestiture Procedure Order.

[4] During the Initial Sale Period, Secure shall provide to the Commissioner and to the Monitor every 30 days a written report describing the progress of its efforts to effect the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. Secure shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of Secure's efforts to complete the Divestiture. An officer or other duly authorized representative of Secure shall certify that the information provided in any such response has been examined and is, to the best of that individual's knowledge and belief, correct and complete in all material respects.

III. DIVESTITURE TRUSTEE SALE PROCESS

[5] In the event that Secure fails to complete the Divestiture during the Initial Sale Period, the Commissioner shall appoint a Divestiture Trustee to complete the Divestiture in accordance with this Divestiture Procedure Order. Such appointment may be made at any time prior to the expiry of the Initial Sale Period or on such later date as the Commissioner determines.

[6] Within 5 Business Days after the appointment of the Divestiture Trustee, Secure shall submit to the Commissioner for approval the terms of a proposed Divestiture Process Agreement with the Divestiture Trustee and the Commissioner that confers on the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the Divestiture.

[7] Within 5 Business Days after receipt of the proposed Divestiture Process Agreement referred to in Section **[6]**, the Commissioner shall advise Secure whether or not the Commissioner approves the terms of the proposed Divestiture Process Agreement. If the Commissioner does not approve the terms of the proposed Divestiture Process Agreement, the Commissioner shall prescribe alternative terms that Secure shall incorporate into a final Divestiture Process Agreement with the Divestiture Trustee and the Commissioner.

[8] Without limiting the Commissioner's discretion to require additional terms, Secure consents to the following terms and conditions regarding the Divestiture Trustee's rights, powers and duties, and shall include such terms in the Divestiture Process Agreement:

(a) The Divestiture Trustee shall complete the Divestiture as expeditiously as possible, and in any event prior to expiry of the Divestiture Trustee Sale Period.

(b) The Divestiture Trustee shall use reasonable efforts to negotiate terms and conditions for the Divestiture that are as favourable to Secure as are reasonably available at that time; however, the Divestiture shall not be subject to any minimum price. The Divestiture Trustee's opinion of what constitutes favourable terms and conditions and what constitutes reasonably available terms and conditions, is subject to review and approval by the Commissioner.

(c) Subject to oversight and approval by the Commissioner, the Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period:

(i) to complete the Divestiture in accordance with the provisions of this Part;

(ii) to solicit interest in a possible Divestiture by whatever process or procedure the Divestiture Trustee believes is suitable to allow a

fair opportunity for one or more prospective good faith Purchasers to offer to acquire the Divestiture Assets, and for greater certainty, in determining whether to pursue negotiations with a prospective Purchaser, may have regard to the approval criteria in Section **[23]**;

(iii) to enter into a Divestiture Agreement with a Purchaser that will be legally binding on Secure;

(iv) to negotiate reasonable commercial covenants, representations, warranties and indemnities to be included in a Divestiture Agreement; and

(v) to employ, at the expense of Secure, such consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants as the Divestiture Trustee believes are necessary to carry out the Divestiture Trustee's duties and responsibilities.

(d) Where any Person makes a good faith inquiry respecting a possible purchase of Divestiture Assets, the Divestiture Trustee shall notify such Person that the Divestiture is being made and shall provide to such Person a copy of this Divestiture Procedure Order.

(e) Where, in the opinion of the Divestiture Trustee, a Person has a good faith interest in purchasing Divestiture Assets and has executed a confidentiality agreement, in a form satisfactory to the Commissioner, with the Divestiture Trustee protecting any Confidential Information that such Person may receive in the course of its due diligence review of the Divestiture Assets, the Divestiture Trustee shall:

(i) promptly provide to such Person all information respecting the Divestiture Assets that is determined by the Divestiture Trustee to be relevant and appropriate;

(ii) permit such Person to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged Records and information, including Confidential Information, that may be relevant to the Divestiture; and

(iii) give such Person as full and complete access as is reasonable in the circumstances to the personnel involved in managing the Divestiture Assets.

(f) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.

(g) The Divestiture Trustee shall provide to the Commissioner and to the Monitor, within 14 days after the later of the Divestiture Trustee's

appointment and the commencement of the Divestiture Trustee Sale Period and thereafter every 30 days, a written report describing the progress of the Divestiture Trustee's efforts to complete the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. The Divestiture Trustee shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of the Divestiture Trustee's efforts to complete the Divestiture.

(h) The Divestiture Trustee shall notify Secure and the Commissioner immediately upon the signing of any letter of intent or agreement in principle relating to the Divestiture Assets, and shall provide to Secure a copy of any executed Divestiture Agreement upon receipt of the Commissioner's approval of the Divestiture contemplated in such Divestiture Agreement.

[9] Secure shall not be involved in the Divestiture process during the Divestiture Trustee Sale Period or in any negotiations with prospective Purchasers undertaken by the Divestiture Trustee, nor will Secure have contact with prospective Purchasers during the Divestiture Trustee Sale Period.

[10] Subject to any legally recognized privilege, Secure shall provide to the Divestiture Trustee full and complete access to all personnel, Records, information (including Confidential Information) and facilities relating to the Divestiture Assets, to enable the Divestiture Trustee to conduct its own investigation of the Divestiture Assets and to provide access and information to prospective Purchasers.

[11] Secure shall take no action that interferes with or impedes, directly or indirectly, the Divestiture Trustee's efforts to complete the Divestiture.

[12] Secure shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Secure shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Divestiture Trustee on behalf of Secure.

[13] Secure will do all such acts and execute all such documents, and will cause the doing of all such acts and the execution of all such documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that the Divestiture Assets are divested in the Divestiture Trustee Sale Period and that agreements entered into by the Divestiture Trustee are binding upon and enforceable against Secure.

[14] Secure shall be responsible for all reasonable fees and expenses properly charged or incurred by the Divestiture Trustee in the course of carrying out the Divestiture

Trustee's duties and responsibilities under this Divestiture Procedure Order. The Divestiture Trustee shall serve without bond or security, and shall account for all fees and expenses incurred. Secure shall pay all reasonable invoices submitted by the Divestiture Trustee within 30 days after receipt and, without limiting this obligation, Secure shall comply with any agreement it reaches with the Divestiture Trustee regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Secure shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Divestiture Trustee by Secure shall be paid out of the proceeds of the Divestiture.

[15] Secure shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Divestiture Trustee.

[16] Secure shall indemnify the Commissioner and hold the Commissioner harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability.

[17] If the Commissioner determines that the Divestiture Trustee has ceased to act or has failed to act diligently, the Commissioner may remove the Divestiture Trustee and appoint a substitute Divestiture Trustee. The provisions of this Divestiture Procedure Order respecting the Divestiture Trustee shall apply in the same manner to any substitute Divestiture Trustee.

[18] Secure may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commissioner.

[19] The Commissioner may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Divestiture Trustee may receive from the Commissioner in connection with the performance of the Divestiture Trustee's duties.

[20] Notwithstanding any term of this Divestiture Procedure Order, the rights, powers and duties of the Divestiture Trustee under this Divestiture Procedure Order shall not expire until the Divestiture is completed.

IV. COMMISSIONER APPROVAL OF DIVESTITURE

[21] The Divestiture may proceed only with the prior approval of the Commissioner in accordance with this Part. For greater certainty, if a Divestiture is a notifiable transaction nothing in this Divestiture Procedure Order affects the operation of Part IX of the Act.

[22] The Divestiture Applicant shall comply with the following process for seeking and obtaining a decision of the Commissioner regarding approval of a proposed Divestiture:

(a) The Divestiture Applicant shall promptly:

(i) inform the Commissioner of any negotiations with a prospective Purchaser that may lead to a Divestiture; and

(ii) forward to the Commissioner copies of any agreement that is signed with a prospective Purchaser, including non-binding expressions of interest.

(b) The Divestiture Applicant shall immediately notify the Commissioner that it intends to enter a Divestiture Agreement with a prospective Purchaser, or has entered into an agreement that, if approved by the Commissioner, will be a Divestiture Agreement within the meaning of this Divestiture Procedure Order. If the Divestiture Applicant has entered into or intends to enter into more than one agreement in respect of the same Divestiture Assets, the Divestiture Applicant shall identify the agreement in respect of which it seeks the Commissioner's approval and the remainder of this Part shall apply only to that agreement unless the Divestiture Applicant designates a substitute agreement.

(c) The notice described in Paragraph **[22(b)]** shall be in writing and shall include: the identity of the proposed Purchaser; the details of the proposed Divestiture Agreement and any related agreements; and information concerning whether and how the proposed Purchaser would, in the view of the Divestiture Applicant, likely satisfy the terms of this Divestiture Procedure Order.

(d) Within 14 days following receipt of the notice described in Paragraph **[22(b)]**, the Commissioner may request additional information concerning the proposed Divestiture from any or all of Secure, the Monitor, the prospective Purchaser and, in the Divestiture Trustee Sale Period, the Divestiture Trustee. These Persons shall each provide any additional

information requested from them. When they have provided a complete response to the Commissioner's request, these Persons shall comply with the following procedures:

(i) the Divestiture Trustee shall provide written confirmation to the Commissioner that the Divestiture Trustee has provided to the Commissioner all additional information requested from the Divestiture Trustee;

(ii) the Monitor shall provide written confirmation to the Commissioner that the Monitor has provided to the Commissioner all additional information requested from the Monitor;

(iii) an officer or other duly authorized representative of Secure shall certify that the additional information provided by Secure in response to the Commissioner's request has been examined and is, to the best of that individual's knowledge and belief, correct and complete in all material respects; and

(iv) an officer or other duly authorized representative of the prospective Purchaser shall certify that the additional information provided by the prospective Purchaser in response to the Commissioner's request has been examined and is, to the best of that individual's knowledge and belief, correct and complete in all material respects.

The date on which the last of the Divestiture Trustee, Secure, the Monitor and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"First Reference Date"**.

(e) Within 7 days after the First Reference Date, the Commissioner may request further additional information concerning the proposed Divestiture from any or all of the Persons identified in Paragraph **[22(d)]**. These Persons shall each provide any further additional information requested from them. When they have provided a complete response to the Commissioner's request, if any, these Persons shall comply with the procedures outlined in Paragraph **[22(d)]** in regard to the further additional information provided. The date on which the last of the Divestiture Trustee, Secure, the Monitor and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"Second Reference Date"**.

(f) The Commissioner shall notify the Divestiture Applicant of the approval of, or the objection to, the proposed Divestiture as soon as possible, and in any event within 14 days after the date on which the Commissioner receives the notice described in Paragraph **[22(b)]** or, if the Commissioner

requests any additional information under Paragraph **[22(d)]** or further additional information under Paragraph **[22(e)]**, within 14 days after the later of:

(i) the First Reference Date; and

(ii) the Second Reference Date, if any.

(g) The Commissioner's determination as to whether to approve a proposed Divestiture shall be in writing.

[23] In exercising discretion to determine whether to approve a proposed Divestiture, the Commissioner shall take into account the likely impact of the Divestiture on competition, and may consider any other factor the Commissioner considers relevant. Prior to granting approval, the Commissioner must also be satisfied that:

(a) the proposed Purchaser is fully independent of and operates at arm's length from Secure;

(b) Secure will have no direct or indirect interest in the Divestiture Assets following the Divestiture;

(c) the proposed Purchaser is committed to carrying on the Divested Business;

(d) the proposed Purchaser has the managerial, operational and financial capability to compete effectively in the supply of oil and gas waste services in the Western Canadian Sedimentary Basin; and

(e) the proposed Purchaser will (i) if the Commissioner grants approval during the Initial Sale Period, complete the Divestiture prior to the expiry of the Initial Sale Period; or (ii) if the Commissioner grants approval during the Divestiture Trustee Sale Period, complete the Divestiture during the Divestiture Trustee Sale Period.

V. PRESERVATION OF DIVESTITURE ASSETS

[24] In order to preserve the Divestiture Assets pending completion of the Divestiture, Secure shall maintain the economic viability, marketability and competitiveness of the Divestiture Assets and Divested Business, and shall comply with any decision of or direction given by the Monitor that relates to preservation of the Divestiture Assets. Without limiting the generality of the foregoing, Secure shall:

(a) maintain and hold the Divestiture Assets in good condition and repair, normal wear and tear excepted, and to standards that are, in the view of the Monitor, at least equal to those that existed at the Effective Date;

(b) ensure that the management and operation of the Divestiture Assets continues in the ordinary course of business and in a manner that is, in the

view of the Monitor, reasonably consistent in nature, scope and magnitude with past practices and generally accepted industry practices, and in compliance with all applicable laws;

(c) not knowingly take or allow to be taken any action that, in the view of the Monitor, adversely affects the competitiveness, operations, financial status or value, viability and saleability of the Divestiture Assets;

(d) ensure that the Divestiture Assets are not engaged in any type of business other than the type of business conducted as of the date of this Divestiture Procedure Order, except with the prior approval of the Monitor and the Commissioner;

(e) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations that are, in Monitor's view subject to consultation with Secure, advisable for the operation of the Divestiture Assets and Divested Business;

(f) take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Divestiture Assets that are, in the view of the Monitor, at least equal to the standards that existed during the fiscal year prior to this Divestiture Procedure Order;

(g) not curtail marketing, sales, promotional or other activities of the Divestiture Assets or Divested Business, except with the prior approval of the Monitor;

(h) not alter, or cause to be altered, the management of the Divestiture Assets as it existed during the fiscal year prior to the date of this Divestiture Procedure Order, except with the prior approval of the Monitor;

(i) not terminate or alter any employment, salary or benefit agreements, as they existed at the date of this Divestiture Procedure Order, for Persons employed in connection with the Divestiture Assets, without the prior approval of the Monitor;

(j) ensure that the Divestiture Assets are staffed with sufficient employees to ensure their viability and competitiveness, including by replacing any departing employees with other qualified employees provided that the Monitor has approved both the qualifications and the need for such replacement employees;

(k) maintain inventory levels and payment terms consistent with the practices of Secure that existed, with respect to the Divestiture Assets, during the fiscal year prior to the date of this Divestiture Procedure Order; and

(l) maintain in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Divestiture Assets and the Divested Business.

[25] Pending completion of the Divestiture, Secure shall not, without the Commissioner's prior written approval:

(a) create any new encumbrances on the Divestiture Assets or Divested Business, other than ordinary course obligations that are not due or delinquent;

(b) enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Divestiture Assets or Divested Business, except as necessary to comply with this Divestiture Procedure Order; or

(c) make any material changes to the Divestiture Assets or Divested Business, except as required to comply with this Divestiture Procedure Order.

[26] Secure shall provide sufficient financial resources, including general funds, capital funds, working capital and reimbursement for any operating, capital or other losses, to maintain the Divestiture Assets in accordance with this Part. If the Monitor believes that Secure has not provided, is not providing or will not provide sufficient financial and other resources under this Part, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Secure must provide. Secure shall comply with any determination made by the Commissioner on this issue.

VI. THIRD PARTY CONSENTS

[27] It shall be a condition in any Divestiture Agreement (whether negotiated by Secure or by the Divestiture Trustee) that Secure shall, as a condition of closing, obtain any consents and waivers from Third Parties that are necessary to permit the assignment to, and assumption by, a Purchaser of all material contracts, approvals and authorizations relating to the Divestiture Assets; provided, however, that Secure may satisfy this requirement by certifying that the Purchaser has executed agreements directly with one or more Third Parties which make such assignment and assumption unnecessary.

VII. TRANSITIONAL SUPPORT ARRANGEMENTS

[28] Secure, or the Divestiture Trustee on behalf of Secure, shall enter into the agreements to supply, at the option of the Purchaser, transitional services for up to 12 months following the completion of the Divestiture, such that the Purchaser will be able to operate the Divested Business in a manner consistent with the

manner in which the Divested Business was conducted during the 12-month period prior to the Effective Date.

VIII. EMPLOYEES

[29] Secure (during the Initial Sale Period) and the Divestiture Trustee (during the Divestiture Trustee Sale Period) shall provide to any prospective Purchaser, the Commissioner and the Monitor information relating to the employees whose responsibilities involve the operation of the Divestiture Assets, to enable such Purchaser to make decisions regarding offers of employment to such employees. The Monitor shall review the information provided to ensure that it is sufficient to enable the Purchaser to make such decisions.

[30] Secure shall:

(a) not interfere, directly or indirectly, with any negotiations by a Purchaser to employ any employees whose responsibilities involve the operation of the Divestiture Assets;

(b) not offer any incentive to such employees to decline employment with the Purchaser or to accept other employment with Secure;

(c) remove any impediment that may deter such employees from accepting employment with the Purchaser;

(d) waive any non-compete or confidentiality provisions of employment or other contracts that could impair the ability of such employees to be employed by the Purchaser; and

(e) pay or transfer to the employees subsequently employed by the Purchaser all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Secure.

[31] For a period of one year following completion of the Divestiture, Secure shall not, without the prior written consent of the Commissioner, directly or indirectly solicit or employ any Persons employed in connection with the Divestiture Assets who has accepted an offer of employment with the Purchaser unless such Person's employment has been terminated by the Purchaser. Nothing in this Divestiture Procedure Order shall restrict the solicitation or employment by Secure of any Person who is solicited by advertising placed in a newspaper, trade journal, through a web site or via other media of general circulation which is not directed at or focused on Persons employed in connection with the Divestiture Assets.

IX. FAILURE OF DIVESTITURE TRUSTEE SALE

[32] If, by the end of the Divestiture Trustee Sale Period, the Divestiture has not been completed, or if the Commissioner is of the opinion that the Divestiture likely will

not be completed prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal, at the Commissioner's election, for either (i) such order as is necessary to complete the Divestiture; or (ii) such order as is necessary to ensure that the Transaction is not likely to prevent or lessen competition substantially.

X. MONITOR

[33] The Commissioner shall appoint a Monitor, responsible for monitoring compliance by Secure with this Divestiture Procedure Order. Such appointment may occur at any time following the Effective Date. A reference in this Divestiture Procedure Order to specific monitoring functions or tasks that are to be undertaken by the Monitor shall in no way detract from the Monitor's general right, power and duty to monitor all aspects of Secure's compliance with this Divestiture Procedure Order.

[34] Within 5 Business Days after the appointment of the Monitor, Secure shall submit to the Commissioner for approval the terms of a proposed Monitor Agreement with the Monitor and the Commissioner that confers on the Monitor all rights and powers necessary to permit the Monitor to monitor compliance by Secure with this Divestiture Procedure Order.

[35] Within 5 Business Days after receipt of the proposed Monitor Agreement referred to in Section **[34]**, the Commissioner shall advise Secure whether or not the Commissioner approves the terms of the proposed Monitor Agreement. If the Commissioner does not approve the terms of the proposed Monitor Agreement, the Commissioner shall prescribe alternative terms for the Monitor Agreement that Secure shall incorporate into a final Monitor Agreement with the Monitor and the Commissioner.

[36] Secure consents to the following terms and conditions regarding the Monitor's rights, powers and duties, and shall include such terms in the Monitor Agreement:

(a) The Monitor shall have the power and authority to monitor Secure's compliance with this Divestiture Procedure Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Divestiture Procedure Order and in consultation with the Commissioner.

(b) The Monitor shall have the authority to employ, at the expense of Secure, such consultants, accountants, legal counsel and other representatives and assistants as the Monitor believes are necessary to carry out the Monitor's duties and responsibilities.

(c) The Monitor shall have no obligation or authority to operate or maintain the Divestiture Assets.

(d) The Monitor shall act for the sole benefit of the Commissioner, maintain all confidences and avoid any conflict of interest.

(e) The Monitor shall have no duties of good faith (except as required by law), of a fiduciary nature, or otherwise, to Secure.

(f) The Monitor shall provide to the Commissioner every 30 days after the date of the Monitor's appointment until the Divestiture is complete and thereafter annually on or before the anniversary of the Divestiture, a written report concerning performance by Secure of its obligations under this Divestiture Procedure Order. The Monitor shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding Secure's compliance.

[37] Subject to any legally recognized privilege, Secure shall provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information) and facilities relevant to monitoring Secure's compliance with this Divestiture Procedure Order.

[38] Secure shall take no action that interferes with or impedes, directly or indirectly, the Monitor's efforts to monitor Secure's compliance with this Divestiture Procedure Order.

[39] Secure shall fully and promptly respond to all requests from the Monitor and, subject to any legally recognized privilege, shall provide all information the Monitor may request. Secure shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Monitor on behalf of Secure.

[40] Secure may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commissioner.

[41] The Commissioner may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Monitor may receive from the Commissioner in connection with the performance of the Monitor's duties.

[42] Secure shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out the Monitor's duties under this Divestiture Procedure Order. The Monitor shall serve without bond or security, and shall account for all fees and expenses incurred. Secure shall pay all reasonable invoices submitted by the Monitor within 30 days after receipt and, without limiting this obligation, Secure shall comply with any agreement it reaches with the Monitor regarding interest on late payments. In the event of any

dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Secure shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Monitor by Secure shall be paid out of the proceeds of the Divestiture.

[43] Secure shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Monitor.

[44] If the Commissioner determines that the Monitor has ceased to act or has failed to act diligently, the Commissioner may remove the Monitor and appoint a substitute Monitor. The provisions of this Divestiture Procedure Order respecting the Monitor shall apply in the same manner to any substitute Monitor.

[45] The Monitor shall serve for such time as is necessary to monitor Secure's compliance with this Divestiture Procedure Order.

XI. COMPLIANCE

[46] Secure shall provide a copy of this Divestiture Procedure Order to each of its own and its Affiliates' directors, officers, employees and agents having managerial responsibility for any obligations under this Divestiture Procedure Order, within 3 Business Days after the Effective Date. Secure shall ensure that its directors, officers, employees and agents with responsibility for any obligations under this Divestiture Procedure Order receive sufficient training respecting Secure's responsibilities and duties under this Divestiture Procedure Order, and the steps that such individuals must take in order to comply with this Divestiture Procedure Order.

[47] Secure shall not, for a period of 10 years after the date when the Divestiture is completed, directly or indirectly acquire any interest in the Divestiture Assets, without the prior written approval of the Commissioner.

[48] For a period of 2 years after the date when the Divestiture is completed, Secure shall not, without providing advance written notification to the Commissioner in the manner described in this Section, directly or indirectly:

(a) acquire any assets or shares of, or any other interest in, any oil and gas waste services business in the Western Canadian Sedimentary Basin business; or

(b) consummate any merger or other combination relating to the oil and gas waste services business in the Western Canadian Sedimentary Basin.

If a transaction described in (a) or (b) is one for which notice is not required under section 114 of the Act, Secure shall supply to the Commissioner the information described in section 16 of the *Notifiable Transactions Regulations* at least 30 days before completing such transaction (or such shorter period as the Commissioner may agree). Secure shall certify such information in the same manner as would be required if section 118 of the Act applied. The Commissioner may accept a competitive impact brief from Secure instead of such information. The Commissioner may, within 30 days after receiving the information described in this Section, request that Secure supply additional information that is relevant to the Commissioner's assessment of the transaction. In the event that the Commissioner issues such a request for additional information, Secure shall supply information to the Commissioner in the form specified by the Commissioner and shall not complete such transaction until at least 30 days (or such shorter period as the Commissioner may agree) after Secure has supplied all such requested information in the form specified by the Commissioner.

[49] One year after the Effective Date and annually thereafter on the anniversary of the Effective Date, and at such other times as the Commissioner may require, Secure shall file an affidavit or certificate, substantially in the form of Schedule **[B]** to this Divestiture Procedure Order, certifying its compliance with Parts **[VII], [VIII]** and **[XI]** of this Divestiture Procedure Order and setting out the following information in detail:

(a) the steps taken to ensure compliance;

(b) the controls in place to verify compliance; and

(c) the names and titles of employees who have oversight of compliance.

[50] If any of Secure, the Divestiture Trustee or the Monitor becomes aware that there has been a breach or possible breach of any of the terms of this Divestiture Procedure Order, such Person shall, within 5 Business Days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the breach or possible breach, provided that notification of a possible breach is not required if such Person determines within those 5 Business Days that it could not reasonably be considered a breach of any of the terms of this Divestiture Procedure Order. Secure shall provide confirmation of its compliance with this provision in all affidavits and certificates of compliance filed with the Commissioner pursuant to Section **[49]** of this Divestiture Procedure Order.

[51] Secure shall notify the Commissioner at least 30 days prior to:

(a) any proposed dissolution of Secure; or

(b) any other change in Secure if such change may affect compliance obligations arising out of this Divestiture Procedure Order including, but not limited to, a reorganization, material acquisition, disposition or

transfer of assets, or any fundamental change for purposes of Secure's incorporating statute.

[52] For purposes of determining or securing compliance with this Divestiture Procedure Order, and subject to any legally recognized privilege, Secure shall, upon written request given at least 5 Business Days in advance to Secure, permit any authorized representative(s) of the Commissioner, without restraint or interference:

(a) to access, during regular office hours of Secure on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Secure related to compliance with this Divestiture Procedure Order, which copying services shall be provided by Secure at its expense; and

(b) to interview such officers, directors or employees of Secure as the Commissioner requests regarding such matters.

XII. NOTICES

[53] A notice or other communication required or permitted to be given under this Divestiture Procedure Order is valid if it is:

(a) in writing and delivered by personal delivery, registered mail, courier service, facsimile or electronic mail; and

(b) addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.

<u>if to the Commissioner</u>:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Commissioner of Competition
Fax: (819) 953-5013
Email address: ic.avisdefusionmergernotification.ic@canada.ca and avisdefusionmergernotification@cb-bc.gc.ca

with a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services

Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Fax: (819) 953-9267
Email address: ic.cb_lsu_senior_general_counsel-avocat_general_principal_usj_bc.ic@canada.ca and cb_lsu_senior_general_counsel-avocat_general_principal_usj_bc@ised-isde.gc.ca

if to Secure:

[Secure's address and contact person]

with a copy to:

[Secure's counsel]

[54] A notice or other communication under this Divestiture Procedure Order is effective on the day that it is received by the receiving party and is deemed to have been received as follows:

(a) if it is delivered in person, by registered mail or by courier, upon receipt as indicated by the date on the signed receipt;

(b) if it is delivered by facsimile, upon receipt as indicated by the time and date on the facsimile confirmation slip; or

(c) if it is delivered by electronic mail, when the recipient, by an email sent to the email address for the sender stated in this Section or by a notice delivered by another method in accordance with this Section, acknowledges having received that email, with an automatic "read receipt" not constituting acknowledgment of an email for purposes of this Section.

If a notice or other communication is received after 5:00 p.m. local time, or on a day that is not a Business Day, it shall be deemed to have been received on the next Business Day.

[55] Notwithstanding Sections **[53]** and **[54]**, a notice or other communication that is not communicated in accordance with Sections **[53]** and **[54]** is valid if a representative of the party to this Divestiture Procedure Order that is the recipient of such communication confirms the receipt of such communication and does not, at the time of such confirmation, request that it be delivered differently.

XIII. GENERAL

[56] In this Divestiture Procedure Order:

(a) **Number and Gender –** Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.

(b) **Time Periods** – Computation of time periods shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21, and the definition of "holiday" in the *Interpretation Act* shall include Saturday.

[57] The Commissioner may, after informing Secure, extend any of the time periods contemplated by this Divestiture Procedure Order other than Sections **[47]** and **[48]**. If any time period is extended, the Commissioner shall promptly notify Secure of the revised time period.

[58] In the event of a dispute regarding compliance with or the interpretation, implementation or application of this Divestiture Procedure Order, the Commissioner or Secure may apply to the Tribunal for directions or a further order.

DATED at Ottawa this day of ________, 2022

SIGNED on behalf of the Tribunal by the presiding judicial member.

SCHEDULE A

DIVESTITURE FACILITIES

Treatment, Recovery and Disposal	Solid Waste Disposal
Boundary Lake	08-09
Brazeau	Kakwa
Buck Creek	Mile 103
Coronation	Moose Creek
Eckville	Swan Hills
Elk Point	
Fort McMurray	**Landfill**
Fox Creek East	Elk Point
Fox Creek	Fox Creek
Gordondale	La Glace
Grande Prairie Industrial	Marshall
Green Court	Silverberry
Gull Lake	South Wapiti
Judy Creek	Spirit River
Kindersley	Willesden Green
La Glace	
Mitsue	
Niton Junction	
Silverberry	
South Taylor	
South Wapiti	**Caverns**
Spirit River	Lindbergh
Stauffer	Unity
Valleyview	
West Edson	

SCHEDULE B

FORM OF COMPLIANCE CERTIFICATION/AFFIDAVIT

I, **[name],** of **[place],** hereby certify[1] in accordance with the terms of the Competition Tribunal's Divestiture Procedure Order dated ●, that:

1. I am the **[title]** of **[Secure]**, and have personal knowledge of the matters deposed to herein, unless they are stated to be on information and belief, in which cases I state the source of such information and believe it to be true.

2. The Divestiture (as defined in the Divestiture Procedure Order) to **[Purchaser]** was completed on **[date]**.

3. Pursuant to Section **[49]** of the Divestiture Procedure Order, Secure is required to file **[annual reports/reports when requested by the Commissioner]** certifying its compliance with Parts VII, VIII and XI of the Divestiture Procedure Order.

Oversight of Compliance

4. **[Names/titles]** have primary responsibility for overseeing compliance with this Divestiture Procedure Order.

Circulation of Divestiture Procedure Order

5. Pursuant to Section **[46]** of the Divestiture Procedure Order, Secure is required to provide a copy of the Divestiture Procedure Order to each of its own and its Affiliates' directors, officers, employees and agents having managerial responsibility for any obligations under the Divestiture Procedure Order, within 3 Business Days after the date of registration of the Divestiture Procedure Order. The Divestiture Procedure Order was circulated by **[whom]** to **[provide list]** on **[dates]**.

6. Pursuant to Section **[46]** of the Divestiture Procedure Order, Secure is required to ensure that its directors, officers, employees and agents with responsibility for any obligations under the Divestiture Procedure Order receive sufficient training respecting Secure's responsibilities and duties under the Divestiture Procedure Order. The following training has been provided: **[provide list of who was trained and by whom as well as a general statement of the content of the training]**

[1] If this is drafted as an affidavit, the words "hereby certify" should be removed and should be replaced with "make oath and say". An affidavit should be sworn under oath. A certification should be certified by a Commissioner for taking affidavits.

Transitional Support Arrangements

7. Section **[28]** of the Divestiture Procedure Order requires Secure to provide transitional support arrangements. **[Describe compliance with this obligation.]**

Employees

8. Sections **[30 and 31]** of the Divestiture Procedure Order require Secure to take various steps in regard to its employees whose responsibilities involved the operation of the Divestiture Assets. Secure has fully complied with the terms of those Sections and, more particularly: **[Describe steps taken to facilitate employee transfer to Purchaser, having regard to the terms of Sections [30 and 31]; provide data on the # of employees who have transferred to the Purchaser.]**

Acquisition, Reacquisition and Corporate Change

9. Section **[47]** of the Divestiture Procedure Order prohibits reacquisition of Divestiture Assets for a period of 10 years after the Divestiture is completed without prior written approval of the Commissioner. Section **[48]** of the Divestiture Procedure Order prohibits certain mergers and acquisitions for a period of 2 years without prior notice to the Commissioner. Secure has fully complied with the terms of those Sections and, more particularly: **[Describe steps taken to ensure commitments have been complied with.]**

10. Section **[51]** of the Divestiture Procedure Order requires notice to the Commissioner of certain corporate changes or other changes to Secure that may affect compliance with the Divestiture Procedure Order. Secure has complied with this provision and, more particularly: **[Describe steps taken to ensure this commitment has been complied with.]**

Notification of Breach

11. Based on my personal knowledge and my inquiries of **[provide names]**, I am not aware of any breach or possible breach of any of the terms of the Divestiture Procedure Order within the meaning of Section **[50]** of the Divestiture Procedure Order.

DATED ●.

______________________________	______________________________
Commissioner of Oaths	**Name and Title of Certifying Officer**

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17 And the answer is that the customers here care
18 about their profit. You know, that's my working assumption
19 when I analyze firms and what they do.
20 So what does that mean in this context? The
21 oil and gas companies, my working assumption, I think, is a
22 reasonable one, and I think it's supported by the
23 testimony, are out to obtain service for their waste at the
24 lowest combined cost and price.
25 And so when I say that there's a match that can

1 be made, what I'm referring to is that some facilities are
2 going to provide the customers with a better match.
3 They're going to be able to provide the customer with a
4 lower price because their cost structure is such that it
5 can serve the customer pretty well or they will be able to,
6 for example, be near the customer, so if the customer used
7 them, they incur lower transportation costs.
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12 121 Q. Does Secure agree that it
13 can and does adjust the tipping fees it may charge
14 a customer based on the location the waste is
15 coming from?
16 A. That is the one of the
17 things that is considered, among many.
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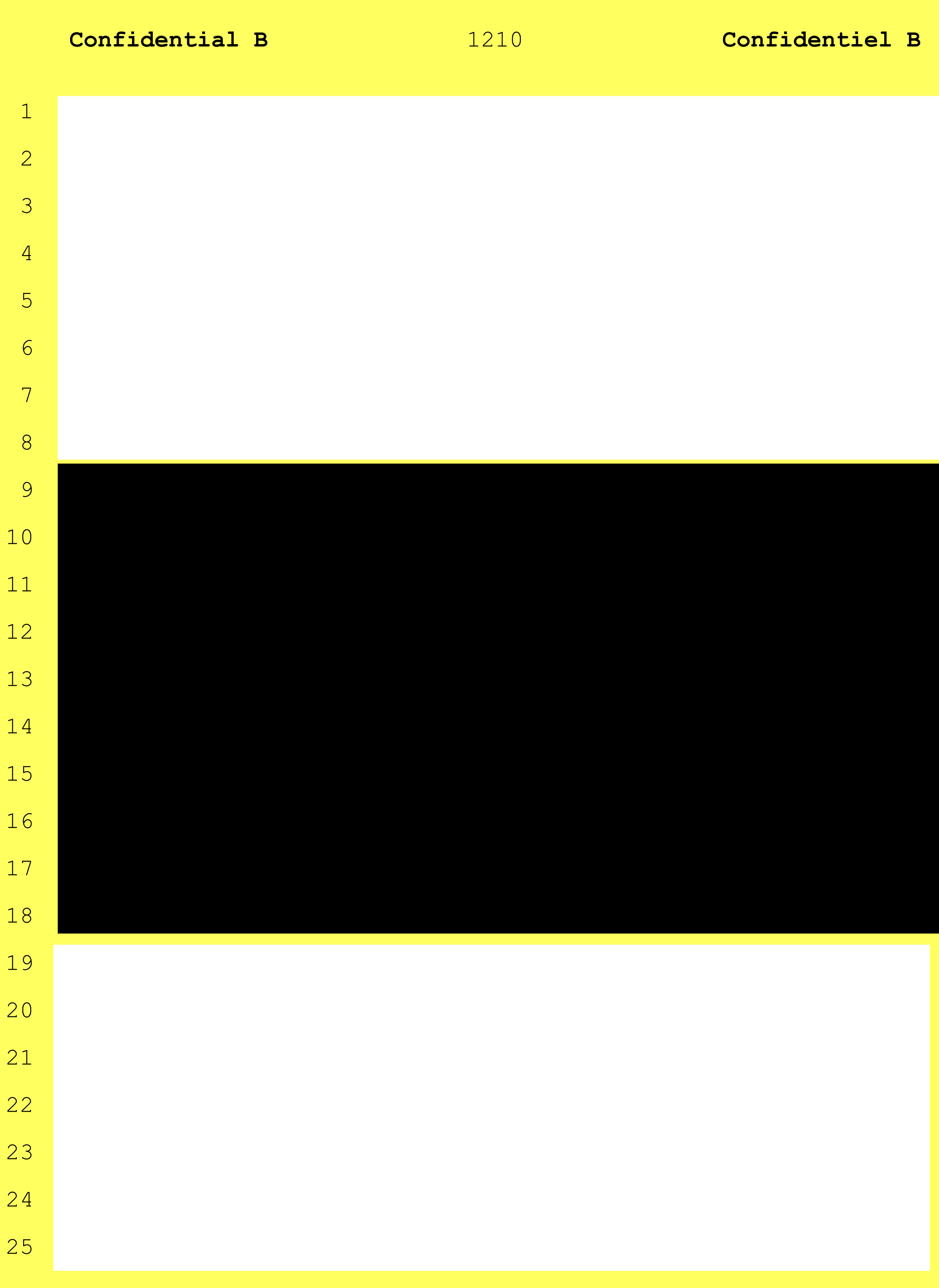
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12 121 Q. Does Secure agree that it
13 can and does adjust the tipping fees it may charge
14 a customer based on the location the waste is
15 coming from?
16 A. That is the one of the
17 things that is considered, among many.
18 122 Q. Okay. Does Secure agree
19 that it can and does adjust the tipping fees it
20 may charge a customer based on the competitive
21 options it believes the customer has?
22 A. That is one consideration
23 among many.
24
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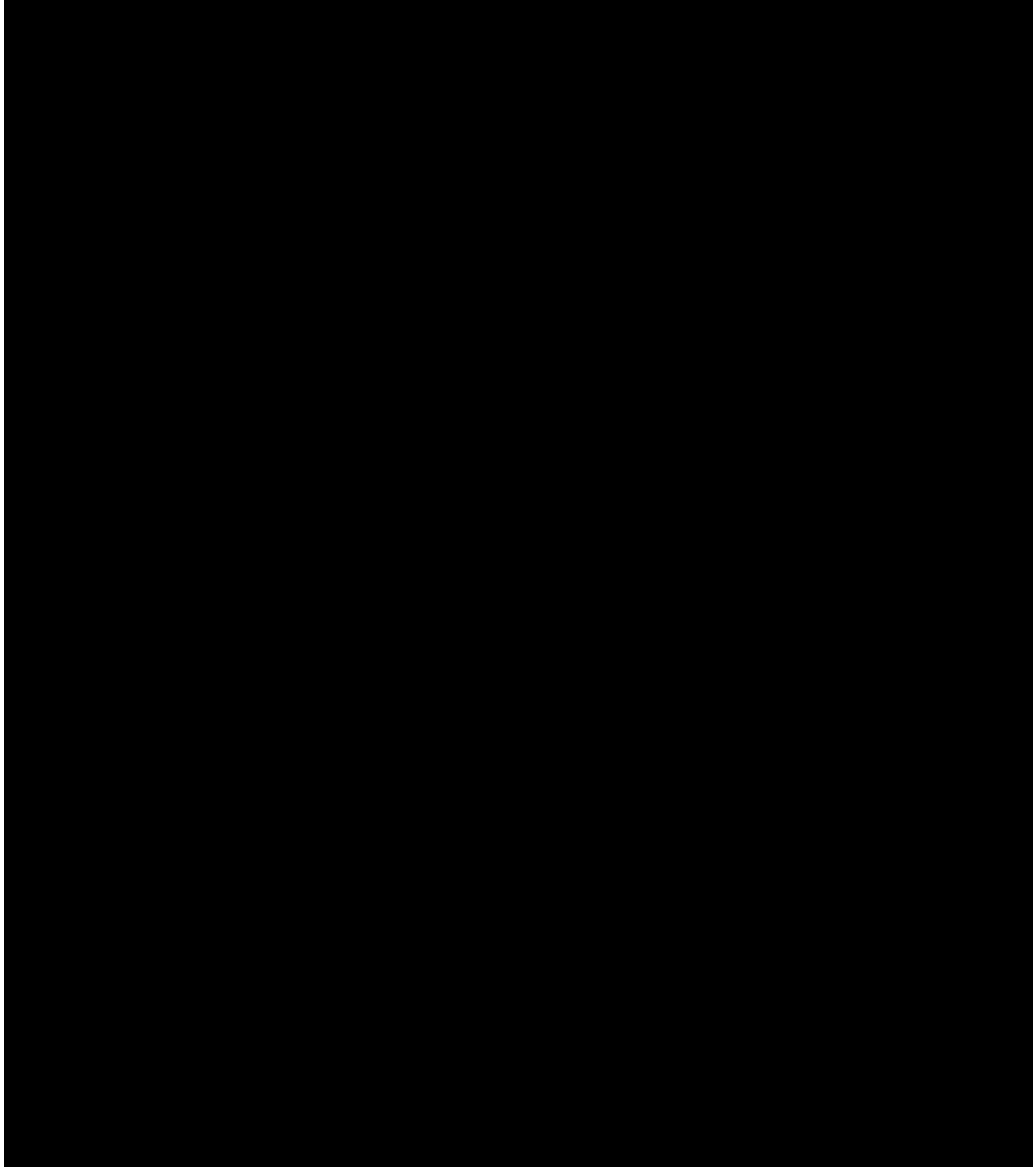

This is Exhibit 42 to the Affidavit of

David Engel

Affirmed on March 25, 2022

This is Exhibit 43 to the Affidavit of

David Engel

Affirmed on March 25, 2022

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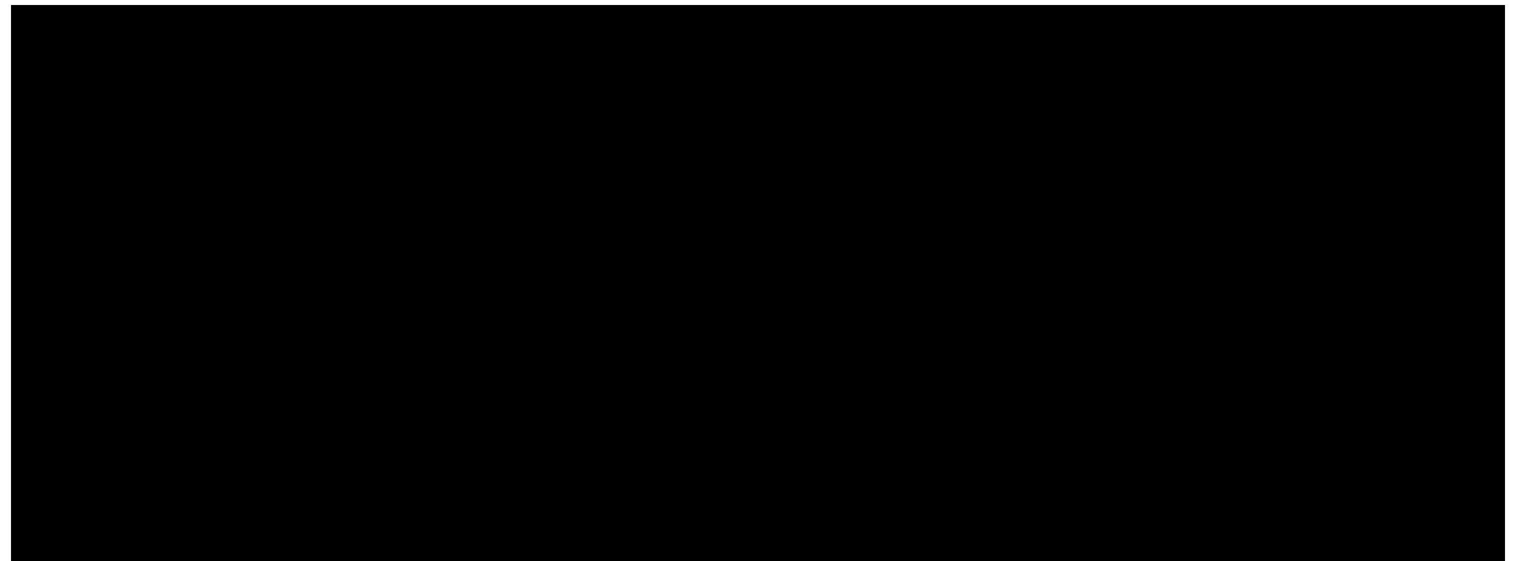
CONF PUBLIC EL Page 212

ONF PUBLIC EL
Page 213

EARTH MATTERS– Please think before you print



This is Exhibit 44 to the Affidavit of

David Engel

Affirmed on March 25, 2022

PUBLIC
Page 216
Tervita Corporation
1600, 140-10th Avenue S.E., Calgary, AB Canada T2G 0R1

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Page 217

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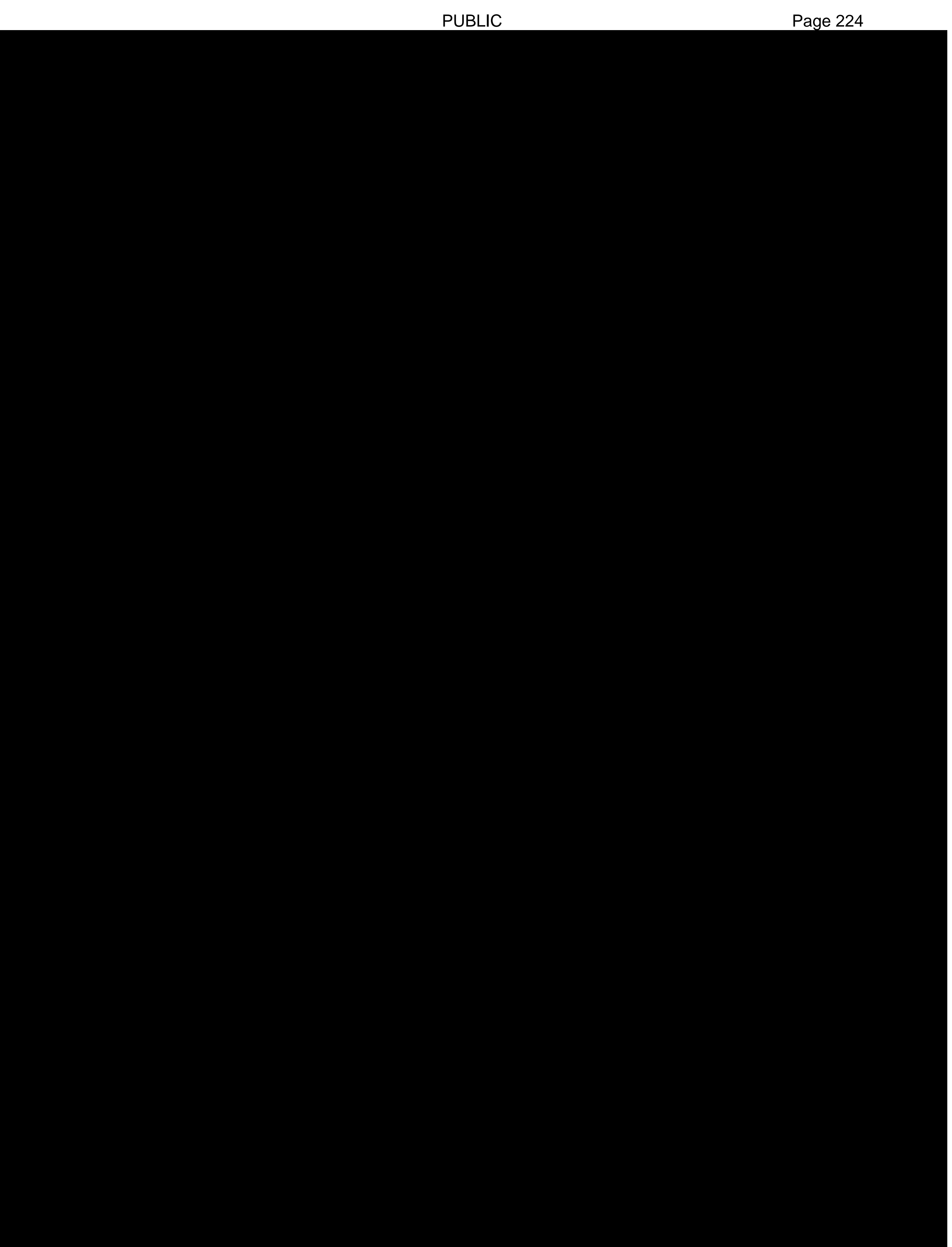
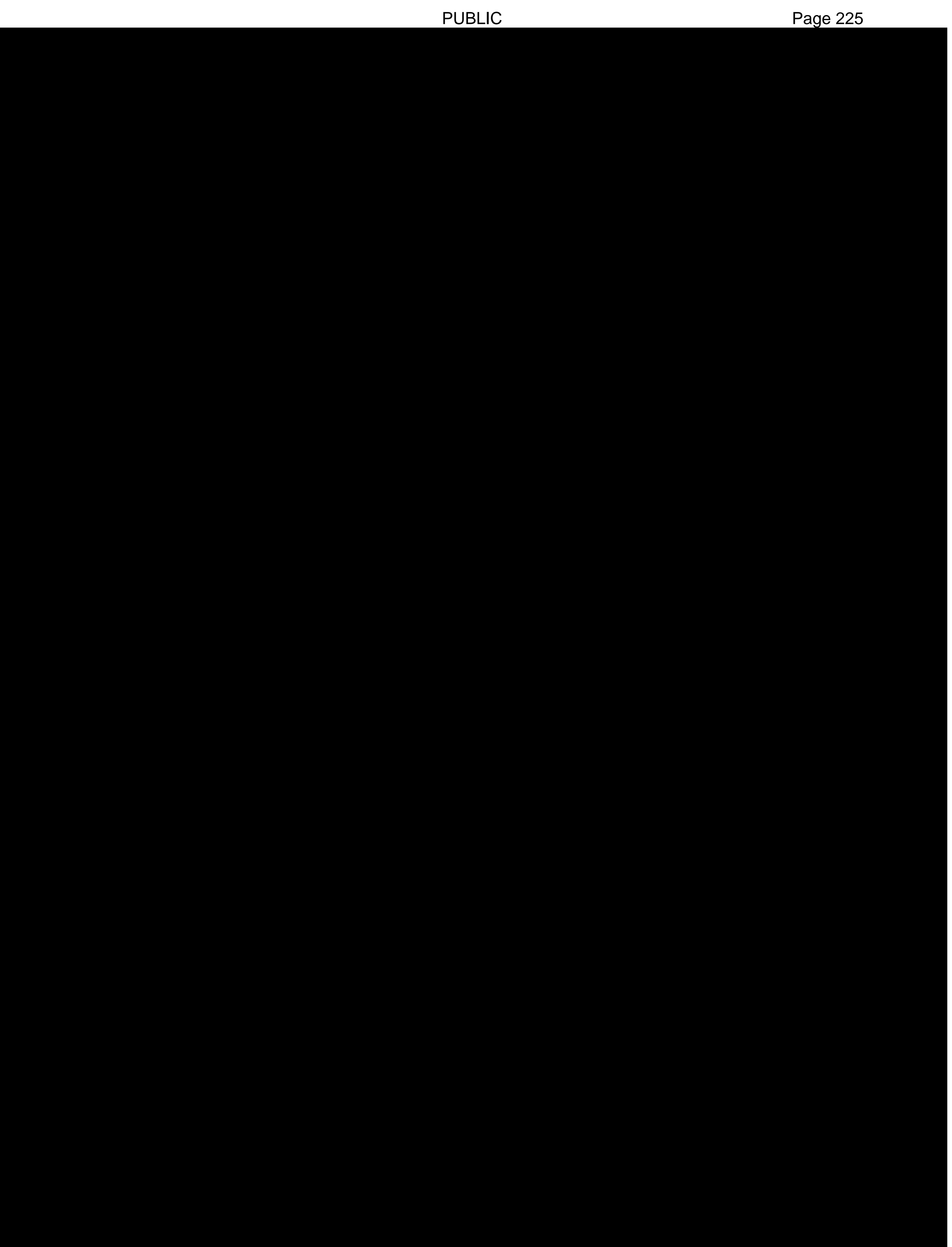
This is Exhibit 45 to the Affidavit of
David Engel
Affirmed on March 25, 2022

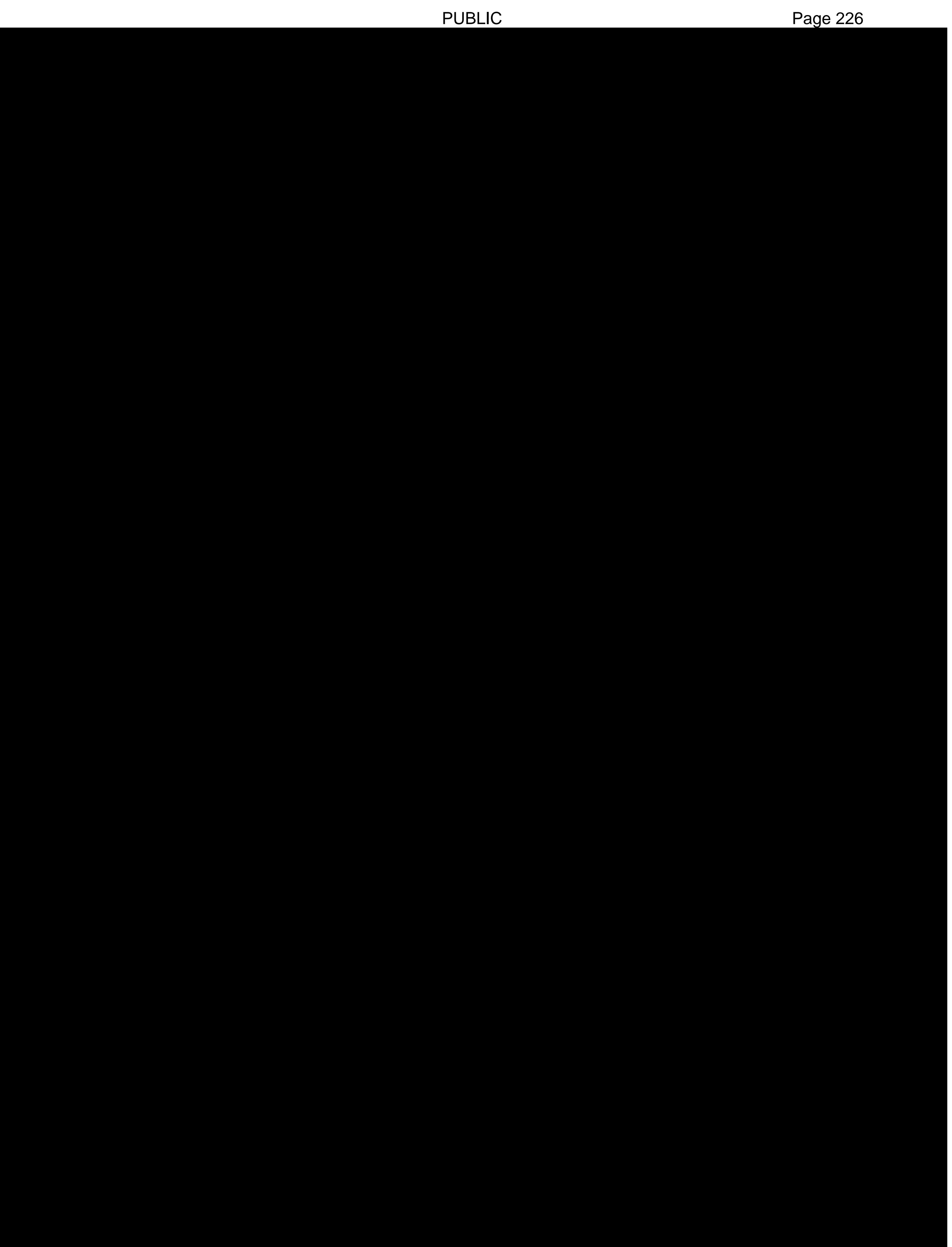
To:

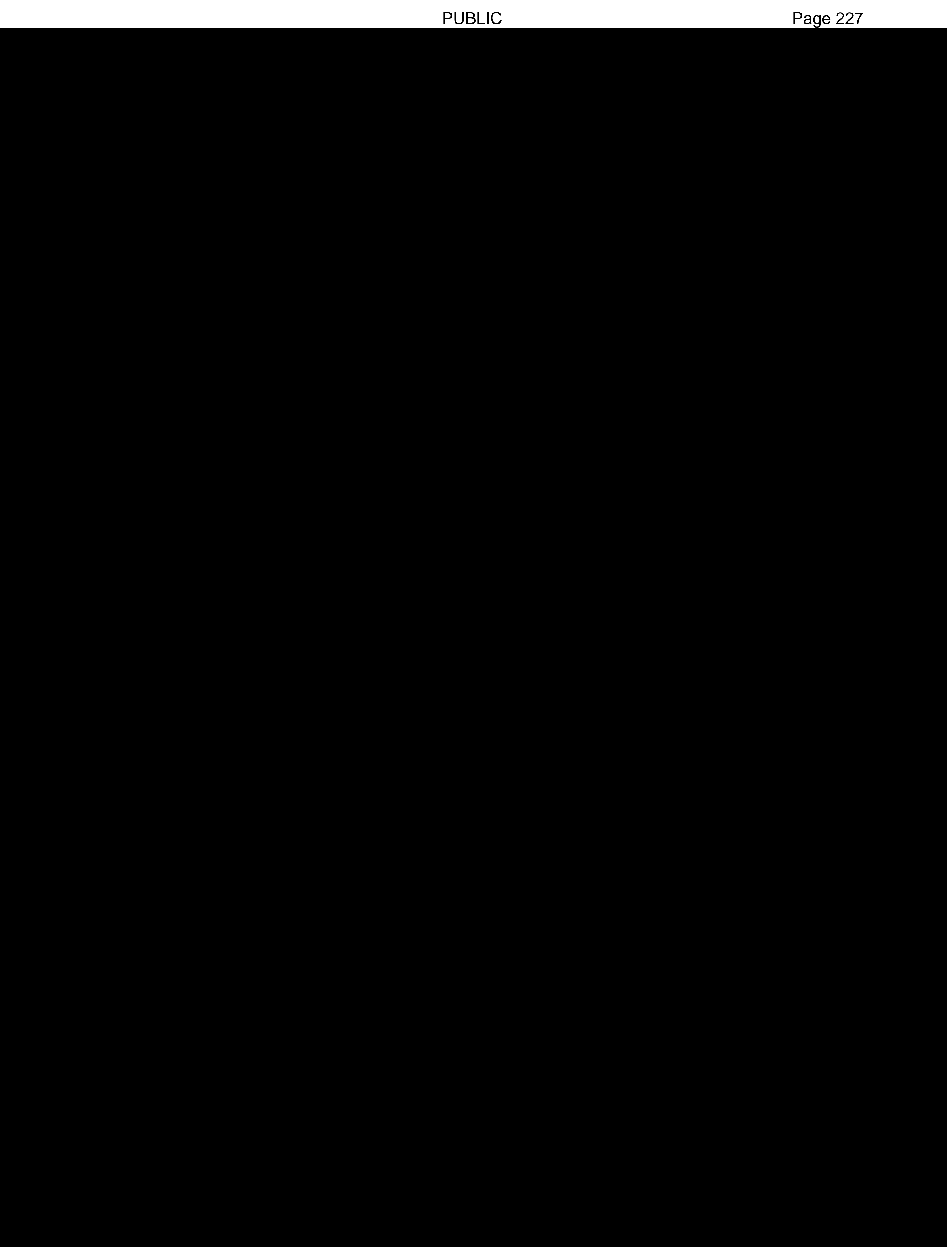
ONF PUBLIC EL
Page 222

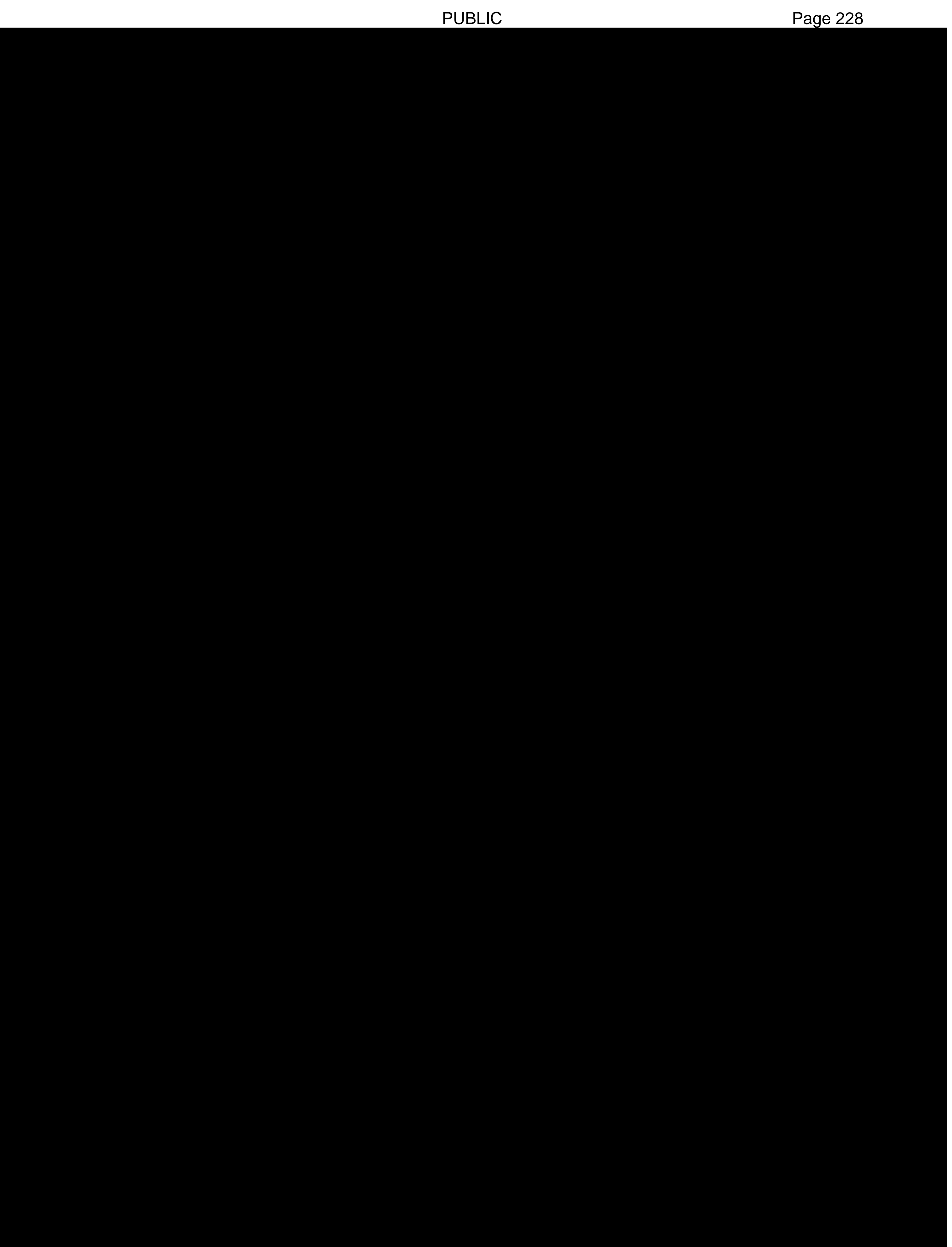
This is Exhibit 46 to the Affidavit of
David Engel
Affirmed on March 25, 2022



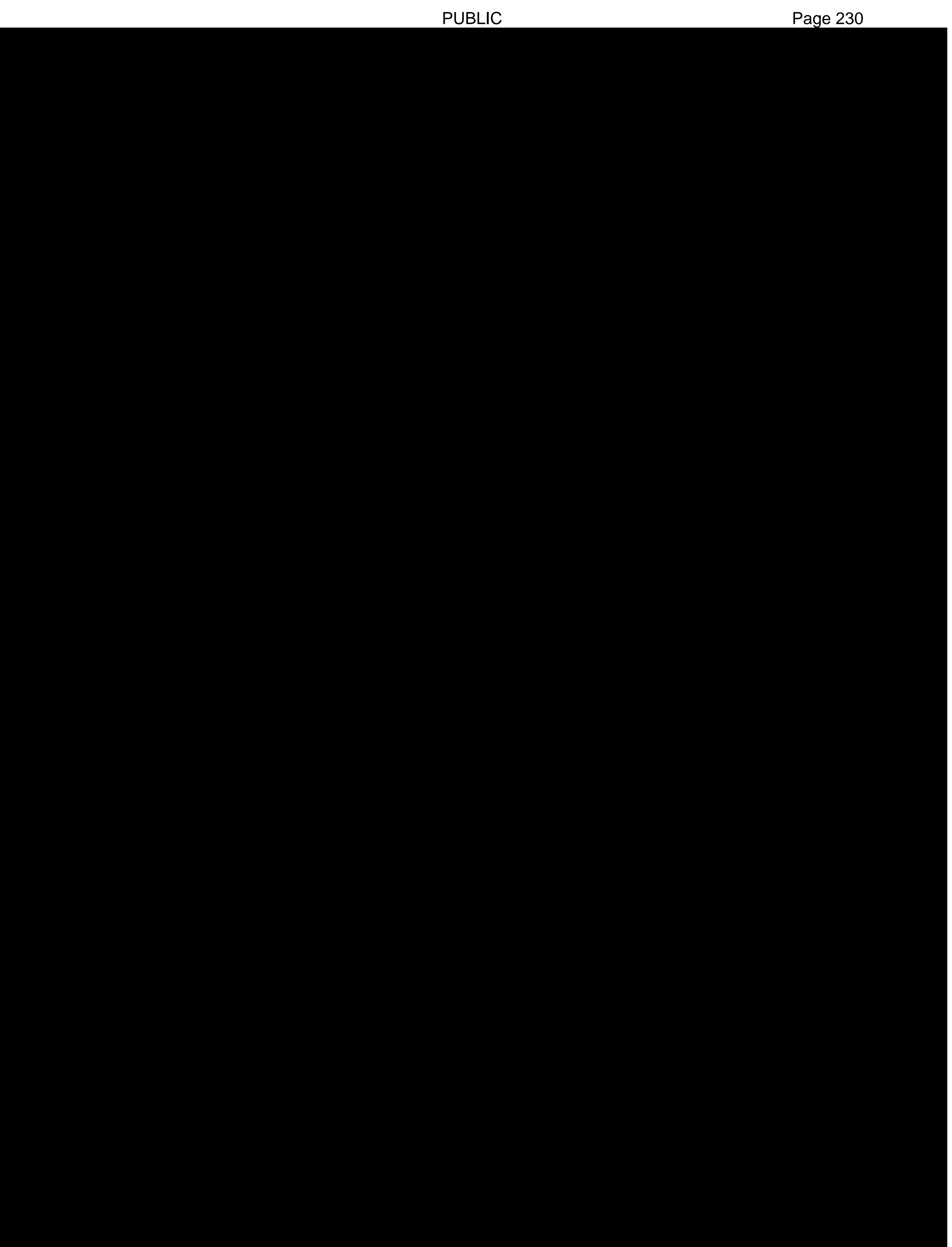








This is Exhibit 47 to the Affidavit of
David Engel
Affirmed on March 25, 2022



This is Exhibit 48 to the Affidavit of

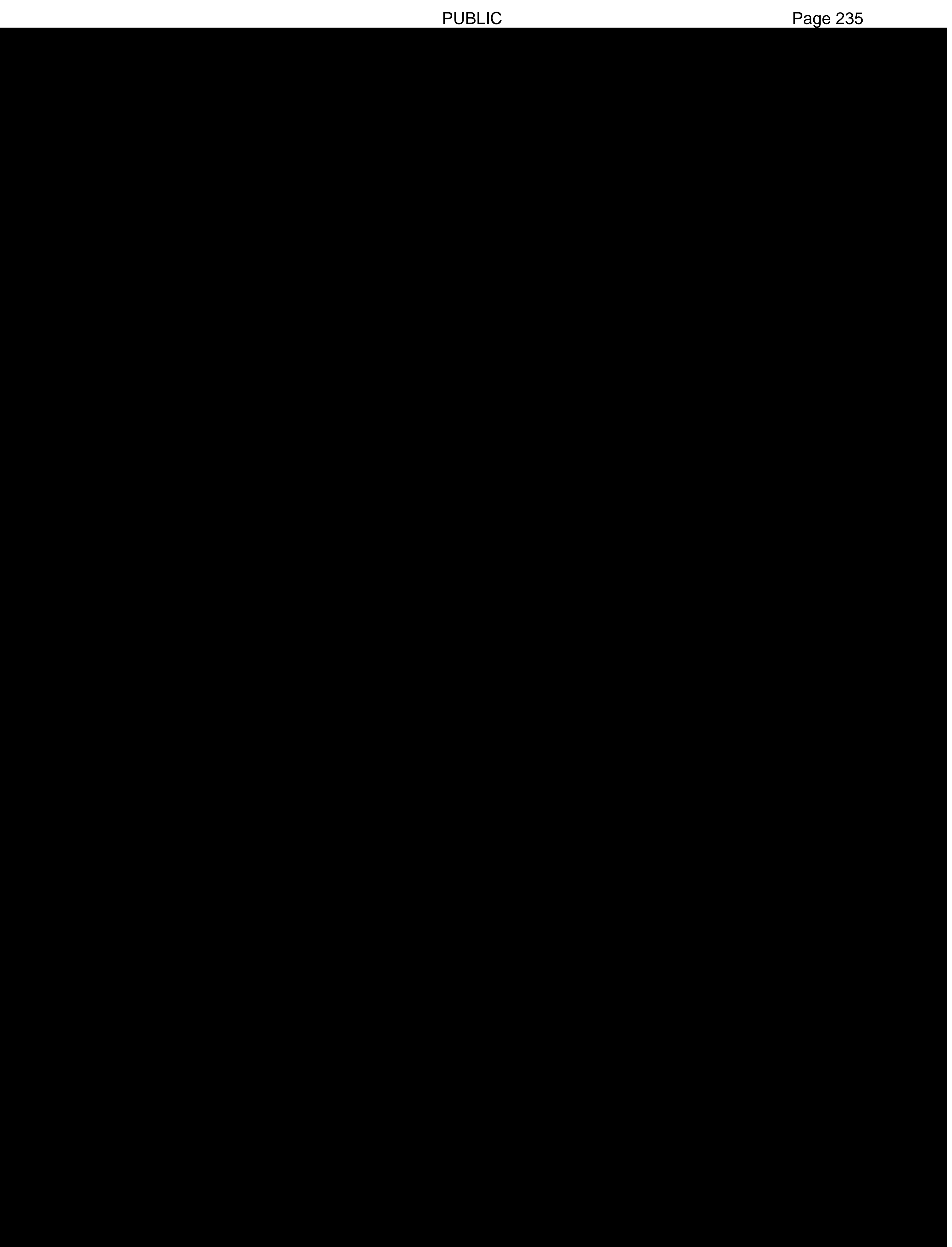
David Engel

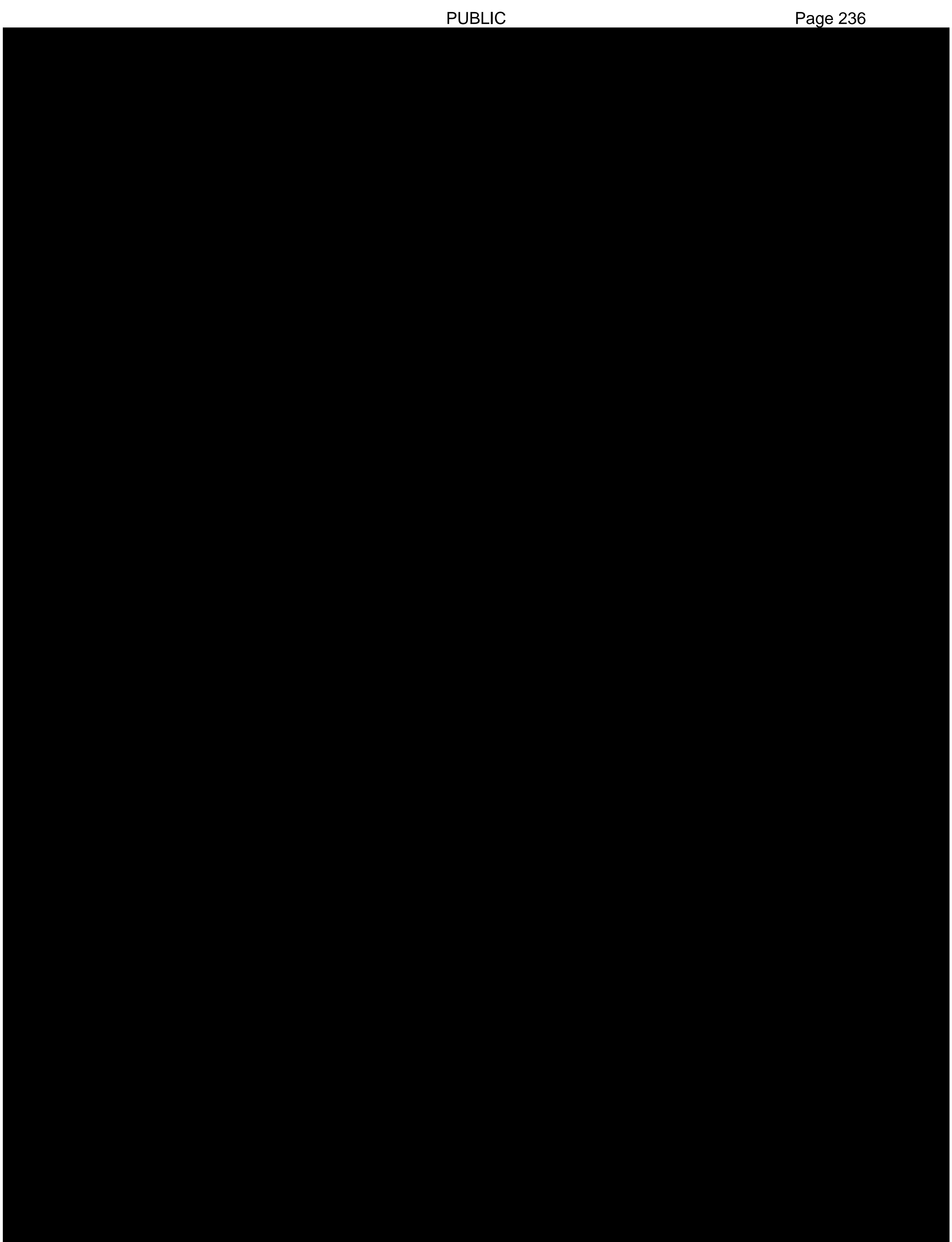
Affirmed on March 25, 2022

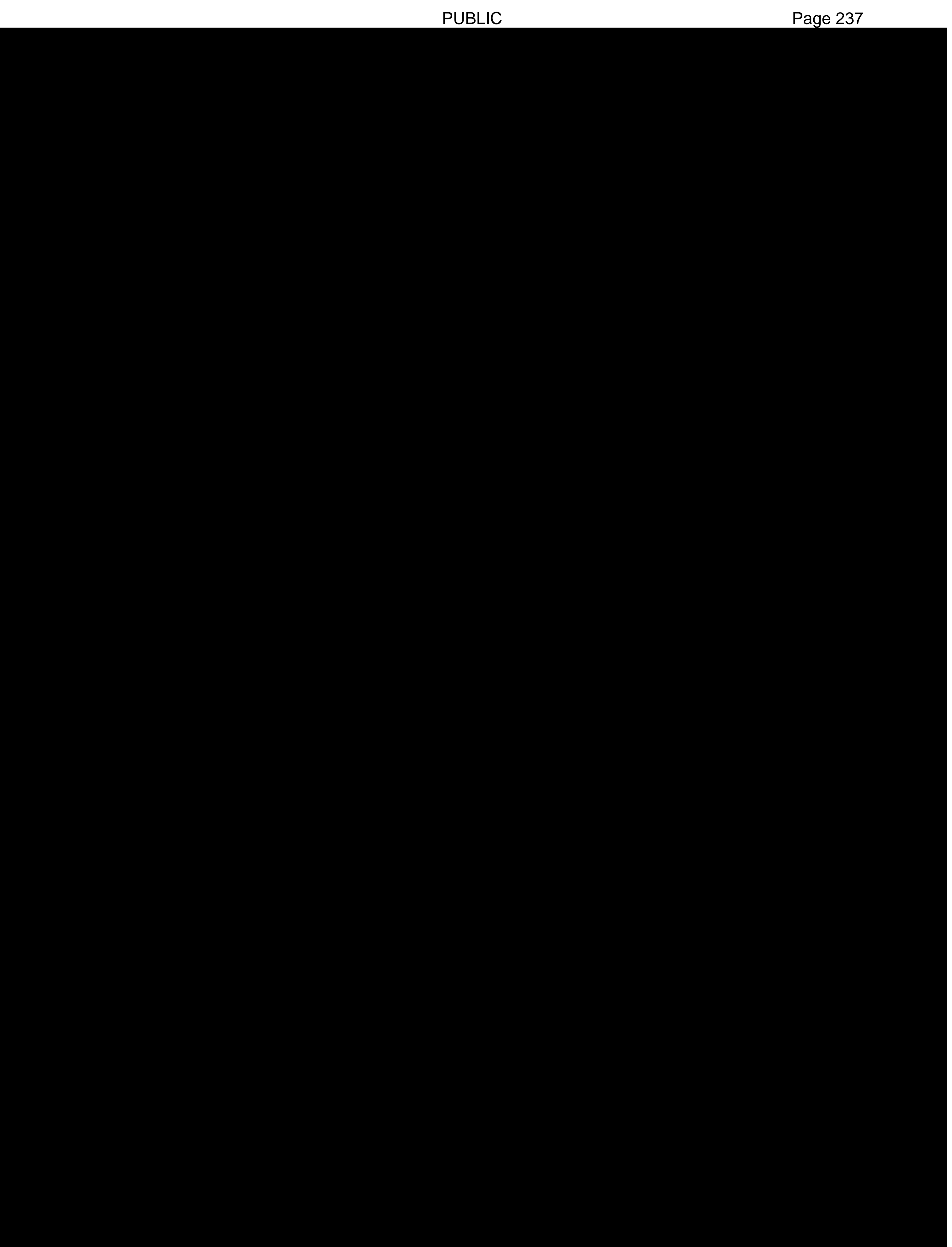
This is Exhibit 49 to the Affidavit of

David Engel

Affirmed on March 25, 2022







From: Geoff Prieur
Sent: Wednesday, May 1, 2019 9:53 AM
To: Wyatt Norn
Subject: RE: Trucking Calculator

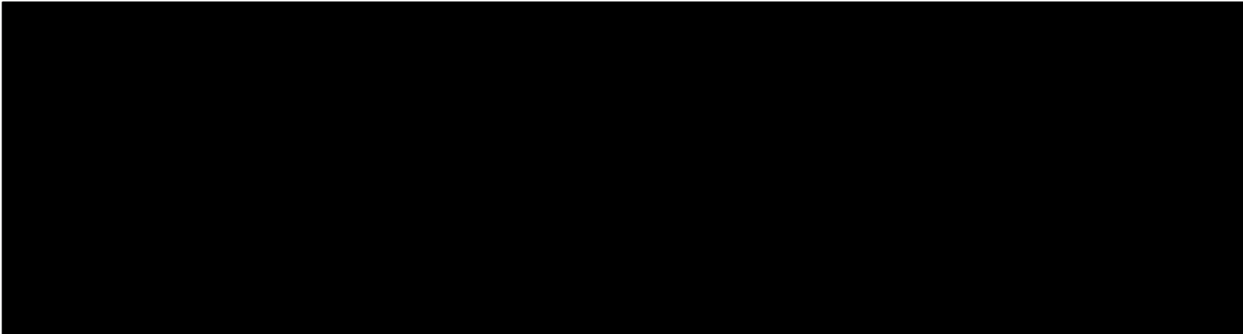
Will follow-up in the coming weeks on this.

Thanks Wyatt.

Geoff Prieur, MBA | Corporate Accounts Representative
Processing, Recovery & Disposal Division
SECURE Energy Services
Office: 403.290.2442 | Mobile: 403.999.4164

From: Wyatt Norn <wnorn@secure-energy.com>
Sent: May 1, 2019 9:11 AM
To: Geoff Prieur <gprieur@secure-energy.com>
Subject: Trucking Calculator

Geoff –



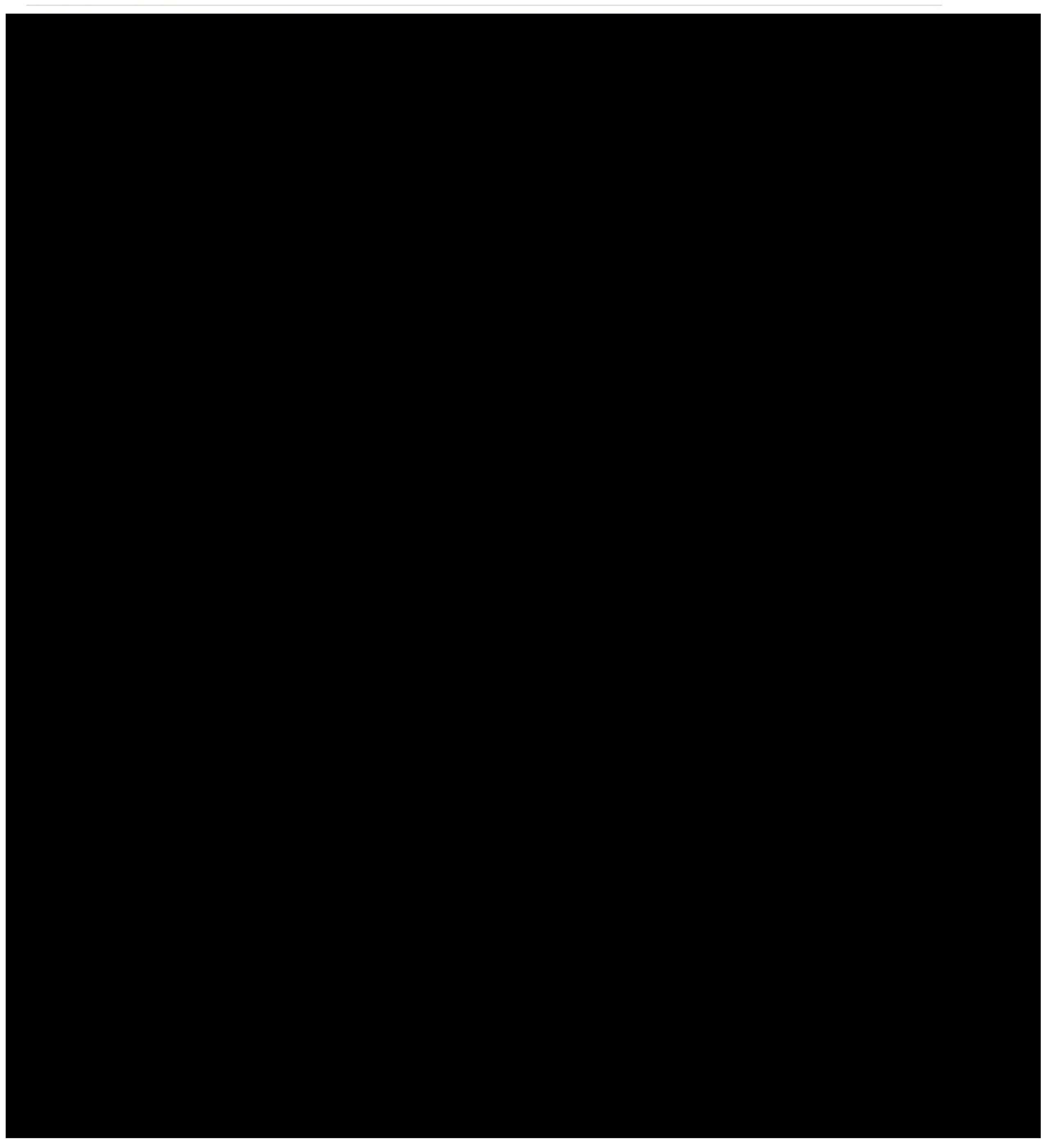
Any questions, don't hesitate to come by and ask!

Regards,

-W

Wyatt Norn | Business Development Representative
Processing Recovery & Disposal Division
SECURE Energy Services
Office: 587.390.8073 | Mobile: 403.818.4866

SECURE ENERGY



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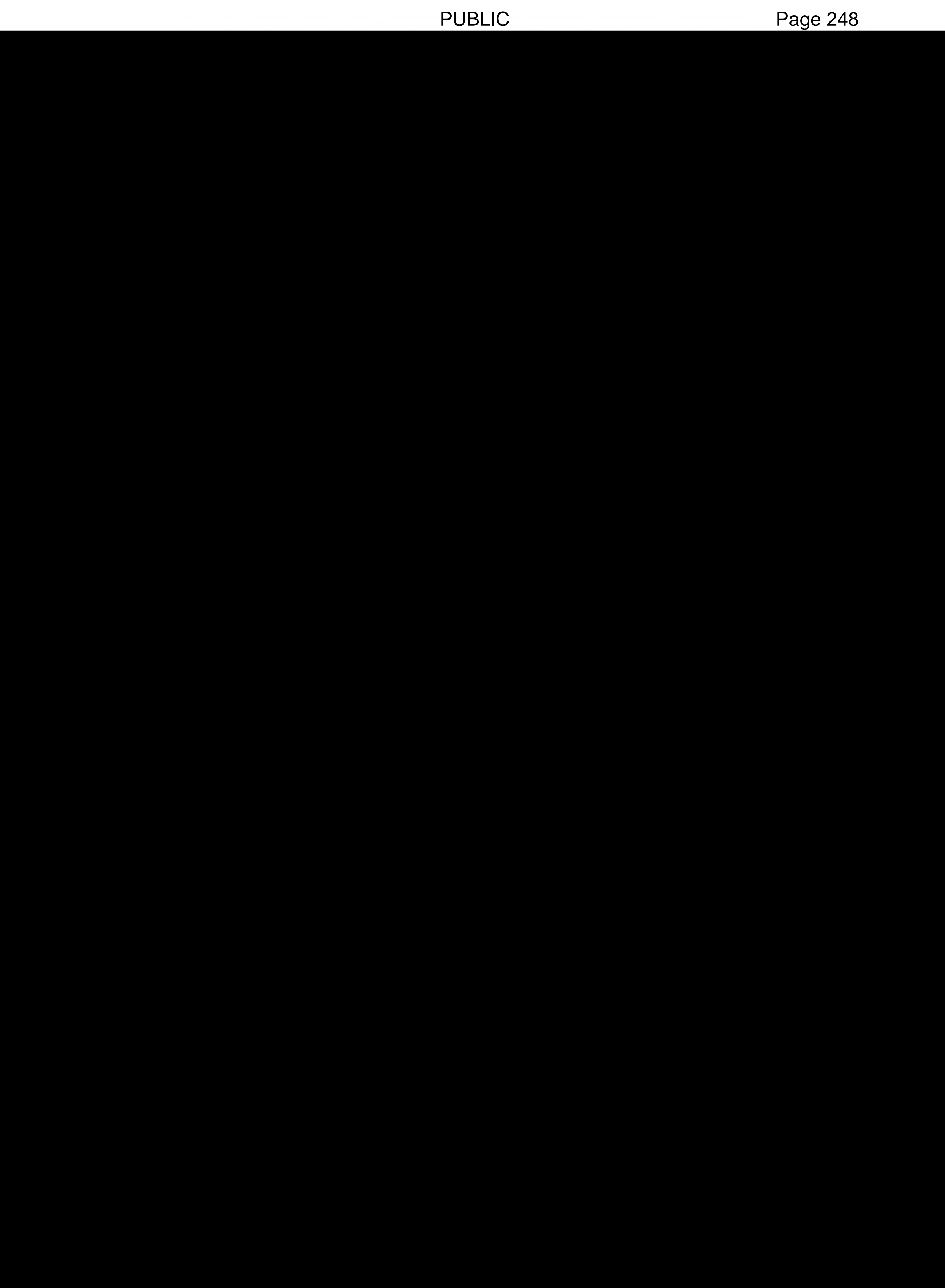
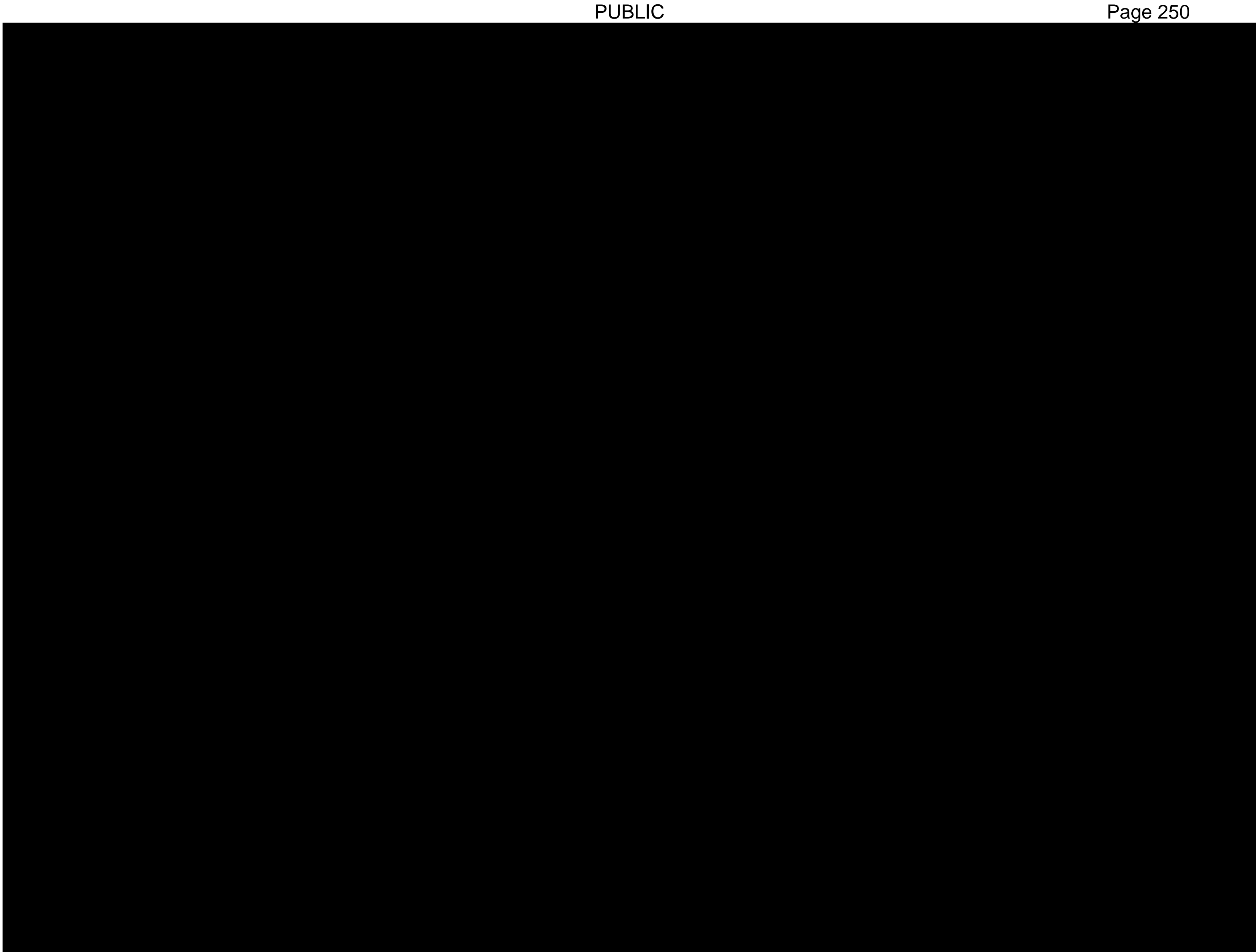
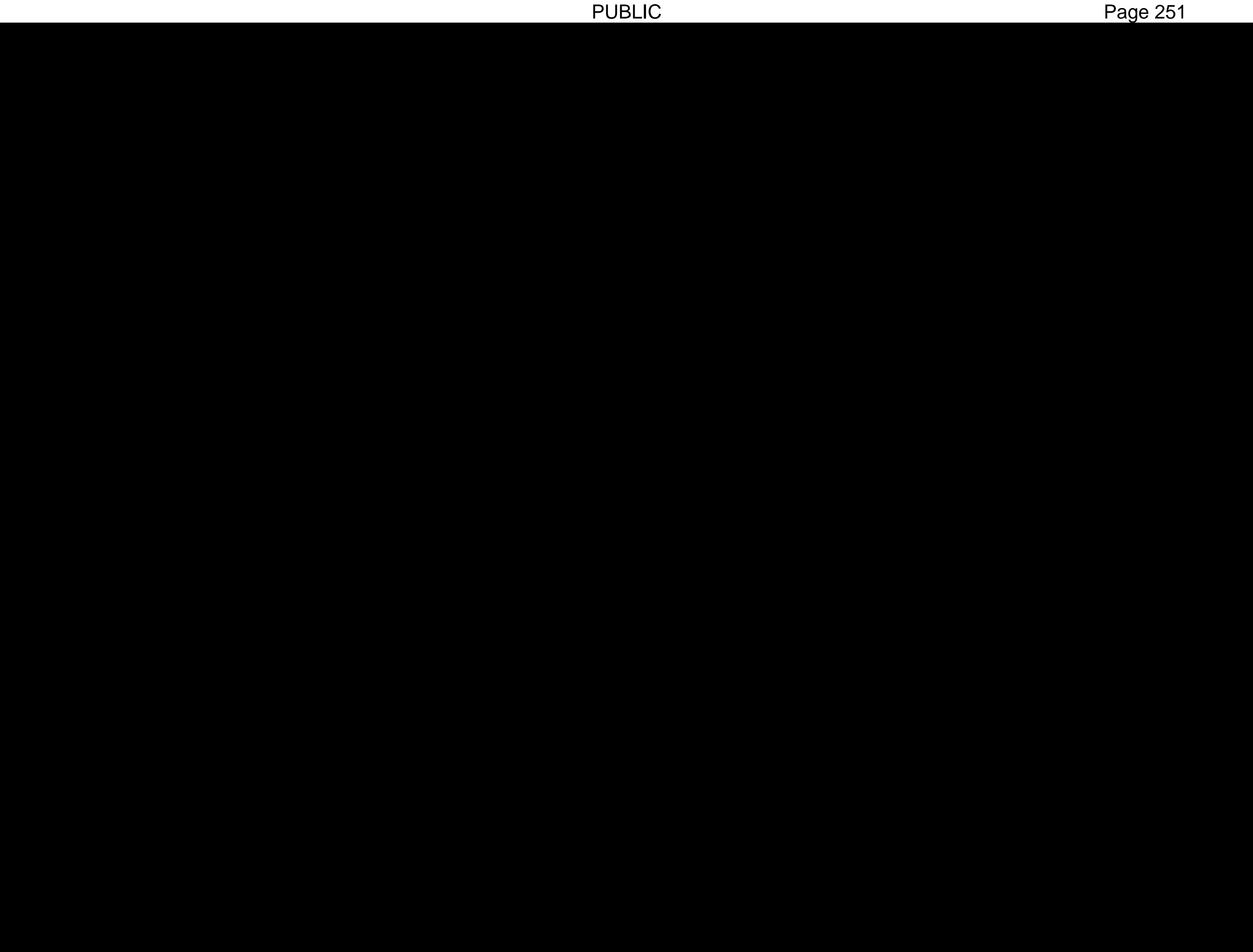
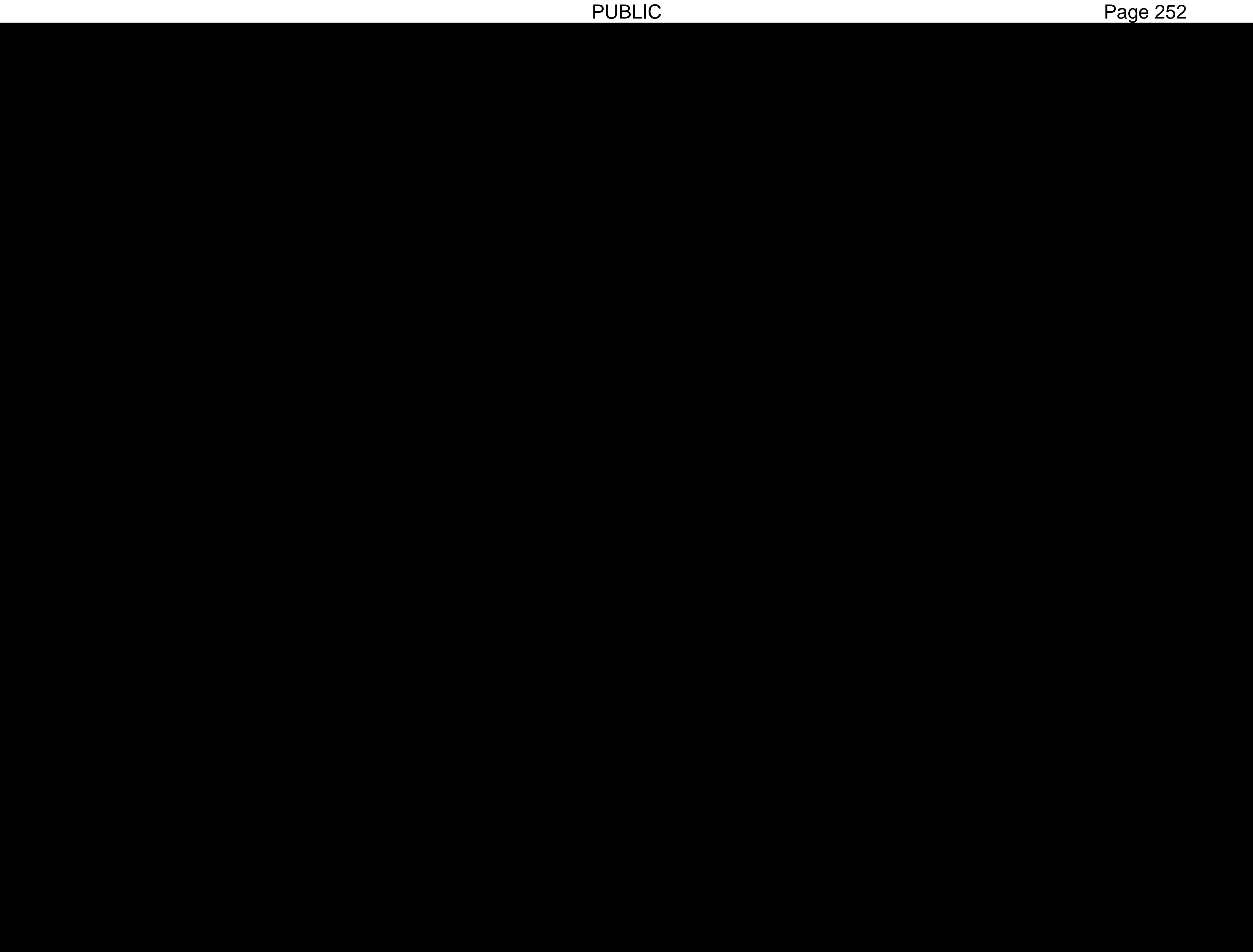
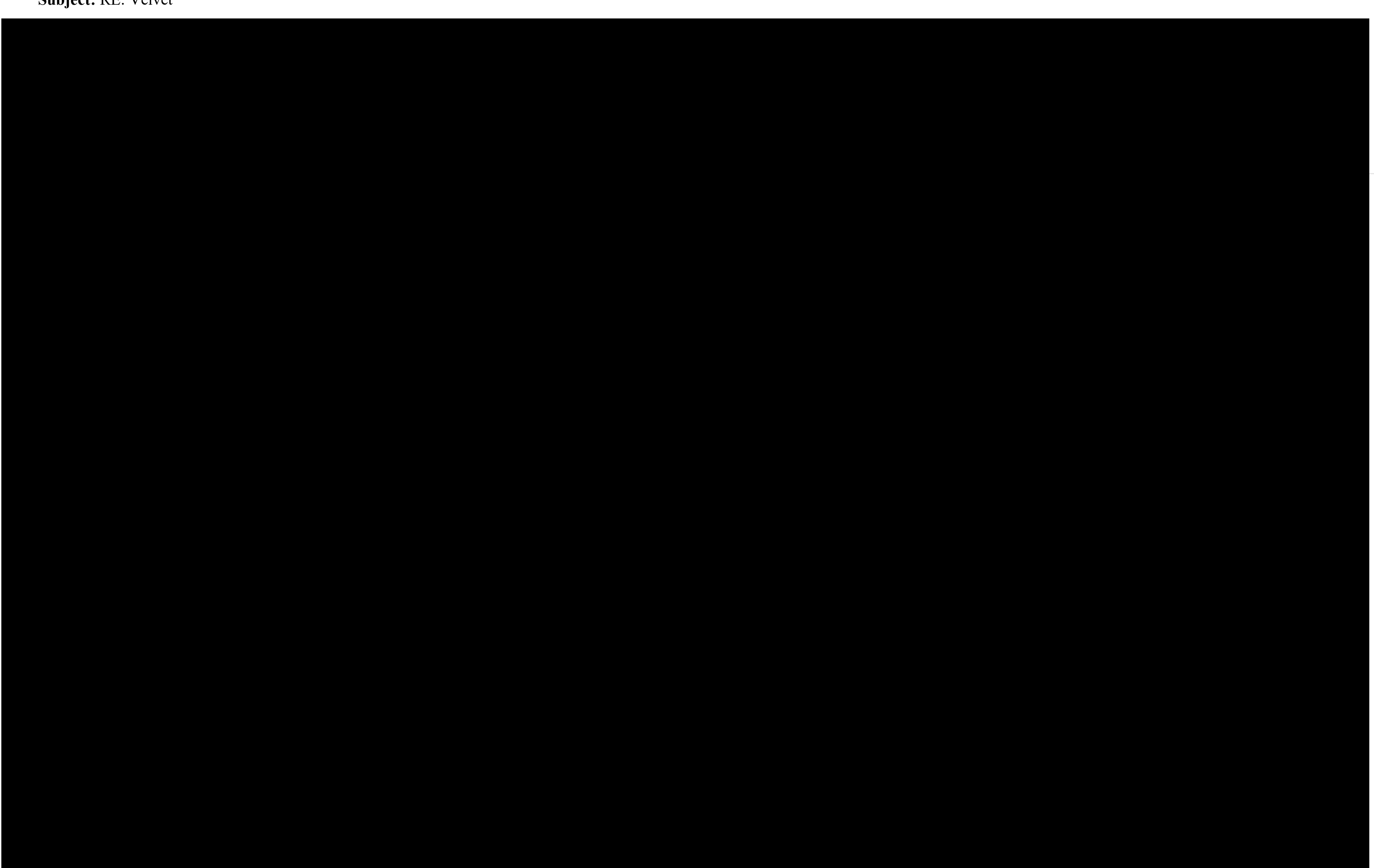






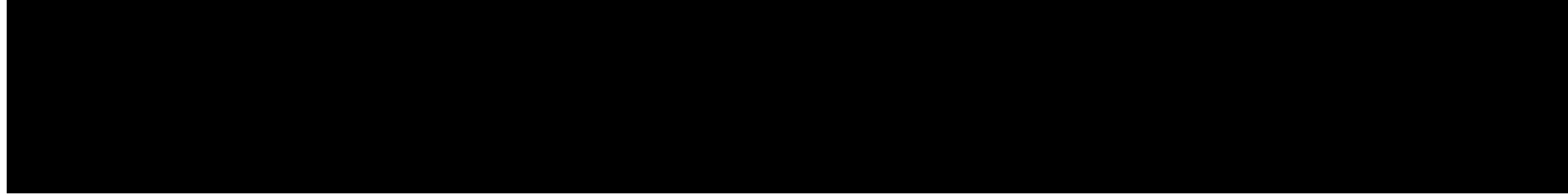


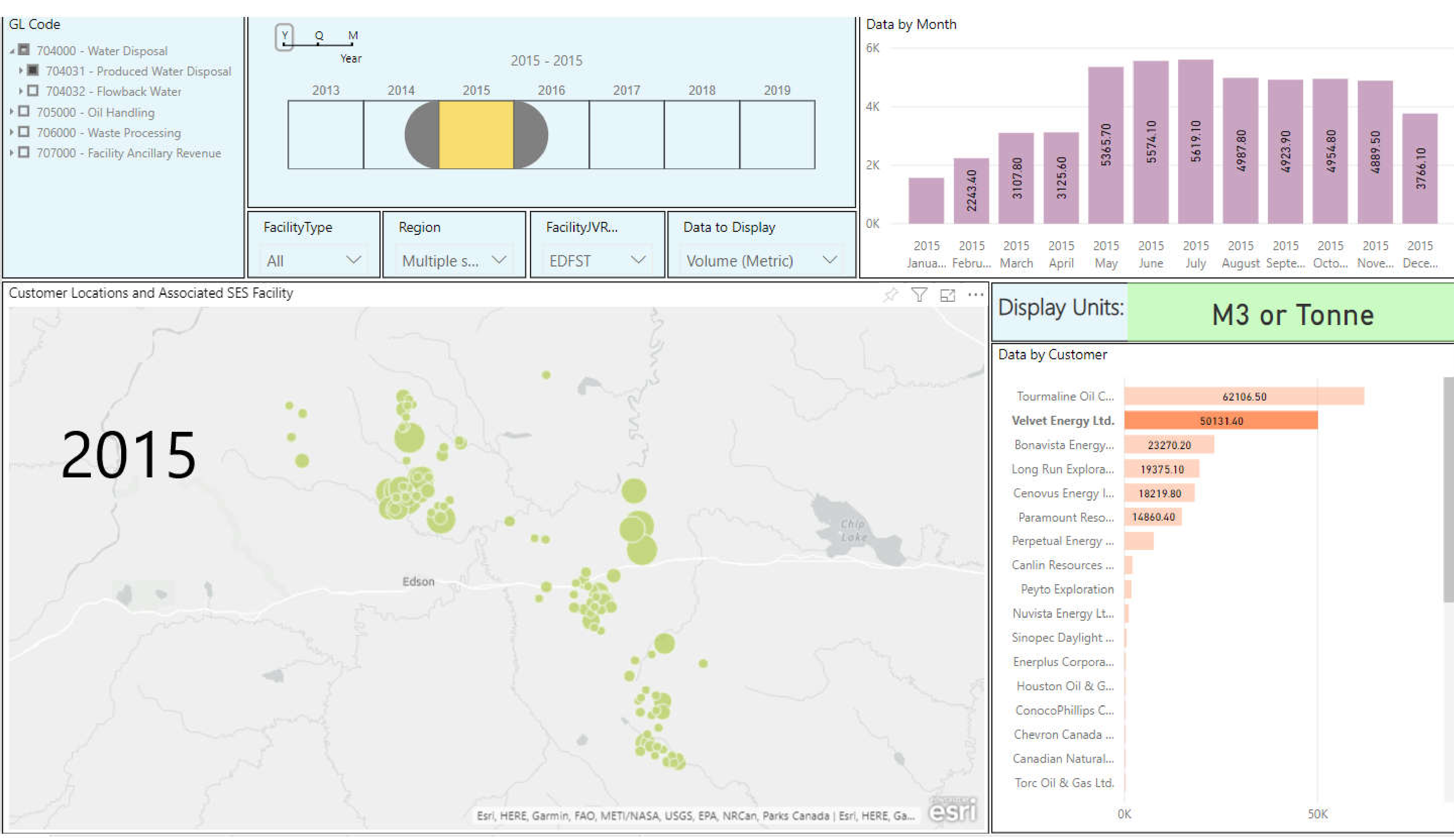
From: Aaron Woods
Sent: Tuesday, December 17, 2019 3:42 PM
To: Dave Desjardins; Rob Pettersen
Subject: RE: Velvet



From: Aaron Woods <awoods@secure-energy.com>
Sent: December 16, 2019 2:30 PM
To: Rob Pettersen <rpettersen@secure-energy.com>; Dave Desjardins <ddesjardins@secure-energy.com>
Subject: RE: Velvet

Guys,





Aaron Woods | Facility Manager Edson, Nosehill & Eccles Facilities
Midstream Infrastructure Division

SECURE energy services
Office 587.466.9831 | Mobile 780.817.6237

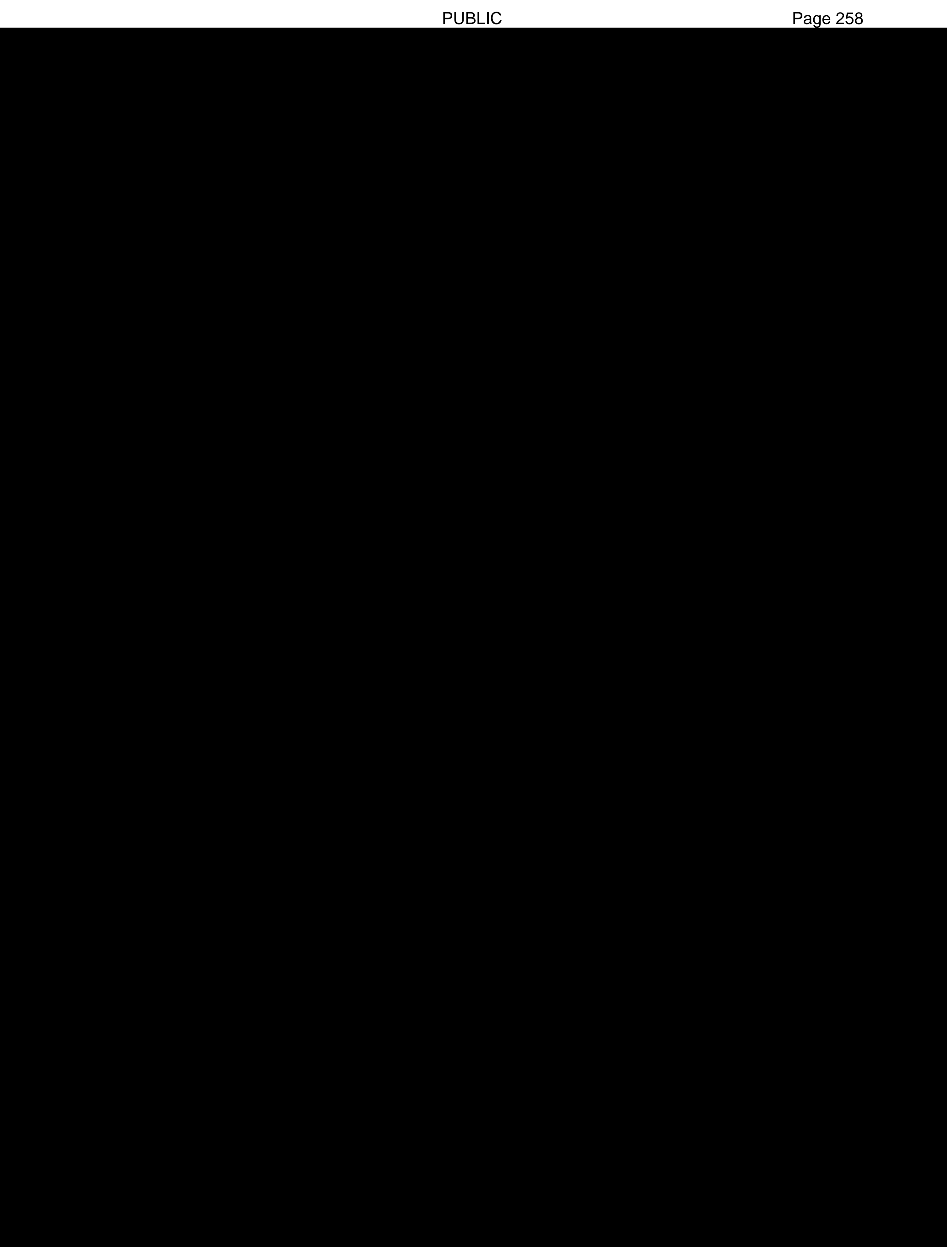
-----Original Message-----
From: Rob Pettersen <rpettersen@secure-energy.com>
Sent: December 13, 2019 2:25 PM
To: Aaron Woods <awoods@secure-energy.com>; Dave Desjardins <ddesjardins@secure-energy.com>
Subject: Velvet

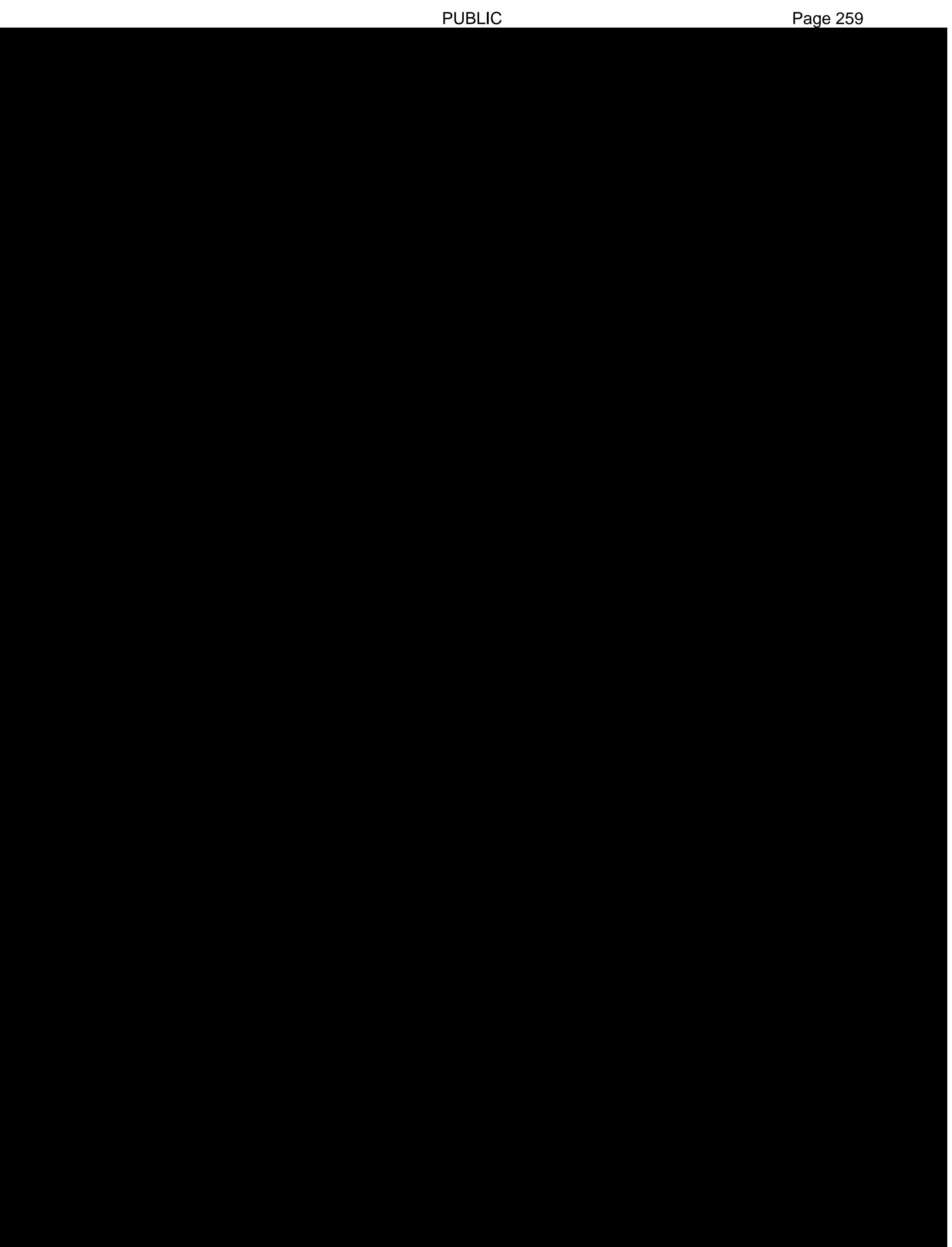
Hi Guys,

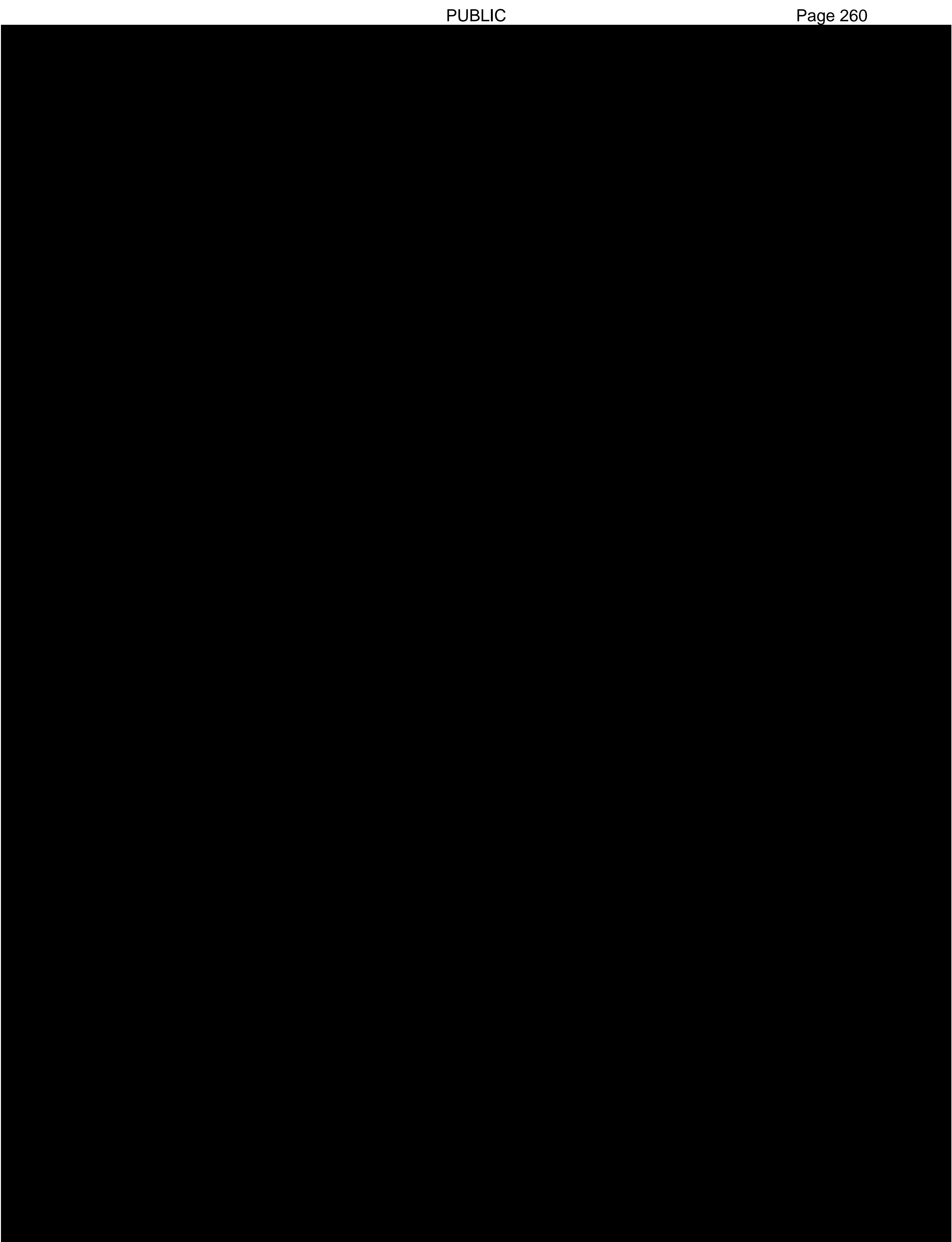
Lonny Pillage finally got back to me. They aren't going for our proposal, they say it's cheaper to go to Tervita.
Not sure if Tervita lowered their price, Lonny has asked if we can lower our rate of 12.50m3 to keep the volumes we are currently getting from them.
I can't see it being cheaper to drive past Edson FST to Tervita.
Let me know you thoughts.

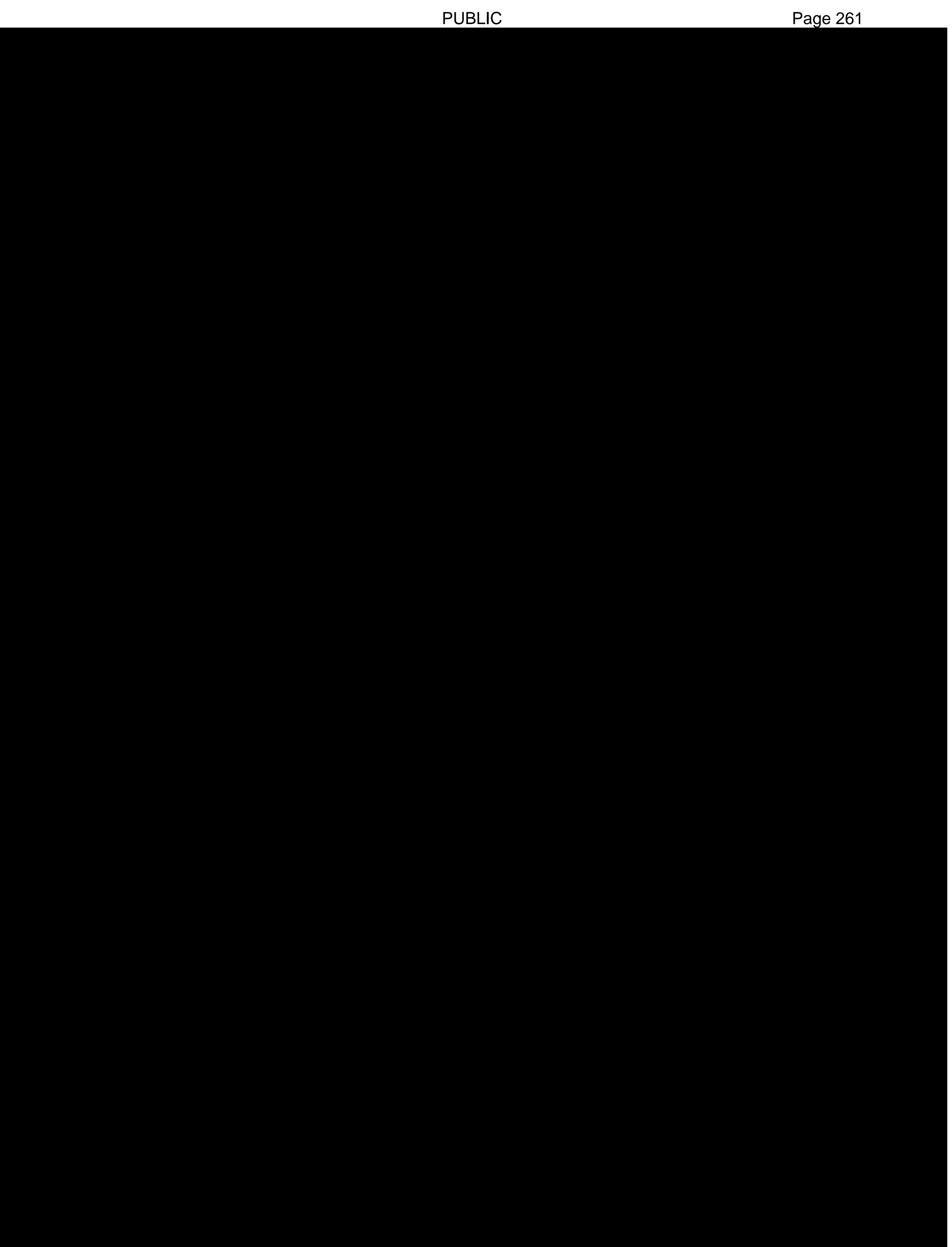
Thanks

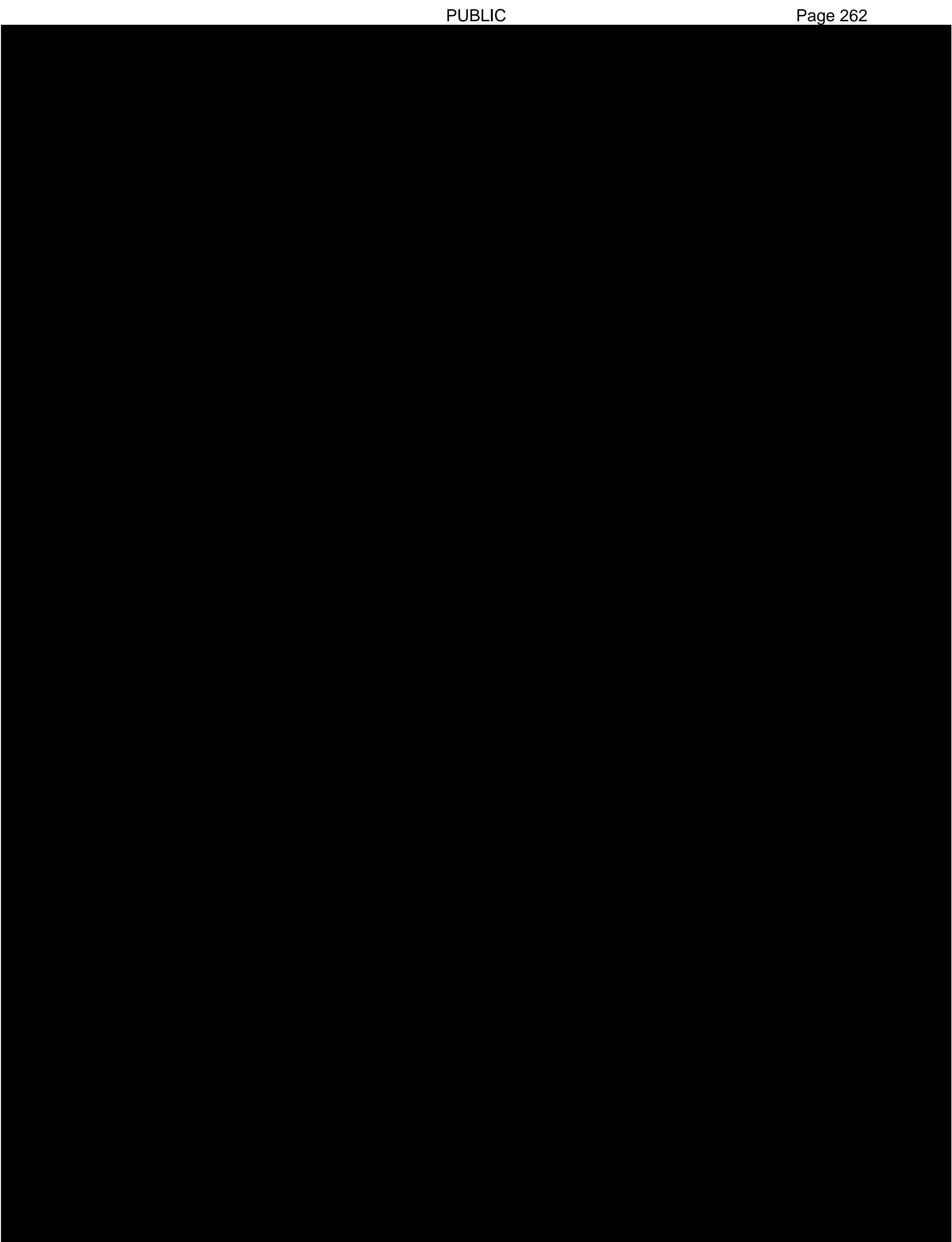
Rob Pettersen Sales & Marketing Representative Edson FST/Nosehill rpettersen@secure-energy.ca. Cell 780 712-1683











From: Ryley Pierson
Sent: Tuesday, July 21, 2020 3:08 PM
To: Jeff Duncan
Subject: Fwd: South GP Discounted Vac Waste Rates

Ryley Pierson **|** Area Manager - Sales
SECURE ENERGY
Mobile: 780-402-9095 **|**

Begin forwarded message:

From: Tyler Harnish <tharnish@secure-energy.com>
Date: June 16, 2020 at 10:45:17 MDT
Subject: RE: South GP Discounted Vac Waste Rates

I'm all for it!!! Great work guys!!!!

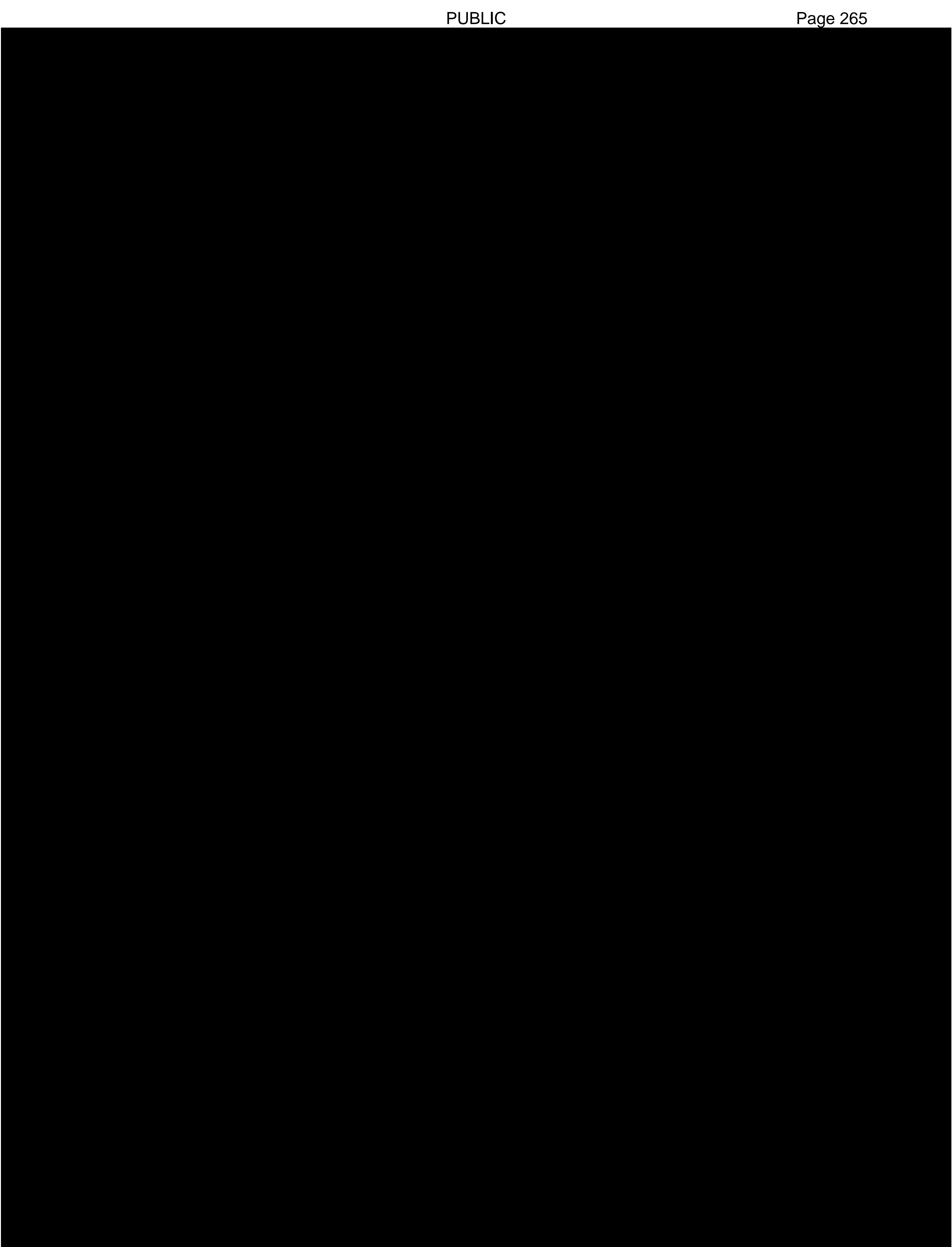
From: Ryley Pierson <rpierson@secure-energy.com>
Sent: June 16, 2020 10:42 AM
To: Jeff Duncan <jduncan@secure-energy.com>; Dustin Moodie <dmoodie@secure-energy.com>; Tyler Harnish <tharnish@secure-energy.com>; Gary Collins <gcollins@secure-energy.com>; Tanner LaValley <tlavalley@secure-energy.com>
Subject: South GP Discounted Vac Waste Rates

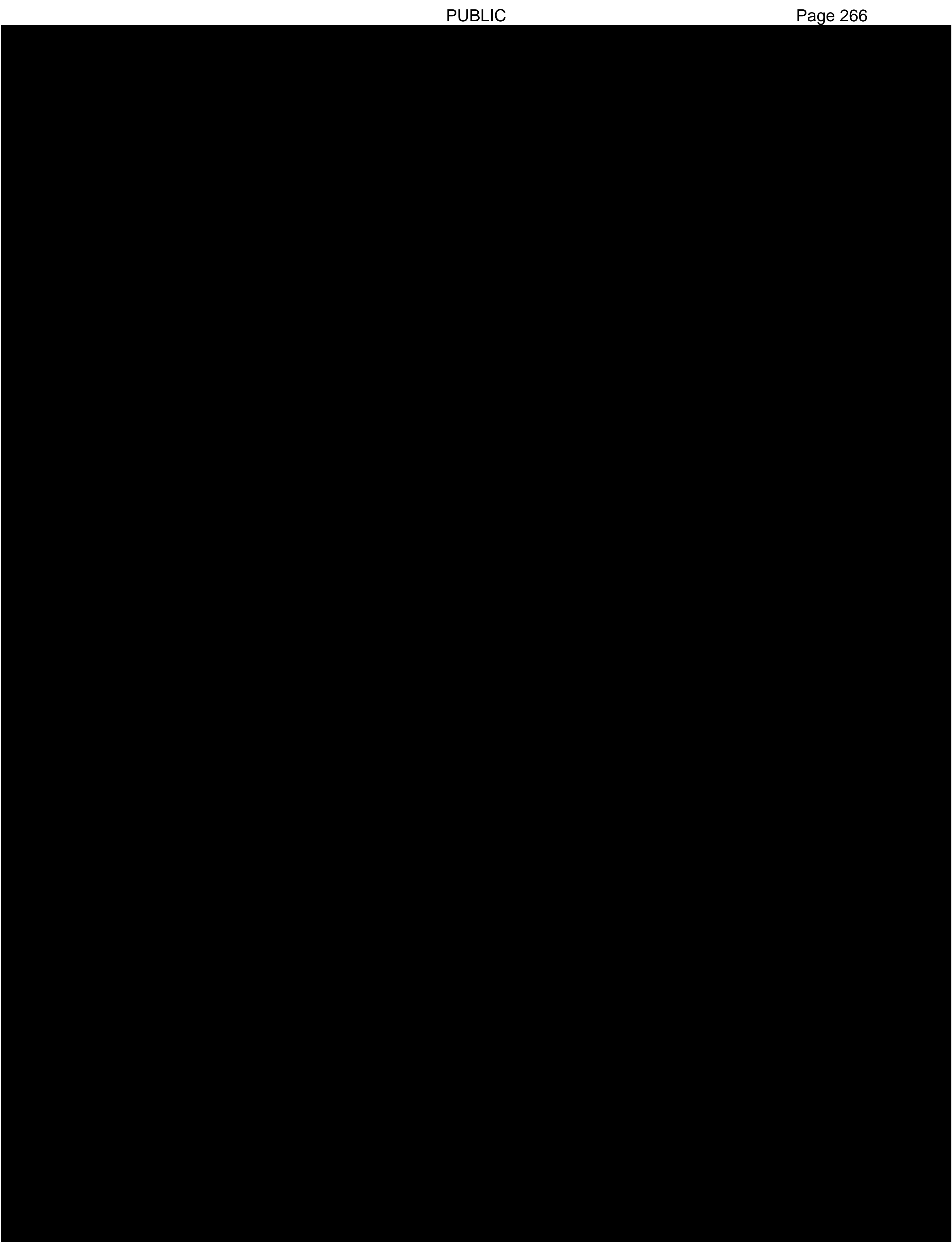
Good Morning Guys,

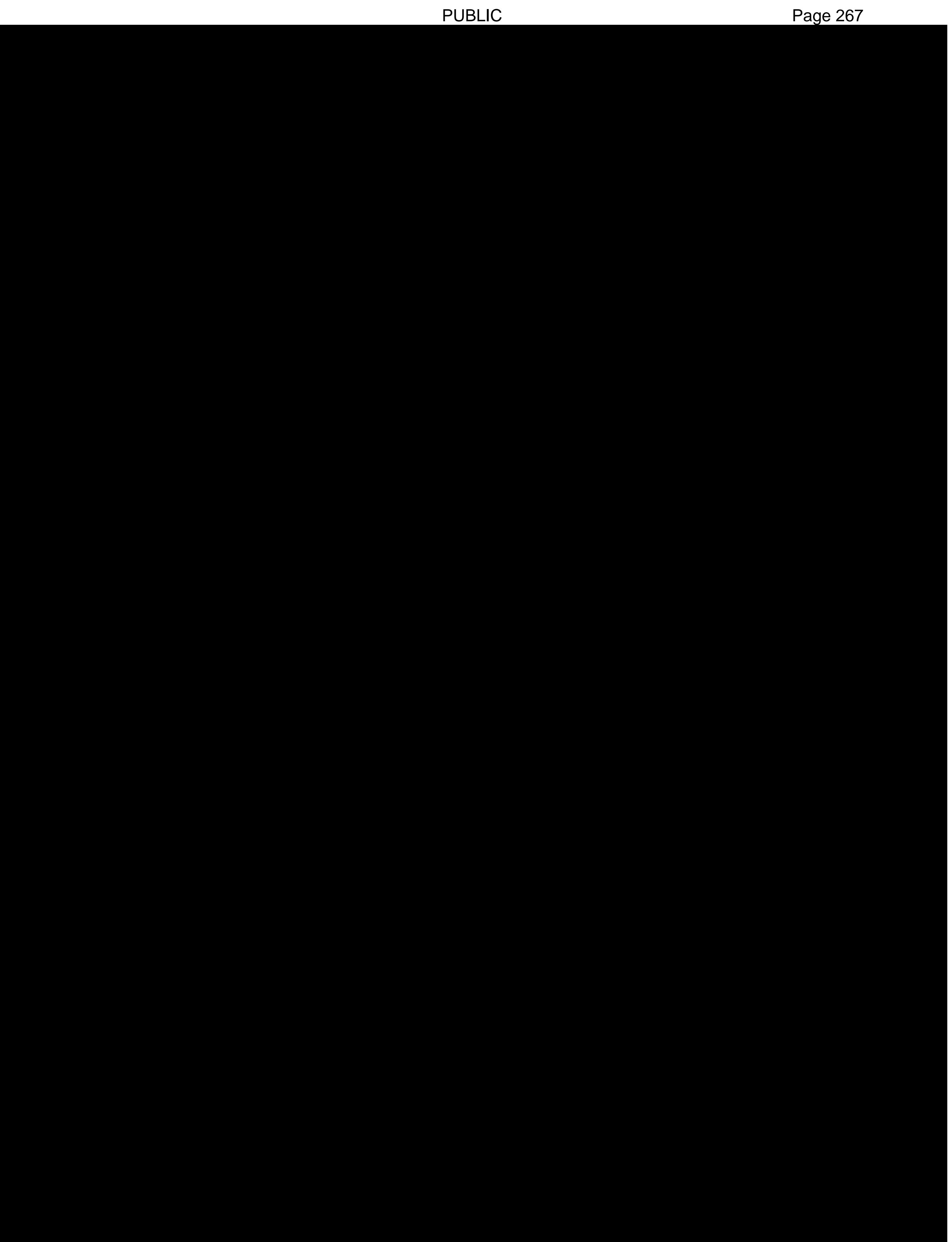
All in Favour?

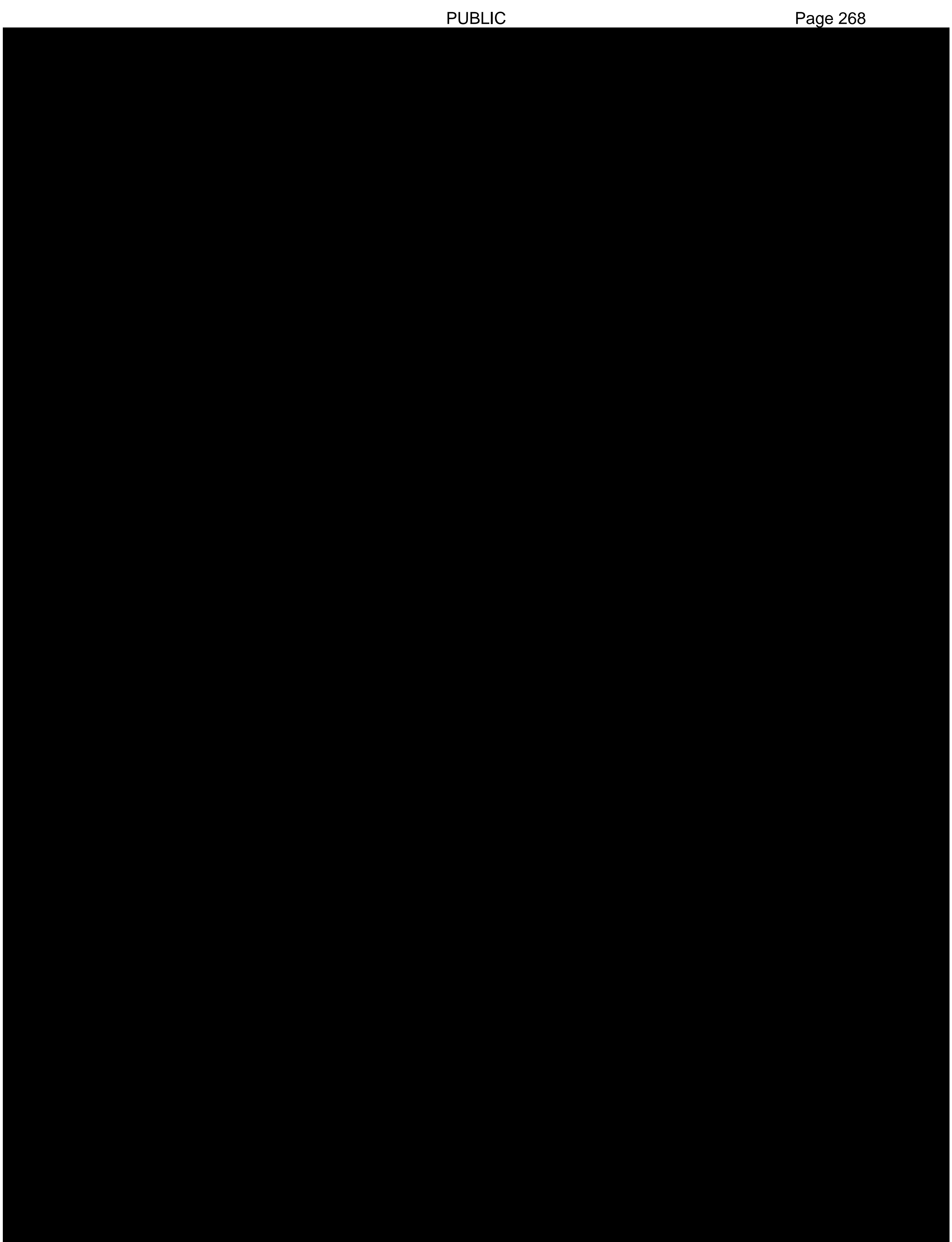
Thanks,

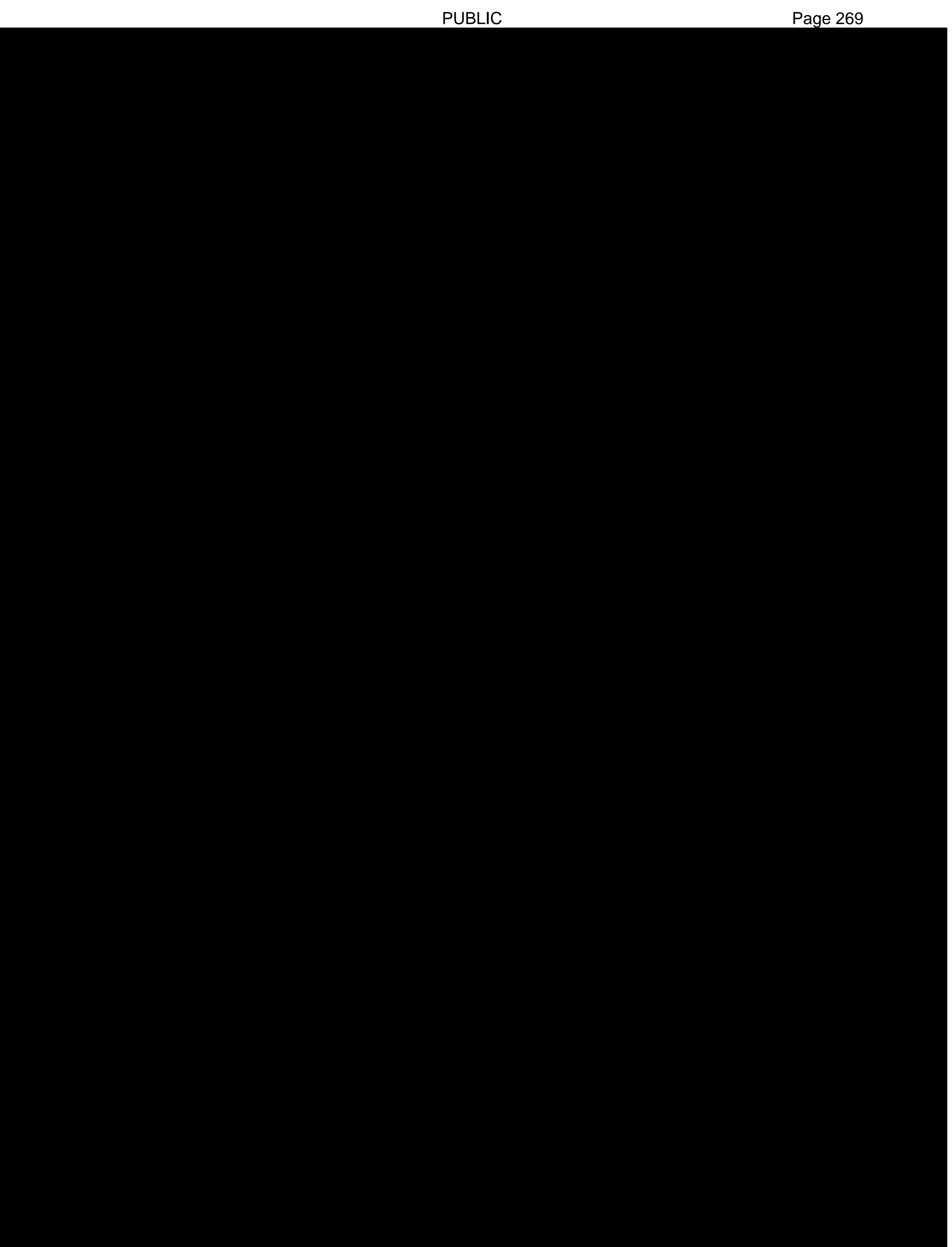
Ryley Pierson | Area Manager - Sales
SECURE ENERGY
Mobile: 780-402-9095

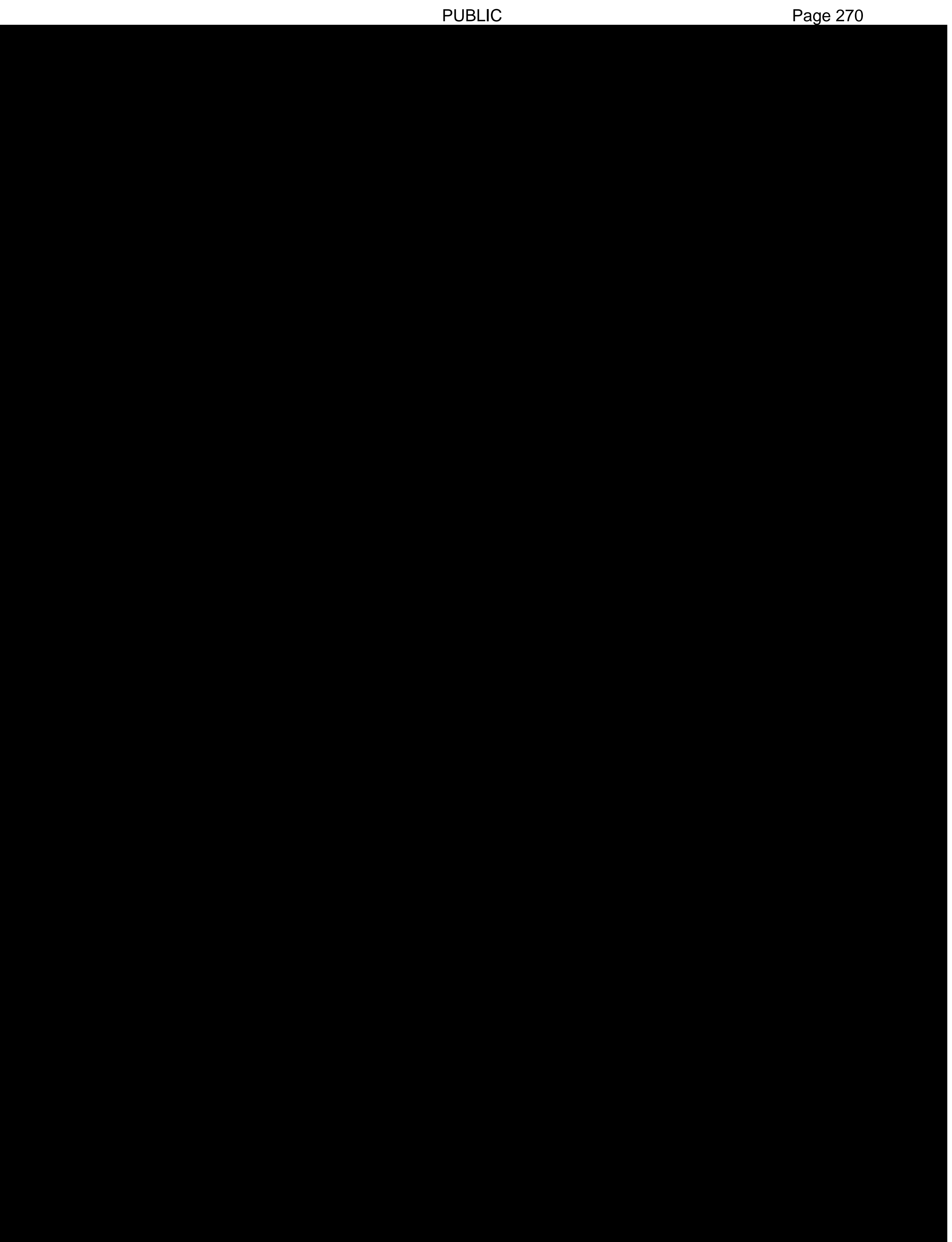


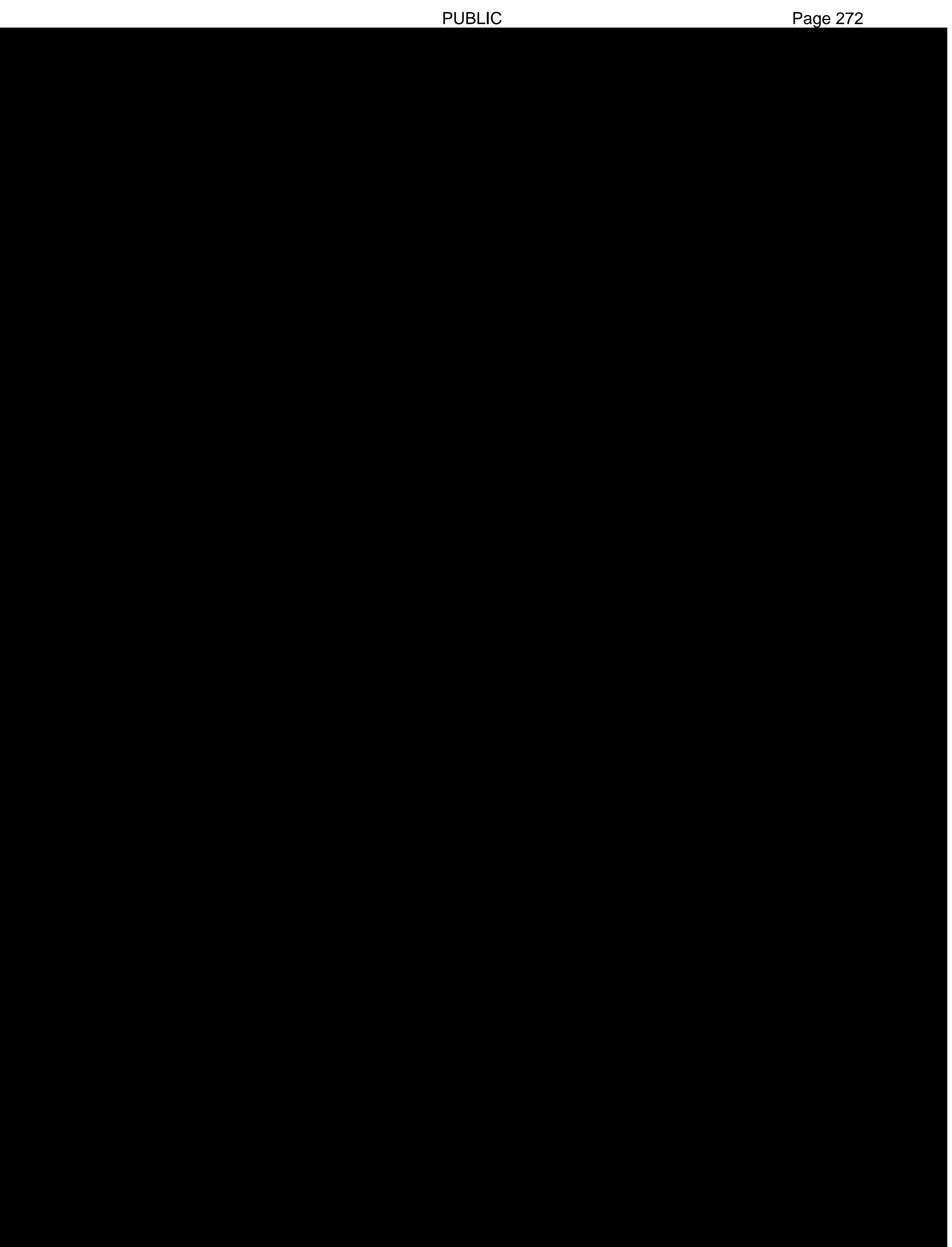












From: Haiden Buck
Sent: Tuesday, March 24, 2020 11:11 AM
To: Ryan Richardson; Jeff Duncan; Ryley Pierson; Bruce Deinstadt; Ed Guenther; Corey Higham
Subject: Re: Discount approval at 101

Thanks,

Haiden Buck | Field Sales DCFST&WNSWD

Secure Energy

Cell # 250-719-7824

From: Corey Higham <chigham@secure-energy.com>
Sent: Tuesday, March 24, 2020 9:03:22 AM
To: Haiden Buck <hbuck@secure-energy.com>; Ryan Richardson <rrichardson@secure-energy.com>; Jeff Duncan <jduncan@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Bruce Deinstadt <bdeinstadt@secure-energy.com>; Ed Guenther <eguenther@secure-energy.com>
Subject: RE: Discount approval at 101

Best regards,

Corey Higham
SECURE ENERGY
Mobile: 403-993-6991

From: Haiden Buck <hbuck@secure-energy.com>
Sent: March 24, 2020 9:47 AM
To: Ryan Richardson <rrichardson@secure-energy.com>; Corey Higham <chigham@secure-energy.com>; Jeff Duncan <jduncan@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Bruce Deinstadt <bdeinstadt@secure-energy.com>; Ed Guenther <eguenther@secure-energy.com>
Subject: Re: Discount approval at 101

Thanks,

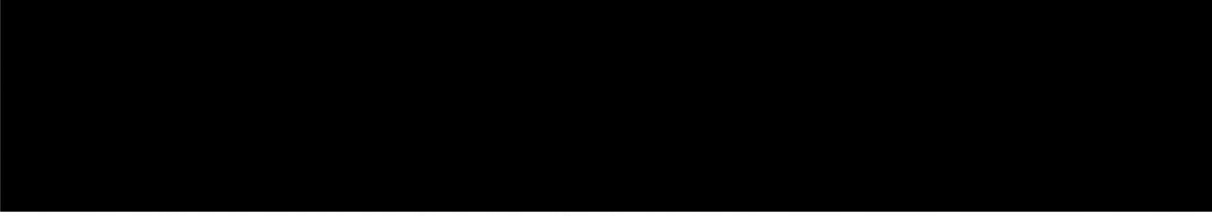
Haiden Buck | Field Sales DCFST&WNSWD

Secure Energy

Cell # 250-719-7824

From: Ed Guenther <eguenther@secure-energy.com>
Sent: Tuesday, March 24, 2020 7:38:56 AM
To: Ryan Richardson <rrichardson@secure-energy.com>; Corey Higham <chigham@secure-energy.com>; Jeff Duncan <jduncan@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Haiden Buck <hbuck@secure-energy.com>; Bruce Deinstadt <bdeinstadt@secure-energy.com>
Subject: RE: Discount approval at 101

Thanks Ryan,



Thoughts from the rest of the group?

Ed

From: Ryan Richardson <rrichardson@secure-energy.com>
Sent: March 24, 2020 8:10 AM
To: Ed Guenther <eguenther@secure-energy.com>; Corey Higham <chigham@secure-energy.com>; Jeff Duncan <jduncan@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Haiden Buck <hbuck@secure-energy.com>; Bruce Deinstadt <bdeinstadt@secure-energy.com>
Subject: Discount approval at 101

Corey, Ed and Jeff,

Let us know if you approve so Haiden and I can let Painted Pony know the new price ASAP to begin swinging volumes to 101.

Ryan Richardson
SECURE ENERGY
587 223 7016

Begin forwarded message:

From: Tricia Stevenson <tstevenson@secure-energy.com>
Date: March 23, 2020 at 2:51:33 PM MDT
To: Haiden Buck <hbuck@secure-energy.com>, Ryley Pierson <rpierson@secure-energy.com>, Ryan Richardson <rrichardson@secure-energy.com>
Cc: Jeff Duncan <jduncan@secure-energy.com>, Ed Guenther <eguenther@secure-energy.com>
Subject: RE: Painted Pony Rate Calculator

Hi,

Thank you,
Tricia

Tricia Stevenson | Sales and Marketing Administrator
SECURE ENERGY
Office: 780-306-4555 | Mobile: 780-933-4039

From: Tricia Stevenson
Sent: Monday, March 23, 2020 2:07 PM
To: Haiden Buck <hbuck@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Ryan Richardson <rrichardson@secure-energy.com>
Cc: Jeff Duncan <jduncan@secure-energy.com>; Ed Guenther <eguenther@secure-energy.com>
Subject: Painted Pony Rate Calculator

Please see attached for Painted Pony.
With the short timeline, please call me at any time and I can have a Quote back to you ASAP.
Thank you,
Tricia

Tricia Stevenson | Sales and Marketing Administrator
SECURE ENERGY
Office: 780-306-4555 | Mobile: 780-933-4039

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6 **MR. HOOD:** I don't think it's necessary.
7 If we could bring up agreed book document
8 08410.
9 Sorry. Before we bring this up, I'm sorry, we
10 need to be in Confidential Level B.
11 --- Upon recessing at 9:41 a.m., to resume
12 immediately in Confidential Level B /
13 Suspension à 9 h 41 pour reprendre immédiatement
14 en session confidentielle niveau B
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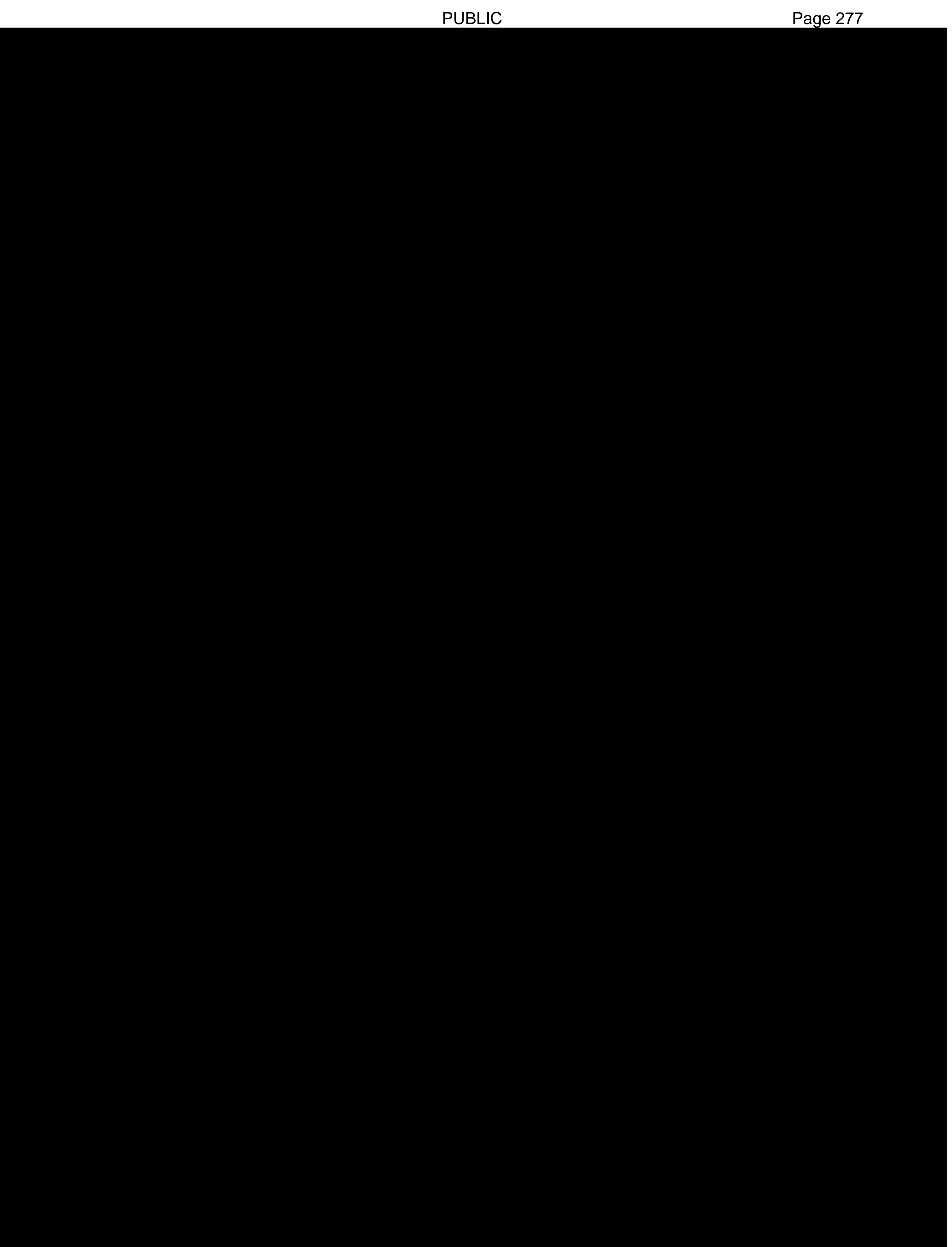
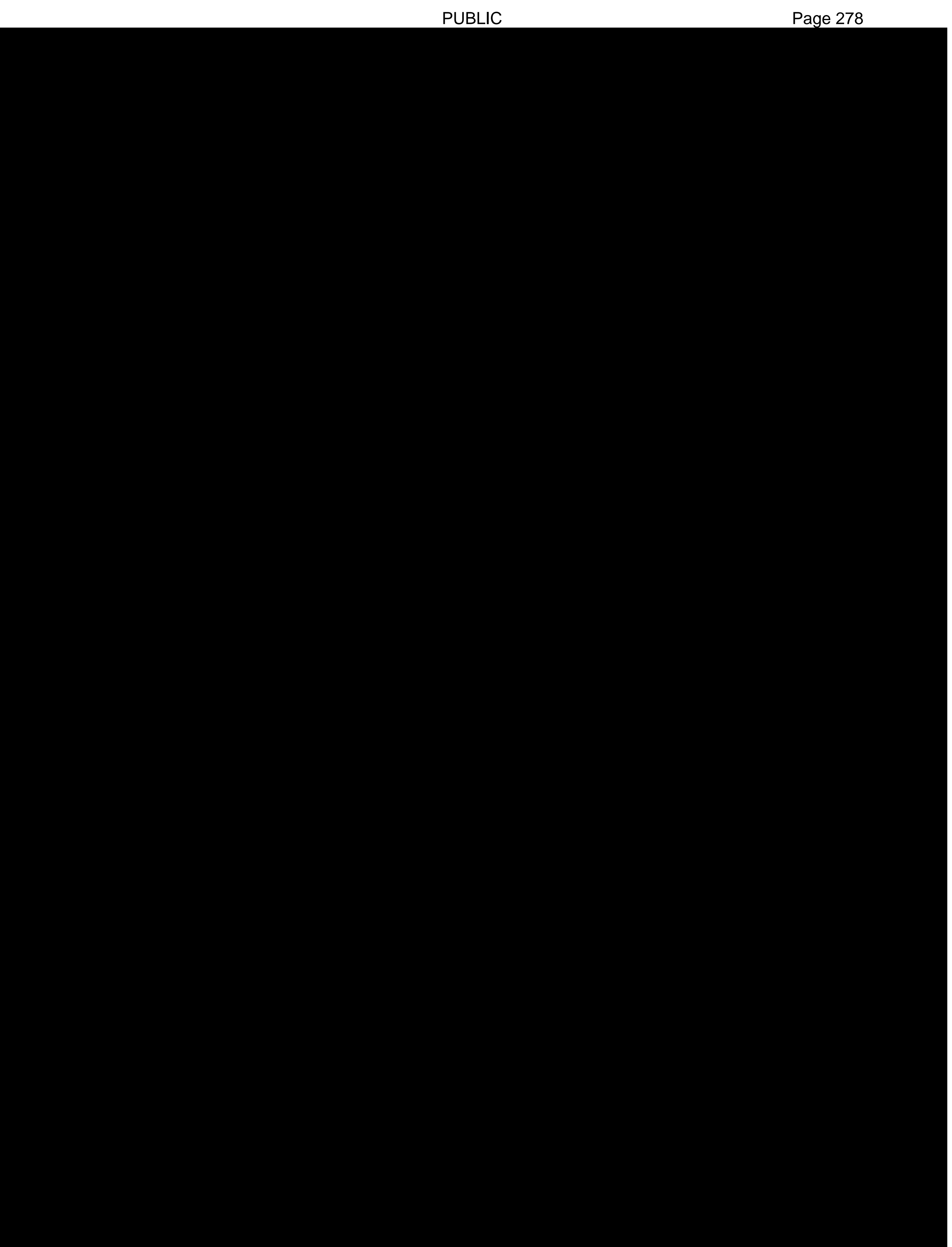
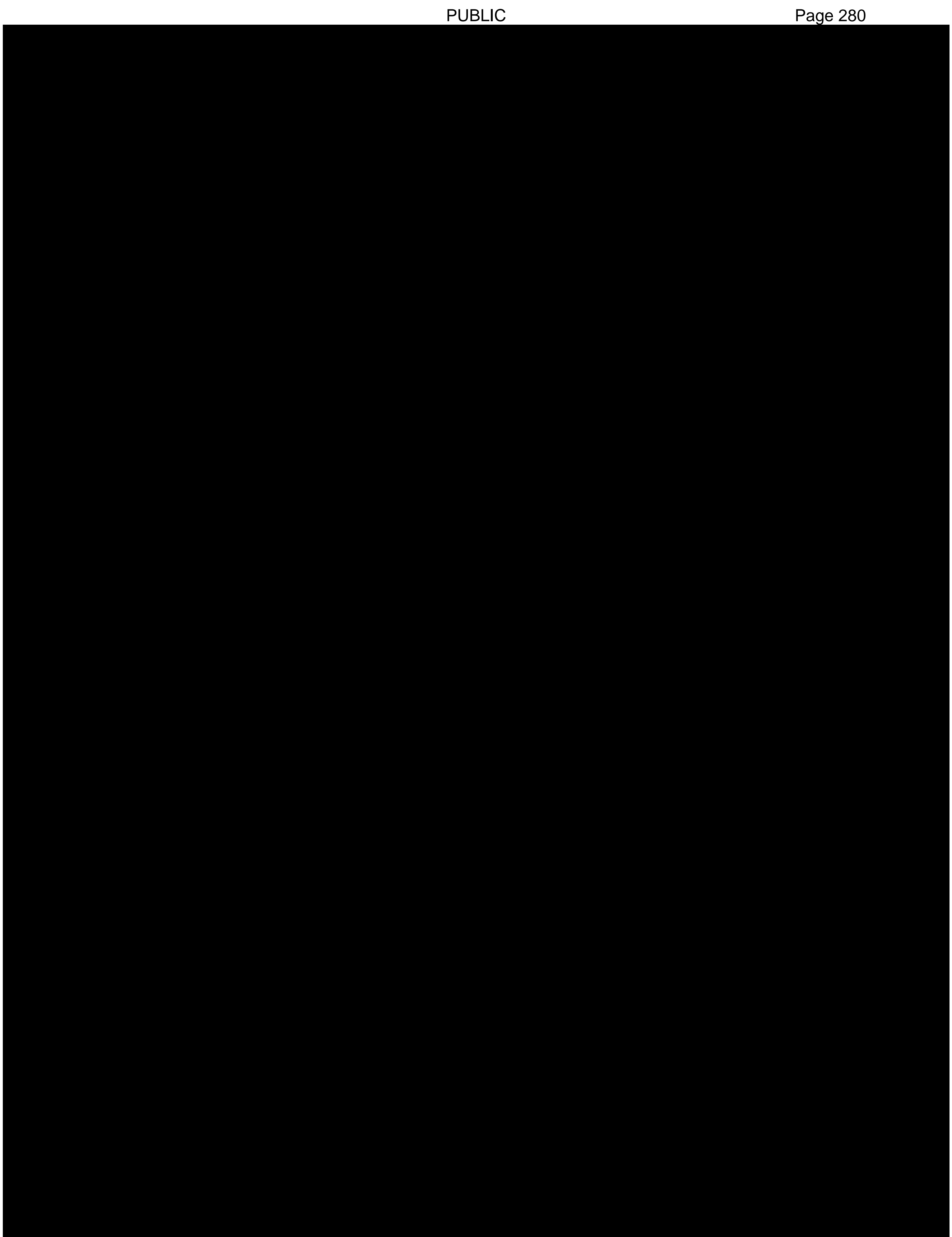
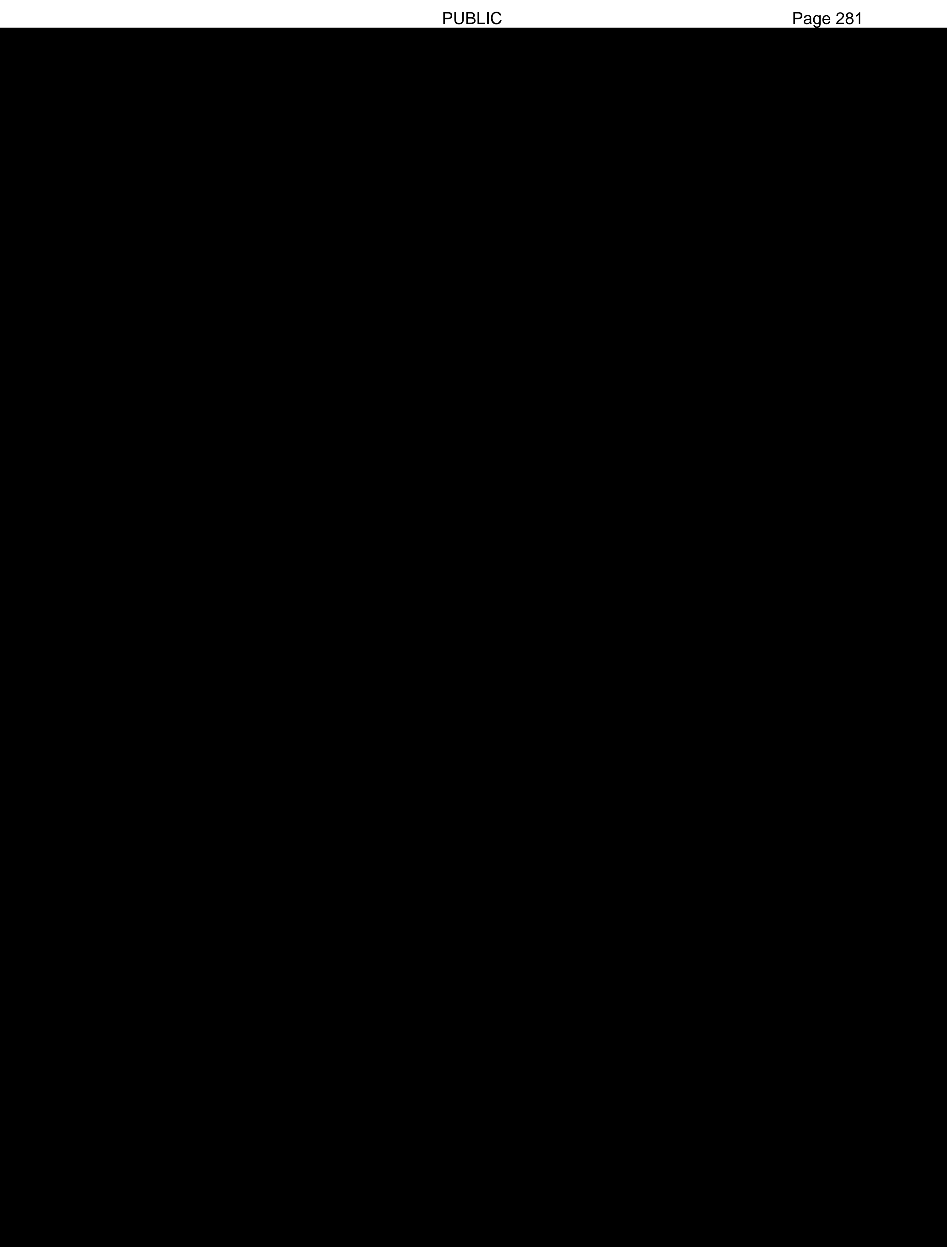








From: Nick Giugovaz
Sent: Wednesday, January 13, 2021 8:36 AM
To: Tricia Stevenson
CC: Keith Baron; Ryley Pierson; Gary Collins; Haiden Buck
Subject: Re: CNRL 4 Well Pad

Do add mud as well please.

My best,

Nick Giugovaz | Corporate Service Rep. – Midstream Infrastructure
SECURE ENERGY
Office: 587-390-2537 | Mobile: 403-819-4135

Available via mobile **anytime**.

On Jan 13, 2021, at 8:31 AM, Tricia Stevenson <tstevenson@secure-energy.com> wrote:

Morning :)

Thank you!
Tricia

On Jan 12, 2021, at 3:48 PM, Keith Baron <kbaron@secure-energy.com> wrote:

Keith Baron - Field Sales Representative -SGPLF & SADLF
SECURE ENERGY
Mobile 1-780-814-4910
kbaron@secure-energy.com

On Jan 12, 2021, at 3:45 PM, Ryley Pierson <rpierson@secure-energy.com> wrote:

Ryley Pierson | Area Manager - Sales
SECURE ENERGY
Mobile: 780-402-9095 | Office: 780-357-5642 x5642

From: Nick Giugovaz <ngiugovaz@secure-energy.com>
Sent: January 12, 2021 3:42 PM
To: Keith Baron <kbaron@secure-energy.com>
Cc: Ryley Pierson <rpierson@secure-energy.com>; Gary Collins <gcollins@secure-energy.com>; Tricia Stevenson <tstevenson@secure-energy.com>; Haiden Buck <hbuck@secure-energy.com>
Subject: RE: CNRL 4 Well Pad

Do we have a shot at mud?

Nick Giugovaz
SECURE ENERGY
Office: 587-390-2537 | Mobile: 403-819-4135

Available via mobile **anytime**.

From: Keith Baron <kbaron@secure-energy.com>
Sent: January 12, 2021 3:31 PM
To: Nick Giugovaz <ngiugovaz@secure-energy.com>
Cc: Ryley Pierson <rpierson@secure-energy.com>; Gary Collins <gcollins@secure-energy.com>; Tricia Stevenson <tstevenson@secure-energy.com>
Subject: Re: CNRL 4 Well Pad

Keith Baron - Field Sales Representative -SGPLF & SADLF
SECURE ENERGY
Mobile 1-780-814-4910
kbaron@secure-energy.com

On Jan 12, 2021, at 3:26 PM, Nick Giugovaz <ngiugovaz@secure-energy.com> wrote:

Nick Giugovaz
SECURE ENERGY
Office: 587-390-2537 | Mobile: 403-819-4135

Available via mobile **anytime**.

From: Nick Giugovaz
Sent: January 12, 2021 3:23 PM
To: Keith Baron <kbaron@secure-energy.com>; Ryley Pierson <rpierson@secure-energy.com>; Gary Collins <gcollins@secure-energy.com>
Cc: Tricia Stevenson (tstevenson@secure-energy.com) <tstevenson@secure-energy.com>
Subject: CNRL 4 Well Pad

Thanks+

<image001.png>

Nick Giugovaz | Corporate Service Representative – Midstream Infrastructure
SECURE ENERGY
Office: 587-390-2537 | Mobile: 403-819-4135

Available via mobile **anytime**.

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: May 3, 2022
CT- 2021-002

Sara Pelletier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. Doc. # 279

PUBLIC

File No. CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corporation;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

B E T W E N :

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

AGREED STATEMENT OF FACTS

Secure Energy Services Inc.

1. Secure Energy Services Inc. (“**Secure**”) is a publicly traded Canadian company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange.

2. Secure divides its business into two segments: Midstream Infrastructure and Environmental and Fluid Management.

3. Secure’s Midstream Infrastructure business segment includes a network of midstream processing and storage facilities, crude oil and water pipelines, and crude by rail terminals located in Western Canada, North Dakota and Oklahoma.

85. Secure's pricing at its TRDs are not uniform across all locations.

86. Secure's pricing at its landfills are not uniform across all locations.

87. Secure's pricing at disposal wells are not uniform across all locations.

88. SECURE has entered into and continues to have Master Service Agreements with some of its customers.

89. Secure's customers generally arrange for transportation of waste themselves, and do not pay Secure for transportation costs.

90. Unless there is a pipeline connection for the purpose of transporting waste streams, Secure receives waste at its facilities via truck.

Orphaned Wells

91. An orphaned well is a well that no longer has a legal or financial owner.

92. There exist both orphaned and abandoned well sites throughout the WCSB.

93. The OWA is a customer of Secure.

94. The OWA is a former customer of Tervita.

95. In 2020, the federal government announced a $1.7 billion stimulus package to help fund the closure of orphaned and inactive wells in the WCSB.

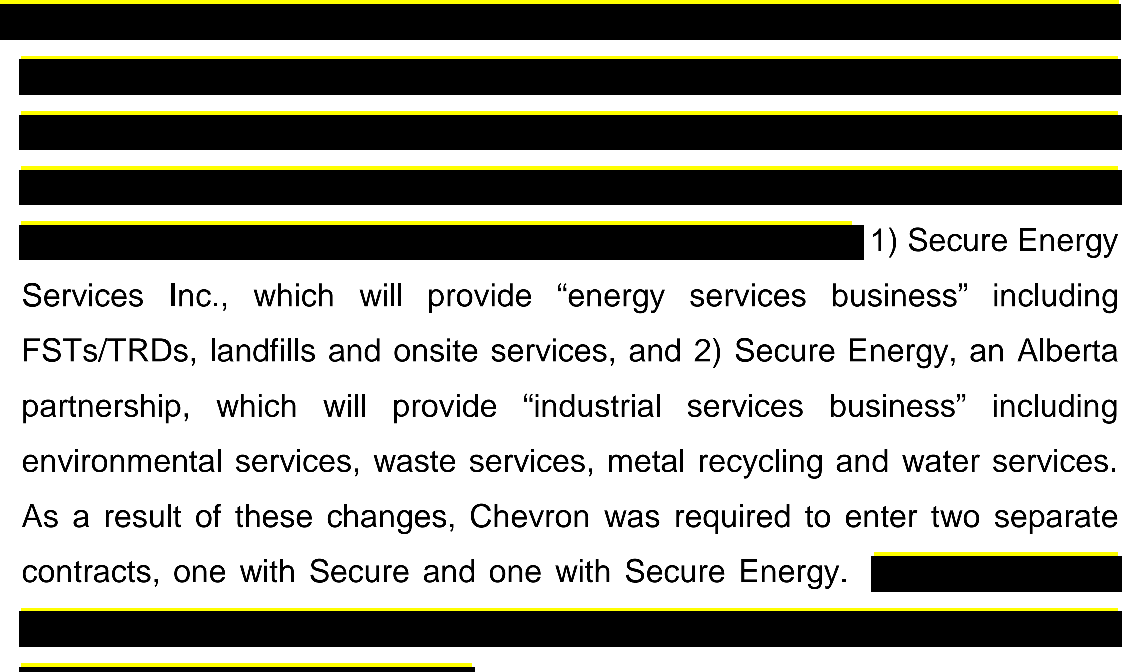
Canadian oil and gas industry

96. SECURE's customers are predominantly oil and gas producers.

97. There have been at least 52 transactions involving the consolidation of oil and gas producers since 2017.

98. The Canadian Net-Zero Emissions Accountability Act became law on June 29, 2021, and represents Canada's legislative commitment to achieve "net-zero" emissions by 2050.

13. Chevron negotiates its waste disposal prices by way of service contracts. The price is made up of a tipping fee and disposal fee. Each facility will have varying tipping fees that are priced according to market dynamics and the levels of surrounding competition.



1) Secure Energy Services Inc., which will provide "energy services business" including FSTs/TRDs, landfills and onsite services, and 2) Secure Energy, an Alberta partnership, which will provide "industrial services business" including environmental services, waste services, metal recycling and water services. As a result of these changes, Chevron was required to enter two separate contracts, one with Secure and one with Secure Energy.

15. Transportation costs increase significantly when there are fewer FST/TRD and landfill facilities in a given area, due to travel distance and increased wait times. Transportation costs make up a significant percentage of the cost of waste disposal, in almost all cases the transportation costs for Chevron are the most significant proportion of the cost of waste disposal.

16. Chevron has been advised that Secure has closed the following Tervita facilities since October 1, 2021: Tervita Fox Creek East TRD, Tervita Bigstone TRD, Tervita Judy Creek South TRD, Tervita Valleyview TRD, Tervita Highway

7. Crew Energy has used facilities owned by Tervita and Secure for solid waste disposal in NEBC. In particular, Crew Energy has used the Silverberry facility previously owned by Tervita (which is also licensed to accept NORM waste) and Secure's Saddle Hills facility. At times, Crew Energy may truck condensate to Secure's Gordondale facility.

8. Crew Energy also uses Secure and Tervita's treatment, recovery and disposal facilities ("**TRDs**") as well. These facilities can separate waste containing mixtures of solid waste, liquid waste, and hydrocarbons into different waste streams, and typically have liquid waste disposal wells on-site. Specifically, Secure's Dawson Creek facility and Tervita's South Taylor facility have been used in the past.

CHOICE OF DISPOSAL SITE

9. A large component of the cost incurred for waste disposal consists of the cost to truck the waste to the disposal site. Crew Energy looks for disposal options that are the closest to its operations to manage these costs. Hence, trucking costs and distance are a key factor in deciding where the waste will be taken for disposal.

10. For TRDs listed in paragraph 8 above, Crew Energy mostly utilizes Secure's Dawson Creek facility because it has a pipeline connection to Pembina and it avoids further trucking charges.

11. Another important factor in deciding which site to choose for disposal is capacity at the facility. Pricing is typically determined by phoning the representatives at each facility on an as-needed basis. Generally speaking, when a facility is capacity-constrained, prices to dispose of waste will be higher, and when there is enough capacity, the prices will be lower.

disposal of Surmont waste due to the inherent safety risks (time on the road/distance for drivers, transporting 'Dangerous Goods') and energy expended (greenhouse gas impact of additional driving) associated with travel to and from Tulliby. In addition, using the Tulliby facility, in contrast to a closer facility, results in significant incremental costs for the ~800km round-trip hauling required.

CHOICE OF DISPOSAL SITE

13. ConocoPhillips' choice of waste disposal site is influenced by the facility's ability to accept the type of waste ConocoPhillips' operations generate, and by the total price for its disposal. The total price of waste disposal services is the sum of the cost of transportation fees to a facility and the cost of tipping fees charged by the facility. "Tipping fees" refers to the fees charged for waste disposal by a waste disposal facility or landfill.

15. Access to disposal capacity is also a factor in ConocoPhillips' choice of waste disposal facility. For example, in the Montney region many producers drill new wells at the same time of year, which collectively results in the production of a large volume of flowback water. ConocoPhillips choice of waste disposal facility during these busy times of year is often constrained by this increased demand for waste disposal capacity.

16. Wait times at a facility can also influence ConocoPhillips' choice of facility. ConocoPhillips may incur "standby" charges with its third-party trucking companies if waste disposal facilities lack sufficient offloading capacity to process loads as they arrive. In addition, if a facility lacks sufficient capacity to efficiently offload waste truck drivers may 'time out' (exceed the amount of time they are allowed to be driving) causing additional and potentially costly delays.

CONOCOPHILLIPS USE OF OTHER WASTE DISPOSAL SERVICE PROVIDERS

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,

August 2021 when more competitive pricing was secured at a competitive water disposal facility in the area.

9. With respect to solid waste, Halo uses Secure's Fox Creek Landfill at 06-32-063-20 W5 to dispose of its drilling waste, and has also used the Fox Creek landfill formerly owned by Tervita at 03-29-062-20 W5M. These are Class II landfills licensed to accept a variety of solid oilfield waste products. Halo disposes of 100% of its solid waste materials between the two facilities.

CHOICE OF DISPOSAL SITE

10. When Halo is choosing a disposal site for its waste products, getting the best value in terms of net cost is generally our goal. We would consider trucking costs, distance, and disposal fees in selecting a disposal site.

11. As transportation costs to the disposal site can be significant, distance is an important factor. However, some facilities may have lengthy wait times for dropping off loads of waste, such that it may be better value to truck the waste to a more distant facility when those wait times are taken into account. Water disposal facility capacity demand can be the highest in winter when drilling and completion/fracturing flowback activities are at their peak.

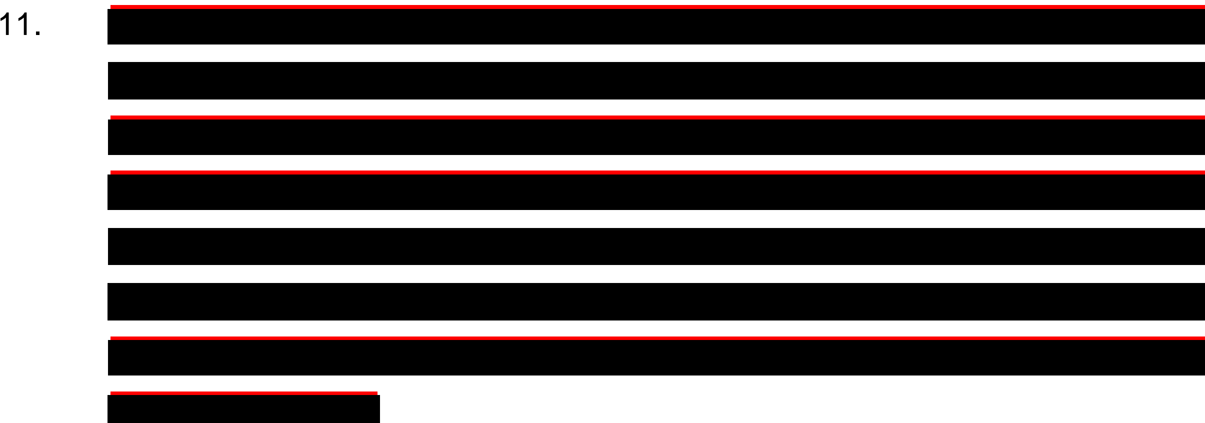
12. There are other factors that can influence the choice of disposal site as well, including perks (such as meals) for drivers dropping off waste, and how the facility evaluates our products.

13. The costs of disposal are dependent on the type of waste. For example it is significantly more expensive to dispose of flowback water than produced water.

14. If Halo delivers a load of oil to a TRD that provides terminalling services, the waste disposal company may require Halo to pay for emulsion treating services if it tests the oil and finds that there are other fluids, typically water,

USE OF SERVICES FROM SECURE / TERVITA

10. In the course of its oil production activities, Chevron engages with waste disposal service companies including Secure and the former Tervita. Chevron disposes of solid waste from drill cuttings and contaminated materials at Secure and Tervita-owned landfills. Chevron disposes of solids, drilling muds, water and oil emulsions, liquid solid emulsions, most chemicals and some of its saline water at the Tervita Treatment Recovery and Disposal Facilities ("**TRDs**") and Secure's Full Service Terminals ("**FST**"). Chevron also disposes of some of its saline water at Secure's Saline Water Disposal Facilities ("**SWD**"). With the exception of certain water emulsions that Secure and the Tervita are not capable of disposing, Chevron disposes its hazardous waste almost exclusively at the Secure or the former Tervita facilities.

11. 

CHOICE OF DISPOSAL SITE

12. Chevron chooses a disposal facility based on waste type and distance from Chevron's relevant operations. As long as the facility can legally accept the waste type, distance (or travel time) typically determines which facility will receive Chevron's business. Distance is an important factor as it has a direct impact on Chevron's transportation costs. Chevron utilizes third-party trucking providers to transport its waste.

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2 36 Q. I take it, Mr. Engel,
3 then, that you would agree that services that
4 disposal wells provide are not a functional
5 substitute for landfills. Right?
6 A. Correct.
7 37 Q. Okay, and so you can't
8 dispose of produced waste water in a landfill, and
9 you can't send contaminated soil down a disposal
10 well. Right?
11 A. Correct. In most cases,
12 there are some disposal wells, or have been
13 historically, that have disposed of solids, but,
14 in general, they are not interchangable.
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6 The first is that transportation costs are high
7 and comprise a substantial fraction of the overall cost to
8 customers. And an implication of high transportation cost
9 is that when I define markets, I'm going to define the
10 local markets around the location of customers. And so,
11 I'll explain that shortly.
12 Another implication of transportation costs is
13 that customers are going to view the facilities
14 differently, and, for example, it can be advantageous to
15 use a closer facility to a more distant facility. And
16 that's going to create some amount of what I'll call
17 differentiation, the notion that there's sort of better
18 matches that can be made between customers and facilities,
19 and some facilities that are less advantageous for the
20 overall economy, but also for the firms involved.
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August 2021 when more competitive pricing was secured at a competitive water disposal facility in the area.

9. With respect to solid waste, Halo uses Secure's Fox Creek Landfill at 06-32-063-20 W5 to dispose of its drilling waste, and has also used the Fox Creek landfill formerly owned by Tervita at 03-29-062-20 W5M. These are Class II landfills licensed to accept a variety of solid oilfield waste products. Halo disposes of 100% of its solid waste materials between the two facilities.

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12. There are other factors that can influence the choice of disposal site as well, including perks (such as meals) for drivers dropping off waste, and how the facility evaluates our products.

13. The costs of disposal are dependent on the type of waste. For example it is significantly more expensive to dispose of flowback water than produced water.

14. If Halo delivers a load of oil to a TRD that provides terminalling services, the waste disposal company may require Halo to pay for emulsion treating services if it tests the oil and finds that there are other fluids, typically water,

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,

Murphy may truck waste generated in this area to a facility outside of Fox Creek.

18. Murphy receives corporate tipping fees from the disposal facilities across our operations, which represents base pricing for service. This typically occurs on an annual basis. In scenarios of large project-specific volumes requiring numerous trucks and extended disposal windows, Murphy may issue a project-specific request to the area's disposal facilities to negotiate tipping fees and to establish each disposal facility's capacity to meet demand. In Murphy's experience, companies may decrease pricing to more distant facilities to offset trucking costs.

19. Tipping fees may also be negotiated for projects such as for the disposal of waste collected in cleaning up a spill or decommissioning an inactive oil well.

DISPOSAL OF WASTE TO THIRD PARTIES

20. Through 2020 and the first 3 quarters of 2021, Murphy hauled solid waste to several different regional Class II landfills, including Secure – Fox Creek, Secure – Saddle Hills and Tervita – South Wapiti. Corporate tipping fees were used, facilities chosen for solids disposal were those closest to Murphy's projects.

21. For waste requiring processing at a FST or similar facility, including water waste, Murphy has historically requested project-specific pricing proposals from Secure – Fox Creek and Catapult Water Midstream – Fox Creek. These two facilities have been chosen as they were the closest to Murphy's projects. Preferential pricing was established with Catapult Water Midstream – Fox Creek, and waste water was hauled for disposal there.

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purpose, commonly for the purposes of reservoir pressure maintenance as part of an AER-approved waterflooding project. Over time, tanks and vessels that treat such production prior to sale can collect residuals and solids (sludge) the Company does not have the capability of handling ourselves. It is collected and disposed of at appropriate treatment facilities and/or landfills.

12. Obsidian has entered into agreements with Secure that involve the procurement, trucking, and injection, and sale of butane as an additive to our produced oil as a means of maximizing revenue from our facilities while remaining within shipper pipeline specifications.

13. When an unplanned release of reservoir fluids or chemicals occurs from a well, pipeline, or facility, Obsidian acts to minimize the impact of the event through timely remediation. These releases may result from a failed wellhead, pipeline, vessel, or tank.

14. As part of decommissioning activity for a well at the end of its function life, Obsidian may have to dispose of materials such reservoir or completions fluids (commonly brine) and/or contaminated soils as part of site remediation and reclamation. Discovery of historical releases may also occur during the decommissioning of a production site that is no longer in use.

PRICING

15. Pricing and business terms are established through negotiation. Tipping fees and trucking rates (in cases when they offer trucking) are usually negotiated annually. As with most services, supply and market demand pressures will impact the fees that Obsidian is required to pay.

TRANSPORTATION TO DISPOSAL FACILITIES

16. Obsidian's waste products are typically transported to disposal facilities by truck. Trucking expenses are significant relative to the overall cost of disposal, often comparable to fees at the disposal facilities themselves. For any load of

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waste, trucking costs are calculated and charged either as rates per kilometer travelled, or per hour spent travelling. For that reason, distances from a waste-producing site to available disposal facilities may be a significant factor in selecting a disposal facility.

17. So long as each facility is appropriately permitted to accept the waste being disposed, there is little differentiation between facilities for the shipper. Obsidian therefore typically uses whichever facility results in the lowest total cost, calculated as the sum of transportation costs plus fees charged at the disposal facility per unit of waste. The latter are commonly known as tipping fees.

THIRD-PARTY DISPOSAL FACILITIES

18. From its Peace River production area, Obsidian must dispose of drilling fluids, workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

19. From its Cardium production area, Obsidian must dispose of drilling fluids, completion fluids and flowback volumes, workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

20. From its Alberta Viking production area, Obsidian must dispose of workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

21. From its Legacy production area, Obsidian must dispose of workover fluids, untreatable production tank emulsions and residues, and any contaminated

radioactive material ("NORMs") must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

11. When choosing a disposal site, the primary consideration is total disposal cost, inclusive of transportation. Waste is typically transported by truck from its source to an appropriate disposal site of our choosing. The costs of transportation are significant, such that they often amount to more than the fees paid to a disposal site operator for a given load of waste. For example, trucks can usually carry approximately 35 to 40 tonnes of waste and trucking prices are typically in the range of $180 per hour. For that reason, among others including carbon footprint, driving distance from the waste's source to potential disposal site is a central consideration when choosing a site.

12. Availability and capacity at nearby disposal sites is also a factor impacting this choice. Sometimes landfills are full or closed, and this can require travelling further to access alternative landfills. Disposal wells can also be capacity constrained with lengthy wait times, particularly in periods with lots of drilling.

13. Transportation costs tend to be measured in time, as trucking companies will quote a price per hour. Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.

THIRD PARTY WASTE DISPOSAL

14. TAQA North's options for landfills include Secure and formerly Tervita, as described above. Typically ████ of TAQA North's waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North's landfillable waste was taken to a Class II or equivalent site.

7. Crew Energy has used facilities owned by Tervita and Secure for solid waste disposal in NEBC. In particular, Crew Energy has used the Silverberry facility previously owned by Tervita (which is also licensed to accept NORM waste) and Secure's Saddle Hills facility. At times, Crew Energy may truck condensate to Secure's Gordondale facility.

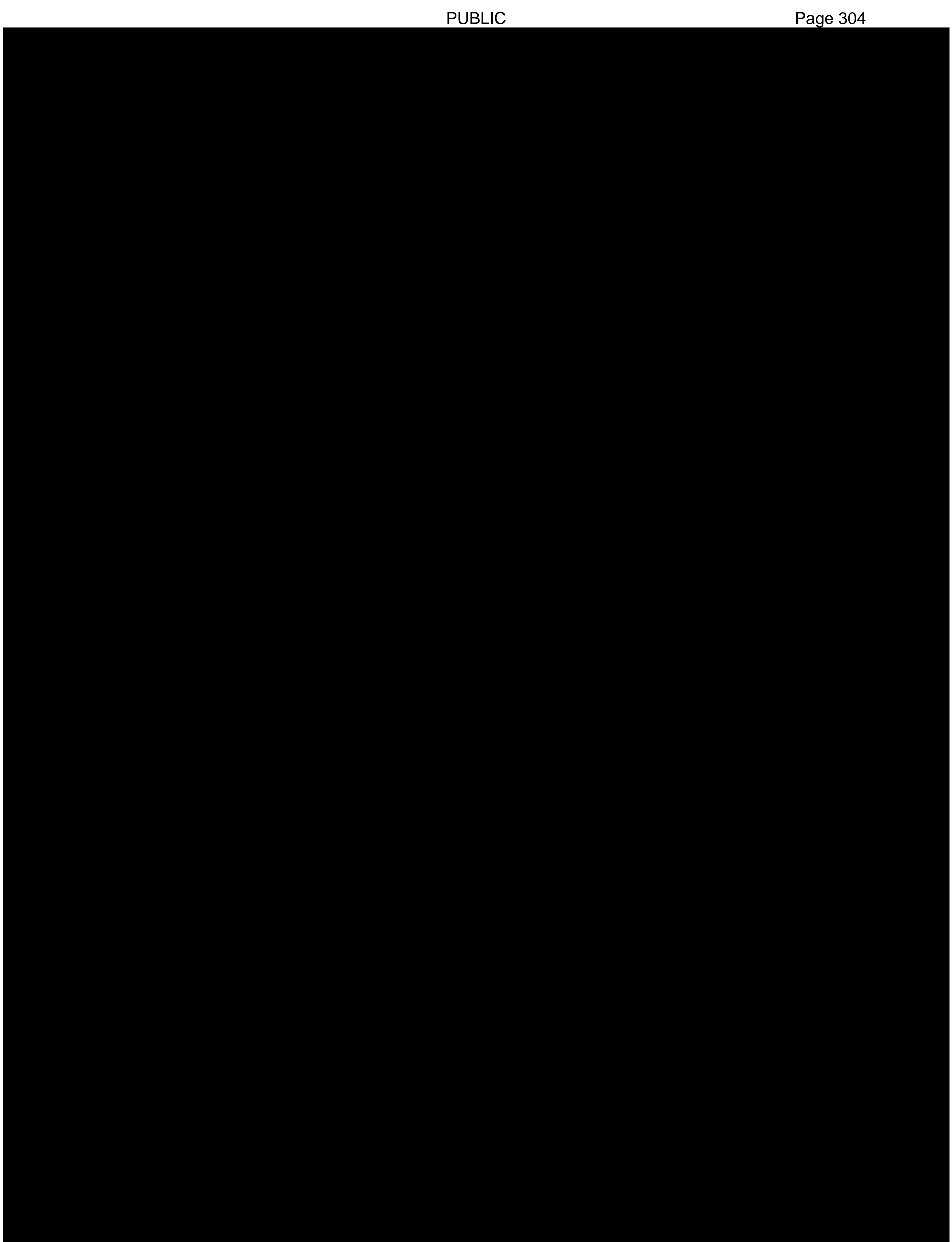
8. Crew Energy also uses Secure and Tervita's treatment, recovery and disposal facilities ("**TRDs**") as well. These facilities can separate waste containing mixtures of solid waste, liquid waste, and hydrocarbons into different waste streams, and typically have liquid waste disposal wells on-site. Specifically, Secure's Dawson Creek facility and Tervita's South Taylor facility have been used in the past.

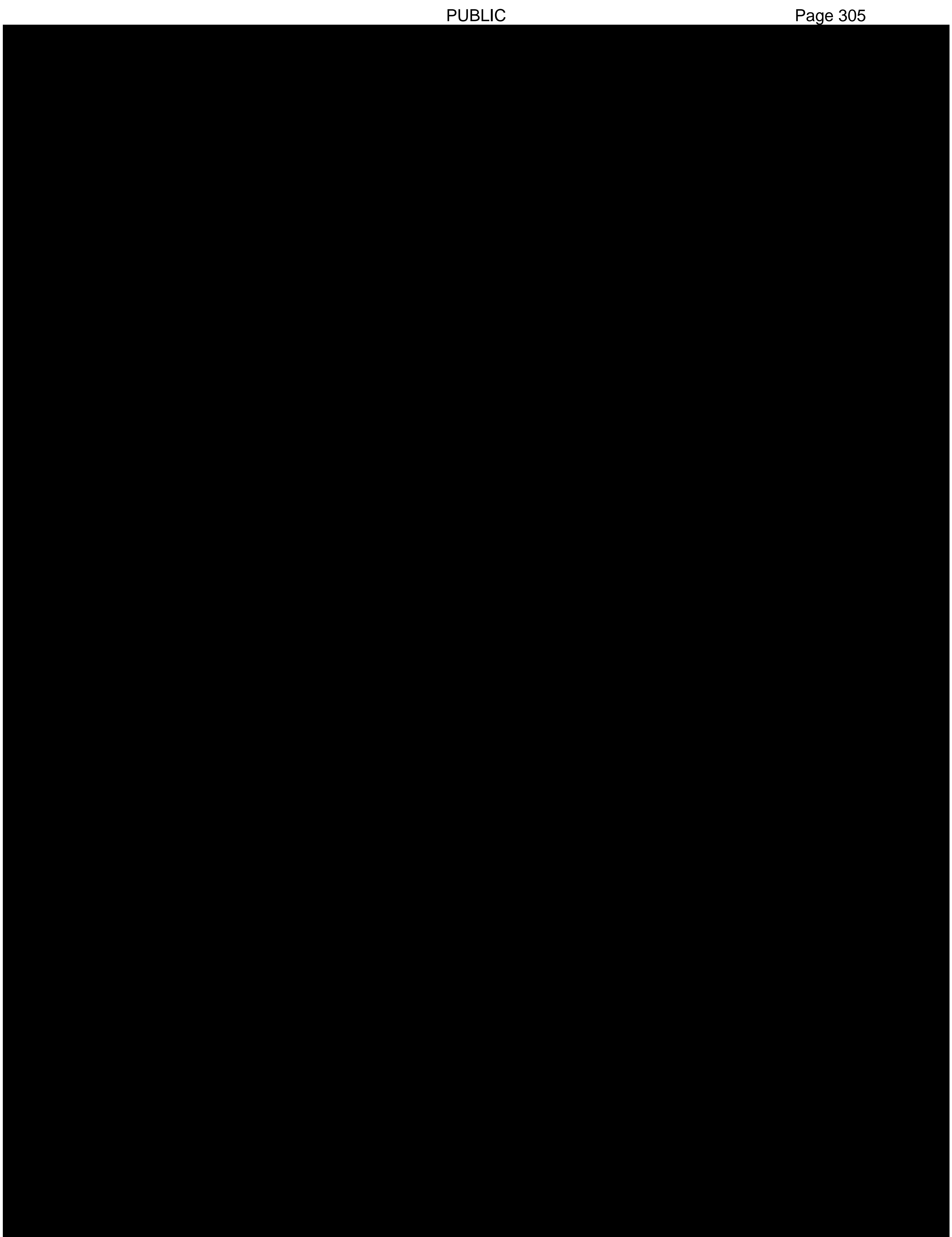
CHOICE OF DISPOSAL SITE

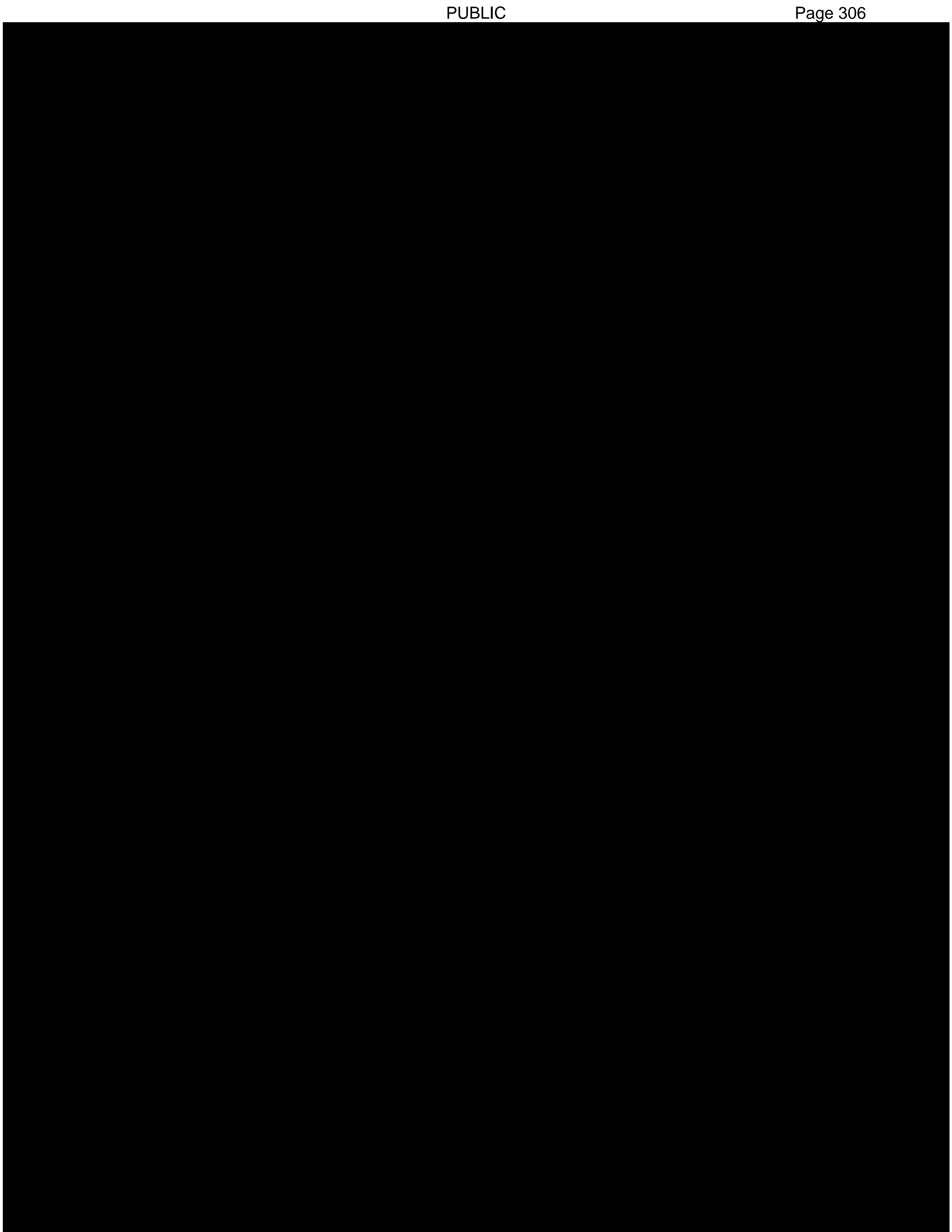
9. A large component of the cost incurred for waste disposal consists of the cost to truck the waste to the disposal site. Crew Energy looks for disposal options that are the closest to its operations to manage these costs. Hence, trucking costs and distance are a key factor in deciding where the waste will be taken for disposal.

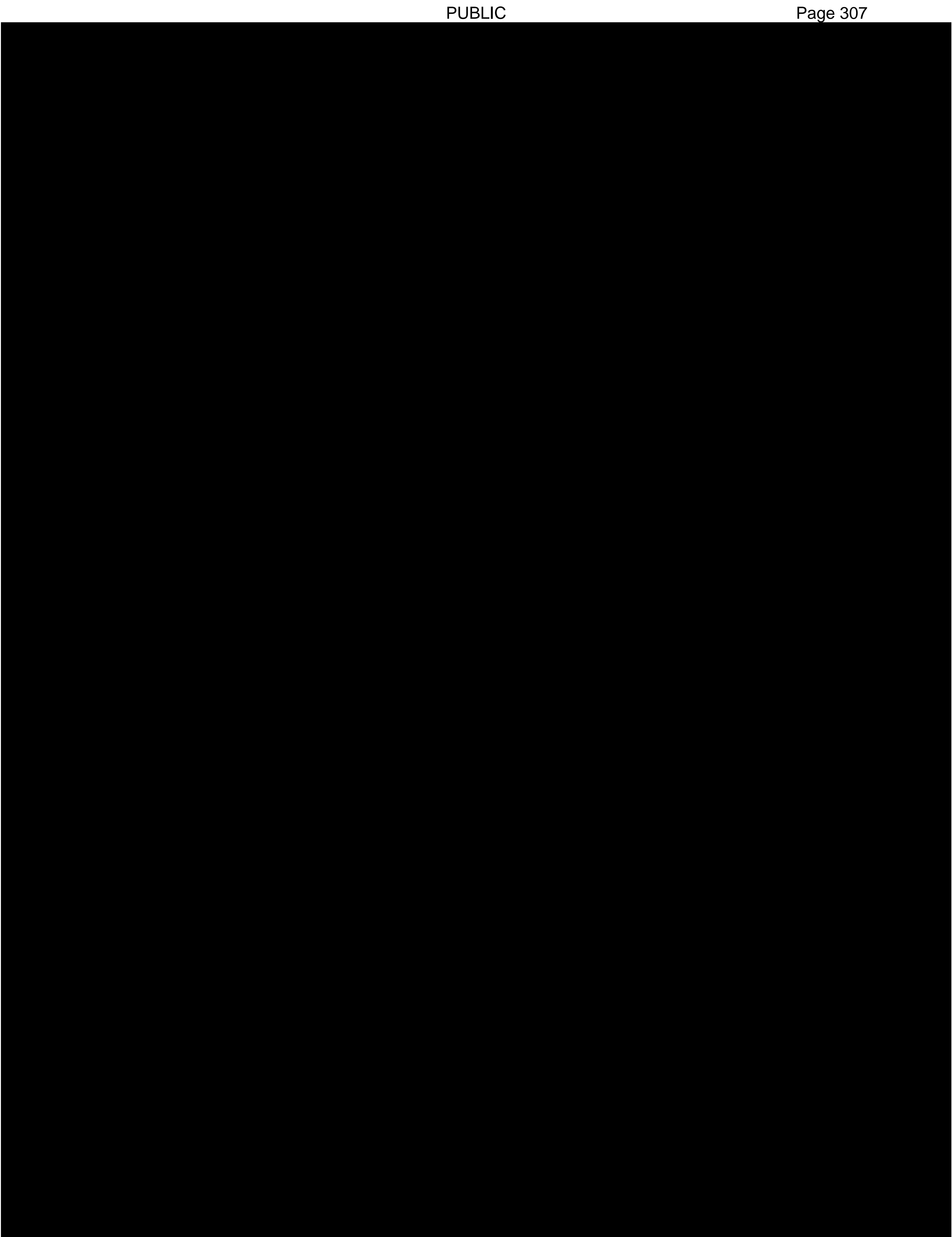
10. For TRDs listed in paragraph 8 above, Crew Energy mostly utilizes Secure's Dawson Creek facility because it has a pipeline connection to Pembina and it avoids further trucking charges.

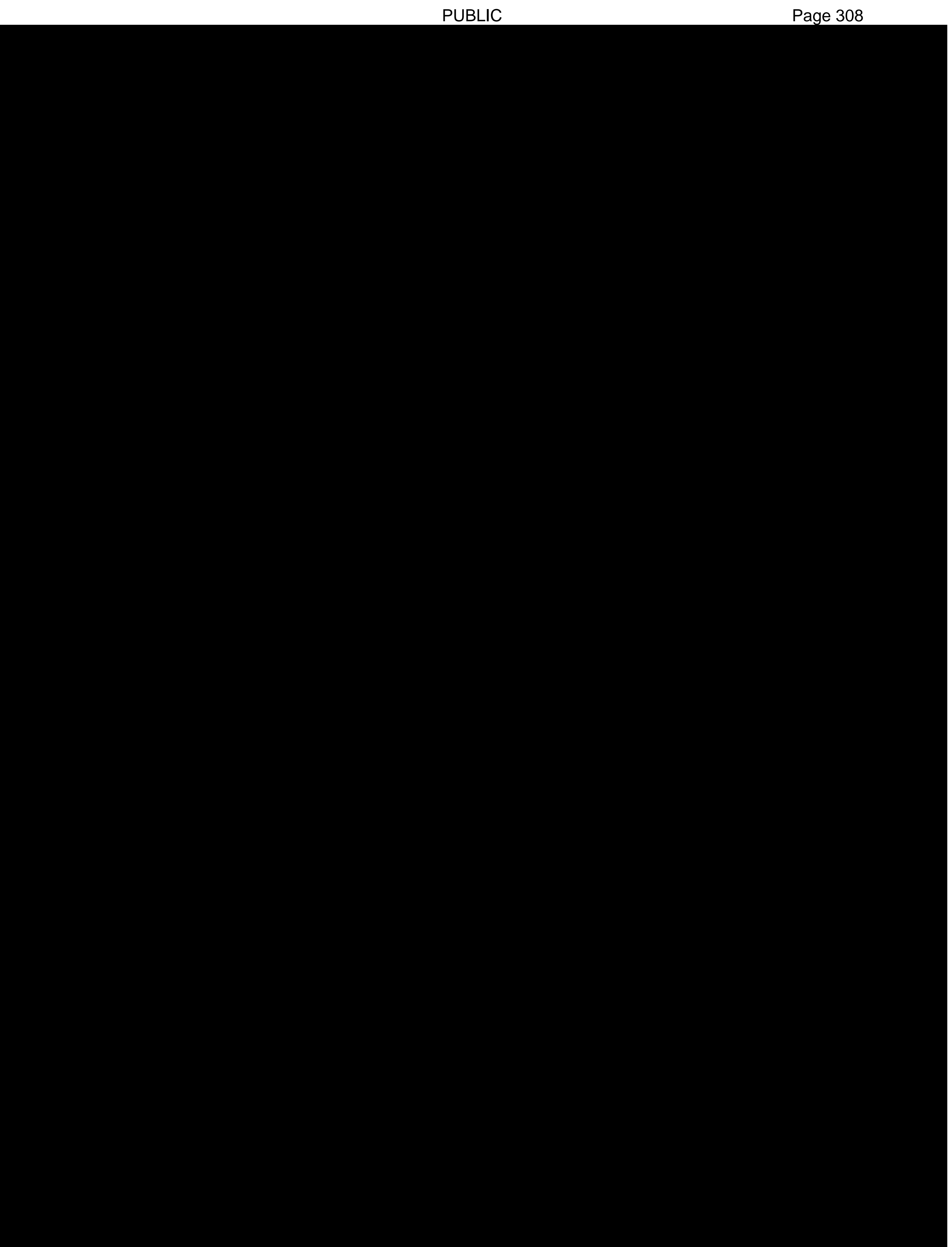
11. Another important factor in deciding which site to choose for disposal is capacity at the facility. Pricing is typically determined by phoning the representatives at each facility on an as-needed basis. Generally speaking, when a facility is capacity-constrained, prices to dispose of waste will be higher, and when there is enough capacity, the prices will be lower.

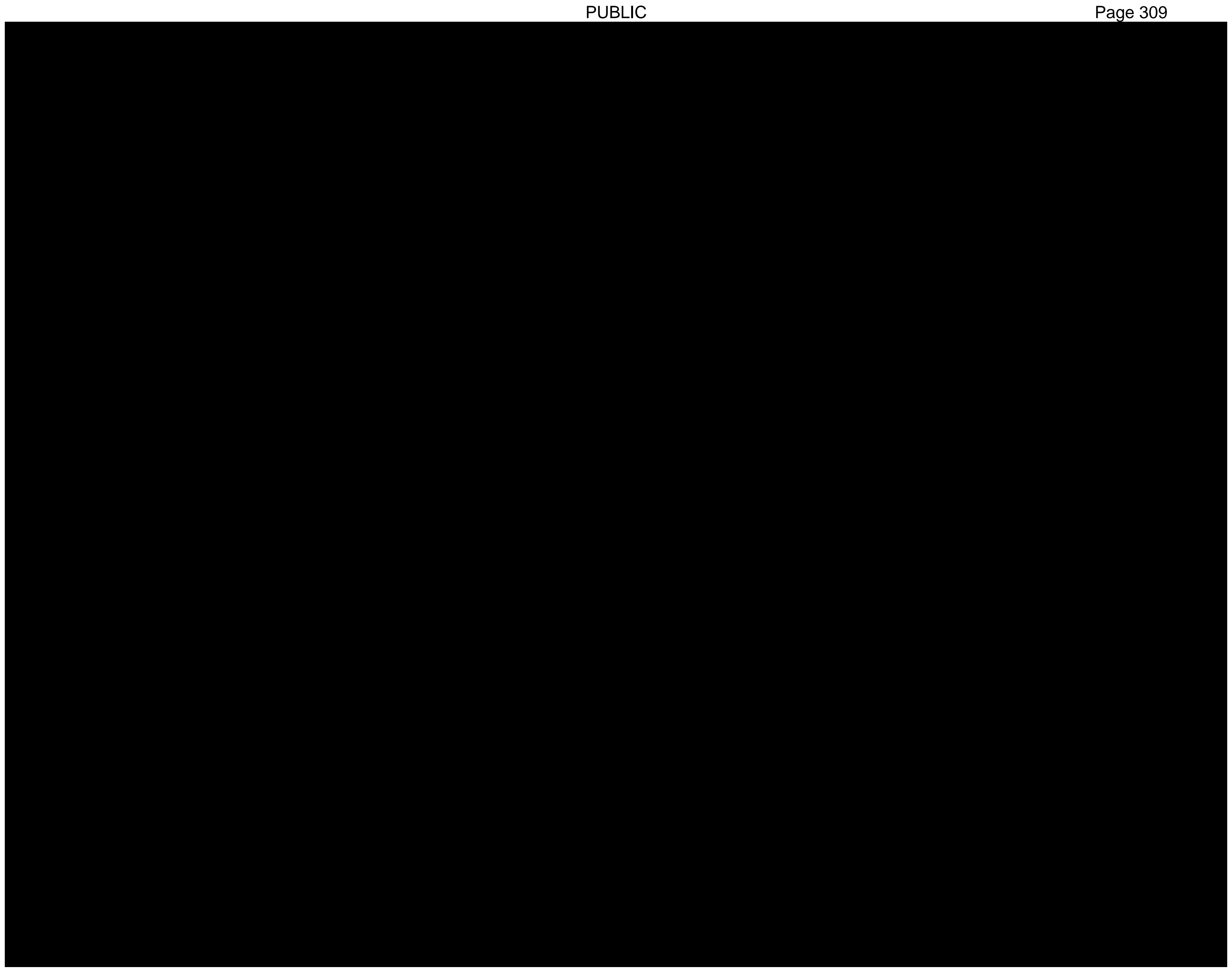


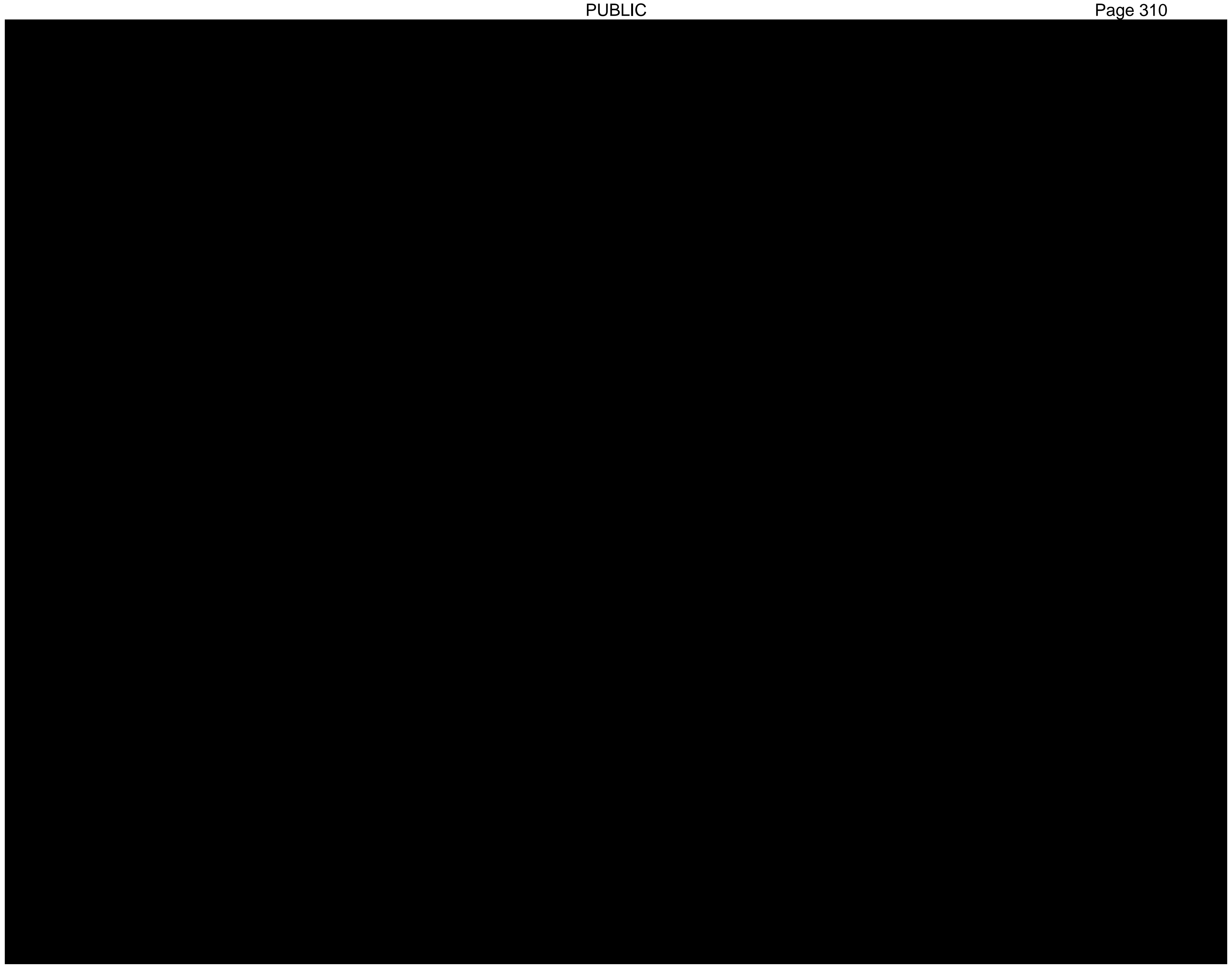












related to the incremental value the firm creates for customers (a value that is lost if the firm is closed).[142]

5.3. Responses to Dr. Duplantis' claims that there is little to no product differentiation besides the location of plants

98. Dr. Duplantis appears to suggest that my DWL estimate is overstated using two arguments: (1) transportation cost is a primary driver of choices that is observable and (2) the increase in transportation cost I calculated only accounts for less than 10 percent of my DWL estimate.

99. With respect to her first argument, I have discussed other factors that appear to differentiate facilities in the eyes of customers, both in my Initial Affidavit and above (Section 3.2.1).

100. I also explained that differentiation can be inferred from observed data. For example, high markups are an indication of differentiation. Facilities are able to maintain high markups if they provide to customers different features than their competitors. Customers would accept a facility's higher prices if they derive incremental value from that facility. As another empirical observation indicating differentiation between facilities, data show that customers often choose facilities that are not the closest. Based on the Secure and Tervita transaction data, I find that large percentages of transactions for customers (defined as well sites) are for waste sent to farther away facilities when there is a closer facility.[143]

101. Further, the industrial organization and econometric literature has long recognized that there may be characteristics of a product that are valued by customers but may not be observable to the researcher or individually quantifiable. This does not mean, however, that they do not exist. As I explain in Section 4.2, my approach leverages information on observed customer choices and margins to quantify the overall value of closed facilities even with

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[142] When a customer trades with the producer she values higher, the trade creates additional social surplus compared to when she trades with another producer that she values less. This additional social surplus is the difference between her valuation of her first and second choices. The price at which the trade occurs only determines the division of this incremental surplus. Under a pricing model that posits that the producer captures all the incremental surplus (e.g., second-score auction), variable profits are an exact estimate of the additional social surplus created. Under other pricing models, variable profits are a lower bound estimate of the additional social surplus (because some of the social surplus is captured by the customer).

[143] I find that ██ percent of landfil ██ percent of TRD, and ██ percent of water disposal transactions are at facilities operated by one of the Party facilities that are not the nearest facilities to the well sites generating the waste. See my workpapers.

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17 **MS. HENDERSON:** In your Witness Statement, you
18 also mention that there can be capacity constraints at
19 waste disposal facilities. And essentially your point
20 there is that when you send waste to a facility, you need
21 to make sure that the facility actually has capacity to
22 take it before you send the truck, right?
23 **MR. HART:** Yes, that's how we avoid standby
24 times.
25 **MS. HENDERSON:** Right. And that's part of

1 minimizing your overall cost of disposal? I'm sorry, I
2 didn't hear you. Did you say yes, sir?
3 **MR. HART:** Yes.
4 **MS. HENDERSON:** It may be the audio on my end.
5 I apologize if it is. Just to make sure I'm clear, if your
6 truck gets to a facility and it turns out there's no
7 capacity, that truck will either have to drive to another
8 facility or theoretically bring the waste back to CNRL. Is
9 that right?
10 **MR. HART:** No. We will wait till all the other
11 trucks are through, if that facility has capacity, or haul
12 to an alternative facility.
13 **MS. HENDERSON:** And either way, that costs CNRL
14 more money, more trucking time; fair?
15 **MR. HART:** Yes.
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21 **MS. HENDERSON:** So in paragraph 16, you say
22 that CNRL's practice has been to contact waste disposal
23 facilities up to a month in advance to communicate your
24 anticipated volume and timing requirements.
25 Do you see that?

1 **MR. HART:** Yes.
2 **MS. HENDERSON:** And that's been your practice
3 both before the merger and since the merger, right?
4 **MR. HART:** Yes.
5 **MS. HENDERSON:** And I take it the reason you do
6 that is so that the waste disposal companies can work with
7 you to route your waste to particular facilities at
8 particular times, so that you can try to avoid capacity
9 issues or wait times, is that right?
10 **MR. HART:** Yes.
11 **MS. HENDERSON:** But in your Witness Statement
12 you say that sometimes, despite that planning, trucks may
13 be turned away because the facility is at capacity when
14 they pull up?
15 **MR. HART:** Correct. The difficult --
16 **MS. HENDERSON:** I'm sorry, sir, I didn't mean
17 to cut you off. Go ahead.
18 **MR. HART:** No problem. I was just going to
19 say, difficult for them at 30 days out. So we often do 30
20 days out, try to do one week out, and then operations are
21 operations.
22 **MS. HENDERSON:** Fair enough. I've seen that.
23 There are some longer-term communication and then some sort
24 of day-off, where-can-we-go communication; fair?
25 **MR. HART:** Yes.

1 **MS. HENDERSON:** And this issue we've spoken
2 about with capacity times and trucks occasionally being
3 turned away, I take it that was an issue from time to time
4 before the merger as well?
5 **MR. HART:** Yes.
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12 **MS. HENDERSON:** So as I understand it,
13 minimizing wait times at a facility is an important factor
14 for Halo because it minimizes the overall net cost of
15 transporting waste; correct?
16 **MR. CAIN:** That is a consideration, yes.
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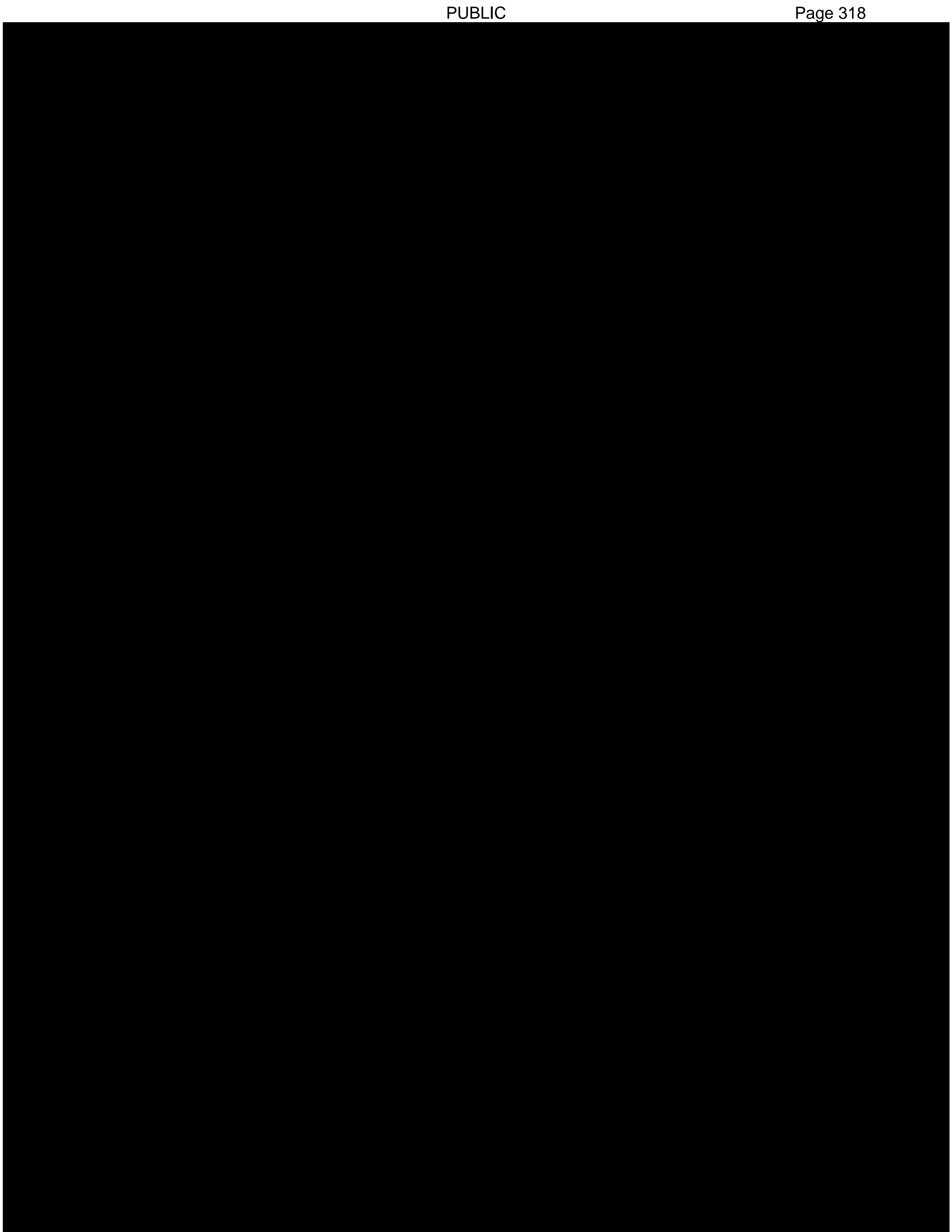

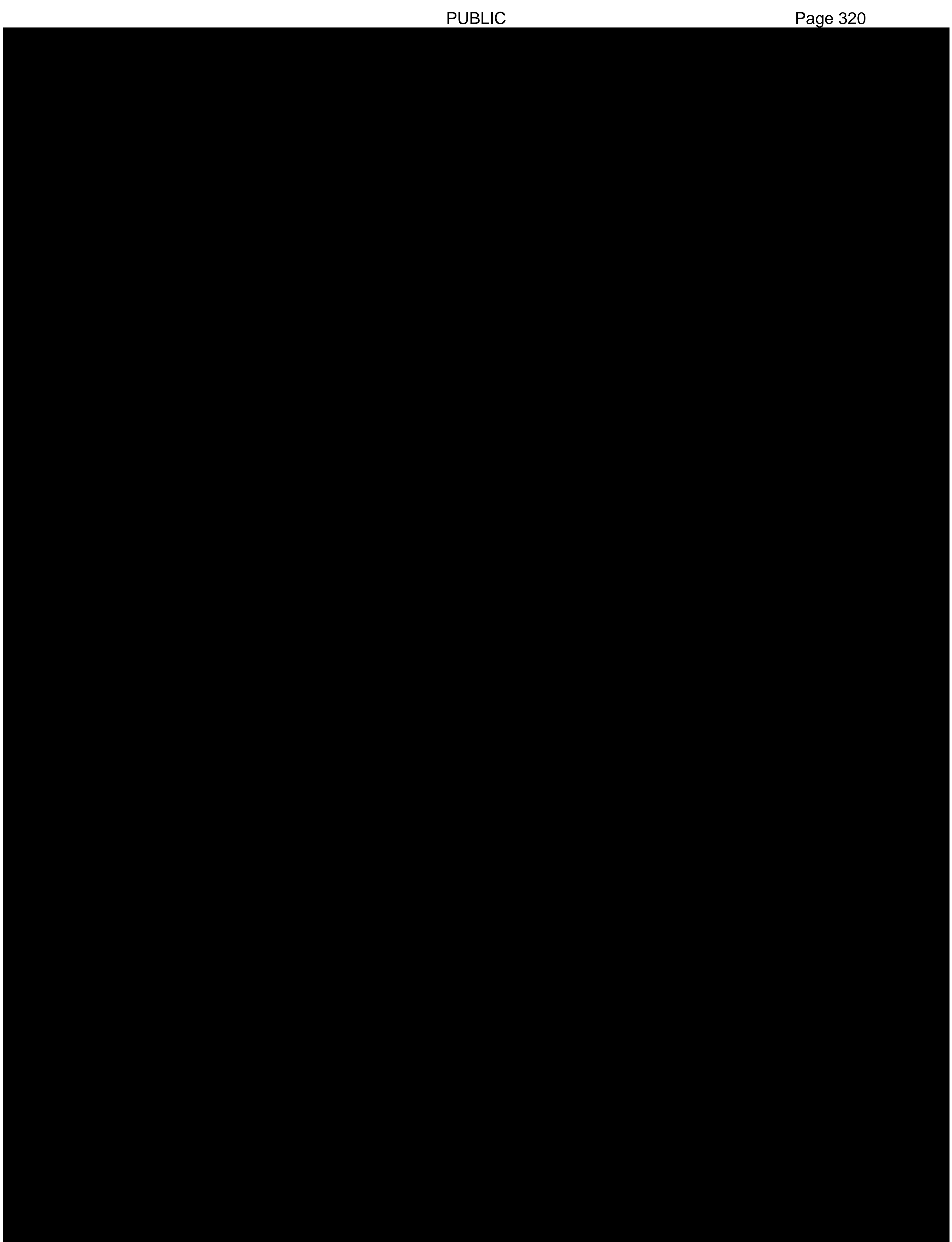

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24 **JUSTICE GASCON:** I do, Chief Justice.
25 Good morning, Mr. McSween. I'm looking at your

1 witness statement, paragraph 8, and you refer at the end of
2 the paragraph, in terms of the reason why you used
3 Tervita's facilities, you refer to the relationship that
4 you built with that company. Can you elaborate on what you
5 mean by the relationship and its impact?
6 **MR. McSWEEN:** I would say the relationship is
7 also, you know, has to do with the rates that we're
8 receiving and the service. The trucking companies that we
9 use that haul in there say good things. We didn't have
10 wait times. So I'd say that's all kind of co-mingled into
11 the relationship, is the whole business aspect of this.
12 **JUSTICE GASCON:** So you mentioned the rates,
13 you mentioned the wait times. So that --
14 **MR. McSWEEN:** Yeah.
15 **JUSTICE GASCON:** -- is what you include in the
16 relationship?
17 **MR. McSWEEN:** Yeah, yeah.
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From: Geoff Prieur
Sent: Monday, January 22, 2018 4:09 PM
To: Travis Porter
CC: Daniel Schwarz; Ed Guenther; Cameron Heitt; Dave Desjardins; BJ Carey; Nick Giugovaz; Stetson MacDonald; Administrator, Tulliby LF; Administrator, Judy Creek FST
Subject: FW: Crestwynd Exploration Ltd. - Solid / Fluid Disposal Options
Attachments: Crestwynd-West Rock Solid Quote (63-22W4).pdf; Crestwynd-WestRock Fluids Quote (63-22W4)_JCFST.PDF

Travis,

Cheers,

Geoff Prieur | Corporate Inside Sales Representative
Processing, Recovery & Disposal Division
SECURE Energy Services
Office: 403.290.2442 | Mobile: 403.999.4164

From: Travis Porter <tporter@secure-energy.com>
Date: January 19, 2018 at 4:21:57 PM MST
To: DPS Bids <dpsbids@secure-energy.com>
Subject: Fwd: Crestwynd Exploration Ltd. - Solid / Fluid Disposal Options

Porter
(403) 608 2926

Sent from my Samsung Galaxy smartphone.

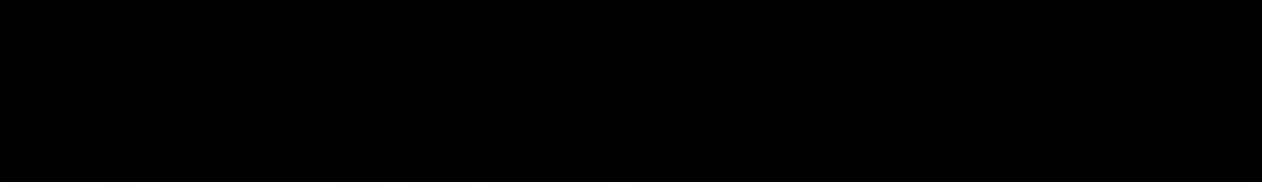
-------- Original message --------
From: Troy Anderson <TAnderson@westrock-energy.com>
Date: 2018-01-19 4:10 PM (GMT-07:00)
To: Travis Porter <tporter@secure-energy.com>
Subject: Crestwynd Exploration Ltd. - Solid / Fluid Disposal Options

Any questions, give me a call.

Thanks,

From: Les Kohle
Sent: Monday, November 5, 2018 4:44 PM
To: Steve Rooyakkers
CC: Mike Hawkings
Subject: Re: Secure Rocky- Westbrick

Hi Steve,



If you have any questions please give me a call.

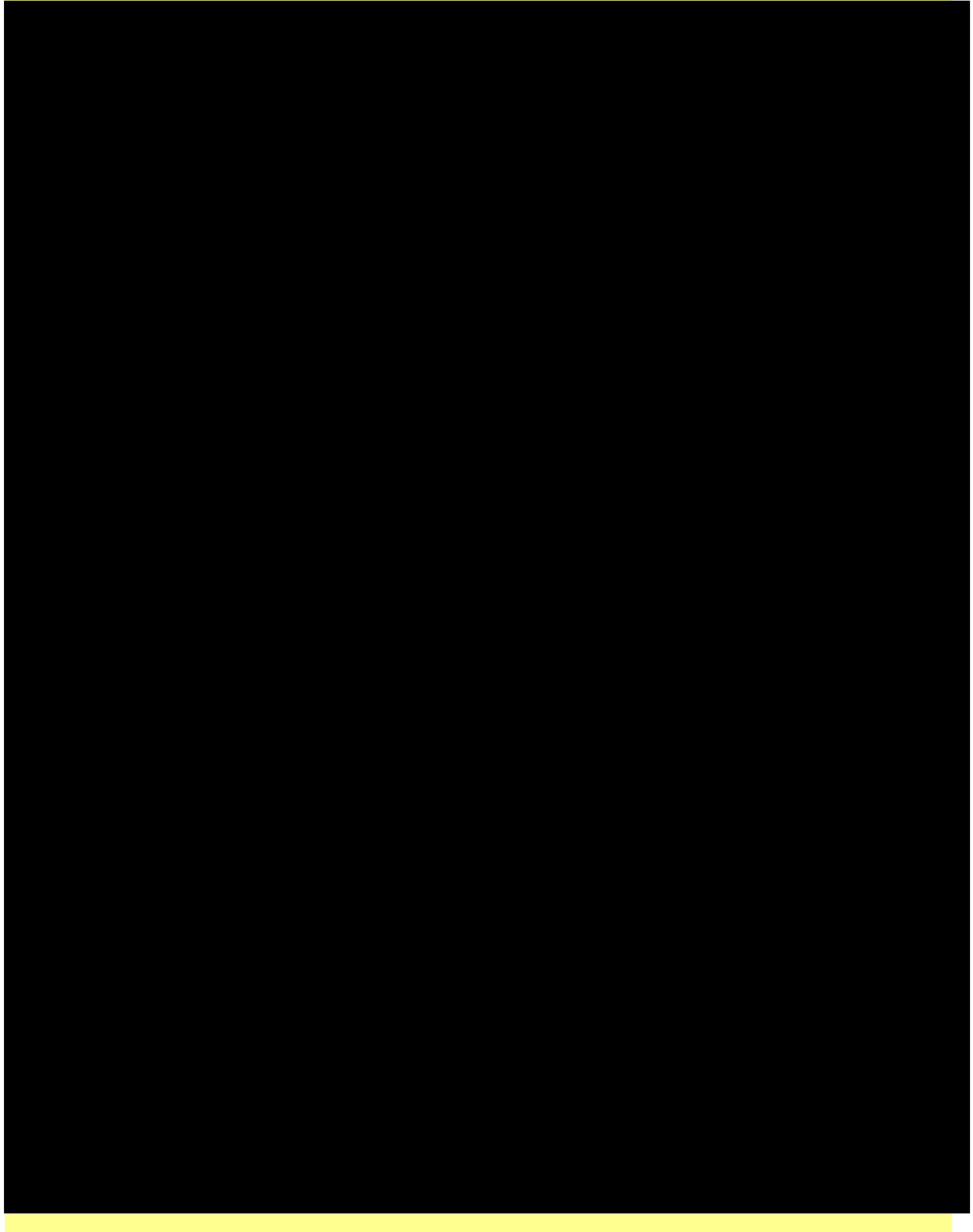
Thanks

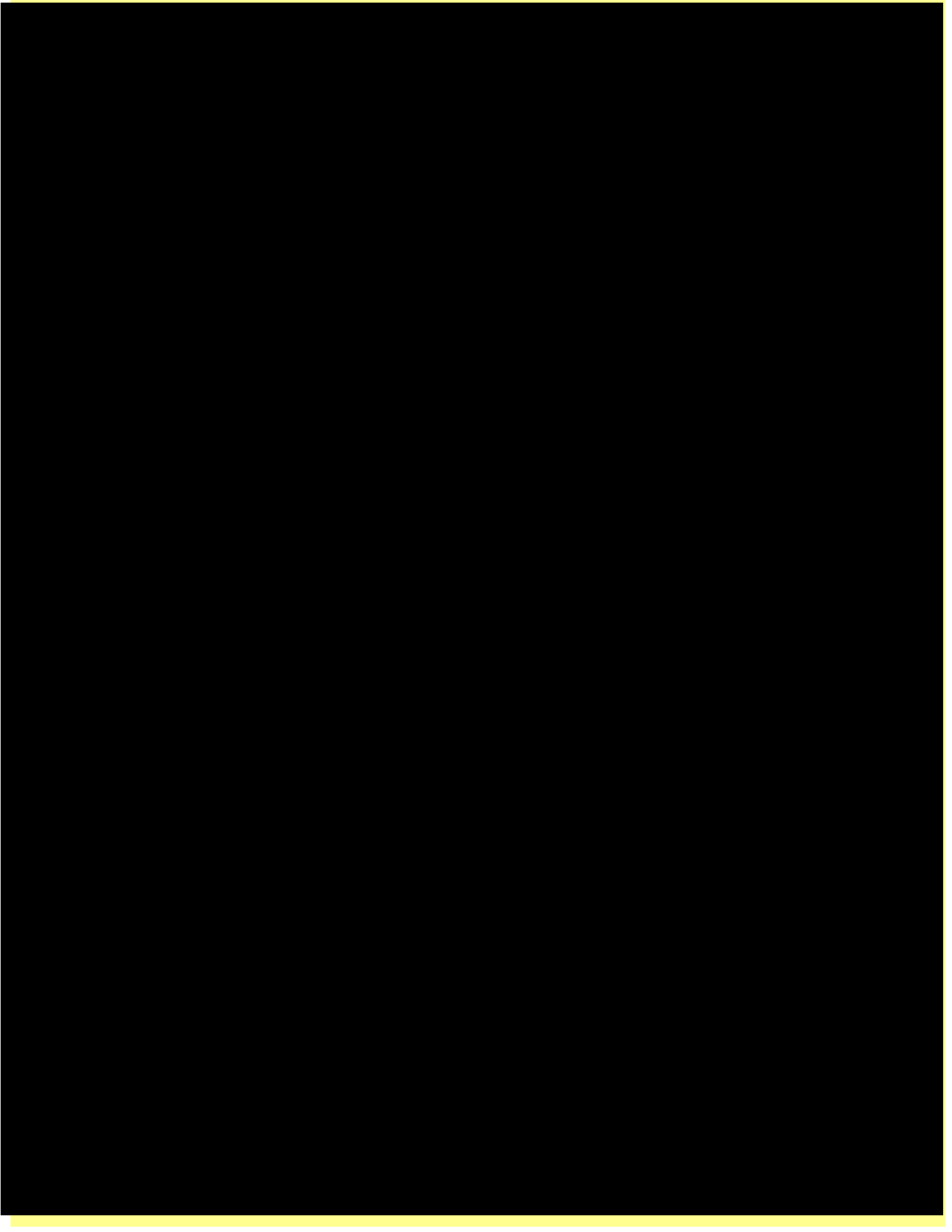
Les Kohle | Southern Area Sales Manager
Processing Recovery & Disposal Division
SECURE energy services
Office 855.391.9738 | Mobile 780.514.5547
Email lkohle@secure-energy.com

On Nov 5, 2018, at 3:41 PM, Steve Rooyakkers <srooyakkers@westbrick.ca> wrote:

Hi Les,

Thank you,
Steve Rooyakkers
Production Foreman
WESTBRICK Energy Ltd.
srooyakkers@westbrick.ca
Cell: 780-898-4727
Office: 780-515-9855
2724-64th Street
Drayton Valley, AB
24HR EMERGENCY (403)232-8805





From: William Lacey <wlacey@steelheadpetroleum.com>
Sent: February 19, 2020 9:21 AM
To: Dennis Krainyk <dkrainyk@steelheadpetroleum.com>; Dave Mudie <dmudie@steelheadpetroleum.com>
Cc: Kevin Madden <kmadden@secure-energy.com>
Subject: FW: SIGNATURE REQUIRED: Contract STE-2020-0186

Kevin,

Thanks

William,

From: Contracts <contracts@secure-energy.com>
Sent: February 18, 2020 6:02 PM
To: William Lacey <wlacey@steelheadpetroleum.com>
Cc: Kevin Madden <kmadden@secure-energy.com>
Subject: SIGNATURE REQUIRED: Contract STE-2020-0186

Hello,

Kind regards,

Kaitlyn Fulton | Contract Analyst
SECURE Energy
contracts@secure-energy.com
403.984.6104 ext 2655

--
Disclaimer: This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. Please note that any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damages caused by any virus transmitted by this email.

From: Dave Desjardins
Sent: Wednesday, October 31, 2018 2:42 PM
To: Ed Guenther
Subject: FW: Murphy Oil RFP
Attachments: Scope of Work - RFP 2018-352.pdf; SECURE Energy Services - Murphy Oil Proposal - Fox Creek Disposal .docx

Hi Ed,

Thank you!

Dave

From: Dave Desjardins
Sent: October 30, 2018 3:54 PM
To: Kaitlin Moffat <kschuster@secure-energy.com>; Pat Coffey <pcoffey@secure-energy.com>
Subject: Murphy Oil RFP

Good day team!

Thanks much,

Dave

Dave Desjardins | Sr. Corporate Accounts Representative
Processing Recovery & Disposal Division
SECURE energy services
T: 403.984.6698 | **C:** 403.519.7675
E: ddesjardins@secure-energy.com

November 2nd, 2018

Murphy Oil Company Ltd.
#4000, 520 3rd Avenue SW
Calgary, Alberta, T2P 0R3

Attention: Logan Marlow

[APG]

[APG]

Logan Marlow
Murphy Oil Company Ltd.

[APG]

Logan Marlow
Murphy Oil Company Ltd.

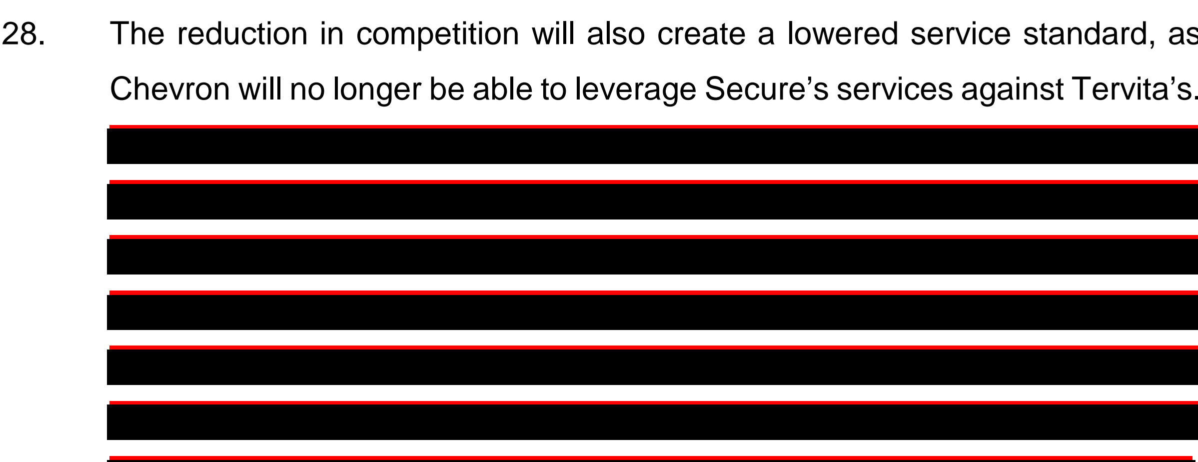
estimates of the capital expenditures required to build a TRD/FST or landfill indicate it would not be economically feasible.

26.

EFFECT OF THE MERGER

27. Chevron has already seen the effects of an amalgamated Secure/Tervita entity. Paragraph 16 outlines the closure of certain facilities in the Fox Creek area, the effects of which have led to an increase in transportation costs and overall waste disposal costs.

28. The reduction in competition will also create a lowered service standard, as Chevron will no longer be able to leverage Secure's services against Tervita's.



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10 There is no evidence in this case that the
11 parties systematically track wait times, but surely they
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25 **MS. HENDERSON:** Does Secure systematically

1 track or collect any data about wait times at your
2 facilities?
3 **MR. ENGEL:** No. The only time we've tracked is
4 in very precise instances where a customer said, "Hey, we
5 heard there's an issue. Can you track some wait times?"
6 But it's never been needed to develop into something more
7 systemic. And I think for exactly the reason I gave, that
8 we don't track it and our customers don't track it either,
9 because it is very infrequent.
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StenoTran
Les Services StenoTran Services Inc.

FACILITY TRAFFIC

excerpt from page 10 of ABD# 10419

radioactive material ("NORMs") must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

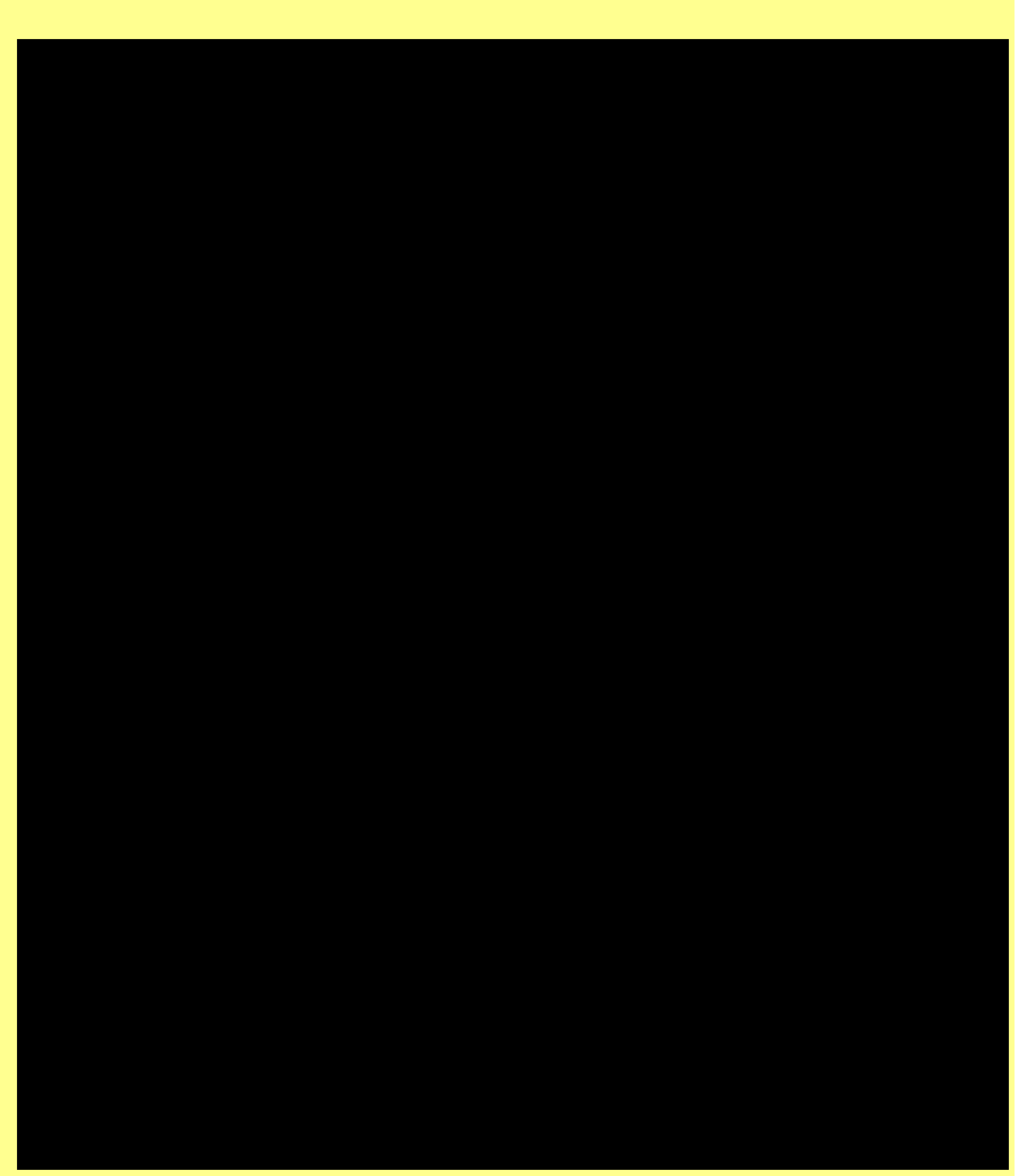
11. When choosing a disposal site, the primary consideration is total disposal cost, inclusive of transportation. Waste is typically transported by truck from its source to an appropriate disposal site of our choosing. The costs of transportation are significant, such that they often amount to more than the fees paid to a disposal site operator for a given load of waste. For example, trucks can usually carry approximately 35 to 40 tonnes of waste and trucking prices are typically in the range of $180 per hour. For that reason, among others including carbon footprint, driving distance from the waste's source to potential disposal site is a central consideration when choosing a site.

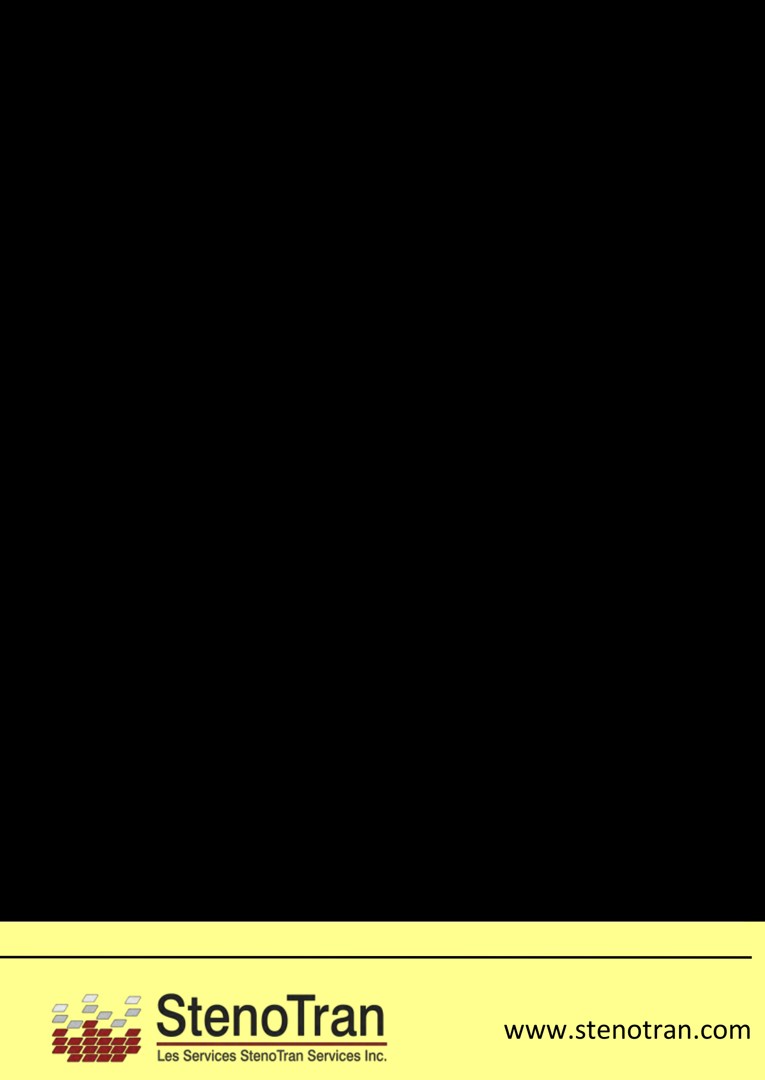
12. Availability and capacity at nearby disposal sites is also a factor impacting this choice. Sometimes landfills are full or closed, and this can require travelling further to access alternative landfills. Disposal wells can also be capacity constrained with lengthy wait times, particularly in periods with lots of drilling.

13. Transportation costs tend to be measured in time, as trucking companies will quote a price per hour. Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.

THIRD PARTY WASTE DISPOSAL

14. TAQA North's options for landfills include Secure and formerly Tervita, as described above. Typically ████ of TAQA North's waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North's landfillable waste was taken to a Class II or equivalent site.





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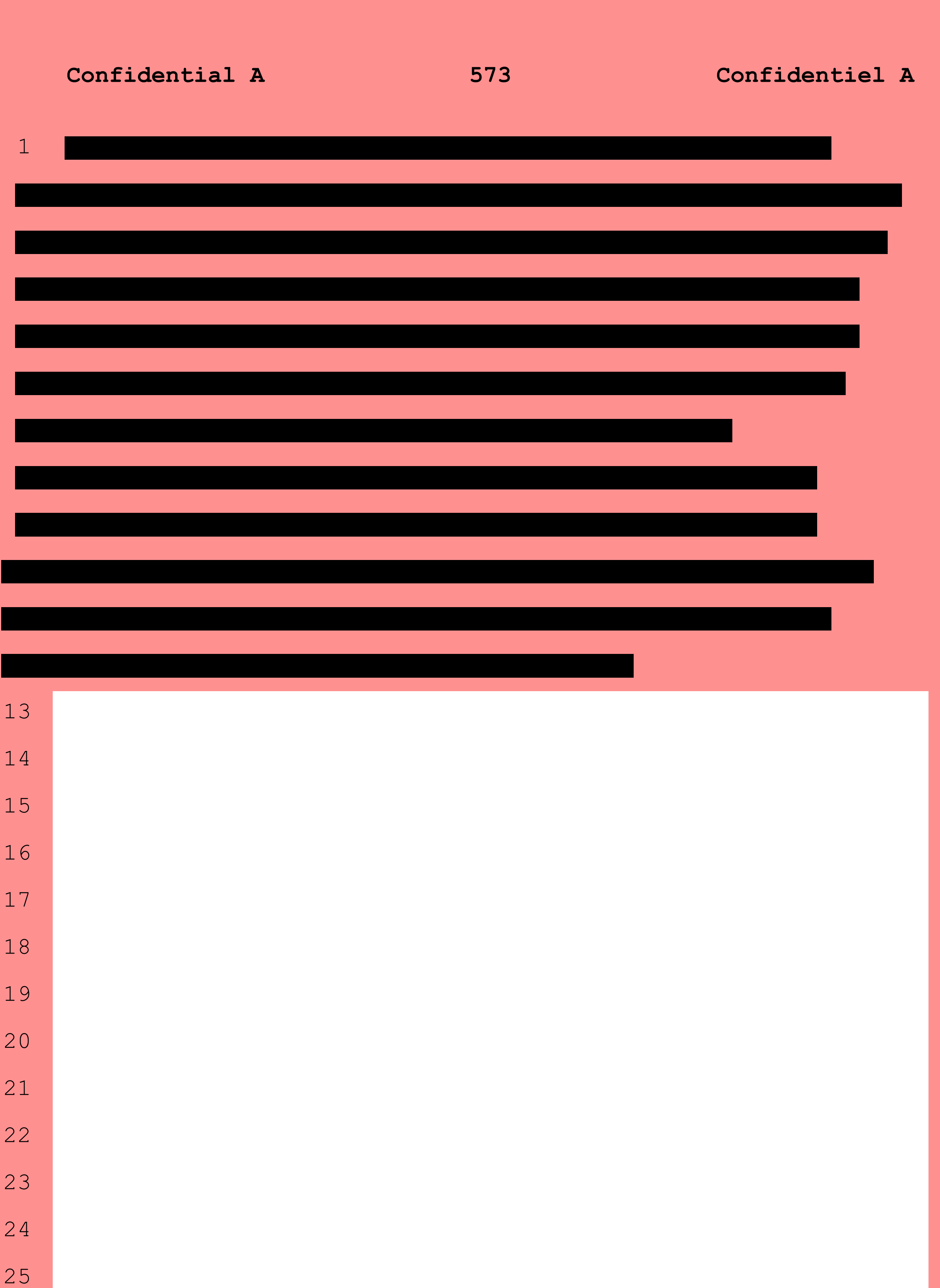
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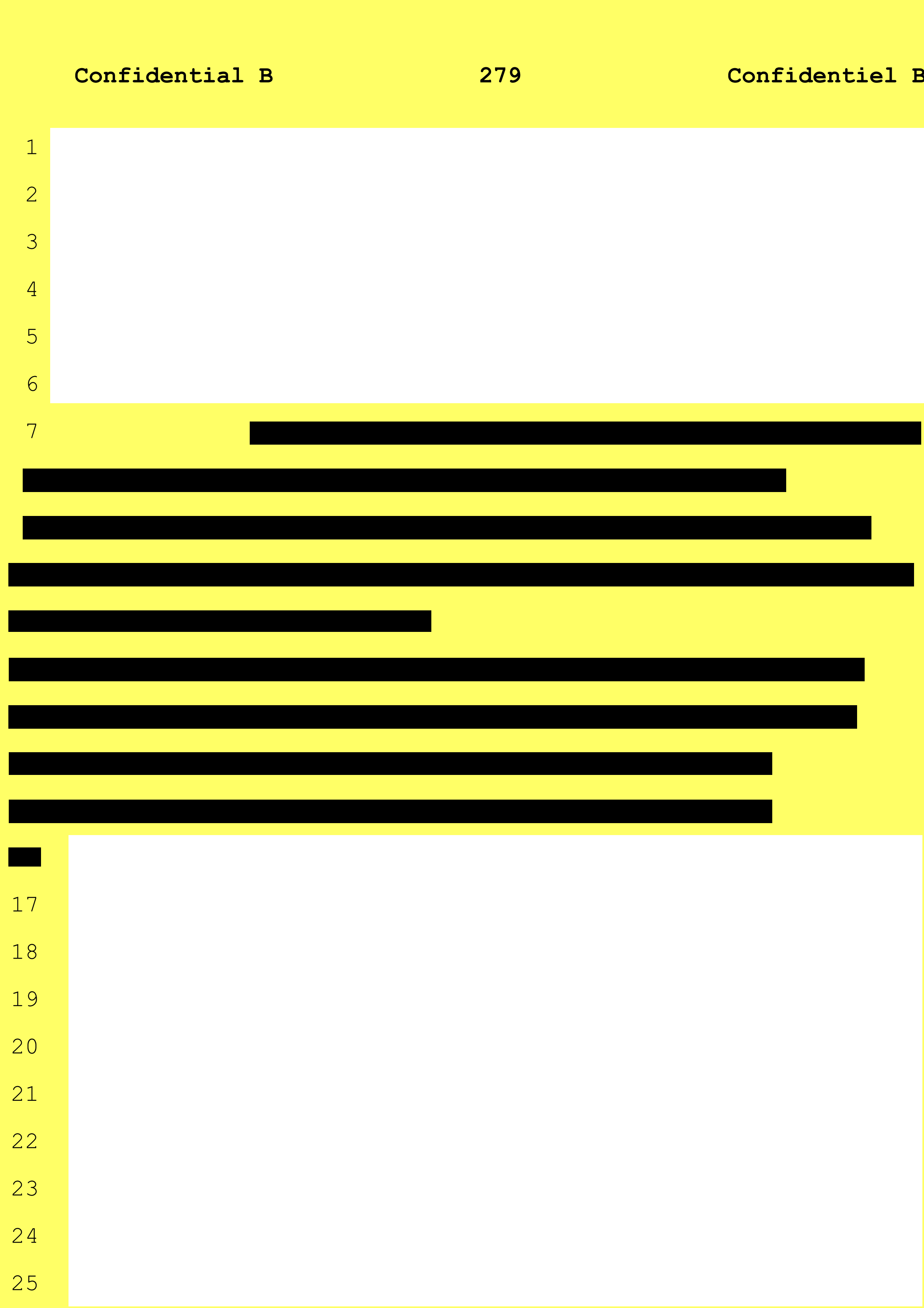

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25 **CHIEF JUSTICE CRAMPTON:** Okay. That's helpful.

1 Thank you. And just a very quick question. So at
2 paragraph 13, you know, you talk about -- of your reply --
3 you talk about the wait times having increased and now
4 range from 15 minutes up to 3 hours. But I think you've
5 made it clear generally in your statements that
6 transportation costs are the big driver here for you.
7 So what would be the impact of these wait times
8 on transportation costs, generally? Are we talking a major
9 impact? Are we talking an impact at the level of, you
10 know, 5, 10, 15 percent? Like what -- because I know
11 you're paying more for the trucking company once you get by
12 a certain threshold. But, you know, what's the overall
13 impact on this broad envelope of transportation costs that
14 everything seems to get reduced to, if I understand
15 correctly?
16 **MR. DZIUBA:** Admittedly, I don't have much
17 insight into transportation costs as I do disposal costs.
18 I have been advised by our logistics team that given the
19 wait times we are seeing right now at the landfills ranging
20 from 7 to 12 hours, and steadily climbing wait times at the
21 FST, the impact to our business this year will be high
22 six-figure, low seven-figure range. I don't know that as a
23 percentage, I'm sorry.
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radioactive material (“NORMs”) must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

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THIRD PARTY WASTE DISPOSAL

14. TAQA North’s options for landfills include Secure and formerly Tervita, as described above. Typically ███ of TAQA North’s waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North’s landfillable waste was taken to a Class II or equivalent site.

price (sum of transportation and tipping fees) charged to dispose of waste at Secure's Janvier facility is ~$18.00 less expensive per tonne than at Tulliby. Transportation of waste to disposal sites is contracted by ConocoPhillips to third party transportation service providers.

15. Access to disposal capacity is also a factor in ConocoPhillips' choice of waste disposal facility. For example, in the Montney region many producers drill new wells at the same time of year, which collectively results in the production of a large volume of flowback water. ConocoPhillips choice of waste disposal facility during these busy times of year is often constrained by this increased demand for waste disposal capacity.

16. Wait times at a facility can also influence ConocoPhillips' choice of facility. ConocoPhillips may incur "standby" charges with its third-party trucking companies if waste disposal facilities lack sufficient offloading capacity to process loads as they arrive. In addition, if a facility lacks sufficient capacity to efficiently offload waste truck drivers may 'time out' (exceed the amount of time they are allowed to be driving) causing additional and potentially costly delays.

CONOCOPHILLIPS USE OF OTHER WASTE DISPOSAL SERVICE PROVIDERS

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

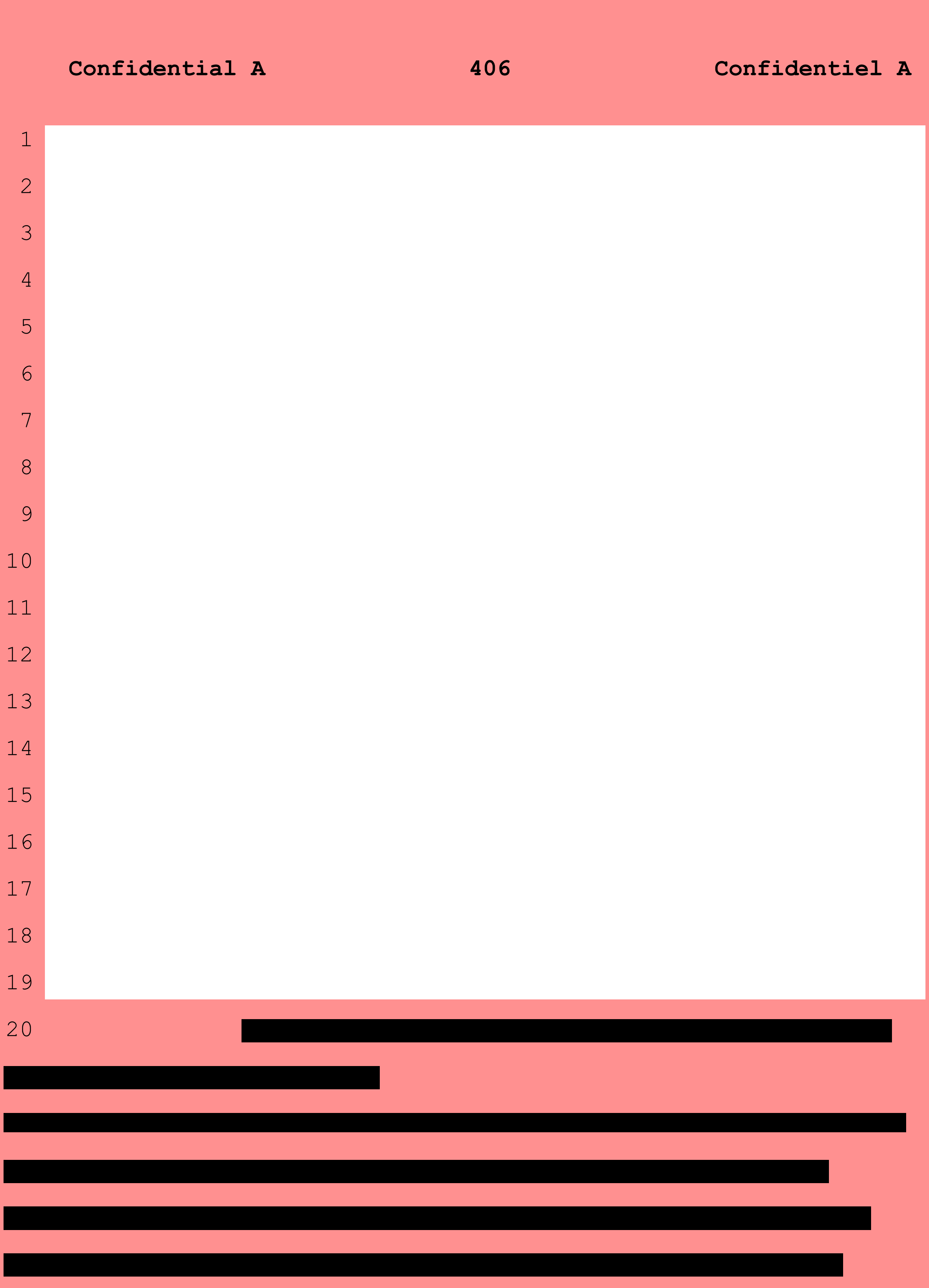
14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,



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September 18, 2020

Cenvous Inc.
Christina Lake Facility
55 2 St SW #2100
500 Centre St S, Calgary, AB T2P 0M5

Kevin,

From: Dave Desjardins
Sent: Wednesday, October 31, 2018 2:42 PM
To: Ed Guenther
Subject: FW: Murphy Oil RFP
Attachments: Scope of Work - RFP 2018-352.pdf; SECURE Energy Services - Murphy Oil Proposal - Fox Creek Disposal .docx

Hi Ed,

Thank you!

Dave

From: Dave Desjardins
Sent: October 30, 2018 3:54 PM
To: Kaitlin Moffat <kschuster@secure-energy.com>; Pat Coffey <pcoffey@secure-energy.com>
Subject: Murphy Oil RFP

Good day team!

Thanks much,

Dave

Dave Desjardins | Sr. Corporate Accounts Representative
Processing Recovery & Disposal Division
SECURE energy services
T: 403.984.6698 | **C:** 403.519.7675
E: ddesjardins@secure-energy.com

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Les Services StenoTran Services Inc.

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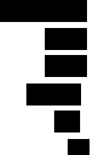
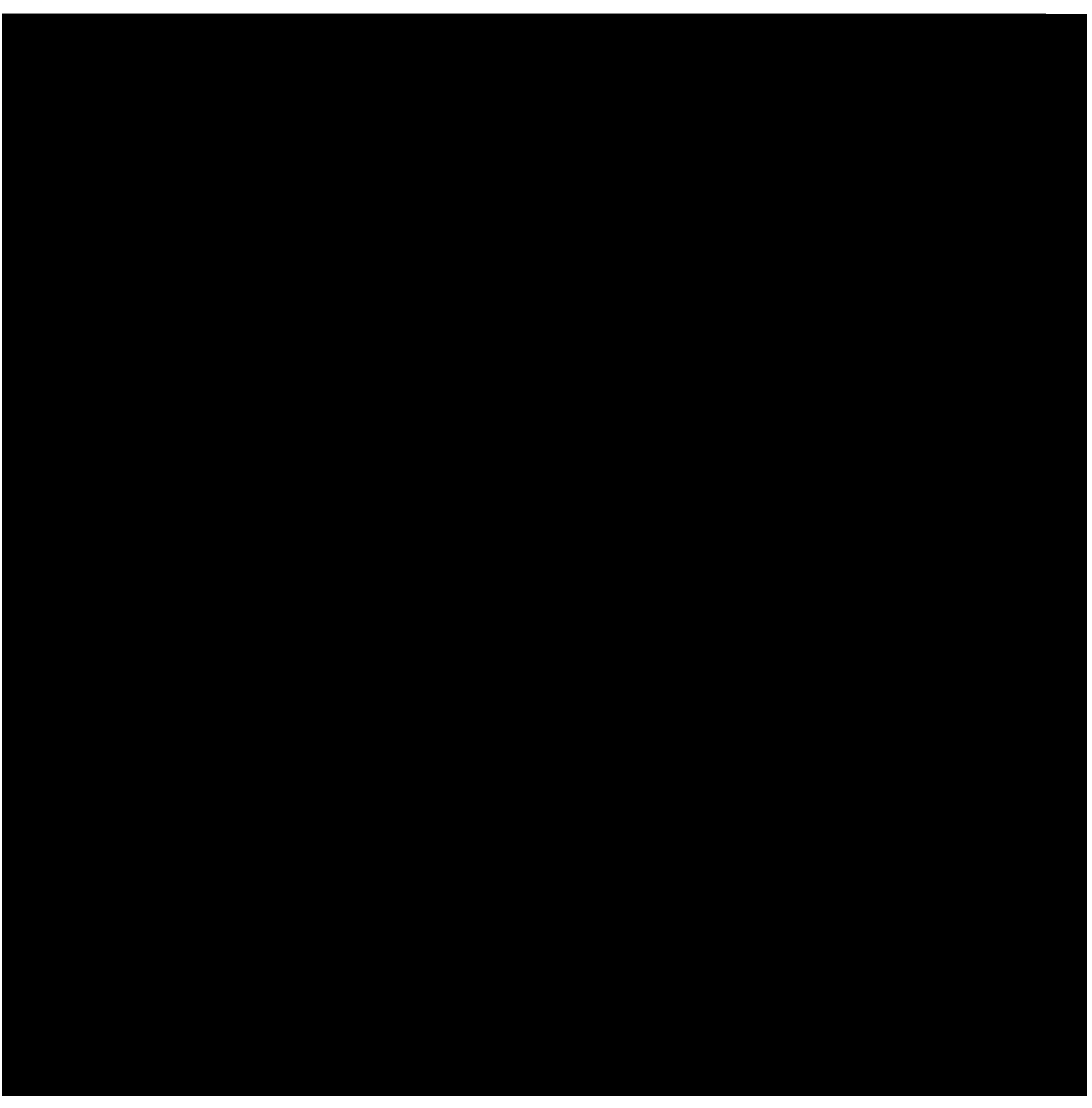
Les Services StenoTran Services Inc.





SECURE
ENERGY
Water Disposal Services

SECURE ENERGY

Water Disposal Services

Waste Water Disposal – RFP 2018-352

Description of Work - Duvernay Asset:

Murphy Oil Company operates in various areas of the Duvernay play around Fox Creek, Alberta. Primary areas of operation are Kaybob East, Kaybob West, Kaybob North, Simonette, Saxxon and Two Creeks. Murphy Oil's **Completions** team is requesting pricing for disposal capacity for the 2018-2019 year with the potential of an option to extend based market conditions and satisfaction of MOCL personnel. Murphy's Completions team is currently planning ~21 wells on ~10 different pads in the Duvernay asset (please see table below for estimated dates and volumes per well).

Once allocated daily volumes are reached Murphy will have the right to dispose of flowback volumes elsewhere.

Operational Assumptions:

- 24-hour flow back operations
- Trace of condensate in water
- MOCL Completions representatives will work with awarded contractors on exact schedules and estimated volumes for frac'ing & flowback operations closer to Completion dates.
- MOCL will not accept excessive wait times. If MOCL encounters any excessive wait times, MOCL will have the right to elsewhere.

Required Information:

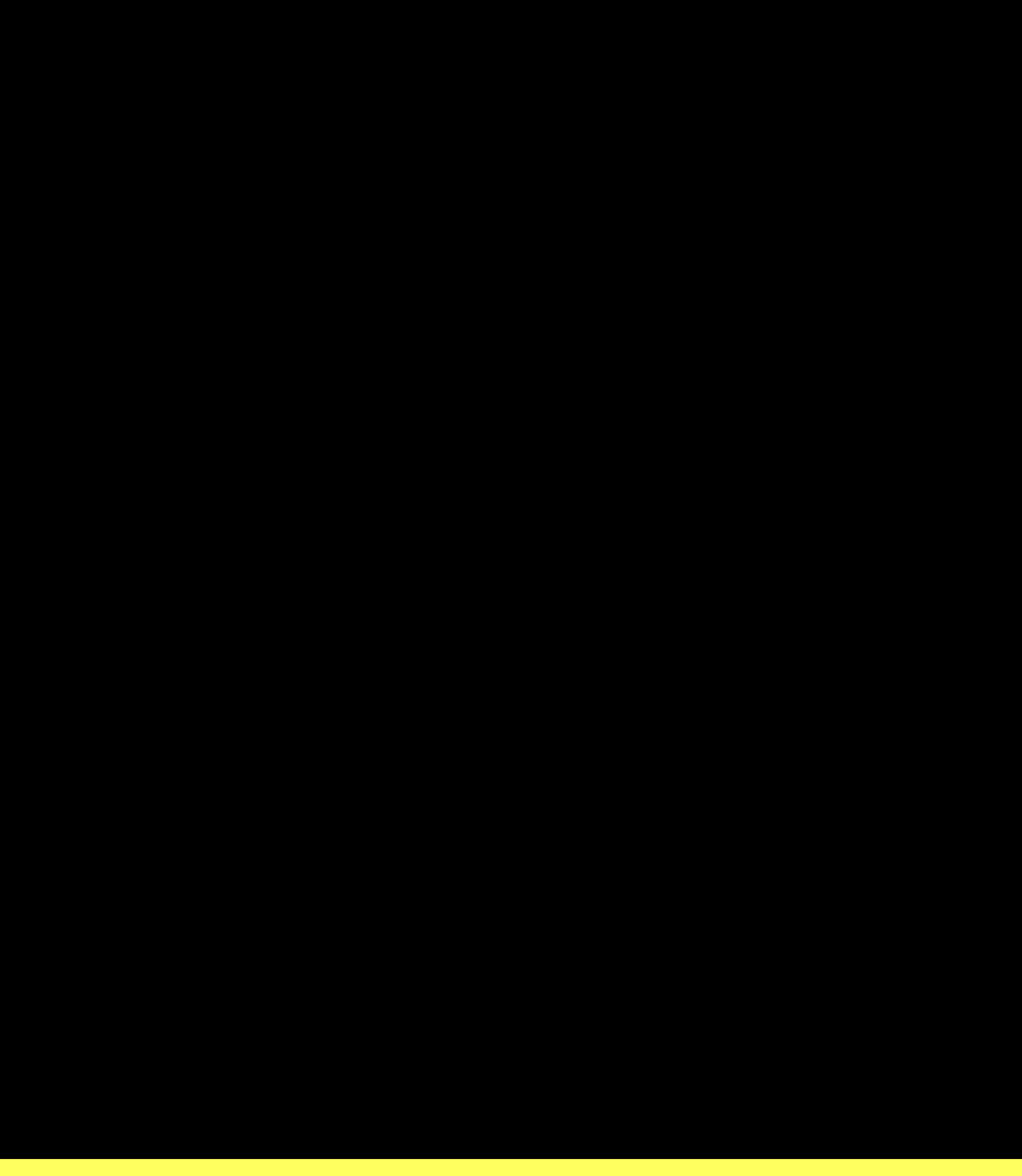
- Provide a map of disposal Locations in and around Fox Creek
    - Include storage tank volumes at each site
    - Include injection rates and daily volumes per site
    - Provide a description how the trucks off load
    - Provide average wait times per load

Required pricing:

- Provide $/m³ for flow back water disposal
    - Criteria defining flow back water
- Provide $/m³ for produced water disposal
    - Criteria defining produced water
- Provide $/m³ for tank bottoms/sludge
- Provide $/m³ for solids disposal – sand
- Provide details on the process for measuring and crediting condensate volumes back to Murphy Oil
- Provide any potential value-add or any other discounts that may be available.

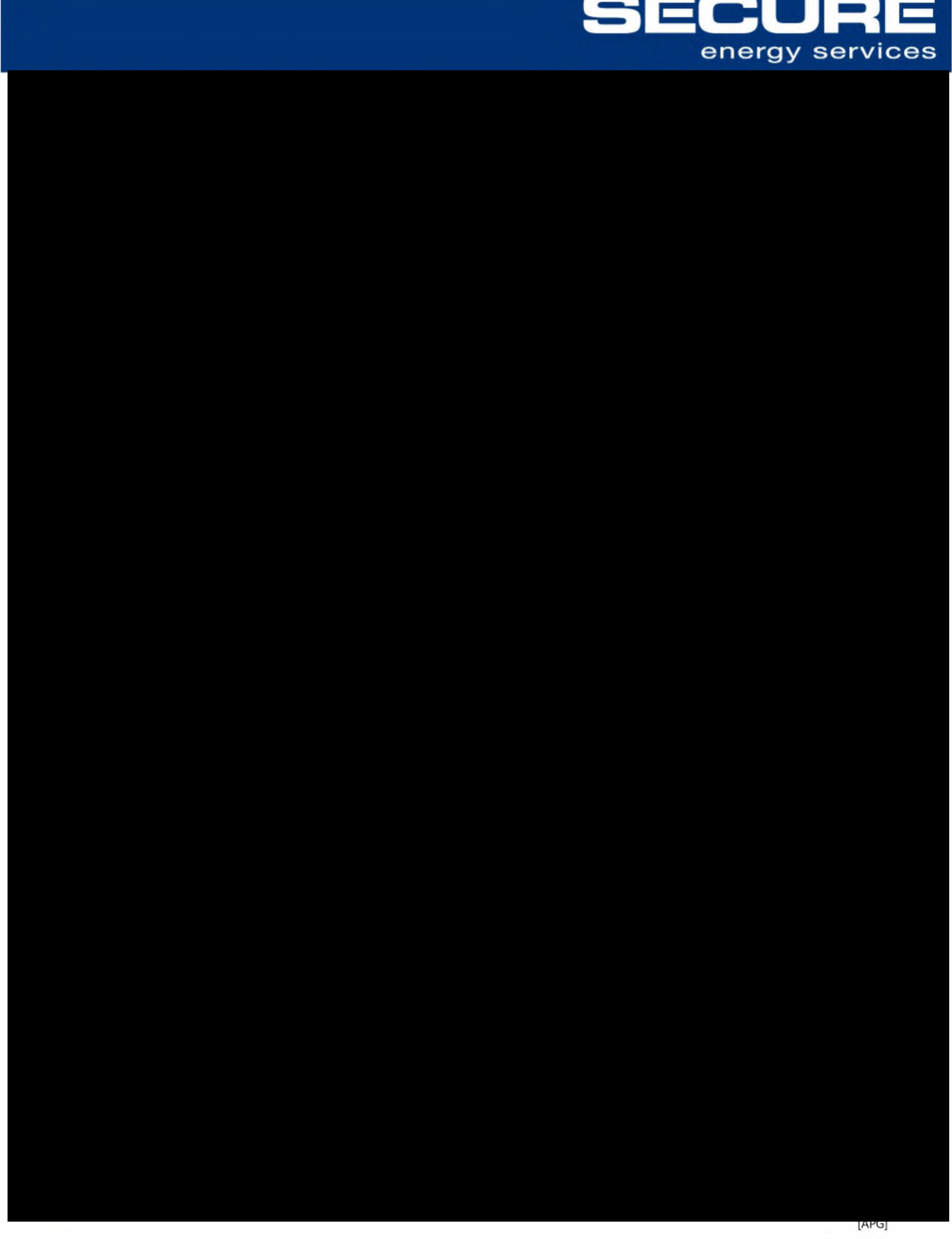
Tentative Completions Schedule & Volumes for 2018-2019

Pad	Area	Completion Start Date	Completion End Date	# Wells on Pad	Flowback Start	Flowback End	Pad FB Estimate
16-14-64-21W5	KW	10/2/2018	10/16/2018	3	23-Oct-18	6-Nov-18	**8,100**
4-21-64-16 W5	TC	10/23/2018	10/30/2018	1	6-Nov-18	20-Nov-18	**2,700**
16-25-65-20W5	KN	1/1/2019	1/11/2019	1	18-Jan-19	1-Feb-19	**2,700**
08-03-64-24W5	SIM	1/21/2019	2/7/2019	**2**	14-Feb-19	28-Feb-19	**5,400**
05-19-64-15W5	TC	2/8/2019	2/27/2019	2	6-Mar-19	20-Mar-19	**5,400**
16-29-64-16W5	TC	3/1/2019	3/22/2019	2	29-Mar-19	12-Apr-19	**5,400**
02-03-65-20W5	KW	6/1/2019	7/2/2019	4	9-Jul-19	23-Jul-19	**10,800**
05-23-65-21W5	KN	9/1/2019	10/2/2019	4	9-Oct-19	23-Oct-19	**10,800**
13-31-63-15W5	TC	10/3/2019	10/12/2019	1	19-Oct-19	2-Nov-19	**2,700**
11-12-65-18W5	KE	10/13/2019	10/23/2019	1	30-Oct-19	13-Nov-19	**2,700**
	Please note, all volumes and dates are estimates only						**56,700**



[APG]

Logan Marlow
Murphy Oil Company Ltd.



[APG]

Logan Marlow
Murphy Oil Company Ltd.

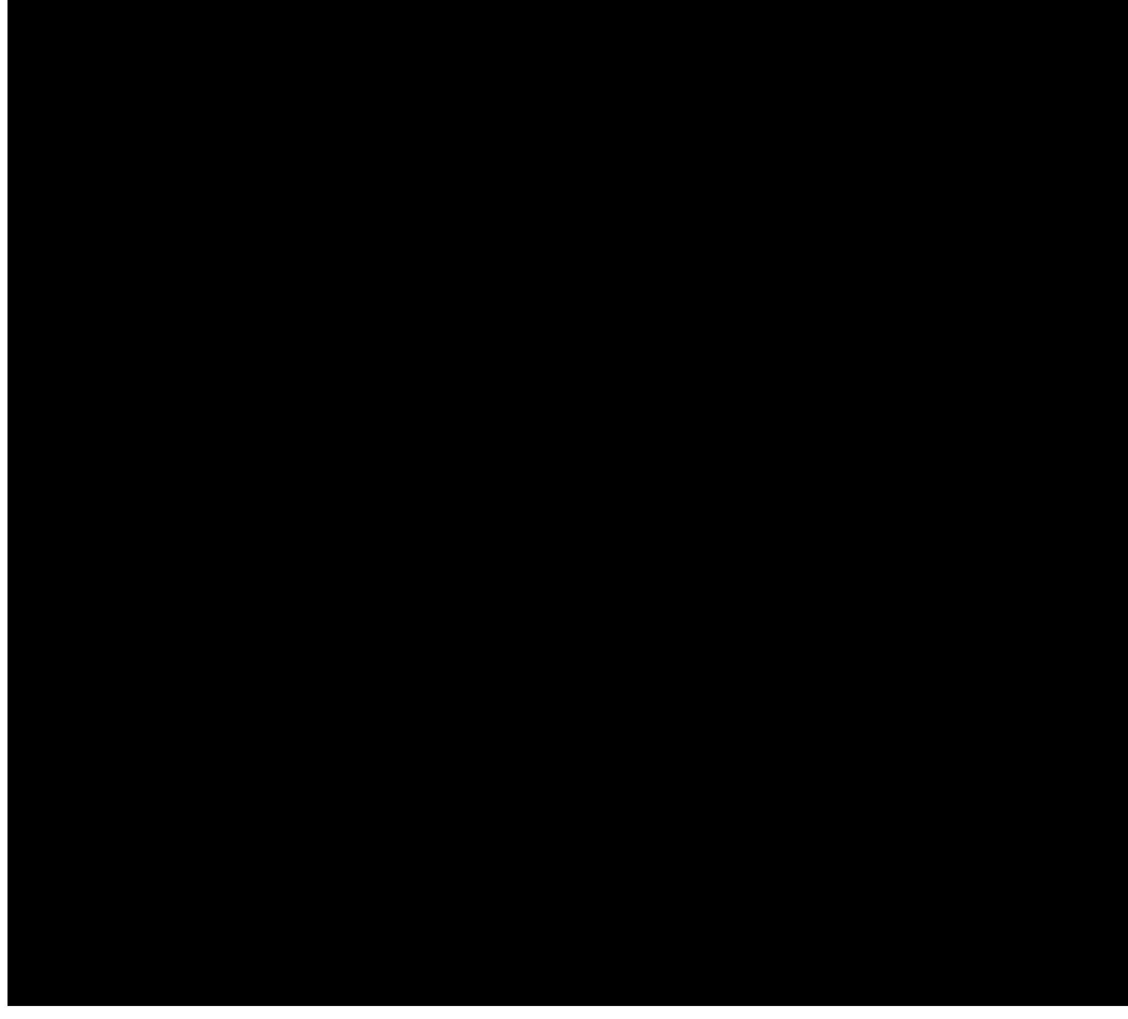
Logan Marlow
Murphy Oil Company Ltd.

Dave

Dave Desjardins Sr. Corporate Accounts Representative
SECURE ENERGY
Office: 403-984-6698 Mobile: 403-519-7675

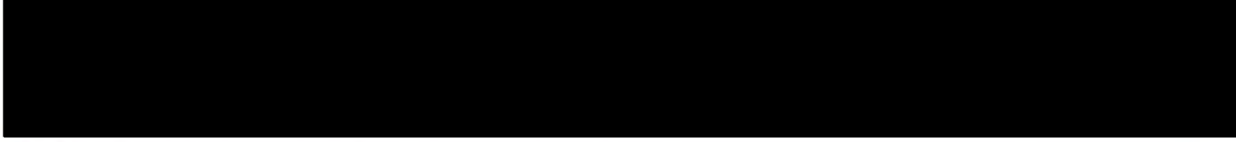
From: Clarisa.Madilao@shell.com <Clarisa.Madilao@shell.com>
Sent: March 24, 2020 4:56 PM
To: Daniel Schwarz <dschwarz@secure-energy.com>
Subject:

Hi Dan,



From: jmcneil@tervita.com
Sent: Tue, 14 Apr 2020 13:10:46 -0400
To: cchilds@tervita.com; rmenzies@tervita.com
Subject: RE: Kicking Horse - South Wapiti Opportunity

Hi Cassie,



Thanks,
Jay

From: Childs, Cassie
Sent: Tuesday, April 14, 2020 10:52 AM
To: Menzies, Rob <rmenzies@tervita.com>; McNeil, Jay <jmcneil@tervita.com>
Subject: RE: Kicking Horse - South Wapiti Opportunity

Sounds great, I'll check in with Dave!

Thanks!

Cassie

Cassandra Childs
Account Manager
D: (403) 294-4063 C: (403) 899-7071
E: cchilds@tervita.com

Tervita Corporation
1600, 140 10th Avenue S.E., Calgary, AB Canada T2G 0R1
M: (403) 233-7565 F: (403) 261-5612

From: Menzies, Rob
Sent: Tuesday, April 14, 2020 10:27 AM

To: McNeil, Jay <jmcneil@tervita.com>; Childs, Cassie <cchilds@tervita.com>
Subject: RE: Kicking Horse - South Wapiti Opportunity

Rob Menzies
Manager, Sales

Energy Services
C: (403) 844-6575

www.tervita.com

EARTH MATTERS – Please consider the environment before you print.

From: McNeil, Jay
Sent: Tuesday, April 14, 2020 10:25 AM
To: Childs, Cassie <cchilds@tervita.com>; Menzies, Rob <rmenzies@tervita.com>
Subject: RE: Kicking Horse - South Wapiti Opportunity

From: Childs, Cassie
Sent: Tuesday, April 14, 2020 9:56 AM
To: McNeil, Jay <jmcneil@tervita.com>; Menzies, Rob <rmenzies@tervita.com>
Subject: Kicking Horse - South Wapiti Opportunity

Hi Jay and Rob,

Thank you,

Cassie

Cassandra Childs
Account Manager
D: (403) 294-4063 C: (403) 899-7071
E: cchilds@tervita.com

Tervita Corporation
1600, 140 10th Avenue S.E., Calgary, AB Canada T2G 0R1
M: (403) 233-7565 F: (403) 261-5612

From: Rick Fehr <rfehr@kickinghorseoil.com>
Sent: Tuesday, April 14, 2020 8:43 AM
To: Childs, Cassie <cchilds@tervita.com>
Subject: EXTERNAL - FW: Tervita - South Wapiti - Proposal for Produced Water Disposal

Hey Cassie,

Thoughts?

RF

From: Ashten Waugh <awaugh@kickinghorseoil.com>
Sent: April 13, 2020 8:22 PM
To: Rick Fehr <rfehr@kickinghorseoil.com>
Cc: Shane Lutz <slutz@kickinghorseoil.com>; Paul Poohkay <ppoohkay@kickinghorseoil.com>
Subject: Re: Tervita - South Wapiti - Proposal for Produced Water Disposal

Ashten

On Apr 13, 2020, at 7:56 PM, Rick Fehr <rfehr@kickinghorseoil.com> wrote:

Shane/Ashten,

From: Childs, Cassie <cchilds@tervita.com>
Sent: April 13, 2020 5:32 PM
To: Rick Fehr <rfehr@kickinghorseoil.com>
Subject: RE: Tervita - South Wapiti - Proposal for Produced Water Disposal

Cassandra Childs
Account Manager
D: (403) 294-4063 C: (403) 899-7071
E: cchilds@tervita.com

Tervita Corporation
1600, 140 10th Avenue S.E., Calgary, AB Canada T2G 0R1
M: (403) 233-7565 F: (403) 261-5612

From: Rick Fehr <rfehr@kickinghorseoil.com>
Sent: Monday, April 13, 2020 5:27 PM
To: Childs, Cassie <cchilds@tervita.com>
Subject: RE: Tervita - South Wapiti - Proposal for Produced Water Disposal

From: Childs, Cassie <cchilds@tervita.com>
Sent: April 13, 2020 4:08 PM
To: Rick Fehr <rfehr@kickinghorseoil.com>
Subject: Tervita - South Wapiti - Proposal for Produced Water Disposal

Hi Rick,

Warm Regards,

Cassie

Cassandra Childs
Account Manager
D: (403) 294-4063 C: (403) 899-7071
E: cchilds@tervita.com

Tervita Corporation
1600, 140 10th Avenue S.E., Calgary, AB Canada T2G 0R1
M: (403) 233-7565 F: (403) 261-5612

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Tervita-03-14-2012

Waste Water Disposal – RFP 2018-352

Description of Work - Duvernay Asset:

Murphy Oil Company operates in various areas of the Duvernay play around Fox Creek, Alberta. Primary areas of operation are Kaybob East, Kaybob West, Kaybob North, Simonette, Saxxon and Two Creeks. Murphy Oil's **Completions** team is requesting pricing for disposal capacity for the 2018-2019 year with the potential of an option to extend based market conditions and satisfaction of MOCL personnel. Murphy's Completions team is currently planning ~21 wells on ~10 different pads in the Duvernay asset (please see table below for estimated dates and volumes per well).

Once allocated daily volumes are reached Murphy will have the right to dispose of flowback volumes elsewhere.

Operational Assumptions:

- 24-hour flow back operations
- Trace of condensate in water
- MOCL Completions representatives will work with awarded contractors on exact schedules and estimated volumes for frac'ing & flowback operations closer to Completion dates.
- MOCL will not accept excessive wait times. If MOCL encounters any excessive wait times, MOCL will have the right to elsewhere.

Required Information:

- Provide a map of disposal Locations in and around Fox Creek
    - Include storage tank volumes at each site
    - Include injection rates and daily volumes per site
    - Provide a description how the trucks off load
    - Provide average wait times per load

Required pricing:

- Provide $/m³ for flow back water disposal
    - Criteria defining flow back water
- Provide $/m³ for produced water disposal
    - Criteria defining produced water
- Provide $/m³ for tank bottoms/sludge
- Provide $/m³ for solids disposal – sand
- Provide details on the process for measuring and crediting condensate volumes back to Murphy Oil
- Provide any potential value-add or any other discounts that may be available.

Tentative Completions Schedule & Volumes for 2018-2019

Pad	Area	Completion Start Date	Completion End Date	# Wells on Pad	Flowback Start	Flowback End	Pad FB Estimate
16-14-64-21W5	KW	10/2/2018	10/16/2018	3	23-Oct-18	6-Nov-18	**8,100**
4-21-64-16 W5	TC	10/23/2018	10/30/2018	1	6-Nov-18	20-Nov-18	**2,700**
16-25-65-20W5	KN	1/1/2019	1/11/2019	1	18-Jan-19	1-Feb-19	**2,700**
08-03-64-24W5	SIM	1/21/2019	2/7/2019	**2**	14-Feb-19	28-Feb-19	**5,400**
05-19-64-15W5	TC	2/8/2019	2/27/2019	2	6-Mar-19	20-Mar-19	**5,400**
16-29-64-16W5	TC	3/1/2019	3/22/2019	2	29-Mar-19	12-Apr-19	**5,400**
02-03-65-20W5	KW	6/1/2019	7/2/2019	4	9-Jul-19	23-Jul-19	**10,800**
05-23-65-21W5	KN	9/1/2019	10/2/2019	4	9-Oct-19	23-Oct-19	**10,800**
13-31-63-15W5	TC	10/3/2019	10/12/2019	1	19-Oct-19	2-Nov-19	**2,700**
11-12-65-18W5	KE	10/13/2019	10/23/2019	1	30-Oct-19	13-Nov-19	**2,700**

Please note, all volumes and dates are estimates only **56,700**

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24 **JUSTICE GASCON:** I do, Chief Justice.
25 Good morning, Mr. McSween. I'm looking at your

1 witness statement, paragraph 8, and you refer at the end of
2 the paragraph, in terms of the reason why you used
3 Tervita's facilities, you refer to the relationship that
4 you built with that company. Can you elaborate on what you
5 mean by the relationship and its impact?
6 **MR. McSWEEN:** I would say the relationship is
7 also, you know, has to do with the rates that we're
8 receiving and the service. The trucking companies that we
9 use that haul in there say good things. We didn't have
10 wait times. So I'd say that's all kind of co-mingled into
11 the relationship, is the whole business aspect of this.
12 **JUSTICE GASCON:** So you mentioned the rates,
13 you mentioned the wait times. So that --
14 **MR. McSWEEN:** Yeah.
15 **JUSTICE GASCON:** -- is what you include in the
16 relationship?
17 **MR. McSWEEN:** Yeah, yeah.
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COMPETITION IN THIRD PARTY WASTE DISPOSAL

18. Based on Catapult's experience in competing in this market, it is generally not economical to truck fluid waste products beyond 50-75 km from a producer's site to a third party disposal facility. Therefore, third party fluid disposal facilities within this general radius of a producer's site typically compete for the producer's business on the spot market within a specific area.

19. However, as new technologies have emerged, water production in Western Canada has grown substantially and producers often find it more efficient to transport its fluids via midstream infrastructure (*i.e.* pipelines). Third party disposal companies therefore also compete in building long-term relationships with producers and establishing midstream infrastructure.

20. Catapult compiles a water injection report that provides an overview of the total water injected, by company, across the region of the Montney and Duvernay formations. This report is a summary of injections by facility compiled on a monthly basis for internal use, based on the most recently available public data. All of the injection volumetric data is compiled from Petrinex, a joint venture organization representing provincial regulators and producers, and AccuMap (a well data platform owned by IHS).

21. Catapult's injection report divides the Montney and Duvernay into four main regions: BC, West, Central, and South, with each region further subdivided into areas taking into account market, facility location, and road access. In total, Catapult's injection report tracks 15 areas. Catapult provided a copy of its March 2020 injection report to the Competition Bureau on April 7, 2021. A copy of this report is attached as Exhibit "A". A map of the areas can be seen on page 3 of this Exhibit.

22. Catapult is aware of 10 to 15 areas tracked in its injection report within which Secure and Tervita's third party fluid disposal services competed prior to the

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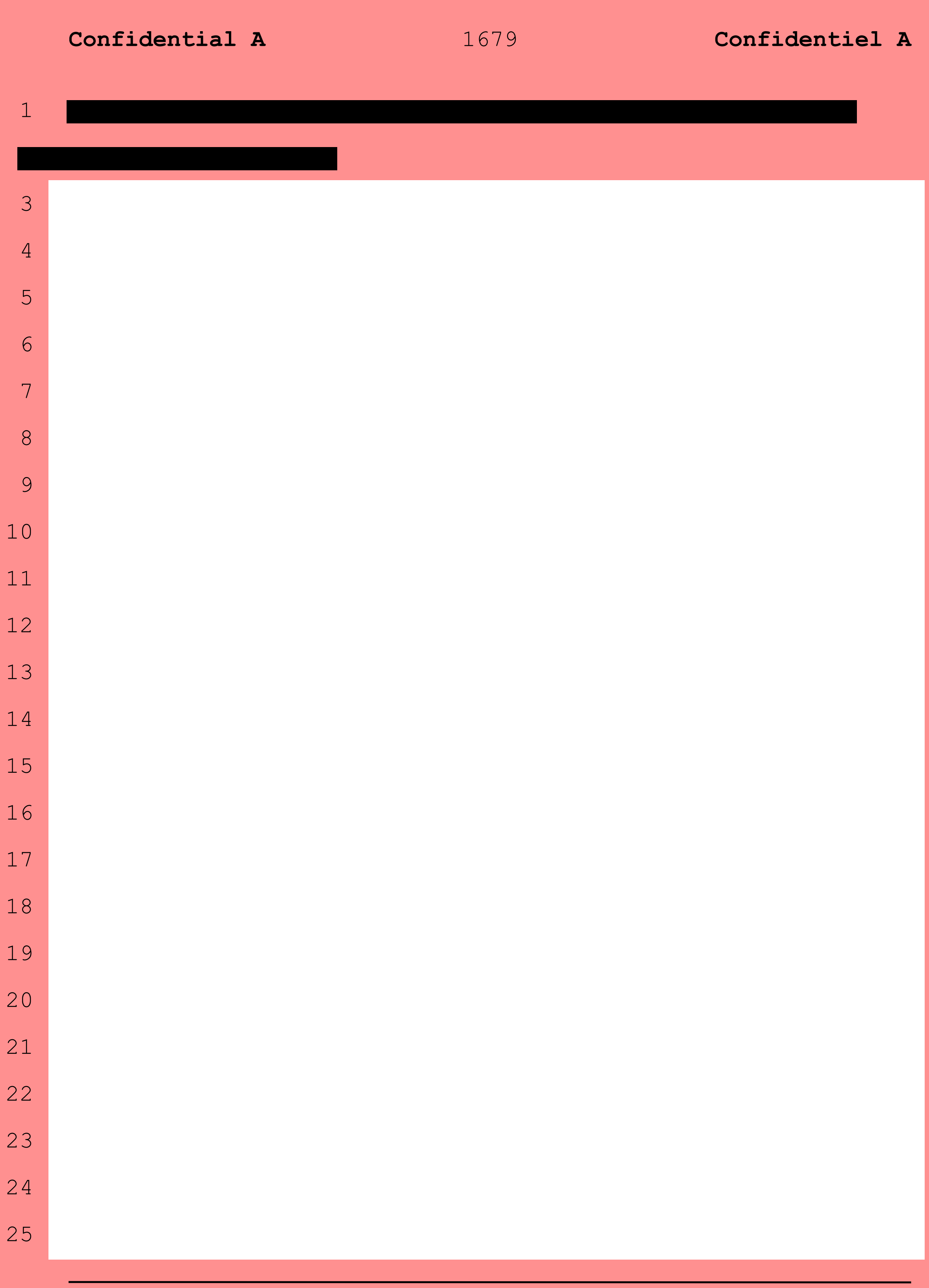
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9. With or without the Transaction, IPC Canada would have taken the vast majority of its waste to SECURE facilities for disposal. The reason for our decision to routinely go with SECURE is that it is consistently our most cost-effective option, due primarily to the proximity of SECURE's facilities to our operations. Transportation costs are the primary driver of IPC's decision of where to dispose of our waste. Based on my own experience, SECURE strategically constructs facilities close to its customers operations for this reason. For example, when SECURE wants to build a new landfill or facility, it seeks feedback from producers, especially staff in the field, to ensure that it is choosing a location that would be good for them.

THE TRANSACTION

A. The Importance of a Financially Stable Waste Disposal Provider

10. Prior to the Transaction, IPC Canada was concerned that the clock was ticking on SECURE and Tervita and, the way the business was going, one or both of them would not have survived. The Canadian oil and gas industry has faced significant challenges over the last several years and producer activity (i.e., new drilling, well workovers, recompletions, and optimization) has been limited and declining due to numerous years of a challenging pricing environment. This reduced activity directly impacts service companies like SECURE and Tervita, and we were concerned that both SECURE and Tervita were losing money. SECURE today is a financially stronger partner for IPC Canada and other producers in the Western Canadian Sedimentary Basin ("**WCSB**") because of the Transaction.

11. Financial stability in a waste disposal service provider is important for multiple reasons. First, producers want to partner with a company that is focused on sustainability and managing waste in a way that has less environmental risk. A financially strained waste disposal services provider could go out of business or cut corners by disposing of waste in a manner that

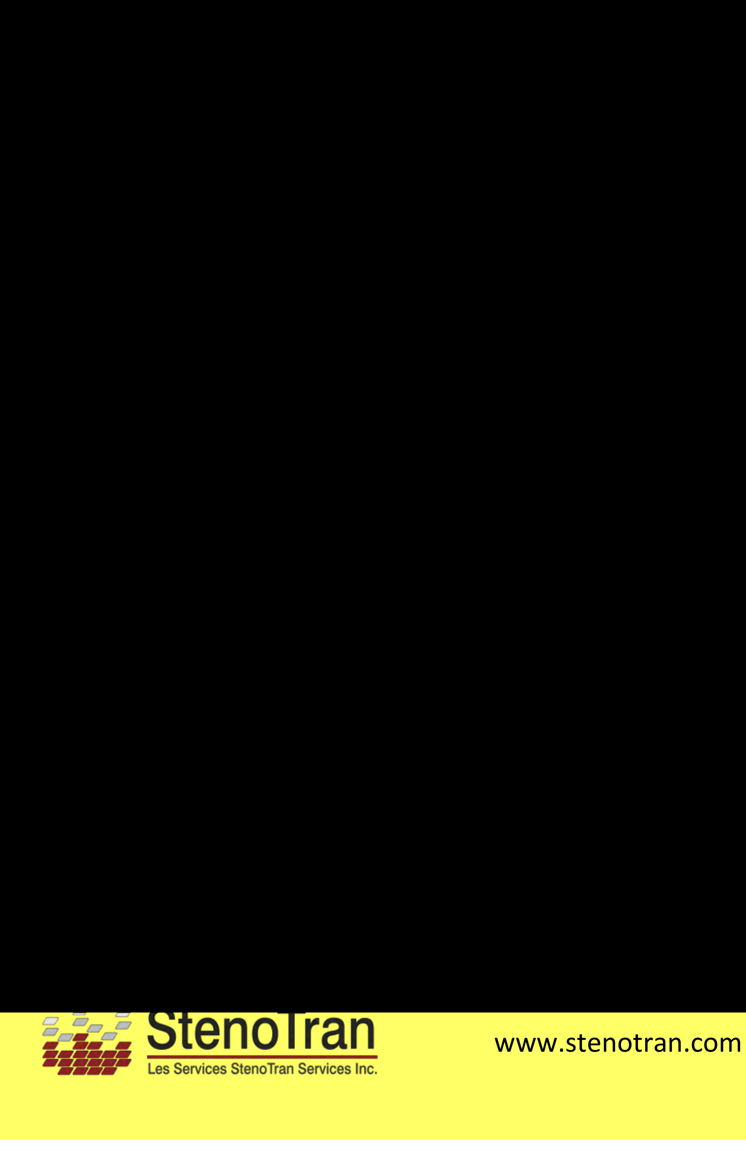
is not environmentally friendly or sound. Second, as IPC could be faced with the environmental liability for the waste generated by our operations, even when we use third parties for disposal, having a financially stable supplier who will continue to operate in the long-term, and continue to monitor and properly handle our waste is critical.

B. How IPC Canada Would React to a SECURE Price Increase

12. IPC Canada is not concerned about SECURE increasing prices after the Transaction. Currently, SECURE is the low-cost, most efficient option for waste disposal for IPC Canada. If the cost of our waste disposal were to rise, IPC Canada would not hesitate to quickly look elsewhere, and we are more than capable of disposing of our own waste internally, whether water or solid.

13. For water disposal, wells are key infrastructure for IPC Canada. IPC Canada drills and operates water disposal wells across its business, and we have no issue with using our own wells for disposal.

14. For solids, IPC has storage facilities called sand pits. Waste is placed into a sand pit and allowed to de-water, where it can be stored for 10-15 years. Once dried, the waste will contain much less product and volume and will be a much more consistent material, allowing IPC Canada to get a better price for its eventual disposal. The dried waste can also be encapsulated in a road instead of going to a landfill. Operating sand pits from a regulatory perspective is not difficult and is a matter of containment and monitoring of the waste in the pit. Although not currently in operation, we have these facilities available to us and provide us with an alternative option for disposal or storage – this threat acts as a deterrent for SECURE to increase prices or decrease service quality.



Kind regards,

Geoff Prieur, MBA | Corporate Accounts Representative
Processing, Recovery & Disposal Division
SECURE Energy Services
Office: 403.290.2442 | Mobile: 403.999.4164

From: Nick Giugovaz
Sent: Wednesday, September 18, 2019 4:21 PM
To: Keith Baron
Subject: RE: NuVista Clean up

Nick Giugovaz
SECURE energy services
Office 587.390.2537 | Mobile 403.819.4135

From: Keith Baron <kbaron@secure-energy.com>
Sent: September 16, 2019 11:43 AM
To: Nick Giugovaz <ngiugovaz@secure-energy.com>
Subject: Fwd: NuVista Clean up

Keith Baron
Sales and Marketing
South Grande Prairie & Saddle Hills Landfills
Processing Recovery & Disposal Division
SECURE energy services
Mobile 1-780-814-4910
kbaron@secure-energy.com

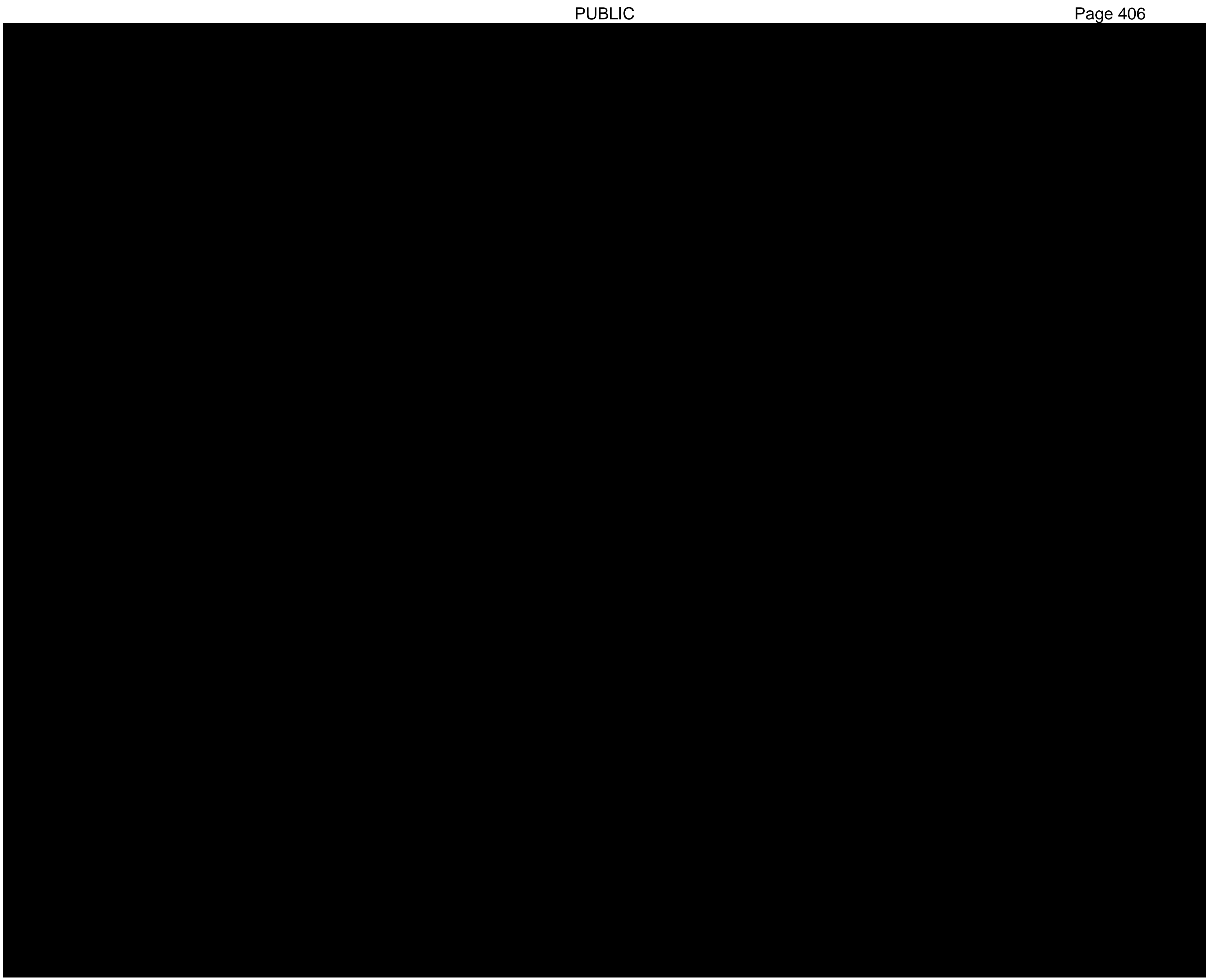
Begin forwarded message:

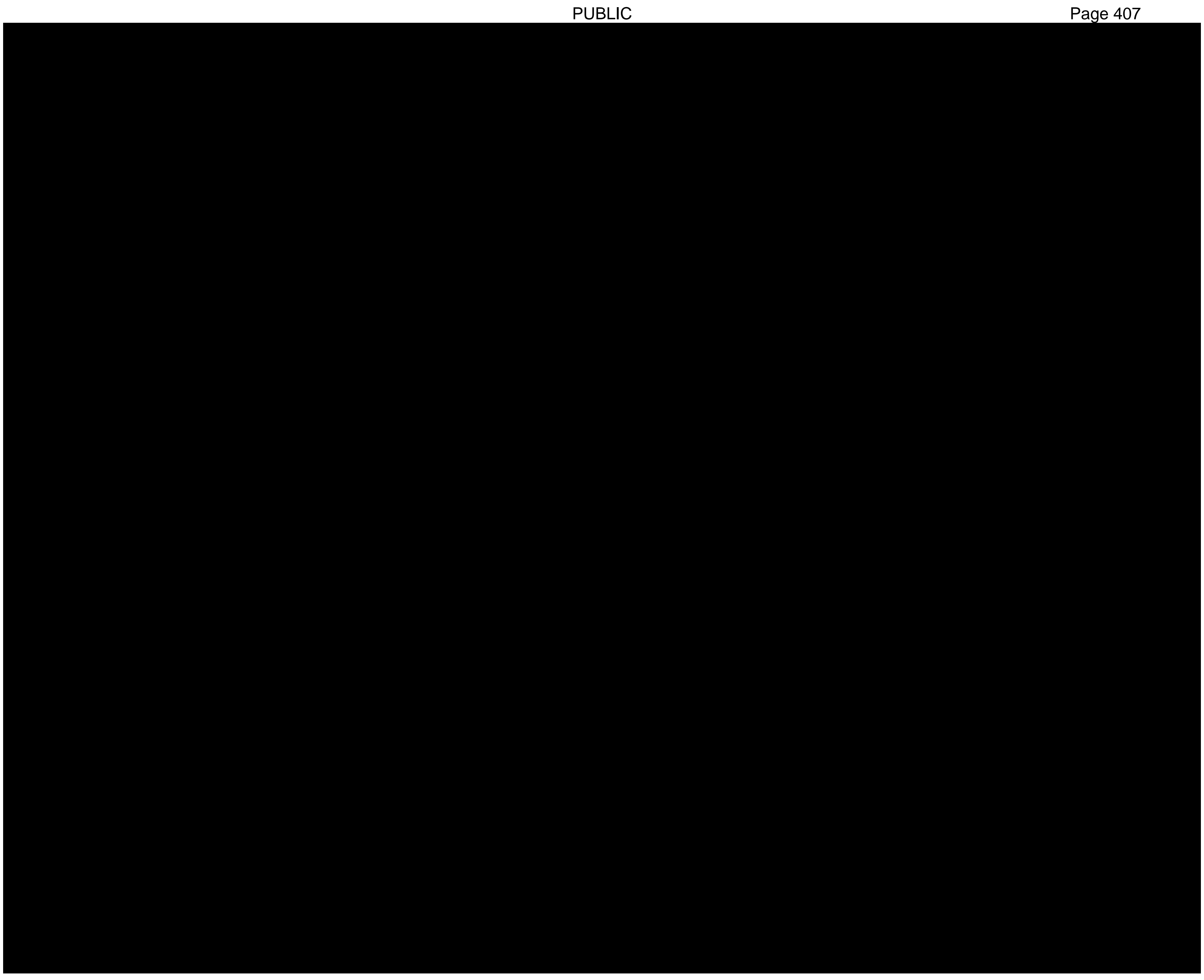
From: Keith Baron <kbaron@secure-energy.com>
Date: September 14, 2019 at 5:34:37 PM MDT
To: "jlehoux@northshoreenv.com" <jlehoux@northshoreenv.com>
Cc: Tyler Harnish <tharnish@secure-energy.com>, Ryley Pierson <rpierson@secure-energy.com>, Debbie Knodel <dknodel@secure-energy.com>
Subject: NuVista Clean up

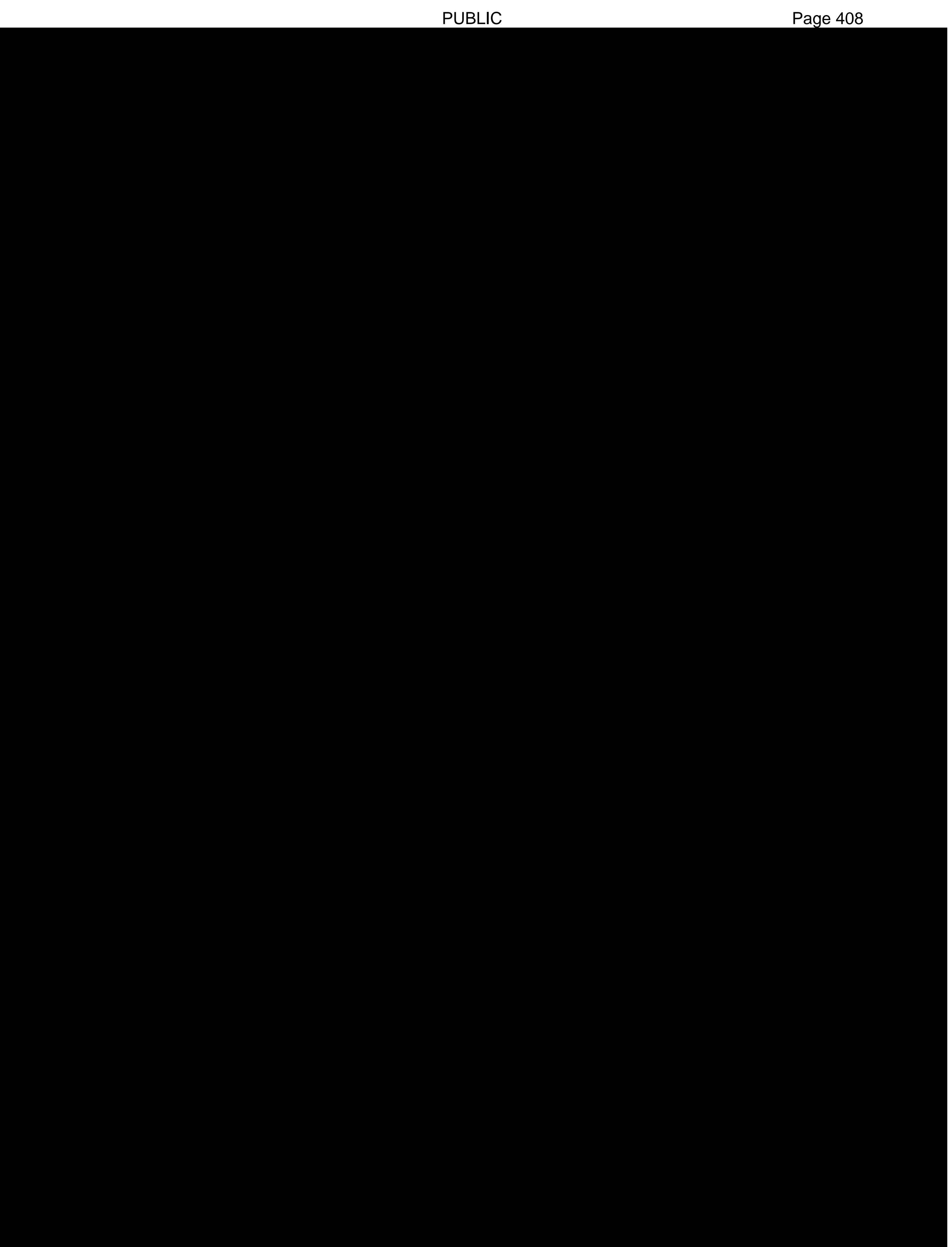
Good afternoon Justin,

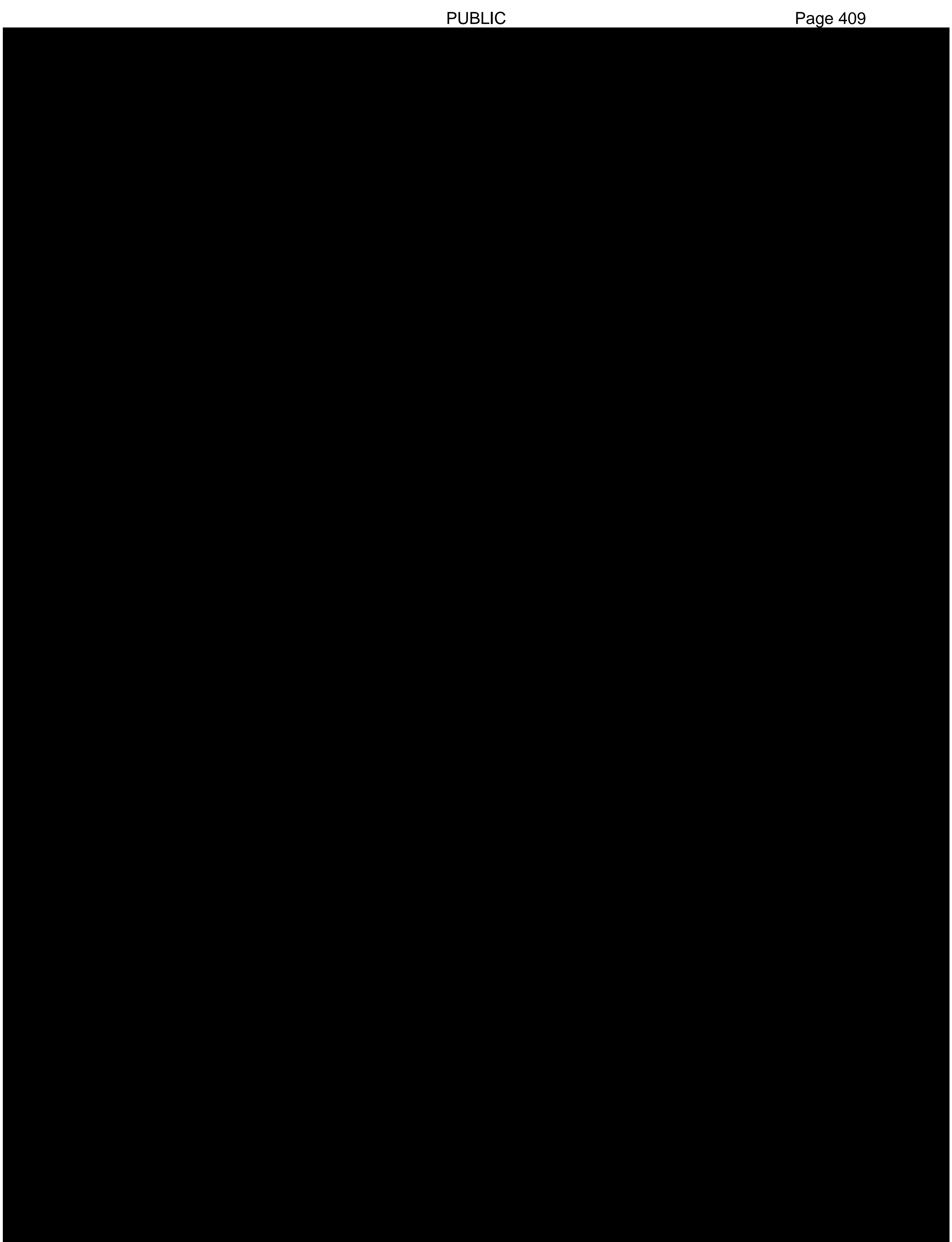
Thanks and have a great everning

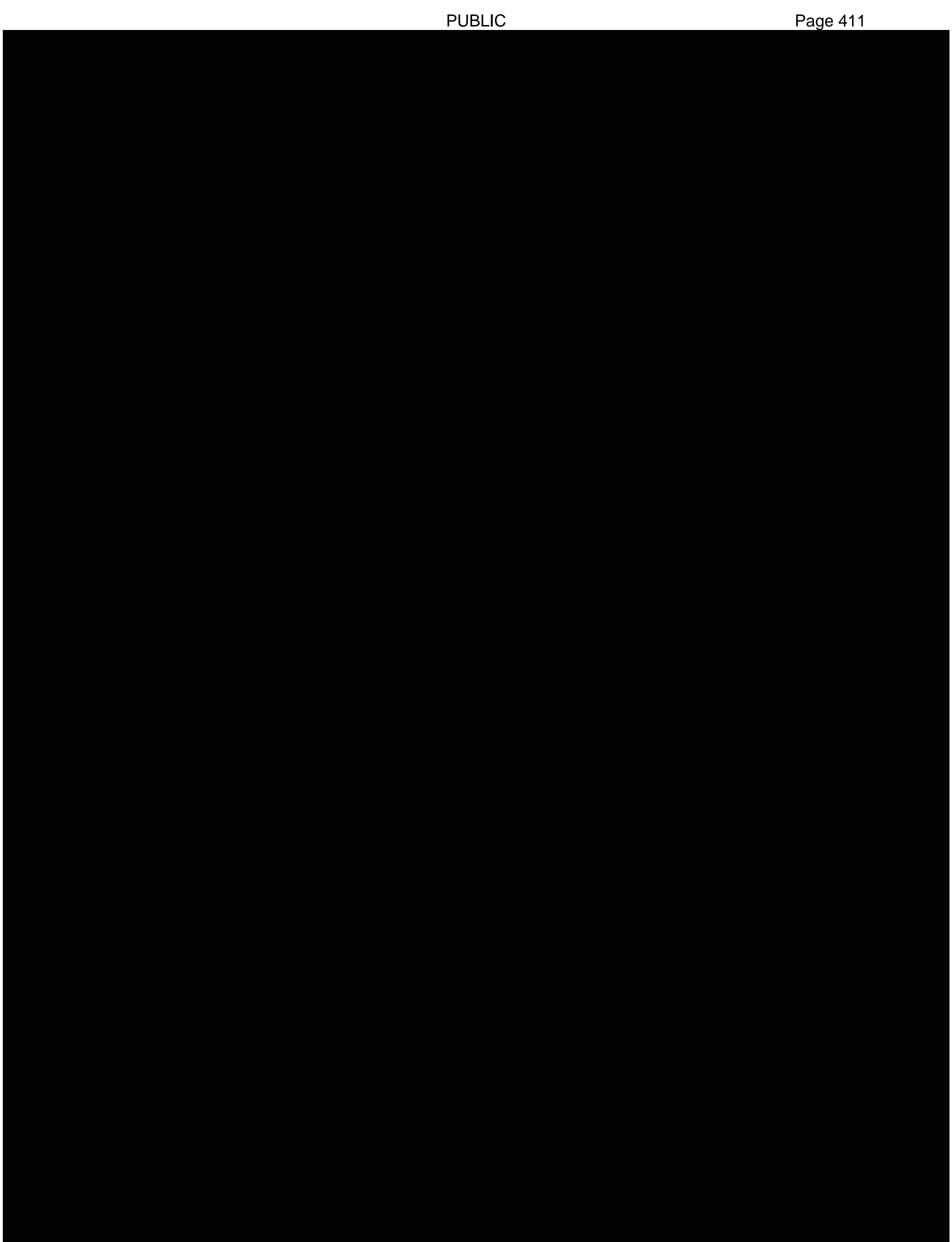
Keith Baron
Sales and Marketing
South Grande Prairie & Saddle Hills Landfills
Processing Recovery & Disposal Division
SECURE energy services
Mobile 1-780-814-4910
kbaron@secure-energy.com











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22 In the final analysis, the producers produce
23 waste, and they need to get rid of it. And where they get
24 rid of it, for lack of a better phrase, they're holes in
25 the ground. They tend to be located in different places

1 around Alberta and British Columbia.
2 And there's a cost of getting it there, which
3 is significant. And there's a cost to the service provider
4 providing the hole. But that's it.
5 Like to try and make this something more than
6 that, that there's -- that it's like your favourite jam or
7 like your Lamborghini or like anything else, it's just not
8 what's happening here. And that's really is the point that
9 I think is captured in it.
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further information on SECURE's commitment to contributing to climate change solutions, including how we can help our partners in industry reduce the overall emissions associated with delivering energy to the world.

A major consequence of climate change is the impact on the world's water supply. Sourcing a sufficient quantity and quality of water could become problematic if fresh water supplies are restricted. Refer to *"Business Strategy"* under the heading Enhanced Sustainability Practices for more information about how SECURE's operations use fresh water. Large volumes of water are used and produced in extracting resources. We are also helping our customers manage their water needs through various onsite water solutions offered. SECURE owned and/or operated onsite centralized water hubs, where recycling can occur, could provide producers with economical access to the water required for their operations while efficiently managing the wastewater generated. Such conservation and recycling solutions will reduce the negative environmental impact of oil and gas operations while reducing the overall carbon footprint of water handling.

Indigenous Peoples Consultation, Claims and Relationships

Indigenous peoples have Aboriginal treaties, and have or asserted Aboriginal rights, including title in certain instances, to a substantial portion of lands in the WCSB. SECURE acknowledges the rights and interests of Indigenous peoples and implements processes to ensure it builds respectful and long-lasting relationships with local Indigenous communities. Early and regular engagement allows SECURE to identify potential concerns and opportunities. Such engagement enables SECURE to respond quickly and to take a proactive approach to building, managing and maintaining its relationship. The Corporation is committed to providing socio-economic opportunities, including business and employment opportunities to qualified local businesses, residents and Indigenous peoples in the areas surrounding the communities in which it operates. Starting in 2018, dedicated resources were allocated to the Indigenous and stakeholder relations program, and towards proactive relationship development.

SECURE has implemented an Indigenous Relations Policy which is a guidance document for creating respectful and productive relations with Indigenous communities. To encourage economic inclusion, the Corporation has implemented business processes to identify Indigenous vendors and track spending with these businesses.

SECURE has a formalized a Supply Chain Management Best Practice Guideline with the goal of mitigating financial, environment, quality and health and safety risk related to vendor management and procurement. Elements of the Corporation's Indigenous Relations Policy related to local and Indigenous communities are integrated in the guideline to support:

- Preferential selection of those Indigenous and local vendors that meet the Corporations' requirements, such preference includes increased weight in the competitive selection process; and
- Formation and strengthening of company-to-community and business-to-business relationships with Indigenous and local vendors to build capacity with the goal of awarding more work over time.

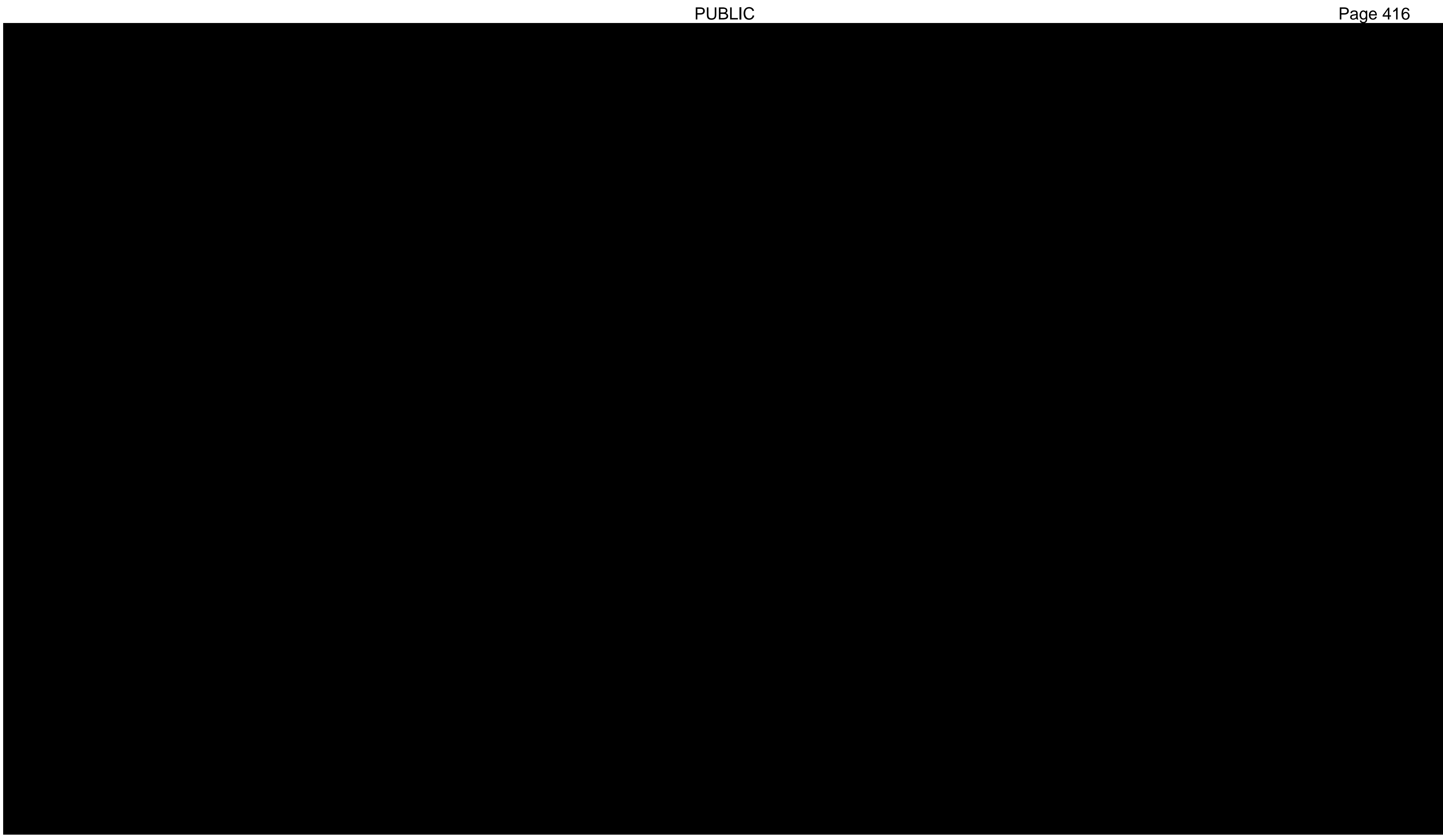
The Corporation spent approximately $10.5 million with Indigenous vendors in 2021, representing a 15% decrease in the amount spent using Indigenous vendors in 2020. In 2020 two large capital construction projects, the East Kaybob Pipeline and the Kakwa Water Disposal Facility, contributed significantly to one-time spending with Indigenous vendors.

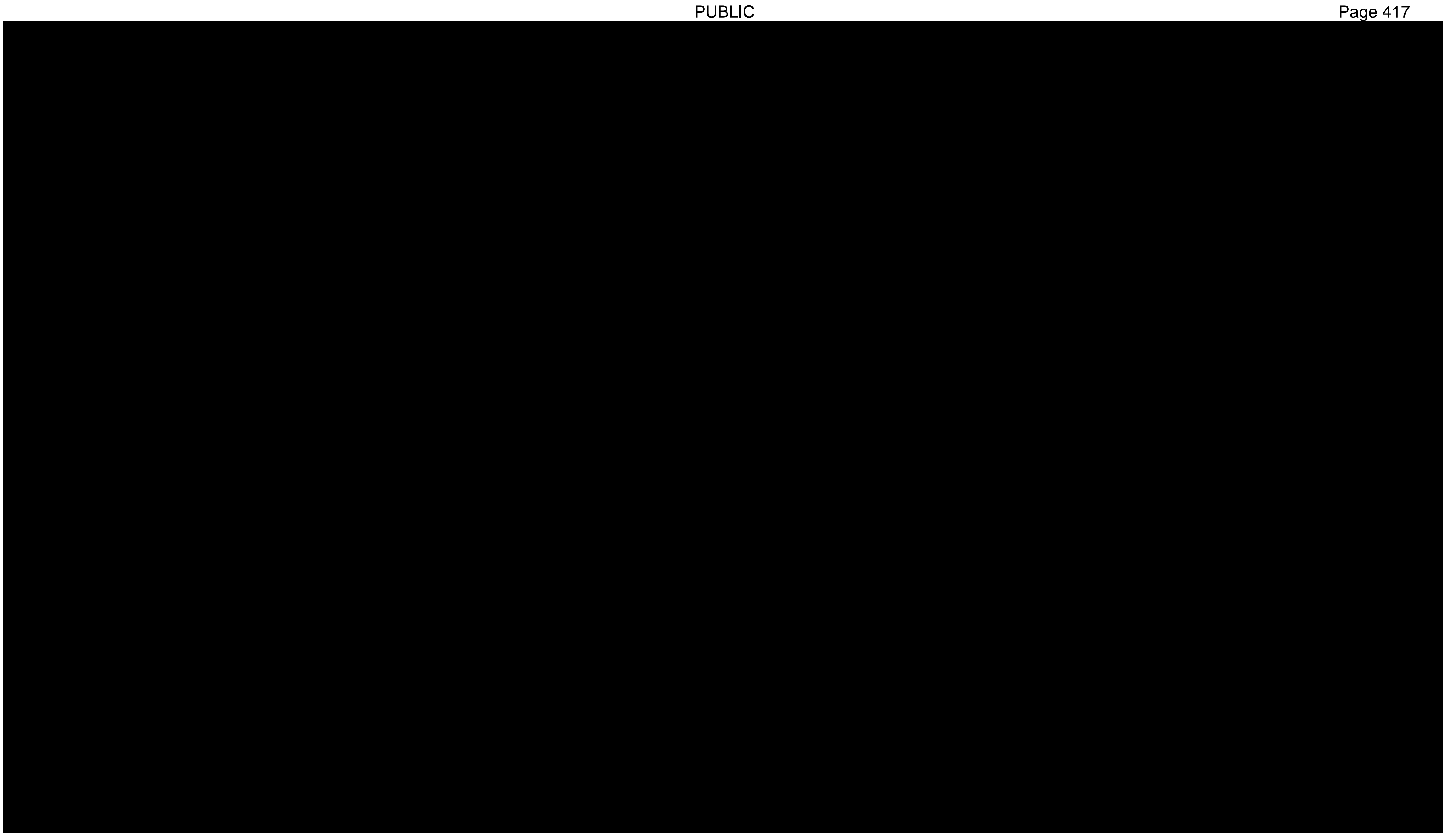
The Transaction significantly expanded the capacity and geographical extent of our Indigenous network. SECURE currently has 21 Economic Partnership Agreements and nine additional relationship agreements ranging from Consultation and Engagement to Cooperation Agreements with Indigenous communities and business partners.

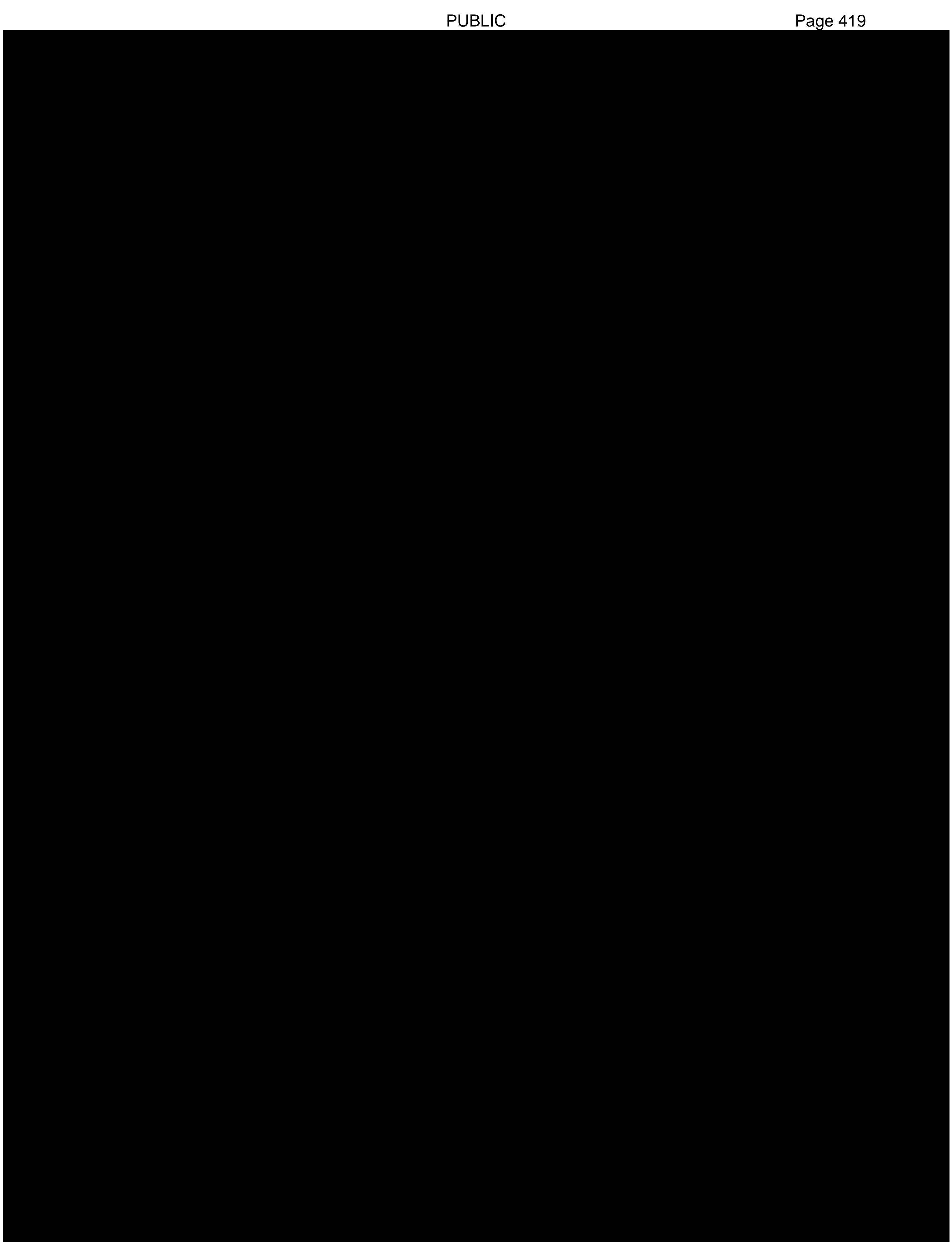
Regulatory Environment

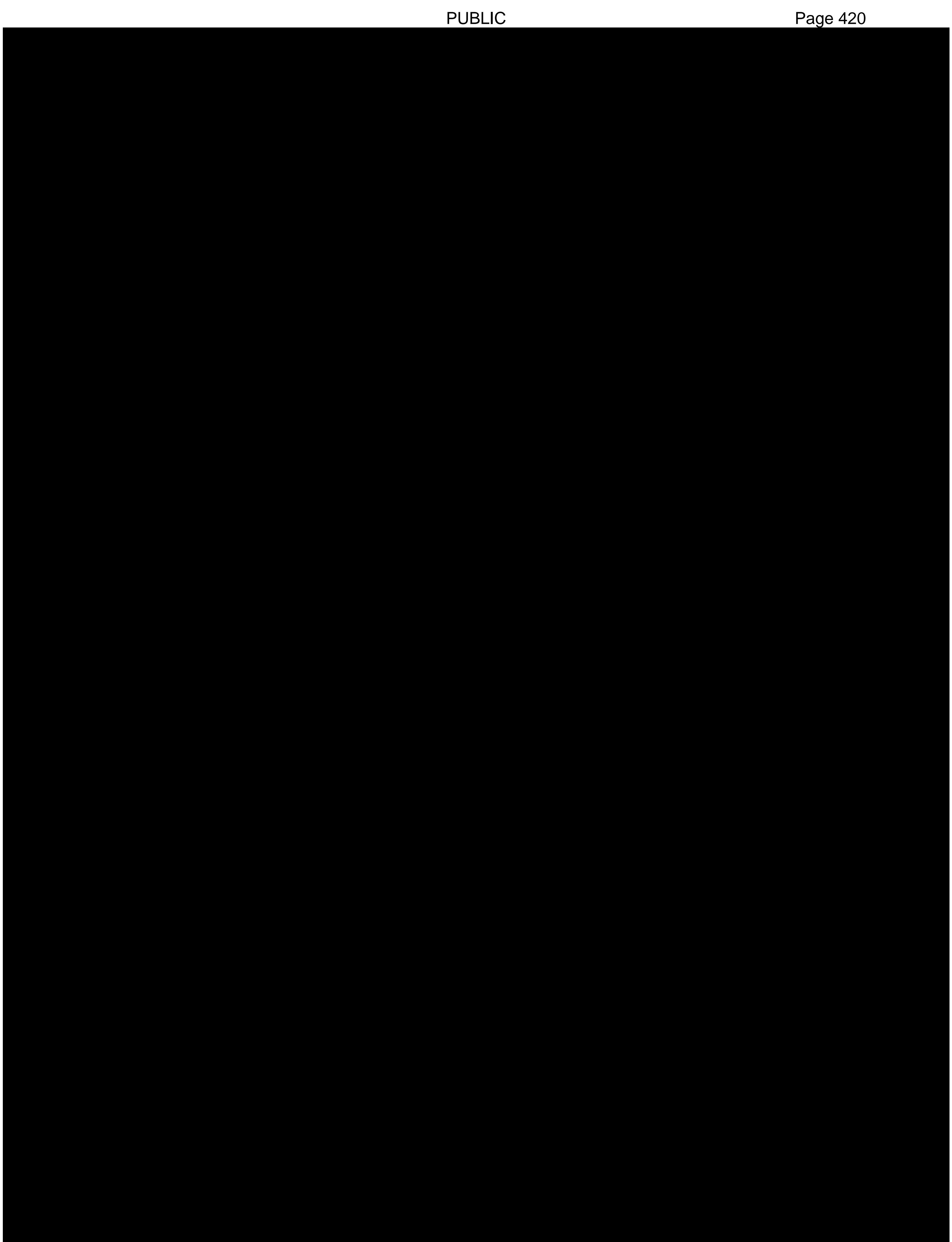
In each market that the Corporation operates, the oil and natural gas and environmental services industries are subject to a complex and increasingly stringent array of laws addressing the actual and potential environmental impacts inherent to the business, including laws governing waste management, reclamation and remediation and the blending, storage, transportation, use and handling of fluids used in oil and gas drilling and completion operations.

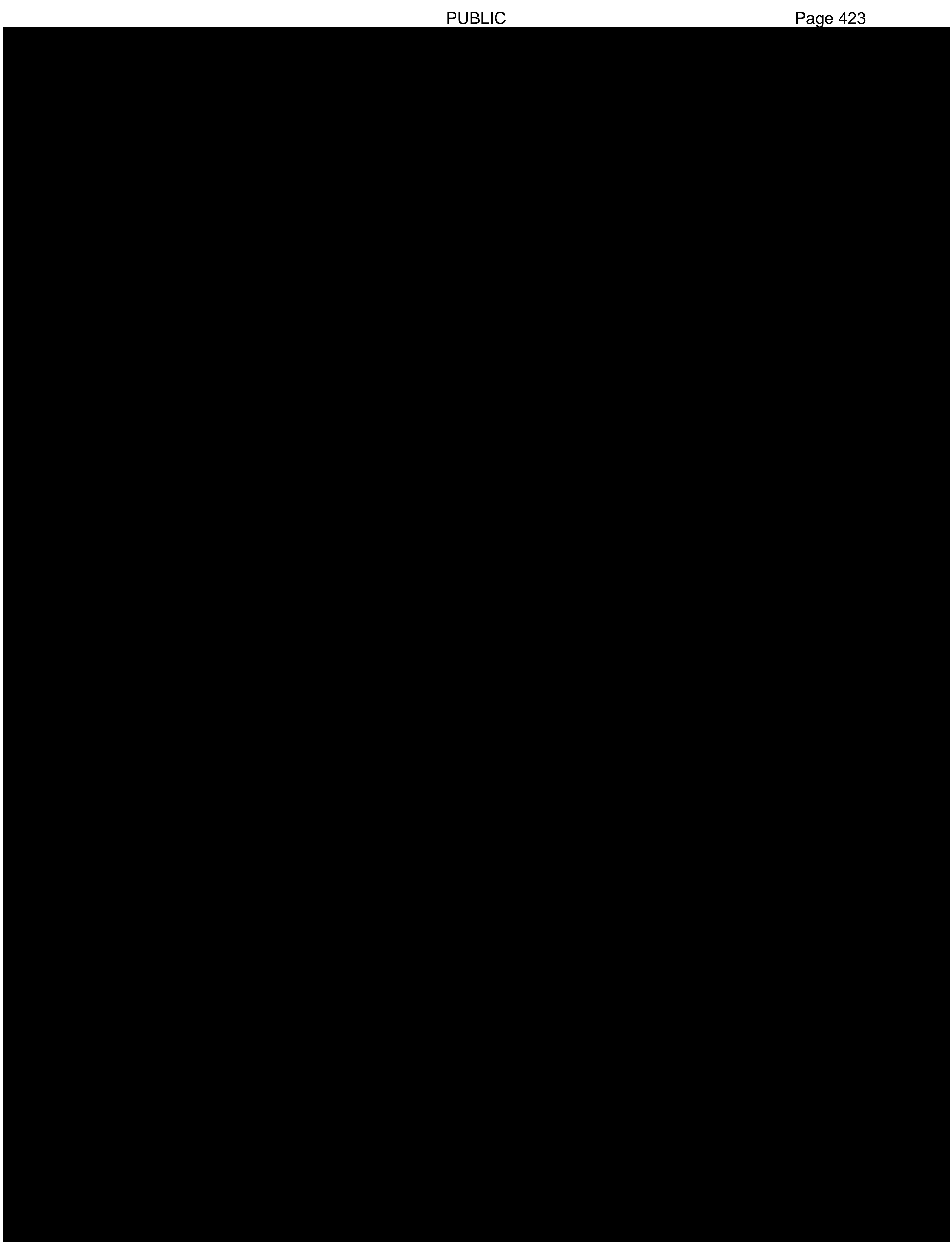
This is Exhibit 172 to the Affidavit of David Engel Affirmed on March 25, 2022











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20 larger decision that you have where you are balancing those
21 costs, and those are real resource costs to the economy,
22 but you have something else that you're considering on the
23 anti-competitive effects. And I think and respectfully
24 say, I think the Tribunal has balanced those considerations
25 reasonably in the past and I have no doubt you will do it

1 here as well.
2 **MEMBER HORBULYK:** Okay, thank you. Madam
3 Registrar, could we turn to exhibit PR-884 at slide 57,
4 please? Mr. Harington, I'm interested in this list of
5 bullets at the top left where the second bullet addresses
6 the issue of asset retirement obligations. This comes up
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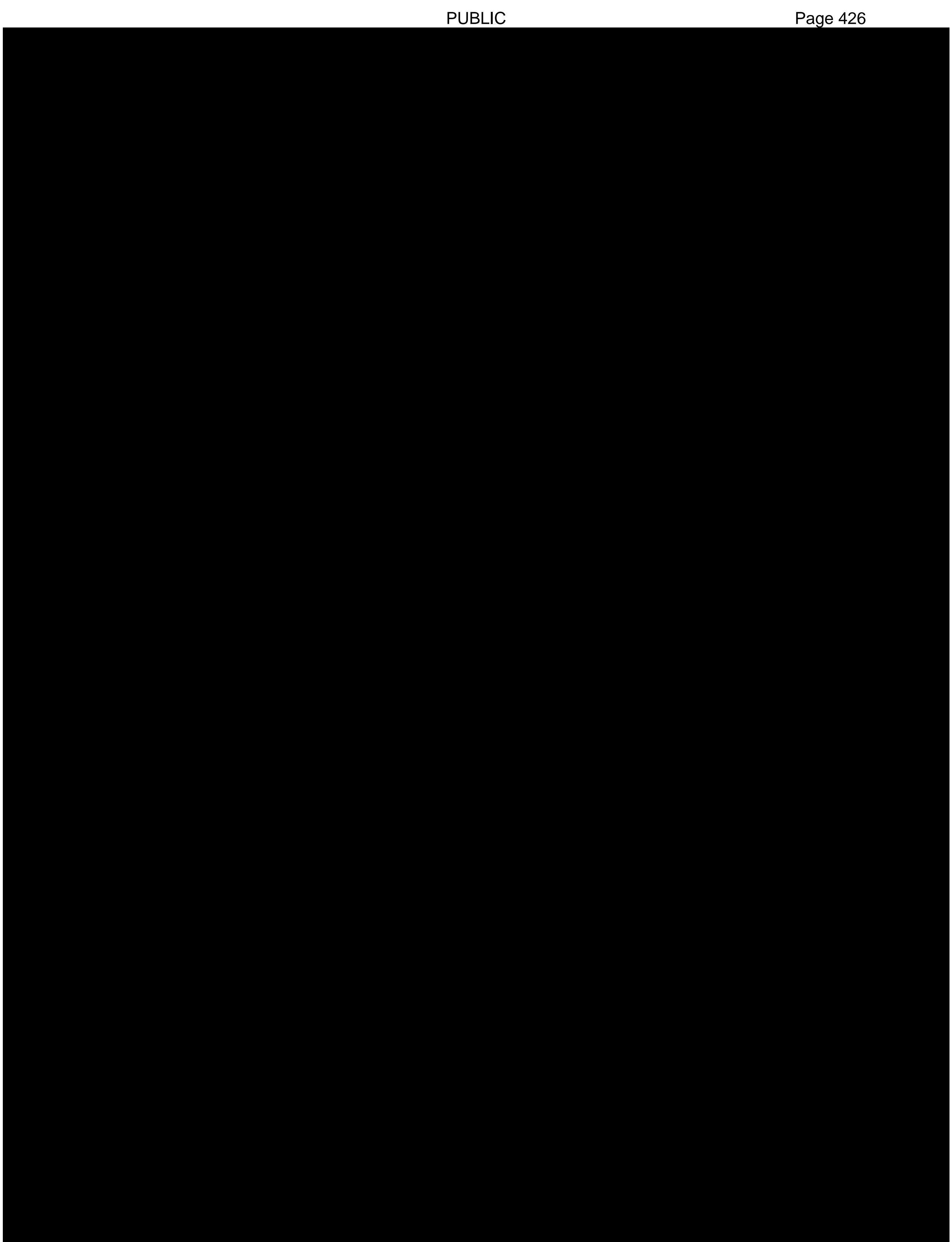

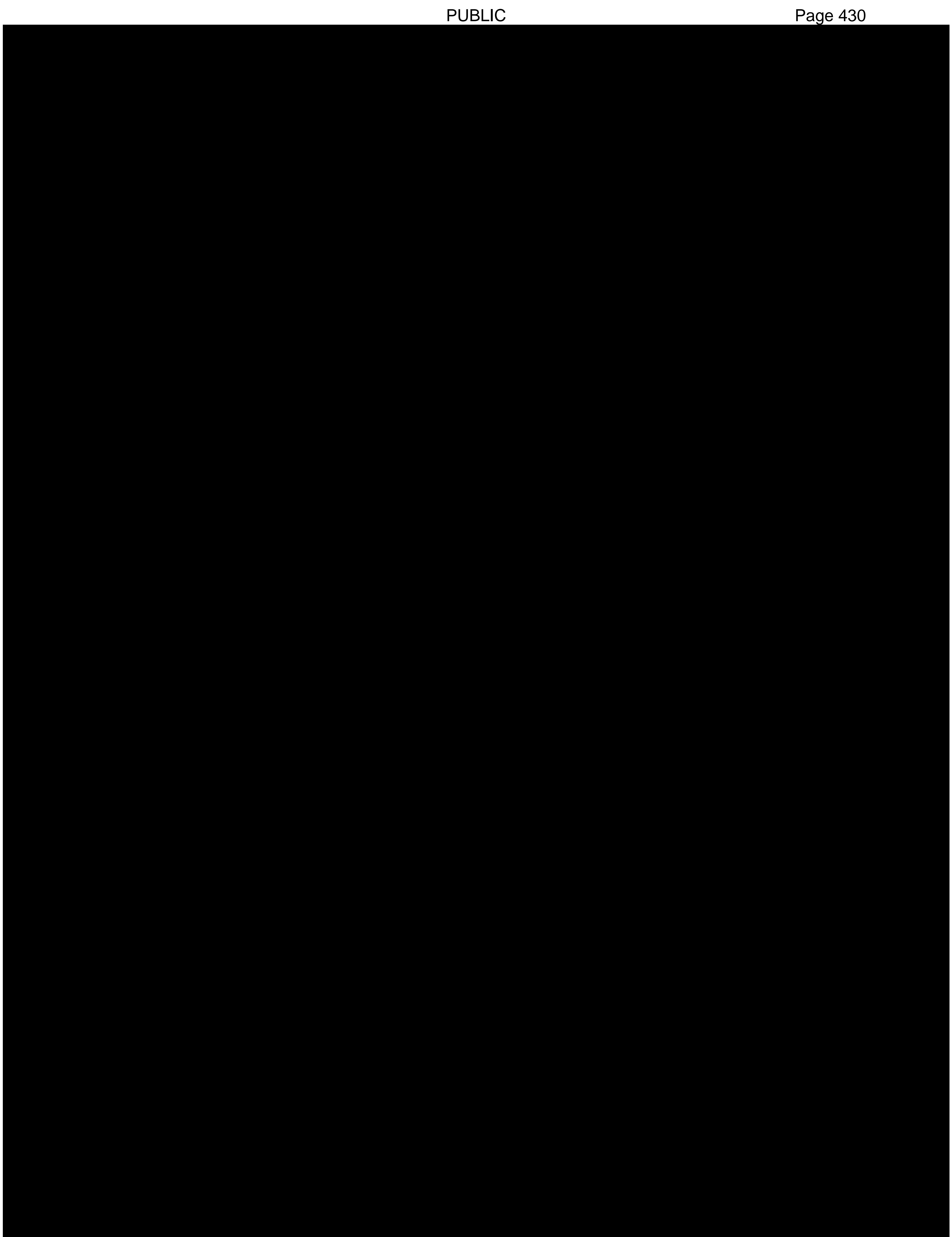

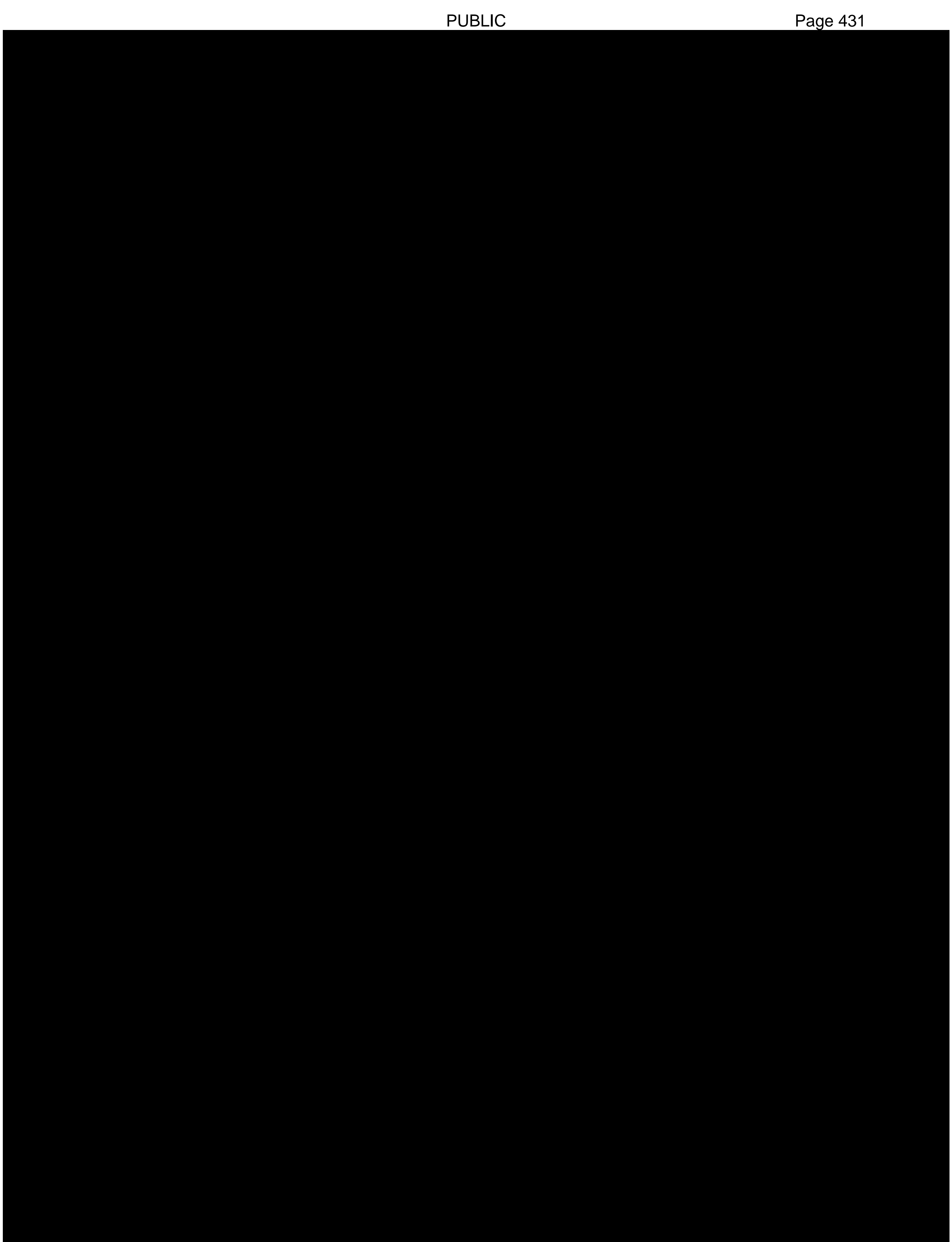

Competition), 2002 FCA 121, [2002] 4 F.C. 598 (Fed. C.A.), at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3 (F.C.A.), at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181 (F.C.A.), at para. 5).

37 In finding that the presumption of reasonableness is not rebutted, Justice Abella acknowledges that the statutory language in the appeal provisions in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), and *Smith* differs from the language at issue here, but is of the opinion that "it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute" (para. 179).

38 With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission "may appeal to the Court of Appeal with leave of a justice of that court" (Securities Act, S.B.C. 1985, a. 83, s. 149(1), which later became Securities Act, S.B.C. 1996, c. 418, s. 167 (1)). The appeal provision in *Smith* provided that, under the National Energy Board Act, R.S.C. 1985, c. N-7, "[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court" (s. 101). By contrast, the *Competition Tribunal Act* provides that "an appeal lies to the Federal Court of Appeal from any decision or order ... of the Tribunal *as if it were a judgment of the Federal Court*" (s. 13(1)).

39 The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.

40 I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

B. Merger Review Analysis Under Section 92 of Act

41 At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.

(1) Merger Review: An Overview

42 Merger review is conducted under s. 92 of the Act. A merger is "an acquisition of control or a significant interest in all or part of the business of another" (B. A. Facey and D. H. Assaf, *Competition and Antitrust Law: Canada and the United States*. (4th ed. 2014), at p. 205). Section 91 of the Act defines merger as follows:

> **91.** [Definition of "merger"] In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

43 A merger review is designed to identify those mergers that will have anti-competitive effects (Facey and Assaf, at p. 209). Section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. Section 92(1) provides for remedial orders to be made when a merger is found to either lessen or prevent competition substantially.

44 Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" (O. Wakil, The 2014 Annotated Competition Act (2013), at p. 246). Market power is the ability to "profitably

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influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2001), 11 C.P.R. (4th) 425 (Competition Trib.), at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178 (Fed. C.A.) leave to appeal dismissed, [2004] 1 S.C.R. vii (note) (S.C.C.)). Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289Competition Trib., at p. 314); where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers" (J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2nd ed. 2010), at p. 29). If a merger does not have or likely have market power effects, s. 92 will not generally be engaged (B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), at p. 141).

45 The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (Hillsdownat pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.

46 What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

> What will constitute a likely "substantial" lessening will depend on the circumstances of each case. ... Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.
>
> (*Hillsdown*, at pp. 328-29)

47 If the Tribunal concludes that the merger substantially lessens or prevents or is likely to substantially lessen or prevent competition, the Tribunal is empowered to make a remedial order pursuant to s. 92(1)(e) and *(f)*. The Tribunal "may prohibit the parties from proceeding with all or part of the merger, or it may order the dissolution of a completed merger or divestiture of assets or shares" (Musgrove, MacNeil and Osborne, at p. 185).

48 The ability to make a remedial order is subject to exceptions (see ss. 94 to 96 of the Act). For the purposes of this appeal, only s. 96, the so-called efficiencies defence, is relevant. After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.

(2) Determining Whether a Substantial Lessening or Prevention Will Likely Occur

(a) "But For" Analysis Should Be Used

49 The Tribunal, relying on *Canada Pipe*, used the "but for" test to assess the merger in this case.

50 *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(c) of the Act. The words of s. 79(1)(c) — "is having or is likely to have the effect of preventing or lessening competition substantially in a market" — are very close to the words of s. 92(1) — "likely to prevent or lessen" — and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:

> ... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial"....
>
> The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]

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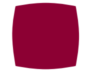
term contractual arrangements or pre-existing long-term business relationships) may constitute a merger within the meaning of section 91.

1.19 When determining whether an acquisition or establishment of a significant interest constitutes a merger, the Bureau examines the relationship between the parties prior to the transaction or event establishing the interest, the likely subsequent relationship between the parties, the access that an acquirer has and obtains to confidential business information of the target business, and evidence of the acquirer's intentions to affect the behaviour of that business.



PART 2: THE ANTI-COMPETITIVE THRESHOLD

Overview

2.1 As set out in section 92(1) of the Act, the Tribunal may make an order when it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.

2.2 In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice, service, innovation and advertising—especially in markets in which there is significant non-price competition. To simplify the discussion, unless otherwise indicated, the term "price" in these guidelines refers to all aspects of firms' actions that affect the interests of buyers. References to an increase in price encompass an increase in the nominal price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

2.3 These guidelines describe the analytical framework for assessing market power from the perspective of a seller of a product or service ("product," as defined in section 2(1) of the Act). Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time. The jurisprudence establishes that it is the *ability* to raise prices, not whether a price increase is likely, that is determinative.

2.4 The Bureau also applies this analytical framework to its assessment of the market power of the buyers of a product. Market power of buyers is the ability of a single firm (monopsony power) or a group of firms (oligopsony power)[10] to profitably depress prices paid to sellers (by reducing the purchase of inputs, for example) to a level that is below the competitive price for a significant period of time. Part 9, below, sets out the Bureau's approach to situations of monopsony power.

10 Oligopsony power occurs where market power in the relevant purchasing market is exercised by a coordinated group of buyers. Except where otherwise indicated in these guidelines, the term "monopsony" includes situations of oligopsony.

79 It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable. Definition of the relevant market is indeed a necessary step in the inquiry; and the fact that the Tribunal dwelled on it is perhaps understandable if, as seems to have been the case, the bounds of the relevant market were not clear.

80 I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

81 Accordingly, the Tribunal's conclusion must stand.

H. Remedy

82 Having found that Southam's acquisitions had produced a substantial lessening of competition in the market for real estate print advertising on the North Shore, the Tribunal ordered Southam to divest itself, at its own option, of either the *Real Estate Weekly* or the *North Shore News*. The Federal Court of Appeal declined to disturb this remedy. I agree with the Federal Court of Appeal that the remedy settled upon by the Tribunal should be allowed to stand.

83 The appellants submit that the correct test for a remedy under the *Competition Act* is whether it eliminates any substantial lessening of competition that the merger may have caused. The appellants observe that this is the standard that has been applied in cases under s. 92(1)(e)(iii) of the Competition Act, in which the parties have consented to the remedy. See, e.g., *Canada (Director of Investigation& Research) v. Air Canada* (1989), 27 C.P.R. (3d) 476(Competition Trib.), at pp. 513–14. They observe also that substantial lessening of competition is the evil that Parliament has sought to address in the Act. Mergers themselves are not considered to be objectionable except in so far as they produce a substantial lessening of competition. Therefore, restoration to the pre-merger situation is not what is wanted. Indeed, presumably *some* lessening of competition following a merger is tolerated, because the Act proscribes only a *substantial* lessening of competition. The appellants object further to what they see as the punitive quality of the remedy that the Tribunal imposed, and to what they regard as the illicit shifting to them of the burden of showing that the proposed remedy would be effective.

84 The respondent, for his part, says that the test of a remedy is whether it restores the parties to the pre-merger competitive situation. I believe that the appellants' test is the better one.

85 The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. This is the test that the Tribunal has applied in consent cases. The Tribunal attempted to distinguish this case from those cases on precisely the ground that here the Director did not consent to the appellants' proposed remedy. But the distinction is not a sensible one. I can think of only two reasons why the test should be more forgiving where the parties have consented to a remedy. The first is that parties who have not consented should be punished for their obduracy. The second, which is related to the first, is that the

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2.14 The Bureau does not consider a numerical threshold for the material price increase.[14] Instead, it bases its conclusions about whether the prevention or lessening of competition is substantial on an assessment of market-specific factors that could have a constraining influence on price following the merger. Additionally, where the merging firms, individually or collectively, have pre-existing market power, smaller impacts on competition resulting from the merger will meet the test of being substantial.

PART 3: ANALYTICAL FRAMEWORK

3.1 In determining whether a merger is likely to create, maintain or enhance market power, the Bureau must examine the competitive effects of the merger. This exercise generally involves defining the relevant markets and assessing the competitive effects of the merger in those markets. Market definition is not necessarily the initial step, or a required step, but generally is undertaken. The same evidence may be relevant and contribute to both the definition of relevant markets and the assessment of competitive effects. Merger review is often an iterative process in which evidence respecting the relevant market and market shares is considered alongside other evidence of competitive effects, with the analysis of each informing and complementing the other.

3.2 The overall objective of market definition in merger analysis is to identify the set of products that customers consider to be substitutes for those produced by the merging firms and the set or sets of buyers that could potentially face increased market power owing to the merger. Market definition, and the measurement of market share and concentration in the relevant market, is not an end in itself. Consistent with this, section 92(2) of the Act precludes the Tribunal from concluding that a merger is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share. The ultimate inquiry is not about market definition, which is merely an analytical tool – one that defies precision and can thus vary in its usefulness – to assist in evaluating effects. Rather, the ultimate inquiry is about whether a merger prevents or lessens competition substantially. That said, when reviewing a merger, market definition generally sets the context for the Bureau's assessment of the likely competitive effects of a merger.

3.3 In some cases, it may be clear that a merger will not create, preserve or enhance market power under any plausible market definition. Alternatively, it may be clear that anti-competitive effects would result under all plausible market definitions. In both such circumstances, the Bureau need not reach a firm conclusion on the precise metes and bounds of the relevant market(s). Additionally, when a completed merger has resulted in a material price increase, the Bureau may rely on evidence of that increase, taking into account other relevant factors. Cases may also arise in which the choice among several plausible market definitions may have a significant impact on

14 A material price increase is distinct from (and will generally be less than) the "significant and non-transitory price increase" that is used to define relevant markets, as described in Part 4, below. What constitutes a "materially greater" price varies with the industry and the context. For purposes of the statement above, materiality includes not only the magnitude and scope but also the sustainability of the price increase.

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> ... More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition.

49 In the Tribunal's view, the factual and expert evidence on substitutability is very important. The Tribunal distinguishes between "switching" in its common sense meaning and substitutability in the economic sense; it is the latter that is important in delineating a relevant product market. It may be, as the respondents claim, that at the end of the useful life of their heating or other energy-using equipment, consumers do switch to propane from alternate fuels depending, in part at least, on differences in fuel prices. However, this behaviour demonstrates *de novo* choice; at the end of their equipment life cycle, those consumers are in the same position as when they first chose a fuel. This behaviour is not evidence of substitutability, which refers to changing a consumption pattern in response to a price change with all other determinants of change, including the age of equipment, held constant.

50 Mr. Katz stated that AmeriGas was successful in attracting customers to propane from other fuels before the end of the useful life of their existing equipment. However, he provided no quantitative evidence as to AmeriGas's success in this regard and accordingly, it is difficult for the Tribunal to judge the extent of such success.

51 Mr. Sparling's testimony is that Sparling is seeking to attract new propane customers in the new housing developments. If Sparling is successful, it is evidence that such customers are making fuel choices as a consequence of a decision to relocate. While this residential location decision may involve a change in fuel, it does not demonstrate that the price of propane was the reason for the move and hence does not provide evidence of substitution.

52 In its 10-K securities filing in the United States, AmeriGas makes similar comments about competition from alternate fuels. However, in the absence of evidence showing significant customer switching during the life of the existing equipment, the Tribunal is of the view that the evidence of AmeriGas does not support the substitutability of alternate fuels for competition market purposes.

53 As to the views of industry participants, Sparling may well be correct in some long-term sense in its view that propane competes with all alternate fuels. However, no evidence indicates that Sparling's behaviour is affected by inter-fuel competition. According to Mr. Sparling, the company is mainly concerned about "consistent pricing" from customer to customer and not with pricing in relation to alternate fuels (transcript at 12:1731 (14 October 1999)). Moreover, Sparling has not experienced customers switching to other fuels other than natural gas (*ibid.* at 1733).

54 Hence the Tribunal does not accept that propane industry views support the substitutability of alternate fuels in the mind of consumers. Indeed, witnesses consider alternate fuels for the most part at the end of equipment life cycle, rather than in a shorter period of time in which market power could be exercised and which is relevant for merger review.

55 As to the conclusions drawn by Rothstein J. in denying the injunction sought by the Commissioner, it suffices to note that he did not have the benefit of the extensive record and expert opinions that were produced during the 48-day hearing of the application under section 92.

56 The Tribunal notes that the Act does not require that markets be delineated. However, the Tribunal accepts that the delineation of competition markets is one way of demonstrating the likely competitive effect of a merger and that, where such an approach is valid, the competition market adopted must be relevant to the purposes and goals of the merger provisions of the Act, which focus on the creation or enhancement of market power. In this connection, the Tribunal notes that there could be many competition markets containing retail propane. For example, it might be found that market power could be exercised over a product market consisting of retail propane, fuel oil, natural gas and electricity or any sub-group thereof. The share of retail propane in a market becomes larger as products are removed from the definition of the market. It is not clear, however, that any such market is the relevant competition market.

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(Moorefield) was able then to process one-third of the remaining Rothsay (Toronto) volumes and Orenco processed the other two-thirds.

IV. Market Definition

23 In order to determine the likely effects of any merger or acquisition it is first necessary to determine the boundaries of the *relevant* market. A *relevant* market is that product or service with respect to which after a merger there is likely to be a substantial lessening of competition. Once the *relevant* market is defined, an assessment can be made as to the likely effect of the merger or acquisition on that market. Market boundaries, however, are not static. They expand and contract in response to price. One can conceptually think of a series of concentric areas whereby as the price rises the radii lengthen. The very definition of the market boundaries therefore carries with it an assessment as to whether the merged firm has or is likely to have market power. While the various elements relevant in considering the effect of a merger, first market boundaries and then whether a substantial lessening of competition is likely to occur, will be discussed in a linear fashion, the non-linear aspect of the analysis should be kept in mind. [8]

24 It is useful to refer to the explanation of the concept of a *relevant* market set out in the monograph *Horizontal Mergers: Law and Policy*:

> For purposes of assessing the likelihood that a merger will create or enhance single-firm market power, market definition has been characterized as "an analytical construct enabling us to compensate for our inability to measure market power directly." Areeda and Turner explain:
>
> > Market definition becomes crucial only when there are no other discoverable facts establishing the existence and degree of market power more directly and with tolerable accuracy. One would never need to define the market if he could accurately establish the firm's demand and cost curves - the quantities that could be sold at various prices, and the costs of producing those quantities. That information would directly establish both the presence of market power and the magnitude of potential monopoly profits. The firm's demand curve would reflect the availability of any substitutes, without further need for identifying them or their closeness.
>
> Because direct measurement of a firm's market power is extraordinarily difficult, a two-step indirect measurement process has evolved: first define the relevant market, and then infer power within the market through the use of proxies such as market shares and other factors. [9] (footnotes omitted)

25 The identification of the relevant market in which it is alleged a substantial lessening of competition is likely to occur is normally assessed from two perspectives: the product or products with respect to which a merged firm acting alone or in concert with others is likely to be able to exercise market power and the geographic area within which such power is likely to be exercised. [10] The term "product" is used in the legal and economic literature relevant to competition law as meaning the output (product or service) which the producer (seller) provides to the consumer (purchaser). Thus, the use of that term should not be taken as excluding services. [11]

A. Product Dimension (Product Market)

26 Conceptually, the product in issue in this case can be thought of as the renderable material obtained by the renderers from the suppliers of that material or it can be thought of as rendering services provided by the renderers to slaughterhouses, meat processing plants, grocery stores, etc. If the first characterization is used then the analysis for competition purposes focuses on the possible monopsony power of the renderers as buyers of the raw materials. If the second characterization is used then the analysis focuses on the possible market power of the renderers as sellers of the rendering service. No significant difference results from the two characterizations. The Tribunal accepts that the more convenient way of describing the product is the latter, that is, as the sale of rendering services. This is more convenient because it avoids the conceptual awkwardness which arises from the fact that sometimes the renderer pays for the renderable materials and sometimes charges for its collection.

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Barbara Baniulis, project administrator for Trinity, although not totally objective, called *The Leader* one of the province's "superior" community newspapers.

46 Two other community newspapers are still independently published: the *Langley Advance* and *The Vancouver Echo*. In April 1991, however, LMPL acquired a 15% interest in *The Vancouver Echo* from Jack Burch, its long-time owner. Mr. Burch retained 25% ownership of the paper and his two daughters and son-in-law each purchased 20% from him. LMPL guaranteed the substantial bank loan which enabled them to purchase these shares from Mr. Burch. In return each granted LMPL a right of first refusal on the sale of their shares which total 60%. *The Vancouver Echo* has a long history and publishes twice a week. Its distribution area covers mainly the eastern portion of the city of Vancouver. The *Langley Advance* has been around for some fifty years; it publishes twice a week.

47 According to Mr. Grippo's estimate, as confirmed by figures filed for MetroValley, LMPL (for not quite the same time period) and *The Vancouver Echo*, the MetroValley publications received 50-55% of the advertising revenue flowing to the community newspapers in the Lower Mainland. L9MPL had 40-45% and the independents 5%.[43] Within LMPL, the *North Shore News* and the *Courier* accounted for 60% of revenue and the remaining community newspapers for the rest. The combined advertising revenue of all the community newspapers is of the order of 30% of total newspaper advertising revenue in the Lower Mainland.

III. THE MARKET

A. General Considerations

48 The general issues with respect to the definition of a market in a merger case have been set out in the *Hillsdown Holdings (Canada) Limited decision*.[44] The relevant market for purposes of merger analysis is one in which the merging firms acting alone or in concert with other firms could exercise market power. Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers. The following quotation neatly summarizes these points:

> The modern concept of market power focuses on the potential for consumers to suffer injury through the actions of a single firm or a group of firms acting in concert. It has become traditional to think of the ability of a firm or group of firms to maintain prices above the competitive level, although the meaning of "price" can easily be expanded to take into account other forms of consumer injury such as inferior quality.[45]

The aspects of market power that are of concern in a particular case will depend on the allegations of the Director and the evidence brought forward by both parties. The focus on market power in the conceptualization of markets brings to the fore the central concern: whether the merger will create, increase or preserve market power.

49 The delineation of the relevant market is a means to the end of identifying the significant market forces that constrain or are likely to constrain the merged entity. Initially, it is necessary to identify the output of other firms that buyers can avail themselves of in the event that the price or other characteristics of the product offered by the merged firm are unacceptable to buyers. This is the task of delineating the product market, i.e., identifying the products that are close substitutes for that of the merged firm.

50 The second problem is to identify the firms or classes of firms that produce or can quickly produce the products in question and can influence the offerings to the customers of the merger. Generally this question is cast in terms of the geographic boundaries of the relevant market. It may also relate to firms that use similar technology to that used by firms that currently produce the product or products and that could quickly change their output if it were profitable to do so. Firms with convertible capacity can be counted as part of the relevant market where conversion can be performed quickly and with small investments. The firms in question can be treated as potential entrants where these conditions do not apply and there is no history of firms changing their product line. It matters little in the end whether the relevant market is expanded to include firms with similar technology or whether it is concluded that these firms can enter with ease in the event that attractive profit opportunities appear in

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61. Solid waste generated by oil and gas producers include contaminated soil, drill cuttings, and produced sand.

62. The majority of solid waste generated by oil and gas producers in Alberta is non-hazardous and disposed of in Class II landfills.

63. Solid waste containing NORMs can be disposed of in a landfill licensed to accept NORM waste.

64. Secure's Pembina landfill in Alberta and its Silverberry landfill in Northeastern British Columbia are licensed to accept NORM waste.

Caverns

65. Caverns are deep sealed salt formations that can also store liquids with high pH content, processed sludge, and other waste types.

66. The waste disposed of in caverns includes but is not limited to drill mud, drill cuttings, sludges, waste water, produced water, and certain NORM contaminated solids.

67. There are five operating cavern facilities. Most cavern facilities have multiple caverns.

68. Secure acquired three caverns from Tervita as a result of the Transaction, including the Hughenden cavern in Alberta, the Lindbergh cavern in Alberta and the Unity cavern in Saskatchewan.

69. White Swan owns a cavern in Atmore, Alberta.

70. Plains Environmental owns a cavern in Melville, Saskatchewan.

71. Two caverns can take NORM waste, provided it is in slurry form, which are Secure's Unity cavern and Plains' Melville cavern.

Disposal Wells

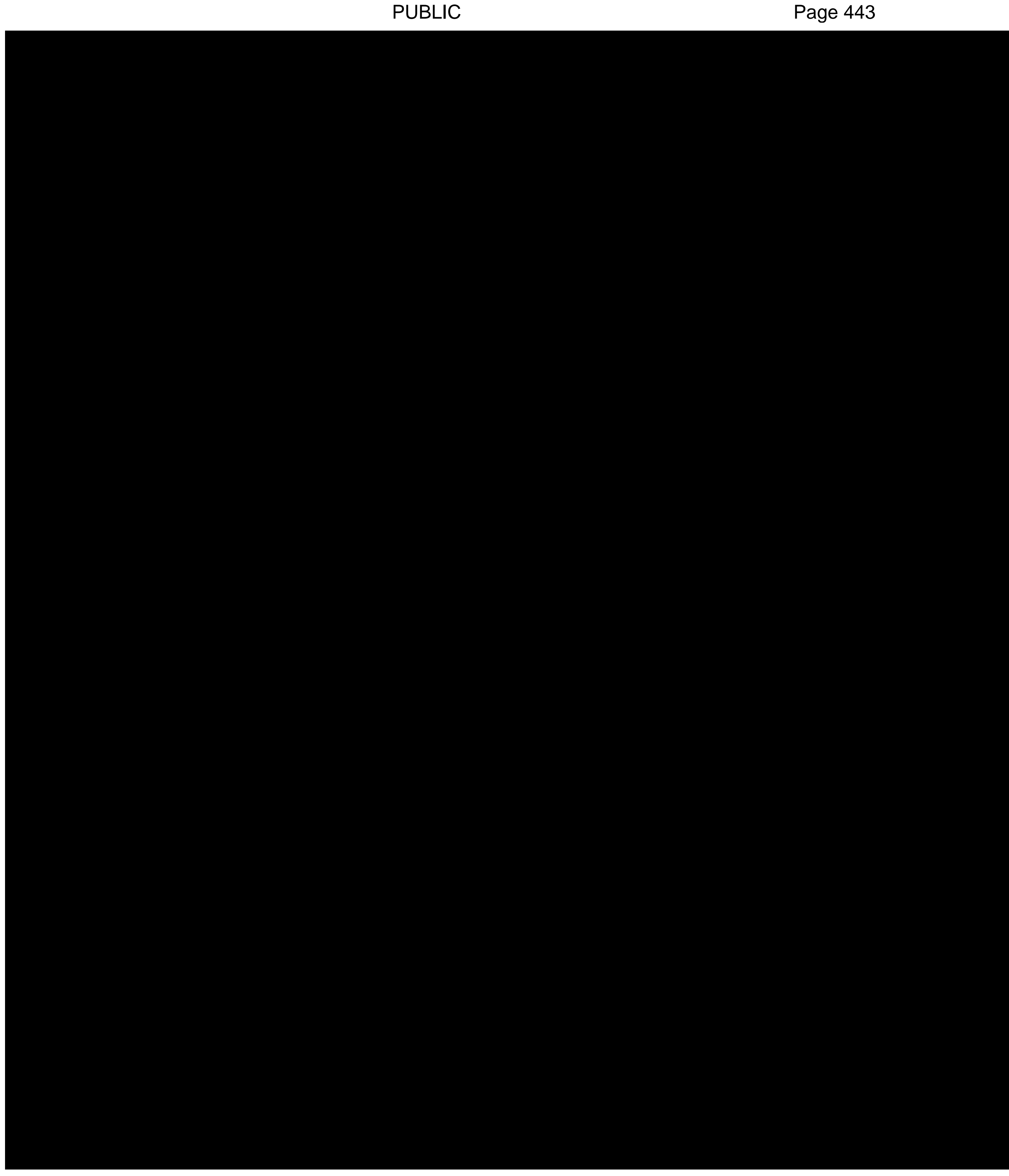
72. Disposal wells are used to dispose of produced or waste water.

8. I further confirm that the Records were made in the usual and ordinary course of business. I attest that each of the Records produced by Plains Environmental in connection with the Application is a true copy of the original and was in the possession, power, or control of Plains Environmental.

9. Plains Environmental operates a cavern waste management facility in Melville, Saskatchewan. The Melville cavern is permitted to accept wastes, such as sludges, contaminated with "Naturally Occurring Radioactive Materials" (NORMs). NORM waste represents a small percentage of the waste accepted at the Melville cavern. The cavern can accept solid wastes but only if they are first slurried. The Melville cavern charges $130/tonne for disposal of bulk non-NORM wastes, and $400/tonne for disposal of bulk NORM wastes. A price list for the cavern is attached to this witness statement as Exhibit "B".

Signed this 23 day of February 2022.

Greg Beddoes



22. Landfills take in solid wastes that come directly from the well sites when the solid wastes do not require further processing, as well as post-processing wastes from TRDs.[39] Landfills may take in substances such as drill cuttings, contaminated soil, and produced sand directly from drilled wells, in addition to treated solids from the TRDs.[40] Tervita and Secure take in landfill waste from chemical producers, pulp and paper producers, and environmental remediation service providers, as well.[41]

23. Produced water and waste water, as well as other water-based liquid wastes, are often disposed of by injecting it into water disposal wells, sometimes without prior treatment.[42] As noted above, water disposal wells owned by waste service providers can be stand alone or at the location of TRDs.

24. Tervita also operated three cavern facilities that are used to dispose of both liquid and solid wastes.[43] Caverns are deep sealed salt formations that can also store liquids with high pH content, processed sludge, and other contaminants.[44] I understand that caverns can take in wastes that cannot be disposed of into the landfills or waste water wells, likening caverns to TRDs in terms of the types of wastes accepted in them.

25. Oil and gas operations sometimes produce waste streams that are contaminated with naturally occurring radioactive materials ("NORM" waste).[45] Solid waste that is contaminated with NORMs must either be

[39] Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 17.

[40] Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 17; SECURE ENERGY Annual Information Form for the year ended December 31, 2020 [RBBC00003_000000009], p. 9.

[41] Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 17; SECURE ENERGY Annual Information Form for the year ended December 31, 2020 [RBBC00003_000000009], p. 29.

[42] SECURE ENERGY Annual Information Form for the year ended December 31, 2020 [RBBC00003_000000009], p. 19 ("Residual liquid waste water is injected via deep disposal wells into disposal zones between impermeable layers of rock."); Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 25 ("Tervita's network of fixed facilities includes 22 engineered landfills, eight standalone salt water disposal wells, three cavern disposal facilities, 44 TRD Facilities and a number of deep underground injection disposal wells that handle a broad variety of wastes.").

[43] The three caverns include Lindbergh, Hughenden, and Unity. See Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 16.

[44] Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 16 ("Tervita utilizes salt formations deep below the surface to allow for the disposal of most solid or liquid wastes, including those that are difficult to process or not appropriate for placement in TRD Facilities or engineered landfills, such as high pH fluids, chemicals, NORMs, processed sludges and other contaminants.").

[45] SECURE ENERGY Annual Information Form for the year ended December 31, 2020 [RBBC00003_000000009], p. 10 ("In many geographic areas, the oil and gas industry requires services providers capable of managing and disposing of NORMs, which may include production waste, impacted equipment and materials, water treatment, residuals and waste, and spills. The Corporation provides a full line of

disposed of in landfills or caverns that are permitted to accept it.[46] I understand that the only two landfills in the WCSB that can accept NORM-contaminated wastes are Secure's Pembina and Tervita's Silverberry landfill, which is now owned by Secure, as well.[47] NORM-contaminated wastes can also be disposed of in caverns, provided it is in a slurry form,[48] and the only two caverns that can accept this type of waste are the Unity salt cavern in Saskatchewan, now owned by Secure, and the Melville salt cavern owned by Plains Environmental.[49]

26. In my analysis, I do not separately analyze the potential effects of the merger on NORM disposal independent from any other wastes. I note, however, that the merger between the Parties increases the market concentration for this specialized service since, because of the merger, Secure now operates three of the four facilities that can handle NORM waste in the WCSB. As such, a separate analysis of NORM services would likely also show a price increase.

3.2.2. *The Parties own and operate multiple waste-service facilities in the Western Canadian Sedimentary Basin*

27. Tervita and Secure's waste service facilities and operations are predominantly located in Western Canada. According to Tervita's 2020 Annual Information Form, Tervita owned and operated 44 TRDs, three caverns, 22 landfills (18 of which were owned by Tervita), and eight stand-alone water disposal facilities in the WCSB.[50] According to Secure's 2020 Annual

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services for managing NORMs, including site assessments, remediation, waste collection and disposal, and NORM safety training and consulting.").

[46] Engel testimony, December 20, 2021, question 62; Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], p. 16.

[47] [RBBC00003_000000009], p. 9 ("In addition to a Class II cell, the Pembina Area Landfill has a separate Class I Landfill cell and is approved for NORM disposal allowing SECURE to provide customers with a safe, economical and environmentally responsible disposal option for NORM impacted solids."); Mr. Engel confirmed that the Silverberry landfill is also permitted to accept NORMs. See Engel testimony, December 20, 2021, p. 65, question 65 ("Q. Okay. Mr. Engel, would you agree with me that, in any BC, Silverberry is able to accept solid waste contaminated by NORMs? A. Yes, to a certain threshold.").

[48]

[49] Engel testimony, December 20, 2021, question 71 ("Q. It is our understanding that the only ones in the western Canadian sedimentary basin are Unity and Melville. Is that your understanding, as well? A. Yes. Q. Okay, and Unity was owned by Tervita and now by Secure, while Plains Environmental owns Melville? A. Correct.").

[50] Tervita's 2020 Annual Information Form refers to Western Canada as primary location for various types of assets. See Tervita Annual Information Form for the fiscal year ended December 31, 2020 [RBBC00003_000000017], pp. 14-17. See, e.g., Engel testimony, December 20, 2021, questions 427-428 ("Q. Okay. And those five FSTs also have water disposal wells. Is that correct? A. That is correct. Q. Okay. There are really 10 disposal wells, then? A. Yes.").

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Key Areas of Agreement

- Product market definition: waste disposal services at TRDs, WDs, LFs.
- Geographic market definition: customer centric geographic markets, with customers' facility choice driven primarily by distance.
- Economic analysis predicts transaction is likely to result in some price effects and incremental hauling costs for some oil and gas producers.

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25 43 Q. Okay. So then,

1 Mr. Engel, would you agree with me that services
2 provided by FSTs or TRDs are not a functional
3 substitute for services provided by landfills?
4 A. Yes.
5 44 Q. Okay, and you would agree
6 with me that services provided by FSTs or TRDs are
7 not a functional substitute for services provided
8 by disposal wells?
9 A. It depends because most,
10 if not all, the vast majority, of FSTs have a
11 disposal well as part of their infrastructure, so
12 they would be able to be interchangable for an
13 SWD, but an SWD would not in most cases be able to
14 substitute for an FST, with the exception that
15 some disposal wells can handle small volumes of
16 emulsion or oil-water mixes and be able to provide
17 some services that are provided by an FST. So
18 there is some overlap between the two. It is not
19 a perfect line between them.
20 45 Q. Okay, so to the extent --
21 so you mentioned that some of these disposal wells
22 are often, I guess, collocated; they are at the
23 same facility as an FST. But would you agree with
24 me that the treatment services that an FST and TRD
25 provide are not a functional substitute for

1 services provided by disposal wells?
2 A. The majority of treatment
3 services, yes.
4 46 Q. Okay. What kinds of
5 services would overlap?
6 A. You can, you can do
7 emulsion treatment at a water-disposal well.
8 There have been instances where we have taken
9 emulsion and separated it at a water-disposal
10 facility to save the customer trucking their water
11 all the way to a facility. There are small
12 examples like that.
13 47 Q. What other examples are
14 there?
15 A. That would probably be
16 the primary one.
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"hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP")."[103]

46. I consider the following three product markets for waste services:

(i) supply of waste processing and treatment services by TRDs;
(ii) disposal of solid oil and gas waste into industrial landfills; and
(iii) disposal of produced and waste water into water disposal wells owned by third-party waste service providers.

47. These three defined product markets are distinct for several reasons, and they largely do not overlap with one another. Due to federal and provincial regulations, as well as the technical capabilities of different facilities, customers have to dispose different types of waste at specific types of facilities.[104] Secure's representative Mr. Engel agreed that landfills, TRDs, and disposal wells handle different types of waste and are not generally substitutes for each other.[105] Therefore, TRD, landfill, and waste water disposal facilities are not functionally substitutable across all different types of waste. Water disposal wells are not able to accept solid waste and, conversely, industrial landfills cannot accept waste water. Neither of these types of facilities are substitutes for the services offered by TRDs, which handle wastes that require treatment to separate resalable oil from water or other fluids, and other types of waste processing that reduce the fluid's hazard level before it can be safely disposed.[106]

48. Company documents and transaction data confirm that each facility handles different and largely non-overlapping types of waste. For example, a Tervita document presented in **Exhibit 5** lists the types of wastes accepted by different facility types and shows that there is little overlap between TRD and

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[103] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 4.3.

[104] Secure's submission to the Competition Bureau Re: Proposed Transaction between Tervita and Newalta, May 17, 2018 [RBBA00011_000000002], pp. 3-4 for regulations. See also "Energy Services Division, Waste Processing," Tervita, June 1, 2021, TER_00001910, p. 10.

[105] Engel testimony, December 20, 2021, questions 37, 43, 45 ("Q. Okay, and so you can't dispose of produced waste water in a landfill, and you can't send contaminated soil down a disposal well. Right? A. Correct. In most cases, there are some disposal wells, or have been historically, that have disposed of solids, but, in general, they are not interchangable. ... Q. Mr. Engel, would you agree with me that services provided by FSTs or TRDs are not a functional substitute for services provided by landfills? A. Yes. ... Q ... But would you agree with me that the treatment services that an FST and TRD provide are not a functional substitute for services provided by disposal wells? A. The majority of treatment services, yes.").

[106] See Section 3.2.

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[106] See Section 3.2.

landfill facilities,[107] and **Exhibit 6** uses the Parties' transaction data to demonstrate minimal overlap across all three product markets.[108]

EXHIBIT 5
Wastes accepted by different types of facilities

	TRDs (Fluids)	Caverns (Fluids and Solids)	Landfills (Dry Solids)
Drilling	• Dirty Water from Rig Tanks • Spent Drill Mud	• Drill Mud • Cuttings	• Cuttings • Solids from Drill Mud
Completions	• Water Flowback • Acid Water Flowback • Hydrocarbon Flowback • Frac Sand Returns	• Frac Sand • Cement	• Frac Sand Returns • Cement
Production	• Emulsion • Produced Water • Sludges • Dry Oil / Condensate	• Oil Field Sludges • Waste Water • Produced Water • NORMs	• Produced Sand • Lime Waste • NORMs
Turnarounds	• Tank Bottoms • Treater Bottoms	• Tank Bottoms • Sludges	
Spills	• Oily Water	• Spill Material	• Contaminated Soil • Contaminated Wood
Abandonments			• Contaminated Soil from Pits • Contaminated Soil from Facilities

Water Oil Solids

Source: "Tervita at [redacted]" Tervita, August 19, 2019 [TEV00143218], p. 24

49. The Parties' transaction data confirm that each type of facility accepts different types of waste and there is minimal overlap between types of facilities. **Exhibit 6** lists the largest categories of waste types delivered to Tervita facilities by the facility types. In particular, it describes the types of wastes delivered to Tervita landfills, TRDs, and water disposal facilities according to

[107] There are no common waste categories in this chart that are accepted by both TRDs and landfills, with the exception of "frac sand returns" generated by the well-completion process. Note, however, that there is overlap in wastes accepted at TRDs and caverns or between caverns and landfills. For example, both TRDs and caverns accept produced water and sludge generated during production, as well as tank bottom wastes generated during turnaround. Both caverns and landfills accept cuttings generated during drilling, cement generated during completions, and NORM waste generated during production.

[108] Secure's submission to the Competition Bureau Re: Proposed Transaction between Tervita and Newalta, May 17, 2018 [RBBA00011_000000002], p. 5 ("Caverns are used primarily for difficult to treat solid and liquid wastes that are not suitable for Waste Management Facilities or Landfills. These types of waste include but are not limited to; high pH fluids, tight emulsions, NORMs, chemicals, and sludges."); Engel testimony, December 22, 2021 at p. 565, questions 1569-70. I understand that Tervita operates all but two caverns in the WCSB (White Swan and Plains Environmental own Atmore West and Melville caverns, respectively). The two competitor owned caverns are in rural locations. The competitor owned caverns are respectively 169 kilometers and 215 kilometers away from the nearest landfill owned by the Parties and respectively 33 kilometers and 214 kilometers away from the nearest waste water disposal facility owned by the Parties. See my workpapers. I understand that caverns are facilities that dispose of liquid and solid wastes that can be handled by landfills and waste water wells (see Section 3.2). In my analysis, caverns are considered to be potential sources of competition in all three product markets. See Workpaper 4.

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Production	• Emulsion • Produced Water • Sludges • Dry Oil / Condensate	• Oil Field Sludges • Waste Water • Produced Water • NORMs	• Produced Sand • Lime Waste • NORMs
Turnarounds	• Tank Bottoms • Treater Bottoms	• Tank Bottoms • Sludges	
Spills	• Oily Water	• Spill Material	• Contaminated Soil • Contaminated Wood
Abandonments			• Contaminated Soil from Pits • Contaminated Soil from Facilities

Water Oil Solids

Source: "Tervita at Teck," Tervita, August 19, 2019 [TEV00143218], p. 24

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Water Oil Solids

Source: "Tervita at [redacted] Tervita, August 19, 2019 [TEV00143218], p. 24

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the 2019 transaction data. Notably, most of the different types of waste can only be handled by one facility type, e.g., "waste-drill cuttings" and "waste-contaminated soil" is always handled by landfills, whereas "waste-drill fluids" and "waste-processing" is always handled by TRDs. Most TRDs have water disposal wells on site and are able to take in produced water and waste water.[109]

EXHIBIT 6
Waste services rendered by different types of facilities

	Service Group	Service Share of Total Revenue	Share of Revenue going to a... Landfill	TRD	Water Disposal Facility
1.	Waste - Contaminated Soil				
2.	Waste - Drill Cuttings				
3.	Waste - Lime Sludge				
4.	Treating - Emulsion				
5.	Treating - Water				
6.	Waste - Bitumen Waste Unit				
7.	Waste - Drill Fluids				
8.	Waste - Drilling Fluids				
9.	Waste - Ebd Water < 12.5 Ph				
10.	Waste - Hydrovac Waste				
11.	Waste - Processing				
12.	Waste - Solid Component				
13.	Waste - Solids				
14.	Waste - Water Component				
15.	Waste - Ho Processing				
16.	Waste - Sludge				
17.	Water - Waste Water				
18.	Waste - Frac Water				
19.	Water - Produced Water				
20.	Other Services				
	Total / Average[1]				

Source: Tervita Transaction Data; Secure Transaction data; Appendix; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7)

Note: Transactions were excluded from this analysis if the customer was Tervita; if they had blank, add-on service, or terminalling service types; if they are associated with a TCC, Hydrovac, or fractionation plant; or indicated credits (i.e. negative revenue). Moreover, this sample does not include transactions missing travel data due to unconvertable UWI or undefined travel routes (e.g. off-road terrain). One transaction was removed from "Waste - Drill Cuttings" due to misassigned units. In this table, the Water Disposal Facility category includes stand-alone facilities only, and do not include the TRDs with water disposal wells on site, which also dispose of produced water and waste water.

[1] Service type groups are generated based on specific service types.

[2] TRD includes cavern facilities.

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[109] I include produced and waste water disposal services rendered at TRDs as part of the product market that includes standalone water disposal facilities. Tervita, in particular, operates fewer standalone waste water disposal wells, but the TRD facilities dispose of large quantities of produced and waste water that could otherwise be sent to standalone water disposal wells (i.e., tickets in the Tervita transaction data that do not include processing or treatment services).

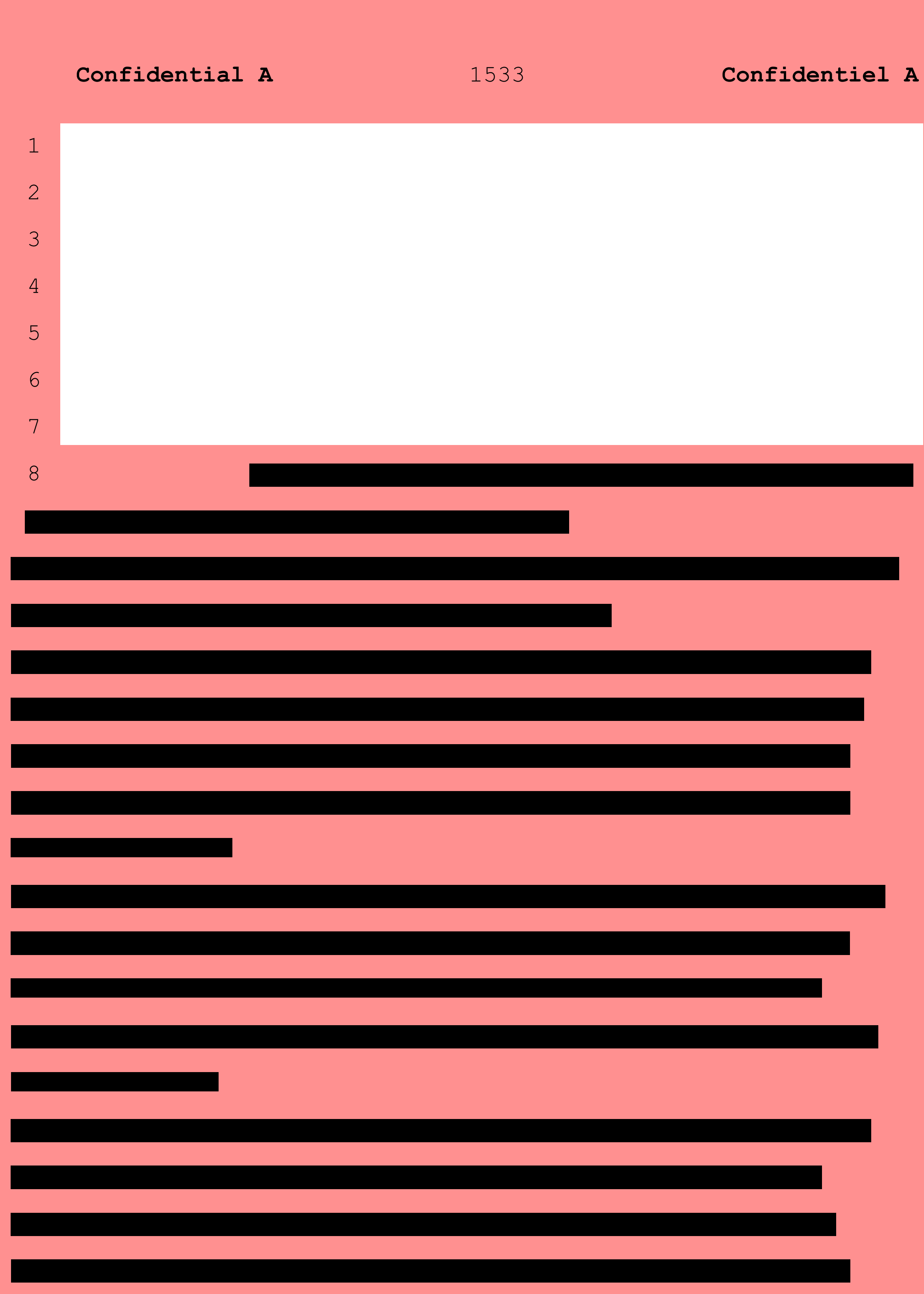
Typically, the Breton Facility accepts around 75% oil and gas waste and 25% industrial waste.

7. On May 10, 2017, RemedX received approval from Alberta Environment and Parks (the "**AEP**") for the construction, operation and reclamation of the Breton Class II industrial landfill (the "**Breton Landfill**"), located at the Breton Facility. The Breton landfill cannot accept hazardous waste, as it is a Class II landfill. It is also not permitted to accept NORMs. The majority of waste disposed of at the Breton facility is contaminated soils, either from reclamation activities or spills. The approval for RemedX's Breton landfill is attached to my witness statement as Exhibit "A". (https://avw.alberta.ca/pdf/00328574-00-00.pdf)

8. Separately, RemedX gave notice to the AEP on May 1, 2018 of its intention to operate a hydrovac waste facility at the site of the Breton Facility. This is an extension of the Breton Facility to accept non-hazardous hydrovac slurry from industrial and oilfield activities for solid-liquid phase separation. The notice related to this facility is attached to my witness statement as Exhibit "B". (https://avw.alberta.ca/pdf/00416669-00-00.pdf)

9. Prior to opening the Breton Landfill, RemedX had already been operating the soil treatment facility at the Breton Facility for 15 years. This facility can bio-treat soils with light-end hydrocarbon contamination. Biotreatment or bioremediation involves mixing the soil with water and allowing natural processing of the soil by organisms to treat the soil.

10. The bioremediation at RemedX's Breton Facility is not effective for soils contaminated with heavier hydrocarbons. Bioremediation is also expensive relative to disposal of the same material at a landfill (approximately double the cost). In RemedX's experience, customers for solid waste disposal are cost-sensitive and generally prefer the cheapest option; they typically choose to use landfills instead of bioremediating solid waste.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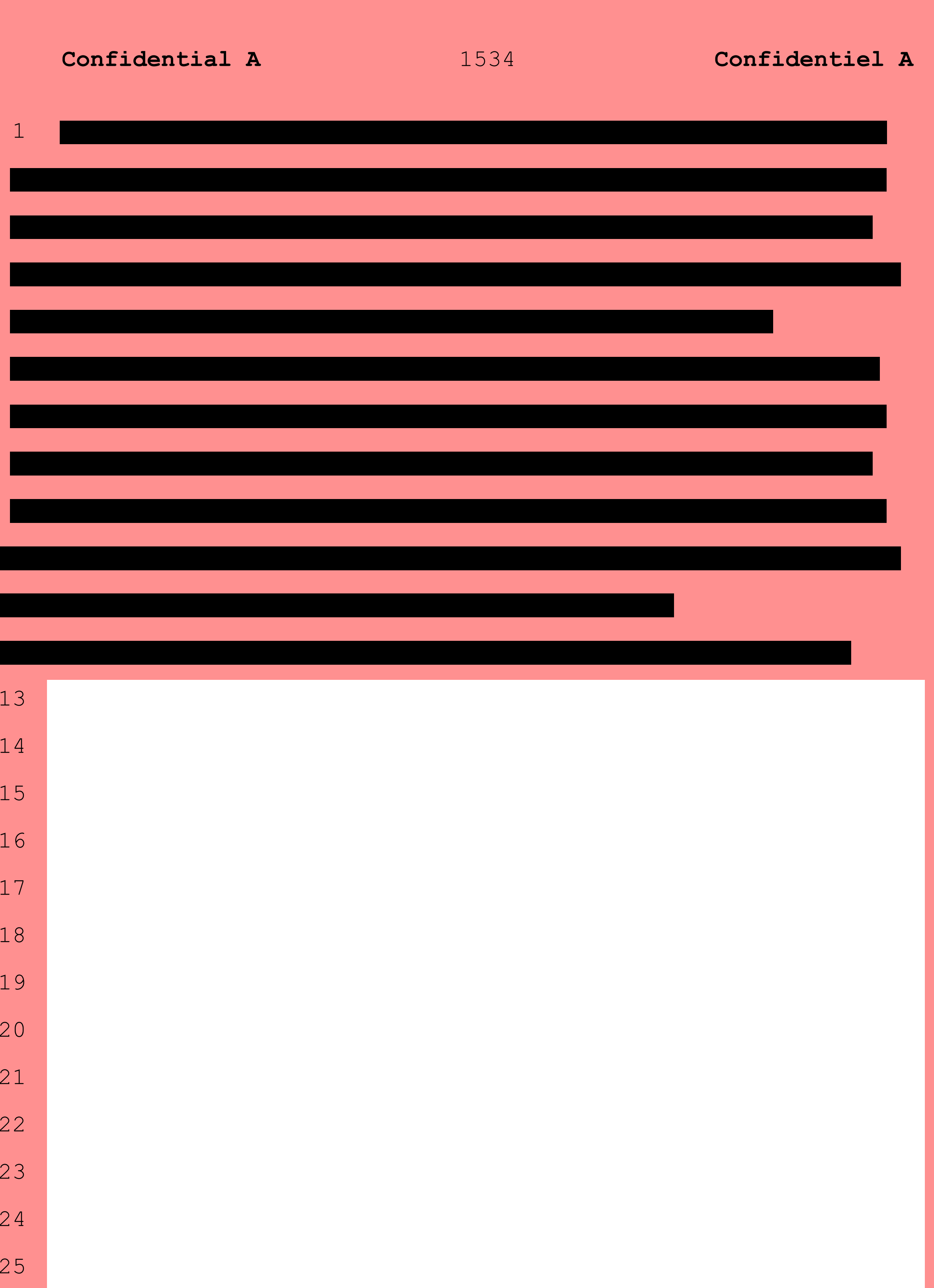
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11 95 Q. Now, if we can turn to
12 bioremediation, Mr. Engel, can bioremediation be
13 used to effectively treat solid waste contaminated
14 with heavy metals?
15 A. Not normally. There is
16 -- I know I have seen research in being able to
17 use bioremediation for reducing things like metals
18 and salts, but, normally, it is focused on
19 hydrocarbon contamination.
20 96 Q. Okay, so would you then
21 -- I guess from your answer it sounds like you
22 also agree that bioremediation cannot be used to
23 effectively treat solids contaminated with salts?
24 A. In most cases, but we
25 have -- I mean just by -- the bioremediation

1 portion of those facilities won't break down
2 salts, but these facilities are open air and, just
3 through the process of turning and having
4 precipitation and rain, you can flush the salts
5 out of soils which could then be collected and
6 disposed of down a disposal well.
7 97 Q. Can bioremediation be
8 used to effectively treat solids contaminated with
9 heavy end hydrocarbons?
10 A. Not from a standpoint
11 of -- not normally from a standpoint of breaking
12 down the heavy end hydrocarbons, but what also
13 happens at bioremediation sites is that amendments
14 are added to fluff up the solids and sometimes
15 through the addition of those amendments and other
16 soils the concentration of the -- say, a heavy end
17 that can't be broken down might be reduced to a
18 level that it now meets environmental standards.
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26. Obsidian provides water disposal to third parties where Obsidian is disposing of its own water related to its operations. However, Obsidian does not have dedicated disposal infrastructure for disposal of third-party water. Obsidian's current disposal revenue is relatively insignificant (approximately hundreds of dollars per month) and spread across hundreds of possible wells. These operations are considered normal course for a producer in the Western Canadian Sedimentary Basin and do not represent a significant water disposal business.

27. Obsidian does not own or operate any TRDs or landfills.

WASTE STORAGE

28. Obsidian does not store waste long term. Waste fluids, such as completions flowback and drilling fluids, cannot be economically stored for the long term, as tanks are typically rented as part of these operations. Soil remediation may include temporary storage atop impermeable membranes, but this is not a viable long term disposal method. Solid waste that must be disposed of due to a recent event must be moved with minimal delay.

BIOREMEDIATION

29. Bioremediation is a method of treating soil by using micro-organisms to reduce contamination. In some instances, this may provide an opportunity to treat/attenuate some forms of contamination, which may allow for additional options for the disposal of contaminated soil at a landfill.

30. For bioremediation to be effective, the soil cannot contain high levels of hydrocarbons, salt, or other contaminants. Given the typical contents of contaminated soil generated by Obsidian, bioremediation is not a replacement for disposing at a landfill. For example, it cannot address salt contamination

32. In general, longer-term storage of waste to wait for better waste disposal pricing is not an option, particularly for high volumes like those produced during completion of a well.

33. Murphy does not have its own landfills, nor does it have any plans to construct a landfill.

INFORMATION SUPPLIED TO THE COMPETITION BUREAU

34. In response to a request for information from the Bureau on July 21, 2021 (the "**RFI**"), Murphy supplied information relating to its waste disposal facilities on July 26, 2021. The RFI us attached to this Witness Statement as Exhibit "C".

35. The Record provided to the Commissioner include a list of Murphy's disposal wells as well as sales data relating to Murphy's disposal of other producers' water in Western Canada ("**Record**"). The Record is attached to my Witness Statement as Exhibit "D".

36. I reviewed the Record, and certified that the information supplied is, to the best of my knowledge and believe, correct and complete in all material respects. The certification is attached to this Witness Statement as Exhibit "E".

EFFECT OF THE MERGER

37. Should significant price increases for waste disposal occur, Murphy would be unlikely to scale back its production in affected areas as the majority of Murphy's water and emulsion processing of direct wellhead production occurs at in-field facilities through pipeline connection. Even where Murphy does require third-party waste processing services, Catapult Water

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and as of year-end 2021, these assets produce an average of 20,182, 3,152, 794, and 477 barrels of oil equivalent per day (BOE/day), totaling 24,605 BOE/day.

USE OF SERVICES FROM SECURE / TERVITA

8. Obsidian's oil and gas production activities require services provided by both Tervita and Secure, primarily for the disposal of waste products. These waste products are disposed of in appropriate and licensed facilities, as mandated by provincial regulations in Alberta.

9. When drilling an oil-extracting well, Obsidian uses water-based or oil-based drilling muds. These drilling muds and other contaminated solid wastes must typically be disposed of in a landfill that can accept such waste, as outlined by the Environmental Protection and Enhancement Act. Both Secure and the former Tervita operate landfills in proximity to Obsidian's operations.

10. When completing an oil-extracting well, Obsidian may produce large quantities of fracturing fluid and sand, reservoir water and oil, reservoir solids, and emulsions of oil and water that our normal production facilities cannot accommodate and are therefore transferred to waste treatment facilities. Contaminated solids typically must be disposed at a landfill. Contaminated fluid mixtures and emulsions are treated and separated into constituent water and oil fractions at Treatment Recovery and Disposal Facilities ("**TRDs**"). Separated water or unusable fluids disposed of in disposal wells licensed by the Alberta Energy Regulator ("**AER**") (per Directive 051) for such purpose. Saleable oil portions are then sold into regional transportation systems with a portion of proceeds commonly refunded to the producer. Secure, inclusive of formerly Tervita-owned facilities, operates a number of disposal wells and TRDs in proximity to Obsidian's production sites.

11. During routine well operation, produced oil and gas are sold into regional transportation systems. Produced water is reinjected into wells licensed for this

has over 60 sections of Montney, over 40 sections of Duvernay and has identified over 300 locations as supported by the Company's reserve evaluator. The company has recently completed a Q1 drilling campaign and expects Q2 volumes to exceed 2500Boe/d.

USE OF SERVICES FROM SECURE / TERVITA

6. Halo's oil and gas development and production activities generate certain waste products, including drilling waste, produced water, and flowback fluids. These liquid and solid wastes must be disposed of at an appropriate waste disposal facility in accordance with Alberta regulations. Some waste disposal companies like Secure also offer oil terminalling and marketing services at their Treatment, Recovery and Disposal facilities ("TRDs"), and Halo can deliver loads of clean oil to these facilities for sale without further processing.

7. Liquid waste products can generally be disposed of at an appropriately-classed disposal well, and solid wastes at a landfill licensed to accept that waste. Where the waste is an emulsion, or mixture of multiple substances, such as liquid waste, solid waste, and oil, the waste will generally be taken to a TRD operated by a waste disposal company. At TRDs the waste can be separated into its constituent parts. Liquid and solid waste will be disposed of at a well or landfill as appropriate, and any recovered oil will be marketed and sold.

8. Halo disposes of liquid wastes at and/or uses the oil terminalling services at a number of TRDs in the Fox Creek area owned by Secure, including the Fox Creek TRD at 13-36-062-20 W5M, the Fox Creek East TRD at 16-36-62-20-W5M, and the Fox Creek TRD at 12-36-062-20 W5. The first two facilities were owned by Tervita prior to Secure's acquisition of Tervita. Halo has been directing 96% of Halo's clean oil production to the Secure 12-36 TRD and 100% of Halo's produced water to Tervita TRD 13-16 & 16-36 until early

Key Areas of Agreement

- Product market definition: waste disposal services at TRDs, WDs, LFs.
- Geographic market definition: customer centric geographic markets, with customers' facility choice driven primarily by distance.
- Economic analysis predicts transaction is likely to result in some price effects and incremental hauling costs for some oil and gas producers.

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,

Murphy may truck waste generated in this area to a facility outside of Fox Creek.

18. Murphy receives corporate tipping fees from the disposal facilities across our operations, which represents base pricing for service. This typically occurs on an annual basis. In scenarios of large project-specific volumes requiring numerous trucks and extended disposal windows, Murphy may issue a project-specific request to the area's disposal facilities to negotiate tipping fees and to establish each disposal facility's capacity to meet demand. In Murphy's experience, companies may decrease pricing to more distant facilities to offset trucking costs.

19. Tipping fees may also be negotiated for projects such as for the disposal of waste collected in cleaning up a spill or decommissioning an inactive oil well.

DISPOSAL OF WASTE TO THIRD PARTIES

20. Through 2020 and the first 3 quarters of 2021, Murphy hauled solid waste to several different regional Class II landfills, including Secure – Fox Creek, Secure – Saddle Hills and Tervita – South Wapiti. Corporate tipping fees were used, facilities chosen for solids disposal were those closest to Murphy's projects.

21. For waste requiring processing at a FST or similar facility, including water waste, Murphy has historically requested project-specific pricing proposals from Secure – Fox Creek and Catapult Water Midstream – Fox Creek. These two facilities have been chosen as they were the closest to Murphy's projects. Preferential pricing was established with Catapult Water Midstream – Fox Creek, and waste water was hauled for disposal there.

purpose, commonly for the purposes of reservoir pressure maintenance as part of an AER-approved waterflooding project. Over time, tanks and vessels that treat such production prior to sale can collect residuals and solids (sludge) the Company does not have the capability of handling ourselves. It is collected and disposed of at appropriate treatment facilities and/or landfills.

12. Obsidian has entered into agreements with Secure that involve the procurement, trucking, and injection, and sale of butane as an additive to our produced oil as a means of maximizing revenue from our facilities while remaining within shipper pipeline specifications.

13. When an unplanned release of reservoir fluids or chemicals occurs from a well, pipeline, or facility, Obsidian acts to minimize the impact of the event through timely remediation. These releases may result from a failed wellhead, pipeline, vessel, or tank.

14. As part of decommissioning activity for a well at the end of its function life, Obsidian may have to dispose of materials such reservoir or completions fluids (commonly brine) and/or contaminated soils as part of site remediation and reclamation. Discovery of historical releases may also occur during the decommissioning of a production site that is no longer in use.

PRICING

15. Pricing and business terms are established through negotiation. Tipping fees and trucking rates (in cases when they offer trucking) are usually negotiated annually. As with most services, supply and market demand pressures will impact the fees that Obsidian is required to pay.

TRANSPORTATION TO DISPOSAL FACILITIES

16. Obsidian's waste products are typically transported to disposal facilities by truck. Trucking expenses are significant relative to the overall cost of disposal, often comparable to fees at the disposal facilities themselves. For any load of

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waste, trucking costs are calculated and charged either as rates per kilometer travelled, or per hour spent travelling. For that reason, distances from a waste-producing site to available disposal facilities may be a significant factor in selecting a disposal facility.

17. So long as each facility is appropriately permitted to accept the waste being disposed, there is little differentiation between facilities for the shipper. Obsidian therefore typically uses whichever facility results in the lowest total cost, calculated as the sum of transportation costs plus fees charged at the disposal facility per unit of waste. The latter are commonly known as tipping fees.

THIRD-PARTY DISPOSAL FACILITIES

18. From its Peace River production area, Obsidian must dispose of drilling fluids, workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

19. From its Cardium production area, Obsidian must dispose of drilling fluids, completion fluids and flowback volumes, workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

20. From its Alberta Viking production area, Obsidian must dispose of workover fluids, untreatable production tank emulsions and residues, and any contaminated soil from unplanned spills or releases or from ongoing reclamation and remediation projects.

21. From its Legacy production area, Obsidian must dispose of workover fluids, untreatable production tank emulsions and residues, and any contaminated

36. The OWA also pays to truck the waste from the generating site to the disposal facility so we will also seek quotes on the trucking costs from the orphan site to the disposal facility from transportation companies. Depending on the location of the generating site, trucking costs can be as much or more than the cost to dispose of the waste in the facility. The OWA will choose the disposal facility that has the cheapest price of the combined transportation and disposal costs.

37. Typically there is more time available to make a decision on which waste facility to use when dealing with solid waste going to a landfill versus a liquid waste going to a TRD. As such, the OWA can negotiate improved rates when dealing with a large landfill job as demonstrated above with the Debolt job.

38. Pricing for the disposal of oil and gas waste is transparent. Waste disposal companies like Secure and the former Tervita must track where the waste being disposed of in their facilities is coming from (i.e., the generating site). As a result, they are able to determine how much it would cost to truck waste to the next closest facility. This allows them to adjust their tipping fees so that the total cost of disposal is still cheaper than going to the next closest facility.

39. The OWA does not own any of its own landfills or TRDs, nor does it have plans to build any. The regulatory process to license and construct new landfills is difficult, expensive and time consuming. In my previous role at Penn West, we did consider the option of building our own landfill and TRD but made a similar decision to not pursue this option due to the capital requirements and lengthy regulatory requirements.

IMPACT OF THE MERGER

40. Secure, and formerly Tervita, facilities are located in most of the areas where the OWA has orphan sites with the exception of landfills in the southern part of Alberta. The OWA has benefited from competition between Secure and

26. Further, PECL generates a second type of liquid waste incidental to its field operations in the form of miscellaneous waste fluids. These fluids, which result from a variety of process is removed from tank bottoms and sumps via vacuum truck and is comprised of an amalgam of saline water, emulsion (oil suspended in water), oily sludge and the chemicals using in various oilfield processes. The combined fluid is partially treated via separation before disposed of in various waste streams including injection into water disposal wells and sequestration of solids in landfill.

27. In each case both solid and liquid waste must be disposed of in accordance with applicable provincial regulations.

28. In the Province of British Columbia contaminated solid oilfield waste was must be disposed of in a "secure landfill". Produced water must be disposed of in a licensed water disposal well.

29. In the Province of Alberta contaminated solid oilfield was must be disposed of in a "Class II landfill".

30. Owing to the broad geographic distribution of company operations, Oilfield waste is transported by semi trailer transport truck from its point of origin at a well site to the point of final disposal.

31. The cost of truck transport constitutes a significant portion of the total disposal cost and oilfield industry participants consistently seek out the closest disposal facility to minimize this expense.

32. In the calendar year 2021, the fifty-four (54) new natural gas wells drilled by PECL generated [redacted] of solid waste or approximately 830 tons per well drilled.

33. Based on the projected drilling activity referenced in paragraph 14 above, PECL estimates that future drilling over the next five years will generate a total

radioactive material ("NORMs") must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

11. When choosing a disposal site, the primary consideration is total disposal cost, inclusive of transportation. Waste is typically transported by truck from its source to an appropriate disposal site of our choosing. The costs of transportation are significant, such that they often amount to more than the fees paid to a disposal site operator for a given load of waste. For example, trucks can usually carry approximately 35 to 40 tonnes of waste and trucking prices are typically in the range of $180 per hour. For that reason, among others including carbon footprint, driving distance from the waste's source to potential disposal site is a central consideration when choosing a site.

12. Availability and capacity at nearby disposal sites is also a factor impacting this choice. Sometimes landfills are full or closed, and this can require travelling further to access alternative landfills. Disposal wells can also be capacity constrained with lengthy wait times, particularly in periods with lots of drilling.

13. Transportation costs tend to be measured in time, as trucking companies will quote a price per hour. Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.

THIRD PARTY WASTE DISPOSAL

14. TAQA North's options for landfills include Secure and formerly Tervita, as described above. Typically ████ of TAQA North's waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North's landfillable waste was taken to a Class II or equivalent site.

11. In RemedX's experience, customers of landfills are generally concerned with how close they are to the landfill, and ease of transportation, when choosing where to dispose of their waste. Transportation costs are sometimes two to three times higher than the cost for disposal at the landfill. Typically, waste disposed of at the Breton Landfill comes from within an hour's drive of the Breton Facility. Transportation distance is such a significant factor that at times waste disposal companies like Secure may send waste to their competitor's landfills rather than their own if the competing landfill is closer to the waste generation site.

12. Prices for disposal at a landfill can be based on customer-specific factors. For example, customers who dispose of higher volumes of waste typically get volume discounts. Often RemedX is contacted by environmental services consultants who are looking for a waste disposal site for their client.

13. RemedX views the Breton Landfill as competing with Secure and Tervita landfills, including Secure's Pembina landfill, Secure/Tervita's Willisden Green landfill, municipal landfills, etc. in the area of the Breton Facility. Municipal landfills near the Breton Facility will, at times, accept industrial waste. While municipal landfills sometimes have lower waste disposal costs, in general these municipal landfills cannot accept all of the waste types that can be disposed of at a Class II landfill and there may be greater environmental risk in disposal at a municipal landfill. In RemedX's experience, Class II industrial landfills are generally constructed and regulated to a higher standard.

LANDFILL DEVELOPMENT AND CONSTRUCTION

14. RemedX spent approximately $6 million building the Breton Landfill, and the landfill construction process took approximately two years. The Breton Landfill development was quicker than the typical landfill development process because RemedX had already owned its soil treatment facility at the same site

Energy's deliveries. Some deliveries are made to smaller players such as Catapult and Voda Midstream. LB Energy has also hauled waste to Dragos in the past; however, the company appears to have gone out of business. LB Energy has very rarely hauled produced water or wastewater to another producer's disposal wells.

CHOICE OF DISPOSAL SITE

12. Typically, LB Energy's role is limited to picking up the waste from the producer's site and dropping it off to the waste disposal site. Producers select the facility to which the product is hauled approximately 75% of the time, and may sometimes have volume commitments in their own contracts with waste disposal companies that dictate where their waste is hauled. However, in some instances, LB Energy is asked to find the best disposal site from a logistical perspective, or is required to choose a different disposal site if the producer's preferred site is not available.

13. Where LB Energy is asked to find a disposal site, disposal fees, wait times at the facility, and distance from the producer's location to the facility are important factors in selecting a facility. As trucking costs are often higher than disposal fees, distance and wait times are significant factors. A rate for any additional wait time is usually built into LB Energy's contracts with the producers. In other words, once LB Energy's trucks get to the facility, if there are additional wait times, the producer is charged on a per hour basis for that time. In LB Energy's experience, some facilities have wait times in excess of 6 hours when they are busy.

14. The vast majority of loads will simply be dropped by LB Energy without further discussion. However, sometimes there are disputes about the quality or characteristics of the load, including its volume measurement which is measured using a micro motion metering system, but calibrations can be inaccurate. For example, if a TRD thinks that a load of oil requires further

materials. SHARP's work often involves finding landfill disposal options for contaminated soils.

11. In SHARP's experience, the cost of waste disposal is a major factor in determining which disposal option is selected. The cost to dispose of waste includes the tipping fee charged by the landfill, and the cost to transport the waste to the landfill. Trucking distance to the landfill is therefore a significant consideration when selecting a disposal site. The distance and route of the truck may also be considered, as there are potential risks from transporting waste further or on lower-quality roads.

12. Bioremediation of complex contaminated soils at sites SHARP is contracted to remediate is not generally an option. This is because bioremediation is not typically possible where the soil have been contaminated with metals, salts, or heavy hydrocarbons. In addition, biotreatment typically requires warmer temperatures, so the temperature and climate in Western Canada limits which treatment options are effective.

INTERACTIONS WITH SECURE AND TERVITA

13. When SHARP has a client like the OWA requiring waste disposal, SHARP will approach waste disposal companies like Secure and, formerly, Tervita, to ask for quotes for the disposal of that volume of waste in a particular location. In SHARP's experience, waste disposal is a competitive process when SHARP has other waste disposal options within any given area. Waste receivers will offer lower prices in their bids to remain competitive.

14. In one particular example in October 2020, SHARP was tasked with finding waste disposal from a site the OWA was remediating near DeBolt Alberta, at approximately LSD 16-16-70-26-W5 (the "**Apex Site**"). The Apex Site had several thousand tonnes of highly-contaminated solids that would require disposal at a Class II landfill.

August 2021 when more competitive pricing was secured at a competitive water disposal facility in the area.

9. With respect to solid waste, Halo uses Secure's Fox Creek Landfill at 06-32-063-20 W5 to dispose of its drilling waste, and has also used the Fox Creek landfill formerly owned by Tervita at 03-29-062-20 W5M. These are Class II landfills licensed to accept a variety of solid oilfield waste products. Halo disposes of 100% of its solid waste materials between the two facilities.

CHOICE OF DISPOSAL SITE

10. When Halo is choosing a disposal site for its waste products, getting the best value in terms of net cost is generally our goal. We would consider trucking costs, distance, and disposal fees in selecting a disposal site.

11. As transportation costs to the disposal site can be significant, distance is an important factor. However, some facilities may have lengthy wait times for dropping off loads of waste, such that it may be better value to truck the waste to a more distant facility when those wait times are taken into account. Water disposal facility capacity demand can be the highest in winter when drilling and completion/fracturing flowback activities are at their peak.

12. There are other factors that can influence the choice of disposal site as well, including perks (such as meals) for drivers dropping off waste, and how the facility evaluates our products.

13. The costs of disposal are dependent on the type of waste. For example it is significantly more expensive to dispose of flowback water than produced water.

14. If Halo delivers a load of oil to a TRD that provides terminalling services, the waste disposal company may require Halo to pay for emulsion treating services if it tests the oil and finds that there are other fluids, typically water,

present (referred to as "cutting wet"). It is preferable for the oil to "cut clean" and be accepted without further processing.

15. In my experience, there can be disagreement about whether a load of oil cuts clean, and some waste disposal operators may be more likely to require further treating or processing of the oil. How a company has handled these disagreements over testing is an aspect of service that Halo considers when choosing a disposal site.

DISPOSAL OF WASTE TO THIRD PARTIES

16. Apart from the Secure facilities described above, Halo has also disposed of produced water and liquid waste at Catapult's Fox Creek disposal well. Halo started splitting produced water disposal loads between the Catapult Fox Creek Facility and the Tervita East 16-36 TRD on August 7, 2021 as a result of securing more competitive pricing from Catapult.

17. In the past, there was also a company called Dragos providing water disposal in the area of Halo's operations. However, more recently they do not appear to be operating and their facilities are inactive.

18. With respect to solid waste, Halo has not generally used more distant landfills than the Fox Creek landfills, as they are much further away from Halo's operations. Secure owns the only landfills in Fox Creek. Largely there are no other liquid or solid waste disposal facilities outside the Fox Creek area, not withstanding oil & gas operators' privately owned facilities, that would be an alternative because of the cost of trucking time to facilities outside the area. Halo has in the past diverted the odd load to Tervita Valleyview North of Fox Creek when there has been facility outages or lineups at Fox Creek.

EFFECT OF THE MERGER

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,

Murphy may truck waste generated in this area to a facility outside of Fox Creek.

18. Murphy receives corporate tipping fees from the disposal facilities across our operations, which represents base pricing for service. This typically occurs on an annual basis. In scenarios of large project-specific volumes requiring numerous trucks and extended disposal windows, Murphy may issue a project-specific request to the area's disposal facilities to negotiate tipping fees and to establish each disposal facility's capacity to meet demand. In Murphy's experience, companies may decrease pricing to more distant facilities to offset trucking costs.

19. Tipping fees may also be negotiated for projects such as for the disposal of waste collected in cleaning up a spill or decommissioning an inactive oil well.

DISPOSAL OF WASTE TO THIRD PARTIES

20. Through 2020 and the first 3 quarters of 2021, Murphy hauled solid waste to several different regional Class II landfills, including Secure – Fox Creek, Secure – Saddle Hills and Tervita – South Wapiti. Corporate tipping fees were used, facilities chosen for solids disposal were those closest to Murphy's projects.

21. For waste requiring processing at a FST or similar facility, including water waste, Murphy has historically requested project-specific pricing proposals from Secure – Fox Creek and Catapult Water Midstream – Fox Creek. These two facilities have been chosen as they were the closest to Murphy's projects. Preferential pricing was established with Catapult Water Midstream – Fox Creek, and waste water was hauled for disposal there.

radioactive material ("NORMs") must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

11. When choosing a disposal site, the primary consideration is total disposal cost, inclusive of transportation. Waste is typically transported by truck from its source to an appropriate disposal site of our choosing. The costs of transportation are significant, such that they often amount to more than the fees paid to a disposal site operator for a given load of waste. For example, trucks can usually carry approximately 35 to 40 tonnes of waste and trucking prices are typically in the range of $180 per hour. For that reason, among others including carbon footprint, driving distance from the waste's source to potential disposal site is a central consideration when choosing a site.

12. Availability and capacity at nearby disposal sites is also a factor impacting this choice. Sometimes landfills are full or closed, and this can require travelling further to access alternative landfills. Disposal wells can also be capacity constrained with lengthy wait times, particularly in periods with lots of drilling.

13. Transportation costs tend to be measured in time, as trucking companies will quote a price per hour. Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.

THIRD PARTY WASTE DISPOSAL

14. TAQA North's options for landfills include Secure and formerly Tervita, as described above. Typically ████ of TAQA North's waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North's landfillable waste was taken to a Class II or equivalent site.

13)

CHOICE OF DISPOSAL SITE

14) CNRL develops disposal plans for waste generated in its operations based on the type and volume of waste streams generated at a particular location, regulatory requirements (e.g. Alberta Energy Regulator ("**AER**") requirements), and the type and proximity of waste disposal facilities available in the relevant area where disposal is required.

15) In deciding which facility to use, CNRL considers the total cost of disposal, which is the cost of trucking plus tipping fees at the applicable waste disposal facility. Trucking costs include time required for loading, unloading and standby/wait times. Trucking costs vary due to a number of factors such as truck availability, fuel and maintenance costs and road conditions (amongst other things) but typically range from [redacted] in western Canada.

Accordingly, CNRL typically gets quotes from trucking companies, as needed for specific waste disposal requirements. As a result, the distance to the waste disposal facility, wait times at the facility, the transportation route and road conditions to and from a waste disposal facility can have a significant impact on CNRL's transportation costs. For example, trucks can typically travel faster on higher grade highways than on gravel roads. All of these factors impact CNRL's cost of waste disposal and minimizing the trucking time and distances required to haul the waste is necessary to control CNRL's overall waste disposal costs.

16) Capacity constraints at different waste disposal facilities can be a significant factor in choice of which waste disposal facility CNRL will use. Capacity at different waste disposal facilities varies due to capacity of the well/zone and the number of risers / disposal bays available for trucks unloading. When CNRL is undertaking drilling / completions at a particular location, CNRL's practice is to contact waste disposal facilities up to a month in advance of its expected disposal timeframe with information about its anticipated volume and timing requirements. However, even with advanced planning, trucks may be turned away at the time of disposal because the facility is at capacity. [redacted]

DISPOSAL OF WASTE TO THIRD PARTIES

17) CNRL can take some of its waste to other third party waste disposal companies. Some examples are: [redacted]

18) However, as noted above, the facilities now owned by Secure provide the vast majority of CNRL's waste disposal services. Less than [redacted] of CNRL's waste

27 In determining the product dimensions of the market, the first step is to identify the product or products with respect to which, prior to the merger, the two firms were competitors. The second step is to ask whether there are any close substitutes to that product to which consumers could easily switch if prices were raised (an indication of demand elasticity). If two products appear to be close substitutes when both are sold at marginal cost, then the two should be included in the same product market.

28 At the time of the acquisition, Rothsay (Moorefield) rendered red meat by-products, blood, deadstock, poultry offal and feathers. Orenco rendered red meat by-products, blood, deadstock and grease but not poultry offal or feathers. Rothsay (Toronto) rendered the same kind of materials as Orenco.

29 The grease rendered by both Rothsay (Toronto) and Orenco is in general "restaurant grease" which has been used for deep frying certain foods. Although both Rothsay (Toronto) and Orenco processed grease it is processed differently from other renderable materials, usually in different equipment, and it is collected independently of the other renderable materials. Rothsay (Moorefield) has not and does not render grease. Little evidence was led with respect to grease or as to how the merger affected competition in this segment of the industry. Thus, it has not been established that it should be considered as part of the relevant product market.

30 The Director has not suggested that poultry offal and feathers should be included in the relevant market. Orenco did not process such material before the merger. It lacked the equipment required to process poultry feathers. Special equipment is not required to render poultry offal. While there is some documentation which indicates that prior to the merger Orenco was planning to acquire equipment to enable it to process poultry feathers, it has not been suggested by the Director that the merger would lead to any substantial lessening of competition with respect to rendering services for producers of that material.

31 Prior to the acquisition approximately 30% of the material rendered by Orenco came from affiliated Canada Packers Inc. operations. The remaining 70% was acquired from non-captive sources. Approximately 14% of Rothsay's material came from affiliated Maple Leaf Mills Limited operations. The remaining 86% was acquired from non-captive sources. There is no dispute that captive materials are not included in the product dimension of the relevant market.

32 It is clear that there are few "product substitutes", that is, alternatives available to the consumer of rendering services (demand elasticity is low). Some deadstock presumably might be buried but this is not a viable option for a significant amount of renderable material. [12] Landfill-site regulations often prohibit the disposal of renderable material at those locations and, as noted above, slaughterhouses require that renderable materials be removed on a daily basis.

33 While conceptually it would seem that supply elasticity with respect to the product dimensions of the market should also be included in defining the market, these factors are often considered when assessing whether the merger is likely to lessen competition substantially in the relevant market. Supply elasticity would be high and market power therefore would not likely be significant if other firms could immediately respond to a price rise by flooding the market with the relevant product either because they have excess capacity or because they can easily switch their production facilities to produce the relevant product. Those factors will be considered when the likelihood of substantial lessening of competition is assessed. [13]

34 The Tribunal accepts the Director's contention that the product dimension of the relevant market is the provision of rendering services for non-captive red meat renderable material which includes deadstock materials and blood.

B. Geographic Dimension (Geographic Market)

35 Determining the geographic dimensions of the relevant market is similar to determining the product dimensions; one asks whether there is a geographic area within which the merged firm either alone or in concert with others is likely to have market power. This requires identifying some area such that the merged firm has an advantage based on geographic considerations over firms not inside that area. Frequently this advantage results from transportation costs but often other factors may also be relevant, such as differing labour costs in the two areas or governmental restrictions and regulations. [14]

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one geographic area respond or have responded to changes in the price, packaging or servicing of the relevant product in another geographic area. The extent to which merging parties and other sellers take distant sellers into account in their business plans, marketing strategies and other documentation can also be a useful indicator for geographic market definition.

4.20 Various functional indicators can assist in determining whether geographic areas are considered to be substitutes, including particular characteristics of the product, switching costs, transportation costs, price relationships and relative price levels, shipment patterns and foreign competition.

4.21 Several price and non-price factors could affect buyers' ability or willingness to consider distant options. Non-price factors include the fragility or perishability of the relevant product, convenience, frequency of delivery, and the reliability of service or delivery.

4.22 As with product market definition, high switching costs may discourage buyers from substituting between geographic areas. In addition, transportation costs play a central role in defining the geographic scope of relevant markets because they directly affect price. For example, when the price of the relevant product in a distant area plus the cost of transporting it to a candidate geographic market exceeds the price in the candidate market including a SSNIP, the relevant market does not generally include the products of sellers located in the distant area.[23]

4.23 Evidence that prices in a distant area have historically either exceeded or been lower than prices in the candidate geographic market by more than the transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs.[24] However, before reaching this conclusion, the Bureau determines whether a SSNIP in the candidate geographic market may change the pricing differential to the point that distant sellers may be able to constrain a SSNIP.

4.24 Significant shipments of the relevant product from a distant area into an area in which a price increase is being postulated may suggest that the distant area is in the relevant geographic market. However, pre-merger shipment patterns do not, by themselves, establish the constraining effect of distant sellers and may be insufficient to justify broadening the geographic market. The Bureau undertakes further analysis to determine whether shipments from the distant area would make the SSNIP unprofitable.

23 However, distant firms that have excess capacity may in certain circumstances be willing to ship to another market, even when the net price received is less than the price in their own market.

24 For example, the existence of tariffs or other trade-related factors may create price differentials.

31. Due to the high transportation costs, waste service operations are local in nature. Based on my analysis of Tervita and Secure's transaction data, the average driving distance between waste service customers and Tervita landfill facilities is 95 kilometers, and that distance is 104 kilometers for Secure's landfill customers.[65] For TRDs, the average travel distances for Tervita and Secure TRD customers are 74 and 71 kilometers, respectively. For water disposal wells, the average travel distances of Tervita and Secure customers are 74 and 66 kilometers, respectively. **Exhibit 4** summarizes these distances between waste service customers and Tervita and Secure facility locations for TRDs, landfills, and water disposal wells.[66]

[65] Throughout my report, I use the transaction-level and facilities data from the parties and focus my analyses on transactions that occurred in 2019. The Secure sales data describes the transactions for the midstream segment of the business and includes information about the customer identity, customer location, the types of waste, and the pricing (17 - Sales and SES Truck Tickets Data (Midstream).txt [RBEJ00002_000000007]). The Secure facilities data describes the facility name, location, operational status, and a code for facility type, e.g., whether it is a full-service terminal or landfill (Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306). The Tervita sales data also describes similar information, and I focus on transaction specific to the energy services (energy_services_qfaim_sales_2017_2021.txt [RBEK00004_000000048]) and waste services (waste_services_qfaim_sales_2019_2020.txt [RBEK00004_000000004]). Similarly, the Tervita facilities data describes the facility name, location, type, and operational status (facilities_list.xlsx [RBEK00004_000000068]). I use the customer and facility locations to calculate the driving distances between them with the GridAtlas and ArcGIS software. See Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; SES0030460.html; SES0030461.docx; PROTECTED & CONFIDENTIAL Waste_Services_HMM_Sales_2018_2021.txt: RBEK00004_000000084.

[66] Note that TRD facilities include deep well disposal facilities, so the distances between TRD customers and facilities are also summarized in the distances between well water customers and facilities (similarly Secure's FST and customer distances are also included in the well water customers). See, e.g., Engel testimony, December 20, 2021, p. 153, questions 427-428 ("Q. Okay. And those five FSTs also have water disposal wells. Is that correct? A. That is correct. Q. Okay. There are really 10 disposal wells, then? A. Yes.").

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12 121 Q. Does Secure agree that it
13 can and does adjust the tipping fees it may charge
14 a customer based on the location the waste is
15 coming from?
16 A. That is the one of the
17 things that is considered, among many.
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36. The OWA also pays to truck the waste from the generating site to the disposal facility so we will also seek quotes on the trucking costs from the orphan site to the disposal facility from transportation companies. Depending on the location of the generating site, trucking costs can be as much or more than the cost to dispose of the waste in the facility. The OWA will choose the disposal facility that has the cheapest price of the combined transportation and disposal costs.

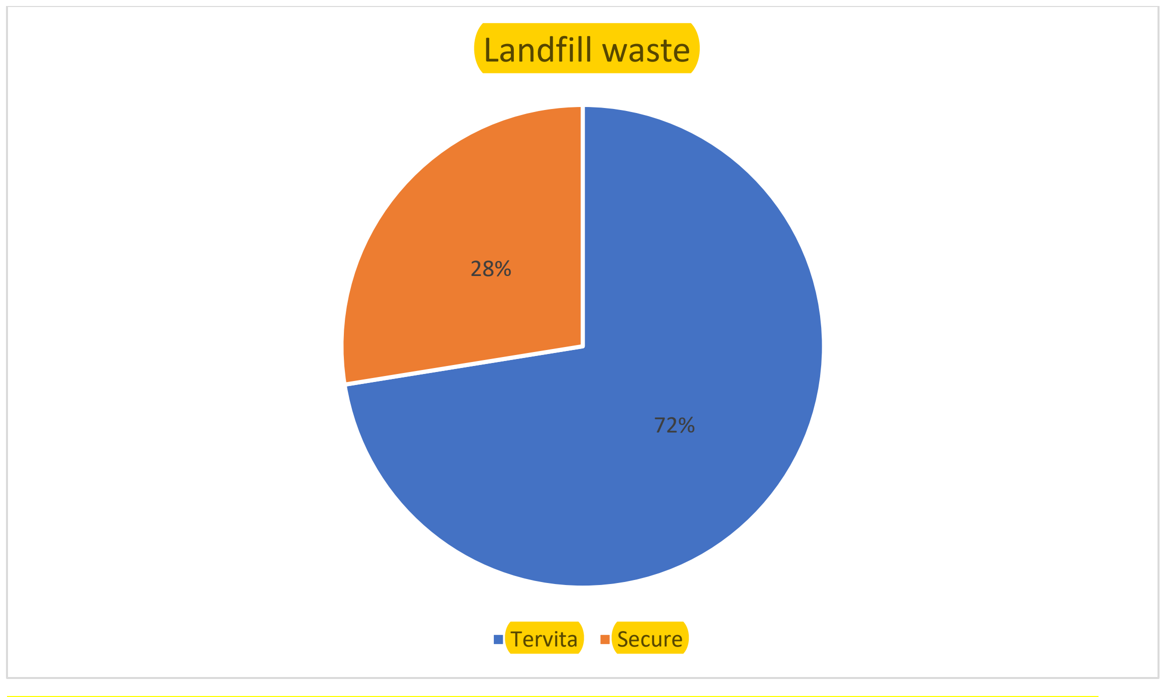
37. Typically there is more time available to make a decision on which waste facility to use when dealing with solid waste going to a landfill versus a liquid waste going to a TRD. As such, the OWA can negotiate improved rates when dealing with a large landfill job as demonstrated above with the Debolt job.

38. Pricing for the disposal of oil and gas waste is transparent. Waste disposal companies like Secure and the former Tervita must track where the waste being disposed of in their facilities is coming from (i.e., the generating site). As a result, they are able to determine how much it would cost to truck waste to the next closest facility. This allows them to adjust their tipping fees so that the total cost of disposal is still cheaper than going to the next closest facility.

39. The OWA does not own any of its own landfills or TRDs, nor does it have plans to build any. The regulatory process to license and construct new landfills is difficult, expensive and time consuming. In my previous role at Penn West, we did consider the option of building our own landfill and TRD but made a similar decision to not pursue this option due to the capital requirements and lengthy regulatory requirements.

IMPACT OF THE MERGER

40. Secure, and formerly Tervita, facilities are located in most of the areas where the OWA has orphan sites with the exception of landfills in the southern part of Alberta. The OWA has benefited from competition between Secure and



24. It is typically not possible to obtain a substantial discount by leveraging the fact that Chevron is a customer in other areas.

COMPANY'S DISPOSAL FACILITIES

25. Currently, Chevron does not operate any of its own TRDs or landfills. Chevron's primary business is oil and gas exploration and it does not have plans to build any such facilities. There are many factors that make it difficult to internalize this type of business. For example, receiving the necessary permits to begin creation of a landfill can take between 24-36 months, even just finding a geologically suitable location can be very difficult, and initial

EXHIBIT 4
Distribution of travel distance between customers and Secure and Tervita facilities

	Company	Product Market[1]	Number of Transactions[2]	Number of Associated Customer Wells	Average Travel Distance (km)	Median Travel Distance (km)	90th Percentile Travel Distance (km)
1.	Secure	Landfill	38,074				
2.	Secure	TRD	211,928				
3.	Secure	Water, TRD	157,780				
4.	Tervita	Landfill	71,413				
5.	Tervita	TRD	292,312				
6.	Tervita	Water, TRD	134,188				

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7); GridAtlas; ArcGIS

Note: Tervita transactions were excluded from this analysis if the customer was Tervita; if they had blank, most add-on services, or terminalling service types; if they are associated with a TCC, Hydrovac, or fractionation plant; or indicated credits (i.e. negative revenue). Secure transactions were excluded from this analysis if the customer was Secure; if they had blank, industrial landfill, terminalling, or "Other Revenue" general ledger names; or indicated credits (i.e. negative revenue). Moreover, this sample does not include transactions missing travel data due to unconvertable UWI or undefined travel routes (e.g. off-road terrain).
[1] TRDs are listed with the water disposal wells since TRDs often have water disposal wells on site that can dispose of waste and produced water directly without any processing or treatment services. The summary statistics for the "water, TRD" product market only include TRD transactions for direct water disposal services akin to the services provided by standalone water disposal wells.
[2] Statistics are weighted by the number of transactions.

32. Moreover, my findings are consistent with the information Tervita and Newalta provided to the Bureau during their 2018 transaction. According to Tervita and Newalta, "treatment of oilfield waste and its disposal is regional in nature... Typically, the majority of customers will be located within [redacted] km of a treatment facility..."[67]

3.4. Industry pricing practices

33. Waste service providers, such as the Parties, charge customers disposal fees for their services. The presence and proximity of other competitors, distance between customers and the facility, master service agreements, and volume commitments, among other factors, determine how disposal fees are set. In other words, the Parties can and do price discriminate between customers (i.e., charge different customers different prices) depending on locations and local

[67] Tervita and Newalta further explained that "distance between customers and facilities "varies considerably depending on the local topography and infrastructure (e.g., rivers, mountains, roads, density of production activity), and whether the customer has solid waste or waste water to process. Customers are generally more willing to transport solids farther than water, in part because there are more options available to dispose of waste water. In more remote locations, customers are more willing to transport waste upwards of [redacted] km if necessary to receive service." Letter from Kevin Ackhurst (Norton Rose Fulbright) to Commissioner John Pecman (Competition Bureau of Canada), March 1, 2018 [RBBA00008_000000023], p. 14.

competitive conditions. The Parties' practice of price discrimination is reflected in the Parties' internal documents and their transaction-level sales data.

34. Tervita's internal documents show that its pricing varies across its facilities and local competition is a consideration in pricing decisions. For example, an internal pricing discussion document indicates that Tervita considers "market rate and strategy" at each facility separately.[68] Other pricing strategy documents include facility-level pricing information, including average rates quoted for different service types and the win/loss records for them.[69]

35. Regarding local market conditions, a Tervita presentation about market rates shows that "competition" and "competitive dynamics" are factors that Tervita considers when deciding to adjust its rates,[70] and a Tervita competition analysis tracks proximity to competitor facilities and estimated competitor pricing information.[71] Oil and gas producers also note that prices are negotiated based on local market conditions.[72] Other documents suggest that prices tended

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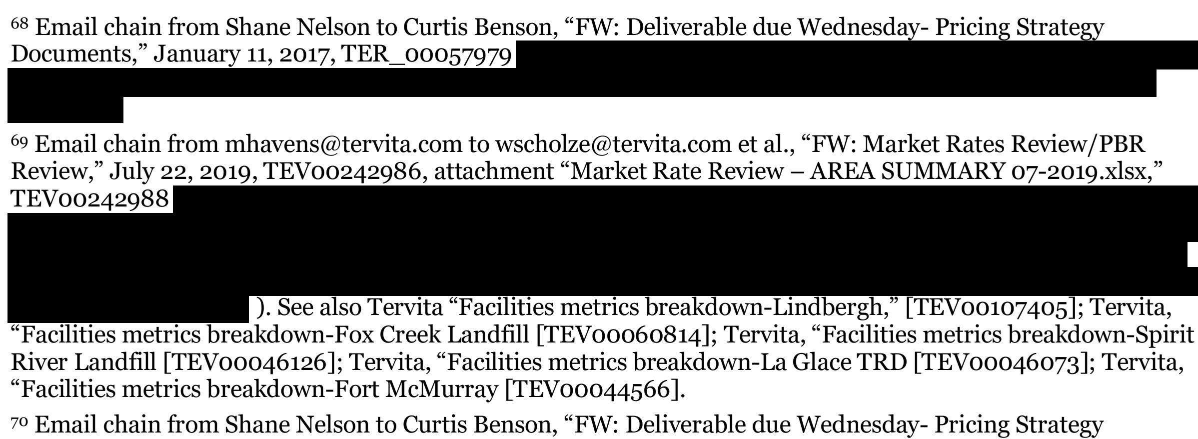
[68] Email chain from Shane Nelson to Curtis Benson, "FW: Deliverable due Wednesday- Pricing Strategy Documents," January 11, 2017, TER_00057979



[69] Email chain from mhavens@tervita.com to wscholze@tervita.com et al., "FW: Market Rates Review/PBR Review," July 22, 2019, TEV00242986, attachment "Market Rate Review – AREA SUMMARY 07-2019.xlsx," TEV00242988). See also Tervita "Facilities metrics breakdown-Lindbergh," [TEV00107405]; Tervita, "Facilities metrics breakdown-Fox Creek Landfill [TEV00060814]; Tervita, "Facilities metrics breakdown-Spirit River Landfill [TEV00046126]; Tervita, "Facilities metrics breakdown-La Glace TRD [TEV00046073]; Tervita, "Facilities metrics breakdown-Fort McMurray [TEV00044566].

[70] Email chain from Shane Nelson to Curtis Benson, "FW: Deliverable due Wednesday- Pricing Strategy Documents," January 11, 2017, TER_00057979, attachment "WP 2017 Market Rate – Internal Information," TER_0005781, p. 4

[71] A Tervita competition analysis describes the distances to the next nearest competitors for each facility, along with estimated competitor prices and market shares for different Waste Service types. See TER_00023052. Email chain from Keith Blundel to Jesse Rausch, "Market Studies," January 24, 2018, [SES0004680] (See also Dawson Creek FST study [SES0004681].

[72] Witness Statement of Paul Dziuba (Chevron Canada Resources), February 24, 2022, ¶ 14 ("Chevron negotiates prices in a service contract. The price is made up of a tipping fee and disposal fee. Each facility will have varying tipping fees that are priced according to market dynamics and the levels of surrounding competition."); Witness Statement of Cliff Swadling, Obsidian Energy LTD., February 21, 2022, p. 5 ("Pricing and business terms are established through negotiation. Tipping fees and trucking rates (in cases when they offer trucking) are usually negotiated annually. As with most services, supply and market demand pressures will impact the fees that Obsidian is required to pay."); Witness Statement of Petronas Energy Canada LTD., Carl Lammens, February 3, 2022, ¶ 44 ("In PECL's experience, companies offering waste disposal services are aware of their customers' transportation costs and offer specific customers prices that are comparable with the next-closest option, taking into account those transportation costs") Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022, ¶ 21 ("Companies like Secure know where third party owned facilities (including

to be lower in regions where competitors could potentially attract Tervita's customers away by offering lower prices.[73]

36. Tervita's transaction data confirms that pricing for the same service varies across different facilities. For example, according to Tervita's 2019 transaction data, Tervita's per ton "Plant based rate" for "drilling waste advanced gel chemical" was at the Fox Creek landfill, at the East Peace landfill, and at the Judy Creek landfill.[74] The transaction data also shows that prices vary across customers who deliver their waste to the same facility. For example, Tervita's 2019 "ticket rates," (i.e., prices after discounts to the "Plant based rate") at the East Peace landfill varied between 2 and and, at the Judy Creek landfill, they varied between and [75] Mr. Engel, a senior vice president at Secure, testified that Secure's prices also change by facility.[76]

37. Proximity to competitors' waste service facilities and the oil and gas producers' well site locations are additional factors in pricing decisions. Secure's Mr. Engel testified that Secure takes into account customers' locations and competitive conditions.[77] Tervita often conducts a differential analysis that

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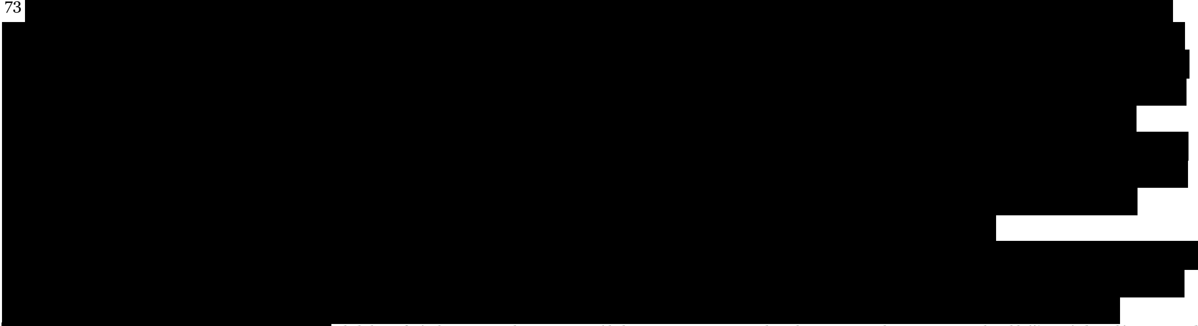
CNRL-owned facilities) are located relative to their own facilities and the estimated trucking costs, and may price their services based on this knowledge."); Witness Statement of the Orphan Well Association, February 22, 2022 at ¶ 38 ("Pricing for the disposal of oil and gas waste is transparent. Waste disposal companies like Secure and the former Tervita must track where the waste being disposed of in their facilities is coming from (i.e., the generating site). As a result, they are able to determine how much it would cost to truck waste to the next closest facility. This allows them to adjust their tipping fees so that the total cost of disposal is still cheaper than going to the next closest facility").

[73] 
uld be fairly equal or possibly even a touch cheaper than Marshall.") Ridgeline and Tulliby are competing facilities.

[74] See my workpaper. The analysis is based on Tervita's 2019 sales data. See Workpaper 2.

[75] See my workpaper. For example, at the Judy Creek landfill, Tervita charged See Workpaper 3.

[76]

[77] Engel testimony, December 20, 2021, questions 121-122 ("Q. Does Secure agree that it can and does adjust the tipping fees it may charge a customer based on the location the waste is coming from? A. That is the one of the things that is considered, among many. Q. Okay. Does Secure agree that it can and does adjust the tipping fees it

compares distances between the well locations and Tervita facilities, as well as competitor facilities.[78] The disposal prices offered may be lower or higher depending on how far a customer would need to transport the waste or how close competitor facilities are.[79] With regard to the Tervita-Newalta transaction, Secure explained that, "Customers consider the total cost of the Service fees, plus the transportation expense. Therefore, a service provider may consider the next nearest facility location in determining the price for Services."[80] A Tervita employee email chain references a negotiation with a representative, who noted the relative proximity to Tervita and competitor facilities as a pertinent factor when asking Tervita to quote lower fees to handle his company's waste.[81] Another internal email discusses pricing for and an attachment spreadsheet compares the travel distances, times, and

may charge a customer based on the competitive options it believes the customer has? A. That is one consideration among many.").

[78] I understand that Tervita uses the differential analyses to assess the transportation costs of nearby competing facilities in order to determine a per-unit price to offer to the customer. Email chain from bbowes@tervita.com to mjohnson@tervita et al., "RE: / Mile 103 Pricing Follow Up," October 13, 2020, TEV00114394, attachment "Trucking Differentials Mile 103.xlsx," TEV00045140 ("Please see attached. [trucking differential analysis] You can play around with the variables to see the impact. The trucking differentials will help determine where we should be at."); Email chain from tnickled@tervita.com to drollings@tervita.com , "FW: Differential," October 5, 2020, TEV00155420 (. See also Email chain from tnickel@tervita.com to cmacmullin@tervita.com, "Re: A volumes," October 15, 2020 [TEV00223412], attachment [TEV00223413] .

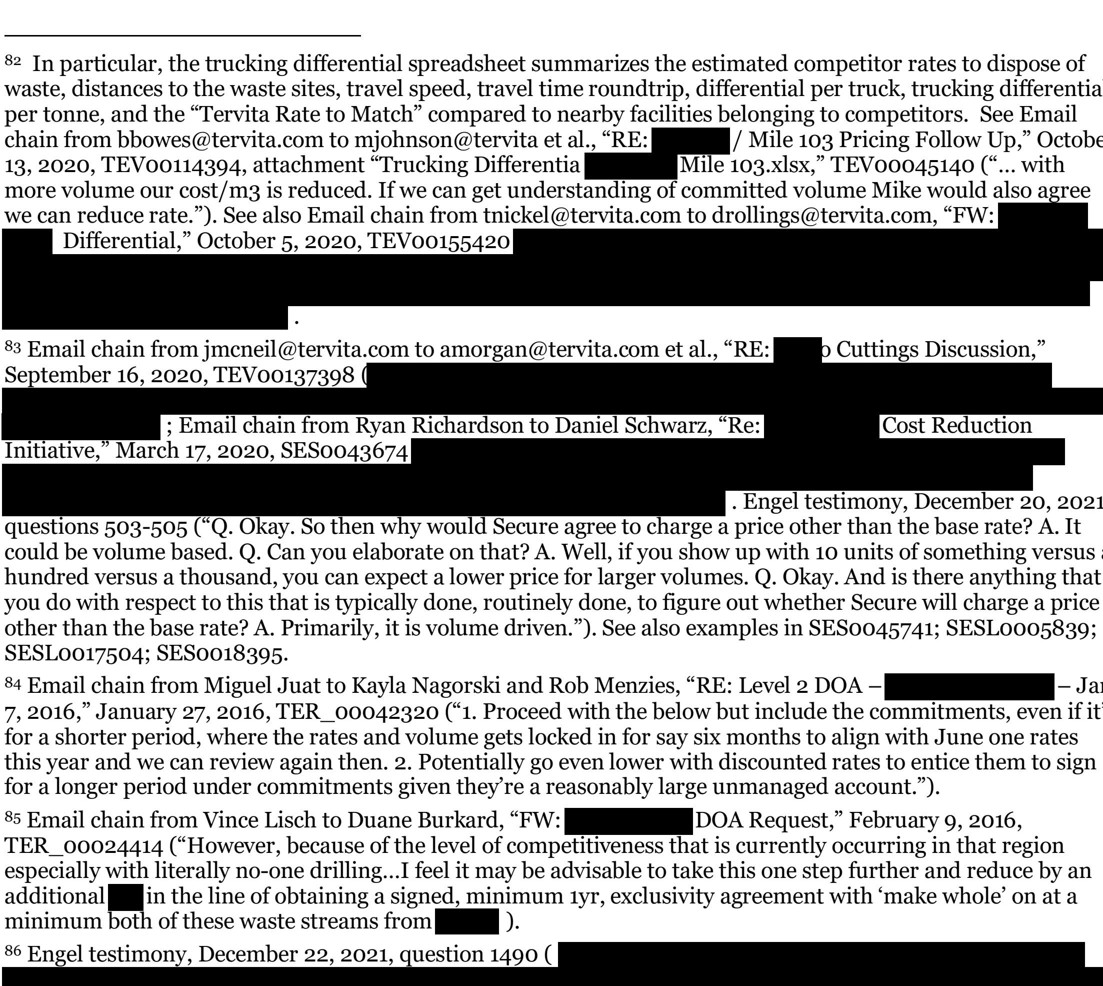
[79]

[80] Secure's submission to the Competition Bureau Re: Proposed Transaction between Tervita and Newalta, May 17, 2018 [RBBA00011_000000002], p. 5. See also Witness Statement of Petronas Energy Canada LTD., Carl Lammens, February 3, 2022, ¶ 44 ("In PECL's experience, companies offering waste disposal services are aware of their customers' transportation costs and offer specific customers prices that are comparable with the next-closest option, taking into account those transportation costs"); Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022, ¶ 21 ("Companies like Secure know where third party owned facilities (including CNRL-owned facilities) are located relative to their own facilities and the estimated trucking costs, and may price their services based on this knowledge.").

[81]

trucking cost differentials per tonne of shipment in order to assess the rates that Tervita needs to match to compete for their business.[82]

38. Documents and testimony also indicate that waste service providers may consider customers' volume commitments specific to third-party waste service at facilities in pricing decisions.[83] In one example of negotiations with an active customer, a Tervita employee agreed not to increase prices at the Buck Creek facility in exchange for commitment, stating that Tervita could "[p]otentially go even lower with discounted rates to entice them to sign for a longer period under commitments."[84] In the negotiation noted above, the correspondence recommends offering rates that are based on an agreement to deliver 100% of waste streams to Tervita.[85] Mr. Engel testified that arrangements with customers may allow for discounted rates when volumes exceed a specified threshold.[86]



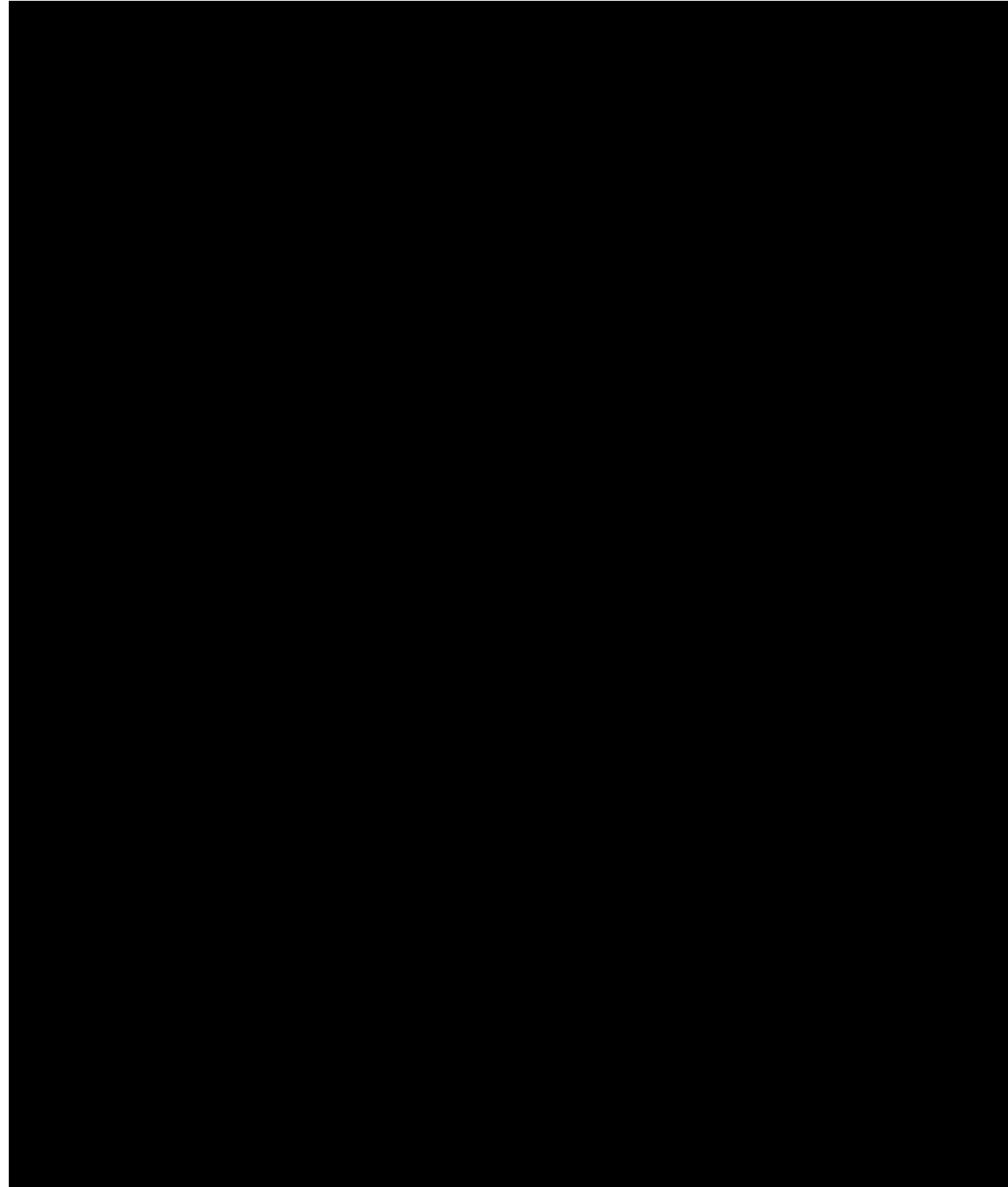
[82] In particular, the trucking differential spreadsheet summarizes the estimated competitor rates to dispose of waste, distances to the waste sites, travel speed, travel time roundtrip, differential per truck, trucking differential per tonne, and the "Tervita Rate to Match" compared to nearby facilities belonging to competitors. See Email chain from bbowes@tervita.com to mjohnson@tervita et al., "RE: / Mile 103 Pricing Follow Up," October 13, 2020, TEV00114394, attachment "Trucking Differentia Mile 103.xlsx," TEV00045140 ("… with more volume our cost/m3 is reduced. If we can get understanding of committed volume Mike would also agree we can reduce rate."). See also Email chain from tnickel@tervita.com to drollings@tervita.com, "FW: Differential," October 5, 2020, TEV00155420 .

[83] Email chain from jmcneil@tervita.com to amorgan@tervita.com et al., "RE: Cuttings Discussion," September 16, 2020, TEV00137398 (; Email chain from Ryan Richardson to Daniel Schwarz, "Re: Cost Reduction Initiative," March 17, 2020, SES0043674 . Engel testimony, December 20, 2021, questions 503-505 ("Q. Okay. So then why would Secure agree to charge a price other than the base rate? A. It could be volume based. Q. Can you elaborate on that? A. Well, if you show up with 10 units of something versus a hundred versus a thousand, you can expect a lower price for larger volumes. Q. Okay. And is there anything that you do with respect to this that is typically done, routinely done, to figure out whether Secure will charge a price other than the base rate? A. Primarily, it is volume driven."). See also examples in SES0045741; SESL0005839; SESL0017504; SES0018395.

[84] Email chain from Miguel Juat to Kayla Nagorski and Rob Menzies, "RE: Level 2 DOA – – Jan 7, 2016," January 27, 2016, TER_00042320 ("1. Proceed with the below but include the commitments, even if it's for a shorter period, where the rates and volume gets locked in for say six months to align with June one rates this year and we can review again then. 2. Potentially go even lower with discounted rates to entice them to sign for a longer period under commitments given they're a reasonably large unmanaged account.").

[85] Email chain from Vince Lisch to Duane Burkard, "FW: DOA Request," February 9, 2016, TER_00024414 ("However, because of the level of competitiveness that is currently occurring in that region especially with literally no-one drilling…I feel it may be advisable to take this one step further and reduce by an additional in the line of obtaining a signed, minimum 1yr, exclusivity agreement with 'make whole' on at a minimum both of these waste streams from).

[86] Engel testimony, December 22, 2021, question 1490 (



24 528 Q. Okay. You agree that

25 Secure knows where the waste going into landfills,

1 its FSTs and disposal wells, is coming from?

2 A. Yes.

3 529 Q. Okay. So you would agree

4 all waste that is coming into a landfill TRD and

5 disposal well, Secure knows where all that waste

6 is coming from?

7 A. Yes.

40. Together, the evidence suggests that, while some customers negotiate rates under MSA agreements, they are situationally able to obtain lower rates, including in response to competing rates from competitors or rates that are project-specific.

41. Mr. Engel also testified that other factors, such as "[r]elationships, historical pricing for different customers in different areas," as well as prices paid for bundles of services, may lead to discounted pricing.[94] He explained that oil and gas producers' field supervisors move around to different well sites, and they may try to negotiate lower prices for one field site based on prices paid at other locations where they have worked.[95] He also described how Secure would consider discounting the prices paid for particular service when considered together with all of the waste services purchased from Secure.[96]

42. I understand that arbitrage in waste services is not possible.[97] In economics, arbitrage is the practice of profiting from price differences between two or more markets. In the case of waste services, customer A, who is facing higher disposal fees, can theoretically take advantage of lower disposal fees quoted to customer B by sending its waste to customer B and customer B then sending the waste to Waste Service providers at the lower disposal fee. However, due to waste manifesting and tracking requirements, waste services providers always know the original customer and the location where the waste is generated and thus can prevent arbitrage.[98] Further, high transportation costs would likely

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[94] Engel testimony, December 20, 2021, questions 508-512.

[95] Engel testimony, December 20, 2021, questions 508-512.

[96] Engel testimony, December 22, 2021, questions 1475-1476 ("A. I think we would consider what we are doing with other services such as oil before we would make a change to a different service so as not to impact the relationship. Q. Right. So you may offer discounts to customers based on other products that they may be purchasing from Secure? A. Yes.").

[97] In their submissions to the Bureau, the Parties did not mention the possibility or practice of arbitrage. Letter from Brian A. Facey (Blakes) to Commissioner Matthew Boswell (Competition Bureau of Canada), "SECURE Energy Services Inc.'s acquisition of Tervita Corporation," March 12, 2021 [RBBB00001_000000002].

[98] See Engel testimony, December 20, 2021, Qs. 526-529: UWI stands for unique well identifier? A. Correct. Q. And the UWI tells Secure where the waste is coming from. Correct? A. Yes. Q. Okay. You agree that Secure knows where the waste going into landfills, its FSTs and disposal wells, is coming from? A. Yes. Q. Okay. So you would agree all waste that is coming into a landfill TRD and disposal well, Secure knows where all that waste is coming from? A. Yes."); Witness Statement of Carol Nelson, January 25, 2022, ¶ 26 ("In addition to issuing approvals for certain waste-receiving facilities in Alberta, the AEP also mandates certain reporting requirements for hazardous waste. To track hazardous waste from its point of generation, the AEP issues an identification number to each hazardous waste-generating facility."). For chain of custody requirements see Tervita, "AER Directive 58 Reference," available at https://tervita.com/files/public-files/aer-directiven-58-reference.pdf (Alberta), BC Environment Industry Association, "General Information Fact Sheet Hazardous Waste Management in BC" https://bceia.com/wp-content/uploads/2018/05/bceia_001_Hazardous_Waste_Management_in_BC_General_Information_2013.pdf (British Columbia), SRC Environmental Analytical Laboratories, "Chain of Custody / Analysis Form," https://www.src.sk.ca/sites/default/files/files/resource/EAL%20COC%20and%20TC%20FILLABLE%20CSM-132A_May2021.pdf (Saskatchewan).

eliminate any arbitrage opportunities if the waste is physically transported between customer facilities.

4. MARKET DEFINITION

43. A common theme in antitrust analysis is that mergers or acquisitions may harm customers if they "are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power… Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time."[99] A useful analytical tool in assessing how a merger changes the industry participants' abilities to exercise market power is market definition.[100] Market definition specifies the line(s) of commerce and geographic area(s) in which competitive concerns arise. It "identif[ies] the set of products that customers consider to be substitutes for those produced by the merging firms."[101] The customers (in our context, oil and gas producers) that might be harmed by the transaction are those that might reasonably purchase any of the identified services.

44. Defining a market involves identifying both a product market (**Section 4.1**) and a geographic market (**Section 4.2**), which is detailed below.[102]

4.1. Product markets

45. The relevant market comprises the products and services of the merging firms and those products that customers consider to be reasonable substitutes. Not every substitutable product needs to be considered in the relevant market. The *Guidelines* specify that a relevant product market consists of "the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a

[99] "Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time." Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 2.1, 2.3.

[100] "Market definition is not necessarily the initial step, or a required step, but generally is undertaken." Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 3.1.

[101] High market shares and concentration inform the analysis of competitive effects even though they are not conclusive on their own regarding the effects of the merger. See Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 3.2.

[102] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 4.1.

77 It appears to the Tribunal that if Professor Baye is correct, the observed pattern of Tipping Fees reflects the exercise of that power, and it would not be profitable for any disposal site to raise its fee further, *ceteris paribus*. Therefore, Professor Baye's theory appears to be consistent with the observed uniformity of combined transportation and disposal pricing although inconsistent with Professor Hay's characterization of the industry as competitive.

78 The issue to be decided here is the implication of those theories for geographic market definition. In the Tribunal's view, the respondents' theory of combined transportation and disposal pricing may be the correct one if the question is whether a provisional Southern Ontario geographic market ought to be expanded to include certain parts of Michigan and New York. Indeed, based on the hypothetical monopolist paradigm, the respondents may even be correct in their position that such market should be expanded. However, where price discrimination is possible, it is appropriate to delineate additional smaller markets based on the location of customers against whom price discrimination would be exercised. The evidence of Tipping Fees indicates that price discrimination is currently being practised by disposal sites in Southern Ontario, Michigan and New York. To attract ICI Waste from Transfer Stations in the GTA, disposal sites increasingly distant from the GTA solicit business from those Transfer Stations by reducing their Tipping Fees, resulting in freight allowed pricing, as described by the Commissioner's witness, Mr. Wagner, of Earthwatch Waste Systems, Inc., who is in the waste brokerage business in Buffalo, New York.

79 Further, Mr. Collins, a sale representative in the Special Waste Group of CWS, testified that he determines the price of a particular customer based on the best price he thinks he can get, keeping in mind the minimum threshold price set by the company.

> MR. HOUSTON: When you set the price that you are going to give to that customer, you set it in relation to what you think the customer can get elsewhere and you price to be able to get the business from that customer, knowing what you think his other alternatives are. Is that fair?
>
> MR. COLLINS: No. I believe I price to the maximum dollar I can get for the client above my minimum threshold because I do have a minimum that I can sell into the landfills at that has been set. So if I can sell above that, I do.
>
> MR. HOUSTON: When you say "a minimum that has been set", that is a minimum set by somebody in CWS management who says "We are not going to sell space below some number"?
>
> MR. COLLINS: Yes.

transcript at 8:992 (16 November 2000).

80 Further evidence of price discrimination exists in the form of customer lists where prices are shown to be determined based on the customer location.

81 In his statistical analysis, Professor Baye indicates that transfer stations in the GTA are willing to pay a Tipping Fee premium of about five cents per tonne per kilometer a disposal site is closer to the transfer station (expert affidavit of M.R. Baye (12 October 2000); exhibit 348a at paragraph 54). This evidence is not criticized by the respondents. Such targeted pricing by distance is indicative of price discrimination.

82 Such price discrimination would not be possible if disposal sites accepted non-directed ICI Waste on a free-on-board basis at the disposal site gate. Absent evidence that the basis for industry pricing would change to this format, the existing practice of delivered pricing indicates that price discrimination is possible in a post-merger environment. This finding supports the delineation of a market that is narrower than the area over which uniform combined transportation and disposal prices prevail.

83 The Tribunal regards Professor Hay's theory of locational rent as inconsistent with the evidence that individual disposal sites actively seek out Transfer Stations in the GTA and negotiate Tipping Fees based on distance. Such marketing and negotiating practices are not part of the idealized wheat market that Professor Hay uses as an example. In such a competitive market, the wheat price a farmer receives is not adjusted based on the transportation costs that the farmer incurs in getting the wheat to market.

transaction represents "three-to-two merger," and they are represented by the blue-shaded area.

76. Both groups of well sites can be identified based on their locations, and the customers cannot engage in arbitrage or turn to other reasonable means (such as shipping their waste to far away facilities) to handle their waste in response to a small price increase.[166] Therefore, the hypothetical monopolist comprised of these three facilities can profitably increase prices to them by a SSNIP.

77. For each product market, my relevant geographic markets are comprised of sets of customers' well sites located within the Parties' overlapping draw areas. Specifically, draw areas are defined based on the locations of the nearest well sites from which a facility receives 90 percent of its waste service revenue.[167] In the example above, the black and the yellow boundaries encircling the black and yellow triangles that mark Secure and Tervita facility locations define Secure and Tervita's draw areas, respectively. Consequently, the relevant geographic markets consist of the green and blue shaded regions where Secure and Tervita's draw areas overlap with one another.[168]

78. Using the method described above to locate the sets of relevant, customer-defined markets, I identify 16 TRD markets that are 2-to-1 23 that are 3-to-2, and 56 that are 4-to-3 (or higher).[169] Among landfills, I identify 3 customer-defined markets that are 3-to-2, 25 that are 4-to-3 (or higher), and among water disposal wells, I identify 3 that are 2-to-1, 14 that are 3-to-2, and 131 that are 4-to-3 (or higher). In my Appendix (Section 7.1.2), I provide maps that capture the location of these markets and table that enumerate the each of the customer defined markets.

[166] As I discuss below, Secure and Tervita transaction data indicate that customers in relevant geographical areas send only a small share of their waste to Secure and Tervita facilities outside of the market.

[167] Tervita, Secure, and competitor facility locations are identified by precise geo-coordinates (longitudes and latitudes). Customers, or well sites, are also identified by geo-coordinates, or UWIs (universal well identifiers) that have been converted to geo-coordinates. I use the facility and customer geo-coordinates to calculate the driving distances and driving times to all nearby facilities using ArcGIS. The draw area calculation described in fn. [163, 164] uses the driving distances between facilities and the customers, or well sites, from which it draws 90 percent of its revenue. Customers, or wells sites, are then categorized into customer-defined markets based on the proximity to the Secure, Tervita, and competitor facilities. See additional details in my backup materials.

[168] Competitors' draw areas as assumed to be the maximum draw area of the measured draw areas for the Secure and Tervita facilities located nearest to the competitors' facility locations. See also fn. [164, 165].

[169] Conservatively, I impose that both of the Parties must generate at least five percent of the total Party revenue in each relevant customer-defined market for inclusion in the set of relevant markets. There are well sites in the Parties' overlapping draw region that are not counted among the relevant customer-defined markets, but that are also likely affected by reduced waste facility choices because of the merger.

customers but not to others, or raise prices to some customers by more than for others. The *Guidelines* explain:

> [W]hen price discrimination is feasible, it may be appropriate to define relevant markets with reference to the characteristics of the buyers who purchase the product (assuming they can be delineated) or to the particular locations of the targeted buyers.[158]

71. Price discrimination is feasible when sellers can identify targeted customers based on their observable characteristics (e.g., location) and targeted customers cannot switch easily to other suppliers in response (e.g., due to transportation costs) and cannot engage in arbitrage.[159] As I described in Section 3.4, these conditions are met in the relevant product markets here and, as reflected in their transaction data, the Parties are able to and do charge different prices to customers depending on customers' locations and proximity to competing facilities. Therefore, I use the customer-based approach to geographic market definition.[160]

72. I define a customer-based geographic market around a set of customers that are likely to be similarly impacted by the transaction, and I then calculate the Parties' market shares based on these.[161] In particular, for each product market, I define customer-based relevant geographic markets comprised of regions from which both Parties' facilities draw waste services revenues (i.e., "overlapping draw areas").[162] Customers in this region may have distinct preferences for the facilities but roughly share the same competitive conditions. The process of defining a customer-based geographic market starts by

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[158] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 4.8.

[159] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 4.8.

[160] This approach was used and analyzed in academic literature. See, for example, Coate, Malcolm, and Jeffrey H. Fischer, "A Practical Guide to the Hypothetical Monopolist Test for Market Definition," *Journal of Competition Law & Economics,* Vol. 4 no.4 (April 2008): pp. 1031–1063, at pp. 1036, 1057; Bailey, DeeVon, B. Wade Brorsen, and Michael R. Thomsen, "Identifying Buyer Market Areas and the Impact of Buyer Concentration in Feeder Cattle Markets Using Mapping and Spatial Statistics," *American Journal of Agricultural Economics*, Vol. 77 (1995): pp.309–318.

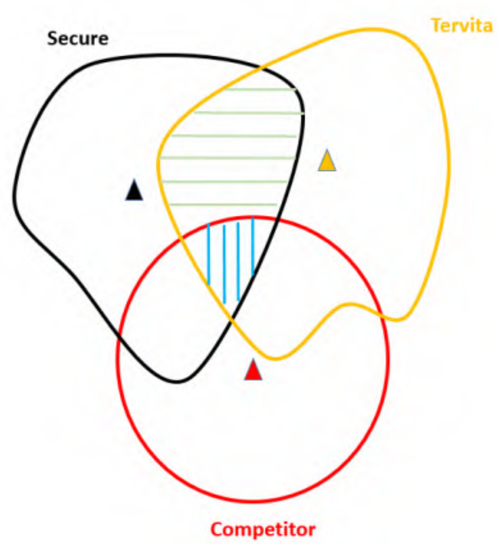
[161] As characterized by my model of customers' preferences presented in Section 5.3 and detailed in the Appendix (Section 7.4), underlying the market share calculations are individualized preferences based on how an oil and gas producer that operates a specific well site values a facility different than another nearby operator might. Customers' values for facilities that are part of the same customer-defined market include a common component that is shared across all customers in the same market and an idiosyncratic component that explains why one customer chooses a particular facility for a transaction and another customer does not. My market share analysis assumes that these customers, while acting based on individual preferences, behave similarly in aggregate because they face similar competitive conditions for waste services and would incur similar levels of transportation costs to any given facility located in the relevant market.

[162] In my Initial Affidavit, I confirmed that a facility-based market definition results in similar conclusions to those reached using a customer-based approach. See Miller June Expert Report, RCFC00001_000000015 p. 2716 at section 5.2, p. 2748.

identifying customers, or well sites, that currently benefit from competition between Secure and Tervita facilities. **Exhibit 8** illustrates the approach. In this simplified illustration, there is a Secure facility (denoted by the black triangle) and a Tervita facility (denoted by the yellow-orange triangle) that are located nearby. The black shape represents the Secure facility's draw area, and the yellow-orange shape represents the Tervita facility's draw area.

73. A "draw area" is comprise of the locations from which a waste service facility expects to acquire most of its revenues. I use the Parties' transaction data to identify the draw areas as locations of the closest well site from which a facility receives at least 90 percent of its waste service revenue. In this illustrative example, Secure's and Tervita's draw areas overlap. Customers' well sites that fall in the overlapping draw areas benefit from competition between the Parties and, thus, they may be impacted by the merger.

EXHIBIT 8
Illustration of customer-based geographic market definition



74. I then identify any third-party facilities (i.e., those owned by competing waste service providers) that may also provide a competitive option to Secure's and Tervita's waste service customers. These are the facilities that are within a viable travel distance to customers in Secure's and Tervita's overlapping draw area. In this illustrative example, there is one competing facility denoted by the red triangle in Exhibit 8. I determine the competing facility's draw area (denoted by the red circle) using a fixed travel distance from the facility. I choose the distance by calculating the distance from Secure and Tervita

transaction represents "three-to-two merger," and they are represented by the blue-shaded area.

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[169] Conservatively, I impose that both of the Parties must generate at least five percent of the total Party revenue in each relevant customer-defined market for inclusion in the set of relevant markets. There are well sites in the Parties' overlapping draw region that are not counted among the relevant customer-defined markets, but that are also likely affected by reduced waste facility choices because of the merger.

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Key Areas of Agreement

- Product market definition: waste disposal services at TRDs, WDs, LFs.
- Geographic market definition: customer centric geographic markets, with customers' facility choice driven primarily by distance.
- Economic analysis predicts transaction is likely to result in some price effects and incremental hauling costs for some oil and gas producers.

10

51 A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

(b) The "But For" Analysis Under Section 92(1) Is Forward-Looking

52 The words of the Act and the nature of the "but for" merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.

53 The Tribunal must determine whether "a merger or proposed merger prevents or lessens, *or is likely to prevent or lessen*, competition substantially". While the tense of the words "prevents or lessens" indicates existing circumstances, the ordinary meaning of "is likely to prevent or lessen" points to events in the future. To the same effect, the French text of s. 92(1) states "*qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*". Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.

(c) Similarities and Differences Between the "Lessening" and "Prevention" Branches of Section 92

54 In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the "prevention" or "lessening" branch is "essentially the same" (para. 367). Both focus on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" (*ibid.*). Under both branches, the lessening or prevention in question must be "substantial" (*Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 ("*Superior Propane I*"), at paras. 246 and 313). And the analysis under both the "lessening" and "prevention" branches is forward-looking.

55 However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the "prevention" branch, the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

> In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur. [Emphasis in original.]
>
> (Tribunal decision, at para. 368)

C. The "Prevention" Branch of Section 92(1)

56 While this Court has had occasion to consider the "lessening" branch of s. 92(1) in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.), this is the first case, in which we have had the opportunity to focus on the "prevention" branch of s. 92(1).

57 Tervita seeks clarity as to the appropriate legal test under the "prevention" branch. In Tervita's view, the "Tribunal erred in its application of the legal test for a substantial prevention of competition" (A.F., at para. 59). Tervita argues that "the Act requires that the Tribunal focus its analysis on the merger under review" (*ibid.*). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it

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(i) Based on all of the foregoing, the Tribunal has concluded that the Merger is likely to prevent competition substantially. The Merger prevented likely future competition between the Vendors and CCS in the supply of Secure Landfilling services in, at the very least, the Contestable Area. Although the competition that was prevented in 2012 is not likely to be substantial, the Tribunal is satisfied that by no later than the spring of 2013, either the Vendors or a party that purchased the Babkirk Facility would have operated in direct and serious competition with CCS in the supply of Secure Landfill services in the Contestable Area.

(ii) In estimating the magnitude of the likely adverse price effects of the Merger, the Commissioner relied on expert evidence adduced by Dr. Baye. That evidence included economic theory and regression models. However, for reasons discussed below the Tribunal has not given significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger. In reaching this decision, the Tribunal took into account the fact that the models do not control for costs, and the fact that, although Dr. Baye acknowledged that his theory of spatial competition should only be used if other data were unavailable, he used his theory even though he had actual CCS data.

(iii) Nevertheless, as discussed below in connection with the "effects" element of section 96, the Tribunal is satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the Merger.

(iv) The Tribunal therefore finds that the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the absence of the Merger, and that the Merger is likely to prevent competition substantially.

Issue 7 When the Efficiencies Defence Is PLEADED, What is the Burden of Proof on the Commissioner and on the Respondent?

230 CCS has alleged that the Commissioner failed to properly discharge her burden to prove the extent of the quantifiable effects of the Merger. CCS alleges that the Commissioner's failure to prove those effects in her case in chief has precluded CCS from being able to meet its overall burden to prove the elements of the efficiencies defence on a balance of probabilities. CCS asserts that the Commissioner's failure means that the effects should be zero and that the Application should therefore be dismissed.

231 In paragraph 48 of its response to the Commissioner's Application, CCS pleaded the efficiencies defence in the following terms:

> The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

232 The burdens of proof under section 96 were established and applied over the course of the four decisions in *Propane* (*Propane*, at para. 48, rev'd on other grounds 2001 FCA 104, [2001] 3 F.C. 185 (Fed. C.A.) ("*Propane 2*"), leave to appeal to SCC refused [2001 CarswellNat 1905 (S.C.C.)], 28593 (September 13, 2001), redetermination, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (Competition Trib.) ("*Propane 3*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 (Fed. C.A.) ("*Propane 4*")). "The effects of any prevention or lessening of competition" must be demonstrated by the Commissioner on balance of probabilities (*Propane*, above, at para. 402; *Propane*, above, at para. 177, *Propane*, at para. 17). Her burden is to prove (i) the extent of the *anti-competitive* effects in question where they are quantifiable, even if only roughly so (*Propane*, at paras. 35-38), and (ii) any non-quantifiable or qualitative *anti-competitive* effects of the merger. It also includes the burden to demonstrate the extent of any *socially adverse* effects that are likely to result from the merger, i.e., the proportion of the otherwise neutral wealth transfer that should be included in the trade-off assessment contemplated by section 96, as well as the weighting that should be given to those effects (*Propane*, above, at paras. 35-38, and 61-64). In this case, there being no socially adverse effects, the term "Effects" will be used to described quantifiable and non-quantifiable anti-competitive effects.

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says it did in this case and that its "fundamental error" is that it focused "not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future" (A.F., at para. 71).

58 My understanding of Tervita's argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

59 For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

(1) The Law

60 The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.

(a) Identify the Potential Competitor

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (Hillsdown, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) Examine the "But For" Market Condition

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

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366 These topics are all addressed to some extent in the Panel's decision. I would simply like to add some additional comments, particularly with respect to the analytical framework applicable to the Tribunal's assessment of whether a merger prevents, or is likely to prevent, competition substantially.

367 The Tribunal's general focus in assessing cases brought under the "substantial prevention of competition" and "substantial lessening of competition" branches of section 92 is essentially the same. In brief, that focus is upon whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger. The same is true with respect to other sections of the Act that contain these words.

368 In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

369 In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the "but for", or "counterfactual", scenario. In the case of a completed merger, that "but for" scenario is the market situation that would have been most likely to emerge had the merger not occurred.

370 When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new*, market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the "prevent or lessen competition substantially" test.

371 With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

372 In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy.

373 In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is *relative*, rather than *absolute*, in nature (*Canada Pipe Co.*, above, at paras. 36 — 38). In short, the assessment of levels of price and non-price competition is made relative to the levels of price and non-price competition that likely would exist "but for" the merger.

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Limited and presently uses Darling as a renderer. Mr. Smith operates a deadstock collecting and processing operation as well as a pet food business, Atwood Pet Food Supplies Ltd and presently uses Orenco as a renderer.

73 There is no evidence that Baker's plant in Rochester, New York has historically been a competitor of Rothsay and Orenco in southern Ontario. That plant, like Darling, is also part of a large multi-plant firm. It is the second largest renderer on the North American continent. The Baker (Rochester) plant is within geographical reach of the relevant market, being located 135 miles from Orenco's plant in Dundas. It is clear that both Baker (Rochester) and Darling (Detroit) would become increasingly competitive in the southern Ontario market served by the merged firm (insofar as geographical location is concerned) in proportion to any supra-competitive price rise which might be exacted. Since Baker (Rochester) has not historically been in the market and since it is not immediately adjacent to the border, it may be that it should be considered a potential entrant rather than a competitor in the market. Its relationship to the merged firm will be considered from both points of view.

74 Lomex commenced operating in the Toronto market in the summer of 1991[42] and, as has been noted, is taking two full truck loads from two of the larger Toronto area producers of renderable materials to Lomex's plant outside Montreal. The Tribunal has not classified Lomex as a competitor within the market but recognizes that as a potential entrant Lomex will provide some discipline on the merged firm's ability to raise prices.

V. Substantial Lessening of Competition

75 Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing. In assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

76 Whether an enhancement of market power exists as a result of a merger and whether it is substantial is determined by reference to a number of factors. Market share data can give a *prima facie*[43] indication as to whether such is the case.

A. Market Concentration

77 The market concentration in the relevant market can be measured by reference to a number of different indicia. What measure will be chosen will depend upon the nature of the industry in question and the data available. In this case two measures have been used: the amount of renderable material actually processed in the recent past by the firms (historical output) and the plant capacity of the competitors (productive capacity). With respect to firms which have not previously been active in the market but which as a result of changes are now considered to be competitors, only the second method of measurement can be used.

78 A market share measurement based on pre-merger volumes of renderable material processed in southern Ontario indicates that Orenco and Rothsay were each servicing approximately 30% of that non-captive red meat rendering market. Darling's Toronto plant was processing 13%. Banner was processing 12% and Fearman 2%. An extrapolation from those data indicates that after the merger the merged Rothsay-Orenco firm will hold approximately 62-63% of the southern Ontario market. The next largest firm, Darling, for the moment at least would hold approximately 12-13%. Banner would hold 11-12%. Schneider and Ray Bowering would continue to process small amounts of non-captive material.

79 While the increased market share concentration calculated on that basis can be seen at a glance, two tools which have been developed in the United States for measuring market concentration in a summary fashion were referred to in evidence: the four-firm concentration ratio[44] and the Herfindahl-Hirschman Index ("HHI"). The four-firm concentration ratio measures market concentration by adding together the market shares of the four largest firms in the market. If the post merger concentration is

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1 **MS. NEKIAR:** Can you give me a summary of your
2 opinion on this question?
3 **MR. JOHNSTON:** Yeah. So the way I went about
4 approaching this was assessing the major most notable
5 public-facing forecasts from a variety of public or
6 industry bodies, in this case mainly the Alberta Energy
7 Regulator, or AER, the Canadian Energy Regulator, or CER,
8 and the Canadian Association of Petroleum Producers, or
9 CAPP. Across four different forecasts from those three
10 different bodies, the CER has two, just to note, none of
11 them foresaw a near-term falloff in oil production in the
12 Western Canadian sedimentary basin and only one began to
13 see a very kind of modest plateau and downturn at the
14 beginning of the 2030s, and that was the CER's forecast of
15 -- it was basically their evolving policy scenario, which
16 took into account both stricter environmental regulations.
17 But I think in this case, and as I describe further in the
18 report, was importantly a very -- a much lower price
19 forecast, which is going to be the largest driver of these
20 investment intentions.
21 So in my opinion, based on the question that I
22 was asked by the Competition Bureau, I see it as highly
23 unlikely that production plateaus in the very near term,
24 and certainly very low likelihood that production declines
25 outright in the Western Canadian sedimentary basin within

1 the next decade.
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CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corporation;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

SECURE ENERGY SERVICES INC.

Respondent

AFFIDAVIT OF RORY JOHNSTON
(AFFIRMED FEBRUARY 24, 2022)

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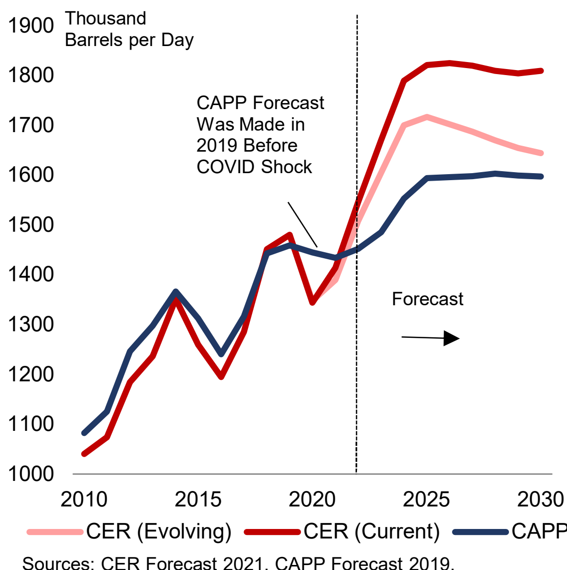
1. My name is Rory Johnston. I am the author of the Commodity Context newsletter and am currently employed by Melancthon Capital, a family investment office operating under the business name Price Street.

2. My area of expertise is global commodity markets with a focus in the North American energy industry and been researching the sector for a decade. I spent 6 years covering and eventually leading commodity market research in Scotiabank's

sands have substantially reduced the pace of Western Canadian oil production growth. However, while the oil market is still digesting the COVID shock the outlook and futures pricing continues to improve[34].



Sources: CER Forecast 2021, CAPP Forecast 2019.

Conclusion

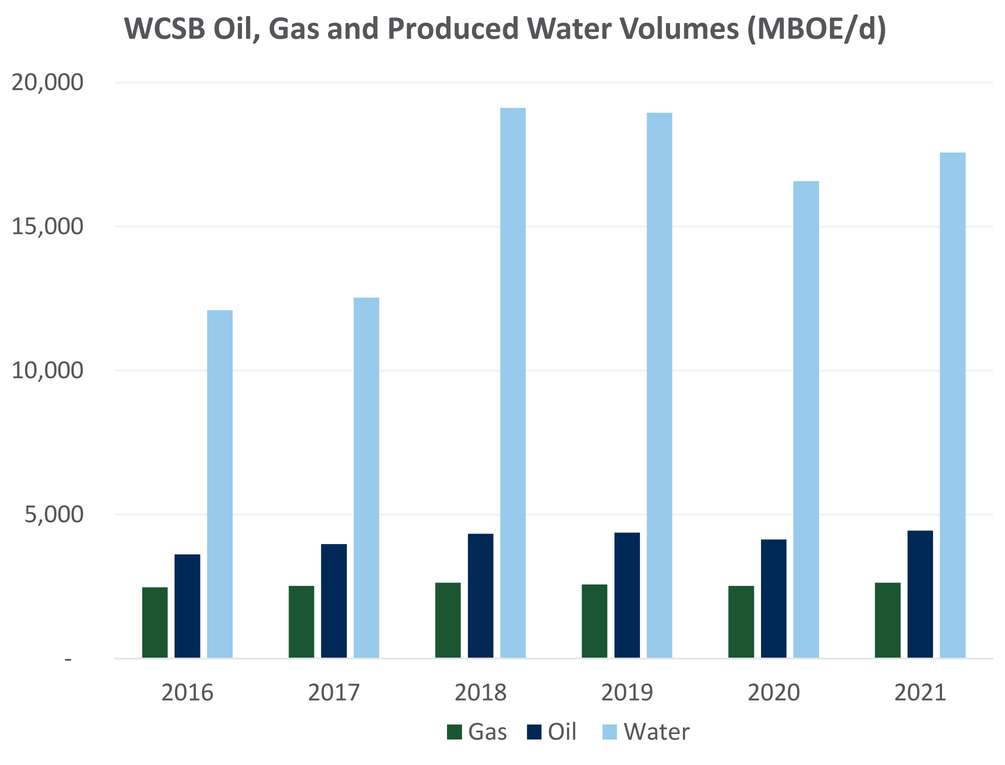
35. In my opinion, oil production in the WCSB will continue to grow through at least the next decade. Of the four Forecast scenarios analyzed in this report, only one Forecast sees a production peak of any kind and even that occurs after 2030.[35] The Forecasts that explicitly state price assumptions (CER and AER) use oil price assumptions that are well below current market levels, and there are increasing signs, in my opinion, that prices may assume a structurally higher path coming out of the COVID-19 shock given a slowing of US shale responsiveness. While a lower price outlook is still possible it seems to be a reasonably low probability given my current understanding of the oil market. Risks remain tilted to the upside of longer-term oil price forecasts in the flat $66 per barrel range like that used by the CER's Current Policies scenario or the low-but-gradually rising to $70 per barrel forecasts used by the AER.

[34] Given the rise in crude prices, the upward shift in the forward curve, and the material gains in the equity prices of the dominant WCSB producers.

[35] The CER's "Evolving Policies" scenario maintains an extremely pessimistic low-price outlook, and even with this scenario, WCSB production only peaks in 2032 (outside the scope of this investigation) before gradually declining thereafter.

Industry Fundamentals Support Long-Term Growth

Recurring produced water volumes provide midstream opportunities for SECURE



» Produced water volumes increased 45% during the last 5 years, compared to a 16% increase in oil and gas production during the same period

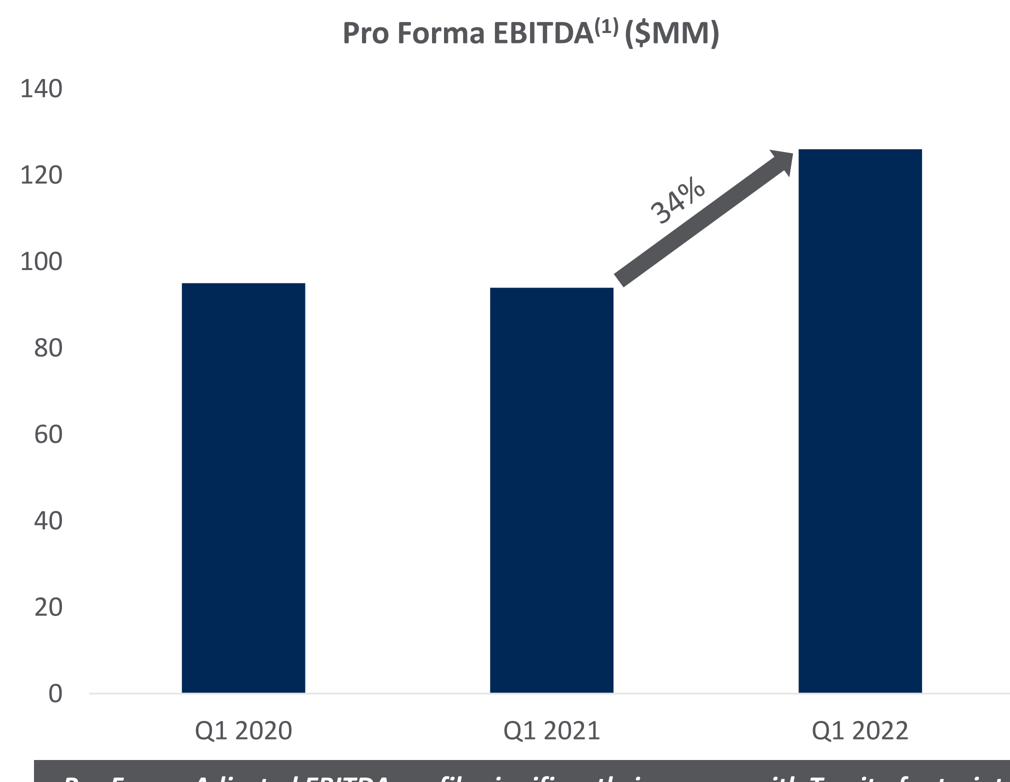
» As industry activity increases, produced water volume will also increase
  - Treatment and disposal services for oil & gas by-products continue to be in high demand
  - Water midstream solutions help our customers meet stringent and evolving environmental and regulatory standards

» SECURE expects increased regulations to safely dispose and/or recycle volumes in the future

Source: Petrinex (water), Canadian Energy Regulator (oil and gas production) data based on December 31 year ends, 2021 oil and gas data through December 2021

Growing Adjusted EBITDA

Stronger commodity prices and increased producer activity positively impacting all business units



Pro Forma Adjusted EBITDA profile significantly improves with Tervita footprint

- Adjusted EBITDA in Q1 2022 34% above pro forma 2020 and 2021 levels, demonstrating strength and scale of the combined business
- SECURE benefitting from steadily increasing activity as well as realization of synergies, both of which we expect to continue to improve as we progress through 2022
- Rising crude oil, liquids, and natural gas prices and producer cash flows driving higher industry activity and demand for SECURE Midstream Infrastructure services
- Remediation and reclamation work and demand for ferrous and base metals providing support for SECURE's Environmental Solutions services
- Focus on managing costs resulting in strong margins in both the Midstream Infrastructure and Environmental and Fluid Management segments
- Strong industry activity levels expected to continue in 2022

(1) Pro Forma the Tervita transaction. Non-GAAP financial measure, refer to "Non-GAAP and other financial measures" in this presentation and the Q1 2022 MD&A, and the "Tervita Merger" section in the Q4 2021 MD&A

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7 **MS. NEKIAR:** So in paragraph 5, you provide
8 some information about the oil and gas industry; correct?
9 **MR. GEE:** Correct.
10 **MS. NEKIAR:** And at the end of the paragraph,
11 which is actually on the next page, you attach an exhibit;
12 correct?
13 **MR. GEE:** M'hmm.
14 **MS. NEKIAR:** That would be Exhibit 3?
15 **MR. GEE:** That's correct.
16 **MS. NEKIAR:** And Exhibit 3 is Peyto's corporate
17 presentation from January 3rd, 2022; correct?
18 **MR. GEE:** That's right.
19 **MS. NEKIAR:** So let's go to this exhibit, which
20 is at page 97.
21 So Mr. Gee, this is Peyto's corporate
22 presentation from January 3rd, 2022; correct?
23 **MR. GEE:** M'hmm.
24 **MS. NEKIAR:** And this presentation is available
25 on Peyto's website; correct?

1 **MR. GEE:** That's correct. It's updated,
2 typically, every month.
3 **MS. NEKIAR:** Okay. So the updated version
4 would also be on the website; correct?
5 **MR. GEE:** I believe there is one updating to
6 April, if not May, yeah.
7 **MS. NEKIAR:** So we actually do have the April
8 2022 version. Let's bring that up. It should be Agreed
9 Book Document number 10466.
10 Mr. Gee, this is Peyto's corporate presentation
11 from April 2022?
12 **MR. GEE:** Looks like it, yeah. If you scroll
13 to probably the third page, it would have a date stamp on
14 it so we can probably see -- yeah, there you go. April
15 13th, yeah.
16 **MS. NEKIAR:** Mr. Gee, this presentation is
17 available to the public; correct?
18 **MR. GEE:** It is, yes.
19 **MS. NEKIAR:** And the information that's
20 provided in this presentation is accurate or was accurate
21 at the time it was added to the website?
22 **MR. GEE:** That is correct, at least to the best
23 of my knowledge.
24 **MS. NEKIAR:** So let's go to page 5 of this
25 presentation. Thank you.

1 Mr. Gee, this is labelled "Peyto Total
2 Shareholder Return Model"; correct?
3 **MR. GEE:** That is right.
4 **MS. NEKIAR:** The graph is titled "Peyto
5 Exploration and Development Corp 23 Year Trading History".
6 **MR. GEE:** It shows, yes, several things, but in
7 addition to our production, it shows our share price
8 trading history. That's right.
9 **MS. NEKIAR:** We see a graph here with a legend
10 to the top left. Do you see that?
11 **MR. GEE:** M'hmm.
12 **MS. NEKIAR:** In the legend we see that the
13 black line identifies Peyto production; correct?
14 **MR. GEE:** Yes.
15 **MS. NEKIAR:** Do you see that black line in the
16 graph?
17 **MR. GEE:** Yeah.
18 **MS. NEKIAR:** And we see a dash at the end of
19 that black line; correct?
20 **MR. GEE:** Correct.
21 **MS. NEKIAR:** We see beside the dashed line it
22 says organic growth for LNG exports; correct?
23 **MR. GEE:** Correct.
24 **MS. NEKIAR:** At the time of this presentation
25 Peyto was telling the public that it was predicting growth;

1 correct? Is.
2 **MR. GEE:** Correct.
3 **MS. NEKIAR:** So let's move to slide 12 of this
4 presentation.
5 So we see here a slide titled "Peyto's
6 Strategy - growing North American gas market". Correct?
7 **MR. GEE:** M'hmm.
8 **MS. NEKIAR:** Beside the title we see a sticky
9 note; correct?
10 **MR. GEE:** Yeah.
11 **MS. NEKIAR:** And in this sticky note, Peyto is
12 telling the public that it is likely over the next decade
13 North American natural gas consumption will be up another
14 billion cubic feet per day; correct?
15 **MR. GEE:** Correct.
16 **MS. NEKIAR:** So now let's move on to slide 45
17 of this presentation.
18 We see the title for this slide is "Peyto
19 Returns Best Year Ever"; correct?
20 **MR. GEE:** Correct.
21 **MS. NEKIAR:** Again we see another sticky note
22 at the top right; correct?
23 **MR. GEE:** Yeah.
24 **MS. NEKIAR:** And in this sticky, Peyto is
25 telling the public it had the strongest returns in years,

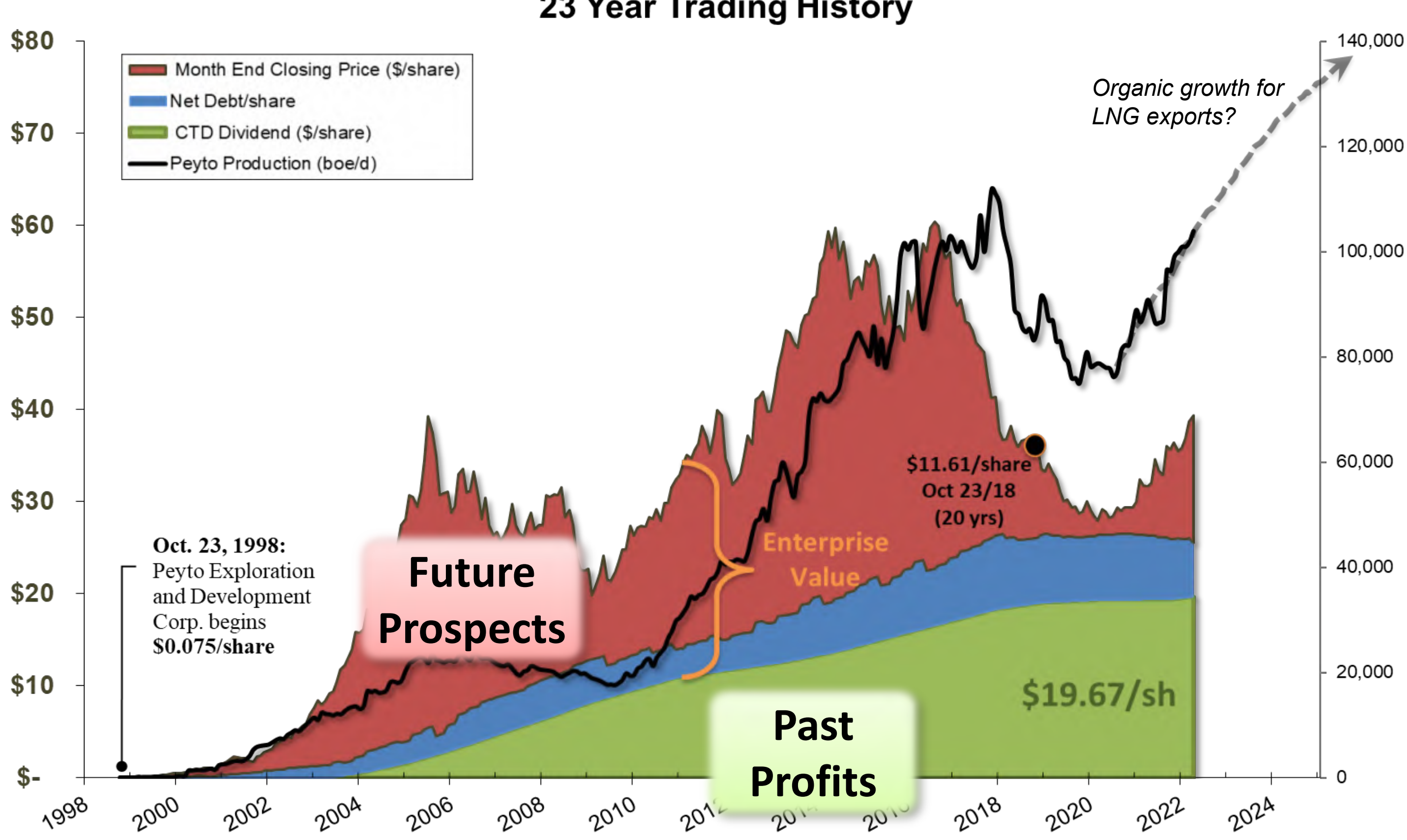
1 with many of the wells already having paid out their
2 initial capital investment; correct?
3 **MR. GEE:** Correct.
4 **MS. NEKIAR:** Let's go to slide 52.
5 We see here the title is "Peyto's Future Back
6 to Strong Earnings and Dividends"; correct?
7 **MR. GEE:** Correct.
8 **MS. NEKIAR:** And again we see a sticky to the
9 top right; correct?
10 **MR. GEE:** Correct.
11 **MS. NEKIAR:** And if we look at the sticky, it
12 says -- here we see Peyto is telling the public that Peyto
13 has an incredible track record of earnings and dividends;
14 correct?
15 **MR. GEE:** Correct.
16 **MS. NEKIAR:** It's also telling the public that
17 2020 "was our only blemish"?
18 **MR. GEE:** Correct.
19 **MS. NEKIAR:** It also tells the public that
20 hopefully "2022 will be a record year for us"; correct?
21 **MR. GEE:** Correct.
22
23
24
25

PEY.TO

Total Shareholder Return Model

"Our track record of success is defined by our past profits. Our plan is to continue this trend, despite how the market currently values our future prospects."

Peyto Exploration and Development Corp.
23 Year Trading History



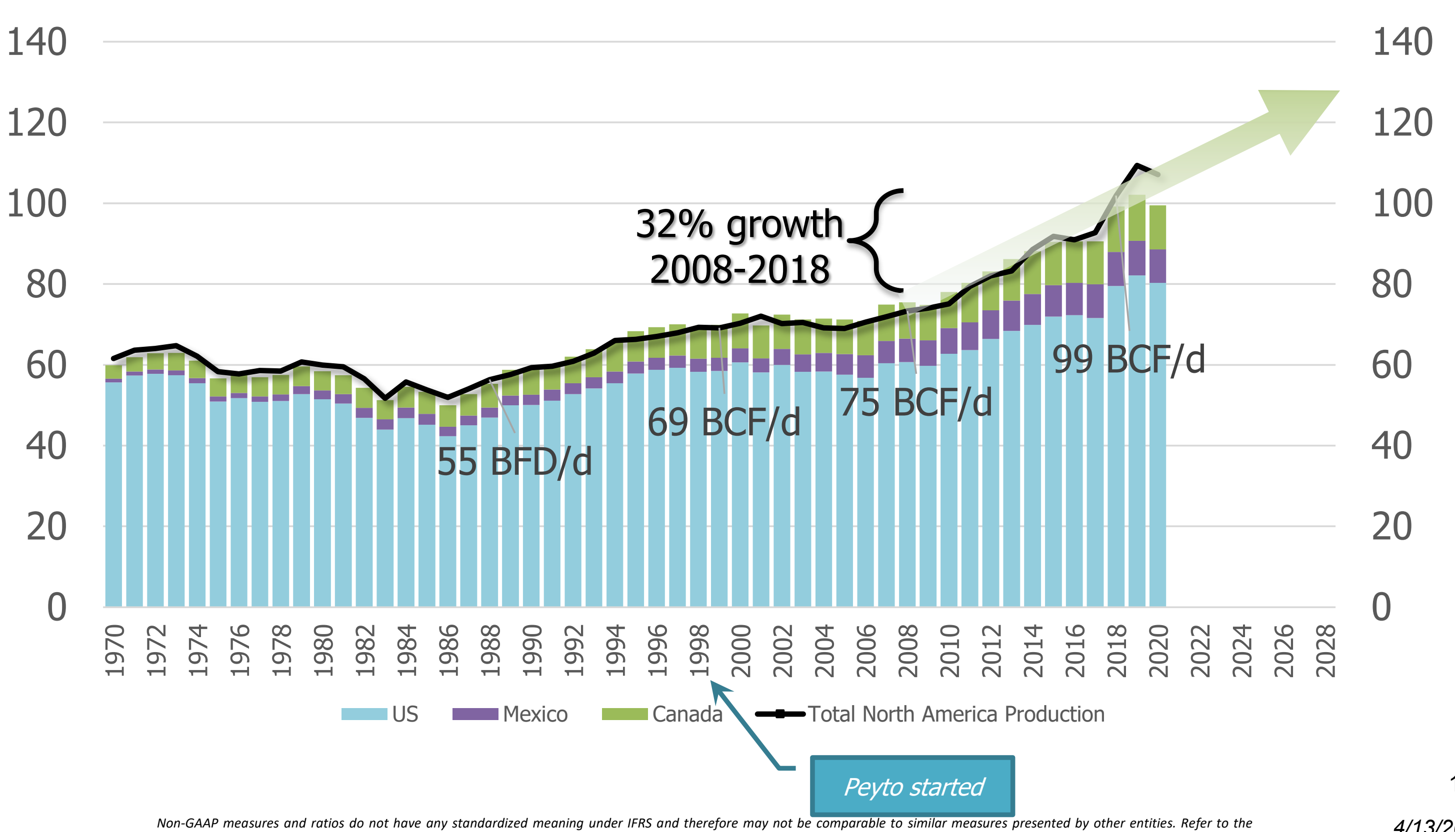
BOE factor - 6 mcf = 1 bbl of oil equivalent

Non-GAAP measures and ratios do not have any standardized meaning under IFRS and therefore may not be comparable to similar measures presented by other entities. Refer to the section entitled "Non-GAAP and Other Financial Measures" and "Non-GAAP and Other Financial Ratios" contained within the fourth quarter 2021 MD&A for an explanation of composition.

The Peyto's Strategy

Growing North American Gas Market

"It is likely, over the next decade, North American natural gas consumption will be up another 30 BCF/d. That's another Marcellus or two Canadas!"



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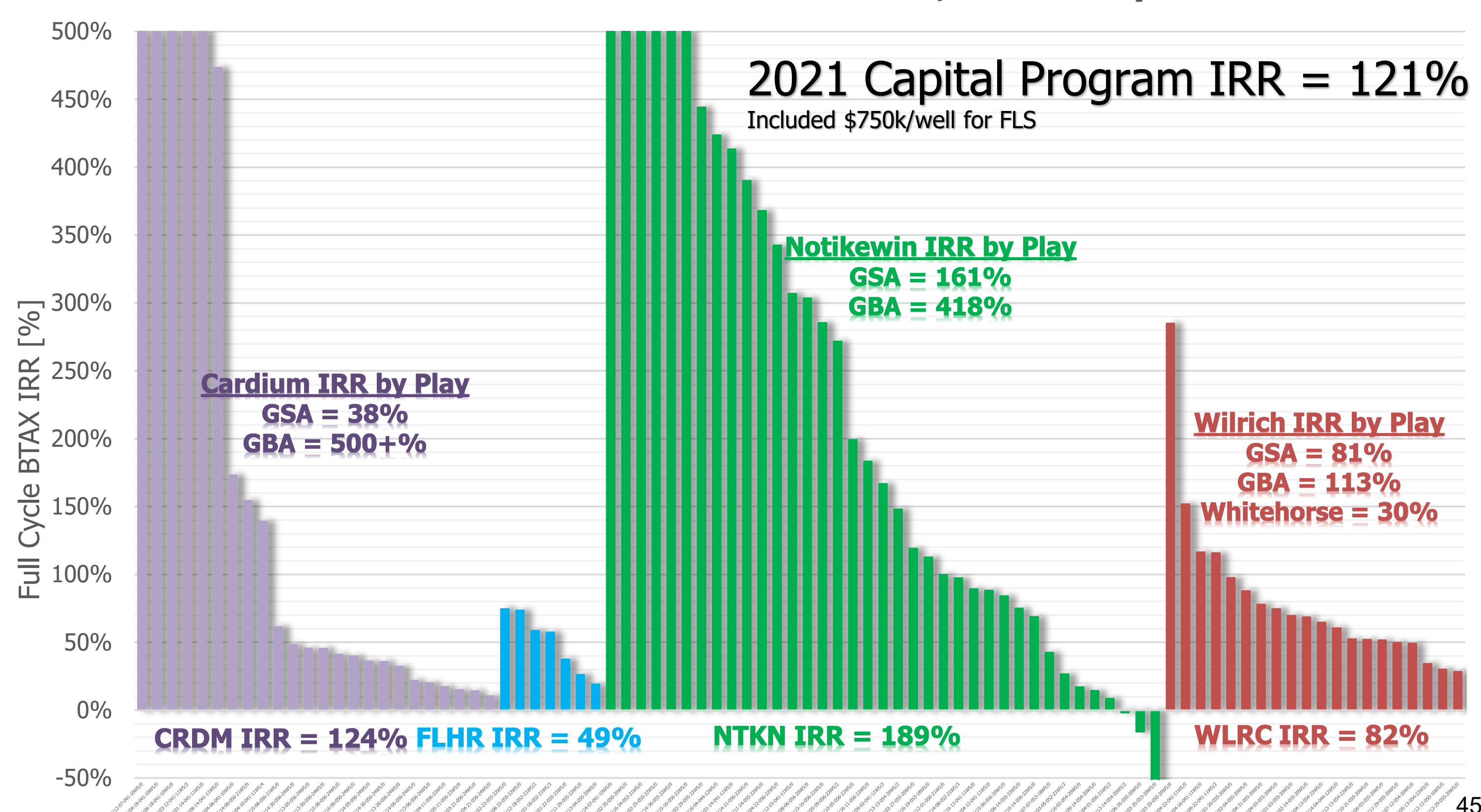
Peyto Returns

Best Year Ever

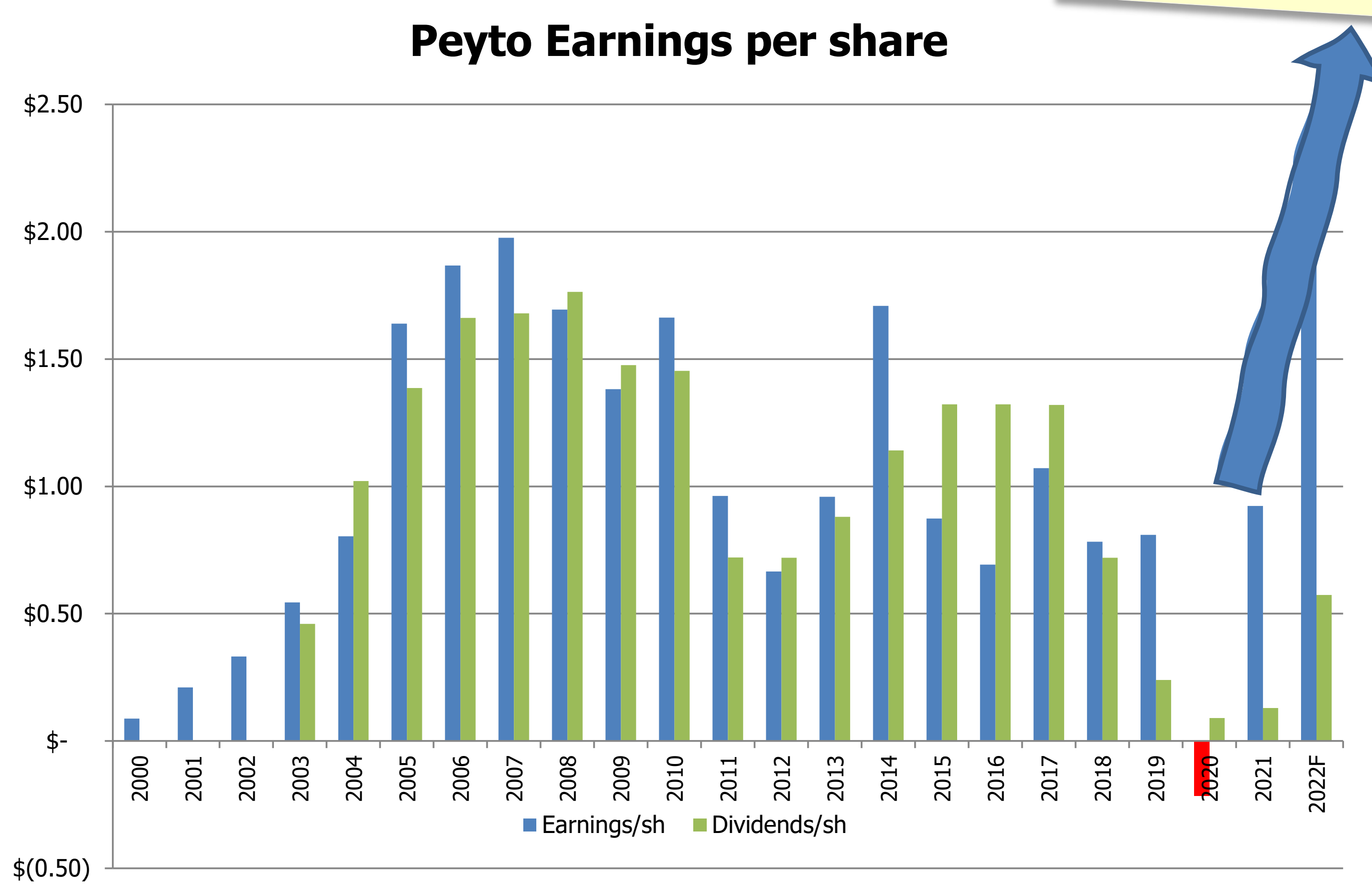
Strongest returns in years with many of the wells having already paid out their initial capital investment.



Non-GAAP measures and ratios do not have any standardized meaning under IFRS and therefore may not be comparable to similar measures presented by other entities. Refer to the section entitled "Non-GAAP and Other Financial Measures" and "Non-GAAP and Other Financial Ratios" contained within the fourth quarter 2021 MD&A for an explanation of composition.

Peyto's Future

Back to Strong Earnings and Dividends



** 2021 and beyond provided for illustration only using Mar 8, 2022 strip prices, $375MM flat capital investment as illustrated in slide 49 and current dividend level. Budgets and forecasts are subject to change due to a variety of factors including but not limited to prior year's results. FFO – Funds from Operations, see definition in Financial Reports. Future illustration derived from historical well performance and cost assumptions.*

Non-GAAP measures and ratios do not have any standardized meaning under IFRS and therefore may not be comparable to similar measures presented by other entities. Refer to the section entitled "Non-GAAP and Other Financial Measures" and "Non-GAAP and Other Financial Ratios" contained within the fourth quarter 2021 MD&A for an explanation of composition.

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has

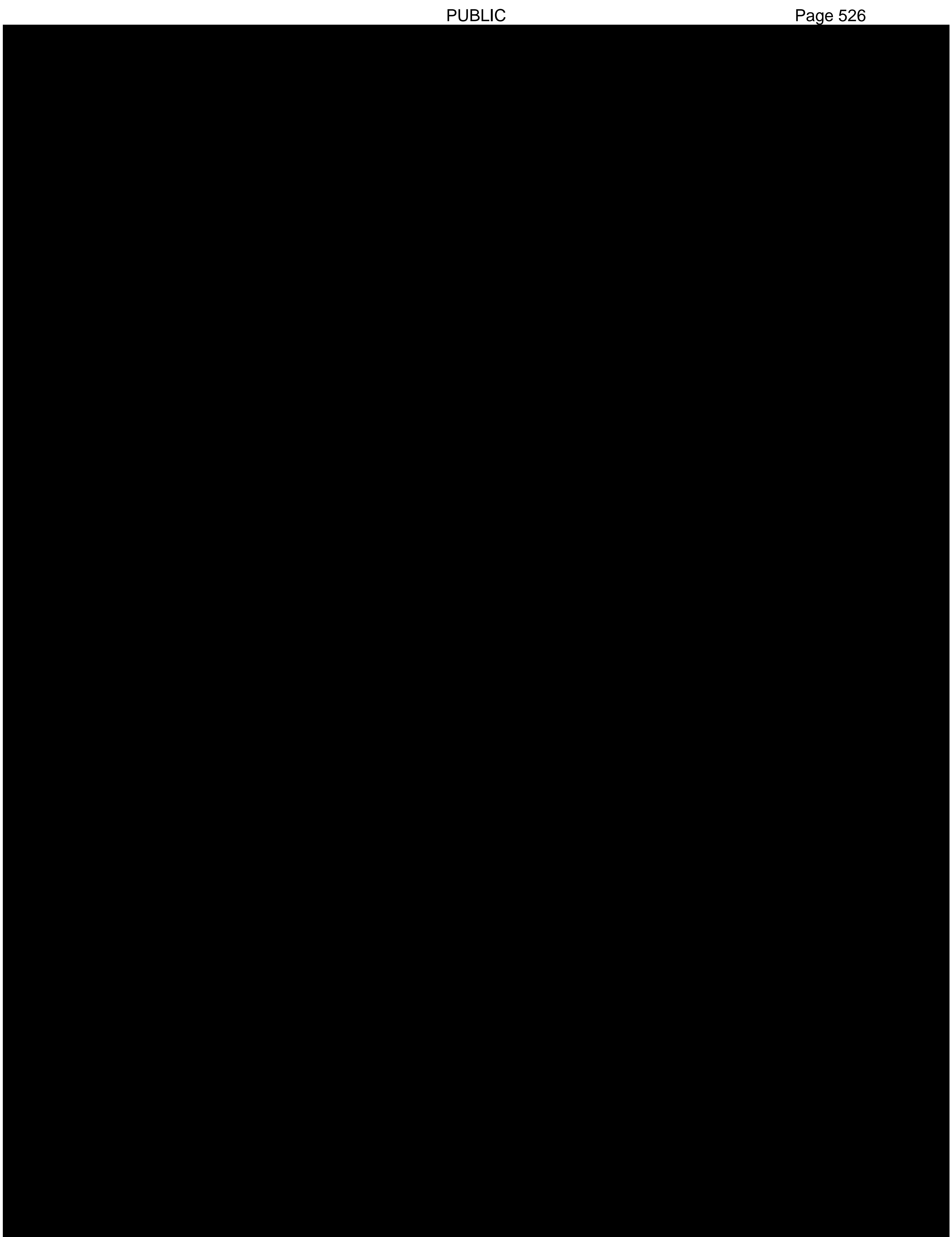
Exception

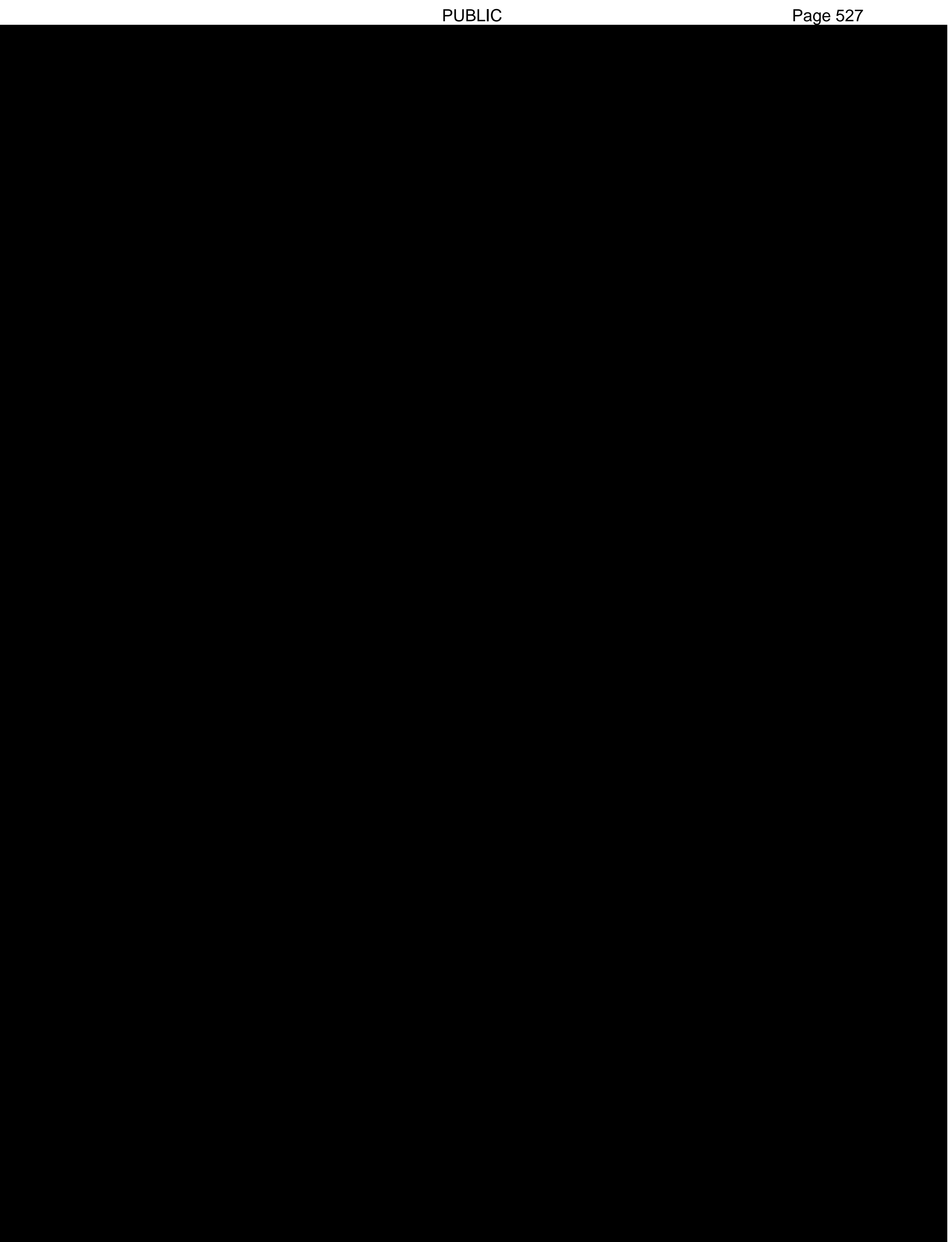
94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

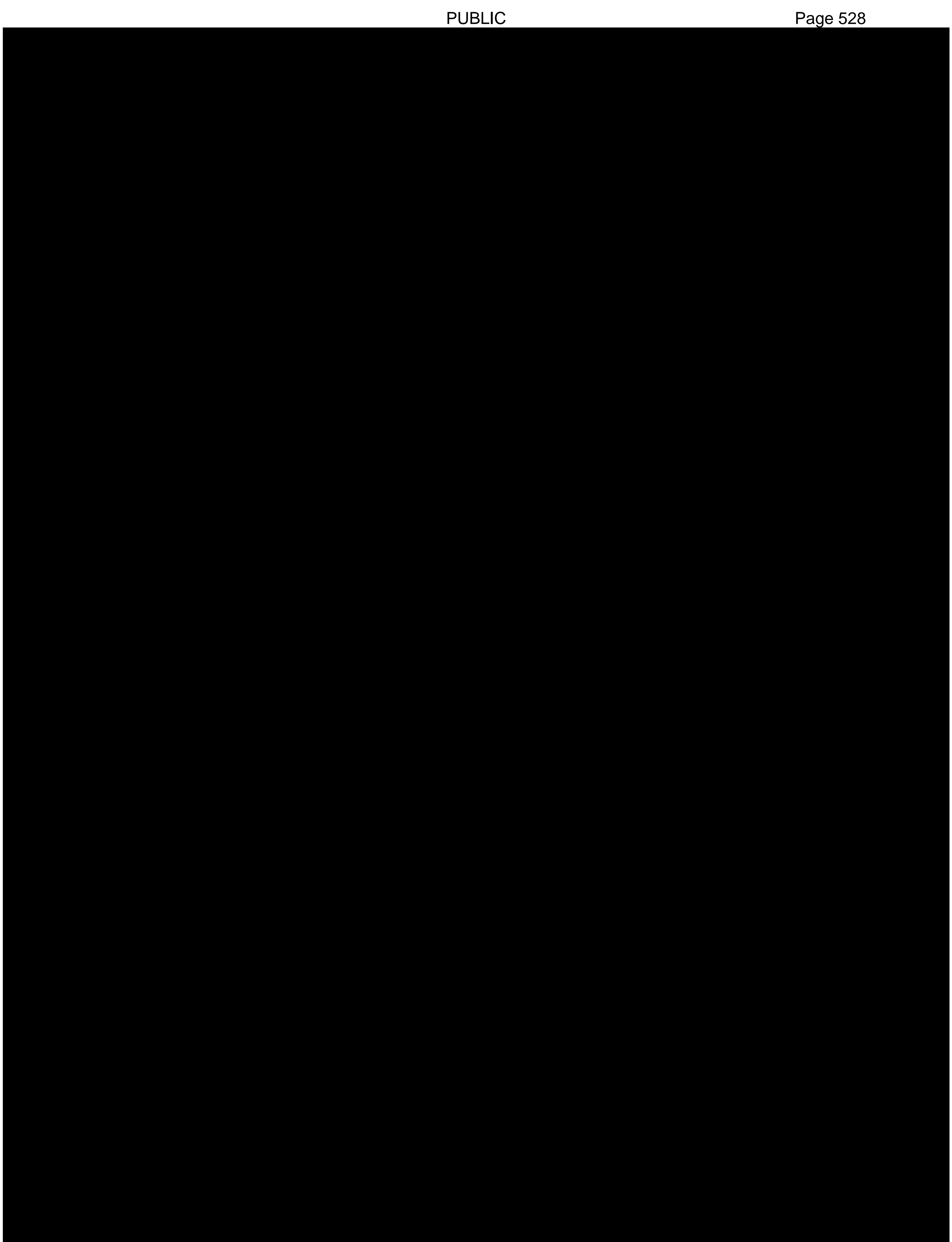
a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

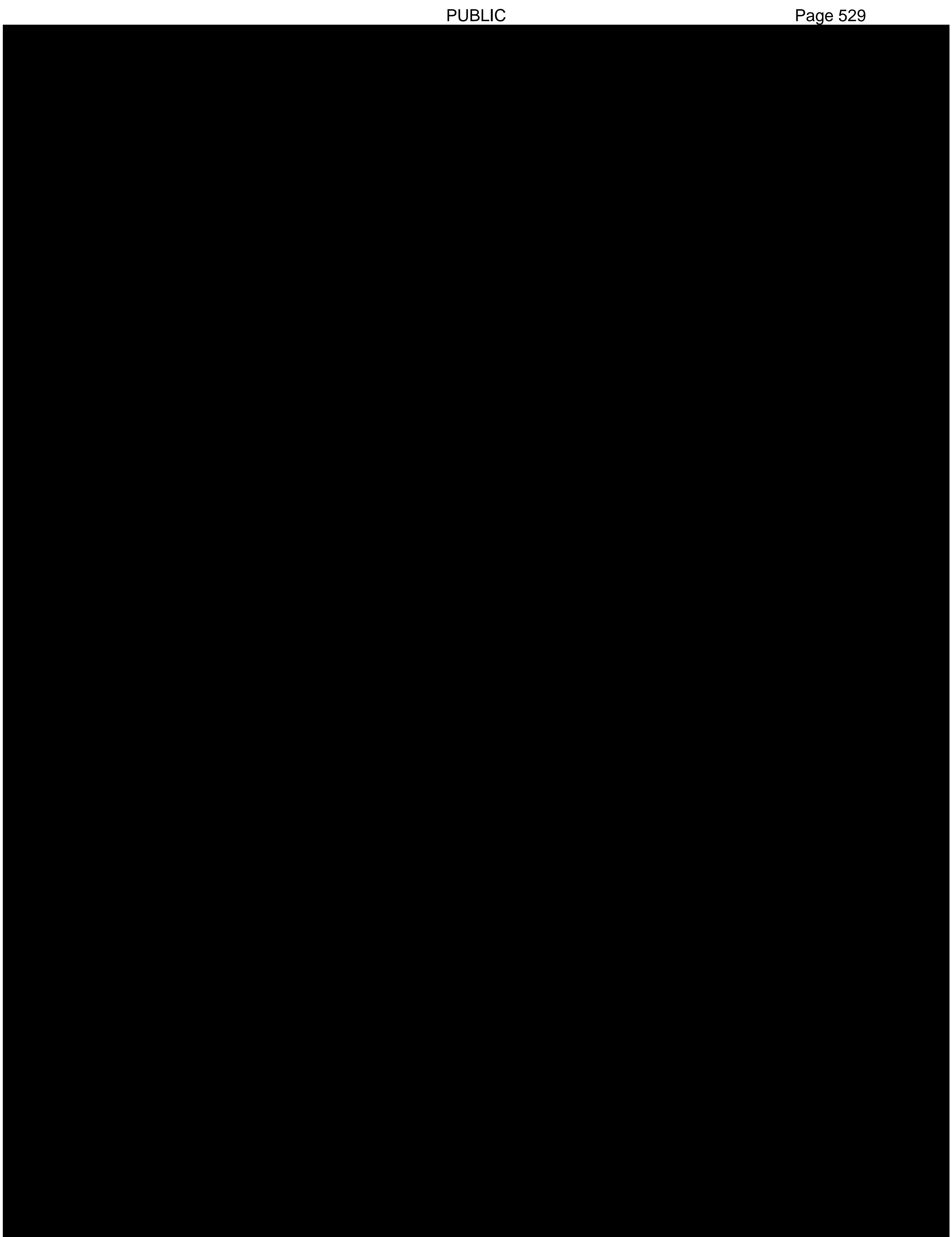
b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*, et à propos de laquelle le ministre des Finances certifie au commissaire le nom des parties et certifie que cette fusion est dans l'intérêt public ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

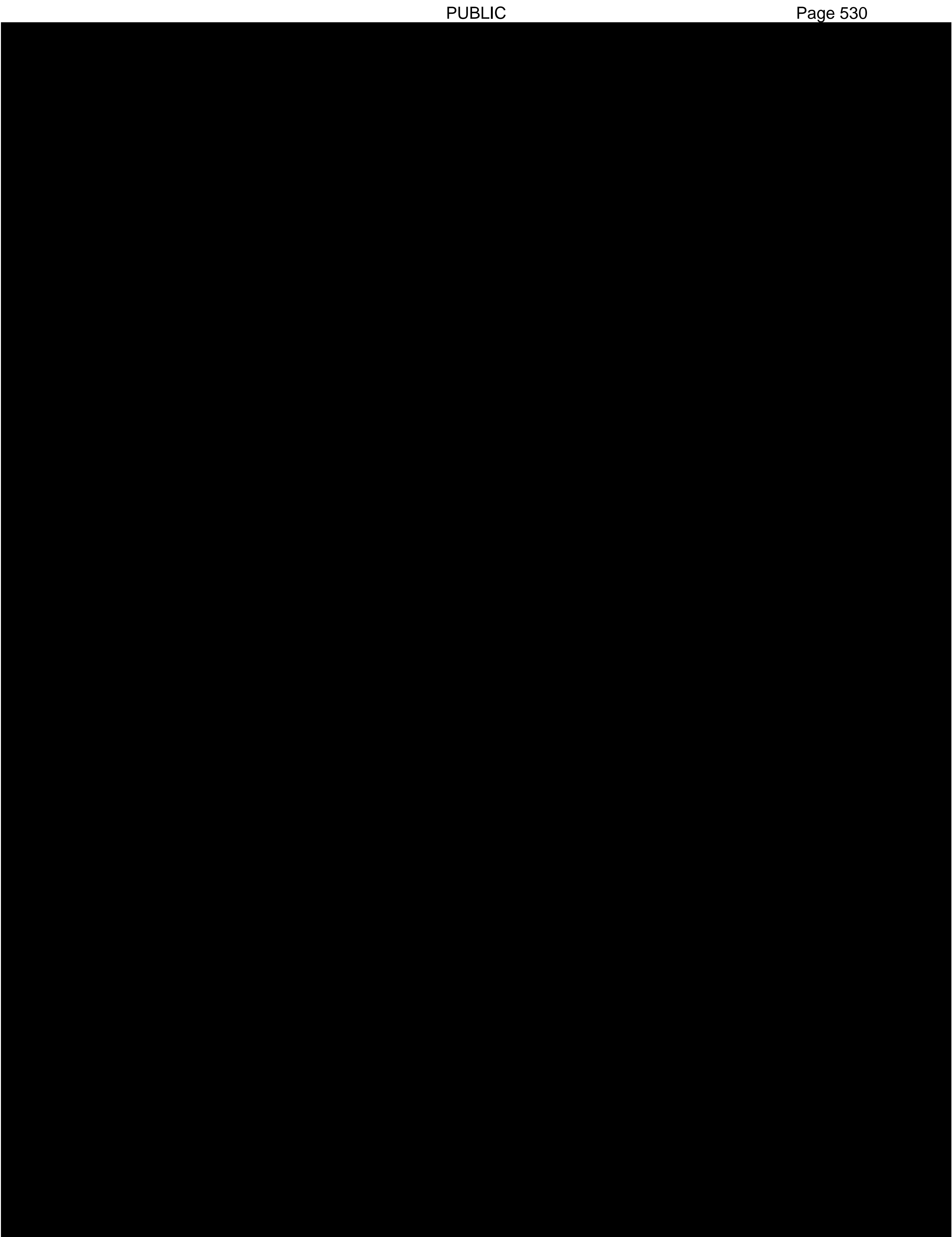
c) d'une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard de laquelle le ministre

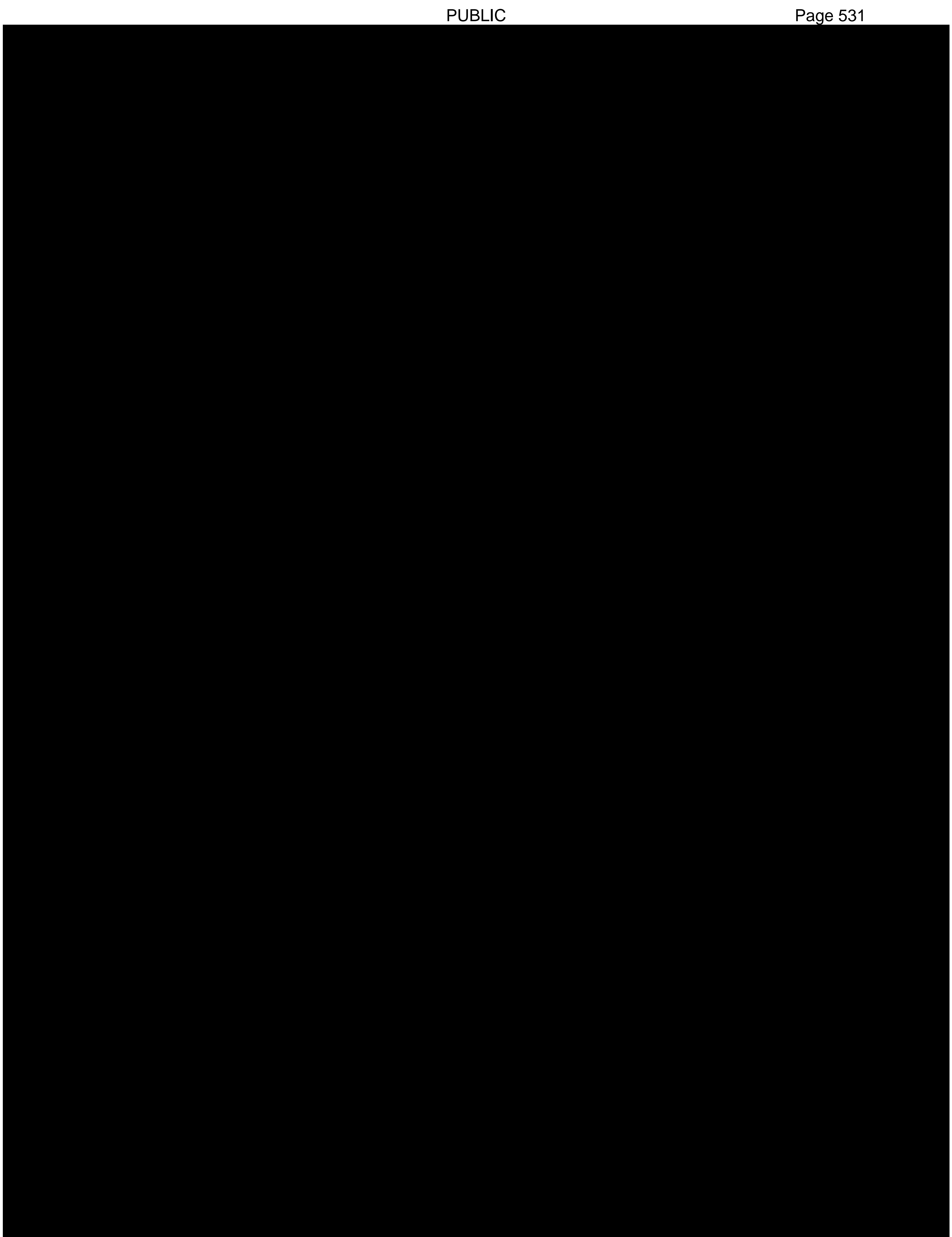


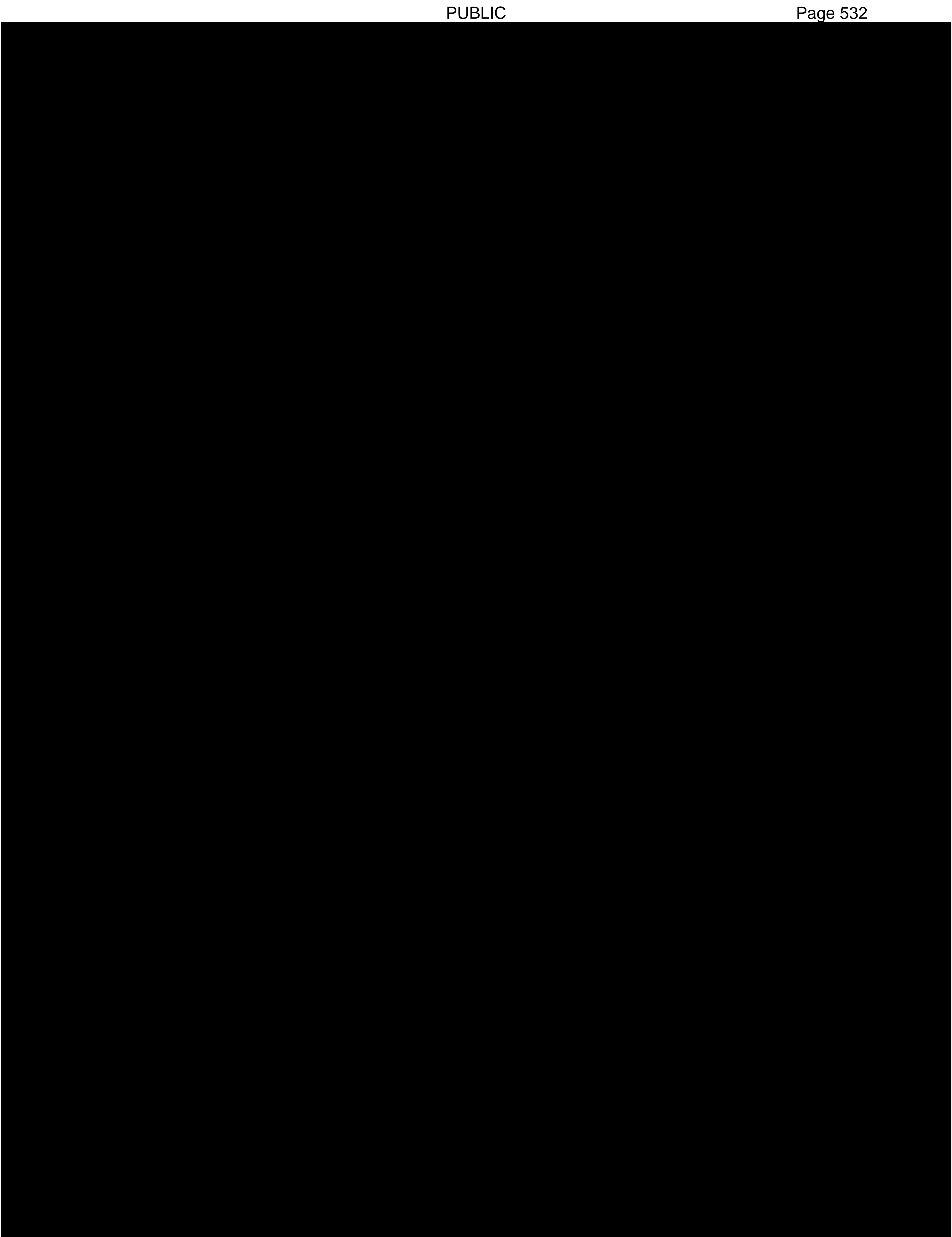


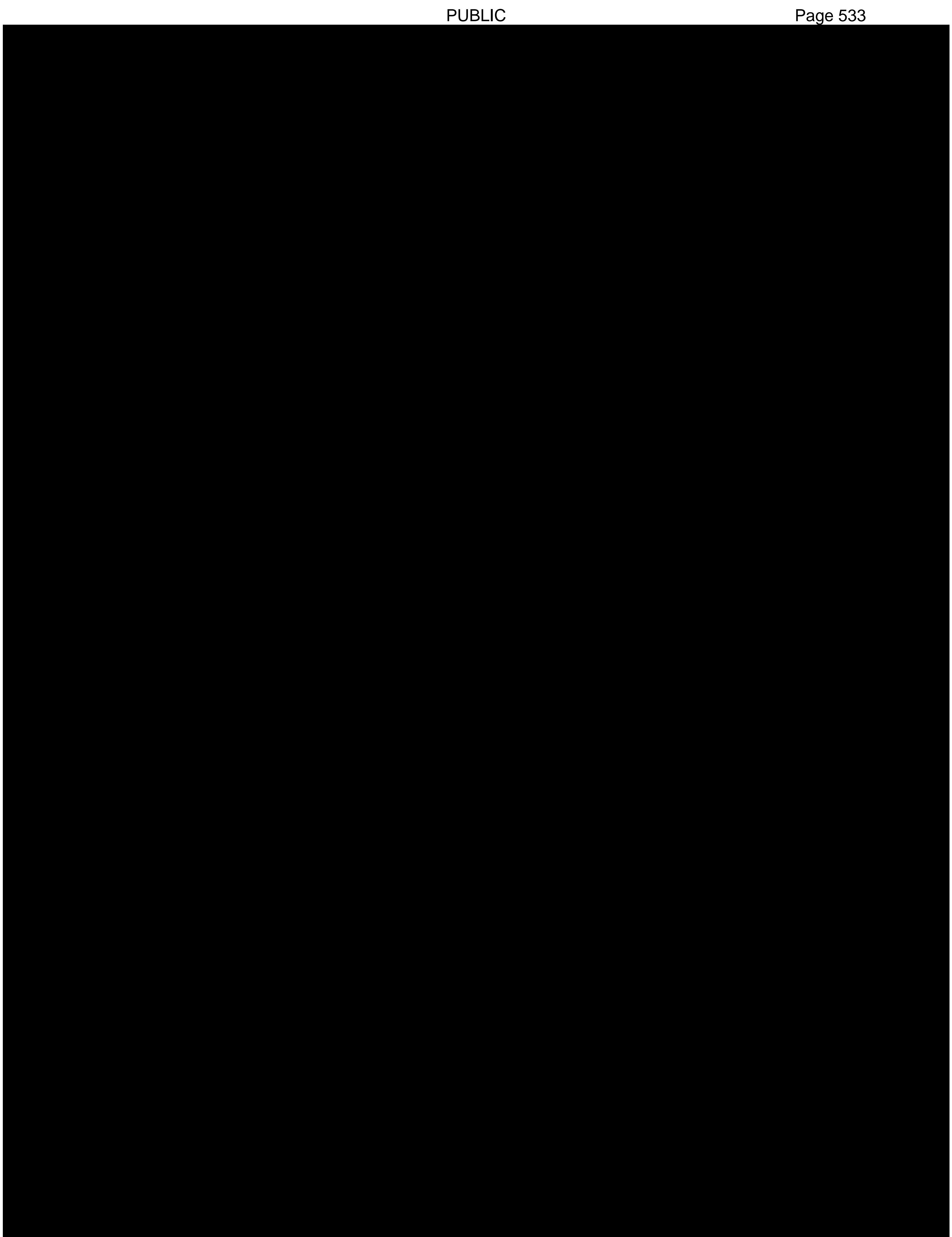


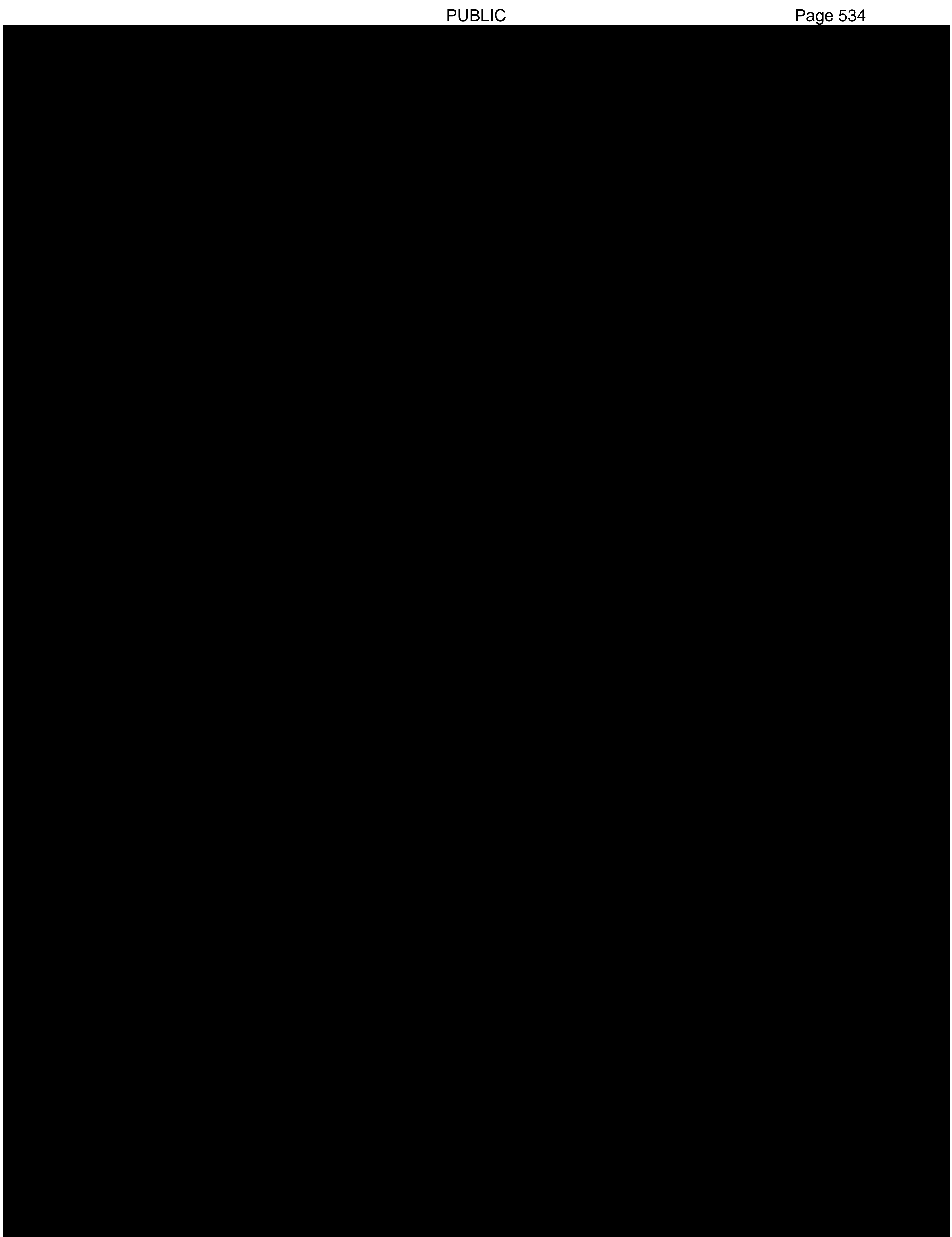


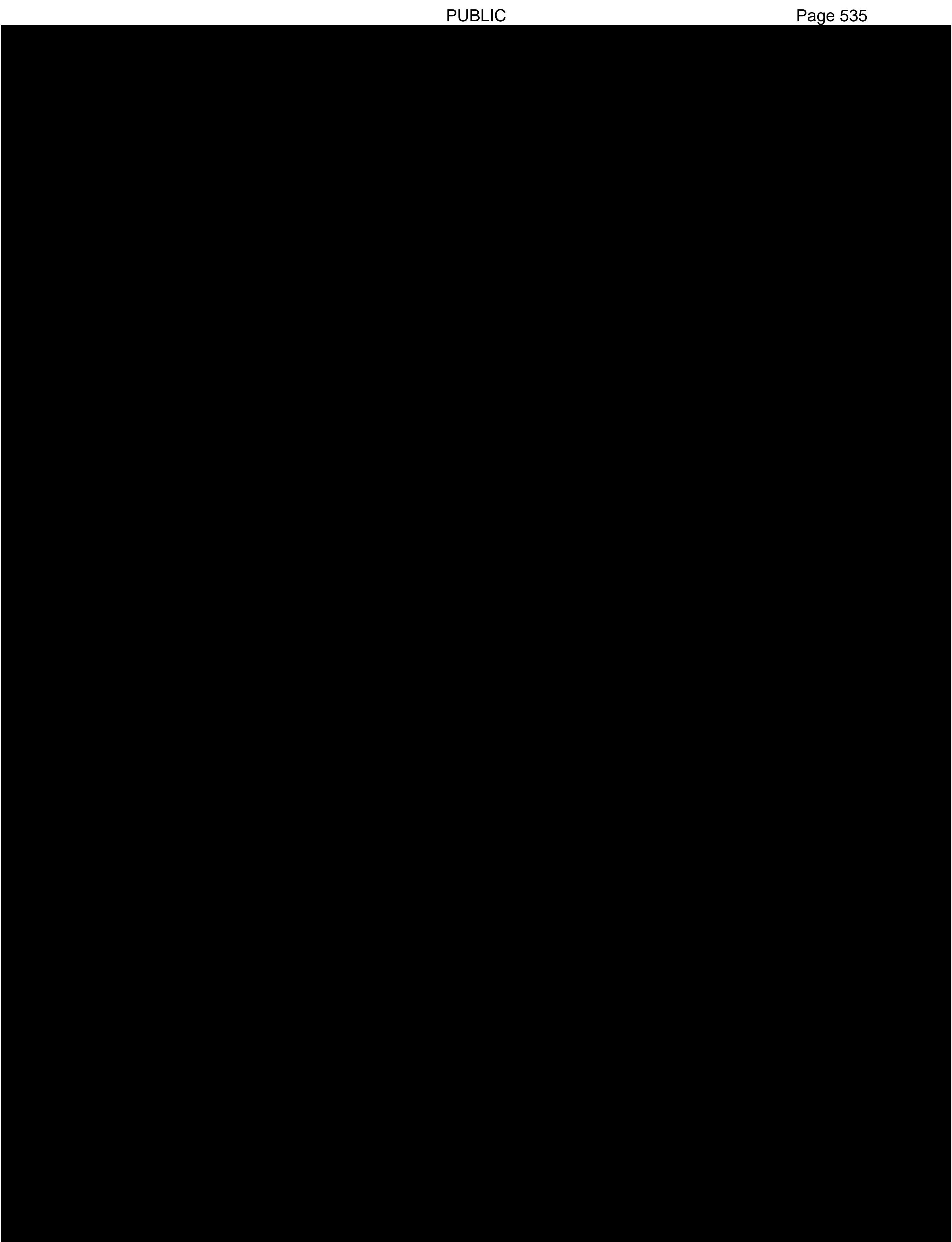




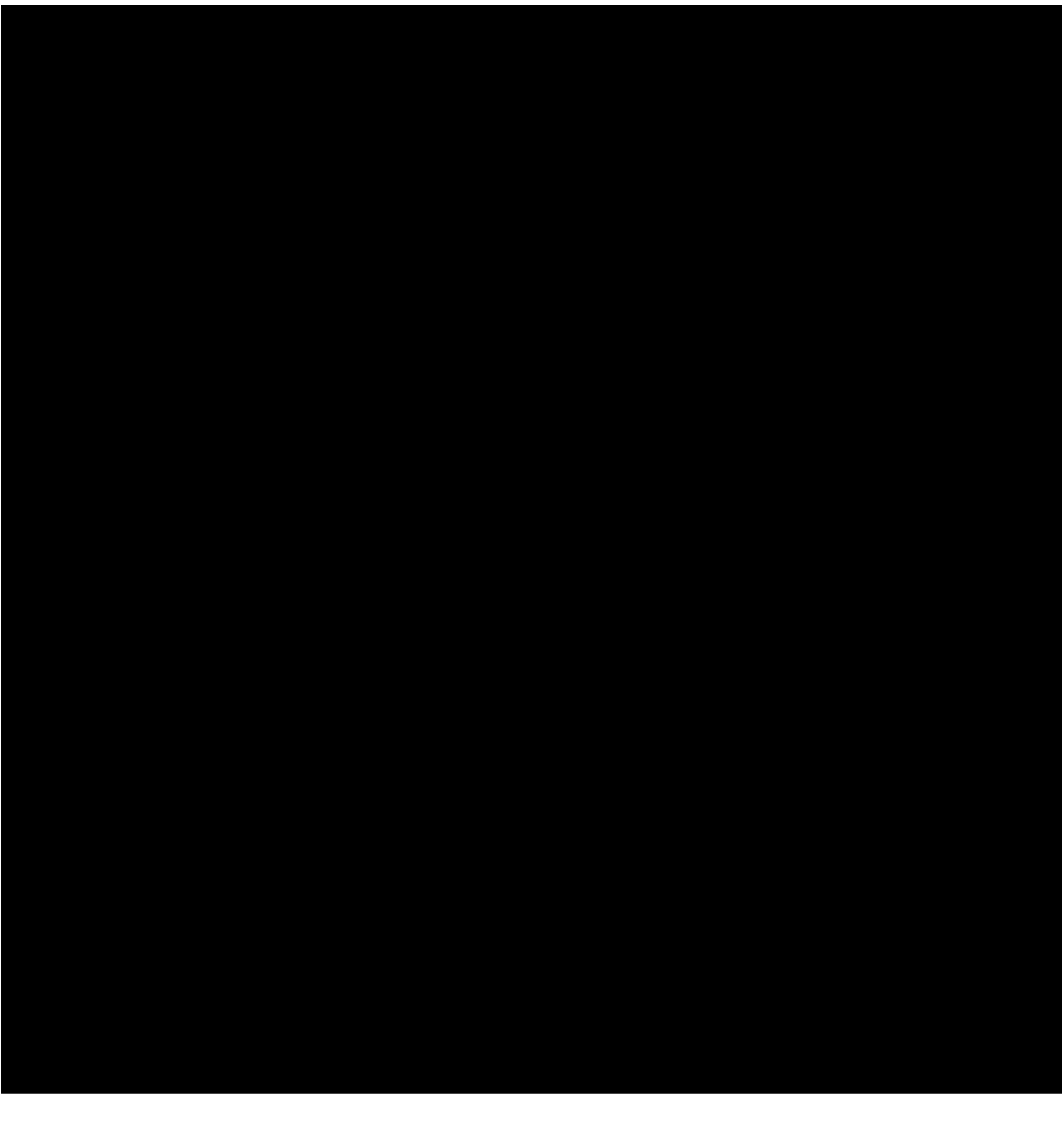


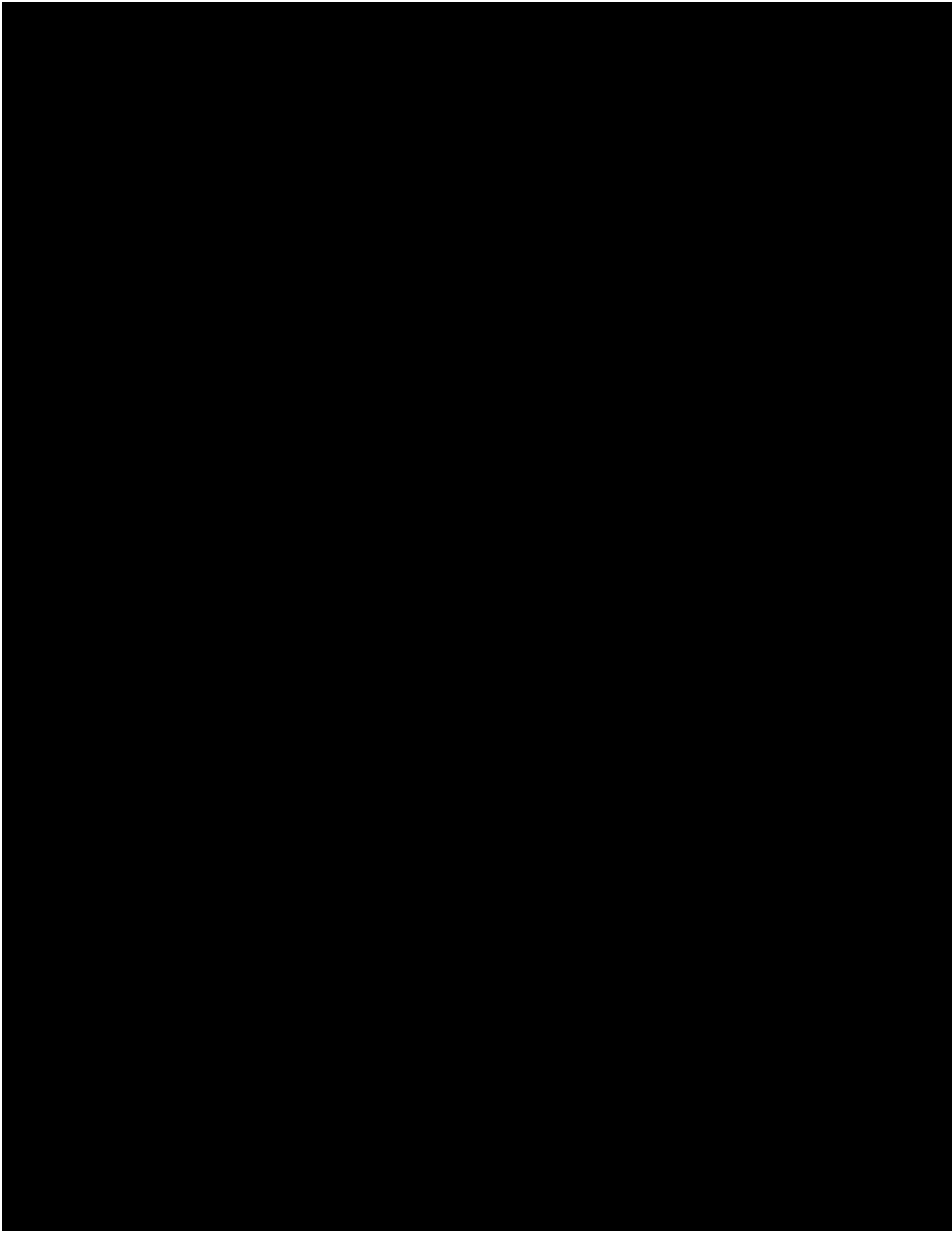


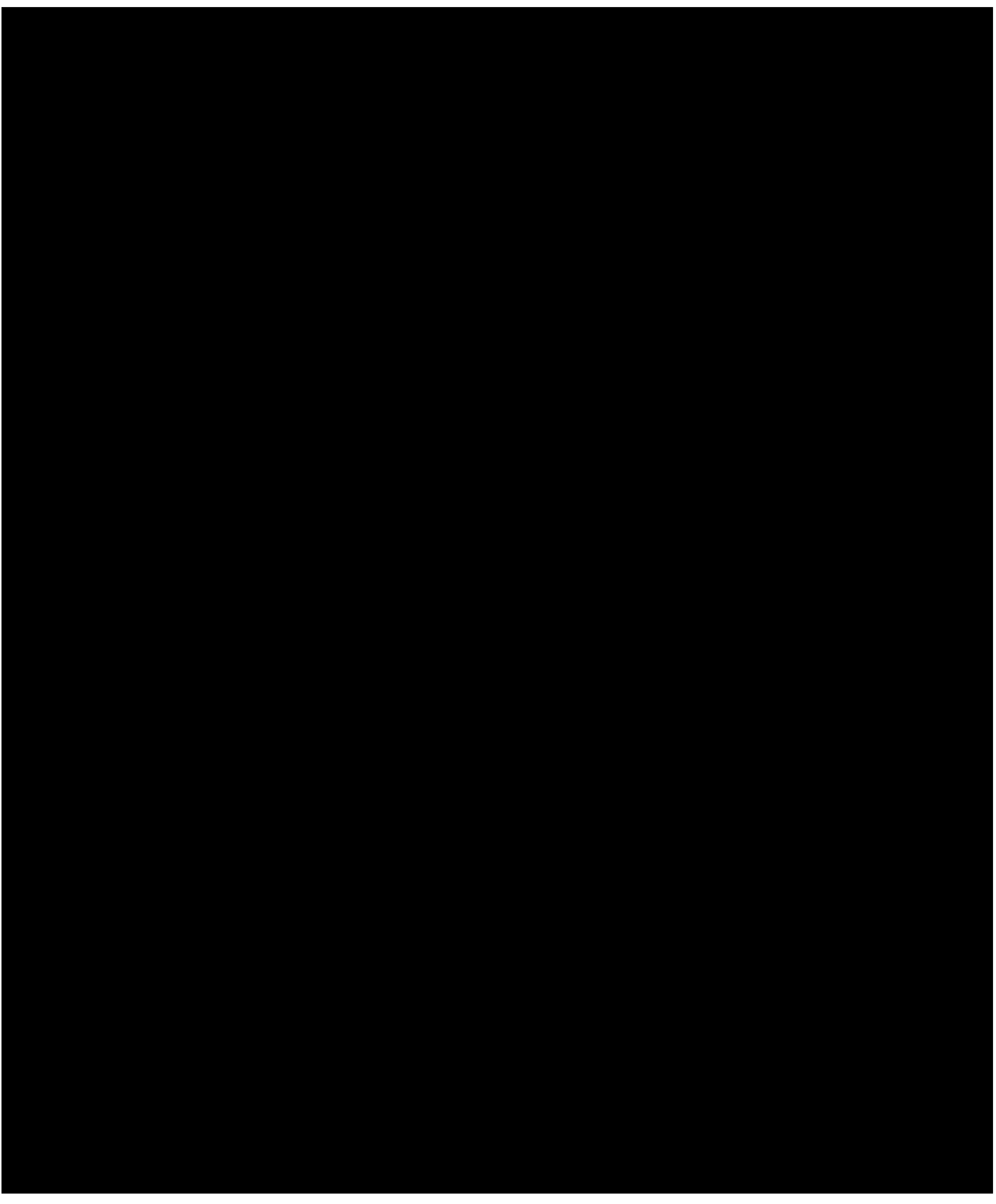


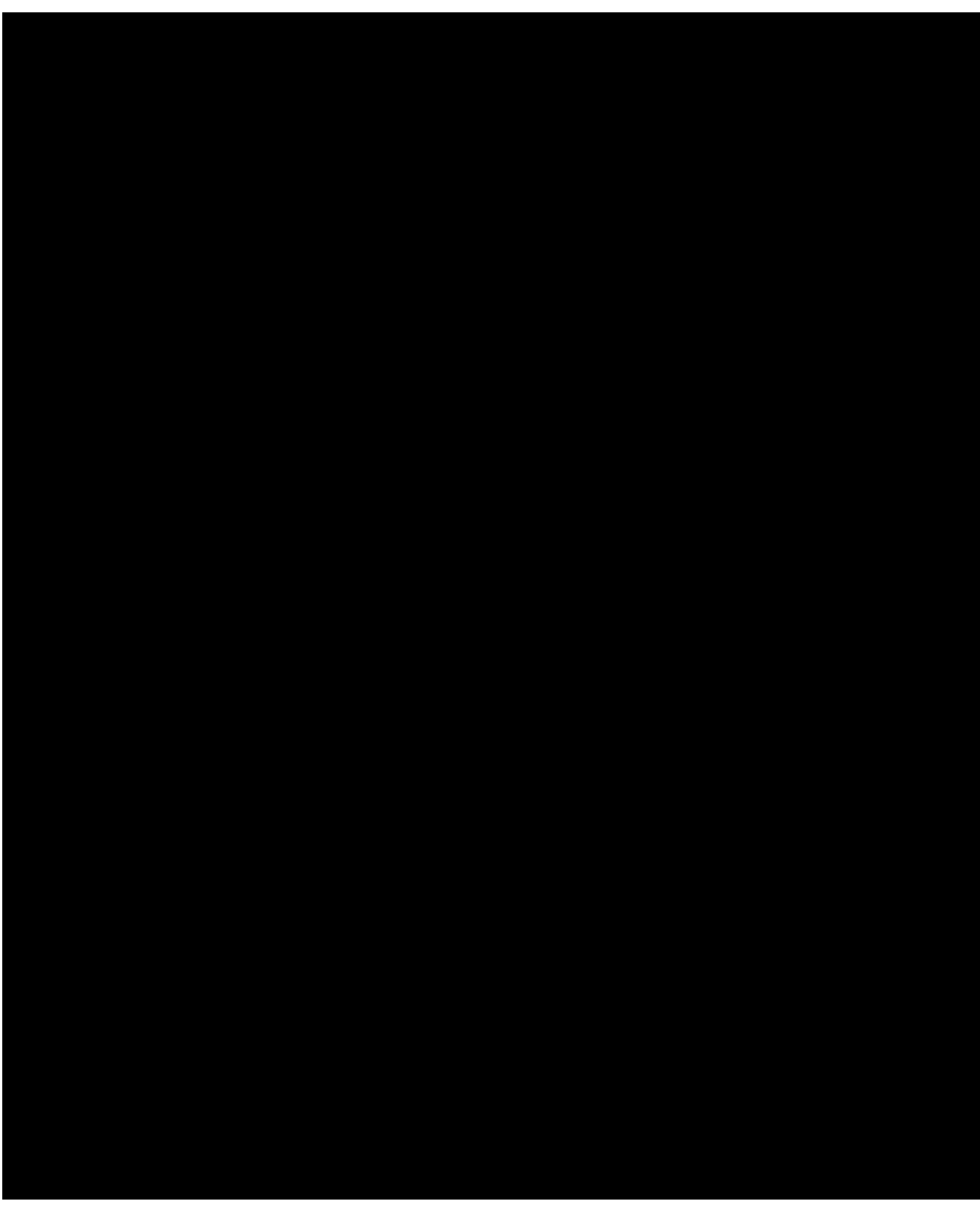


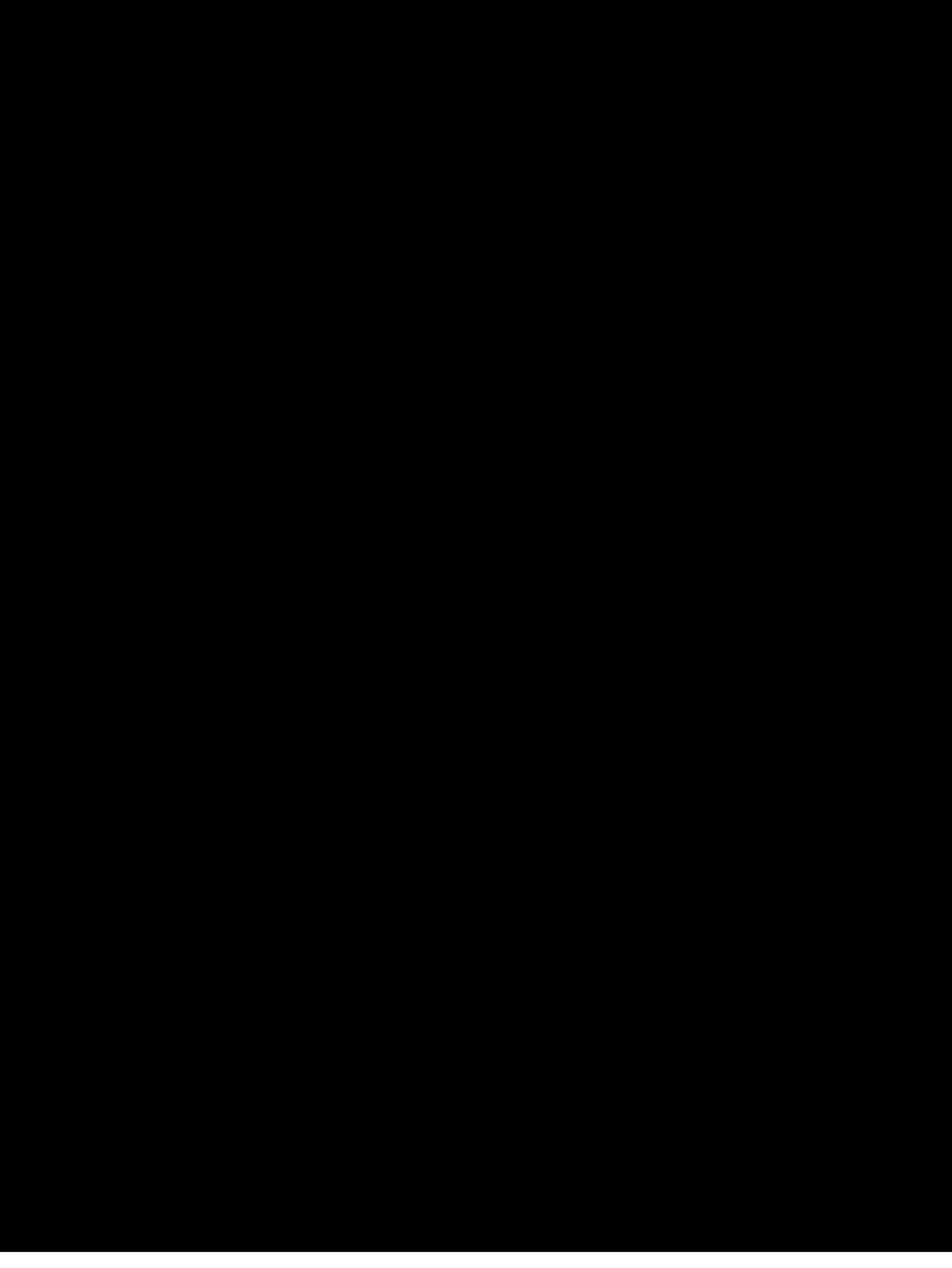
[APG]

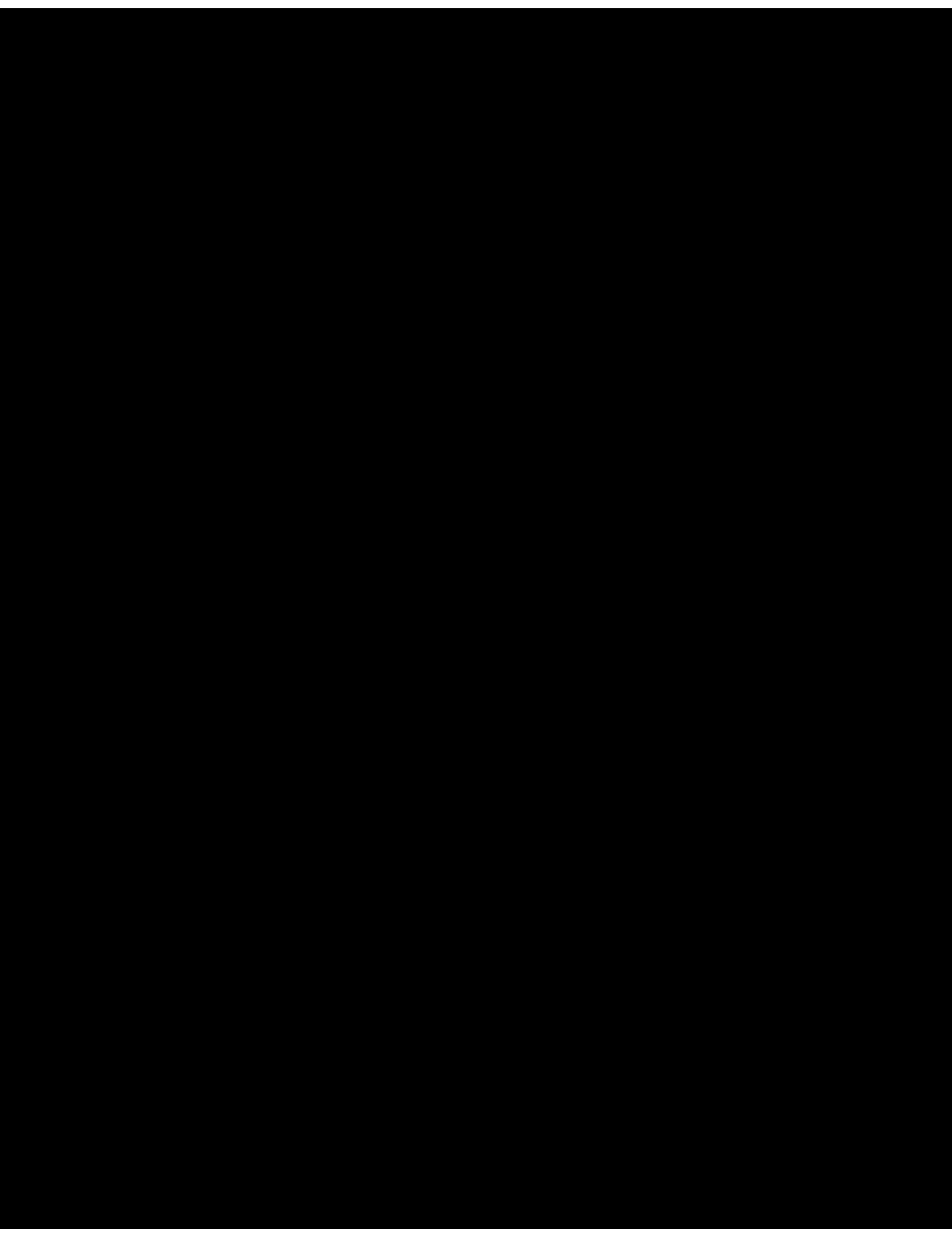


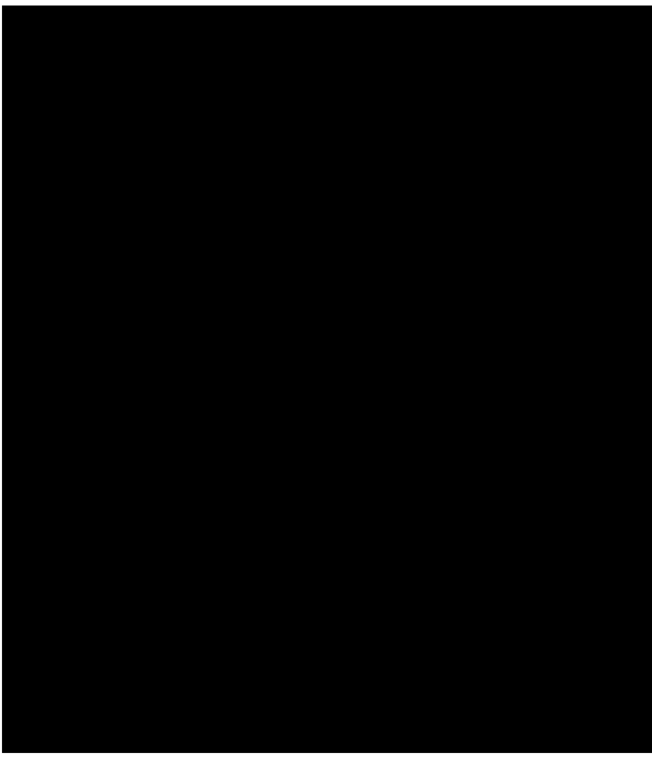












INTRODUCTION

1. I am the Senior Vice President, Landfill Solutions of SECURE Energy Services Inc. ("**SECURE**"). In this capacity, I was a member of the senior executive team at SECURE involved in evaluating and planning the merger of SECURE and Tervita Corporation ("**Tervita**"), which closed on July 2, 2021 (the "**Transaction**"), as further described below in my affidavit. Since the Transaction closed, I have also been a member of the senior executive team overseeing the integration of the former Tervita assets into SECURE's operations and tracking the synergies resulting from that integration. As such, I have knowledge of the matters contained in this affidavit. Where I rely on information received from others, I state the source of that information and believe it to be true.

2. I joined SECURE in 2007. Over the years, I have held the following positions at the company: Executive Vice President, New Ventures (May 2020 – June 2021), Executive Vice President, Operations (May 2019 – May 2020), Executive Vice President, Technical Services (September 2017 – May 2019), Executive Vice President, Processing Recovery & Disposal division (January 2017 – September 2017) and VP of Operations & Sales (December 2011 – January 2017). From 2000 to 2007, I held various roles at Tervita (which was previously known as CCS Corp.) including roles in Environment & Regulatory, Project Development, Mergers & Acquisitions, and Business Development. Prior to that, I worked for other companies in the energy industry, including Newalta Corporation. In total, I have more than 23 years of experience in the energy industry.

3. I have held my current position at SECURE as Senior Vice President, Landfill Solutions since the closing of the Transaction. My responsibilities include all aspects of planning and

17, 2022, that it will construct an oil battery in Mica, AB for oil/gas/water separation, which will be sponsored by NorthRiver Midstream Inc. through a $55 million investment. Attached as Exhibit 145 is a Stifel First Energy report summarizing the investment.

76. SECURE itself is an example of sponsored entry in the oil and gas waste disposal industry. SECURE was founded in 2007, and rapidly expanded its network of disposal facilities, constructing nine facilities by April 2010 when SECURE went public. By 2014, SECURE had expanded to 24 facilities. SECURE's growth as a competitor in the industry was made possible by the sponsorship of the construction of SECURE's facilities through the sale of discounted equipment, which SECURE still uses today, by its customers (many of whom were customers of former Tervita at the time).

77. Customers are also capable of self-supply with respect to energy marketing services. Many oil and gas producers are vertically integrated and have the capabilities and infrastructure required to treat, terminal and market their own oil and gas. Many producers build their own batteries and tie-ins to transmission pipelines, eliminating the need for third-party energy marketing services.

78. For example, Tourmaline connects directly to the Pembina Peace Pipeline System at its Spirit River location, as do Paramount at its Gold Creek location, CNRL at its Grande Prairie and La Glace locations, and Seven Generations (now ARC Resources) at its Kakwa facility. Attached as Exhibit 146 to my affidavit is a petroleum toll schedule issued by Pembina for its Peace Pipeline System, which lists all receipt points to the pipeline including many major customers of SECURE. Customers frequently leverage this self-

On October 22, 2010, Winalta received court and creditor approval of a plan of arrangement (the "**Plan**") pursuant to the CCAA under which Winalta amalgamated with certain of its subsidiaries and, effective October 29, 2010, emerged from CCAA protection to begin focused operations on its oilfield services business.

The board of directors maintained its usual role during the period while Winalta was under CCAA protection and, together with management, was primarily responsible for formulating the Plan for restructuring Winalta's affairs.

Conflicts of Interest

There are no known existing or potential material conflicts of interest between the Corporation (including its subsidiaries) and any director or officer of the Corporation. Certain of the directors and officers also serve as directors and/or officers of other public and private companies that may be involved in the oil and natural gas industry, and therefore it is possible that a conflict may arise between their duties as directors or officers of the Corporation and their duties as directors and/or officers of such other companies. The Corporation and the directors attempt to minimize such conflicts. In the event that such a conflict of interest arises at a meeting of the Board, a director who has such a conflict will abstain from voting for or against the approval of such items of which they are conflicted. In appropriate cases, the Corporation will establish a special committee of independent directors to review a matter in which directors, or management, may have a conflict. In accordance with the *Business Corporations Act* (Alberta), the directors of the Corporation are required to act honestly, in good faith and in the best interests of the Corporation. In determining whether or not the Corporation will participate in a particular program and the interest therein to be acquired by it, the directors will primarily consider the potential benefits to the Corporation, the degree of risk to which the Corporation may be exposed and our financial position at that time. Other than as indicated, the Corporation has no other procedures or mechanisms to deal with conflicts of interest.

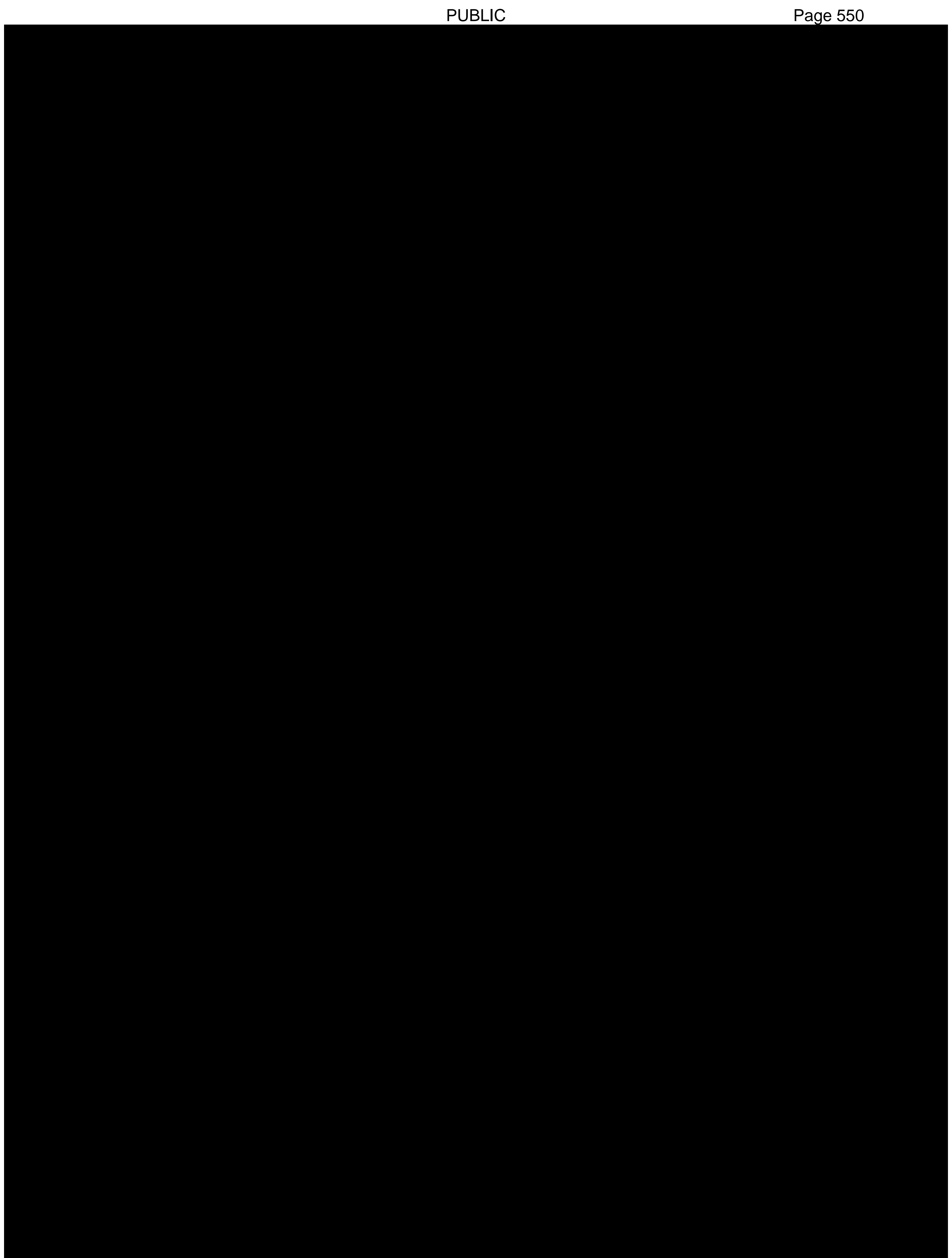
LEGAL PROCEEDINGS

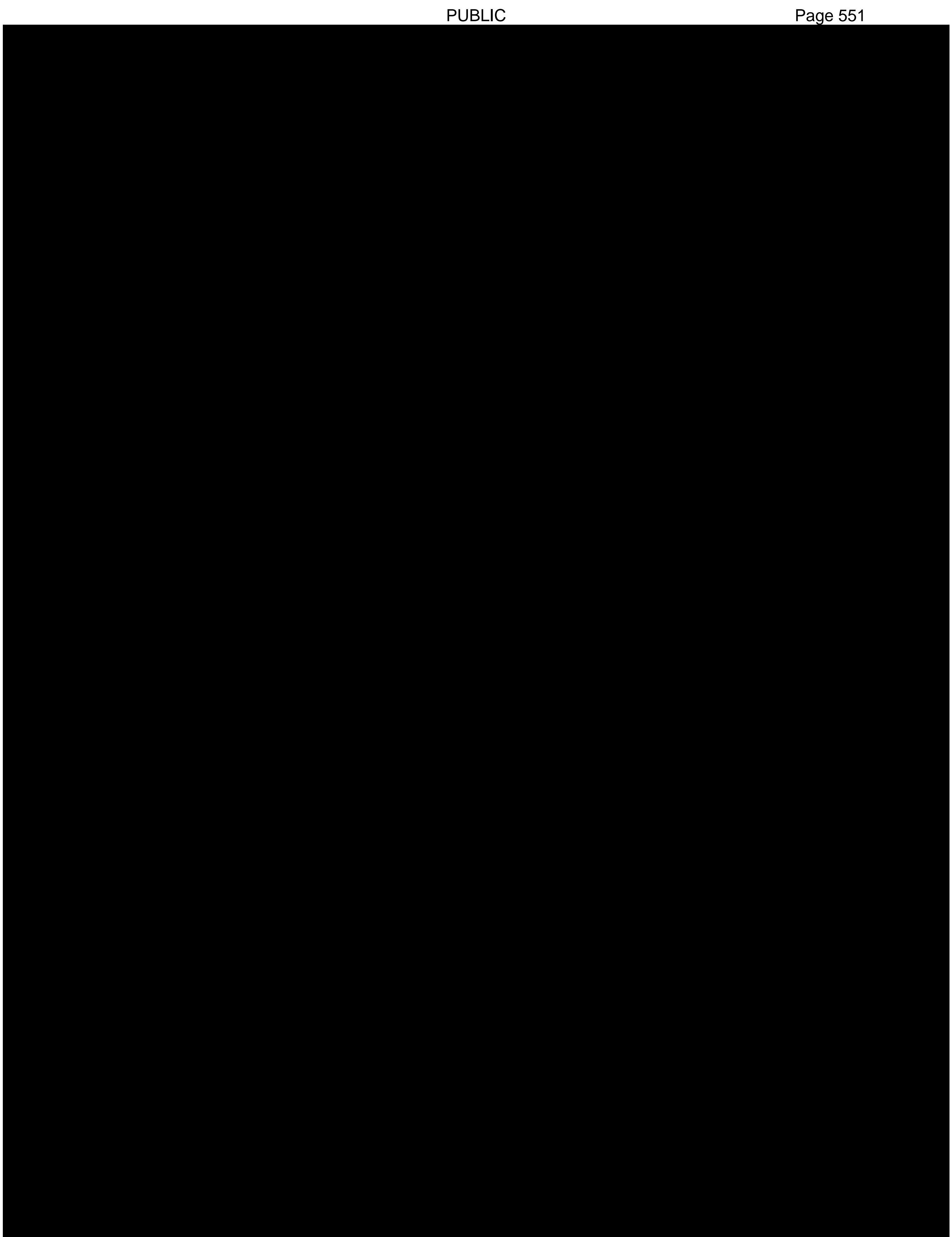
On December 21, 2007, Tervita Corporation ("**Tervita**") filed a statement of claim (the "**Tervita claim**") in the Court of Queen's Bench of Alberta, (the "**Court**") against the Corporation and certain of the Corporation's employees who were previously employed by Tervita (collectively, the "**SECURE Defendants**") alleging the SECURE Defendants breached their employment contracts with Tervita and engaged in other unlawful conduct. A Statement of Defence was filed by the SECURE Defendants on November 10, 2008 denying all of the allegations made against them. The Corporation also filed a counterclaim against Tervita, alleging that Tervita engaged in conduct constituting a breach of the Competition Act (Canada), unlawful interference with the economic relations of the Corporation and conspiracy (the "**counterclaim**"). This counterclaim includes damages related to the delay of building facilities as a result of the actions of Tervita.

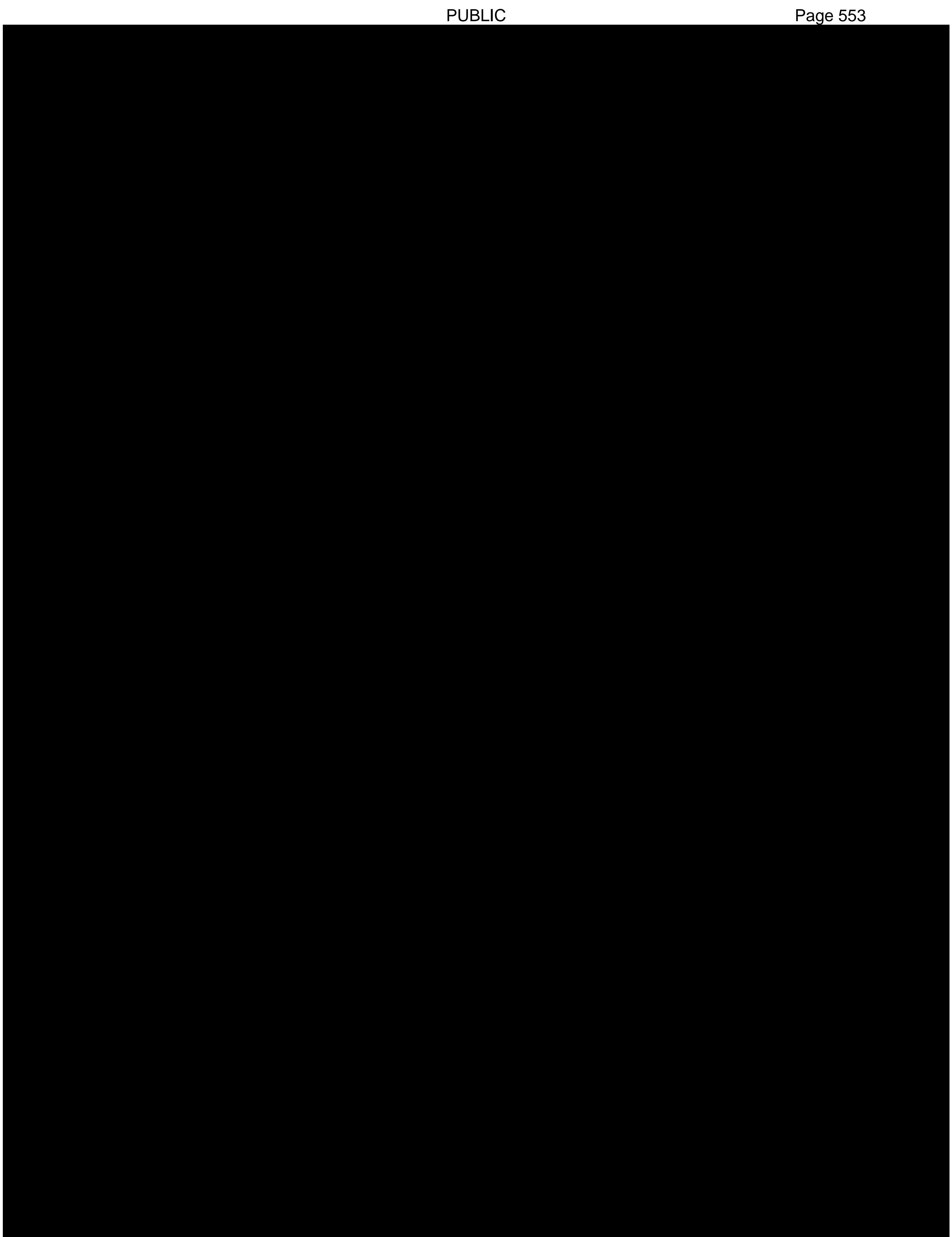
After nearly 12 years of litigation, on December 10, 2019, the Tervita claim and counterclaim were amended to $250.0 million and $83.0 million, respectively. These claims are scheduled to proceed to trial in 2022.

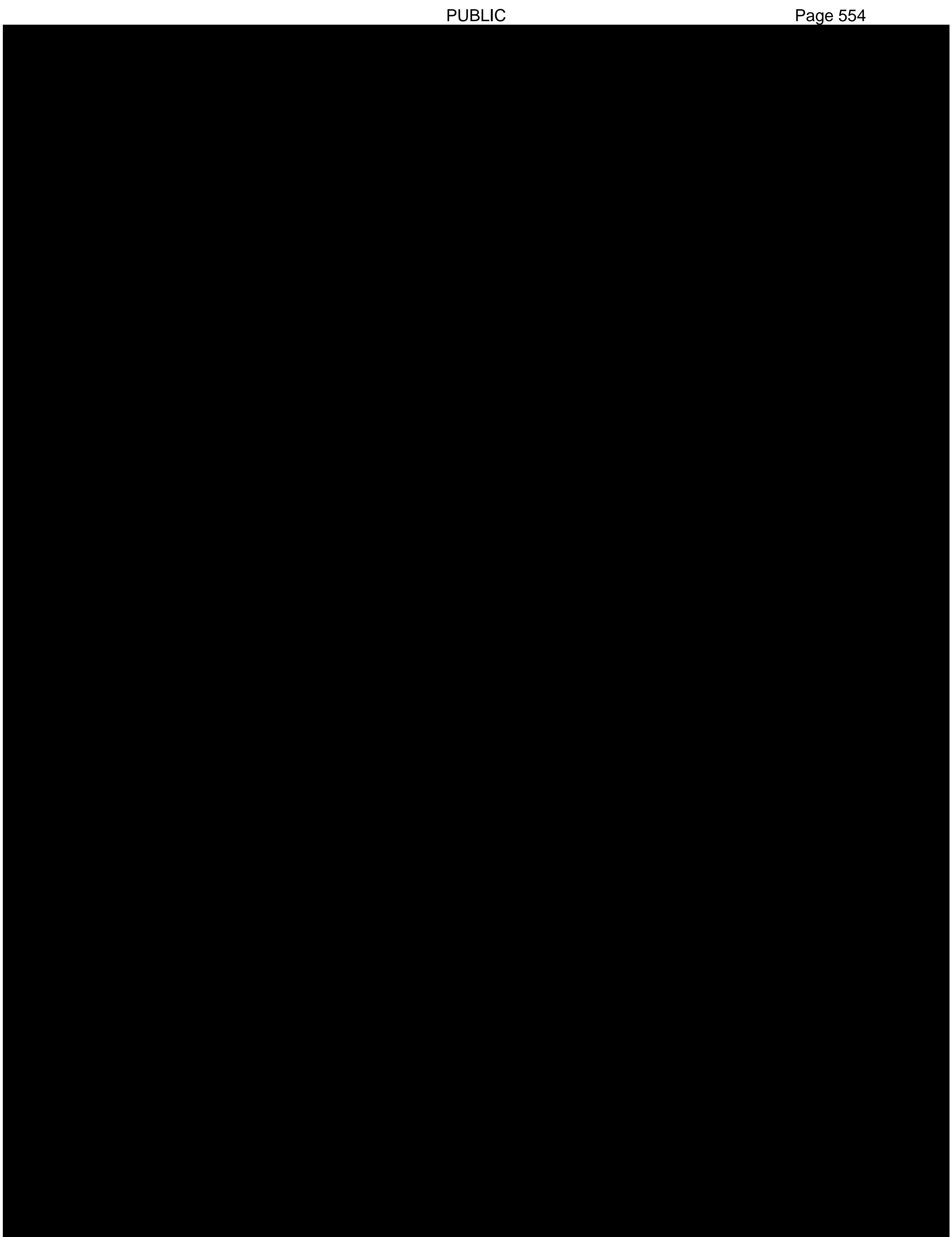
The matters raised in the claim are considered by the Corporation to be unfounded and unproven allegations that will be vigorously defended, although no assurances can be given with respect to the outcome of such proceedings. The Corporation believes it has valid defences to this claim and accordingly has not recorded any related liability.

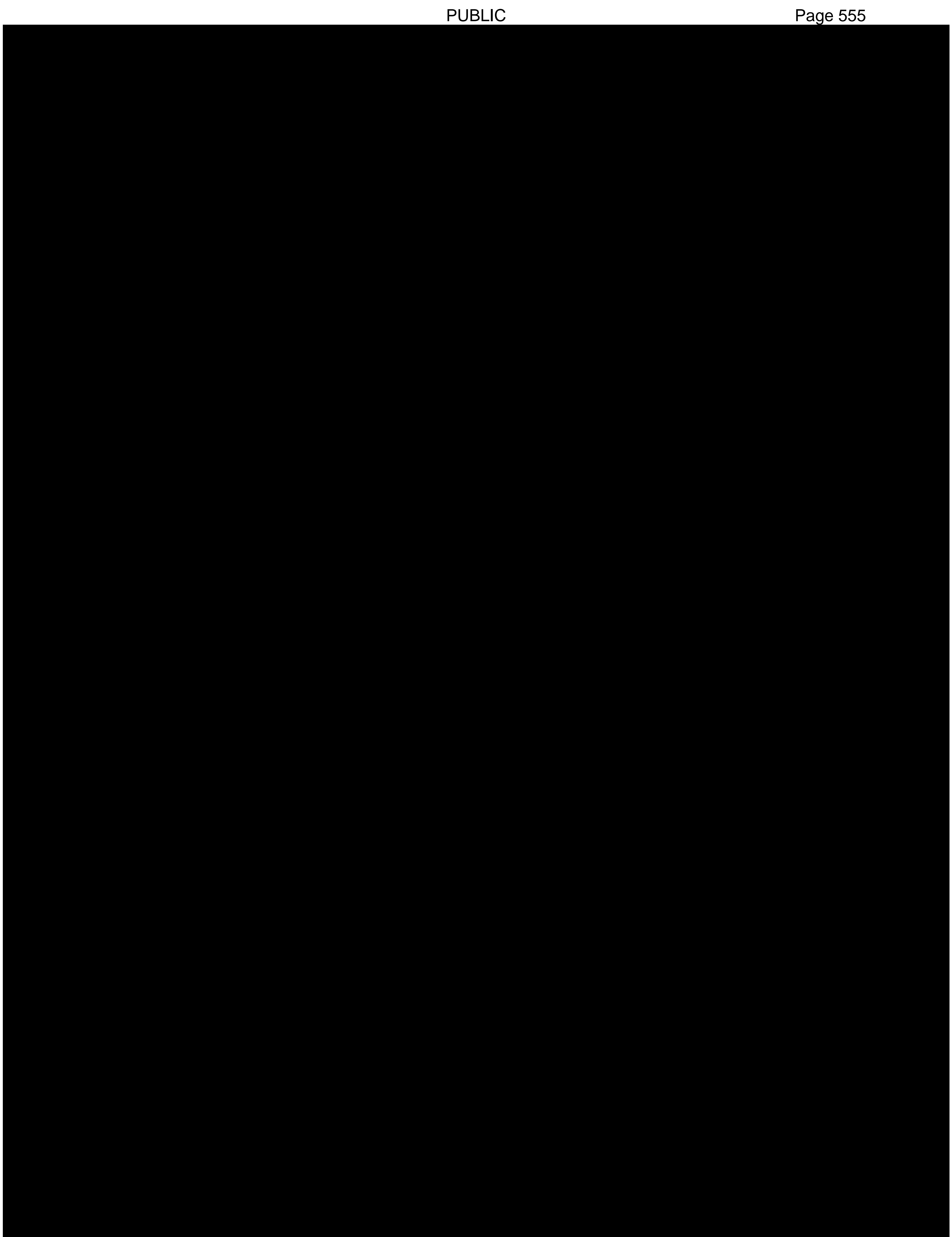
The Corporation is a defendant and plaintiff in legal and regulatory actions that arise in the normal course of business. The Corporation believes that any liabilities that might arise pertaining to such matters would not have a material effect on our consolidated financial position. Also see "*Risk Factors – Legal Proceedings*".





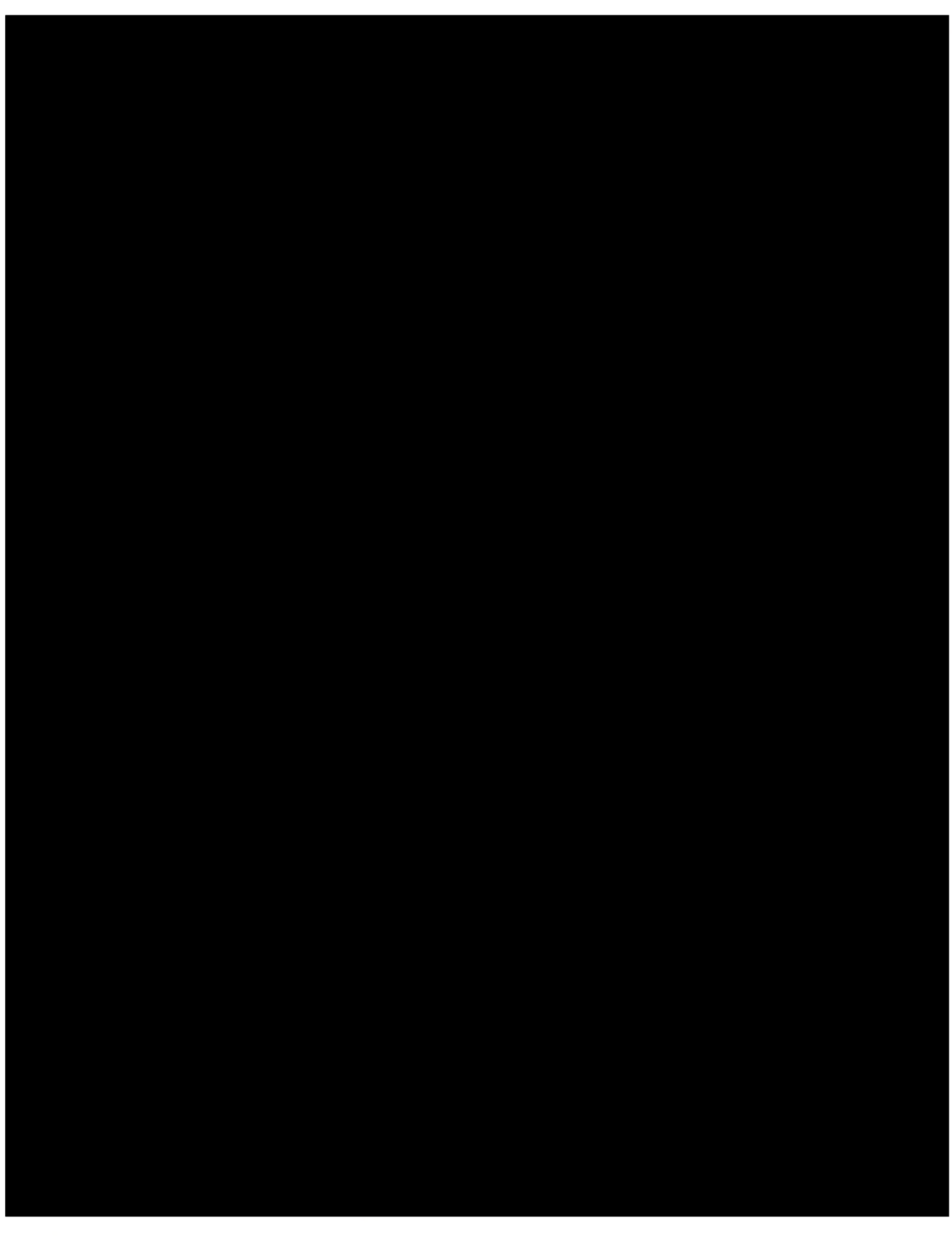


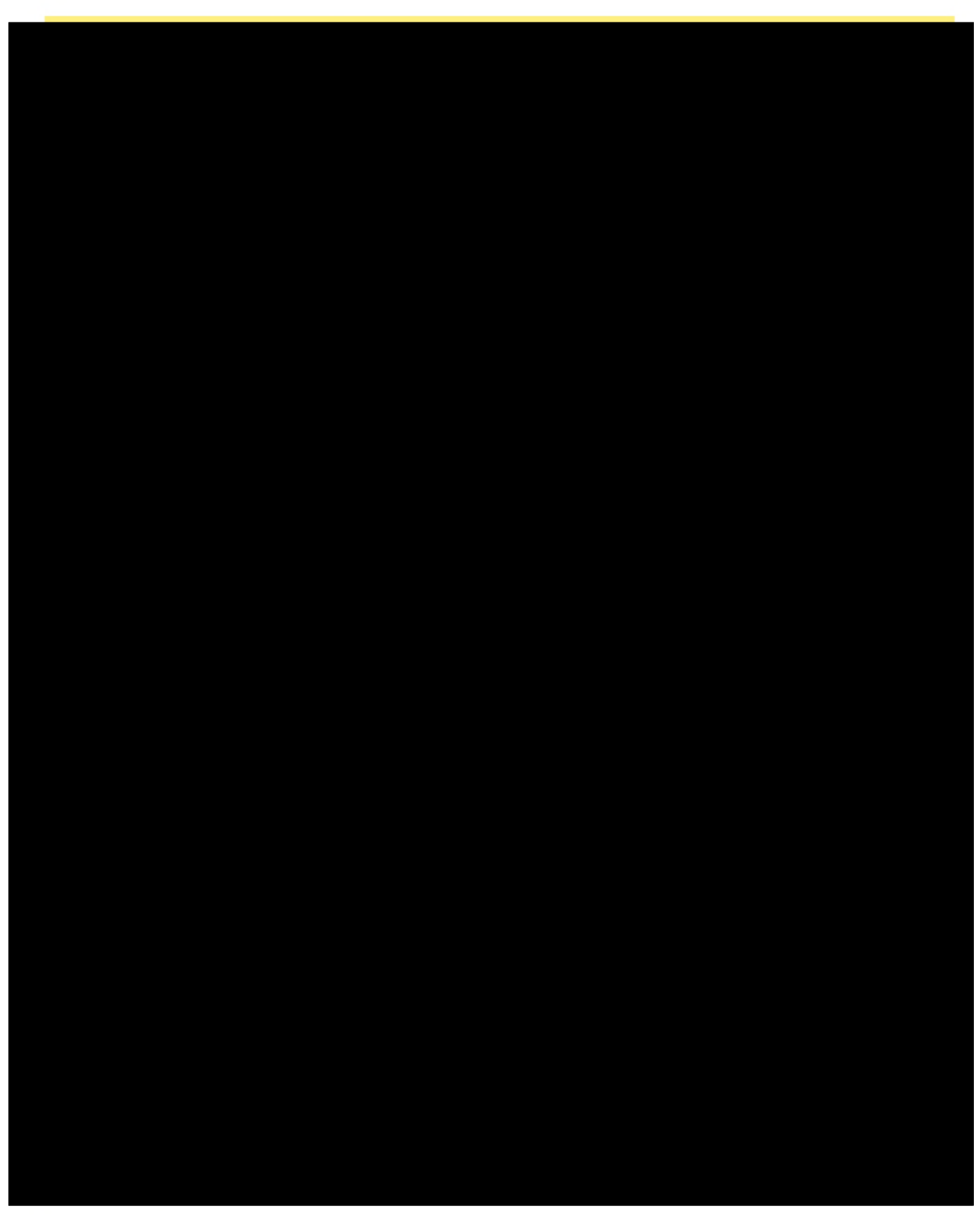




Sent by Email

Best regards,





> I should say that the average residence basic telephone bill in Bell Canada with Touchtone is about $12.75. So, if you didn't have the Tele-Direct activities going on, that bill would have to be more than $16.00. Of course, if Tele-Direct were a completely arm's length company, we would still get some of that commission revenue.
>
> . . .
>
>> Q. I think you did point out that in any telco basically they always collect some of this profit through the 40 percent. I mean every telco seems to collect that so they all get subsidized in that way by publishers. Is that what you were saying?
>>
>> A. That's correct, and I should point out that it's a very large part. I guess the commission revenues might be two-thirds and the net income one-third of that subsidy.... [126]

282 George Anderson, who was previously with NYNEX, described a similar situation in the United States. He testified that the utility directory publisher has to "impute" a substantial portion of its income, over and above the cost for subscriber listing information which has been widely available for some time in that country, back to the telco to help defer the cost of telephone service. In his words:

> The [AT & T] consent decrees ... took an unregulated business, which was Yellow Pages, and at the ninety-ninth hour put it in with the regulated segment of the business to serve as a cash cow, not my words, to serve as a funding business that would help defray, defer, hold down the rate of return and hold down the cost of telephone service. [127]

James Logan, currently President of YPPA and formerly with US West, confirmed this view.

283 We observe that if all Tele-Direct and other telco directory publishers were earning was a competitive return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose, namely cross-subsidization of local telephone service. Unless intangibles are to be treated as a *deus ex machina* to explain away high economic profits, they must be identifiable, as must be the activities resulting in their creation. Otherwise, simply asserting "intangibles" would always preclude high profits from demonstrating market power. We cannot accept an approach leading to such a conclusion. Intangibles that can account for *apparent* high economic profit are the result of activities that are extraordinarily successful, such as those creating new products or ways of doing things better than others. In contrast to the example of successful magazines cited by Professor Willig, there is no evidence of this in the case of Tele-Direct or the other Yellow Pages publishers. Moreover, the fact that there is such widespread subsidization of telephone services by Yellow Pages publishers associated with telcos strongly suggests that the source of the subsidies is not any outstanding effort on the part of individual publishers.

284 The Director also argues that the fact that new entrants view the market as potentially profitable, even given the large price discounts off Tele-Direct's prices that they must offer and the other expenses they must incur to establish their own credibility or reputation, is an objective measure of Tele-Direct's profitability. We agree that market participants are responding to economic profit rather than to accounting profit.

285 We conclude, therefore, that the payment to the telcos by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telco. The cost to the telcos of providing the subscriber listings and doing the billing is minimal. The listings are a by-product of supplying telephone service and the billing for advertising is incorporated into the subscriber's monthly telephone bill. While it is true that it would be more costly for Tele-Direct to do the billing itself, it is unlikely that it would cost, at most, more than a few percent of revenue. [128]

286 In the face of competition from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With sufficient competition the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada,

place products in separate markets if their existence would not prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

(2) Dissatisfied Customers

287 The Director submits that the respondents' actions towards the advertisers, their customers, display market power. Reference is made to Tele-Direct's requirement that advertisers give up copyright in their advertisement, its restrictions on group advertising and evidence of low customer satisfaction in general. There is evidence, in the form of studies like the Elliott reports and the presence of consultants, that a significant percentage of Tele-Direct customers are less than happy with the service provided by Tele-Direct. We reviewed the evidence to this effect in the section on Market Definition when dealing with the arguments of the respondents which emphasized the low degree of customer satisfaction. As a direct indicator of market power, however, we are reluctant to rely on customer dissatisfaction because of the practical difficulties in applying such a subjective test.

(3) Other: Pricing Policies

288 In addition to the evidence of profitability advanced by the Director, the Tribunal is of the view that Tele-Direct's approach to setting prices supports the conclusion that Tele-Direct is behaving more like a firm with a comfortable margin of market power than a firm facing close substitutes. We note Professor Willig's point that evidence of price discrimination, in isolation, would not reliably indicate market power. In combination with the other evidence it is, however, compelling. Two aspects of Tele-Direct's price-setting policy are important: the premiums charged for colour and larger size (price discrimination) and the effort to equalize price per thousand across geographic markets (circulation alignment).

(a) Price Discrimination

289 As we reviewed in the section on market definition, colour and increased size are more valuable to advertisers who rely more heavily on the Yellow Pages. In broad terms, these are advertisers whose business involves infrequently purchased or emergency services (e.g., plumber, exterminator, mover, auto repairs, lawyer), infrequently purchased, expensive durables where comparison shopping is likely (e.g., cars, major appliances), services used by travellers (e.g., car rental) or which encourage orders by telephone (e.g., pizza, lumber yard with telephone order business). They need to attract attention in the Yellow Pages so that a consumer is drawn to their Yellow Pages advertisement as opposed to the Yellow Pages advertisement of their competitor. In our view, Tele-Direct systematically price discriminates against advertisers who are heavily reliant on the Yellow Pages through its pricing of colour and size and its ability to do so is direct evidence of market power.

290 Tele-Direct charges a 50 percent premium to add red to an advertisement. This premium is unrelated to costs of production. The representative of one of the independent publishers testified that at a 50 percent premium, a publisher would be realizing a very high profit margin. In other words, the additional printing and production costs are well below the price charged.

291 Ms. McIlroy explained that the object of Tele-Direct's pricing of colour at a premium is to control its penetration to ensure that it will be sufficiently uncommon so that the coloured advertisements "stand out" on the page. The price is set high enough that everyone will not buy it. In the same vein, Tele-Direct introduced multi-colour in those markets where there was already a lot of red in the directories as an alternative way of allowing advertisers to "stand out". This is not the kind of pricing policy that can be pursued by a firm under competitive pressure because its competitors would simply charge a lower price to take advantage of the profit opportunity and compete away the premium.

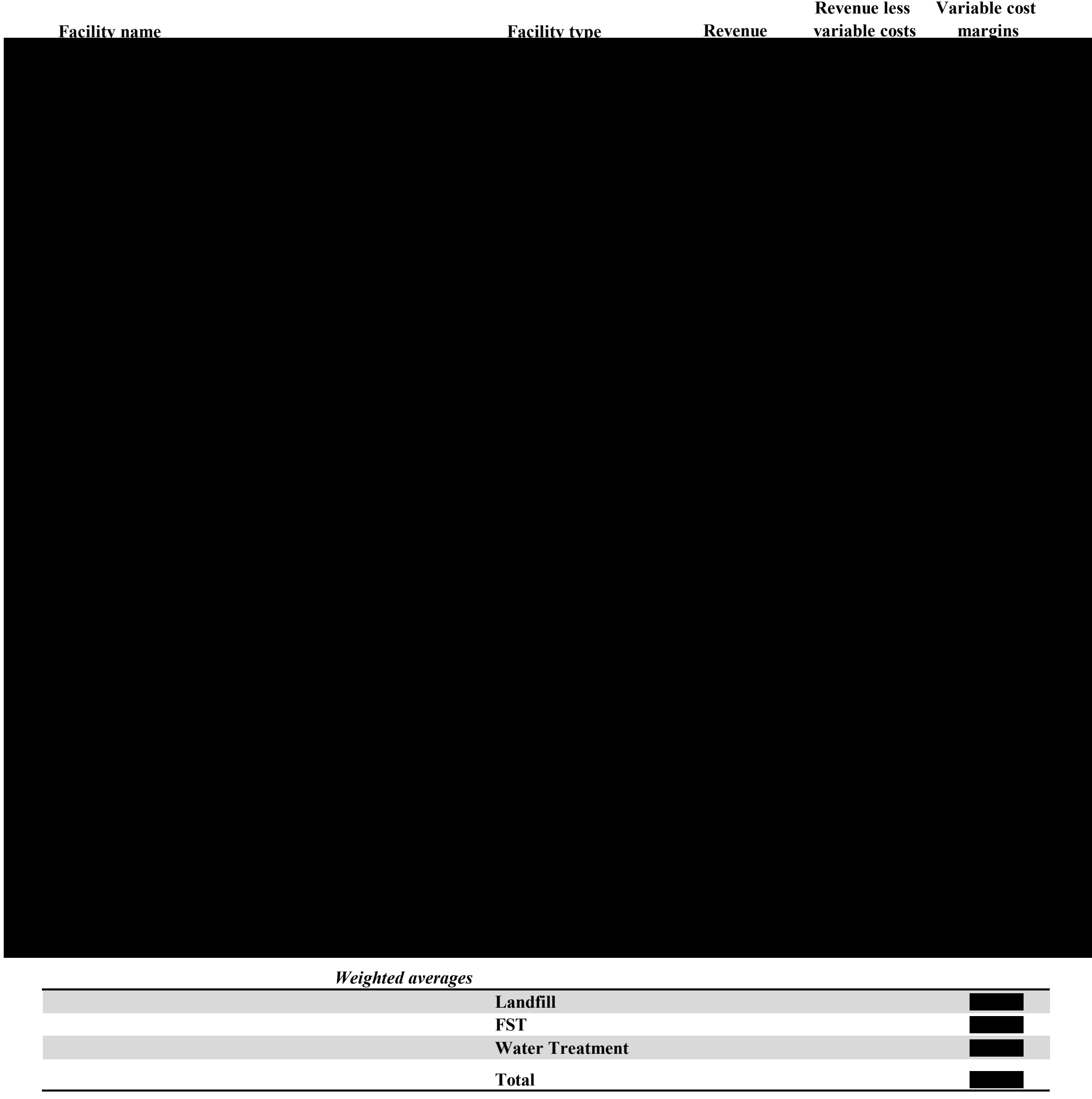
292 Further, the premium for red is largely invariant across local markets. It is difficult to see how there could be such uniform pricing in the face of "competition" from other local media, which would vary from market to market. Tele-Direct's pricing of red can hardly be seen as a response to these prices but is much more consistent with a company concerned only about its own, unique environment.

180. The Secure margins are presented in **Exhibit 43**, Tervita landfill margins are presented in **Exhibit 44**, and Tervita TRD, cavern, and water well margins are presented in **Exhibit 45**. Note that my analysis relies on 2019 data; however, the weighted average variable cost margins across Secure or Tervita facilities are similar across years.[300]

[300] See Exhibits 43, 44, 45 and backup.

EXHIBIT 43
Variable cost margins for Secure facilities (2019)

Facility name	Facility type	Revenue	Revenue less variable costs	Variable cost margins

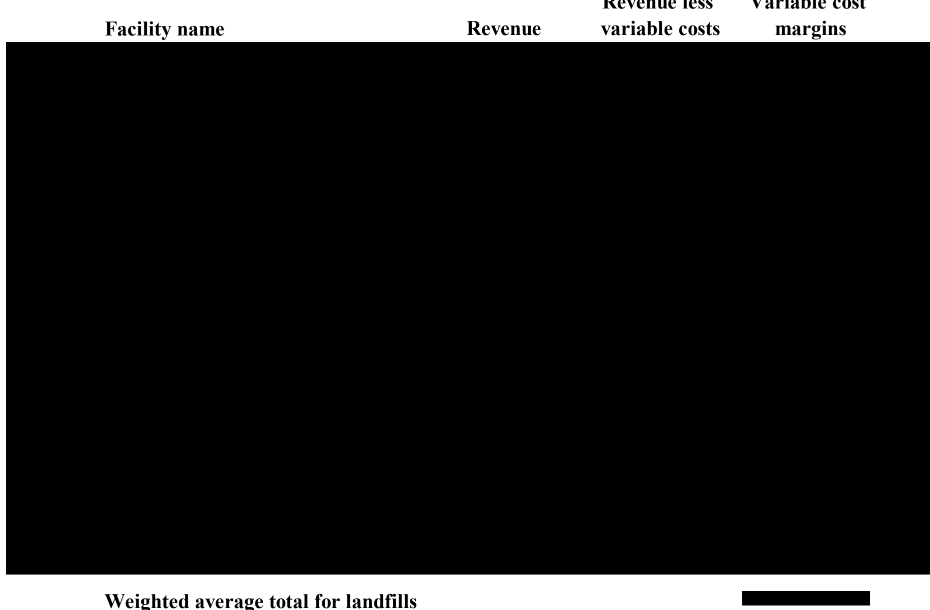


Weighted averages	
Landfill	
FST	
Water Treatment	
Total	

Source: V.A.2 Dec 2020 01.14.2021 ALL PRD Canada Facility Statements - Secure Details.xlsx

EXHIBIT 44
Variable cost margins for Tervita landfill facilities (2019)

Facility name	Revenue	Revenue less variable costs	Variable cost margins

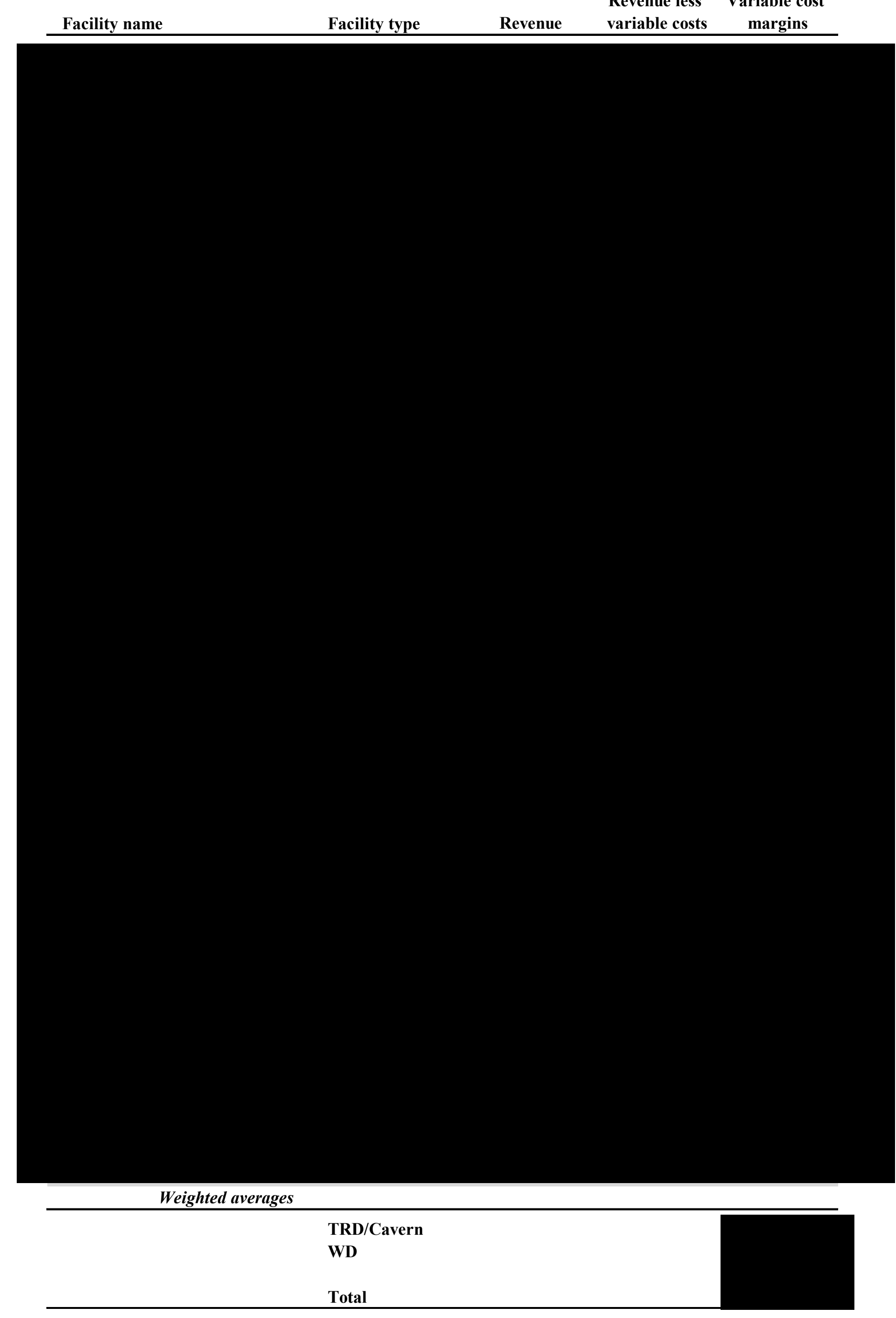


Weighted average total for landfills			

Source: SESL0002187 (landfills).xlsx

Note: analysis, which is 29.5 percent. Fox Creek's variable cost margin in both 2020 and 2021 where both positive. See my backup.

EXHIBIT 45
Variable cost margins for Tervita TRD, cavern, and water disposal well facilities (2019)

Facility name	Facility type	Revenue	Revenue less variable costs	Variable cost margins
				
Weighted averages				
	TRD/Cavern			
	WD			
	Total			

Source: a. 04272021 TRD-Financial Summary wo EM_no link Costs Analyzed.xlsx

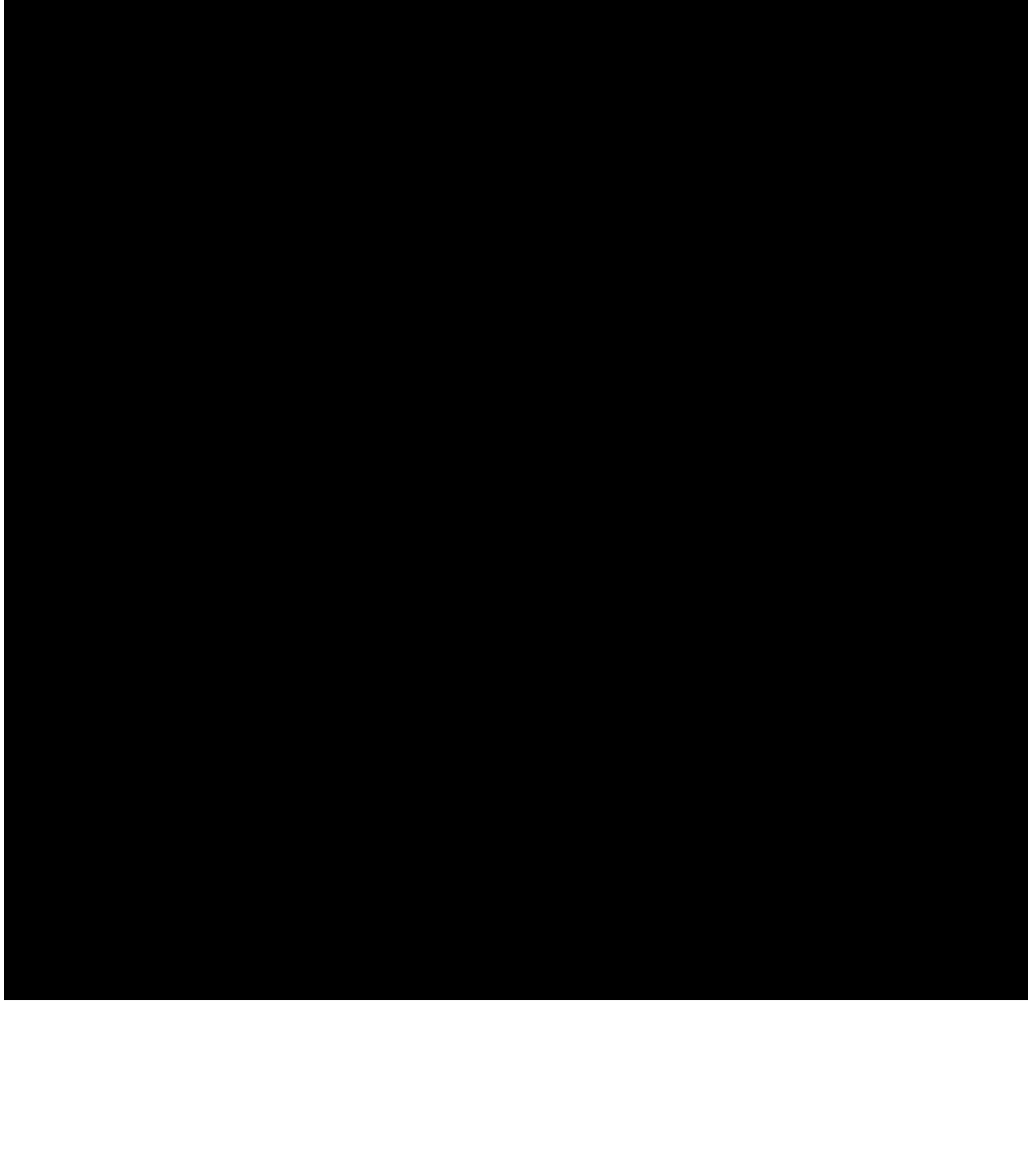


EXHIBIT 42
Key for water disposal facilities operated by Secure

Facility Name	Number Key	Facility Name	Number Key
Athabasca	1	Kindersley	14
Big Mountain Creek	2	Kotcho	15
Eccles	3	La Glace	16
Emerson	4	Nosehill	17
Gordondale	5	Obed	18
Kaybob	6	Rocky Mountain House	19
Wonowon	7	Silverdale	20
Brazeau	8	South Grande Prairie	21
Dawson Creek	9	Tulliby Lake	22
Drayton Valley	10	Gold Creek	23
Edson	11	Pipestone	24
Fox Creek	12	Tony Creek	25
Judy Creek	13	Rycroft	26

Source: Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx); Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx); SES0030460.html; SES0030461.docx; GridAtlas; ArcGIS
Note: The number key corresponds to the Secure water disposal and TRD facility locations marked in updated Exhibit 41.

7.2. Calculating variable cost margins for waste service

179. My price effects (Section 5.3) and DWL from facility closure (Section 6.1.2) analyses both rely on variable cost margins, by which I mean the amount a facility profits after deducting its variable costs to process, treat, and/or dispose of oilfield wastes. I calculate the variable cost margins using facility-level financial statements from the Parties.[298] I used the same variable and fixed cost categorizations specified by the Parties' expert Mr. Harington in his backup materials.[299] I use the following formula to calculate the variable cost margins for each Secure and Tervita facility indexed by j:

$$Variable\ cost\ margin_j = \frac{revenue_j - variable\ costs_j}{revenue_j}$$

[298] I do not calculate separate margins for facilities that are part of both the TRD and water disposal markets. Based on the Parties' financial data, I cannot assign variable cost expenses to TRD-specific services versus those services that could be completely handled at a standalone water well. However, based on margins for standalone water wells that are not tethered to a TRD or FST (Exhibit 42 and Exhibit 44), I understand that water well margins tend to be higher than TRD margins. Consequently, using TRD margins for water wells tethered to a TRD or FST is a conservative assumption for my analyses.

[299] Harington Affidavit, [RCFD00001_000000014] backup materials (a. 04272021 TRD-Financial Summary wo EM_no link Costs Analyzed.xlsx).

180. The Secure margins are presented in **Exhibit 43**, Tervita landfill margins are presented in **Exhibit 44**, and Tervita TRD, cavern, and water well margins are presented in **Exhibit 45**. Note that my analysis relies on 2019 data; however, the weighted average variable cost margins across Secure or Tervita facilities are similar across years.[300]

[300] See Exhibits 43, 44, 45 and backup.

EXHIBIT 43
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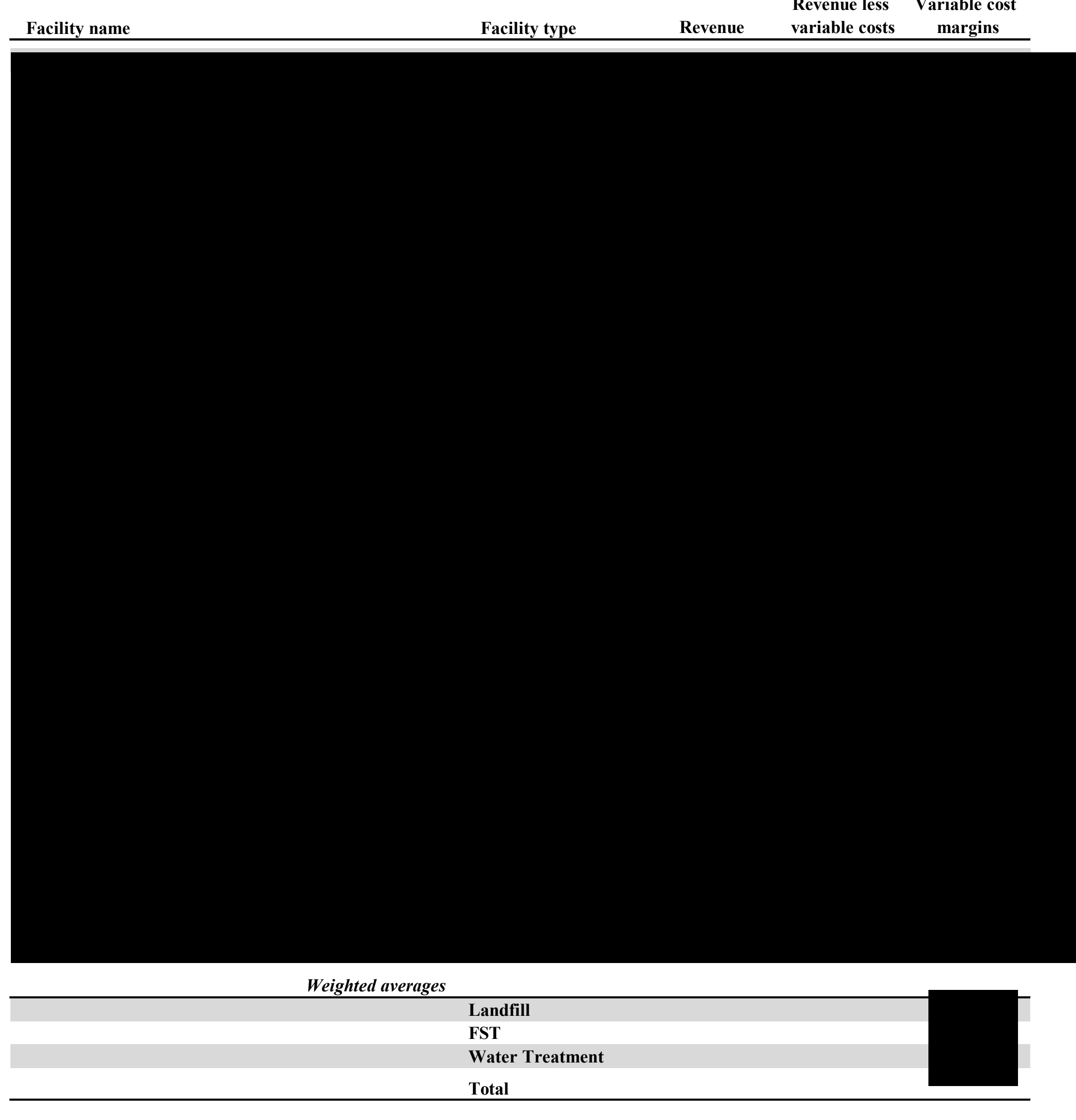
Facility name	Facility type	Revenue	Revenue less variable costs	Variable cost margins

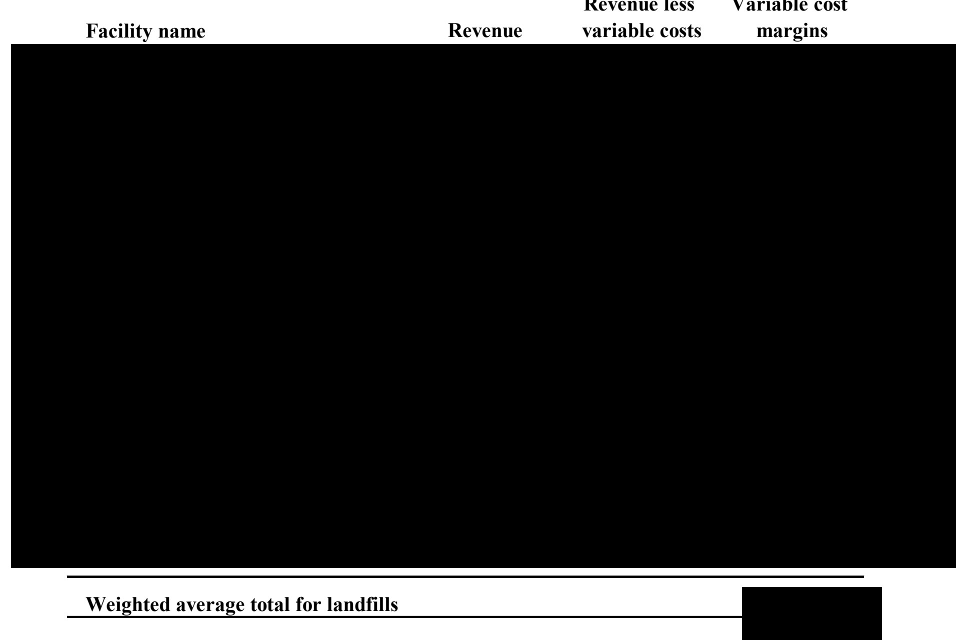


Weighted averages				
	Landfill			
	FST			
	Water Treatment			
	Total			

Source: V.A.2 Dec 2020 01.14.2021 ALL PRD Canada Facility Statements - Secure Details.xlsx

EXHIBIT 44
Variable cost margins for Tervita landfill facilities (2019)

Facility name	Revenue	Revenue less variable costs	Variable cost margins

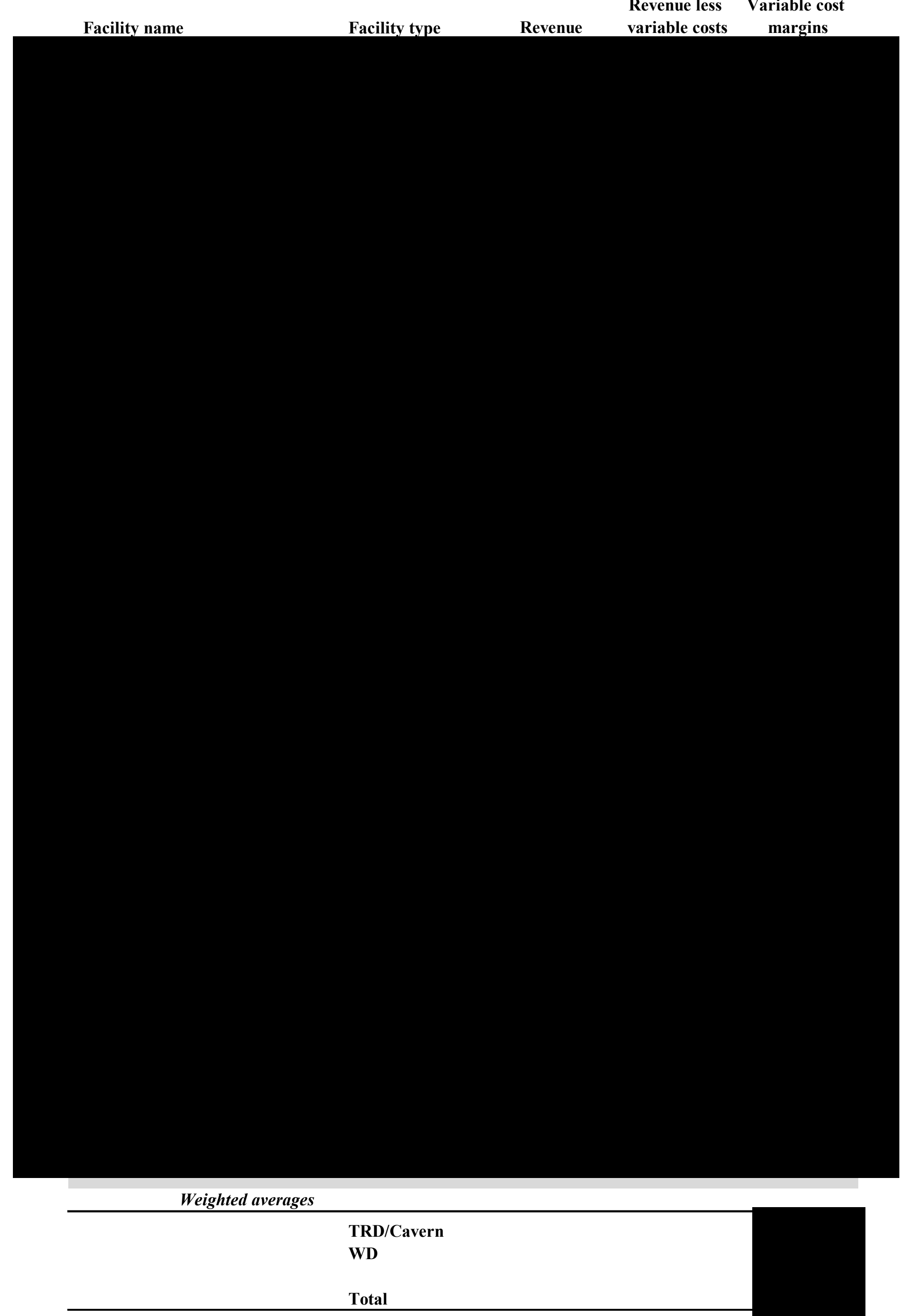


Weighted average total for landfills			

Source: SESL0002187 (landfills).xlsx
Note

EXHIBIT 45
Variable cost margins for Tervita TRD, cavern, and water disposal well facilities (2019)

Facility name	Facility type	Revenue	Revenue less variable costs	Variable cost margins



Weighted averages				
	TRD/Cavern			
	WD			
	Total			

Source: a. 04272021 TRD-Financial Summary wo EM_no link Costs Analyzed.xlsx

7. APPENDIX

7.1. Variable cost margins

106. As described in Section 3.2.4, even if I take into account the additional costs that Mr. Harington claims are variable in nature (depletion and incremental asset retirement obligations), the price impact and DWL from facility closure results from my Initial Affidavit remain largely unchanged (see Exhibit 1) and (see Exhibit 2).

107. I account for the depletion costs by using the line item for depletion costs in the Parties' financial statements. As described in Section 3.2.4, I understand that these costs only apply to landfills. To account for an estimate of landfill AROs, I use the "estimated closure cost" and the "post-closure (ongoing)" that captures the costs to monitor the waste once the facility has closed.[155] Each of these numbers is spread over the life of the facility, so for a facility that has been operating the last 10 years, I divide each of the two costs by 10 to get an annualized incremental cost for them. I then assume 10 years of monitoring costs, so I multiply the annualized on-going cost by 10. The sum of the two annualized costs is assumed to comprise the variable portion of the ARO.[156]

108. TRDs are treated differently because, as I understand, there is 6-year schedule to handle the ARO that consists of decommissioning in year 1, environmental assessments in year 2, remediation in years 3 and 4, reclamation in year 5, monitoring in year 6, and DSA and recertification in year 7.[157] The costs in years 2, 6 and 7 are all generally fixed for facilities of a certain size at $█████ or █████ depending on the cost, therefore I do not account for these costs in my estimate of the variable component of ARO. The first year to decommission involves handling the facility and plant fixed capital, which I also exclude from my variable ARO estimate. The remaining costs for remediation and reclamation that take place in years 3 to 5 are included, however, and I spread these costs across all years the facility has operated.[158]

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[155] SESL0035131.xlsx.

[156] $ARO_{landfill} = Estimated\ Closure\ Costs\ x\ \left(\frac{1}{y}\right) + Post\ Closure\ Ongoing\ Costs\ x\ \left(\frac{1}{y}\right) x\ 10$

[157] SESL0007576.

[158] SESL0039188; SESL0035131 (ARO). I use information about permitting date and other documents to estimate the years in which the facilities opened. For all facilities that do not have an opening date or ARO data, I assume that the facility incurs the average ARO based on all facilities from which I have data. The average annualized AROs are calculated separately for landfills, TRDs, and water wells.

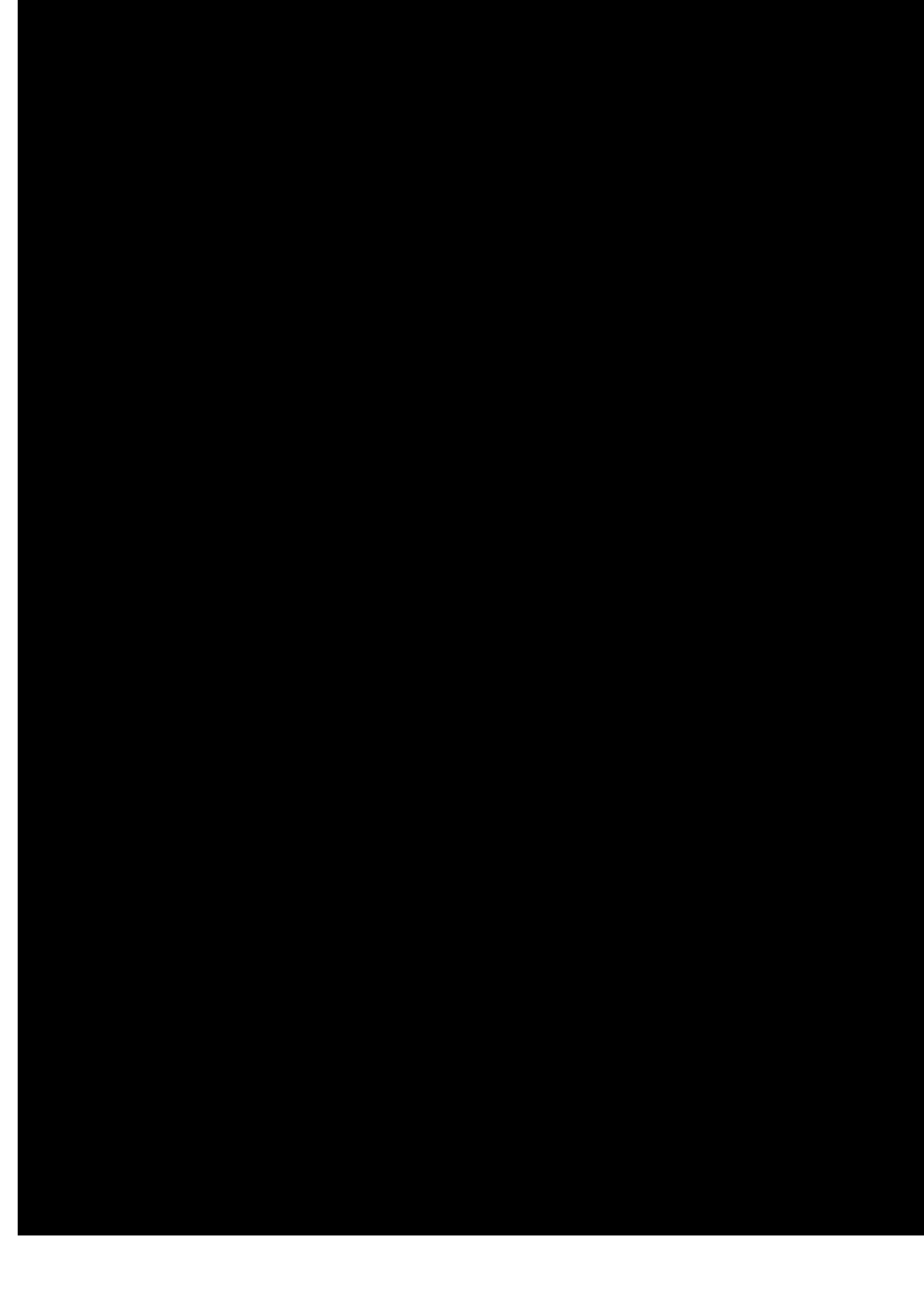

EXHIBIT 9
Sample of predicted price effects and DWL in the customer-defined markets for landfill services accounting for depletion and annualized ARO

	Secure Facilities	Tervita Facilities	Nearby Competitors	acility Closure Overlap	
				ecure	Tervita
3 to 2					
1.	Fox Creek and 0 others	Fox Creek and 3 others	Municipal and 1 other	1	0
2.	South Grande Prairie and 1 other	South Wapiti and 4 others	Municipal and 1 other	1	1
3.	South Grande Prairie and 1 other	La Glace and 4 others	Municipal and 1 other	1	1
4 to 3 or more					
1.	Saddle Hills and 0 others	Spirit River and 3 others	Municipal and 2 others	0	1
2.	Saddle Hills and 0 others	Silverberry and 0 others	CNRL and 2 others	0	0
3.	Fox Creek and 0 others	Fox Creek and 3 others	Ridgeline and 2 others	1	0
4.	Willy Green and 1 other	Willesden Green and 2 others	Waste Management and 3 others	0	1
5.	Pembina and 1 other	Willesden Green and 2 others	RemedX and 2 others	0	1
6.	Pembina and 1 other	Willesden Green and 2 others	Municipal and 2 others	0	1
7.	Tulliby Lake and 0 others	Marshall and 5 others	Ridgeline and 3 others	0	2
8.	Willy Green and 0 others	Willesden Green and 2 others	RemedX and 4 others	0	1
9.	Pembina and 1 other	Willesden Green and 2 others	Clean Harbors and 3 others	0	1
10.	Willy Green and 0 others	Willesden Green and 2 others	Ridgeline and 5 others	0	1

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7) in my Initial Affidavit; GridAtlas; ArcGIS

Note: The table describes the weighted-average price effects and and DWL from facility closure estimates (from share-based approach with second-score auction model) for specific customer-defined markets in my analysis. These market-level measures underly the average price effects reported in Exhibit 1 and share-based DWL reported in Exhibit 2. Only the top ten markets in terms of combined share are listed in the table, and the remaining statistics for all customer-defined markets in my analysis can be found in my backup materials. See my backup for details about the calculation of the market-level price effects.

EXHIBIT 10

Sample of predicted price effects and DWL in the customer-defined markets for water disposal services accounting for depletion and annualized ARO

	Secure Facilities	Tervita Facilities	Nearby Competitors	Predicted price change	DWL	Facility Closure Overlap	
						Secure	Tervita
2 to 1							
1.	Edson and 1 other	West Edson and 4 others	-	[redacted]	[redacted]	2	2
2.	Obed and 1 other	West Edson and 4 others	-	[redacted]	[redacted]	2	2
3.	Nosehill and 3 others	West Edson and 4 others	-	[redacted]	[redacted]	2	2
3 to 2							
1.	Edson and 1 other	West Edson and 5 others	TAQA and 1 other	[redacted]	[redacted]	2	3
2.	Obed and 0 others	Grande Prairie Industrial and 1 other	Wolverine and 1 other	[redacted]	[redacted]	1	0
3.	Athabasca and 1 other	Fort McMurray and 0 others	White Swan and 1 other	[redacted]	[redacted]	1	0
4.	Eccles and 3 others	West Edson and 5 others	TAQA and 1 other	[redacted]	[redacted]	2	3
5.	Nosehill and 3 others	West Edson and 5 others	TAQA and 1 other	[redacted]	[redacted]	2	3
6.	Kindersley and 0 others	Kindersley and 2 others	Whitecap and 1 other	[redacted]	[redacted]	0	1
7.	Kindersley and 0 others	Gull Lake and 0 others	Whitecap and 1 other	[redacted]	[redacted]	0	0
8.	Obed and 1 other	Kakwa and 2 others	Wolverine and 1 other	[redacted]	[redacted]	1	0
9.	Nosehill and 3 others	West Edson and 4 others	Catapult and 1 other	[redacted]	[redacted]	2	2
10.	Athabasca and 0 others	Mitsue and 3 others	CNRL and 1 other	[redacted]	[redacted]	0	0
4 to 3 or more							
1.	Kindersley and 1 other	Kindersley and 3 others	CNRL and 2 others	[redacted]	[redacted]	1	1
2.	Wonowon and 0 others	Mile 103 and 1 other	Aquaterra and 2 others	[redacted]	[redacted]	0	1
3.	Edson and 2 others	West Edson and 7 others	TAQA and 2 others	[redacted]	[redacted]	2	5
4.	Big Mountain Creek and 6 others	South Wapiti and 7 others	Aquaterra and 6 others	[redacted]	[redacted]	4	0
5.	Tulliby Lake and 1 other	Lindbergh Caverns and 1 other	Aquaterra and 3 others	[redacted]	[redacted]	1	1
6.	South Grande Prairie and 6 others	South Wapiti and 7 others	Wolverine and 7 others	[redacted]	[redacted]	4	0
7.	Gold Creek and 6 others	South Wapiti and 7 others	Wolverine and 7 others	[redacted]	[redacted]	4	0
8.	Big Mountain Creek and 6 others	South Wapiti and 7 others	Wolverine and 7 others	[redacted]	[redacted]	4	0
9.	Big Mountain Creek and 6 others	Kakwa and 7 others	Wolverine and 7 others	[redacted]	[redacted]	4	0
10.	Tony Creek and 3 others	Fox Creek and 7 others	Catapult and 4 others	[redacted]	[redacted]	0	4

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7) in my Initial Affidavit; GridAtlas; ArcGIS

Note: The table describes the weighted-average price effects and second-score DWL loss figures for specific customer-defined markets in my analysis. These market-level measures underly the average price effects reported in Exhibit 1 and share-based DWL reported in Exhibit 2. Price effects can be negative in my analysis due to closing facilities. Only the top ten markets in terms of combined share are listed in the table, and the remaining statistics for all customer-defined markets in my analysis can be found in my backup materials. See my backup for details about how I calculate the market-level price effects.

Nathan Miller

Nathan Miller, Ph.D.
April 11, 2022

SECURE
energy services
Key Drivers
Market
Project Assumptions and Economics

293 Based on the evidence before us, there is similar uniformity and lack of relationship to cost in Tele-Direct's pricing of larger advertisements. A comprehensive Tele-Direct rate card was not placed in evidence. In the 33 local markets included on the excerpt from the YPPA rates that was tendered as an exhibit, the price increases by about 90 percent for each doubling of advertisement size from a quarter column (1/16 page) to a double quarter column (1/8 page) and from a double quarter column to a double half column (1/4 page). [129] As in the case of colour, the evidence revealed that the additional costs of producing larger advertisements do not appear to justify the increase in price. Based on cost, one would expect a discount greater than ten percent for an advertisement twice as large.

294 The respondents do not dispute that Tele-Direct's premiums for red and for size cannot be explained by additional costs. Counsel conceded in argument that those were the facts but argued that Tele-Direct was engaging in "value pricing". He hypothesized that an advertiser buying a larger advertisement might get ten times the results that would have been obtained with a smaller advertisement and, therefore, paying almost twice as much for the larger advertisement is actually a bargain. The larger advertiser, the argument goes, is getting more value out of the medium. Value pricing is not a phenomenon readily associated with a competitive market, the hallmark of which is pricing which is ultimately cost-driven. [130] Value pricing is more likely to be associated with a regulated monopolist and is more an indication of the presence of market power than of its absence.

295 The ability of Tele-Direct to discriminate against customers who spend *more* on advertising by way of larger or coloured advertisements is of particular importance in assessing whether Tele-Direct lacks market power *because* other local media provide close substitutes for Yellow Pages, as argued by the respondents. Larger Yellow Pages advertisers have greater choice among the allegedly competitive media since, by definition, they have more dollars in Yellow Pages that they can switch to any other media. Smaller advertisers are less likely to be able to afford the full range of other media. While it may be true, as Professor Willig pointed out, that certain vehicles, such as community newspapers or church calendars might be more acceptable to smaller advertisers, there is no denying that, from a budget point of view, larger advertisers have more options. Thus, larger Yellow Pages advertisers should have the more elastic demand if there are, as the respondents argue, close substitutes to Yellow Pages. The fact that Tele-Direct's margin over cost increases with enhanced expenditures on colour and size indicates the opposite. The anomaly of Tele-Direct being able to price discriminate against advertisers who at first blush have the greatest range of options underscores its market power.

296 The two broadly-scoped independent publishers, White and DSP, also charge some premiums for colour or size, although neither charges a premium as high or as consistent across the board as Tele-Direct's. [131] Certainly, no one has suggested that either White or DSP has market power. Yet, Mr. Campbell provided the same explanation of DSP's pricing of red, for example, as Ms. McIlroy did -- that it is priced above incremental costs to ensure its scarcity. Does the independents' use of some premiums for colour or size imply that Tele-Direct has no market power? We think not. The presence of two publishers in Sault Ste. Marie and Niagara certainly does not indicate a "competitive" market.

297 The evidence regarding the independent publishers does not detract from our view that Tele-Direct's ability to price discriminate is evidence of market power. Although the independents can, to a much more limited extent, implement some of the same pricing policies, this is not surprising. Tele-Direct prices in each local market create an "umbrella" beneath which the new entrants can shelter which underlines that Tele-Direct has market power sufficient to create the umbrella.

(b) Circulation Alignment

298 Since 1987 (or for 1989 prices onwards), Tele-Direct has actively pursued a policy of "circulation alignment" in calculating its annual price increases. The only exception was in 1992 (for 1994 prices) when poor economic conditions resulted in a zero price increase across the board. The objective of this policy was to bring about consistency in cost per thousand or CPM between directories. Some directories had experienced rapid growth in circulation but since they were subject to the same general price increases as other directories which had not grown as much in circulation, their CPM or price relative to circulation was substantially lower. Ms. McIlroy referred to the Mississauga directory as one in which the rates were seen as too low given

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2 For example, it could reflect pre-existing

3 market power, or oligopolistic pricing, or barriers to

4 entry, just to mention a couple of things. We even see

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> For some months, the prices in B.C. and Ontario are seen to be much lower (30% and more lower) than the prices for the same products in Quebec. Under such circumstances it is hard to see how prices, particularly in Quebec, can be at competitive levels. [78]

135 The Commissioner submits that the capacity to lower prices shows that prices were supra-competitive to begin with. It also shows, according to the Commissioner, Bibby's market power. Dr. Ross gave statistical evidence to show that Bibby lowered its prices in the West in response to import entry. Dr. Ware cast some doubt on Dr. Ross' calculations. In Dr. Ross' model, the variable used to show the impact of imports was in fact, according to Dr. Ware, whether Westburne, the major distributor, was buying from Bibby or importing its supplies. Dr. Ware pointed out two deficiencies with this method: first, while Westburne was on the SDP in Alberta starting in July 1998, Dr. Ross assumed that the Alberta branch was importing throughout 1998; second, according to Dr. Ware, Statistics Canada figures relating to DWV cast iron imports are a more reliable measure of import activity than Westburne's participation in the SDP. Using Statistics Canada's figures, Dr. Ware showed that the movement of Bibby's prices in relation to imports was not statistically significant. [79] The issue was left unresolved.

136 Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.

137 It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. Dr. Ware and counsel for the Respondent certainly have shown the frailties of the Commissioner's position, but the Tribunal notes that no cost calculations are provided in response. It would have been within Bibby's power to present the true profitability of pipe and fittings sales. No such evidence is before us. We are left with Bibby's hefty margins and its significant ability to vary prices across the regions.

(ii) Indirect Approach

Market Share

138 As stated in *Laidlaw* and *Nielsen*, a large market share leads to a *prima facie* conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power. In the case of cast iron DWV products, it would appear that the following barriers to entry should be considered: sunk costs, cost of entry, incumbent advantage and the Stocking Distributor Program.

139 The Tribunal must also review evidence of actual entry into the market, which would serve to negate the presence of barriers. Entry, of course, must be both effective and viable to be significant. In addition, the Tribunal must consider customer countervailing power and the state of the market.

140 The concentration of the market in Bibby's hands, through the various buy-outs, consolidations and marketing arrangements with American sister companies, has given Bibby an overwhelming share of the market. Evidence shows that Bibby controls between 80 and 90% of the market in cast iron DWV products. Market share can be a significant indicator of market power, absent evidence of ease of entry for competitors (*Tele-Direct*). What needs to be considered, therefore, is whether the barriers to entry or other factors preclude other competitors from entering the market.

Barriers to Entry

and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. Geographic Market

223 There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. Control: Market Power

224 The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry. [107]

225 The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

A. Indirect Approach: Market Structure

226 Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry. [108]

227 We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

228 Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec. [109] It is instructive to note that, in 1992, a Tele-Direct document estimated the total *potential* sales of independent directories in Ontario and Quebec at $32 million. [110] That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the *actual* sales of independents at less than one-third of the "potential" amount set out.

229 The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

230 Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market information

increase, their conclusions regarding the anti-competitive effects of the merger are important and significant for the purpose of determining the likelihood of a substantial lessening of competition. The Tribunal will discuss the entry argument below under the heading "Evidence on Entry".

125 A key issue in this case is the evaluation of the post-acquisition market share of the merged entity by market. The respondents argue strenuously that the post-merger market share on a national basis has been declining and may have reached between 50 and 60 percent in 1998. These national market shares were introduced to establish the significant growth of independent propane marketers over the period between 1990 to 1998. The Tribunal believes that since relevant geographic markets are local, evidence of high market shares on a local basis cannot be defeated by a trend of national market shares purporting to demonstrate that entry can overcome this substantial lessening of competition.

126 Information on high market shares is, therefore, relevant but not determinative in respect of a finding of a likely substantial prevention or lessening of competition. However, the Tribunal notes that these market shares must be measured with respect to relevant product and geographic markets. In this case, since no national product market for retail propane has been demonstrated, information on market shares for Canada as a whole are not informative as to the exercise of market power in local markets.

B. Barriers to Entry

127 As stated by the Tribunal in *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at 324, (Competition Trib.):

> In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level.

128 This statement emphasises the economic effect of entry. Evidence of commencement of operations, per se, is insufficient to establish the competitive restraint on a supra-competitive price or a likely exercise of market power. Moreover, if the impact on price is delayed beyond a reasonable period, then entry for the purpose of the Act has not occurred even if new businesses have started their operations. The appropriate length of time for judging the impact of entry is a matter of opinion; however, the Tribunal notes that the MEG's, cited above at paragraph [57], refer to a period of two years.

129 The Commissioner submits that there are high barriers to entry into the propane distribution business. The barriers include the nature and existence of customer contracts and tank ownership, switching costs, minimal required scale, reputation, maturity of the market, the competitive response to entry (including litigation threats), access to propane supply, capital requirements, sunk costs and the time to get the business profitable.

130 The respondents dispute the existence and/or significance of these barriers mainly on the basis of their evidence of alleged entry and expansion by independent retail propane marketers.

(1) Contracts

131 The Commissioner's expert, Michael D. Whinston, conducted an analysis of the customer contracts used by Superior and ICG and the likely competitive effects arising from the merger (expert affidavit of M.D. Whinston (18 August 1999): exhibit A-2063). Professor Whinston reviewed the standard form contracts offered by Superior and ICG and found several provisions that could limit entry and/or expansion. These provisions include long-term exclusivity, automatic renewal, termination fees, right of first refusal (Superior only), and tank ownership.

(a) Contract Duration and Exclusivity

132 It is not disputed that a high percentage of propane customers take delivery under contracts. For example, Superior has estimated that 90 to 95 percent of its customers are under standard form contracts with the remaining 5 to 10 percent under negotiated non-standard contracts (confidential exhibit CA-701 at 06976). The Commissioner's expert, Professor Whinston, provides the same number with respect to ICG. According to Mr. Schweitzer, 70 percent of Superior's propane customers are

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(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(ii) de se départir, selon les modalités qu’il indique, des éléments d’actif et des actions qu’il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l’ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d’un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l’ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l’objet de l’ordonnance, de s’abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l’interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n’empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l’objet de l’ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Preuve

(2) Pour l’application du présent article, le Tribunal ne conclut pas qu’un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu’il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Éléments à considérer

93 Lorsqu’il détermine, pour l’application de l’article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s’il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

Limited and presently uses Darling as a renderer. Mr. Smith operates a deadstock collecting and processing operation as well as a pet food business, Atwood Pet Food Supplies Ltd and presently uses Orenco as a renderer.

73 There is no evidence that Baker's plant in Rochester, New York has historically been a competitor of Rothsay and Orenco in southern Ontario. That plant, like Darling, is also part of a large multi-plant firm. It is the second largest renderer on the North American continent. The Baker (Rochester) plant is within geographical reach of the relevant market, being located 135 miles from Orenco's plant in Dundas. It is clear that both Baker (Rochester) and Darling (Detroit) would become increasingly competitive in the southern Ontario market served by the merged firm (insofar as geographical location is concerned) in proportion to any supra-competitive price rise which might be exacted. Since Baker (Rochester) has not historically been in the market and since it is not immediately adjacent to the border, it may be that it should be considered a potential entrant rather than a competitor in the market. Its relationship to the merged firm will be considered from both points of view.

74 Lomex commenced operating in the Toronto market in the summer of 1991[42] and, as has been noted, is taking two full truck loads from two of the larger Toronto area producers of renderable materials to Lomex's plant outside Montreal. The Tribunal has not classified Lomex as a competitor within the market but recognizes that as a potential entrant Lomex will provide some discipline on the merged firm's ability to raise prices.

V. Substantial Lessening of Competition

75 Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing. In assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

76 Whether an enhancement of market power exists as a result of a merger and whether it is substantial is determined by reference to a number of factors. Market share data can give a *prima facie*[43] indication as to whether such is the case.

A. Market Concentration

77 The market concentration in the relevant market can be measured by reference to a number of different indicia. What measure will be chosen will depend upon the nature of the industry in question and the data available. In this case two measures have been used: the amount of renderable material actually processed in the recent past by the firms (historical output) and the plant capacity of the competitors (productive capacity). With respect to firms which have not previously been active in the market but which as a result of changes are now considered to be competitors, only the second method of measurement can be used.

78 A market share measurement based on pre-merger volumes of renderable material processed in southern Ontario indicates that Orenco and Rothsay were each servicing approximately 30% of that non-captive red meat rendering market. Darling's Toronto plant was processing 13%. Banner was processing 12% and Fearman 2%. An extrapolation from those data indicates that after the merger the merged Rothsay-Orenco firm will hold approximately 62-63% of the southern Ontario market. The next largest firm, Darling, for the moment at least would hold approximately 12-13%. Banner would hold 11-12%. Schneider and Ray Bowering would continue to process small amounts of non-captive material.

79 While the increased market share concentration calculated on that basis can be seen at a glance, two tools which have been developed in the United States for measuring market concentration in a summary fashion were referred to in evidence: the four-firm concentration ratio[44] and the Herfindahl-Hirschman Index ("HHI"). The four-firm concentration ratio measures market concentration by adding together the market shares of the four largest firms in the market. If the post merger concentration is

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and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. Geographic Market

223 There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. Control: Market Power

224 The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry. [107]

225 The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

A. Indirect Approach: Market Structure

226 Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry. [108]

227 We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

228 Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec. [109] It is instructive to note that, in 1992, a Tele-Direct document estimated the total *potential* sales of independent directories in Ontario and Quebec at $32 million. [110] That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the *actual* sales of independents at less than one-third of the "potential" amount set out.

229 The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

230 Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market information

87. As reported in Exhibit 9, in 3-to-2 markets, the combined market shares are at least 78 percent. Across all market types, the combined market shares are greater than 64 percent for each of the product markets. The TRD and landfill markets are the most concentrated by the Parties, and the weighted average combined market shares are 81 and 75 percent, respectively. The water disposal market's weighted average market share across all market types is 64 percent. See my Appendix (Section 7.1.2) and backup materials for the market-level results.

EXHIBIT 9
Weighted average of Parties' market shares for the TRD, landfill, and water disposal markets

Market Type	Total Secure and Tervita Market Revenue	No. of Secure and Tervita Well Sites in the Market	Estimated Market Share of Merged Entity
TRDs			
1. 2-to-1			90.0%
2. 3-to-2			88.5%
3. 4-to-3 (or higher)			73.3%
5. Total			*80.5%*
Landfills			
1. 2-to-1			-
2. 3-to-2			87.7%
3. 4-to-3 (or higher)			66.8%
5. Total			*74.8%*
Water disposal (+TRDs)			
1. 2-to-1			90.0%
2. 3-to-2			78.3%
3. 4-to-3 (or higher)			63.2%
5. Total			*64.4%*

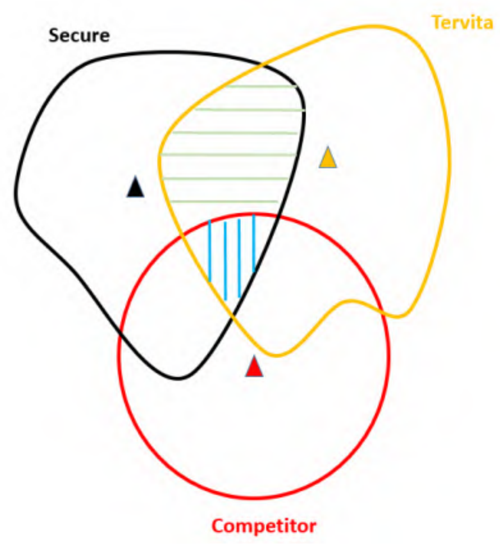
Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7)

Note: Revenue, customers (or well sites), and shares are reported for customer-defined markets in which there is a change in concentration due to the merger between Secure and Tervita, which accounts for around 63 percent of all waste service revenue generated at Secure and Tervita waste service facilitie across the WCSB. See Workpaper 10. Thirty-seven percent of revenue is generated in markets comprised of overlapping draw area(s) of only one or the Parties, some of which are already Secure or Tervita monopolies, or in customer-defined markets where both of the parties do not take in at least 5 percent of revenue. The category 5-to-4 (or higher) refers to markets that will experience a reduction in competition from 5 to 4, 6 to 5, or any other higher-level reduction. facilities that comprise the overlapping draw area of the relevant market. These small and fragmented markets tend to arise in regions where there are many waste service facilities, and applies to less than 1 percent of the Parties' revenue. See Workpaper 11.

does not generate at least 5 percent of revenue in the relevant market, and when I exclude those markets, the percentages increase. See Workpaper 9.

and competitor customer locations are not likely to be random. In particular, customers are likely to be more concentrated in regions where facility draw areas overlap because waste service companies are more likely to open facilities nearer to customers requiring those types of services. Consequently, I apportion observed competitor revenue based on the distribution of Secure-Tervita customers across markets to which a competitor facility belongs.

EXHIBIT 46
Illustration of customer-based geographic market definition



184. For example, **Exhibit 46** demarcates four markets:

1. between Secure and Tervita captured by the green shading,
2. between Secure, Tervita, and another "Competitor" captured by the blue shading,
3. between Tervita and the "Competitor" captured by the overlapping yellow and red circles, less the blue shaded region, and
4. between Secure and the "Competitor" captured by the overlapping black and red circles, less the blue shaded region.

185. I apportion the Competitor's revenue across all three markets to which it belongs based on the share of Secure and Tervita revenue in each market. Based on the example, suppose that the second market includes 40 percent of Secure and Tervita revenue (relative to all Secure and Tervita revenue generated across the three relevant markets), the third market includes 20 percent, and the fourth market includes 40 percent. Then I apportion 40 percent of the

Competitor's revenue to the second market, 20 percent to the third, and 40 percent to the fourth. Note that this is a conservative approach as I apportion all of the Competitor's revenue to one of the markets where it competes with Secure or Tervita. I do not apportion any revenue to the red area that does not overlap with Secure and Tervita draw areas. This approach is conservative because it likely overstates the Competitor's presence in the relevant markets.

186. Because my markets are customer-based markets, market shares represent the share of revenues that the customers spend on any waste service facility. A small amount of revenue may be spent on facilities that are not part of the customer-defined markets. These facilities are farther away and their draw areas do not overlap with the particular customer-defined markets. These "outside" facilities can be owned by Secure, Tervita or competitors. I observe the spending by Secure and Tervita customers at "outside" Secure and Tervita facilities. However, I do not observe the Secure and Tervita customers' spending at "outside" competitor facilities nor do I observe the spending oil and gas producers that are not Secure and Tervita customers.

187. As noted in Section 5.1 and described in fn. 173 and 174, I account for waste revenue spent on "outside" facilities by assuming that customers that comprise the local market spend 10 percent of their waste service expenses on facilities outside the market. **Exhibit 47**, the assumed outside revenue could have been spent at Secure or Tervita facilities located far away, or at a facility operated by a competitor such as Rush. This assumption is likely to be conservative.

188. Assuming 10 percent of revenue is captured by outside facilities is likely to be conservative because Secure and Tervita data indicate that customer well sites that are located in relevant markets spend smaller amounts of their waste service expenditures on facilities located outside of the market (i.e., at a Secure or Tervita facility represented by the blue star in Exhibit 47). Specifically, compared to the Parties' transaction data, assuming that customers spend 10 percent of waste service expenditures outside of relevant geographic markets results in "outside revenue" that is, on average, between 30 and 40 percent higher (depending on the product market) than the amount of expenditure that is actually spent at Secure and Tervita facilities outside of the market.[304]

[304] See Workpaper 9.

example, if most of the excess capacity in the relevant market were held by discount sellers in a highly differentiated market, the market shares of these sellers calculated on the basis of total capacity would be greater than if they were calculated on the basis of actual unit or dollar sales. In this case, market shares based on total capacity would be a misleading indicator of the relative market position of the discount sellers.[29] In such circumstances, dollar sales may be the better indicator of the size of the total market and of the relative positions of individual firms. Because unit sales may also provide important information about relative market positions, the Bureau often requests both dollar sales and unit sales data from the merging parties and other sellers.[30]

5.6 The Bureau generally includes the total output or total capacity of current sellers located within the relevant market in the calculation of the total size of the market and the shares of individual competitors. However, when a significant proportion of output or capacity is committed to business outside the relevant market and is not likely to be available to the relevant market in response to a SSNIP, the Bureau generally does not include this output or capacity in its calculations.

5.7 For firms that participate in the market through a supply response, the Bureau only includes in the market share calculations the output or capacity that would likely become available to the relevant market without incurring significant sunk investments.

Market Share and Concentration Thresholds

5.8 Consistent with section 92(2) of the Act, information that demonstrates that market share or concentration is likely to be high is not, in and of itself, sufficient to justify a conclusion that a merger is likely to prevent or lessen competition substantially. However, information about market share and concentration can inform the analysis of competitive effects when it reflects the market position of the merged firm relative to that of its rivals. In the absence of high post-merger market share and concentration, effective competition in the relevant market is generally likely to constrain the creation, maintenance or enhancement of market power by reason of the merger.

5.9 The Bureau has established the following thresholds to identify and distinguish mergers that are unlikely to have anti-competitive consequences from those that require a more detailed analysis:

29 Similar results occur as the level of differentiation between sellers increases. For instance, two firms may operate with the same capacity (e.g., number of trucks) but have significantly different revenue streams (because one firm may have many buyers along a truck route, i.e., route density). In such cases, market shares based on capacity and revenues provide different information about relative market positions.

30 While publicly available or readily observable information may be useful for estimating market shares, when credible and possible, the Bureau relies on transaction-level data from individual market participants as the most accurate measure of market shares.

- The Commissioner generally will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger market share of the merged firm would be less than 35 percent.
- The Commissioner generally will not challenge a merger on the basis of a concern related to a coordinated exercise of market power when
  - the post-merger market share accounted for by the four largest firms in the market (known as the four-firm concentration ratio or CR4) would be less than 65 percent; or
  - the post-merger market share of the merged firm would be less than 10 percent.

5.10 Mergers that give rise to market shares or concentration that exceed these thresholds are not necessarily anti-competitive. Under these circumstances, the Bureau examines various factors to determine whether such mergers would likely create, maintain or enhance market power, and thereby prevent or lessen competition substantially.

5.11 When other information suggests that current market shares do not reflect the competitive role of one of the merging parties relative to its rivals, the Bureau considers this information when determining whether a merger is likely to prevent or lessen competition substantially. In all cases, examining market shares and concentration is only one part of the Bureau's analysis of competitive effects.

5.12 In addition to the level of market shares or concentration in the relevant market, the Bureau examines the distribution of market shares across competitors and the extent to which market shares have changed or remained the same over a significant period of time.

5.13 All else being equal, the likelihood that a number of firms may be able to bring about a price increase through coordinated behaviour increases as the level of concentration in a market rises and as the number of firms declines.[31] In contrast, coordinated behaviour becomes increasingly difficult as the number or size of firms that have the ability to increase output increases.

5.14 When evaluating market share information, the Bureau considers the nature of the market and the impact of forthcoming change and innovation on the stability of existing market shares.[32] While a small incremental increase in concentration following a merger may suggest that the merger is not likely to have a significant impact on the

31 In addition to the CR4, the Bureau may examine changes in the Herfindahl-Hirschman Index ("HHI") (calculated by summing the squares of the individual market shares of all market participants) to observe the relative change in concentration before and after a merger. While the change in HHIs may provide useful information about changes in the market structure, the Bureau does not use HHI levels to delineate any safe harbour threshold.

32 For example, historical or existing market shares may be less relevant in bidding markets in which rapid fluctuations in market shares are more common. In such cases, the analysis focuses on the likely future effectiveness of independent sources of competition, regardless of their current shares. Bidding and bargaining markets are discussed in additional detail under "Unilateral Effects" in Part 6.

American Express functionality through their terminals, but they play no role in cardholder authorization, financial settlement, or merchant billing for American Express transactions. As a result of its vertical integration, American Express cannot be viewed as a participant in the market for Credit Card Network Services supplied to Acquirers. Of course, American Express does compete with Visa and MasterCard Acquirers in the downstream market for Credit Card Acceptance Services sold to Merchants.

260 The relevant product market as defined by the Commissioner is a differentiated product duopoly in which one duopolist, Visa, has two-thirds of the market with MasterCard holding the balance. This is obviously a very highly concentrated market.

261 Product differentiation (branding) implies that the Visa and MasterCard networks are not perfect substitutes for each other. To some degree this would insulate them from price competition from each other even in the absence of the Merchant Rules. The pricing discretion of Visa and MasterCard may be enhanced to the extent that their Cardholders single-home (use one card exclusively). In that case each network is the "gatekeeper" of its Cardholder base and with the Merchant Rules in place, it can offer this base to individual Merchants on an all-or-nothing basis.

262 An illustration of the pricing discretion of MasterCard is the "interchange fee gap" episode during which MasterCard was able to raise its Interchange Fees and thus its Acquirer Fees relative to Visa apparently without any loss of market share.

263 While there are a number of factors at work to attenuate the competitive pressure on the Respondents to undercut each other's Acquirer Fees, Dr. Carlton emphasizes that price competition is still sufficient to keep Acquirer Fees below the level a monopolist would set and thus to oblige the Respondents to "leave money on the table."

264 Barriers to entry into the supply of Credit Card Network Services must be regarded as high. Considerable capital is required, the minimum viable scale is significant relative to the size of the market and the chicken and egg problem (i.e. convincing Merchants to accept a card that is not held by many Cardholders, and convincing consumers to hold and use a card that is not accepted by many Merchants) implies that it could take a long time to reach the break-even point. Taken together, this implies significant fixed, sunk entry costs, investment that would not be recovered in the event that entry was not successful. With respect to minimum viable scale, Dr. Frankel cites a document from MasterCard stating that its card would not be viable in a national market with market share of much less than 35 percent:

> In 1998, when there was no duality in Canada (i.e., banks could only issue either MasterCard or Visa branded credit cards, but not both), MasterCard was concerned about the possibility that a proposed bank merger between the Royal Bank and the Bank of Montreal ("BMO") would result in the largest MasterCard issuer (i.e., BMO) becoming a Visa issuer. MasterCard explained that at the smaller network scale that would result from this change in Canada, "MasterCard anticipates there would be further erosion over a short time, to approximately 7% MasterCard, with Visa at 93%. At that level of participation in the marketplace," MasterCard explained, "MasterCard would no longer be a viable competitive alternative." Indeed, MasterCard disclosed then that "MasterCard's Global Board has determined that, as a long-term proposition, the card is not viable in a market with much less than a 35% share."

265 With respect to potential competition from new payment technologies, the Tribunal accepts that payment technologies are evolving and that the Respondents are under competitive pressure to invest in technological improvements. The evidence adduced by the Respondents is insufficient, however, to support an inference that alternative payment technologies pose a competitive threat to them.

266 In light of the foregoing behavior and structural considerations, the Tribunal concludes that with approximately two-thirds of the relevant market, Visa has unilateral market power.

267 Given its one-third share of the relevant market and its apparent concern about whether a market share of this magnitude is sufficient for long-term viability, MasterCard might be regarded as being in a different situation. While it is true that the *Merger Enforcement Guidelines* state that a market share under 35% do not normally raise unilateral market power concerns, this does not mean that it can never do so. Taking into account MasterCard's pricing discretion, its margins and the very high barriers to entry, the Tribunal concludes that MasterCard also has market power in the relevant market.

simplicity, I rely on Dr. Miller's facility- and market-level variable margins for SECURE and Tervita facilities.[188]

167. Total revenues represent the combined annual sales of all participants in the relevant market. I use Dr. Miller's estimates of total party revenue and market shares to derive an implied total market size estimate, including competitors.

168. Predicted price increases are based on the Tervita/Newalta natural experiment described above. In particular, I find baseline price effects of 11% for "2-to-1" markets, 9.8% for "3-to-2" markets, and 0.9% for "4-to-3 or more" markets. I also consider price effects from an alternative specification of my analysis, as described below.

169. Figure 20 below summarizes total deadweight loss for the full Transaction (i.e., across all of Dr. Miller's relevant markets), as well as for each of Hypothetical Divestiture Option 1 and Hypothetical Divestiture Option 2, as well as the Commissioner's Proposed Remedy, with (a) based on the "Relevant Facilities" approach and (b) based on the "Closest Facilities" approach. I show deadweight loss on an annual basis and then convert these figures to a 10-year net present value using the same discounting approach as applied to the efficiencies in the Harington Report.

[188] Note that, as discussed in Section IV.C.2, to the extent that Dr. Miller has overestimated variable margins for certain facilities (e.g., by failing to include certain variable costs) this would make my deadweight loss estimates conservative.

Good afternoon all,

Please see the Market Share update for April provided below.

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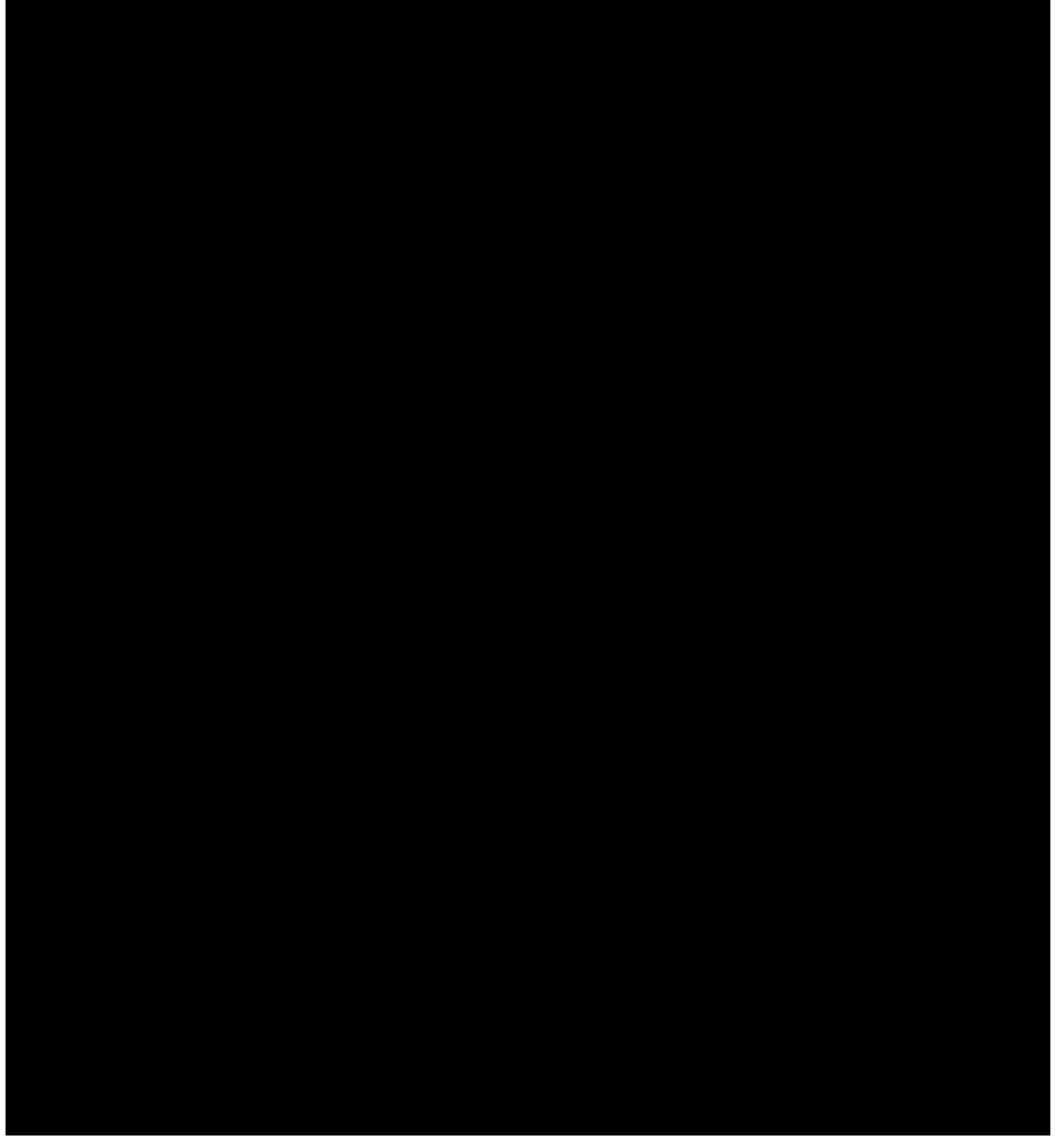

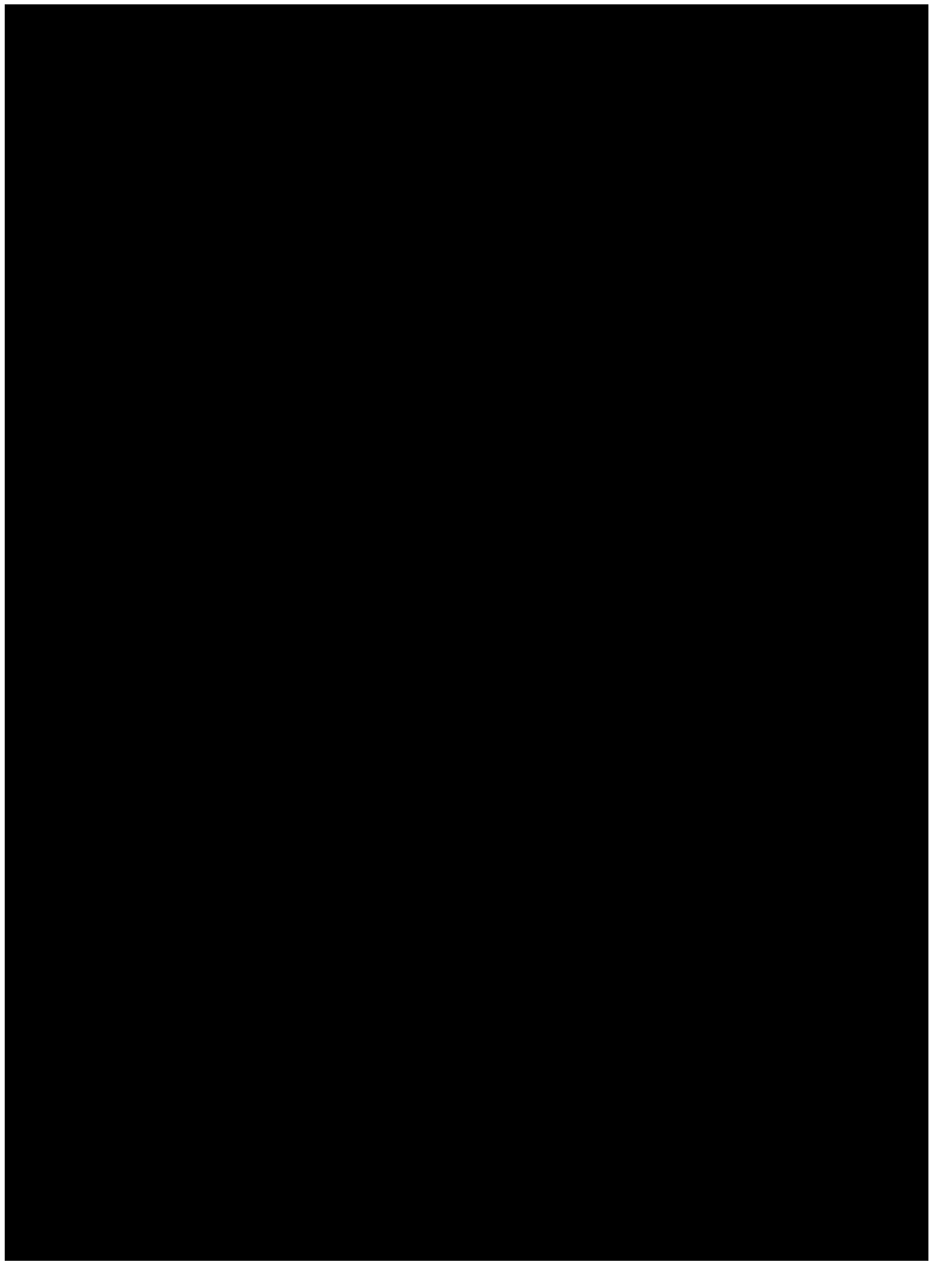

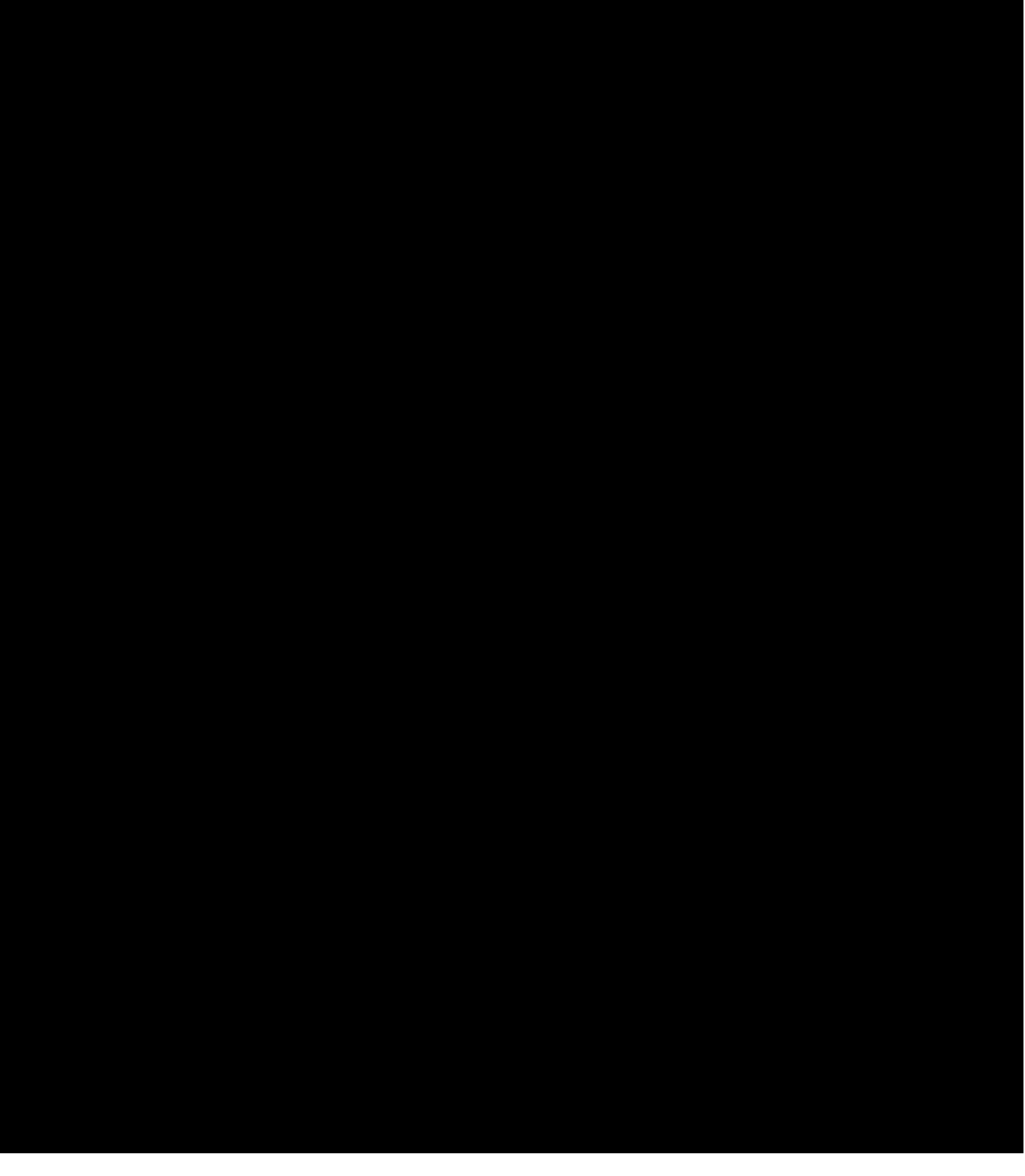

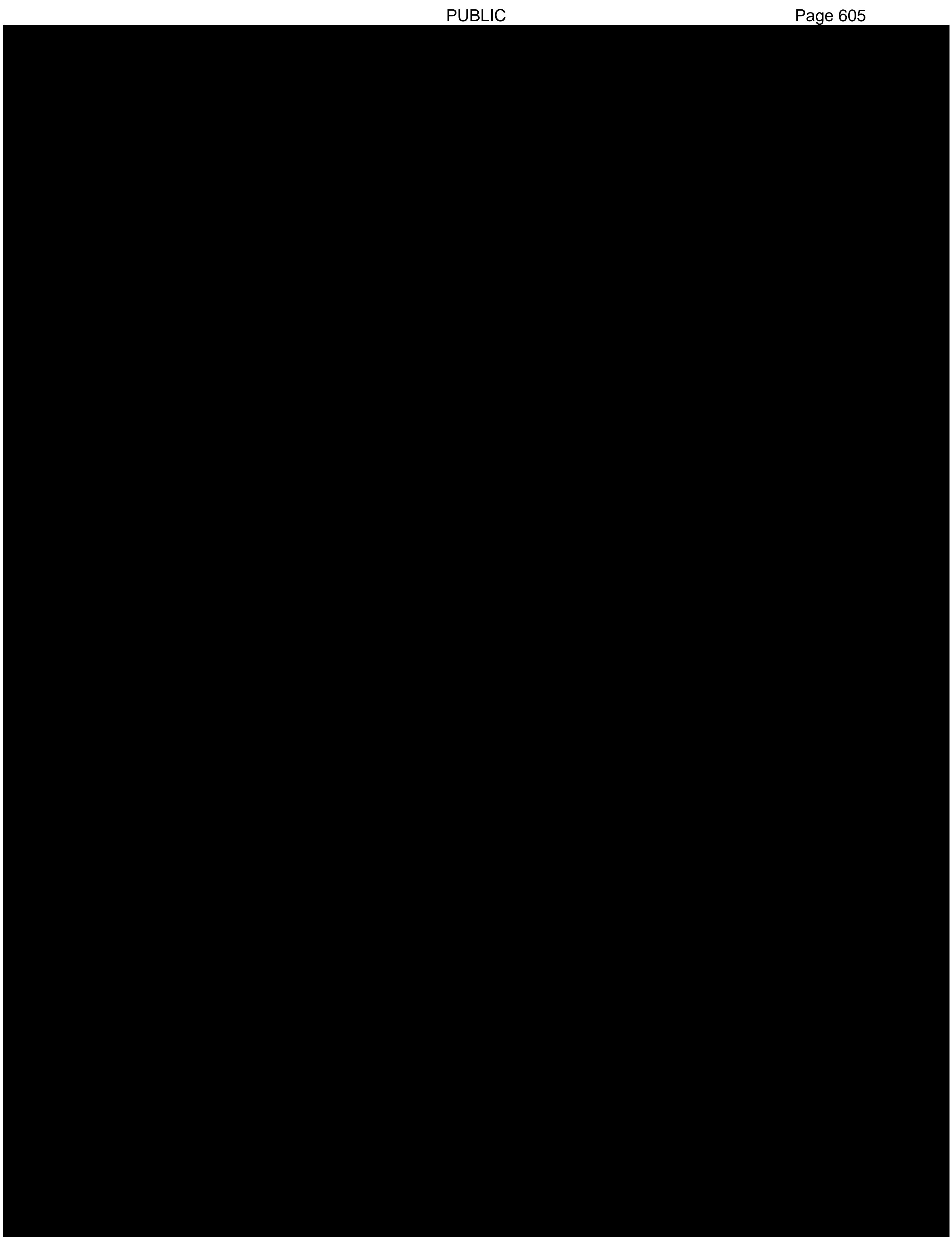

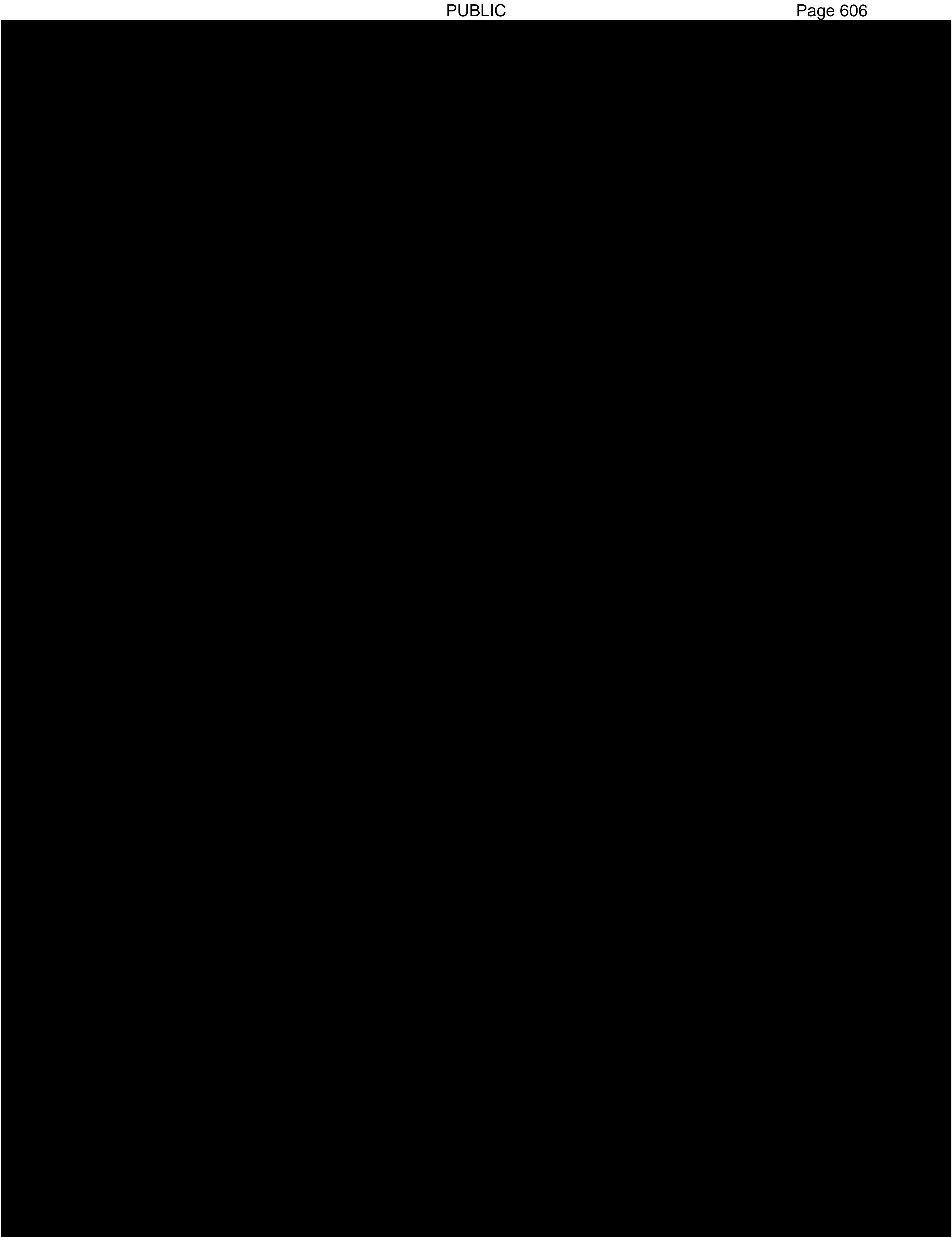

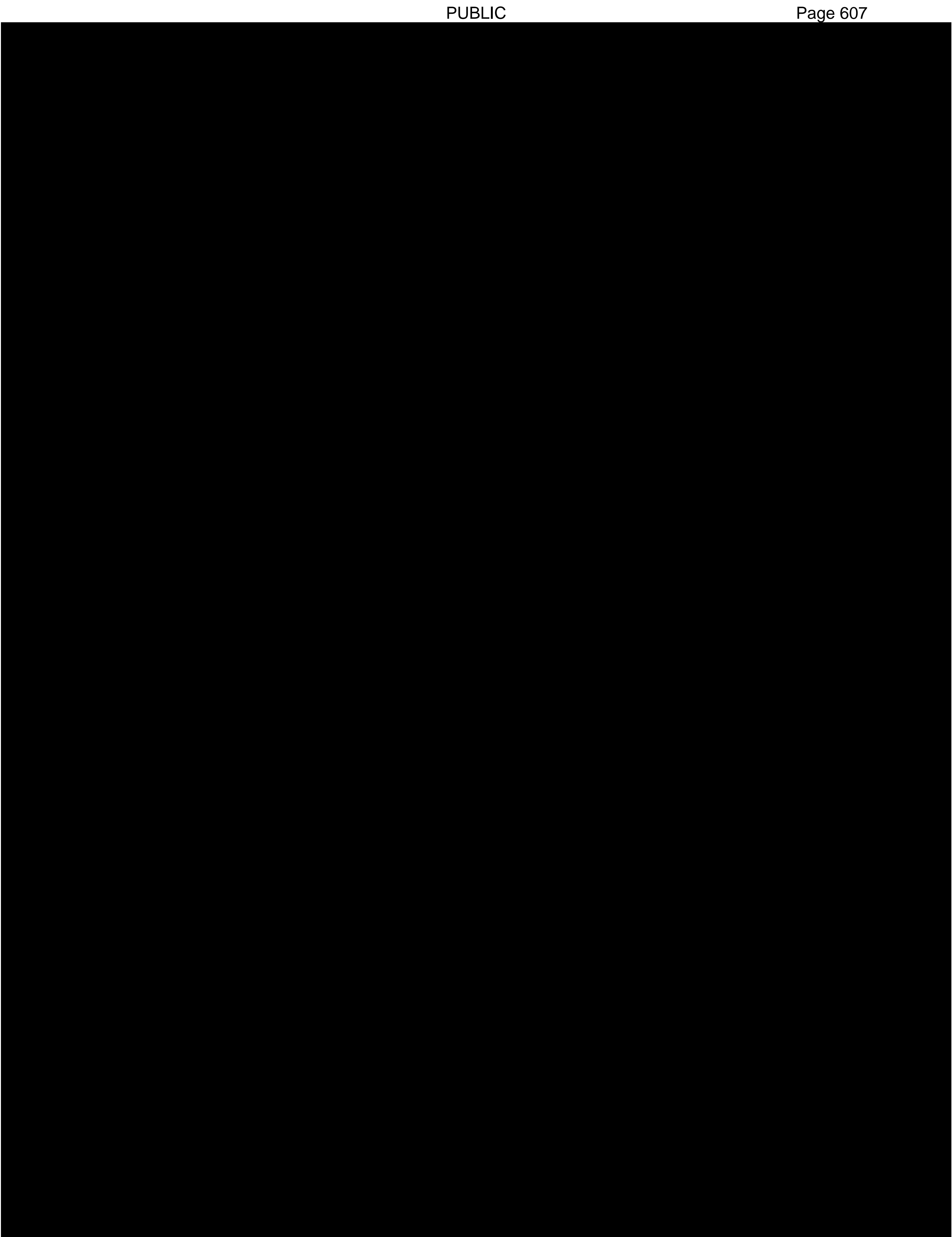

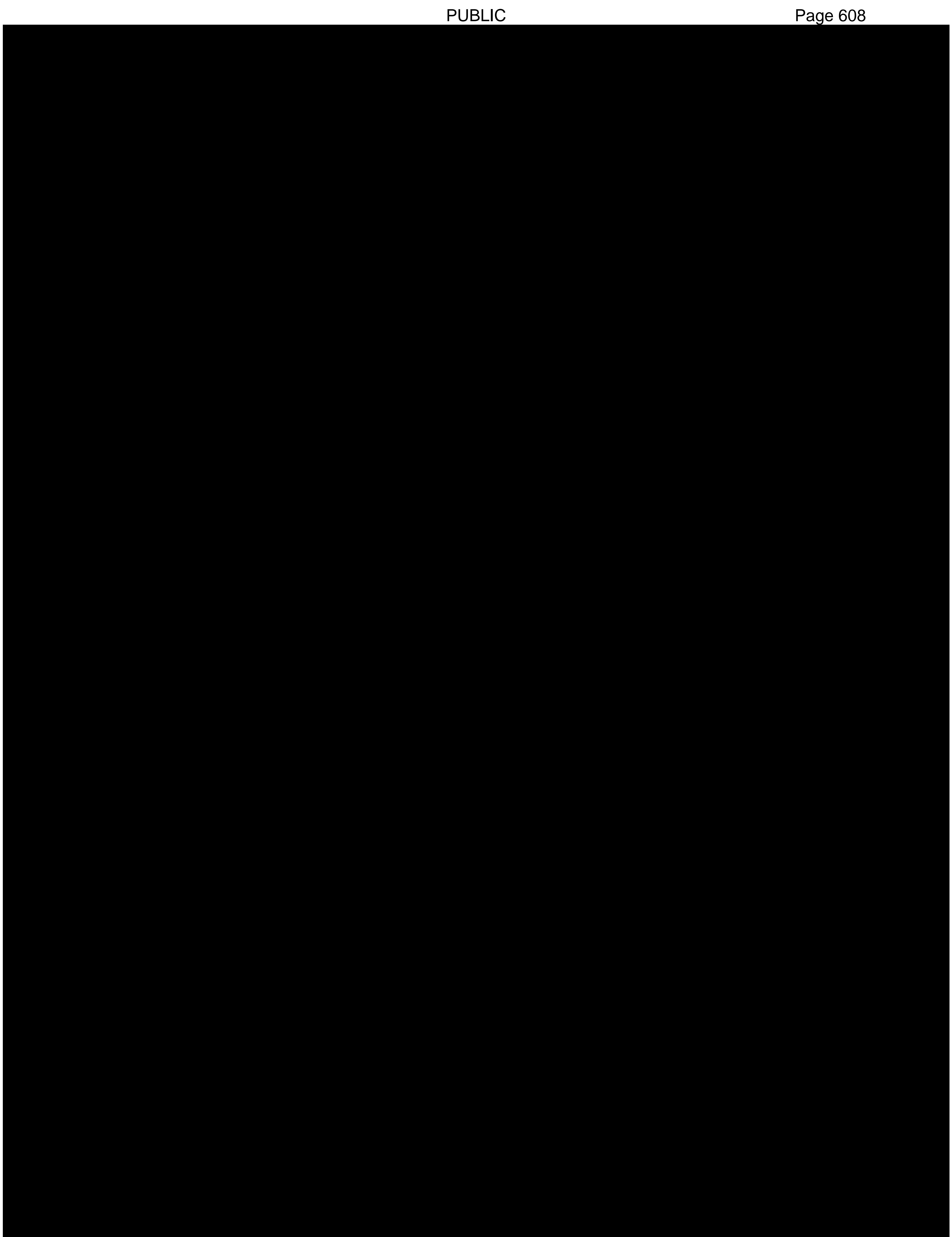

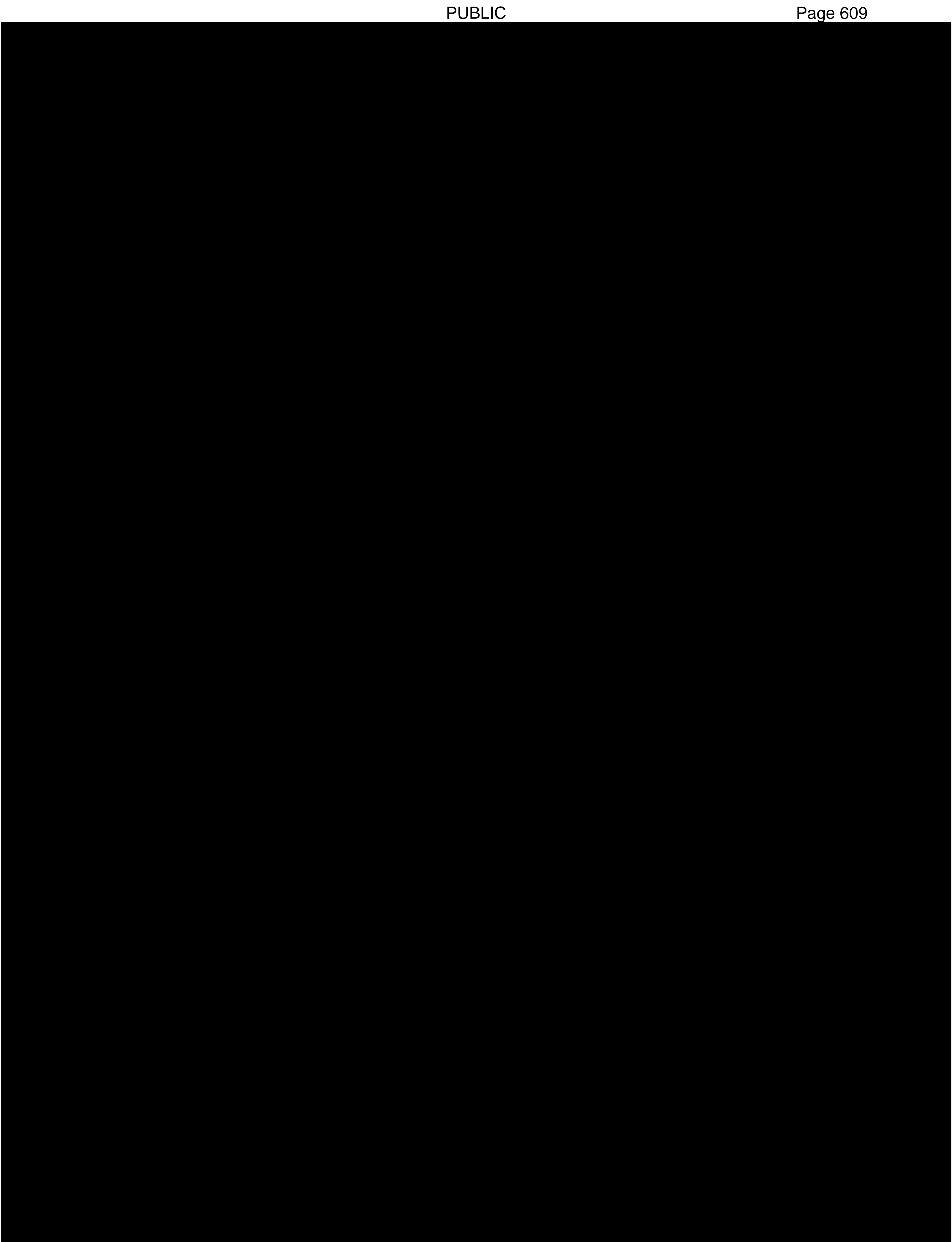

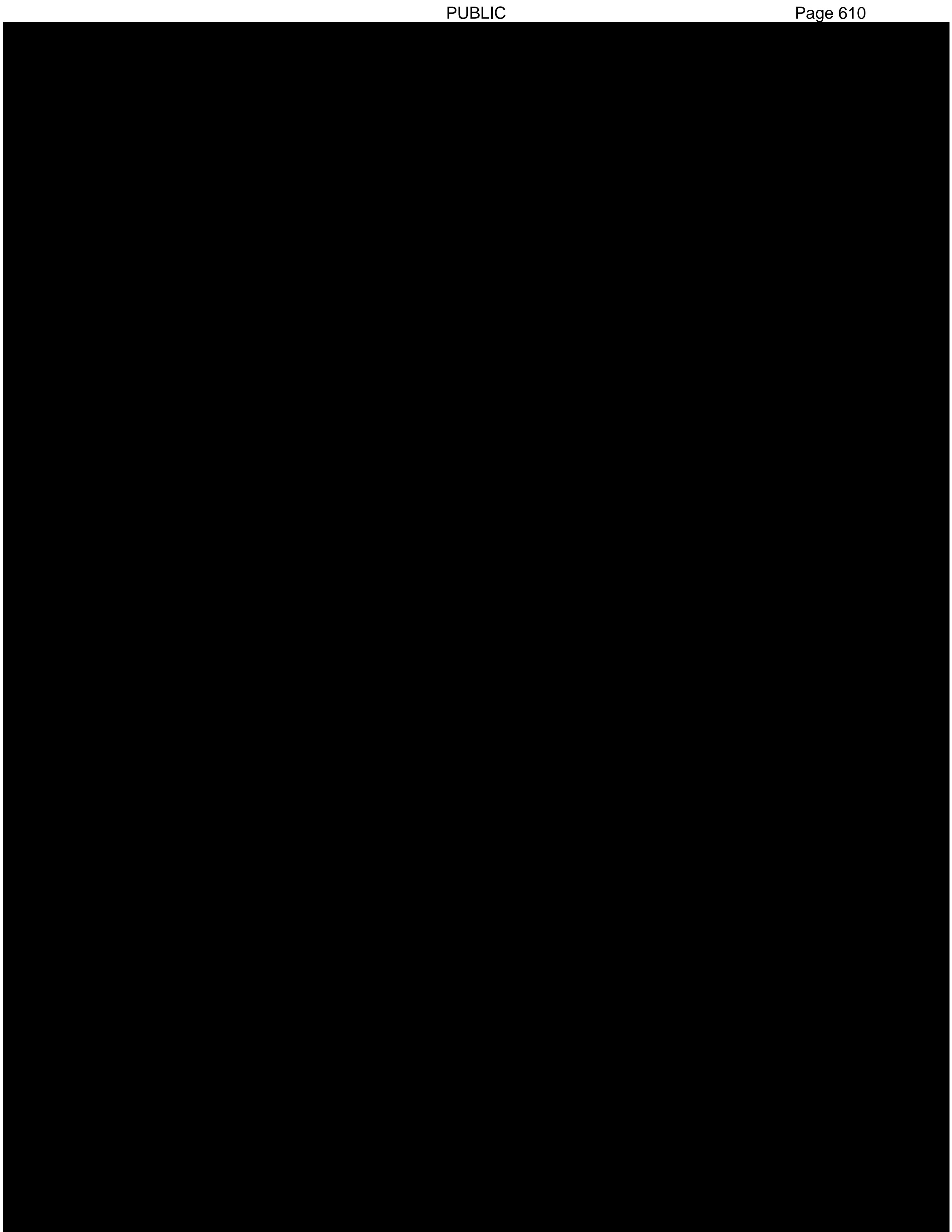

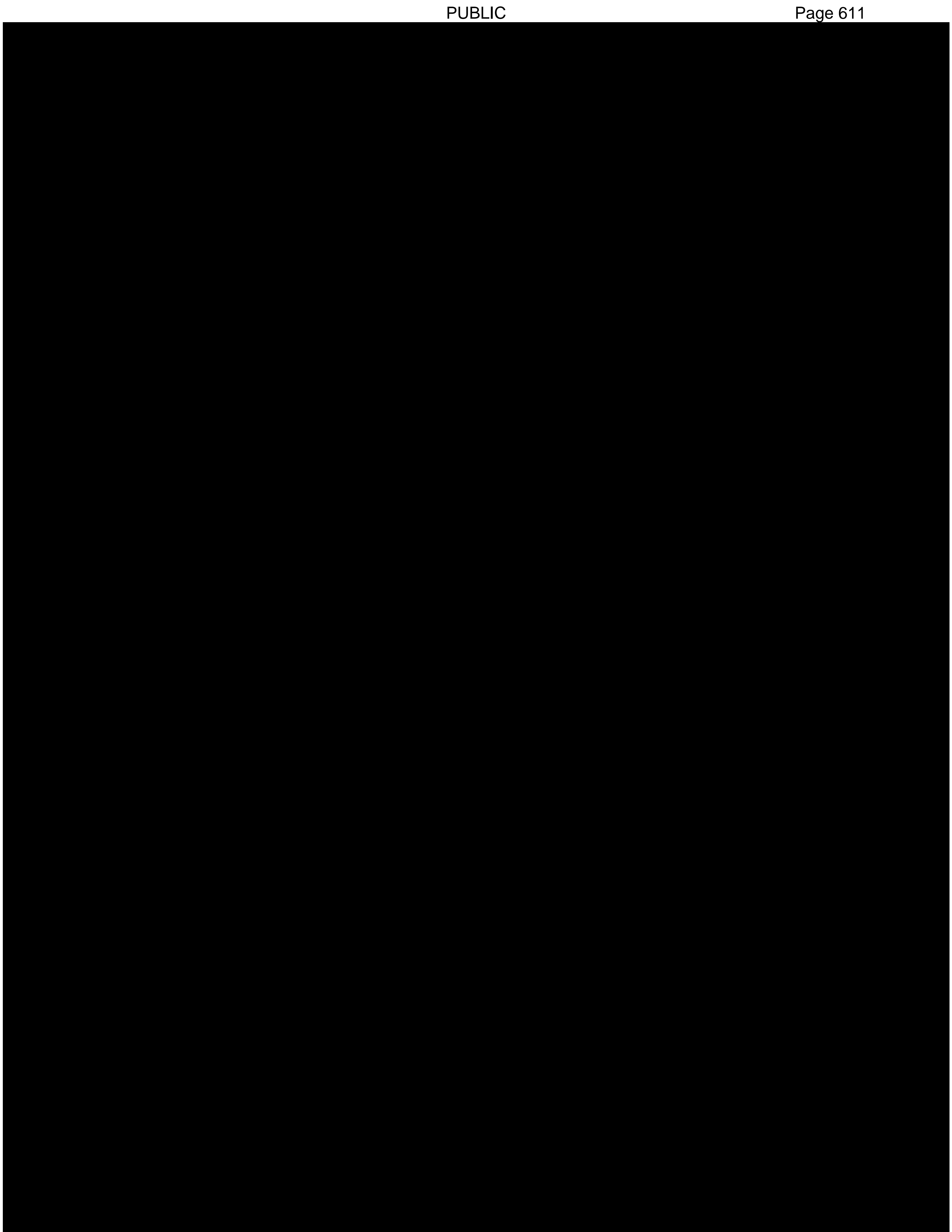

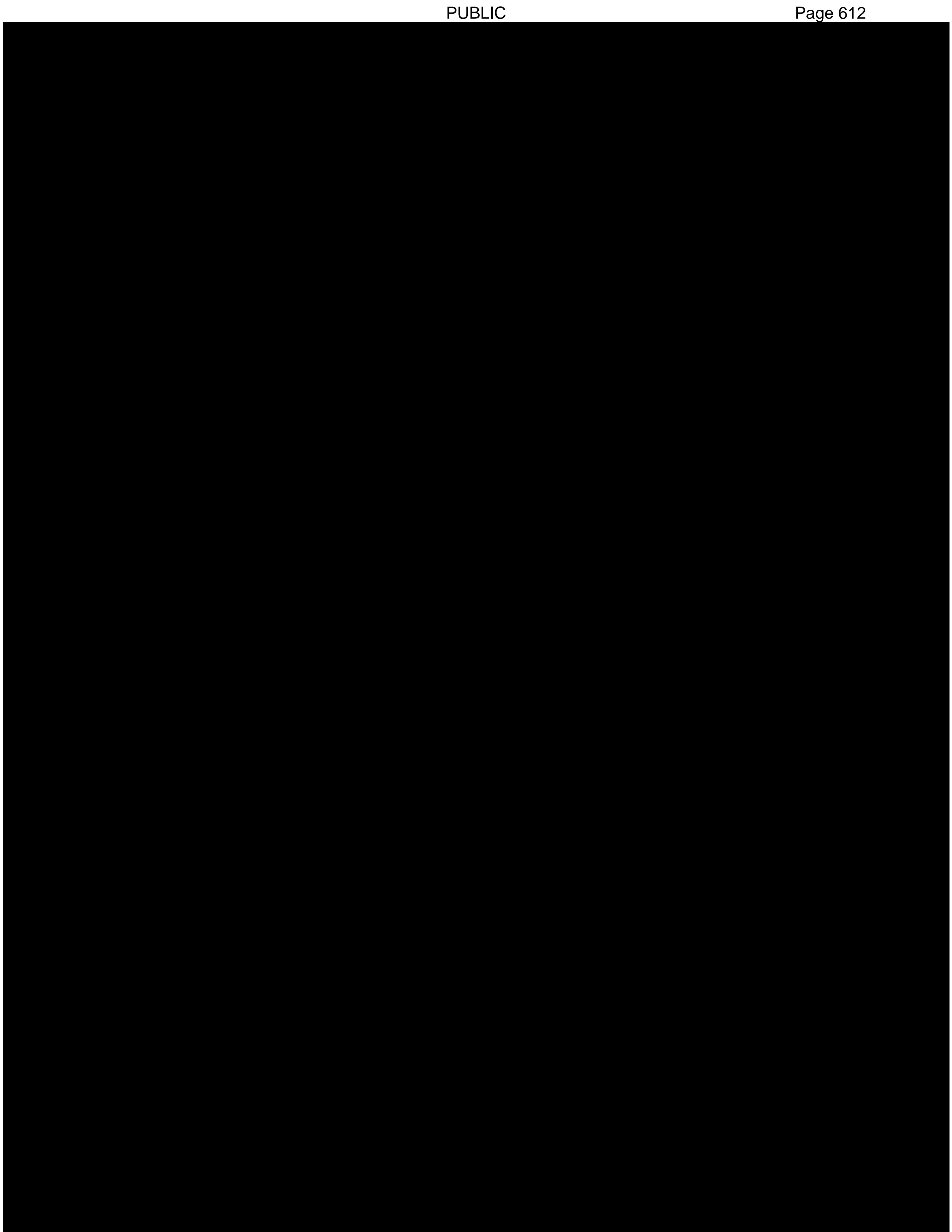

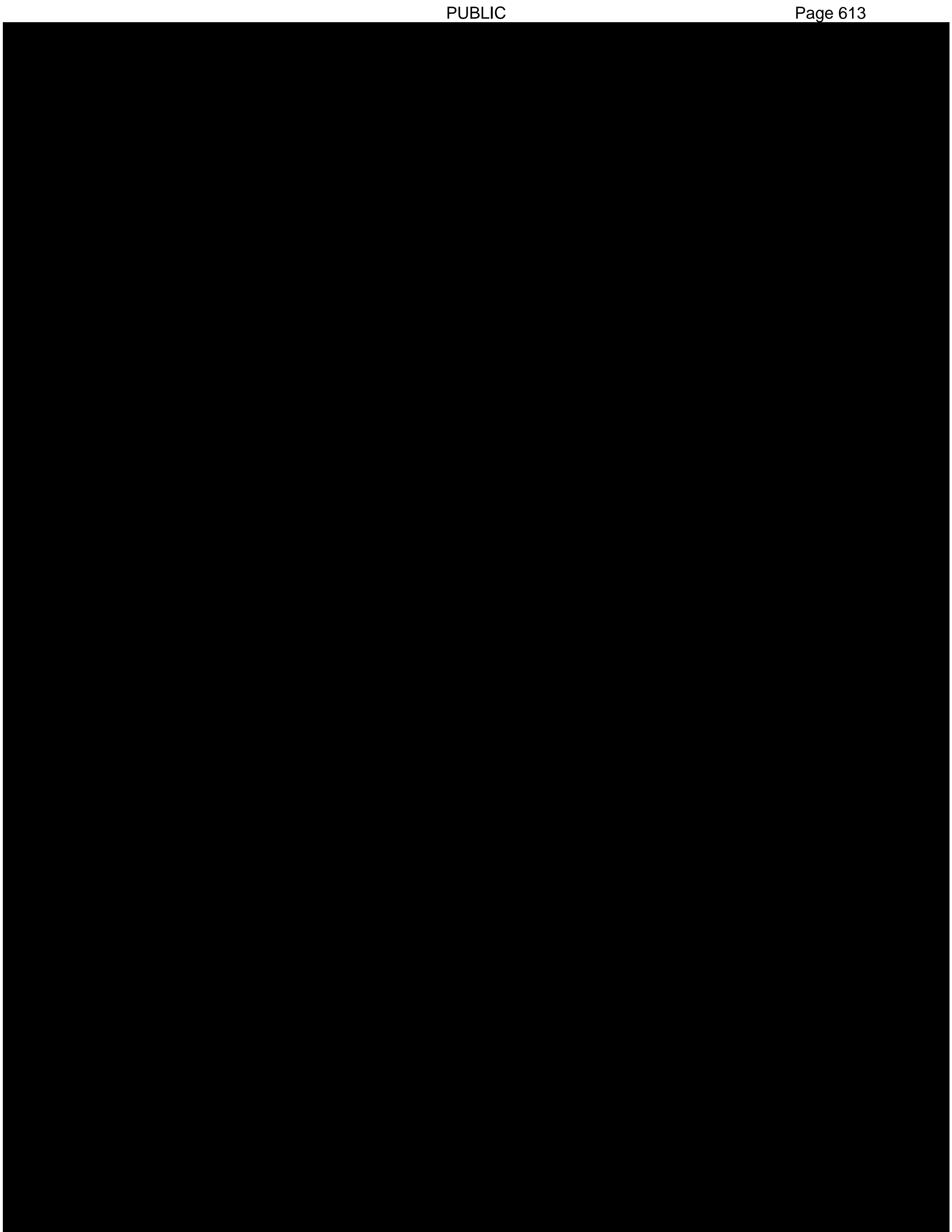

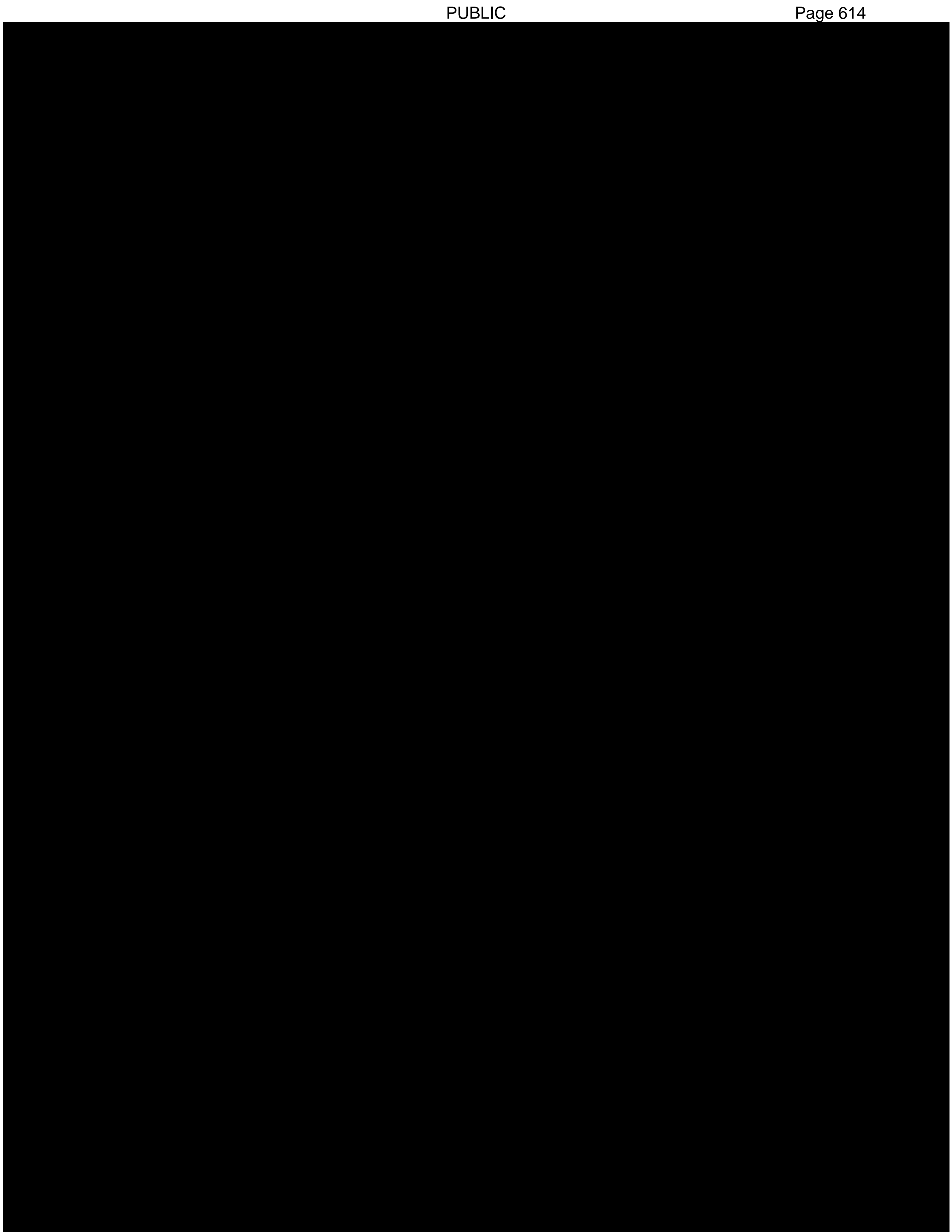

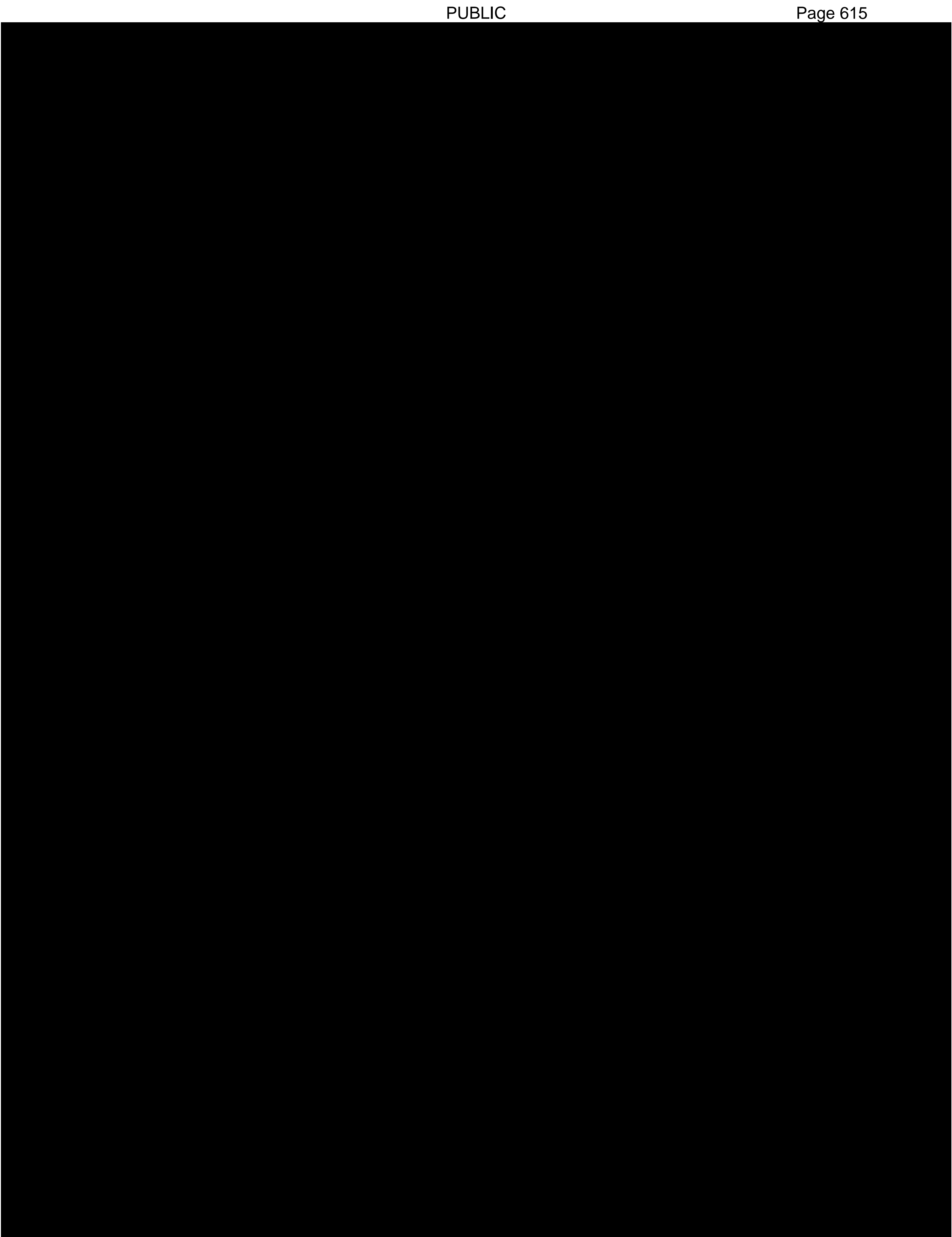

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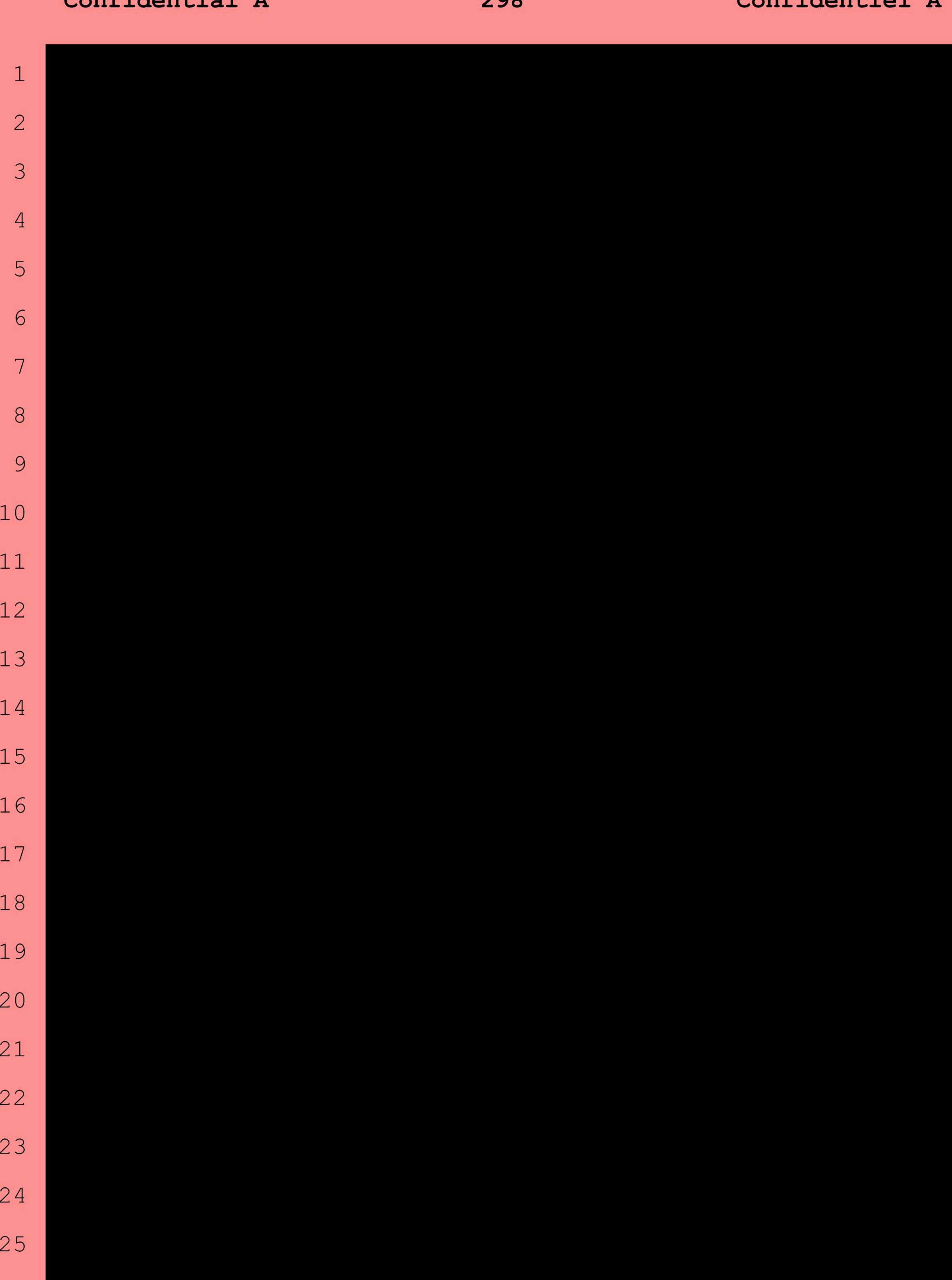

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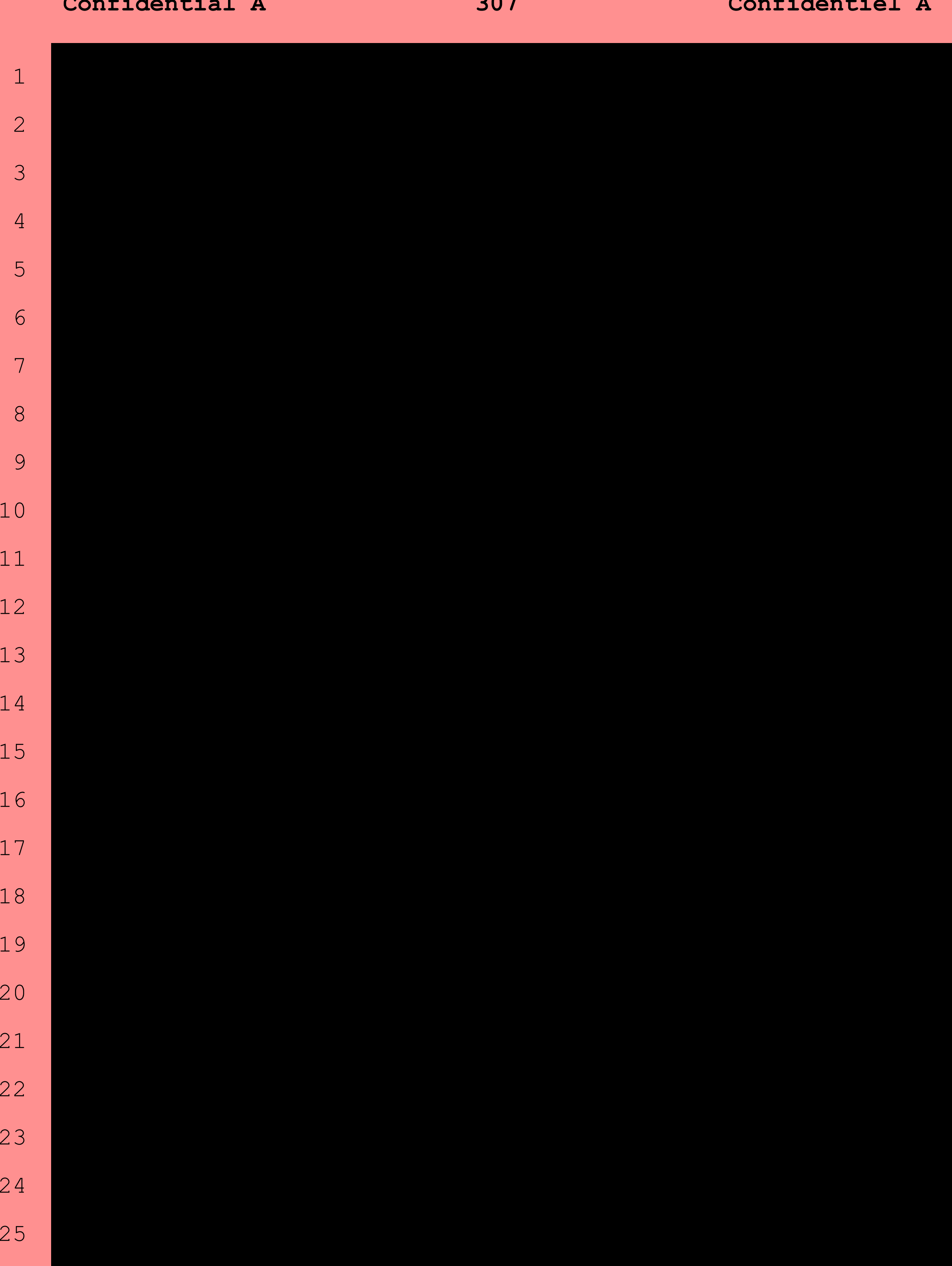

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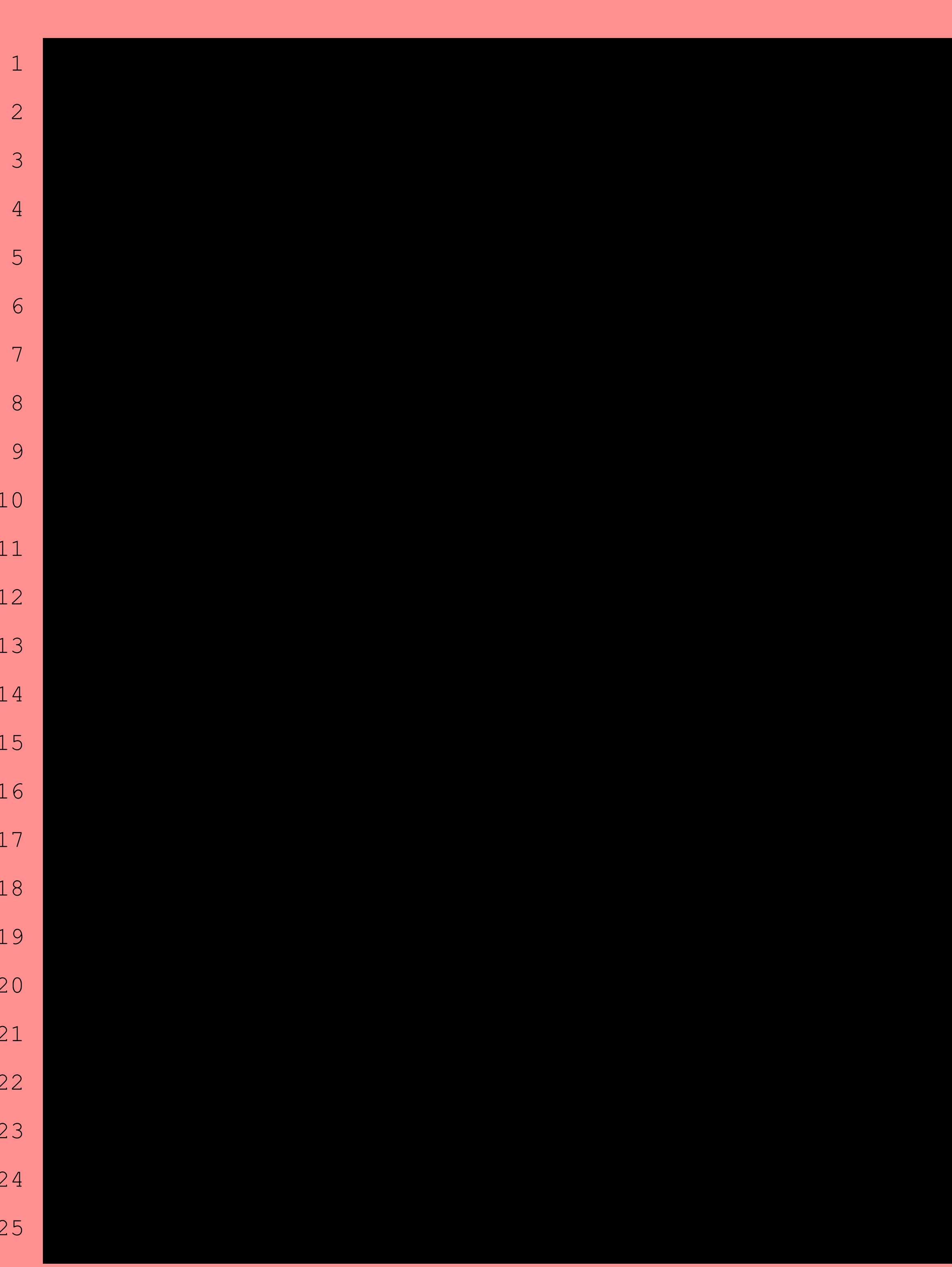

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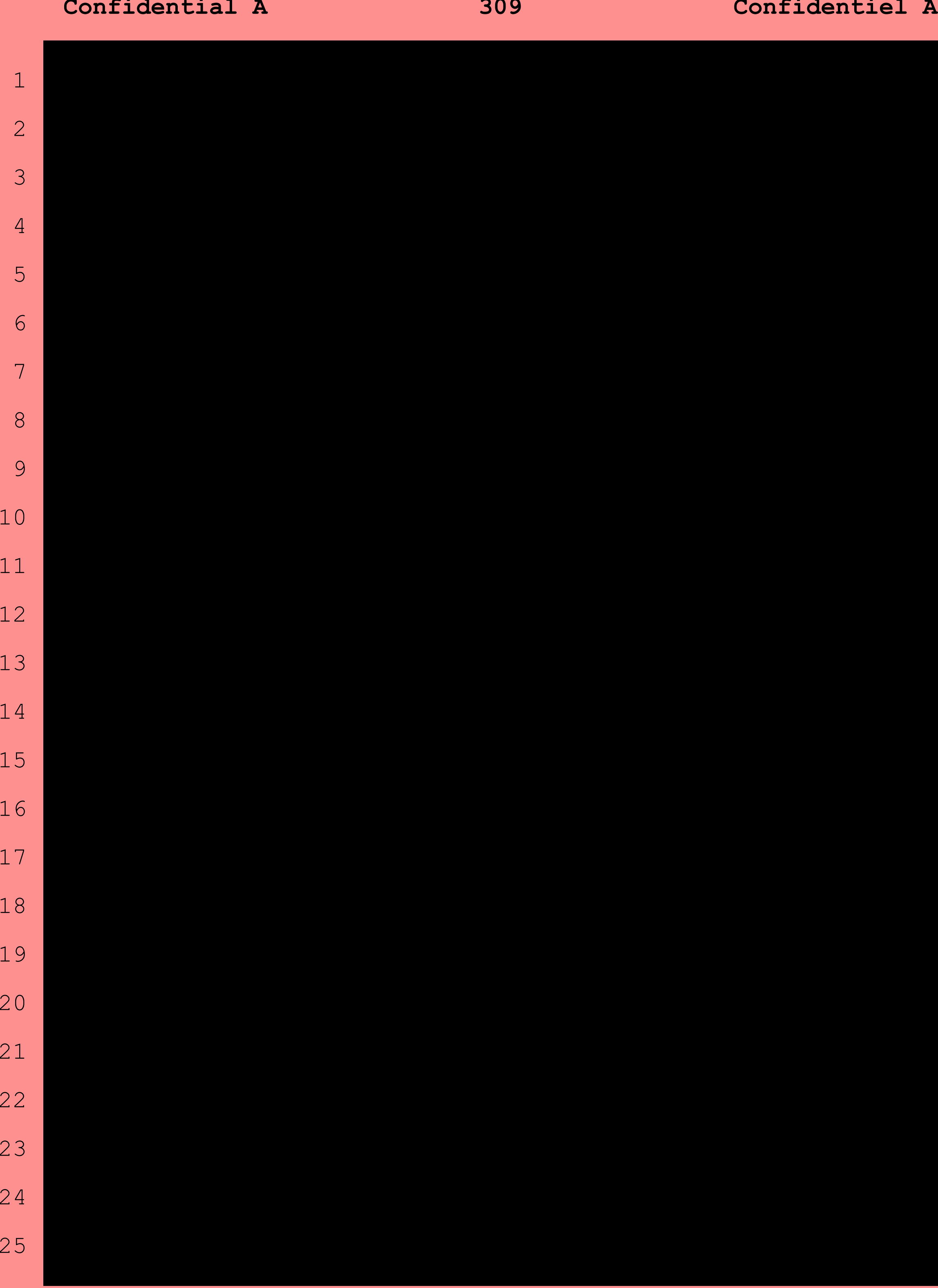

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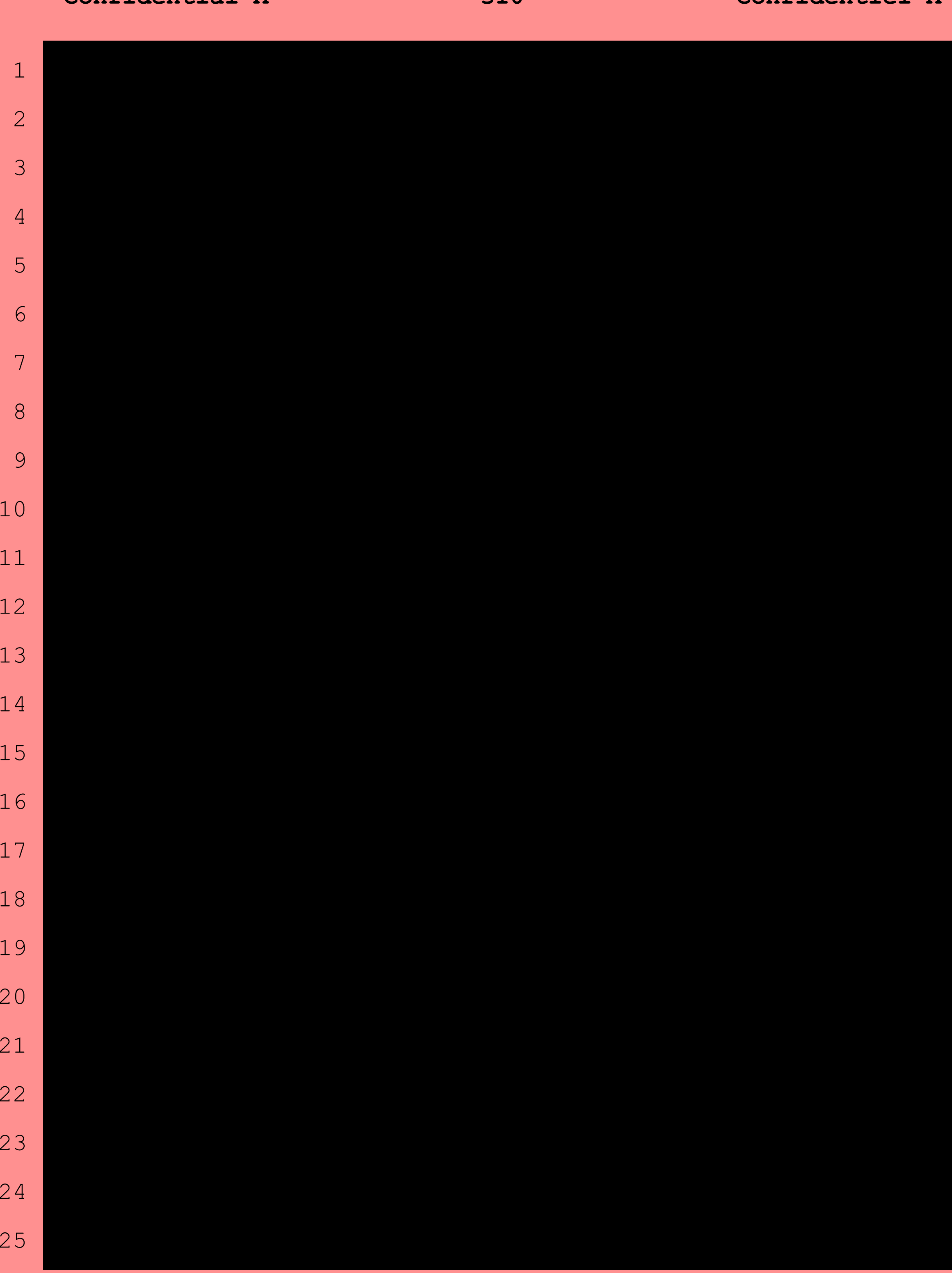

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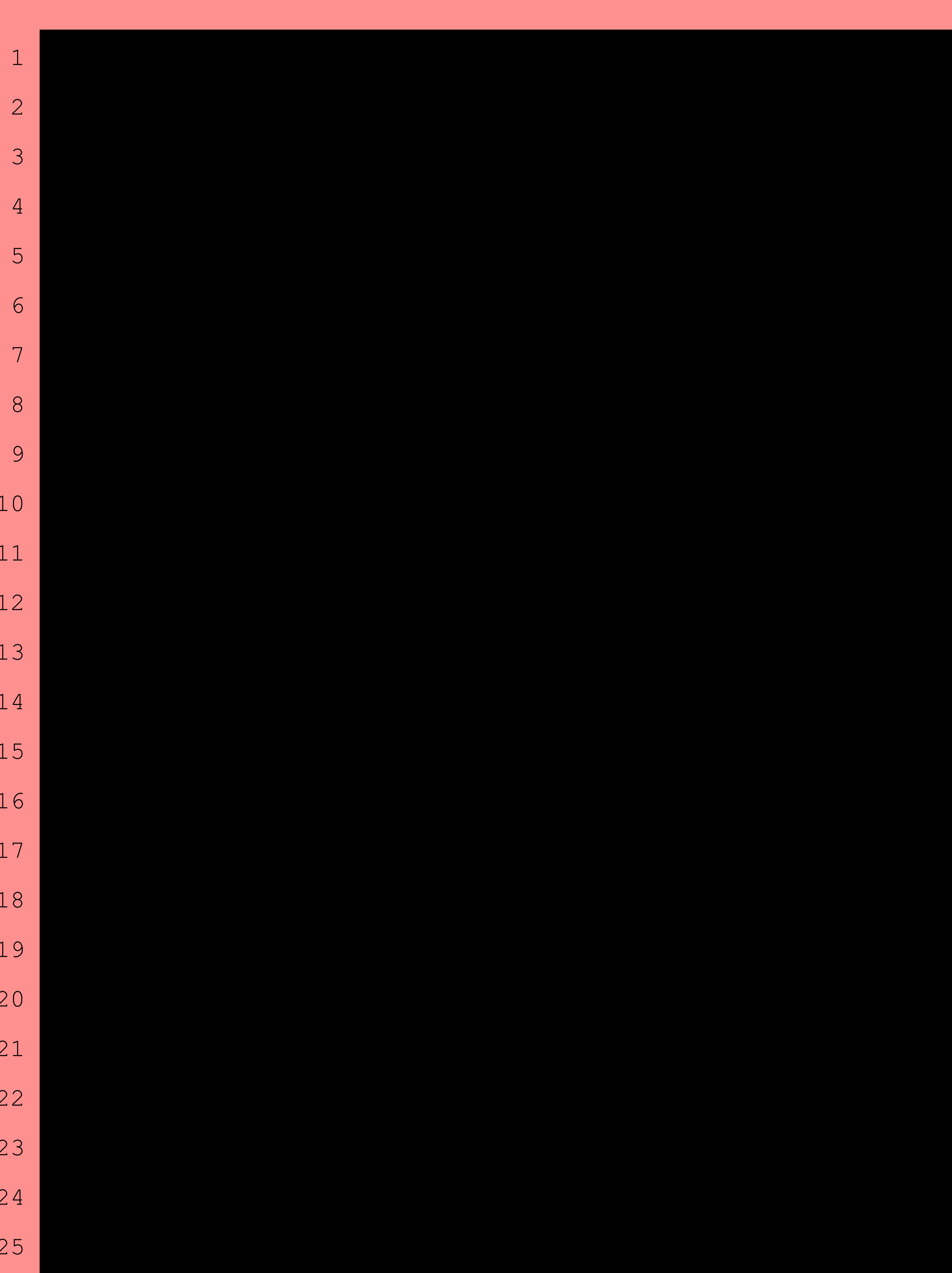

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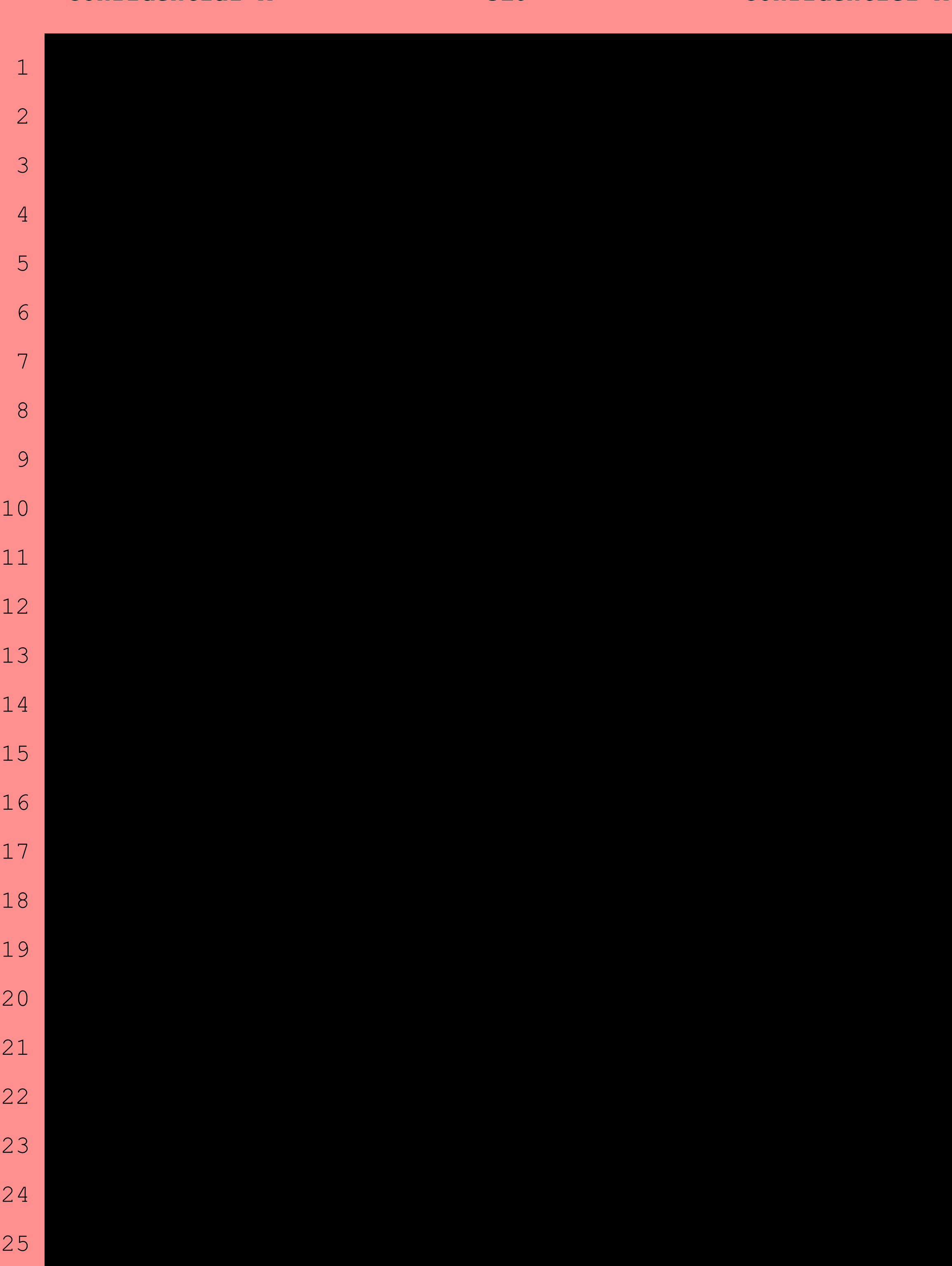

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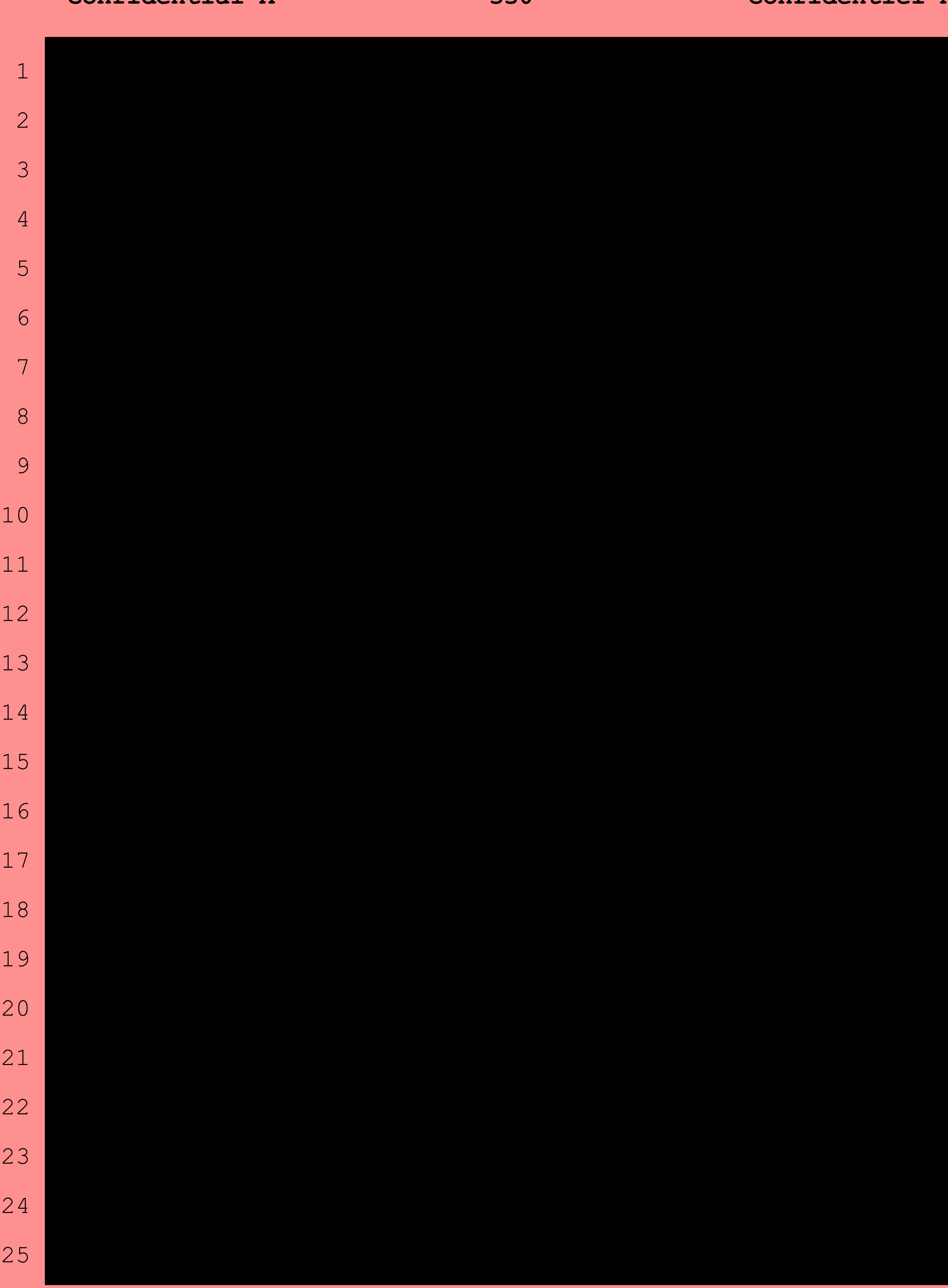

- For the purposes of the identifying the effects of facility closures on my estimated price effect, DWL, and transportation costs analyses and identifying transaction affected by partial closures, I further aggregated each service and substance into broader categories consisting of waste, water, treating, and non-oilfield waste.
- For the purposes of assigning each transaction to a relevant product market, I classified each service and substance into a "market participant" consisting of landfill, trd, and "water, trd."[327]
- I omitted transactions with substances coded as "non-oilfield" wastes (or NONOFD).[328]
- I omitted transactions with services or substances with per-unit prices greater than $5,000.
- I omitted most types of "add on services" ("AOSs") from the Tervita transaction data and retain all AOSs related to tank or truck flushing services that are most often bundled with waste deliveries on the same ticket or transaction number.

7.7.3. *Competitor data descriptions and assumptions*

228. Below I describe the transaction sales data provided by third-party waste service competitors, which I include in my analysis. Note that I did not receive data from [redacted] [329] and I assume that those facilities have the same revenues as the maximum revenue of the Secure and Tervita facilities in that market.

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[327] See Section 4.1.1 for a discussion of waste types that can be handled by both a water disposal well and TRD (since TRDs often have water disposal wells on site) versus services that can only be handled by TRDs.

[328] Confidential Level B - Answers to Undertakings from the Examination of Dave Engel held December 20-22, 2021, p. 13 [redacted].

[329] I include the Rimbey facility operated by Gibson in the TRD market because I understand that it provides drilling fluid, transfer, waste processing services, but that it no longer disposes of third-party waste or produced water. Witness Statement of Gibson Energy Inc., February 24, 2022 ¶¶ 8-10 ("... the waste management facility in Edson, the oil base mud processing operations in Sexsmith, and the custom treating operations in Hardisty have been shut down. The disposal wells at Gibson's Rimbey, Hardisty, Plato North, and Plato South facilities do not accept produced water or waste water from third parties. The Rimbey and Plato South disposal wells have been shut down. Gibson's Rimbey, Plato South, and Plato North facilities continue to offer some emulsion treating services. However, they do not offer the full suite of processing and disposal services offered at Treatment, Recovery, and Disposal facilities like those owned by Secure."); Gibson Energy, available at https://www.gibsonenergy.com/locations/ (accessed February 22, 2022).

- **Albright Flush Systems**: I understand that Albright operates one TRD facility

- **Aqua Terra**: I understand that Aqua Terra (also known as AQT Water Management) currently operates nine water disposal wells (Drumheller, Gold Creek, Gordondale, High Level, Kitscoty, Dawson Creek, Ft. St. John, Hillmond, and Torrington).

- **Cancen Oil Processors Inc.**: I understand that Cancen operates two water disposal wells.[332]

[330] See, e.g., Witness Statement of Albright Flush Systems Ltd., February 8, 2022 Exhibit B

[331] See Witness Statement of Aqua Terra Water Management, Exhibit A

[332] See Cancen Oil Processors, Inc., https://cancenoil.com/about-cancen-2/ (accessed February 22, 2022) ("Cancen Oil Processors Inc owns and operates two deep well disposal facilities with the capacity to dispose of large volumes of liquid waste."); Witness Statement of Cancen Oil Processors Inc. at Exhibit B.

[333]

[334]

- **Catapult**: I understand that Catapult operates four water disposal wells (Tower, Berland, Fox, and Pipestone).
”
- **Clean Harbors**: I understand that Clean Harbor operates one landfill (at Ryley location) facility and one water disposal (at Seller's location) facility.[336] The Red Deer and Grand Prairie facilities were not considered [337]
- **Envolve Energy Services**: I understand that Envolve Energy Services operates one water disposal well (Grovedale).

[334] Cancen Oil Processors, Inc., “Morinville Alberta,” available at https://cancenoil.com/waste-water-disposal-morinville-alberta/ (accessed February 22, 2022).

[335]

[336] See Witness Statement of Clean Harbors Canada Inc., February 17, 2022 at Exhibit C(07),

[337] See Witness Statement of Clean Harbors Canada Inc., February 17, 2022 at Exhibit C(07),

[339] See Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit B(02)

[340]

- **MROR**: I understand that MROR operates two water disposal wells and one TRD.

- **Plains Environmental**: I understand that Plains Environmental operates one cavern facility (Melville) and one TRD facility (Willmar)

- **Pure Environmental**: I understand that Pure Environmental operates one TRD facility (Fort Kent Waste Management facility).[344]

- **RemedX**: I understand that RemedX operates one landfill facility (Breton Waste Management)

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[340] See Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit B(03)

[341] See Witness Statement of Medicine River Oil Recyclers, February 22, 2022 at Exhibit B

[342] See Witness Statement of Plains Environmental, February 23, 2022 at Exhibit A(01) and A(02)

[343] See Witness Statement of Plains Environmental, February 23, 2022 at Exhibit A(03)

[344] See Witness Statement of Pure Environmental, February 11, 2022 at Exhibit B

[345] See Witness Statement of Pure Environmental, February 11, 2022 at Exhibit B (

[346]

- **Ridgeline:** I understand that Ridgeline operates eight active landfill facilities (Redcliff, Youngstown, Fairview, High Prairie, Lloydminster, Shaunavon, Okotoks, and Edmonton)
- **Rush Energy Services**: I understand that Rush operates one TRD facility (Breton) and one water well facility (Rimbey, which opened in March 2020).[349]
- **Waste Connections (municipal landfill)**: I understand that Waste Connections operates one landfill (Coronation).

[346] See Witness Statement of RemedX Remediation Services Inc., February 7, 2022 at Exhibit D(03) (

[347] See, e.g., Witness Statement of Ridgeline Canada Inc., February 8, 2022 at Exhibit B(03) and B(05)

[348] See Witness Statement of Ridgeline Canada Inc., February 8, 2022 at Exhibit B(03) and B(05)

[349] See Witness Statement of Rush Energy Services Inc., February 9, 2022 at Exhibit B(50) and B(135) (

[350] See Witness Statement of Rush Energy Services Inc., February 9, 2022 at Exhibit B.

[351] See Witness Statement of Canada Waste Connections of Canada Inc., February 16, 2022 at Exhibit B

- **Waste Management**: I understand that Waste Management operates two landfills (ThorHild and Big Valley).
- **White Owl**: I understand that White Owl operates one TRD facility in Grande Prairie.[353]
- **White Swan**: I understand that White Swan operates a TRD (Conklin), a cavern (Atmore West), and a water disposal well (Atmore East),
- **Wolverine**: I understand that Wolverine operates five TRD facilities (Claresholm, Rycroft, Grande Cache, Mayerthorpe, and Cynthia) and one landfill (Heward),

[352] See Witness Statement of Lorna Engleson of Waste Management of Canada Corporation, February 24, 2022 at Exhibits B(04) and B(06) -

[353] See Witness Statement of White Owl Energy Services Inc., February 17, 2022 at Exhibit B.

[354] See Witness Statement of White Owl Energy Services Inc., February 17, 2022 at Exhibit B.

[355] See Witness Statement of White Swan Environmental Ltd., February 3, 2022, Exhibit B(02)

[356]

[357]

- **Municipal landfills**: I rely on 2018 data provided by the AEP to account for the volume of special or contaminated wastes delivered to municipal landfills located in Alberta.[358] [redacted] [359] I omitted the Cold Lake municipal landfill from my analysis because [redacted] and its website does not describe taking in oilfield wastes on the page listing the types of tipping fees.[360] I did not receive data from GAP Disposal, a municipal landfill located on the southern border of Saskatchewan, so I imputed revenue for that facility using the same method I use to impute revenue for the [redacted] facilities.[361]

7.7.4. *First-party producer and other data source descriptions and assumptions*

229. The below describes the first-party oil and gas producers from which the Canadian Competition Bureau has requested information. The Bureau has requested from each producer its transaction level sales data for disposal of other producers' waste for the period covering January 1, 2019 and December 31, 2020, including transaction information such as number of units, unit of measure, price, and also product, customer, facility, contract and shipment information if the data is available.[362] Below I describe the data provided, whether I have incorporated it into my analysis, and if not, support for my decision.

- **Canadian Natural Resources Limited ("CNRL")**: I have included CNRL's transaction sales data related to third-party waste it disposed in my analysis. CNRL operates two landfills and thirteen disposal wells (among its more than 300 active disposal wells) that disposed of third-party producers' waste during the 2019-2020

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[358] See Witness Statement of Carol Nelson, January 26, 2022 at Exhibit F [redacted]

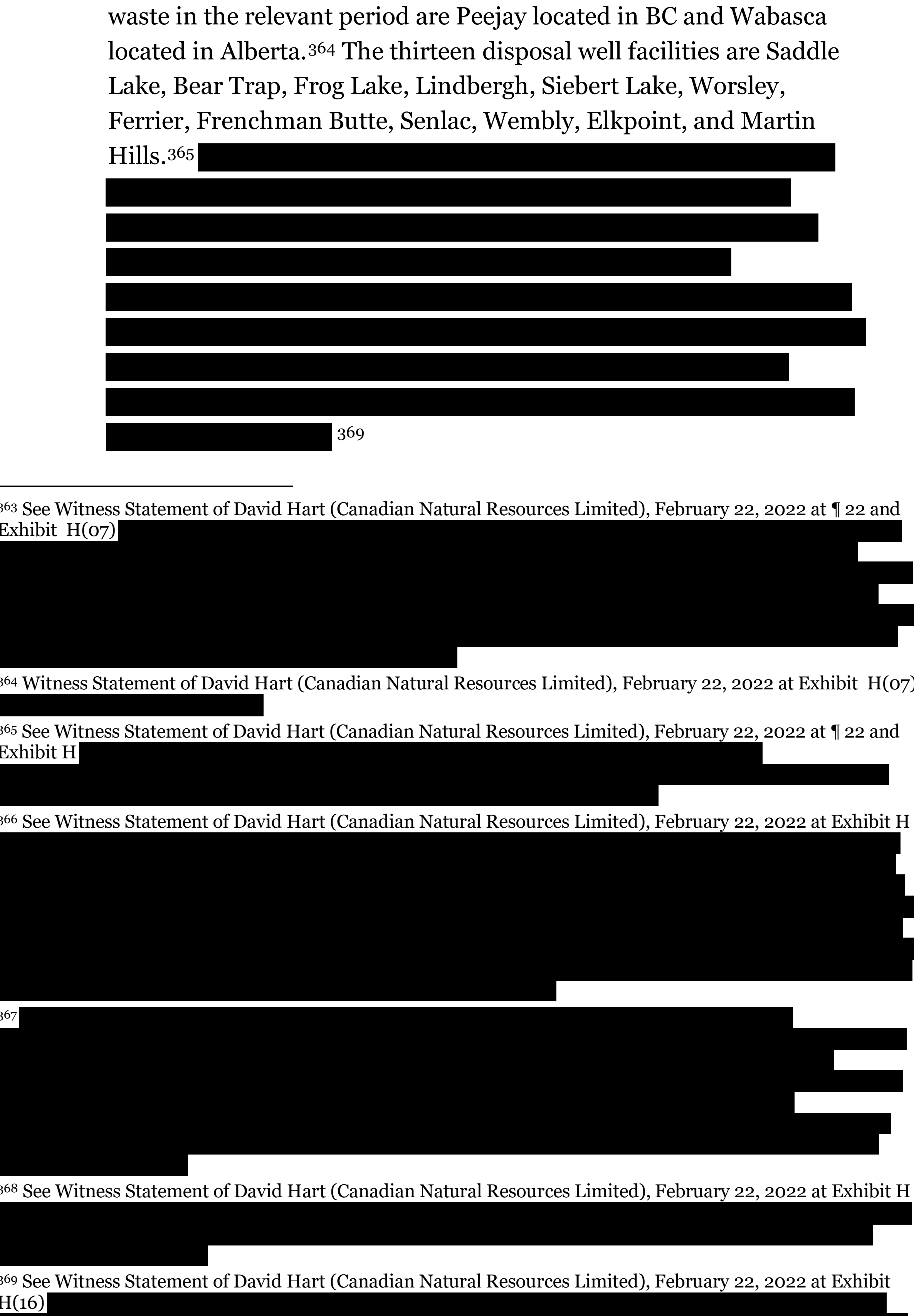
[359] Engel testimony, December 20, 2021, p. 46 ([redacted]

[360] See City of Cold Lake, https://coldlake.com/en/live/fees-and-penalties.aspx (accessed February 24, 2022).

[361] A recent press release notes that GAP takes in oilfield waste. See GAP Disposal, https://gapdisposal.ca/news_release.html (accessed February 24, 2022).

[362] See, e.g., Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit A.

period.[363] The two CNRL landfill facilities that accepted third-party waste in the relevant period are Peejay located in BC and Wabasca located in Alberta.[364] The thirteen disposal well facilities are Saddle Lake, Bear Trap, Frog Lake, Lindbergh, Siebert Lake, Worsley, Ferrier, Frenchman Butte, Senlac, Wembly, Elkpoint, and Martin Hills.[365]



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[363] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at ¶ 22 and Exhibit H(07)

[364] Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H(07),

[365] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at ¶ 22 and Exhibit H

[366] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H

[367]

[368] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H

[369] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H(16)

- **Galatea**: Galatea does not own or operate waste disposal facilities, so I do not include Galatea's data in my analysis. I understand that Galatea provides oil and gas producers a Waste Coordinator software product that allows them to "optimize processes related to the transport and disposal of oilfield waste."[370] [371]
- **Obsidian**: I also do not include Obsidian ("OBE") in my analysis, .[372]
- **Plains Midstream**: Plains Midstream accepts some waste from other producers only in its Rimbey facility and I include it in my analysis.[373] [374]
- **Recover Inc.**: I do not include Recover Inc. in my analysis. Recover Inc. is an environmental technology company cleaning oil base drilling waste of third-party waste generators.[375] The cleaned drill cuttings generated from the oil base drilling waste treating, however,

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[370] Witness Statement of Chad Hayden, February 9, 2022, p. 2.

[371] Witness Statement of Chad Hayden, February 9, 2022, p. 5.

[372] Witness statement of Obsidian, Cliff Swadling, February 21, 2022, ¶¶ 24-27 ("Obsidian provides water disposal to third parties where Obsidian is disposing of its own water related to its operations. However, Obsidian does not have dedicated disposal infrastructure for disposal of third-party water. Obsidian's current disposal revenue is relatively insignificant (approximately hundreds of dollars per month) and spread across hundreds of possible wells. These operations are considered normal course for a producer in the Western Canadian Sedimentary Basin and do not represent a significant water disposal business.").

[373] Witness Statement of Plains Midstream Canada, February 9, 2022 at Exhibit C and

[374] See Witness Statement of Plains Midstream Canada, February 9, 2022 at Exhibit C

[375] See https://www.recover-energy.com/.

still needs to be sent to landfill facilities [376] Recover Inc. thus can be considered a customer for landfill services.

- **Sprocket Energy Corporation**: I include Sprocket Energy Corporation in my analysis. [377]
- **TAQA**: I incorporate the data related to produced water TAQA accepted from other producers for disposal at its water disposal wells in my analysis. [379]
- **Tourmaline**: I also include in my analysis Tourmaline's transaction data related to water waste it took from other oil and gas producers [380]
- **Whitecap Resource Inc.**: [381]

[376] Witness Statement of Recover Inc., February 2, 2022 at Exhibit B. See also https://www.recover-energy.com/recyling-reuse ("Once processed at our facility, the waste is dry and substantially void of hydrocarbons. This material (known as Recover Dry™) is then sent to an industrial landfill where it is recycled as a stabilization material for other waste streams.")

[377] See Witness Statement of Sprocket Energy Corporation, February 1, 2022 at Exhibit B

[378] See Witness Statement of Nigel Wiebe, January 27, 2022 at Exhibit A(c)

[379] The UWI for the three TAQA wells are "00/12-09-013-14W4", "00/14-09-013-14W4" and "00/12-16-013-14W4." See "

[38

[381]

reported in Section 6.1,[85] and I find that the changes in them are not large.[86] Additionally, I calculate the implied predicted price impact, which is reported in **Exhibit 1**.[87] Compared to the results of Exhibit 21 from my Initial Affidavit, the largest changes in predicted price impacts are to landfill markets, which is consistent with landfills having larger depletion and estimated annual ARO costs.[88] Nonetheless, the predicted price effects are still large in all three product markets.

EXHIBIT 1
Merger simulation predicted price increase estimates accounting for depletion and estimates of annualized ARO

	TRD	Landfill	Water Well
2-to-1	50.5%	-	23.9%
3-to-2	23.9%	8.9%	22.0%
4-to-3 (or higher)	14.9%	8.9%	10.3%
Total weighted average	*24.3%*	*8.9%*	*11.1%*

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix to Miller Initial Affidavit (Section 7.7)

Note: Simulation assumes that Parties complete planned closures. Each predicted percentage price increase is based on the revenue-weighted average across each of the Parties' geographic markets. To calculated the percentage change in prices, or the percentage change in markups, the post-merger implied markups are compared to the pre-merger implied markups. Markets in which either Secure or Tervita do not generate at least 5 percent of revenue are excluded from the percentage changes in markups because these markets appear to have less direct competition between the Parties and may not experience a change in competitive conditions due to the merger. Markets comprised only of a Secure or Tervita draw area are also excluded because these markets are already monopolies and may not experience and change in competitive conditions due to the merger. See the Appendix (Section (7.6) for more details.

3.3. Dr. Duplantis' "natural experiment" is not an appropriate indicator for price effects of this merger

52. Dr. Duplantis puts forward a price-effects model based on the idea of comparing the average waste service prices pre- and post-Tervita-Newalta merger. [89] She estimates smaller price effects (for example, around 10 percent in the markets she describes as merger-to-monopoly) and claims that findings of the model are indicative of the effects of the Secure and Tervita transaction.[90]

[85] See Section 6.1 for the calculation of these costs.

[86] My estimates of variable cost margins were reported in Exhibit 43 of Miller Initial Affidavit.

[87] I re-calculated the DWL, as well, and the results are reported in Section 4.2.

[88] See my backup materials.

[89] Duplantis Affidavit, ¶ 78.

[90] Duplantis Affidavit, ¶ 79 ("I show that for my baseline specification prices increased on average as a result of the Tervita/Newalta transaction by up to 11.0% for '2-to-1' markets, up to 9.8% for '3-to-2' markets, and 0.9% for '4-to-3 or more' markets."). Duplantis Affidavit, ¶¶ 79, 81.

130. I note that while the results of the merger simulation are based on a second-score auction model, the academic literature has shown that the predicted price impact of second-score model is similar to the predicted price impact of a merger simulation first-price auction model.[230] Therefore, the results are unlikely to be sensitive to the use of second-score auction model.[231] A merger simulation based on the first-price auction model captures the post-merger pricing incentives in transactions where waste service suppliers bid to provide waste services to oil and gas producers, and then producers decide which facility best fits their needs and pays the bid price. This approach also captures the post-merger pricing incentives when firms "post" prices to its customers, or a posted price market.

131. Given that the merger simulation based on either approach yields approximately similar predictions on pricing incentives, it is immaterial which of the bargaining processes better describes the industry. Showing a large price impact of the merger based on the second-score auction model indicates that the price impact is likely to be of similar magnitude in a first-price auction model.[232]

132. Moreover, in implementation, I assume that 10 percent of revenue is generated outside the market. I make this assumption even in markets where I observe that the Parties' facilities comprise the only viable facilities for customers' well sites located in those local geographic market.[233] This assumption mechanically underestimates the price impact, and it builds in some competition and source of price constraint, even in markets where there are no apparent competitors but the Parties.

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[230] Miller, Nathan H., and Gloria Sheu. "Quantitative methods for evaluating the unilateral effects of mergers." *Review of Industrial Organization* 58, no. 1 (2021): 143-177.

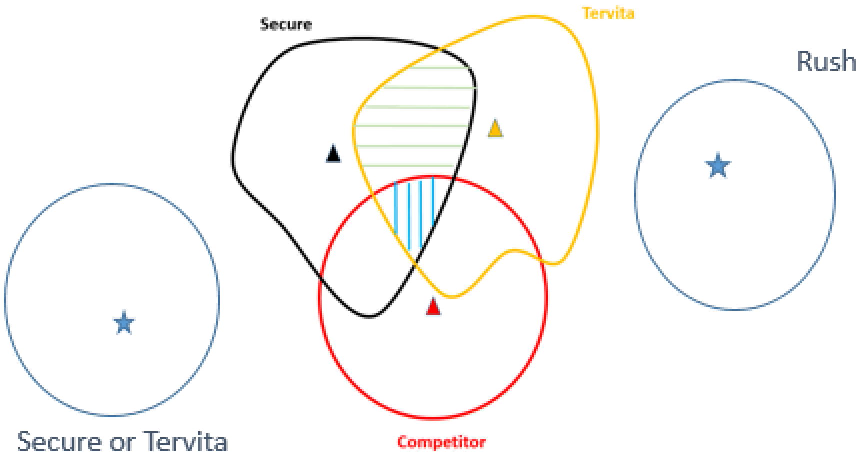
[231] The model results are instead driven by data on market shares and the markups, which capture the competitive significance of the merging firms and their ability to exert pricing power, respectively.

[232] See Section 7.6 for more details linking outcomes from the two modeling frameworks.

[233] See Section 4.2 and my Appendix (Section 7.3).

189. By assuming that customers spend on average more outside the market than inside the market I understate the Parties' revenue-based shares inside the market.[305] Consequently my analysis under-estimates the predicted price effects and share-based DWL, both of which depend on the Parties' shares inside the affected markets, rendering my analysis more conservative overall.[306]

EXHIBIT 47
Illustration of customers with facilities located outside the customer-defined market



7.4. Examples of customer-defined markets

190. For visualization, the following maps provide examples of clusters of customers that are part of the same customer-defined markets for each of the TRD, landfill, and water well product markets. The first set of maps describes the locations of markets along the Alberta and British Columbia border. The second set of maps describe locations southeast of the Alberta and British Columbia border. Each cluster of colored dots depicts the locations of customers that are part of a customer-defined market comprised of the same overlapping draw area. The gray dots depict other customer locations that are part of different customer-defined markets.

[305] Section 5.1, Exhibit 9.

[306] See Section 7.7 for a description of the formula that measures the predicted changes in markups, which is a function of the Parties' revenue in affected markets. See Section 7.6.1 for a description of the formula that measure the share-based DWL. See Sections 5.3 and 6.2.2 for my estimates of predicted price effects and share-based DWL that depend on the conservative assumptions in my model.

For these reasons, onsite storage is unlikely to be a viable large scale alternative to third-party landfills for most oil and gas producers.

63. Third, oil and gas producers can potentially dispose of solid waste in municipal landfills. However, municipal landfills are not likely to be close substitutes to third-party landfills because they do not typically handle the significant volumes of contaminated soil and other solid waste produced during oil and gas operations.[137] Consequently, they are not likely to be part of my relevant product market. Nonetheless, I include municipal landfills as part of the landfill product market in my competitive effects and welfare analyses, and the conclusions of my analysis hold.

64. Large oil and gas producers, such as Canadian National Resources (CNRL), may own a number of landfills and can "self-supply" solid waste disposal services.[138] However, landfills owned by producers are not close substitutes to third-party facilities.[139] They are often operated for the exclusive use of their owners and are not permitted to take in waste from other oil and gas producers,[140], [141] and other oil and gas producers noted that they would not consider building their own landfills.[142]

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there was no evidence about the volumes stored in NEBC and no evidence to suggest that the tenure payments or the cost to obtain a certificate of restoration have any impact on Tipping Fees at Silverberry.").

[137] Witness Statement of Petronas Energy Canada LTD., Carl Lammens, February 3, 2022, ¶ 36 ("Municipal landfills are not an option for PECL as they are neither licensed for nor designed to accept the type of solid oilfield waste which PECL generates."); Witness Statement of RemedX Remediation Services Inc., Barrie Flood, February 7, 2022, ¶ 13 ("Municipal landfills near the Breton Facility will, at times, accept industrial waste. While municipal landfills sometimes have lower waste disposal costs, in general these municipal landfills cannot accept all of the waste types that can be disposed of at a Class II landfill and there may be greater environmental risk in disposal at a municipal landfill. In RemedX's experience, Class II industrial landfills are generally constructed and regulated to a higher standard."). See Witness Statement of Carol Nelson, January 26, 2022 at Exhibit F (RBED00003_000000002). See Section 7.1.1 for a comparison of volume taken in by municipal landfills versus Secure or Tervita landfill facilities.

[138] Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022, ¶¶ 20-24

[139] I am not aware of any full service TRDs owned by oil and gas producers. Witness Statement of Tinu Odeyemi, January 8, 2022 at Exhibit B.

[140] Letter from Brian A. Facey (Blakes) to Commissioner Matthew Boswell (Competition Bureau of Canada), "SECURE Energy Services Inc.'s acquisition of Tervita Corporation," March 12, 2021 [RBBB00001_000000002], p. 13 ("...producers such as CNRL, Cenovus/Husky, Shell and ConocoPhillips operate landfills for their own exclusive use..."). See also Alberta Energy Regulator, "Approved Oilfield Waste Management Facilities," available at http://www1.aer.ca/ProductCatalogue/41.html.

[141]

[142] Witness Statement of Petronas Energy Canada LTD., Carl Lammens, February 3, 2022, ¶¶ 58-59 ("While the ability to dispose of solid oilfield waste is an essential service for PECL, the company does not produce sufficient volumes of internally produced solid oilfield waste to justify establishing its own licenced landfill facility. In addition to possessing insufficient volumes, PECL does not regard solid waste disposal as part of its' core business."); Witness Statement of Paul Dziuba (Chevron Canada Resources), February 24,

7.1.1. *Maps of waste service customers that will experience decrease in competition as a result of the merger*

171. Similar to map exhibits in my June Expert Report,[289] the following updated **Exhibit 27**, **Exhibit 28**, and **Exhibit 29** show the changes in waste service provider concentration for customers of TRD, landfills, and water disposal wells, respectively, because of the merger between the Parties.[290] These maps update the maps in my June Expert Report because they include additional municipal landfills, additional competitor facilities, one additional Secure facility, and several first-party landfills and water disposal wells that take in other oil and gas producers' wastes. I include all of these in my current analyses even though I do not consider municipal landfills and first-party facilities to necessarily be viable substitutes to the Parties' facilities, as I describe in Section 4.1.2 and 4.1.3. Consequently, my analysis likely understates the levels of increased competition.

172. I plot the locations of each Secure and Tervita customer and color-code them depending on the number of alternative waste service providers available to them after the merger.

- Red dots indicate customer locations for whom the merger reduces the number of waste service-provider competitors from two to one (i.e., merger-to-monopoly). These customers currently benefit from the competition between Secure and Tervita facilities, but they will face a monopoly (i.e., no nearby third-party owned facilities) after the merger.
- Purple dots represent customer locations that are currently benefitting from competition between Secure, Tervita, and another competitor, but they will only have two competing waste service-provider options after the merger (i.e., 3-to-2 merger).
- Blue dots represent locations that will experience a reduction in competition due to the merger, but will continue to have at least 3 proximate competitor facilities.
- Gray dots represent customers' locations that will be unlikely to experience a reduction in competition, or that are already located in a

[289] Miller June Expert Report, RCFC00001_000000015 p. 2757-2760.

[290] Refer to Section 4.2 for a description of how I define customer-based markets for each of the three product markets.

12. Dr. Miller's auction model is disconnected from the realities of what constrains pricing of waste disposal services to oil and gas producers in the Western Canadian sedimentary basin. For this reason, his predicted price increases are unreliable and substantially overstated.

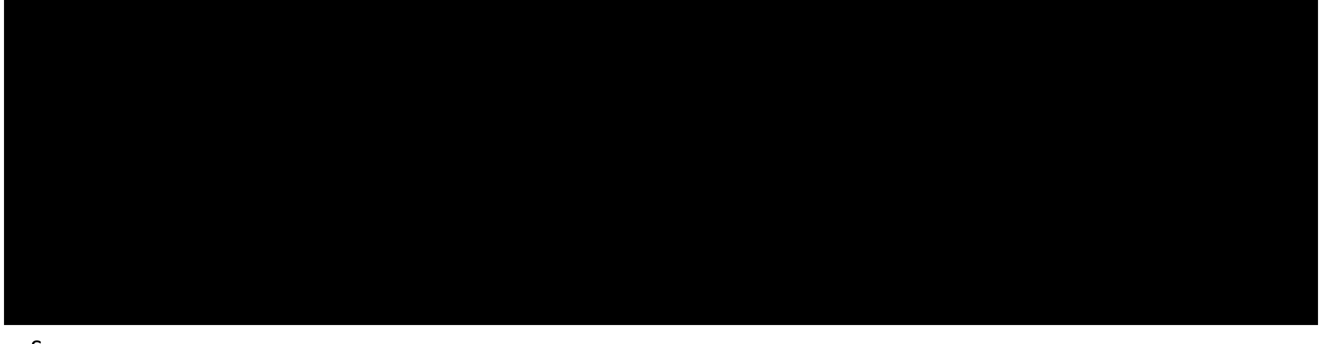
13. In particular, Dr. Miller's model rests on an assumption that waste services facilities are significantly differentiated from one another from the customer's perspective, in ways that go beyond spatial/geographic differentiation, and that these facilities charge different prices in respect of each individual customer location. These are theoretical assumptions that are impractical in reality, inconsistent with SECURE's pricing philosophy, and inconsistent with how customers actually pay for and use waste services facilities. Dr. Miller ignores the sophistication of customers, including their ability to discipline suppliers across product areas and geographies as part of the competitive process. Equally important, Dr. Miller's model also ignores the proven ability of buyers both to vertically integrate and sponsor entry. (See Section III.A.)

14. The price increases predicted by Dr. Miller's second-score auction model significantly exceed the price increases I estimate from a standard natural experiment analysis of the 2018 Tervita acquisition of Newalta Corporation ("Newalta") (the "Tervita/Newalta merger"). The Tervita/Newalta merger is a powerful natural experiment for assessing the price effects here, as it took place in the same industry, involved many of the same customers, and also involved consolidation in similar market structures. In reality, the Tervita/Newalta merger did not cause price increases on the order that Dr. Miller predicts for the current Transaction, which is contrary to the results from Dr. Miller's model. (See Section III.B.)

15. Tellingly, I apply Dr. Miller's auction model to the Tervita/Newalta merger and I find that Dr. Miller's model would have predicted significant price increases that did not occur in actuality. This is strong confirmation that his model does not fit the pricing dynamics at play in this industry. (See Section III.C.)

16. Dr. Miller purports to estimate what he refers to as "social loss" or "deadweight loss" from facility closures (what I will refer to in this report as his "facility closure effect") using novel methods.[5] His facility closure effect is a notable departure from standard methodologies for estimating deadweight loss based on predicted price increases and a resulting output effect that depends, among other things, on the elasticity of demand. In particular, he calculates his

[5] Throughout his report, Dr. Miller uses the terms social loss, welfare loss, loss of consumer choice, and deadweight loss largely interchangeably. Throughout my report, I will refer to his loss of consumer choice through facility closures as the "facility closure effect" and the loss of allocative efficiency (whereby a price increase brings about a negative resource allocation) as "deadweight loss."



Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.

III.A.3. Dr. Miller's model ignores buyer power and the threats of customer insourcing or sponsored entry

67. Dr. Miller's auction model with price discrimination also fails to account for the negotiating leverage of customers in this industry. So called "buyer power" provides additional constraints on pricing independent of the asserted relative value of alternative facilities to the customer well location.

68. SECURE's (and formerly Tervita's) customers are oil and gas producers, many of whom have substantial oilfield operations and their own waste disposal facilities. As shown in Figure 10 and Figure 11 above, the [redacted] customers of SECURE and Tervita in 2019 accounted for [redacted] of total revenue for SECURE and [redacted] for Tervita. Not only do the largest customers account for substantial portions of total revenue for SECURE and Tervita, but as mentioned above they also utilize multiple facilities and multiple facility types.

69. While I broadly agree with Dr. Miller's assessment that TRDs, LFs, and WDs are not widely substitutable for each other for a given waste service that a customer requires, ultimately it is the same oil and gas producers that require most if not all of these services. This affects pricing for large proportions of the Parties' revenues.

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7 The two pieces of economics that I think speak
8 to this are first, the margins that we see. And the
9 margins that we see are pretty high, prices are elevated
10 compared to variable cost. And that isn't the sort of
11 thing you would normally expect if self-supply is putting
12 substantial downward pressure on prices in the pre-merger
13 environment. So just the margins to me give me pause, you
14 know, lead me to think that self-supply is probably not the
15 constraining factor here, or in most situations, having a
16 big effect.
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17 The second piece of evidence I'll point you to
18 is the expert report of Dr. Yatchew, who analyses this
19 market, you know, in some detail, and, you know, obtains
20 the conclusion that demand is highly inelastic. And he
21 reaches that conclusion based on an analysis of the
22 qualitative factors and also through an econometric study,
23 and he determines the supply of third-party waste services
24 is highly inelastic, not only for TRDs, which really makes
25 a lot of sense, and landfills, where there's a little bit

1 of self-supply and not much, but he also reaches that
2 conclusion with respect to water disposal.
3 In fact, he reports a point estimate of the
4 demand elasticity of negative 0. -- it's either 0.5 or
5 0.49, I actually don't remember exactly, but it's on that
6 order of magnitude, and so determines that water disposal
7 itself is inelastic.
8 Dr. Duplantis relied on those calculations in
9 calculating her own deadweight loss. And so, you know,
10 putting that together, I sort of think the economists here
11 are on the same page about the demand being relatively
12 inelastic for waste disposal services, including for water.
13 Let's contextualize that. Why might that make sense? And
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19 So on the next slide, I've provided a table
20 which highlights different assumed outside shares. If we
21 could go to the next slide, sorry?
22 Different assumed outside shares, and on the
23 far left it's approximately zero percent. If the assumed
24 outside share in Dr. Miller's second-score auction model is
25 zero percent, then the price effects would be infinitely

1 large.

2 So what I've demonstrated here is 0.000. I

3 think there are 10 zeros and a one, so essentially zero.

4 And if the outside share is infinitesimally small, then the

5 price effects in a 2:1 market would be over 2,000 percent.

6 And likewise, if the outside share percentage was 25

7 percent in a 2:1 market, those price effects would be on

8 the order of 21 percent.

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Estimation of Competitive Effects

Sensitivity of Dr. Miller's Model to Assumptions

Contrary to Dr. Miller's contention, his conclusions depend crucially on the assumptions of his theoretical modelling.

Miller Model Simulation Price Increase Estimates for SECURE/Tervita Merger

Weighted Average	Assumed Outside Share %											
Price Increase	≈ 0%	1%	5%	10%	15%	20%	25%	30%	35%	40%	45%	50%
2-to-1	2007.6%	157.6%	78.2%	49.9%	35.7%	26.8%	20.7%	16.3%	12.9%	10.3%	8.2%	6.5%
3-to-2	585.2%	73.8%	37.6%	23.2%	15.8%	11.3%	8.2%	6.0%	4.4%	3.2%	2.3%	1.5%
4-to-3 (or higher)	23.2%	21.3%	16.2%	12.3%	9.7%	7.7%	6.2%	5.0%	4.0%	3.3%	2.6%	2.1%

References: Reply to Miller Rebuttal Report, ¶6. *See also* Miller Report, Section 5.1 and 7.3; Miller Rebuttal Report, 3.2.3

comparison, SECURE post-Transaction now owns and operates only 80 facilities (2 percent) with produced water and waste water disposal capabilities.

38. Many producers already supply water and waste water disposal services internally and can recycle waste water generated through their operations (e.g., by reusing produced water for fracking). SECURE understands that producers that already have existing internal capabilities can easily expand their internal capacity to meet their needs. SECURE (including the former Tervita business) has lost at least [redacted] in revenues since 2016 due to customers switching to internal supply, despite our ongoing efforts to optimize our services and offer competitive pricing to our customers.

39. SECURE competes with other companies for waste disposal services. Depending on the product, SECURE competes with integrated oil and gas producers, pipeline companies, energy marketing companies, other large companies, and small regional companies with a more targeted service offering. For example:

a) Ridgeline Canada Inc. ("**Ridgeline**") operates seven landfills across the WCSB;

b) Voda Inc. ("**Voda**") operates a landfill in Saskatchewan and six FSTs/TRDs in Alberta, offering treating, solid waste, water, and terminalling services;

c) Pure Environmental LP ("**Pure Environmental**") recently opened a facility near Bonnyville, AB, which, includes a cavern for disposal, and they are also actively working on a proposed landfill site north of Fort Kent, Alberta;

51. Following the Transaction, SECURE continues to face competition from other traditional oilfield landfill operators such as RemedX Remediation Services ("**RemedX**"), Claystone Waste Ltd. ("**Claystone**"), Clean Harbors, Inc. ("**Clean Harbors**") Waste Connections of Canada ("**Waste Connections**") and Waste Management, Inc. ("**Waste Management**"). Attached as Exhibit 32 to my affidavit is a list of examples of competitors offering solid oilfield waste disposal. Similar as with liquid oilfield waste, SECURE's experience is that customers can readily switch between competitors when looking to drop off their solid oilfield waste volumes.

52. SECURE competes against municipal and regional landfills. Municipal and regional landfills that accept non-hazardous residential waste compete for oilfield waste volumes to use as daily top-cover. In many cases, non-oilfield landfills prefer to use oilfield waste for this purpose to ensure sufficient on-site soil for final closure material at the end of the municipal/regional landfill's life cycle as well as a source of revenue.

53. Many customers/producers perform waste disposal functions internally. For example, producers such as CNRL, Cenovus/Husky, Shell Energy ("**Shell**") and ConocoPhillips operate landfills for their own use and have become less reliant on third-party midstream infrastructure providers, including SECURE, to fulfill their solid waste disposal needs. SECURE has (including the former Tervita business) lost over than [REDACTED] in revenues since 2016 as a result of producers switching to self-supply, including significant volumes lost to [REDACTED] from 2016-2019. As with water disposal, these losses to self-supply have come despite SECURE's ongoing efforts to optimize our services and offer competitive pricing to our customers. CNRL

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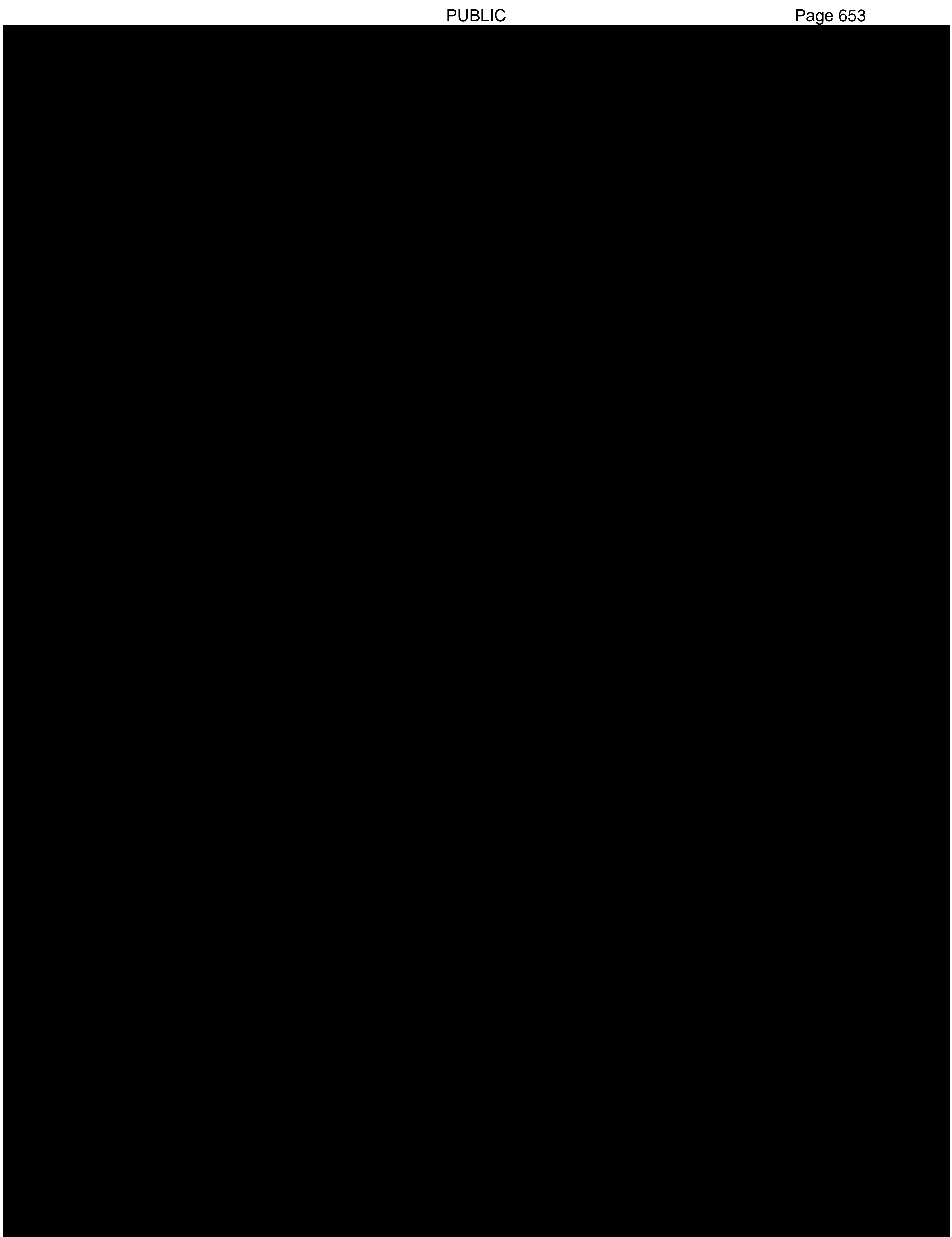
owns at least three landfills which are approved to accept third party volumes, at Wabasca, Peejay, and Manatokan.

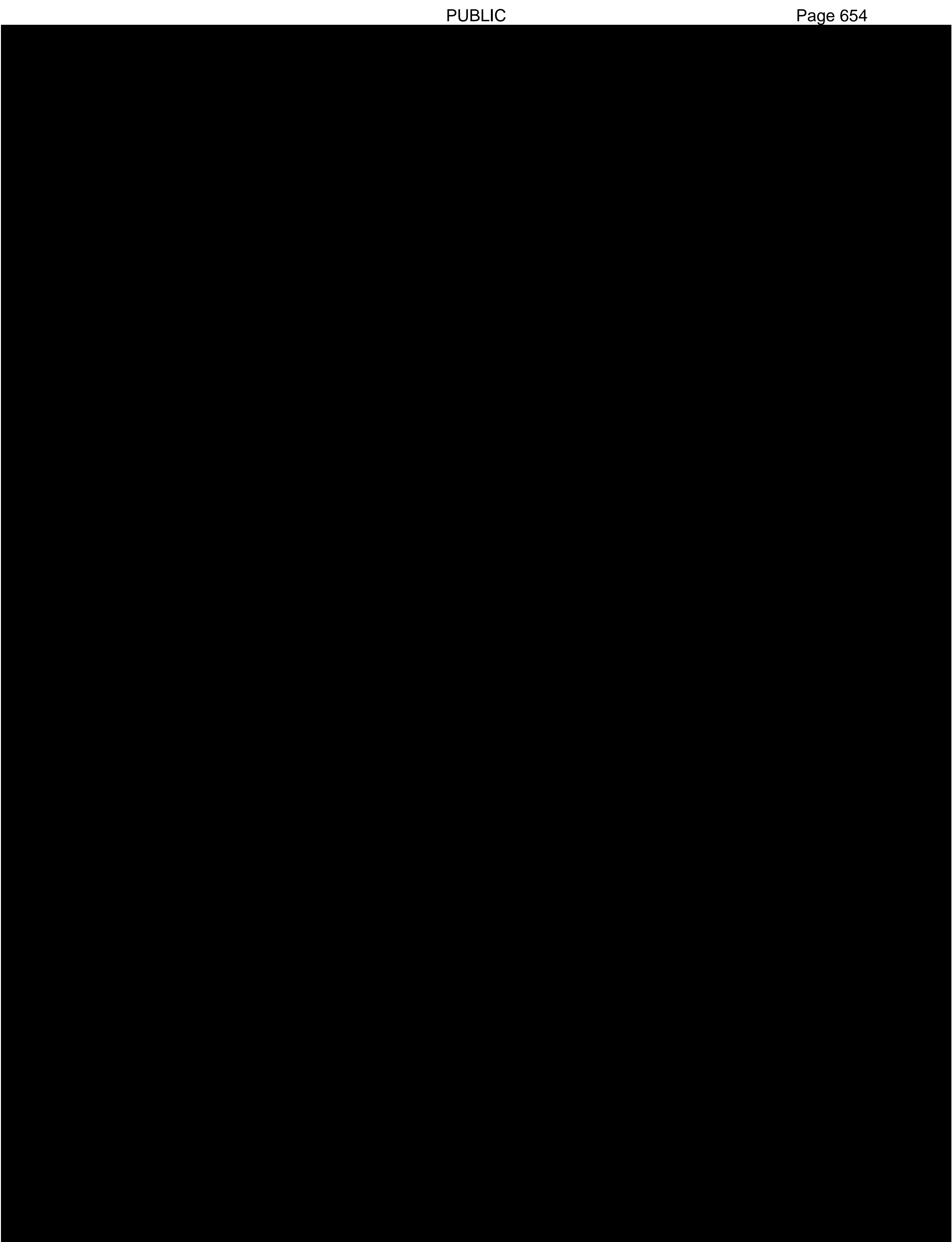
SECURE'S PRICING PHILOSOPHY AND CONSTRAINTS

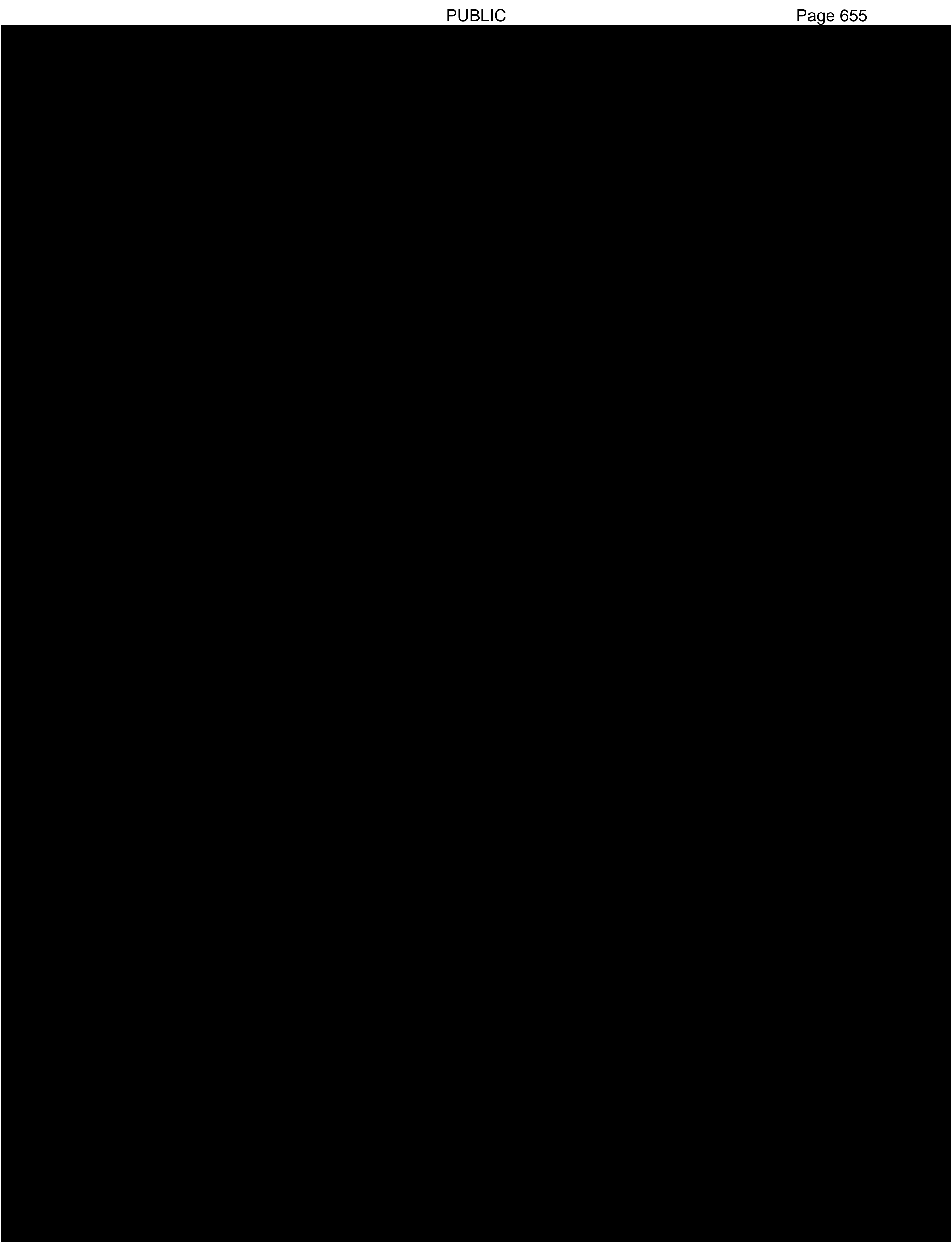
A. SECURE's Pricing Philosophy

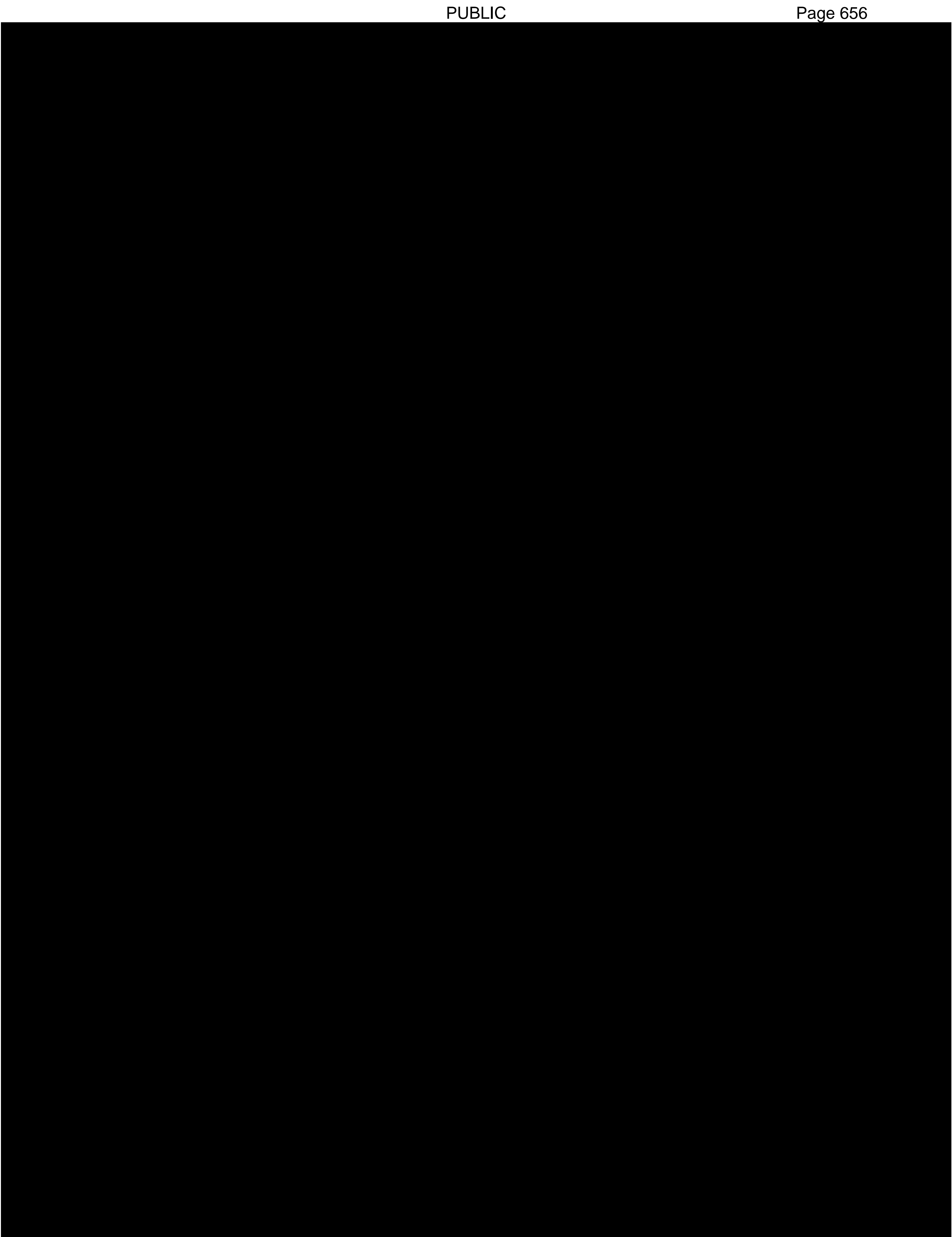
54. SECURE's pricing philosophy is to partner with its customers to ensure both can operate profitably and continue to survive in an increasingly challenging economic and regulatory environment. [redacted].

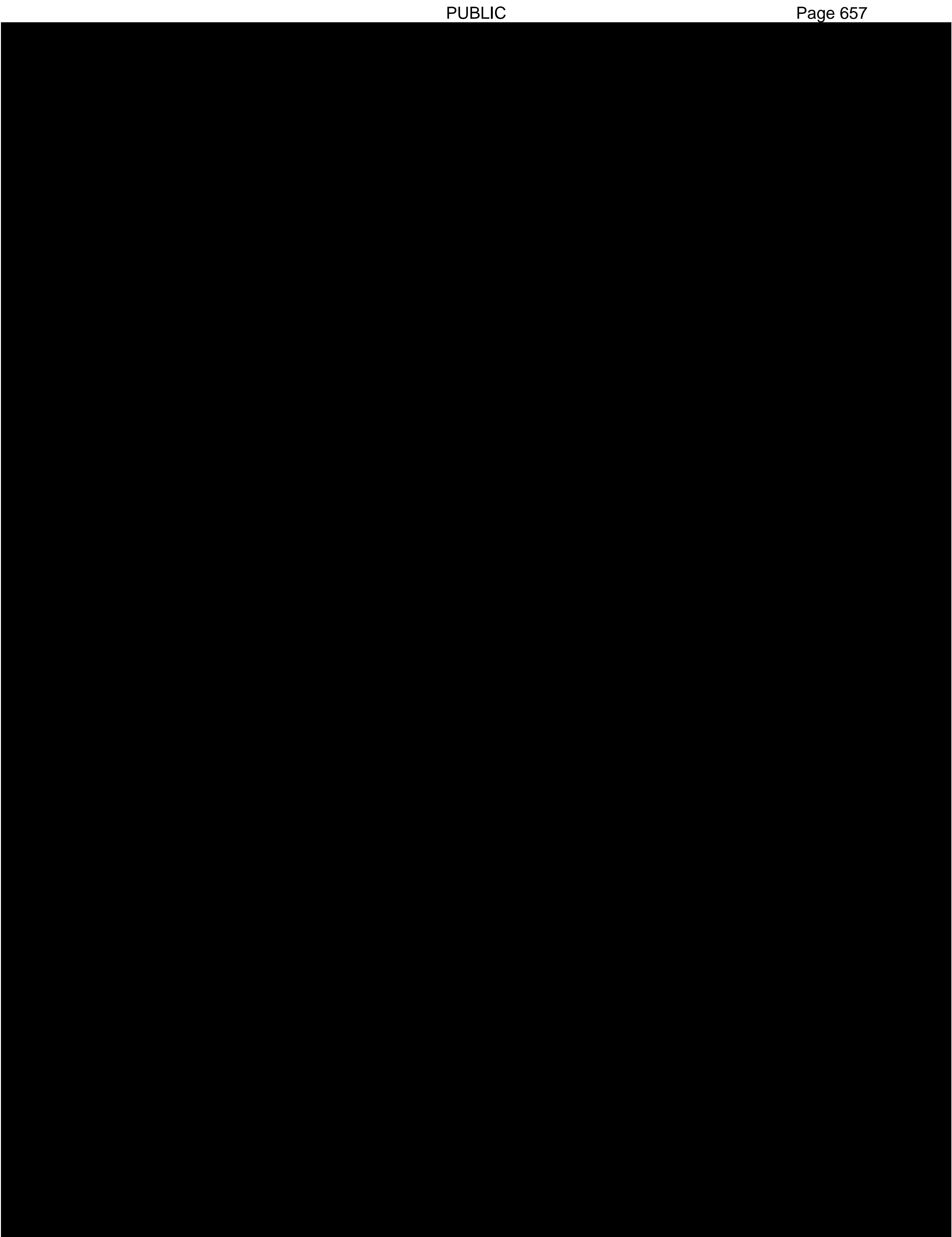
55. [redacted]

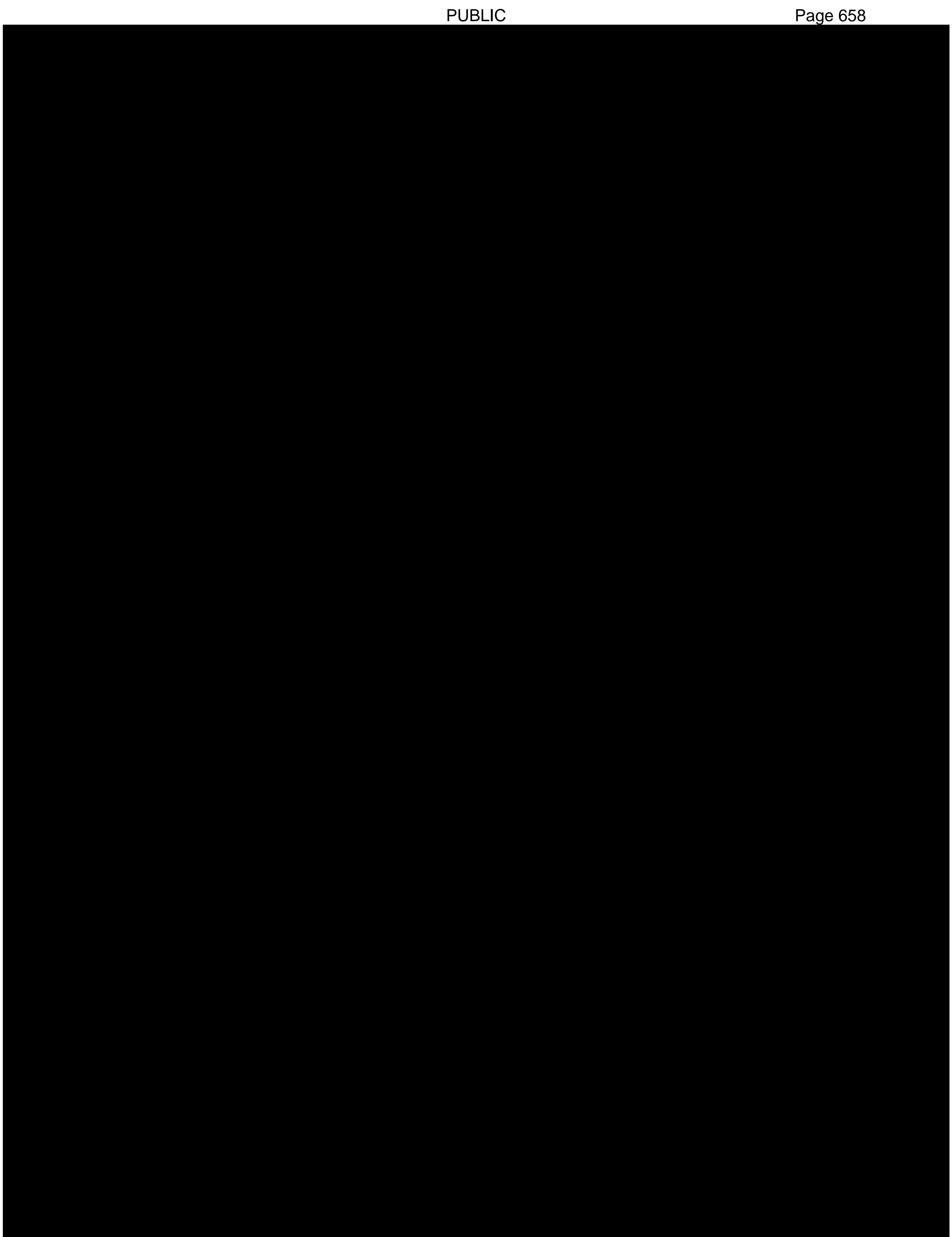


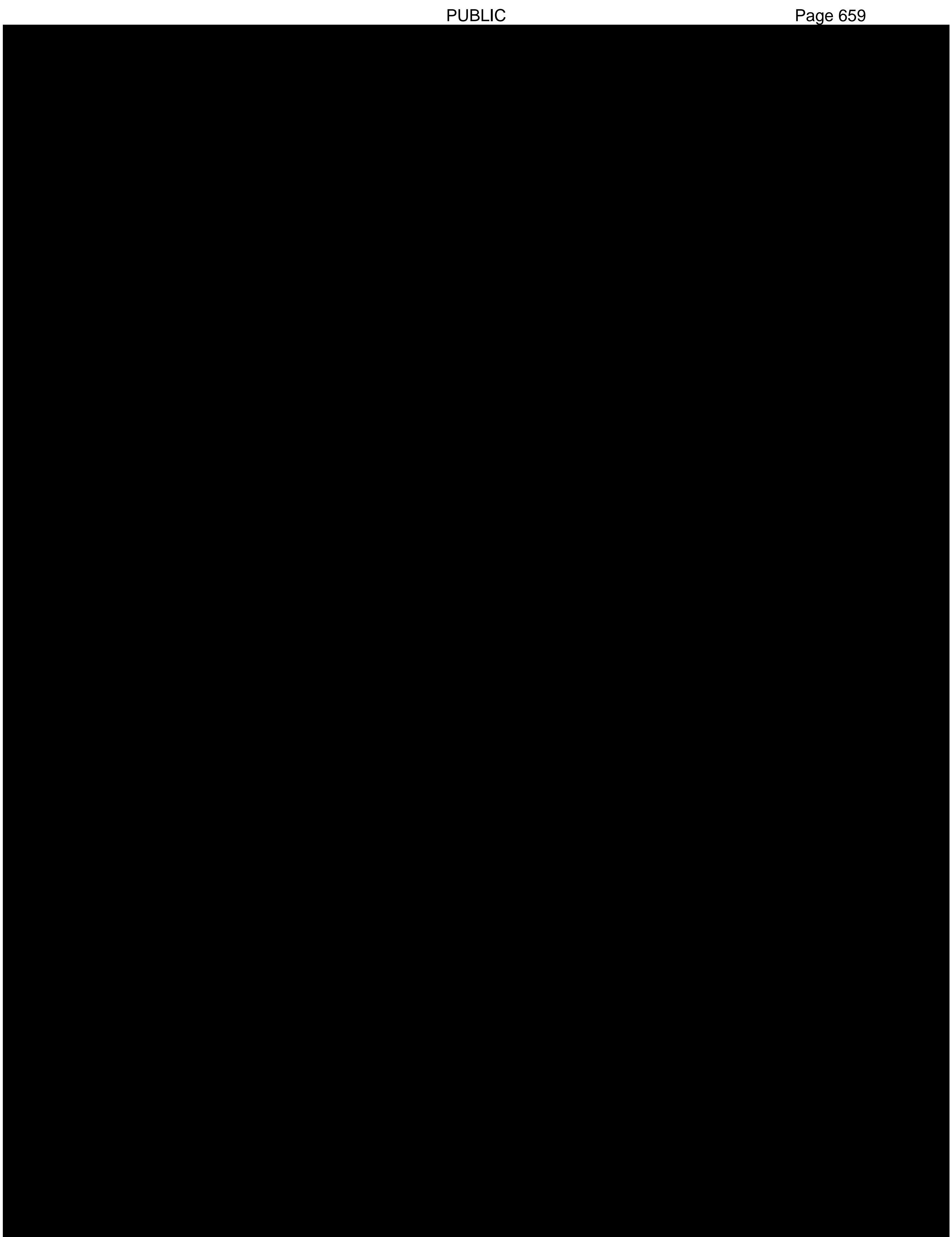


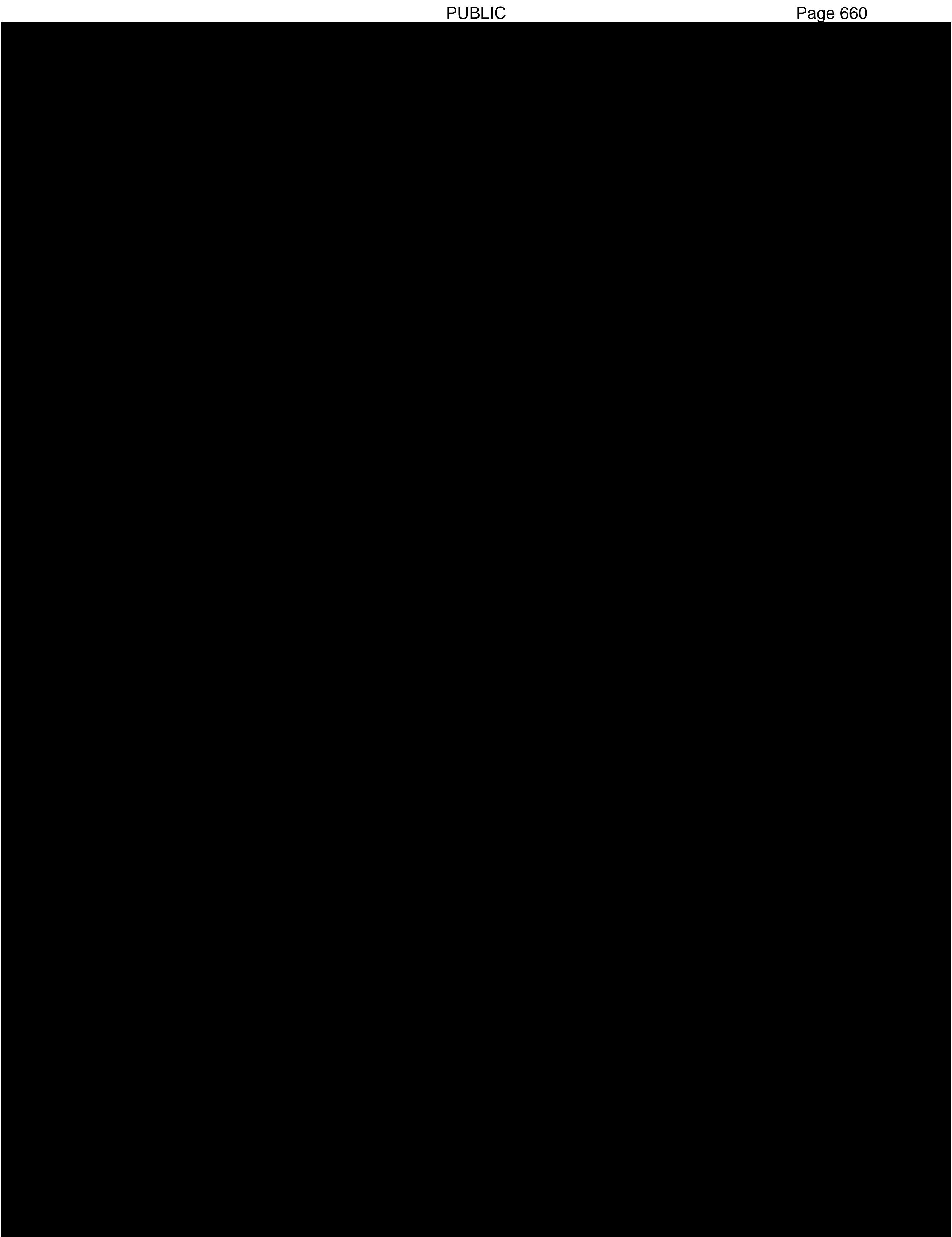












- For the purposes of the identifying the effects of facility closures on my estimated price effect, DWL, and transportation costs analyses and identifying transaction affected by partial closures, I further aggregated each service and substance into broader categories consisting of waste, water, treating, and non-oilfield waste.
- For the purposes of assigning each transaction to a relevant product market, I classified each service and substance into a "market participant" consisting of landfill, trd, and "water, trd."[327]
- I omitted transactions with substances coded as "non-oilfield" wastes (or NONOFD).[328]
- I omitted transactions with services or substances with per-unit prices greater than $5,000.
- I omitted most types of "add on services" ("AOSs") from the Tervita transaction data and retain all AOSs related to tank or truck flushing services that are most often bundled with waste deliveries on the same ticket or transaction number.

7.7.3. *Competitor data descriptions and assumptions*

228. Below I describe the transaction sales data provided by third-party waste service competitors, which I include in my analysis. Note that I did not receive data from [redacted][329] and I assume that those facilities have the same revenues as the maximum revenue of the Secure and Tervita facilities in that market.

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[327] See Section 4.1.1 for a discussion of waste types that can be handled by both a water disposal well and TRD (since TRDs often have water disposal wells on site) versus services that can only be handled by TRDs.

[328] Confidential Level B - Answers to Undertakings from the Examination of Dave Engel held December 20-22, 2021, p. 13 ("[redacted].

[329] I include the Rimbey facility operated by Gibson in the TRD market because I understand that it provides drilling fluid, transfer, waste processing services, but that it no longer disposes of third-party waste or produced water. Witness Statement of Gibson Energy Inc., February 24, 2022 ¶¶ 8-10 ("... the waste management facility in Edson, the oil base mud processing operations in Sexsmith, and the custom treating operations in Hardisty have been shut down. The disposal wells at Gibson's Rimbey, Hardisty, Plato North, and Plato South facilities do not accept produced water or waste water from third parties. The Rimbey and Plato South disposal wells have been shut down. Gibson's Rimbey, Plato South, and Plato North facilities continue to offer some emulsion treating services. However, they do not offer the full suite of processing and disposal services offered at Treatment, Recovery, and Disposal facilities like those owned by Secure."); Gibson Energy, available at https://www.gibsonenergy.com/locations/ (accessed February 22, 2022).

- **Albright Flush Systems**: I understand that Albright operates one TRD facility.

- **Aqua Terra**: I understand that Aqua Terra (also known as AQT Water Management) currently operates nine water disposal wells (Drumheller, Gold Creek, Gordondale, High Level, Kitscoty, Dawson Creek, Ft. St. John, Hillmond, and Torrington).

- **Cancen Oil Processors Inc.**: I understand that Cancen operates two water disposal wells.[332]

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[330] See, e.g., Witness Statement of Albright Flush Systems Ltd., February 8, 2022 Exhibit B

[331] See Witness Statement of Aqua Terra Water Management, Exhibit A

[332] See Cancen Oil Processors, Inc., https://cancenoil.com/about-cancen-2/ (accessed February 22, 2022) ("Cancen Oil Processors Inc owns and operates two deep well disposal facilities with the capacity to dispose of large volumes of liquid waste."); Witness Statement of Cancen Oil Processors Inc. at Exhibit B.

[333]

[334]

- **Catapult**: I understand that Catapult operates four water disposal wells (Tower, Berland, Fox, and Pipestone).

  ”
- **Clean Harbors**: I understand that Clean Harbor operates one landfill (at Ryley location) facility and one water disposal (at Seller's location) facility.[336] The Red Deer and Grand Prairie facilities were not considered [337]
- **Envolve Energy Services**: I understand that Envolve Energy Services operates one water disposal well (Grovedale).

[334] Cancen Oil Processors, Inc., "Morinville Alberta," available at https://cancenoil.com/waste-water-disposal-morinville-alberta/ (accessed February 22, 2022).

[335]

[336] See Witness Statement of Clean Harbors Canada Inc., February 17, 2022 at Exhibit C(07)

[337] See Witness Statement of Clean Harbors Canada Inc., February 17, 2022 at Exhibit C(07),

[338]

[339] See Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit B(02)

[340]

- **MROR**: I understand that MROR operates two water disposal wells and one TRD.

- **Plains Environmental**: I understand that Plains Environmental operates one cavern facility (Melville) and one TRD facility (Willmar).

- **Pure Environmental**: I understand that Pure Environmental operates one TRD facility (Fort Kent Waste Management facility).[344]

- **RemedX**: I understand that RemedX operates one landfill facility (Breton Waste Management).

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[340] See Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit B(03)

[341] See Witness Statement of Medicine River Oil Recyclers, February 22, 2022 at Exhibit B

[342] See Witness Statement of Plains Environmental, February 23, 2022 at Exhibit A(01) and A(02)

[343] See Witness Statement of Plains Environmental, February 23, 2022 at Exhibit A(03)

[344] See Witness Statement of Pure Environmental, February 11, 2022 at Exhibit B (

[345] See Witness Statement of Pure Environmental, February 11, 2022 at Exhibit B

[346]

- **Ridgeline:** I understand that Ridgeline operates eight active landfill facilities (Redcliff, Youngstown, Fairview, High Prairie, Lloydminster, Shaunavon, Okotoks, and Edmonton).
- **Rush Energy Services**: I understand that Rush operates one TRD facility (Breton) and one water well facility (Rimbey, which opened in March 2020).[349]
- **Waste Connections (municipal landfill)**: I understand that Waste Connections operates one landfill (Coronation).

[346] See Witness Statement of RemedX Remediation Services Inc., February 7, 2022 at Exhibit D(03) (

[347] See, e.g., Witness Statement of Ridgeline Canada Inc., February 8, 2022 at Exhibit B(03) and B(05)

[348] See Witness Statement of Ridgeline Canada Inc., February 8, 2022 at Exhibit B(03) and B(05)

[349] See Witness Statement of Rush Energy Services Inc., February 9, 2022 at Exhibit B(50) and B(135)

[350] See Witness Statement of Rush Energy Services Inc., February 9, 2022 at Exhibit B.

[351] See Witness Statement of Canada Waste Connections of Canada Inc., February 16, 2022 at Exhibit B

- **Waste Management**: I understand that Waste Management operates two landfills (ThorHild and Big Valley)
- **White Owl**: I understand that White Owl operates one TRD facility in Grande Prairie.[353]
- **White Swan**: I understand that White Swan operates a TRD (Conklin), a cavern (Atmore West), and a water disposal well (Atmore East),
- **Wolverine**: I understand that Wolverine operates five TRD facilities (Claresholm, Rycroft, Grande Cache, Mayerthorpe, and Cynthia) and one landfill (Heward),

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[352] See Witness Statement of Lorna Engleson of Waste Management of Canada Corporation, February 24, 2022 at Exhibits B(04) and B(06) -

[353] See Witness Statement of White Owl Energy Services Inc., February 17, 2022 at Exhibit B.

[354] See Witness Statement of White Owl Energy Services Inc., February 17, 2022 at Exhibit B.

[355] See Witness Statement of White Swan Environmental Ltd., February 3, 2022, Exhibit B(02)

[356]

[357] (

- **Municipal landfills**: I rely on 2018 data provided by the AEP to account for the volume of special or contaminated wastes delivered to municipal landfills located in Alberta.[358] [359] I omitted the Cold Lake municipal landfill from my analysis because and its website does not describe taking in oilfield wastes on the page listing the types of tipping fees.[360] I did not receive data from GAP Disposal, a municipal landfill located on the southern border of Saskatchewan, so I imputed revenue for that facility using the same method I use to impute revenue for the facilities.[361]

7.7.4. *First-party producer and other data source descriptions and assumptions*

229. The below describes the first-party oil and gas producers from which the Canadian Competition Bureau has requested information. The Bureau has requested from each producer its transaction level sales data for disposal of other producers' waste for the period covering January 1, 2019 and December 31, 2020, including transaction information such as number of units, unit of measure, price, and also product, customer, facility, contract and shipment information if the data is available.[362] Below I describe the data provided, whether I have incorporated it into my analysis, and if not, support for my decision.

- **Canadian Natural Resources Limited ("CNRL")**: I have included CNRL's transaction sales data related to third-party waste it disposed in my analysis. CNRL operates two landfills and thirteen disposal wells (among its more than 300 active disposal wells) that disposed of third-party producers' waste during the 2019-2020

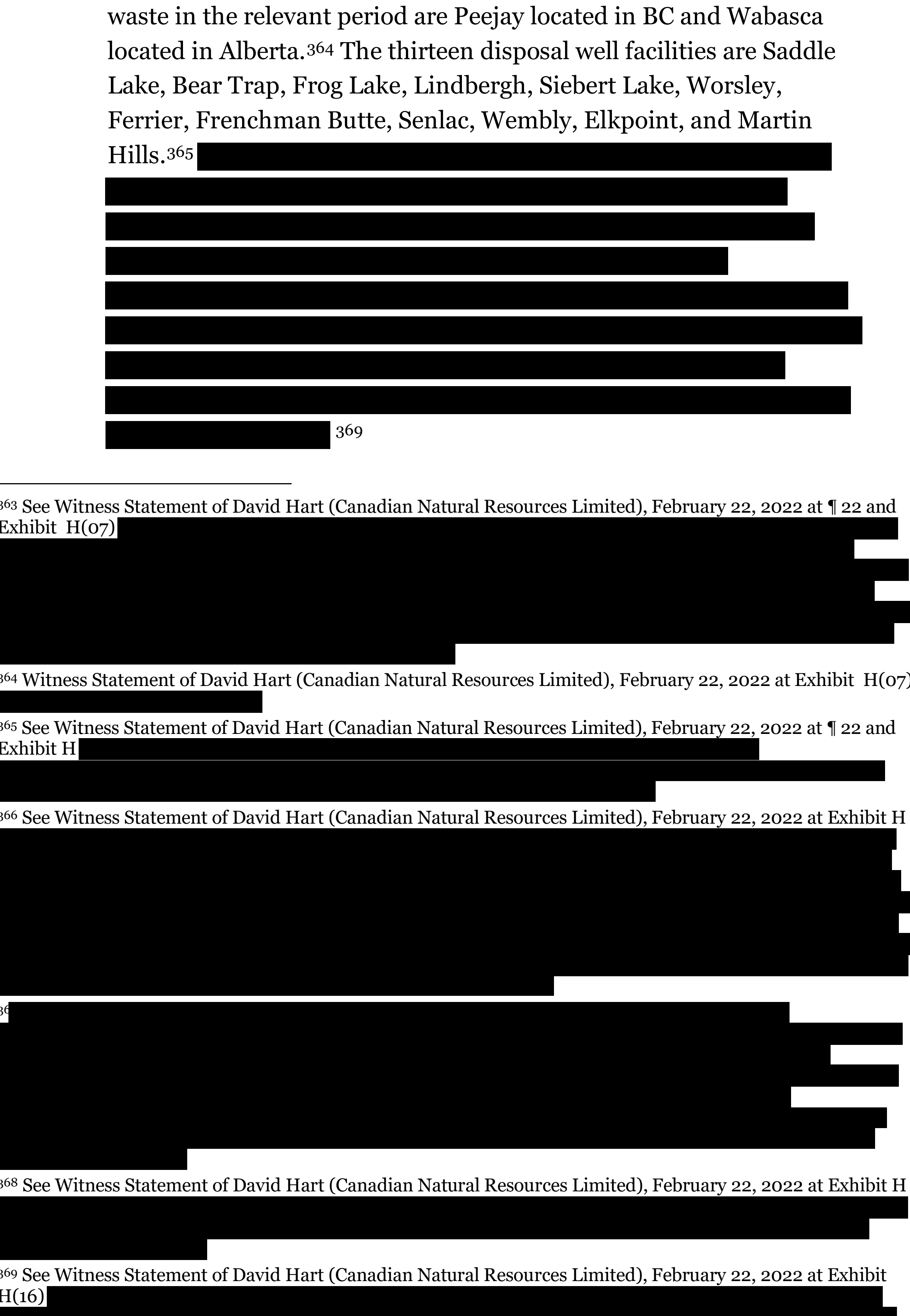
[358] See Witness Statement of Carol Nelson, January 26, 2022 at Exhibit F

[359] Engel testimony, December 20, 2021, p. 46 (

[360] See City of Cold Lake, https://coldlake.com/en/live/fees-and-penalties.aspx (accessed February 24, 2022).

[361] A recent press release notes that GAP takes in oilfield waste. See GAP Disposal, https://gapdisposal.ca/news_release.html (accessed February 24, 2022).

[362] See, e.g., Witness Statement of Envolve Energy Services, February 16, 2022 at Exhibit A.



period.[363] The two CNRL landfill facilities that accepted third-party waste in the relevant period are Peejay located in BC and Wabasca located in Alberta.[364] The thirteen disposal well facilities are Saddle Lake, Bear Trap, Frog Lake, Lindbergh, Siebert Lake, Worsley, Ferrier, Frenchman Butte, Senlac, Wembly, Elkpoint, and Martin Hills.[365] [369]

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[363] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at ¶ 22 and Exhibit H(07)

[364] Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H(07),

[365] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at ¶ 22 and Exhibit H

[366] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H

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[368] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H

[369] See Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022 at Exhibit H(16)

- **Galatea**: Galatea does not own or operate waste disposal facilities, so I do not include Galatea's data in my analysis. I understand that Galatea provides oil and gas producers a Waste Coordinator software product that allows them to "optimize processes related to the transport and disposal of oilfield waste."[370] [371]
- **Obsidian**: I also do not include Obsidian ("OBE") in my analysis, [372]
- **Plains Midstream**: Plains Midstream accepts some waste from other producers only in its Rimbey facility and I include it in my analysis.[373] [374]
- **Recover Inc.**: I do not include Recover Inc. in my analysis. Recover Inc. is an environmental technology company cleaning oil base drilling waste of third-party waste generators.[375] The cleaned drill cuttings generated from the oil base drilling waste treating, however,

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[370] Witness Statement of Chad Hayden, February 9, 2022, p. 2.

[371] Witness Statement of Chad Hayden, February 9, 2022, p. 5.

[372] Witness statement of Obsidian, Cliff Swadling, February 21, 2022, ¶¶ 24-27 ("Obsidian provides water disposal to third parties where Obsidian is disposing of its own water related to its operations. However, Obsidian does not have dedicated disposal infrastructure for disposal of third-party water. Obsidian's current disposal revenue is relatively insignificant (approximately hundreds of dollars per month) and spread across hundreds of possible wells. These operations are considered normal course for a producer in the Western Canadian Sedimentary Basin and do not represent a significant water disposal business.").

[373] Witness Statement of Plains Midstream Canada, February 9, 2022 at Exhibit C and .

[374] See Witness Statement of Plains Midstream Canada, February 9, 2022 at Exhibit C (

[375] See https://www.recover-energy.com/.

still needs to be sent to landfill facilities [376] Recover Inc. thus can be considered a customer for landfill services.

- **Sprocket Energy Corporation**: I include Sprocket Energy Corporation in my analysis. [377]
- **TAQA**: I incorporate the data related to produced water TAQA accepted from other producers for disposal at its water disposal wells in my analysis. [379]
- **Tourmaline**: I also include in my analysis Tourmaline's transaction data related to water waste it took from other oil and gas producers [380]
- **Whitecap Resource Inc.**: [381]

[376] Witness Statement of Recover Inc., February 2, 2022 at Exhibit B. See also https://www.recover-energy.com/recyling-reuse ("Once processed at our facility, the waste is dry and substantially void of hydrocarbons. This material (known as Recover Dry™) is then sent to an industrial landfill where it is recycled as a stabilization material for other waste streams.")

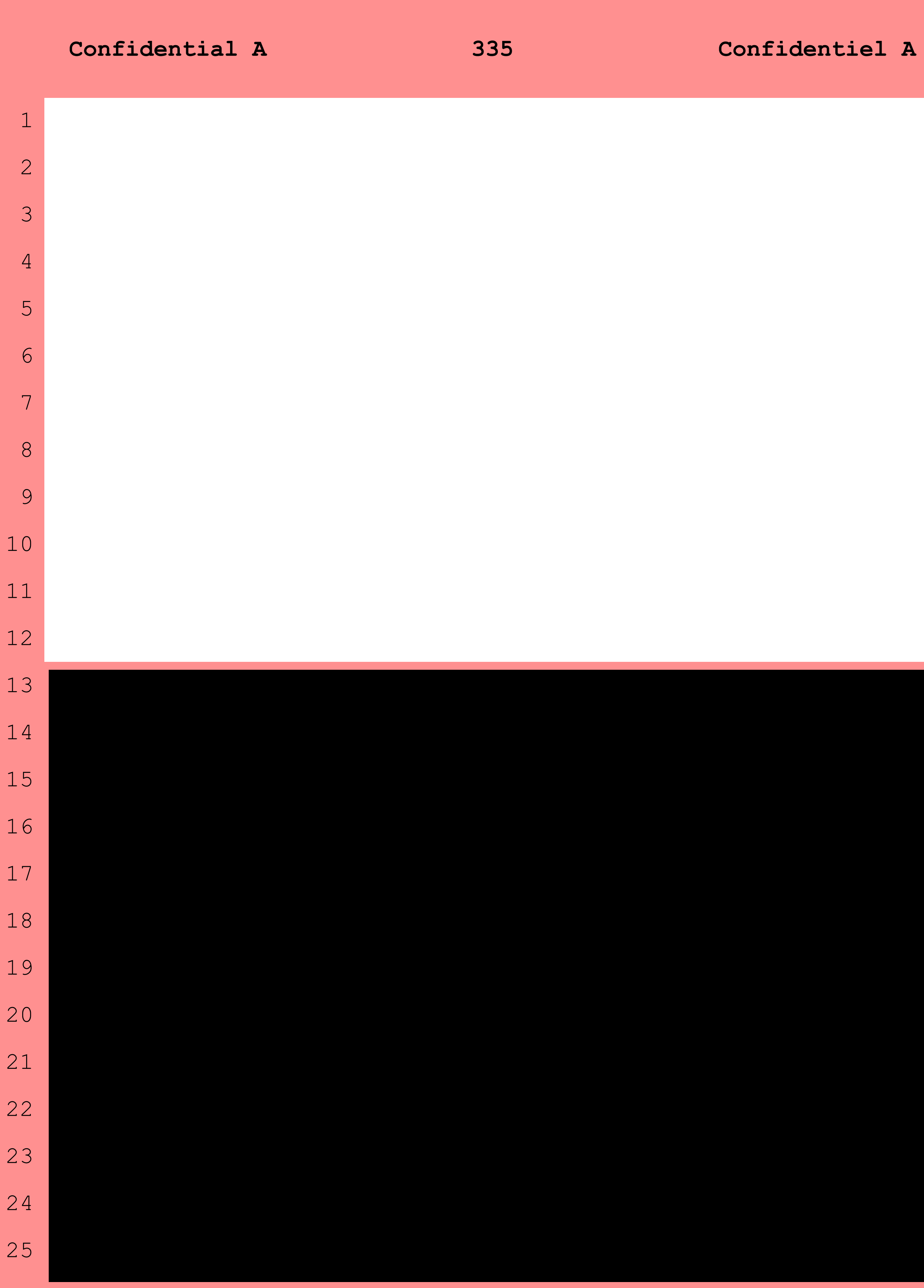
[377] See Witness Statement of Sprocket Energy Corporation, February 1, 2022 at Exhibit B

[378] See Witness Statement of Nigel Wiebe, January 27, 2022 at Exhibit A(c)

[379] The UWI for the three TAQA wells are "00/12-09-013-14W4", "00/14-09-013-14W4" and "00/12-16-013-14W4." See "

[380]

[381]



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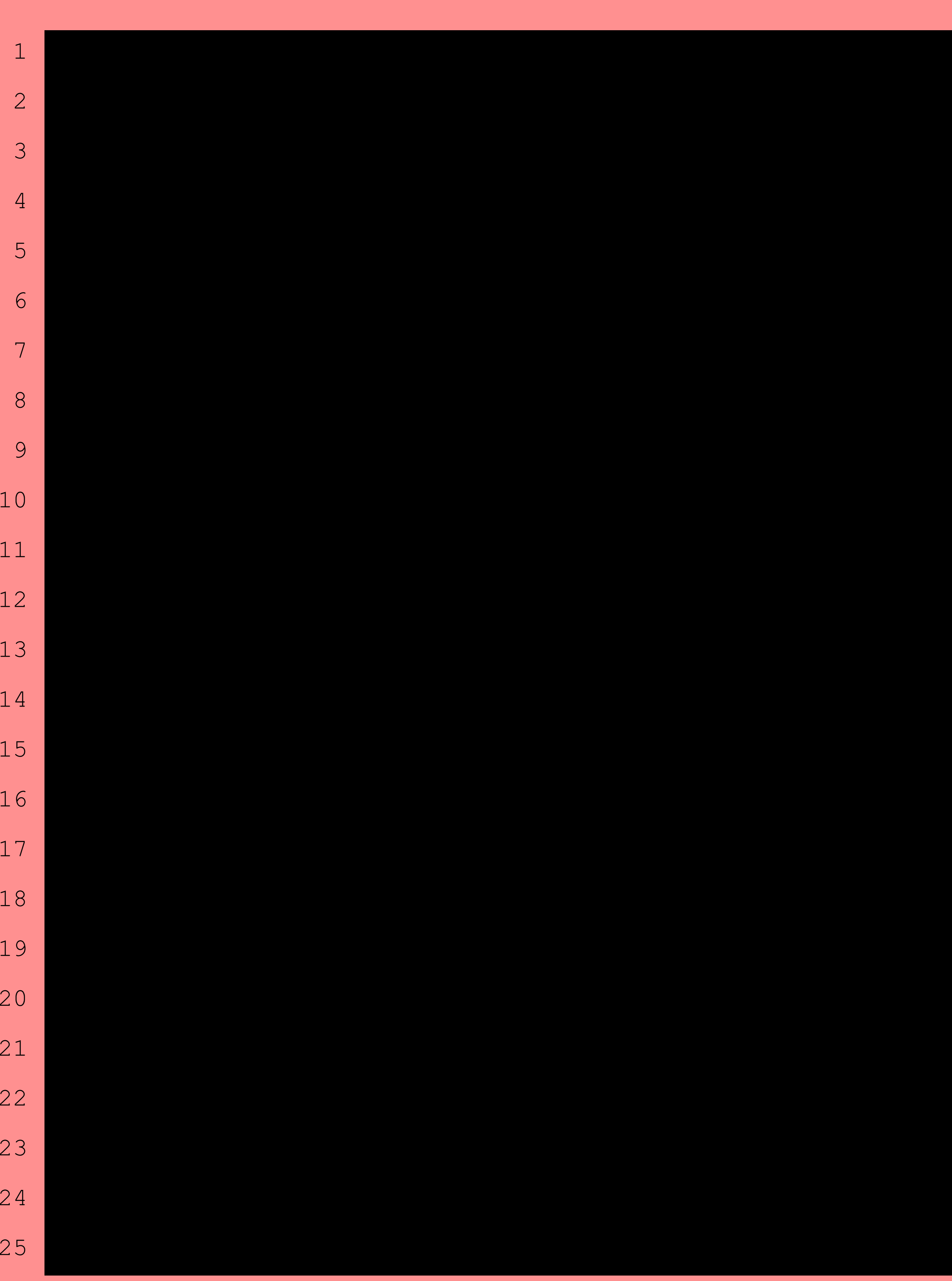

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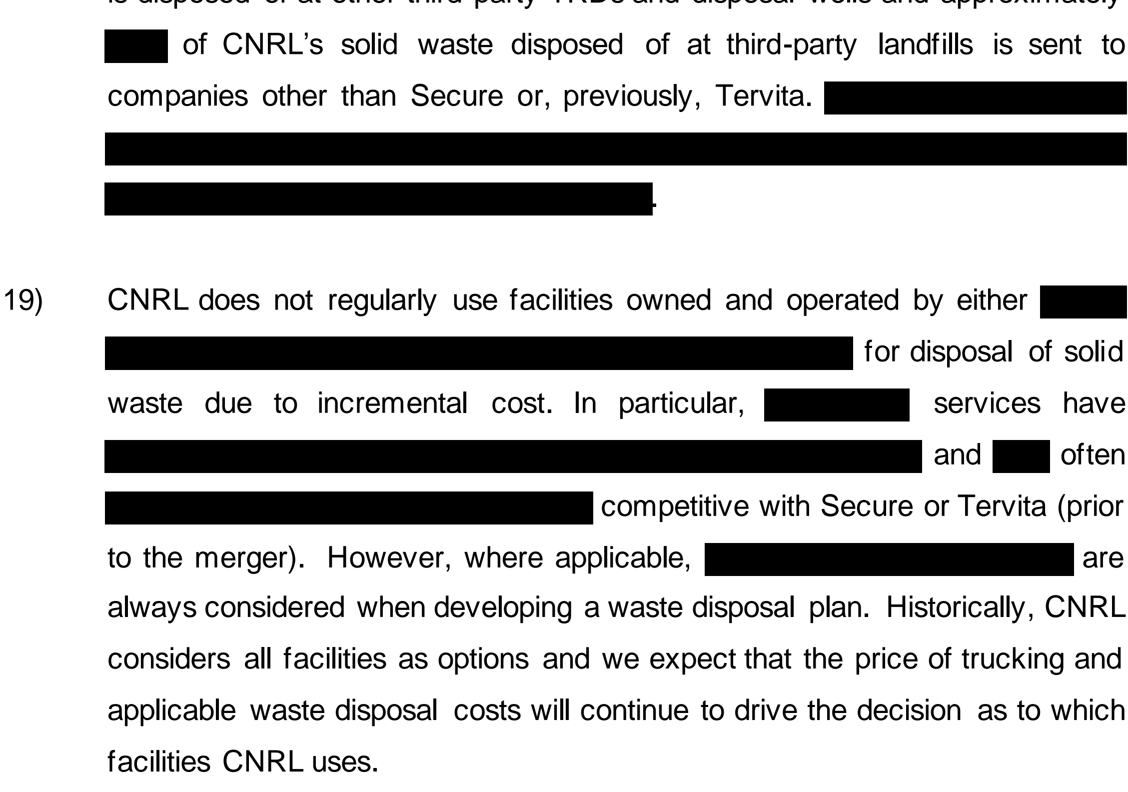
Accordingly, CNRL typically gets quotes from trucking companies, as needed for specific waste disposal requirements. As a result, the distance to the waste disposal facility, wait times at the facility, the transportation route and road conditions to and from a waste disposal facility can have a significant impact on CNRL's transportation costs. For example, trucks can typically travel faster on higher grade highways than on gravel roads. All of these factors impact CNRL's cost of waste disposal and minimizing the trucking time and distances required to haul the waste is necessary to control CNRL's overall waste disposal costs.

16) Capacity constraints at different waste disposal facilities can be a significant factor in choice of which waste disposal facility CNRL will use. Capacity at different waste disposal facilities varies due to capacity of the well/zone and the number of risers / disposal bays available for trucks unloading. When CNRL is undertaking drilling / completions at a particular location, CNRL's practice is to contact waste disposal facilities up to a month in advance of its expected disposal timeframe with information about its anticipated volume and timing requirements. However, even with advanced planning, trucks may be turned away at the time of disposal because the facility is at capacity. [REDACTED]

DISPOSAL OF WASTE TO THIRD PARTIES

17) CNRL can take some of its waste to other third party waste disposal companies. Some examples are: [REDACTED]

18) However, as noted above, the facilities now owned by Secure provide the vast majority of CNRL's waste disposal services. Less than [REDACTED] of CNRL's waste



is disposed of at other third party TRDs and disposal wells and approximately of CNRL's solid waste disposed of at third-party landfills is sent to companies other than Secure or, previously, Tervita.

19) CNRL does not regularly use facilities owned and operated by either for disposal of solid waste due to incremental cost. In particular, services have and often competitive with Secure or Tervita (prior to the merger). However, where applicable, are always considered when developing a waste disposal plan. Historically, CNRL considers all facilities as options and we expect that the price of trucking and applicable waste disposal costs will continue to drive the decision as to which facilities CNRL uses.

CNRL'S DISPOSAL FACILITIES

20) CNRL currently owns eight landfills (Horizon, Albian, Jackfish, Manatokan, Peejay, Swan Hills, Woodenhouse, Wabasca), seven caverns (Frog Lake, Elk Point, Lindbergh, Beartrap, Wolf Lake, Kirby South and Kirby North), and approximately active disposal wells with varying surface infrastructure to handle the CNRL waste.

21) CNRL owns and operates waste disposal facilities in western Canada that compete with Secure, and previously, Tervita. The decision to use its own waste disposal facilities versus third party facilities is primarily based upon cost and capacity. In particular, CNRL charges itself internally for waste disposal and considers transportation costs and capacity in choosing whether to use its own facilities. Once a CNRL-owned facility is at capacity, CNRL must use a

15. TAQA North uses landfills in the Fox Creek and Grande Prairie areas, [redacted]

16. [redacted]

17. [redacted]

18. Secure's TRDs and disposal wells are also our primary option for water disposal in Northern Alberta. [redacted]

FIRST-PARTY DISPOSAL

19. Currently, TAQA North does not operate any of its own TRDs or landfills, and has not taken any steps in consideration of building a TRD or landfill.

20. TAQA North does own water disposal wells for disposal of TAQA's produced water. TAQA does not accept third party waste.

21. TAQA North bioremediates less than [redacted] of our waste instead of transporting the material to landfill. This material is primarily light end hydrocarbons. Bioremediation is a only viable alternative to disposal depending on the level

12. Further, Crew Energy's choice of a facility also depends on the characteristics of the waste that is acceptable to a particular waste company. For example, Crew Energy has to dispose of plastic liners from time-to-time; one company may require us to shred it first, while another may accept it as-is. Tervita mandated that the plastic liners be cut into small squares, while Secure accept them as-is. Cutting the plastic liners to smaller squares would add more costs because of the additional work required to cut them and because more trucks would be needed to bring them to the site.

DISPOSAL OF WASTE TO THIRD PARTIES

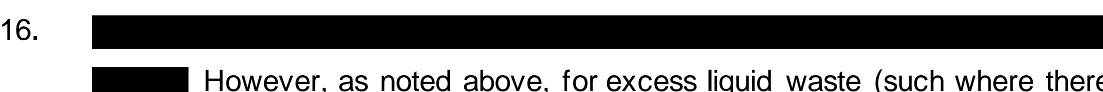
13. With respect to liquid waste, Crew Energy will use third party facilities for disposal when it has above-usual flowback on completions or when skimming tanks, or when directly connected to another third party supplier.

14.

COMPANY'S DISPOSAL FACILITIES

15. Crew Energy has its own disposal wells, connected to its Septimus and West Septimus facilities, which it uses to dispose most of the waste water generated in its normal operations. Some of Crew's producing wells are jointly owned with other producers, and therefore a percentage of the water disposed of from these wells belongs to Crew's partners. However, Crew does not generally dispose of water or other waste products from third parties at its own facilities, and does not consider itself a competitor to Secure.

16.



However, as noted above, for excess liquid waste (such where there

I, Frank Vanden Elsen, of the City of Calgary, Alberta, state as follows:

1. I am a Manager Operations Pipelines Change & Implementation for Gibson Energy ("Gibson").

2. I have personal knowledge of the matters in this Witness Statement, except where I have otherwise indicated that I am relying on information from others, in which case I believe such information to be true.

PURPOSE OF THIS WITNESS STATEMENT

3. I make this Witness Statement in connection with the Application by the Commissioner of Competition (the "Commissioner") against Secure Energy Services Inc. ("Secure"), relating to their acquisition of Tervita Corporation ("Tervita"), in proceeding CT-2021-002 (the "Application").

4. On February 24, 2022, the Commissioner served me with a subpoena in the context of the Application.

OPERATIONS OF GIBSON

5. Gibson is an oil-focused midstream infrastructure company headquartered in Calgary, Alberta. Gibson's storage and pipeline assets include the Hardisty terminal, the largest independent storage facility in Western Canada.

GIBSON'S WASTE DISPOSAL FACILITIES

6. Gibson previously owned a number of waste disposal facilities in the Western Canadian Sedimentary Basin. In 2019, Gibson sold the assets its environmental waste services business to Wolverine Energy and Infrastructure ("Wolverine"). This included the majority of Gibson's waste disposal facilities, located in Alberta and Saskatchewan.

7. Gibson's website includes a map showing a few legacy facilities which were not sold to Wolverine. A screenshot of this map is attached to my witness statement as Exhibit "A".

8. The facilities on this map do not supply waste disposal services to third parties. In particular, the waste management facility in Edson, the oil base mud processing operations in Sexsmith, and the custom treating operations in Hardisty have been shut down.

9. The disposal wells at Gibson's Rimbey, Hardisty, Plato North, and Plato South facilities do not accept produced water or waste water from third parties. The Rimbey and Plato South disposal wells have been shut down.

10. Gibson's Rimbey, Plato South, and Plato North facilities continue to offer some emulsion treating services. However, they do not offer the full suite of processing and disposal services offered at Treatment, Recovery, and Disposal facilities like those owned by Secure.

INFORMATION SUPPLIED TO THE BUREAU

11. In response to a request for information from the Bureau on July 27, 2021 (the "RFI"), Gibson supplied information on August 10, 2021.The RFI is attached to this Witness Statement as Exhibit "B".

12. The response provided to the Commissioner confirmed that Gibson did not have information responsive to the RFI (the "Response"). The Response is attached to this Witness Statement as Exhibit "C".

13. The Response was reviewed by me and I certified that the information supplied is, to the best of my knowledge and belief, correct and complete in all material respects. The certification is attached to this Witness Statement as Exhibit "D".

waste, and in general cannot accept wastes with the same level of contamination as those accepted at the Class I landfills operated by Secure.

6. Any waste from oil and gas companies disposed of at the Grande Prairie Landfill is largely municipal-type waste coming from camps or sites which collect their industrial "clean" waste separately from more hazardous waste generated in oil and gas production. The cost to transport waste by truck is significant and distance often drives a customer's choice between Class II landfills. As a result, the Grande Prairie Landfill generally only receives these wastes from sites within approximately 20-25 km of the landfill.

7. On occasion the Grande Prairie Landfill accepts contaminated soil from oil and gas producers. However, this type of waste represents a very small percentage of the waste disposed of at the Grande Prairie Landfill, and is typically accepted where Aquatera requires "daily cover", i.e., soil to cover a layer of waste in the landfill. The soil the Grande Prairie Landfill accepts for this purpose must generally pass certain environmental testing requirements and cannot be significantly contaminated; soil that is more contaminated would require disposal at a landfill like those operated by Secure.

8. The current disposal fee for normal refuse, construction and demolition debris at the Grande Prairie Landfill is approximately $95.00/tonne.

Signed this 21 day of February, 2022.

Lora Brenan

28. During the period from January 1, 2020 to November 30, 2021 the top two vendors for expenditures on landfill services were Secure and Tervita. Attached as Exhibit E is a report from the OWA accounting system showing the total fees paid by the OWA from January 1, 2020 to November 30, 2021 by company. Some of these transactions are recorded by the waste receiver as a transaction with the OWA while others may be under the name of the defunct company that was responsible for the well when the waste generation report is completed. Tervita and Secure combined for 40% of total landfill expenditures in the period.

29. We also reviewed liquid waste receivers (TRDs) over the same period as landfills and Secure and Tervita were again our top two vendors. Attached as Exhibit F is a report from the OWA accounting system showing the disposal fees paid by the OWA from January 1, 2020 to November 30, 2021 by company. Tervita and Secure combined for 60% of total TRD expenditures in the period.

30. Depending on where the waste is located, the OWA may have limited alternatives to Secure or Tervita landfills. The OWA has disposed of waste in municipal landfills, including those operated by Ridgeline. Municipal landfills may be restricted by the types and capacity of solid waste they can accept. For example, some municipal landfills may only accept contaminated soil that they can use for daily cover. Municipal landfills also tend to be located farther away from oil and gas producing regions where Secure and Tervita have landfills. For example, the OWA sends waste to Waste Management, Waste Connections, and Ridgeline facilities where Secure does not operate a landfill.

31. Following Tervita's acquisition of Newalta in 2018 and Secure's acquisition of Tervita, most of the TRDs in Alberta are operated by Secure. The OWA is aware that other companies operate TRDs but generally these are not viable options in most areas where the OWA operates.

I, Scott Lauinger, of the City of Calgary, in the Province of Alberta, state as follows:

1. I am the President & CEO of Dragos Water Management ("**Dragos**"). I am responsible for management and direction of Dragos' business.

2. I have personal knowledge of the matters in this Witness Statement, except where I have otherwise indicated that I am relying on information from others, in which case I believe such information to be true.

PURPOSE OF THIS WITNESS STATEMENT

3. I make this Witness Statement in my capacity as President & CEO of Dragos and not in my personal capacity, in connection with the Application by the Commissioner of Competition (the "**Commissioner**") against Secure Energy Services Inc. ("**Secure**") in proceeding CT-2021-002 (the **"Application**").

INFORMATION SUPPLIED TO THE COMPETITION BUREAU

4. On August 3, 2021, the Commissioner requested Dragos provide records related to waste disposal at Dragos' Class 1B disposal well in the Little Smokey/Fox Creek Alberta area, at LSD 2-17-66-21W5.

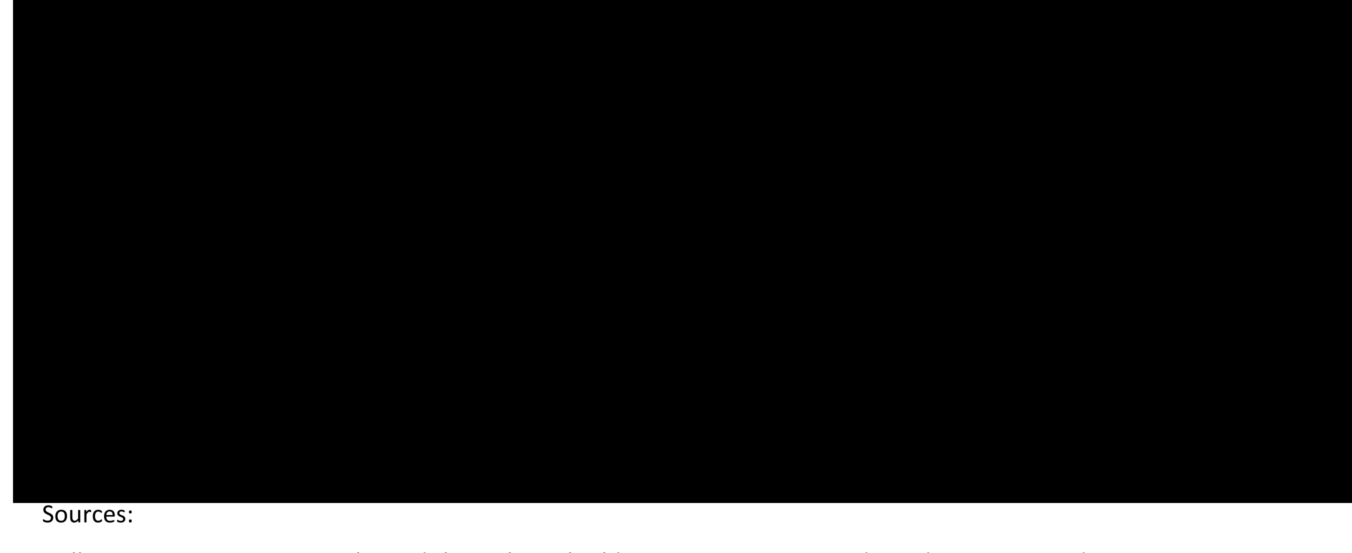
5. Dragos did not provide the Commissioner with any records in connection with the application as Dragos has experienced significant financial pressures since fall 2021, following the merger of Secure and Tervita. Dragos has effectively shut down its facility since fall 2021.

Signed this 23 day of February 2022.

ONF PUBLIC EL
Page 683

Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.



Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.

66. Many customers not only use multiple facilities of the same Party, but also use both Parties' facilities interchangeably.[79] As shown in Figure 12 below, out of the top [redacted] customers of each of SECURE and Tervita shown above, [redacted] are common to the [redacted] of both Parties (i.e., SECURE and Tervita shared many of the same largest customers). For these [redacted] customers, on average, [redacted] of the facilities they used in 2019 were SECURE facilities (accounting for [redacted] of their total spend), and [redacted] were Tervita facilities (accounting for [redacted] of their total spend). These findings are contrary to Dr. Miller's assumption that waste service facilities are significantly differentiated from the customer perspective, and that a customer simply reveals its preference for a particular preferred facility.

79 [redacted]

This is Exhibit 29 to the Affidavit of

David Engel

Affirmed on March 25, 2022

This is Exhibit 30 to the Affidavit of

David Engel

Affirmed on March 25, 2022

This is Exhibit 31 to the Affidavit of

David Engel

Affirmed on March 25, 2022

This is Exhibit 32 to the Affidavit of

David Engel

Affirmed on March 25, 2022

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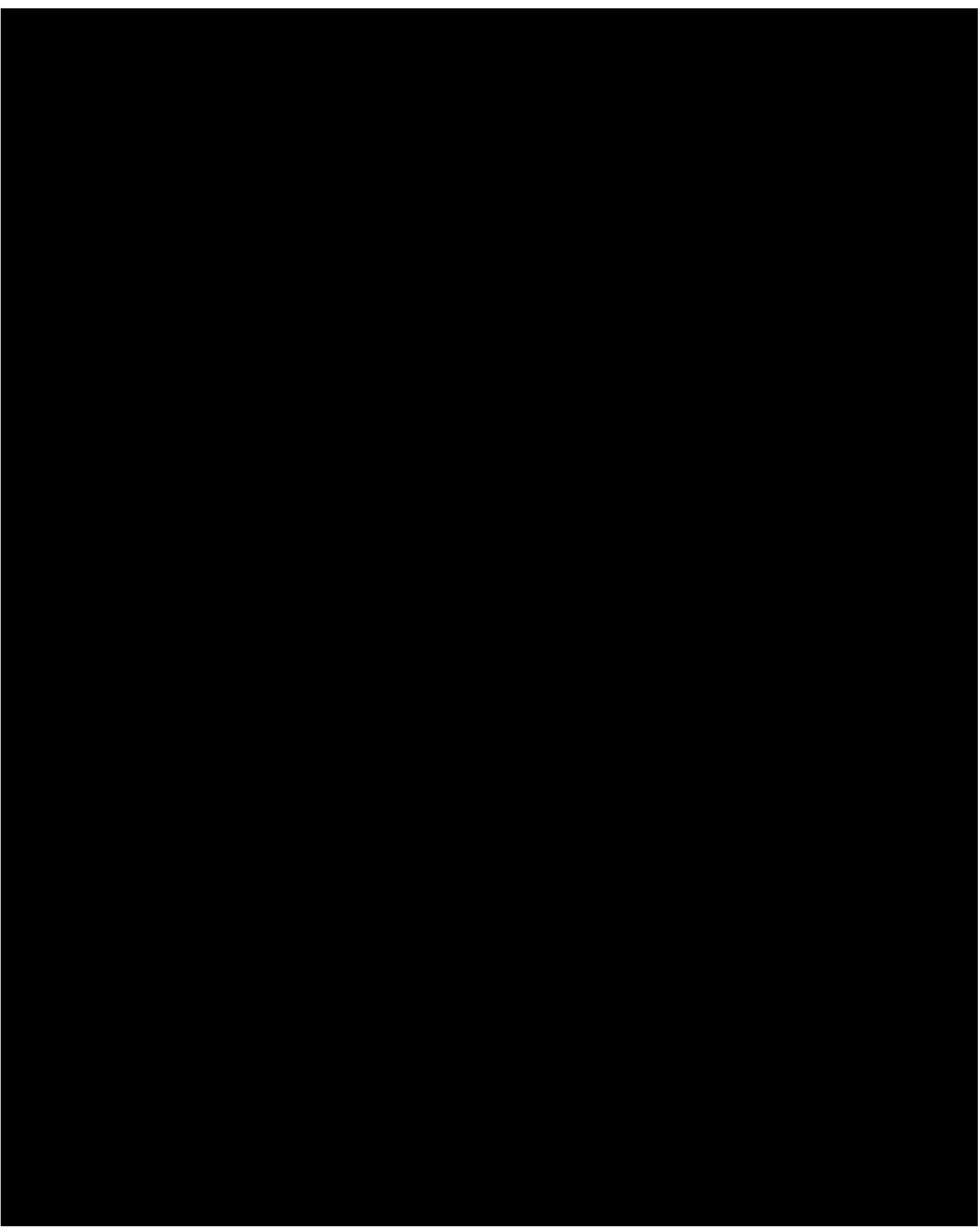

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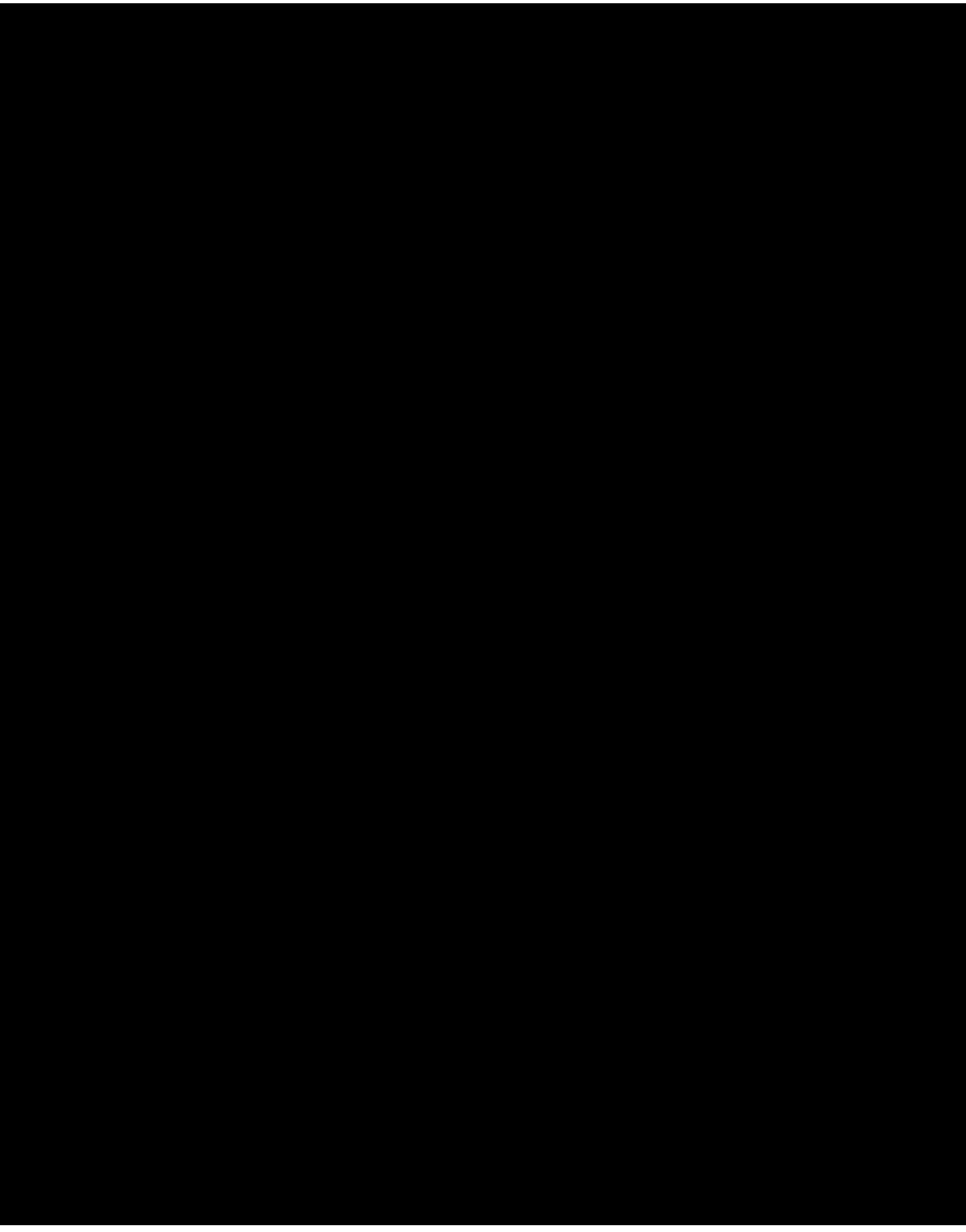
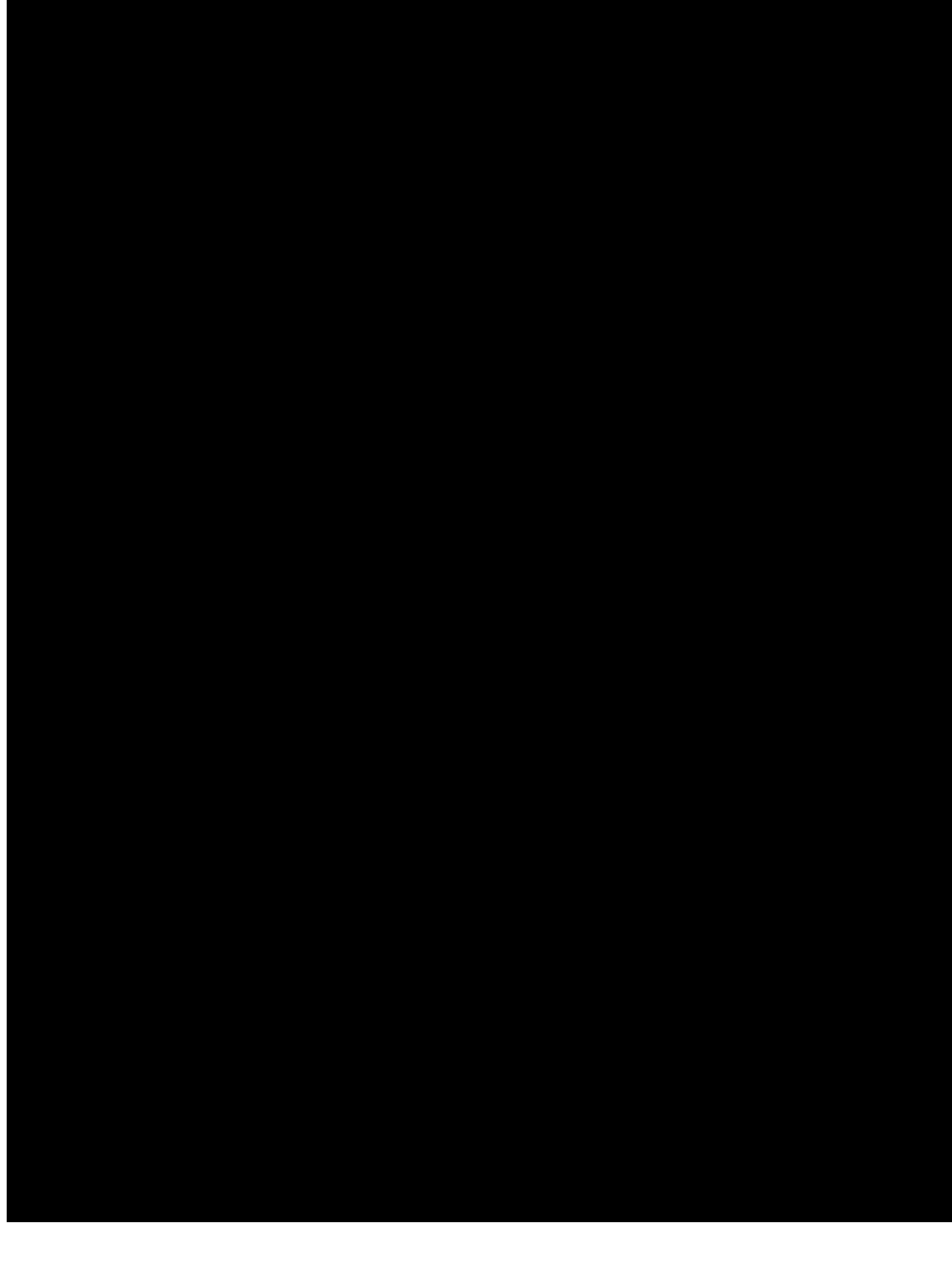




c) Potential Development of PECL Owned Landfill

58. While the ability to dispose of solid oilfield waste is an essential service for PECL, the company does not produce sufficient volumes of internally produced solid oilfield waste to justify establishing its own licenced landfill facility.

59. In addition to possessing insufficient volumes, PECL does not regard solid waste disposal as part of its' core business.

PRODUCED WATER DISPOSAL

60. The volumes of produced water which PECL is required to manage varies according to two variables.

    a. Following the completion of a fracture stimulation operation a substantial volume of produced water is recovered from newly drilled, newly completed wells during a period known as "flowback". During flowback, a newly completed well is tested by allowing it produce natural gas at accelerated rates allowing the well to expel the water previously injected during the hydraulic fracturing process. This process is imperfect and does not recover 100% of volumes previously injected.

    b. An nominal amount of produced water is recovered from the geologic formation during normal well production. This volume of produced water is comprised of both water injected during completion and water naturally occurring in the subsurface formation.

61. PECL's preferred practice is to recover, conserve and reuse produced water for use in future hydraulic fracture stimulation operations although there are instances when the volume of water produced exceeds storage capacity or where the quality of recycled water has deteriorated to the point where it can

is above-usual flowback when completing a well or when Crew Energy skims its tanks) third-party wells will be used instead. Tanks are skimmed every 1-3 months, and excess completions flowback is generated a couple of times per year.

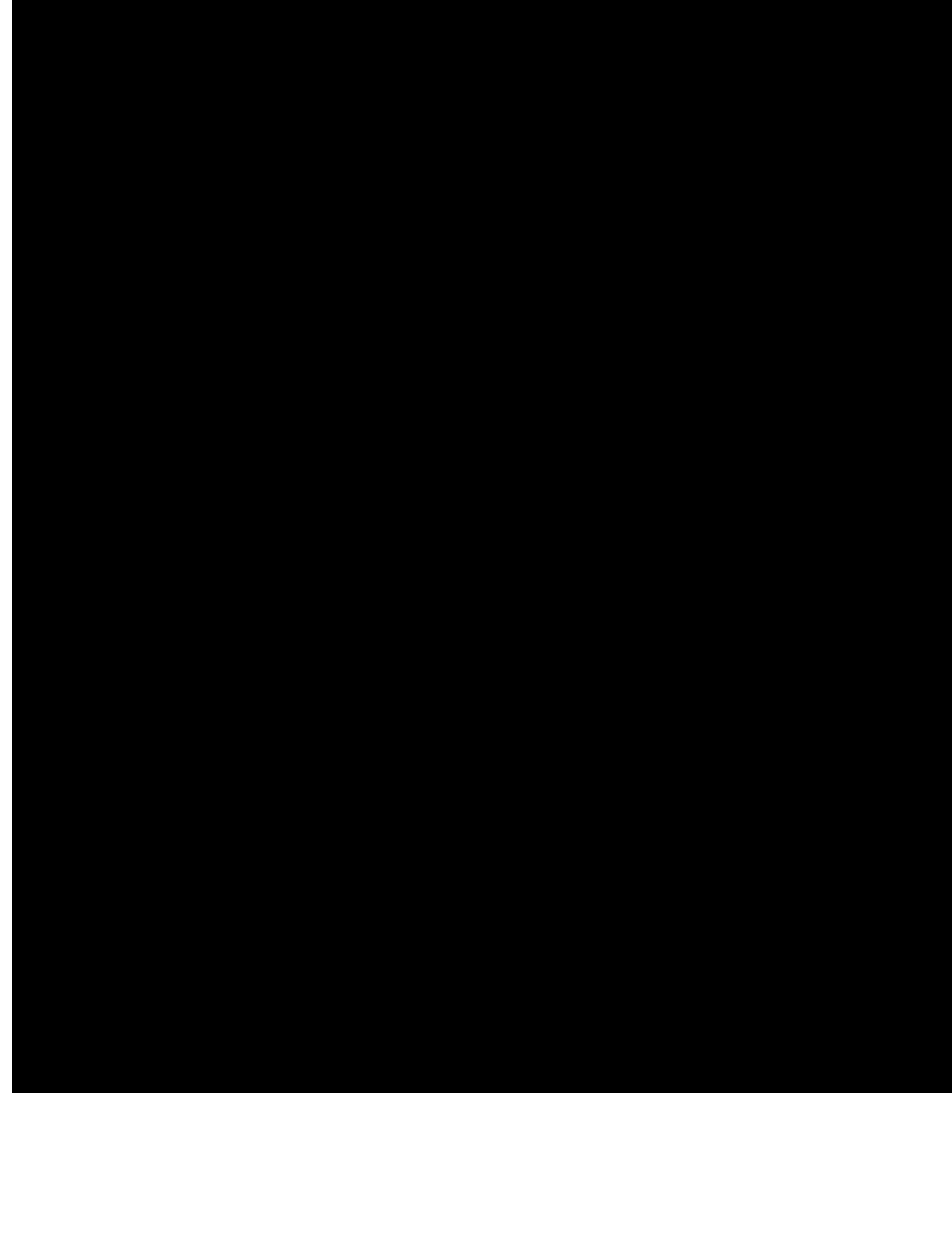
17. To begin the process of building a disposal well, Crew Energy evaluates subsurface geological targets for potential disposal zones. In depth geophysical, geological and engineering analyses occur to identify the geological horizon and the location of the well. Further, a drilling permit is acquired and then, a well is drilled, completed or converted to disposal services. An injecting and hydraulic isolation test is completed. At this point, an application for approval for long-term disposal is submitted to the BC OGC. If approval is granted for the well, then the surface facilities are constructed to enable permanent disposal. This process can take around one year, depending on seasonal work schedules and approval timelines.

18.

EFFECT OF THE MERGER

19. Generally speaking, the merger between Secure and Tervita should lower costs to consumers if the combined entity is able to lower their costs and transfer that to the consumer. A letter sent by the CEO of Crew is attached as Exhibit “A” to my witness statement.

20. This dynamic can be different if facilities are being closed, which could reduce competition. Crew Energy’s experience is that prices for disposal of waste are higher when there are fewer disposal options in a given area.



7. Murphy's production volume profile, based on the 4th quarter 2021, for onshore Canada averaged 52,100BOE/day.

USE OF SERVICES FROM SECURE / TERVITA

8. From each of its operations in the WCSB, Murphy regularly produces certain waste streams which must be disposed in appropriate facilities, as mandated by provincial authorities.

9. Generally, solid waste generated by Murphy such as contaminated soil or drill cuttings must be disposed in either a Class II landfill in Alberta or a secure landfill in BC.

10. Water waste is produced regularly during operation of oil and gas wells, and in larger quantities upon completion of a new well. Disposing of this water generally requires use of a Class 1b or Class 2 disposal well.

11. The majority of Murphy's production streams containing emulsions of oil and water are pipeline connected to in-field custom treating facilities, where the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, typically on-site, and the recovered oil is taken in-kind and sold by Murphy.

12. Murphy's remaining production streams containing emulsions of oil and water that are not pipeline connected are in majority in-field hauled to tank farm/oil loading and unloading terminals, where the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, typically on-site, and the recovered oil is taken in-kind and sold by Murphy.

13. Only direct wellhead production uncontaminated by other waste streams can be treated at the in-field custom treating facilities described above. If there is

any amount of oilfield waste generated, such as a sludge containing solid waste, the stream must be sent to treatment facilities such as Secure's Full Service Terminals ("**FSTs**"). FSTs are capable of separating emulsions into their constituent oil, and solid and/or liquid waste streams.

14. Murphy, from some of its operations, may send production streams containing emulsions of oil and water toFSTs. At these facilities the emulsion is separated into its oil and water components. Water is then disposed in an appropriate disposal well, often on-site at the facility. Recovered oil is either sold by the facility operator, resulting in a rebate to Murphy for its value, or it is taken in-kind and sold by Murphy. Any other solid or liquid wastes present in an emulsion or sludge can also be separated out at an FST and disposed of at an appropriate disposal well or landfill.

15. Secure, and formerly Tervita, both operated a number of each of these types of disposal facilities relatively near to Murphy's production sites in the WCSB.

CHOICE OF DISPOSAL SITE

16. In choosing a disposal site for a load of waste, Murphy considers a number of factors. Beyond the type of waste, these include the distance between operations and the facility, facility processing and disposal fees ("**tipping fees**"), transportation costs from trucking companies, as well as current capacity and wait times at available facilities.

17. Because transportation costs often represent a large portion of total disposal costs (ranging from $10-$45 per cubic meter), it is often preferable to use disposal facilities nearest to where the waste was generated. However, differences in the other above-mentioned factors can lead to the most cost-effective option being further away. For example, if facilitiy tipping fees in Fox Creek are higher or if capacity limits would likely lead to longer wait times,

69. Produced water and waste water represent more than [redacted] of SECURE's midstream infrastructure revenues (pre-closing) and [redacted]. Waste water disposal is also the service that is characterized by the largest number of competing third-party suppliers, as well as the highest prevalence of customer self-supply. Since the Transaction has closed, SECURE operates only 2 percent of facilities with produced water and waste water disposal capabilities, as set out above. The intensity of competition and ease and prevalence of self-supply in water disposal in particular is a powerful constraint on any price increases in other waste disposal streams.

70. Customers can and do self-supply landfill and liquid waste disposal services. For example, CNRL, ConocoPhillips Canada, Cenovus/Husky, Imperial Oil Limited, Shell, and Suncor Energy have approved landfills in Alberta. Similarly, Baytex Energy and Cenovus/Husky all have approved waste processing facilities in Alberta.

71. SECURE always considers the internal economics of customers' ability to self-supply in negotiating pricing – the ability to in-source alone creates a limit on any pricing SECURE will to offer its customers. Attached as Exhibits 62 to 138 to my affidavit are internal SECURE (and formerly Tervita) communications and documents that demonstrate the extent to which self-supply is a competitive constraint.

72. The chart below summarizes instances where SECURE lost volumes to competitors to self-supply over the past five years. These losses cut across product lines, geographies and customers:

10. Currently, there are 220 oilfield waste management facilities under the AER's jurisdiction, 143 of these facilities are "operating" and the remainder either are cancelled, undergoing abandonment, undergoing suspension, undergoing closure or undergone closure. Of the 143 operating facilities, 115 are third party facilities, of which 64 are owned by Secure. Narrowing the scope to only large waste management facilities i.e., facilities that conduct more than one waste management activity such as waste processing and fluid disposal activities, 57 of 82 facilities are owned by Secure. A publicly available list of AER approved third party oilfield waste management facilities is attached as Exhibit "A" to my witness statement. A publicly available list of AER approved first party oilfield waste management facilities is attached as Exhibit "B" to my witness statement.

THE APPROVAL PROCESS

11. I have been informed by AER staff who process these applications of the following respecting the **License process for a new disposal well and new scheme approval**: The applicant will first apply for a well license in accordance with *Directive 056 Energy Development Applications and Schedules*. All well licences are submitted via the OneStop system and may be issued within 24 hours if there is no manual review required. The applicant will also need to apply for a *Directive 051: Injection and Disposal Wells – Well Classifications, Completions, Logging, and Testing Requirements* and receive a *Directive 051* letter of approval. The Directive 051 approval is divided into four different categories depending on the disposal waste fluid type. All Directive 051 application are processed within 30 business days. The four different fluid types are:

- Class-Ia for oilfield / industrial wastes;
- Class-Ib for produced water/ specified common oilfield wastes;
- Class-II for produced water / brine equivalent; and
- Class-III for hydrocarbon / inert / sour gases.

AER Approved First Party Oilfield Waste Management Facilities

Updated: June 30, 2021

Company Name	Facility Name	WM Approval Number	Amendment Letter	Facility Description	Surface Location
ARC Resources Ltd. 1200, 308 - 4 Avenue SW Calgary AB T2P 0H7 403-503-8600	ARC Red Water	WM 118	A	BD	/14-09-057-21W4
Baytex Energy Ltd. 2800, 520 - 3 Avenue SW Calgary, AB T2P 0R3 587-952-3000	Baytex Ardmore	WM 089	D	WPF	/-16-061-03W4
Canadian Natural Resources Limited	CNRL Turner Valley	WM 032	E	BD	/16-22-020-03W5
2500, 855 -2 Street SW	CNRL Brintnell	WM 100	D	SF(1b)	/14-04-082-22W4
Calgary AB T2P4J8	CNRL Tilley	WM 055	F	ST	/16-10-017-12W4
403-517-6700	CNRL Taber	WM 148		ST	/06-24-010-17W4
	CNRL Jackfish	WM 105	J	LF2	/28-075-06W4
Canlin Energy Corporation	Canlin Mudge/Basing	WM 087	C	SF(1b)	/06-01-048-19W5
PO Box 4335 Station C	Canlin Wildcat Hills	WM 094	C	SF(1b)	/04-30-026-05W5
2600, 237 - 4th Ave SW	Canlin Medicine Hat	WM 101	F	ST	/07-20-015-03W4
Calgary AB T2P 4K3 403-351-9500					
Cenovus Energy Inc. PO Box 766 500 Centre Street SE Calgary AB T2P 0M5 403-766-2000	Cenovus Foster Creek	WM 082	C	ST	/-21-070-04W4
Conoco Phillips Canada Resources Corp. Gulf Canada Square 401 - 9 Avenue SW Calgary AB T2P 3C5 403-233-4000	Conoco Surmont Landfill	WM 208	B	LF2	/-07-083-06W4
Crescent Point Energy Corp. 2000, 585 - 8 Avenue SW Calgary AB T2P 1G1 403-693-0020	Crescent Point Diamond Valley	WM 075	G	BD	/10-12-019-02W5
Husky Oil Operations Limited	Husky Sylvan Lake	WM 103	A	BD	/05-16-038-02W5

707 - 8 Avenue SW Calgary AB T2P 1H5 403-298-6111	Husky Sunrise Husky Windfall Husky Sunrise	WM 139 WM 196 WM 200	B A	LF2 LF2 WPF	/-16-095-07W4 /-17-060-15W5 /06-16-095-07W4
Imperial Oil Resources Limited 505 Quarry Park Blvd Calgary AB T2C 5N1 1-800-567-3776	Imperial Cold Lake Imperial Cold Lake	WM 039 WM 136	K A	LF2\LF3 ST	/-33-064-03W4 /10-12-065-04W4
IPC Canada Ltd. 900, 215 - 9 Avenue SW Calgary, AB T2P 1K3 403-215-8313	IPCCAN Suffield	WM 038	F	ST	/04-03-015-06W4
ORLEN Upstream Canada Ltd. 400,850 - 2 Street SW Calgary AB T2P 0R8 403-265-4115	Orlen Kakwa Orlen Kakwa	WM 192 WM 210	A	ST ST	/03-03-063-05W6 /12-13-063-06W6
Plains Midstream Canada ULC 607, 8 Avenue SW Calgary, AB T2P 0A7 403-298-2100	Plains Mid - Empress	WM 076	D	SF(1b)	/13-35-019-01W4
Shell Canada Limited 400 - 4 Avenue SW Calgary AB T2P 0J4 403-691-3111	Shell Waterton	WM 033	I	LF2	/-21-004-30W4
Suncor Energy Inc. 150 - 6 Avenue SW Calgary AB T2P 3E3 403-296-8000	Suncor Mackay River Suncor Firebag	WM 072 WM 095	F G	LF2 LF2\ST	/12-17-093-12W4 /03-04-095-06W4
Tourmaline Oil Corp. 3700, 250 - 6 Avenue SW Calgary AB T2P 3H7 403-266-5952	Banshee ECP Tourmaline Horse Field ECP	WM 187 WM 203		ST ST	/11-12-050-21W5 /09-08-058-26W5
Velvet Energy Ltd. 1500, 308 - 4 Avenue SW Calgary AB T2P 0H7 403-781-9125	Velvet Montney Asset ECP	WM 205	A	ST	/--067-02W6

* First party receivers can only accept upstream oilfield waste generated by one oil and gas

associated with a disposal well (class 1b or 1a): Receiving
LF = Landfill (class 1a, 1b, II or III): Final disposal location for solid oilfield waste that involves
Facility: Normally tanks used for purposes such as neutralization of materials, solids processing
short term storage of 1st party oilfield waste which is later transferred to an appropriate
BF = Biodegradation Facility: Enables the removal of hydrocarbon contamination from

engineering and design ("FEED") studies; market and sustainability assessments that support long-term market demand and community support for the service offered, surface and mineral land acquisitions, and regulatory approvals. [REDACTED]

11. In addition to the above, facilities must be located in areas with suitable geology. There are numerous factors and variables involved in the assessing suitable reservoirs for disposal well purposes. These include factors such as reservoir capacity, downhole pressures, hydraulic isolation (concerns of reservoirs communicating with one another), economics, and surface and mineral land access.

12. North East British Columbia (NEBC) has challenging geology and reservoir dynamics in general due to faulting and induced seismicity. Downhole disposal options are much more limited and involve a higher degree of capital risk. Catapult has experienced this challenge firsthand while developing our Tower water management facility. The initial disposal wells that we completed did not accept fluids despite having a thorough geological review conducted. The review identified multiple successful nearby disposal wells that were completed in this same zone. Our wells were subsequently re-completed into another reservoir zone which did prove to accept fluids and continues to do so today. This is just an example of one of the risks associated with finding suitable reservoirs for long term disposal purposes.

13. Oil and gas producers have the option to build and use their own water disposal facilities ("first party" facilities), use third party disposal facilities such as those owned by Catapult or Secure, or use a combination of both. Oil and gas producers with their own disposal facilities may be able to meet their basic

disposal needs (*i.e.* after the first few weeks of the production cycle where reduced and stable water volumes are produced).

14. However, production activities (such as completion of a well) can create a significant surge in the amount of water produced – this can be five to ten times greater than the non-peak production water volumes. During these times the water disposal requirements of producers peak, and typically necessitate the use of third party disposal services.

15. Although producers can build their own facilities, third party facilities like those owned by Catapult and Secure satisfy an important need of producers during peak water disposal requirements. Catapult has observed that producers have tolerated wait times of six hours or more for trucks to line up and dispose of flowback water during peak season.

16. Midstream water disposal is a commodity business. There are no significant branding differentiators to water handling and water re-injection. When selecting a third party disposal service one of the biggest factors customers typically consider is cost. The total cost is always significantly influenced by the distance the fluid has to travel, and the form in which it travels.

17. Typically, oilfield water is transported from the producer’s site to the disposal facility via truck. Some third party disposal facilities including some Secure, former Tervita and Catapult facilities offer pipeline connections between producers’ sites and the disposal facility to reduce ongoing disposal costs, surface damage and traffic. Where there is no pipeline connection, the producer is responsible for arranging transportation for the water to Catapult’s facilities.

estimates of the capital expenditures required to build a TRD/FST or landfill indicate it would not be economically feasible.

EFFECT OF THE MERGER

27. Chevron has already seen the effects of an amalgamated Secure/Tervita entity. Paragraph 16 outlines the closure of certain facilities in the Fox Creek area, the effects of which have led to an increase in transportation costs and overall waste disposal costs.

28. The reduction in competition will also create a lowered service standard, as Chevron will no longer be able to leverage Secure's services against Tervita's.

35) My understanding from others on my team is that the design and construction of CNRL's Woodenhouse landfill took ██ months (from inception to first waste accepted).

DISPOSAL WELL DEVELOPMENT

36) In my role at CNRL, I liaise with the Exploitation and Production group that generates fluid waste for disposal, as well as the Production Engineering group that is responsible for the development of new disposal wells to meet CNRL's needs. If CNRL determines there is a need for a new disposal well for its operations, CNRL will either develop an in-field disposal well or will use one or more wells at an associated facility to manage formation fluid, water or waste generated at a particular site. Often these disposal wells are not new drills but are the result of converting a well that formerly produced hydrocarbons to accept fluid waste. The timeline to develop a new in-field disposal well ranges from ██████████ The timeline to convert an existing well to a disposal well is █████████

37) When developing an in-field disposal well, CNRL first identifies a zone that can accept fluids. Then, CNRL applies to the relevant regulator to have the applicable license amended to permit a disposal well. Once regulatory approval is obtained, the disposal well is constructed using a service rig that sets a packer, isolates the desired geologic zone(s), and perforates the well casing. Depending on subsurface conditions, the supply and installation of surface equipment may be required to pump fluids down the hole for disposal. There are both surface and subsurface constraints that would be considered when developing a new disposal well or converting an existing well for disposal. Surface constraints could consist of environmental protection requirements, seasonal access limitations, suitability of terrain and stakeholder concerns. Subsurface constraints could consist of formations having poor

isolation (poor cap rock, faults, etc.) as well as stakeholder concerns (e.g. groundwater contamination or the concerns of other mineral rights holders).

EFFECT OF THE MERGER

38) One noticeable impact of the merger of Secure and Tervita is the actual closure of waste disposal facilities, resulting in increased costs to CNRL as well as potential future closure of other facilities used by CNRL. Since the merger, Secure has closed the facilities listed below. CNRL utilized [redacted] closed facilities. Attached as Exhibit E is a confidential document that shows the facilities closed after the merger and CNRL's prior three-year volume history at each facility.

As of the date of this Witness Statement, the facilities closed by Secure since the merger are as follows:

Moose Creek Stand Alone Water Disposal ("**SWD**")
Deerhill Full Service Terminal ("**FST**") (the waste side)
Eckville FST
Emerson SWD
Stauffer FST
Fox Creek East FST
Fox Creek Bigstone FST
Judy Creek South FST
Kaybob South SWD
Kindersley East FST
Kindersley West Treating
Silverdale FST
Emerson FST
Judy Creek Landfill
Fox Creek Landfill

39) Previously, when Tervita acquired Newalta, Tervita closed various facilities. This translated into additional cost to CNRL resulting from additional trucking distance and time for CNRL to haul its waste. For example, CNRL had to switch from hauling [redacted] to hauling them to [redacted]. Increased trucking distances result in additional costs,

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18 **CHIEF JUSTICE CRAMPTON:** Thank you.
19 So if you just take the current situation at
20 current economics, if you don't have -- would it be fair to
21 say that if you don't have another disposal well, it's
22 because the economics aren't there to justify it?
23 **MR. GEE:** That's fair.
24 **CHIEF JUSTICE CRAMPTON:** Okay. And so -- let
25 me just ask. What would it take to justify it based on

1 current conditions? Would rates have to go up 10 percent,
2 20 percent?
3 Like I'm just trying to get an order of
4 magnitude of what it would take to justify that type of an
5 investment.
6 **MR. GEE:** There's probably a lot more into it
7 than that. We used an available well bore, for instance.
8 So that lowered our costs substantially, to use an old
9 suspended well to turn into disposal, you need to have the
10 disposal reservoir identified and it has to have the
11 capability to accept fluids at high rate. Not all
12 producers have that, but some producers do. In this case,
13 we did have a reservoir that we could dispose into.
14 So it really is geologic-dependent whether or
15 not you've got the capability. You know, drilling a brand
16 new well for disposal, obviously, is more expensive than
17 using an existing suspended well for disposal and
18 converting that. So depending on how many wells are in
19 your area that you can use for that. Again, you know, my
20 point earlier that larger companies have more capacity.
21 They have more well bores that they can then consider for
22 disposal.
23 I think in our business, the water disposal
24 part of it is easy for producers like Peyto to take on.
25 It's very similar operationally to production. You know,

1 we're talking about drilling wells, completing into a
2 formation, and pushing fluids in as opposed to pulling
3 fluids out. That's very similar business.
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8 but also disposal. So we'd have to compare that to then
9 what was the going rate for disposal services versus what
10 we could drill and put a well into operation for.
11 That was the analysis we did a while ago when
12 we decided to convert one of our wells into disposal. We
13 looked at whether it was more economic to keep trucking it
14 to a third-party disposal service or whether it was
15 economic for us to put our own well into service. And we
16 felt it was economic to put our own well into service, so
17 we went about investing that capital to do so.
18 **CHIEF JUSTICE CRAMPTON:** Thank you.
19 So if you just take the current situation at
20 current economics, if you don't have -- would it be fair to
21 say that if you don't have another disposal well, it's
22 because the economics aren't there to justify it?
23 **MR. GEE:** That's fair.
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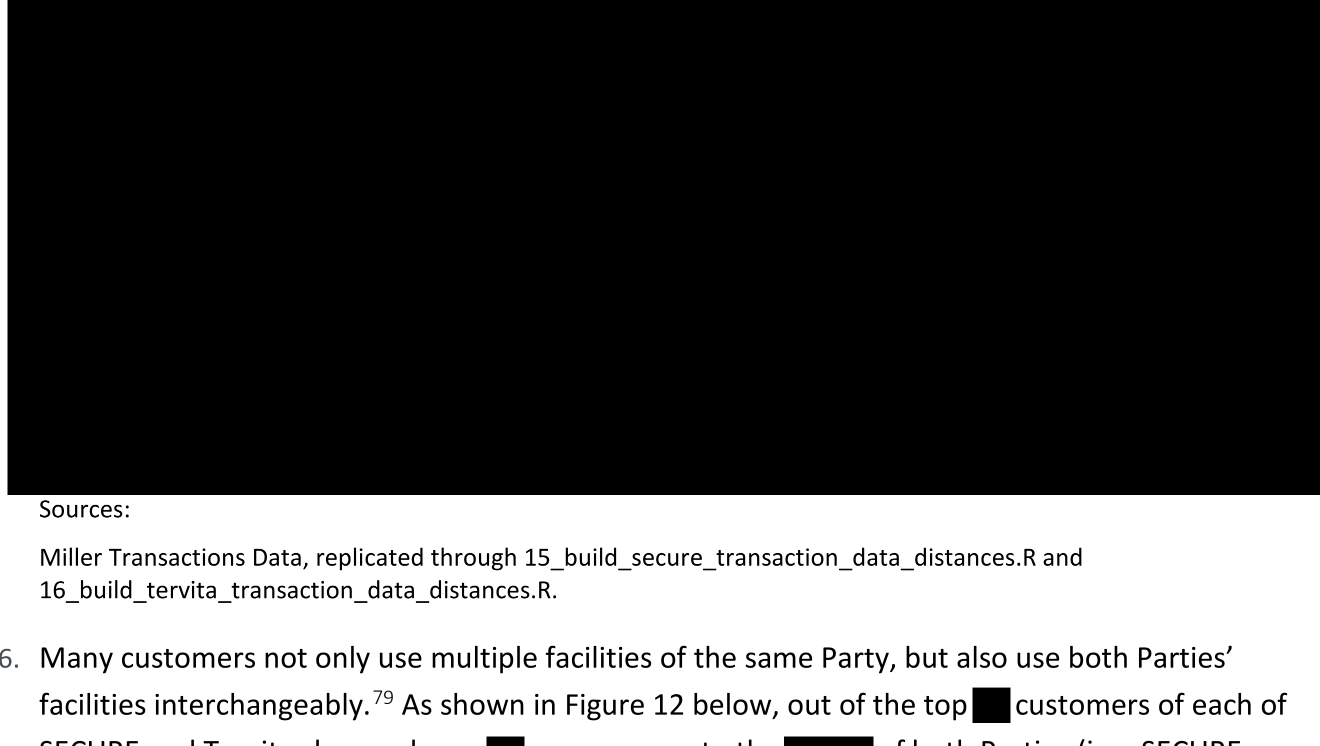
		Units	2016	2017	2018	2019	2020
Energy Efficiency							
Energy Produced (excl consumption)		GJ	256,441,783	267,057,732	238,604,922	208,264,121	205,906,898
Energy Consumed (gas)		GJ	8,191,965	8,702,603	7,825,698	7,257,794	7,515,868
Energy Efficiency (gas)		% of GJ Prod+Cons	3.10	3.16	3.18	3.37	3.52
Energy Efficiency/unit production (gas)		GJ/produced m^3OE	1.31	1.31	1.32	1.40	1.46
Air Quality (Criteria air contaminants (CAC)							
NOx [4]		tonnes/yr	1,198	1,428	1,416	1,143	1,220
Volatile Organic Compounds (VOC's)		tonnes/yr	355	344	386	328	328
Particulate Matter (PM^{10})		tonnes/yr	3	4	3	2	3
SO2 [2]		tonnes/yr	no SO2 emissions	no SO2 emissions	no SO2 emissions	no SO2 emissions	no SO2 emissions
Water Management							
Total Non-saline make-up water[5]		m3	275,549	309,884	217,049	217,552	244,524
	As a % of total of water use	% of frac water	67	72	84	81	82
Non-saline withdrawals from high stress regions		%	not tracked	not tracked	not tracked	not tracked	0
Frac Water Used[5]		m3	409,087	427,868	259,546	268,397	297,811
Number Wells Frac'd[5]		Number	130	139	66	58	68
Frac Water Used per Well[5]		m3	3,147	3,078	3,933	4,628	4,380
Frac Flowback Water Volumes[6]	Produced	m3	150,331	154,748	72,572	66,258	71,706
	Recycled	m3	120,306	117,944	42,343	46,992	52,860
		%	80	76	58	71	74
	Disposed	m3	30,025	36,804	30,229	19,266	18,846
Well/Plant Water Production	Produced[7]	m3	213,716	303,210	331,062	278,503	274,695
	Recycled[8]	m3	13,232	40	154	1,490	427
		%	6	0	0	1	0
	Disposed[8]	m3	200,484	303,170	330,908	277,013	274,268

Notes:
5. SasB-EM-EP 140a.1
6. SasB-EM-EP 140a.2
7. SasB-EM-EP 140a.3
8. SasB-EM-EP 140a.4

Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.



Sources:

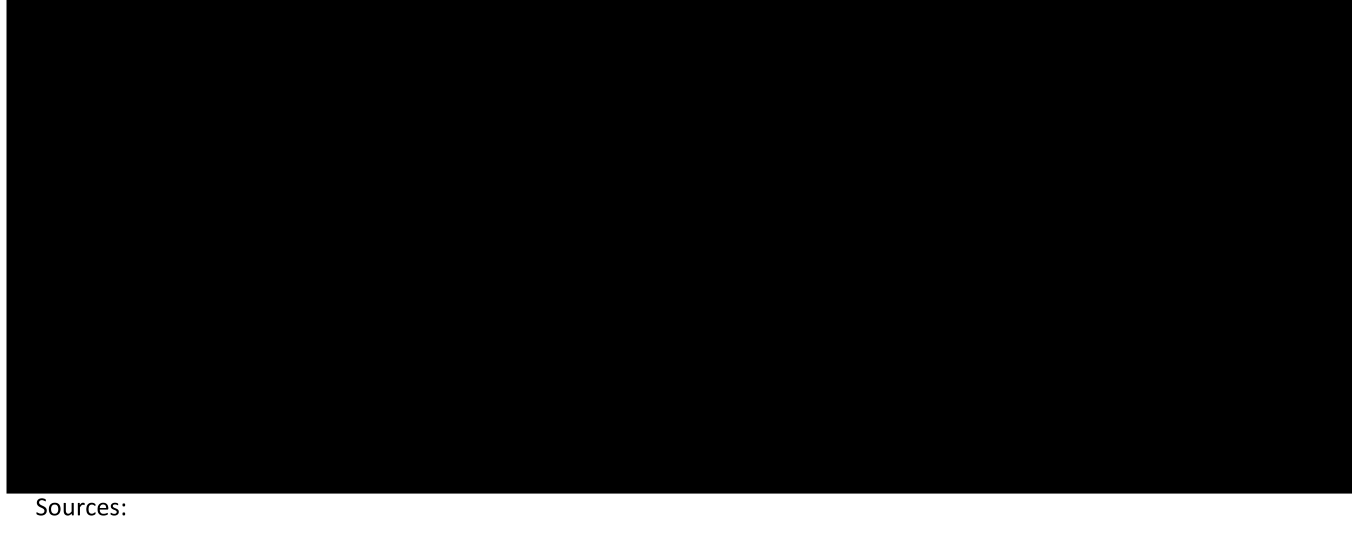
Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.

66. Many customers not only use multiple facilities of the same Party, but also use both Parties' facilities interchangeably.[79] As shown in Figure 12 below, out of the top ██ customers of each of SECURE and Tervita shown above, ██ are common to the ████ of both Parties (i.e., SECURE and Tervita shared many of the same largest customers). For these ██ customers, on average, ████ f the facilities they used in 2019 were SECURE facilities (accounting for ███ of their total spend), and ███ were Tervita facilities (accounting for ███ of their total spend). These findings are contrary to Dr. Miller's assumption that waste service facilities are significantly differentiated from the customer perspective, and that a customer simply reveals its preference for a particular preferred facility.

79 ████████

Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.



Sources:

Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.

66. Many customers not only use multiple facilities of the same Party, but also use both Parties' facilities interchangeably.[79] As shown in Figure 12 below, out of the top [redacted] customers of each of SECURE and Tervita shown above, [redacted] are common to the [redacted] of both Parties (i.e., SECURE and Tervita shared many of the same largest customers). For these [redacted] customers, on average, [redacted] of the facilities they used in 2019 were SECURE facilities (accounting for [redacted] of their total spend), and [redacted] were Tervita facilities (accounting for [redacted] of their total spend). These findings are contrary to Dr. Miller's assumption that waste service facilities are significantly differentiated from the customer perspective, and that a customer simply reveals its preference for a particular preferred facility.

79 [redacted]

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15 With respect to buyer power. You know, first
16 of all, I've mentioned that there are different ways that
17 negotiations happen in this industry, and we want to think
18 about that. I'm not sure that buyer power, or I don't
19 think buyer power is a consideration that's going to be
20 important in most situations in this market, and the
21 reason, first of all, has to do with sort of the factual
22 basis for it. If you look at the size of the customers
23 relative to the amount of revenue that Secure and Tervita
24 bring in, and what I mean is -- I'll get to that in a
25 moment -- what we see is that no customer accounts for more

1 than 10 percent of the revenue of either Secure or Tervita.
2 And if you look at the list of top 25 customers
3 of Secure and Tervita that Dr. Duplantis provided, on
4 average each of those customers supplies or accounts for
5 less than 3 percent of the revenue from Secure and Tervita.
6 And so putting those together, the factual basis that you
7 know, this is I think somewhat weak for the notion that
8 buyer power is going to be sort of a persistent, important
9 consideration in the market.
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10 But I also want to pull in the theory here,
11 because we have a fair amount of theory on buyer power, and
12 what we know is even if there is buyer power in the market,
13 mergers matter. The reason is that the easiest way to
14 exercise buyer power is to play one supplier off the other,
15 either explicitly or implicitly through the threat of being
16 able to move. And when you have a merger between the two
17 major suppliers in a market, it diminishes the ability of
18 buyers to bargain. And so putting that together, I don’t
19 see a strong -- a compelling sort of factual basis by the
20 numbers for the importance of buyer power in this market.
21 And theoretically, I would still have concerns about price
22 effects in the presence of buyer power, if it did exist.
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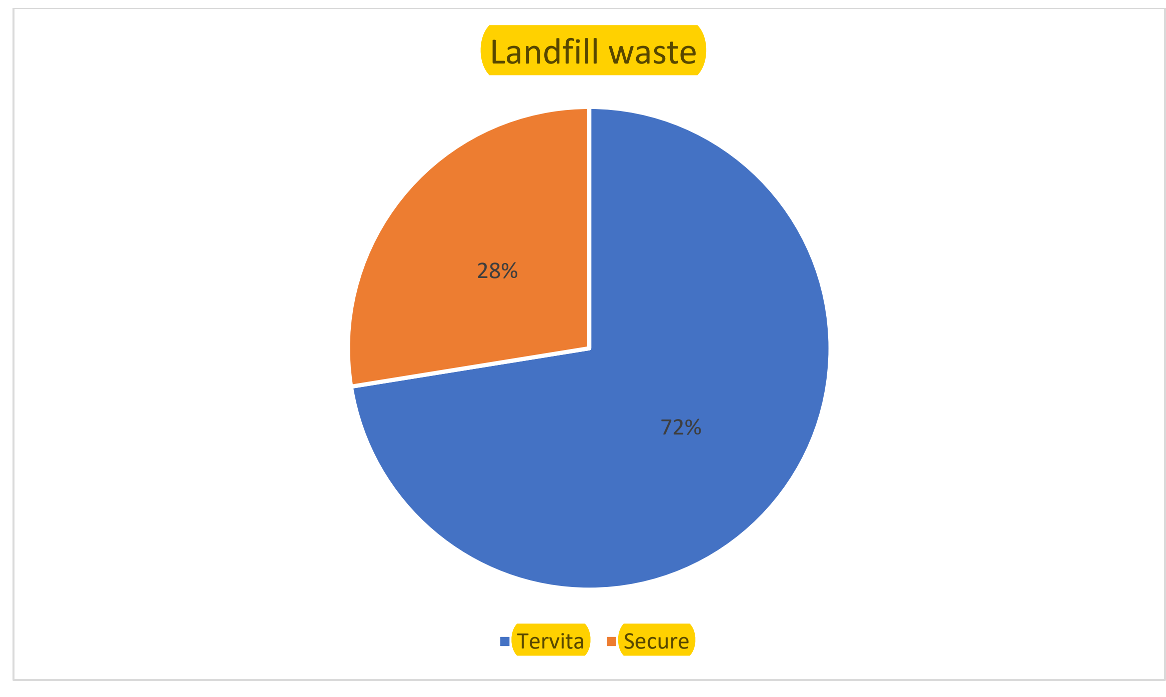
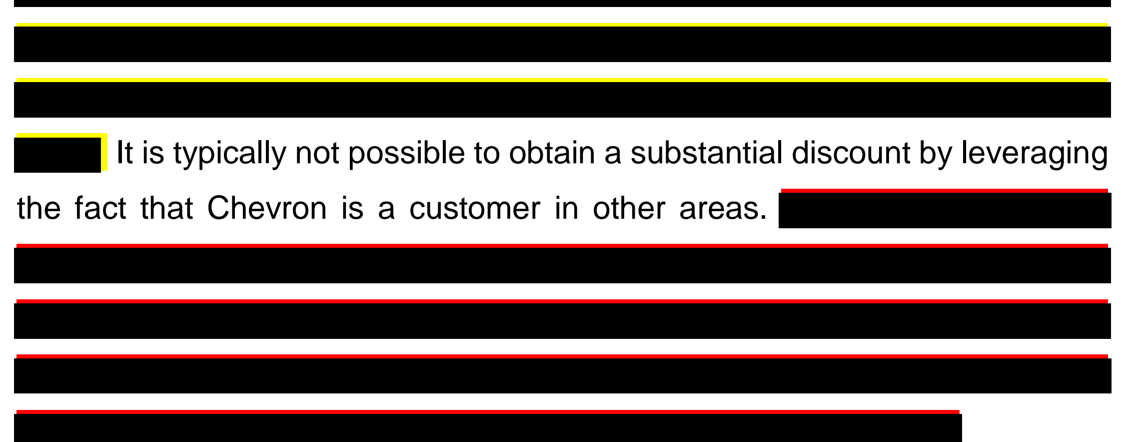


24. 
It is typically not possible to obtain a substantial discount by leveraging the fact that Chevron is a customer in other areas.

COMPANY'S DISPOSAL FACILITIES

25. Currently, Chevron does not operate any of its own TRDs or landfills. Chevron's primary business is oil and gas exploration and it does not have plans to build any such facilities. There are many factors that make it difficult to internalize this type of business. For example, receiving the necessary permits to begin creation of a landfill can take between 24-36 months, even just finding a geologically suitable location can be very difficult, and initial

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21 **CHIEF JUSTICE CRAMPTON:** Anyway, Mr. Dziuba,
22 back to what I was going to be asking. So generally
23 speaking, if you're presented with a price increase in one
24 area where, as you have put it, you feel you don't have any
25 alternatives, can't you threaten to take business away from

1 that supplier in another area? Say, "Well, okay, if you're
2 going to do this to me here where I don't have any options,
3 I'm going to move some business in another market where I
4 do have options, unless you behave more reasonably here
5 where you've kind of got me over a barrel", so to speak?
6 **MR. DZIUBA:** That's a very good question. In
7 our specific circumstance, I don't think we have that lever
8 available to us, simply because the Kaybob Duvernay region
9 probably represents 70 percent of our business with Secure.
10 Further, the next largest slice being probably 25 percent
11 is in Fort Nelson, where again they have the only FST and
12 the only landfill.
13 **CHIEF JUSTICE CRAMPTON:** So for you, that's not
14 something that you can do with Secure, but is it something
15 that you can or have done with other suppliers in other
16 regions? Is this something that you can -- is this a
17 tactic, in your experience, that can be fully effective
18 where you're presented with a price increase by a supplier,
19 but you can say, "Look, I can take some business away from
20 you elsewhere"? Is that something that completely protects
21 you where you do have that leverage?
22 **MR. DZIUBA:** Completely, no. But I could see
23 it being a tactic that could be employed. That's fair to
24 say.
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17 **CHIEF JUSTICE CRAMPTON:** That's very helpful.
18 I'm just writing this down.
19 My last question is, you talk in paragraph 40
20 about the impact of the merger and, following Secure's
21 acquisition of Tervita, the number of viable alternative
22 competitive landfills and TRDs has been significantly
23 reduced. Given the pricing dynamics that, you say,
24 "...I have described above, I
25 expect it will become easier for

1 Secure to raise its tipping and
2 processing fees, as it will now
3 often own what would have been the
4 next closest facility.”
5 So my question to you is, given your presence
6 all over the province, can’t you threaten to switch
7 business away from Secure in another area where you do have
8 a competitive option as kind of a tactic to avoid being
9 subject to these increased tipping and processing fees that
10 you talk about here in the area where you don’t have a
11 choice?
12 Like is this meaningful leverage that you have,
13 geographic leverage, where you can say, well, okay, you’ve
14 got me here, but I’ve got you over there, so be careful?
15 **MR. DePAUW:** I would say no, that wouldn’t
16 work, in my estimation.
17 The sites that we have are fixed. They’re at a
18 specific geographic location, and the waste is at that
19 specific site because, you know, the nature of where we’re
20 at.
21 Yes, we could move other ones, but that site
22 that’s, say, in an area where there’s no competition, will
23 never move, it’ll always be there. And if there’s no
24 competition and we need to landfill it, it’s only the
25 trucking and the tipping that comes into it.

1 You know, there might be ways that we could get
2 more, but again, it depends on how far you need to truck
3 it. And at the end of the day, it's just those two
4 calculations. It's as simple as that.
5 I don't see any way that we'd be able to
6 leverage other sites because the volume that's in an area
7 that, say, has the -- no competition, they could just keep
8 raising the rates. There's no way that we'd be able to
9 leverage that. There might be some minor ones, but it
10 wouldn't be material at all.
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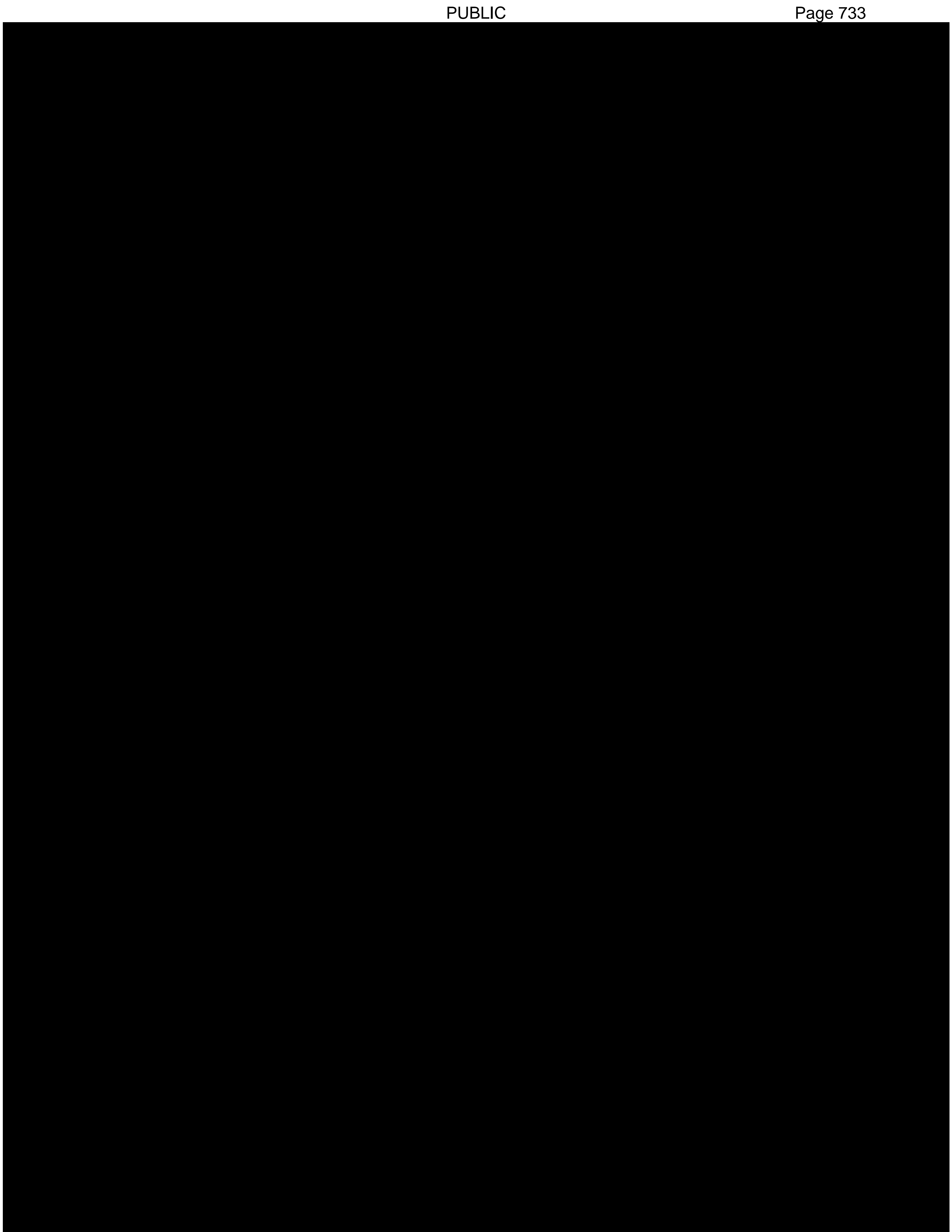

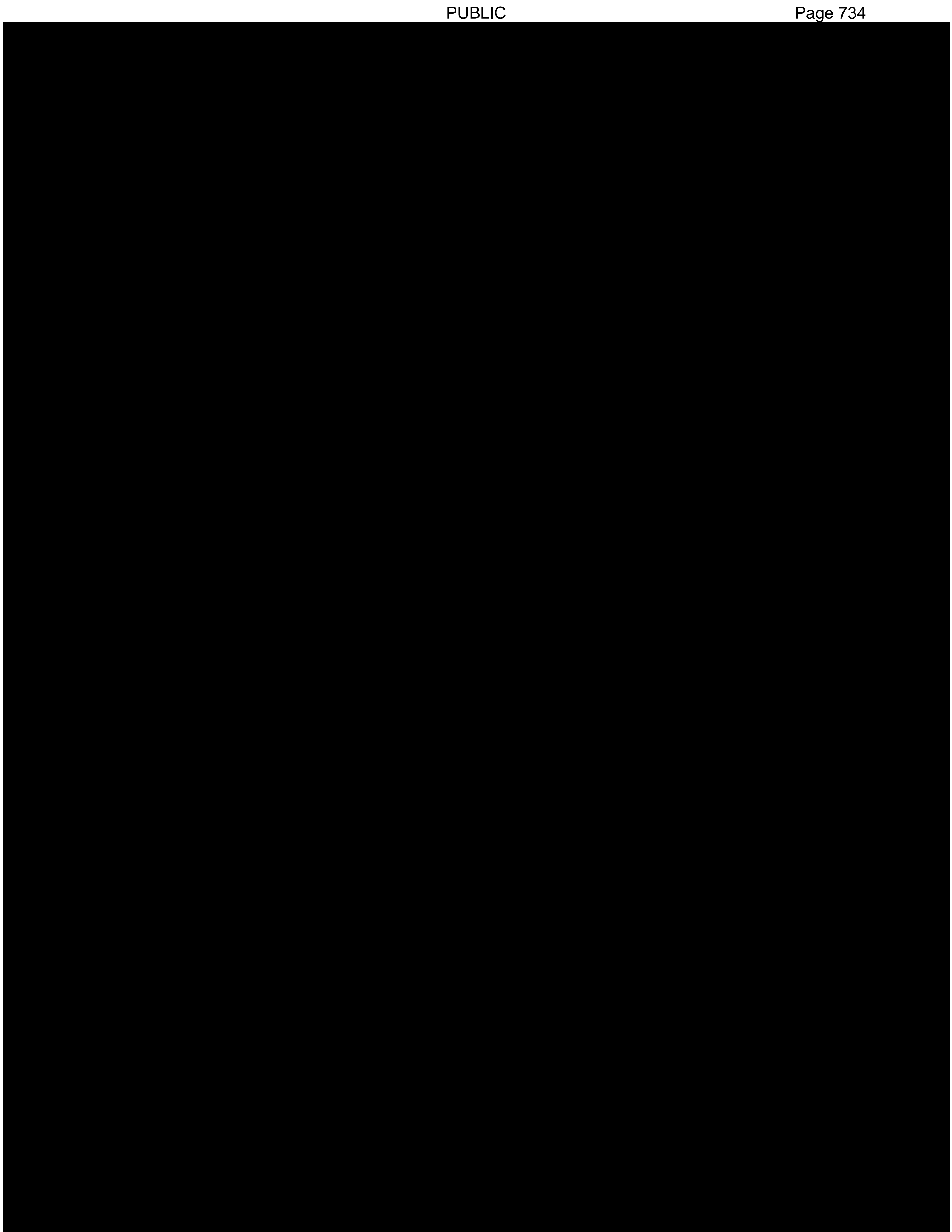

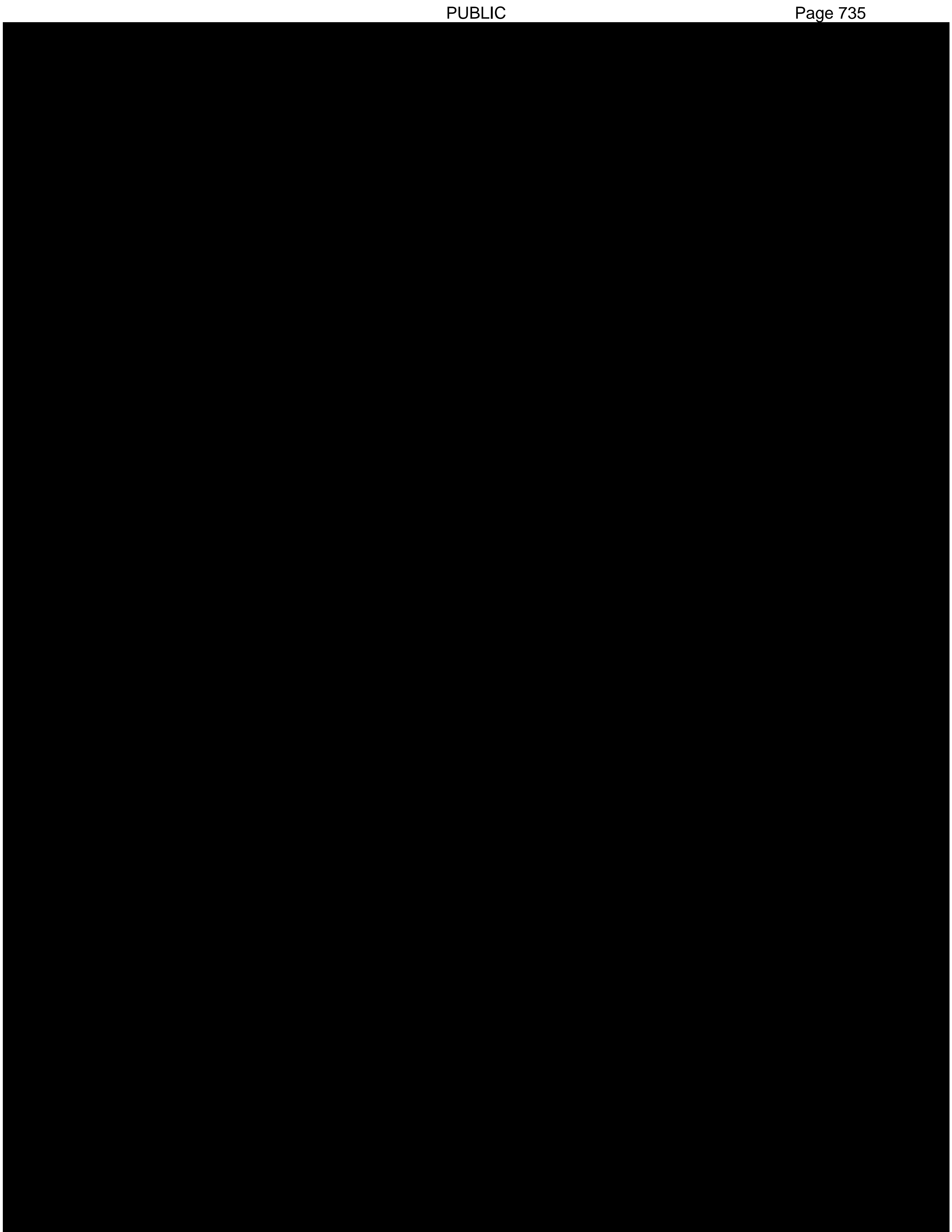

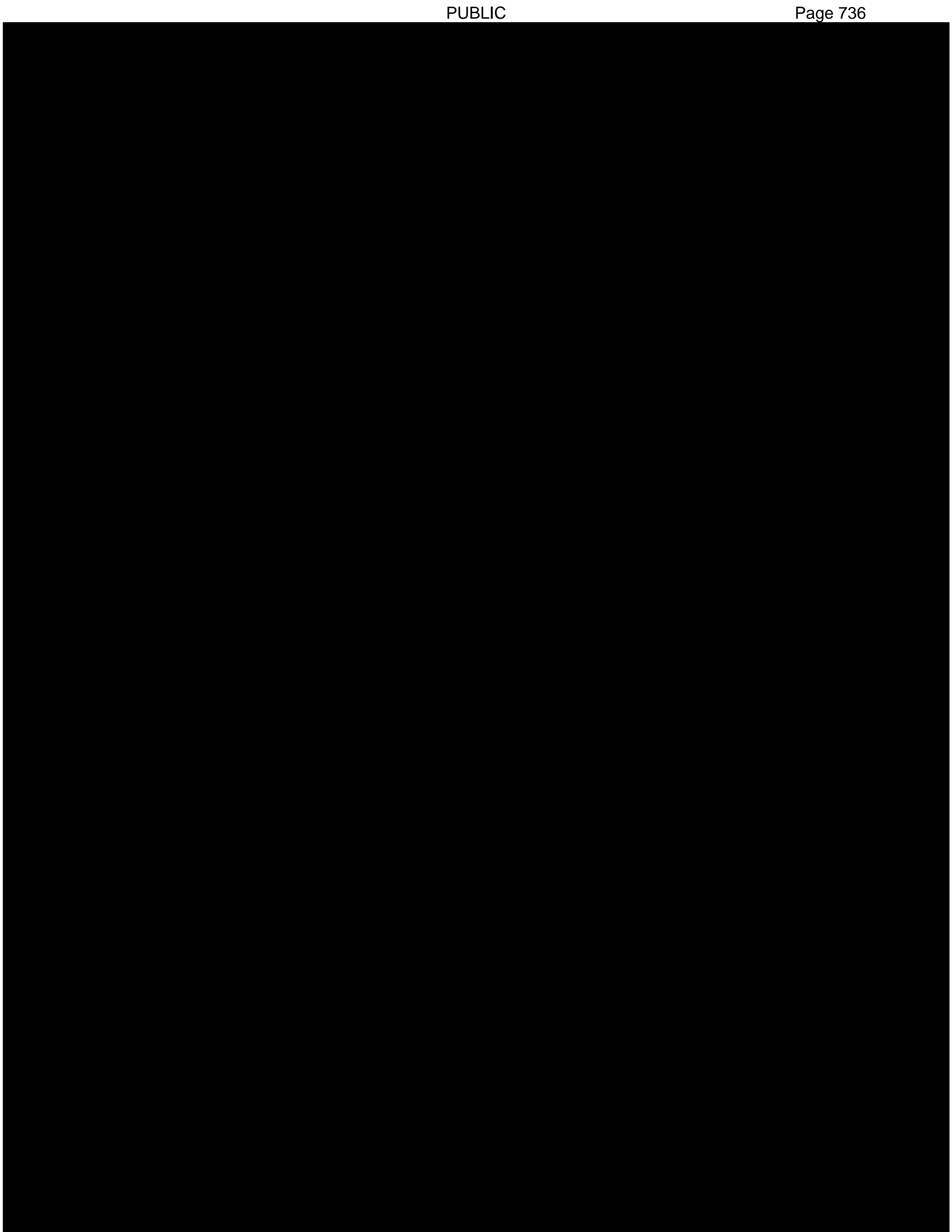

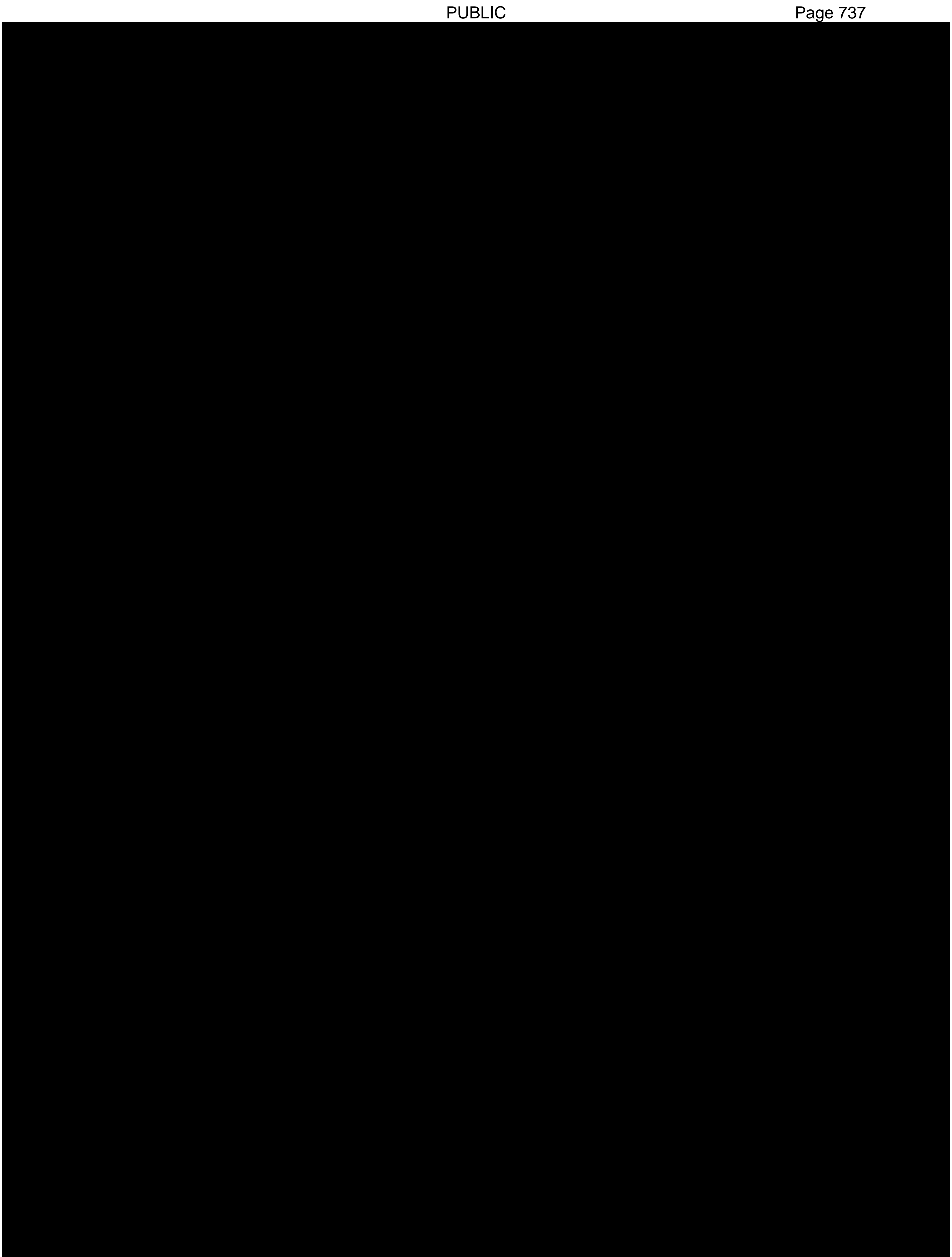

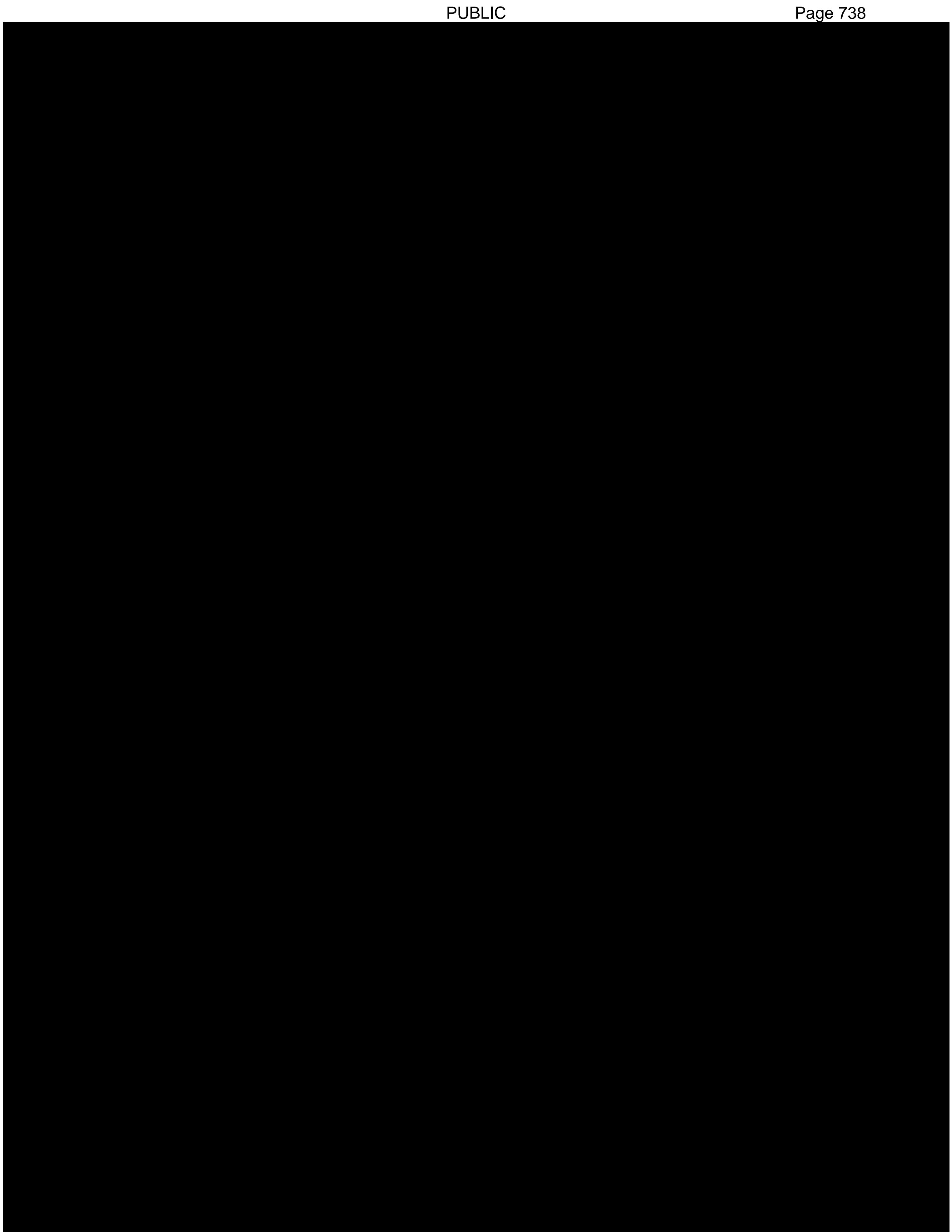

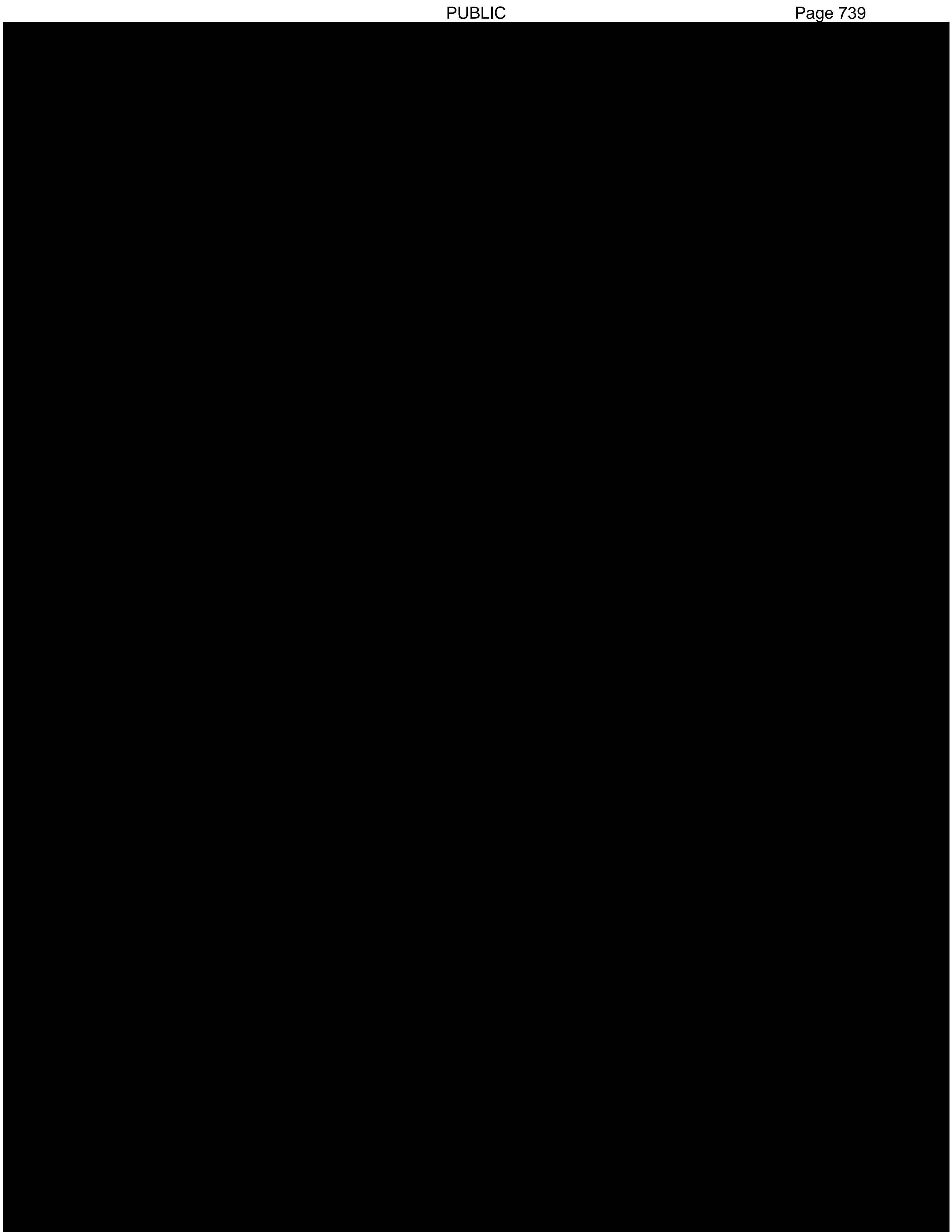

> Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

214 In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

215 Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

216 The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time" (*Hillsdown*, above, at 324; see also *Propane*, above, at para. 127).

217 To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

218 CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

219 Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, *[CONFIDENTIAL]* spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

220 Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

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(i) Likelihood of Entry by One of the Merging Parties

67 In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

68 Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently, there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the time frame for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

69 My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

70 Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: "... the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

71 Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289Competition Trib., at p. 330). The lead time required to enter a market due to barriers to entry ("lead time") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.

72 In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case BOC International Ltd. v. Federal Trade Commission1977557 F.2d 24(2d Cir. 1977), which considered whether a merger violated s. 7 of theClayton Act, 15 U.S.C. § 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (BOC International, at p. 28).

73 The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test based largely on "ephemeral possibilities" (BOC International, at pp. 28-29). An actual potential entrant should be expected to enter in the 'near' future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> ... it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.
>
> (*BOC International*, at p. 29)

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74 Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test. However, in other contexts — for example, those where product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.

75 The timeframe that can be considered must of course be determined by the evidence in any given case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

76 Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.

77 If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

78 It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

79 Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

80 The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

81 The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

- barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(d));
- there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(c));

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PART 7: ENTRY

7.1 A key component of the Bureau's analysis of competitive effects is whether timely entry[44] by potential competitors would likely occur on a sufficient scale and with sufficient scope to constrain a material price increase in the relevant market. In the absence of impediments to entry, a merged firm's attempt to exercise market power, either unilaterally or through coordinated behaviour with its rivals, is likely to be thwarted by entry of firms that

- are already in the relevant market and can profitably expand production or sales;
- are not in the relevant market but operate in other product or geographic markets and can profitably switch production or sales into the relevant market; or
- can profitably begin production or sales into the relevant market de novo.

Conditions of Entry

7.2 Entry is only effective in constraining the exercise of market power when it is viable. When entry is likely, timely and sufficient in scale and scope, an attempt to increase prices is not likely to be sustainable as buyers of the product in question are able to turn to the new entrant as an alternative source of supply.

Timeliness

7.3 The Bureau's assessment of the conditions of entry involves determining the time that it would take for a potential entrant to become an effective competitor in response to a material price increase that is anticipated to arise as a result of the merger. In general, the longer it takes for potential entrants to become effective competitors, the less likely it is that incumbent firms will be deterred from exercising market power. For that deterrent effect to occur, entrants must react and have an impact on price in a reasonable period of time. In the Bureau's analysis, the beneficial effects of entry on prices in this market must occur quickly enough to deter or counteract any material price increase owing to the merger, such that competition is not likely to be substantially harmed.

Likelihood

7.4 When determining whether future entry is likely to occur, the Bureau generally starts by assessing firms that appear to have an entry advantage. While other potential sources of competition may also be relevant, typically the most important sources of potential competition are the following:

- fringe firms already in the market;
- firms that sell the relevant product in adjacent geographic areas;

44 As noted previously, throughout these guidelines, the term "entry" also refers to expansion by existing firms. The same factors that constrain new entrants also often constrain significant expansion by fringe firms, even though in many cases expansion costs for existing firms may be lower than entry costs for a new entrant.

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has

Exception

94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*, et à propos de laquelle le ministre des Finances certifie au commissaire le nom des parties et certifie que cette fusion est dans l'intérêt public ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) d'une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard de laquelle le ministre

Regulatory Barriers

7.9 The types of barriers identified in section 93(*d*) of the Act—namely tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory control over entry—can provide incumbents with absolute cost advantages over potential entrants, presenting considerable and, in some cases, insurmountable impediments to entry.

Sunk Costs

7.10 Substantial sunk costs directly affect the likelihood of entry and constitute a significant barrier to entry. Costs are sunk when they are not recoverable if the firm exits the market. In general, since entry decisions are typically made in an environment in which success is uncertain, the likelihood of significant future entry decreases as the absolute amount of sunk entry costs relative to the estimated rewards of entry increases. The Bureau's assessment of sunk costs also focuses on the time required to become an effective competitor and the probability of success, and whether these factors justify making the required investments.

7.11 New entrants must often incur various start-up sunk costs, such as acquiring market information, developing and testing product designs, installing equipment, engaging personnel and setting up distribution systems. New entrants may also face significant sunk costs owing to the need to

- make investments in market-specific assets and in learning how to optimize the use of these assets;
- overcome product differentiation-related advantages enjoyed by incumbents; or
- overcome disadvantages presented by the strategic behaviour of incumbents.

7.12 These potential sources of sunk costs can create significant impediments to entry when they require that potential entrants factor greater costs into their decision-making relative to incumbents who can ignore such costs in their pricing decisions because they have already made their sunk cost commitment.

7.13 The investment required to establish a reputation as a reliable or quality seller is also a sunk cost, constituting a barrier to entry when it is an important element in attracting buyers, particularly in industries in which services are an important element of the product. Under these circumstances, the time to establish a good reputation may make profitable entry more difficult, and therefore delay the competitive impact that an entrant may have in the marketplace.

7.14 Long-term exclusive contracts with automatic renewals, rights of first refusal, most favoured customer or "meet or release" clauses or termination fees may constitute barriers to entry. Contracts with attributes that limit buyer switching may make it difficult for firms to gain a sufficient buyer base to be profitable in one or more markets (even when barriers to entry in the industry are otherwise relatively low) and can thus make entry unattractive. The deterring effects of such contracts are

within Canada but that the tallow products are exported. It is noted that there is an abundant supply of alternative non-animal based products which compete with the tallows and which are being promoted as preferable to the animal-based products.

105 In general, then, the industry is one in which there has been and is a decreasing supply of quality renderable materials, costs have been rising and there is little ability to control the price at which the finished products (tallow and meal) are sold. Renderers have been increasing their prices to customers, for example, by charging for the pick-up of materials which previously had been collected without charge and by picking up but ceasing to pay for materials which previously had been purchased. While some of the witnesses see these changes as resulting from the merger, the evidence indicates that such is not the case. These changes are a result of the increasing costs and decreasing revenues which the renderers are experiencing. Rendering is a necessary service and thus renderers are not likely to disappear completely from an urban area. The pressures on the industry, however, have led to increasing consolidation. [60]

D. Barriers to Entry

106 In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level.

107 As has been noted above, whether one classifies a firm which has not previously been active as a competitor to the merged firm as a competitor in the relevant market or as a potential entrant whose existence restrains the merged firm from levying supra-competitive prices is not of great importance. The respondents argue that entry can be defined in a number of ways: to include new firms entering the market, firms expanding their activities into the relevant market from another geographic area, local firms beginning to offer the relevant product (which did not do so before), and firms already in the relevant market (sometimes called "fringe firms") expanding their output. [61] The Tribunal has chosen not to classify the expansion of output by existing firms, be they "fringe firms" or major competitors, as entry decisions. The Tribunal considers entry to be either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area (e.g., the Tribunal has already indicated that it considered Lomex to be attempting entry) or local firms which previously did not offer the product in question commencing to do so (e.g., deadstock operators or slaughterhouses commencing to also operate a rendering facility). [62]

108 The Director has alleged that barriers to entry into the relevant market consist of: the environmental and regulatory requirements which must be met; the difficulty which exists with respect to acquiring sufficient supplies to become viable; the sunk costs involved in starting a rendering plant.

(1) Environmental and Regulatory Constraints

109 There is no doubt that provincial Ministry of the Environment, Ministry of Agriculture and Food and municipal approvals are needed to start a rendering plant and that some locations are simply not available for this use. Many sites in urban areas or sites close to urban areas are not likely to be available. Environmental and regulatory approvals can more easily be obtained, however, if an appropriate site is chosen, for example, a site in an industrially-zoned area of a large municipality. Mr. Kosalle testified that the Hamilton Harbour Commission has several sites suitable for rendering facilities and that the Hamilton Harbour Commission is amenable to leasing a site for such a facility. These sites are particularly attractive as they provide access to a wharf which allows for the economical transportation of finished products. [63]

110 Reference was made to the fact that Central By-Products had been delayed in opening its newly constructed facility as a result of the need to comply with environmental requirements. Central By-Products commenced construction of its facility in February 1990 without obtaining prior environmental approval. Professional engineers were not retained to design air and water treatment until after construction had been started. Ministry of the Environment approval for the new plant is expected shortly. [64] The experiences of that firm demonstrate the difficulties which an inexperienced entrant into the market can encounter.

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111 The Tribunal does not put much weight on the length of time Rothsay took in trying to locate a new site when faced with the expropriation of its Toronto plant. There would be good reasons for Rothsay to try to retain its Toronto location for as long as possible. The Tribunal is of the view that *de novo* entry would likely take approximately 18 months to accomplish. At the same time, entry by a supplier from an adjacent geographic market through expansion of its collection area would not entail this difficulty. Also, forward integration on a small scale by the larger slaughterhouses would likely be less difficult if land were available at the site and the slaughterhouse already located in an appropriately zoned area.

(2) Sufficient Supplies

112 Insofar as obtaining sufficient supplies are concerned, the amount of material needed will depend on the size of the plant in question. Central By-Products clearly is of the view that 113 metric tonnes is sufficient.[65] A slaughterer or deadstock operator who establishes a rendering plant at the same location as his slaughtering or deadstock operation, will incur less costs in rendering material produced therefrom than a non-integrated renderer since no collection costs will be involved. Fearman, for example, has been operating a rendering plant for its captive pork products having a capacity of 450 metric tonnes per week. Schneider has a capacity of approximately 800 metric tonnes per week. Banner which has no captive material operates a plant having a capacity of approximately 510 metric tonnes per week.

113 Better Beef and Quality Meat Packers are examples of slaughterers with sufficient supply to establish at least a small scale rendering operation. They respectively produce approximately 900 and 1,000 metric tonnes of renderable material per week. Groups of smaller suppliers might also have the requisite minimum volume to justify construction of a rendering plant.[66]

114 Such enterprises, of course, would not be able to establish a rendering facility of the scale of Orenco or Rothsay. What is more, given the contracting nature of the industry one can question whether or not much entry is in fact likely to occur as a result of forward-integration by slaughterers such as Better Beef and Quality Meat Packers or by a group of smaller companies. But this is clearly more than just a mere possibility. Central By-Products has taken this initiative recently and insofar as poultry is concerned, Maple Lodge Farms Ltd appears to have done so. The test as to whether potential entry will discipline the market is whether such entry is likely to occur, not merely whether it could occur.

(3) Sunk Costs

115 Insofar as sunk costs are concerned, there is little evidence as to the proportion of the investment which is sunk in a rendering plant. There is evidence, however, that the total investment required can vary considerably depending on the size of the facility. Central By-Products has recently built a plant in Hickson, Ontario at a cost of $1.1 to $1.2 million. Ray Bowering is a small collector who originally sold material to Phil's Recycling. Ray Bowering built his own plant which can render 23 metric tonnes of material per week.[67] At the other end of the scale, however, Rothsay has estimated that $10 million would be reasonable as an estimate for the cost of a new plant.[68] While there is no direct evidence concerning the proportion of costs which would be sunk, it is clear that some must be involved, for example, the costs of obtaining regulatory approvals, the specialized equipment and building required which on resale would command a lower price than that for which they were bought.

(4) Conclusion

116 The extent of the barriers to entry depends upon the would-be-entrant. They are moderately high for a *de novo* entrant. The regulatory and environmental approvals which are required together with the construction time involved, as has been noted, would probably mean that approximately 18 months would be required to effect entry. In addition, the obtaining of sufficient volumes, unless one purchased such from an existing competitor in the market, as well as the fact that some sunk costs would be involved would discourage such entry. Indeed, given the state of this market one would not expect *de novo* entry.

117 As has been noted, entry on a small scale by forward integration of the larger slaughterhouses or groups thereof cannot be dismissed as a possible source of entry particularly if they are located in an area where such industry is accepted and where

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> Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

214 In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

215 Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

216 The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time" (*Hillsdown*, above, at 324; see also *Propane*, above, at para. 127).

217 To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

218 CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

219 Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, *[CONFIDENTIAL]* spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

220 Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

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169 The Commissioner argues therefrom that high capital costs are themselves a barrier to entry, ostensibly on the basis that few people had the required financial resources to enter the industry. Competitors in the industry testified to the effect that costs of entry may vary.

It cost Donald J. Edwards $935,000 to construct EDPRO Energy Group Inc.'s facility in London, Ontario, excluding the purchase of tanks for customer use (transcript at 6:1072, 1073 (6 October 1999)). Evidence was also submitted indicating that costs associated with meaningful entry might vary upon the end-use served.

170 The Tribunal does not accept that high capital costs are inherently a barrier to entry. If a potential entrant's equity is insufficient to cover capital costs of entry at minimum efficient scale, then the balance can be obtained through credit markets providing that lenders are satisfied that the project is viable. In the event that lenders deny credit because of their assessment of the project, their reluctance to lend does not indicate that capital is not available. In response to a question from the Tribunal, Professor Schwindt stated that high costs, per se, did not constitute an entry barrier.

171 On this latter point, the Commissioner accepts that high capital costs are not, in absolute dollars, an issue relevant to entry; rather, the relevant costs to be considered are the sunk costs because they represent what the entrant will lose in the event of failure.

(b) Sunk Costs

172 It is generally agreed that the portion of costs that are not recoverable in the event of exit (the sunk costs) can, where they are significant, constitute a barrier to entry. The Commissioner suggests that the retail propane market is characterized by significant sunk costs. There is a dispute between the Commissioner and the respondents as to the proportion of the costs that can be qualified as sunk costs. The extent of these costs depends on a variety of factors.

173 In the propane industry, the sunk costs would include the market development costs, site-preparation costs, and the discounts to purchase price that would be incurred on asset disposals. Mr. Milne of IOL estimated that 50 percent of its costs were non-recoverable when IOL entered the Camrose market. Mr. Katz from AmeriGas indicated that 30 to 80 percent of investment in propane operations would be non-recoverable. As well, salaries and other operating costs incurred to the date of exit would also be non-recoverable. The respondents' experts, Cole Valuation Partners Limited and A.T. Kearney (expert affidavit of C.O'Leary and E. Fergin (17 August 1999): confidential exhibit CR-112), recognize at page 202 of their report that certain costs are sunk. For example, they assume decommissioning costs of $50,000 per site for locations to be closed, which costs would be non-recoverable.

174 The Commissioner's experts, Professors Schwindt and Globerman, emphasize the sunk cost of time required for a new entrant to develop a reputation for reliability, as well as for obtaining the necessary permits to install storage capacity. They also characterize at page 49 of their report (exhibit A-2056) as sunk the cost penalty of operating below minimum efficient scale.

175 The Tribunal is satisfied that sunk costs are meaningful in the industry and constitute a significant obstacle to a new entrant.

(7) Evidence on Entry

176 The respondents seek to demonstrate that barriers to entry are low by presenting evidence on actual entry over time by independent firms. The respondents have chosen to rely, for the most part, on evidence of growing market shares of independent firms rather than presenting evidence contrary to each of the Commissioner's submissions regarding barriers to entry.

177 The Commissioner submits that barriers to entry are high and that small scale entry is not an unusual event, but that entry occurs at a relatively low scale and expansion of entrants appears to be both modest and slow. Professors Schwindt and Globerman submit at page 53 of their report (exhibit A-2056) that small scale entry has occurred in the marketplace and that there is considerable turnover or "churn" among small scale entrants. They cite the membership list of the Propane Gas Association of Canada and state that there were 41 new memberships from 1994 to May 1999. They also find that 22 of those members

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Regulatory Barriers

7.9 The types of barriers identified in section 93(*d*) of the Act—namely tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory control over entry—can provide incumbents with absolute cost advantages over potential entrants, presenting considerable and, in some cases, insurmountable impediments to entry.

Sunk Costs

7.10 Substantial sunk costs directly affect the likelihood of entry and constitute a significant barrier to entry. Costs are sunk when they are not recoverable if the firm exits the market. In general, since entry decisions are typically made in an environment in which success is uncertain, the likelihood of significant future entry decreases as the absolute amount of sunk entry costs relative to the estimated rewards of entry increases. The Bureau's assessment of sunk costs also focuses on the time required to become an effective competitor and the probability of success, and whether these factors justify making the required investments.

7.11 New entrants must often incur various start-up sunk costs, such as acquiring market information, developing and testing product designs, installing equipment, engaging personnel and setting up distribution systems. New entrants may also face significant sunk costs owing to the need to

- make investments in market-specific assets and in learning how to optimize the use of these assets;
- overcome product differentiation-related advantages enjoyed by incumbents; or
- overcome disadvantages presented by the strategic behaviour of incumbents.

7.12 These potential sources of sunk costs can create significant impediments to entry when they require that potential entrants factor greater costs into their decision-making relative to incumbents who can ignore such costs in their pricing decisions because they have already made their sunk cost commitment.

7.13 The investment required to establish a reputation as a reliable or quality seller is also a sunk cost, constituting a barrier to entry when it is an important element in attracting buyers, particularly in industries in which services are an important element of the product. Under these circumstances, the time to establish a good reputation may make profitable entry more difficult, and therefore delay the competitive impact that an entrant may have in the marketplace.

7.14 Long-term exclusive contracts with automatic renewals, rights of first refusal, most favoured customer or "meet or release" clauses or termination fees may constitute barriers to entry. Contracts with attributes that limit buyer switching may make it difficult for firms to gain a sufficient buyer base to be profitable in one or more markets (even when barriers to entry in the industry are otherwise relatively low) and can thus make entry unattractive. The deterring effects of such contracts are

> In the shot [*sic*] term, competitive threats may be limited. Currently 58% of Superior customers are *not aware* of an alternative propane supplier on an unaided basis, and 74% say they are not familiar with an alternative.

156 The respondents submit that the existence of a "proven track record", as in the case of Superior and ICG, is not an impediment to competition; rather, it is the natural result of competition.

157 Loyalty is a related consideration. The Commissioner presented witnesses from cooperatives and credit union organizations whose sellers offer propane and give dividends to member customers based on such purchases. These customers have an incentive to continue to be loyal to their propane supplier. Based on the evidence submitted by factual witnesses, the Tribunal accepts that reputation is an important feature of propane suppliers to which customers attach value. It appears that this is particularly true for major account customers whose factual witnesses testified that the reputation of the companies capable of delivering propane is an important factor in their purchasing decision. The Tribunal notes that the time to gain a reputation may make profitable entry more difficult and hence delays the competitive impact that an entrant would have in the marketplace.

(4) Maturity of Market

158 The Commissioner called witnesses who testified that the market was mature and that the demand was flat (see testimony of John A. Osland from Mutual Propane, transcript at 6:833 (4 October 1999) and testimony of Luc Sicotte from Gaz Métropolitain, transcript at 18:3148 (25 October 1999)). Mr. Schweitzer testified that it was a relatively mature market (transcript at 31:5920 (3 December 1999)).

159 The Commissioner's experts, Professors Schwindt and Globerman, testified on the competitive impact of this mature market at page 48 of their report (exhibit A-2056):

> ... the industry is mature and has experienced slowly declining demand in recent years. As noted in the *Merger Enforcement Guidelines*, entry into start-up and growth markets is less difficult and time consuming than it is in relation to mature market.

160 In light of the evidence submitted, the Tribunal is satisfied that the traditional retail propane market place can be qualified as mature.

(5) Access to Propane Supply

161 The Commissioner refers to the opinion of many competitors that the ability to access propane supply is a "critical barrier to entry/expansion". Evidence in this regard consists of the disadvantages that independent firms face in obtaining supply that Superior and ICG do not face. For example, the respondents have established supply relationships and have invested in storage and transportation facilities that provide cost advantages over rivals who may be restricted to local pick-up from refinery racks. These arrangements are apparently valuable for serving branches particularly distant from refinery sites. Superior and ICG also have "scale demand" for propane which gives them an edge over traditional patterns of supply.

162 One of the Commissioner's experts, Terry S. Kemp, observes at pages 15 and 16 of his report (expert affidavit of T.S. Kemp (18 August 1999): exhibit A-2070) that:

> Sup-ICG with the exception of a few selective refineries, will have access to supply at virtually every producing location in the country. Sup-ICG will thus have an implied supply advantage and flexibility that cannot be matched by any other retail propane competitor.
>
> Sup-ICG should be able to selectively choose the most advantageous supply locations and drop others, thereby extracting the most out of supply arrangements. Sup-ICG will also be in a position to leverage supply from location to location for trades and exchanges and, will in essence, be able to create preferential access to supply and location adjustments. These advantages can be utilized in a number of ways:
>
> - Pressuring supplier price location arrangements

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Regulatory Barriers

7.9 The types of barriers identified in section 93(*d*) of the Act—namely tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory control over entry—can provide incumbents with absolute cost advantages over potential entrants, presenting considerable and, in some cases, insurmountable impediments to entry.

Sunk Costs

7.10 Substantial sunk costs directly affect the likelihood of entry and constitute a significant barrier to entry. Costs are sunk when they are not recoverable if the firm exits the market. In general, since entry decisions are typically made in an environment in which success is uncertain, the likelihood of significant future entry decreases as the absolute amount of sunk entry costs relative to the estimated rewards of entry increases. The Bureau's assessment of sunk costs also focuses on the time required to become an effective competitor and the probability of success, and whether these factors justify making the required investments.

7.11 New entrants must often incur various start-up sunk costs, such as acquiring market information, developing and testing product designs, installing equipment, engaging personnel and setting up distribution systems. New entrants may also face significant sunk costs owing to the need to

- make investments in market-specific assets and in learning how to optimize the use of these assets;
- overcome product differentiation-related advantages enjoyed by incumbents; or
- overcome disadvantages presented by the strategic behaviour of incumbents.

7.12 These potential sources of sunk costs can create significant impediments to entry when they require that potential entrants factor greater costs into their decision-making relative to incumbents who can ignore such costs in their pricing decisions because they have already made their sunk cost commitment.

7.13 The investment required to establish a reputation as a reliable or quality seller is also a sunk cost, constituting a barrier to entry when it is an important element in attracting buyers, particularly in industries in which services are an important element of the product. Under these circumstances, the time to establish a good reputation may make profitable entry more difficult, and therefore delay the competitive impact that an entrant may have in the marketplace.

7.14 Long-term exclusive contracts with automatic renewals, rights of first refusal, most favoured customer or "meet or release" clauses or termination fees may constitute barriers to entry. Contracts with attributes that limit buyer switching may make it difficult for firms to gain a sufficient buyer base to be profitable in one or more markets (even when barriers to entry in the industry are otherwise relatively low) and can thus make entry unattractive. The deterring effects of such contracts are

ongoing obligations of a landfill operator, are outlined in the February 2010 document, *Standards for Landfills in Alberta*. This document is attached to this witness statement as Exhibit "B" at pages 17-19.

17. Registration is a less stringent process available to landfills that will accept and disposes of less than 10 000 tonnes per year of waste. The AEP generally considers registration to be a process intended for smaller, municipal landfills. AER Directive 99-01 and Directive 058 mandate that certain wastes generated from an oilfield must only be disposed in landfills meeting certain strict liner requirements. Landfills under registration are not required to meet this design requirement. These liners are not required by the registration process and are expensive to build. Investing in such a liner system is unlikely worthwhile for a small registered landfill. For that reason, the AEP would typically direct any prospective landfill operator who intends to accept oilfield waste toward the approval process, rather than registration.

18. Prior to seeking AEP approval, a prospective landfill must obtain a local development permit and submit a disclosure plan to the AEP. Depending on local land zoning, this typically requires that the landfill developer engage with municipal governments and communities to find a willing host community for the landfill. The disclosure plan must contain the applicant's proposed process for public consultation, how they intend to address concerns arising from consultations, and their proposed process for conducting the site's technical investigations as required in the upcoming formal application.

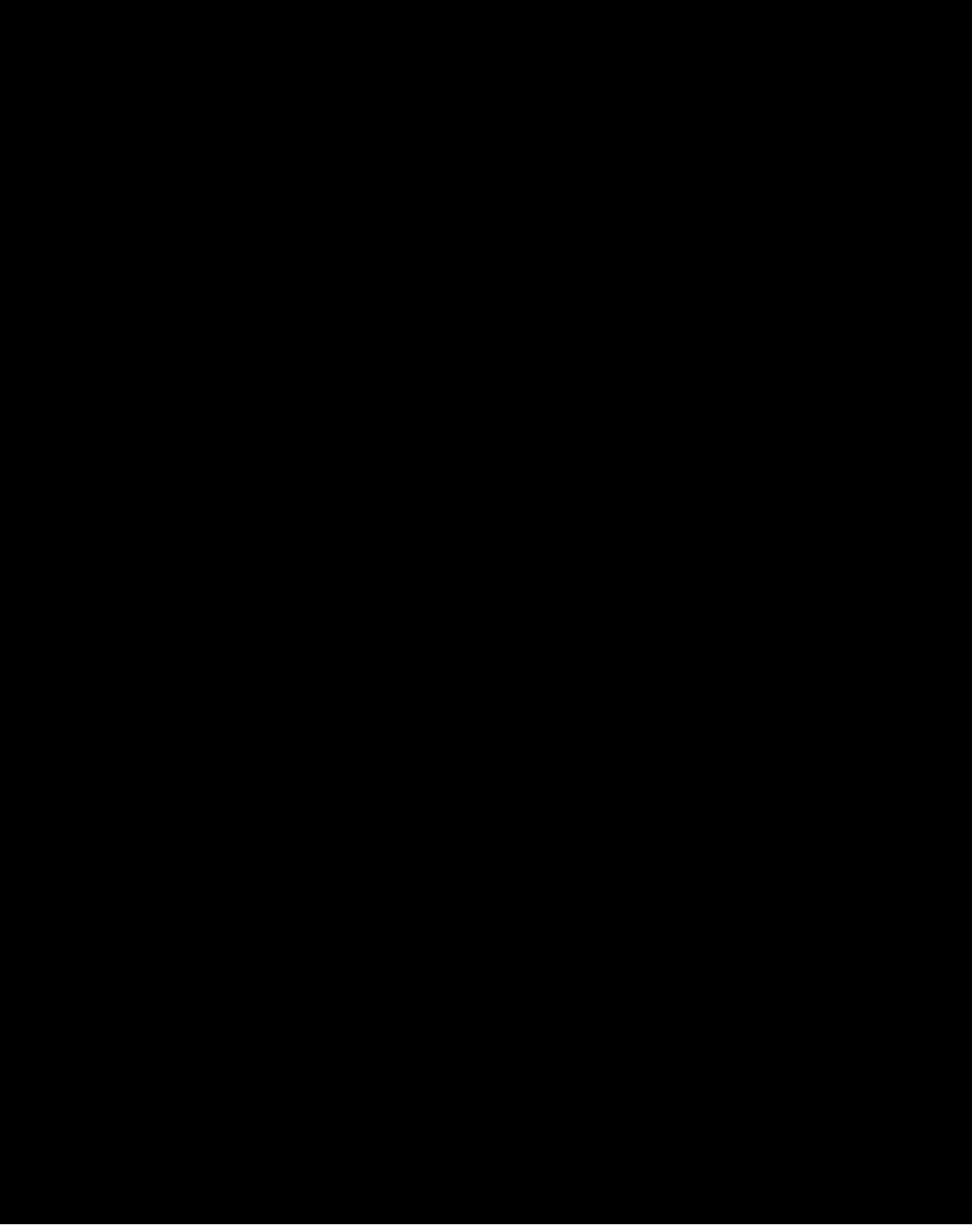
19. To be considered for approval, the prospective landfill operator must submit a formal application to the AEP. The form, *Approval Or Registration Of A Class II Or Class III Landfill Under The Environmental Protection And Enhancement Act*, outlines the AEP's requirements for applications concerning prospective Class II and III landfills in Alberta. This form is attached to this witness statement as Exhibit "D".

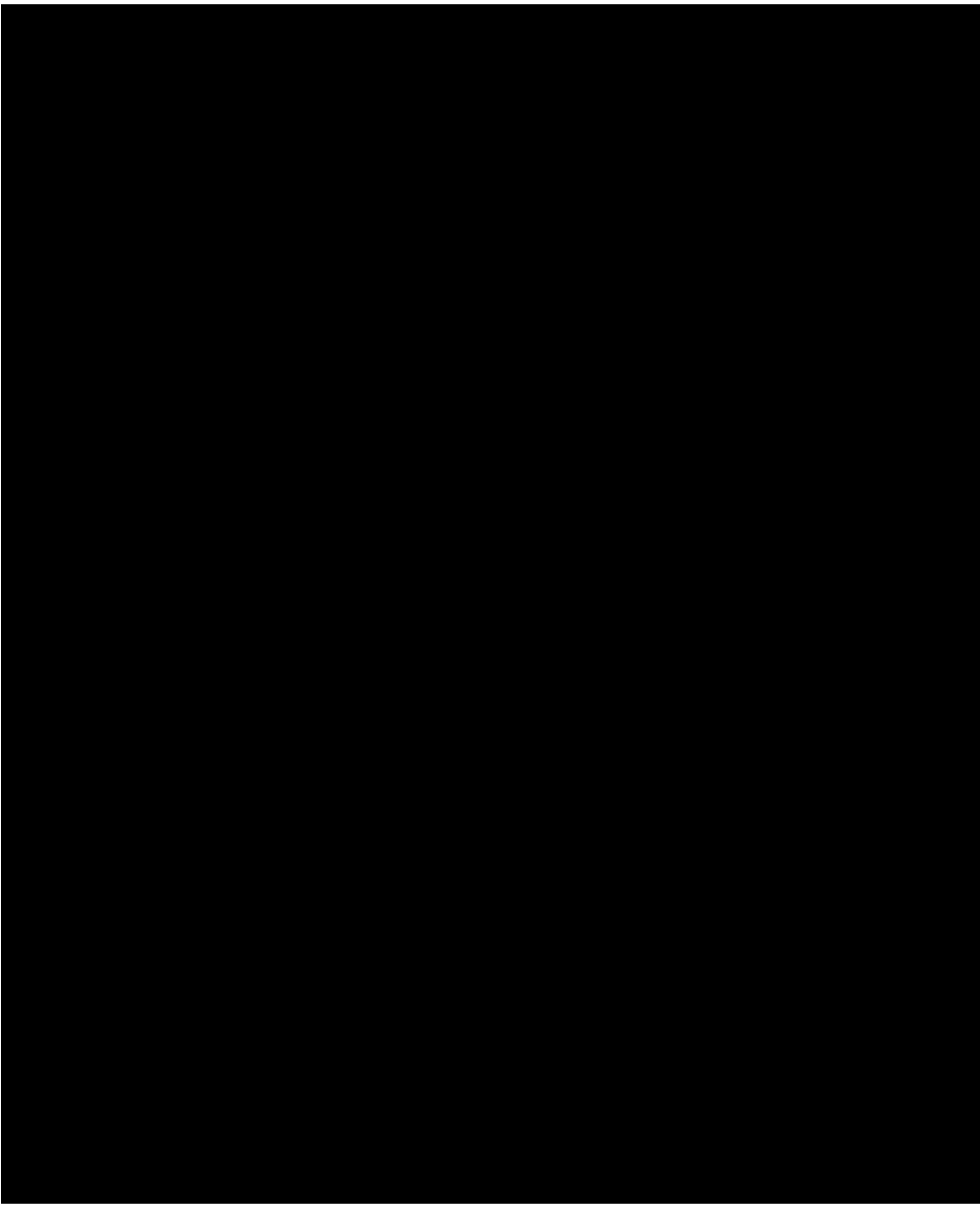
20. For example, among other requirements, a complete application must contain siting assessments of the site's geology and hydro-geology; an engineering report which describes its expected waste streams; and detailed design plans regarding how the facility will be constructed, operated, monitored, and eventually closed.

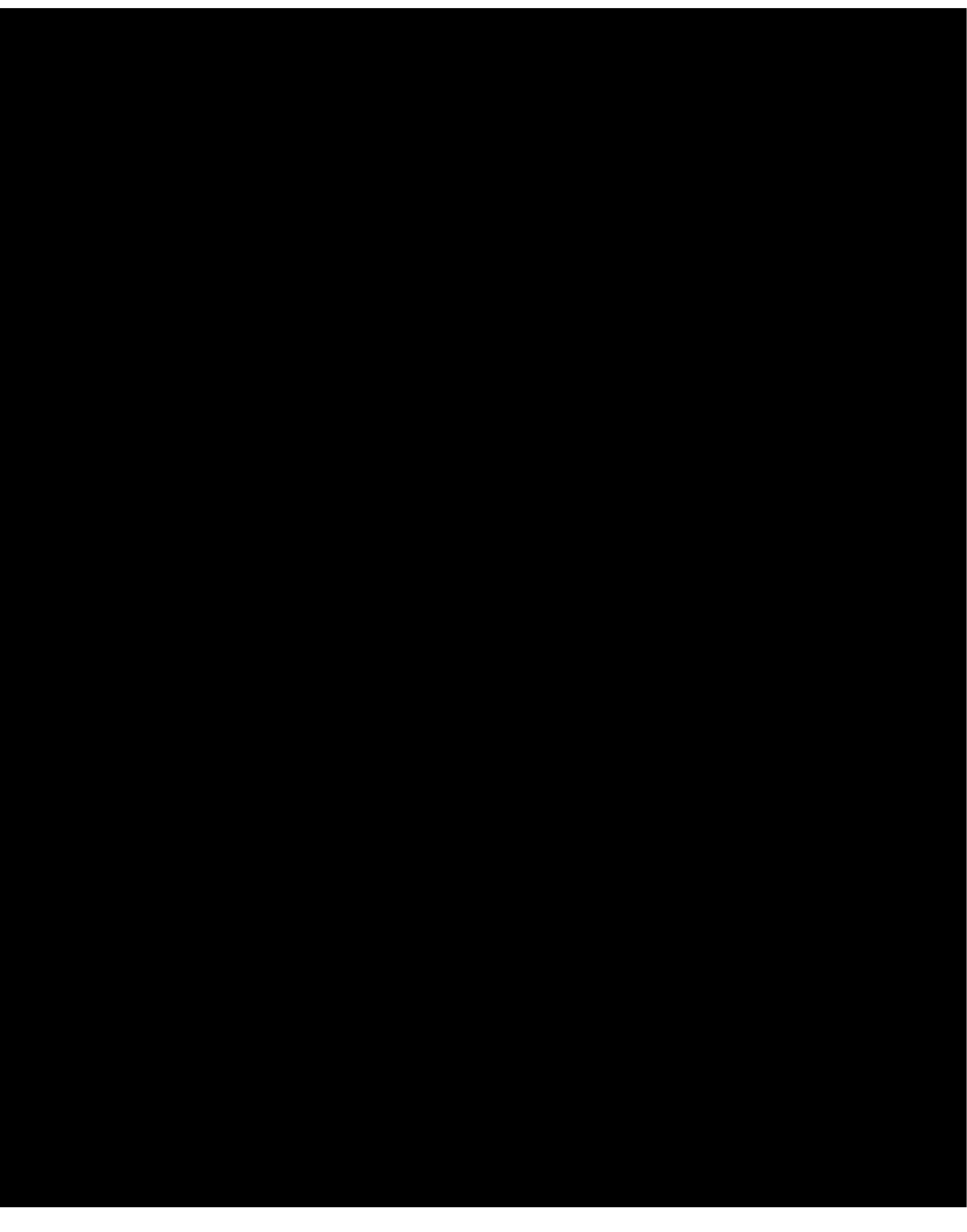
21. The geological requirements for this application process represent a significant limitation on where a landfill may be constructed. For example, *Standards for Landfills in Alberta* requires the proposed site contain at least ten metres of clay underneath the landfill's liner for the application to be considered.

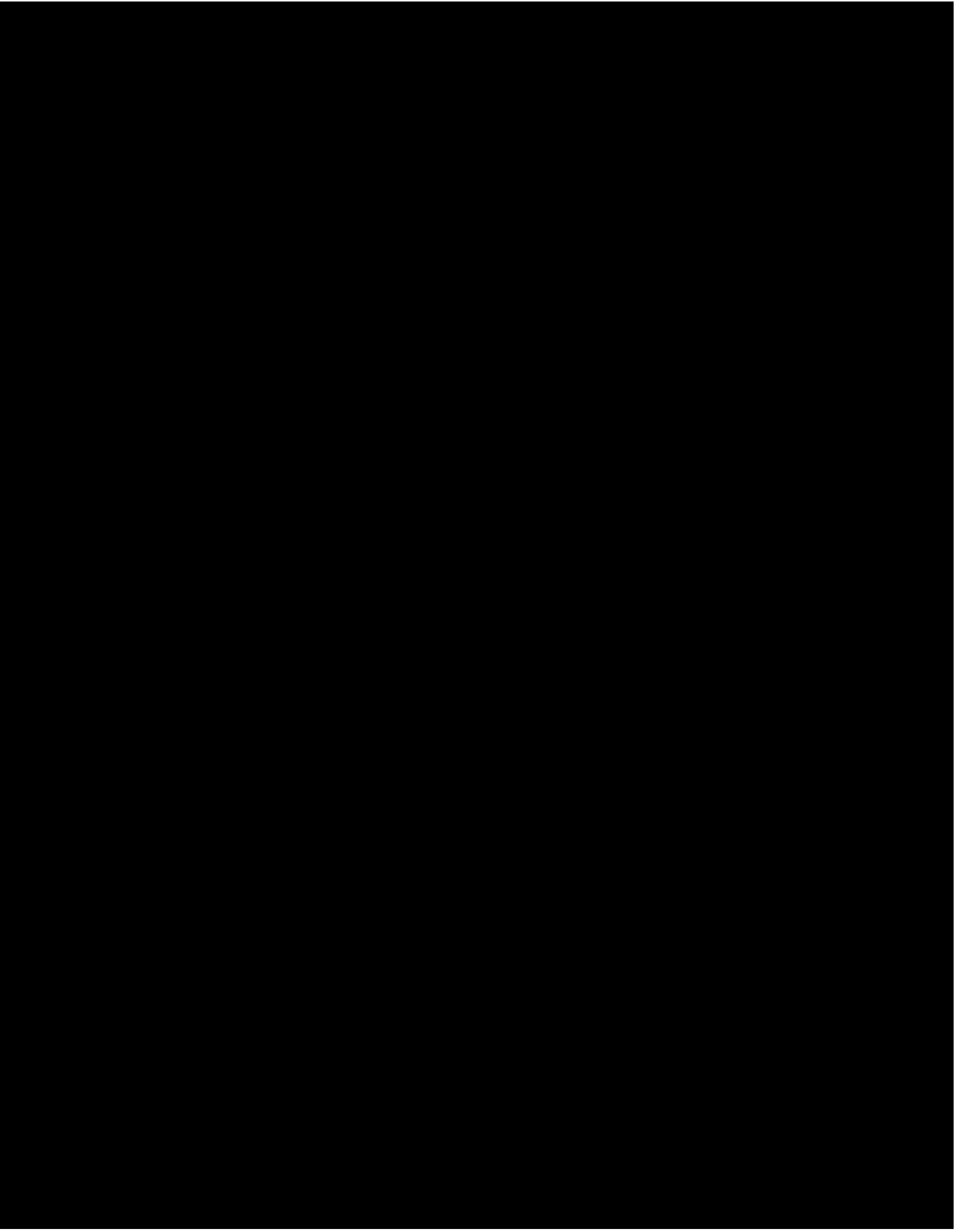
22. Public support is often a significant barrier or delay to the construction of a new landfill. During multiple stages of process, such as when seeking a local development permit, the applicant is expected to engage with the communities near the landfill. The engagement consultations can identify objections from community members who prefer not to have a landfill constructed nearby. This was the case when Secure proposed to build a Class II Industrial landfill near Conklin, AB in 2019. The landfill did not have sufficient local support from the community, and was not completed as a result.

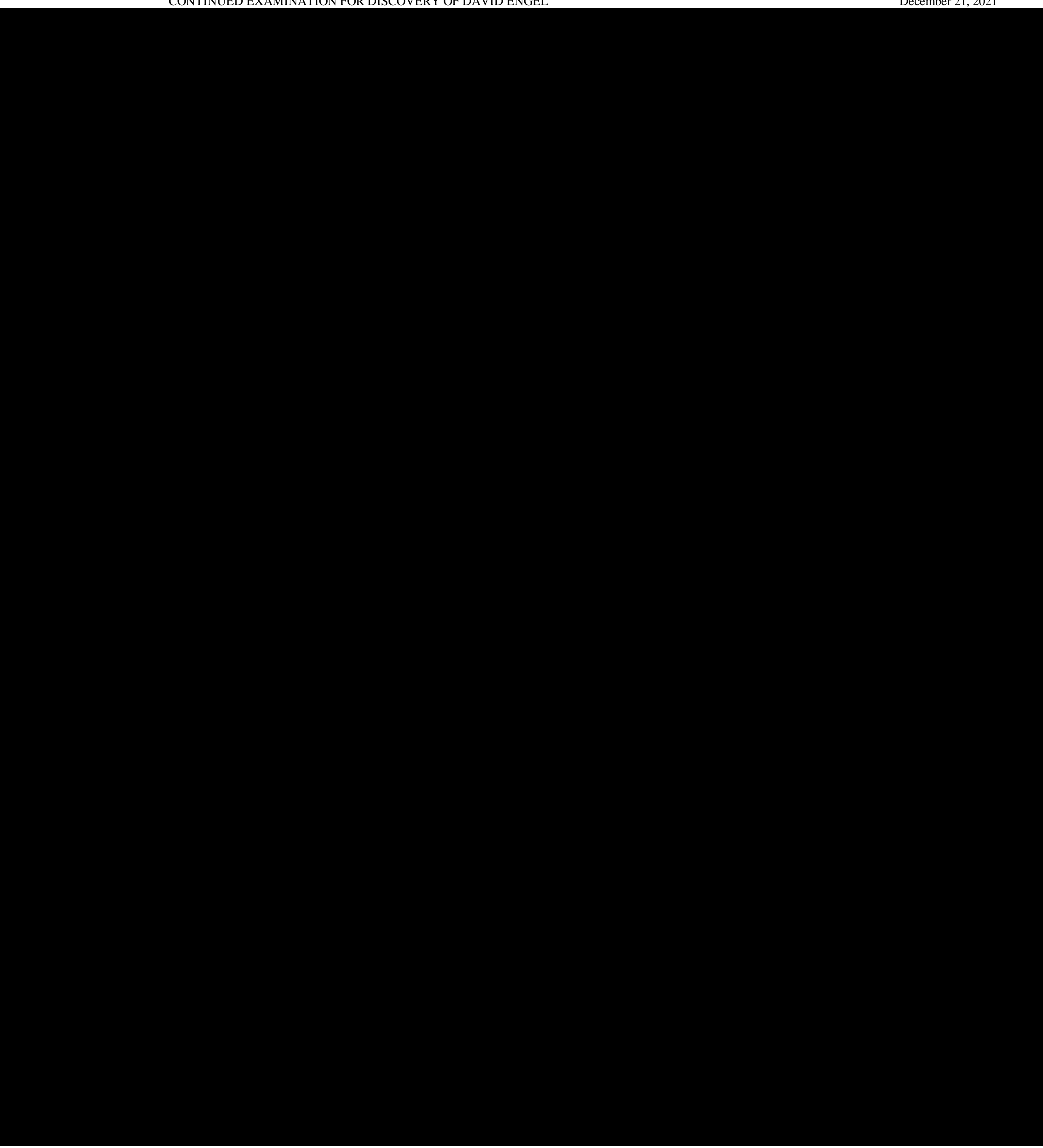
23. If all documentation is complete and satisfactory when submitted to the AEP, an application for a Class II landfill can be fully processed within a year. However, significant delays often arise during this process. Separately from the initial public consultations, once certain administrative procedures have been completed, community members may submit statements of concern to the AEP. If the application is approved, this then allows these community members to appeal the AEPs decision to Environmental Appeal Board (http://www.eab.gov.ab.ca/).











25 720 Q. Mr. Engel, it is our

1 understanding that, around April 2020, the
2 community of Conklin successfully opposed Secure's
3 appeal of the refusal by the regional municipality
4 of Secure's Conklin development. Do you agree
5 with that?
6 A. Yes.
7 721 Q. Okay. Mr. Engel, it is
8 also our understanding that Secure is no longer
9 pursuing a landfill at Conklin. Is our
10 understanding correct?
11 A. Correct.

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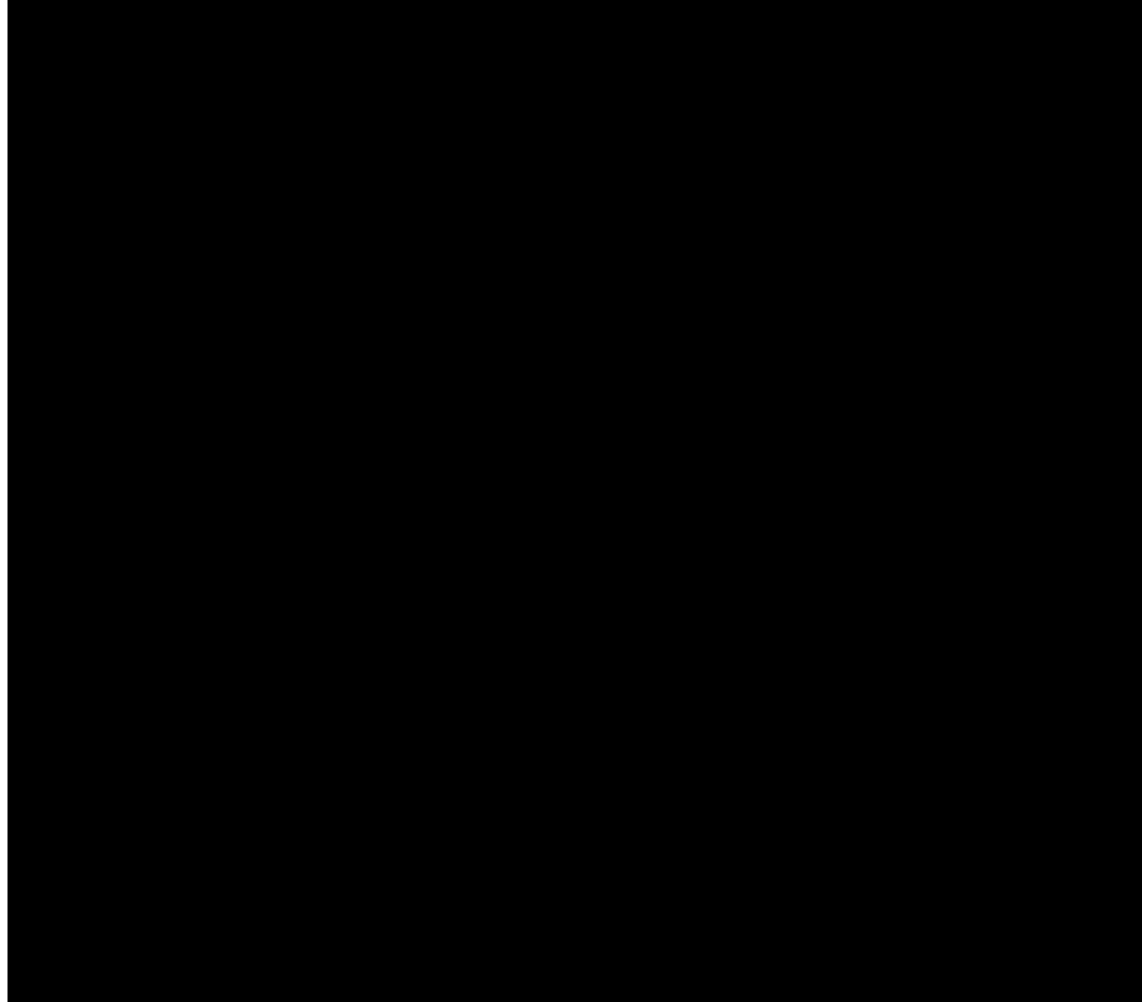
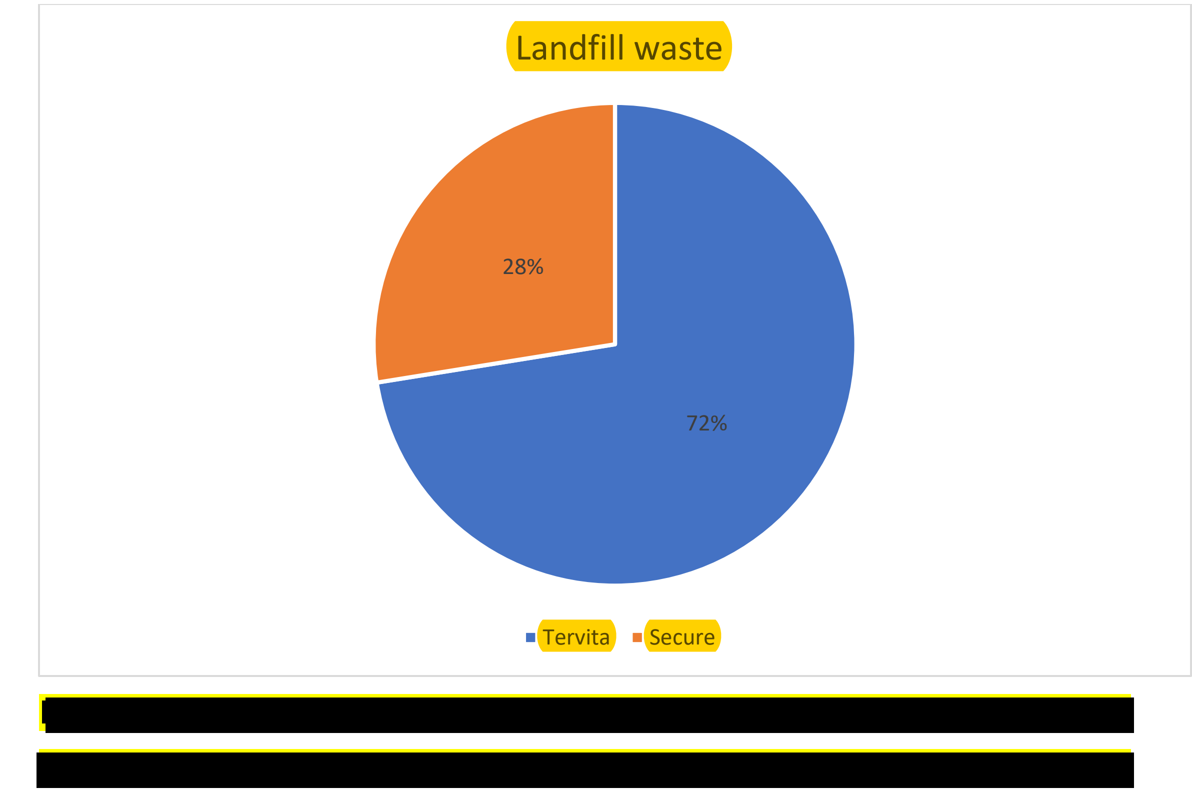
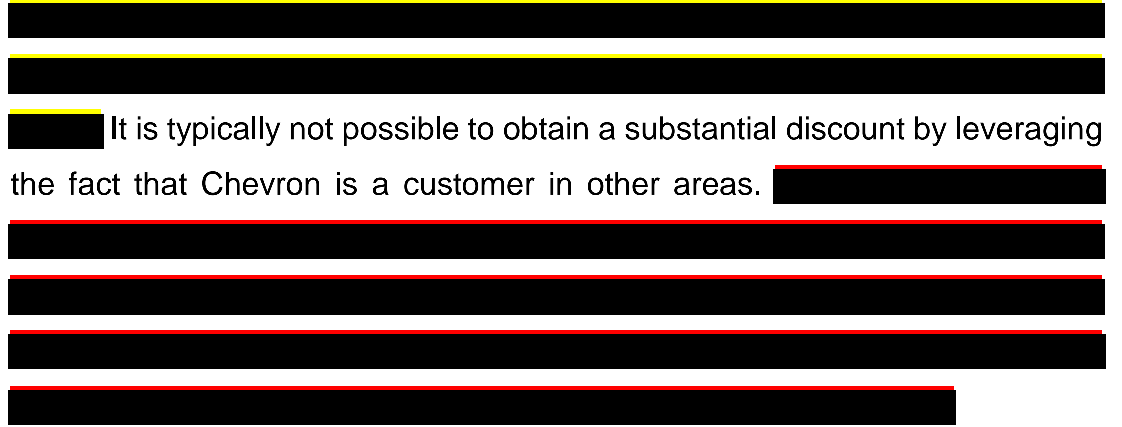


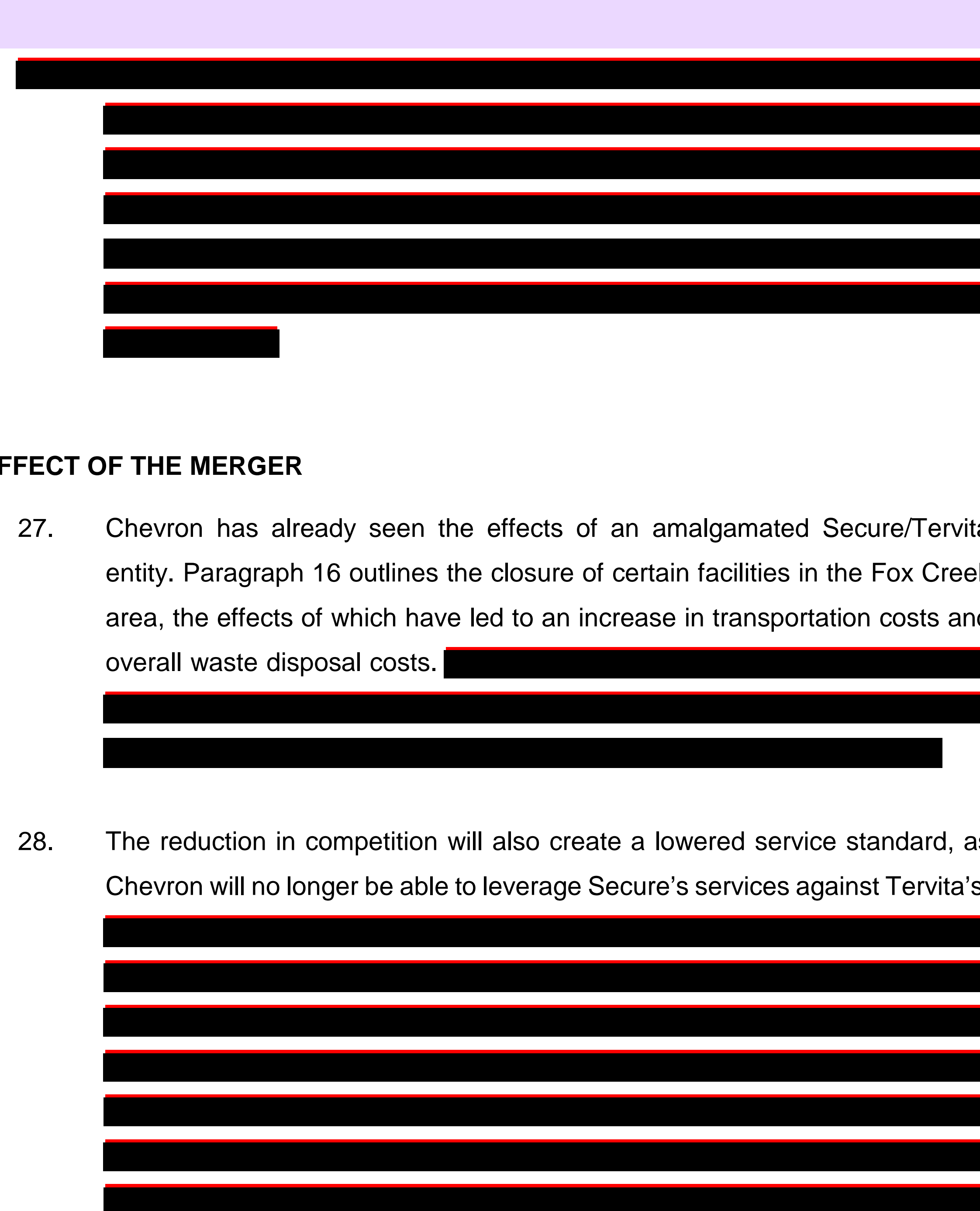
17 recently -- I think it was in the summer -- there
18 was a landmark Supreme Court decision with regards
19 to land rights in British Columbia, that basically
20 turned the entire industry up there on its head,
21 both from a permitting new sites as well as
22 developing even existing permits. So we have seen
23 a lot of activity move out of the area. So that
24 is the First Nations piece. It is a huge wild
25 card right now.



24.  It is typically not possible to obtain a substantial discount by leveraging the fact that Chevron is a customer in other areas.

COMPANY'S DISPOSAL FACILITIES

25. Currently, Chevron does not operate any of its own TRDs or landfills. Chevron's primary business is oil and gas exploration and it does not have plans to build any such facilities. There are many factors that make it difficult to internalize this type of business. For example, receiving the necessary permits to begin creation of a landfill can take between 24-36 months, even just finding a geologically suitable location can be very difficult, and initial



estimates of the capital expenditures required to build a TRD/FST or landfill indicate it would not be economically feasible.

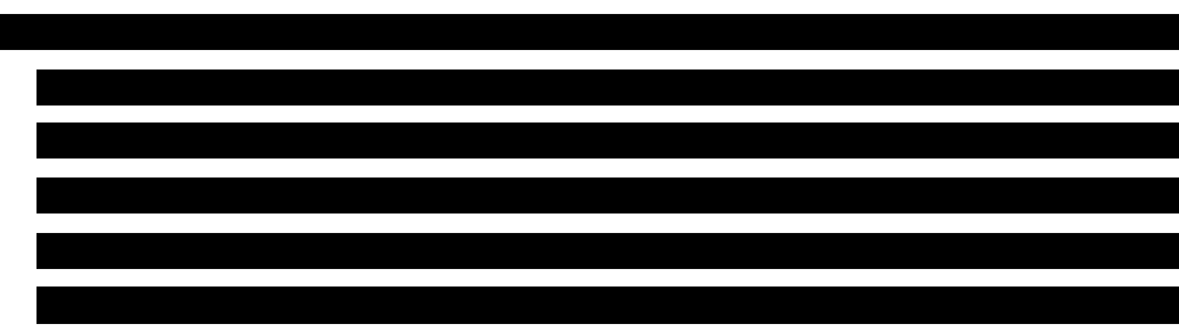
EFFECT OF THE MERGER

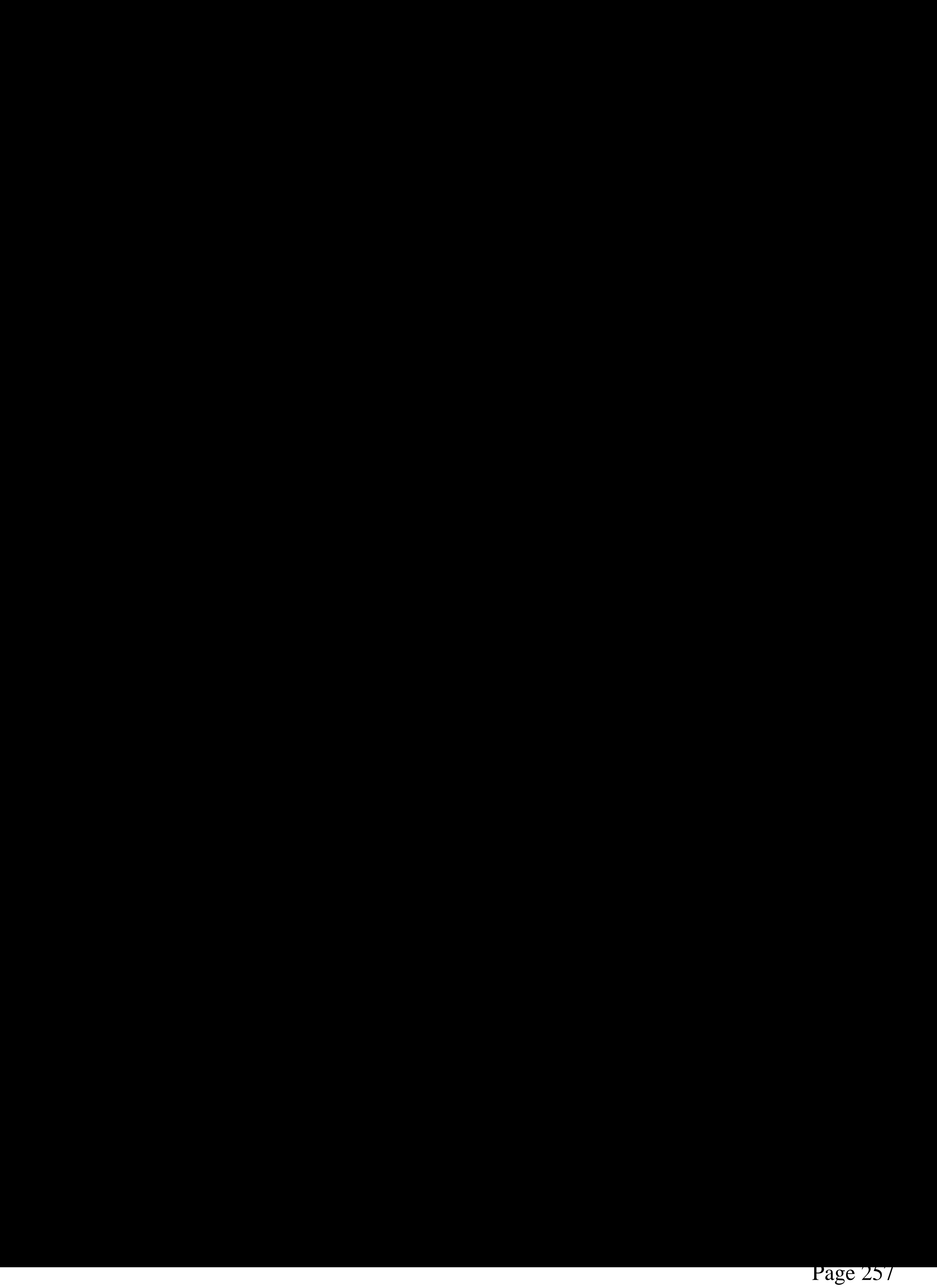
27. Chevron has already seen the effects of an amalgamated Secure/Tervita entity. Paragraph 16 outlines the closure of certain facilities in the Fox Creek area, the effects of which have led to an increase in transportation costs and overall waste disposal costs.

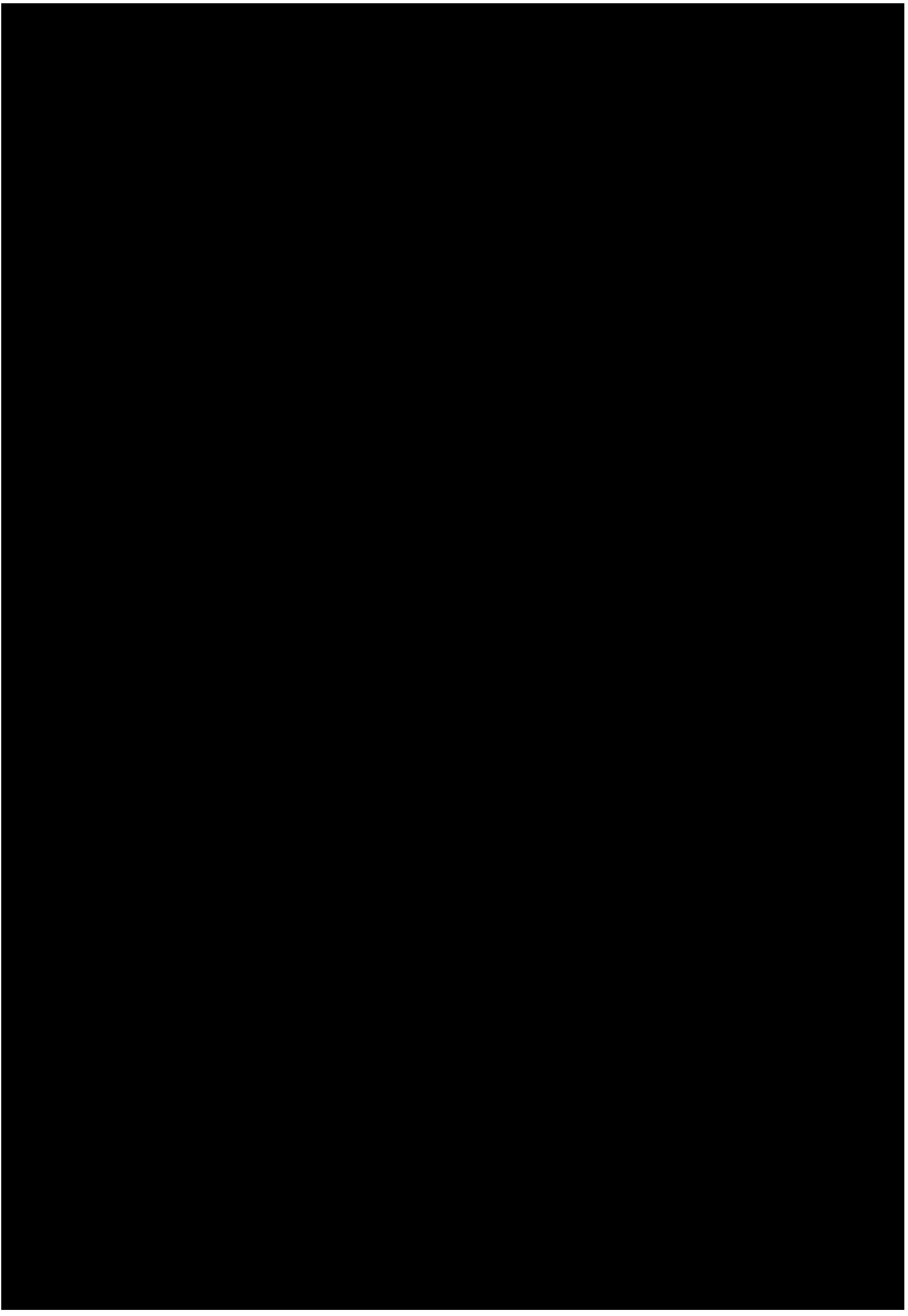
28. The reduction in competition will also create a lowered service standard, as Chevron will no longer be able to leverage Secure's services against Tervita's.

CONONCOPHILLIPS' DISPOSAL FACILITIES

20. ConocoPhillips currently has very basic in-house disposal capabilities at Surmont and can recycle some waste and water. However, most waste produced, including caustic waste, desand waste, and contaminated waste, must go to third party facilities.







1 each individual site.
2 1520 Q. Right. But you would
3 agree with me that is still accurate today?
4 A. Yes.
5 1521 Q. Okay. If we look at the
6 second bullet, it says:
7 "Timelines from landfill
8 site assessment public
9 and First Nations
10 consultation,
11 application, approval,
12 construction to
13 operations can range from
14 approximately 24 months
15 to 36 months should no
16 opposition arise."
17 That was accurate when Secure
18 made its submissions on May 17, 2018, correct?
19 A. Yes.
20 1522 Q. You would agree with me
21 that is still accurate today?
22 A. Yes, subject to this
23 specific site.
24 1523 Q. Okay. If we look at the
25 next bullet, it says:

1 1569 Q. Okay. Now, if we turn to
2 1472, we will see at the bottom E, "Cavern
3 Disposal Facilities." It says:
4 "Caverns are used
5 primarily for difficult
6 to treat solid and liquid
7 wastes that are not
8 suitable for waste
9 management facilities or
10 landfills."
11 That was accurate when Secure
12 made its submissions on May 17th 2018?
13 A. Yes.
14 1570 Q. And that is still
15 accurate today?
16 A. Yes, primarily.
17 1571 Q. Okay. If we now turn to
18 1475, under the heading "Area 1: North East BC,"
19 near the end of that paragraph we see says:
20 "In recent years
21 regulatory approvals have
22 become a significant
23 challenge in the region.
24 A landfill permit
25 typically takes 2 to 3

1 years to obtain.
2 However, the Northeast BC
3 region it can take up to
4 5 plus years to obtain."
5 That was accurate when Secure
6 made submissions on May 17th 2018?
7 A. Yes.
8 1572 Q. You would agree with me
9 that is still accurate today?
10 A. Accurate based on our
11 experience, yes.
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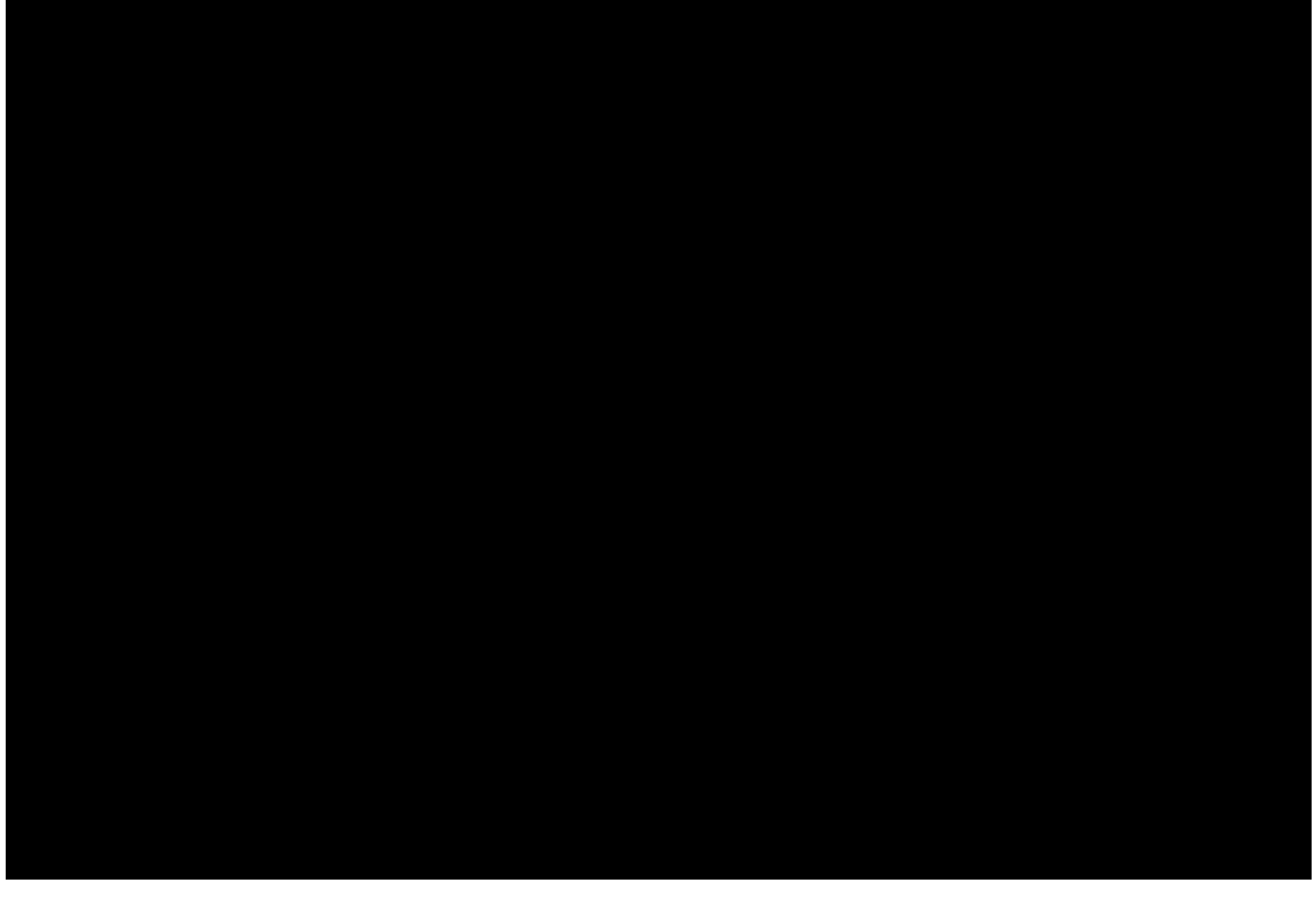


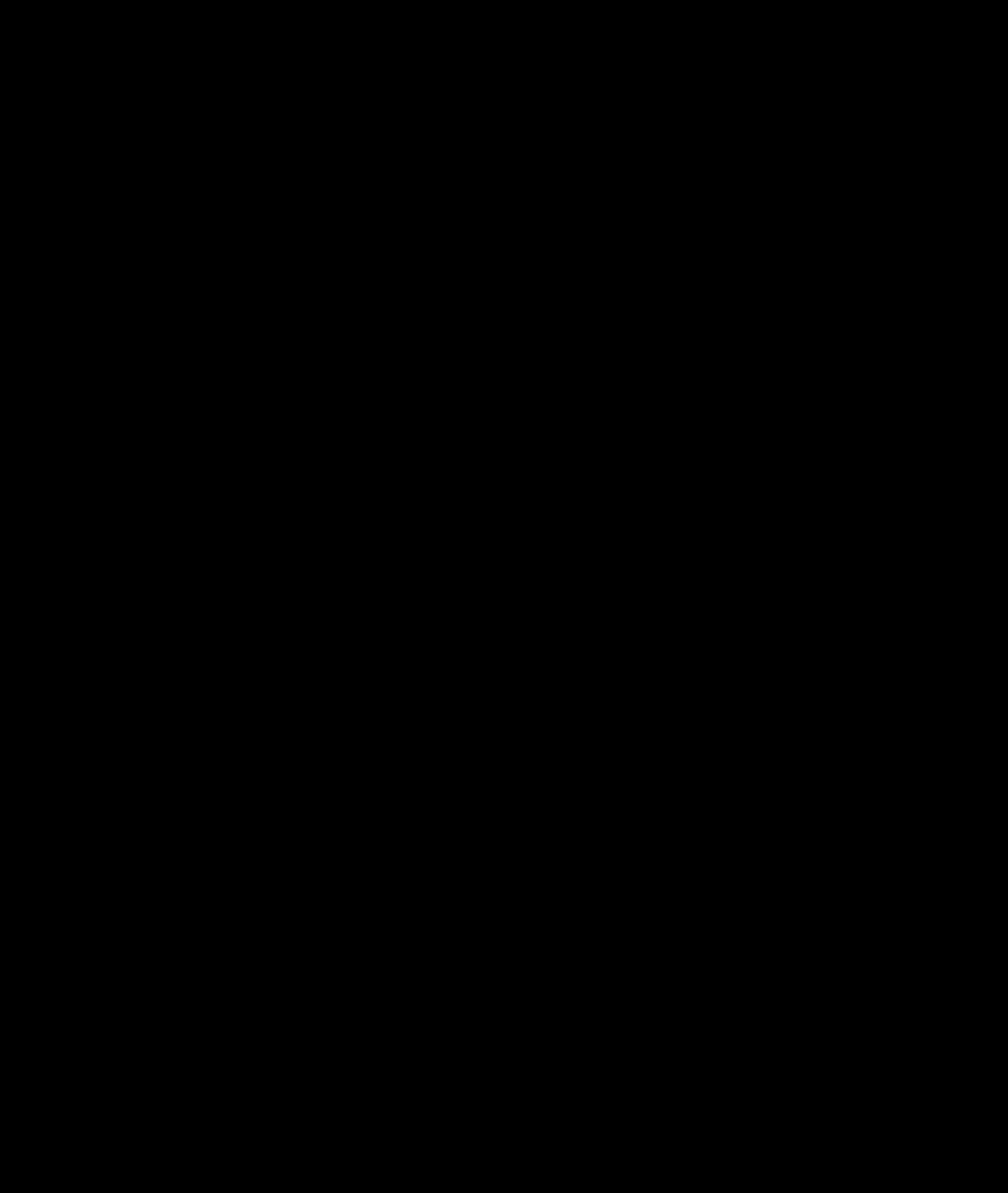
Business Development Opportunities

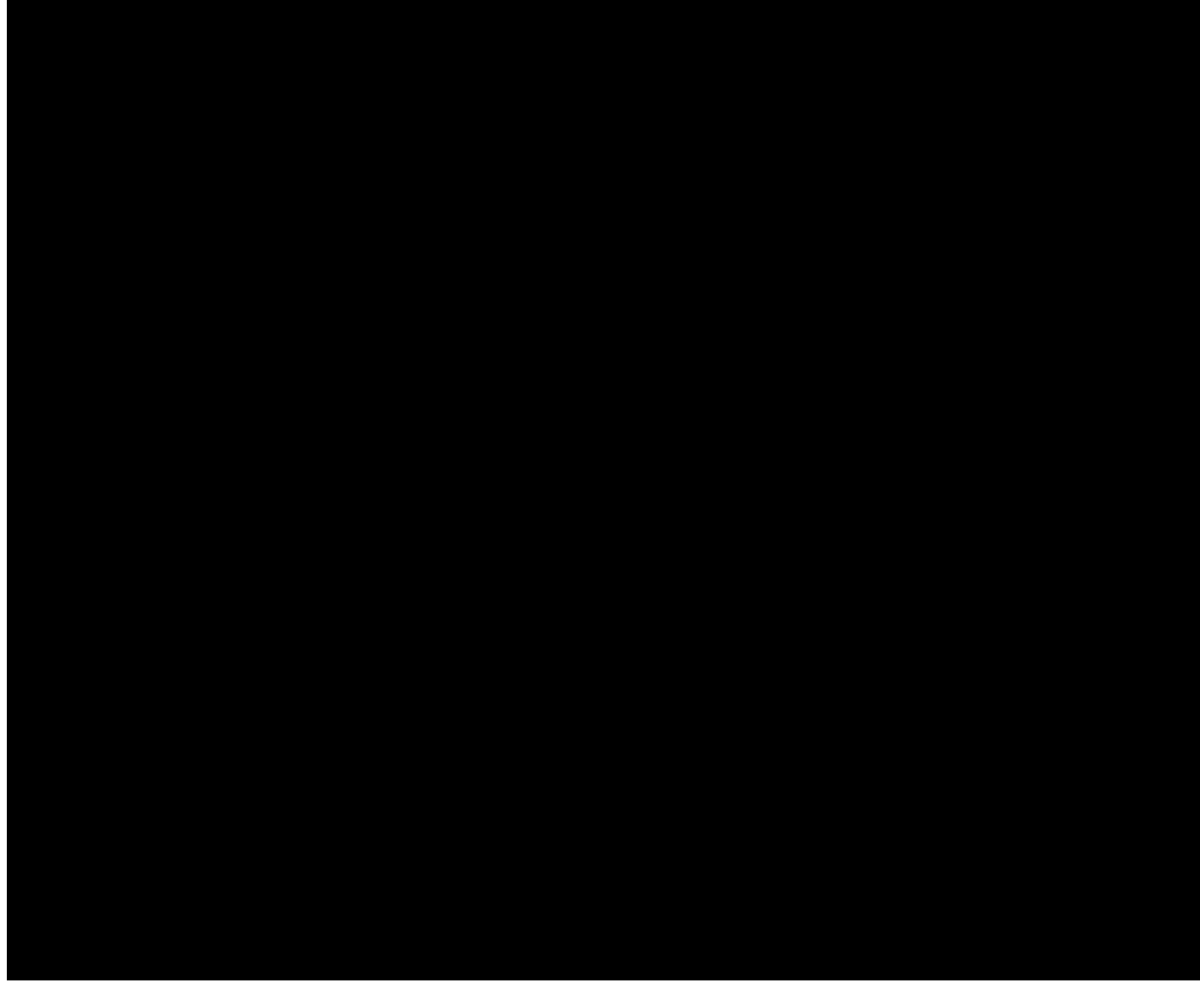
GROWTH

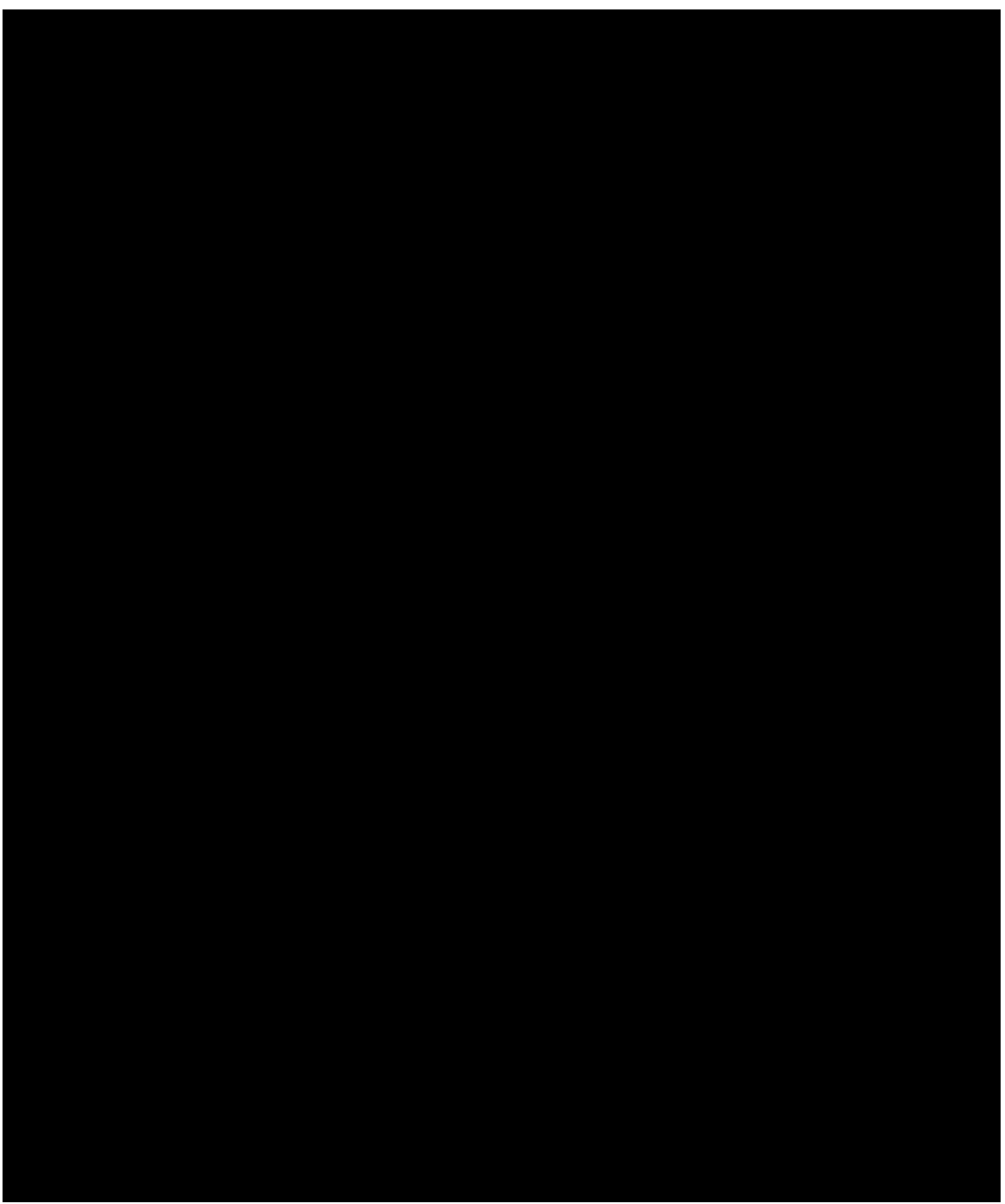
Background:

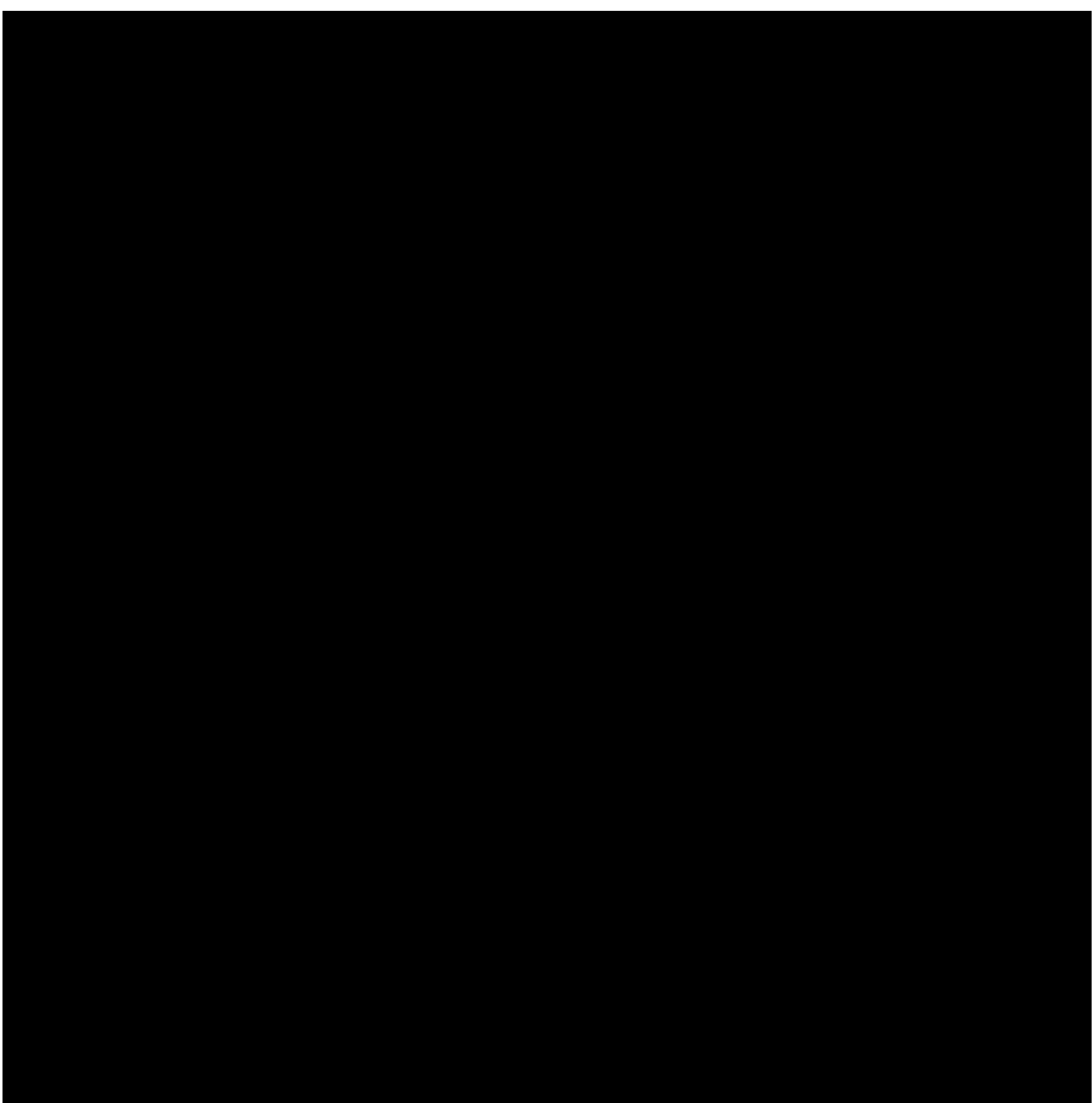
Concept:

Business Development Opportunities









1 Correct?
2 A. Yes.
3 1510 Q. You would agree with me
4 that is still accurate today?
5 A. Yes.
6 1511 Q. If we look at the second
7 bullet it says:
8 "Application timelines
9 from drilling approval,
10 drilling, completions,
11 injection application,
12 injection approval and
13 construction to
14 operations will typically
15 take from approximately
16 12 to 18 months."
17 That was correct when Secure
18 made its submissions on May 17, 2018. Correct?
19 A. Yes.
20 1512 Q. You would agree with me
21 that is still accurate today?
22 A. That seems reasonable.
23 1513 Q. If we go to the third
24 bullet, it says:
25 "Disposal wells and

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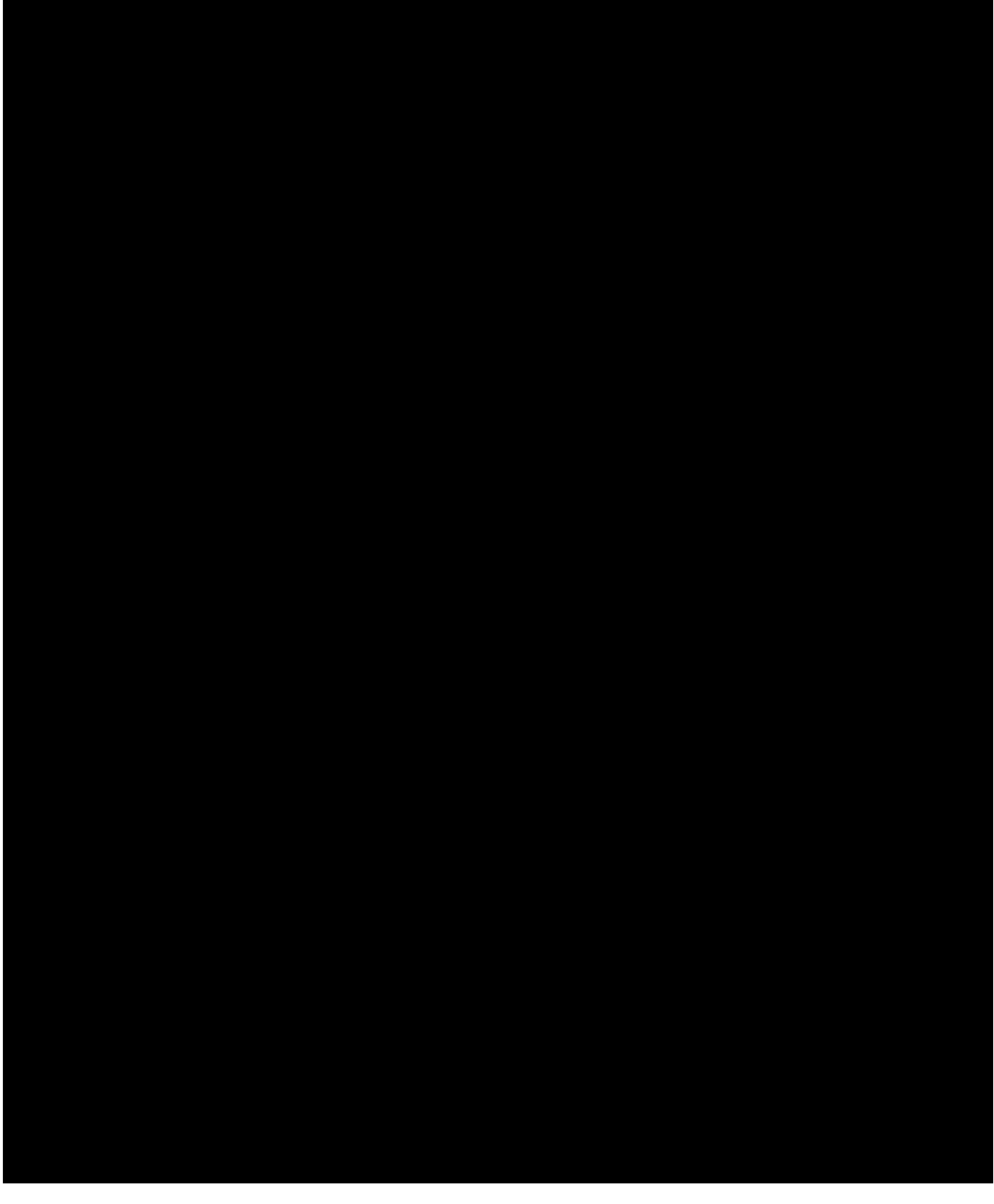

1 Correct?
2 A. Yes.
3 1510 Q. You would agree with me
4 that is still accurate today?
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6 1511 Q. If we look at the second
7 bullet it says:
8 "Application timelines
9 from drilling approval,
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13 construction to
14 operations will typically
15 take from approximately
16 12 to 18 months."
17 That was correct when Secure
18 made its submissions on May 17, 2018. Correct?
19 A. Yes.
20 1512 Q. You would agree with me
21 that is still accurate today?
22 A. That seems reasonable.
23 1513 Q. If we go to the third
24 bullet, it says:
25 "Disposal wells and

1 associated surface
2 facilities can range in
3 cost from approximately 2
4 to 10 million depending
5 mainly on well depth and
6 drilling and completion
7 complexity."
8 That was accurate when Secure
9 made its submissions on May 17th 2018. Correct?
10 A. Yes.
11 1514 Q. You would agree with me
12 that is still accurate today?
13 A. Yes.
14 1515 Q. Okay. What does
15 completion complexity mean?
16 A. Well, depending on the
17 type of disposal well and whether if it is a
18 re-entry or even a new well if it is very deep
19 then it is more complex to do the completion work
20 if the well is potentially not vertical, if it is
21 a directional well, that could add complexity,
22 pressures that you are dealing with, if there is
23 sour fluid, any number of things would create
24 complexity.
25 1516 Q. Okay. If we look at the

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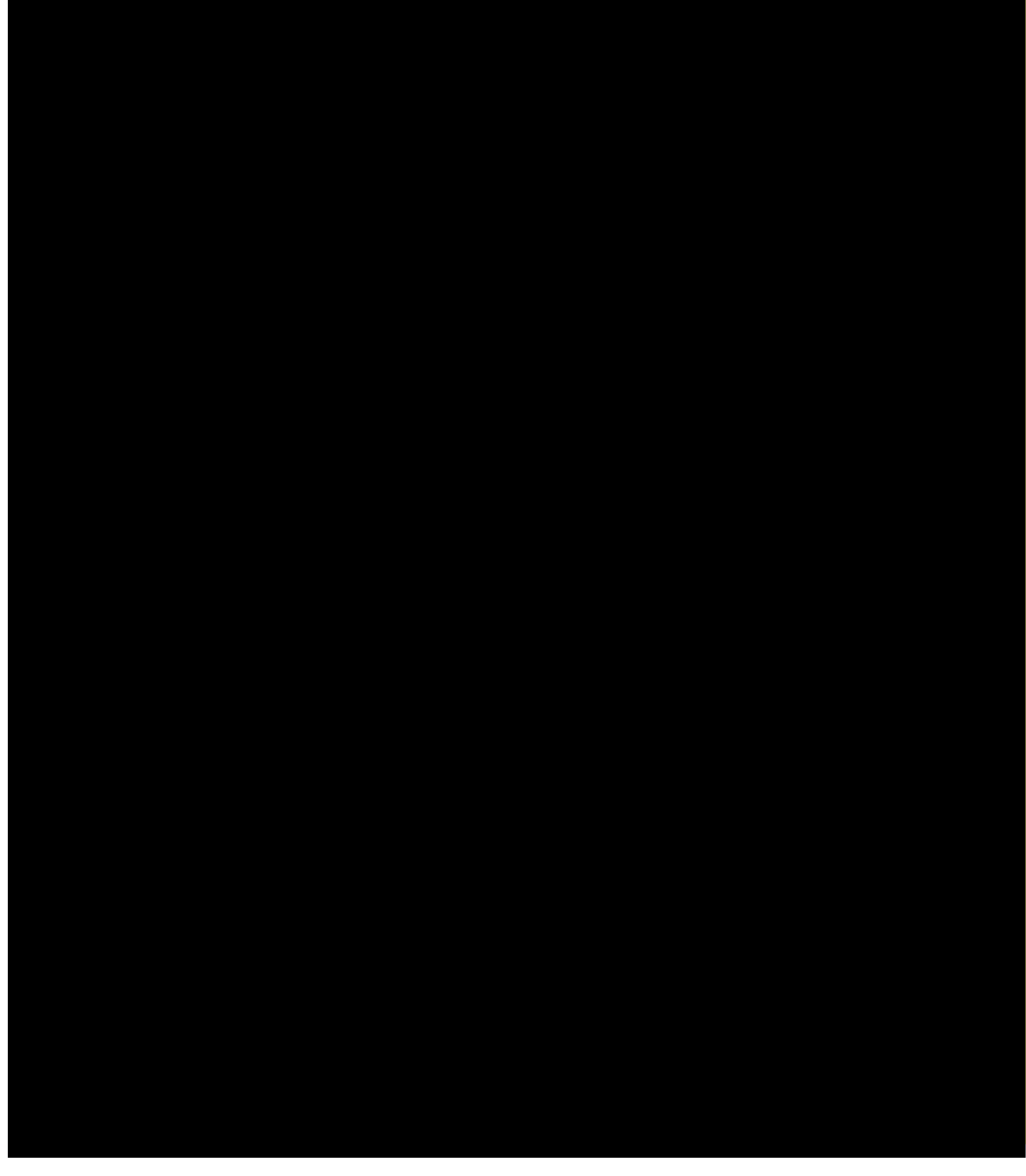
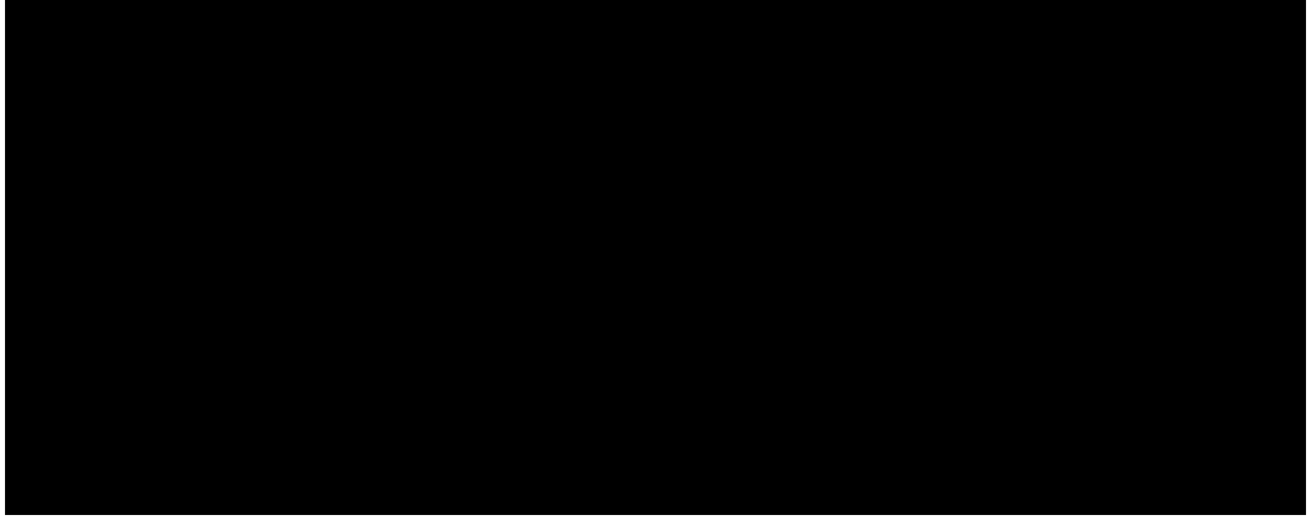


1 associated surface
2 facilities can range in
3 cost from approximately 2
4 to 10 million depending
5 mainly on well depth and
6 drilling and completion
7 complexity."
8 That was accurate when Secure
9 made its submissions on May 17th 2018. Correct?
10 A. Yes.
11 1514 Q. You would agree with me
12 that is still accurate today?
13 A. Yes.
14 1515 Q. Okay. What does
15 completion complexity mean?
16 A. Well, depending on the
17 type of disposal well and whether if it is a
18 re-entry or even a new well if it is very deep
19 then it is more complex to do the completion work
20 if the well is potentially not vertical, if it is
21 a directional well, that could add complexity,
22 pressures that you are dealing with, if there is
23 sour fluid, any number of things would create
24 complexity.
25 1516 Q. Okay. If we look at the

1 fourth bullet it says "associated surface
2 facilities can be difficult to site in developed
3 areas." You see that the?
4 A. I do.
5 1517 Q. That was accurate when
6 Secure made submissions on May 17, 2018, correct?
7 A. Yes, within developed
8 areas that is correct.
9 1518 Q. You would agree with me
10 that that is still accurate today?
11 A. Yes.
12 1519 Q. Now, if we can scroll
13 down a bit, we will see landfills, the heading is
14 for landfills. We will see the first bullet says:
15 "There are limit areas
16 within Alberta with the
17 appropriate subsurface
18 clay material to
19 construct landfills."
20 That was accurate when Secure
21 made submissions on May 17, 2018. Correct.
22 A. Yes, in a very broad
23 sense. And I think for all of these points that
24 is what we are speaking to. I think it is
25 important to say that it really does depend on

1 refers to a different type of drilling, but I am
2 not sure that he said that they do not apply to
3 drilling a new well.
4 682 Q. So, Mr. Engel, are you
5 suggesting that these factors do not apply when
6 you are drilling a new well?
7 A. I am not suggesting that,
8 at all. You had asked me with reference to the
9 other well whether it was a new drill, and I said
10 no, it was a side track re-entry.
11 683 Q. Right, okay.
12 A. If you'd like to ask me
13 that question, I will answer it.
14 684 Q. Sure. So these factors
15 that we looked at, like reservoir fill-up, mineral
16 rights, regulatory approvals, would those factors
17 apply when you drill a new well?
18 A. Yes.
19 685 Q. Okay. Are there any
20 other factors to consider when you drill a
21 disposal well?
22 A. Yes.
23 686 Q. Okay. Can you tell me
24 what those are?
25 A. Surface location.

1 687 Q. What do you mean by that?
2 A. You need to be able to
3 acquire a surface location that will allow you to
4 drill an access to where you think the reservoir
5 is. There's any number of things that go into
6 that, proximity to building either a pipeline to
7 tie to a facility or access to get fluid to a
8 well, whether that is by pipeline or truck, in
9 which case you would need a road.
10 We've already -- I think we've
11 got -- mineral rights are already listed. You
12 would need approval of the mineral-rights holder
13 in order to acquire the mineral rights; then, a
14 weighing of the risks of drilling or
15 re-completing, based on what is known of the
16 reservoir in an area.
17 Those are the ones that come
18 to mind.



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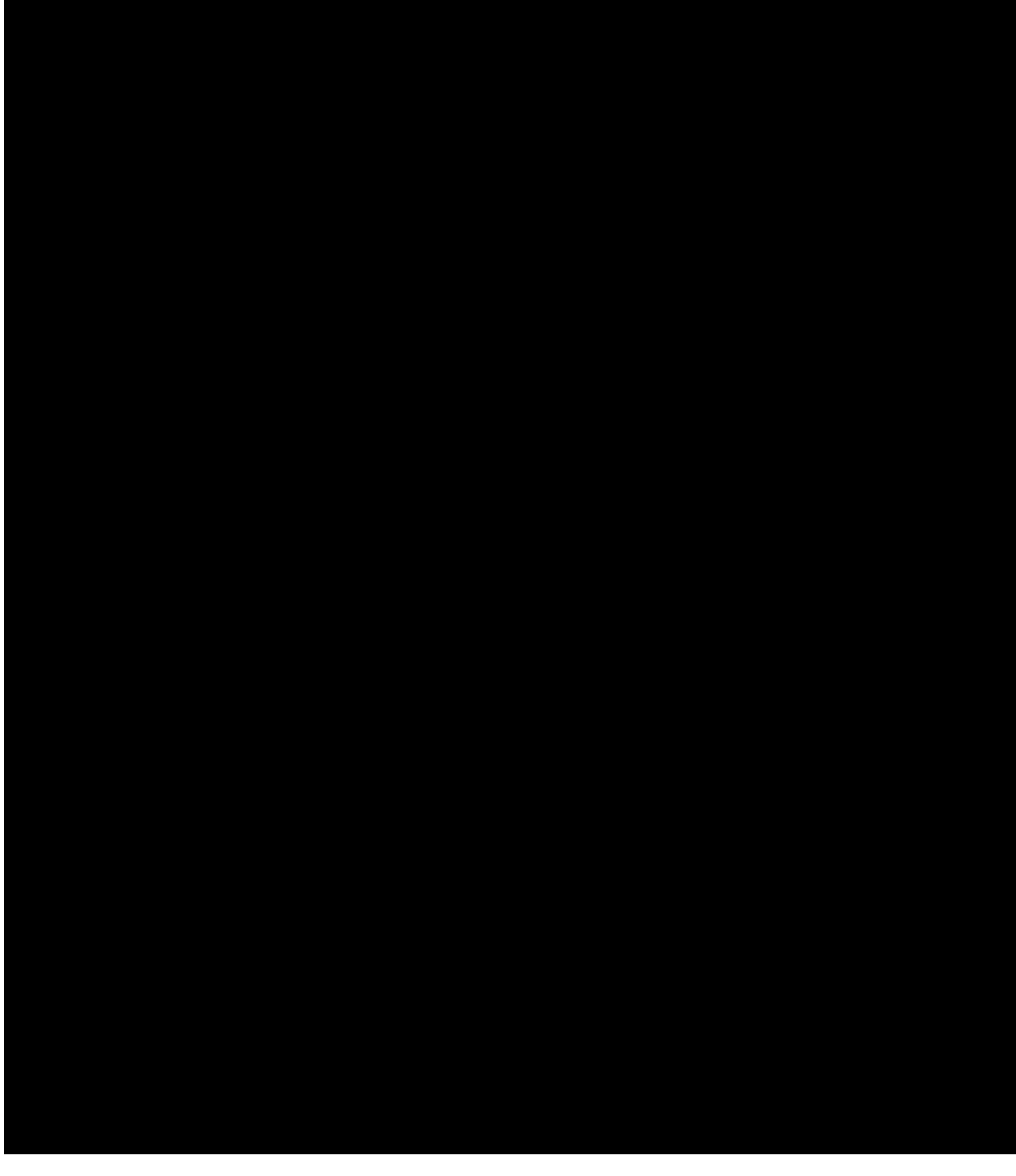

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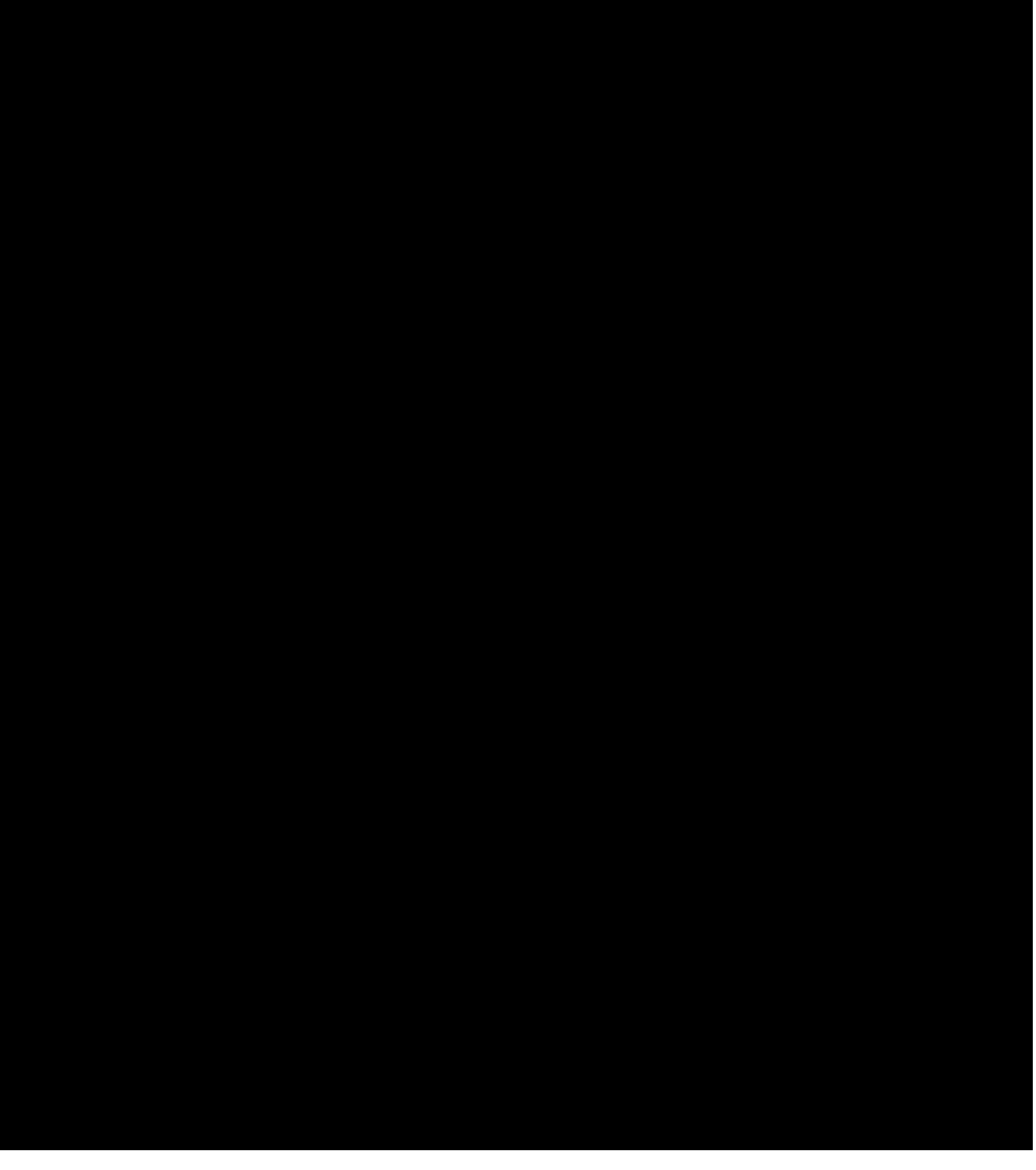
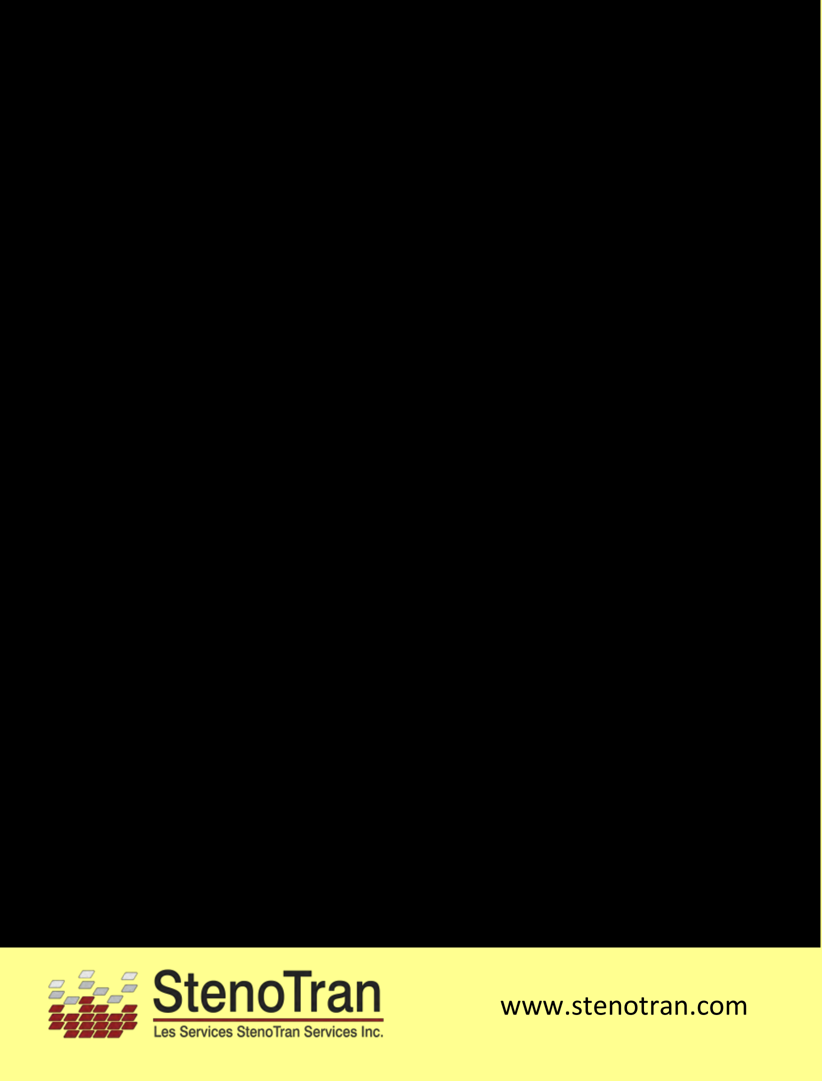


1 have provided additional
2 market information.
3 Appendix A is a
4 spreadsheet containing
5 responses to the
6 information in the RFI
7 letter."
8 Mr. Engel, this is Secure's
9 response to the Competition Bureau's information
10 request. Correct?
11 A. Yes.
12 1508 Q. If we can go to page
13 1492, you will see the heading titled "barriers to
14 entry," and below it we will see a heading for
15 disposal wells. Do you see that?
16 A. I do.
17 1509 Q. Underneath the heading it
18 says:
19 "There are limited areas
20 within Alberta with the
21 appropriate geology to
22 construct disposal
23 wells."
24 Mr. Engel, that was correct
25 when Secure made its submissions on May 17, 2018.

1 Correct?
2 A. Yes.
3 1510 Q. You would agree with me
4 that is still accurate today?
5 A. Yes.
6 1511 Q. If we look at the second
7 bullet it says:
8 "Application timelines
9 from drilling approval,
10 drilling, completions,
11 injection application,
12 injection approval and
13 construction to
14 operations will typically
15 take from approximately
16 12 to 18 months."
17 That was correct when Secure
18 made its submissions on May 17, 2018. Correct?
19 A. Yes.
20 1512 Q. You would agree with me
21 that is still accurate today?
22 A. That seems reasonable.
23 1513 Q. If we go to the third
24 bullet, it says:
25 "Disposal wells and



engineering and design ("FEED") studies; market and sustainability assessments that support long-term market demand and community support for the service offered, surface and mineral land acquisitions, and regulatory approvals.

11. In addition to the above, facilities must be located in areas with suitable geology. There are numerous factors and variables involved in the assessing suitable reservoirs for disposal well purposes. These include factors such as reservoir capacity, downhole pressures, hydraulic isolation (concerns of reservoirs communicating with one another), economics, and surface and mineral land access.

12. North East British Columbia (NEBC) has challenging geology and reservoir dynamics in general due to faulting and induced seismicity. Downhole disposal options are much more limited and involve a higher degree of capital risk. Catapult has experienced this challenge firsthand while developing our Tower water management facility. The initial disposal wells that we completed did not accept fluids despite having a thorough geological review conducted. The review identified multiple successful nearby disposal wells that were completed in this same zone. Our wells were subsequently re-completed into another reservoir zone which did prove to accept fluids and continues to do so today. This is just an example of one of the risks associated with finding suitable reservoirs for long term disposal purposes.

13. Oil and gas producers have the option to build and use their own water disposal facilities ("first party" facilities), use third party disposal facilities such as those owned by Catapult or Secure, or use a combination of both. Oil and gas producers with their own disposal facilities may be able to meet their basic

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14 So it really is geologic-dependent whether or
15 not you've got the capability. You know, drilling a brand
16 new well for disposal, obviously, is more expensive than
17 using an existing suspended well for disposal and
18 converting that. So depending on how many wells are in
19 your area that you can use for that. Again, you know, my
20 point earlier that larger companies have more capacity.
21 They have more well bores that they can then consider for
22 disposal.
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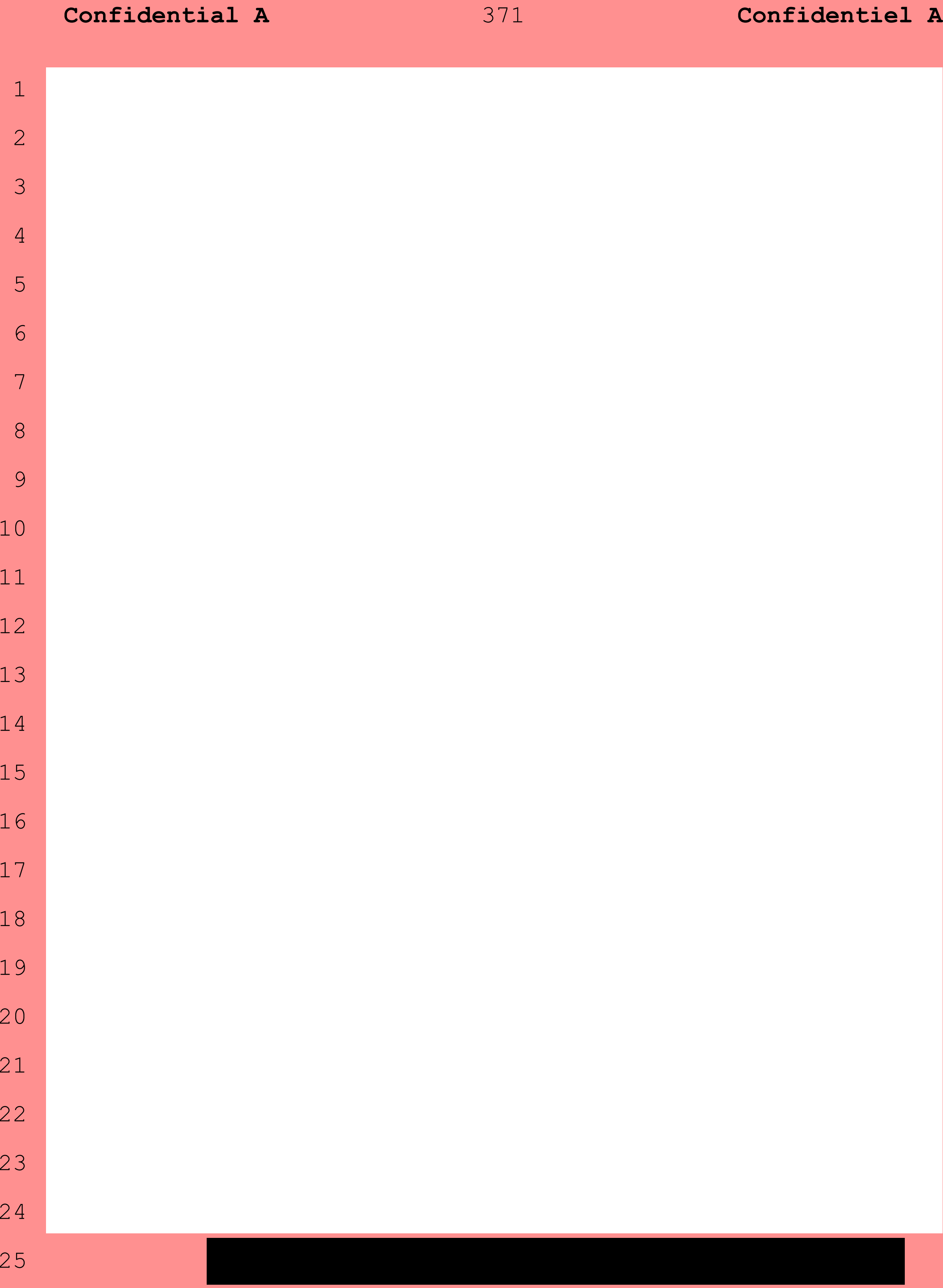

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8 **MS. HENDERSON:** And I take it your impression
9 is that however it's done, by agreement or specific
10 direction, that customers are generally going to be
11 directing you to use the waste disposal facility that will
12 give them the lowest overall cost when you take into
13 account tipping fees, transportation costs, et cetera?
14 **MR. McLEAN:** It's one of the factors for
15 certain. There are of course regulatory due diligence on
16 the facility itself and, you know, some companies obviously
17 have to be an approved facility before they're used. So
18 you know, it's not always that I can go find a cheaper
19 option, "Would you like me to take it to Facility X?" The
20 answer is no. It must be, you know, pre-approved by the
21 client based on things such as -- yeah.
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5 **MR. HOOD:** Madam Registrar, can we turn to page
6 4? And you see the heading "Choice of disposal site", and
7 Madam Registrar, if we can just scroll after the blacked
8 out paragraph. I just want to give Ms. McRae a chance to
9 see the paragraphs after as well.
10 Optimum, I'm going to ask you a question about
11 how Conoco chooses to dispose of its waste. We see the
12 information in paragraph 14 has been blacked out. I don't
13 want you to reference the specific examples that are there.
14 So without reference to information in paragraph 14, can
15 you describe the factors that influence Conoco's choice of
16 disposal site?
17 **MS. McRAE:** Absolutely. So for us there's
18 really three main factors, and the first being safety. So
19 safety is always a factor in our decisions. So ability of
20 the company from a technical perspective, so from a volume
21 and capability to accept our waste. And then obviously
22 from a commercial perspective, we want to have something
23 commercially competitive.
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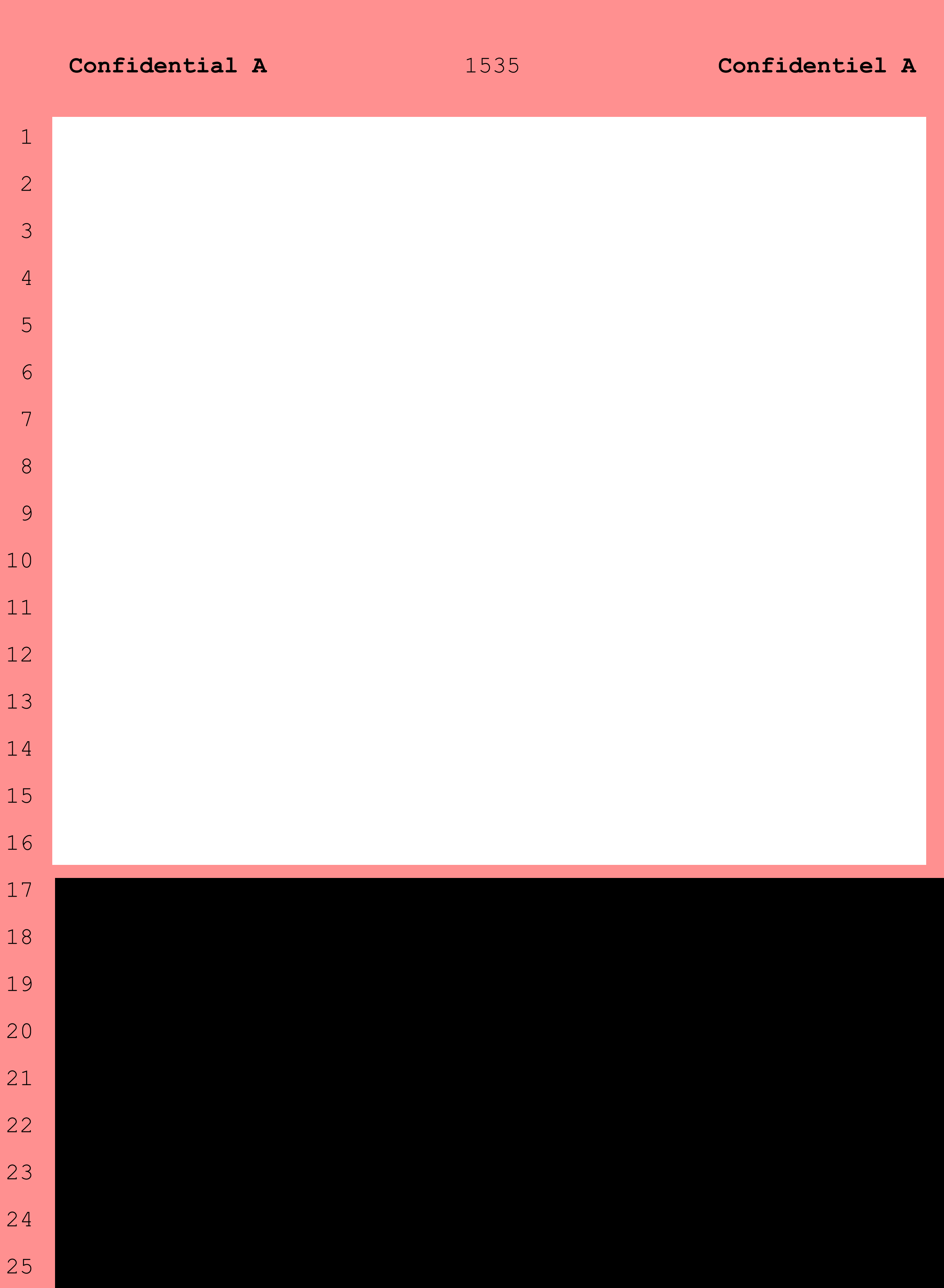
25 **MS. HENDERSON:** And what I mean by that is the

1 total cost is made up of the disposal fees charged by the
2 facility as well as the transportation costs associated
3 with trucking the waste there. Is that fair?
4 **MR. LAMMENS:** Yeah, those are the key -- the
5 main two factors. Health and safety, you know, more time
6 of the road is involved a bit too but, yeah, those are the
7 main two.
8 **MS. HENDERSON:** Of course. And for that
9 reason, I take it that Petronas usually tries to use the
10 closest facility to its operations to dispose of waste?
11 **MR. LAMMENS:** Typically, yeah.
12 **MS. HENDERSON:** Sorry. I take it that you'd
13 agree with me that transportation costs are a significant
14 component of the overall cost of waste disposal?
15 **MR. LAMMENS:** They are.
16 **MS. HENDERSON:** And really a key driver of your
17 choice in that regard?
18 **MR. LAMMENS:** Yeah.
19 **MS. HENDERSON:** And that's because from your
20 perspective -- and I'm talking prior to the merger --
21 Secure and Tervita basically provide the same service at
22 their facilities. It's really -- provided the same service
23 at their facilities. It's really an issue of the
24 economics.
25 **MR. LAMMENS:** Yeah. Typically, I mean, the



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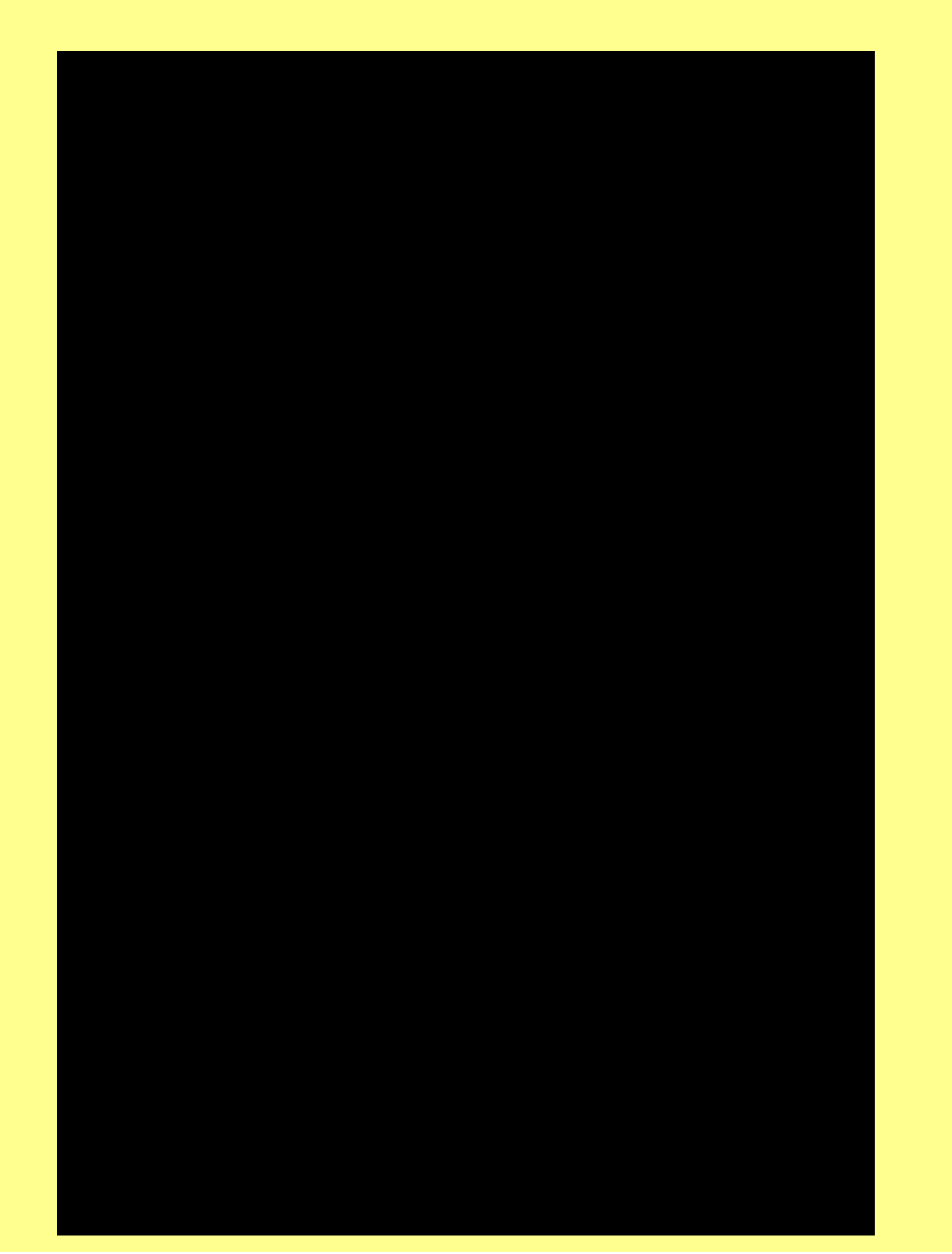
12 You know, and we have longstanding
13 relationships with many of our service providers that we
14 have worked with for years, and years, and years, and so
15 there is a mutual respect there that when times are tough,
16 we're still trying to be active and to keep using those
17 same services. We're not just looking for necessarily the
18 very cheapest guy on the block. We're looking for quality
19 but we're also looking to recognize those relationships,
20 and when times like now, where commodity prices are really
21 good and, you know, everybody is looking for a little pound
22 of flesh from that, we hope that those relationships that
23 we've had longstanding, stand up in those times as well and
24 that we're not treated unfairly by those service providers
25 that we've been working with for years and years.



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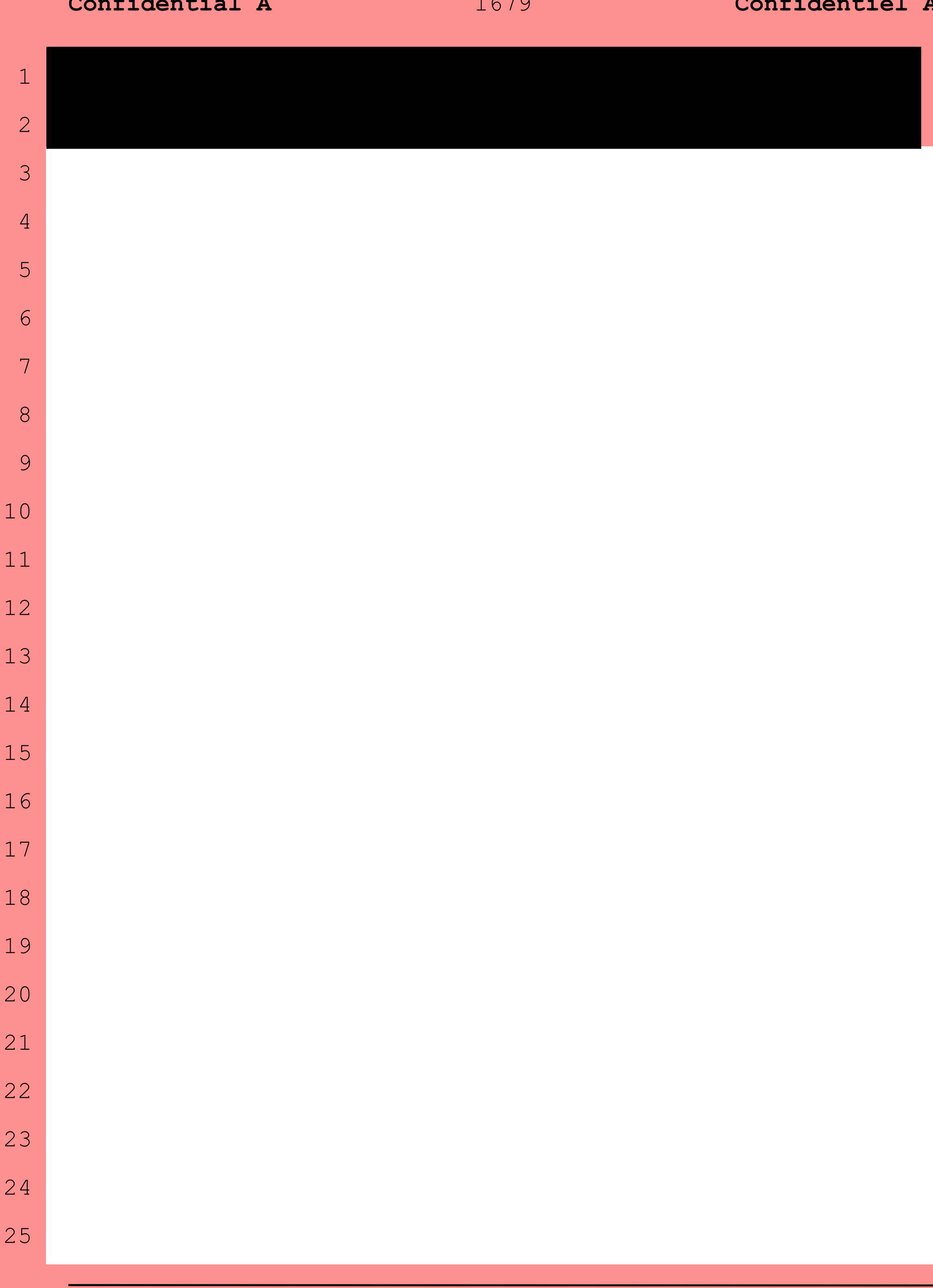

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market, the Bureau assesses the growth expectations for one or both of the merging parties to determine whether the merger may eliminate an important competitive force.

PART 6: ANTI-COMPETITIVE EFFECTS

6.1 As noted in Part 3, above, the Bureau may consider market definition and competitive effects concurrently in a dynamic and iterative analytical process. When the market share and concentration thresholds listed in paragraph 5.9, above, are exceeded or when other information suggests that a merger may prevent or lessen competition substantially, the Bureau's assessment of competitive effects based on quantitative analysis and the application of relevant factors, including the factors listed in section 93 of the Act, takes on greater importance. Such an assessment falls under the broad categories of unilateral effects and coordinated effects, as described below.

6.2 When it is clear that the level of effective competition that is to remain in the relevant market is not likely to be reduced as a result of the merger, this alone generally justifies a conclusion not to challenge the merger.

6.3 To determine the ability and effectiveness of remaining competitors to constrain an exercise of market power by the merged firm, the Bureau examines existing forms of rivalry, such as discounting and other pricing strategies, distribution and marketing methods, product and package positioning, and service offerings. Whether the market shares of firms are stable or fluctuate over time is also relevant, as is the extent to which product differentiation affects the degree of direct competition among firms. Further, the Bureau assesses whether competitors are likely to remain as vigorous and effective as they were prior to the merger.

6.4 The extent and quality of excess capacity held by merging and non-merging firms provides useful information about whether the merger could result in the exercise of market power. Excess capacity held by rivals to the merged firm improves their ability to expand output should the merged firm attempt to exercise market power. On the other hand, when the merged firm holds a significant share of excess capacity in the relevant market, this may discourage rivals from expanding.

6.5 The Bureau assesses the competitive attributes of the target business to determine whether the merger will likely result in the removal of a vigorous and effective competitor.[33] In addition to the forms of rivalry discussed above, the Bureau's assessment includes consideration of whether one of the merging parties:

33 See section 93(*f*) of the Act. A firm that is a vigorous and effective competitor often plays an important role in pressuring other firms to compete more intensely with respect to existing products or in the development of new products. A firm does not have to be among the larger competitors in a market in order to be a vigorous and effective competitor. Small firms can exercise an influence on competition that is disproportionate to their size. Mavericks (described in "Coordinated Effects," in Part 6, below) are one type of vigorous and effective competitor.

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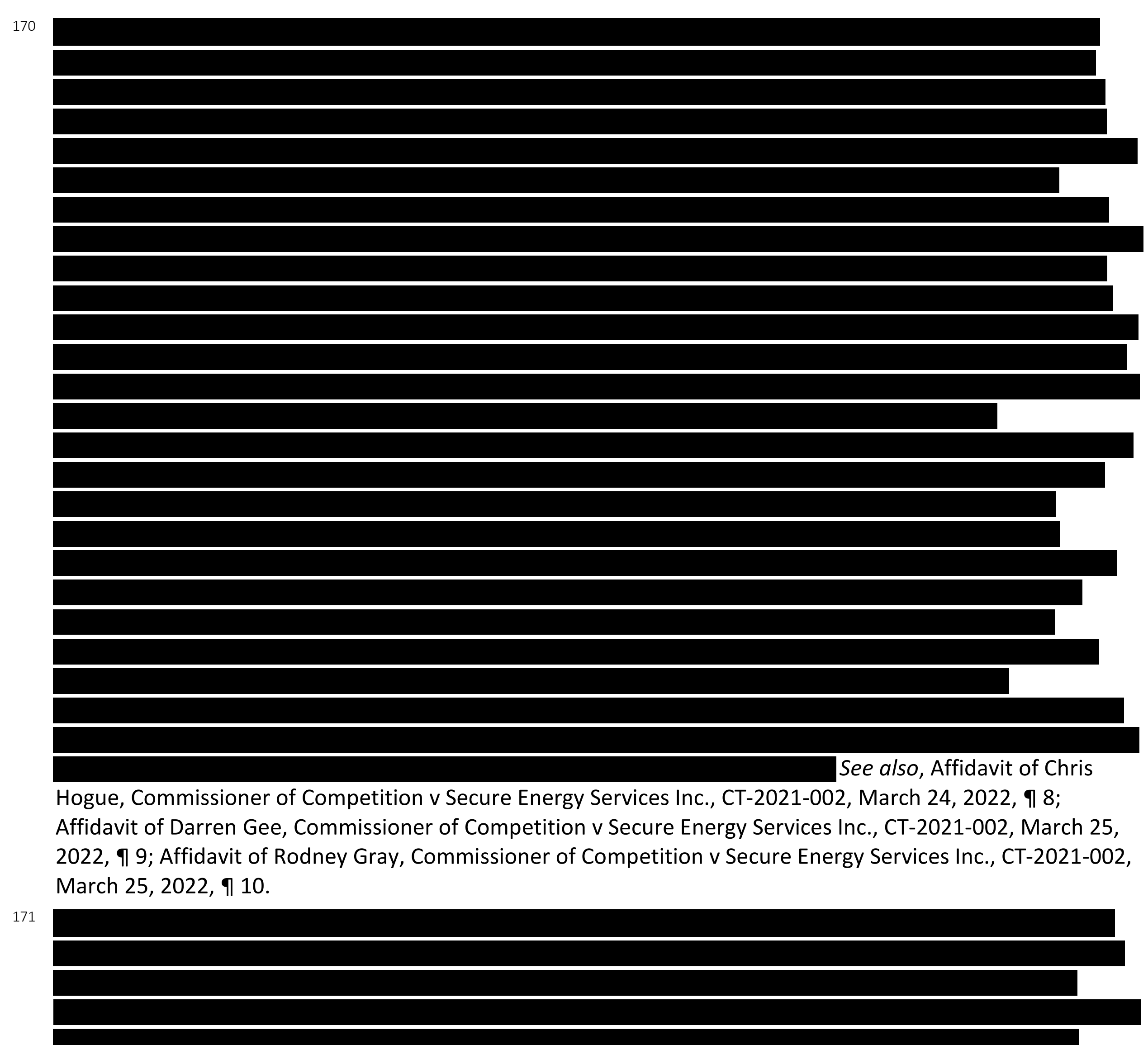
140. While distance and transportation costs are observable and quantifiable, other factors customers may value are not, which explains why Dr. Miller only individually quantifies the increase in transportation costs component of his facility closure effect. Because other factors are not readily observable to SECURE when it is pricing, it is not practical that SECURE can observe a customer's willingness to pay at other facilities and price accordingly.[172]



170 *See also*, Affidavit of Chris Hogue, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 24, 2022, ¶ 8; Affidavit of Darren Gee, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 25, 2022, ¶ 9; Affidavit of Rodney Gray, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 25, 2022, ¶ 10.

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172 Dr. Miller may argue that his logit model of customer demand is agnostic to the exact form of product differentiation. However, the parameters of his model are calibrated based on market shares and weighted

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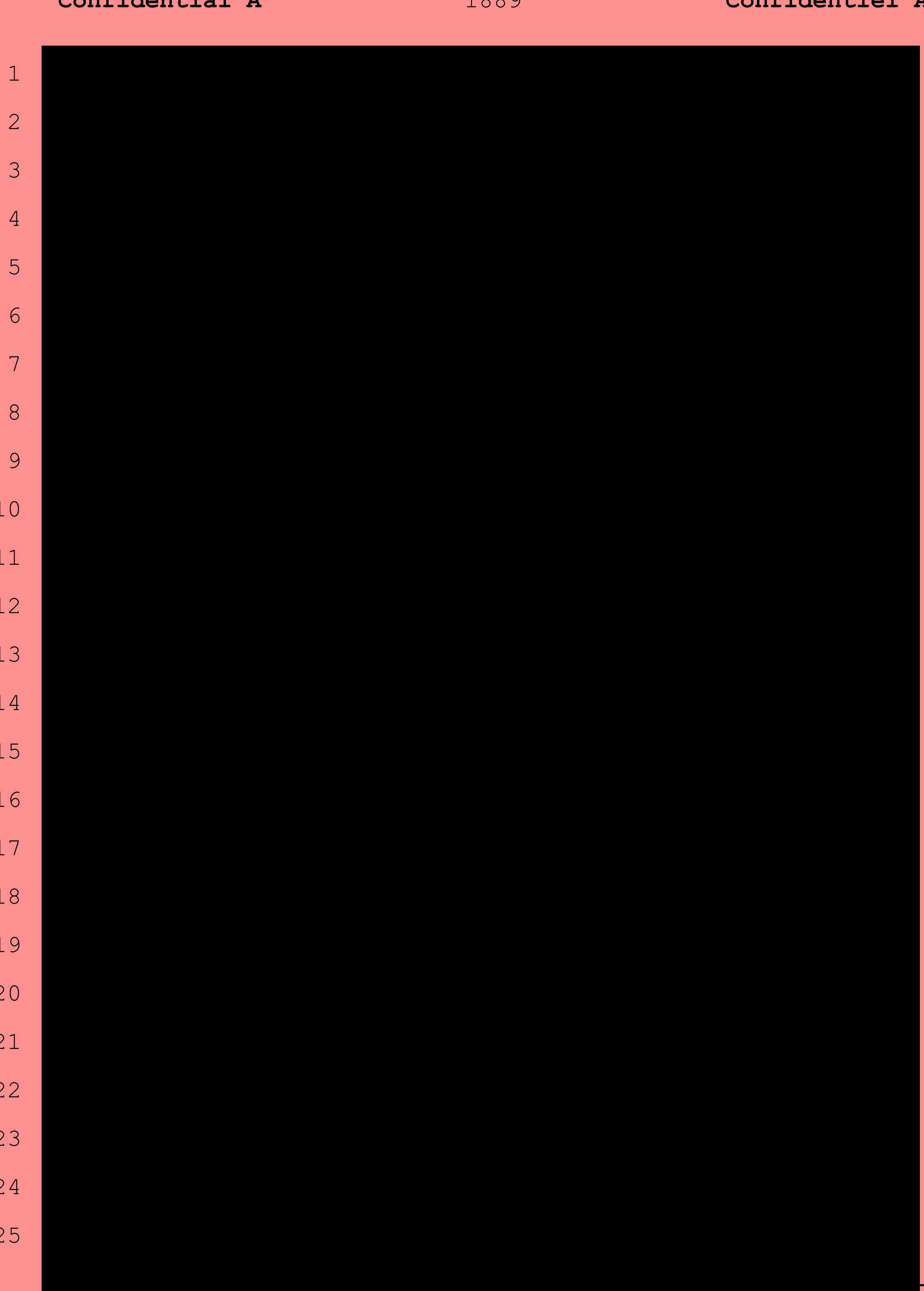

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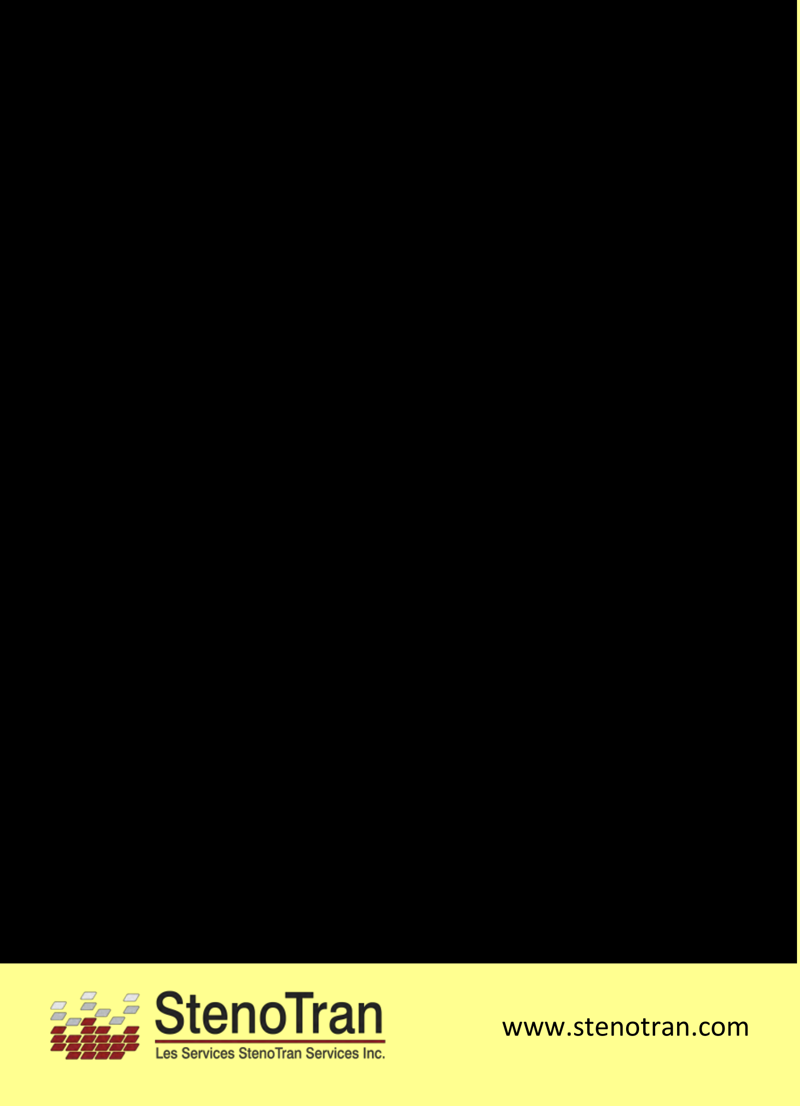

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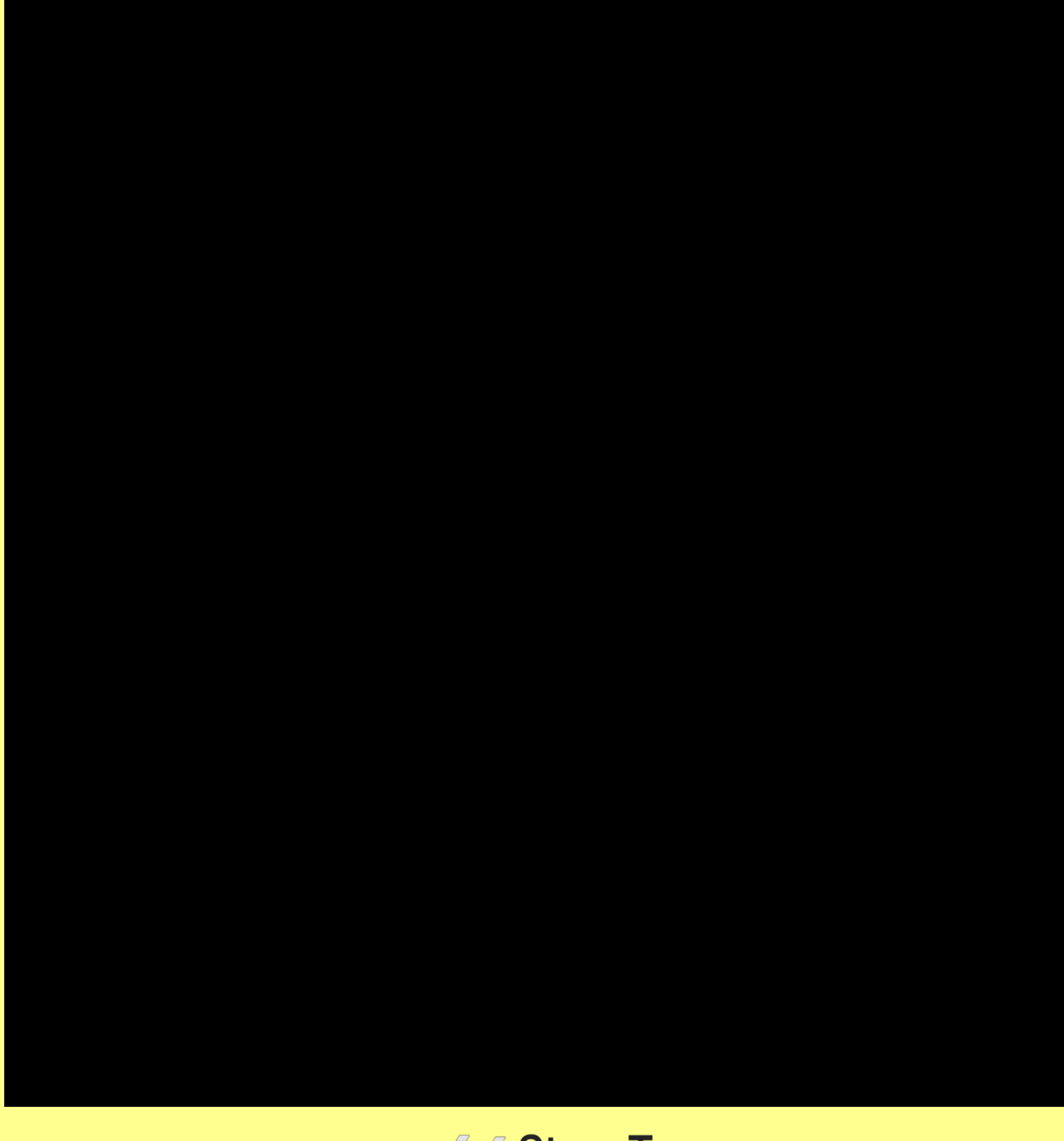


dated October 23, 2020 from Kyle Schachtel of CNRL to Jason Weimer of Tervita attached as Exhibit 1.

CNRL DISPOSAL AT BONNYVILLE LANDFILL

11) I am advised by counsel for the Applicant that the exhibits to Mr. Engel's affidavits also include documents relating to CNRL's ownership of a landfill near the Bonnyville landfill. As described in paragraph 23 of my February 22, 2022 Witness Statement, CNRL acquired the Manatokan landfill (located approximately 70 km from Tervita's Bonnyville landfill) from Devon Canada in July 2019 as part of its acquisition of all of Devon Canada's Canadian assets (the "Devon Acquisition"). The Bonnyville landfill is now owned by Secure.

12) Prior to CNRL's acquisition of the Manatokan landfill, CNRL disposed of landfillable waste generated from its nearby operations at Tervita's Bonnyville landfill.

13) In the summer of 2018, CNRL discussed with Tervita the possibility that it might construct a landfill in the area of the Bonnyville landfill or purchase the Bonnyville landfill from Tervita if it would be more economical to do so than pay the rates Tervita offered at the Bonnyville landfill. Tervita did not lower the rates CNRL paid to dispose of waste at the Bonnyville landfill after these discussions.

14) CNRL's plans to either construct a landfill or purchase the Bonnyville landfill did not proceed. Subsequently, as part of the Devon Acquisition, CNRL acquired the Manatokan landfill and was able to use the Manatokan landfill for some of its disposal requirements in the Bonnyville area instead of the third party facilities.

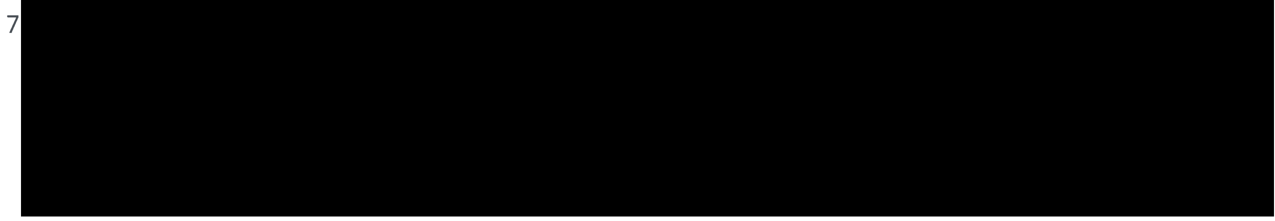
Miller Transactions Data, replicated through 15_build_secure_transaction_data_distances.R and 16_build_tervita_transaction_data_distances.R.

III.A.3. Dr. Miller's model ignores buyer power and the threats of customer insourcing or sponsored entry

67. Dr. Miller's auction model with price discrimination also fails to account for the negotiating leverage of customers in this industry. So called "buyer power" provides additional constraints on pricing independent of the asserted relative value of alternative facilities to the customer well location.

68. SECURE's (and formerly Tervita's) customers are oil and gas producers, many of whom have substantial oilfield operations and their own waste disposal facilities. As shown in Figure 10 and Figure 11 above, the [redacted] customers of SECURE and Tervita in 2019 accounted for [redacted] of total revenue for SECURE and [redacted] for Tervita. Not only do the largest customers account for substantial portions of total revenue for SECURE and Tervita, but as mentioned above they also utilize multiple facilities and multiple facility types.

69. While I broadly agree with Dr. Miller's assessment that TRDs, LFs, and WDs are not widely substitutable for each other for a given waste service that a customer requires, ultimately it is the same oil and gas producers that require most if not all of these services. This affects pricing for large proportions of the Parties' revenues.

7 

Customers can and do use their water disposal volumes and threats to shift this volume in negotiating with waste service providers across a range of services and locations.[83]

71. In discussing the role of producer self-supply for water disposal and landfills, Dr. Miller focusses on the observation that most producer self-supply points are used for internal disposal and are not available to other producers, or that volumes available for use by other producers at these first-party facilities are relatively small. On this basis, he finds that producer-owned disposal facilities are unlikely to be viable alternatives to third-party owned facilities for all customers.[84]

72. What Dr. Miller fails to account for is that even if producer-owned facilities are not readily available to other producers, their existence or threat of existence impacts the demand for third party waste disposal services and the prices they can charge. That is, the ability of a large customer to self-supply and construct its own wells for water disposal is sufficient to discipline pricing – and not just to water disposal, but also to other services because customers can leverage the entirety of their purchases when negotiating with a supplier.[85]

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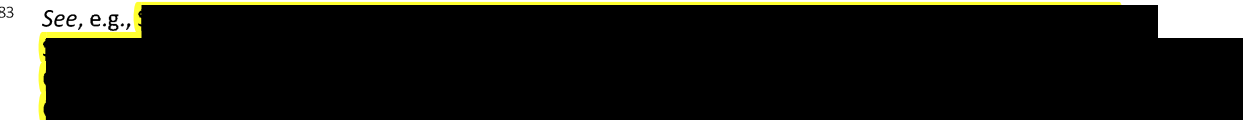
81 Miller Report, footnote 363.

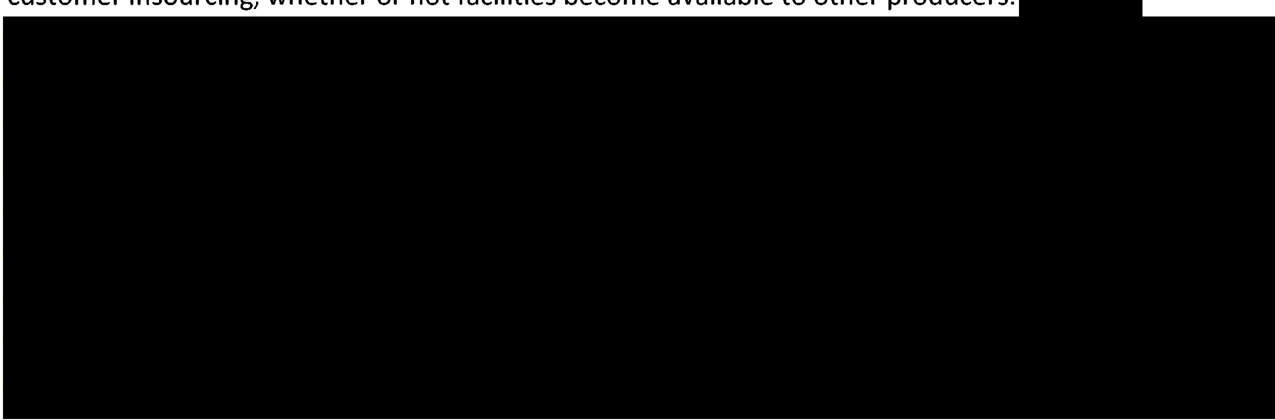
82 See Miller Report backup, "Exhibit 9.xlsx" and my backup to Figure 21.

83 *See*, e.g., 

84 *See*, e.g., Miller Report, ¶¶ 64-69.

85 It is well understood that the threat of competition can constrain a firm's pricing. For a prominent empirical example from the airline industry, see Austan Goolsbee and Chad Syverson, "How Do Incumbents Respond to the Threat of Entry? Evidence from the Major Airlines," *Quarterly Journal of Economics* 123(4) 2008: 1611-1633, 1611. "We examine how incumbents respond to the *threat* of entry by competitors (as distinct from how they respond to *actual* entry)… We find that incumbents cut fares significantly when threatened by Southwest's entry." *See also*, Jean Tirole, *The Theory of Industrial Organization,* Cambridge: The MIT Press, 1988, pp. 308-309, discussing a model under which market contestability impacts incumbent firms' pricing, "[i]n the absence of actual competition, potential competition is very effective in disciplining the incumbent firms." *See also*, Affidavit of Chris Hogue, Commissioner of Competition v Secure Energy Services Inc., CT-2021-

73. There is ample documentary evidence that SECURE and Tervita are aware of the threat of customer insourcing, whether or not facilities become available to other producers.



74. When insourcing does occur, it impacts financial performance.[89]

002, March 24, 2022, ¶¶ 13-14, 16; Affidavit of Robert Broen, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 24, 2022, ¶¶ 25-26; Affidavit of Rodney Gray, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 25, 2022, ¶¶ 15-16.

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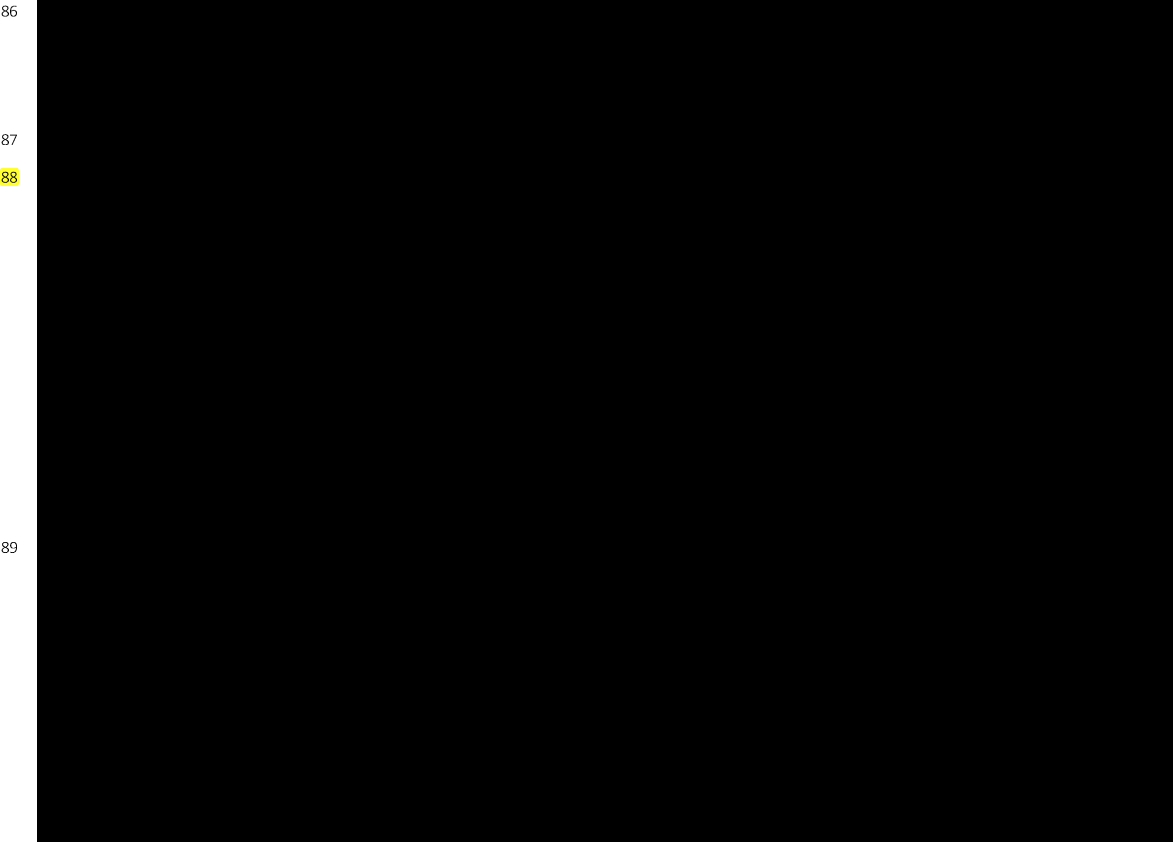

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76. Further, SECURE and Tervita have noted that there is an industry trend towards the insourcing of waste disposal.[97] In the Affidavit of Darren Gee of Peyto

Exploration and Development, he states that after periods of low commodity prices, "those who have survived have become increasingly efficient and cost conscious" and that "recent industry consolidation means that the producers that survived the downturn are bigger and more capable of in-sourcing."[100]

77. In addition to the threat of third party entry and customer insourcing, customers also encourage suppliers to enter the market by sponsoring new facilities and/or guaranteeing business.[101] For example, Tervita reached an agreement in 2019 "with a senior E&P to develop a water disposal network including multiple disposal wells and a water injection facility pipeline connected to the E&P's production facilities in the Alberta Montney."[102] Another example is the announcement of Topaz Energy in 2021 to enter into "a strategic alliance with a private midstream water company" in order to "each acquire a working interest in certain water infrastructure assets from an E&P producer."[103]

III.B. A standard natural experiment confirms the presence of pricing constraints that Dr. Miller's model does not capture

78. In 2018, Tervita acquired Newalta in a merger that involved substantially the same products and geographies as the Transaction, including "2-to-1" and "3-to-2" markets. As I describe in greater detail below, I conduct a natural experiment analysis to estimate the price effects of the Tervita/Newalta merger. I do so using a standard "difference-in-differences" ("DiD") approach, accounting for, among other things, the fact that SECURE's presence as a remaining competitor in Tervita/Newalta may have imposed a constraint on pricing that is no longer present today.

100 *See*, Affidavit of Darren Gee, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 25, 2022, ¶¶ 7, 13.

101 *See*, Affidavit of Darren Gee, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 25, 2022, ¶ 15; Affidavit of Robert Broen, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, March 24, 2022, ¶ 27.

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Witness Statement of Aqua Terra Water Management, Commissioner of Competition v Secure Energy Services Inc., CT-2021-002, February 2022.

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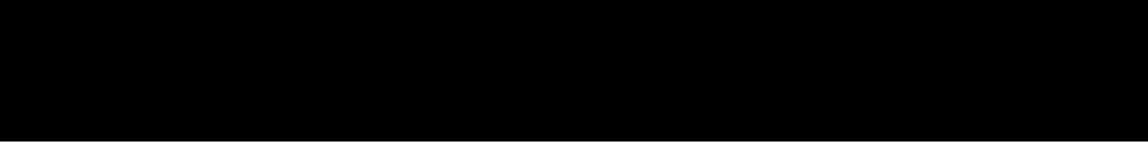

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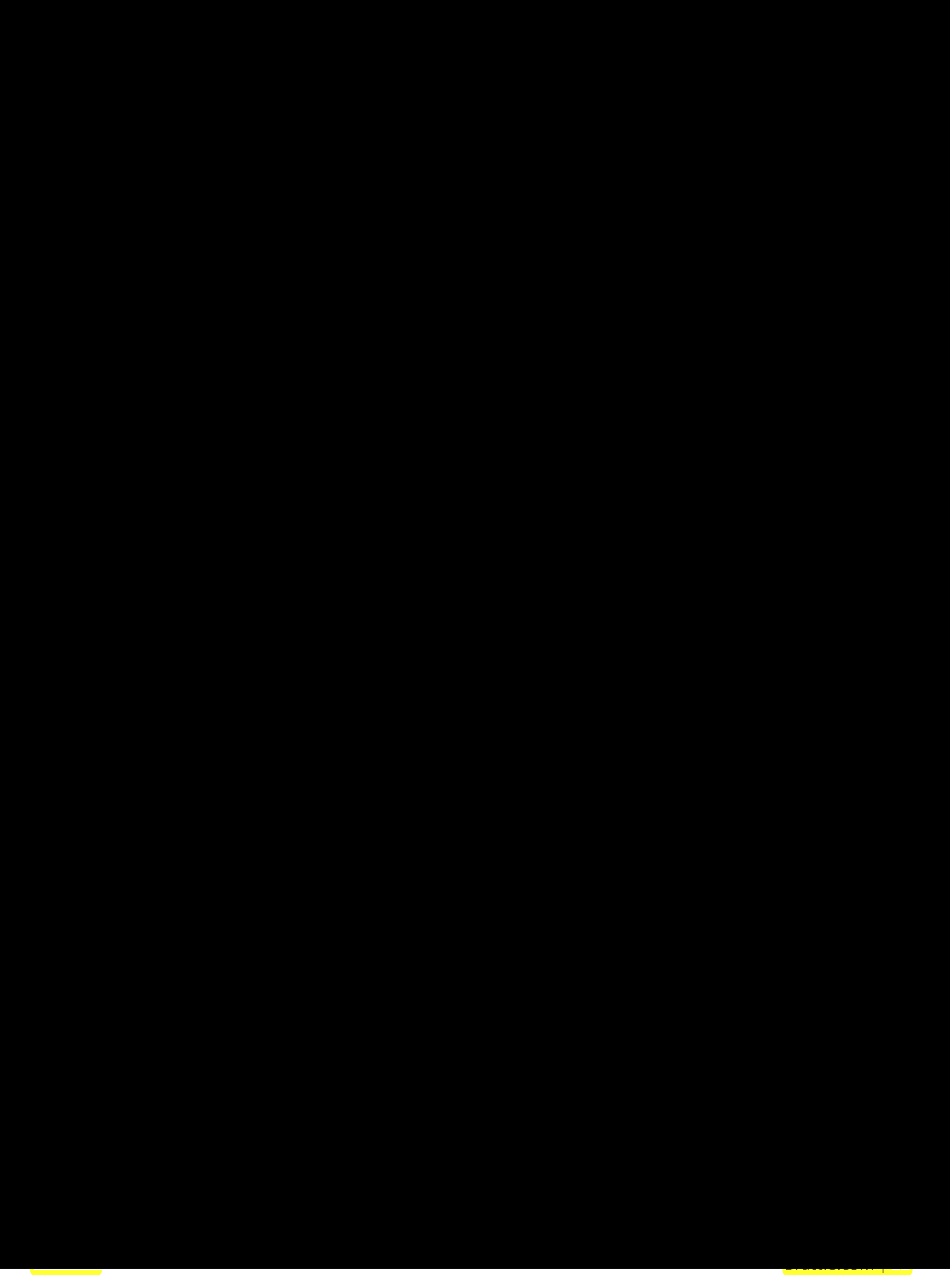

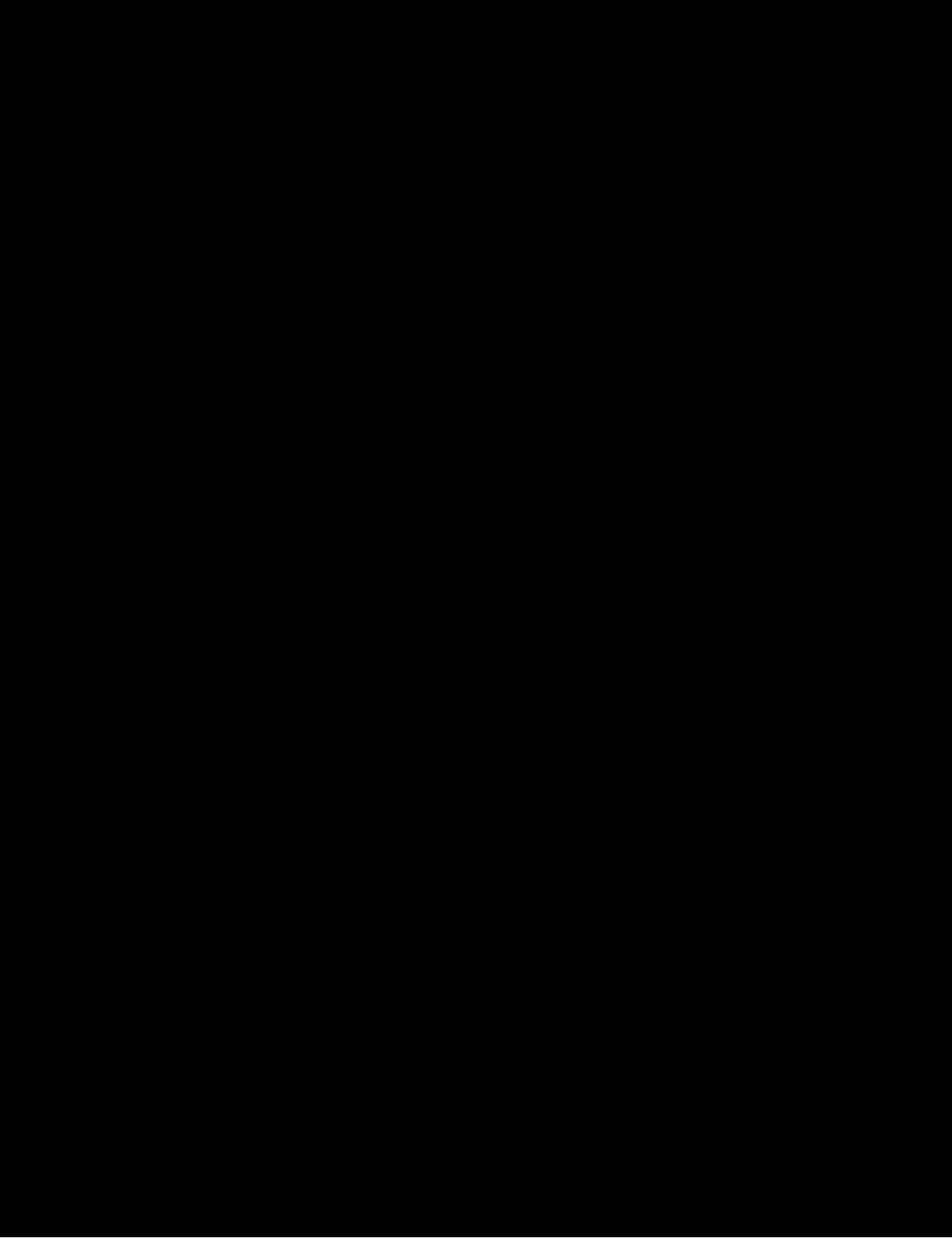

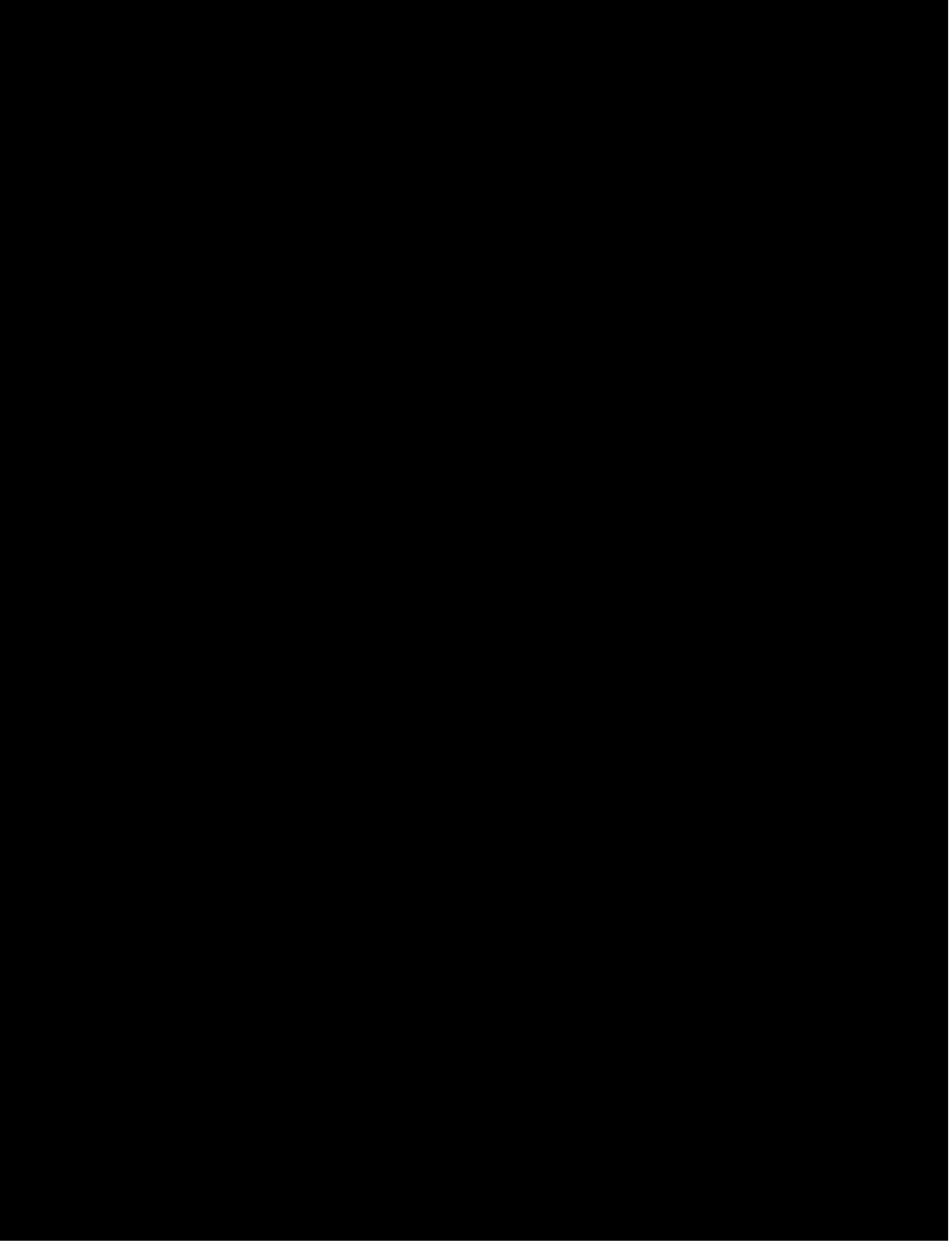

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Appendix C: Acknowledgement of expert witness

I, Renée M. Duplantis, acknowledge that I will comply with the Competition Tribunal's code of conduct for expert witnesses which is described below:

1. An expert witness who provides a report for use as evidence has a duty to assist the Tribunal impartially on matters relevant to his or her area of expertise.
2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

March 25, 2022

(Date) (Signature of expert witness)

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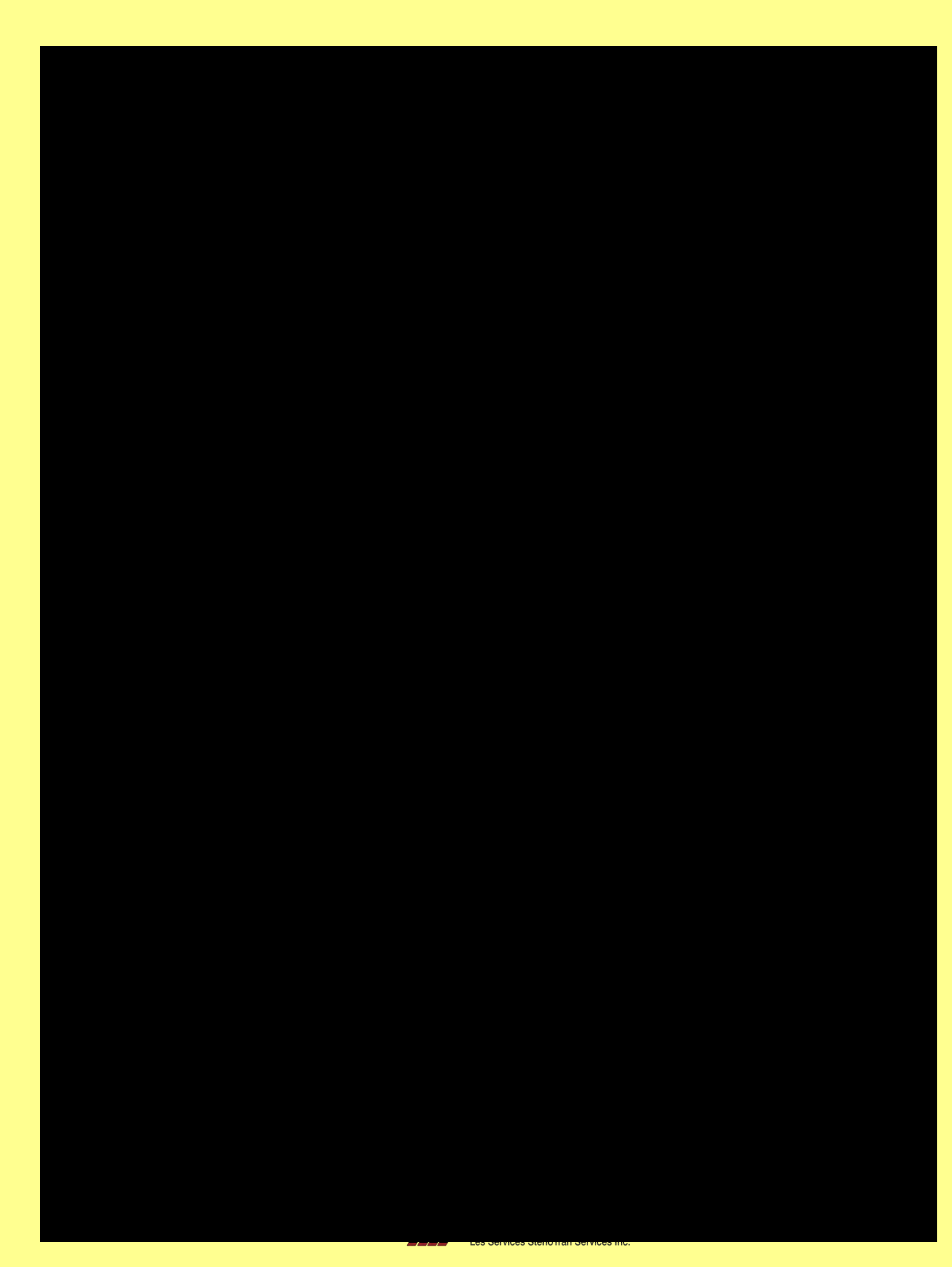

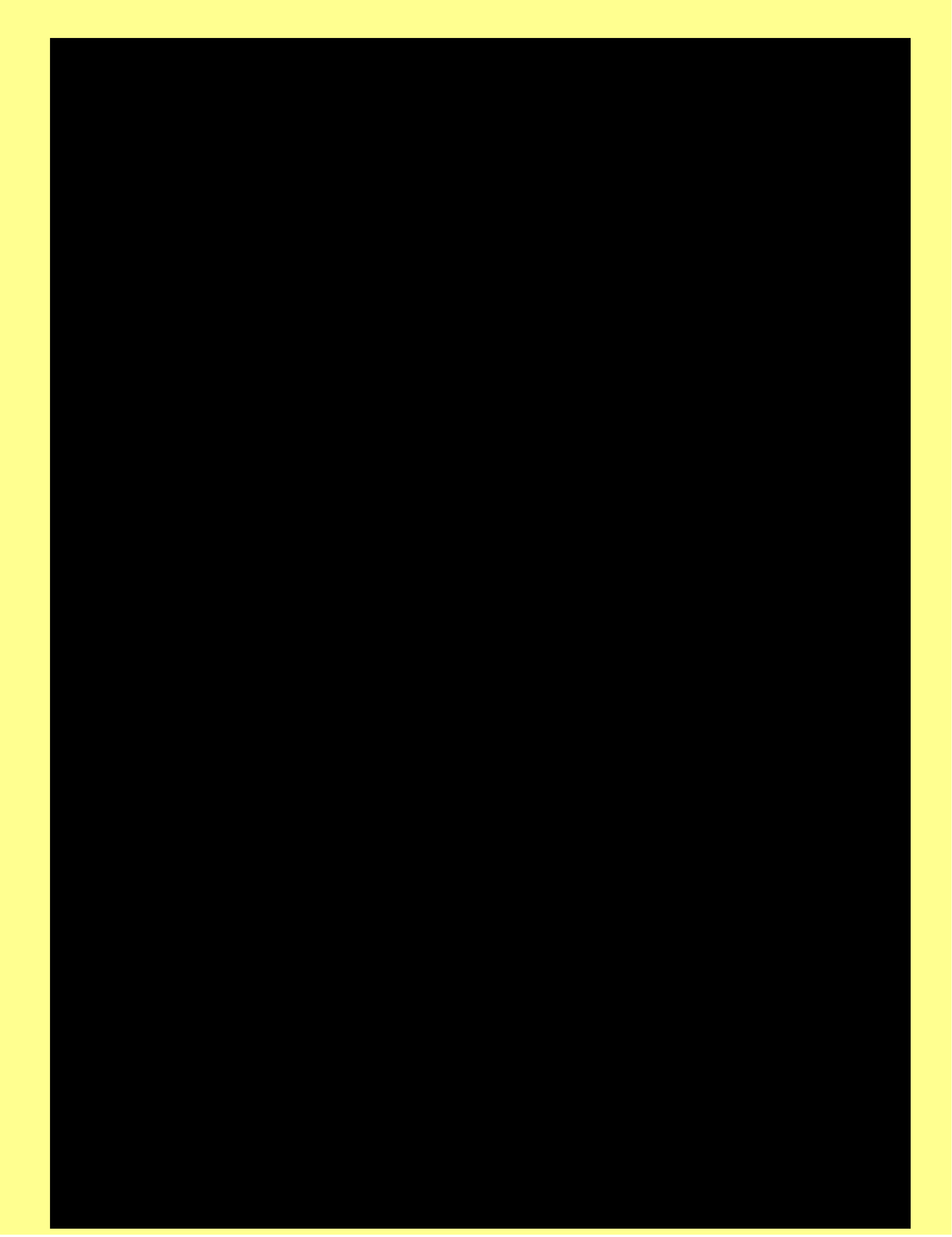

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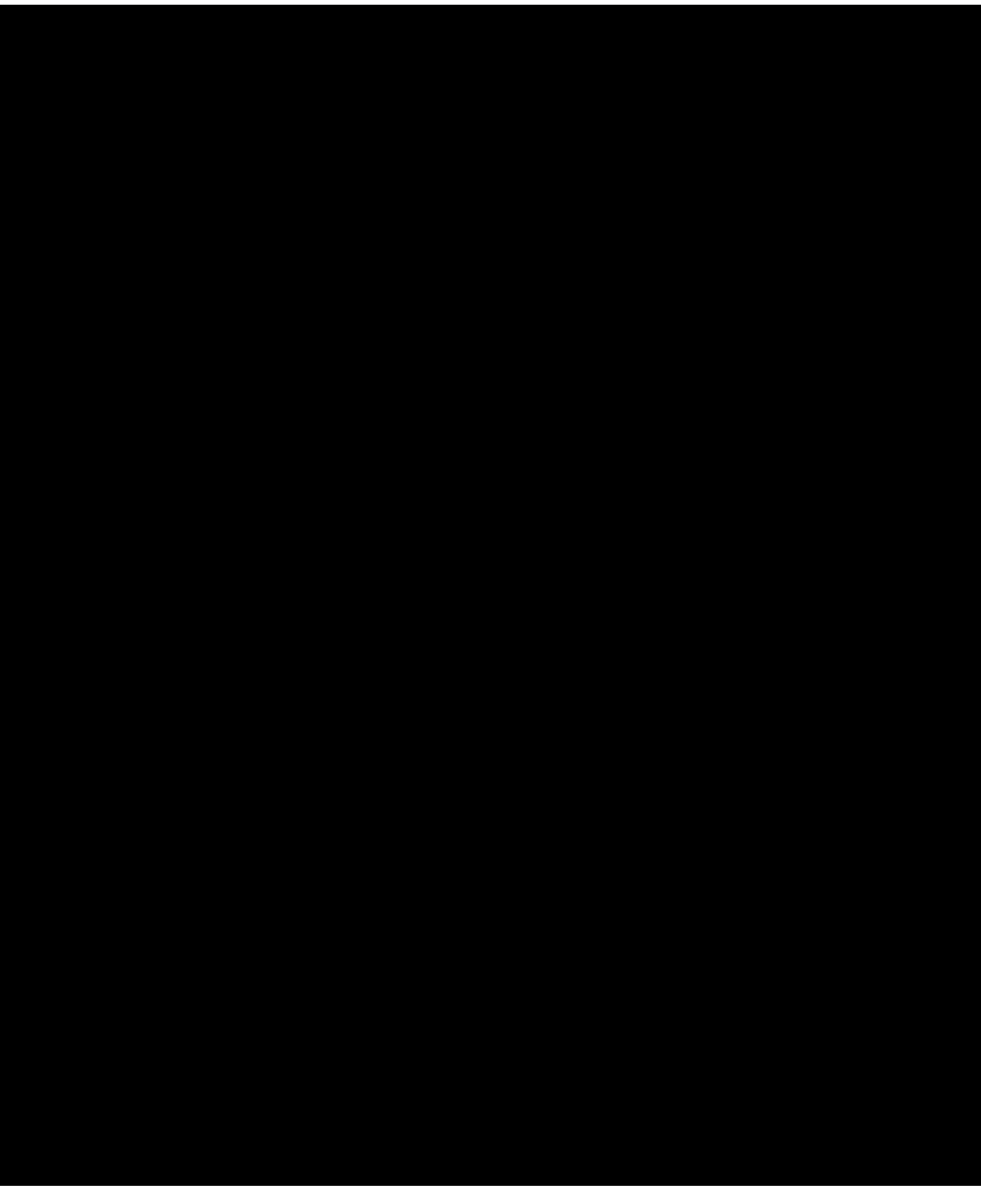

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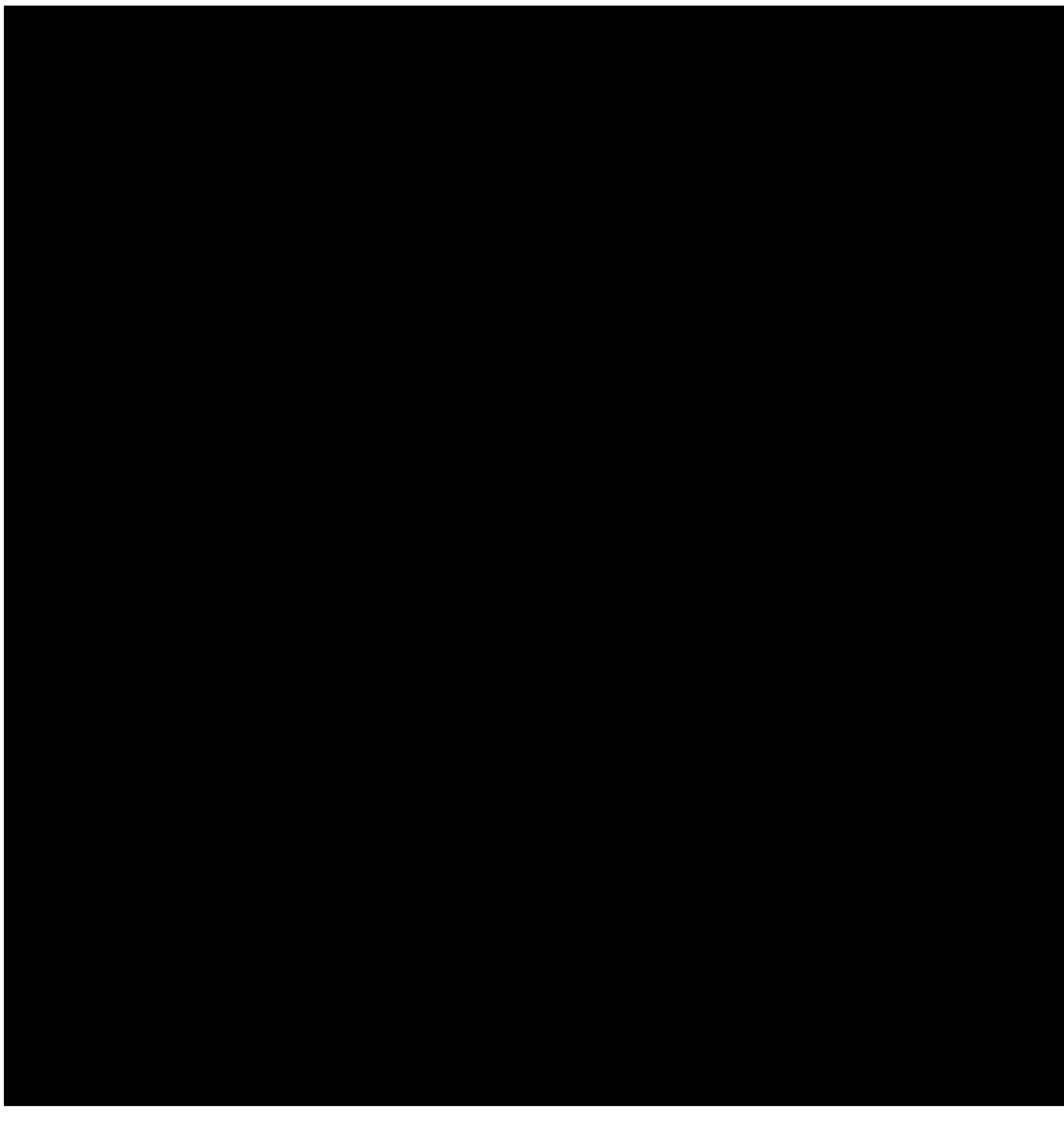

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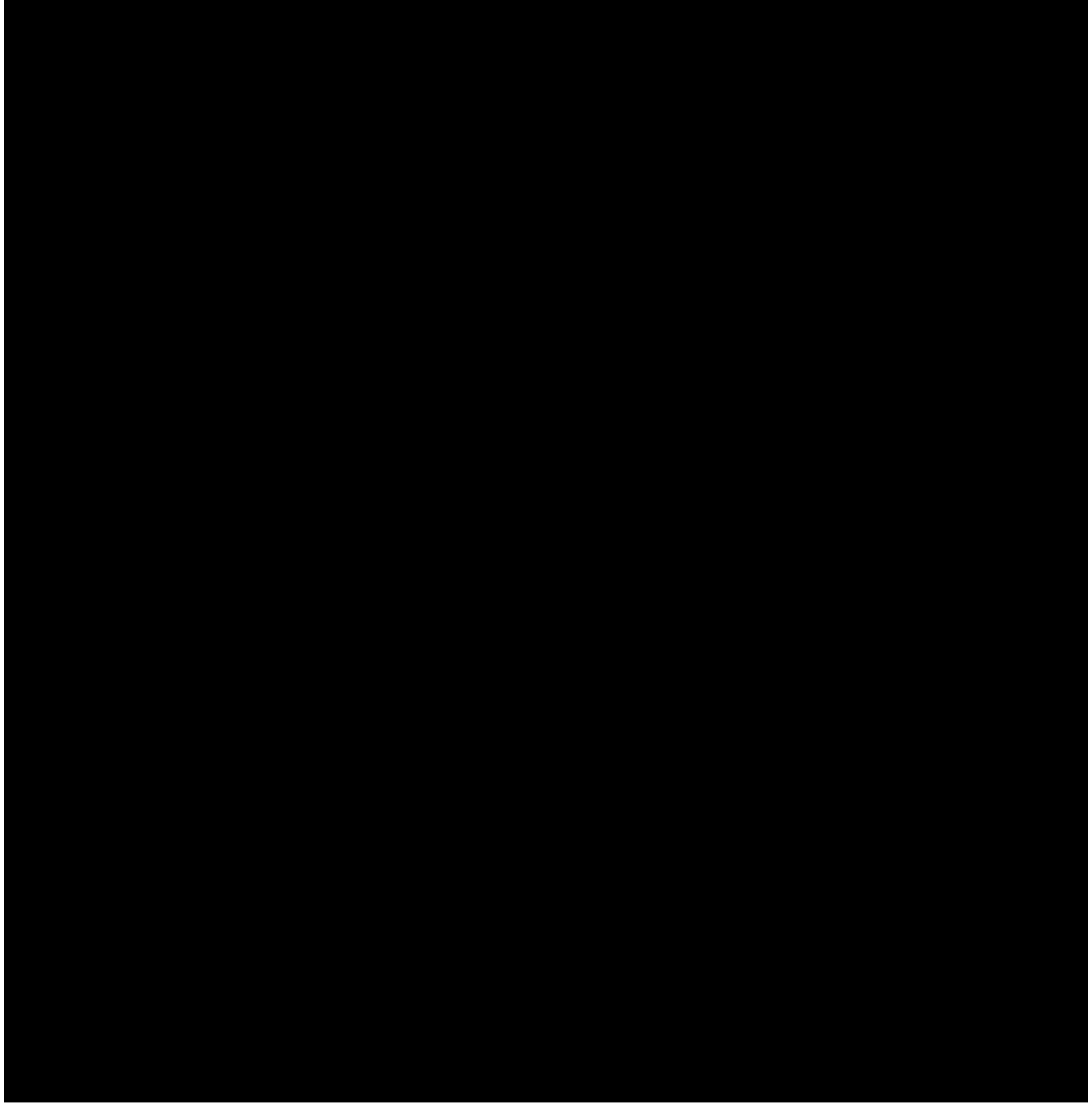

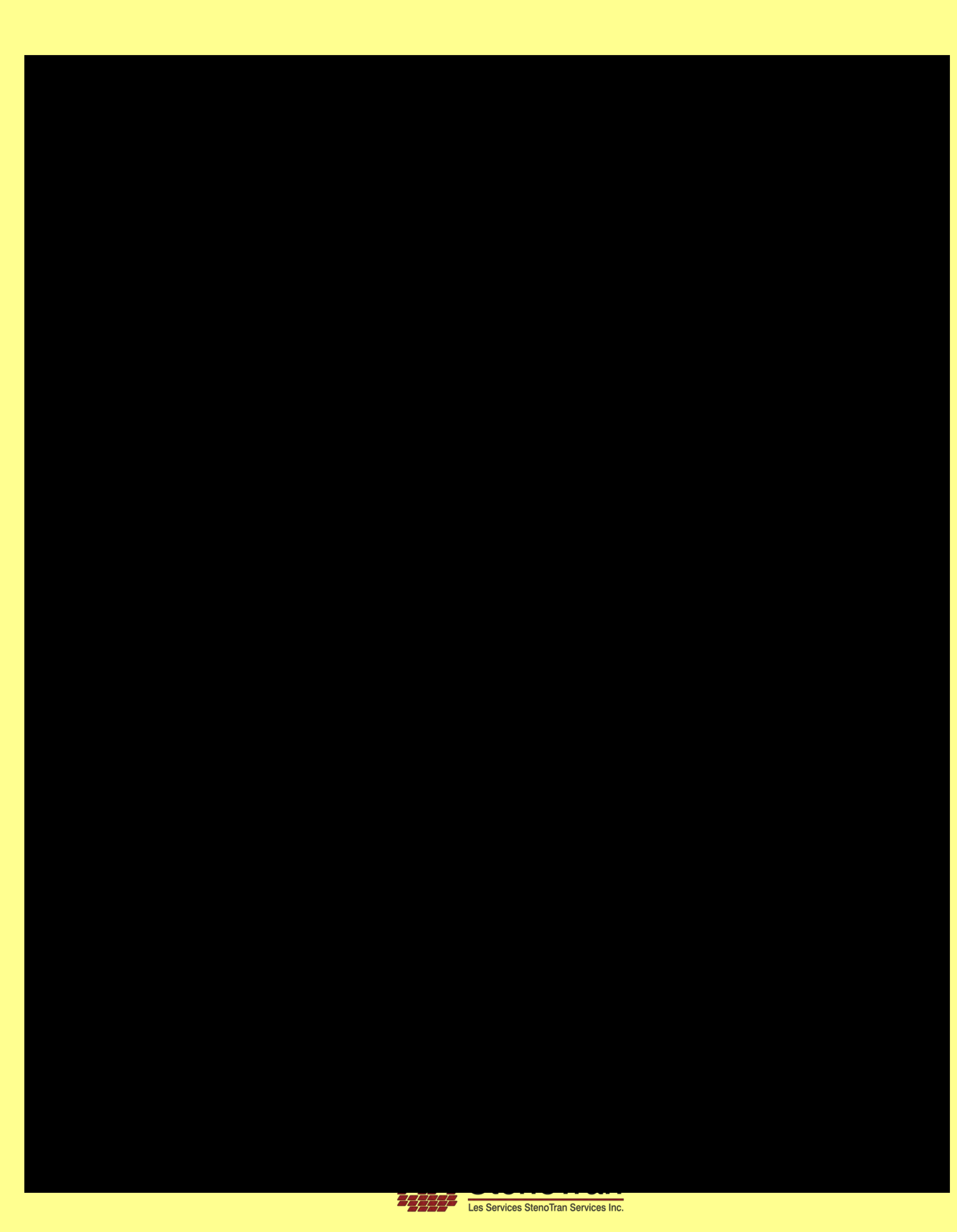

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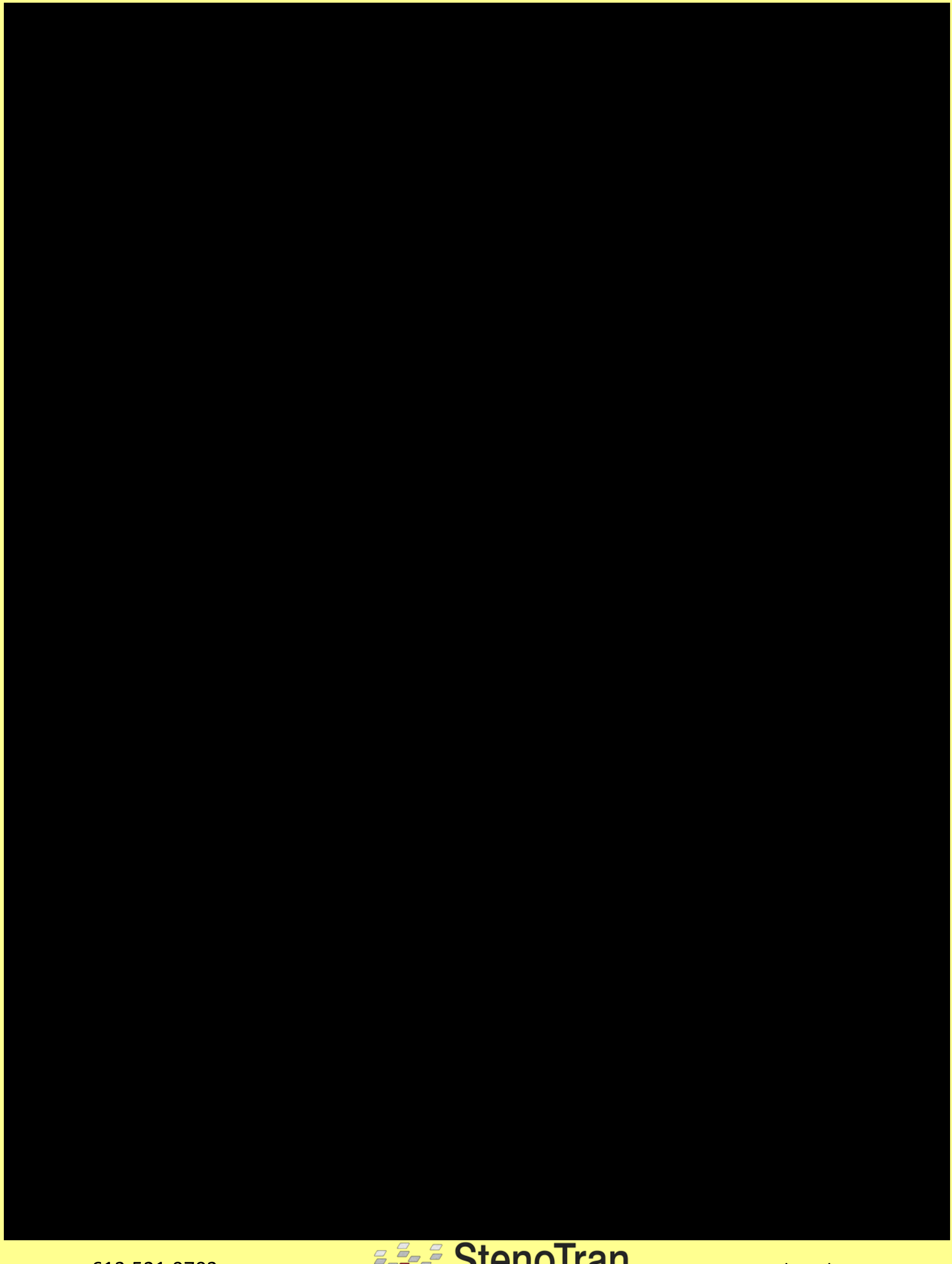

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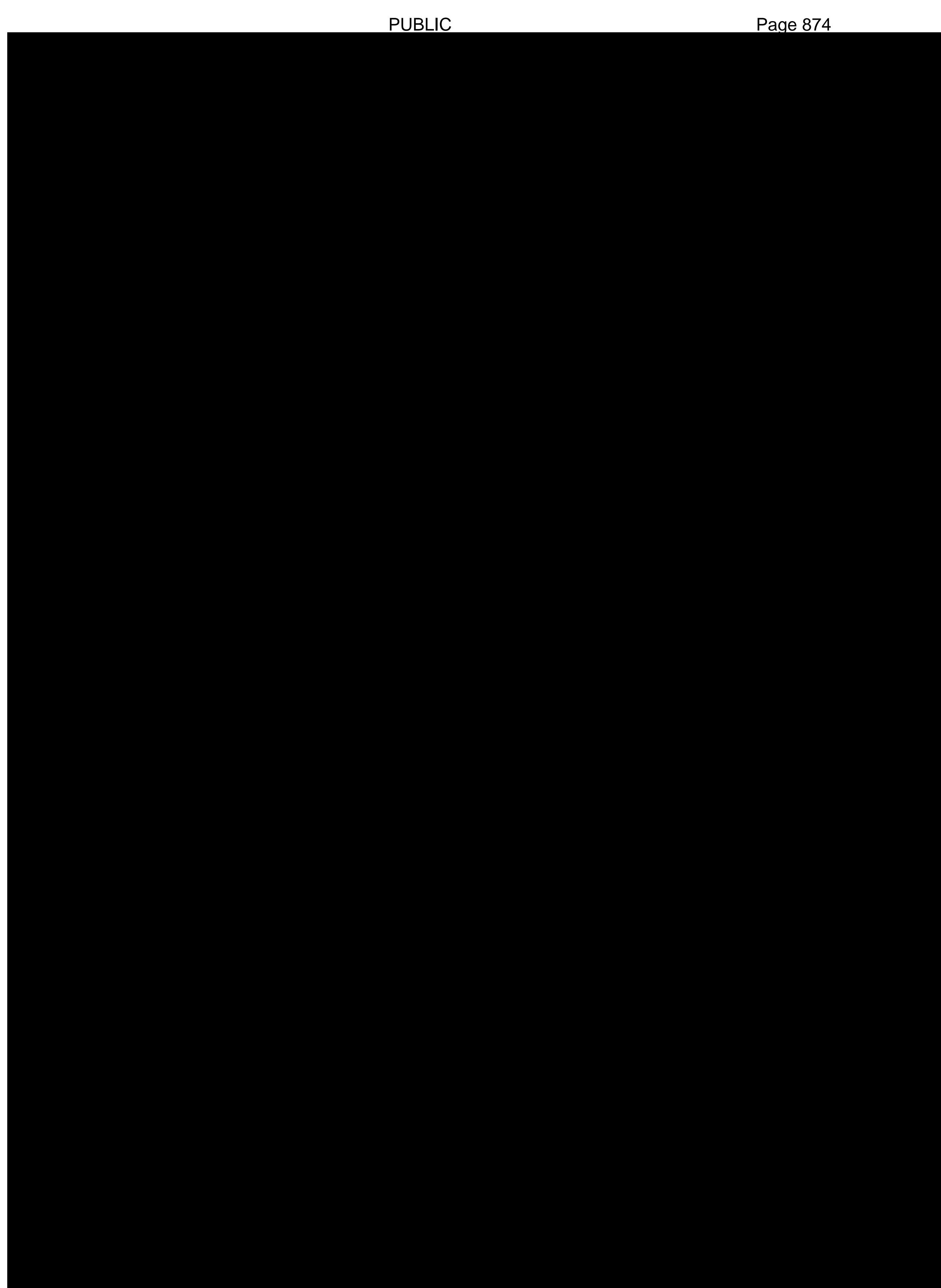
4 1500 Q. Okay. So, Mr. Engel, I
5 would like to talk to you about Secure's
6 submissions with respect to the Newalta review
7 now. You are familiar with the Competition
8 Bureau's review of Tervita's acquisition of
9 Newalta in 2018?
10 A. I am familiar with it.
11 1501 Q. Okay Secure provided the
12 Bureau with information responsive to the Bureau's
13 request for information. Correct?
14 A. Yes.
15 1502 Q. And, of course,
16 Mr. Engel, Secure knew it was making a submission
17 to a law enforcement agency?
18 A. Yes, I believe we knew
19 what we were doing.
20 1503 Q. Okay. Secure was trying
21 to be accurate and truthful in the submissions it
22 would make to a law enforcement agency?
23 A. Absolutely.
24 1504 Q. So if we can go to tab 7,
25 page 1465, so we see here it is an e-mail from Aly

1 Sudermann to Thomas Stieber copying Allen Gransch
2 and Bevan Howell dated May 17, 2018. Do you see
3 that?
4 A. I do.
5 1505 Q. The subject is "request
6 for information." Do you see that?
7 A. I do.
8 1506 Q. The attachment is
9 competitionbureauresponsefulldocumentfinal.pdf.
10 Correct?
11 A. Correct.
12 1507 Q. Let's turn to that
13 attachment. It is at tab 8, page 1469. We see
14 this is dated May 17, 2018 and the introduction
15 states:
16 "The information
17 contained herein is in
18 response to the request
19 for information by the
20 Competition Bureau to
21 Secure Energy Services
22 Inc. ("Secure") on April
23 13th. In addition to
24 responding to the
25 information request, we

1 have provided additional
2 market information.
3 Appendix A is a
4 spreadsheet containing
5 responses to the
6 information in the RFI
7 letter."
8 Mr. Engel, this is Secure's
9 response to the Competition Bureau's information
10 request. Correct?
11 A. Yes.
12 1508 Q. If we can go to page
13 1492, you will see the heading titled "barriers to
14 entry," and below it we will see a heading for
15 disposal wells. Do you see that?
16 A. I do.
17 1509 Q. Underneath the heading it
18 says:
19 "There are limited areas
20 within Alberta with the
21 appropriate geology to
22 construct disposal
23 wells."
24 Mr. Engel, that was correct
25 when Secure made its submissions on May 17, 2018.



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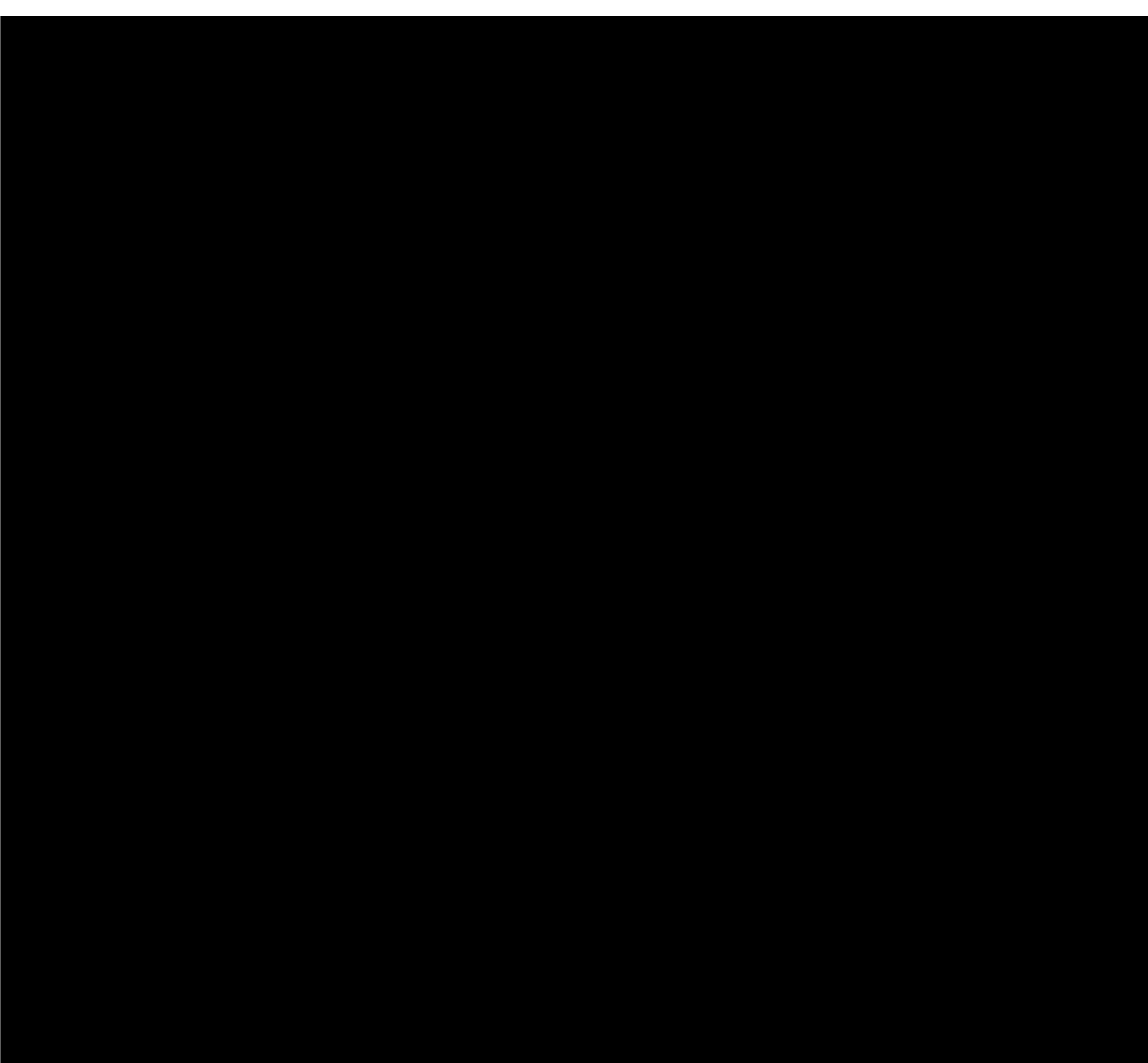
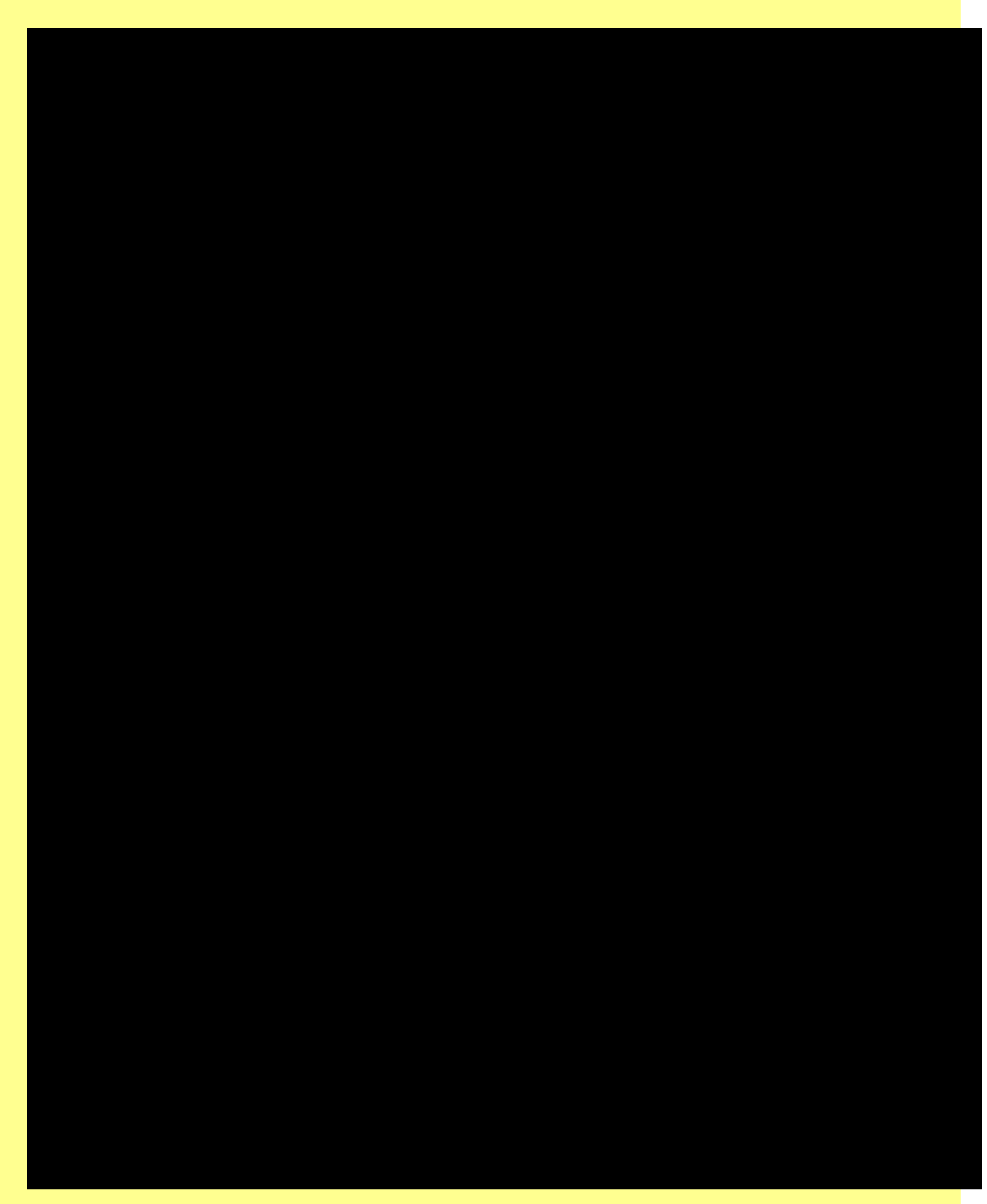
76. Further, SECURE and Tervita have noted that there is an industry trend towards the insourcing of waste disposal.[97] In the Affidavit of Darren Gee of Peyto





Journal of Economic Perspectives—Volume 24, Number 2—Spring 2010—Pages 3–30

The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics

Joshua D. Angrist and Jörn-Steffen Pischke

Just over a quarter century ago, Edward Leamer (1983) reflected on the state of empirical work in economics. He urged empirical researchers to "take the con out of econometrics" and memorably observed (p. 37): "Hardly anyone takes data analysis seriously. Or perhaps more accurately, hardly anyone takes anyone else's data analysis seriously." Leamer was not alone; Hendry (1980), Sims (1980), and others writing at about the same time were similarly disparaging of empirical practice. Reading these commentaries as late-1980s Ph.D. students, we wondered about the prospects for a satisfying career doing applied work. Perhaps credible empirical work in economics is a pipe dream. Here we address the questions of whether the quality and the credibility of empirical work have increased since Leamer's pessimistic assessment. Our views are necessarily colored by the areas of applied microeconomics in which we are active, but we look over the fence at other areas as well.

Leamer (1983) diagnosed his contemporaries' empirical work as suffering from a distressing lack of robustness to changes in key assumptions—assumptions he called "whimsical" because one seemed as good as another. The remedy he proposed was sensitivity analysis, in which researchers show how their results vary with changes in specification or functional form. Leamer's critique had a refreshing emperor's-new-clothes earthiness that we savored on first reading and still enjoy today. But we're happy to report that Leamer's complaint that "hardly anyone takes anyone else's data analysis seriously" no longer seems justified.

■ *Joshua D. Angrist is Ford Professor of Economics, Massachusetts Institute of Technology, Cambridge, Massachusetts. Jörn-Steffen Pischke is Professor of Economics, London School of Economics, London, United Kingdom. Their e-mail addresses are ⟨angrist@mit.edu⟩ and ⟨s.pischke@lse.ac.uk⟩.*

doi=10.1257/jep.24.2.3

the enrollment function. Regression discontinuity estimates using Israeli data show a marked increase in achievement when class size falls.[6]

The key assumption that drives regression discontinuity estimation of causal effects is that individuals are otherwise similar on either side of the discontinuity (or that any differences can be controlled using smooth functions of the enrollment rates, also known as the "running variable," that determine the kink points). In the Angrist–Lavy study, for example, we would like students to have similar family backgrounds when they attend schools with grade enrollments of 35–39 and 41–45. One test of this assumption, illustrated by Angrist and Lavy (and Hoxby, 2000) is to estimate effects in an increasingly narrow range around the kink points; as the interval shrinks, the jump in class size stays the same or perhaps even grows, but the estimates should be subject to less and less omitted variables bias. Another test, proposed by McCrary (2008), looks for bunching in the distribution of student background characteristics around the kink. This bunching might signal strategic behavior—an effort by some families, presumably not a random sample, to sort themselves into schools with smaller classes. Finally, we can simply look for differences in mean pre-treatment characteristics around the kink.

In a recent paper, Urqiola and Verhoogen (2009) exploit enrollment cutoffs like those used by Angrist and Lavy in a sample from Chile. The Chilean data exhibit an enticing first stage, with sharp drops (discontinuities) in class size at the cutoffs (multiples of 45). But household characteristics also differ considerably across these same kinks, probably because the Chilean school system, which is mostly privatized, offers both opportunities and incentives for wealthier students to attend schools just beyond the cutoffs. The possibility of such a pattern is an important caution for users of regression discontinuity methods, though Urqiola and Verhoogen note that the enrollment manipulation they uncover for Chile is far from ubiquitous and does not arise in the Angrist–Lavy study. A large measure of the attraction of the regression discontinuity design is its experimental spirit and the ease with which claims for validity of the design can be verified.

The last arrow in the quasi-experimental quiver is differences-in-differences, probably the most widely applicable design-based estimator. Differences-in-differences policy analysis typically compares the evolution of outcomes in groups affected more and less by a policy change. The most compelling differences-in-differences-type studies report outcomes for treatment and control observations for a period long enough to show the underlying trends, with attention focused on how deviations from trend relate to changes in policy. Figure 1, from Donohue and Wolfers (2005), illustrates this approach for the death penalty question. This figure plots homicide rates in Canada and the United States for over half a century, indicating

[6] Fuzzy regression discontinuity designs are most easily analyzed using instrumental variables. In the language of instrumental variables, the relationship between achievement and kinks in the enrollment function is the reduced form, while the change in class size at the kinks is the first stage. The ratio of reduced form to first-stage effects is an instrumental variable estimate of the causal effect of class size on test scores. Imbens and Lemieux (2008) offer a practitioners' guide to the use of regression discontinuity designs in economics.

WORKING PAPERS

Do Retail Mergers Affect Competition? Evidence from Grocery Retailing

Daniel Hosken
Luke M. Olson
Loren K. Smith

WORKING PAPER NO. 313

December 2012

FTC Bureau of Economics working papers are preliminary materials circulated to stimulate discussion and critical comment. The analyses and conclusions set forth are those of the authors and do not necessarily reflect the views of other members of the Bureau of Economics, other Commission staff, or the Commission itself. Upon request, single copies of the paper will be provided. References in publications to FTC Bureau of Economics working papers by FTC economists (other than acknowledgment by a writer that he has access to such unpublished materials) should be cleared with the author to protect the tentative character of these papers.

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WASHINGTON, DC 20580

also affected prices. Grocery prices, particularly meat and produce, are highly volatile. An increase (decrease) in the price of some food items coincident with the market event being studied would bias a simple time difference estimator of the event's effect on prices upward (downward).

We use two methods to calculate merger price effects. The first method follows the literature and estimates merger price effects using a difference-in-difference estimator; that is, we identify merger price effects by comparing the change in prices in markets affected by mergers to presumably similar markets unaffected by the merger. For this approach to be valid, it must be the case that the change in price of the comparison markets closely approximates the counterfactual change in price that would have occurred in the market affected by the event had the event not occurred. To validate these results we examine how similar the merger and comparison markets are, and determine how robust the merger estimates are to changes in the comparison group used in estimation.

The second method estimates price effects using the synthetic control method suggest by Abadie et al. (2010). This is a data-driven technique that uses information on pre-merger prices and demographic characteristics to construct an explicit forecast of price for the counterfactual in the treatment market.

Difference-in-Difference Estimates

We first estimate price effects using the difference-in-difference estimation in equation (1) below, where the (log) of retailer i's price in market j in quarter t is regressed on a retailer/market specific fixed-effect (γ_{ij}), a time indicator to control for idiosyncratic factors affecting grocery prices in all markets in a given quarter (δ_t), an indicator set equal to one in the

series regression analysis to estimate the impact these events may have had on prices, discounts or margins and then uses those estimates to predict the potential price effects from this merger."[106]

86. DiD is a common statistical technique used in analyzing natural experiments, and is often applied to estimate the price effects of mergers both in the academic literature and in regulatory or legal proceedings.[107] Indeed, the Commissioner and his experts have relied on natural experiments and difference-in-differences in prior matters. For example, Prof. Michael Baye, working for the Commissioner, used natural experiments and difference-in-differences to assess the effect of new entrants on prices in the hazardous waste disposal industry in Tervita's acquisition of Complete Environmental in 2011.[108] As with any retrospective analysis, evaluating whether it is useful for predicting the outcome of a similar event is a transparent exercise of examining the similarities and differences between the two settings, and assessing whether the methodology sufficiently isolated the treatment effect from factors or conditions not shared by the forward-looking setting.[109]

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[106] Renée M. Duplantis, "Economic Analysis of Retail Mergers at the Competition Bureau," *Canadian Competition Bureau*, September 15, 2014, pp. 6-7 (footnotes omitted).

[107] Within the academic literature, DiD analysis is a widely-used methodology for evaluating the price changes attributable to mergers or similar events. *See*, for example, Dennis Rickert, Jan Philip Schain, and Joel Stiebale, "Local Market Structure and Consumer Prices: Evidence from a Retail Merger," *Journal of Industrial Economics* 69(3) 2021: 692-729. *See also, e.g.,* Justine S Hastings, "Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California," *American Economic Review*, 94(1) 2004: 317–328. The straightforward statistical properties of DiD have made it a central tool for evaluating the performance of the theoretical approach in predicting the price effect of mergers. *See*, Matthew C. Weinberg, "More Evidence on the Performance of Merger Simulations," *American Economic Review* 101(3) 2011: 51-55; and Craig Peters, "Evaluating the Performance of Merger Simulations: Evidence from the U.S. Airline Industry," *Journal of Law and Economics* 49, 2006: 627–649. Proponents of DiD and similar methods emphasize the transparency and relative simplicity of these methods. *See*, Joshua D. Angrist and Jörn-Steffen Pischke, "The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics," *Journal of Economic Perspectives* 24(2) 2010: 3–30, generally, and pp. 20-22 for a specific discussion in the context of industrial organization and merger analysis. Prof. Angrist was a co-recipient of the 2021 Nobel Prize in Economics, along with David Card.

[108] RBBA00007_000000036-00001 at RBBA00007_000000036-00069-RBBA00007_000000036-00072, Expert Report of Michael R. Baye, Sept. 30, 2011, *Commissioner of Competition v. CCS Corporation,* Competition Tribunal CT-2011-002, Section VIII.D.2.

[109] As Angrist and Pischke put it, "Empirical evidence on any given causal effect is always local, derived from a particular time, place, and research design… Economic theory often suggests general principles, but extrapolation of causal effects to new settings is always speculative. Nevertheless, anyone who makes a living out of data analysis probably believes that heterogeneity is limited enough that the well-understood past can be informative about the future." Joshua D. Angrist and Jörn-Steffen Pischke, "The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics," *Journal of Economic Perspectives* 24(2) 2010: 3–30, p. 23. *See also*, Daniel Hosken, Luke M. Olson, and Loren K. Smith, "Do retail

87. The fundamental insight behind the DiD approach is that, in order to determine the price effect of an event (I will use a merger to illustrate here), we must account for how prices would have otherwise changed if the merger did not occur. We cannot simply compare the prices paid by the affected customers before the merger to the prices paid after the merger, because prices may have otherwise increased or decreased for a reason unrelated to the merger. For example, suppose we observe that the price of hamburgers at some locations of two fast-food chains increased after their merger. That price increase may be attributable to the merger, but it could also be the result of unrelated economic forces: for instance, there may have been an increase in the price of beef; or wages may have risen due to an overall shortage of workers. The DiD approach allows us to isolate the effect of the merger by comparing the change in prices paid by customers affected by the merger (the "treatment group") to the change in prices paid by customers who were not (the "control group"). To use a common approach to selecting a control group in merger analysis, we might use the prices at locations of the merging fast-food chains where they did not directly compete prior to the merger, but instead competed with a third, unrelated chain. By comparing the difference in prices (i.e., the before-and-after price changes) at the treatment locations to the difference in prices at the control locations (or, in other words, by calculating the difference in these differences, hence the name of the technique) we can isolate the price effect of the merger.

III.B.2. The 2018 Tervita/Newalta merger is a powerful natural experiment for assessing the effects here

88. In March 2018, Tervita and Newalta announced their intention to merge their operations into a single entity under the Tervita name to create the "largest energy-focused waste and environmental services company in Canada serving energy and industrial customers."[110] Both companies provided "energy-focused waste disposal services within the Western Canadian Sedimentary Basin" and the merger was reviewed by the Bureau under the *Competition Act*, with the focus of the Bureau's review being the "parties' oilfield waste disposal services within the Western Canadian Sedimentary Basin."[111]

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mergers affect competition? Evidence from grocery retailing," *Bureau of Economics Federal Trade Commission*, Working Paper No. 313, December 2012, https://www.ftc.gov/sites/default/files/attachments/guarding-consumers-pocketbooks/wp313.pdf.

[110] Tervita, "Newalta and Tervita Agree to Merge to Create the Leading Energy-Focused Environmental Solutions Provider in Canada," March 1, 2018, https://tervita.com/news/article/newalta-and-tervita-agree-to-merge-to-create-the-leading-energy-/.

[111] Competition Bureau Canada, "Competition Bureau continues Tervita and Newalta merger review," July 20, 2018, *News Release*, https://www.canada.ca/en/competition-bureau/news/2018/07/competition-bureau-continues-tervita-and-newalta-merger-review.html.

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13 So you know, in the academic literature, papers
14 that use differences and differences methodology explore
15 something that's called the parallel trends assumption.
16 The key thing is that you want the control
17 group and the control markets and the markets that are
18 affected to be moving similarly to establish they're
19 actually good comparisons for each other. And you can do
20 that by looking at outcomes before the merger happens to
21 show that sort of they're moving together. And then if it
22 breaks apart, you can say we're confident that's the price
23 effect of the merger, whereas if they're just trending in
24 different directions from the start, you're not going to
25 pick up the merger effect. You might find a merger effect,

1 but it could be overstated or understated and not affect --
2 not be any relationship with what the truth is.
3 So in exploration of pre-trends, it's sort of
4 table stakes when you go to differences and differences.
5 And there's enough data to do it here, but Dr. Duplantis
6 didn't look at that.
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engineering and design ("FEED") studies; market and sustainability assessments that support long-term market demand and community support for the service offered, surface and mineral land acquisitions, and regulatory approvals.

11. In addition to the above, facilities must be located in areas with suitable geology. There are numerous factors and variables involved in the assessing suitable reservoirs for disposal well purposes. These include factors such as reservoir capacity, downhole pressures, hydraulic isolation (concerns of reservoirs communicating with one another), economics, and surface and mineral land access.

12. North East British Columbia (NEBC) has challenging geology and reservoir dynamics in general due to faulting and induced seismicity. Downhole disposal options are much more limited and involve a higher degree of capital risk. Catapult has experienced this challenge firsthand while developing our Tower water management facility. The initial disposal wells that we completed did not accept fluids despite having a thorough geological review conducted. The review identified multiple successful nearby disposal wells that were completed in this same zone. Our wells were subsequently re-completed into another reservoir zone which did prove to accept fluids and continues to do so today. This is just an example of one of the risks associated with finding suitable reservoirs for long term disposal purposes.

13. Oil and gas producers have the option to build and use their own water disposal facilities ("first party" facilities), use third party disposal facilities such as those owned by Catapult or Secure, or use a combination of both. Oil and gas producers with their own disposal facilities may be able to meet their basic

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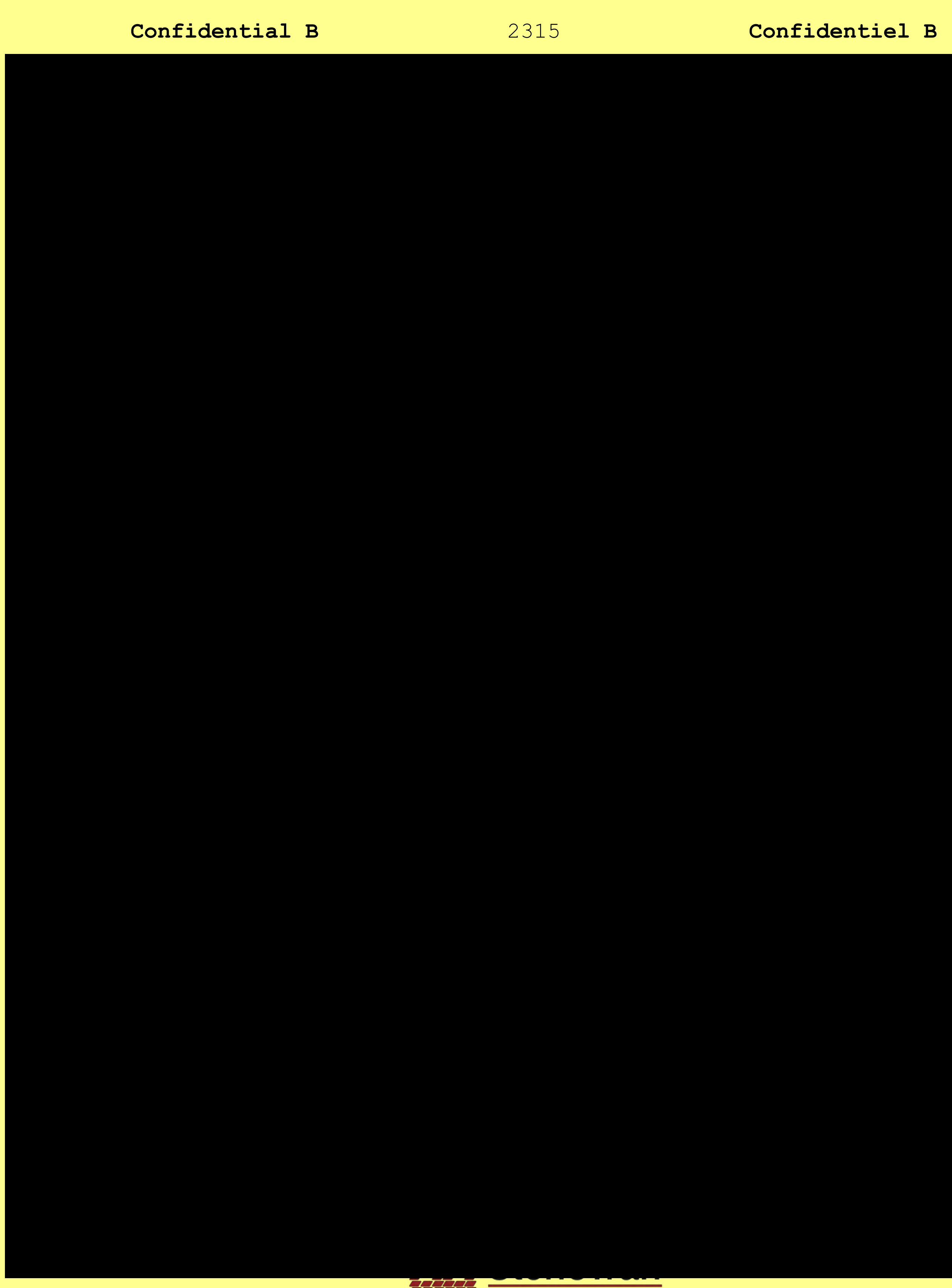
Summary for Approval

Project Name:		
Date: 2019-04-04	C&CM Number	Facility:
Budget Type: Business Development	Capital Type: Projects	Project Sponsor: Kelly Smith



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7 **MR. HOOD:** My point was more simple. Prior to
8 the merger maybe the 2-to-1 control group split their waste
9 50-50 with two options, while the treatment 2-to-1 group,
10 prior to the merger, split their waste 95 to 5 percent.
11 That could be a possibility?
12 **DR. DUPLANTIS:** That could be a possibility,
13 yes. The question is whether it systematically affects it
14 or not.
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also assign products (substance-service combinations) into product markets using Dr. Miller's classifications.[114]

94. I provide the technical details of the analysis in Appendix D, but at a high level, there are four main steps in the analysis I undertake to examine the prior Tervita/Newalta transaction:

    a. Assess the market structure around each customer-well location for each product purchased before and after the merger.[115] (This step is identical to Dr. Miller's approach to customer-centric geographic markets).

    b. Aggregate customer well locations up to the level of an individual customer at a given facility for each product purchased, and calculate the weighted average price and market structure (weighted by revenue) for each customer-facility-substance combination. This aggregation allows me to assess prices for each type of waste delivered by a customer to each facility for disposal. For example, if a customer well location disposes of its waste at two different facilities, that customer would have two prices (one for each facility) factoring into the analysis.

    c. For each type of waste delivered by a customer to a facility, those customers that experienced a change in market structure due to the Tervita/Newalta merger form the "treatment" observations in the difference-in-differences framework. The "control" observations are the customers that saw no change in market structure for each product purchased.

    d. Calculate the change in prices for each customer-facility-substance combination between 2017/2018 and 2019/2020. The post period chosen consists of August 2019 through March 2020 to cover the time period after the Bureau's investigation of the transaction had been concluded up to the beginning of the COVID time period.[116] So that the comparison of

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[114] Miller Report, Section 4.1 and Appendix Section 7.7. *See also*, Miller Report backup, "service_classification_secure_tervita.xlsx," which I have extended to also cover products sold by Tervita during the period 2017/2018 in the file "Tervita Product xWalk.xlsx" available in my backup materials.

[115] As discussed in Appendix D, the transaction-level data record the customer well location, the facility used and the product purchased (i.e., product and substance combination). My analysis is conducted at the customer, facility and substance combination.

[116] Tervita announced the Bureau's investigation of the transaction had concluded on the one-year anniversary of the closing of the transaction. *See*, Tervita, "Tervita Corporation Announces End of Competition Bureau Review Period for the Newalta Transaction," July 22, 2019, https://tervita.com/news/article/tervita-corporation-announces-end-of-competition-bureau-review-p/.

I end the post period through March 2020 as there is a large decrease in sales beginning in April 2020 following the onset of COVID restrictions, which could potentially bias the analysis if prices were affected in any way from the reduced volumes.

before and after price changes is undertaken over a consistent set of months and thereby not affected by the possibility of seasonality, the pre-period includes the time period August 2017 to March 2018.

e. Compare the before-and-after change in prices among treatment observations to the change in prices among control observations to determine the overall effect of the merger. I define separate treatment and control groups for each pre-merger market structure. For example, I compare the "3-to-2" treatment group to observations that remained in a 3-competitor market structure from 2017/2018 to 2019/2020. I also account for markets where SECURE was a remaining competitor after the Tervita/Newalta transaction.

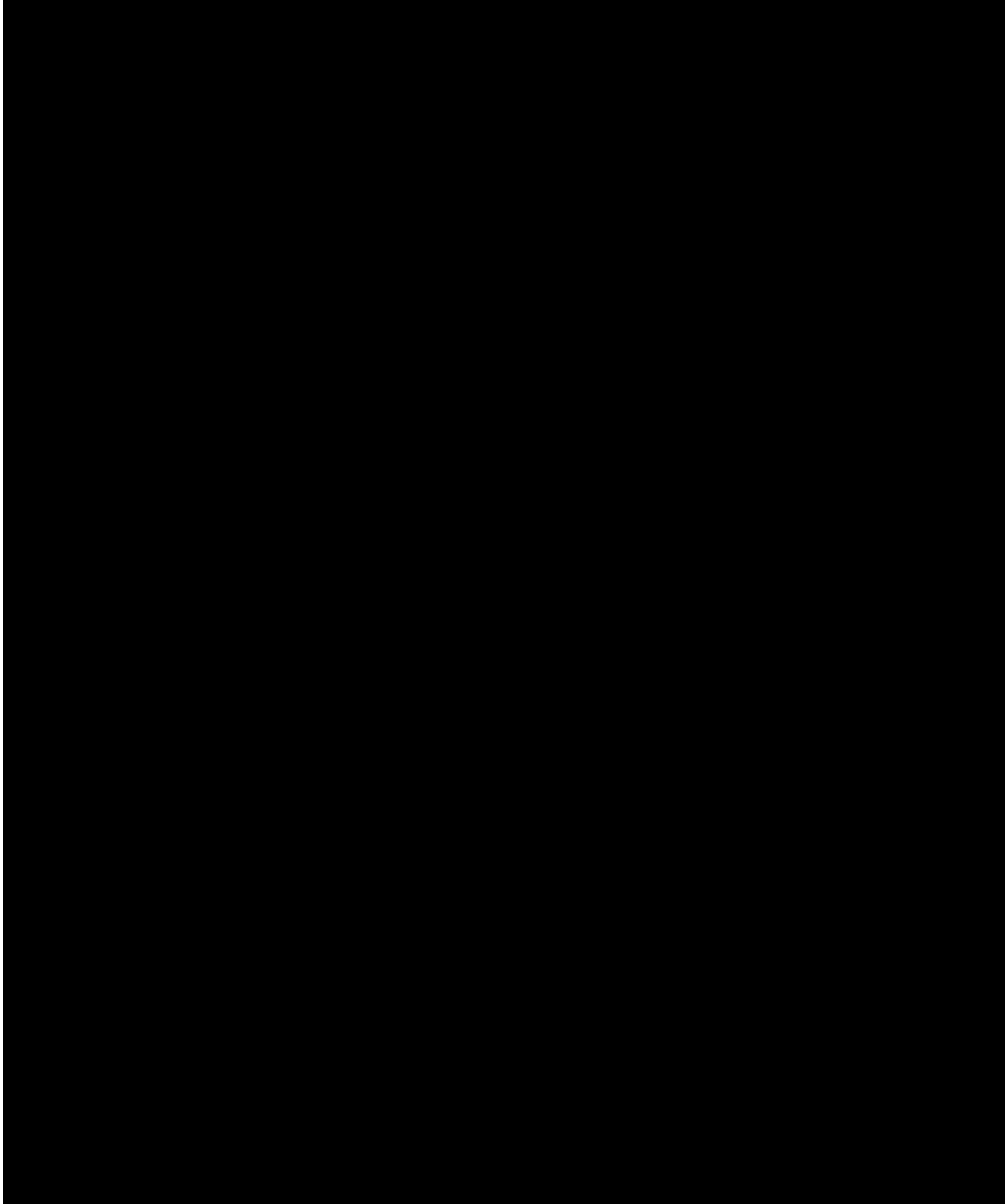
95. As discussed below and in Appendix D, I first conduct the analysis by looking at simple averages to illustrate the DiD methodology and then extend it to a regression analysis, which allows me to control for other important factors, like cost changes. Finally, I conducted numerous robustness checks on the regression specification, which are discussed in Appendix D and detailed in my backup.

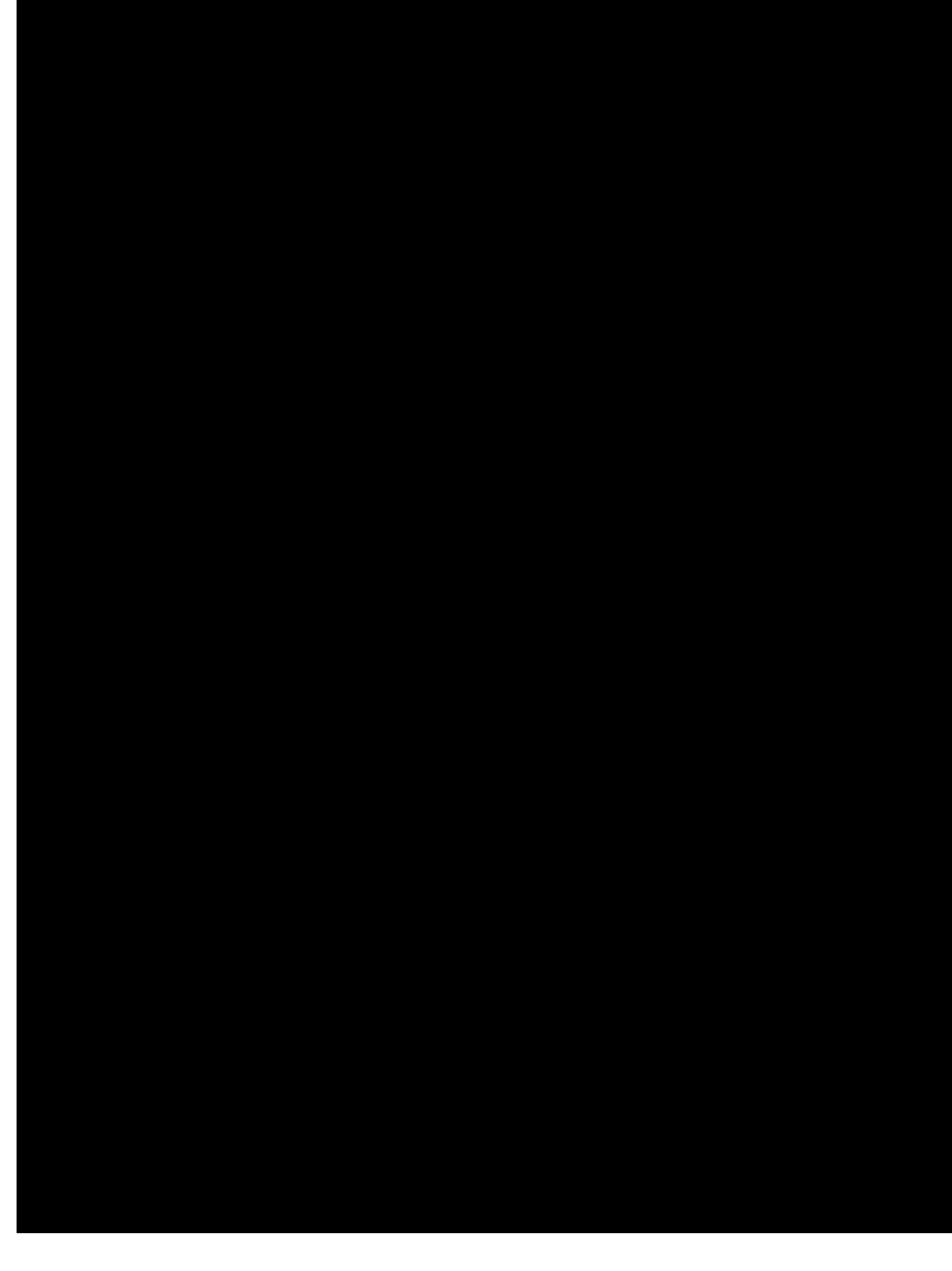
III.B.4. The natural experiment results confirm that Dr. Miller's auction model is not reflective of likely competitive effects

96. In Figure 14, Figure 15, and Figure 16 below, I provide visual illustrations of the natural experiment analysis using simple averages, limiting the analysis to customers who pre-merger had two suppliers to choose from, for ease of illustration.[117] Each circle in the plot is the price change calculated between 2017/2018 and 2019/2020 for a given customer-facility-substance combination that had two competitors in their market in 2017/2018, and the size of the circle represents the relative revenue for that customer.

97. In Figure 14, for each customer-facility-substance combination, I show those observations that did not experience a change in their available suppliers as a result of the Tervita/Newalta merger. These are instances where the pre-merger market structure was two competitors in 2017/2018, and remained that way in 2019/2020 (or the customer experienced almost no

[117] The illustrative figures below incorporate all natural experiments, but the analysis is conducted several different ways as outlined in Appendix D.





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8 **MR. HOOD:** So Dr. Duplantis, you understand
9 that on July 23rd, 2019, when the one-year period expired,
10 Tervita could not immediately raise prices for all of its
11 customers; correct?
12 **DR. DUPLANTIS:** Not for all of them, but they
13 could -- well, I don't know that they could or couldn't for
14 all of them. I imagine that once the transaction closed,
15 contracts get assigned. There's an ability to renegotiate
16 those things. When those happened, I'm not certain. But
17 there's possibilities that some customers may not have
18 renegotiated them, but many of them may have.
19 **MR. HOOD:** And we've seen a number of disposal
20 quotations in evidence, and as I think you just recognized,
21 those quotations can be effective for a set period of time;
22 correct?
23 **DR. DUPLANTIS:** Absolutely.
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16 **MEMBER HORBULYK:** Okay. One of the factors
17 that you do mention in your report is the fact that some of
18 these customers are under contract. So how would the
19 existence of long-term contracts prevent the kind of price
20 increase that we might expect at say, in spot markets?
21 **DR. DUPLANTIS:** So in my analysis, the
22 existence of long-term contracts is only a concern if it
23 affects the control or treatment groups differently. I
24 think in my analysis, because we're looking at things on a
25 facility customer basis across their wells, you will have

1 some customers that are in the control group for a given
2 facility and some customers with a different facility in a
3 treatment group.
4 So to the extent that a customer is across
5 multiple groups, which many are because they're are
6 geographically dispersed, as long as the long-term
7 contracts aren't affecting one treatment or control group
8 more than the other and it's just a randomness across, I
9 think that the natural experiment analysis, kind of
10 accounts for that. I think the long-term contracts, you
11 know, are always things that you need to look for. If all
12 of the contracts came up at the same date, you know, if
13 they were all at the end of the time period that I was
14 looking at, then that would be something that, you know,
15 would -- you'd have to look at.
16 But I think my understanding of the contracts
17 is that they're up for renewal across time periods. I
18 don't know that there's any systematic date by which
19 they're all being renewed. So on any given month you could
20 have different renewals happening. And especially with the
21 different projects coming up that come in, those are
22 one-offs or amended contracts. And so the randomness of
23 that kind of across both the control and treatment groups
24 wouldn't necessarily affect the results.
25 **MEMBER HORBULYK:** So could you just remind me

1 again what the time dimension was of this price data set
2 you use for the analysis?
3 **DR. DUPLANTIS:** So the data set that I used
4 went from 2017 to 2020. I looked at the transaction
5 occurred -- closed in July 2018. And then the Bureau has a
6 one-year period by which they could review, continuing to
7 review the transaction. So in order to ensure there were
8 no confounding effects like Tervita wad holding prices or
9 not changing prices because of the Bureau’s review, I
10 waited until the one-year time period was over. And so the
11 analysis started in August 2019 for the post period up to
12 March 2020, right before Covid hit.
13 **MEMBER HORBULYK:** Okay. And so if in both the
14 treatment and the control groups there were a bunch of
15 contracts that didn't come up for renewal during that
16 period, and for which there were no observed price
17 increases, did you -- for the purposes of computing all
18 these statistics, including means and so on, did you take
19 those observations out of the data set or did you leave
20 them as if there was zero price increase?
21 **DR. DUPLANTIS:** I left them in as they were a
22 zero price increase, because over that time period they
23 would have been a zero price increase.
24 **MEMBER HORBULYK:** Okay. So their presence in
25 both the treatment and control, their presence would lower

1 the observed mean value, right?
2 **DR. DUPLANTIS:** To the extent that you would
3 have expected them to have price increases. But we know
4 for many of the contracts, even when they come up for
5 renewal, they sometimes don't actually have increases. I
6 mean, I think there are evidence in the record of some
7 prices being quite consistent and steady over time. So I
8 think it's a question as to whether or not the contract
9 actually resulted in a price increase, depending on the
10 negotiated power of the producer of that contract.
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8 But the first is that the number of
9 observations that she has to work with is considerably
10 lower, and the reason is that she has to drop markets in
11 which Secure does not compete. And going on one of the
12 spreadsheets she provided in her backup, I believe she's
13 dropping at least 60 percent of the observations to
14 accomplish this.
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(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 79 ou 92.

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429; 2018, c. 8, s. 115; 2018, c. 10, s. 87.

Définition de *concurrent*

(11) Au paragraphe (1), ***concurrent*** s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

2009, ch. 2, art. 429; 2018, ch. 8, art. 115; 2018, ch. 10, art. 87.

Mergers

Definition of *merger*

91 In sections 92 to 100, ***merger*** means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Fusionnements

Définition de *fusionnement*

91 Pour l'application des articles 92 à 100, ***fusionnement*** désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

Ordonnance en cas de diminution de la concurrence

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

79 It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable. Definition of the relevant market is indeed a necessary step in the inquiry; and the fact that the Tribunal dwelled on it is perhaps understandable if, as seems to have been the case, the bounds of the relevant market were not clear.

80 I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

81 Accordingly, the Tribunal's conclusion must stand.

H. Remedy

82 Having found that Southam's acquisitions had produced a substantial lessening of competition in the market for real estate print advertising on the North Shore, the Tribunal ordered Southam to divest itself, at its own option, of either the *Real Estate Weekly* or the *North Shore News*. The Federal Court of Appeal declined to disturb this remedy. I agree with the Federal Court of Appeal that the remedy settled upon by the Tribunal should be allowed to stand.

83 The appellants submit that the correct test for a remedy under the *Competition Act* is whether it eliminates any substantial lessening of competition that the merger may have caused. The appellants observe that this is the standard that has been applied in cases under s. 92(1)(e)(iii) of the Competition Act, in which the parties have consented to the remedy. See, e.g., *Canada (Director of Investigation& Research) v. Air Canada* (1989), 27 C.P.R. (3d) 476(Competition Trib.), at pp. 513–14. They observe also that substantial lessening of competition is the evil that Parliament has sought to address in the Act. Mergers themselves are not considered to be objectionable except in so far as they produce a substantial lessening of competition. Therefore, restoration to the pre-merger situation is not what is wanted. Indeed, presumably *some* lessening of competition following a merger is tolerated, because the Act proscribes only a *substantial* lessening of competition. The appellants object further to what they see as the punitive quality of the remedy that the Tribunal imposed, and to what they regard as the illicit shifting to them of the burden of showing that the proposed remedy would be effective.

84 The respondent, for his part, says that the test of a remedy is whether it restores the parties to the pre-merger competitive situation. I believe that the appellants' test is the better one.

85 The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. This is the test that the Tribunal has applied in consent cases. The Tribunal attempted to distinguish this case from those cases on precisely the ground that here the Director did not consent to the appellants' proposed remedy. But the distinction is not a sensible one. I can think of only two reasons why the test should be more forgiving where the parties have consented to a remedy. The first is that parties who have not consented should be punished for their obduracy. The second, which is related to the first, is that the

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law should provide parties with an incentive to come to a consensual arrangement. Neither reason is valid on closer analysis. The burden of a harsh standard falls entirely on one of the parties: the company. No punishment falls on the Director when he or she is obdurate, and the harsh standard gives him or her no incentive to consent to a remedy. Therefore, even if there is a policy of encouraging consent and punishing obduracy, it is not well served by the imposition of a more stringent standard in cases in which the parties have not consented. The better approach is to apply the same standard in contested proceedings as in consent proceedings.

86 However, the appellants do not benefit by their proposed standard. The reason is that the Tribunal expressly found that, even accepting that the appropriate standard is the one used in consent proceedings, Southam's proposed remedy fails because it would not likely be effective in eliminating the substantial lessening of competition. Robertson J.A. accepted this finding, saying that it was entitled to deference. I agree.

87 The Tribunal's choice of remedy is a matter of mixed law and fact. The question whether a particular remedy eliminates the substantial lessening of competition is a matter of the application of a legal standard to a particular set of facts. Therefore, for reasons I have already given, the Tribunal's decision must be reviewed according to a standard of reasonableness.

88 Because the Tribunal did not decide unreasonably when it decided that Southam's proposed remedy would not be effective, its decision should be allowed to stand. What Southam proposed was that it should sell the real estate supplement that appears weekly in the *North Shore News*. But, as the Tribunal very properly pointed out, it is not clear that the supplement would prosper or even survive on its own. Even if the supplement continued to enjoy the advantages of a close association with the *North Shore News*, the closeness of the association would not tend to foster competition. See the Tribunal's decision, supra, at p. 252.

89 The appellants' other objections to the remedy are unconvincing. The remedy is not punitive, because the Tribunal found that it was the only effective remedy. If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective. As for the claim that the Tribunal wrongly required the appellants to demonstrate the effectiveness of their proposed remedy, no more need be said than that he who asserts should prove, as Robertson J.A. so aptly put it ((1995), 127 D.L.R., (4th) 329) at p. 337.

90 Therefore, I would dismiss the appeal of the remedy.

6. Conclusion

91 The Tribunal decided that the acquisition by Southam of several community newspapers did not substantially lessen competition in the market for retail print advertising in the Lower Mainland of British Columbia. That decision is entitled to deference. Because it is not unreasonable, it must be allowed to stand.

92 Accordingly, I would allow the appeal on the merits with costs throughout, set aside the judgment of the Federal Court of Appeal, and restore the order of the Tribunal. I would dismiss the appeal on the remedy with costs.

Appeal from judgment on merits allowed; appeal from judgment on remedy dismissed.

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offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*, at para. 16). Therefore, the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This 'wealth transfer' or 'redistributive effect' is considered to be neutral" (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.

96 In the *Superior Propane* cases, the Tribunal and the Federal Court of Appeal recognized another methodology called the "balancing weights" approach. This approach enables Tribunal members to "use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power" (*Superior Propane I*, at para. 431).

97 As explained in *Superior Propane IV*, under the balancing weights approach, the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. The Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Then, the Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity (*Superior Propane IV*, at para. 20).

98 The Tribunal may also adopt a modified version of the balancing weights approach (see *Superior Propane IV*, at paras. 21 and 26). Under this modified approach, socially adverse redistribution effects, or the portion of the wealth transfer that is attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*, at para. 333).

99 However, there is no mandated "correct" methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002). at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

100 The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*, at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).

101 The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.

(4) Order Implementation Efficiencies Are Not Valid Efficiencies Under Section 96

102 In the context of a merger, efficiencies are pro-competitive benefits. As Brian A. Facey and Cassandra Brown explain, "Economists' conception of efficiency revolves around the benefit, value or satisfaction that accrues to society due to the actions

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and choices of its members" (p. 253). There are three components: (1) production efficiency, which "is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology"; (2) innovation or dynamic efficiency, which "is achieved through the invention, development and diffusion of new products and production processes"; and (3) allocative efficiency, which "is achieved when the existing stock of goods and productive output is allocated throughout the price system to those buyers who value them most in terms of willingness to pay, such that 'resources available to society are allocated to their most valuable use'" (Facey and Brown, at pp. 253-55, quoting Competition Bureau, Merger Enforcement Guidelines (2011), at para. 12.4).

103 Tervita argues that the Tribunal erred in rejecting valid efficiencies from its consideration of the efficiency gains, namely those referred to by the Tribunal as OIEs. Tervita submits that all economic efficiencies, however arising, should be considered.

104 Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *transportation* gains in efficiency are "productive gains in efficiency realized by the customers who are closer to the Babkirk site, allegedly than to Tervita's Silverberry secure landfill. Since Tervita acquired the allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131). Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.

105 The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site secure landfill: "Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry ..." (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser — from the spring of 2012 to the spring of 2013.

106 The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment ("MOE") to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).

107 A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

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Competition Policy

This is plainly an area where public policy must tread warily, avoiding *per se* rules and simple *a priori* assumptions that mergers are generally good or generally bad. It would not be at all inconsistent, in Canadian circumstances, for public policy to act against certain mergers while positively encouraging certain others -- those which, for example, were regarded as part of a necessary reorganization of an industrial sector to meet changing world trading conditions. We would suggest that in instances where the federal government, through the Department of Industry, Trade and Commerce, might on occasion act as a marriage broker and actively seek to bring about certain mergers deemed to be in the public interest, prior consultations between this Department, the tribunal and the Department of Consumer and Corporate Affairs should take place. Such public sponsorship, provided it were based on adequate study of the particular industrial structures involved, would be entirely in accord with our general philosophy of approach to mergers. The precise machinery by which prior consultation might be arranged, we leave to others; for the present, our immediate concern is to recommend a procedure for safeguarding the public, to the greatest extent possible, against the adverse effects of mergers undertaken on the initiative of a firm or group of firms. The role of the Competitive Practices Tribunal in this regard would be to examine those mergers that appeared to contain a significant potential for harm, and where such a potential was found, to balance this off carefully against any potential for good that was also found (both good and bad potentials to be viewed, of course, from the standpoint of the economy as a whole and the general public interest). Having made its balancing assessment, the tribunal would, according to its findings, make one of three types of decision:

(1) block the merger unconditionally;

(2) allow it to proceed unconditionally; or

(3) allow it to proceed in altered form, or subject to other conditions designed to ensure that potential disadvantages were reduced to the point where they were outweighed by potential good effects.

would arise in attempting to "unscramble the egg" if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical "unscramble the egg" undertaking concerned with the intermingling of assets.

118 The evidence in this case does not support Tervita's claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

119 The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

120 For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).

(5) The Balancing Test Under Section 96

121 Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on the Commissioner's failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) The Commissioner's Burden

122 As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

123 Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

124 The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

125 The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a

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157 The Commissioner has the legal burden of proving the extent of the relevant effects, while the respondents have the burden, not only of proving the scale of the efficiency gains that would not have occurred but for the merger, but also of persuading the Tribunal on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects.

158 The appellant should have his costs, but because the respondents were successful on the burden of proof issue, I would reduce the costs awarded by 20% of those otherwise allowable.

***Létourneau J.A.*:**

159 I have had the benefit of reading the reasons for judgment issued by my colleague, Evans J.A.. I agree with him that the interpretation of the word "effects" in section 96 of the *Competition Act* (Act) R.S.C. 1985, c. C-34 involves a pure question of law that falls to be decided on a standard of correctness.

160 I also agree with my colleague that the word "effects" in section 96 of the Act ought not to be limited, as the Tribunal did, to the effects identified by the total surplus standard. As my colleague has pointed out, the interpretation of section 96 of the Act involves balancing market power and efficiency gains. The approach taken in this matter both in the United States and in Canada is by no means free from ambiguity and harsh criticism: see Robert H. Lande, The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust (1988) 33 *Antitrust* 429; David B. Andretsch, Divergent Views in antitrust Economics (1988) 33 *Antitrust Bull.* 135; Alan A. Fisher, Frederick I. Johnson and Robert H. Lande, Price Effects of Horizontal Mergers (1989) 77 *Calif. L.R.* 777; Lloyd Constantine, An Antitrust Enforcer Confronts the New Economics (1989) 58 *Antritrust L.J.* 661; Roy M. Davidson, When Merger Guidelines Fail to Guide (1992), *Canadian Competition Policy Record* 44, at page 46; Stephen F. Ross, Afterword - Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so the World can be More Efficient? (1997) 65 *Antitrust Law Journal* 641, at pages 643-646; Tim Hazledine, Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy (1998) *Review of Industrial Organization* 243; Jennifer Halliday, The Recognition, Status and Form of the Efficiency Defence to a Merger: Current Situation and Prospects for the Future (1999) *World Competition* 91. A review of these authorities reveals that the provision is at best confusing and puzzling. At worst, it can defeat the very purpose of the Act. I reproduce sections 96 and 1.1 for convenience:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront:

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bears in practice an evidential burden, that is the burden of leading evidence as to both components of the efficiency defence to alert the Tribunal to what the real, as opposed to the alleged, gains and effects are. In the end, however, the legal burden is on the merging parties to convince the Tribunal, first, that the efficiency gains are of the amount that they have contended, second, that the effects of the lessening of competition are those that they have identified and not those submitted by the Commissioner, and third, that the efficiency gains are greater than, and will offset, the effects.

177 I agree with the respondents that the Commissioner, with his statutory investigative powers, may be in a better position to gather information relevant to the effects and, indeed, that it would have done so in the context of the application of section 92 to which section 96 is a defence. The availability of statutory investigative powers will, indeed, enable the Commissioner to assume his evidentiary burden of gathering and filing relevant evidence to counter and rebut the allegations and evidence of the merging parties as to the effects of the lessening of competition. However, this is not sufficient to transfer the legal burden of proving these effects on the Commissioner. Indeed, there is no rationale and justification for putting on the Commissioner the burden of persuasion on one of the three components of the efficiency defence.

178 In conclusion, I would dispose of the matter as proposed by my colleague, except as to costs where I would make no apportionment in view of my conclusion that the Tribunal also erred on the issue of the legal burden of proof.

Appeal allowed in part.

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Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(2) Il est entendu que le présent article ne s'applique pas à l'égard de l'acquisition d'éléments d'actif d'une association d'intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

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Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l'article 92 à l'égard d'un fusionnement qui est essentiellement complété depuis plus d'un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l'endroit d'une personne ne peut être présentée au titre de l'article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*, at para. 16). Therefore, the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This 'wealth transfer' or 'redistributive effect' is considered to be neutral" (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.

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104 Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *transportation* gains in efficiency are "productive gains in efficiency realized by the customers who are closer to the Babkirk site, allegedly than to Tervita's Silverberry secure landfill. Since Tervita acquired the allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131). Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.

105 The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site secure landfill: "Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry ..." (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser — from the spring of 2012 to the spring of 2013.

106 The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment ("MOE") to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).

107 A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

108 Though the Tribunal held that the one-year efficiencies claimed by Tervita were OIEs, the Tribunal's reasons also appear to suggest that those efficiencies could have been classified as early-mover efficiencies. The Tribunal noted that Tervita would have been prepared to operate the Babkirk site as a secure landfill by the summer of 2012 (para. 269), and also found that, under its "but for" analysis in which the merger would not have occurred, the site would not have been operated as a secure landfill accepting significant quantities of waste until the spring of 2013 (para. 207). Thus, it would appear that any transportation and market expansion efficiencies arising from the operation of the Babkirk site as a secure landfill from 2012 to 2013 under

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(underlining added)

130 Section 96 recognizes the fact that mergers which result in or are likely to result in a substantial lessening of competition may have beneficial consequences as well as detrimental and anti-competitive ones. Mergers can increase the efficiency of firms, for example, by enabling them to benefit from economies of scale (the unit cost of production decreases as the amount of output product increases); economies of scope (when lower costs are included in producing two or more products together than in producing them separately); dynamic efficiencies which arise because of improvements to product quality or innovation. [71]

A. Assessment of Cost Savings Claimed as Efficiencies

131 Three types of efficiencies are claimed by the respondents as arising out of the merger: administrative cost savings; transportation savings; and manufacturing costs savings.

(1) Administrative Cost Savings

132 The total annual administrative cost savings alleged is $1,101,337. These arise from a reduction in the number of positions which are no longer required at Orenco allegedly as a result of the merger, positions such as a marketing manager, an accountant, a route service manager, three grease salesmen. The cost savings arise from the money which would have been spent on salaries and associated benefits as well as expenses (e.g., travel expenses). The numerical amount claimed as cost savings is not in dispute. What is disputed is whether these savings arose from the merger or from some other cause. Also, a consideration not raised in argument is why, if grease is not now considered to be in the relevant market, savings with respect to grease salesmen are included in the efficiency calculations.

133 The Director's experts challenge these administrative cost savings as efficiency gains arising out of the merger on the ground that: (i) information relating to them is entirely in the hands of the respondents and it is easy in the context of a merger to camouflage the dismissal of redundant employees; (ii) these kinds of savings are due to spreading fixed costs over larger output and thus they could have been obtained through means other than the merger, e.g., internal growth, joint venture, or as a result of another merger. The Director's position is that cost savings that do not arise *uniquely* out of the merger are not to be considered as efficiency gains. The respondents' position is that the test to be applied is whether the efficiency gains would *likely* have been realized in the absence of the merger. The Tribunal accepts the respondents' position.

134 The most significant difficulty in assessing whether these cost savings arose as a result of the merger, however, arises because they are based on assumptions with respect to the likely structure of the market had the merger not occurred and those assumptions do not appear to be the appropriate ones. This same consideration arises with respect to at least some of the transportation cost savings and will be addressed in discussing them.

(2) Transportation Cost Savings

135 Three sources of savings on transportation costs are identified: the rationalization of truck routes in Western Ontario; the rationalization of routes in Toronto; and the savings arising from transporting material to Orenco in Dundas rather than to Rothsay (Moorefield). With respect to Western Ontario, since Rothsay (Moorefield) and Orenco covered much of the same territory in Western Ontario, it is possible after the merger to use fewer trucks to collect the same amount of material, resulting in savings of mileage, labour and capital. The total annual savings from these is calculated to be $241,433.46. There is no serious argument that these figures and savings are not accurate. Insofar as the savings respecting the Toronto routes are concerned, these routes were serviced prior to Rothsay (Toronto) volumes being moved to Dundas out of Rothsay (Toronto) and Orenco. Combining these routes resulted in savings in mileage, labour and capital of $1,451,522.69.

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136 The respondents claim only one-third of these (an annual cost saving of $483,841) as being attributable to the merger. This apportionment is based on the assumption that Rothsay would not have solved its expropriation problems by expanding Moorefield or by obtaining a location on the Hamilton Harbour, but would have had to relinquish two-thirds of its Toronto business. Since it could accommodate one-third of the business at Moorefield without expansion of its existing facility, it claimed only one-third of the savings arising under this heading. A similar one-third allocation was made with respect to the savings claimed as arising out of transporting material from Toronto to Orenco in Dundas rather than from Toronto to Moorefield. One-third of $519,905 was claimed ($173,302) as an annual cost savings.

137 There is little quarrel with the numbers which are claimed. The validity of the claims with respect to the last two categories of transportation savings, however, is based on the assumption that Rothsay would have responded to the expropriation notice it was under by moving as much material as it could to Moorefield (i.e., one-third of the Toronto volume) and abandoning the rest.[72] This is not a credible assumption. Mr. Kosalle's evidence was that the most likely solution to the expropriation notice would have been for Rothsay to have constructed a new plant in the Hamilton Harbour area. In addition, notices given to drivers who were terminated from the Rothsay (Toronto) plant on transfer of the Toronto volumes to Rothsay (Moorefield) and Orenco were told that their termination was the result of the expropriation of the Toronto plant. Mr. Kosalle admitted that it was impossible to distinguish cost savings which might have arisen as a result of the merger from those which arose as a result of the restructuring which occurred in response to the expropriation. Insofar as efficiency gains likely to arise from the merger are concerned, the burden of proof is on the respondents. The respondents have not met that burden with respect to the claimed efficiency gains insofar as such claims depend upon the assumption that Rothsay would have responded to the expropriation by moving one-third of its Toronto volumes to Moorefield and by abandoning the rest.

(3) Manufacturing Cost Savings

138 The savings in manufacturing costs which are alleged to result from the merger relate to Orenco's purchase before the merger of approximately 6 million pounds of bleachable fancy tallow to mix with its raw material in order to produce higher quality tallow. This tallow was purchased from Taylor By-Product in the United States. It cost Orenco $184,400 more annually than would have been the case had it purchased the tallow locally. In addition, the cost of heating, milling and refining the tallow was $33,600 annually. It is alleged that Orenco can now produce the same product using Rothsay raw materials.

139 The Tribunal is not convinced that this is a saving arising out of the merger. It is argued that Orenco could not buy the quantity of tallow required in Canada before the merger because it was not available in the amounts required and that it could not buy the raw material to itself produce this grade of tallow because at the time it was operating at full operational capacity. It seems clear that the savings in question arose because Orenco upgraded its machinery, thereby increasing its capacity, and not as a result of the merger. This should therefore not be considered to be an efficiency gain.[73]

140 Donald G. McFetridge prepared expert evidence assessing the deadweight loss[74] which likely could arise from the merger and compared it to the efficiencies claimed by the respondents. He assumed for the purposes of this analysis a 20% (and alternatively a 30%) decrease in the price paid by the renderers to the suppliers of renderable material. He also did an analysis based on a 40% increase with an elasticity of 0.1. On the basis of that analysis he concluded that the claimed efficiency gains outweighed the deadweight loss. Dr. McFetridge chose the 20% figure as a starting point because on examination for discovery the Director's representative, Stephen Peters, had referred to this percentage. It is clear that the percentage decreases which were used may not be very realistic for this industry. The prices can vary from a fairly small amount (e.g., three cents per pound) to a charge being levied for pick-up. In any event, given the Tribunal's findings elsewhere it is not necessary to express any conclusions with respect to this analysis.

(4) Conclusion

141 It is first necessary to address the question of the burden of proof which must be met by respondents when alleging efficiency gains. Counsel for the respondents seemed to argue that once they had established the claimed efficiency gains on a *prima facia* basis, that was sufficient to transfer the onus of disproving them to the Director. He argued that if on the balance

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of probabilities there was uncertainty, the doubt should be resolved in the respondents' favour. The Tribunal does accept that argument. The respondents have the onus of proving the existence of the efficiencies claimed, or the likelihood of their existence when the merger has not been consummated, on the balance of probabilities in the normal way. Many of the claimed efficiency gains in this case, as has been noted, have not been proven to have arisen out of the merger as opposed to having arisen as a result of the restructuring caused by the expropriation. More importantly, however, the respondents based their trade-off analysis on a legal interpretation of section 96 which the Tribunal does not think is correct. That interpretation will be discussed below.

B. Legal Interpretation of Subsection 96(1)

142 In order to understand the arguments which were presented to the Tribunal respecting the proper interpretation of section 96, it is necessary to refer to a distinction which is made by economists between two different types of detrimental effects which may result from a firm having a monopoly or a dominant position in a market. If the merger results in the merged entity being able to raise prices above what would exist in a competitive market, then a transfer of funds (the wealth transfer) from the consumer to the producers is likely to occur. While this will be detrimental to individual consumers personally, it is not necessarily classified by economists as detrimental to society as a whole. This thesis postulates that there is no reason to suppose that the wealth transfer in the hands of the purchaser (consumer) would be used for any more socially beneficial purpose than would be the case if it were in the hands of the producer (seller). What is important under this economic value judgment, is the detrimental effects which arise from the merger which lead to losses for society as a whole. [75]

143 Detriment to society as a whole is said to arise, for example, when consumers because of the higher prices choose an alternate and less appropriate substitute product for the use they have in mind. They substitute a product which would have been their second choice in a competitive market. This inefficient substitution is seen as a misallocation of resources; it is seen as a loss to society as a whole. It is referred to as allocative inefficiency or the deadweight loss.

144 Both the Director and the respondents argue that subsection 96(1) directs the Tribunal to balance "the gains in efficiency" which will arise from the merger against this allocative inefficiency or deadweight loss. [76] The Director's *Merger Enforcement Guidelines* states:

> Section 96(1) requires efficiency gains to be balanced against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger". Where a merger results in a price increase, it brings about both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada. The efficiency gains described above are balanced against the latter effect, i.e., the deadweight loss to the Canadian economy. [77] (footnote omitted)

This interpretation of section 96 is also found in the text *Mergers and the Competition Act* by Crampton. [78] The Tribunal [79] has difficulty accepting this interpretation.

145 In the first place, the Tribunal is directed by subsection 96(1) of the *Competition Act* to balance "the gains in efficiency" against the "effects of any prevention or lessening of competition that will result or is likely to result". [80] If only allocative inefficiency or the deadweight loss to the Canadian economy was intended by Parliament to be weighed in the balance then one would have thought that the section would have been drafted to specifically so provide. The interpretation which both the Director and the respondents put on section 96 requires a reading down of the phrase "effects of substantial lessening of" so that it does not include the transfers from consumers to producers which will generally be the largest effect of the substantial lessening. [81]

146 Indeed, earlier bills respecting proposed revisions to the *Combines Investigation Act*, which preceded the *Competition Act*, contained clauses which made it clear that efficiency gains were to be given precedence without any necessity to weigh them against the total effects arising out of a substantial lessening of competition occurring by reason of the merger. For example, Bill C-42 read:

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12.2 As the starting point, when determining the relevant anti-competitive effects for the purpose of performing the trade-off, the Bureau recognizes the significance of all of the objectives set out in the statutory purpose clause contained in section 1.1 of the Act.

12.3 The Bureau, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, makes an assessment of whether the efficiency gains that are likely to be brought about by a merger will be greater than and will offset the anti-competitive effects arising from that merger, and will not necessarily resort to the Tribunal for adjudication of the issue. However, the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made.

12.4 In general, categories of efficiencies that are relevant to the trade-off analysis in merger review include the following:

- allocative efficiency: the degree to which resources available to society are allocated to their most valuable use;
- technical (productive) efficiency: the creation of a given volume of output at the lowest possible resource cost; and
- dynamic efficiency: the optimal introduction of new products and production processes over time.

12.5 These categories are examined in reference to both gains in efficiency and anti-competitive effects (which include losses in efficiency).

12.6 For the purpose of the trade-off analysis in litigated proceedings before the Tribunal, the Bureau must show the anti-competitive effects of a merger. As outlined in more detail in paragraph 12.13 below, the merging parties must show all other aspects of the trade-off, including the nature, magnitude, likelihood and timeliness of efficiency gains, and whether such gains are greater than and offset the anti-competitive effects. Whether or not a case proceeds to litigation, the Bureau seeks information from the merging parties and other sources to evaluate gains in efficiencies and anti-competitive effects.

12.7 By incorporating an explicit exception for efficiency gains, Parliament has indicated that the assessment of the competitive effects of the merger under section 92 of the Act is to be segregated from the evaluation of efficiency gains under section 96. That said, cost savings from substantiated efficiency gains may be relevant to the analysis under section 92 of whether the merger is likely to prevent or lessen competition substantially in the following limited sense: the Bureau considers whether, as a result of true cost savings (discussed below under "Types of Efficiencies Generally Included

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(2) Il est entendu que le présent article ne s'applique pas à l'égard de l'acquisition d'éléments d'actif d'une association d'intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l'article 92 à l'égard d'un fusionnement qui est essentiellement complété depuis plus d'un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l'endroit d'une personne ne peut être présentée au titre de l'article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

109 The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

110 In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

111 Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

112 For ease of reference, I produce s. 96 here:

> **96. (1)** The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

113 In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

114 The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

115 Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

116 Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

117 "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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460 Similarly, the effects of any lessening of competition can also have both measurable and qualitative elements. The estimated value of the deadweight loss, while measuring the effect of the higher price on resource allocation, may not capture lessening of service or quality reduction.

461 For greater certainty, the Tribunal is of the view that all of the gains in efficiency must be compared with all of the effects of any prevention or lessening of competition, even though this requires judgment when combining measured gains (effects) with qualitative gains (effects).

462 The Commissioner submits that subsection 96(1) requires the Tribunal to consider whether the efficiency gains would likely be realized absent the merger. The Commissioner criticizes the Cole-Kearney report for not considering whether claimed efficiencies could have been achieved through less anti-competitive means than a full scale merger. Following the decision on this point in *Hillsdown*, cited above at paragraph [127], at page 332, the Tribunal is of the view that the test to be applied is whether the efficiency gains would likely be realized in the absence of the merger. In dealing with this issue in *Hillsdown*, the Tribunal stated:

> The Director's position is that cost savings that do not arise *uniquely* out of the merger are not to be considered as efficiency gains. The respondents' position is that the test to be applied is whether the efficiency gains would *likely* have been realized in the absence of the merger. The tribunal accepts the respondents' position.

463 The Tribunal finds that the estimated gains in efficiency from this merger are $29.2 million per year over 10 years and these gains in efficiency would not likely be attained if the order for total divestiture were made. The Tribunal finds that the estimated deadweight loss is approximately $3.0 million per year over the same ten-year period.

464 The Commissioner submits that qualitative effects include distributional impacts and other qualitative elements including changes to levels of service, product quality and product choice, increased probability of coordinated behaviour, and innovation. For the reasons already given, the Tribunal will not consider distribution impacts.

465 The Tribunal took into account the increased probability of coordinated behaviour in its consideration of the evidence regarding a substantial lessening of competition. To the extent that the effect of such anti-competitive behaviour is a higher price, then it has already been reflected in the deadweight loss estimate. If there are other effects of coordinated behaviour to be considered under section 96, further and better evidence about those effects is required. It cannot suffice simply to restate the concern under section 92.

466 A decline in service levels, holding quality of service constant, is also reflected in the deadweight loss estimate. However, the evidence indicates that ICG had established certain services and pricing arrangements (e.g., the Golf-Max program) that Superior and other propane marketers did not offer. Their removal or reduction would reduce the real output of the industry. Although no evidence was given on the likelihood or scope of the reduction or removal of these product offerings following the merger, the exercise of market power might take such forms together with, or instead of, a direct increase in price.

467 The Tribunal must determine whether all of the gains in efficiency brought about or likely to be brought about by the instant merger are greater than the estimated deadweight loss and the negative qualitative effects resulting or likely to result therefrom. As noted above, this determination requires that the latter two components be combined and then compared with total efficiency gains. The Tribunal views the impact on resource allocation of the negative qualitative effects as minimal and as most unlikely to exceed in amount the estimated deadweight loss. Thus, the combined effects of lessening or prevention of competition from the instant merger cannot exceed, in the Tribunal's opinion, $6 million per year for 10 years. On this basis, the Tribunal finds that the gains in efficiency are greater than those effects.

468 The Tribunal must also determine whether all of the gains in efficiency will offset those effects. Gains in efficiency exceed those effects by at least $23.2 million per year for 10 years and, in the Tribunal's opinion, adequately compensate society for those effects. Accordingly, the Tribunal finds that the gains in efficiency will offset those effects.

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(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(underlining added)

130 Section 96 recognizes the fact that mergers which result in or are likely to result in a substantial lessening of competition may have beneficial consequences as well as detrimental and anti-competitive ones. Mergers can increase the efficiency of firms, for example, by enabling them to benefit from economies of scale (the unit cost of production decreases as the amount of output product increases); economies of scope (when lower costs are included in producing two or more products together than in producing them separately); dynamic efficiencies which arise because of improvements to product quality or innovation. [71]

A. Assessment of Cost Savings Claimed as Efficiencies

131 Three types of efficiencies are claimed by the respondents as arising out of the merger: administrative cost savings; transportation savings; and manufacturing costs savings.

(1) Administrative Cost Savings

132 The total annual administrative cost savings alleged is $1,101,337. These arise from a reduction in the number of positions which are no longer required at Orenco allegedly as a result of the merger, positions such as a marketing manager, an accountant, a route service manager, three grease salesmen. The cost savings arise from the money which would have been spent on salaries and associated benefits as well as expenses (e.g., travel expenses). The numerical amount claimed as cost savings is not in dispute. What is disputed is whether these savings arose from the merger or from some other cause. Also, a consideration not raised in argument is why, if grease is not now considered to be in the relevant market, savings with respect to grease salesmen are included in the efficiency calculations.

133 The Director's experts challenge these administrative cost savings as efficiency gains arising out of the merger on the ground that: (i) information relating to them is entirely in the hands of the respondents and it is easy in the context of a merger to camouflage the dismissal of redundant employees; (ii) these kinds of savings are due to spreading fixed costs over larger output and thus they could have been obtained through means other than the merger, e.g., internal growth, joint venture, or as a result of another merger. The Director's position is that cost savings that do not arise *uniquely* out of the merger are not to be considered as efficiency gains. The respondents' position is that the test to be applied is whether the efficiency gains would *likely* have been realized in the absence of the merger. The Tribunal accepts the respondents' position.

134 The most significant difficulty in assessing whether these cost savings arose as a result of the merger, however, arises because they are based on assumptions with respect to the likely structure of the market had the merger not occurred and those assumptions do not appear to be the appropriate ones. This same consideration arises with respect to at least some of the transportation cost savings and will be addressed in discussing them.

(2) Transportation Cost Savings

135 Three sources of savings on transportation costs are identified: the rationalization of truck routes in Western Ontario; the rationalization of routes in Toronto; and the savings arising from transporting material to Orenco in Dundas rather than to Rothsay (Moorefield). With respect to Western Ontario, since Rothsay (Moorefield) and Orenco covered much of the same territory in Western Ontario, it is possible after the merger to use fewer trucks to collect the same amount of material, resulting in savings of mileage, labour and capital. The total annual savings from these is calculated to be $241,433.46. There is no serious argument that these figures and savings are not accurate. Insofar as the savings respecting the Toronto routes are concerned, these routes were serviced prior to Rothsay (Toronto) volumes being moved to Dundas out of Rothsay (Toronto) and Orenco. Combining these routes resulted in savings in mileage, labour and capital of $1,451,522.69.

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136 The respondents claim only one-third of these (an annual cost saving of $483,841) as being attributable to the merger. This apportionment is based on the assumption that Rothsay would not have solved its expropriation problems by expanding Moorefield or by obtaining a location on the Hamilton Harbour, but would have had to relinquish two-thirds of its Toronto business. Since it could accommodate one-third of the business at Moorefield without expansion of its existing facility, it claimed only one-third of the savings arising under this heading. A similar one-third allocation was made with respect to the savings claimed as arising out of transporting material from Toronto to Orenco in Dundas rather than from Toronto to Moorefield. One-third of $519,905 was claimed ($173,302) as an annual cost savings.

137 There is little quarrel with the numbers which are claimed. The validity of the claims with respect to the last two categories of transportation savings, however, is based on the assumption that Rothsay would have responded to the expropriation notice it was under by moving as much material as it could to Moorefield (i.e., one-third of the Toronto volume) and abandoning the rest.[72] This is not a credible assumption. Mr. Kosalle's evidence was that the most likely solution to the expropriation notice would have been for Rothsay to have constructed a new plant in the Hamilton Harbour area. In addition, notices given to drivers who were terminated from the Rothsay (Toronto) plant on transfer of the Toronto volumes to Rothsay (Moorefield) and Orenco were told that their termination was the result of the expropriation of the Toronto plant. Mr. Kosalle admitted that it was impossible to distinguish cost savings which might have arisen as a result of the merger from those which arose as a result of the restructuring which occurred in response to the expropriation. Insofar as efficiency gains likely to arise from the merger are concerned, the burden of proof is on the respondents. The respondents have not met that burden with respect to the claimed efficiency gains insofar as such claims depend upon the assumption that Rothsay would have responded to the expropriation by moving one-third of its Toronto volumes to Moorefield and by abandoning the rest.

(3) Manufacturing Cost Savings

138 The savings in manufacturing costs which are alleged to result from the merger relate to Orenco's purchase before the merger of approximately 6 million pounds of bleachable fancy tallow to mix with its raw material in order to produce higher quality tallow. This tallow was purchased from Taylor By-Product in the United States. It cost Orenco $184,400 more annually than would have been the case had it purchased the tallow locally. In addition, the cost of heating, milling and refining the tallow was $33,600 annually. It is alleged that Orenco can now produce the same product using Rothsay raw materials.

139 The Tribunal is not convinced that this is a saving arising out of the merger. It is argued that Orenco could not buy the quantity of tallow required in Canada before the merger because it was not available in the amounts required and that it could not buy the raw material to itself produce this grade of tallow because at the time it was operating at full operational capacity. It seems clear that the savings in question arose because Orenco upgraded its machinery, thereby increasing its capacity, and not as a result of the merger. This should therefore not be considered to be an efficiency gain.[73]

140 Donald G. McFetridge prepared expert evidence assessing the deadweight loss[74] which likely could arise from the merger and compared it to the efficiencies claimed by the respondents. He assumed for the purposes of this analysis a 20% (and alternatively a 30%) decrease in the price paid by the renderers to the suppliers of renderable material. He also did an analysis based on a 40% increase with an elasticity of 0.1. On the basis of that analysis he concluded that the claimed efficiency gains outweighed the deadweight loss. Dr. McFetridge chose the 20% figure as a starting point because on examination for discovery the Director's representative, Stephen Peters, had referred to this percentage. It is clear that the percentage decreases which were used may not be very realistic for this industry. The prices can vary from a fairly small amount (e.g., three cents per pound) to a charge being levied for pick-up. In any event, given the Tribunal's findings elsewhere it is not necessary to express any conclusions with respect to this analysis.

(4) Conclusion

141 It is first necessary to address the question of the burden of proof which must be met by respondents when alleging efficiency gains. Counsel for the respondents seemed to argue that once they had established the claimed efficiency gains on a *prima facia* basis, that was sufficient to transfer the onus of disproving them to the Director. He argued that if on the balance

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of probabilities there was uncertainty, the doubt should be resolved in the respondents' favour. The Tribunal does accept that argument. The respondents have the onus of proving the existence of the efficiencies claimed, or the likelihood of their existence when the merger has not been consummated, on the balance of probabilities in the normal way. Many of the claimed efficiency gains in this case, as has been noted, have not been proven to have arisen out of the merger as opposed to having arisen as a result of the restructuring caused by the expropriation. More importantly, however, the respondents based their trade-off analysis on a legal interpretation of section 96 which the Tribunal does not think is correct. That interpretation will be discussed below.

B. Legal Interpretation of Subsection 96(1)

142 In order to understand the arguments which were presented to the Tribunal respecting the proper interpretation of section 96, it is necessary to refer to a distinction which is made by economists between two different types of detrimental effects which may result from a firm having a monopoly or a dominant position in a market. If the merger results in the merged entity being able to raise prices above what would exist in a competitive market, then a transfer of funds (the wealth transfer) from the consumer to the producers is likely to occur. While this will be detrimental to individual consumers personally, it is not necessarily classified by economists as detrimental to society as a whole. This thesis postulates that there is no reason to suppose that the wealth transfer in the hands of the purchaser (consumer) would be used for any more socially beneficial purpose than would be the case if it were in the hands of the producer (seller). What is important under this economic value judgment, is the detrimental effects which arise from the merger which lead to losses for society as a whole. [75]

143 Detriment to society as a whole is said to arise, for example, when consumers because of the higher prices choose an alternate and less appropriate substitute product for the use they have in mind. They substitute a product which would have been their second choice in a competitive market. This inefficient substitution is seen as a misallocation of resources; it is seen as a loss to society as a whole. It is referred to as allocative inefficiency or the deadweight loss.

144 Both the Director and the respondents argue that subsection 96(1) directs the Tribunal to balance "the gains in efficiency" which will arise from the merger against this allocative inefficiency or deadweight loss. [76] The Director's *Merger Enforcement Guidelines* states:

> Section 96(1) requires efficiency gains to be balanced against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger". Where a merger results in a price increase, it brings about both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada. The efficiency gains described above are balanced against the latter effect, i.e., the deadweight loss to the Canadian economy. [77] (footnote omitted)

This interpretation of section 96 is also found in the text *Mergers and the Competition Act* by Crampton. [78] The Tribunal [79] has difficulty accepting this interpretation.

145 In the first place, the Tribunal is directed by subsection 96(1) of the *Competition Act* to balance "the gains in efficiency" against the "effects of any prevention or lessening of competition that will result or is likely to result". [80] If only allocative inefficiency or the deadweight loss to the Canadian economy was intended by Parliament to be weighed in the balance then one would have thought that the section would have been drafted to specifically so provide. The interpretation which both the Director and the respondents put on section 96 requires a reading down of the phrase "effects of substantial lessening of" so that it does not include the transfers from consumers to producers which will generally be the largest effect of the substantial lessening. [81]

146 Indeed, earlier bills respecting proposed revisions to the *Combines Investigation Act*, which preceded the *Competition Act*, contained clauses which made it clear that efficiency gains were to be given precedence without any necessity to weigh them against the total effects arising out of a substantial lessening of competition occurring by reason of the merger. For example, Bill C-42 read:

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studies, strategic plans, integration plans, management consultant studies and other available data. The Bureau may also require physical access to certain facilities and will likely require documents and information from operations-level personnel who can address, among other matters, how their business is currently run and areas where efficiencies would likely be realized.

12.12 Section 96(2) requires the Tribunal to consider whether the merger is likely to bring about gains in efficiency described in section 96(1) that will result in (1) a significant increase in the real value of exports; or (2) a significant substitution of domestic products for imported products. To assist this analysis, firms operating in markets that involve international trade should provide the Bureau with information that establishes that the merger will lead them to increase output owing to greater exports or import substitution.[56]

Burden on the Parties

12.13 The parties' burden includes proving that the gains in efficiency

- are likely to occur. In other words, the parties must provide a detailed explanation of how the merger or proposed merger would allow the merged firm to achieve the gains in efficiency. In doing so, the parties must specify the steps they anticipate taking to achieve the gains in efficiency, the risks involved in achieving these gains and the time and costs required to achieve them.
- are brought about by the merger or proposed merger (i.e., that they are merger-specific). The test under section 96(1) is whether the efficiency gains would likely be realized in the absence of the merger. Thus, if certain gains in efficiency would likely be achieved absent the merger, those gains are not counted for the purposes of the trade-off.
- are greater than and offset the anti-competitive effects. The parties must provide a quantification of the gains in efficiency and a detailed and robust explanation of how the quantification was calculated. They should also, to the extent relevant, provide any information on qualitative efficiencies. While the burden is ultimately on the parties to establish that the gains in efficiency are greater than and offset the anti-competitive effects, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, the Bureau undertakes its own internal assessment of the trade-off before deciding whether to challenge a merger at the Tribunal.
- would not likely be attained if an order under section 92 were made. Gains in efficiency that would likely be achieved, even if an order prohibiting all or part of the merger were made, are not counted for the purposes of section 96.[57]

56 Increased output in this context is generally only possible with an associated decrease in price.

57 For example, if remedying a substantial prevention or lessening of competition required divestitures only in certain markets, cost savings resulting from the rationalization of head office facilities would not be included in the trade-off, assuming that such savings would be achievable despite the divestitures. A portion of head office cost savings may be relevant in this example only if the parties can clearly demonstrate that those cost savings

Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

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60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
- savings resulting from a reduction in output, service, quality or product choice.

Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

12.23 In addition to direct effects in the relevant market, the Bureau also considers price and non-price effects in interrelated markets. For example, mergers that are likely to

63 Consideration will only be given to alternative merger proposals that could reasonably be considered practical given the business realities faced by the merging firms.

64 The market realities of the industry in question will be considered in determining whether particular efficiencies could reasonably be expected to be achieved through non-merger alternatives. This includes growth prospects for the market in question, the extent of excess capacity in the market, and the extent to which the expansion can be carried out in increments.

65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

Restriction

(2) Il est entendu que le présent article ne s’applique pas à l’égard de l’acquisition d’éléments d’actif d’une association d’intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

Facteurs pris en considération

(2) Dans l’étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) Pour l’application du présent article, le Tribunal ne conclut pas, en raison seulement d’une redistribution de revenu entre plusieurs personnes, qu’un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l’article 92 à l’égard d’un fusionnement qui est essentiellement complété depuis plus d’un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l’endroit d’une personne ne peut être présentée au titre de l’article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d’une procédure engagée à l’endroit de cette personne en vertu des articles 45 ou 49;

Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

109 The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

110 In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

111 Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

112 For ease of reference, I produce s. 96 here:

> **96. (1)** The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

113 In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

114 The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

115 Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

116 Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

117 "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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> But even in cases where the trade-off issue must be faced, it seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth, and a decision about it requires a choice between two groups of consumers that should be made by the legislature rather than by the judiciary. (reference omitted)

(b) Standard for Merger Review

427 Assessing a merger's effects in this way is generally called the "total surplus standard". As discussed by the Commissioner's expert, Professor Townley (expert affidavit (16 August 1999): exhibit A-2081), and in a recent article by Michael Trebilcock and Ralph Winter, transfers from consumers to shareholders are not counted as losses under the total surplus standard. The anti-competitive effect of the merger is measured solely by the deadweight loss (M. Trebilcock and R. Winter, "The State of Efficiencies in Canadian Merger Policy" (1999-2000) 19:4 Canadian Competition Record 106). Under the total surplus standard, efficiencies need only exceed the deadweight loss to save an anti-competitive merger.

428 Other standards have been proposed. Under a "price standard", efficiencies are not recognized as a justification for a merger which results in a price increase to consumers. Under a "consumer surplus standard", efficiencies can be considered in merger review only if they are sufficiently large as to prevent a price increase. Effectively, this means that transfers of income are considered as losses; hence efficiencies must exceed the sum of the transfer of income and the deadweight loss.

429 From an economic point of view, the cost to society of an anti-competitive merger is the deadweight loss which measures lost economic resources. If, on the other hand, the merger generates efficiencies, it creates economic resources and hence the net economic effect of the merger in terms of resources may be much less than the deadweight loss. Indeed, the merger could be economically positive if efficiencies were sufficiently large, in which case society would benefit economically from allowing the merger.

430 This possibility is the basis for considering efficiencies in merger review. It is not to determine whether shareholders will be better off at the expense of consumers, but rather whether the economy gains more resources than it loses through the transaction. For this reason, it is important to distinguish true efficiencies, those savings that enable the firm to produce the same amount with fewer inputs, from "pecuniary" economies, those savings that increase shareholder profits but do not allow the firm to be more productive. This distinction is recognized in subsection 96(3) which excludes pecuniary efficiencies from consideration. The only standard that addresses solely the effects of a merger on economic resources is the total surplus standard.

(c) Reasons for Total Surplus Standard

431 Professor Townley offers an approach ("balancing weights") in which the members of the Tribunal are invited to use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power. However, the members of the Tribunal are selected for their expertise and experience in order to evaluate evidence that is economic or commercial in nature, not to advance their views on the social merit of various groups in society. As noted by Iacobucci J. in the Supreme Court's decision in *Southam*, cited above at paragraph [48], at pages 773 and 774:

> As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court — Trial Division, and not more than eight lay members, who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See *Competition Tribunal Act*, s.3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the *Competition Act*, economic or commercial expertise is more desirable and important than legal acumen.

432 First, the Tribunal is of the view, as already stated, that distributional concerns do not fall within the ambit of the merger provisions of the Act. If Parliament had intended that transfers from consumers to shareholders be considered, it would no doubt have clearly stated this intent in the Act.

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> (8) the likelihood that the merger would be productive of substantial "social savings", i.e. savings in the use of resources (including resources used for such purposes as research and development), viewed from the standpoint of the Canadian economy as a whole.

(Report, at 115-116) [Underlined emphasis added]

46 Given the Economic Council's overriding concern with efficiency and its belief that distributional concerns were not part of competition policy, it is clear that the tribunal was not to be concerned with the redistributional effects of an anti-competitive merger when it considered item (8) because those effects were not losses of resources and, as redistributions of income, were not losses to society when viewed from the standpoint of the Canadian economy as a whole. Accordingly, the use of the phrase "offsetting public benefits" could not be used to introduce redistributional effects. Yet, the Economic Council did refer to a "balancing assessment":

> ...[The Director] would leave the consideration of item (8), dealing with social savings, to the tribunal, which in many cases would find itself required to perform *a balancing assessment between possible detrimental effects on competition and possible beneficial effects in the form of social savings*. It should be pointed out in this connection that what appear to be cost savings to individual firms are not always "social savings", i.e. savings for the total economy. Thus, for example, a firm that has grown larger by acquiring another firm may be able to obtain certain supplies more cheaply purely by virtue of its greater bargaining power. There are various possible outcomes in terms of profits and prices, but there is no saving in terms of the real resources (the physical amounts of labour, capital, etc.) required to produce and transport the supplies in question. No real resources are freed for other uses in the economy... (Report, at 117) [Emphasis added]

Accordingly, the Economic Council's "balancing assessment" referred, not to adverse redistributive effects on consumers, but to the detrimental effects of a merger on competition. In this assessment, the Economic Council emphasized the need to distinguish between real savings and pecuniary savings.

B. Legislative History of the Efficiency Defence

47 Bill C-256 was the government's first attempt to amend the *Combines Investigation Act* following publication of the Report. The government did not accept the Economic Council's insistence on economic efficiency as the sole objective of competition policy, as can be seen in the preamble to Bill C-256:

> Whereas competition in the private sector is ordinarily the best means of allocating resources, of enhancing efficiency in the production and distribution of goods and services and of transmitting the benefits of efficiency to the public, and competition also furthers individual enterprise by decentralizing economic power and reducing the need for government intervention in the achievement of economic objectives;
>
> And Whereas it is therefore desirable to promote competition actively and also to remove, throughout Canada, obstacles to competition whether created by combinations, mergers, monopolies or other situations or practices, and such objectives can only be achieved through the recognition, encouragement and enforcement of the role of competition as a matter of national policy;
>
> And Whereas it is also recognized that in cases where a market is too small to support a sufficient number of independent firms of efficient size to promote effective competition, alternative means of promoting maximum efficiency may be required, *but that where such an alternative means is adopted, it is necessary to ensure that the resultant benefits will be transmitted in substantial part and within a reasonable time to the public and that the public will be protected against any abuses that the alternative means of promoting efficiency may facilitate*;
>
> And Whereas it is necessary and desirable, in the interest of efficiency of production and distribution and the transmission of the benefits thereof to the public, to promote honest and fair dealing in the market;

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142 Commentators on the penultimate version of the amendments to the Act, while calling attention to mergers that increase concentration in the small Canadian economy, write:

> On the other hand, smallness of market also means a greater probability of the existence of non-captured scale and other economies. For this reason, it seems to us essential that when a Canadian merger is challenged, the parties to it be given ample opportunity to offer an economies-capture defence. We must add, however, for this defence to be valid, the economies must occur in real resource use, as contrasted with the mere use of the new-found market power of bigness to squeeze extra "pecuniary" gains out of the profit margins of upstream suppliers, or of downstream processors and distributors. (B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis*, Canada Law Book Inc., Toronto 1987 at 186)

Given the size of the American economy and the historic purpose of American antitrust laws, it is not surprising that the potential for losing scale economies was not a significant concern; indeed, under the Price Standard, such economies worked against the merger.

(5) Small Business

143 As noted above, small business historically received special consideration in the United States. The survival of small, locally-owned enterprises was a key goal of antitrust laws and, as noted above, efficiency considerations in mergers that created large competitors to small business were treated with hostility. While the emphasis of the U.S. antitrust laws on protecting small businesses from competition from larger firms has diminished very markedly, the hostile attitudes toward efficiencies have not.

144 The treatment of small business under Canada's Act is again very different. As the Tribunal noted, the purpose clause of the Act does not protect small businesses from large competitors; rather the Act provides that, under competition, small businesses have an "equitable opportunity" to participate in economic activity. Accordingly, if by virtue of greater efficiency, a merged firm obtains a competitive advantage over smaller, less efficient competitors, the Act finds no violation. If however that merger is anti-competitive, then if the test under section 96 is satisfied, the merger would proceed nonetheless.

(6) Foreign Ownership

145 Another important difference between the two countries is the implicit concern with Canadian ownership and economic control. In light of the degree of industrial concentration in Canada, mergers among large Canadian companies in the same industry would frequently be denied absent a recognized defence. One consequence of this is that large Canadian companies could more easily merge with foreign enterprises since the resulting merged company would less frequently cross the anti-competitive threshold in Canada.

146 It must be remembered that the Act was amended and the efficiency defence inserted therein at the same time as the debate on free trade with the United States and the growing trend toward privatization. In a globally more liberal environment for international trade and investment, the efficiency defence in section 96 allows the possibility that mergers among major Canadian businesses may produce entities that may possibly compete more effectively with large foreign enterprises at home and abroad.

(7) Efficiencies: "merger-specific" v. "order-driven"

147 As stated in the Horizontal Merger Guidelines, claimed efficiency gains must be "merger-specific". Although those Guidelines do not elaborate, this requirement appears to mean that a claimed efficiency gain is not cognizable if it could be achieved in another, presumably less anti-competitive, way.

148 The Tribunal found that the gains in efficiency in the instant merger would not be achieved absent the merger (i.e. if the order were made) and hence could be included in the test under subsection 96(1) (Reasons, at paragraph 462). This requirement is not the same as the one used by the American enforcement agencies. After satisfying itself that the two approaches were not identical, the Tribunal noted the same distinction was addressed in *Hillsdown, supra*, which supported the view that the Act

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Limited and presently uses Darling as a renderer. Mr. Smith operates a deadstock collecting and processing operation as well as a pet food business, Atwood Pet Food Supplies Ltd and presently uses Orenco as a renderer.

73 There is no evidence that Baker's plant in Rochester, New York has historically been a competitor of Rothsay and Orenco in southern Ontario. That plant, like Darling, is also part of a large multi-plant firm. It is the second largest renderer on the North American continent. The Baker (Rochester) plant is within geographical reach of the relevant market, being located 135 miles from Orenco's plant in Dundas. It is clear that both Baker (Rochester) and Darling (Detroit) would become increasingly competitive in the southern Ontario market served by the merged firm (insofar as geographical location is concerned) in proportion to any supra-competitive price rise which might be exacted. Since Baker (Rochester) has not historically been in the market and since it is not immediately adjacent to the border, it may be that it should be considered a potential entrant rather than a competitor in the market. Its relationship to the merged firm will be considered from both points of view.

74 Lomex commenced operating in the Toronto market in the summer of 1991 [42] and, as has been noted, is taking two full truck loads from two of the larger Toronto area producers of renderable materials to Lomex's plant outside Montreal. The Tribunal has not classified Lomex as a competitor within the market but recognizes that as a potential entrant Lomex will provide some discipline on the merged firm's ability to raise prices.

V. Substantial Lessening of Competition

75 Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing. In assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

76 Whether an enhancement of market power exists as a result of a merger and whether it is substantial is determined by reference to a number of factors. Market share data can give a *prima facie* [43] indication as to whether such is the case.

A. Market Concentration

77 The market concentration in the relevant market can be measured by reference to a number of different indicia. What measure will be chosen will depend upon the nature of the industry in question and the data available. In this case two measures have been used: the amount of renderable material actually processed in the recent past by the firms (historical output) and the plant capacity of the competitors (productive capacity). With respect to firms which have not previously been active in the market but which as a result of changes are now considered to be competitors, only the second method of measurement can be used.

78 A market share measurement based on pre-merger volumes of renderable material processed in southern Ontario indicates that Orenco and Rothsay were each servicing approximately 30% of that non-captive red meat rendering market. Darling's Toronto plant was processing 13%. Banner was processing 12% and Fearman 2%. An extrapolation from those data indicates that after the merger the merged Rothsay-Orenco firm will hold approximately 62-63% of the southern Ontario market. The next largest firm, Darling, for the moment at least would hold approximately 12-13%. Banner would hold 11-12%. Schneider and Ray Bowering would continue to process small amounts of non-captive material.

79 While the increased market share concentration calculated on that basis can be seen at a glance, two tools which have been developed in the United States for measuring market concentration in a summary fashion were referred to in evidence: the four-firm concentration ratio [44] and the Herfindahl-Hirschman Index ("HHI"). The four-firm concentration ratio measures market concentration by adding together the market shares of the four largest firms in the market. If the post merger concentration is

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Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

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60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
- savings resulting from a reduction in output, service, quality or product choice.

Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

12.23 In addition to direct effects in the relevant market, the Bureau also considers price and non-price effects in interrelated markets. For example, mergers that are likely to

63 Consideration will only be given to alternative merger proposals that could reasonably be considered practical given the business realities faced by the merging firms.

64 The market realities of the industry in question will be considered in determining whether particular efficiencies could reasonably be expected to be achieved through non-merger alternatives. This includes growth prospects for the market in question, the extent of excess capacity in the market, and the extent to which the expansion can be carried out in increments.

65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

R.S.C., 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

L.R.C., 1985, ch. C-34

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

the first such situation, excess profits from sales to non-residents should be excluded. The second is the case of pre-existing monopsony.

(1) Redistribution to Foreigners

192 While advocating that the entire amount of the redistributed income be included as an effect for the analysis under subsection 96(1), counsel for the Commissioner suggests, in response to a question from the Tribunal (Transcript, vol. 1, October 9, 2001, at 68, lines 18-23) that there may be circumstances where the Tribunal should use its discretion to do otherwise. One instance is a merger of Canadian exporters following which the price increase is paid very largely by foreign consumers. In this case, counsel submits that the domestic component of the wealth transfer may be quite modest and the large component falling on foreign consumers could be ignored. The Tribunal should use its discretion to disregard the latter and therefore give the total wealth transfer less weight; accordingly, significant efficiency gains in comparison with the loss of efficiency (i.e. a small deadweight loss) and other effects could well allow the anti-competitive merger to proceed (Transcript, vol. 1, October 9, 2001, at 72, line 15, at 73, line 6).

193 The respondents argue, similarly, that many of Superior's largest customers are foreign owned companies and that the effect of the transfer on these foreign shareholders is not an adverse effect that should be considered (Memorandum of the Respondents Superior Propane Inc. and ICG Propane Inc. in Relation to the Redetermination Proceedings ("Respondents' Memorandum on Redetermination Proceedings"), paragraph 136 at 62).

194 The Tribunal notes that international aspects of the application of section 96 have been raised previously, most notably by Madame Justice Reed in *obiter dicta* in the *Hillsdown* decision. Reed J. queried whether the Act required neutral treatment of the redistribution of income consequent to an anti-competitive merger of foreign-owned firms located in Canada, as the excess profits earned on sales to Canadian consumers would flow to the foreign shareholders. It appears that the hypothetical situation posited by counsel to the Commissioner is the opposite of that characterized by Reed J.

195 The international ramifications of section 96 have been discussed by the American Professor Ross whose article was cited with approval by the Court. He posits an anti-competitive acquisition under the Act in Canada of a Canadian-owned firm by an American-owned firm where efficiency gains are large but accrue only in the United States; yet consumers pay higher prices, there are significant layoffs in Canada, and the deadweight loss is small. He concludes that under a "...*total world welfare*" standard, such merger would be approved, but under the "...*consumer surplus* model (roughly followed in the United States)", it would be blocked. He further concludes that under a "...*total Canadian welfare* model", the merger could be blocked by excluding the efficiency gains in the United States, but this raises serious questions of discrimination under Canada's international obligations under NAFTA and GATT. Accordingly, for this reason, and because he endorses the American approach to efficiencies generally, he doubts that the Canadian Parliament intended a standard other than the Consumer Surplus Standard (Ross, at 643-644).

196 Under the purpose clause of the Act, the purpose thereof is to maintain and encourage competition in Canada in order, *inter alia*, to promote the efficiency and adaptability of the Canadian economy. Accordingly, in the Tribunal's view, efficiency gains and deadweight loss (i.e. losses in efficiency) in foreign markets resulting from an anti-competitive merger in Canada are to be excluded in the application of section 96. This is clearly stated in the statute and is not a discretionary matter for the Tribunal. Accordingly, if the deadweight loss in foreign markets is an excluded effect, so are all other effects in foreign markets. In the Tribunal's view, the Act does not endorse a "*total world welfare*" standard.

197 A "*total Canadian welfare* standard" as defined by Professor Ross may or may not be discriminatory under Canada's international obligations, but the Act is not. In the Tribunal's understanding, those obligations require "national treatment" in the application of Canadian laws. Accordingly, if efficiency gains and effects in foreign markets are excluded when reviewing an anti-competitive merger of two Canadian-owned firms in Canada, the same exclusion must be accorded if those merging firms are owned by non-residents. In Professor Ross' hypothetical, the anti-competitive merger of an American-owned and a Canadian-owned firm would be blocked under the Total Surplus Standard (even if consideration of the layoffs was excluded) because there are no gains in efficiency in Canada.

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
- savings resulting from a reduction in output, service, quality or product choice.

Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

12.23 In addition to direct effects in the relevant market, the Bureau also considers price and non-price effects in interrelated markets. For example, mergers that are likely to

63 Consideration will only be given to alternative merger proposals that could reasonably be considered practical given the business realities faced by the merging firms.

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65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

Restriction

(2) Il est entendu que le présent article ne s’applique pas à l’égard de l’acquisition d’éléments d’actif d’une association d’intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

Facteurs pris en considération

(2) Dans l’étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) Pour l’application du présent article, le Tribunal ne conclut pas, en raison seulement d’une redistribution de revenu entre plusieurs personnes, qu’un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l’article 92 à l’égard d’un fusionnement qui est essentiellement complété depuis plus d’un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l’endroit d’une personne ne peut être présentée au titre de l’article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d’une procédure engagée à l’endroit de cette personne en vertu des articles 45 ou 49;

Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

109 The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

110 In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

111 Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

112 For ease of reference, I produce s. 96 here:

> **96. (1)** The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

113 In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

114 The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

115 Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

116 Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

117 "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that

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did not require that claimed gains in efficiency not be achievable in another, less anti-competitive way, although this was the requirement of the Commissioner's Merger Enforcement Guidelines ("MEGs").

149 The Commissioner may require that efficiency gains be merger-specific when deciding whether to challenge a merger. However, once an application is brought under the Act, included efficiency gains are "order-driven" rather than "merger-specific". Since an order of the Tribunal is formulated based on its findings under section 92 of the Act, efficiency gains are evaluated in light of the order. Hence, efficiencies can have no influence on the order that the Tribunal formulates.

I. American Commentary

150 The Court refers approvingly (Appeal Judgment, at paragraph 137) to American commentators who clearly articulate consumer protection as the overriding objective of U.S. antitrust laws. However, the merger provisions of Canada's Act are not so focussed on consumer protection. It appears to the Tribunal that American commentators have generally not realized this. Instead, they have been quick to attack section 96 of Canada's Act, and always on the basis that it diverges from the approach under American antitrust law. In this, the commentators are entirely correct, but they ignore Canadian economic conditions and concerns, in particular, the comparatively small size of the Canadian economy.

151 For example, in his analysis of the Act, Professor Ross advocates that the phrase "prevention or lessening of competition" in subsection 96(1) be interpreted in the same way as the phrase "restrain or injure competition unduly" in section 45 (presumably paragraph 45(1)(d)) and hence prevent redistributions of wealth from anti-competitive mergers as Parliament intended for criminal conspiracy (S. Ross, *Afterword-Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So That The World Can Be More Efficient*?, Antitrust Law Journal, vol. 65, Issue 1, Fall 1996 at 641) [hereinafter, *Ross*]. The Tribunal disagrees with this view. If Parliament had intended the same meanings to these phrases, it would have used the same language when it added section 96 to the Act in 1986.

152 Secondly, Professor Ross notes the concern that the Consumer Surplus Standard would "...effectively read an efficiency defence out of the Competition Act" (Ross, at 647). Referring to the *obiter dicta* comments of Reed J. in the *Hillsdown* decision, he concludes that that standard would permit mergers where the efficiency gains are "...almost certain" and the "threat of substantially lessened competition is only likely..." (Ross, at 648). However, nothing in the Act suggests this, and in the Tribunal's view, the requirement that efficiency gains be shown on a balance of probabilities applies equally to any effects that are asserted.

153 Professor Ross may be correct to conclude that subsection 96(2) is inconsistent with the Total Surplus Standard (Ross, at 648), but it is also inconsistent with the Consumer Surplus Standard and the Modified Surplus Standard.

154 Professor Ross defines and criticizes a "total Canadian welfare model" because, when it results in blocking a merger by excluding efficiency gains and effects outside of Canada, it violates the non-discrimination requirements under international treaties and agreements (Ross, at 643-644). In the Tribunal's understanding, the "total Canadian welfare model" as defined by Professor Ross includes consideration of the deadweight loss to the Canadian economy and losses due to income transfer from Canadian consumers to foreign shareholders. Accordingly, it is a version of the Consumer Surplus Standard in which effects are limited to those experienced in Canada. As discussed below, the Tribunal disagrees with his conclusion regarding Canada's international obligations and his interpretation of the purpose clause of the Act.

155 In the Tribunal's view, Professor Ross appears to be antagonistic to any approach that differs from the approach adopted in the United States. Indeed, although his position is not entirely clear, his view appears to the Tribunal to be that no harm from an anti-competitive merger should be tolerated, regardless of proven efficiency gains. Although he refers to a consumer welfare standard, he appears to articulate the Modified Price Standard, which was criticized by Professor Townley at the first hearing.

156 The Court's reliance on Professor Brodley's article is puzzling since that article does not discuss Canadian law at all (Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress* (1987) 62 N.Y.U. Law Review, 1020) [hereinafter, *Brodley*]. It cites neither the Act nor the Canadian MEGs, and it does not express surprise at the interpretation of section 96 adopted in the MEGs. Instead, addressing the on-going debate within American

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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in the Trade-Off"), the parties to the merger are better positioned to compete in a competitive market or are less likely to engage in coordinated behaviour.[54]

12.8 Where efficiencies may be material, merging parties are encouraged to make their efficiency submissions to the Bureau as early as possible in the merger review process. This facilitates an expeditious assessment of the nature, magnitude, likelihood and timeliness of the efficiency gains and of the trade-off between relevant efficiency gains and anti-competitive effects. Having detailed information regarding efficiency claims at an early stage of the process will facilitate the preparation of focused follow-up information requests and/or the targeted use of other information-gathering mechanisms and, subject to confidentiality restrictions, enable the Bureau to test the claims during its market contacts regarding the merger. Submissions regarding anticipated efficiency gains may also assist the Bureau in understanding the rationale underlying the proposed transaction.

Gains in Efficiency

12.9 To be considered under section 96(1), it must be demonstrated that the efficiency gains "would not likely be attained if the order (before the Tribunal) were made." This involves considering the nature of potential orders that may be made, including those that may apply to the merger in its entirety or are limited to parts of the merger. Each of the anticipated efficiency gains is then assessed to determine whether these gains would likely be attained by alternative means if the potential orders are made. Where the order sought is limited to parts of a merger, efficiency gains that are not affected by the order are not included in the trade-off analysis.

12.10 To facilitate the Bureau's review of efficiency claims, parties should provide detailed and comprehensive information that substantiates the precise nature, magnitude, likelihood and timeliness of their alleged efficiency gains, as well as information relating to deductions from gains in efficiency, such as the costs associated with implementing the merger. The information should specifically address the likelihood that such gains would be achieved and why those gains would not likely be achieved if the potential Tribunal orders were made.

12.11 Typically, the Bureau uses industry experts to assist in its evaluation of efficiency claims. To assess efficiency claims, Bureau officers and economists, as well as experts retained by the Bureau, require access to detailed financial and other information.[55] To enable the objective verification of anticipated efficiency gains, efficiency claims should be substantiated by documentation prepared in the ordinary course of business, wherever possible. This includes plant and firm-level accounting statements, internal

54 The impact of efficiencies on a firm's cost structure may render coordination more difficult by enhancing its incentive to compete more vigorously.

55 This includes all pre-existing merger planning documents. Additional information that may be relevant includes (1) information on efficiencies realized from previous mergers involving similar assets; (2) pre-merger documents relating to product and process innovation; and (3) information related to economies of scale, including minimum efficient scale, and economies of scope in production.

studies, strategic plans, integration plans, management consultant studies and other available data. The Bureau may also require physical access to certain facilities and will likely require documents and information from operations-level personnel who can address, among other matters, how their business is currently run and areas where efficiencies would likely be realized.

12.12 Section 96(2) requires the Tribunal to consider whether the merger is likely to bring about gains in efficiency described in section 96(1) that will result in (1) a significant increase in the real value of exports; or (2) a significant substitution of domestic products for imported products. To assist this analysis, firms operating in markets that involve international trade should provide the Bureau with information that establishes that the merger will lead them to increase output owing to greater exports or import substitution.[56]

Burden on the Parties

12.13 The parties' burden includes proving that the gains in efficiency

- are likely to occur. In other words, the parties must provide a detailed explanation of how the merger or proposed merger would allow the merged firm to achieve the gains in efficiency. In doing so, the parties must specify the steps they anticipate taking to achieve the gains in efficiency, the risks involved in achieving these gains and the time and costs required to achieve them.
- are brought about by the merger or proposed merger (i.e., that they are merger-specific). The test under section 96(1) is whether the efficiency gains would likely be realized in the absence of the merger. Thus, if certain gains in efficiency would likely be achieved absent the merger, those gains are not counted for the purposes of the trade-off.
- are greater than and offset the anti-competitive effects. The parties must provide a quantification of the gains in efficiency and a detailed and robust explanation of how the quantification was calculated. They should also, to the extent relevant, provide any information on qualitative efficiencies. While the burden is ultimately on the parties to establish that the gains in efficiency are greater than and offset the anti-competitive effects, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, the Bureau undertakes its own internal assessment of the trade-off before deciding whether to challenge a merger at the Tribunal.
- would not likely be attained if an order under section 92 were made. Gains in efficiency that would likely be achieved, even if an order prohibiting all or part of the merger were made, are not counted for the purposes of section 96.[57]

56 Increased output in this context is generally only possible with an associated decrease in price.

57 For example, if remedying a substantial prevention or lessening of competition required divestitures only in certain markets, cost savings resulting from the rationalization of head office facilities would not be included in the trade-off, assuming that such savings would be achievable despite the divestitures. A portion of head office cost savings may be relevant in this example only if the parties can clearly demonstrate that those cost savings

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12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

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62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
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Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

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65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

would arise in attempting to "unscramble the egg" if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical "unscramble the egg" undertaking concerned with the intermingling of assets.

118 The evidence in this case does not support Tervita's claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

119 The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

120 For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).

(5) The Balancing Test Under Section 96

121 Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on the Commissioner's failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) The Commissioner's Burden

122 As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

123 Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

124 The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

125 The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a

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144 The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

145 Together, the terms "greater than" and "offset" mandate that the Tribunal determine both quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. This approach is supported by the common understanding of the word "offset". *The Oxford English Dictionary* (2nd ed. 1989) defines the verb "offset" to mean "[t]o set off as an equivalent against something else ...; to balance by something on the other side or of contrary nature" (p. 738). Similarly, the *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) entry defines it to mean "to serve as a counterbalance for" (p. 862). This understanding supports the interpretation of the "offset" requirement in s. 96 as imposing a consideration of the qualitative aspects of the merger and a balancing of those qualitative aspects against the quantitative effects of the merger.

146 This is a flexible balancing approach, but the Tribunal's conclusions must be objectively reasonable. As the Federal Court of Appeal held, the overall analysis "must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*" (para. 147 (emphasis in original)). As such, in most cases the qualitative effects will be of lesser importance. In addition, the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence.

147 In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

148 It should be noted that this two-step analysis does not seek to define the methodological details of how quantitative efficiencies and anti-competitive effects are to be identified and compared. Instead, the two-step analysis preserves the ability of the Tribunal to select the quantitative methodology to be employed, provided this quantitative comparison is conducted within step one of the framework described above.

149 Justice Karakatsanis raises concerns that this framework unnaturally separates quantitative and qualitative considerations, and that doing so is "superfluous" in light of the final offset determination which considers both quantitative and qualitative factors (para. 189). Instead, she would instruct the Tribunal to weigh whether the quantitative and qualitative efficiencies, taken as a whole, outweigh the quantitative and qualitative anti-competitive effects, taken as a whole. I would emphasize that the above framework does not require the Tribunal to isolate quantitative and qualitative considerations such that they are never compared. The ultimate offset analysis does allow for consideration of both quantitative and qualitative effects. However, I would think that the Tribunal, even proceeding under Justice Karakatsanis's proposed single-step weighing, would at some point in that consideration ask how the quantitative factors lined up relative to each other, and would also examine how the qualitative factors compared to each other, before attempting to reconcile the whole universe of factors into an ultimate determination. The

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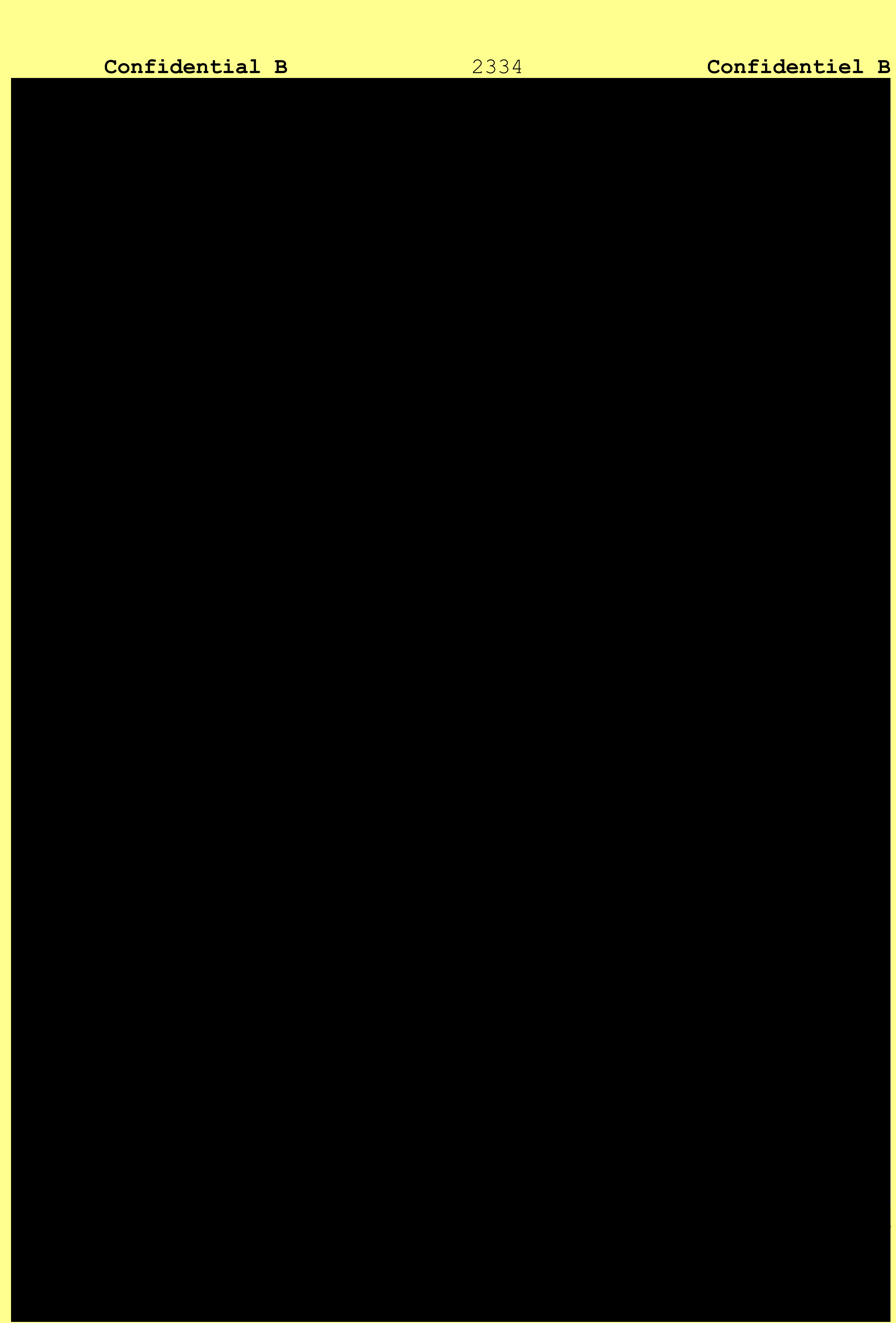

management services to be provided has not changed since 1996 when the terms of the agreement were established. Hence, the respondents argue that any change in payment must be a pecuniary transfer (confidential exhibit CR-113 at 11, 12).

338 The Tribunal does not agree that the Management Agreement is solely an investment, although it may have aspects thereof. In view of the fact that the management fees paid to SMS pursuant to the Management Agreement are tax-deductible expenses to Superior, they cannot be distributions of after-tax profits. While the managers purchased for their interests in the Management Agreement supported in part by interest-free non-recourse loans, the Tribunal finds that the acquisition price they paid only provides further incentive to them to supply additional services that increase their remuneration. Moreover, it appears to the Tribunal that the managers' ability to transfer their interests in the Management Agreement is highly circumscribed by section 6.1 of the Unitholders Agreement (confidential exhibit CR-113, appendix G, tab 3).

339 The Tribunal observes that managers of for-profit enterprises often receive compensation in the form of investments or investment-related vehicles, such as shares of the managed company, stock options on company shares, low-interest loans to acquire shares of the managed company, etc. Although the payments that they receive from these investments may be in the form of dividends or capital gains, these forms of managerial compensation are nonetheless techniques for improving the quality and quantity of managerial effort. In particular, these methods seek to align the interests of managers with those of owners so that managerial decisions benefit the latter group. Thus, even when the incentive payments are in the form of distributions on company securities held by the managers, their purpose is to provide incentive to managers to achieve corporate goals and those payments are properly viewed as compensation for effort.

340 The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.

341 However, the Tribunal disagrees with the Commissioner regarding the appropriate amount of that deduction. The proper quantum is that amount that compensates the managers for additional effort and hence must be less than the total fees paid to SMS under the Management Agreement because 72 percent thereof accrues to the Enterprise investors. There is no evidence that Enterprise investors or their board representative are or will be involved in active management or in achieving the claimed efficiencies. Accordingly, they benefit from the additional efforts provided by the management group but supply none themselves.

342 The Tribunal views the distributions on SMS's class A units by Incentive Trust to the Enterprise investors as a pecuniary redistribution of Superior's pre-tax profit from Superior's owners, particularly because those owners receive nothing from the Enterprise investors when the Management Agreement changed hands.

343 The respondents calculate the payments to the managers under the Management Agreement under different assumptions about Superior's future tax position and conclude that the managers will receive between $1.5 million and $2.8 million per annum if $40 million of efficiencies are properly claimed and achieved. Following the Commissioner's approach, the Tribunal adopts the average thereof, $2.2 million as the deduction from the claimed efficiencies (confidential exhibit CR-113 at 13 and appendix B at B1).

344 The Tribunal notes that the $7.5 million deduction claimed by the Commissioner is the Commissioner's estimate of the management fees payable to SMS in respect of this merger when the efficiency gains are $40 million per year. Since the Commissioner asserts that this amount is itself overstated for a variety of reasons, the amount of the management fees and hence any deduction in respect thereof must necessarily be lower if the Commissioner's assertion is correct.

345 The Tribunal notes further that the Commissioner's amount of $7.5 million average estimated management fees equals 18.75 percent of the $40 million claimed efficiency gain. The $2.2 million average fees resulting from the respondents' calculations are 5.5 percent of those efficiencies. Since the Tribunal agrees with the respondents as to exclusion of amounts received by the Enterprise investors, in determining the proper amount to deduct when efficiencies are less than $40 million, the Tribunal will use the latter percentage.

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Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

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60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

• there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93(f));

• the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(f)); and

• "the [m]erger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition" (para. 297; see s. 93(e)).

82 I agree with the Commissioner that "the Tribunal did not speculate on what would happen to the Babkirk site .... It made findings of fact based on the abundant evidence before it" (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.

83 Accordingly, the Tribunal's conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.

D. The Efficiencies Defence

84 Tervita raises two issues with respect to the Tribunal's assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal's divestiture order under s. 92, be taken into account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.

(1) History of the Efficiencies Defence

85 Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, Mergers Law and Practice: The Regulation *of* Mergers Under the Competition Act (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981), 5 Can. Bus. L.J. 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the Combines Investigation Act, R.S.C. 1970, c. C-23 (ibid., p. 381). This process "yielded valuable experience laying the groundwork for what was to become the *Competition Act*" (Facey and Assaf, at p. 10).

86 Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, was introduced in the House of Commons in 1985 (1st Sess., 33rd Parl., first reading Dec. 17, 1985, assented to June 17, 1986, s.c. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).

87 A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons*

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competitive effects of a merger makes it easier to justify a merger between suppliers of goods for which demand is relatively inelastic than of goods for which demand is relatively elastic.

[1]

104 This is because, where the demand for particular goods is inelastic, as it is for propane, the goods cannot be substituted as cost-effectively as where the demand is elastic. Hence, price increases that result from the exercise of market power are tolerated more by purchasers of goods for which the demand is inelastic than by purchasers of those where the demand is elastic. Thus, since purchasers of goods for which demand is inelastic are relatively insensitive to price, fewer will purchase substitute goods despite increases in price. Therefore, a significant price increase will result in a smaller deadweight loss in a product where demand is inelastic than where it is elastic.

105 Thus, on the Tribunal's interpretation of section 96, the more inelastic the demand for the goods produced by the merged entity, the smaller will be the efficiencies required from the merger in order to offset its anti-competitive effects. It follows on this reasoning that, for the purpose of balancing efficiencies and effects, a potentially large wealth transfer from consumers of goods for which demand is inelastic to producers is to be ignored.

106 It is certainly not obvious how an interpretation of "effects" that creates a differential treatment of mergers by reference to the elasticity of demand for the goods produced by the merged entity is rationally related to any of the statutory aims of the *Competition Act*.

107 Another consequence of limiting the anti-competitive "effects" of a merger to deadweight loss is that it is irrelevant that the merger results in the creation of a monopoly in one or more of the merged entity's markets. According to the Tribunal, the fact that the merged entity of Superior and ICG will eliminate all consumer choice, and remove all competition, in the propane supply market, as it is likely to do in Atlantic Canada, for example, is not an "effect" that legally can be weighed under section 96 against the efficiency gains from the merger.

108 Again, such a conclusion seems to me so at odds with the stated purpose of the Act, namely "to maintain and encourage competition", and the statutory objectives to be achieved thereby, as to cast serious doubt on the correctness of the Tribunal's interpretation of section 96.

109 Given the purposes historically pursued by competition legislation and, in particular, the expressly stated purpose and objectives of the *Competition Act*, it is reasonable to infer from Parliament's failure to state expressly that only deadweight loss is to be considered as an "effect" of a merger for the purpose of section 96, that other effects related to the statutory purpose and objectives, including the interests of the consumers of the merged entity's products, must also be taken into account when the trade-off is made between efficiencies and anti-competitive effects.

(iii) Predictability

110 It was strenuously argued by counsel for the respondents that, since one of the objectives of the *Competition Act* set out in section 1.1 is to "promote the efficiency and adaptability of the Canadian economy", it was important for business people to be able to predict whether or not a proposed merger was likely to receive regulatory approval. Otherwise, they might be deterred from entering into a merger that would violate section 92 by substantially lessening competition, but would increase wealth in the Canadian economy as a whole by producing substantial efficiency gains.

111 Hence, it was argued, it is consistent with the purpose of section 96 to interpret the efficiency defence as requiring the use of the total surplus standard to determine the anti-competitive effects of a merger, because the use of this standard makes the result of the section 96 balancing exercise much more predictable. While far from self-applying, the total surplus standard will generally make it much easier than the balancing weights approach favoured by the Commissioner to predict what will be the "effects" of a merger.

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changes to operations and used the example of the Peterborough branch (a branch where the rationalization is straight forward) to demonstrate the effects that the integration will have on costs, as shown at table 7 on page 26 of their report in rebuttal (confidential exhibit CA-3131). They conclude at page 26 that:

> *The staffing level will increase by 60 percent*. Cylinder operations will be consolidated at this site which will increase cylinder truck traffic. *The bulk delivery fleet will double*. The increased fleet will require additional maintenance capacity on the site as well as general access and parking area. This could require reconfiguration of the site to handle the step change in delivery equipment. *Bulk delivery volumes are projected to increase by 220 percent*. Such a large increase will mean that *both primary deliveries and bulk truck daily liftings will also increase proportionately*. This suggests that the *site will have to be reconfigured* to handle the significant increase in load factors. (emphasis added)

483 The expert opinion of Professors Schwindt and Globerman and Mr. Kemp, as stated above, supports the Commissioner' submission that the efficiencies claimed by the respondents are overstated and hence, have not been demonstrated on a balance of probabilities:

> Secondly, we reiterate that the efficiency gains that were used for the purposes of this calculation of 21.2 million, on an annualized basis, is overstated for the reasons that we set out in the quantitative section of our materials.
>
> While that represents taking off the deductions that we were able to specifically identify in the evidence of Professors Schwindt and Globerman and as detailed in the argument, *we have pointed out many instances where the Respondents' efficiency gains are excessively optimistic, exaggerated, or don't meet the standard, in our submission, of being established on a balance of probabilities*. (emphasis added) transcript at 44:8737 (4 February 2000).

484 As stated in paragraph 5.7.2 of the MEG's, cited above at paragraph [57], and as discussed by the author A. Neil Campbell in *Merger Law and Practice, The Regulation of Mergers under the Competition Act* (Scarborough: Carswell 1997) at 162, I am of the view that efficiencies should be measured net of the implementation costs that would be incurred in obtaining them. Therefore, "retooling" and other costs necessary to achieve efficiency gains should be deducted from the total value of the efficiencies.

485 In light of my remarks on the methodology used by the experts and the insufficient consideration being given to additional costs that will result from the integration of field sites, I am of the view that the respondents have not demonstrated *on a balance of probabilities* the existence of the claimed $40 million of efficiencies per annum. As I have explained earlier, some problems identified with the methodology undermines greatly the validity of the efficiencies claimed by the respondents. There is no question that efficiencies can be realized in any merger or most particularly in this merger. However, the requirement under section 96 of the Act is to demonstrate the existence or the likelihood that the gains in efficiency will be brought about by the merger, hence the quantum of the claimed efficiencies on a balance of probabilities. In my view, the respondents have not met their burden of proof on that crucial element of their efficiency defence. As a result, I do not accept the respondents' efficiencies claim of $40 million per annum nor the reduced quantum of $29.2 million of efficiencies as accepted by the majority. Since I am not able to measure the degree to which these errors have affected the results nor able to quantify the inevitable costs that will result from this merger, I am not in a position to assess the real value of the efficiencies that will result or is likely to result from the merger and, therefore, will not speculate on their quantum.

B. The Merger has Brought About or is Likely to Bring About Gains in Efficiency (i.e., Likely to be Realized Post-Merger)

486 The respondents have not convinced me on a balance of probabilities that the $40 million of efficiencies claimed will be realized for the reasons stated above. In addition, regardless of the quantum of efficiencies that *theoretically* could be realized, the Tribunal has not been provided, in my opinion, with any evidence that they are likely to *materialize* post-merger.

487 In my view, the term "likely" used in section 96 requires more than the sole demonstration of the quantum of possible efficiencies. Rather, I believe that the term "likely" requires some evidence of the implementation process leading to the materialization of the claimed efficiencies. It is my opinion that evidence of this nature is necessary to provide the Tribunal

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subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable"). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities.

126 In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

127 The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 158) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

128 With respect, I cannot agree. As explained above, the Commissioner's burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

129 As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages* (5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as "marginal" and "insignificant" (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.

130 The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

> Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para. 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of "undetermined", its analysis did not meet the necessary objective standard.

131 The Federal Court of Appeal's "undetermined" approach also raises concerns of fairness to the merging parties. The court recognized that a "proper interpretation of s. 96 of the Competition Act requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects" (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

132 The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal's finding that competition from the Babkirk site would have led to an average price

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above framework merely guides the structure of that inquiry to ensure that the Tribunal's reasoning is as explicit and transparent as possible.

150 Respectfully, the assertion in the dissenting reasons that "simply tallying up 'mathematical quantifications', while important, cannot provide a complete answer" (para. 190) misreads these reasons. They do not say that quantitative considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

151 However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

152 Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

153 With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

154 Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

155 For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

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(b) Procurement

346 The Cole-Kearney report indicates that suppliers to the merged company will experience cost savings as a result of the combination of purchasing activities in one company rather than two. The merged company will be able to demonstrate these savings and negotiate discounts in truck freight and rail freight rates, among other areas (confidential exhibit CR-112, tab A9 at 115). The Cole-Kearney report had claimed approximately $2.84 million per year in savings to the merged company, but revised its estimate to $3.28 million per year in reply to the report prepared by the Commissioner's experts in rebuttal to include cost savings at Superior's transportation affiliate, Energy Transportation Incorporated (confidential exhibit CR-114, tab 6).

347 The Commissioner submits that the procurement savings of $3.28 million per year are largely pecuniary and not well documented. Indeed, in their report in rebuttal, the Commissioner's experts, Professors Schwindt and Globerman and Mr. Kemp, note that the estimates are based solely on A.T. Kearney's experience in negotiating transportation contracts for other clients (confidential exhibit CA-3131 at 19).

348 The Tribunal finds that there is insufficient evidence to support the claimed savings in the Cole-Kearney report. The Tribunal accepts the Commissioner's criticisms and consequently concludes that no savings have been established.

(c) Public Company Costs

349 The respondents claim an annual saving due to the merger of $660,000 in avoided public company costs. Such avoided costs include stock exchange listing fees, costs of outside directors, trustee's fees, regulatory filing costs, legal and audit fees, etc. Absent the merger, the respondents argue that ICG would have gone public and incurred these costs (confidential exhibit CR-112, tab A-8 at 111).

350 The Commissioner's experts criticize these savings on the basis that ICG could plausibly have been acquired by another company and could have avoided these costs. As a result, they argue that the cost savings are not properly attributed to the instant merger (confidential exhibit CA-3131 at 18).

351 The evidence of witness Henry Roberts, vice-president of Petro-Canada, is that arrangements had already been put in place to take ICG public through an offering of trust units when Superior made its offer to acquire ICG; ICG had already issued a preliminary prospectus and was promoting the offering via road shows. According to Mr. Roberts, Petro-Canada had received expressions of interest by a few potential buyers and had discussions with them; however, no such buyer made a binding offer to purchase ICG.

352 History aside, will these savings likely be attained if the Tribunal orders total divestiture. At the present time, the Tribunal does not and cannot know how the ordered divestiture would take place. However, since Superior is claiming the savings in public company costs as efficiencies, it has the burden of demonstrating to the satisfaction of the Tribunal that those savings are properly included in the analysis under subsection 96(1). Thus, Superior must establish that it would or would likely take ICG public in the event of a total divestiture order. It has not done so, and the efficiency claim is therefore denied.

(2) Field Operations

(a) Fleet and Driver Reductions

353 The Cole-Kearney report estimates that the merged entity will require fewer trucks of all types in the overlapping trade areas of the merging firms, so that a number of trucks and related delivery driver positions in overlapping areas can, therefore, be eliminated. The efficiencies in these categories arise from the elimination of certain planned vehicle purchases, the elimination of the operating costs on vehicles removed from service, proceeds of disposal of certain delivery vehicles (confidential exhibit CR-112, section C, tab C4), and the savings in driver remuneration (*ibid.*, tab C-5).

354 The Cole-Kearney report uses statistical regression methods (as subsequently presented during the hearing in confidential exhibit CR-113, appendix G, tab 5) to determine the relationship between operating hours per bulk truck and three determinants

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1 quantify.

2 If one were to talk total costs divided by

3 units, then I have effectively included that, but that's

4 not your question.

5 **MEMBER HORBULYK:** Right. I appreciate that.

6 Thank you.

7 And then what about in terms of demand? I

8 mean, sometimes in discussion that things will be different

9 with the merged firm and that, all else being equal,

10 consumers are going to be willing to pay for the offerings

11 of the merged firm on a higher rate per unit across the

12 board than they were willing to pay per before, so in some

13 sense, the demand curve has shifted rightward.

14 Just to confirm, I don't see that being spelled

15 out in your analysis.

16 **MR. HARINGTON:** That is not in my analysis. As

17 I said, I'm not an economist. I don't deal with the demand

18 curves, the change in demands. I hold output constant for

19 no reason other than to ensure that I don't include any

20 efficiencies on account of a reduction in output.

21 **MEMBER HORBULYK:** Okay. Thank you.

22 I wanted to turn to something -- a somewhat

23 different topic but is central to the big picture we arrive

24 at here.

25 Could you just give a little overview of the

amalgamated pursuant to a short form amalgamation and a Certificate of Amalgamation was issued by the Registrar of Corporations for the Province of Alberta in accordance with the *Business Corporations Act (Alberta)*. Upon the amalgamation, SECURE and Tervita ceased to exist as separate legal entities and continued as one corporate entity.[35]

55. In connection with the closing, SECURE entered into an $800 million three-year credit facility with nine financial institutions and Chartered Banks which was used to replace and repay SECURE's existing first and second lien credit facilities and Tervita's first lien credit facility.[36]

VIII. Definitions

56. For purposes of my conclusion, I have considered Productive Efficiencies generated by the Transaction to reflect the likely reduction in the resource costs incurred by SECURE, following the Transaction, as compared to the aggregate resource costs that SECURE and Tervita would have incurred separately absent the Transaction but with no reduction in output. Similarly, for purposes of my conclusion as to the Productive Efficiencies lost under a Hypothetical Divestiture Order, I have considered the likely increase in the aggregate resource costs incurred by SECURE and a prospective purchaser, following the implementation of the hypothetical Divestiture Order, as

[35] Affidavit of Dave Engel, paragraph 16.

[36] Secure Business Acquisition Report, Form 51-102F4, section 2.3.

offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*, at para. 16). Therefore, the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This 'wealth transfer' or 'redistributive effect' is considered to be neutral" (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.

96 In the *Superior Propane* cases, the Tribunal and the Federal Court of Appeal recognized another methodology called the "balancing weights" approach. This approach enables Tribunal members to "use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power" (*Superior Propane I*, at para. 431).

97 As explained in *Superior Propane IV*, under the balancing weights approach, the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. The Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Then, the Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity (*Superior Propane IV*, at para. 20).

98 The Tribunal may also adopt a modified version of the balancing weights approach (see *Superior Propane IV*, at paras. 21 and 26). Under this modified approach, socially adverse redistribution effects, or the portion of the wealth transfer that is attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*, at para. 333).

99 However, there is no mandated "correct" methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002). at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

100 The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*, at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).

101 The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.

(4) Order Implementation Efficiencies Are Not Valid Efficiencies Under Section 96

102 In the context of a merger, efficiencies are pro-competitive benefits. As Brian A. Facey and Cassandra Brown explain, "Economists' conception of efficiency revolves around the benefit, value or satisfaction that accrues to society due to the actions

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and choices of its members" (p. 253). There are three components: (1) production efficiency, which "is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology"; (2) innovation or dynamic efficiency, which "is achieved through the invention, development and diffusion of new products and production processes"; and (3) allocative efficiency, which "is achieved when the existing stock of goods and productive output is allocated throughout the price system to those buyers who value them most in terms of willingness to pay, such that 'resources available to society are allocated to their most valuable use'" (Facey and Brown, at pp. 253-55, quoting Competition Bureau, Merger Enforcement Guidelines (2011), at para. 12.4).

103 Tervita argues that the Tribunal erred in rejecting valid efficiencies from its consideration of the efficiency gains, namely those referred to by the Tribunal as OIEs. Tervita submits that all economic efficiencies, however arising, should be considered.

104 Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *transportation* gains in efficiency are "productive gains in efficiency realized by the customers who are closer to the Babkirk site, allegedly than to Tervita's Silverberry secure landfill. Since Tervita acquired the allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131). Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.

105 The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site secure landfill: "Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry ..." (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser — from the spring of 2012 to the spring of 2013.

106 The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment ("MOE") to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).

107 A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

108 Though the Tribunal held that the one-year efficiencies claimed by Tervita were OIEs, the Tribunal's reasons also appear to suggest that those efficiencies could have been classified as early-mover efficiencies. The Tribunal noted that Tervita would have been prepared to operate the Babkirk site as a secure landfill by the summer of 2012 (para. 269), and also found that, under its "but for" analysis in which the merger would not have occurred, the site would not have been operated as a secure landfill accepting significant quantities of waste until the spring of 2013 (para. 207). Thus, it would appear that any transportation and market expansion efficiencies arising from the operation of the Babkirk site as a secure landfill from 2012 to 2013 under

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12.2 As the starting point, when determining the relevant anti-competitive effects for the purpose of performing the trade-off, the Bureau recognizes the significance of all of the objectives set out in the statutory purpose clause contained in section 1.1 of the Act.

12.3 The Bureau, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, makes an assessment of whether the efficiency gains that are likely to be brought about by a merger will be greater than and will offset the anti-competitive effects arising from that merger, and will not necessarily resort to the Tribunal for adjudication of the issue. However, the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made.

12.4 In general, categories of efficiencies that are relevant to the trade-off analysis in merger review include the following:

- allocative efficiency: the degree to which resources available to society are allocated to their most valuable use;
- technical (productive) efficiency: the creation of a given volume of output at the lowest possible resource cost; and
- dynamic efficiency: the optimal introduction of new products and production processes over time.

12.5 These categories are examined in reference to both gains in efficiency and anti-competitive effects (which include losses in efficiency).

12.6 For the purpose of the trade-off analysis in litigated proceedings before the Tribunal, the Bureau must show the anti-competitive effects of a merger. As outlined in more detail in paragraph 12.13 below, the merging parties must show all other aspects of the trade-off, including the nature, magnitude, likelihood and timeliness of efficiency gains, and whether such gains are greater than and offset the anti-competitive effects. Whether or not a case proceeds to litigation, the Bureau seeks information from the merging parties and other sources to evaluate gains in efficiencies and anti-competitive effects.

12.7 By incorporating an explicit exception for efficiency gains, Parliament has indicated that the assessment of the competitive effects of the merger under section 92 of the Act is to be segregated from the evaluation of efficiency gains under section 96. That said, cost savings from substantiated efficiency gains may be relevant to the analysis under section 92 of whether the merger is likely to prevent or lessen competition substantially in the following limited sense: the Bureau considers whether, as a result of true cost savings (discussed below under "Types of Efficiencies Generally Included

Types of Efficiencies Generally Included in the Trade-Off: Gains in Productive Efficiency

12.14 Productive efficiencies result from real cost savings in resources, which permit firms to produce more output or better quality output from the same amount of input. In many cases, such efficiencies can be quantifiably measured, objectively ascertained, and supported by engineering, accounting or other data, subject to a discount, as appropriate, for likelihood in practice. Timing differences in the realization of these savings are accounted for by discounting to the present value.

12.15 Productive efficiencies include the following:

- cost savings at the product, plant and multi-plant levels;
- savings associated with integrating new activities within the firm;[58] and
- savings arising from transferring superior production techniques and know-how from one of the merging parties to the other.[59]

12.16 Information respecting gains in efficiency that relate to cost savings should be broken down according to whether they are one-time savings or a recurring savings. When considering cost savings, the Bureau examines claims related to the following:

- economies of scale: savings that arise from product- and plant-level reductions in the average unit cost of a product through increased production;
- economies of scope: savings that arise when the cost of producing more than one product at a given level of output is reduced by producing the products together rather than separately;
- economies of density: savings that arise from more intensive use of a given network infrastructure;
- savings that flow from specialization, the elimination of duplication, reduced downtime, a smaller base of spare parts, smaller inventory requirements and the avoidance of capital expenditures that would otherwise have been required;
- savings that arise from plant specialization, the rationalization of various administrative and management functions (e.g., sales, marketing, accounting, purchasing, finance, production), and the rationalization of research and development activities; and
- savings that relate to distribution, advertising and raising capital.

---

would not be achievable if the proposed remedy is granted. Only those gains in efficiency that will be forgone as a result of the remedy will be counted.

58 These include reduced transaction costs associated with contracting for inputs, distribution and services that were previously performed by third parties, but exclude pecuniary savings such as those related to bringing idle equipment into use if such idle capacity will be transferred from the merged firm to third parties.

59 While such legitimate production-related savings may exist, it will generally be difficult to demonstrate that efficiencies will arise owing to "superior management," that savings are specifically attributable to management performance or that they would not likely be sought and attained through alternative means.

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evenly). If that is true, consumers will lose some welfare as they shift to that less preferred substitute product, which delivers less consumer surplus to them because of its characteristics. This loss of welfare is also a deadweight loss to society, because it is not recovered through a transfer to another group.[71]

The effects on society we see from the above example as a result of the monopolist's price increase are that (1) more resources are being used to satisfy the same social needs and the social "pie" of resources has actually shrunken; and (2) consumers have shifted to a less desirable substitute product, reducing social welfare. These are the sources of the deadweight loss to society from this increase in price.

The price increase may also result in an additional loss of "producer surplus" (the difference between revenue received by the producer and the cost of producing the product) if the price being charged for product X before the price increase was already above cost. The graphical explanation of this, which also illustrates the loss of consumer surplus, is provided below in this chapter at Appendix 3.1.

ii) Productive Efficiency

While allocative efficiency considers the impact on the economy as a whole in terms of resource allocation, productive efficiency focuses on the efficiency of individual firms or businesses. Productive efficiency considers whether any given level of output is being produced at least cost, or alternatively, whether a given amount of inputs (e.g., labour, parts, machinery) is yielding the maximum possible output.[72] Productive efficiency occurs where the cost per unit produced by a firm is at its lowest point.

We can illustrate this through examining a firm's "average cost curve," which is a line plotting the per-unit cost of production (vertical axis) with changes in output (horizontal axis). In the chart below, the firm's average cost per unit is in the $250 to $300 per unit range at the

71 In *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd*, [1992] CCTD 4 at para 143, Reed J in examining the merger efficiency defence described this loss:

> Detriment to society as a whole is said to arise, for example, when consumers because of the higher prices choose an alternate and less appropriate substitute product for the use they have in mind. They substitute a product which would have been their second choice in a competitive market. This inefficient substitution is seen as a misallocation of resources; it is seen as a loss to society as a whole. It is referred to as allocative inefficiency or the deadweight loss.

72 Dunlop, McQueen & Trebilcock, above note 29 at 51.

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lowest level of production, but drops to approximately $50 per unit at output of 2,000 to 2,500 units, the level of output involving the greatest productive efficiency.

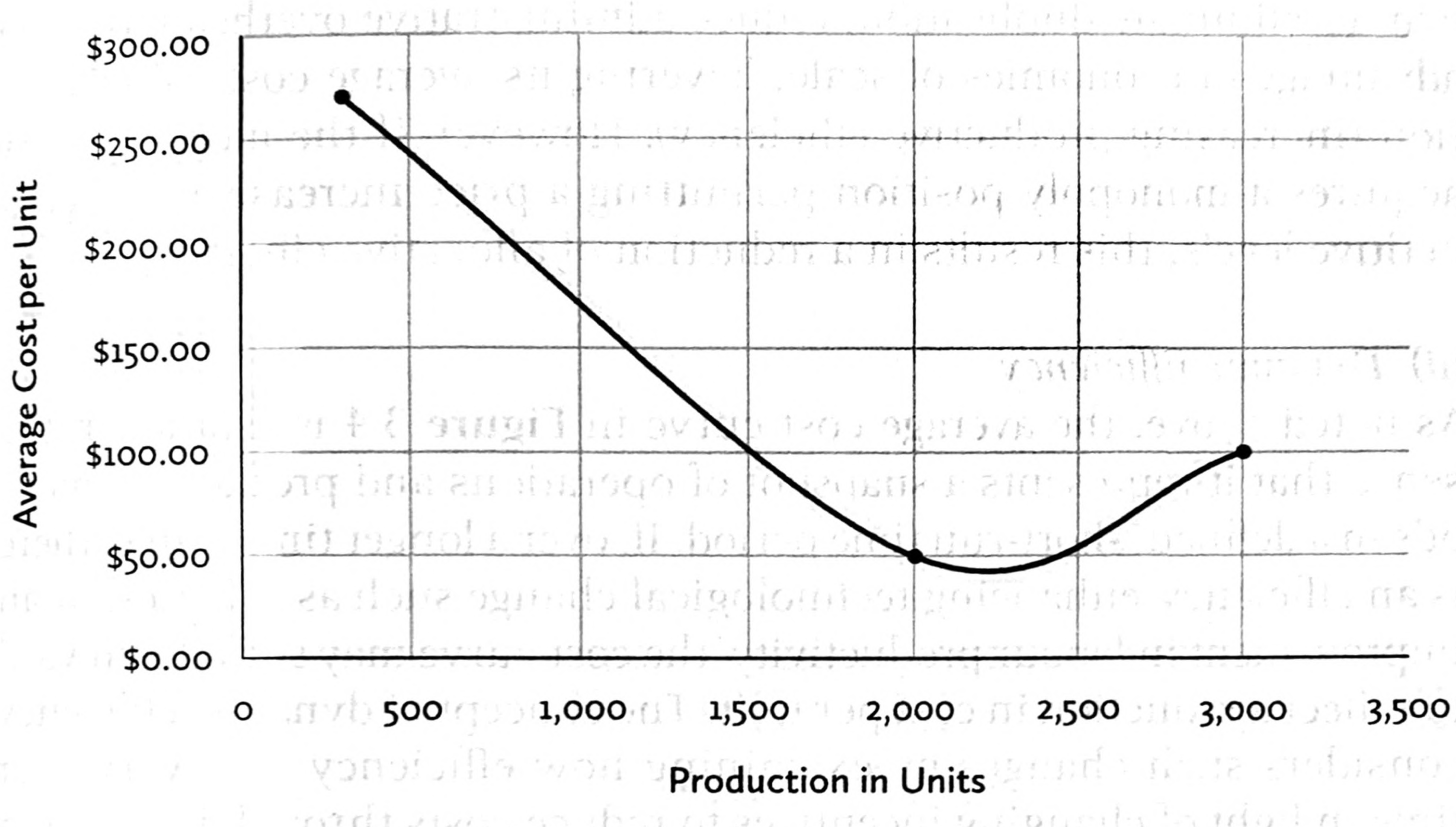

FIGURE 3.4. Cost curve

This kind of structure is typical of industries such as manufacturing, in which some significant costs (e.g., administrative overhead, plant, or equipment) are fixed. Fixed costs cannot be changed in the short to medium term. They cannot be adjusted to permit an increase in output without significant time delays. Other costs, such as labour and parts, are variable in the short run, and change in response to increases or decreases in the number of units produced.

A factory making plastic cup lids, for example, must invest in the heat-molding plant and machinery needed, whether the facility makes 100 units or 100,000. The firm will also incur other fixed costs, such as management salaries, a human resources department, debt payments, and insurance. None of these items vary with output, at least in the short run. The U-shaped cost curve above (which shows the situation in static or short-run terms) reflects the typical situation in which there are economies of scale: average cost per unit (total cost divided by output) falls as output expands. While variable cost per unit (at least initially) doesn't change, average fixed costs per unit fall as output increases. At some point, diseconomies of scale may set in, such as reduced assembly line efficiency due to crowding on the shop floor, or a level of output which outstrips management's ability to ensure quality control or efficient production practices. At that point, average costs per unit begin

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to rise because of an increase in average variable costs and the curve turns upward.

Productive and allocative efficiency may come into conflict. For example, a merger of competing business may permit the continuing firm to eliminate duplication, reduce administrative overhead, or take advantage of economies of scale, lowering its average costs of production (increasing productive efficiency). However, if the merged entity acquires a monopoly position permitting a price increase above competitive levels, this results in a reduction of allocative efficiency.

iii) Dynamic Efficiency

As noted above, the average cost curve in **Figure 3.4** is "static" in the sense that it represents a snapshot of operations and production methods in a defined, short-run time period. If, over a longer time frame, there is an efficiency-enhancing technological change such as robotics, or an improvement in labour productivity, the cost curve may shift downward to reflect a reduction in cost per unit. The concept of dynamic efficiency considers such changes by examining how efficiency may vary over time in light of changing incentives to reduce costs through innovation or other change. The *Skeoch-MacDonald*, or "Dynamic Change" *Report*, prepared for the government in 1976 in the context of proposals to amend the legislation, viewed dynamic efficiency as the most important objective for competition law:

> The primary thrust of policy in our view should be to promote adaptability and flexibility in the economy, and to provide both pressures and incentives to develop new products and services, as well as new methods of production and distribution, which will more effectively meet the needs and desires of society.[73]

There has been a building recognition of the importance of competition in stimulating innovation and dynamic change. It is well known that technological and other innovations introduced by firms such as Microsoft, Google, Apple, Netflix, Amazon, Zoom, Uber, Lyft, Shopify, and others have become a key driver of economic growth in recent years.[74] The scholarship has studied the relationship among competition,

73 Skeoch & McDonald, above note 45 at 205.

74 John Pecman, "Remarks by John Pecman, Commissioner of Competition" (Speech delivered at the Innovation and Antitrust Workshop, Ottawa, 4 November 2014), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03834.html: "Economic research has shown that technological innovation is the primary driver of economic growth. In fact, growth theory pioneered by Nobel laureate Robert Solow has found that the vast majority of output growth in an economy

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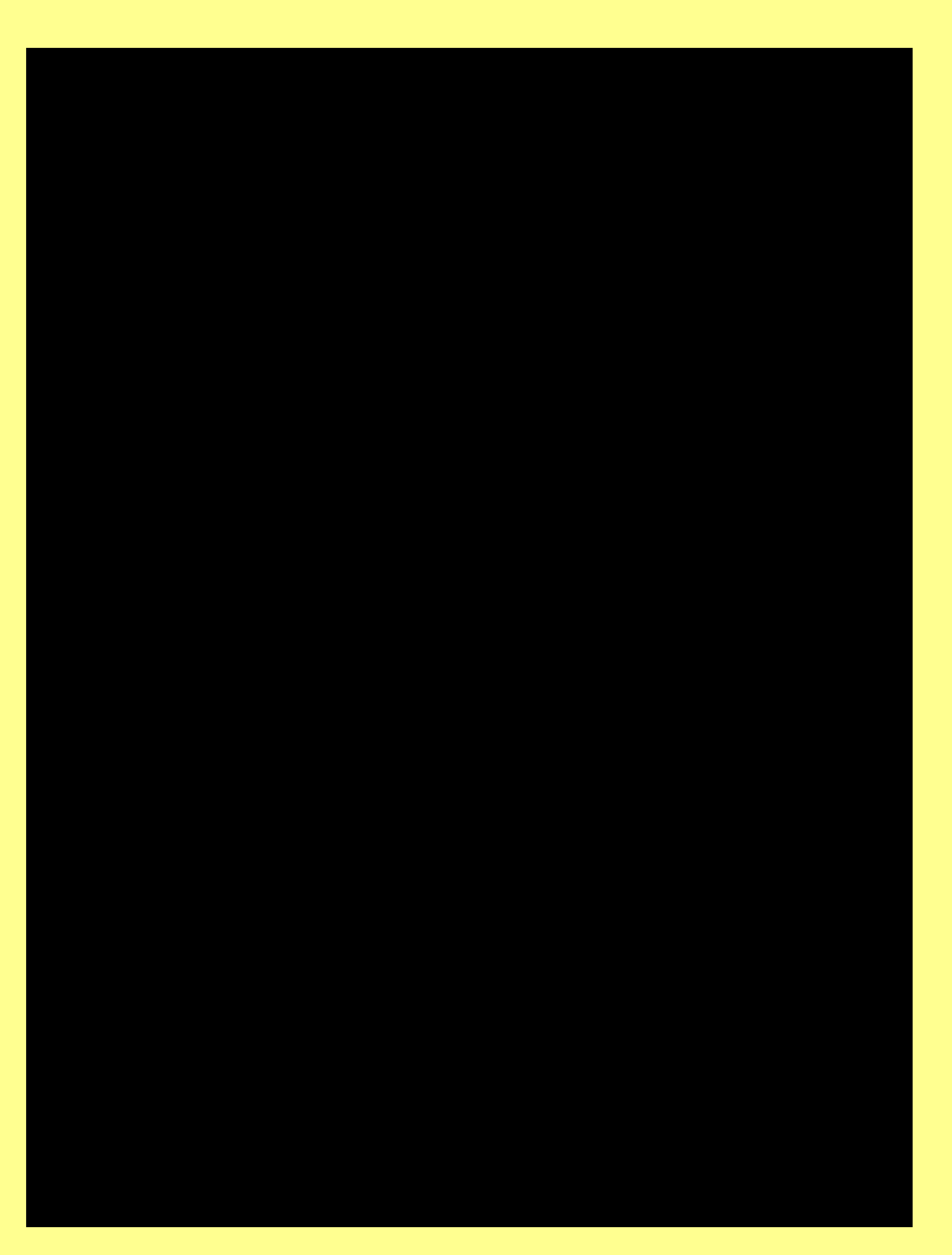

c. For these facilities, I also obtained monthly processed water volumes in cubic metres (m^3); and

d. I then ran a correlation analysis between the monthly water volumes and the monthly expenses for each cost category for the periods indicated above for which I had financial information. Through this analysis, I identified those cost line items which indicated a significant correlation with volumes. For the correlation analysis of the former SECURE facilities, see Schedules G5.1, G5.2, G5.3, G5.4, G5.5, G5.6, G5.7 and G5.8. For the correlation analysis of the former Tervita facilities, see Schedules G6.1, G6.2 and G6.3.

~~113.~~112. Reflecting the above, and taking into account the nature of the expense, and SECURE management's indication of which line items vary with volumes,[66] I selected a fixed component percentage for each line item as set out in Table 12 (for former SECURE facilities) and Table 13 (for former Tervita facilities). I have also indicated the average percentage of total costs that are represented by each expense line item.

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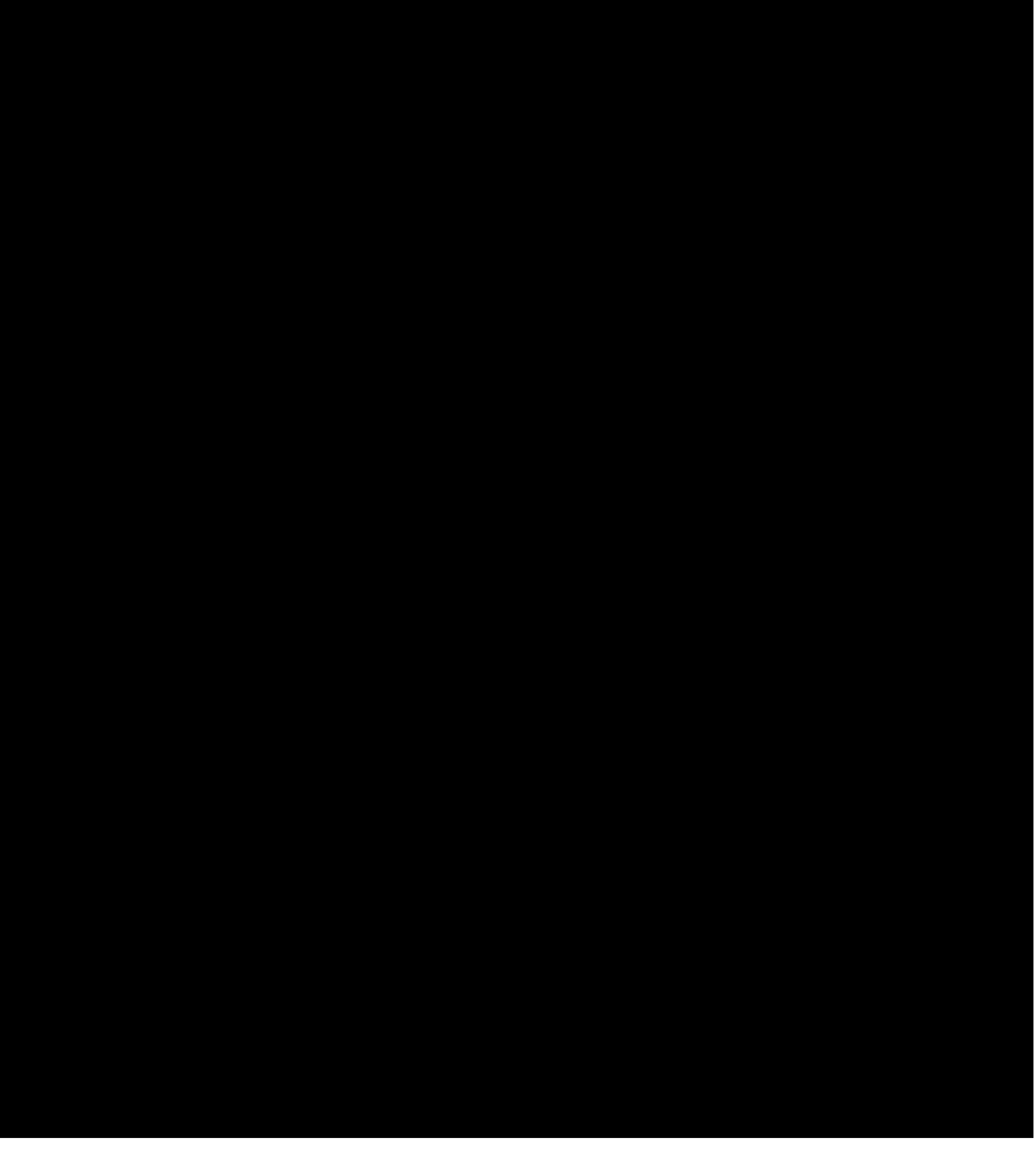

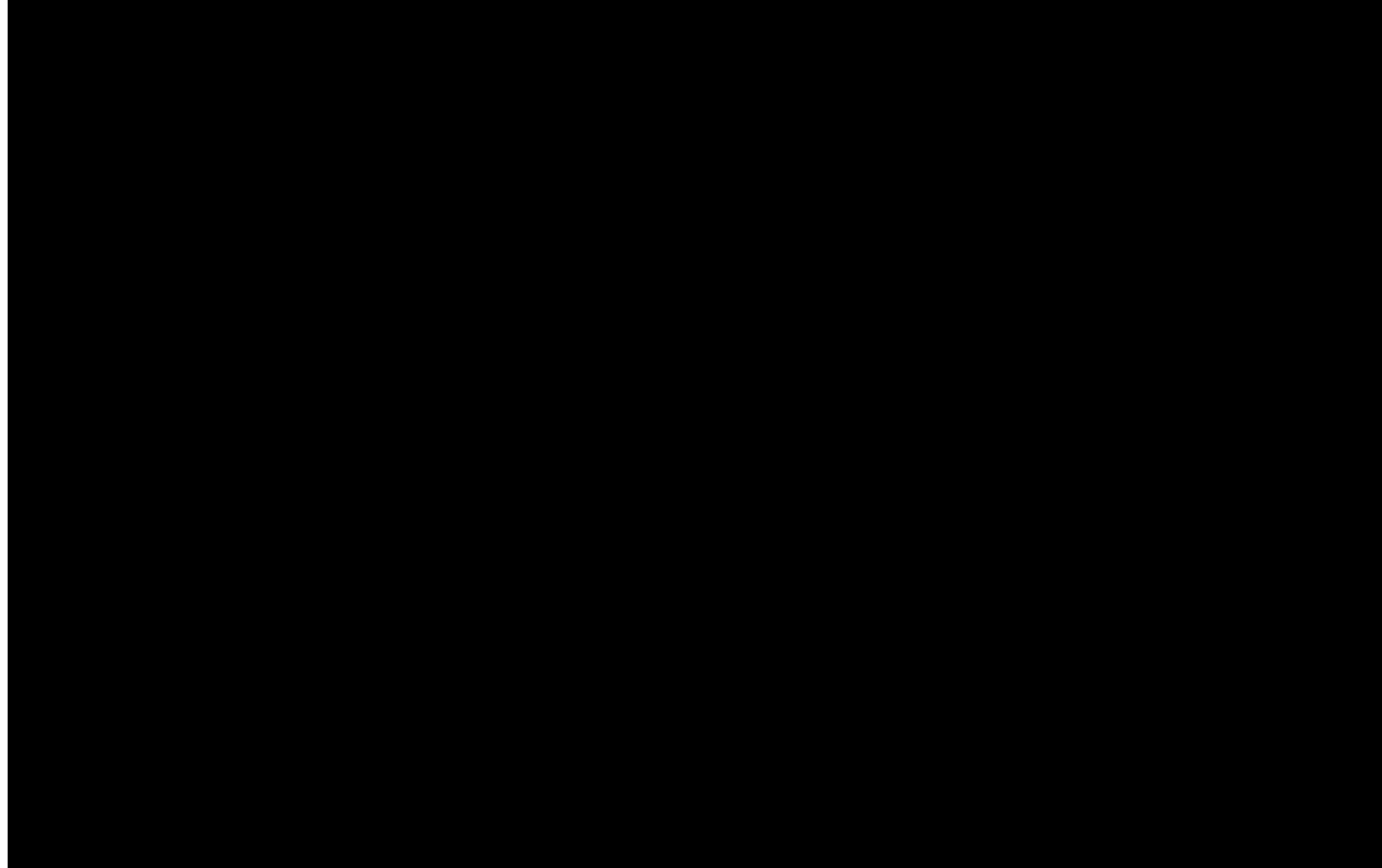

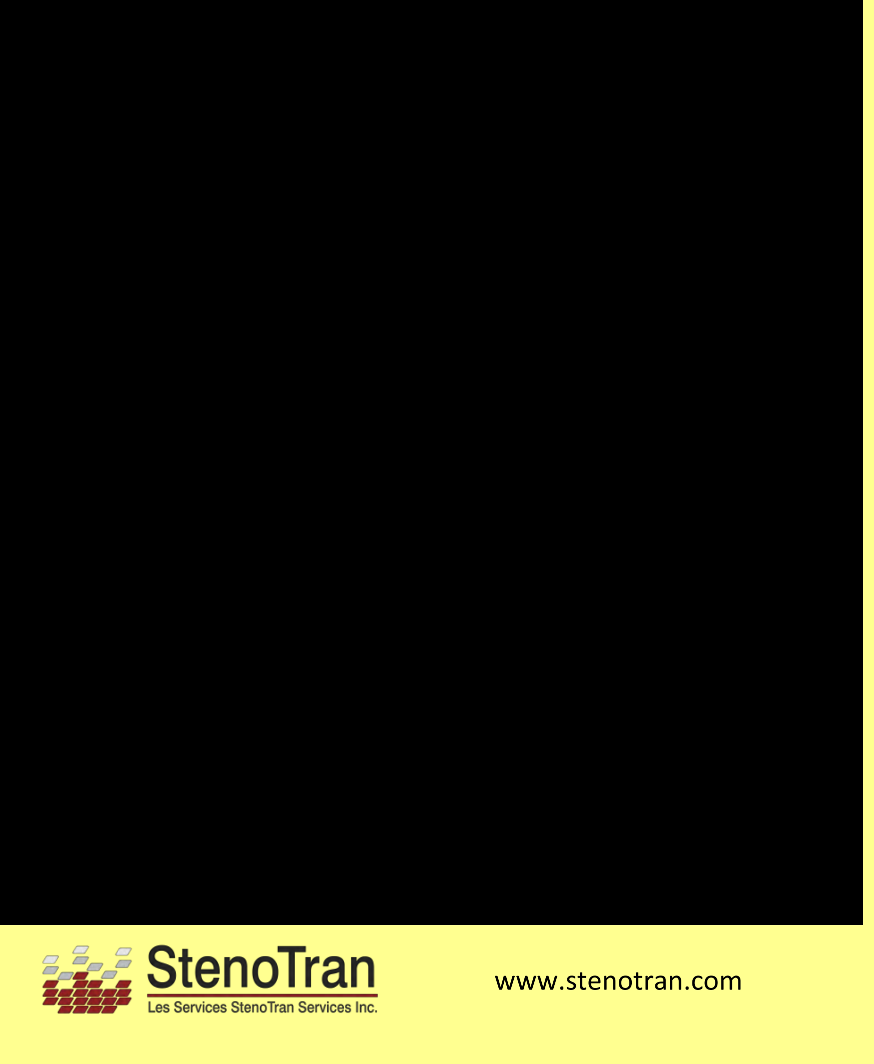

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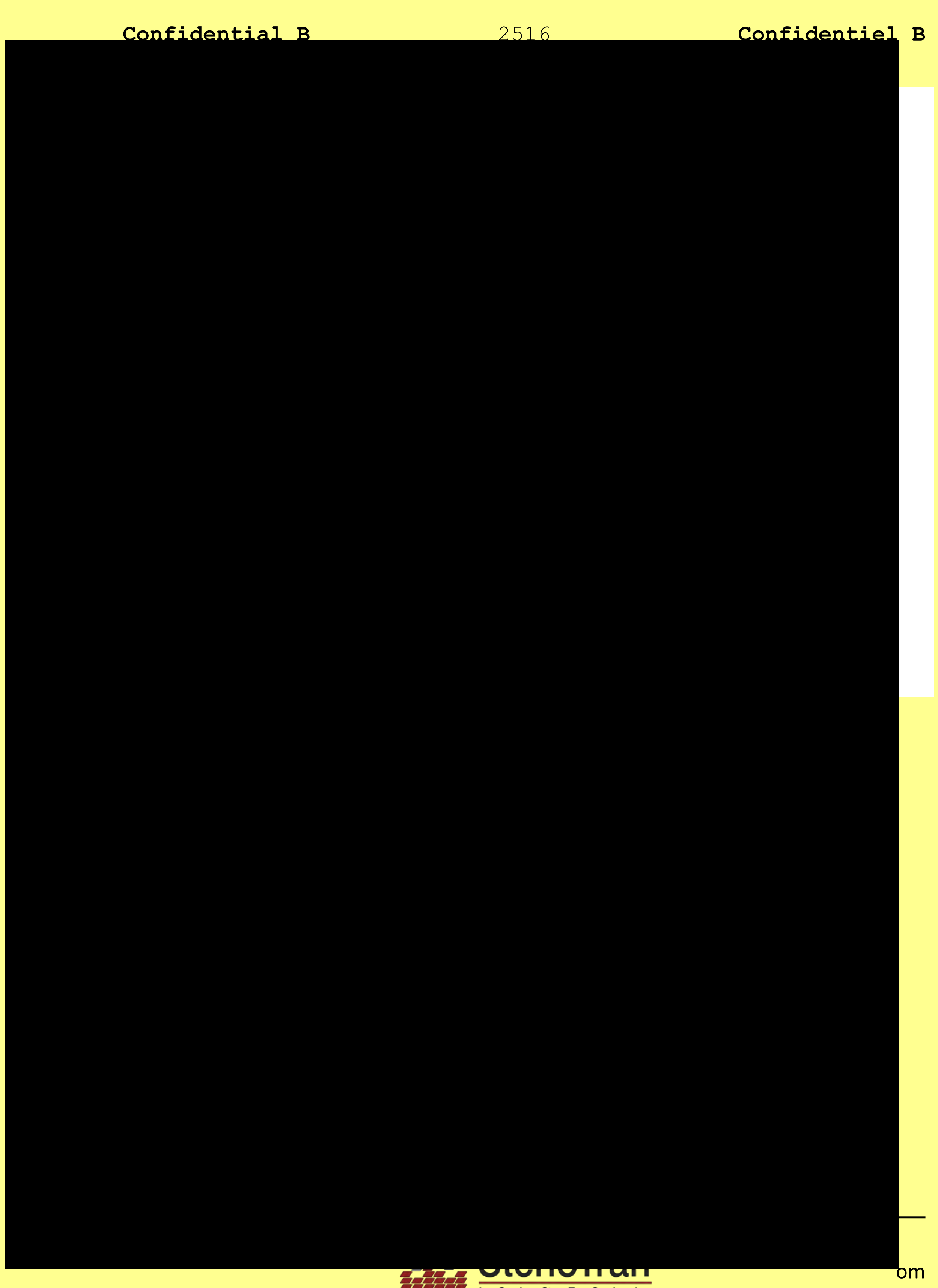


58. As noted above, the results of Mr. Harington's analysis include instances of negative correlations. It is not clear from Mr. Harington's analysis why these negative correlations have occurred. For example, if a cost category consisted of fixed costs, it should have a correlation of zero, as changes in output would not affect the fixed (unchanging) cost. If a cost category consisted of all variable costs, it should have a positive correlation, as changes in output would affect the amount of variable costs incurred. It is not clear from Mr. Harington's analysis how to interpret the cost structure of expense line items for which there is a negative correlation between costs and volumes. The fact that his methodology indicates that there is a negative relationship between volume and expenses demonstrates that his methodology may not be reliable. Due to the lack of documentation and unexplained outputs, I am not able to verify this analysis.

59. Further, as described above, Mr. Harington assumes that the dollar value of reduced labour as a result of headcount reductions represents [redacted] on average, of the actual labour costs incurred at the closed facilities.[92] He further assumes, without appropriate support for his assumption, that this same percentage of labour cost savings will be achieved as a result of closing the remaining FST and SWD facilities.[93]

60. [redacted]

61. As described above, Mr. Harington's analysis fails to consider the variability in ratios of fixed versus variable expenses across facilities. Because Mr. Harington's analysis fails to consider the variability in ratio of fixed versus variable expenses on a location-by-location basis, I am unable to

[92] Harington Report, ¶ 105.
[93] Harington Report, ¶ 106.
[94] *See, for example,* Blundell Affidavit, p. 66.

52. Mr. Harington performs a separate analysis to determine the portion of fixed costs attributable to labour at landfills and non-labour expense line items at FSTs, SWDs, and landfills. To calculate these claimed cost savings, Mr. Harington prepares a quantitative and qualitative analysis[80] by cost category for the Secure and Tervita FST, SWD, and landfill income statements (excluding FST and SWD labour savings). His quantitative analysis utilizes a correlation analysis that compares each grouping's (FST, SWD, landfill) monthly cost categories and monthly product volumes. He asserts that when he is able to identify a positive correlation between the volume of activity and the cost category, this would imply that there is a variable component to that cost.[81] For example,

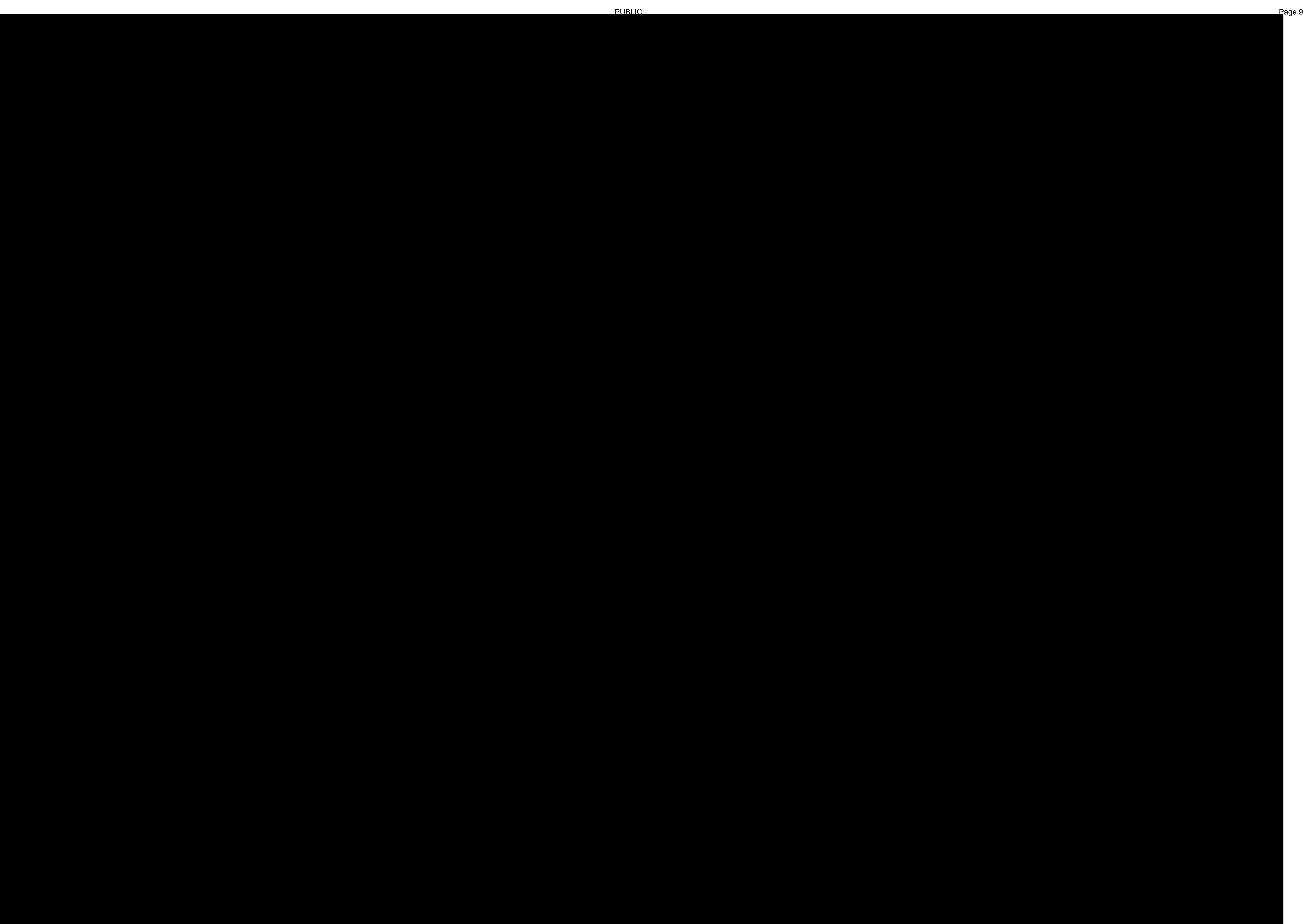
53. Mr. Harington's analysis of labour and non-labour facility rationalization cost savings fails to consider the variability in ratios of fixed versus variable expenses across closing and absorbing facilities. Mr. Harington's approach uses an average ratio of fixed and variable costs for each facility, but does not provide verification that this average is appropriate for each specific facility for which he has claimed efficiencies. Mr. Harington has combined facilities that appear to have meaningful variation in their fixed and variable cost structures. Therefore, it is not possible to verify whether there will be any productive efficiencies arising from shifting volumes from closed or closing facilities to absorbing facilities. To the extent volumes are shifted among facilities with significantly different cost structures, this may result in a loss of productive efficiency. Consequently, based on Mr. Harington's analysis, not only am I unable to verify the claimed efficiencies, it is also unclear whether the facility rationalization would lead to any productive efficiencies.

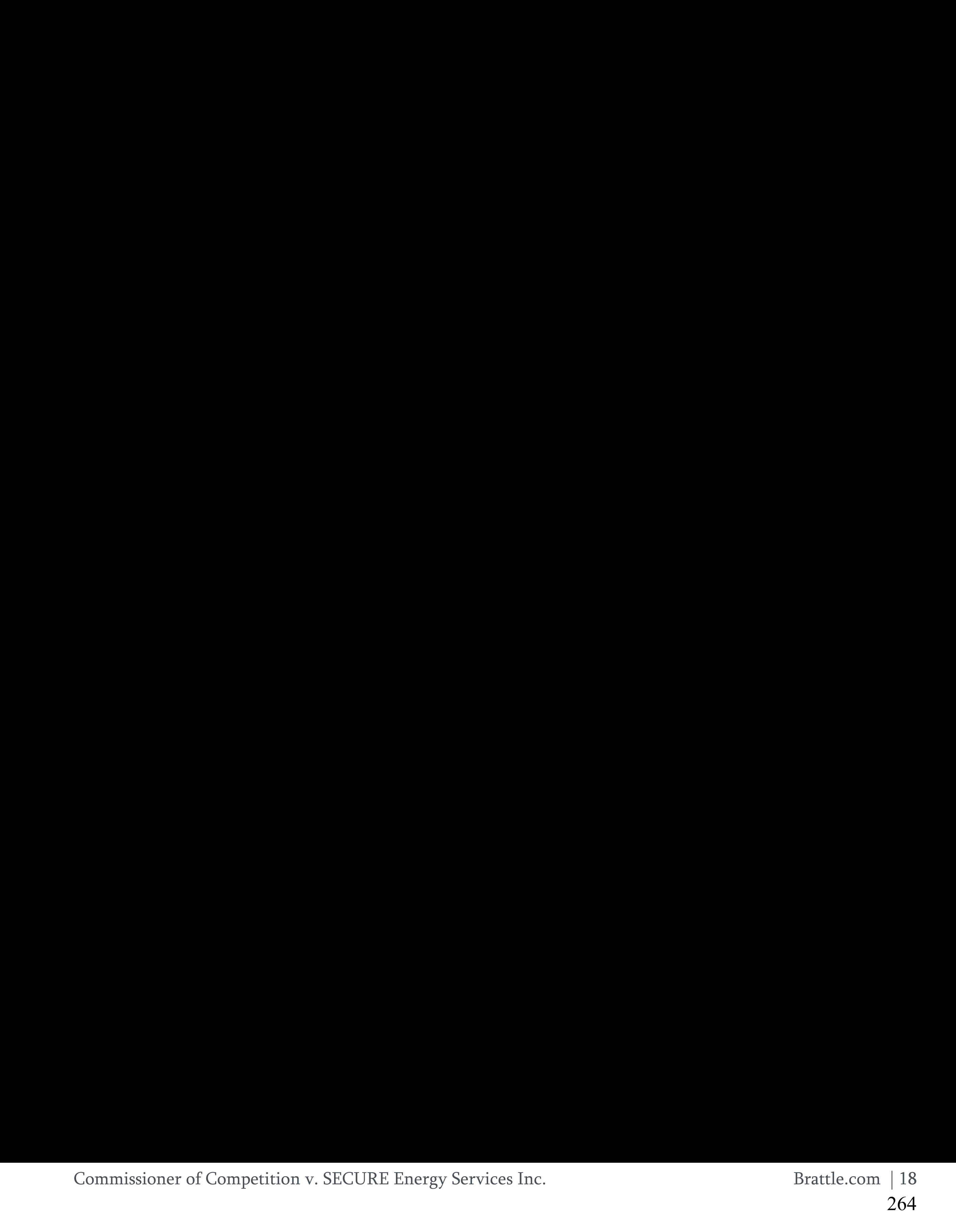
[80] A qualitative analysis is "often inductive," and "often relies on the categorization of data (words, phrases, concepts) into patterns," while a quantitative analysis is "often deductive," involving precise measurement, mathematical formula, and testing hypotheses. *See* "Qualitative or Quantitative Research?" *McGill*, https://www.mcgill.ca/mqhrg/resources/what-difference-between-qualitative-and-quantitative-research.
[81] Harington Report, ¶ 114.
[82] Harington Report, Tables 12 and 13.
[83] *See* Harington Report, ¶ 114, Tables 12–15.

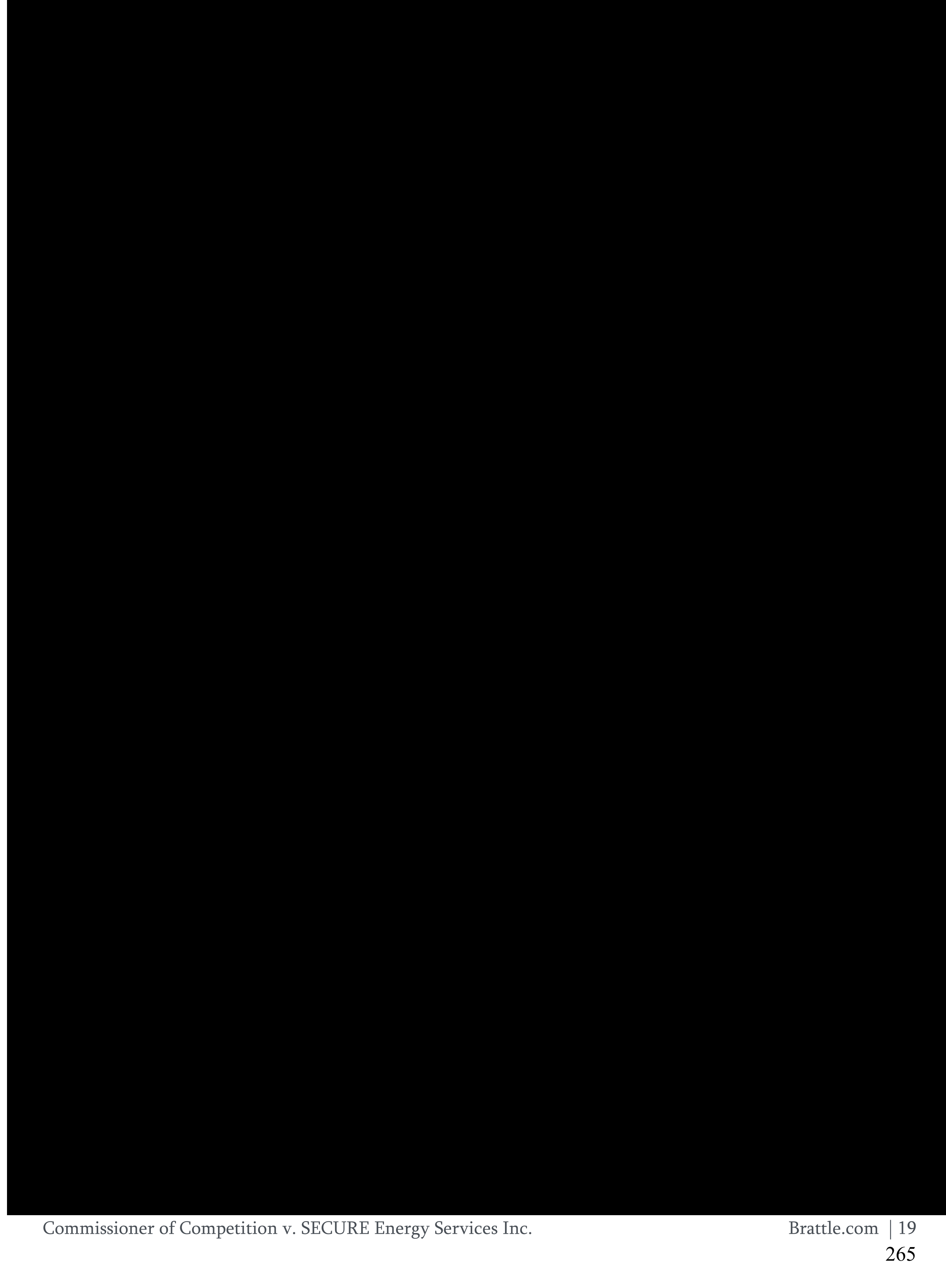
54. In his correlation analysis for labour costs at landfills and non-labour operating costs at FSTs, SWDs, and landfills, Mr. Harington computes the average correlation of volumes and expenses line items across Secure and Tervita's FSTs, SWDs, and landfills, and he uses these average correlations as the basis for his determination of certain fixed and variable component splits.[84] The correlation results of these facilities show that there is meaningful variability in these cost categories across closing and absorbing facilities. In other words, the variability in the correlations shown in his analysis demonstrates that these entities have meaningful variation in their fixed and variable cost structures as they respond to volume. Because Mr. Harington applies the average to the facilities, he disregards these different fixed and variable cost structure across location, as well as the variability in operating efficiency.

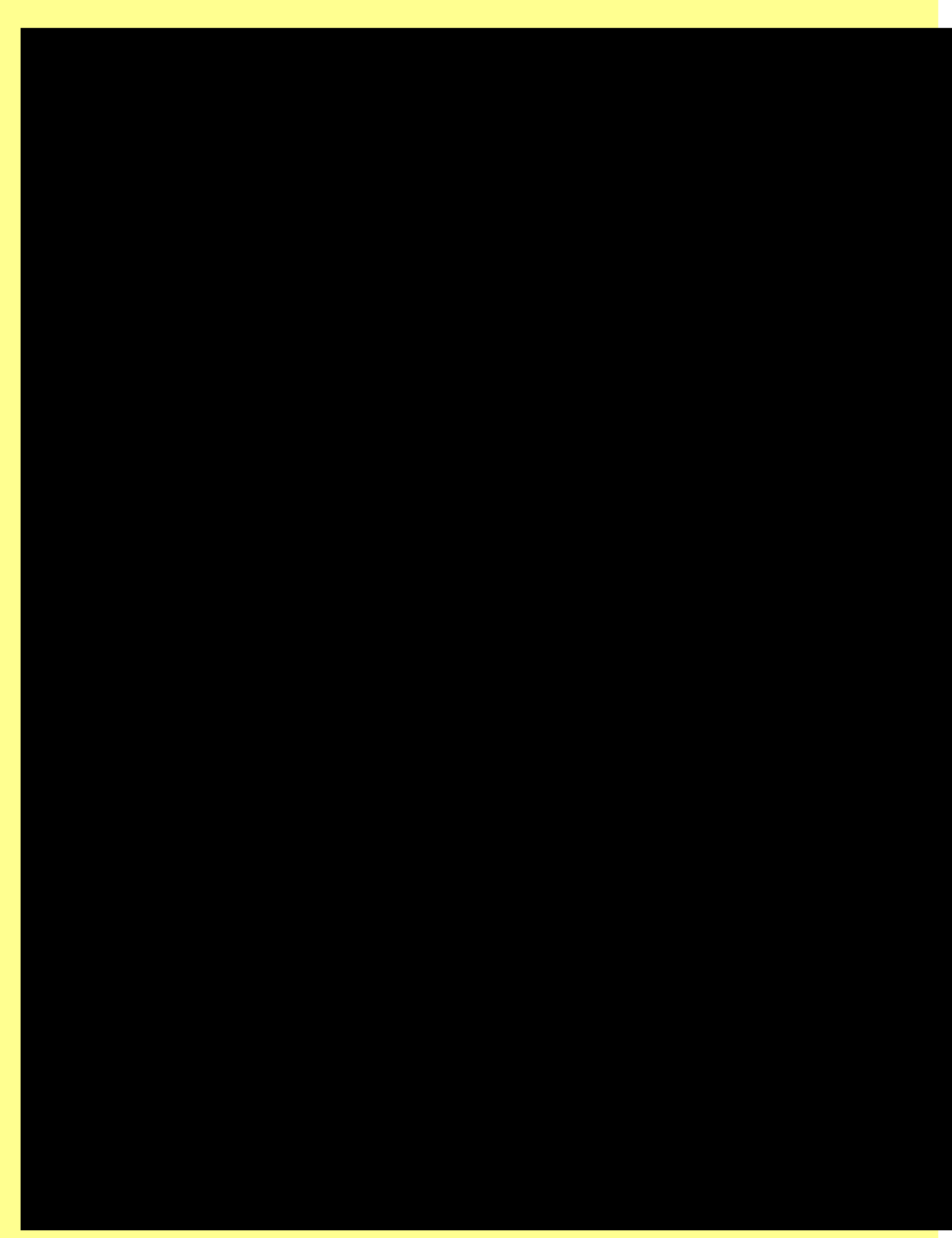
55. To demonstrate that there is variability in operating efficiency by facility type, I calculated ratios of revenues, wages, and total costs to volumes for landfills listed in Harington's Table 5, *Summary of Integration Plan-Landfills*.[85] Results are presented in Table 3 below.[86] For the period spanning January 2020 to December 2020, These figures demonstrate that certain facilities were much more operationally efficient than others in 2020.

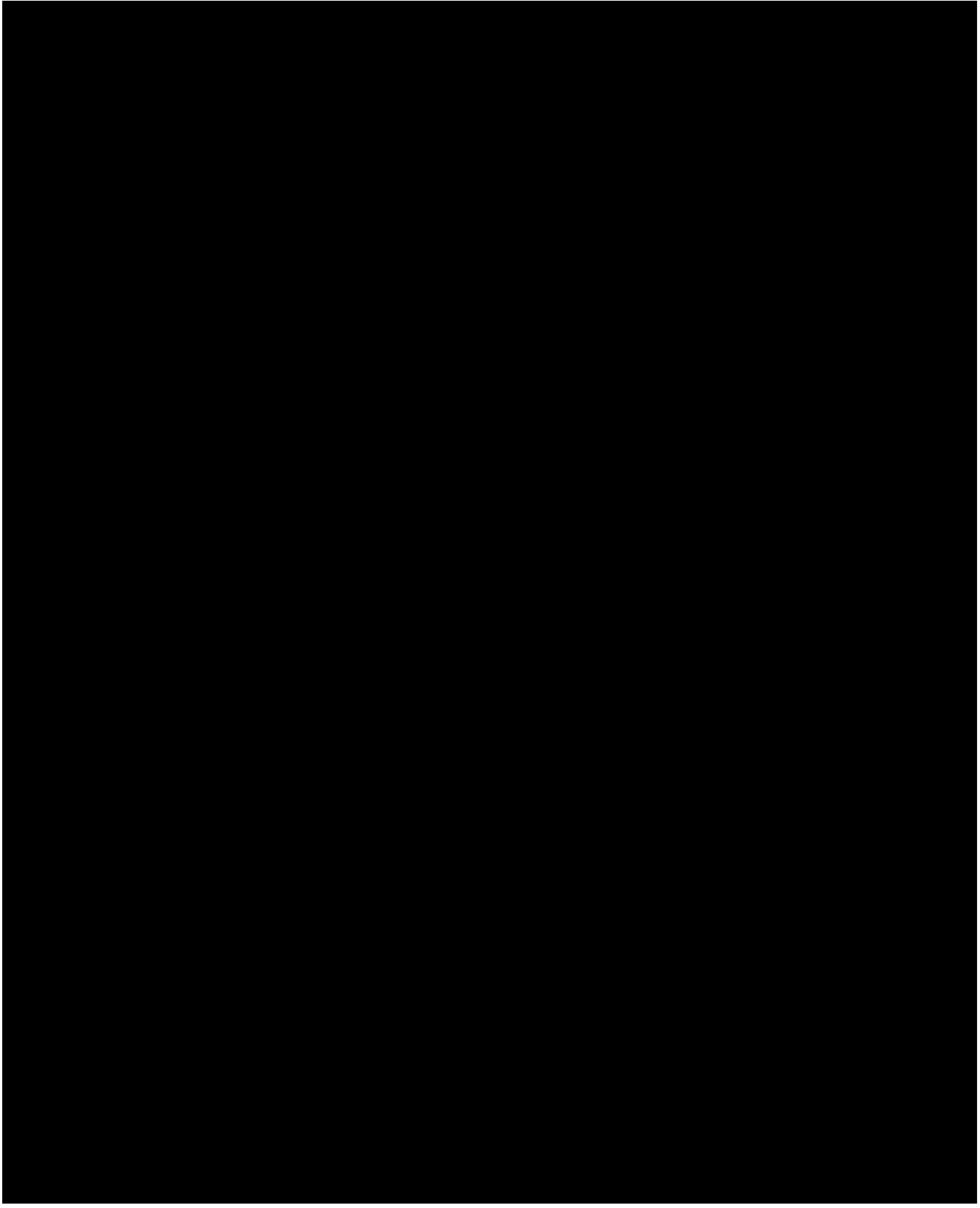
[84] *See, e.g.*, Harington Report, Tables 12, 13, 14, 15, 21.
[85] My analysis of landfills is meant to provide a simple example of the variability across these locations. As the FST and SWDs have multiple revenue drivers and associated costs I have not performed such an analysis, nor am I aware of whether the cost data necessary to perform this analysis is available.
[86] I note that complete 2021 data was unavailable for Tervita, hence the use of 2020 figures.











46. [redacted]

When the price of oil rises, certain oil drilling and production activities become economically feasible, as demonstrated by Secure management's statements. Thus, an increase in price could yield a return of market participants or new entrants and result in an increase in overall volumes beyond what Mr. Harington used in his analysis, and even higher than those recent historical volumes.

3. Mr. Harington's Analysis Does Not Account for Related Diseconomies of Scale That Are Likely to Result as Absorbing FST and SWD Facilities Approach or Even Exceed Capacity

47. Mr. Harington's analysis also does not appear to consider the potential diseconomies of scale that would likely result from increases in volume, particularly as facilities are approaching or exceeding capacity. Diseconomies of scale for these facilities would lead to reductions in production efficiency and higher marginal costs, driven by a number of potential factors. For instance, Secure may incur increased repairs and maintenance costs, to accommodate additional capacity at absorbing facilities. Additionally, potential "bottlenecks" may arise as customers will be directing volumes to fewer locations, resulting in increased wait times and additional costs to customers (also discussed below). General inefficiencies in facility management may also arise, as absorbing facilities will be operating at higher capacities for extended periods of time. As a result, Secure may need to hire additional logistical staff, incur additional information systems costs, and respond to decreased performance and increased turnover of overextended staff. The impact of diseconomies of scale is particularly concerning given that Mr. Harington's analysis asserts that the fixed and variable cost structures at the closing and absorbing facilities are the same and will remain the same. As discussed further below, Mr. Harington provides no analysis to assess this potential impact on fixed or variable cost of production at each absorbing facility.

48. In my opinion, Mr. Harington's analysis falls short by failing to fully consider the impact of increased volumes at absorbing FSTs and SWDs. Therefore, it is difficult to determine the impact of increased volumes, as Mr. Harington has not fully performed this analysis. Mr. Harington also does

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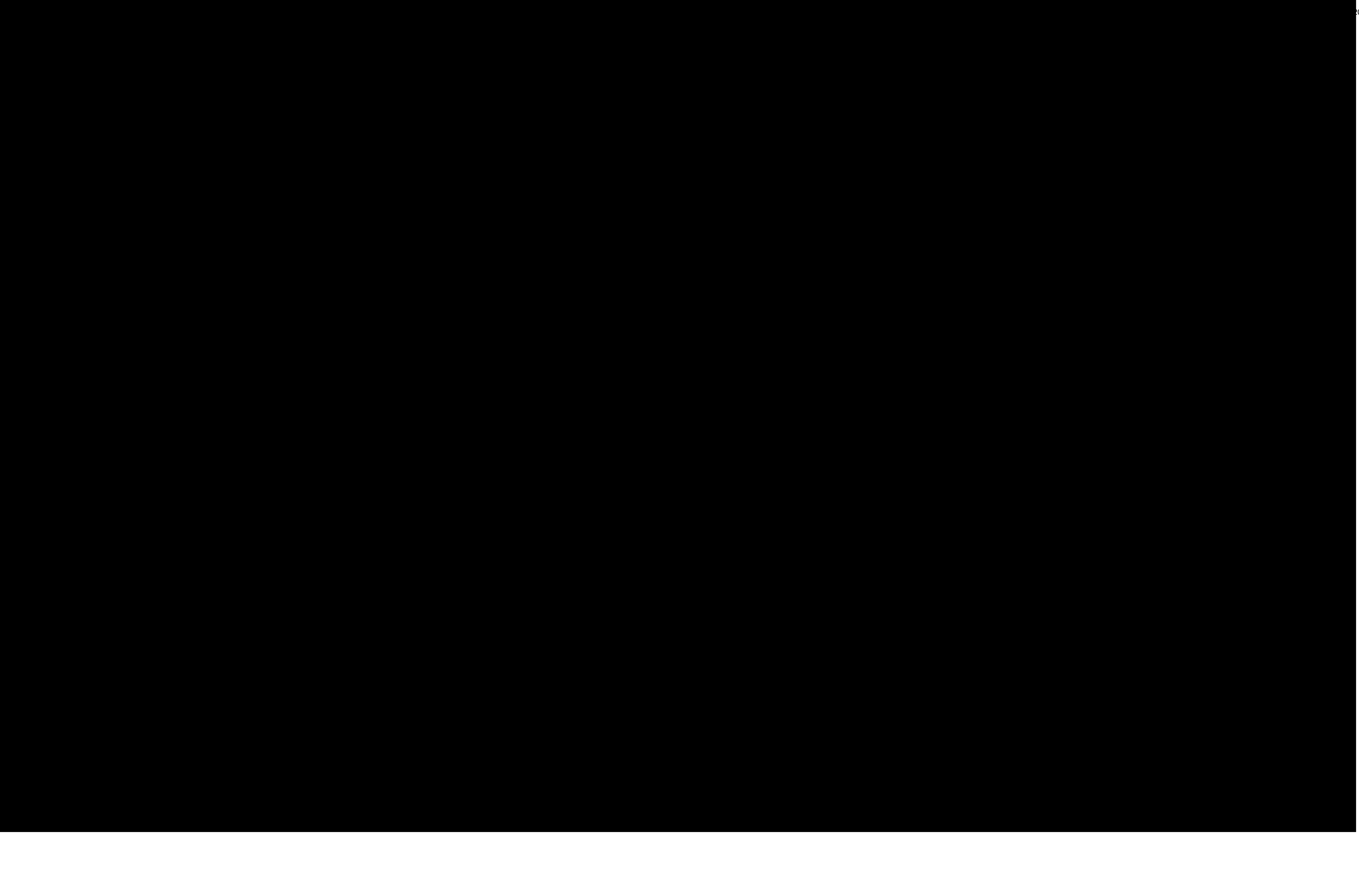
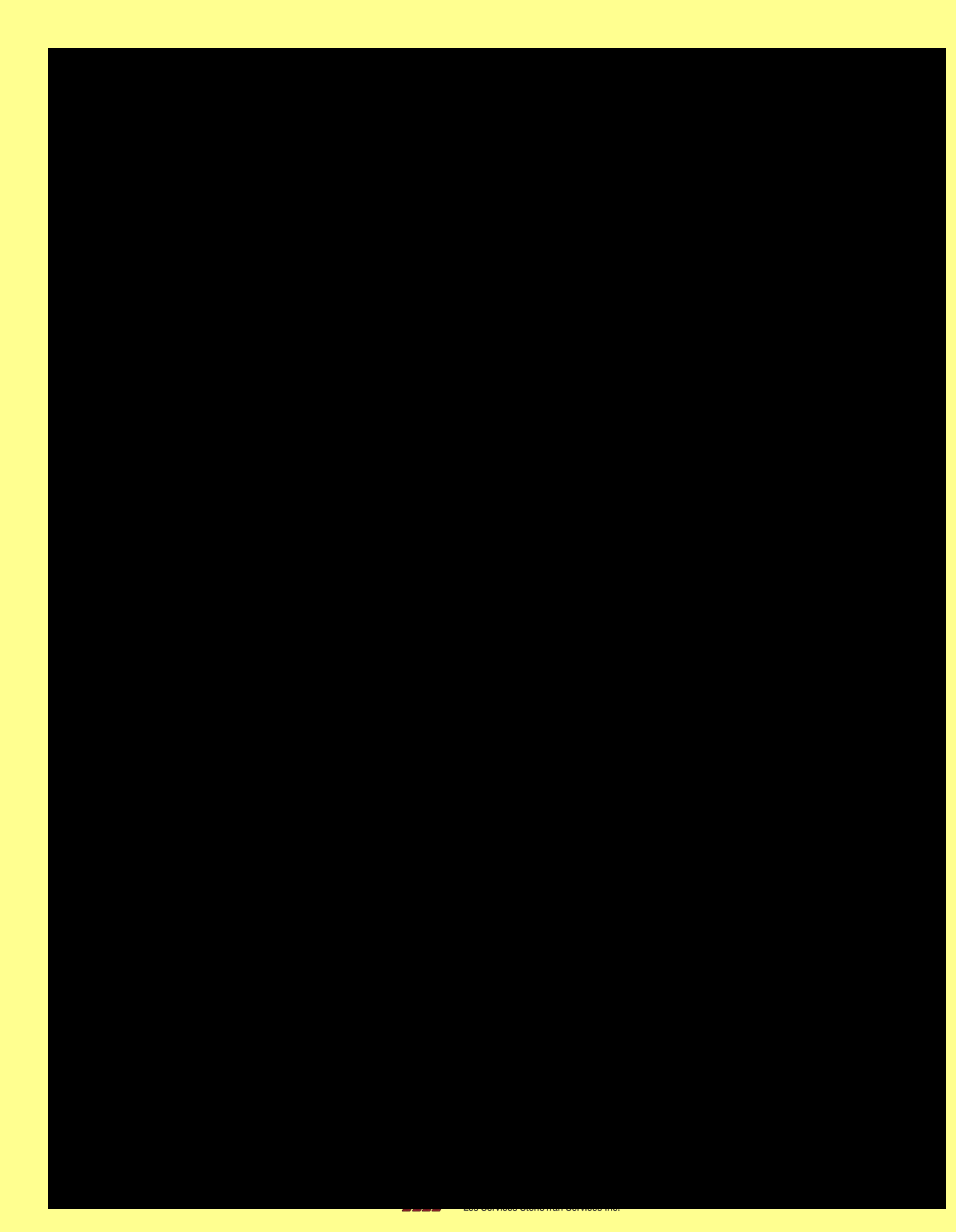
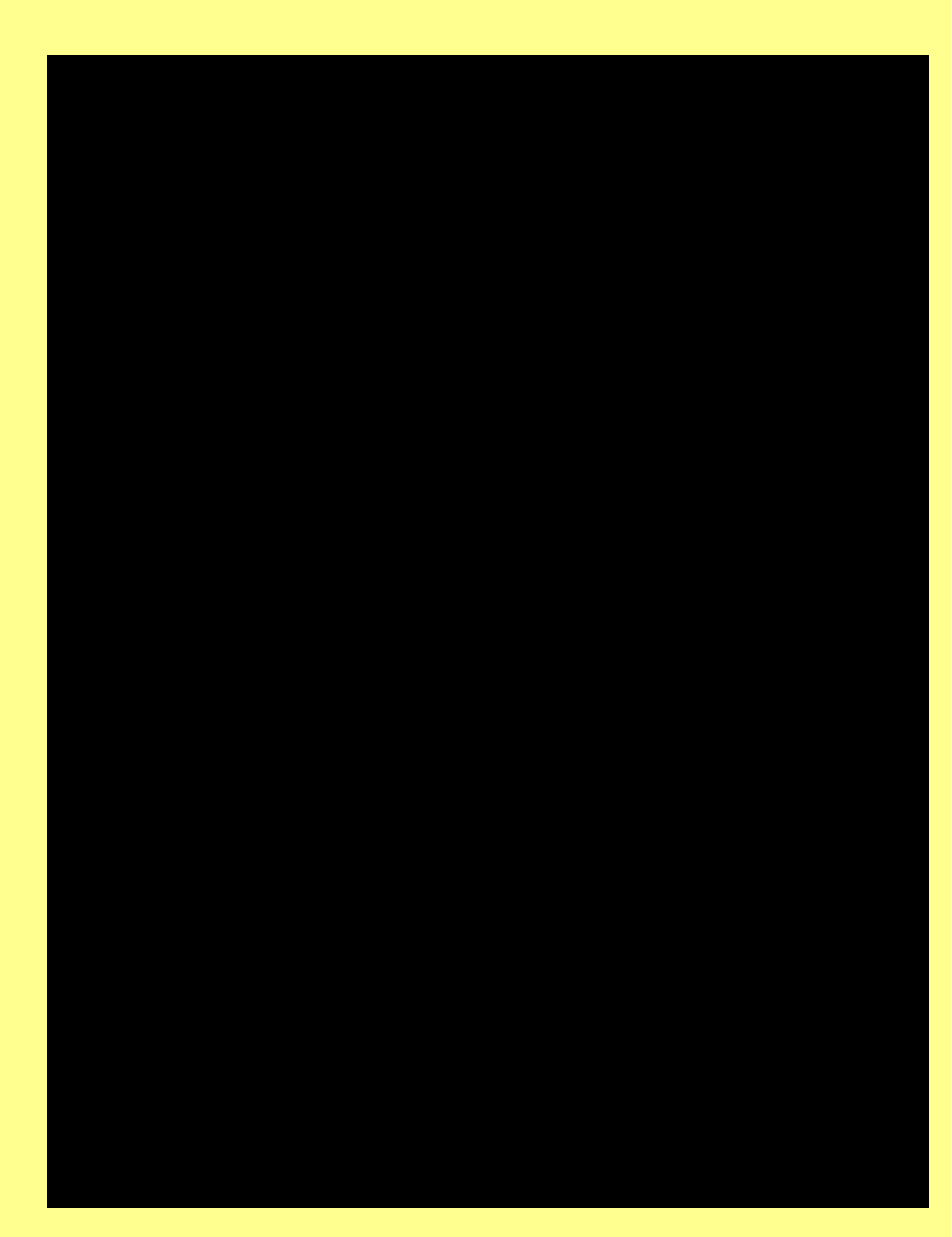


76. I discuss each of the above in more detail below.

Location Market Conditions Affect the Efficiencies of Landfills

77. As indicated in Table 2 above, the apparent range of efficiency ratios expenses to volumes significantly decreases when compared to the other landfill in the same local market. This comparison is more meaningful because facilities in the same geographic market are affected by the same external factors, while those in other markets could face external factors that are quite different. These will include:





~~93.~~92. I discuss my calculation of the amount of net Productive Efficiencies in each of the above categories below.

X.A. FST and SWD Facility Rationalization

~~94.~~93. SECURE and Tervita both operated networks of full-service midstream infrastructure facilities in Western Canada.[61] SECURE refers to these as Full Service Terminals (FSTs) and Tervita referred to them as treatment, recovery and disposal (TRD) facilities. In this report, I will use the term FST. Integral to the operation of an FST is a water disposal facility. In some cases, the water disposal is located on the same site as the FST and, in others, it is a free standing location (and SWD) but generally in close geographic proximity to the FST.

~~95.~~94. The fact that both companies operated facilities providing the same services in overlapping geographic markets enables management of the merged company to integrate facilities where sufficient capacity exists to provide the same services to customers while avoiding the fixed costs associated with the facility ceasing to operate, thereby resulting in Efficiencies. In the absence of the Transaction, these Productive Efficiencies would not be achieved.

~~96.~~95. The FST integration plans are summarized in Section IX and described in detail in Appendix F and summarized in Table 4, above, which is repeated in Table 7 below.

[61] Landfills are discussed in the next section.

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14 **MEMBER HORBULYK:** Lots of discussion about, you
15 know, all these cubic metres of water or waste or tons of
16 landfill things and in some hypothetical context, one would
17 point to all kinds of evidence and saying it's just a lot
18 cheaper to process a ton in the merged firm than it was in
19 the old firm. That's sort of what I'm asking about.
20 **MR. HARINGTON:** Okay. Fair enough.
21 So if one is only talking about the variable
22 costs on a per-ton basis, then my previous answer stands.
23 And I have not included any efficiencies on account of
24 greater economies of scale at the variable cost level other
25 than, as I said, the one that I alluded to but I did not

1 quantify.

2 If one were to talk total costs divided by

3 units, then I have effectively included that, but that's

4 not your question.

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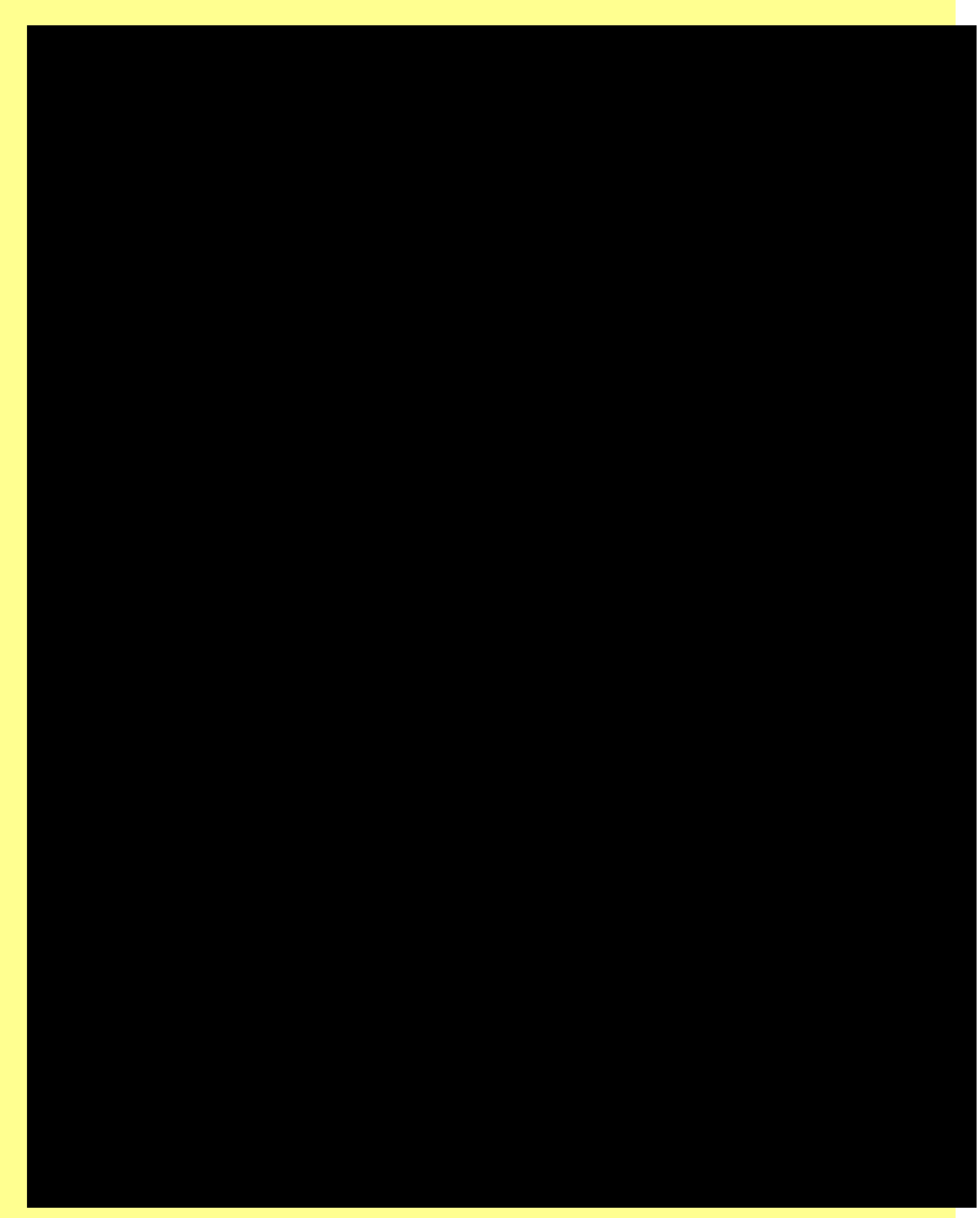

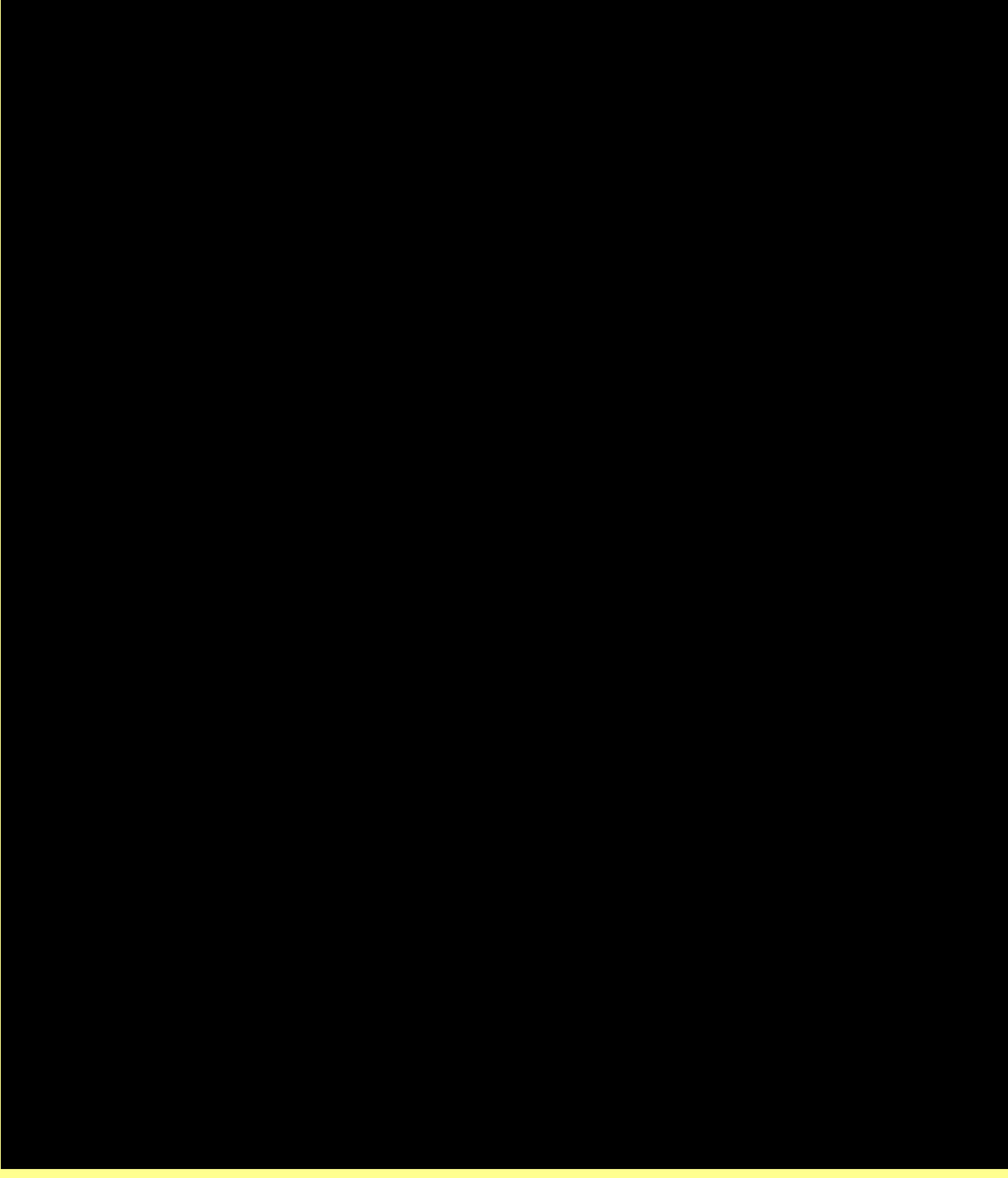

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Les Services StenoTran Services Inc.

the avoidance of these costs would represent positive productive efficiencies to the Canadian economy.

130. It would, however, also avoid the profit margin that was paid to SECURE that would represent a saving to the customer, but not a saving to the Canadian economy.

131. Further, the SWDs that Dr. Eastman cites are, like landfills, depleting assets. When a well is full, another well needs to be drilled. Accordingly, while the customer would incur an upfront cost of constructing a well, the well that SECURE was operating would have a longer operating life such that, over time, the cost of planning, permitting and constructing wells are not likely to be a factor when considered from the perspective of the Canadian economy.

132. Without analyzing the facts relating to the particular customer, therefore, it is not possible to state with certainty whether the decision by a customer to operate its own facilities would result in a net reduction or increase in productive efficiencies.

VII. My Comments on the Miller Rebuttal Report

133. To estimate the landfill ARO costs, Dr. Miller assumes that the ongoing post-closure monitoring costs for landfills will be incurred over a period of only 10 years.[91] However, SESL0035131.xlsx, the document relied upon by Dr. Miller, indicates that the post closure duration period for ongoing costs [redacted][92] Accordingly, by including the ongoing ARO costs for only 10 years

[91] Miller Rebuttal Report, paragraph 107.

[92] SESL0035131.xlsx

the rate of depletion increases as volume increases) and any identified as depreciation would generally be considered fixed costs. Dr. Miller has not considered this cost category in his profit calculations.

b. Periodic capital costs – in the above example these are in the form of periodic capping and new cell construction costs. As the timing of these costs is affected by the volume that goes into the facility, I have not considered these costs in my analysis of Productive Efficiencies because they are, in substance, variable costs, to the extent that they are categorized as depletion (per above). Dr. Miller has not considered this cost category in his profit calculations.

c. Operating fixed costs – these costs take the form of fixed costs of operating a facility that would be avoided if the facility was closed. I have incorporated these costs in my analysis of Productive Efficiencies.

d. End of life capital costs – in the above example these are in the form of the cost of end of life remediation. These costs are a combination of sunk costs (once a facility has received waste the ARO obligation is triggered and therefore the cost is sunk insofar as the obligation has arisen as a result of a past event) and variable costs (as more waste is received the ARO obligation increases). Accordingly, for both reasons, I have not considered these costs in my analysis of Productive Efficiencies. These expenses are not recorded on the income statement

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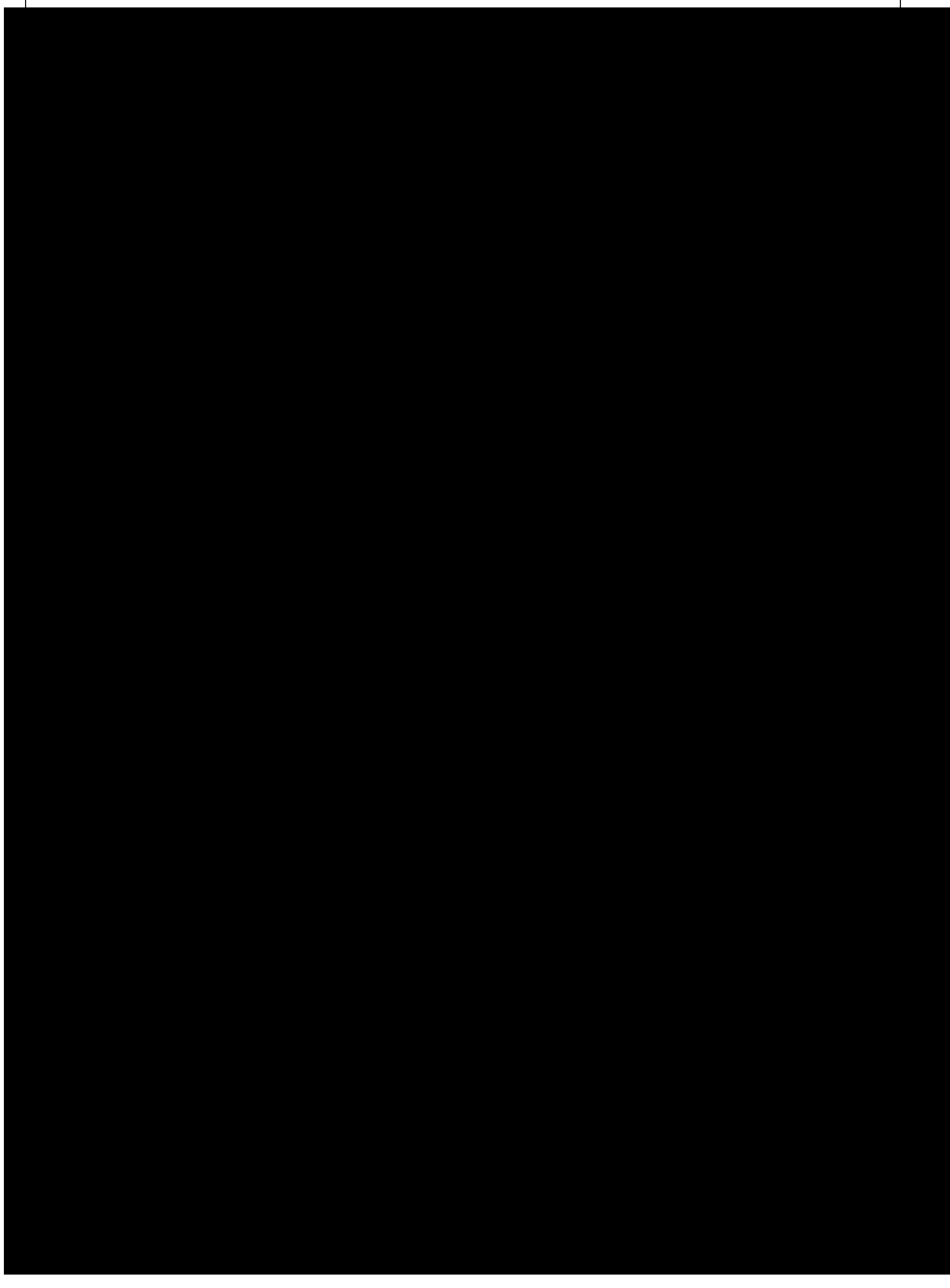
benefit of that asset is realized, the cost is capitalized on the balance sheet as an asset. This cost is then expensed on the income statement over the life of the asset in the form of a depreciation or depletion expense.

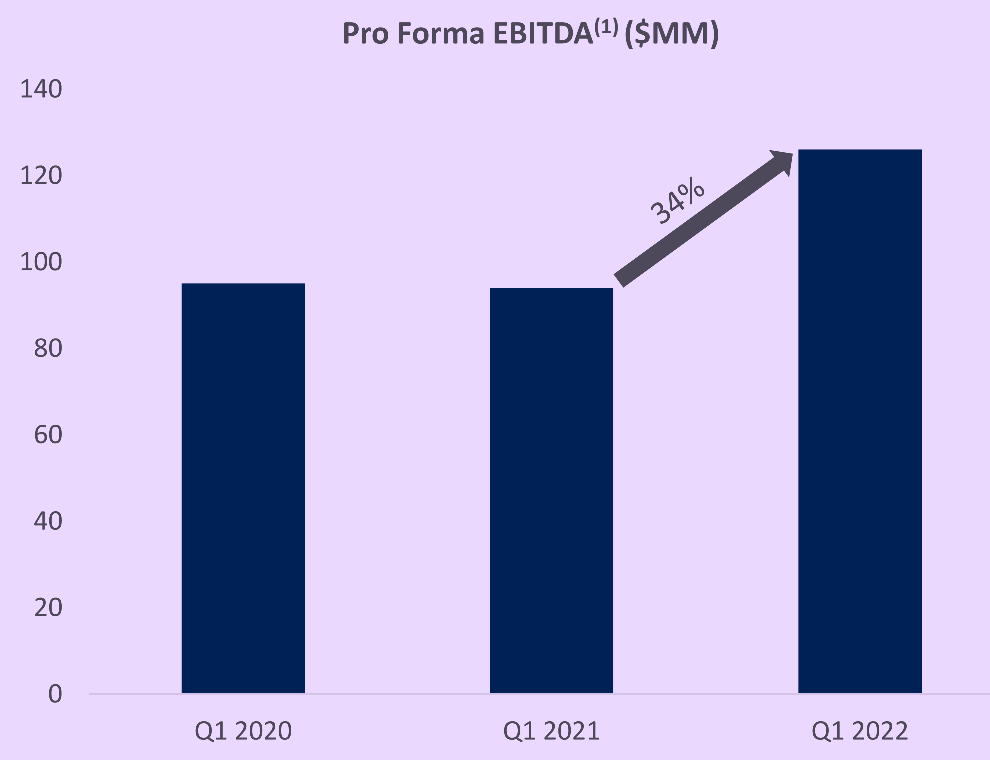
For example, if an asset has an upfront cost of $100 and is used evenly over a 5 year period, the company would record a depreciation expense of $20 in each of the five years.

Alternatively, if the asset as an upfront cost of $100 and can be used to process 100 tonnes of waste, the cost would be depreciated as the waste is processed. For example, if the company received 15, 20, 40, 10 and 15 tonnes in each of the 5 years, the company would record a depreciation expense of $15, $20, $40, $10 and $15 in each of the 5 years, respectively.



Growing Adjusted EBITDA

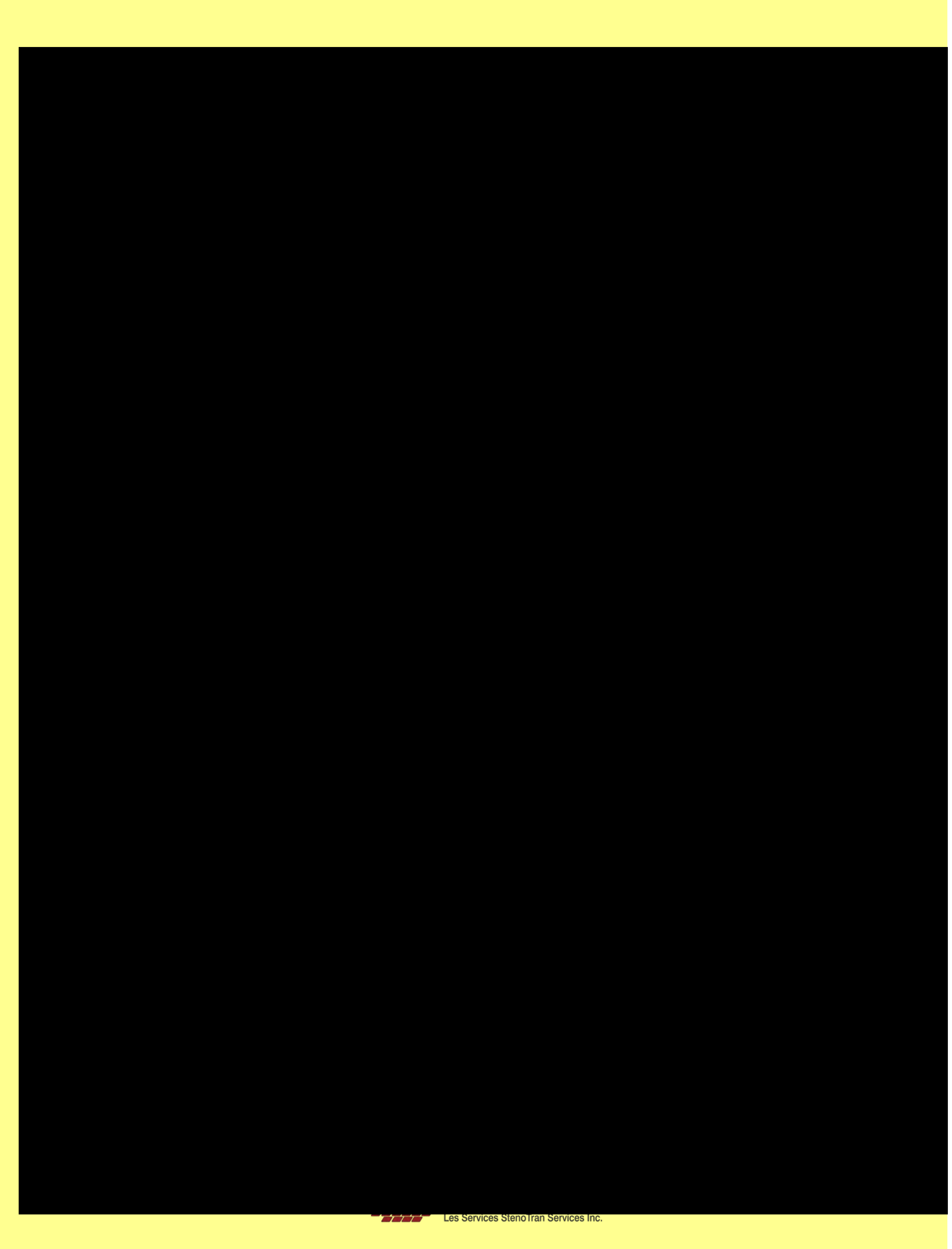
Stronger commodity prices and increased producer activity positively impacting all business units

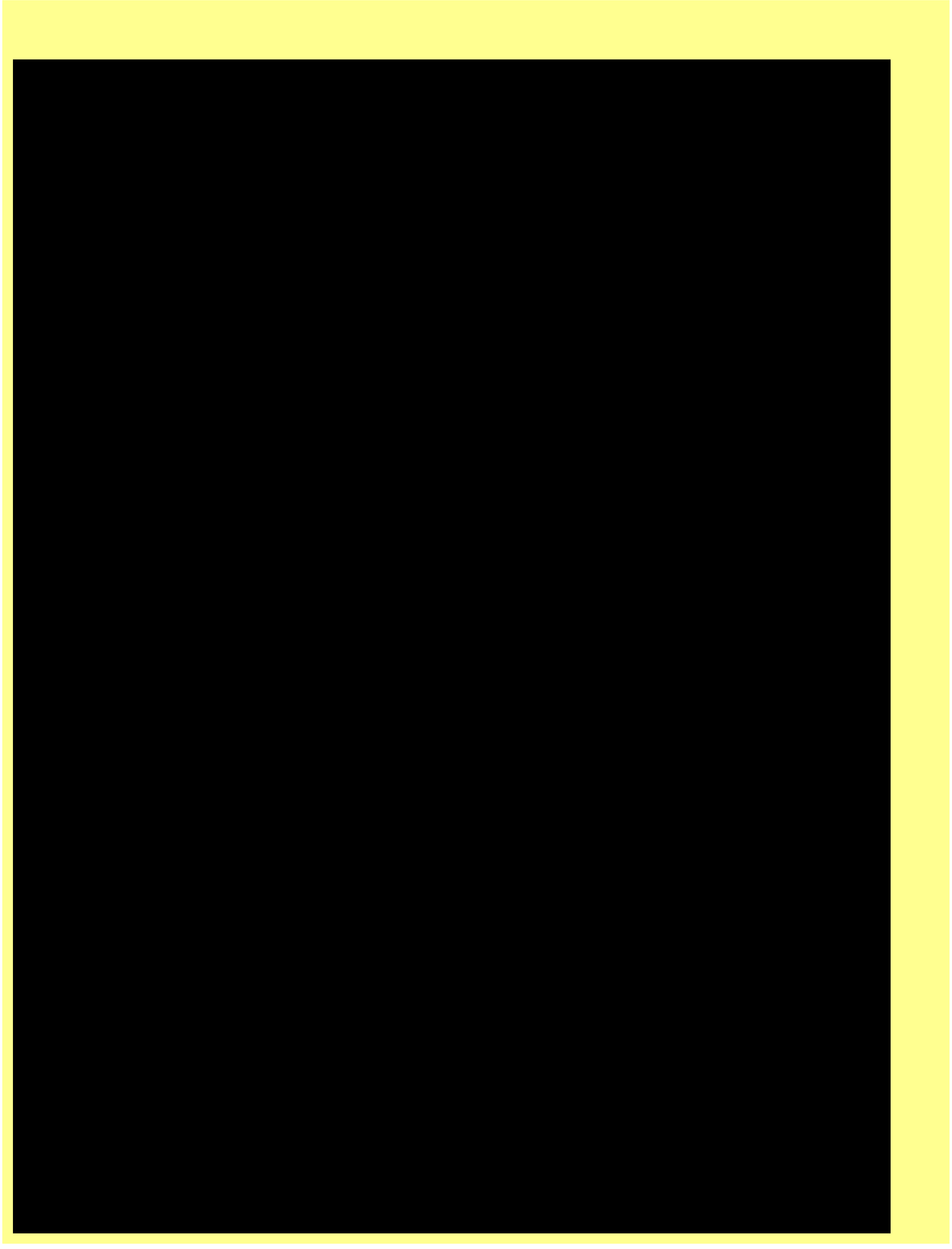


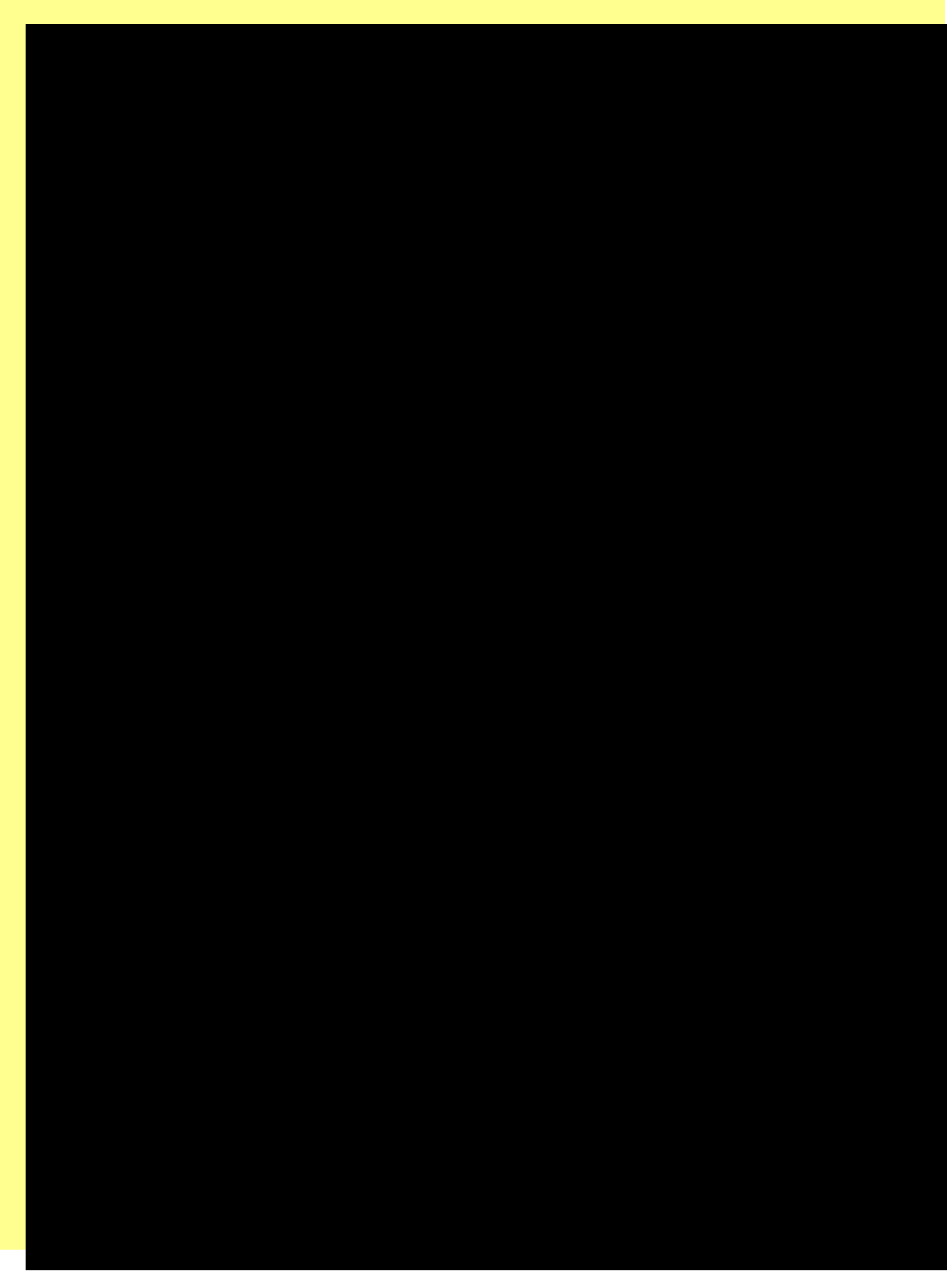
Pro Forma Adjusted EBITDA profile significantly improves with Tervita footprint

- Adjusted EBITDA in Q1 2022 34% above pro forma 2020 and 2021 levels, demonstrating strength and scale of the combined business
- SECURE benefitting from steadily increasing activity as well as realization of synergies, both of which we expect to continue to improve as we progress through 2022
- Rising crude oil, liquids, and natural gas prices and producer cash flows driving higher industry activity and demand for SECURE Midstream Infrastructure services
- Remediation and reclamation work and demand for ferrous and base metals providing support for SECURE's Environmental Solutions services
- Focus on managing costs resulting in strong margins in both the Midstream Infrastructure and Environmental and Fluid Management segments
- Strong industry activity levels expected to continue in 2022

(1) Pro Forma the Tervita transaction. Non-GAAP financial measure, refer to "Non-GAAP and other financial measures" in this presentation and the Q1 2022 MD&A, and the "Tervita Merger" section in the Q4 2021 MD&A

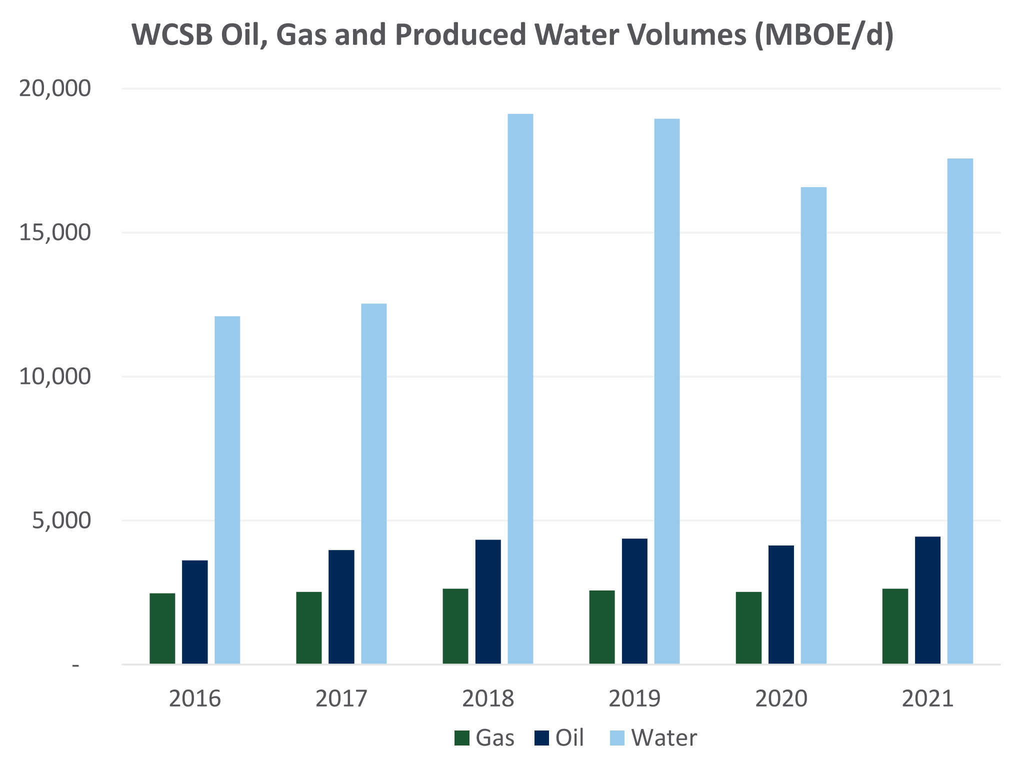






Industry Fundamentals Support Long-Term Growth

Recurring produced water volumes provide midstream opportunities for SECURE



» Produced water volumes increased 45% during the last 5 years, compared to a 16% increase in oil and gas production during the same period

» As industry activity increases, produced water volume will also increase

- Treatment and disposal services for oil & gas by-products continue to be in high demand
- Water midstream solutions help our customers meet stringent and evolving environmental and regulatory standards

» SECURE expects increased regulations to safely dispose and/or recycle volumes in the future

Source: Petrinex (water), Canadian Energy Regulator (oil and gas production) data based on December 31 year ends, 2021 oil and gas data through December 2021

Why SECURE is a Compelling Investment Opportunity

SECURE's Strategy for 2022 is to focus on the integration and full synergy realization, add significant value through increasing activity levels, deliver on ESG initiatives, drive higher discretionary cash flows and pay down debt

Significantly Enhanced Scale and Growth Platform
- Key Focus on facility optimization and merger integration as it materially increases discretionary free cash flow and improves balance sheet

Strong Discretionary Free Cash Flow Generation
- Driven by recurring cash flows and higher utilization of assets without additional capital

Balance Sheet Strength
- Strategic priority of debt reduction in 2022
- Repaid $90 million of debt in Q1 2022

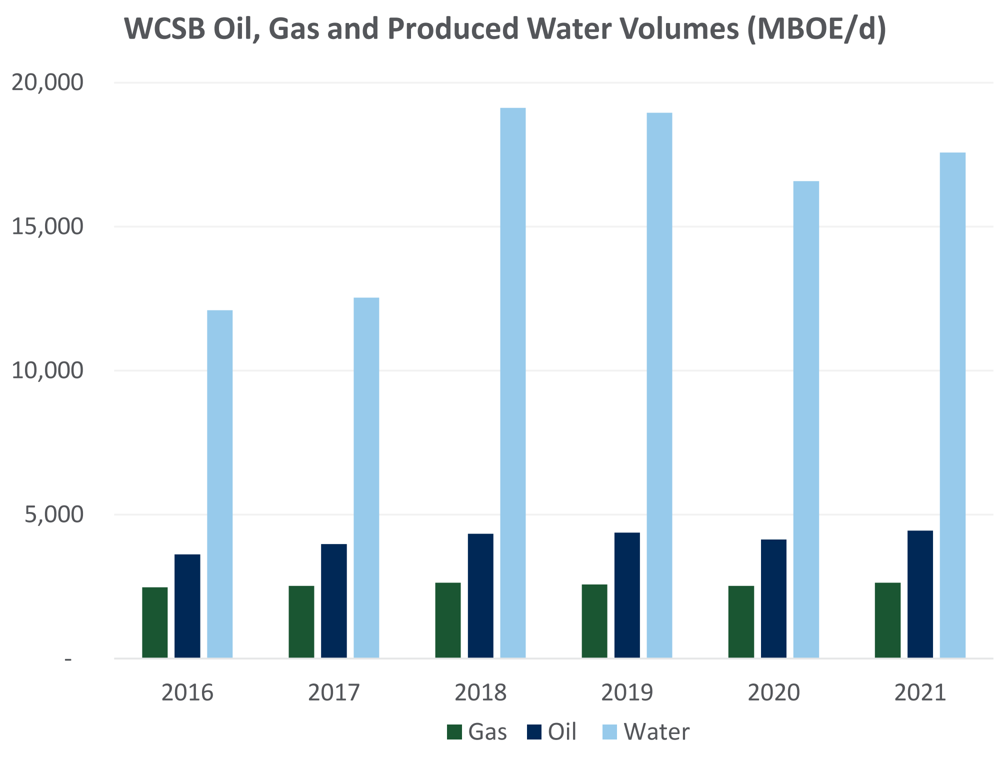
Enhanced ESG Sustainability
- 2021 Sustainability report includes aggressive short-term GHG and water reduction targets

Industry Fundamentals
- Volumes increasing as produced water is increasing at disproportionate rate relative to aggregate production
- ARO focus by regulators on remediation and reclamation activities
- Enhanced recycling and carbon capture and storage (CCS) opportunities

Attractive Valuation
- Trading below midstream and environmental industry peers offers an attractive investment opportunity

Industry Fundamentals Support Long-Term Growth

Recurring produced water volumes provide midstream opportunities for SECURE



» Produced water volumes increased 45% during the last 5 years, compared to a 16% increase in oil and gas production during the same period

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- Treatment and disposal services for oil & gas by-products continue to be in high demand
- Water midstream solutions help our customers meet stringent and evolving environmental and regulatory standards

» SECURE expects increased regulations to safely dispose and/or recycle volumes in the future

Source: Petrinex (water), Canadian Energy Regulator (oil and gas production) data based on December 31 year ends, 2021 oil and gas data through December 2021

Industrial Landfills & Environmental Solutions

Offering a full suite of solutions utilizing expanded network of facilities to provide customers with environmental and waste management solutions delivered with world-class ESG standards

Growth Opportunities

» $1.7 billion - Site Rehabilitation Program instituted by Canadian government in 2020 continues through 2022 and potentially longer

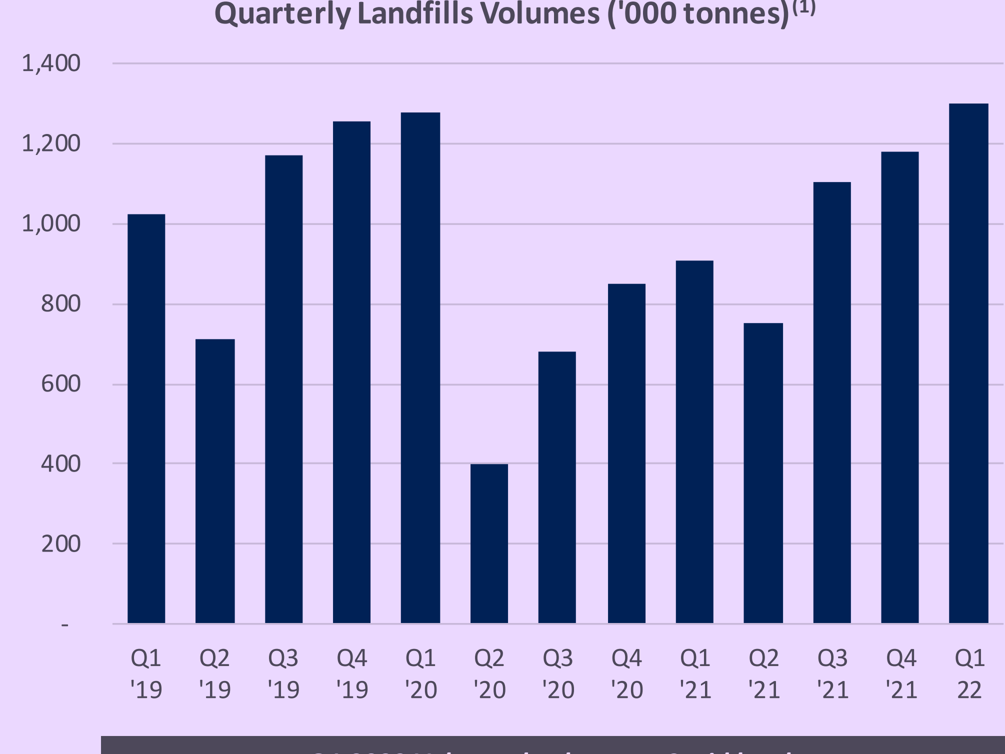
» Alberta Energy Regulator mandatory closure spend targets for 2022 and 2023 and forecasted targets for the following three years.

- 2022 industry target is $422 million, approximately 4.0% of inactive deemed liability increasing to over $500 million by 2026

» Saskatchewan introducing mandatory closure spend targets starting in 2023

» Long-term contracts - with three oil sands producers in the Fort McMurray area

» Increase in volumes from Q1 2021 to Q1 2022 of 38%



(1) Source: Internal, SECURE Energy figures are Pro Forma the merger with Tervita (closed July 2, 2021)

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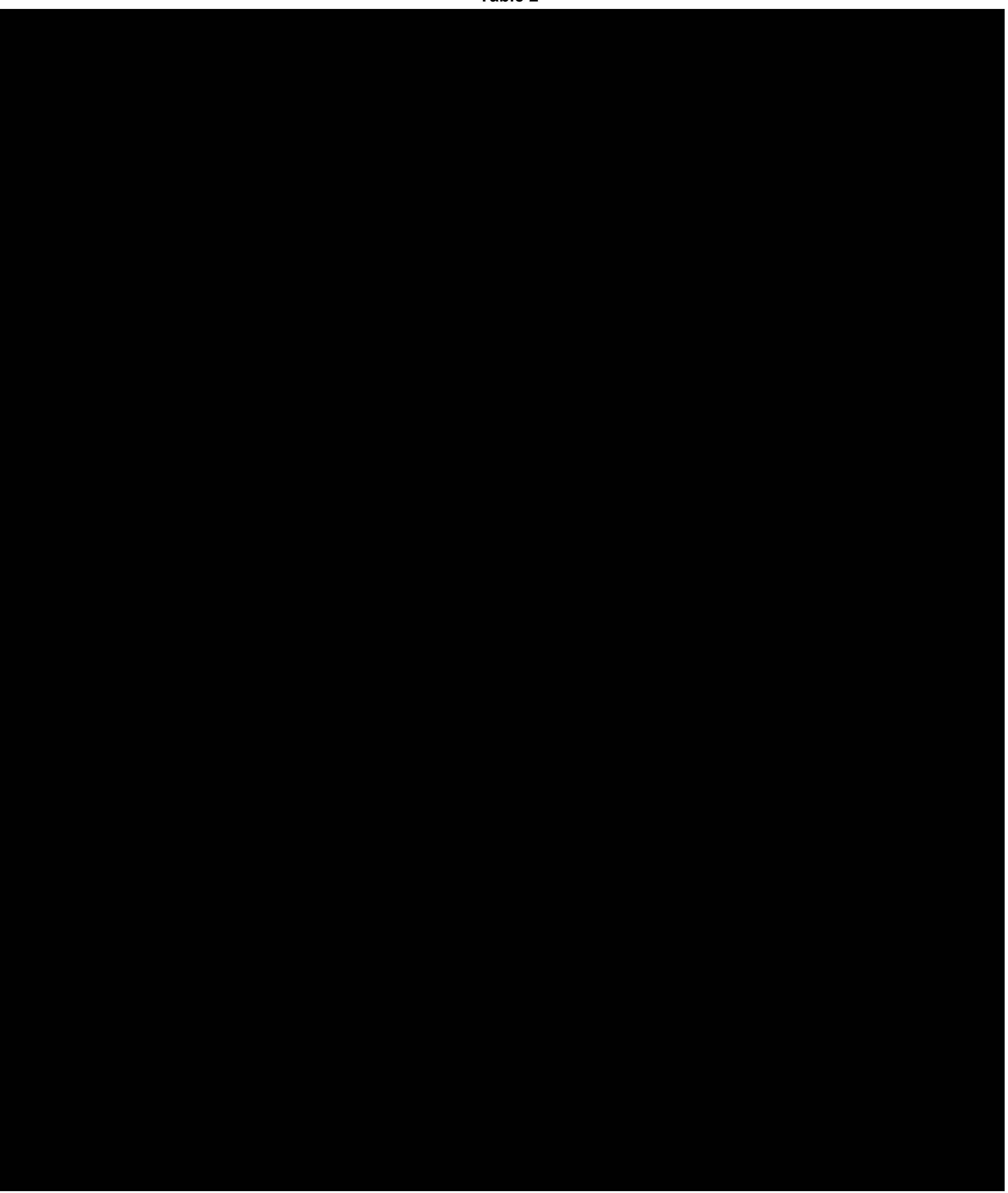
Table 2

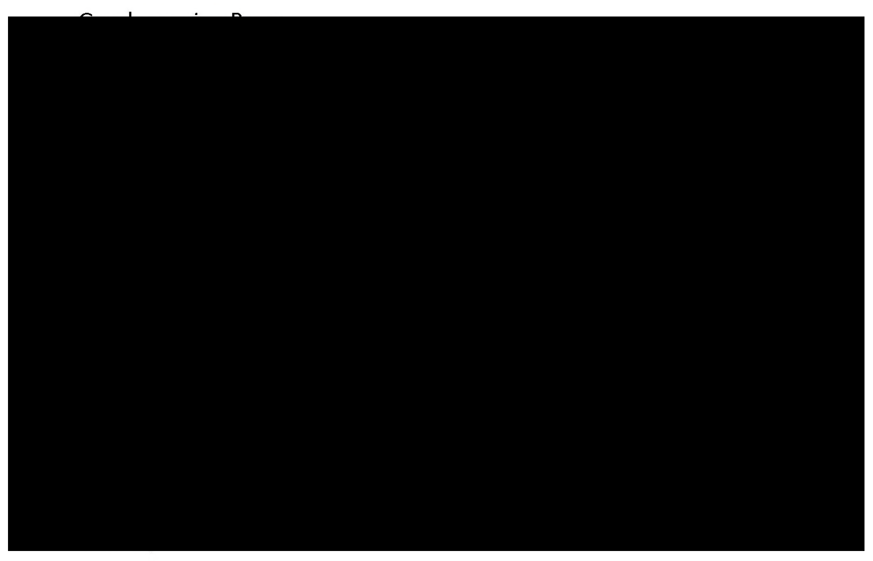


From: Dave Desjardins
Sent: Tuesday, November 9, 2021 1:27 PM
To: Daniel Schwarz; Sarah Ruickbie; Thomas Nickel; Nick Giugovaz
Subject: Fwd: Facility Closures

Dave

Begin forwarded message:

From: Dave Desjardins <ddesjardins@secure-energy.com>
Date: November 9, 2021 at 10:41:00 AM MST
To: Rene Besler <rbesler@secure-energy.com>
Subject: Facility Closures



Dave

Dave Desjardins | Sr. Corporate Accounts Representative
SECURE ENERGY
Office: 403-984-6698 | Mobile: 403-519-7675

From: Rob Pettersen
Sent: Friday, November 19, 2021 8:26 AM
To: Pat Coffey
Subject: AREA UPDATE

Follow Up Flag: Follow up
Flag Status: Flagged

Rob Pettersen – Field Sales
Midstream Infrastructure Division
SECURE ENERGY
Mobile: 780-712-1683

From: Rob Pettersen
Sent: Friday, February 4, 2022 11:29 AM
To: Pat Coffey
Subject: AREA UPDATE

Follow Up Flag: Follow up
Flag Status: Flagged

NITON
Busy week on waste
Received surface mud from Tourmaline & Cenovus
TMX pipeline waste still coming in steady daily
Facility running full on both waste & water
Vermillion & Westbrick fracs coming up in the area, wont be any help on water due to well only injecting 11m3/hr

MOOSE CREEK
Opened facility for 2 days this week while Deerhill was having issues

DEERHILL
Busy week with strong volumes coming in
Receiving produced/flowback from Cenovus 4 well pad
Cenovus 4-well pad to be turned over to production around the 18th , they are anticipating 2-300m3/day of produced water to be hauled to us
Had both ESD,s fail on injection pumps, injection down 22hrs, didn't interrupt service as we opened Moose Creek to help with volumes
Bonavista flowback in next couple weeks, CNRL flowback mid March

NOSEHILL
Steady volumes of produced water from Peyto

WEST EDSON
Challenged on water volumes because of low rate of injection well, have producers on water quotas divert trucks to Deerhill & Obed daily
Strong volumes of waste, received mud from Tourmaline, CNRL & Vermillion
Steady stream of waste from TMX pipeline

OBED
Steady volumes of produced water coming in from area producers
Busy on waste side with mud from Tourmaline & TMX pipeline

ECCLES
Steady volumes of produced water from Peyto, Tourmaline, CNRL & Repsol

Very busy area, should stay that way until break-up
Rig count steady at 16 drilling

Rob Pettersen – Field Sales
Midstream Infrastructure Division
SECURE ENERGY
Mobile: 780-712-1683

From: Rob Pettersen
Sent: Friday, February 25, 2022 2:33 PM
To: Pat Coffey
Subject: AREA UPDATE

Follow Up Flag: Follow up
Flag Status: Flagged

NITON
Centrifuge repaired & processing
Full on water, had to divert water to Deerhill for a couple of days

MOOSE CREEK
Closed facility on Tuesday
Let area producers know facility will only open if they are willing to pay book rate of 16.50m3

DEERHILL
Facility seeing strong water volumes, able to handle without wait times now that flowbacks done
Tourmaline wanting to bring us 1500m3 of c-ring water next week, hopefully have room to help them
Vermillion, Bonavista, Cenovus all starting flowbacks towards the end of the week, will keep the facility to the lids.

NOSEHILL
Steady volumes of produced water from Peyto

WEST EDSON
Still challenged on taking in water volumes from the area, have to divert to Obed & Deerhill daily
Waste side keeping busy, received mud from 2 Tourmaline rigs

OBED
Doing an acid job on March 1st to try to raise injection rate
Steady on waste end, mud from Tourmaline & waste from TMX pipeline

ECCLES
Steady volumes of produced water from Peyto, Tourmaline, CNRL & Repsol

Area still busy, rig count dropped to around 12 rigs drilling
Completion work picked up as companies trying to get new wells on line before break-up hits
Road bans to come on in the area March 7th night hauling only 10pm to 10am

Rob Pettersen – Field Sales
Midstream Infrastructure Division
SECURE ENERGY
Mobile: 780-712-1683

From: Rob Pettersen
Sent: Friday, March 18, 2022 10:54 AM
To: Pat Coffey
Subject: AREA UPDATE

Follow Up Flag: Follow up
Flag Status: Flagged

NITON
Facility still busy, full on water had to divert to Deerhill,
Steady waste from TMX, received mud from Obsidian
Waste side closed on March 21st, facility closed on March 31st

MOOSE CREEK
Opened facility on March 12th for Peyto because of wait times at all other facilities, Peyto rate 15.00m3 on produced water until April 1 than increases to 16.50m3
Cenovus started hauling in, up to 200m3/day, their rate is 12.00m3 until April 1st than increases to 16.50.
Currently have facility opened from 3:00am to 1:00pm

DEERHILL
Wait times all week, very high volume of water coming into facility.
Bonavista flowback is done which will take some pressure off.
Still seeing steady volumes of produces water coming in over a 1000m3/day

NOSEHILL
Steady volumes of produced water from Peyto
Facility helped with over-flow from Deerhill this week
Still taking in flowback from CNRL

WEST EDSON
Busy on waste from TMX, drilling & completion work in the area
Very limited on volume of water we can take due to injection well
Doing an acid job on well March 22 to try to bring injection rate up

OBED
Caught up on water room, didn't have to divert any loads this week
Seeing a lot of strip water from TMX project
Received drilling mud from Tourmaline

ECCLEC
Still seeing strong volumes of produced water from Tourmaline, Peyto, CNRL & Repsol

Very busy area at the moment as everyone trying to get water out of the field before break-up
Experienced wait times at most facilities this week, truckers are waiting instead of driving any long distance because of fuel prices
All road bans will be on by March 20th
Down to around 8 rigs drilling in the area
Tourmaline has developed a disposal well in the Grande Cache area and will be taking produced water from Pembina Resthaven soon
Surprized with the volumes we are seeing at this time of year, usually it is a lot slower. Every one has old & new wells rocking

Rob Pettersen – Field Sales
Midstream Infrastructure Division
SECURE ENERGY
Mobile: 780-712-1683

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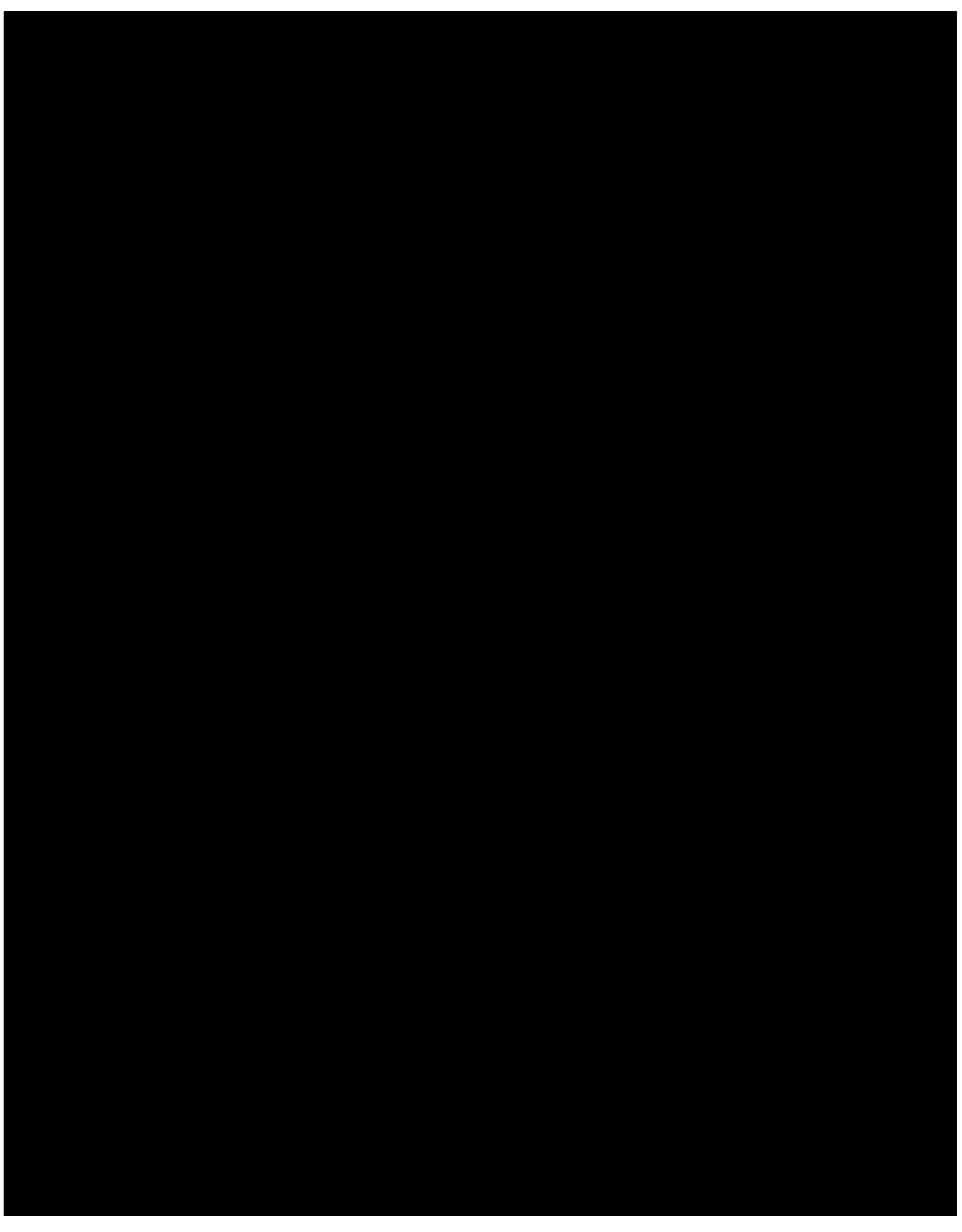
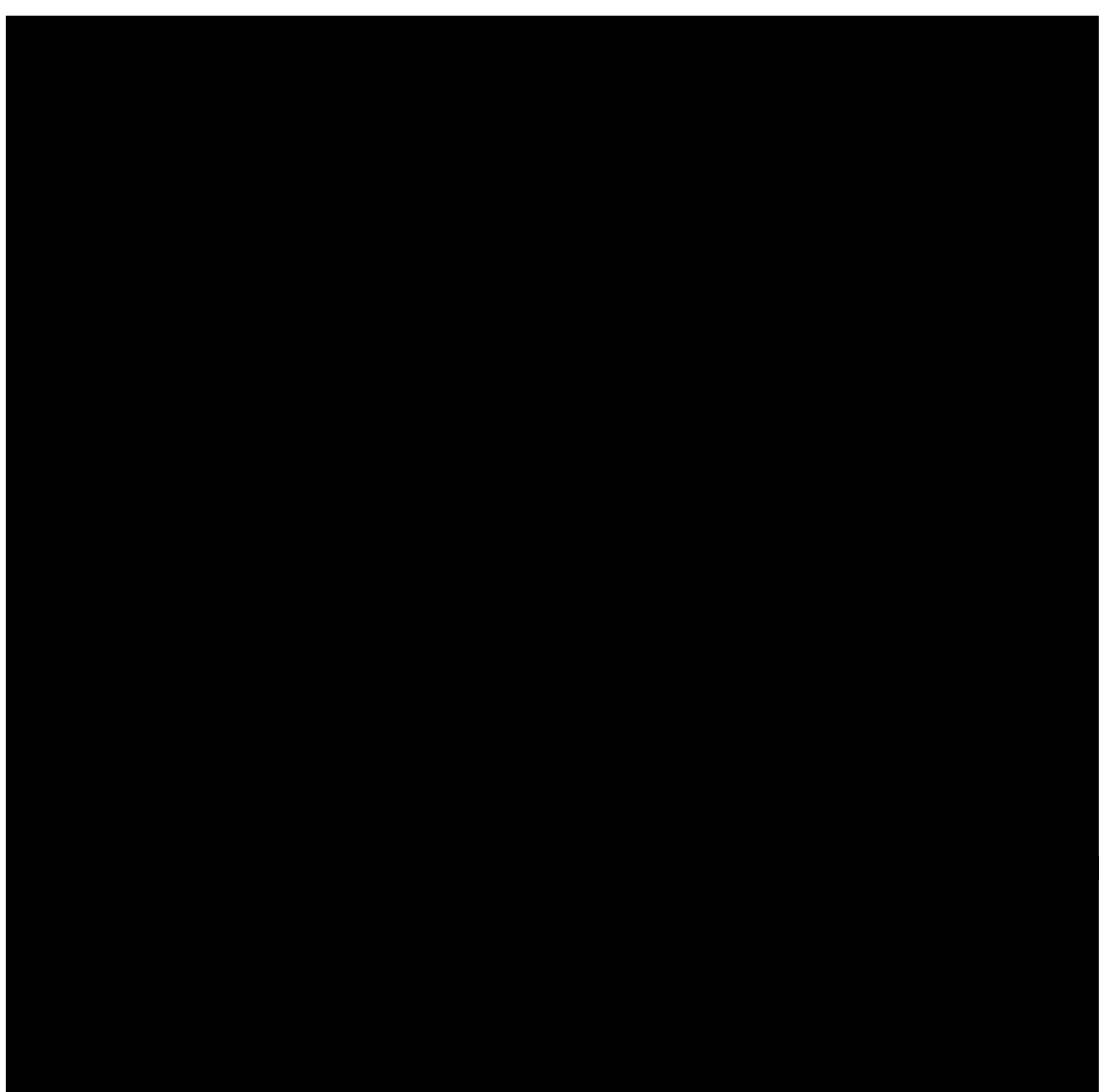
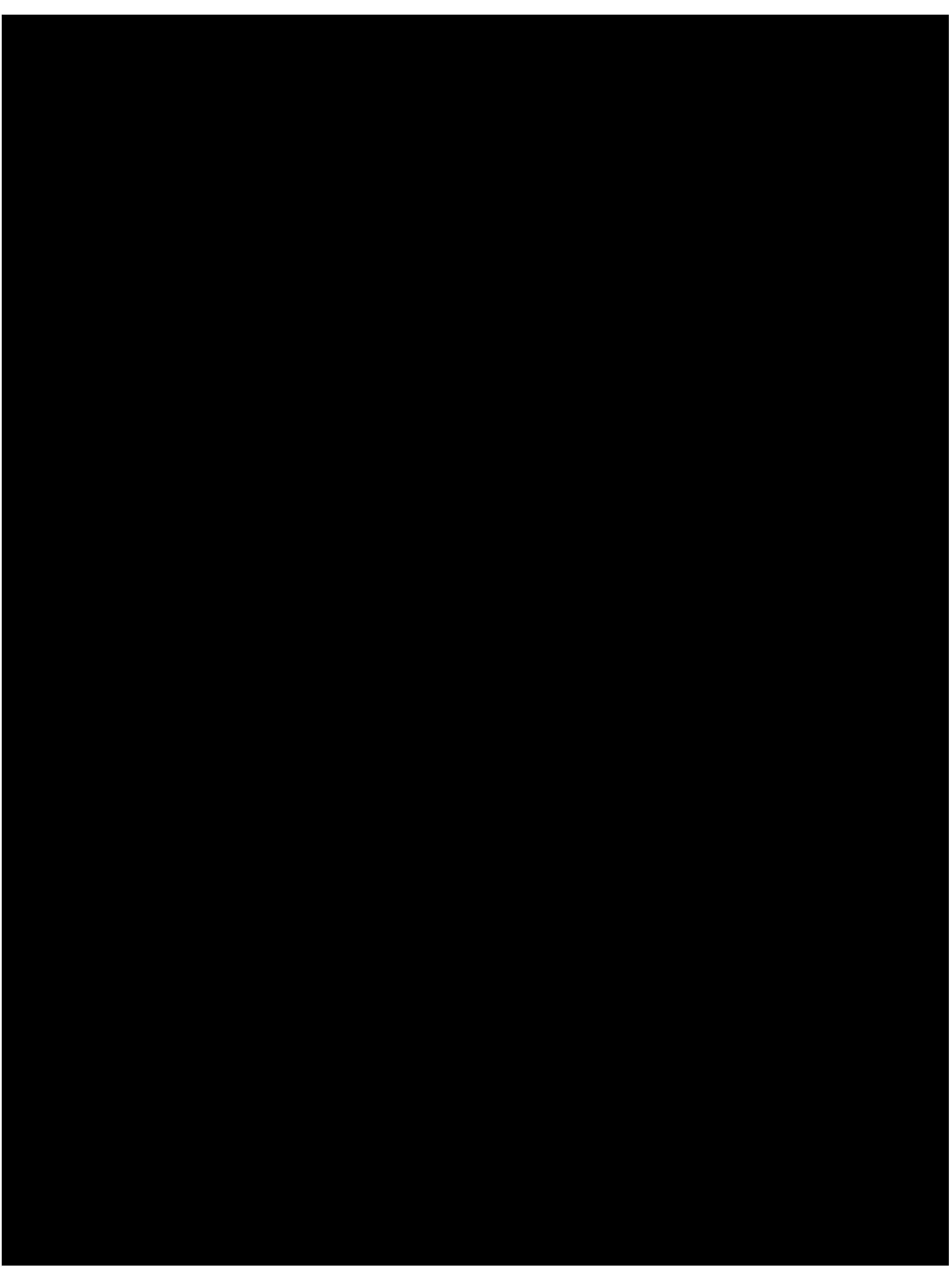
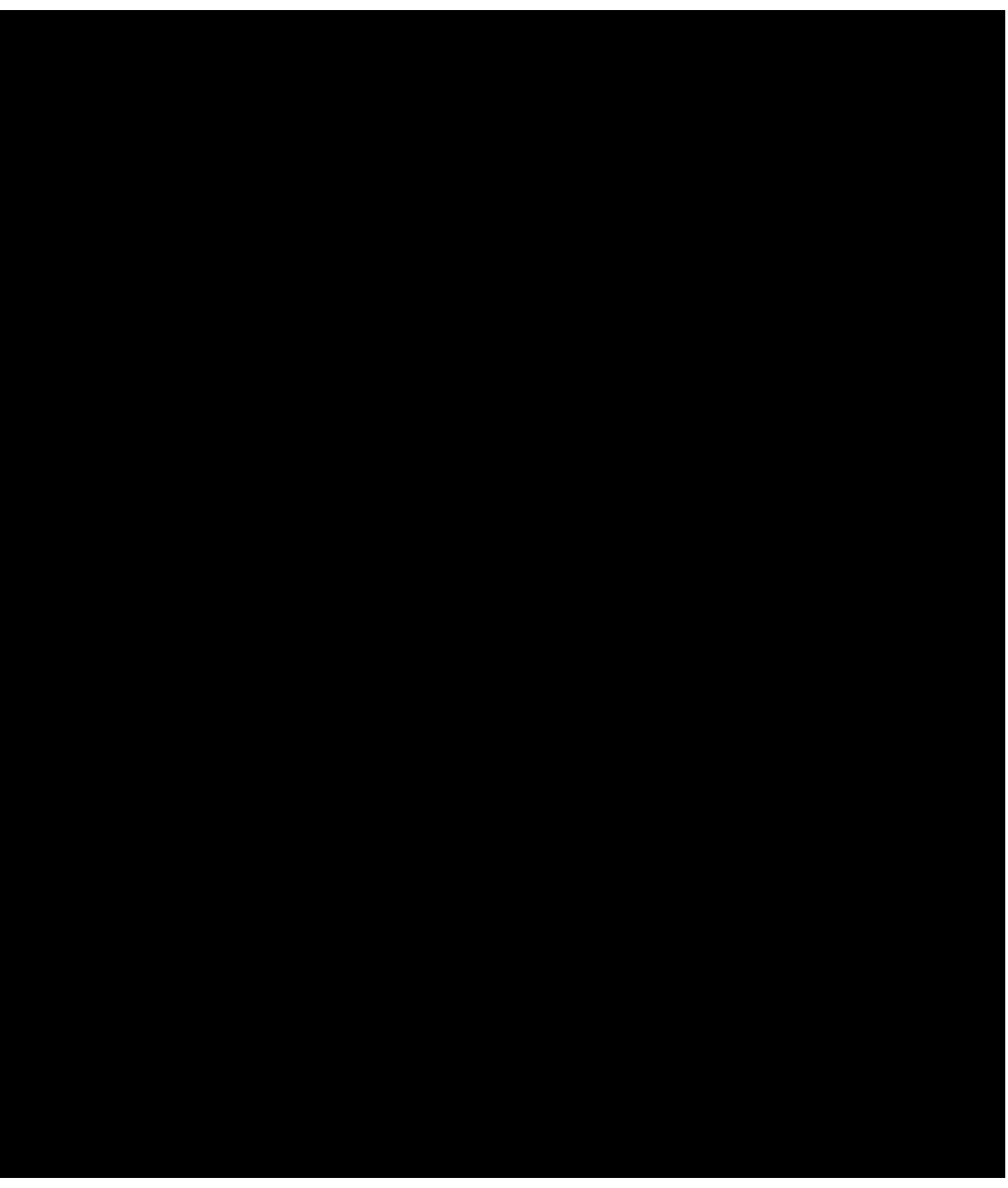


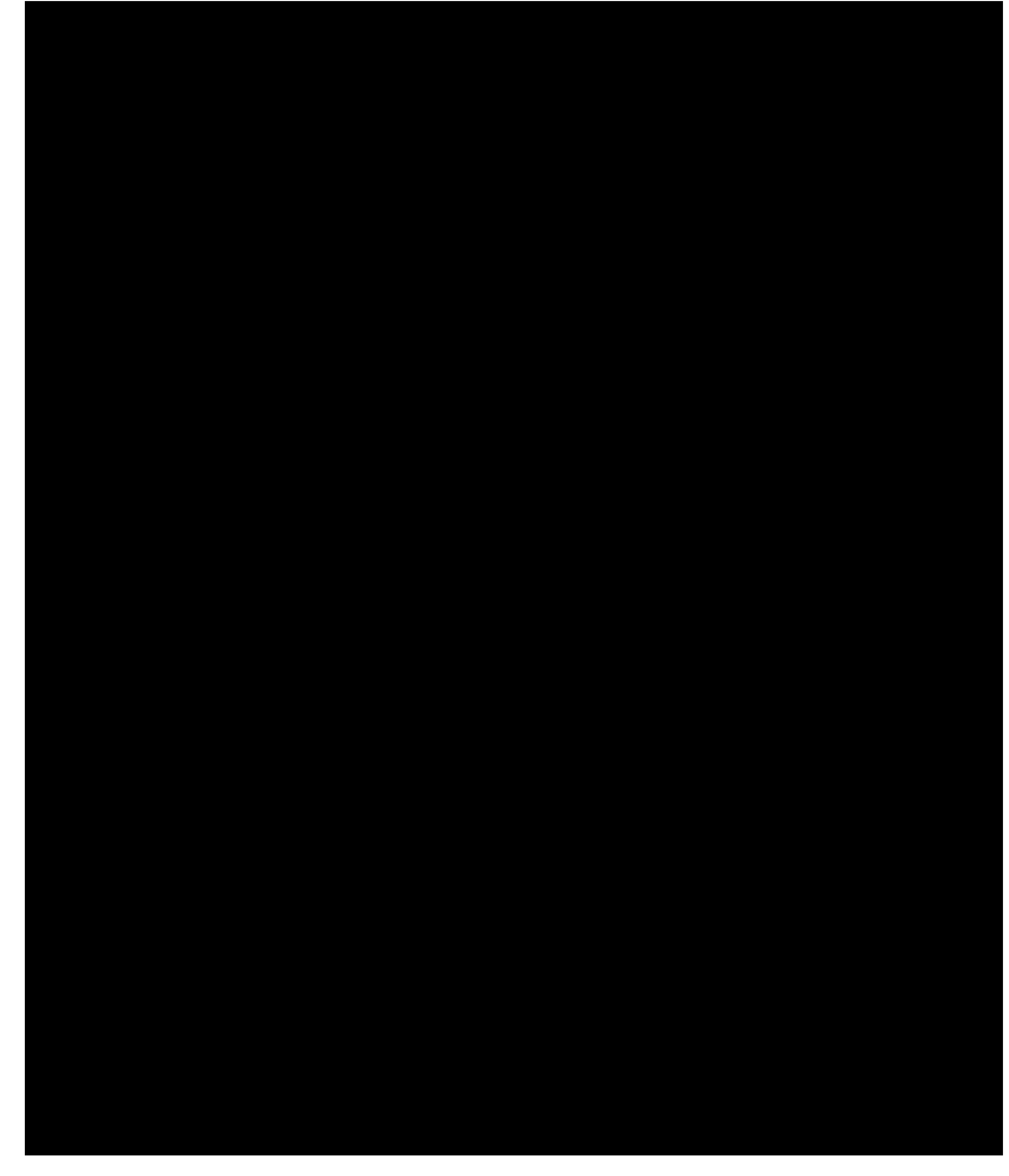


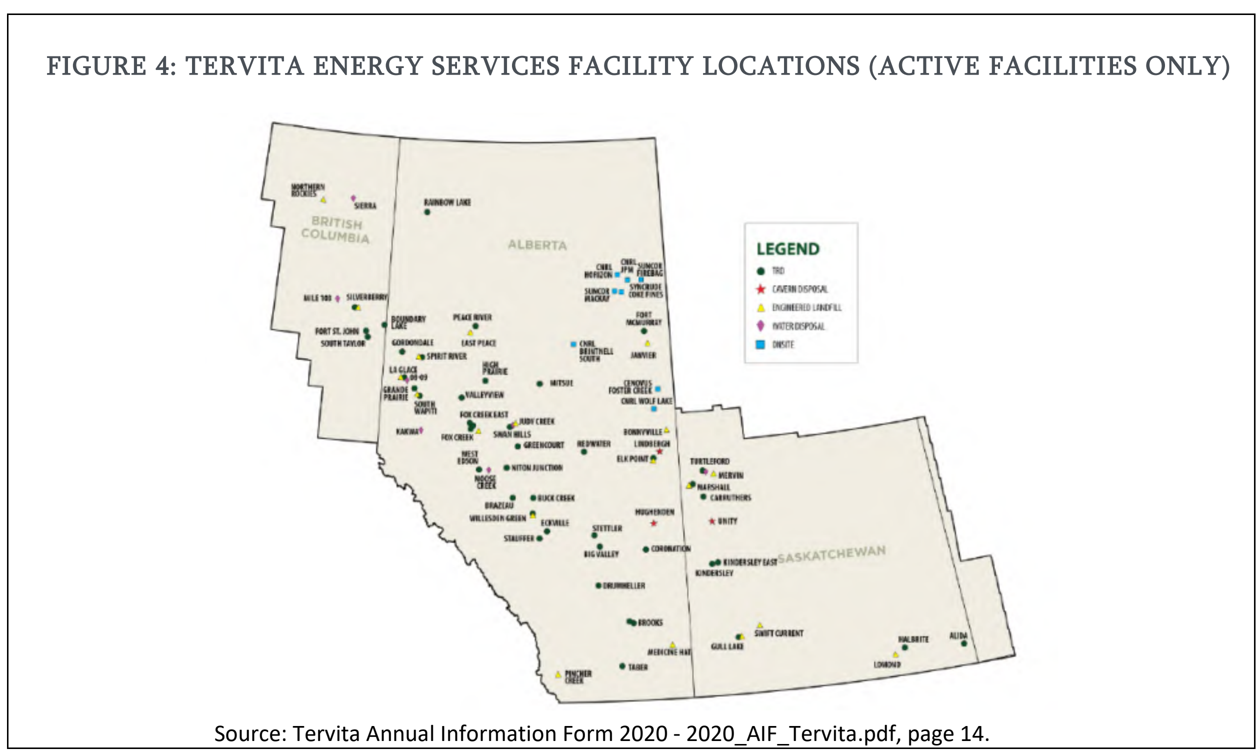
V. HEADCOUNT REQUIREMENTS FOR A HYPOTHETICAL BUYER

122. Considering my experience with the integration planning process and tracking synergies arising from the Transaction, I was asked by SECURE's counsel to consider which of the employees that SECURE has already terminated would likely be required to be rehired by a



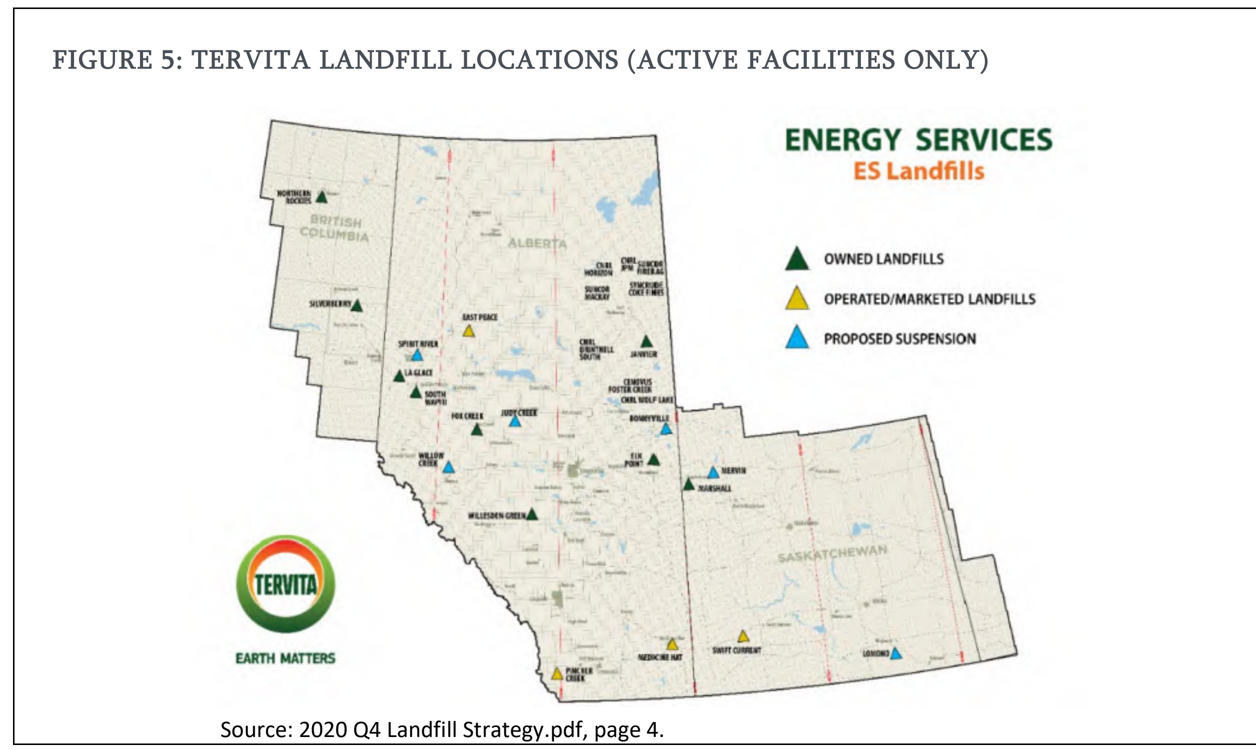




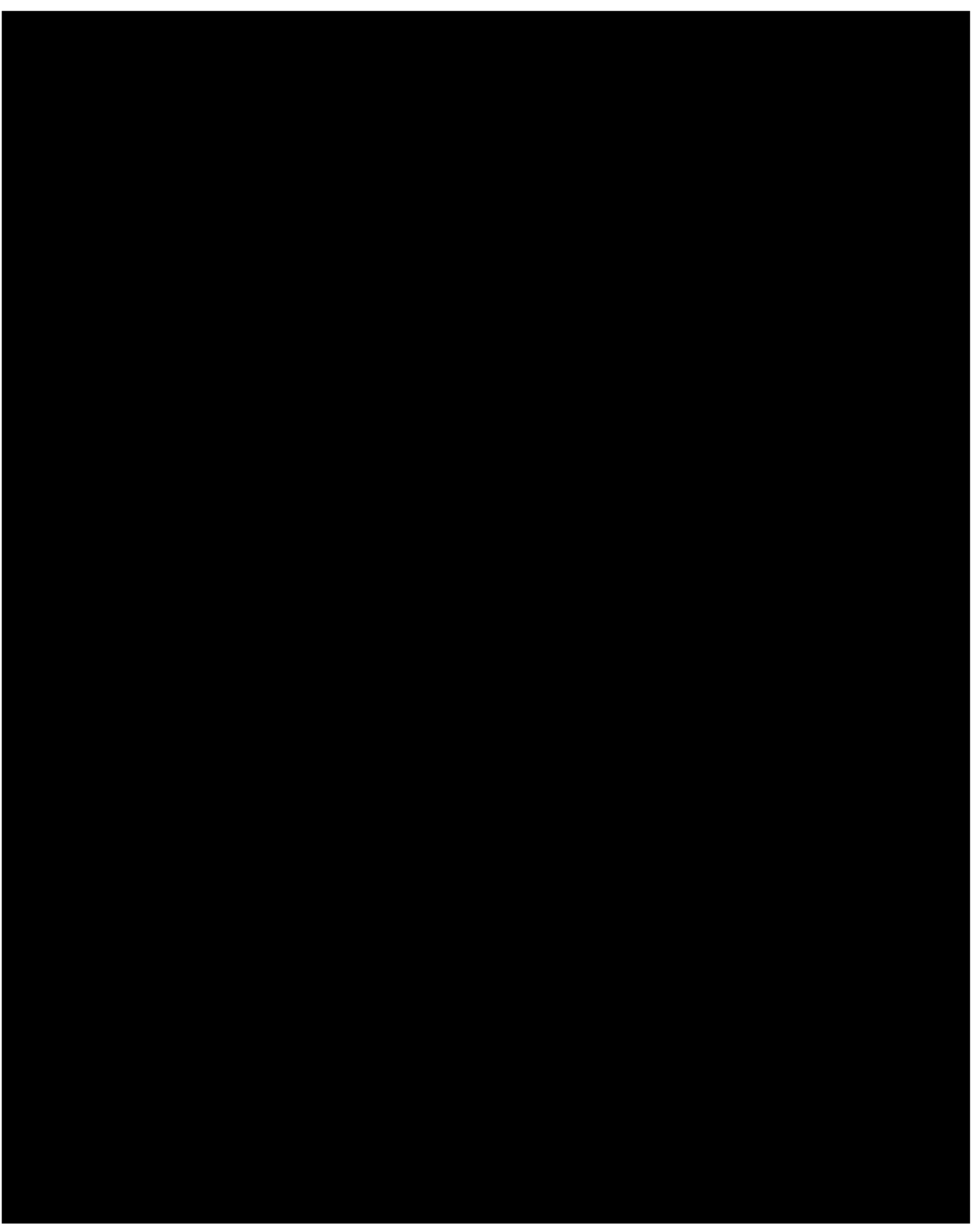


Source: Tervita Annual Information Form 2020 - 2020_AIF_Tervita.pdf, page 14.

49. Figure 5 outlines the locations of Tervita's landfills owned or operated in Canada distinguishing by the proposed status of each, absent the Transaction.



Source: 2020 Q4 Landfill Strategy.pdf, page 4.



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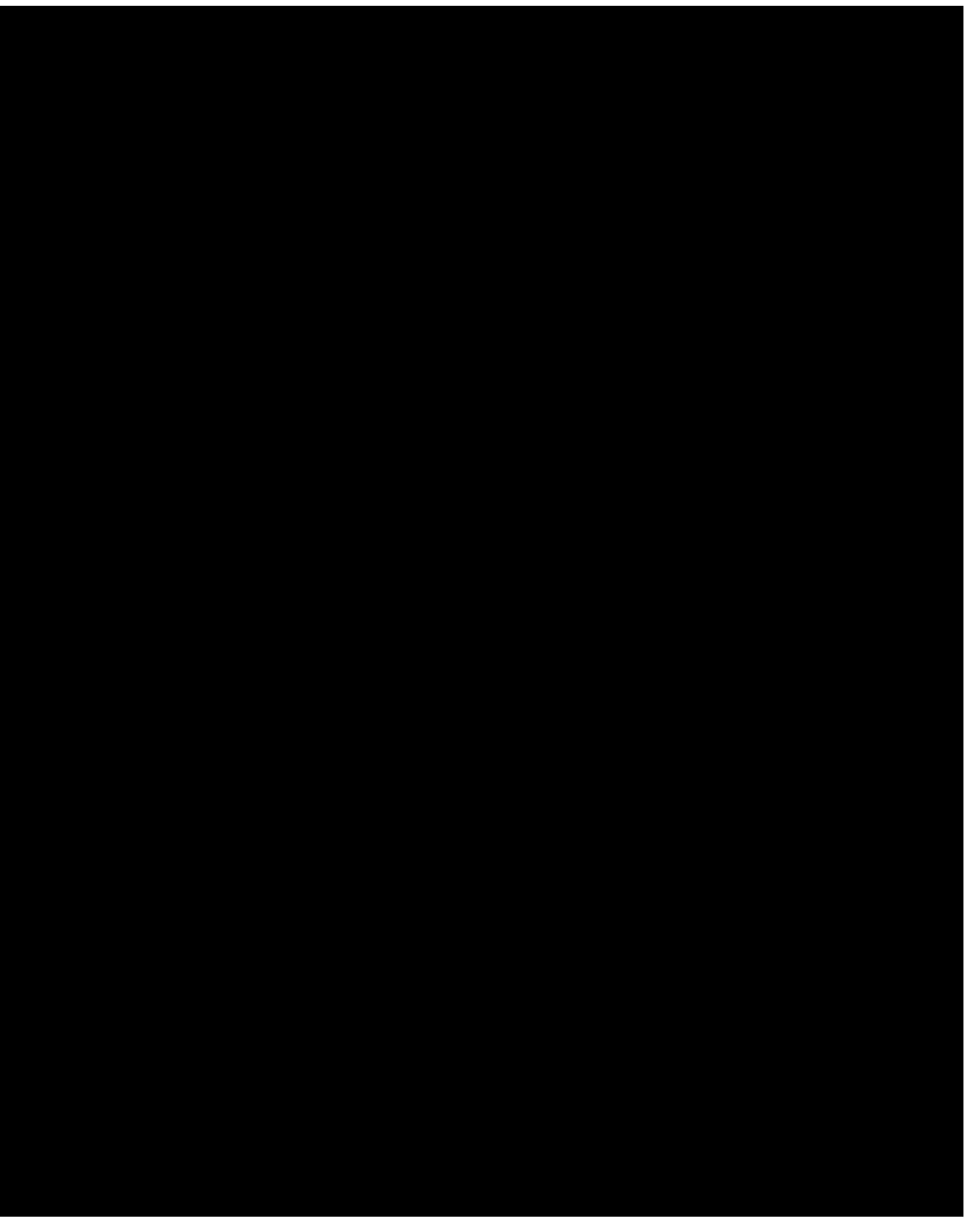

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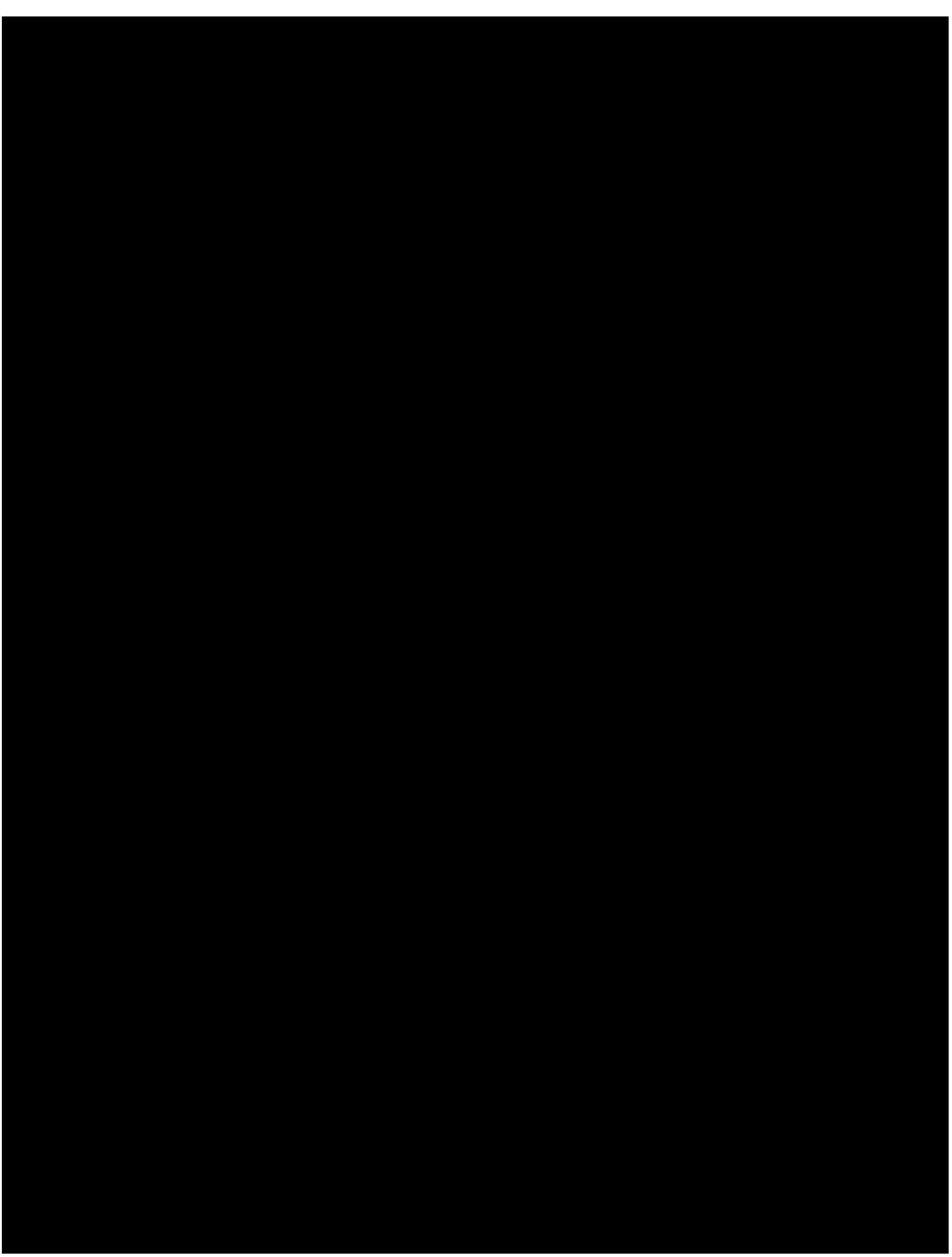

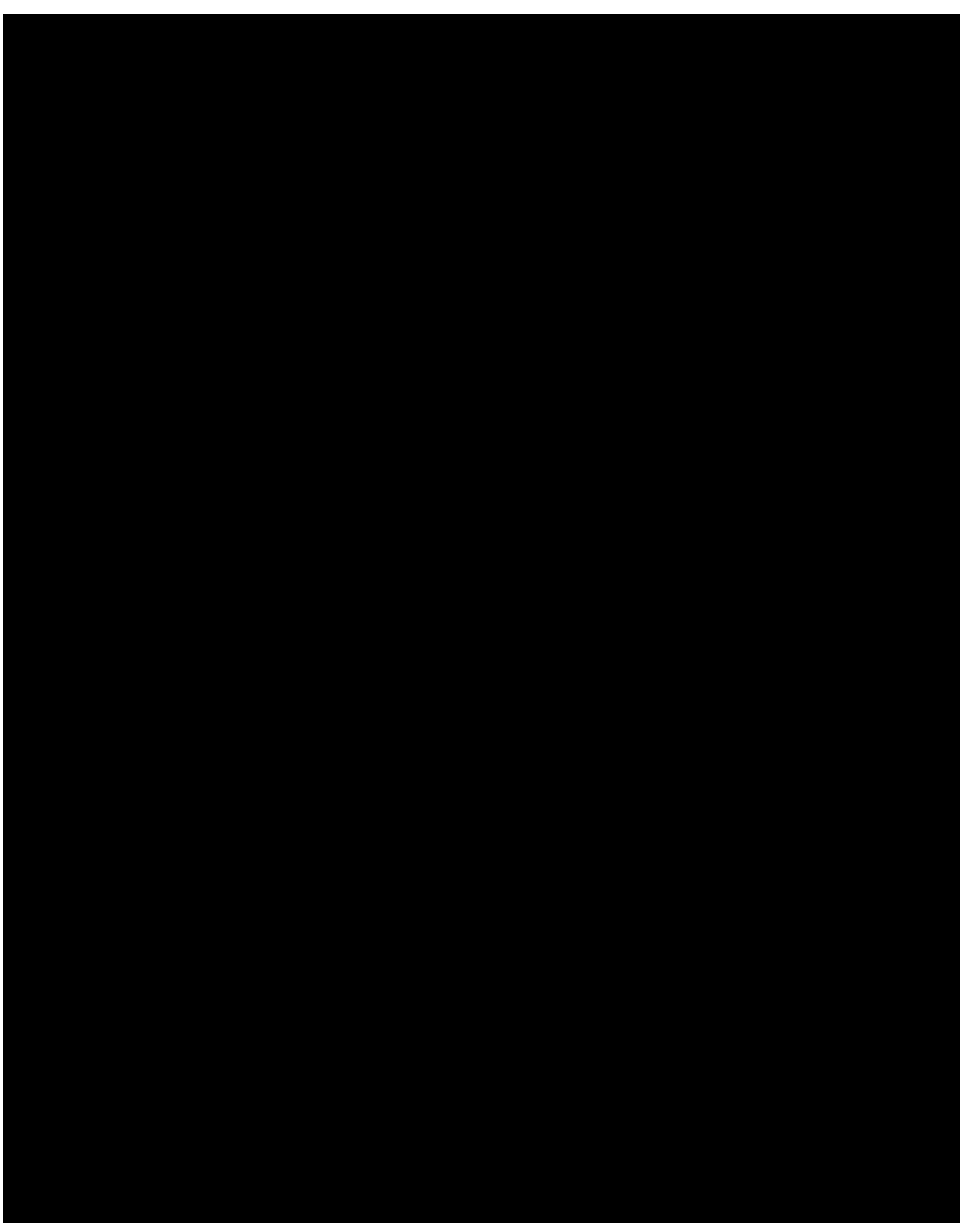

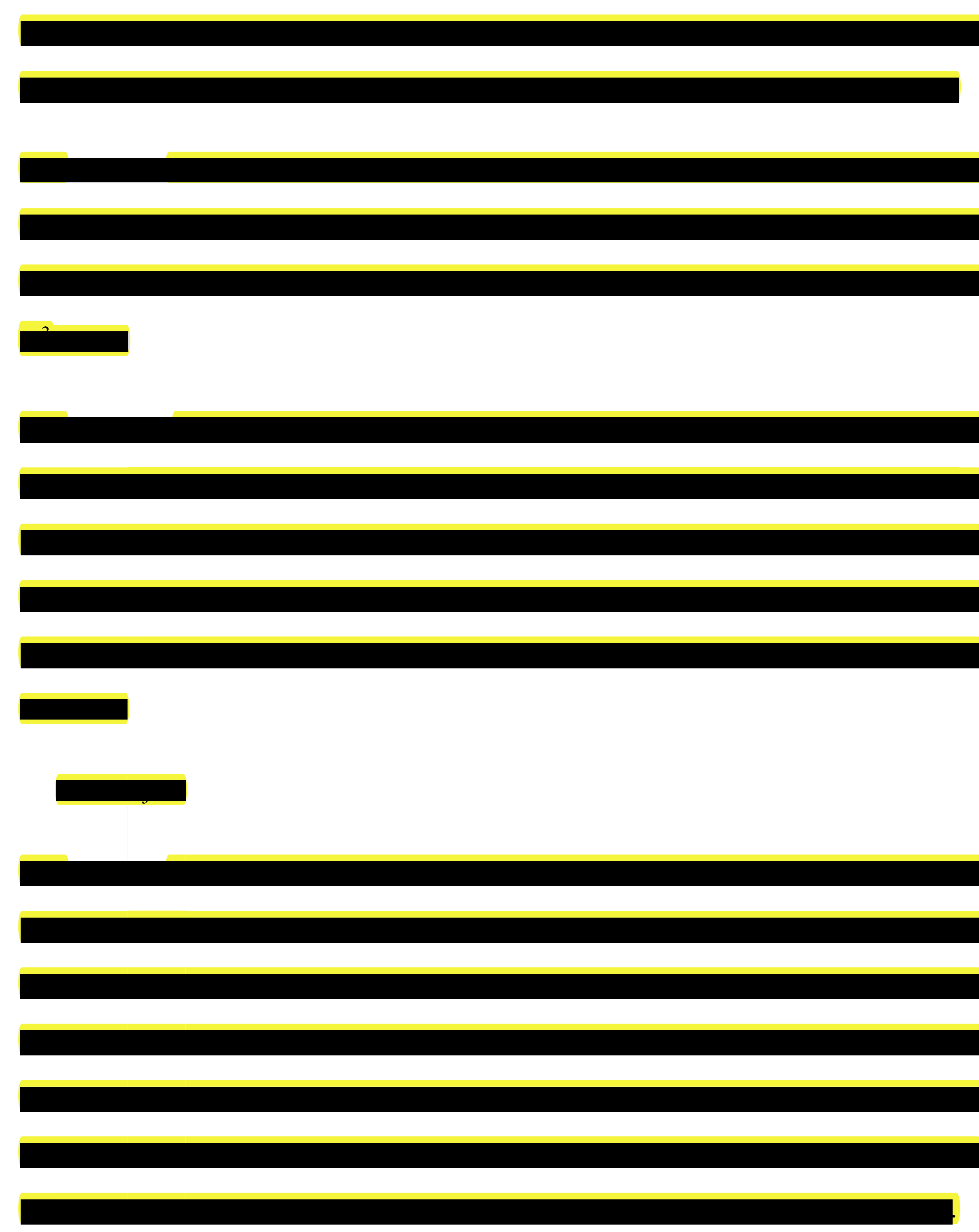

says it did in this case and that its "fundamental error" is that it focused "not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future" (A.F., at para. 71).

58 My understanding of Tervita's argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

59 For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

(1) The Law

60 The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.

(a) Identify the Potential Competitor

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (Hillsdown, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) Examine the "But For" Market Condition

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

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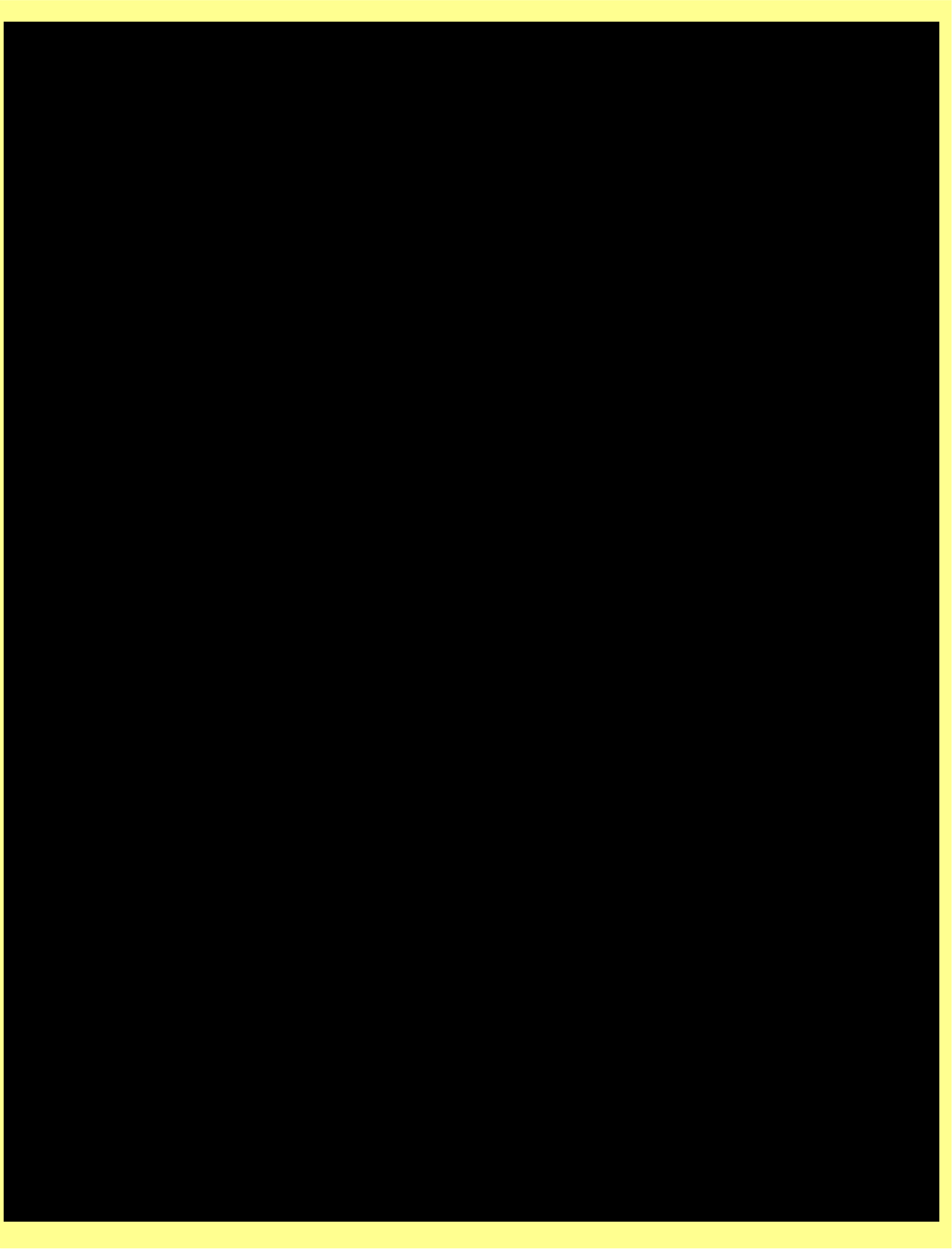

Tweet

Facility Operator - Judy Creek

Job Category: Field Operations

Requisition Number: FACIL002856

Apply now

Posted: May 20, 2022

Full-Time

Whitecourt, AB, CAN

Job Details

Description

The Operator position is responsible for the day-to-day safe and customer service oriented operations of waste treatment, oil treatment and water injection. The Operator will be in constant contact with customers and therefore, must demonstrate excellent communications skills and a high level of customer service. The Operator must be personally motivated in learning the basic plant processes. As this is a safety-sensitive role and due to the nature of working conditions, the Operator is required to be mentally and physically fit to in order to successfully perform the tasks and responsibilities of this role.

Essential Duties & Responsibilities:

The responsibilities of this role include, but are not limited to:

- Injecting water and ensure ongoing maintenance of injection and charge pumps
- Changing sour water injection filters as per SOP’s, using flush water system
- Truck unloading and knowledge of TOLS system
- Perform ongoing routine maintenance at the facility (i.e. general housekeeping)
- Conducting tank operations (i.e. thief hatch maintenance and blanket gas system)
- Performing fluid transfers from tank to tank using a transfer pump
- Skimming oil (i.e. transfer of hydrocarbons)
- Conducting daily, weekly and monthly environmental and safety inspections

Qualifications & Competencies:

The successful candidate will have:

- A High School Diploma, General Education Diploma or equivalent
- A valid and acceptable Driver’s license
- Current and valid safety tickets, including; H2S Alive, First Aid Level One C, WHIMS and TDG
- A strong attention to detail, communication skills and a profound ability to work long hours in a mentally and physically demanding work environment
- Mechanically inclined and productive when working alone and under frequent supervision
- Must demonstrate excellent customer service skills

Qualifications

Skills

Preferred

Solid Work Ethic	*Advanced*
Attention to Detail	*Advanced*
Strong Customer Services	*Advanced*
Organizational Skills	*Advanced*
Team Oriented	*Advanced*

Behaviors

Preferred

Enthusiastic: Shows intense and eager enjoyment and interest
Detail Oriented: Capable of carrying out a given task with all details necessary to get the task done well
Team Player: Works well as a member of a group

Motivations

Preferred

Goal Completion: Inspired to perform well by the completion of tasks
Work-Life Balance: Inspired to perform well by having ample time to pursue work and interests outside of work
Entrepreneurial Spirit: Inspired to perform well by an ability to drive new ventures within the business
Growth Opportunities: Inspired to perform well by the chance to take on more responsibility

Education

Required

High School or better.

Licenses & Certifications

Preferred

Trans of Dangerous Goods
H2S Alive
Confined Space Entry
Drivers Licence (Class 5)
Standard First Aid

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Tweet

Facility Operator - Judy Creek

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Preferred

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H2S Alive
Confined Space Entry
Drivers Licence (Class 5)
Standard First Aid

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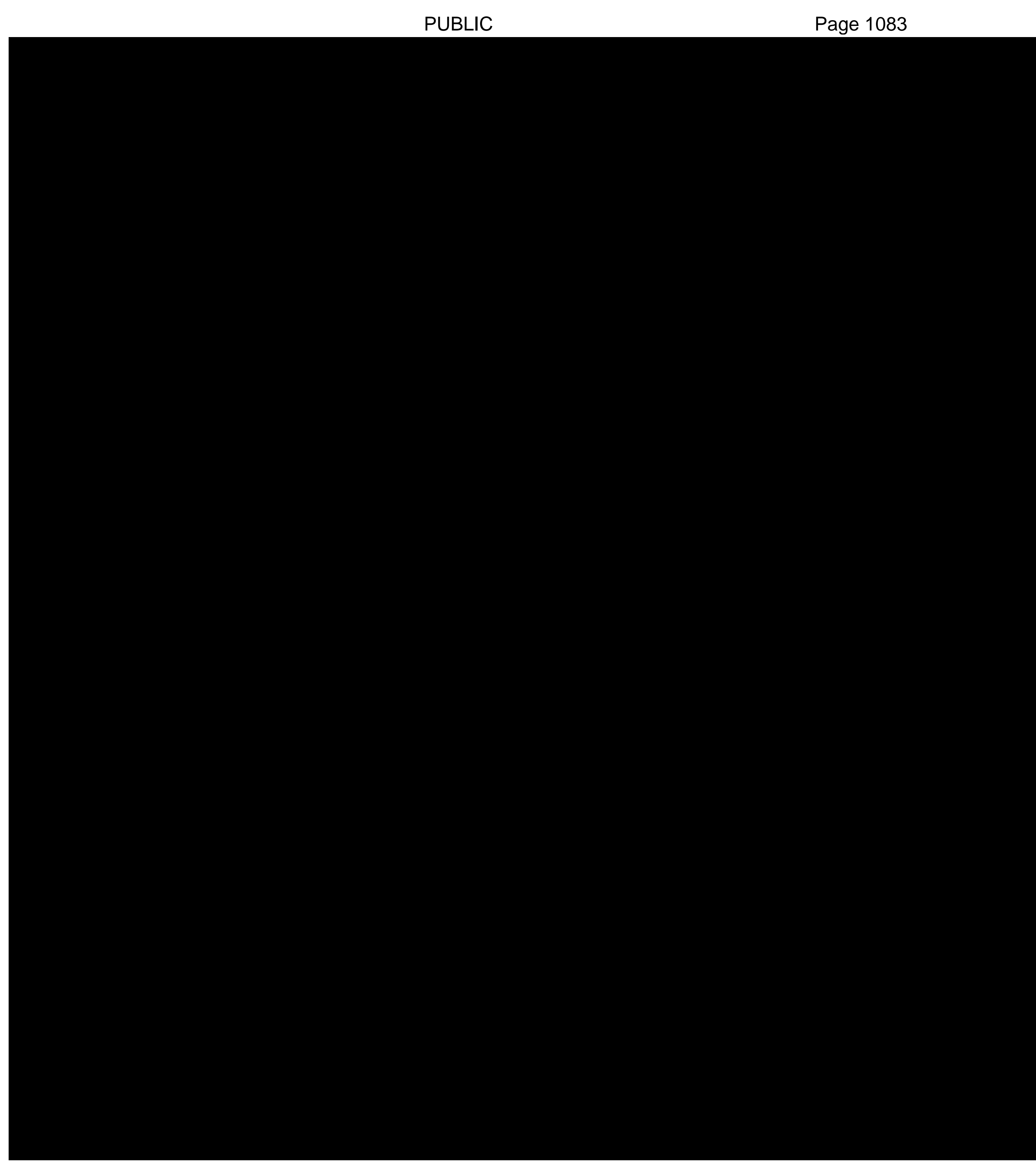


Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

+1 more

Project Manager - Sulphur

May 17, 2022

Job Category: Environmental Services
Requisition Number: PROJE002843
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

+1 more

NORM Labourer

May 17, 2022

Job Category: Field Operations
Requisition Number: NORML002841
Schedule: Full Time

Standard
T0J 3G0, Canada

Facility Operator - Brazeau

May 17, 2022

Job Category: Field Operations
Requisition Number: FACIL002842
Schedule: Full Time

Drayton Valley, AB, CAN

Heavy Duty Mechanic

May 16, 2022

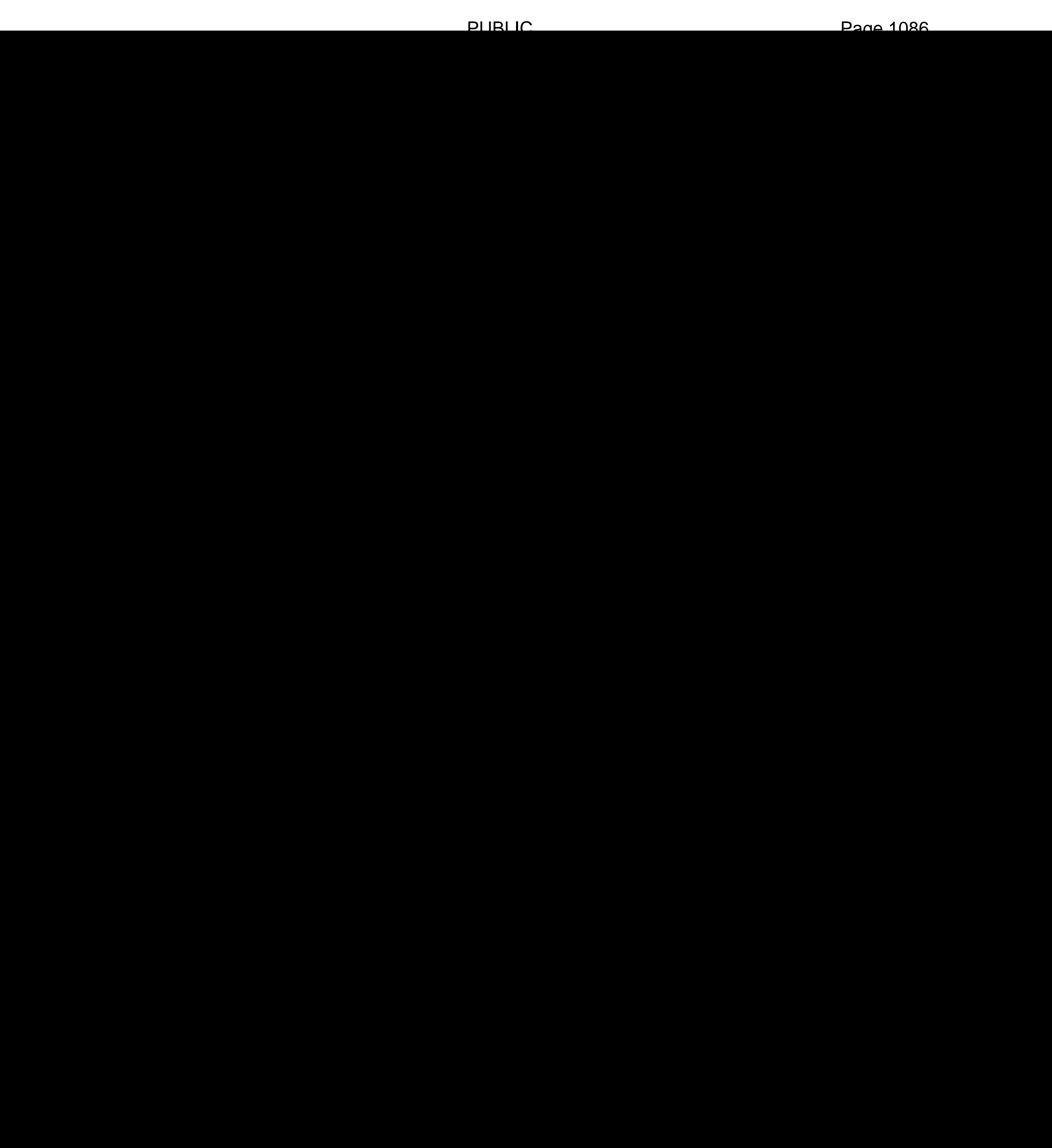
Job Category: Technical Services
Requisition Number: HEAVY002839
Schedule: Full Time

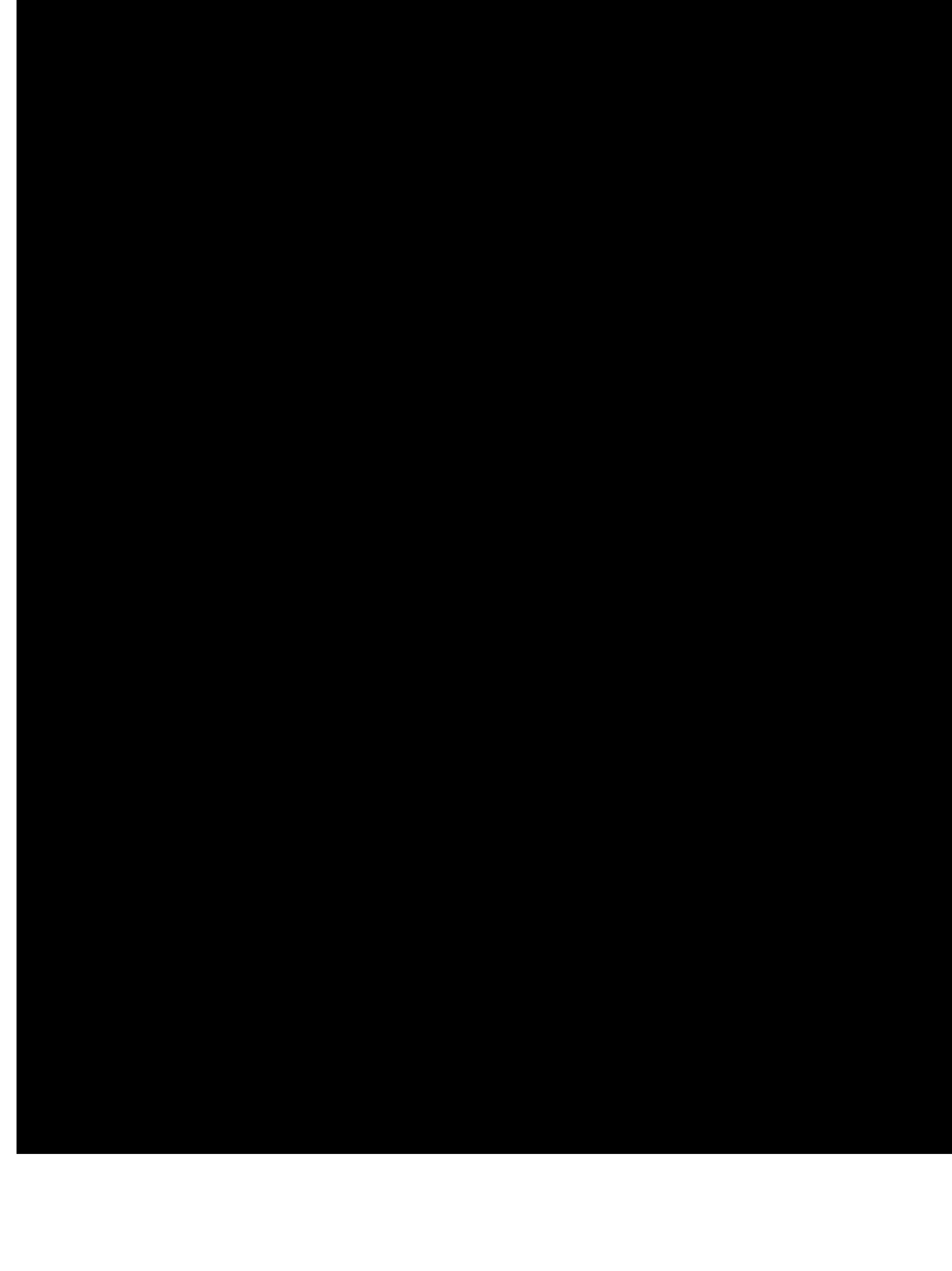
Peace River
T8S 1S8, Canada

Heavy Duty Mechanic - Metals Recycling

May 16, 2022

Job Category: Technical Services
Requisition Number: HEAVY002838
Schedule: Full Time





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Job Title, Job Category, Store, Requisition Number

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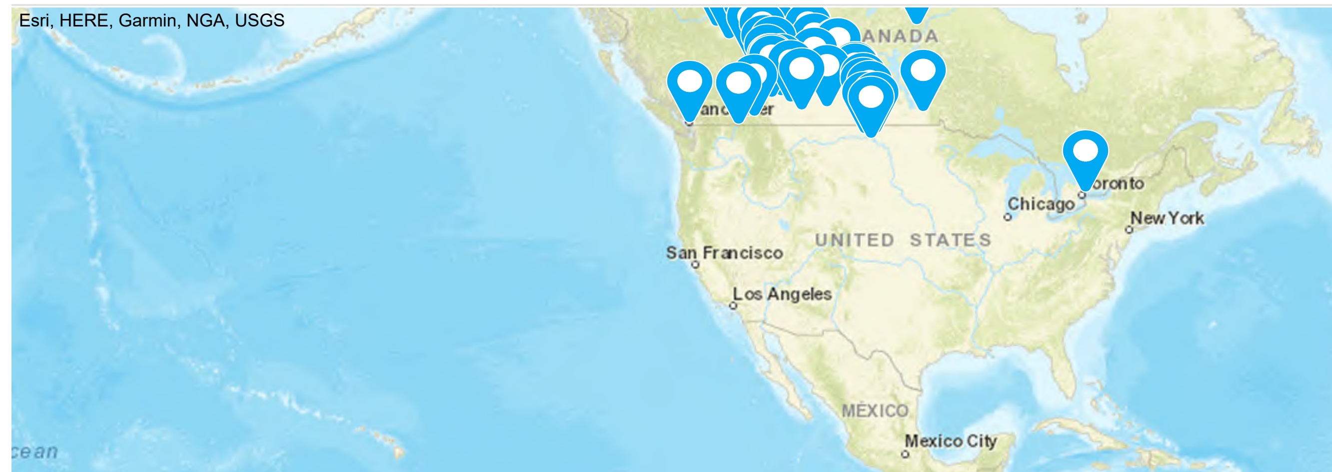
City, State, Zip, Address



Company Location

Job Category

Schedule

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Lead Administrative Process Advisor

May 27, 2022

Job Category: Accounting/Finance

Requisition Number: LEADA002869

Schedule: Full Time

Swift Current
S9H 4Z1, Canada

+3 more

Lead Administrative Process Advisor

May 27, 2022

Job Category: Accounting/Finance
Requisition Number: LEADA002868
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Project Cost Accountant

May 27, 2022

Job Category: Accounting/Finance
Requisition Number: PROJE002864
Schedule: Full Time

Calgary - Blackfoot Point
Calgary, AB T2H, CAN

Non Ferrous Labourer - Metals Recycling

May 26, 2022

Job Category: Environmental Services
Requisition Number: NONFE002866
Schedule: Full Time

Brooks
Brooks, AB, CAN

Heavy Equipment Operator - Metals Recycling

May 26, 2022

Job Category: Environmental Services
Requisition Number: HEAVY002865
Schedule: Full Time

Brooks
Brooks, AB, CAN

Landfill Operator

May 26, 2022

Job Category: Environmental Services
Requisition Number: LANDF002863
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Operations Administrative Assistant

May 25, 2022

Job Category: Administration
Requisition Number: OPERA002862
Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Facility Operator - Stanley

May 25, 2022

Job Category: Field Operations

Requisition Number: FACIL002861

Schedule: Full Time

Stanley | STNWD
Stanley, ND, USA

Strategic People Initiatives Manager

May 20, 2022

Job Category: Human Resources

Requisition Number: STRAT002859

Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Billing Administrator

May 20, 2022

Job Category: Accounting/Finance

Requisition Number: BILLI002857

Schedule: Full Time

Grande Prairie Office
Grande Prairie, AB, CAN

Facility Operator - Judy Creek

May 20, 2022

Job Category: Field Operations

Requisition Number: FACIL002856

Schedule: Full Time

Whitecourt, AB, CAN

Scale Desk Administrator - Swift Current

May 20, 2022

Job Category: Administration

Requisition Number: SCALE002854

Schedule: Full Time

Swift Current
S9H 4Z1, Canada

Pipeline Scheduler

May 19, 2022

Job Category: Midstream
Requisition Number: SCHED002853
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Receptionist

May 19, 2022

Job Category: Environmental Services
Requisition Number: RECEP002851
Schedule: Full Time

Richmond
Richmond, BC V6V, CAN

Marketing Advisor

May 18, 2022

Job Category: Marketing
Requisition Number: MARKE002848
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Communications Advisor

May 18, 2022

Job Category: Marketing
Requisition Number: COMMU002849
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Class 1 Driver

May 18, 2022

Job Category: Environmental Services
Requisition Number: CLASS002846
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Project Manager - Demolition/Remediation

May 17, 2022

Job Category: Environmental Services
Requisition Number: PROJE002844

Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

+1 more

Project Manager - Sulphur

May 17, 2022

Job Category: Environmental Services
Requisition Number: PROJE002843
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

+1 more

NORM Labourer

May 17, 2022

Job Category: Field Operations
Requisition Number: NORML002841
Schedule: Full Time

Standard
T0J 3G0, Canada

Facility Operator - Brazeau

May 17, 2022

Job Category: Field Operations
Requisition Number: FACIL002842
Schedule: Full Time

Drayton Valley, AB, CAN

Heavy Duty Mechanic

May 16, 2022

Job Category: Technical Services
Requisition Number: HEAVY002839
Schedule: Full Time

Peace River
T8S 1S8, Canada

Heavy Duty Mechanic - Metals Recycling

May 16, 2022

Job Category: Technical Services
Requisition Number: HEAVY002838
Schedule: Full Time

Peace River
T8S 1S8, Canada

Landfill Operator - Fox Creek

May 16, 2022

Job Category: Field Operations
Requisition Number: LANDF002836
Schedule: Full Time

Fox Creek
Fox Creek, AB, CAN

Landfill Operator - Pembina

May 16, 2022

Job Category: Field Operations
Requisition Number: LANDF002835
Schedule: Full Time

Drayton Valley, AB, CAN

Roll Off / Lugger Truck Driver, Class 3

May 16, 2022

Job Category: Environmental Services
Requisition Number: ROLLO002834
Schedule: Full Time

Kimberley
V1A 3G9, Canada

Material Handler

May 16, 2022

Job Category: Field Operations
Requisition Number: MATER002831
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

+1 more

Facility Operator - Big Mountain

May 13, 2022

Job Category: Field Operations
Requisition Number: FACIL002827
Schedule: Full Time

Grande Prairie, AB, CAN

Grande Prairie, AB, CAN

less

Junior Capital Accountant

May 13, 2022

Job Category: Accounting/Finance
Requisition Number: ACCOU002826
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Facility Administrator - 12 Month Fixed-Term Position

May 12, 2022

Job Category: Administration
Requisition Number: FACIL002713
Schedule: Full Time

Grande Prairie, AB, CAN

+1 more

Collections EDI Specialist

May 11, 2022

Job Category: Accounting/Finance
Requisition Number: COLLE002821
Schedule: Full Time

Calgary - Blackfoot Point
Calgary, AB T2H, CAN

Facility Operator - Kakwa Water Disposal

May 11, 2022

Job Category: Field Operations
Requisition Number: FACIL002820
Schedule: Full Time

Grande Prairie, AB, CAN

Scale Desk Administrator

May 11, 2022

Job Category: Administration
Requisition Number: SCALE002819
Schedule: Full Time

LaGlace
T0H 3A0, Canada

+2 more

Class 1 Driver / Operator

May 9, 2022

Job Category: Environmental Services
Requisition Number: CLASS002817
Schedule: Full Time

Kimberley
V1A 3G9, Canada

Equipment Operator

May 6, 2022

Job Category: Field Operations
Requisition Number: EQUIP002816
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Labourer - Remediation/Reclamation

May 6, 2022

Job Category: Environmental Services
Requisition Number: LABOU002815
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

---

12 Month Fixed Term Facility Operator - Rocky Mountain House

May 6, 2022

Job Category: Field Operations
Requisition Number: 1824M002814
Schedule: Full Time

Rocky Mountain House
Rocky Mountain House, AB, CAN

Facility Administrator - Unity, SK

May 5, 2022

Job Category: Administration
Requisition Number: FACIL002811
Schedule: Full Time

Unity
S0K 4L0, Canada

Lead Landfill Operator

May 5, 2022

Job Category: Field Operations
Requisition Number: LEADL002810
Schedule: Full Time

Fox Creek
T0H 1P0, Canada

+1 more

Operations Manager

May 4, 2022

Job Category: Environmental Services
Requisition Number: OPERA002809
Schedule: Full Time

Pouce Coupe
V0C 2C0, Canada

Project Coordinator

May 4, 2022

Job Category: Environmental Services
Requisition Number: PROJE002805
Schedule: Full Time

Grande Prairie, AB, CAN

Environmental Technician

May 4, 2022

Job Category: Environmental Services
Requisition Number: ENVIR002804
Schedule: Full Time

Redwater
Redwater, AB, CAN

Facility Administrator - West Edson

May 4, 2022

Job Category: Administration
Requisition Number: FACIL002803
Schedule: Full Time

Edson
Edson, AB, CAN

+1 more

Research Chemist (Drilling Fluids)

May 4, 2022

Job Category: Technical Services
Requisition Number: RESEA002801

Schedule: Full Time

Calgary Laboratory
4816 35B St SE
Calgary, AB T2B, CAN

HR Coordinator

May 4, 2022

Job Category: Human Resources

Requisition Number: HRCOO002800

Schedule: Full Time

Calgary - Blackfoot Point
Calgary, AB T2H, CAN

Operations Manager - Drilling Waste & Water Management

May 4, 2022

Job Category: Field Operations

Requisition Number: OPERA002799

Schedule: Full Time

Calgary - Palliser South
Calgary, AB T2G, CAN

Facility Operator - Fox Creek

May 3, 2022

Job Category: Field Operations

Requisition Number: FACIL002793

Schedule: Full Time

Fox Creek
Fox Creek, AB, CAN

Torch Labourer - Metals Recycling

May 3, 2022

Job Category: Environmental Services

Requisition Number: TORCH002792

Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Heavy Equipment Operator - Metals Recycling

May 3, 2022

Job Category: Environmental Services

Requisition Number: HEAVY002791

Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Field Technician

Apr 27, 2022

Job Category: Field Operations
Requisition Number: FIELD002784
Schedule: Full Time

Edmonton
T5S 1R5, Canada

+1 more

Heavy Duty Mechanic - Metals Recycling

Apr 27, 2022

Job Category: Technical Services
Requisition Number: HEAVY002781
Schedule: Full Time

Peace River
T8S 1S8, Canada

Heavy Duty Mechanic - Metals Recycling

Apr 27, 2022

Job Category: Technical Services
Requisition Number: HEAVY002780
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Facility Operator - Kakwa

Apr 25, 2022

Job Category: Field Operations
Requisition Number: FACIL002779
Schedule: Full Time

Grande Prairie, AB, CAN

+1 more

Project Coordinator

Apr 22, 2022

Job Category: Environmental Services
Requisition Number: PROJE002778
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Project Manager

Apr 22, 2022

Job Category: Environmental Services
Requisition Number: PROJE002777
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Project Manager - Dredging

Apr 22, 2022

Job Category: Environmental Services
Requisition Number: PROJE002776
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Accountant

Apr 22, 2022

Job Category: Environmental Services
Requisition Number: ACCOU002775
Schedule: Full Time

Calgary - Blackfoot Point
Calgary, AB T2H, CAN

Scale Attendant

Apr 18, 2022

Job Category: Environmental Services
Requisition Number: SCALE002771
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Class 1 Driver-Fort McMurray area

Apr 18, 2022

Job Category: Environmental Services
Requisition Number: CLASS002768
Schedule: Full Time

Fort McMurray
T9H 4B2, Canada

Drilling Fluids Technical Advisor

Apr 13, 2022

Job Category: Technical Services
Requisition Number: SRTEC002763

Schedule: Full Time

Calgary - Palliser South
Calgary, AB T2G, CAN

Facility Operator - Spirit River

Apr 13, 2022

Job Category: Field Operations
Requisition Number: FACIL002762
Schedule: Full Time

Spirit River
T0H 3G0, Canada

Torch Labourer - Metals Recycling

Apr 12, 2022

Job Category: Environmental Services
Requisition Number: TORCH002759
Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Waste Technician

Apr 11, 2022

Job Category: Field Operations
Requisition Number: WASTE002756
Schedule: Full Time

Richmond
Richmond, BC V6V, CAN

Yard Labourer - Metals Recycling

Apr 11, 2022

Job Category: Environmental Services
Requisition Number: YARDL002755
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Class 1 Driver

Apr 8, 2022

Job Category: Environmental Services
Requisition Number: CLASS002748
Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Facility Administrator - Kindersley West

Apr 8, 2022

Job Category: Administration
Requisition Number: FACIL002745
Schedule: Full Time

Kindersley
S0L 1S0, Canada

Facility Administrator

Apr 8, 2022

Job Category: Administration
Requisition Number: FACIL002743
Schedule: Full Time

Williston, ND 58801, USA

Waste Labourer

Apr 7, 2022

Job Category: Field Operations
Requisition Number: WASTE002742
Schedule: Full Time

Grande Prairie, AB, CAN

Shop Hand

Apr 7, 2022

Job Category: Field Operations
Requisition Number: SHOPH002740
Schedule: Full Time

Grande Prairie, AB, CAN

Non Ferrous Labourer - Metals Recycling

Apr 6, 2022

Job Category: Environmental Services
Requisition Number: NONFE002737
Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Labourer

Apr 6, 2022

Job Category: Environmental Services
Requisition Number: LABOU002736

Schedule: Full Time

Edmonton
T5S 1R5, Canada

Equipment Operator

Apr 6, 2022

Job Category: Field Operations
Requisition Number: EQUIP002735
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Financial Analyst

Apr 5, 2022

Job Category: Accounting/Finance
Requisition Number: FINAN002734
Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Document Control Specialist

Apr 5, 2022

Job Category: Engingeering/Project Management
Requisition Number: DOCUM002732
Schedule: Full Time

Calgary - Brookfield Place | Calgary - Brookfield Place
Calgary, AB T2P, CAN

Class 3 Driver/Operator

Apr 5, 2022

Job Category: Environmental Services
Requisition Number: CLASS002730
Schedule: Full Time

Thompson
Thompson, MB, CAN

+1 more

Scale Desk Administrator - Lomond Facility

Apr 1, 2022

Job Category: Administration
Requisition Number: SCALE002724
Schedule: Part Time

Weyburn
S4H 2L5, Canada

+2 more

Facility Administrator - Janvier

Mar 31, 2022

Job Category: Administration
Requisition Number: FACIL002718
Schedule: Full Time

Janvier, AB

+6 more

Equipment Operator

Mar 30, 2022

Job Category: Environmental Services
Requisition Number: EQUIP002704
Schedule: Full Time

Richmond
Richmond, BC V6V, CAN

Waste Technician

Mar 28, 2022

Job Category: Environmental Services
Requisition Number: WASTE002692
Schedule: Full Time

Redwater
Redwater, AB, CAN

Senior Project Manager - Rail Services and Emergency Response

Mar 25, 2022

Job Category: Environmental Services
Requisition Number: SENIO002691
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Shop Hand

Mar 21, 2022

Job Category: Field Operations
Requisition Number: SHOPH002677
Schedule: Full Time

Leduc
Leduc, AB, CAN

Centrifuge Technician

Mar 21, 2022

Job Category: Field Operations
Requisition Number: CENTR002676
Schedule: Full Time

Leduc
Leduc, AB, CAN

Scale Desk Administrator - Spirit River Landfill

Mar 18, 2022

Job Category: Administration
Requisition Number: SCALE002670
Schedule: Full Time

Spirit River
T0H 3G0, Canada

Lead Facility Administrator - South Wapiti

Mar 18, 2022

Job Category: Administration
Requisition Number: LEADF002669
Schedule: Full Time

Grande Prairie, AB, CAN

General Labourer

Mar 17, 2022

Job Category: Environmental Services
Requisition Number: GENER002666
Schedule: Full Time

Thompson
Thompson, MB, CAN

+2 more

Scale Desk Administrator - Tulliby Lake

Mar 10, 2022

Job Category: Administration
Requisition Number: SCALE002652
Schedule: Full Time

Lloydminster, AB, CAN

+1 more

Scale Desk Administrator - Janvier Landfill

Mar 9, 2022

Job Category: Administration
Requisition Number: SCALE002650
Schedule: Full Time

Janvier, AB

+6 more

Facility Operator - Keene

Mar 9, 2022

Job Category: Field Operations
Requisition Number: FACIL002651
Schedule: Full Time

Keene, North Dakota
Keene, ND 58847, USA

Torch Labourer - Metals Recycling

Mar 8, 2022

Job Category: Environmental Services
Requisition Number: TORCH002644
Schedule: Full Time

Peace River
T8S 1S8, Canada

Class 1 Driver / Equipment Operator - Metals Recycling

Mar 4, 2022

Job Category: Environmental Services
Requisition Number: CLASS002639
Schedule: Full Time

Peace River
T8S 1S8, Canada

Equipment Operator

Mar 2, 2022

Job Category: Environmental Services
Requisition Number: EQUIP002636
Schedule: Full Time

Winnipeg
Winnipeg, MB, CAN

Labourer

Mar 2, 2022

Job Category: Environmental Services
Requisition Number: LABOU002635
Schedule: Full Time

Winnipeg
Winnipeg, MB, CAN

Facility Administrator - Lindbergh AB

Mar 2, 2022

Job Category: Administration
Requisition Number: FACIL002634
Schedule: Full Time

Lindbergh AB
Sturgeon County, AB T0A, CAN

Water Treatment Technician

Mar 1, 2022

Job Category: Environmental Services
Requisition Number: WATER002632
Schedule: Full Time

Winnipeg
Winnipeg, MB, CAN

+1 more

Equipment Operator/Labourer (Ontario)

Feb 25, 2022

Job Category: Field Operations
Requisition Number: EQUIP002623
Schedule: Full Time

Whitby, ON
Whitby, ON L1N, CAN

Facility Operator

Feb 18, 2022

Job Category: Environmental Services
Requisition Number: FACIL002607
Schedule: Full Time

Redwater
Redwater, AB, CAN

Business Intelligence Analyst

Feb 14, 2022

Job Category: Accounting/Finance
Requisition Number: BUSIN002598

Schedule: Full Time

Calgary - Palliser South
Calgary, AB T2G, CAN

Field Technician (Regulatory)

Feb 14, 2022

Job Category: Environmental Services

Requisition Number: FIELD002595

Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Project Coordinator

Feb 11, 2022

Job Category: Administration

Requisition Number: PROJE002593

Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Site Supervisor

Feb 8, 2022

Job Category: Field Operations

Requisition Number: SITES002578

Schedule: Full Time

Grande Prairie, AB, CAN

Field Services Technician

Feb 7, 2022

Job Category: Environmental Services

Requisition Number: FIELD002573

Schedule: Full Time

Swift Current
S9H 4Z1, Canada

Dredging & Dewatering Lead

Feb 4, 2022

Job Category: Environmental Services

Requisition Number: DREDG002570

Schedule: Full Time

Edmonton
T5S 1R5, Canada

Dredge Operator

Feb 4, 2022

Job Category: Environmental Services
Requisition Number: DREDG002569
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Centrifuge Operator

Feb 4, 2022

Job Category: Environmental Services
Requisition Number: CENTR002568
Schedule: Full Time

Edmonton
T5S 1R5, Canada

General Labourer

Feb 4, 2022

Job Category: Environmental Services
Requisition Number: GENER002566
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Heavy Equipment Operator

Feb 4, 2022

Job Category: Environmental Services
Requisition Number: HEAVY002565
Schedule: Full Time

Edmonton
T5S 1R5, Canada

Administrative Assistant

Feb 3, 2022

Job Category: Administration
Requisition Number: ADMIN002556
Schedule: Full Time

Swift Current
S9H 4Z1, Canada

Site Supervisor

Jan 28, 2022

Job Category: Field Operations
Requisition Number: SITES002547

Schedule: Full Time

Fort McMurray
Fort McMurray, AB, CAN

Heavy Equipment Operator - Metals Recycling

Jan 26, 2022

Job Category: Environmental Services

Requisition Number: HEAVY002529

Schedule: Full Time

Red Deer
T4P 3Z5, Canada

Water Supervisor

Jan 24, 2022

Job Category: Environmental Services

Requisition Number: WATER002520

Schedule: Full Time

Richmond
Richmond, BC V6V, CAN

Corporate Accounts Representative

Jan 19, 2022

Job Category: Sales/Business Development

Requisition Number: CORPO002508

Schedule: Full Time

Grande Prairie Office
Grande Prairie, AB, CAN

Equipment Operator

Jan 19, 2022

Job Category: Field Operations

Requisition Number: EQUIP002506

Schedule: Full Time

Grande Prairie, AB, CAN

Fluid Transfer Manager

Jan 12, 2022

Job Category: Field Operations

Requisition Number: FLUID002488

Schedule: Full Time

Alberta, CAN

Fluid Transfer Labourer

Jan 12, 2022

Job Category: Field Operations
Requisition Number: FLUID002487
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Fluid Transfer Technician

Jan 11, 2022

Job Category: Field Operations
Requisition Number: FLUID02084
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Class 1 Driver / Equipment Operator - Metals Recycling

Jan 7, 2022

Job Category: Environmental Services
Requisition Number: CLASS002478
Schedule: Full Time

Trail
V1R 4W6, Canada

Sulphur Remelt Operator

Jan 6, 2022

Job Category: Environmental Services
Requisition Number: SULPH002473
Schedule: Full Time

Shell Shantz
Mountain View County, AB, CAN

Baler Operator

Dec 7, 2021

Job Category: Field Operations
Requisition Number: BALER002425
Schedule: Full Time

Red Deer
Red Deer County, AB, CAN

Equipment Operator/Labourer (Saskatchewan)

Dec 3, 2021

Job Category: Field Operations

Requisition Number: EQUIP002412

Schedule: Full Time

Regina, SK, CAN

+2 more

Site Supervisor (Saskatchewan)

Dec 3, 2021

Job Category: Field Operations

Requisition Number: SITES002411

Schedule: Full Time

Regina, SK, CAN

+2 more

Featured Opportunities

Facility Operator - Stanley
Field Operations
Stanley | STNWD
Stanley, ND, USA
May 25, 2022
Full Time

Facility Operator - Brazeau
Field Operations
Drayton Valley, AB, CAN
May 17, 2022
Full Time

Heavy Duty Mechanic - Metals Recycling
Technical Services
Peace River
T8S 1S8, Canada
May 16, 2022
Full Time

Landfill Operator - Pembina
Field Operations
Drayton Valley, AB, CAN
May 16, 2022
Full Time

Facility Administrator - 12 Month Fixed-Term Position
Administration
Grande Prairie, AB, CAN
+1 more
May 12, 2022
Full Time

Facility Operator - Kakwa Water Disposal
Field Operations
Grande Prairie, AB, CAN
May 11, 2022
Full Time

HR Coordinator
Human Resources
Calgary - Blackfoot Point
Calgary, AB T2H, CAN
May 4, 2022
Full Time

Facility Operator - Kakwa
Field Operations
Grande Prairie, AB, CAN
+1 more
Apr 25, 2022
Full Time

Drilling Fluids Technical Advisor
Technical Services
Calgary - Palliser South
Calgary, AB T2G, CAN
Apr 13, 2022
Full Time

Facility Administrator
Administration
Williston, ND 58801, USA
Apr 8, 2022
Full Time

Financial Analyst
Accounting/Finance
Red Deer
T4P 3Z5, Canada
Apr 5, 2022
Full Time

Facility Administrator - Lindbergh AB
Administration
Lindbergh AB
Sturgeon County, AB T0A, CAN
Mar 2, 2022
Full Time

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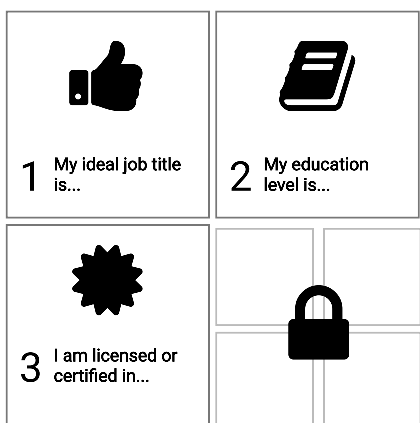

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management services to be provided has not changed since 1996 when the terms of the agreement were established. Hence, the respondents argue that any change in payment must be a pecuniary transfer (confidential exhibit CR-113 at 11, 12).

338 The Tribunal does not agree that the Management Agreement is solely an investment, although it may have aspects thereof. In view of the fact that the management fees paid to SMS pursuant to the Management Agreement are tax-deductible expenses to Superior, they cannot be distributions of after-tax profits. While the managers purchased for their interests in the Management Agreement supported in part by interest-free non-recourse loans, the Tribunal finds that the acquisition price they paid only provides further incentive to them to supply additional services that increase their remuneration. Moreover, it appears to the Tribunal that the managers' ability to transfer their interests in the Management Agreement is highly circumscribed by section 6.1 of the Unitholders Agreement (confidential exhibit CR-113, appendix G, tab 3).

339 The Tribunal observes that managers of for-profit enterprises often receive compensation in the form of investments or investment-related vehicles, such as shares of the managed company, stock options on company shares, low-interest loans to acquire shares of the managed company, etc. Although the payments that they receive from these investments may be in the form of dividends or capital gains, these forms of managerial compensation are nonetheless techniques for improving the quality and quantity of managerial effort. In particular, these methods seek to align the interests of managers with those of owners so that managerial decisions benefit the latter group. Thus, even when the incentive payments are in the form of distributions on company securities held by the managers, their purpose is to provide incentive to managers to achieve corporate goals and those payments are properly viewed as compensation for effort.

340 The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.

341 However, the Tribunal disagrees with the Commissioner regarding the appropriate amount of that deduction. The proper quantum is that amount that compensates the managers for additional effort and hence must be less than the total fees paid to SMS under the Management Agreement because 72 percent thereof accrues to the Enterprise investors. There is no evidence that Enterprise investors or their board representative are or will be involved in active management or in achieving the claimed efficiencies. Accordingly, they benefit from the additional efforts provided by the management group but supply none themselves.

342 The Tribunal views the distributions on SMS's class A units by Incentive Trust to the Enterprise investors as a pecuniary redistribution of Superior's pre-tax profit from Superior's owners, particularly because those owners receive nothing from the Enterprise investors when the Management Agreement changed hands.

343 The respondents calculate the payments to the managers under the Management Agreement under different assumptions about Superior's future tax position and conclude that the managers will receive between $1.5 million and $2.8 million per annum if $40 million of efficiencies are properly claimed and achieved. Following the Commissioner's approach, the Tribunal adopts the average thereof, $2.2 million as the deduction from the claimed efficiencies (confidential exhibit CR-113 at 13 and appendix B at B1).

344 The Tribunal notes that the $7.5 million deduction claimed by the Commissioner is the Commissioner's estimate of the management fees payable to SMS in respect of this merger when the efficiency gains are $40 million per year. Since the Commissioner asserts that this amount is itself overstated for a variety of reasons, the amount of the management fees and hence any deduction in respect thereof must necessarily be lower if the Commissioner's assertion is correct.

345 The Tribunal notes further that the Commissioner's amount of $7.5 million average estimated management fees equals 18.75 percent of the $40 million claimed efficiency gain. The $2.2 million average fees resulting from the respondents' calculations are 5.5 percent of those efficiencies. Since the Tribunal agrees with the respondents as to exclusion of amounts received by the Enterprise investors, in determining the proper amount to deduct when efficiencies are less than $40 million, the Tribunal will use the latter percentage.

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in the Trade-Off"), the parties to the merger are better positioned to compete in a competitive market or are less likely to engage in coordinated behaviour.[54]

12.8 Where efficiencies may be material, merging parties are encouraged to make their efficiency submissions to the Bureau as early as possible in the merger review process. This facilitates an expeditious assessment of the nature, magnitude, likelihood and timeliness of the efficiency gains and of the trade-off between relevant efficiency gains and anti-competitive effects. Having detailed information regarding efficiency claims at an early stage of the process will facilitate the preparation of focused follow-up information requests and/or the targeted use of other information-gathering mechanisms and, subject to confidentiality restrictions, enable the Bureau to test the claims during its market contacts regarding the merger. Submissions regarding anticipated efficiency gains may also assist the Bureau in understanding the rationale underlying the proposed transaction.

Gains in Efficiency

12.9 To be considered under section 96(1), it must be demonstrated that the efficiency gains "would not likely be attained if the order (before the Tribunal) were made." This involves considering the nature of potential orders that may be made, including those that may apply to the merger in its entirety or are limited to parts of the merger. Each of the anticipated efficiency gains is then assessed to determine whether these gains would likely be attained by alternative means if the potential orders are made. Where the order sought is limited to parts of a merger, efficiency gains that are not affected by the order are not included in the trade-off analysis.

12.10 To facilitate the Bureau's review of efficiency claims, parties should provide detailed and comprehensive information that substantiates the precise nature, magnitude, likelihood and timeliness of their alleged efficiency gains, as well as information relating to deductions from gains in efficiency, such as the costs associated with implementing the merger. The information should specifically address the likelihood that such gains would be achieved and why those gains would not likely be achieved if the potential Tribunal orders were made.

12.11 Typically, the Bureau uses industry experts to assist in its evaluation of efficiency claims. To assess efficiency claims, Bureau officers and economists, as well as experts retained by the Bureau, require access to detailed financial and other information.[55] To enable the objective verification of anticipated efficiency gains, efficiency claims should be substantiated by documentation prepared in the ordinary course of business, wherever possible. This includes plant and firm-level accounting statements, internal

54 The impact of efficiencies on a firm's cost structure may render coordination more difficult by enhancing its incentive to compete more vigorously.

55 This includes all pre-existing merger planning documents. Additional information that may be relevant includes (1) information on efficiencies realized from previous mergers involving similar assets; (2) pre-merger documents relating to product and process innovation; and (3) information related to economies of scale, including minimum efficient scale, and economies of scope in production.

Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

330 Superior is managed by Superior Management Services Limited Partnership ("SMS") which acquired the obligations and benefits (the "Management Agreement") of managing Superior from the previous manager, Union Pacific Resources Inc., in May 1998 for $5 million (Cole-Kearney Report Compendium Binder: confidential exhibit CR-114, tab A1, appendix B). Superior Incentive Trust ("Incentive Trust"), which holds the class A units of SMS, receives distributions thereon of the management fees which Superior pays to SMS pursuant to the Management Agreement. The management group of Superior (Grant Billing, Mark Schweitzer and Geoff Mackey) owns 28 percent of Incentive Trust's units and hence is entitled to 28 percent of the distributions made by Incentive Trust. A group of investors, Enterprise Capital Management Inc. (the "Enterprise investors"), owns the remaining 72 percent of Incentive Trust's units.

331 The Commissioner asserts that the schedule of management fees in the Management Agreement provides incentives to SMS to increase (a) the profitability of Superior, and (b) the cash distribution to unitholders of the Superior Income Fund ("cash distribution") which owns Superior. The schedule provides no entitlement to SMS when the cash distribution per unit is less than $1.27. For cash distributions between $1.27 and $1.45, SMS is entitled to an amount equal to 15 percent of those cash distributions and to 25 percent when the cash distribution per unit is between $1.45 and $1.89. Above $1.89, SMS receives an amount equal to 50 percent of the cash distributions.

332 Accordingly, if the management group could achieve efficiencies that resulted in increased cash distributions, SMS would be entitled to the management fees in respect of such efficiency-based cash distributions. Assuming that the management group achieves the $40 million of efficiencies claimed in the Cole-Kearney report, the Commissioner estimates that SMS would receive management fees in respect thereof of approximately $7.5 million per annum. This amount is an average based on differing assumptions about Superior's future tax position given that management fees are a tax-deductible expense.

333 In summary, the Commissioner asserts that the management fees arising from achieving efficiencies attributed to the instant merger are payments that compensate SMS for providing the additional management services that are required to achieve these efficiencies. Viewed in this light, these fees are a cost of achieving the efficiencies and should therefore be deducted from the $40 million per annum of efficiencies claimed by the respondents. The Commissioner submits that the full amount of these fees should be deducted, not just the 28 percent thereof that would be distributable to the management group, because the Enterprise investors have management obligations and involvement through representation on Superior's or ICG's boards.

334 The respondents offer several objections (expert reply affidavit of S. Cole, C. O'Leary, J.P. Tuttle, and E. Fergin (5 October 1999): confidential exhibit CR-113 at 9-13), the main one being that the fees do not call forth additional management efforts by the management group because the managers were fully engaged prior to the merger and because there will be no material change in the level of services provided by the managers; hence, no increase in economic costs will arise (*ibid.* at 10). As a result, the respondents argue that no deduction of the fees against claimed efficiencies is warranted.

335 The respondents indicate that the managers received interest-free, non-recourse loans from the Enterprise investors in order to facilitate the purchase of their 28 percent share in the Management Agreement (confidential exhibit CR-113, appendix B at 56).

336 It appears to the Tribunal that the respondents' position is that the managers are being paid more for providing the same amount of management services and hence that the fees they receive in the form of distributions from Incentive Trust are a pecuniary cost only. In simpler terms, the Management Agreement redistributes some of Superior's profit to the managers at the expense of Superior's owners since no additional management effort is provided. If the respondents' view is correct, the Tribunal finds it a strange argument to make, as it amounts to a statement that, in effect, the management group will be overpaid for the services they provide.

337 The respondents further argue that the Management Agreement is an investment made and paid for by the managers and that the payments they receive from Incentive Trust are distributions of profit rather than compensation for management services. They point out that the owners of the Management Agreement have the right to sell their interests therein. They also submit that since the Management Agreement predates the merger and has not been amended in this respect, the level of

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management services to be provided has not changed since 1996 when the terms of the agreement were established. Hence, the respondents argue that any change in payment must be a pecuniary transfer (confidential exhibit CR-113 at 11, 12).

338 The Tribunal does not agree that the Management Agreement is solely an investment, although it may have aspects thereof. In view of the fact that the management fees paid to SMS pursuant to the Management Agreement are tax-deductible expenses to Superior, they cannot be distributions of after-tax profits. While the managers purchased for their interests in the Management Agreement supported in part by interest-free non-recourse loans, the Tribunal finds that the acquisition price they paid only provides further incentive to them to supply additional services that increase their remuneration. Moreover, it appears to the Tribunal that the managers' ability to transfer their interests in the Management Agreement is highly circumscribed by section 6.1 of the Unitholders Agreement (confidential exhibit CR-113, appendix G, tab 3).

339 The Tribunal observes that managers of for-profit enterprises often receive compensation in the form of investments or investment-related vehicles, such as shares of the managed company, stock options on company shares, low-interest loans to acquire shares of the managed company, etc. Although the payments that they receive from these investments may be in the form of dividends or capital gains, these forms of managerial compensation are nonetheless techniques for improving the quality and quantity of managerial effort. In particular, these methods seek to align the interests of managers with those of owners so that managerial decisions benefit the latter group. Thus, even when the incentive payments are in the form of distributions on company securities held by the managers, their purpose is to provide incentive to managers to achieve corporate goals and those payments are properly viewed as compensation for effort.

340 The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.

341 However, the Tribunal disagrees with the Commissioner regarding the appropriate amount of that deduction. The proper quantum is that amount that compensates the managers for additional effort and hence must be less than the total fees paid to SMS under the Management Agreement because 72 percent thereof accrues to the Enterprise investors. There is no evidence that Enterprise investors or their board representative are or will be involved in active management or in achieving the claimed efficiencies. Accordingly, they benefit from the additional efforts provided by the management group but supply none themselves.

342 The Tribunal views the distributions on SMS's class A units by Incentive Trust to the Enterprise investors as a pecuniary redistribution of Superior's pre-tax profit from Superior's owners, particularly because those owners receive nothing from the Enterprise investors when the Management Agreement changed hands.

343 The respondents calculate the payments to the managers under the Management Agreement under different assumptions about Superior's future tax position and conclude that the managers will receive between $1.5 million and $2.8 million per annum if $40 million of efficiencies are properly claimed and achieved. Following the Commissioner's approach, the Tribunal adopts the average thereof, $2.2 million as the deduction from the claimed efficiencies (confidential exhibit CR-113 at 13 and appendix B at B1).

344 The Tribunal notes that the $7.5 million deduction claimed by the Commissioner is the Commissioner's estimate of the management fees payable to SMS in respect of this merger when the efficiency gains are $40 million per year. Since the Commissioner asserts that this amount is itself overstated for a variety of reasons, the amount of the management fees and hence any deduction in respect thereof must necessarily be lower if the Commissioner's assertion is correct.

345 The Tribunal notes further that the Commissioner's amount of $7.5 million average estimated management fees equals 18.75 percent of the $40 million claimed efficiency gain. The $2.2 million average fees resulting from the respondents' calculations are 5.5 percent of those efficiencies. Since the Tribunal agrees with the respondents as to exclusion of amounts received by the Enterprise investors, in determining the proper amount to deduct when efficiencies are less than $40 million, the Tribunal will use the latter percentage.

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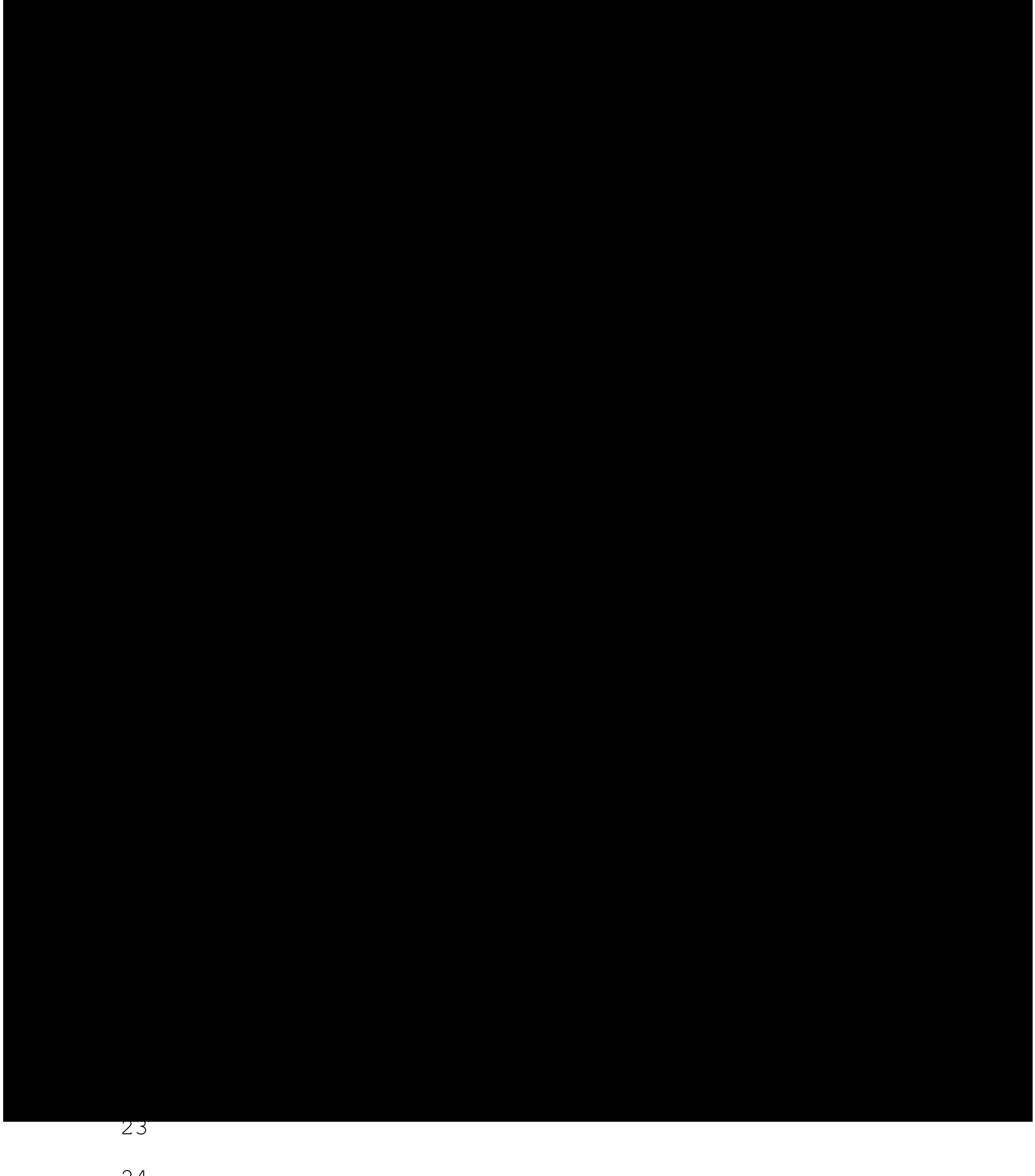
24 1625. Q. And can you describe for
25 me, Mr. Engel, what the bonus target means? I



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3 BY MR. KLIPPENSTEIN:
4 1630. Q. So this bonus is granted
5 to employees if they meet performance targets, is
6 that fair Mr. Engel?
7 A. Yes.
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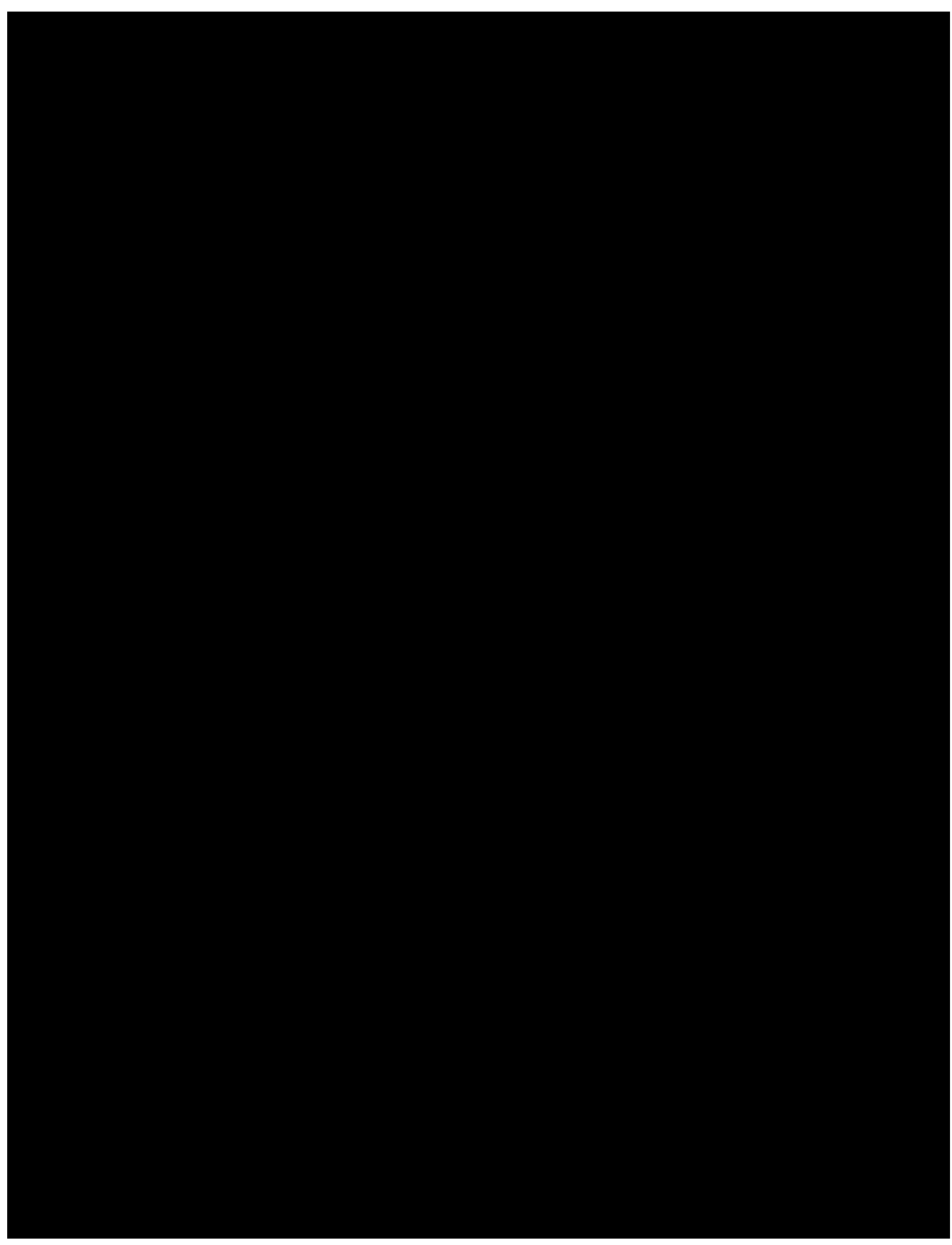


also determined by reviewing the executive officer's other compensation to ensure that total compensation is in line with our overall compensation philosophy.

Base salaries are reviewed annually and adjusted for merit based on each executive officer's success in meeting or exceeding individual objectives. Additionally, base salaries may be adjusted as warranted throughout the year for promotions or other changes in the scope or breadth of an executive officer's role or responsibilities.

2021 Base Salaries

The following table shows each NEO's annual base salary at December 31, 2021 and 2020.

	2021 ($)	2020 ($)	Change[(1)]
RENE AMIRAULT *PRESIDENT AND CEO*	550,000	467,500	18%
CHAD MAGUS *CFO*	315,000	267,750	18%
ALLEN GRANSCH *COO*	410,000	348,500	18%
COREY HIGHAM *SVP, MIDSTREAM OPERATIONS*	360,000	306,000	18%
DAVE ENGEL *SVP, LANDFILL SOLUTIONS*	360,000	306,000	18%

Notes:
(1) Effective April 15, 2020, all NEO salaries were reduced by 15% as part of the Corporation's initiatives to manage fixed costs during the significant economic decline at the time. Effective February 1, 2021, NEO salaries were fully restored to their pre-April 15, 2020 amounts. An 18% increase to the reduced salaries was required to accomplish this.

SHORT-TERM INCENTIVES

Our compensation program includes eligibility for annual STI awards, including a corporate bonus based on the achievement of corporate goals and objectives, and a discretionary performance bonus amount based on individual performance and contributions to achieving SECURE's goals and objectives.

SECURE believes that STI is fundamental to our total executive compensation as it incorporates our pay for performance philosophy by tying the variable portion of pay to the achievement of corporate and divisional performance objectives on an annual basis.

Each year, SECURE's Board and key employees meet to review the Corporation's overall strategy and to set both short and long-term goals to align with strategic objectives. STI awards are based on meeting or exceeding corporate and business unit performance objectives established. The achievement of these performance objectives is evaluated using a combination of quantitative and qualitative measures.

The Board will assess the performance of the Corporation on an annual basis, including assessing the level of each executive officer's achievement in meeting individual goals, as well as that executive officer's contribution towards corporate and business unit performance objectives.

Target levels for annual baseline STI are determined based upon peer benchmarking analyses provided by SECURE's compensation consultants. Short- and long-term incentives are structured to raise total compensation for exceptional levels of corporate and personal performance.

Position	2021 Target STI as a % of Base Salary	2021 Maximum STI as a % of Base Salary
President and CEO	100%	200%
All other NEOs	75%	150%

The following explanations set forth the performance and resulting outcome for each NEO's 2021 STI award.

2021 Short-Term Incentives

The Corporation's key objectives for 2021 were as follows:

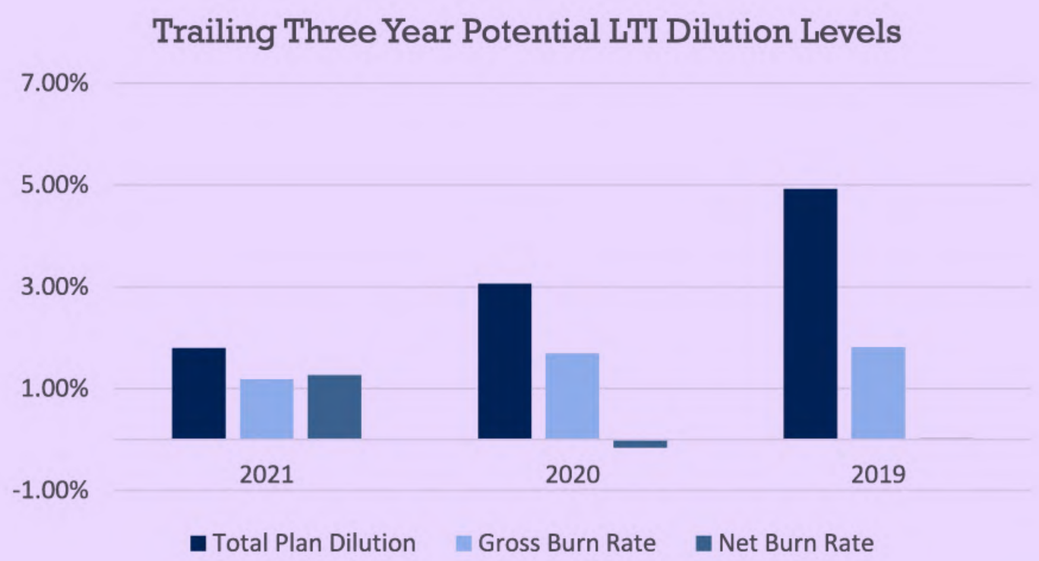
- Focus on the health and safety of our people and our communities;
- Maintain financial resilience, protecting a strong balance sheet by maximizing cash flows and monitoring credit exposure;
- Successfully close the acquisition of Tervita and start achieving the synergies identified to reach the total integration cost savings target impacting Adjusted EBITDA of $75 million by the end of 2022; and
- Continue working with our customers to deliver innovative midstream and environmental solutions that reduce their costs, lower emissions, and improve safety.

For 2021, our NEOs were recognized in their STI payments for their contributions in achieving strong results tied to these objectives. SECURE's NEOs played key roles in determining actions and executing directives to protect the ongoing health of its employees, communities, and other stakeholders, as well as the financial interests of shareholders while combining the businesses of SECURE and Tervita. SECURE's NEOs also played key roles in successfully completing the Transaction in 2021, transforming the company into a larger scale midstream infrastructure and environmental solutions business.

Some of the financial and operational measures taken in the year included:

Safety Results

- We continued to operate with our enhanced health and safety measures including physical distancing and limiting non-essential travel to protect our employees, contractors, customers, and communities in response to the continuing COVID-19 pandemic.
- Within three months of the acquisition of Tervita, all employees across operations were trained and onboarded on a shared safety metrics reporting system. The system includes both Health & Safety and Environment & Regulatory related forms and reports.
- SECURE introduced a company-wide Health, Safety and Environment Management System (HSEMS) in late 2021 that incorporated the best aspects of both SECURE and Tervita's systems. The HSEMS is the foundation of our safety program and applies specifically to SECURE's employees, contractors, and those who work on SECURE's behalf and provides everyone understanding of our company's workplace health, safety, and environment expectations.
- Over the year, SECURE engaged employees, first responders, regulators, response organizations and contractors in 45 emergency response exercises to test the effectiveness of our plans, procedures and training.



	2021	2020	2019
Total Plan Dilution	1.79%	3.06%	4.92%
Gross Burn Rate (1)	1.18%	1.69%	1.81%
Net Burn Rate (2)	1.26%	-0.16%	0.02%

Notes:
(1) Gross burn rate calculated as Unit Incentive Awards granted and dividends reinvested compared to total shares outstanding at period end. PSUs granted can vest at 0 – 200% of the initial grant amount depending on achievement of performance criteria.

(2) Net burn rate represents actual dilution to shareholders, versus gross burn rate which does not consider forfeitures or expiry of awards during the year. In 2020, more awards were forfeited and expired than were granted.

OTHER COMPENSATION

In 2021, certain key executives, including all NEOs, that played critical roles in completing the Transaction, were awarded one-time awards in recognition of their efforts and significant contributions. For Messrs. Amirault, Magus, and Gransch, awards of $550,000, $315,000, and $410,000, respectively, were granted in the form of 25% RSUs, vesting 1/3 annually from the date of grant, and 75% cash. Messrs. Higham and Engel each received a cash award of $150,000. RSU grants and cash payments were made on October 1, 2021, and are reported in the "2021 Executive Compensation Tables - Summary Compensation Table" below.

As part of their employment with the Corporation, executive officers are provided with a taxable monthly vehicle allowance (to cover any lease payments, insurance, maintenance, fuel and depreciation), and parking. Each executive officer has an executive health care spending account ("**HCSA**") which provides up to $25,000 per year for reimbursement of eligible health care expenses or other benefits not covered under the employee benefit plan for the executive officer and their dependents. Activities and equipment purchased in support of personal physical and mental well-being are also reimbursed up to a limited amount for the executive officer by the Corporation.

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14 **MR. KLIPPENSTEIN:** So it's additional
15 compensation for additional work, if I can put it that way.
16 **MR. HARINGTON:** It's additional compensation in
17 part for additional work and in part for having achieved
18 the objectives that they were seeking to achieve.
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management services to be provided has not changed since 1996 when the terms of the agreement were established. Hence, the respondents argue that any change in payment must be a pecuniary transfer (confidential exhibit CR-113 at 11, 12).

338 The Tribunal does not agree that the Management Agreement is solely an investment, although it may have aspects thereof. In view of the fact that the management fees paid to SMS pursuant to the Management Agreement are tax-deductible expenses to Superior, they cannot be distributions of after-tax profits. While the managers purchased for their interests in the Management Agreement supported in part by interest-free non-recourse loans, the Tribunal finds that the acquisition price they paid only provides further incentive to them to supply additional services that increase their remuneration. Moreover, it appears to the Tribunal that the managers' ability to transfer their interests in the Management Agreement is highly circumscribed by section 6.1 of the Unitholders Agreement (confidential exhibit CR-113, appendix G, tab 3).

339 The Tribunal observes that managers of for-profit enterprises often receive compensation in the form of investments or investment-related vehicles, such as shares of the managed company, stock options on company shares, low-interest loans to acquire shares of the managed company, etc. Although the payments that they receive from these investments may be in the form of dividends or capital gains, these forms of managerial compensation are nonetheless techniques for improving the quality and quantity of managerial effort. In particular, these methods seek to align the interests of managers with those of owners so that managerial decisions benefit the latter group. Thus, even when the incentive payments are in the form of distributions on company securities held by the managers, their purpose is to provide incentive to managers to achieve corporate goals and those payments are properly viewed as compensation for effort.

340 The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.

341 However, the Tribunal disagrees with the Commissioner regarding the appropriate amount of that deduction. The proper quantum is that amount that compensates the managers for additional effort and hence must be less than the total fees paid to SMS under the Management Agreement because 72 percent thereof accrues to the Enterprise investors. There is no evidence that Enterprise investors or their board representative are or will be involved in active management or in achieving the claimed efficiencies. Accordingly, they benefit from the additional efforts provided by the management group but supply none themselves.

342 The Tribunal views the distributions on SMS's class A units by Incentive Trust to the Enterprise investors as a pecuniary redistribution of Superior's pre-tax profit from Superior's owners, particularly because those owners receive nothing from the Enterprise investors when the Management Agreement changed hands.

343 The respondents calculate the payments to the managers under the Management Agreement under different assumptions about Superior's future tax position and conclude that the managers will receive between $1.5 million and $2.8 million per annum if $40 million of efficiencies are properly claimed and achieved. Following the Commissioner's approach, the Tribunal adopts the average thereof, $2.2 million as the deduction from the claimed efficiencies (confidential exhibit CR-113 at 13 and appendix B at B1).

344 The Tribunal notes that the $7.5 million deduction claimed by the Commissioner is the Commissioner's estimate of the management fees payable to SMS in respect of this merger when the efficiency gains are $40 million per year. Since the Commissioner asserts that this amount is itself overstated for a variety of reasons, the amount of the management fees and hence any deduction in respect thereof must necessarily be lower if the Commissioner's assertion is correct.

345 The Tribunal notes further that the Commissioner's amount of $7.5 million average estimated management fees equals 18.75 percent of the $40 million claimed efficiency gain. The $2.2 million average fees resulting from the respondents' calculations are 5.5 percent of those efficiencies. Since the Tribunal agrees with the respondents as to exclusion of amounts received by the Enterprise investors, in determining the proper amount to deduct when efficiencies are less than $40 million, the Tribunal will use the latter percentage.

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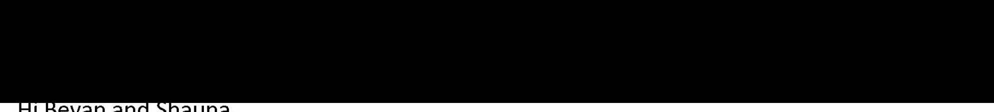
From: Bissett, Dean
Sent: Wednesday, April 28, 2021 1:54 PM
To: Shauna Adams; Bevan Howell
CC: Husband, Michael

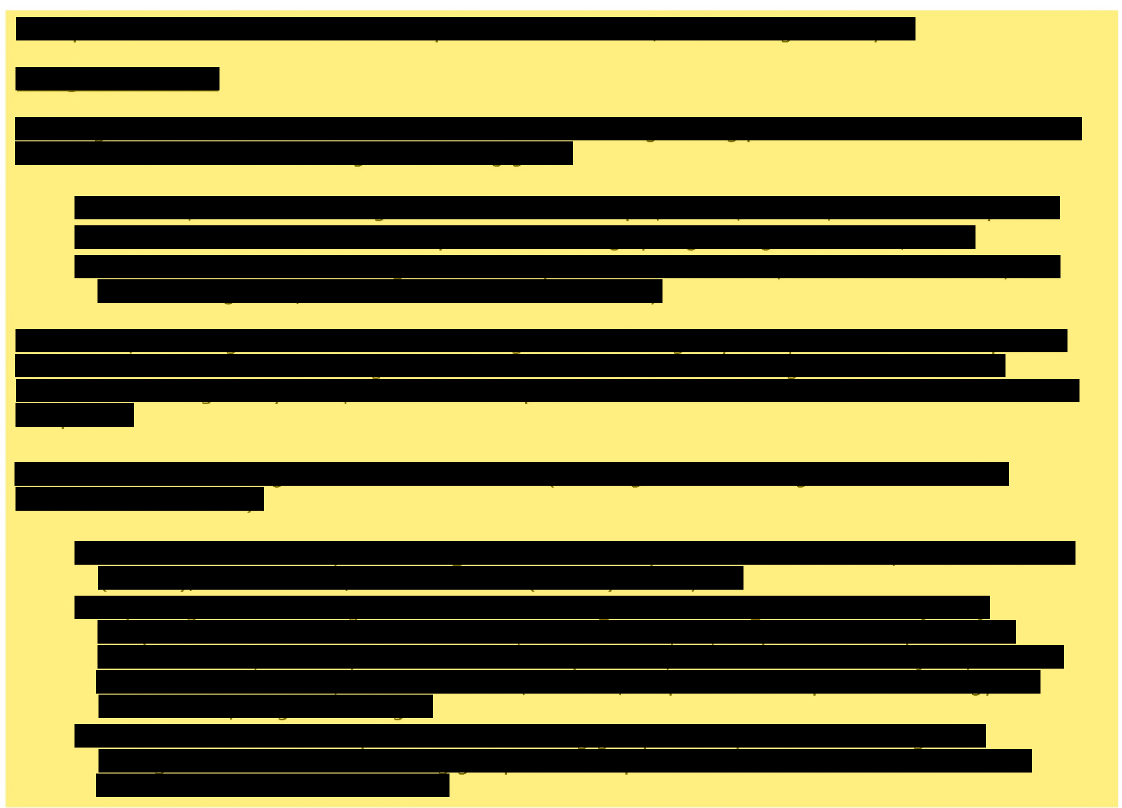


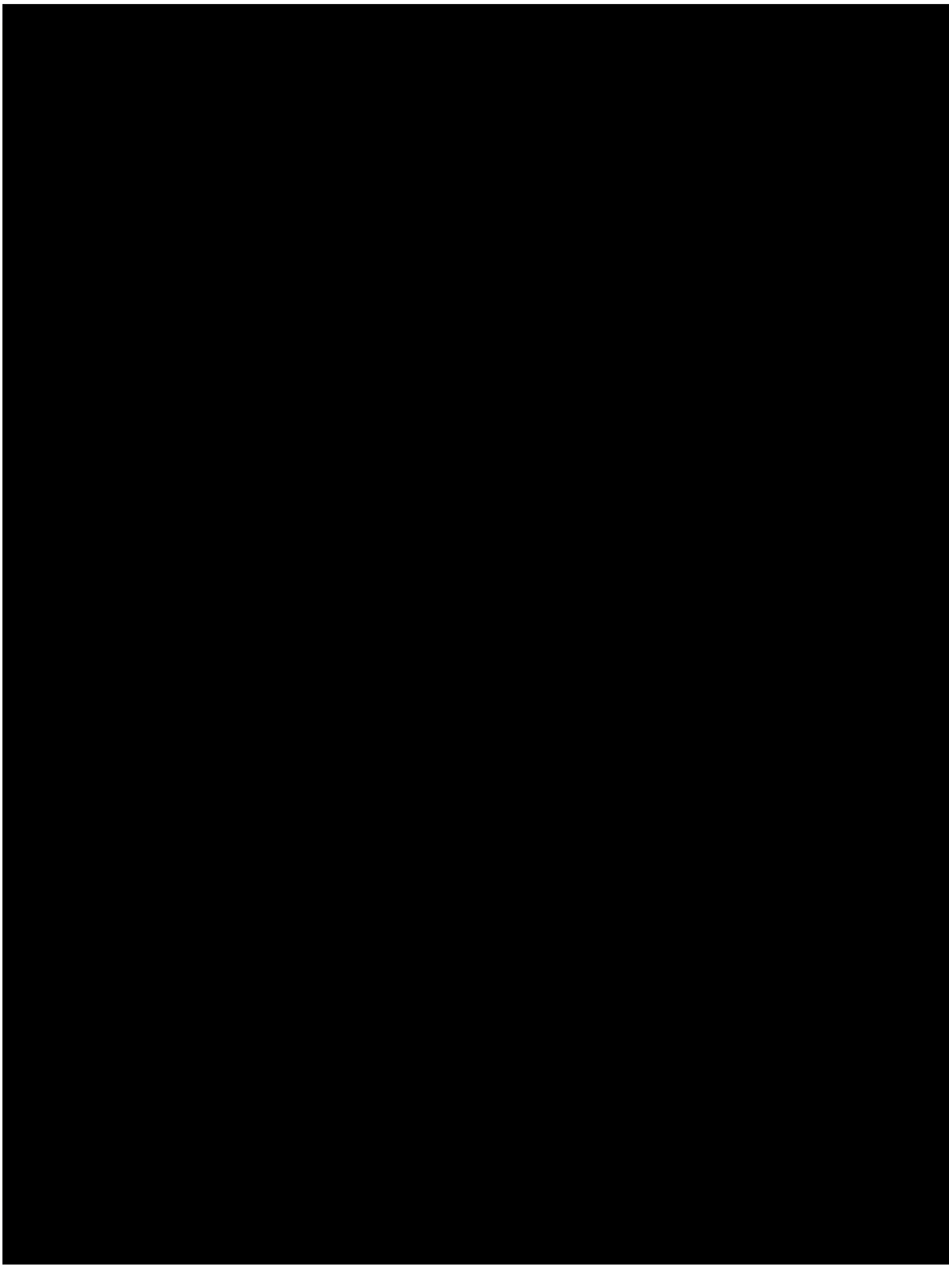
Hi Bevan and Shauna,

Cheers
Dean

From: McCartney, Heather <hmccartney@tervita.com> **On Behalf Of** Town Hall
Sent: Wednesday, April 28, 2021 1:43 PM
To: Town Hall <townhall@tervita.com>
Subject:

Good Afternoon





John

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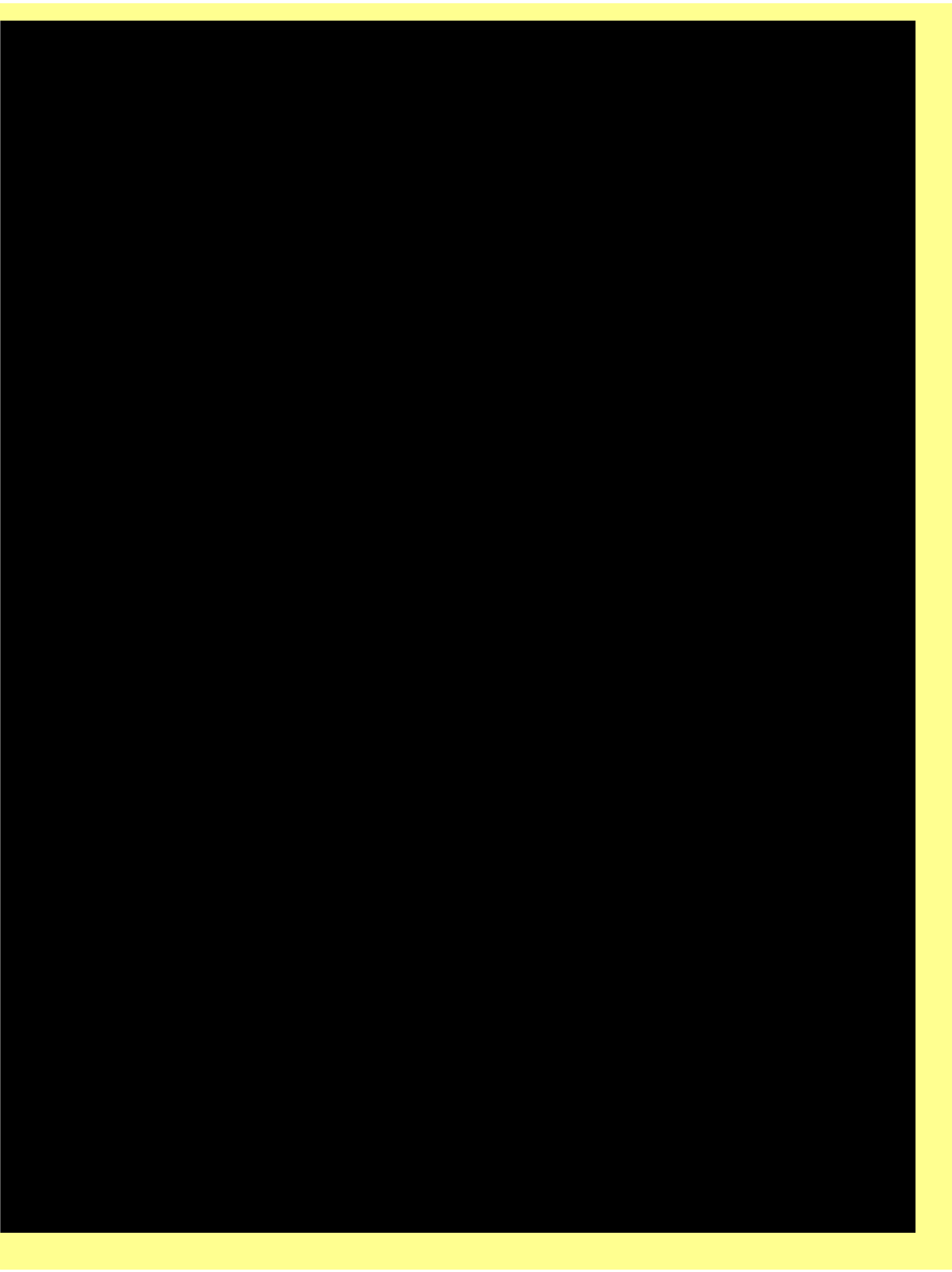
Tervita-03-14-2012



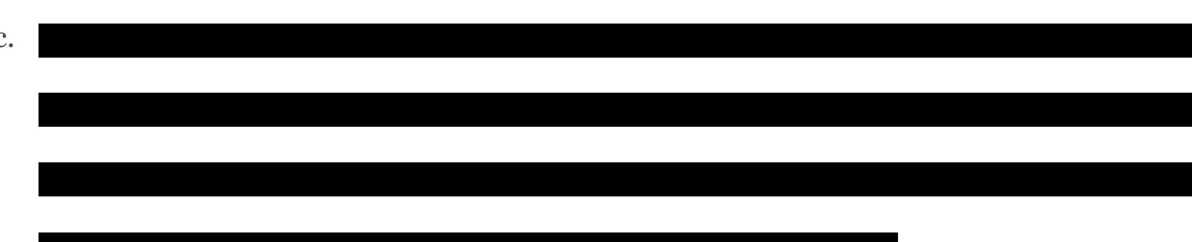
~~202.~~201. The corporate non-labour Productive Efficiencies are set out on Schedule 3.4.2 and the total included in Schedule 3.4.

X.E. Other Qualitative Benefits

~~203.~~202. SECURE has other plans arising from the Transaction to increase Productive Efficiencies that I have not accounted for in my conclusions. These plans are set out in the Affidavit of Dave Engel[85] and summarized below:

a.

b ECURE will be able to more efficiently manage what it refers to as "swing volumes." In the event capacity is limited at a facility or wait times are higher, SECURE can direct the customer to travel to an alternative nearby facility with lower wait times or more capacity and, with the benefit of more facilities as a result of the Transaction, SECURE will be able to direct customers to the optimal facility of the merged firm;

c. 

d. SECURE and Tervita each had relative best practices at their facilities and with the Transaction have been able to share these best practices and improve operational efficiency in different areas;

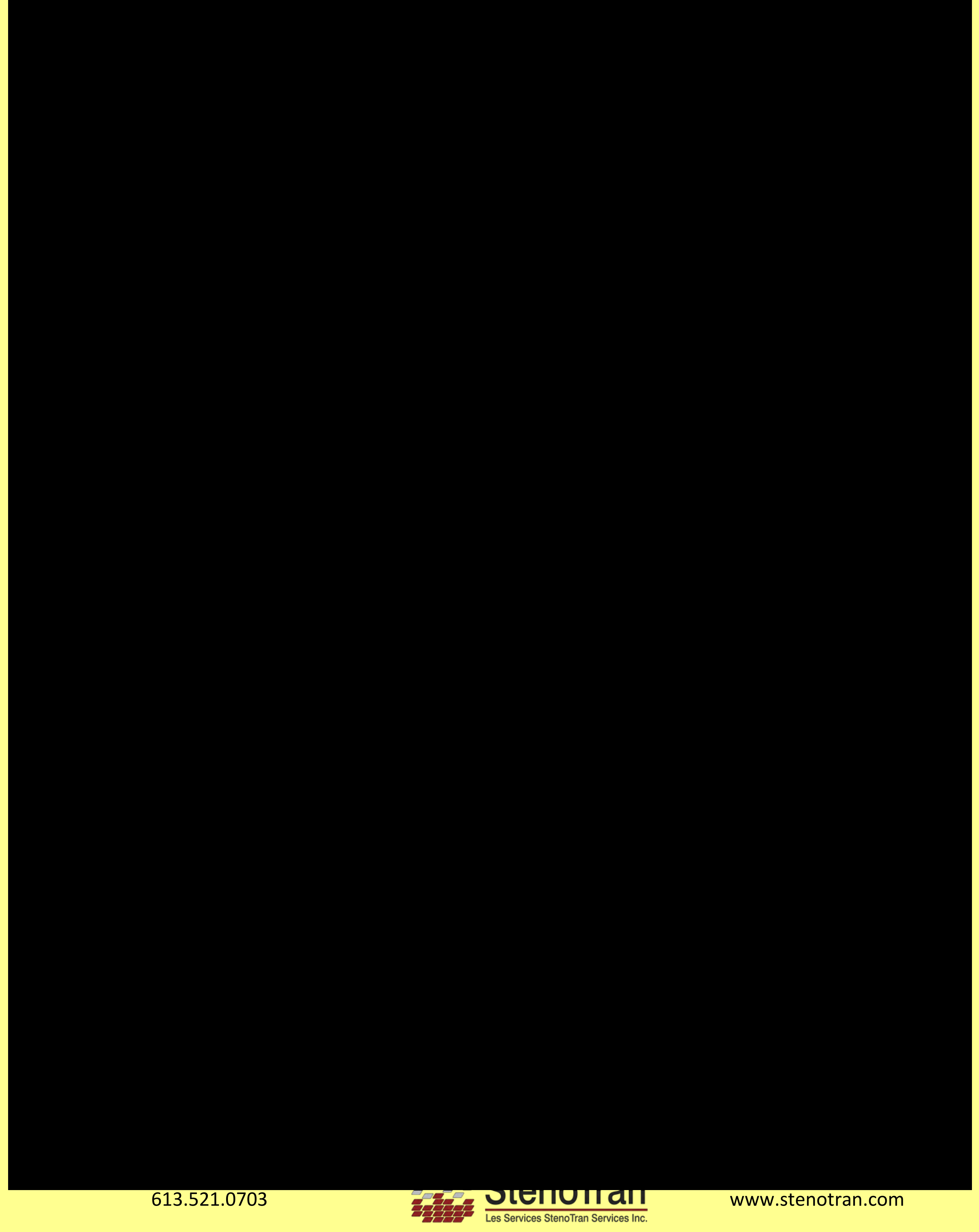
e. SECURE will achieve economies of scale benefits from increased volumes at remaining facilities. See, for example, Section X.B.2 above; and

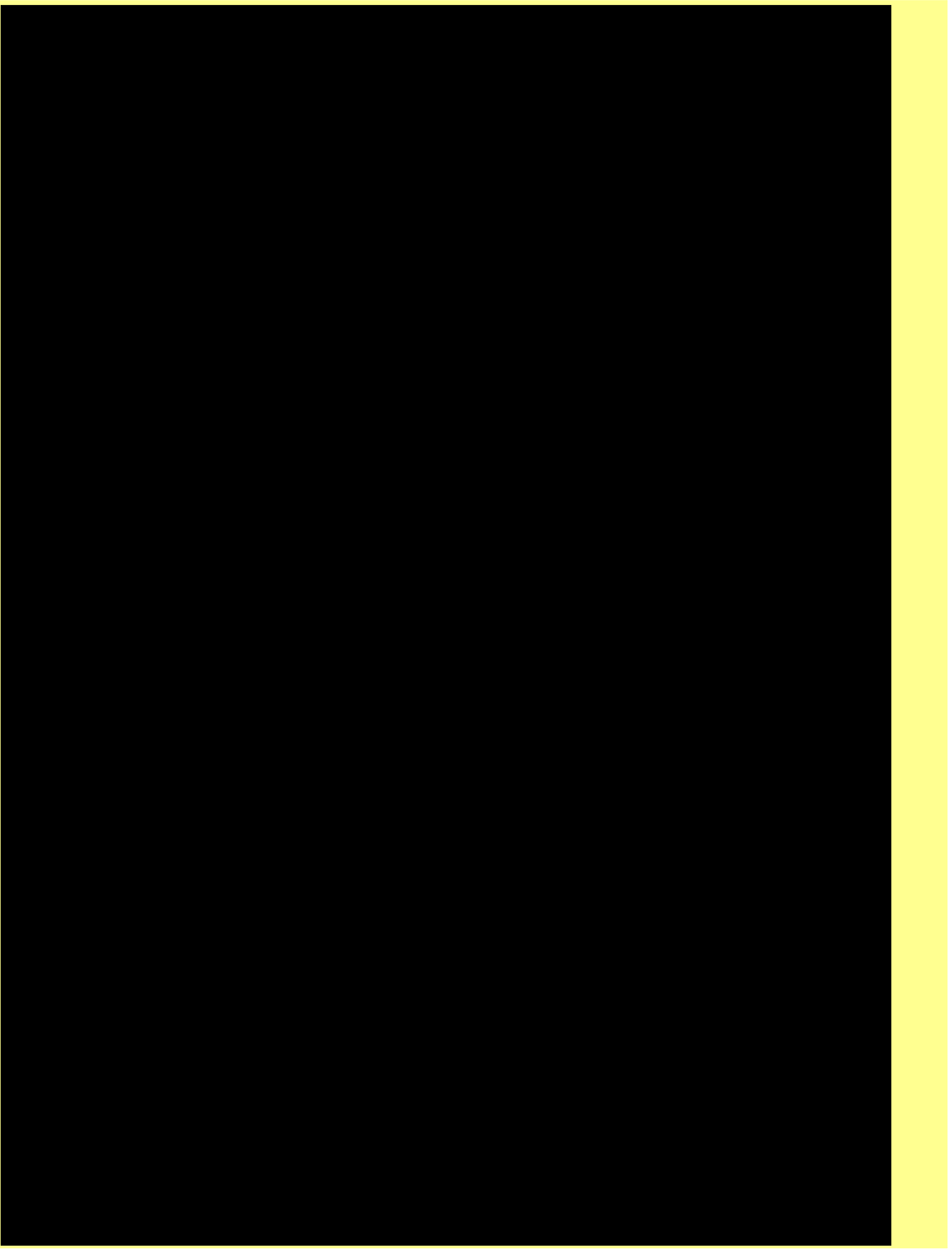
f. With multiple facilities SECURE will be able to optimize its capital spending plan.

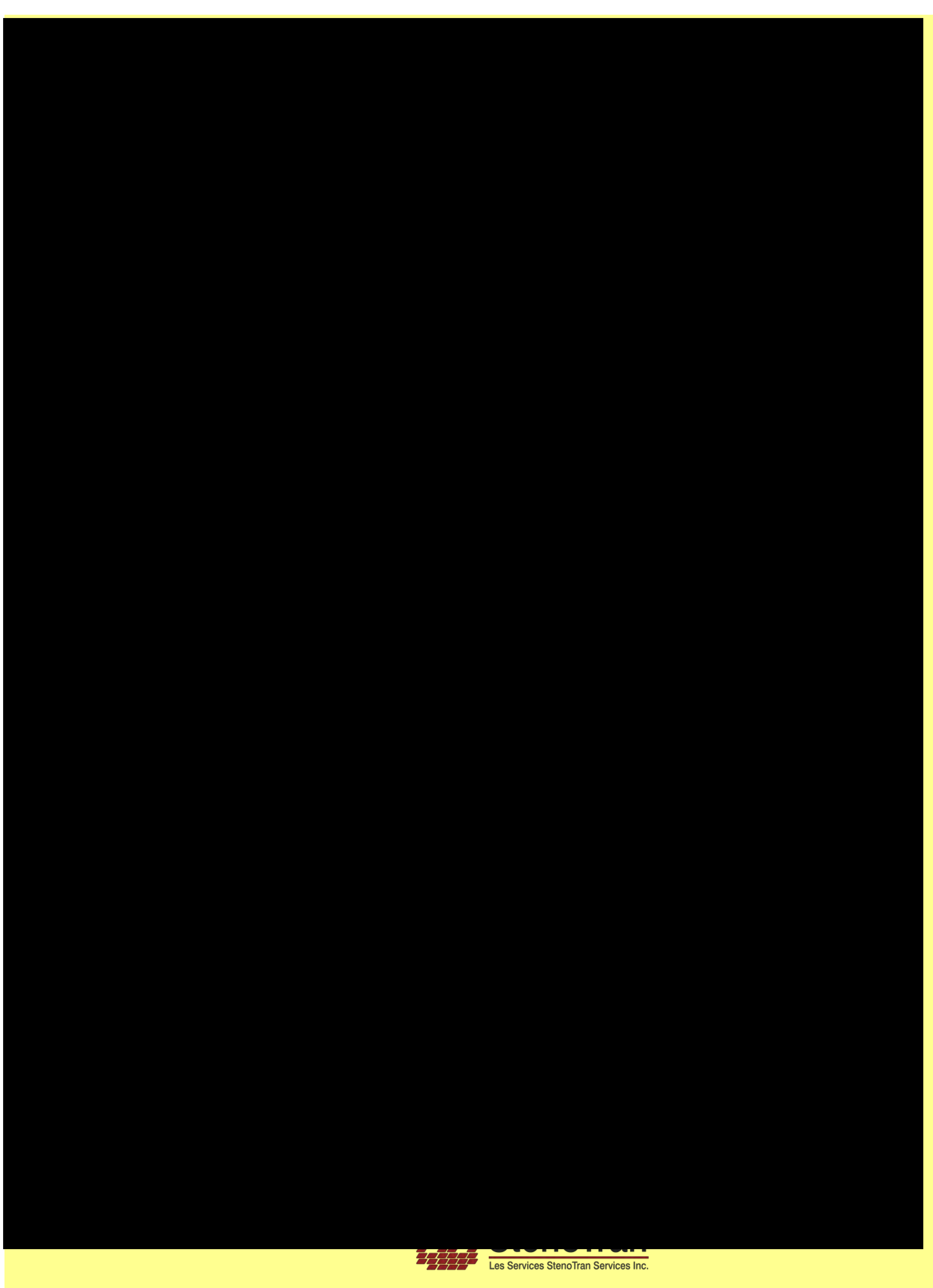
XI. Efficiencies Lost In The Event of A Hypothetical Divestiture Order

~~204.~~203. As noted in paragraph 9 above, Counsel has requested me to provide my opinions as to the Productive Efficiencies lost under ~~both~~each of the Hypothetical Divestiture Orders as at each of:

a. The date of closing of the Transaction (the "Date of Closing Approach" as previously defined); and






Les Services StenoTran Services Inc.

227. The Tribunal Order Date Approach considers the prospective Productive Efficiencies that would be lost from the assumed date of a Tribunal Order[92] and, in my opinion, better reflects the real economic impact. This is because any reduction on account of delay or implementation costs incurred to that point will have already occurred and those deductions are appropriately considered "sunk" costs at that point.

228. For purposes of my conclusions as to the Productive Efficiencies lost in this approach, I have been instructed to assume that the Tribunal would require that the divestiture occur within 6 months of the date of the Order. I further assume that:

   a. A purchaser (and presumably the Competition Tribunal) would require that, at the time of the divestiture, the divested assets should be in full operation so as to be able to supply customers and compete with SECURE; and

   b. The purchaser will require operational due diligence on the facilities prior to completing its acquisition and therefore the facilities will need to have been made operational well before the required divestiture date.

229. The effect of the above is that, immediately after Tribunal ruling, SECURE management will need to commence hiring and incur costs relating to that hiring, training, and re-start costs.

230. Accordingly, to reflect the above, I have made the assumption that run rates costs for the 6 month period commencing the date of the Tribunal ruling until the date of the sale are a proxy for all the hiring, training, restart and operating costs in that period. This may be a conservative assumption.

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92 Which I have been instructed to assume would occur on July 1, 2023.

135 Indeed, the only reason that Tervita could possibly have achieved transportation and market expansion gains in efficiency with the Babkirk Site for the one year period extending from the spring 2012 to the spring 2013 - and a purchaser of that site under the Tribunal's order could not have achieved similar gains in efficiency - was the time required for the Tribunal to render a decision and to effect the actual divestiture of the Babkirk Site into the hands of a third party secure landfill operator. I agree with the Tribunal that it would be contrary to the overall scheme of the *Competition Act* to consider order implementation gains in efficiency since the results of a merger review under that Act should not be driven by the delays required to properly implement a divestiture order from the Tribunal resulting from such a review.

136 There is also another reason for which I would not consider these one year gains in efficiency.

137 Under subsection 96(1) of the *Competition Act*, the Tribunal must find "that the merger...*has brought about* or is *likely to bring about* gains in efficiencies". Thus, gains in efficiency claimed for the period *preceding* the merger review decision must have been *in fact* achieved in order to be recognized ("has brought about"). Gains in efficiency claimed for the period *subsequent* to the merger review decision must be *likely* to be achieved ("likely to bring about"). Possible gains in efficiency which could have been brought about prior to the merger review decision, but were not actually achieved, are consequently not considered. This is because the gains in efficiency defence rests on the premise that the trade-off between merger gains in efficiency and anti-competitive effects must actually benefit the Canadian economy.

138 Tervita has admittedly still not started to build or operate a secure landfill operation at the Babkirk Site. Consequently, the one year transportation and market expansion gains in efficiency have not in fact been realized by Tervita, and will now never be realized. As things now stand, these gains in efficiency are irremediably loss for the Canadian economy. They should therefore not be considered in the balancing exercise required under section 96 of the *Competition Act*.

(7) Did the Tribunal err in its section 96 offset methodology?

139 The methodology adopted by the Tribunal for determining whether the gains in efficiency could offset the anti-competitive effects was a subjective balancing exercise comparing the magnitude of the gains in efficiency to the magnitude of the effects. It explained its methodology as follows at para. 309 of its Reasons:

> The Tribunal considers that the terms "greater than" and "offset" [in section 96 of the *Competition Act*] each contemplate both quantifiable and non-quantifiable (i.e. qualitative) efficiencies. In the Tribunal's view, "greater than" connotes that the efficiencies must be of a larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term "offset" is broad enough to connote a balancing of incommensurables (e.g. apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

140 The Tribunal went even further with this subjective balancing methodology by adding that even quantitative effects which had not been in fact quantified — because of shortcomings in the evidence or where the Commissioner had failed to meet her evidentiary burden — could nevertheless be given *qualitative* weight in certain circumstances as a result of the subjective judgment used to determine whether the gains in efficiency offset the anti-competitive effects:

> Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects.
>
> (Reasons at para. 287; see also concurring opinion of Crampton C.J. at paras. 408-409)

141 In exercising its subjective judgment under the framework it developed, the Tribunal gave considerable weight to the qualitative anti-competitive effects of the merger. This allowed the Tribunal to conclude that even if no weighting were given

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Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

109 The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

110 In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

111 Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

112 For ease of reference, I produce s. 96 here:

> **96. (1)** The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

113 In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

114 The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

115 Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

116 Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

117 "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that

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91. First, Mr. Harington assumes that ██ of the ███ already-terminated corporate headcount, along with ██ of th███ corporate headcount to be terminated, would need to be rehired in the event of a hypothetical divestiture order, totaling ██ headcount and ████ in lost run rate efficiencies.[140] The specific positions and associated labour savings of the ██ headcount are presented in Table 4 below.

92. Mr. Harington assumes that a potential purchaser would be a hypothetical strategic purchaser with some existing corporate infrastructure, but not in the Western Canada market.[141] He relies on estimates from Mr. Blundell for the number of already-terminated employees who would need to be rehired.[142] However, I understand based on the Clean Harbors Reply Witness Statement that "Clean Harbors would be interested in acquiring some or all of the facilities that Secure is required to divest" and that it "has the necessary back office support to integrate the divested assets in its network" and thus would not have to rehire all ██ positions.[143] As noted above, it is likely that less efficiencies would be lost than claimed by Mr. Harington, in particular corporate based cost efficiencies, as it is likely that the individuals at the absorbing company or companies would have adequate capacity to be able to manage and operate these additional facilities. In addition to the Clean Harbors Reply Witness Statement, the witness statements of White Owl, ████ Catapult, and Green Impact appear to show that these potential purchasers are likely to have the capacity and infrastructure to absorb more of the corporate costs than are estimated in Mr. Harington's analysis.[144]

93. In this regard, it is reasonable to assume that a potential acquirer or set of acquirers would likely not need to rehire ████ roles as assumed by Mr. Harington. Additionally, it is likely that a potential acquirer or set of acquirers would not have to rehire the 2 ████ roles for headcount to be terminated. Such ████ roles are common roles that exist in corporate

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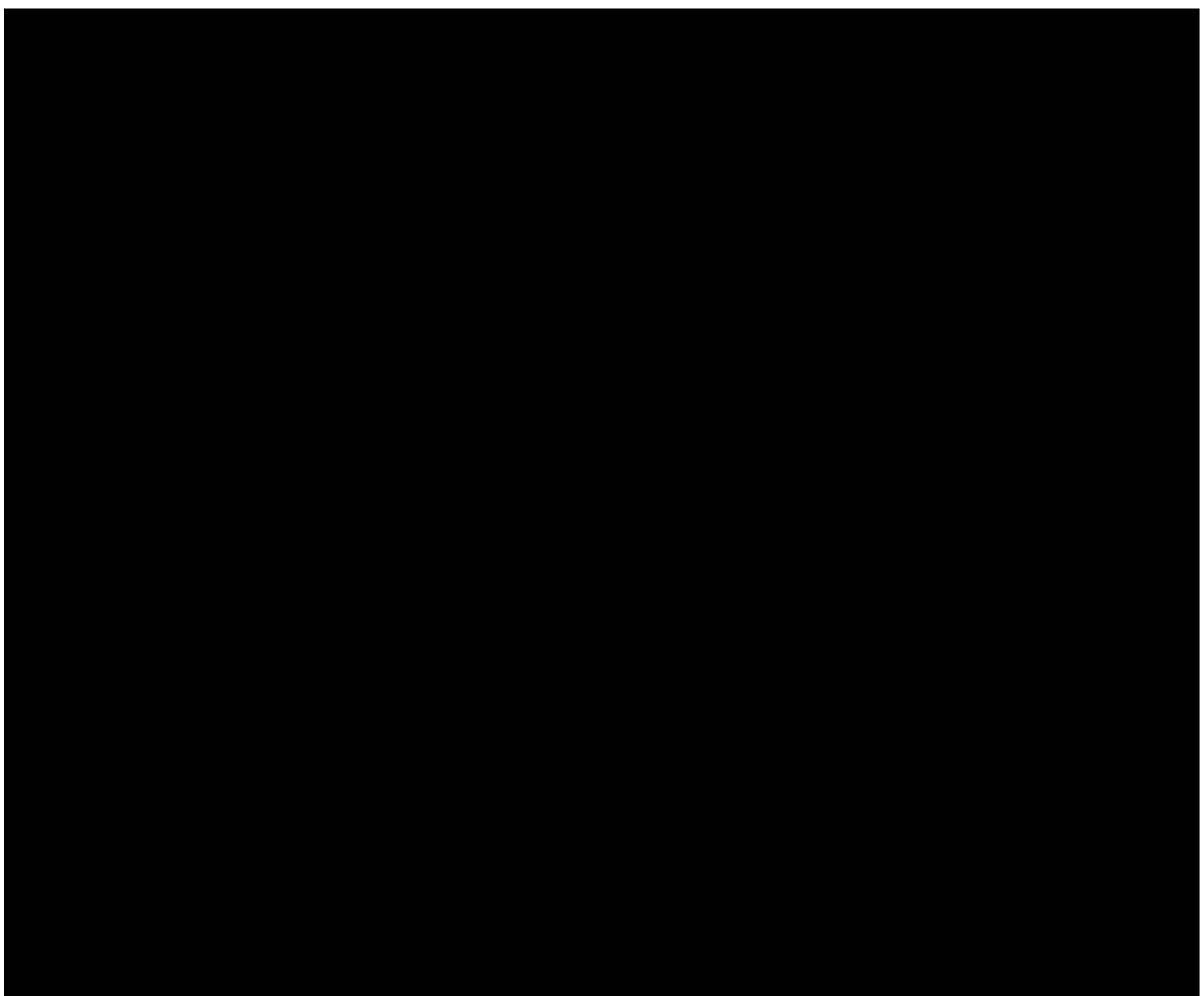
[140] *See* Table 3. *See also*, Harington Report, Schedules 6.2, 6.4.
[141] Harington Report, ¶ 219.
[142] Harington Report, ¶ 220, citing to Blundell Affidavit, ¶¶ 122–124.
[143] Reply Witness Statement of Clean Harbors Canada, Inc., *The Commissioner of Competition v. Secure Energy Services Inc.*, April 8, 2022, ¶¶ 7, 9.
[144] Witness Statement of Ryan Kaminski (Catapult), *The Commissioner of Competition v. Secure Energy Services Inc.*, February 23, 2022, ¶¶ 32–34; Witness Statement of White Owl Energy Services Inc., *The Commissioner of Competition v. Secure Energy Services Inc.*, February 17, 2022, ¶¶ 10–11; ████ Witness Statement of Green Impact Partners Inc., *The Commissioner of Competition v. Secure Energy Services Inc.*, February 25, 2022, ¶ 8.



96. Based on the above considerations, and as shown in Table 4 it is my opinion that the amount of run rating savings lost in a hypothetical divestiture order is at least [REDACTED] lower than Mr. Harington estimates.

J. Gregory Eastman, Ph.D.

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8 topic. You told my friend -- and it says in your witness
9 statements -- that Clean Harbors would potentially be
10 interested in acquiring any waste disposal facilities that
11 the Tribunal might order Secure to divest as a result of
12 this proceeding, right?
13 **MR. McLEAN:** Correct. I just have it in front
14 of me. So if I look to my right, it's because I do have
15 the statement in front of me.
16 **MS. HENDERSON:** Yeah, and please feel free to
17 do that. I know you have your statement in front of you,
18 so if you need paragraph numbers or anything like that,
19 just let me know.
20 And that interest in purchasing facilities is
21 subject of course to the purchase price and Clean Harbors
22 doing its own due diligence?
23 **MR. McLEAN:** That's correct, yes.
24 **MS. HENDERSON:** You have to do that for any
25 acquisition, of course?

1 **MR. McLEAN:** Of course, absolutely, yes.
2 **MS. HENDERSON:** And I take it that those
3 things -- so the purchase price and the result of the due
4 diligence -- could affect how many, if any, facilities
5 Clean Harbors would be interested in acquiring?
6 **MR. McLEAN:** Absolutely, yeah.
7 **MS. HENDERSON:** Is it fair to say that one
8 thing you would probably want to do is to satisfy
9 yourselves that there's enough demand for oilfield waste
10 disposal in a particular area to make sure that your
11 investment in a facility there would be profitable?
12 **MR. McLEAN:** Return on investment, of course,
13 is part of the due diligence process, absolutely.
14 **MS. HENDERSON:** Another form of doing the math,
15 right?
16 **MR. McLEAN:** Exactly.
17 **MS. HENDERSON:** Right. And I take it that at
18 least sometimes it's possible that there's just not enough
19 appetite for a facility in some area to make it worth Clean
20 Harbors' time or money. Is that fair?
21 **MR. McLEAN:** Once again, all part of the due
22 diligence. Correct, yeah.
23 **MS. HENDERSON:** Got it. And with respect to
24 oilfield waste disposal, specifically in doing that due
25 diligence, I imagine that one of the inputs you'd want to

1 consider is what oil production is forecasted to look like
2 in the region around a facility going forward. Is that
3 fair?
4 **MR. McLEAN:** That's one of them, yes.
5 **MS. HENDERSON:** You want to make sure there's
6 production in the area generating waste that people are
7 going to pay you to dispose of?
8 **MR. McLEAN:** It is certainly one of the things
9 you would look at, correct.
10 **MS. HENDERSON:** And of course, you haven't had
11 an opportunity to do any of that due diligence at this
12 phase?
13 **MR. McLEAN:** Specifically, to the Secure issue,
14 we have not done that as part of this phase of the process,
15 no.
16 **MS. HENDERSON:** And then in your Reply Witness
17 Statement, and if you want to look at it just to refresh
18 yourself, it's page 3 of your Reply Witness Statement,
19 paragraph 11. I just want to make sure I have this right.
20 You say that the Commissioner asked you for the
21 purposes of this proceeding to consider a scenario in which
22 Clean Harbors would acquire five to 10 landfills, up to
23 five water disposal wells, and 20 to 25 TRDs. Do you see
24 that?
25 **MR. McLEAN:** I do.

1 **MS. HENDERSON:** And did the Commissioner
2 provide you with a specific list of facilities or just
3 those numbers?
4 **MR. McLEAN:** We were not -- to the best of my
5 knowledge, we were not provided a specific list, no.
6 **MS. HENDERSON:** Okay. So you're considering
7 this scenario without regard, for instance, to geography,
8 like where -- whether the facilities are located close
9 together, far apart, anything like that?
10 **MR. McLEAN:** Yeah. When considering this
11 question -- if this question is brought to you, there are a
12 number of factors that would have to be considered, and
13 that's why it's a very challenging exercise.
14 The staffing of a landfill varies from, you
15 know, it could be four people at a landfill or it could be
16 hundreds of people at a landfill. As I used the analogy to
17 someone else, it's like a restaurant. How many people do
18 you need to staff a restaurant? Well, it's completely
19 dependent on the size of the restaurant and whether you're
20 a 24-hour restaurant or not. So the question's very
21 similar. The amount of staff needed for a landfill is
22 completely dependent on the scope and size.
23 **MS. HENDERSON:** Right. And is your restaurant
24 located, you know, right in the middle of downtown Calgary
25 or is it a -- you know, a rest stop on some quiet highway;

1 right?

2 **MR. McLEAN:** Exactly. There's been landfills

3 that have part-time staff only and they're only open two

4 days a week and they arrange disposal locations and people

5 will drive to that landfill, open it on Tuesday-Thursday,

6 and come back to it next Tuesday and Thursday as an

7 example, correct.

8 **MS. HENDERSON:** So as a general proposition,

9 you'd really need to know what facilities you would be

10 acquiring to make informed judgments about staffing needs.

11 **MR. McLEAN:** It's part of the due diligence,

12 exactly, yeah.

13 **MS. HENDERSON:** Got it. And I won't force you

14 to do much more arithmetic than this, sir, but just summing

15 those numbers up, the scenario we're talking about in

16 paragraph 11 of your reply affidavit would be an

17 acquisition of up to 40 waste disposal facilities?

18 **MR. McLEAN:** So if you added the five to 10,

19 the five, and the 25?

20 **MS. HENDERSON:** Yeah.

21 **MR. McLEAN:** That's approximately in that

22 range. That's correct.

23 **MS. HENDERSON:** Glad I got it right. I'm

24 adding 10, five and 25, and I think that gets us to 40.

25 Last question, last bit of arithmetic. Earlier

1 we talked about the fact that Clean Harbors currently owns
2 two oilfield waste disposal facilities in the Western
3 Canadian Sedimentary Basin, the Ryley landfill and the
4 Calmar well; right?
5 **MR. McLEAN:** Correct.
6 **MS. HENDERSON:** So if Clean Harbors were to
7 acquire 40 facilities from Secure, that would be expanding
8 your existing network by a factor of 20.
9 **MR. McLEAN:** It would be a large expansion,
10 correct.
11 **MS. HENDERSON:** Essentially, an acquisition
12 like that would really be the beginning of having a real
13 waste disposal -- a real oilfield waste disposal business
14 in the Western Canadian Sedimentary Basin. Is that fair?
15 **MR. McLEAN:** It would be a large expansion, for
16 certain. Like you said, we have those main -- we have
17 other facilities, but definitely a large expansion, for
18 sure.
19 **MS. HENDERSON:** And I take it, given our
20 discussion about due diligence and the fact that you don’t
21 know what facilities we might be talking about, that you or
22 anyone else at Clean Harbors haven’t prepared any sort of
23 formal integration plan about how you would integrate those
24 facilities into your existing business.
25 **MR. McLEAN:** Specifically the Secure

1 facilities? We have not prepared a specific integration
2 plan with Secure facilities. That’s correct.
3 **MS. HENDERSON:** Right. And sorry to beat a
4 dead horse, but as I think we’ve said a number of times,
5 you’d need to do -- you need to do your due diligence
6 before you could do that.
7 **MR. McLEAN:** Absolutely we would, as we do when
8 we purchase other facilities. Exactly.
9 **MS. HENDERSON:** Of course. In your first
10 witness statement, so not the reply but your first one, at
11 paragraph 14, which is on page 4, you refer to Clean
12 Harbors as having a shared services administrative model?
13 **MR. McLEAN:** Correct.
14 **MS. HENDERSON:** And am I understanding
15 correctly that what you mean by that is that there are back
16 office employees and resources that support multiple parts
17 of the business?
18 **MR. McLEAN:** Correct.
19 **MS. HENDERSON:** So just to take an example, you
20 don’t need -- you don't need to have multiple in-house
21 lawyers, for instance, supporting every single, you know,
22 different division and segment of the business; right?
23 They share the load.
24 **MR. McLEAN:** Exactly. A shared service model,
25 exactly.

1 **MS. HENDERSON:** Yeah. I use that as an example
2 because no one wants more lawyers than they absolutely have
3 to have.
4 I assume, given the discussion we had earlier
5 about the relative size of Clean Harbors' U.S. and Canadian
6 operations, that many of the back office type employees
7 that support the Canadian business are actually located in
8 the U.S.?
9 **MR. McLEAN:** Many are, absolutely, and I always
10 look at the area code when I call someone because I don't
11 know where they're sitting. They could be -- you know,
12 they could be anywhere in North America many times but,
13 yes, they're all over, for sure.
14 **MS. HENDERSON:** And that's part of that model,
15 right, that that support can be coming -- that support can
16 be coming from anywhere. It doesn't necessarily need to be
17 coming from Canada.
18 **MR. McLEAN:** That's correct.
19 **MS. HENDERSON:** Sorry to jump around. But if
20 we could go back to paragraph 12 of your Reply Witness
21 Statement.
22 Just while the registrar's pulling it up, I
23 assume you're looking for it as well, sir.
24 In discussing this potential acquisition of up
25 to 40 facilities, you review a number of categories of

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1 employees or personnel and consider whether new hiring
2 would be required to support those facilities if Clean
3 Harbors acquired them. Is that a fair summary of what
4 you're doing here?
5 **MR. McLEAN:** Correct.
6 **MS. HENDERSON:** And as you said earlier, this
7 is -- this is difficult to do. This is kind of a
8 back-of-the-envelope kind of thing given all the unknowns;
9 right?
10 **MR. McLEAN:** Yeah. So if you use this specific
11 facility and then if I was to -- if you said this is a
12 facility I wish you to analyze and we would go through the
13 process exactly like that, what's your hours, what's your
14 size, what's your volume, what's your access and egress,
15 you know, et cetera, et cetera, what's your hours, what --
16 you know, you would analyze each one of those and do an
17 integration plan, exactly.
18 **MS. HENDERSON:** My understanding is that that
19 type of integration planning, especially for a large number
20 of facilities like this, can be a very involved process.
21 **MR. McLEAN:** I don't -- it's a -- when you do
22 it, you do it. I don't know how to explain it other than
23 that.
24 It's -- I guess it gets -- as you work through
25 your career, you know what to look for a bit more and you

1 look at -- I just recently did one at a very large facility
2 and I went through -- you look at every shift, you look at
3 every position, you look at every cost and it's -- as
4 people who have done this for a long time, it's what you
5 do.
6 **MS. HENDERSON:** That's right. Some of it
7 becomes a bit -- some of it's almost more of an art than a
8 science; fair?
9 **MR. McLEAN:** You're speaking to a chemist and
10 an engineer, so I don't understand art. I'm sorry.
11 --- Laughter / Rires
12 **MS. HENDERSON:** Fair enough. Let me try and be
13 a little bit more precise about this.
14 The process of integration planning, especially
15 for the acquisition of a large number of facilities, would
16 require a number of different inputs from different parts
17 of your business. Is that fair?
18 **MR. McLEAN:** There's always parts. The
19 actual -- the engineering side, of course. There's the
20 permits and the -- the permits are a critical aspect for
21 analysis. And then you have the HR department, of course,
22 for the employees, whether unionized or non-unionized, for
23 example, is important, whether they're fly-in/fly-out. So
24 there's many aspects to this when you do your due diligence
25 with any merger, acquisition or integration process,

1 absolutely.

2 And you have a team that does that and you have
3 a team leader that's done most aspects of it, and that's
4 part of the process, for sure.

5 **MS. HENDERSON:** Understood. For your
6 information, Mr. McLean, and for the Panel's information, I
7 think I probably have about 10 more minutes.

8 I see the time. I'm mindful that we usually do
9 have a morning break so I'm happy to push through, but I
10 wanted to pause here in case anyone wanted to have a health
11 break at this time.

12 **CHIEF JUSTICE CRAMPTON:** How much more time do
13 you think you're going to be needing?

14 **MS. HENDERSON:** I think I'll be about 10 more
15 minutes.

16 Also, if folks would like to take a short
17 break, a five-minute break to get a glass of water, that's
18 also fine with me. I'm really in your hands. I just
19 didn't want you to think I had forgotten.

20 **CHIEF JUSTICE CRAMPTON:** All right. Well,
21 let's do that, then. Okay. We'll take a short five-minute
22 break given that we may be finishing up pretty soon anyway.

23 All right. So we'll see everyone in five
24 minutes.

25 **DEPUTY REGISTRAR:** The hearing is in recess

1 until 11:27.
2 --- Upon recessing at 11:22 a.m. /
3 Suspension à 11 h 22
4 --- Upon resuming at 11:27 a.m. /
5 Reprise à 11 h 27
6 **CHIEF JUSTICE CRAMPTON:** All right.
7 **THE REGISTRAR:** Are we all ready to start
8 again?
9 **CHIEF JUSTICE CRAMPTON:** Have we got all the --
10 yes, I see Justice Gascon -- is Justice Gascon back?
11 **THE REGISTRAR:** Justice Gascon is there.
12 **CHIEF JUSTICE CRAMPTON:** Okay. Wonderful.
13 **THE REGISTRAR:** The hearing is back in session.
14 Thank you.
15 **MS. HENDERSON:** Thank you for your patience,
16 Mr. McLean. I know it's early in the morning, at least
17 earlier in the morning for you than it is for us. I just
18 have a few more questions for you.
19 I'm looking now at paragraph 12 of your reply
20 affidavit -- your Reply Witness Statement rather. Forgive
21 me. I'm just pulling it up myself.
22 So we talked just before the break about how
23 this is a list of different categories of employees that
24 you might need to operate facilities that you might acquire
25 from Secure. I just want to go through the list and ask

1 you a couple of questions about each one.
2 Subparagraph 12(a) talks about senior
3 management, and you say there is a senior management
4 infrastructure currently in place at Clean Harbors that
5 would not need to be augmented. Do you see that?
6 **MR. McLEAN:** I do.
7 **MS. HENDERSON:** And I take it when we're
8 talking about senior management, we're talking about folks
9 like yourself, but also probably a number of people that
10 are based in the U.S.; is that fair?
11 **MR. McLEAN:** Correct.
12 **MS. HENDERSON:** With respect to subparagraph
13 12(b) in discussing human resources, you note that Clean
14 Harbors already employs about 18,000 people. And I know we
15 talked this morning that that number might be fluid, it
16 might be closer to 20 now?
17 **MR. McLEAN:** Correct.
18 **MS. HENDERSON:** And just to confirm, this
19 morning, earlier this morning, we talked about how probably
20 the number of employees in the U.S. versus Canada is
21 probably five times or greater, in and around there?
22 **MR. McLEAN:** Correct.
23 **MS. HENDERSON:** So I take it most of the HR
24 staff that you're talking about in this paragraph would
25 also be located in the U.S.?

1 **MR. McLEAN:** Actually, we have a very large
2 portion are located in Canada, actually. The ratio is
3 different. I think we have a very large portion of HR
4 staff actually are more Canadian than American in some
5 circumstances, yes.
6 **MS. HENDERSON:** And I'm not looking for a head
7 count. But would you be able to give me a rough
8 proportion, how you think that might differ for HR?
9 **MR. McLEAN:** Once again, I apologize, I don't
10 have the exact numbers, but my understanding is that the
11 number -- the ratios are higher in Canada than they are in
12 the U.S.
13 **MS. HENDERSON:** And I'm not trying to force you
14 to guess, but maybe, to see if we could pin it down a bit
15 more, would it be closer maybe to 3:1 rather than 5:1?
16 **MR. McLEAN:** I hesitate to provide numbers.
17 Yet again, back to the chemist and engineer thing. I
18 hesitate to provide numbers that I don't have the answers
19 for. But my understanding, we have a lot of our workforce
20 in Canada are union and there's a lot of dealings and
21 specialties associated with this, so hence why it's my
22 understanding is there is a larger ratio, or at least there
23 was at one point. And once again, I don't have the numbers
24 to support it. That is anecdotal, I'm sorry.
25 **MS. HENDERSON:** No, fair enough. Subparagraph

1 12(c), you talk about operations staff and note that what
2 employees you might have to hire to operate these
3 facilities would depend on what employees are part of the
4 divestiture agreement. Do you see that?
5 **MR. McLEAN:** I do.
6 **MS. HENDERSON:** So fair to say what you're
7 assuming here is that you'd be purchasing facilities that
8 are currently operating, that have employees on staff,
9 where you'd basically acquire the employees as part of the
10 transaction?
11 **MR. McLEAN:** That is a common occurrence, yes.
12 **MS. HENDERSON:** Right. I know you're acquiring
13 the employment contracts, not the people, but I think we're
14 on the same page about what that means.
15 **MR. McLEAN:** Yeah, correct.
16 **MS. HENDERSON:** Of course, if you were -- you
17 understand, I take it, based on your past experience, that
18 an oilfield waste disposal facility can be temporarily
19 closed or shut in?
20 **MR. McLEAN:** I've heard that, yes. I've heard
21 some just due to lack of inventory production in the area,
22 it's clear that they're not always operating, or they
23 operate on a seasonality or rotating schedule, exactly.
24 **MS. HENDERSON:** Right. And if you have a
25 facility that's been closed or shut in, there wouldn't

1 necessarily be any employees there for you to take.
2 **MR. McLEAN:** That would seem logical, yes.
3 Correct.
4 **MS. HENDERSON:** I just wanted to talk about
5 expertise a little. I think you alluded earlier to the
6 fact that you need employees with specialized kinds of
7 expertise to operate landfills that can accept oilfield
8 waste. Do I have that right?
9 **MR. McLEAN:** Definitely many do. For example,
10 an excavator operator, you can rotate those around. There
11 is many of the operator positions, the labour positions,
12 that are very similar throughout. But there are obviously,
13 certain other positions that require expertise, correct.
14 **MS. HENDERSON:** And would you agree with me
15 also that TRDs in particular, require operations staff with
16 specialized kinds of expertise?
17 **MR. McLEAN:** They are, but there's also the
18 transporter ones, like centrifuge and filter press
19 operators. The focus on a TRD yet again is one of those
20 two separation technologies. So using Clean Harbors as an
21 example, we have a large centrifuge -- fleet of centrifuge
22 operators. So you know, if you acquired a TRD, those
23 centrifuge operators or filter press operators would have
24 those transferable skills.
25 **MS. HENDERSON:** Fair enough. I'm thinking a

1 little bit more about some of the back office expertise you
2 might actually need if you were operating a large number of
3 TRDs. Based on your experience at Tervita and its
4 predecessors, is it your understanding that if you're
5 operating TRDs, you need to have production accountants who
6 know how to track and report the different types of waste
7 volumes that are accepted at the facility?
8 **MR. McLEAN:** My understanding -- at Tervita,
9 they did not report to me, so I want to be clear, I did not
10 have that branch reporting up under me, so I don't want to
11 pretend I did in any way, shape, or form. But yes, -- but
12 waste tracking whether it's TRD landfill or production
13 oils, it is essential and there are back office reports
14 required, absolutely.
15 **MS. HENDERSON:** And based on our discussion
16 earlier, that's based on both because you need to report
17 those volumes to the regulator, and also because the
18 customers want an accurate reporting of those volumes.
19 **MR. McLEAN:** And inventory control as well.
20 You have to know your capacities, your remaining air space,
21 your well space, it's all essential, yes.
22 **MS. HENDERSON:** And that's a specialized skill,
23 that type of tracking?
24 **MR. McLEAN:** It's a skill that a person has to
25 have to be successful at their job, correct.

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1 **MS. HENDERSON:** And is it your understanding
2 that the operation of a TRD requires the operator to have
3 crude oil marketing staff?
4 **MR. McLEAN:** Not the operations level of the
5 TRD, they would not require that, to my understanding.
6 **MS. HENDERSON:** Not, not the on-the-ground
7 operations, but to effectively operate a network of TRDs,
8 you need to have people in the back office that are doing
9 the crude oil marketing?
10 **MR. McLEAN:** Yeah, located somewhere within the
11 business structure, you would require that position or that
12 skill set, I believe is fair.
13 **MS. HENDERSON:** And that's not something that
14 Clean Harbors currently does?
15 **MR. McLEAN:** Within the Safety Kleen branch,
16 I'm not certain where that lies because we have the bulk
17 product service, it's called BPS, which is Safety Kleen
18 also. So there's Safety Kleen Environmental, which is what
19 reports to me, but then there's Safety Kleen Bulk Product
20 Service, BPS, which own the three refineries and a lot of
21 those large ones. So within that division, I'm not certain
22 if they have that group or not. But that's where our
23 re-refining and our bulk oil gets collected and then
24 re-refined report centre.
25 **MS. HENDERSON:** As part of the operation of a

1 TRD, whether on the ground or somewhere else in the
2 business, you need employees to schedule oil product
3 deliveries and pipeline shipments?
4 **MR. McLEAN:** Absolutely is my understanding,
5 yes.
6 **MS. HENDERSON:** And operating a network of
7 TRDs, you would need at least some emergency management
8 staff with knowledge and expertise about the safety issues
9 that pertain to TRDs specifically?
10 **MR. McLEAN:** I would think, yeah, absolutely,
11 you need staff to understand emergency procedures at all
12 your facilities, correct.
13 **MS. HENDERSON:** And what I'm getting at is,
14 there would be at least some different emergency management
15 procedures that would apply at TRDs than potentially other
16 types of facilities that Clean Harbors operates?
17 **MR. McLEAN:** I don't know that. I'd have to
18 read the plans. I've never actually read a TRD operational
19 emergency plan, so I can't comment on the difference
20 between those. I'm sorry.
21 **MS. HENDERSON:** Fair enough.
22 Returning to subparagraph 12(d) of your Reply
23 Witness Statement, you refer to finance and say that:
24 "Clean Harbors does not anticipate
25 having to hire additional employees in

1 this department."
2 Again, I take it that the majority of your back
3 office finance support are located in the U.S.?
4 **MR. McLEAN:** For my business units, all my
5 finance people are actually within Canada. The Canadian
6 group does report up to corporate, which is in the U.S.
7 **MS. HENDERSON:** So there's at least some
8 finance support coming from the U.S. offices?
9 **MR. McLEAN:** Yes. My financial groups, the
10 leader for Canada, does report into an SVP in the U.S.,
11 correct.
12 **MS. HENDERSON:** Then with respect to legal, I
13 think we were agreed that people don't need -- people don't
14 want any more lawyers than they absolutely need to have. I
15 take it that --
16 **MR. McLEAN:** No, that was your statement. I
17 never agreed or disagreed.
18 That was your statement.
19 --- Laughter / Rires
20 **MS. HENDERSON:** I think I saw Chief Justice
21 Crampton agreeing with me, but we'll leave it there.
22 Again, just to clarify, most of the legal
23 department of Clean Harbors is located in the U.S.?
24 **MR. McLEAN:** Correct.
25 **MS. HENDERSON:** Would that, you know, 5:1 or

1 greater ratio apply to legal, would you say?
2 **MR. McLEAN:** All the legal I deal with are U.S.
3 based, so I -- that's all I can say.
4 **MS. HENDERSON:** Got it.
5 **MR. McLEAN:** We hire -- I'm sorry to add on.
6 We hire local counsel as needed so we have
7 contracts with geographically local counsel. So if I have
8 an issue in British Columbia, we hire local counsel in
9 British Columbia, et cetera, et cetera. That's how we do
10 it.
11 **MS. HENDERSON:** Got it. And when you say
12 "local counsel", you mean external counsel, like a law
13 firm, as opposed to in-house lawyers that work for Clean
14 Harbors.
15 **MR. McLEAN:** Thank you for clarifying, yes.
16 **MS. HENDERSON:** I just wanted to make sure we
17 had the same understanding, and then those external lawyers
18 that you hire would be instructed by your U.S. counsel,
19 potentially?
20 **MR. McLEAN:** Correct, to my understanding.
21 **MS. HENDERSON:** Just a few more.
22 Transportation. Subparagraph 12(e) of your
23 Reply Witness Statement, you acknowledge here that if you
24 were to acquire up to 40 facilities, Clean Harbors may have
25 to augment its fleet of trucks?

1 **MR. McLEAN:** Potentially, yes.
2 **MS. HENDERSON:** And that's my only point. You
3 don't know how many trucks you might need. You'd have to
4 know the number of facilities and where they're located to
5 make an informed assessment about that?
6 **MR. McLEAN:** Absolutely, yeah. You have to
7 know what the waste streams are, what type of trucks are
8 required, the number of trucks, whether you go to third
9 party and sign an exclusive contract with a third party.
10 There's a lot of math to be done on that clause, but yes,
11 that's correct.
12 **MS. HENDERSON:** And I take it -- skipping ahead
13 a little bit to subparagraph 12(g), I take it that much the
14 same is true for regional management staff, how many of
15 them you might need would depend on the number of
16 facilities you were acquiring, what geographies they were
17 located in?
18 **MR. McLEAN:** Number, size and geographies.
19 Correct, yes.
20 **MS. HENDERSON:** Right. And given that you
21 haven't had an opportunity to do due diligence, Clean
22 Harbors hasn't assessed any of that in detail?
23 **MR. McLEAN:** We have not assessed that with
24 regard to Secure in detail, no.
25 **MS. HENDERSON:** Subparagraph 12(f), information

1 technology, you mention that Clean Harbors has significant
2 IT and client support resources, as I would expect a
3 company your size to have.
4 Again, I take it that most of those employees
5 are based in the U.S.?
6 **MR. McLEAN:** Yes. We do have a large Canadian
7 presence, though, throughout Canada, but at the end of --
8 the Chief Information Officer is in the U.S. That's
9 correct. Chief IT is in the U.S.
10 **MS. HENDERSON:** Yeah. Again, would it be fair
11 to say that that 5:1 or greater ratio would apply?
12 **MR. McLEAN:** I believe -- I think that's fair.
13 I think that's fair.
14 **MS. HENDERSON:** Just generally speaking, if
15 Clean Harbors were to acquire 40 oilfield waste disposal
16 facilities, I take it you would expect those facilities to
17 generate a significant amount of business, at least that
18 would be your hope?
19 **MR. McLEAN:** Back to what size facilities are
20 they, how much do they operate, it's all return on
21 investment, so it depends on the size of the 40 facilities
22 is directly proportional to what you would expect from
23 them.
24 **MS. HENDERSON:** And again, those specifics --
25 depending on those specifics, Clean Harbors could

1 potentially require additional business development or
2 marketing staff to serve that new network of facilities?
3 **MR. McLEAN:** It depends on the facilities yet
4 again. Some of them would come with contracts, so are
5 you -- do you need more marketing or business staff, or is
6 it the reassignment of a contract from a producer that
7 maybe one of those facilities is only serving a handful of
8 producers and you have contracts that are assignable. I
9 don't know. It's all part of the due diligence once again.
10 **MS. HENDERSON:** You could possibly need
11 additional accounts receivable and payables staff for a new
12 network of facilities like this?
13 **MR. McLEAN:** Yet again, if that facility is
14 servicing a handful of clients and you have contracts, the
15 process becomes quite -- most of them are automated. It's
16 a very automated system, so it's very specific. Yeah, very
17 specific.
18 **MS. HENDERSON:** And I was going to ask the same
19 question with respect to accounting or more senior finance
20 employees. But is it fair to say that, really, it depends
21 on whether you're getting any employees from the facilities
22 you're acquiring and then the size of the facilities and
23 where they're located that's going to drive all those
24 decisions about staffing?
25 **MR. McLEAN:** Yeah. The operational staff on

1 the facility is one component of it, whether there's five
2 or 50 -- just, of course, just random numbers -- but the
3 number of clients and the complexity of the invoicing for
4 those clients and the complexity of their payment schedules
5 are all a huge part of the back room things as well.
6 Some of your major producers, it's an automated
7 invoicing process on a daily basis, it could be on a
8 monthly basis, and the invoicing approval process is
9 dependent upon those producers. So it really is -- it
10 really has to be analyzed closely for each operational
11 facility.
12 **MS. HENDERSON:** I guess -- here again, the
13 analogy that applies is the one we were talking about
14 earlier about opening a restaurant, where is it, how big is
15 it, what do you sell, et cetera.
16 **MR. McLEAN:** Yeah. And to complicate it
17 slightly more, if that restaurant only services one client
18 and at the end of the month you just sent them one bill for
19 everyone that ate there like a corporate cafeteria, that's
20 very easy, relatively speaking, as opposed to a public
21 restaurant where you had 1,000 clients a day.
22 So the complexity varies immensely depending on
23 how that facility -- whether it's set up to service a
24 couple of clients or, for example, a regional district
25 landfill that has almost every homeowner is a new client,

1 and they pay cash. So that's very different.
2 So yeah, it's a lot of -- like you -- it's a
3 lot of homework to be done for each facility and what's
4 required to integrate, for certain.
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12. The answer to this questions is dependent on the number and types of facilities but I describe in more detail below our general expectations with respect to each category:

a. Senior management: the senior management infrastructure currently in place would not need to be augmented;
b. Human resources: Clean Harbors already employees approximately 18,000 people we do not anticipate that the additional employees would require changes in the HR department;
c. Operations: The extent to which additional employees such as energy purchasers; health and safety employees; environmental and regulatory officer; land contracts employee; sales/account managers; business analysts; facility engineers; downhole reservoir engineer; salespeople will depend on the employees that are part of the divestiture agreement. Clean Harbors does have employees who perform some of these functions.
d. Finance and legal: Clean Harbors does not anticipate having to hire additional employees in this department;
e. Transportation: Clean Harbors has a large fleet of trucks and may seek to augment its fleet again depending on the facilities acquired;
f. Information technology: Clean Harbors has a significant IT and client support group that can manage this once the switchover is done;
g. Regional management: Clean Harbors anticipates that it may have to hire additional employees to perform regional management roles. This would be dependent on the number and types of facilities acquired.

13. Clean Harbors has done a number of facility acquisitions before without having to hire additional staff. In fact, sometimes, after Clean Harbors acquires a facility it finds it is able to run the facility with less staff than before.

Signed this 8th day of April, 2022.

Cameron McLean

CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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• there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93(f));

• the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(f)); and

• "the [m]erger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition" (para. 297; see s. 93(e)).

82 I agree with the Commissioner that "the Tribunal did not speculate on what would happen to the Babkirk site .... It made findings of fact based on the abundant evidence before it" (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.

83 Accordingly, the Tribunal's conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.

D. The Efficiencies Defence

84 Tervita raises two issues with respect to the Tribunal's assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal's divestiture order under s. 92, be taken into account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.

(1) History of the Efficiencies Defence

85 Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, Mergers Law and Practice: The Regulation *of* Mergers Under the Competition Act (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981), 5 Can. Bus. L.J. 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the Combines Investigation Act, R.S.C. 1970, c. C-23 (ibid., p. 381). This process "yielded valuable experience laying the groundwork for what was to become the *Competition Act*" (Facey and Assaf, at p. 10).

86 Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, was introduced in the House of Commons in 1985 (1st Sess., 33rd Parl., first reading Dec. 17, 1985, assented to June 17, 1986, s.c. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).

87 A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons*

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Debates, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; and Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (ibid., at pp. 15-17).

(2) Jurisprudential History of Section 96

88 The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev'd on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii(S.C.C.); redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417Competition Trib. (“Superior Propane III”), aff'd2003 FCA 53[2003] 3 F.C. 529 ("*Superior Propane IV*"). Although this Court is not bound by these decisions, the *Superior Propane* cases considered a number of factors relevant to the efficiencies defence and its application.

89 The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).

90 The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other" (para. 95).

(3) Methodological Approaches to Section 96

91 There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the "total surplus standard" and the "balancing weights standard". For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.

92 Producer surplus "measures how much more producers are able to collect in revenue for a product than their cost of producing it" (p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is "a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price" (ibid.). Consumer surplus therefore represents the savings that accrue to consumers from what they would have been willing to pay.

93 The term "total surplus" refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.

94 The total surplus standard involves quantifying the deadweight loss which will result from a merger — "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied" (Facey and Brown, at pp. 256-57). Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" (*Superior Propane IV*, at para. 13). Estimates of the elasticity of demand — or the degree to which demand for a product varies with its price — are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).

95 Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any

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163 I agree with the Commissioner that where environmental effects have economic dimensions, these effects may properly be considered under the s. 96 analysis. Indeed, I do not read the Federal Court of Appeal as saying otherwise. The issue raised by the Commissioner is whether the environmental effects put into evidence by the Commissioner did have an economic dimension. I agree that an effect such as a contingent liability on the books of a company which has to remediate a site is an economic aspect of an environmental effect. However, while there was evidence before the Tribunal with respect to this kind of contingent liability, this evidence cannot be considered in this case.

164 First, there is no evidence as to whether the waste covered by the contingent liability in question fell within the Contestable Area. Second, there is no evidence as to the price elasticity of demand of the customer in question. Finally, and as the Federal Court of Appeal found, if this effect did fall within the Contestable Area, it was quantifiable and therefore should have been quantified by the Commissioner. As explained above, anti-competitive effects which are quantifiable will not be treated qualitatively as a result of a failure to quantify. Therefore, and although the environmental effects in this case had an economic dimension, the Tribunal erred in assessing these effects qualitatively.

(d) Conclusion on the Balancing Under Section 96

165 The Commissioner failed to meet her burden, resulting in the quantifiable anti-competitive effects being assigned a weight of zero. The Federal Court of Appeal properly rejected the environmental effects. There are therefore no proven qualitative anti-competitive effects. Tervita successfully proved quantifiable "overhead" efficiency gains resulting from Babkirk obtaining access to Tervita's administrative and operating functions. In this case, these proven gains met the "greater than and offset" requirement. As there were no quantifiable or qualitative anti-competitive effects proven by the Commissioner, the efficiencies defence applies, and the Federal Court of Appeal was incorrect to conclude otherwise.

166 It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.

(6) Postscript

167 While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created in recognition of the size of Canada's domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. By contrast, this case deals with competition on a local scale and where the operational efficiencies obtained do not appear to have been central to the acquiring party's ability to realize economies of scale to compete in the relevant market. Although I tend to think that this case may not represent one that Parliament had in mind in creating the efficiencies defence, I nonetheless find that the statute as currently drafted supports a finding that the defence is available in this case.

VII. Conclusion

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An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices. (Rutherford and Tyhurst, at 258-259)

76 In the Tribunal's view, the statutory history and, in particular, the introduction of the civil law regime for mergers in the 1986 amendments to the *Combines Investigation Act* indicate that it would be wrong to adjudicate mergers on the basis of the "free competition" doctrine that has been applied by courts at various times in criminal conspiracy matters.

77 The shift in the review of merger from criminal to civil law further indicates the correctness of the "full-blown rule of reason" approach that Gonthier J. distinguished from the "partial rule of reason" that he found to be required by the conspiracy provisions in the *Nova Scotia Pharmaceuticals* case. Except for refusals to deal under section 75 of the Act which does not require a finding of substantial lessening of competition, the Tribunal has decided all cases before it, including mergers, under the full-blown rule of reason. Accordingly, the Tribunal may review all of the effects of an anti-competitive merger when the efficiency defence in section 96 is invoked.

E. Tribunal's Conclusions

78 The Court writes:

> Given the purposes historically pursued by competition legislation and, in particular, the expressly stated purpose and objectives of the *Competition Act*, it is reasonable to infer from Parliament's failure to state expressly that only deadweight loss is to be considered as an "effect" of a merger for the purpose of section 96, that other effects related to the statutory purpose and objectives, including the interests of the consumers of the merged entity's products, must also be taken into account when the trade-off is made between efficiencies and anti-competitive effects. (Appeal Judgment, paragraph 109 at 43)

79 On the basis of the statutory history, the detailed and systematic review of Bill C-91 by the Parliamentary Committee, and the Committee's refusal to delete the efficiency defence or to amend the purpose clause to make consumer protection the primary focus of the legislation, the Tribunal can conclude only that the Committee was well aware that the 1986 amendments to the *Combines Investigation Act* sought goals that differed from the goals historically pursued by Canadian competition legislation. Historically, of course, Canada's merger law did not provide an efficiency defence to an anti-competitive merger. The introduction of section 96 itself indicates that the goals pursued by the 1986 amendments differed from those purposes historically pursued.

80 That the Parliamentary Committee removed the absolute defence of "superior competitive performance" under the proposed abuse of dominance provisions, but accepted the efficiency defence for mergers without amendment is a clear indication that the Committee fully understood the concept of efficiency and the consequences of providing the efficiency defence in merger review. It is clear to the Tribunal that the Parliamentary Committee endorsed the view that efficiency was the paramount objective of the merger provisions of the Act. It is difficult to reconcile these considerations with the Court's conclusion that Parliament did not intend or understand the outcome, or that it intended something else, particularly in light of the various preambles and purpose clauses after Bill C-13 that dropped all reference to equity as a goal of the legislation.

81 When Bill C-91 was introduced on second reading, the Minister stated in the House of Commons that the bill was a major economically-oriented statute:

> ...The report of the Commission on the Economic Union and Development Prospects for Canada underlined the importance of international trade for the Canadian economy by saying that, as much as possible, Canada should use international trade to ensure a continued and aggressive competition on the domestic market.
>
> Mr. Speaker, economically oriented major statutes, such as the laws on competition, bankruptcy, corporations, copyright and trademarks provide the essential tools for orderly trade as they establish the basic rules for a competitive and fair market-based economy. However, most of these instruments are old, inoperative and out of date. Our rules are obsolete, inadequate, and in some cases, more an obstacle than an incentive to productivity. Canadian businesses will have difficulty

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> in taking up the challenge to claim their fair share of international markets and facing the impact of international competition on the domestic market if they are paralyzed by inadequate legislation. Moreover, if our businesses are disadvantaged, all Canadians will suffer.
>
> I therefore believe, Mr. Speaker, that the Members of this House have a clear and pressing responsibility. They must update these statutes, eliminate such obstacles to growth and economic prosperity and see to it that businesses and consumers are treated fairly on the market. (*House of Commons Debates*, (April 7, 1986) at 11926)

While, quite obviously, the government was concerned with fairness "on the market", the primary reason for amending the *Combines Investigation Act* in 1986 was the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international competition to which the government was committed and which would ultimately benefit consumers. Laws on bankruptcy, corporations, copyright and trademarks are concerned with fairness but fairness is not their purpose; those laws are principally concerned with promoting national economic development. Similarly, the Act is a key part of the fundamental framework for economic development. In the Tribunal's view, the portions of the Minister's speech cited by the Court (Appeal Judgment, paragraphs 89 and 91 at 36-37) are indeed consistent with the above-quoted remarks of the Minister.

82 In its Reasons at paragraph 413, the Tribunal concluded that efficiency was the paramount objective of the merger provisions of the Act, and the Court has stated that the Tribunal was correct:

> [90] In spite of the existence of multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective to another. Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be prohibited by section 92. In this sense, the Tribunal was correct to state that section 96 gives paramountcy to the statutory objective of economic efficiency. (Appeal Judgment, at 36-37)

The Court also stated that this conclusion did not limit the definition of effects to be considered:

> [92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects" should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to *all* of the statutory purposes set out in section 1.1. (Appeal Judgment, at 37)

83 The Court instructed the Tribunal to consider redistributive effects but it did not prescribe the method by which the Tribunal would perform its task. The Tribunal must follow this instruction in light of the clear legislative history that indicates that the merger provisions were not driven by the consumer interest. The Tribunal concludes that adopting an approach that prevents efficiency-enhancing mergers in all but rare circumstances must be wrong in law.

V. The Standard or Test to Assess the Efficiency Defence

84 The Commissioner asserts that the full amount of income redistributed by the merger is to be included in the assessment of "effects". The Respondents argue, *inter alia*, that when the appropriate treatment of the redistributive effects (i.e. the income/wealth transfer) is made, the gains in efficiency are sufficient to allow the instant merger to proceed.

85 In the Tribunal's view, the appropriate standard for judging the sufficiency of efficiency gains in relation to the effects of an anti-competitive merger is without doubt the central issue in this matter. The different standards were addressed by the Commissioner's expert witness, Professor Townley, in his report (exhibit A-2081) and his testimony. The Tribunal dealt with alternate standards rather briefly given its acceptance of the Total Surplus Standard. However, in light of the Court's decision, we will now examine the various standards.

A. Price Standard

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142 Commentators on the penultimate version of the amendments to the Act, while calling attention to mergers that increase concentration in the small Canadian economy, write:

> On the other hand, smallness of market also means a greater probability of the existence of non-captured scale and other economies. For this reason, it seems to us essential that when a Canadian merger is challenged, the parties to it be given ample opportunity to offer an economies-capture defence. We must add, however, for this defence to be valid, the economies must occur in real resource use, as contrasted with the mere use of the new-found market power of bigness to squeeze extra "pecuniary" gains out of the profit margins of upstream suppliers, or of downstream processors and distributors. (B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis*, Canada Law Book Inc., Toronto 1987 at 186)

Given the size of the American economy and the historic purpose of American antitrust laws, it is not surprising that the potential for losing scale economies was not a significant concern; indeed, under the Price Standard, such economies worked against the merger.

(5) Small Business

143 As noted above, small business historically received special consideration in the United States. The survival of small, locally-owned enterprises was a key goal of antitrust laws and, as noted above, efficiency considerations in mergers that created large competitors to small business were treated with hostility. While the emphasis of the U.S. antitrust laws on protecting small businesses from competition from larger firms has diminished very markedly, the hostile attitudes toward efficiencies have not.

144 The treatment of small business under Canada's Act is again very different. As the Tribunal noted, the purpose clause of the Act does not protect small businesses from large competitors; rather the Act provides that, under competition, small businesses have an "equitable opportunity" to participate in economic activity. Accordingly, if by virtue of greater efficiency, a merged firm obtains a competitive advantage over smaller, less efficient competitors, the Act finds no violation. If however that merger is anti-competitive, then if the test under section 96 is satisfied, the merger would proceed nonetheless.

(6) Foreign Ownership

145 Another important difference between the two countries is the implicit concern with Canadian ownership and economic control. In light of the degree of industrial concentration in Canada, mergers among large Canadian companies in the same industry would frequently be denied absent a recognized defence. One consequence of this is that large Canadian companies could more easily merge with foreign enterprises since the resulting merged company would less frequently cross the anti-competitive threshold in Canada.

146 It must be remembered that the Act was amended and the efficiency defence inserted therein at the same time as the debate on free trade with the United States and the growing trend toward privatization. In a globally more liberal environment for international trade and investment, the efficiency defence in section 96 allows the possibility that mergers among major Canadian businesses may produce entities that may possibly compete more effectively with large foreign enterprises at home and abroad.

(7) Efficiencies: "merger-specific" v. "order-driven"

147 As stated in the Horizontal Merger Guidelines, claimed efficiency gains must be "merger-specific". Although those Guidelines do not elaborate, this requirement appears to mean that a claimed efficiency gain is not cognizable if it could be achieved in another, presumably less anti-competitive, way.

148 The Tribunal found that the gains in efficiency in the instant merger would not be achieved absent the merger (i.e. if the order were made) and hence could be included in the test under subsection 96(1) (Reasons, at paragraph 462). This requirement is not the same as the one used by the American enforcement agencies. After satisfying itself that the two approaches were not identical, the Tribunal noted the same distinction was addressed in *Hillsdown, supra*, which supported the view that the Act

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Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

the first such situation, excess profits from sales to non-residents should be excluded. The second is the case of pre-existing monopsony.

(1) Redistribution to Foreigners

192 While advocating that the entire amount of the redistributed income be included as an effect for the analysis under subsection 96(1), counsel for the Commissioner suggests, in response to a question from the Tribunal (Transcript, vol. 1, October 9, 2001, at 68, lines 18-23) that there may be circumstances where the Tribunal should use its discretion to do otherwise. One instance is a merger of Canadian exporters following which the price increase is paid very largely by foreign consumers. In this case, counsel submits that the domestic component of the wealth transfer may be quite modest and the large component falling on foreign consumers could be ignored. The Tribunal should use its discretion to disregard the latter and therefore give the total wealth transfer less weight; accordingly, significant efficiency gains in comparison with the loss of efficiency (i.e. a small deadweight loss) and other effects could well allow the anti-competitive merger to proceed (Transcript, vol. 1, October 9, 2001, at 72, line 15, at 73, line 6).

193 The respondents argue, similarly, that many of Superior's largest customers are foreign owned companies and that the effect of the transfer on these foreign shareholders is not an adverse effect that should be considered (Memorandum of the Respondents Superior Propane Inc. and ICG Propane Inc. in Relation to the Redetermination Proceedings ("Respondents' Memorandum on Redetermination Proceedings"), paragraph 136 at 62).

194 The Tribunal notes that international aspects of the application of section 96 have been raised previously, most notably by Madame Justice Reed in *obiter dicta* in the *Hillsdown* decision. Reed J. queried whether the Act required neutral treatment of the redistribution of income consequent to an anti-competitive merger of foreign-owned firms located in Canada, as the excess profits earned on sales to Canadian consumers would flow to the foreign shareholders. It appears that the hypothetical situation posited by counsel to the Commissioner is the opposite of that characterized by Reed J.

195 The international ramifications of section 96 have been discussed by the American Professor Ross whose article was cited with approval by the Court. He posits an anti-competitive acquisition under the Act in Canada of a Canadian-owned firm by an American-owned firm where efficiency gains are large but accrue only in the United States; yet consumers pay higher prices, there are significant layoffs in Canada, and the deadweight loss is small. He concludes that under a "...*total world welfare*" standard, such merger would be approved, but under the "...*consumer surplus* model (roughly followed in the United States)", it would be blocked. He further concludes that under a "...*total Canadian welfare* model", the merger could be blocked by excluding the efficiency gains in the United States, but this raises serious questions of discrimination under Canada's international obligations under NAFTA and GATT. Accordingly, for this reason, and because he endorses the American approach to efficiencies generally, he doubts that the Canadian Parliament intended a standard other than the Consumer Surplus Standard (Ross, at 643-644).

196 Under the purpose clause of the Act, the purpose thereof is to maintain and encourage competition in Canada in order, *inter alia*, to promote the efficiency and adaptability of the Canadian economy. Accordingly, in the Tribunal's view, efficiency gains and deadweight loss (i.e. losses in efficiency) in foreign markets resulting from an anti-competitive merger in Canada are to be excluded in the application of section 96. This is clearly stated in the statute and is not a discretionary matter for the Tribunal. Accordingly, if the deadweight loss in foreign markets is an excluded effect, so are all other effects in foreign markets. In the Tribunal's view, the Act does not endorse a "*total world welfare*" standard.

197 A "*total Canadian welfare* standard" as defined by Professor Ross may or may not be discriminatory under Canada's international obligations, but the Act is not. In the Tribunal's understanding, those obligations require "national treatment" in the application of Canadian laws. Accordingly, if efficiency gains and effects in foreign markets are excluded when reviewing an anti-competitive merger of two Canadian-owned firms in Canada, the same exclusion must be accorded if those merging firms are owned by non-residents. In Professor Ross' hypothetical, the anti-competitive merger of an American-owned and a Canadian-owned firm would be blocked under the Total Surplus Standard (even if consideration of the layoffs was excluded) because there are no gains in efficiency in Canada.

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CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

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Section V

OTHER DISCLOSURES

PRINCIPAL HOLDERS OF COMMON SHARES

As of March 15, 2022, to the knowledge of our directors and executive officers, no person beneficially owns or controls or directs, directly or indirectly, 10% or more of the outstanding Common Shares, other than as set forth below.

Shareholder name	Number of shares held	% of Issued and Outstanding Shares
Angelo Gordon & Company L.P.	46,889,867	15.1%[(1)]
Solus Alternative Asset Management, L.P.	38,225,295	12.3%[(1)]

Notes:
(1) Calculation based on 309,617,803 Common Shares outstanding on March 15, 2022.

INTEREST OF INFORMED PERSONS IN MATERIAL TRANSACTIONS

None of the directors or executive officers of SECURE, no proposed nominee for election as a director of SECURE, nor any person or company that beneficially owns, or controls, or directs, directly or indirectly more than 10% of the voting rights attached to all outstanding voting securities of SECURE, nor any of their respective associates or affiliates, has or has had any material interest, direct or indirect, in any transaction since January 1, 2021 or in any proposed transaction which has materially affected or would materially affect SECURE or any of its subsidiaries.

INTEREST OF CERTAIN PERSONS OR COMPANIES IN MATTERS TO BE ACTED UPON

None of the directors or executive officers of SECURE in 2021, no proposed nominee for election as a director of SECURE, nor any of their respective associates or affiliates, has or has had any material interest, direct or indirect, in any matter to be acted upon other than the election of directors or the appointment of auditors.

CEASE TRADE ORDERS, BANKRUPTCIES, PENALTIES OR SANCTIONS

Cease Trade Orders

Other than as disclosed below, no directors or executive officer is, or has been in the last ten years, a director, chief executive officer or chief financial officer of any company that: (i) was subject to a cease trade or similar order or an order that denied the relevant company access to any exemption under securities legislation for a period of more than 30 consecutive days that was issued while the director was acting in that capacity; or (ii) was subject to such an order that was issued after the proposed director ceased to be a director, chief executive officer or chief financial officer and which resulted from an event that occurred while that person was acting in such a capacity.

Mr. Thornton was a director of Obsidian Energy Ltd. (formerly Penn West Petroleum Ltd. ("**Penn West**")) from June 26, 2013 to February 20, 2019. On July 29, 2014, Penn West announced that the audit

Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

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60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
- savings resulting from a reduction in output, service, quality or product choice.

Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

12.23 In addition to direct effects in the relevant market, the Bureau also considers price and non-price effects in interrelated markets. For example, mergers that are likely to

63 Consideration will only be given to alternative merger proposals that could reasonably be considered practical given the business realities faced by the merging firms.

64 The market realities of the industry in question will be considered in determining whether particular efficiencies could reasonably be expected to be achieved through non-merger alternatives. This includes growth prospects for the market in question, the extent of excess capacity in the market, and the extent to which the expansion can be carried out in increments.

65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

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would arise in attempting to "unscramble the egg" if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical "unscramble the egg" undertaking concerned with the intermingling of assets.

118 The evidence in this case does not support Tervita's claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

119 The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

120 For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).

(5) The Balancing Test Under Section 96

121 Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on the Commissioner's failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) The Commissioner's Burden

122 As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

123 Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

124 The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

125 The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a

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403 The Tribunal is of the view that the respondents bear the burden of proving all of the elements of section 96 on a balance of probabilities, except for "the effects of any prevention or lessening of competition", which must be demonstrated by the Commissioner.

(6) Role of Efficiencies under the Act

404 The Commissioner reminds us that section 1.1 states that the purpose of the Act is to "maintain and encourage competition in Canada" and that competition is not seen as an end in itself, but rather as a means to achieve the four objectives identified in section 1.1. The Commissioner further submits that no hierarchy is established among those "potentially conflicting" objectives. The Commissioner argues that it becomes clear when sections 96 and 1.1 are read together, that a section 96 defence will prevail only when a merger enhances the objectives of competition policy more than it diminishes them. The Commissioner argues that the Tribunal must decide whether Canadians and the Canadian economy are better off with or without the merger.

405 The respondents submit that the Commissioner's interpretation of section 96 is wrong since section 96 is not subordinate to the purpose clause of section 1.1. Further, the respondents suggest that where there is a conflict between a purpose clause statement and a substantive provision, the latter must prevail.

406 There are significant differences in the positions of the parties as to the proper interpretation of sections 1.1 (the purpose clause) and 96 (the efficiency exception) of the Act. Many of the issues raised are of long standing, in part because there have been so few litigated mergers in Canada since the Act was amended. In particular, no decision in a litigated merger has turned on the question of efficiency gains and hence it appears to the Tribunal that there is considerable confusion over the meaning of certain key terms. Before dealing with the positions of the parties, the Tribunal will set out its understanding of the relevant sections of the Act.

407 The Act seeks to obtain the benefits of a competitive economy. As set out in the purpose clause, these benefits, which we have characterized as the objectives of competition policy, are economic efficiency and adaptability, the expansion of opportunities for Canadian participation in world markets and openness to foreign competition at home, opportunities for small businesses to participate in economic activity, and competitive consumer prices and product choices. Under the purpose clause, the Act seeks to achieve these objectives by maintaining and encouraging competition. To this end the Tribunal may, pursuant to section 92 of the Act, order divestiture where a merger is found to prevent or lessen competition substantially.

408 There was some discussion at the hearing concerning the status that should be given to the stated objectives, particularly whether the ordering of objectives in the list contains any useful information in interpreting the Act. Such discussion is misdirected; the true goal specified in the purpose clause is the maintenance and encouragement of competition. It is noteworthy that the Act does not give the Tribunal the powers to achieve the objectives individually.

409 For example, small businesses are not protected under the Act. The purpose clause indicates only that the opportunities for small businesses to participate in economic activity will result from maintaining and encouraging competition. Hence, no other powers are needed to realize this objective.

410 Accordingly, the listing of objectives of competition policy simply presents the rationale for maintaining and encouraging competition. No hierarchy among the listed objectives is indicated and hence no meaning can be taken from the order in which the listed objectives of competition policy appear in the purpose clause. Under the purpose clause, all of the objectives flow from competition.

411 There are, of course, other objectives that could be sought, one such being the proper distribution of income and wealth in society. It is clear, however, that when competition is maintained and encouraged, the resulting distribution of income and wealth may not be the proper one depending on one's political or social outlook. By not including distributional considerations in the list of objectives in the purpose clause, Parliament appears to have recognized this. Indeed, if distributional issues were a concern, Parliament might have felt it necessary to restrict or place limits on competition in order to achieve the proper distribution of income and wealth in society. However, such limits would place competition policy at war with itself.

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bears in practice an evidential burden, that is the burden of leading evidence as to both components of the efficiency defence to alert the Tribunal to what the real, as opposed to the alleged, gains and effects are. In the end, however, the legal burden is on the merging parties to convince the Tribunal, first, that the efficiency gains are of the amount that they have contended, second, that the effects of the lessening of competition are those that they have identified and not those submitted by the Commissioner, and third, that the efficiency gains are greater than, and will offset, the effects.

177 I agree with the respondents that the Commissioner, with his statutory investigative powers, may be in a better position to gather information relevant to the effects and, indeed, that it would have done so in the context of the application of section 92 to which section 96 is a defence. The availability of statutory investigative powers will, indeed, enable the Commissioner to assume his evidentiary burden of gathering and filing relevant evidence to counter and rebut the allegations and evidence of the merging parties as to the effects of the lessening of competition. However, this is not sufficient to transfer the legal burden of proving these effects on the Commissioner. Indeed, there is no rationale and justification for putting on the Commissioner the burden of persuasion on one of the three components of the efficiency defence.

178 In conclusion, I would dispose of the matter as proposed by my colleague, except as to costs where I would make no apportionment in view of my conclusion that the Tribunal also erred on the issue of the legal burden of proof.

Appeal allowed in part.

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157 The Commissioner has the legal burden of proving the extent of the relevant effects, while the respondents have the burden, not only of proving the scale of the efficiency gains that would not have occurred but for the merger, but also of persuading the Tribunal on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects.

158 The appellant should have his costs, but because the respondents were successful on the burden of proof issue, I would reduce the costs awarded by 20% of those otherwise allowable.

***Létourneau J.A.*:**

159 I have had the benefit of reading the reasons for judgment issued by my colleague, Evans J.A.. I agree with him that the interpretation of the word "effects" in section 96 of the *Competition Act* (Act) R.S.C. 1985, c. C-34 involves a pure question of law that falls to be decided on a standard of correctness.

160 I also agree with my colleague that the word "effects" in section 96 of the Act ought not to be limited, as the Tribunal did, to the effects identified by the total surplus standard. As my colleague has pointed out, the interpretation of section 96 of the Act involves balancing market power and efficiency gains. The approach taken in this matter both in the United States and in Canada is by no means free from ambiguity and harsh criticism: see Robert H. Lande, The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust (1988) 33 *Antitrust* 429; David B. Andretsch, Divergent Views in antitrust Economics (1988) 33 *Antitrust Bull.* 135; Alan A. Fisher, Frederick I. Johnson and Robert H. Lande, Price Effects of Horizontal Mergers (1989) 77 *Calif. L.R.* 777; Lloyd Constantine, An Antitrust Enforcer Confronts the New Economics (1989) 58 *Antritrust L.J.* 661; Roy M. Davidson, When Merger Guidelines Fail to Guide (1992), *Canadian Competition Policy Record* 44, at page 46; Stephen F. Ross, Afterword - Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so the World can be More Efficient? (1997) 65 *Antitrust Law Journal* 641, at pages 643-646; Tim Hazledine, Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy (1998) *Review of Industrial Organization* 243; Jennifer Halliday, The Recognition, Status and Form of the Efficiency Defence to a Merger: Current Situation and Prospects for the Future (1999) *World Competition* 91. A review of these authorities reveals that the provision is at best confusing and puzzling. At worst, it can defeat the very purpose of the Act. I reproduce sections 96 and 1.1 for convenience:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront:

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ii) Did the Tribunal err by refusing to consider effects of the merger from a qualitative perspective?

34 By refusing to consider the effects of the merger from a qualitative perspective, the Commissioner argues that the Tribunal failed to follow the directions of the Court to consider all effects. The Commissioner refers to paragraph 233 of the majority reasons:

> In the Tribunal's view, the requirement in subsection 96(1)that efficiency gains must be "greater than" the effects of lessening or prevention of competition favours a quantification of efficiency gains and the effects to be considered, where possible. That a particular effect cannot, even in principle, be quantified does not relieve the Tribunal of assessing the effect in the "greater than" test. Accordingly, where it is possible to quantitatively estimate such effects even in a rough way, perhaps by establishing limits as the Tribunal has done regarding certain qualitative effects, it is desirable to do so where the evidence permits. On the other hand, effects that are, in principle, measurable should be estimated; failure to do so will not lead the Tribunal to view them qualitatively.

35 As I read paragraph 233, the Tribunal was not refusing to consider all effects. On the contrary, the Tribunal acknowledged that it must consider all effects, even if they could not be quantified. Paragraph 233 indicates that where effects are measurable, they should be estimated. The Tribunal goes so far as to say that estimates may even be rough, perhaps by establishing limits. But when it is possible to do so, some quantification must be undertaken. Effects will only be considered qualitatively if they cannot be quantitatively estimated.

36 The Commissioner objects that the Tribunal is imposing a duty to quantify even when the possibility of quantification is only "theoretical". However, the Tribunal's willingness to accept rough estimates, it seems to me, is the practical answer to this objection.

37 Paragraph 233 is guidance to the Commissioner as to the nature of the evidence required to demonstrate the extent of the relevant effects — he must quantify effects where they can be quantified. I think it is understandable why the Tribunal would be of this view.

38 Including the wealth transfer in the effects analysis necessarily involves a significant degree of subjective judgment. The Tribunal's goal appears to have been to minimize the degree of subjective judgment required in the effects assessment process under subsection 96(1). The Tribunal's insistence on quantification, where possible, is to enable it to make the most objective judgment that can be made in the circumstances. In my view, that is not unreasonable.

iii) Did the Tribunal Err by Adopting a Restrictive View of the Merger on Small and Medium Sized Enterprises?

39 In its analysis of the effects of the merger on small and medium sized enterprises, the Tribunal began by considering the question of predatory pricing against competitors by Superior. In my view, the Tribunal rightly observed that there is often a fine distinction between aggressive competition and predatory pricing. In the Tribunal's opinion, there was insufficient evidence of predation of competitors by Superior. The sufficiency of evidence is a matter for the Tribunal to consider and determine.

40 The Tribunal then found there was no evidence that the merger would make it more difficult for potential competitors to enter the market. In the view of the Tribunal, there was no evidence of Superior disciplining competitors. These were matters that had been dealt with in its original decision. No new evidence was advanced on redetermination. As such, these findings were not revisited in the redetermination proceedings.

41 Having regard to the purpose section of the Act, section 1.1, the Tribunal identified the obligation placed on it by the Court as one of considering whether small and medium sized enterprises are denied an equitable opportunity to participate in economic activity. Insofar as competitors were concerned, the Tribunal acknowledged the potential for coordinated pricing by these competitors as a result of the merger; that is, that competitors might, under the umbrella of the merged entity's pricing, charge prices higher than those at competitive levels. However, this was not evidence of competitors being denied an equitable opportunity to participate in the Canadian economy.

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283 The Tribunal expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis, because the socio-economic profiles of consumers and the merged entity's shareholders will not be sufficiently different to warrant a conclusion that the wealth transfer is likely to lead to *socially adverse* Effects. For greater certainty, the cognizable social Effects under section 96 do not include broader social effects, such as those related to plant-closings and layoffs (*Superior Propane Inc.*, at para. 444).

284 In these proceedings, the Commissioner adduced no evidence with respect to *socially adverse* effects. Indeed, in her Final Argument (at para. 208) she conceded that the Merger is not likely to result in any such effects, and that the wealth transfer should be treated as being neutral in this case. Accordingly, the discussion below will be confined to *anti-competitive* effects. In other words, in making its determination under section 96 in the case at bar, the Tribunal will adopt the total surplus approach.

Quantifiable Effects

285 Quantifiable *anti-competitive* Effects are generally limited to the DWL that is likely to result from a merger.

286 In this case, the DWL is the future loss to the economy as a whole that will likely result from the fact that purchasers of Secure Landfill services in the Contestable Area will purchase less of those services than they would have purchased had the Tipping Fees for such services declined due to the competition that would likely have materialized between CCS and Babkirk operated as a Full Service Secure Landfill.

287 The DWL that is likely to result from a merger is likely to be significantly greater when there is significant pre-existing market power than when the pre-merger situation is highly competitive (*Propane*, above, at para. 165). In the case at bar, as in *Propane*, the Commissioner did not adduce specific evidence of pre-existing market power, for example, with respect to the extent to which prevailing Tipping Fees exceed competitive levels. Therefore, the Tribunal is not in a position to quantify the impact that any such pre-existing market power likely would have on the extent of the DWL. Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects. Given the very limited nature of the cognizable efficiencies in this case, it has not been necessary for the Tribunal to attribute such a qualitative weighing to those Effects in making its determination under section 96.

288 As discussed above, CCS submitted that the Tribunal should conclude that there are no quantifiable Effects as a result of the Merger, because the Commissioner did not lead any evidence with respect to such Effects until she served Dr. Baye's reply report, on November 4, 2011. The Tribunal has rejected that position because CCS was not ultimately prejudiced in this regard. The Tribunal will therefore proceed to address the evidence adduced in Dr. Baye's reply report. As will be noted below, the Tribunal is satisfied that CCS would not have met its burden under section 96, even if the quantifiable Effects had been deemed to be zero.

289 At the outset of his reply report, Dr. Baye summarized a number of the conclusions set forth in his initial report, dated September 30, 2011. These included the following:

a. the Merger likely prevents the prices for the disposal of Hazardous Waste generated in NEBC from falling significantly for many customers;

b. the effects of the Merger are unlikely to be uniform across all customers in the relevant market; and

c. the average reduction in the Tipping Fees throughout NEBC is likely to be at least 10%, but the effects are likely to be significantly higher for customers generating Hazardous Waste in the vicinity near Babkirk and Silverberry and lower for customers located near the southern and northern boundaries of NEBC.

290 The Tribunal is satisfied, on a balance of probabilities, that with the exception of the geographic extent of the Effects, the foregoing conclusions are supported by the weight of the evidence that it has found to be credible and persuasive. As to the geographic region over which the aforementioned Effects are likely to result from the Merger, the Tribunal finds that, at a

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paper by Dr. Waehrer that shows that facility closure is not profitable in a second-score auction model unless there are other variable costs savings. I address these concerns in this section.[136]

5.2.1. *Dr. Duplantis' methodological critique based on my use of second-score auction model does not apply to the alternative approach I used to quantify DWL from facility closures*

88. As I explained in Section 3.2, models are approximations that are meant to capture the salient features of markets but are not intended to be perfect representations of them. I view the second-score auction to be a reasonable way to approach this market where there is wide spread price discrimination. I used this model to estimate the DWL using two approaches, the revenue-based approach and the market share-based approach. The revenue-based approach captures the full effect of plant closures on DWL, and the share-based approach captures the effect only on the markets that we specifically delineate.[137] My Initial Affidavit reported estimates of $78 million and $55 million with these approaches, respectively. If I adjust the margins that I used in my Initial Affidavit for the additional variable costs claimed by Mr. Harington, then these estimates are $72 million and $51 million (see **Exhibit 2**).

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[136] To clarify, I used two approaches to quantify DWL from facility closures in my initial report. I called them "profit-based" and "market-share based" approaches. These labels refer to the different information sources I used to estimate the incremental benefit customers derived from closing facilities. I used the second-score model with both the "profit-based" and the "market-share" approaches to estimate the DWL from facility closures. I also used a different model, based on Bertrand competition, with the "market-share" based approach to estimate the DWL from facility closures. Dr. Duplantis criticizes the second-score auction in general and also my "profit-based" approach citing to a theoretical result by Dr. Waehrer. Regarding the "profit-based" approach, she claims that it is inconsistent because it implies that facility closures after the merger would be unprofitable for Secure. Dr. Duplantis does not directly discuss the "market-share" approach using the Bertrand model. Neither of her criticisms apply to the estimates obtained from suing the Bertrand model with the share-based approach.

[137] In the profit-based approach, I estimate the DWL by calculating the profits of closing facilities from their financials and adding them up. This approach is based on the intuition that facilities, with perfect price discrimination, can capture all of the incremental value they generate for customers as profit. When a facility closes, this incremental value (as measured by variable profits) is lost as DWL. In the market share approach, I model consumer demand (logit model) and use the observed consumer choices between facilities (i.e., market shares) to estimate their valuation of a set of available facilities. When the set of available options shrink, consumers' valuation decreases, and this decrease is the DWL. Market shares are informative because, intuitively, facilities that are highly valued by customers would have higher market shares (see Section 7.6 in my Initial Affidavit). This approach is commonly used in the academic literature to estimate the value of new or disappearing products to customers. See, for example, Petrin, Amil, "Quantifying the Benefits of New Products: The Case of the Minivan," Journal of Political Economy, 110 no. 4 (2002): pp. 705–729; Ackerberg, Daniel A., and Marc Rysman, "Unobserved Product Differentiation in Discrete-Choice Models: Estimating Price Elasticities and Welfare Effects," The RAND Journal of Economics, 36 no. 4 (2005): pp. 771–788; Gentzkow, Matthew, "Valuing New Goods in a Model with Complementarity: Online Newspapers," American Economic Review, 97 no. 3 (2007): pp. 713–744. Also see my discussion in Section 4.1.

89. In my Initial Affidavit, I also reported estimates of DWL from facility closures using another standard modeling framework, that of Bertrand competition. In this model, facilities do not price discriminate among customers in the same market (but prices can vary across markets). Therefore, the Bertrand model is not subject to the concerns that Dr. Duplantis raises about whether the second-score auction overstates price discrimination. Dr. Duplantis does not directly comment on my DWL estimate from the Bertrand model.

90. My Initial Affidavit obtains an estimate of DWL due to facility closures of $40 million with the Bertrand model using the market share-based approach. This estimate represents effects within the geographic markets that I delineate, and so are comparable to results from applying the second-score auction model in the share-based approach (which yields DWL estimate of $55 million).[138] If I adjust margins for the additional variable costs claimed by Mr. Harington, then the DWL estimate from the Bertrand model is $37 million (see Exhibit 2).

91. It is not surprising that both the second-score auction model and the Bertrand model obtain comparable levels of DWL from facility closures ($55 million versus $40 million). Both estimates are driven by the fact that many of the closing facilities have large market shares and set prices that are well above

[138] These estimates only measure the DWL in the relevant markets (facilities overlapping draw areas). It does not consider the DWL to customers who may be outside the closed facility's draw area or customers who may be located in parts of the closed facility's draw area that do not overlap with the other merging party's draw areas.

variable costs (i.e., they have high margins). As we observe that consumers select these facilities despite high prices, we can infer that they provide considerable value to consumers. And as margins are high, suppliers gain considerable value (i.e., profit) from the sales they produce. Putting these together, the data indicate that DWL from facility closure is likely to be substantial. The second-score auction model and the Bertrand pricing model simply provide a formal way to interpret these market facts, and combine them into a specific estimate of DWL.

5.2.2. *Responses to Dr. Duplantis' claim that my DWL calculation is inconsistent with the planned plant closures*

92. Now I turn to Dr. Duplantis' critique of my profit-based approach. Dr. Duplantis points to a theoretical result by Dr. Waehrer, that, within the strict confines of the second-score auction model, a merger would not lead the merging firms to close an economically profitable facility unless doing so generates some other benefit, such as lowering costs at other facilities.

93. I do not interpret the finding as evidence that the DWL estimates that I obtain from the second-score auction are unreliable. My profit approach follows from the observation that a facility's economic profitability is related to the incremental value it creates for customers. This observation is based on basic economics, not derived from any modeling assumptions. It is based on consumer rationality (consumers choose services that provide the highest surplus among the options) and firm profit maximization (firms capture at least some of this value). In contrast, Dr. Waehrer's theoretical result is a narrow one proven to hold only for the second-score auction. It does not extend, for example, to variants of the second-score auction that account for some amount of buyer power. It would be inappropriate to discount robust, data-driven estimates of DWL in favor of such a narrow theoretical result.

94. To illustrate why Dr. Waehrer's result is not general, I provide a numerical example that allows for bargaining. Consider a modified model where customer has bargaining power and is able to negotiate the prices.[139] For simplicity, I will continue the example I used in my Initial Affidavit. Recall that I posited an example where there are two facilities and two types of customers.

[139] Dr. Duplantis claims that buyers power exists in this market. Duplantis Affidavit Section III.A.3.

- Customer type I values facility A at $40 and facility B at $20. Customer type II values facility A at $20 and facility B at $40. There are 10 of each type of customer. Each facility can produce the service at $10 cost and also has fixed cost of $100. In my initial report, I described a pricing model where the facilities could extract all the surplus. In that case, customer type I would use facility A and pay $30.[140]
- Suppose that instead, the consumer has bargaining power and can keep some of the incremental surplus. Assuming that the consumer and the producer equally share the surplus from trade, the trade would take place at $20. To see this, consider the range of prices the trade could occur. Facility A would not charge less than $10 (its costs). Customer type I would not pay more than $30 (otherwise it would use facility B at $10 and achieve a higher surplus). With equal bargaining power, they settle on the mid-point, $20.
- The same logic applies to the trade between customer type II and facility B. They also trade at $20.
- In this case, each facility earns $100 in variable profit ($20 price minus $10 cost times 10 customers) and $0 in total profits once the fixed costs are deducted. Each customer type has consumer surplus of $200 ($40 valuation minus $20 price). The total surplus is $400 (adding up all consumer surplus and total profits).

95. Now, consider the situation with a merger where both facilities remain open.

- After the merger, the most facility A can charge is $40, not $30. This is because facility B no longer provides an outside option for consumer type I (i.e., consumer type I can no longer threated facility A that it can use facility B at a price of $10). The lowest price facility A can charge remains at $10. With equal bargaining power, they settle at a price of $25.
- In this case, each facility earns $150 in variable profit ($25 price minus $10 cost times 10 customers) and $50 in total profits once fixed costs are deducted. The aggregate profit of the firm from the two facilities is $100.

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[140] The best offer by facility B is $10, its costs. This offer creates a consumer surplus of $10 ($20 valuation minus $10 price). Facility A can charge $30 (or slightly less), offering the same surplus to the consumer ($40 valuation minus $30 price) and win the sale.

- Each customer type has consumer surplus of $150 ($40 valuation minus $25 price). The total surplus is still $400 as both facilities remain open. The merger changes how this surplus is divided (total profits increase, consumer surplus decreases).

96. What if facility A is closed? Is there a DWL (i.e., decrease in total surplus) and is this closure profitable for the merged entity? The answers are "yes" and "yes."

- If facility A is closed, customer types I and II bargain with facility B. Customer type I pays $15. Customer type I is willing to pay at most $20 and facility B is willing to charge at least $10. With equal bargaining power, they settle at the midpoint of $15. With the same bargaining logic, customer type II pays $25.
- The facility earns $200 in variable profit ($5 from each customer type I and $15 from each customer type II) and $100 in total profits once fixed costs are deducted. Note that the total profits ($100) is not lower than the total profits if both facilities operated ($50 from each facility for a total of $100).[141]
- Customer types I have surplus of $50 ($20 valuation minus $15 price times 10 customers) and customer types II have surplus of $150 ($40 valuation minus $25 price times 10 customers) for a total consumer surplus of $200. The total surplus is now $300 ($100 aggregate profits and $200 consumer surplus), which is lower than the total surplus with both facilities operating. In this example, total surplus decreases when a facility is closed but the profit of the firm is not lower with the closure.

97. This modified example rebuts Dr. Duplantis' criticism that my profit-based approach to quantifying DWL is internally inconsistent because it implies Secure's closing of facilities would decrease its overall profitability. Her criticism is specific to one pricing model (perfect price discrimination) that I used to capture the widespread price discrimination in the market. Her narrow criticism does not invalidate the basic economic fact that firm profits are

[141] Note that with other numerical examples, it may be more profitable to shut down a facility after the merger. In the above example, if Facility A's fixed costs are $150, then merged firm's profit is higher if they operate one facility instead of two.

related to the incremental value the firm creates for customers (a value that is lost if the firm is closed).[142]

5.3. Responses to Dr. Duplantis' claims that there is little to no product differentiation besides the location of plants

98. Dr. Duplantis appears to suggest that my DWL estimate is overstated using two arguments: (1) transportation cost is a primary driver of choices that is observable and (2) the increase in transportation cost I calculated only accounts for less than 10 percent of my DWL estimate.

99. With respect to her first argument, I have discussed other factors that appear to differentiate facilities in the eyes of customers, both in my Initial Affidavit and above (Section 3.2.1).

100. I also explained that differentiation can be inferred from observed data. For example, high markups are an indication of differentiation. Facilities are able to maintain high markups if they provide to customers different features than their competitors. Customers would accept a facility's higher prices if they derive incremental value from that facility. As another empirical observation indicating differentiation between facilities, data show that customers often choose facilities that are not the closest. Based on the Secure and Tervita transaction data, I find that large percentages of transactions for customers (defined as well sites) are for waste sent to farther away facilities when there is a closer facility.[143]

101. Further, the industrial organization and econometric literature has long recognized that there may be characteristics of a product that are valued by customers but may not be observable to the researcher or individually quantifiable. This does not mean, however, that they do not exist. As I explain in Section 4.2, my approach leverages information on observed customer choices and margins to quantify the overall value of closed facilities even with

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[142] When a customer trades with the producer she values higher, the trade creates additional social surplus compared to when she trades with another producer that she values less. This additional social surplus is the difference between her valuation of her first and second choices. The price at which the trade occurs only determines the division of this incremental surplus. Under a pricing model that posits that the producer captures all the incremental surplus (e.g., second-score auction), variable profits are an exact estimate of the additional social surplus created. Under other pricing models, variable profits are a lower bound estimate of the additional social surplus (because some of the social surplus is captured by the customer).

[143] I find that 32 percent of landfill, 59 percent of TRD, and 63 percent of water disposal transactions are at facilities operated by one of the Party facilities that are not the nearest facilities to the well sites generating the waste. See my workpapers.

all characteristics of a facility cannot be observed by the researcher or their values individually quantified. This is a standard approach in the industrial organization literature.[144]

102. I now address Dr. Duplantis' claim that my DWL estimates from facility closures are too large in comparison to my estimate of DWL from increased transportation costs.[145] First, as there appear to be many relevant sources of differentiation that are relevant for customers, it would not be surprising if DWL well exceeds the increase in transportation costs. Still, the approach I took to estimate increased transportation costs in my Initial Affidavit used conservative assumptions that may have led to an understated estimate. For example, I used a conservative assumption on hourly truck rates.[146] I used $██ per hour even though many documents indicate that trucking costs can be as high as $██ (current costs may be even higher with more expensive price of gasoline and diesel). Using $██ per hour would increase the estimate by approximately 42 percent, resulting in predicted transportation costs increases of between $9.2 and $10.2 million.

103. I also note that estimates based only on travel distances do not account for any additional trucking fees incurred due to longer wait-times at the waste service facility, even though trucking fees are paid by the hour and not based on distance.[147] Longer wait-times may occur if the closures increase congestion at

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[144] See, e.g., Berry, Steven T. "Estimating discrete-choice models of product differentiation." *The RAND Journal of Economics* (1994): 242-262; Berry, Steven, James Levinsohn, and Ariel Pakes. "Automobile prices in market equilibrium." *Econometrica: Journal of the Econometric Society* (1995): 841-890; Berry, Steven, James Levinsohn, and Ariel Pakes. "Differentiated products demand systems from a combination of micro and macro data: The new car market." *Journal of political Economy* 112, no. 1 (2004): 68-105; Nevo, Aviv. "Measuring market power in the ready - to - eat cereal industry." *Econometrica* 69, no. 2 (2001): 307-342.

[145] Duplantis Affidavit, Section IV.C.1.

[146] Miller Initial Affidavit, ¶ 226, Exhibit 25. Documentary evidence suggests that the fees may range from $██ to $220. For example, one document assumes a $██ per hour fee to rent a truck in Alberta and ██ in BC. See Email from tnickel@tervita.com to cmacmullin@tervita.com and lgailey@tervita.com, "RE: ██ Volumes," October 15, 2020, TEV00223412, attachment "Trucking Differential – ██ xlsx," TEV00223413. See also TEV00045140 ($190 per hour in BC, else $150); Witness Statement of David Hart (Canadian Natural Resources Limited), February 22, 2022, ¶ 15 ("In deciding which facility to use, CNRL considers the total cost of disposal, which is the cost of trucking plus tipping fees at the applicable waste disposal facility. Trucking costs include time required for loading, unloading and standby/wait times. Trucking costs vary due to a number of factors such as truck availability, fuel and maintenance costs and road conditions (amongst other things) but typically range from ██ per hour in western Canada.").

[147] Several witness statements confirm that wait-times and "turnaround" times are considerations when deciding to which facility they should send waste. Witness Statement of Paul Dziuba, (Chevron), February 24, 2022, ¶ 16 ("These delays increase transportation costs, as transportation costs are charged for both travel time and wait times. They also result in delayed operations at Chevron's sites if waste trucks are not available when required."); Witness Statement of Shanley Bowersock, February 23, 2022, ¶ 13 ("A rate for any additional wait time is usually built into LB Energy's contracts with the producers. In other words, once LB Energy's trucks get to the facility, if there are additional wait times, the producer is charged on a per hour basis for that time. In LB Energy's experience, some facilities have wait times in excess of 6 hours when they are busy."); Witness Statement of ConocoPhillips, February 23, 2022, ¶ 16; SES0045741 ("SECURE is willing to guarantee truck turnaround times

the facilities that remains open.[148] In fact, Mr. Paul Dziuba of Chevron explained that they have been experiencing longer wait times since facilities have been closed as a result of the transaction. According to Mr. Dziuba, wait times are becoming a significant issue and range from 15 minutes up to three hours.[149] Alternatively, if customers have fewer viable facilities from which to choose then, in any given week, there is a higher probability that they must select one with longer wait-times.

104. Wait-times can comprise several hours, wherein one company presentation reported a range of [redacted] hours in wait-times, while the drive-times ranged from [redacted]5 hours.[150] I estimate that trucking waste from customer well sites to closing facilities required around 178,000 trips in 2019.[151] These trips will now be taken to another facility. If trucks experience an additional 30 minutes of wait-time per trip, there would be approximately $13.8 million in additional costs, assuming $[redacted] per hour trucking rate.[152] If I assume a [redacted] per hour trucking rate, the estimate is over $19.6 million.

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of 30 minutes for Cenovus LF loads and cover any additional wait time charges in excess of 30 minutes when at the facility. We are confident that elimination of wait-related charges provides additional operational cost savings to Cenovus."). I understand that facilities may send trucks to other, farther away facilities if there are waiting times, incurring higher transportation costs. For example see, SESL0032727.

[148] For example, TEV00111509 shows that increased volumes also increase waiting times. SESL0032727 shows that high volumes created wait times at some facilities.

[149] Witness Statement of Paul Dziuba, April 8, 2022.

[150] [redacted]); Witness Statement of TAQA [RCFC00002_000000232], ¶ 13 ("Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.").

[151] See my workpapers. While the increased transportation costs from facility closures in my Initial Affidavit only included those customers that would travel farther to reach one of the Parties' facilities post-merger (and closure), other facility closure costs potentially affect all customers of the closed facilities, as well as customers of the facilities that take in waste from the closed facilities' customers.

[152] I have used 30 minutes of additional wait time as an illustration; however, my back-up includes estimates for 15-minute, 30-minutes, 45-minute, and 1 hour increases. See my workpapers. Moreover, my estimates may be conservative based on descriptions of wait-times in the witness testimony. See Witness Statement of Shanley Bowersock, February 23, 2022, ¶ 13 ("A rate for any additional wait time is usually built into LB Energy's contracts with the producers. In other words, once LB Energy's trucks get to the facility, if there are additional wait times, the producer is charged on a per hour basis for that time. In LB Energy's experience, some facilities have wait times in excess of 6 hours when they are busy."); Witness Statement of Chad Hayden, February 9, 2022, ¶ 11 ("However, tipping fees are generally determined by our clients' own negotiations with disposal site operators, and may differ significantly for each client at each potential disposal site. Capacity and wait-times will also vary depending on the site and day; wait times at facilities can be as long as 12 hours. Higher tipping fees, longer wait times, or limited capacity may result in a customer optimally choosing a site that is further from the waste's origin.").

Moreover, these additional costs only account for the added wait-times incurred by customers of the closing facilities. Existing customers of the absorbing facilities may also experience increase in wait-times because of the facility closures. Consequently, my estimate could under-represent the total potential loss caused by increased wait-times.

6. RESPONSES TO MEASURING DWL FROM VOLUME CHANGE

105. In Section 5 of her report, Dr. Duplantis acknowledges that there is DWL that arises due to the increase in prices (and decrease in volume) caused by the merger and puts forth an estimate of DWL. She estimates that the merger will result in $1.2 to $1.6 million DWL depending on the scenario she considers (two divestiture scenarios versus full transaction).[153] Dr. Duplantis' estimates are based on the price impact she calculates from her natural experiment analysis.[154] If the price impact of the transaction is larger (as I estimated in my analysis), her estimates of the DWL from volume reduction would increase. For example, even if the price impact is between my estimates and her estimates, the DWL from the full transaction is around $6 million annually (see **Exhibit 3**).

[153] Duplantis Affidavit, Figure 20.
[154] Duplantis Affidavit, ¶ 168.

1 **CHIEF JUSTICE CRAMPTON:** Okay. Well, unless
2 anyone else would a break now, it might make sense for you
3 to finish your line of questioning, then we'll take a
4 break. And that will provide Justice Gascon and I an
5 opportunity to amend our list of questions because some of
6 what you have asked has covered off what we had been
7 planning to ask in some cases.
8 **MEMBER HORBULYK:** Okay. Thank you.
9 Madam Registrar, could we go to paragraph 134,
10 please, in this same document? And in particular, if we
11 scroll down to the footnote, 160.
12 Dr. Duplantis, I'm just looking for some more
13 explanation of characterization, implications of this
14 comment you've made about partial facility closures in
15 footnote 160. If you'd just take a few minutes to lead us
16 through that, that would be most helpful.
17 **DR. DUPLANTIS:** Sure.
18 Yes. I'm sorry. I've been reading. Would you
19 like me to explain it?
20 **MEMBER HORBULYK:** Yeah, so just a bit more
21 explanation, background, what this is all about, what we
22 know about partial facility closures, how many are there in
23 the total set, what's the status of those facilities, and
24 why you think this overstatement has come up.
25 **DR. DUPLANTIS:** Sure.

1 So Dr. Miller has assumed that the full
2 facility margin as we discussed represents the lost value,
3 the lost incremental value. And so there are facilities
4 that are combination facilities, so some of the SFTs where
5 there is water disposal and a treatment facility on the
6 same location. And so when he -- when there's a partial
7 closure, so Secure is planning or was planning to close
8 let's say, for example, only the water treatment component
9 of that, only the water disposal piece of it, Dr. Miller
10 has incorporated all of the margin for -- across both the
11 TRD or the FST and the water disposal.
12 And so if you only account for the margin that
13 is part of the closure, so the partial closure, so only the
14 piece of it that was closing and not the whole thing, then
15 it actually reduces his facility closure effect by $10
16 million. So some of these facilities had those partial
17 pieces of them and that's where in his workbook, in his
18 backup, we noticed that he didn't account for it correctly,
19 so we just highlighted it here, that the partial closures
20 weren't accounted for correctly.
21 **MEMBER HORBULYK:** And if one wanted to view the
22 calculations you undertook, to support that 10 million, we
23 would look in work paper 2?
24 **DR. DUPLANTIS:** Yes, it would be.
25 **MEMBER HORBULYK:** Okay. That's helpful. Could

anti-competitive merger may frustrate, such as the ability of medium and small businesses to participate in the economy, and the availability to consumers of a choice of goods at competitive prices.

89 Indeed, in moving the second reading of Bill C-91, *An Act to Establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1 st Session, 33 rd Parliament, 1984-85-86, which became the *Competition Act* and *Competition Tribunal Act*, the Minister of Consumer and Corporate Affairs and Canada Post noted *(House of Commons Debates* (April 7, 1986) at 11927):

> The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. *This is the ultimate objective of the Bill*. (Emphasis added)

90 In spite of the existence of the multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective over another. Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be prohibited by section 92. In this sense, the Tribunal was correct to state that section 96 gives paramountcy to the statutory objective of economic efficiency.

91 However, it does not follow from this that the only effects to be weighed against efficiency gains are limited to potential losses to the economy as a whole. Indeed, in the same Parliamentary speech referred to above, the Minister indicated (*Debates*, *supra*, at 11928) that the question posed to the Tribunal is:

> Would a particular merger result in efficiency gains which would offset *any* negative effects on competition? (Emphasis added)
>
> [92] Thus, although section 96 requires the approval of an anti-competitive merger where the efficiencies generated are greater than, and offset, its anti-competitive effects, the ultimate preference for the objective of efficiency in no way restricts the countervailing "effects" to deadweight loss. Instead, the word, "effects", should be interpreted to include all the anti-competitive effects to which a merger found to fall within section 92 in fact gives rise, having regard to *all* of the statutory purposes set out in section 1.1.

(b) "economic"purposes

93 In support of the position that the only effects of a merger that can be considered under section 96 are the resources lost to the economy as a whole, the respondents argued that the Supreme Court of Canada in *Southam* (*supra*, at page 772, paragraphs 48 and 49) authoritatively characterized the aims and objectives of the *Competition Act* as "more 'economic' than strictly 'legal' and as "peculiarly economic". In my opinion, however, these statements are not dispositive of the issue under consideration here, namely, whether the Tribunal's interpretation of "effects" was correct.

94 First, while these statements were clearly directed to the purposes of the *Competition Act* administered by the Tribunal, they were made in the context of the pragmatic or functional analysis conducted to determine the appropriate standard of review. When he used the words quoted above, Iacobucci J. was characterising the purpose of the Act in order to delineate the areas of expertise of the Court and the Tribunal respectively. Hence, they are not decisive in the context of the issue at stake here, namely, determining which effects of an anti-competitive merger may be considered as "effects" under section 96.

95 Second, a characterisation of the objectives of the *Competition Act* as economic does not necessarily lead to the conclusion that it is only permissible to consider as "effects" under section 96 the resources likely to be lost to the economy as a whole. I would have thought that the extent to which a merger is likely to result in the elimination of small and medium sized businesses from a market, or to cause consumers to pay more than competitive prices, are sufficiently "economic" to fall within Iacobucci J.'s characterisation of the aims and objectives of the Act.

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R.S.C., 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

L.R.C., 1985, ch. C-34

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence.*

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficience de l’économie canadienne, d’améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d’assurer à la petite et à la moyenne entreprise une chance honnête de participer à l’économie canadienne, de même que dans le but d’assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Définitions

Définitions

2 (1) Les définitions qui suivent s’appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

choice *per se*, i.e. beyond the effect it has on price or quality of service, which matters have already been considered by the Tribunal (Respondents' Memorandum on Redetermination Proceedings, paragraphs 68-73 at 31-34).

240 The Tribunal recognized that ICG had established certain services and pricing arrangements that Superior and other propane marketers did not offer. (However the Commissioner notes that, in western Canada, Superior offers a program similar to ICG's "Cap-It" arrangement.) In the Tribunal's view, GolfMax and similar arrangements are specialized marketing arrangements and represent ways in which ICG has sought to differentiate itself from its competition in selling propane. The removal of certain specialized marketing arrangements by the merged company would cause a buyer for whom that arrangement was its preferred way of acquiring propane, to select a less-preferred arrangement. As with switching induced by a direct increase in price, this change of arrangements would entail a loss of efficiency as measured, in principle at least, by the deadweight loss and a redistribution of income from buyer to seller. If estimates of these effects could be made, the effects of reduced choice would be captured in the conventional way. If such estimates could not be made, then the effects would have to be established in some other way per the evidence.

241 On the evidence that propane demand was inelastic, the Tribunal concluded that propane consumption would not decline significantly if those marketing arrangements were eliminated. On the evidence, the Tribunal concluded that to the extent that certain marketing arrangements were removed, the deadweight loss therefrom would be "minimal" and "...most unlikely to exceed in amount the estimated deadweight loss..." of $3 million. (Reasons, paragraphs 466-467). In this way, the Tribunal used the available evidence to place an upper bound on the effect on efficiency brought about by the reduction or removal of certain marketing arrangements argued by the Commissioner as a qualitative factor.

242 The Tribunal was directed by the Court to consider the redistributive effects that it ignored initially. However, the Tribunal notes that at the first hearing, the Commissioner did not adduce any evidence on this matter. Rather, the Commissioner was content to argue that the removal/reduction of programs and services should be considered as (negative) qualitative effects. The Commissioner never argued, and hence adduced no evidence, regarding the redistributive effect resulting from this removal/reduction of programs and services.

D. Atlantic Canada

243 The Commissioner submits that the prevention of competition in Atlantic Canada that the Tribunal found in its section 92 inquiry is an effect to be considered qualitatively under section 96 of the Act. The respondents state that there is insufficient information on the record to assess the effect of this prevention of competition and that the Tribunal is *functus officio* in regard to the effects of prevention in Atlantic Canada, except for redistributional effects.

244 The Tribunal accepted that the merger prevents ICG's plans to expand in Atlantic Canada from being implemented. As a result, the price of propane will likely be higher than it would be if the merger did not take place. Accordingly, the possible effects of this prevention of competition in Atlantic Canada would be the efficiency gains and reduction in excess profits that would have resulted from the additional competition that the merger precludes.

245 Having identified and accepted the prevention of competition in Atlantic Canada, the Tribunal must assess the effects of such prevention. The prevention itself is distinguishable from its effects in the same way as above where the Commissioner distinguished between interdependent pricing and the effects thereof. There is no evidence on the record about the extent to which the price of propane would have fallen if ICG's expansion had occurred, and accordingly the possible efficiency gains and redistributional effects that the merger prevents in Atlantic Canada are not directly measured.

246 With respect to the prevented efficiency gains, the Tribunal notes that the Commissioner's calculation of the $3 million deadweight loss included sales by Superior in Atlantic Canada. Such calculation is an indirect way of including the prevented efficiency gains in Atlantic Canada. Though it might be a poor estimate, it was not criticized as such and accordingly, there is no basis or need for the Tribunal to reconsider the deadweight loss effect in a qualitative way. The Tribunal is *functus officio* in regard to the deadweight loss in Atlantic Canada.

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9. These factors are relevant throughout a merger analysis. Non-price factors often are considered by the Agencies and courts in defining the relevant market affected by the merger.[8] A merger that may reduce incentives to provide these valuable features may lead to a reduction in non-price competition.[9] Evidence of the extent of direct competition between the products sold by the merger parties on non-price factors is often the same evidence relied on to determine customer substitution relevant to the hypothetical monopolist test.[10]

3. Modeling price and non-price effects

10. For nearly all products and services, price competition is an important component of competition; the Agencies' analysis will always include an examination of any potential price effects. In many cases, an examination of the merger's potential non-price effects will not be different from the examination of the potential price effects. In some cases, the Agencies can conduct economic analysis or modeling to estimate probable price effects.[11] Because non-price effects tend to be non-quantitative in nature, the Agencies rely less on formal empirical models and more on qualitative evidence to assess the non-price effects of a merger.[12]

[8] See, e.g., FTC v. Sysco Corp., 113 F.Supp. 3d 1 (D.D.C. 2015)(broadline foodservice distribution is a relevant market for national customers that prefer suppliers with a wide selection of products, distinct facilities, timely and reliable delivery, national pricing, and value-add services such as menu planning.)

[9] Id. at 66 ("Sysco and USF are the country's two largest broadliners by any measure. They have far more distribution centers, SKUs, private label products, sales representatives, and delivery trucks than any other broadline distributor. . . . [B]ecause the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market.").

[10] US Horizontal Merger Guidelines §§ 6.1 and 4.1.1.

[11] U.S. submission on Impact Evaluation of Merger Decisions (DAF/COMP/WD(2011)58), available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106impactevaluation.pdf; U.S. submission on Economic Evidence in Merger Analysis (DAF/COMP/WP3/WD(2011)4), available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1102economicevidencemerger.pdf.

[12] Examples of studies analyzing non-price effects of mergers include Gregory J. Werden, Andrew S. Joskow & Richard L. Johnson, The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry, 12 MANAGERIAL & DECISION ECON. 341 (1991); Steven Berry & Joel Waldfogel, Do Mergers Increase Product Variety? Evidence from Radio Broadcasting, 116 Q.J. OF ECONOMICS 1009 (2001); Andrew Sweeting, The Effects of Mergers on Product Positioning: Evidence from the Music Radio Industry, 41 RAND J. OF ECONOMICS 372 (2010); Patrick S. Romano & David J. Balan, A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare, 18 INT'L J. ECON. OF BUSINESS 45 (2011); B.P. Pinto & D.S. Sibley, Unilateral Effects with Endogenous Quality, 49 REVIEW OF INDUSTRIAL ORGANIZATION 449 (2016); and K.R. Brekke, L. Siciliani, & O.R. Straume, Horizontal Mergers and Product Quality, 50 CANADIAN J. OF ECONOMICS 1063 (2017).

parties do not find it profitable to close a facility in the second-score auction model without any additional variable cost savings—to argue that my DWL estimates are internally inconsistent. As I noted in my Initial Affidavit, I view the second-score auction as a providing a reasonable way to estimate DWL from plant closures in this matter. Still, in my Initial Affidavit, I also calculated the DWL using another standard modeling framework (Bertrand), and, this estimate shows a comparable amount of DWL from facility closures. Ultimately, the DWL that I estimate is driven by market facts—in particular that many of the closing facilities have high market shares despite having prices that, on average, well exceed variable cost, which indicate that customers view facilities as differentiated and value this differentiation.

78. Third, Dr. Duplantis appears to suggest that the fact the Parties are viewed by many customers as close substitutes implies that there is very little, if any, differentiation between facilities beyond distance. This is a misguided inference. I have discussed other sources of differentiation above and in my Initial Affidavit. Further, it is a widely accepted notion in the econometric and industrial organization literature that sources of differentiation need not be directly observable to be quantifiable. My method leverages information from the data (which reflects the actual behavior of customers) to quantify the value of product differentiation.

5.1. Potential DWL from loss of options that customers view as differentiated is well established

79. Dr. Duplantis seems to question that there is a DWL from the closure of facilities and claims that my approach is "novel" and "a notable departure from standard methodologies."[124] I disagree with her. Welfare effects due to a loss of product choice is firmly founded in the economic theory of consumer choice. The economics literature and antitrust agencies have widely acknowledged this source of welfare effects.

80. First, to illustrate the DWL from a decrease in volume, consider a market with one firm. A transaction or trade between a customer and the supplier takes place when the value a customer places on the product or the service (or

[124] Duplantis Affidavit, ¶ 16. ("Dr. Miller purports to estimate what he refers to as 'social loss' or 'deadweight loss' from facility closures (what I will refer to in this report as his 'facility closure effect') using novel methods. His facility closure effect is a notable departure from standard methodologies for estimating deadweight loss based on predicted price increases and a resulting output effect that depends, among other things, on the elasticity of demand."). Dr. Duplantis labels my estimate as "facility closure effect" seemingly to distinguish it from "deadweight loss" that she seems to view as limited to "a price increase bring[ing] about a negative resource allocation." See Duplantis Affidavit, fn. 5.

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8 **MR. HOOD:** And just to confirm then, so there
9 can be a deadweight loss even if there is no reduction in
10 output? Is that fair?
11 **DR. DUPLANTIS:** In theory, there could, but
12 again you have to look at the specifics of the case to know
13 whether that's true in any instance.
14 **MR. HOOD:** But at a theoretical level, if I
15 have a town with two grocery stores at either end of the
16 town, and as a result of a merger one is closed, that could
17 result in a loss of consumer surplus even if the volume of
18 groceries purchased remains the same; fair?
19 **DR. DUPLANTIS:** It could in theory, yes.
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8 **MR. HOOD:** Dr. Miller, just before you go on to
9 the other slide, in consumer theory, we typically think of
10 a utility function as being the foundation of demand. But
11 here the customers are firms, they're oil and gas
12 companies, and all they care about are profits as opposed
13 to psychological well-being that a consumer may care about.
14 How does what you've done relate to the utility
15 function?
16 **DR. MILLER:** Thank you.
17 And the answer is that the customers here care
18 about their profit. You know, that's my working assumption
19 when I analyze firms and what they do.
20 So what does that mean in this context? The
21 oil and gas companies, my working assumption, I think, is a
22 reasonable one, and I think it's supported by the
23 testimony, are out to obtain service for their waste at the
24 lowest combined cost and price.
25 And so when I say that there's a match that can

1 be made, what I'm referring to is that some facilities are
2 going to provide the customers with a better match.
3 They're going to be able to provide the customer with a
4 lower price because their cost structure is such that it
5 can serve the customer pretty well or they will be able to,
6 for example, be near the customer, so if the customer used
7 them, they incur lower transportation costs.
8 And there's a whole -- we've seen a fair amount
9 of evidence for things that, in the end, are going to flow
10 to the customer's bottom line, including wait times, okay,
11 the distance. And I've got a list on this and we'll go
12 through it in just a couple slides. So I really want to
13 try to contextualize this for you.
14 But in the end, it's -- you know, I'll use some
15 of the language I use with -- that comes out of consumer
16 utility theory but, you know, it's the same concept except
17 firms are going to be focused on their cost in this setting
18 rather than on, you know -- I don't know what you'd call
19 it, like psychic notions of utility.
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disposal of Surmont waste due to the inherent safety risks (time on the road/distance for drivers, transporting 'Dangerous Goods') and energy expended (greenhouse gas impact of additional driving) associated with travel to and from Tulliby. In addition, using the Tulliby facility, in contrast to a closer facility, results in significant incremental costs for the ~800km round-trip hauling required.

CHOICE OF DISPOSAL SITE

13. ConocoPhillips' choice of waste disposal site is influenced by the facility's ability to accept the type of waste ConocoPhillips' operations generate, and by the total price for its disposal. The total price of waste disposal services is the sum of the cost of transportation fees to a facility and the cost of tipping fees charged by the facility. "Tipping fees" refers to the fees charged for waste disposal by a waste disposal facility or landfill.

applies to a limited scope of work in respect of the disposal of fluid waste at the Boundary Lake facility, and expires in April of 2022. After the merger, both of the Tervita MGSAs were assigned to Secure.

13) On March 31, 2021, the rates for waste disposal services under the Tervita MGSA dated effective June 1, 2017 were due to expire. I participated in the negotiations for the new rates, which commenced in early March 2021 and concluded in early June 2021 with new contract rates that provided additional cost savings to CNRL. The parties were in the process of preparing the updated contract documents to reflect the new rates when the merger between Secure and Tervita was announced. In July 2021, CNRL requested that Secure honour the new rates agreed to by Tervita. In August 2021, Secure advised CNRL that it would not honour the new rates negotiated with Tervita and required that CNRL continue with the higher rates previously in place. Attached as Exhibit C is a confidential August 5, 2021 email from Secure to myself and others at CNRL advising that negotiated rates would not be honoured.

CHOICE OF DISPOSAL SITE

14) CNRL develops disposal plans for waste generated in its operations based on the type and volume of waste streams generated at a particular location, regulatory requirements (e.g. Alberta Energy Regulator ("**AER**") requirements), and the type and proximity of waste disposal facilities available in the relevant area where disposal is required.

15) In deciding which facility to use, CNRL considers the total cost of disposal, which is the cost of trucking plus tipping fees at the applicable waste disposal facility. Trucking costs include time required for loading, unloading and standby/wait times. Trucking costs vary due to a number of factors such as truck availability, fuel and maintenance costs and road conditions (amongst other things) but typically range from [redacted] in western Canada.

radioactive material ("NORMs") must go to a Class I landfill, and waste containing fewer hydrocarbons may go to a Class III landfill.

CHOICE OF DISPOSAL SITE

11. When choosing a disposal site, the primary consideration is total disposal cost, inclusive of transportation. Waste is typically transported by truck from its source to an appropriate disposal site of our choosing. The costs of transportation are significant, such that they often amount to more than the fees paid to a disposal site operator for a given load of waste. For example, trucks can usually carry approximately 35 to 40 tonnes of waste and trucking prices are typically in the range of $180 per hour. For that reason, among others including carbon footprint, driving distance from the waste's source to potential disposal site is a central consideration when choosing a site.

12. Availability and capacity at nearby disposal sites is also a factor impacting this choice. Sometimes landfills are full or closed, and this can require travelling further to access alternative landfills. Disposal wells can also be capacity constrained with lengthy wait times, particularly in periods with lots of drilling.

13. Transportation costs tend to be measured in time, as trucking companies will quote a price per hour. Transporting waste further than otherwise necessary, such as when a facility is full or closed, can significantly increase the total cost of disposal.

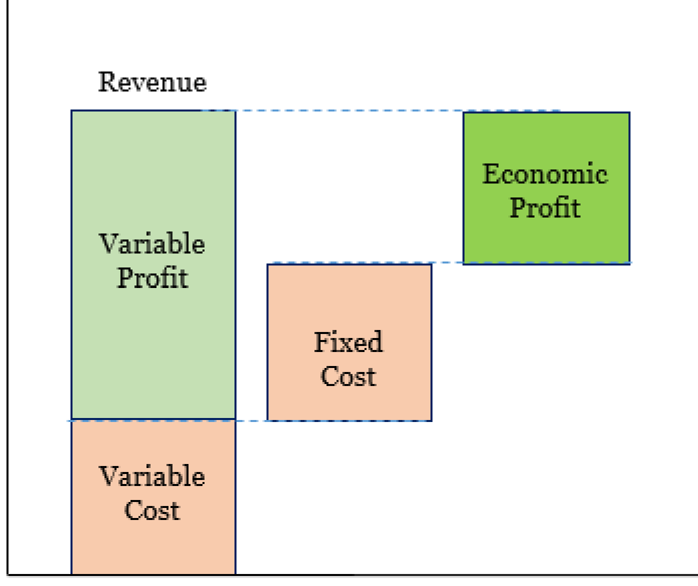
THIRD PARTY WASTE DISPOSAL

14. TAQA North's options for landfills include Secure and formerly Tervita, as described above. Typically ████ of TAQA North's waste goes to landfills owned by Secure and formerly Tervita. In 2020, approximately 100% of TAQA North's landfillable waste was taken to a Class II or equivalent site.

150. In contrast, fixed costs do not depend on the amount of waste services a facility takes in from oil and gas producers. These might include salary and benefits for non-contracted employees, IT and administrative costs, building rents, and land leasing royalties, among others.[257]

151. **Exhibit 23** illustrates the relationship between variable and fixed costs and firm profits for economically profitable firms. A firm's variable profit is the amount of revenue a firm takes in less its variable costs (i.e., variable profit = revenue – variable costs). A firm is economically profitable if its variable profit exceeds its fixed cost. In this case, it is profitable for the firm to continue operating since it can cover the fixed costs. In contrast, if variable profit is less than the firm's fixed cost, the firm would eventually find it financially sound to cease operating.

EXHIBIT 23
Illustrative relationship between variable and economic profit



152. My DWL calculation, does not include potential fixed cost-savings as efficiencies. Thus, my DWL estimate can be compared to any purported cost-savings claimed by the Parties. As detailed in Section 7.6.1, prices in the second-score auction are based on the incremental value derived from a customer's

[257] Harington Affidavit, [RCFD00001_000000014] ¶ 17 see also the line items classified as not "tied to volume" in a. 04-27-2021 SES Analysis (003).xlsx [RBBC00003_000000004].

most preferred facility relative to a customer's next-best alternative. Thus, the variable profit reflects the DWL of closing the facility in my calculation. . Note that because the closing facilities overall were economically profitable (i.e., their variable costs are higher than their fixed costs), the merger will lead to a DWL larger than claimed efficiencies from fixed cost savings.

153. The first row of **Exhibit 24** describes the DWL from facility closures using the method described above. In particular, the first row quantifies the DWL from facility closures using the profit-based method that assumes firms are able to extract the surplus from negotiating waste service prices with individual customers, and the closed facility profits quantify that surplus. I predict that DWL from facility closures could reach around $78 million. The estimates account for harm to oil and gas producers from losing access to their most preferred facilities, which may increase their transportation costs, result in longer wait times to deliver wastes, and require building new relationships with customer service representatives, among other factors. See my Appendix (Section 7.1.2) and backup materials for the market-level results.

EXHIBIT 24
DWL to customer from facility closures

	DWL
Based on profits of closed facilities ***(Accounts for all closed facility customers)***	$78.12 million
Based on market-share approach ***(Accounts for customers in overlapping draw areas)***	$40.05-$55.14 million

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7); Harington Affidavit [RCFD00001_000000014]

Note: The range of DWL estimates reflects the underlying demand model. DWL based on the second score auction is $55 million, and the DWL based on the Bertrand model is $41 million. The DWL is greater when using the profits-based approach because it accounts for all revenue (and profits) generated by each of the closed facilities across all customers, whereas the share-based approaches exclude revenue generated by customers that are not located in the closed facilities' overlapping draw areas. Customers of the closed facilities are excluded if they are located outside of the closed facilities' 10-percent draw areas or if they are located in areas that are not one of the Parties' overlapping draw areas.

154. I also quantify the DWL for the set of customers I analyzed in Section 5 using another estimation technique (*share-based approach* to valuing customer options) to calculate DWL, which is reported in the second row of **Exhibit 24**. In particular, I focus on measuring the DWL for customers located in my relevant market that are affected by closures, which is mechanically smaller than the profit-based DWL calculation that accounts for revenue from

paper by Dr. Waehrer that shows that facility closure is not profitable in a second-score auction model unless there are other variable costs savings. I address these concerns in this section.[136]

5.2.1. *Dr. Duplantis' methodological critique based on my use of second-score auction model does not apply to the alternative approach I used to quantify DWL from facility closures*

88. As I explained in Section 3.2, models are approximations that are meant to capture the salient features of markets but are not intended to be perfect representations of them. I view the second-score auction to be a reasonable way to approach this market where there is wide spread price discrimination. I used this model to estimate the DWL using two approaches, the revenue-based approach and the market share-based approach. The revenue-based approach captures the full effect of plant closures on DWL, and the share-based approach captures the effect only on the markets that we specifically delineate.[137] My Initial Affidavit reported estimates of $78 million and $55 million with these approaches, respectively. If I adjust the margins that I used in my Initial Affidavit for the additional variable costs claimed by Mr. Harington, then these estimates are $72 million and $51 million (see **Exhibit 2**).

[136] To clarify, I used two approaches to quantify DWL from facility closures in my initial report. I called them "profit-based" and "market-share based" approaches. These labels refer to the different information sources I used to estimate the incremental benefit customers derived from closing facilities. I used the second-score model with both the "profit-based" and the "market-share" approaches to estimate the DWL from facility closures. I also used a different model, based on Bertrand competition, with the "market-share" based approach to estimate the DWL from facility closures. Dr. Duplantis criticizes the second-score auction in general and also my "profit-based" approach citing to a theoretical result by Dr. Waehrer. Regarding the "profit-based" approach, she claims that it is inconsistent because it implies that facility closures after the merger would be unprofitable for Secure. Dr. Duplantis does not directly discuss the "market-share" approach using the Bertrand model. Neither of her criticisms apply to the estimates obtained from suing the Bertrand model with the share-based approach.

[137] In the profit-based approach, I estimate the DWL by calculating the profits of closing facilities from their financials and adding them up. This approach is based on the intuition that facilities, with perfect price discrimination, can capture all of the incremental value they generate for customers as profit. When a facility closes, this incremental value (as measured by variable profits) is lost as DWL. In the market share approach, I model consumer demand (logit model) and use the observed consumer choices between facilities (i.e., market shares) to estimate their valuation of a set of available facilities. When the set of available options shrink, consumers' valuation decreases, and this decrease is the DWL. Market shares are informative because, intuitively, facilities that are highly valued by customers would have higher market shares (see Section 7.6 in my Initial Affidavit). This approach is commonly used in the academic literature to estimate the value of new or disappearing products to customers. See, for example, Petrin, Amil, "Quantifying the Benefits of New Products: The Case of the Minivan," Journal of Political Economy, 110 no. 4 (2002): pp. 705–729; Ackerberg, Daniel A., and Marc Rysman, "Unobserved Product Differentiation in Discrete-Choice Models: Estimating Price Elasticities and Welfare Effects," The RAND Journal of Economics, 36 no. 4 (2005): pp. 771–788; Gentzkow, Matthew, "Valuing New Goods in a Model with Complementarity: Online Newspapers," American Economic Review, 97 no. 3 (2007): pp. 713–744. Also see my discussion in Section 4.1.

1 claimed to arise from facility closures. Dr. Miller's
2 facility closure theory has nothing to do with price
3 increases, it does not depend on total output reduction,
4 and it does not depend on any increase in market shares,
5 and it does not result from increase to market power. It
6 has nothing to do with corporate concentration at all.
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3 **MR. HOOD:** Dr. Miller, you have modelled price
4 effects for markets of varying concentration, as we can see
5 up here. We see customers in a 2:1 market will experience
6 a 23.9 percent price increase for water, while customers in
7 the 4:3 market will experience a price increase of 10.3
8 percent. And we're going to get into the deadweight loss
9 from facility closures shortly. But the criticism is that
10 your deadweight loss from facility closure affects everyone
11 equally, regardless of whether the customer is in a 2:1, a
12 3:2, or a 100:99.
13 My first question, is your deadweight loss an
14 effect of the merger?
15 **DR. MILLER:** I think the answer to that is yes.
16 Let me pause there. I'm getting a message that my internet
17 connection is unstable. You can hear me okay?
18 **MR. HOOD:** Yes, we can.
19 **DR. MILLER:** Okay. The reason is to my
20 understanding these facilities are economically profitable.
21 And what I mean by that is that Tervita and Secure had
22 plans to operate them going forward, and in that sort of
23 setting, where the merger is what allows for the facilities
24 to be closed, yes, to me the facility closures are an
25 effect of the merger.

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3 **MR. HOOD:** Dr. Miller, you have modelled price
4 effects for markets of varying concentration, as we can see
5 up here. We see customers in a 2:1 market will experience
6 a 23.9 percent price increase for water, while customers in
7 the 4:3 market will experience a price increase of 10.3
8 percent. And we're going to get into the deadweight loss
9 from facility closures shortly. But the criticism is that
10 your deadweight loss from facility closure affects everyone
11 equally, regardless of whether the customer is in a 2:1, a
12 3:2, or a 100:99.
13 My first question, is your deadweight loss an
14 effect of the merger?
15 **DR. MILLER:** I think the answer to that is yes.
16 Let me pause there. I'm getting a message that my internet
17 connection is unstable. You can hear me okay?
18 **MR. HOOD:** Yes, we can.
19 **DR. MILLER:** Okay. The reason is to my
20 understanding these facilities are economically profitable.
21 And what I mean by that is that Tervita and Secure had
22 plans to operate them going forward, and in that sort of
23 setting, where the merger is what allows for the facilities
24 to be closed, yes, to me the facility closures are an
25 effect of the merger.

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13 **DR. MILLER:** I'm sorry. I fixed the problem.
14 As a general matter, it will be more profitable
15 to close a facility if you're able to recapture the
16 customers of that facility. Now, that refers to recapture
17 as isomorphic to a concept we call diversion. As a matter
18 of economic theory, you expect it to be more profitable to
19 close a facility all else equal, if the firm doing the
20 purchasing of the facility is a close competitor.
21 In this particular instance I've measured high
22 diversion, and my understanding is that the parties intend
23 to recapture many of the customers of the closed facility.
24 And so to my mind the closing of the facility is in fact
25 related to the increase in the market power that's created

1 by the transaction.
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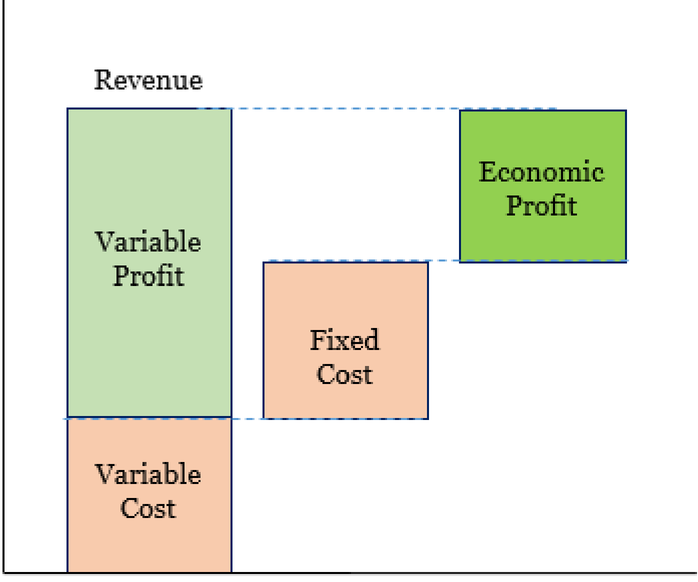
150. In contrast, fixed costs do not depend on the amount of waste services a facility takes in from oil and gas producers. These might include salary and benefits for non-contracted employees, IT and administrative costs, building rents, and land leasing royalties, among others.[257]

151. **Exhibit 23** illustrates the relationship between variable and fixed costs and firm profits for economically profitable firms. A firm's variable profit is the amount of revenue a firm takes in less its variable costs (i.e., variable profit = revenue – variable costs). A firm is economically profitable if its variable profit exceeds its fixed cost. In this case, it is profitable for the firm to continue operating since it can cover the fixed costs. In contrast, if variable profit is less than the firm's fixed cost, the firm would eventually find it financially sound to cease operating.

EXHIBIT 23
Illustrative relationship between variable and economic profit



152. My DWL calculation, does not include potential fixed cost-savings as efficiencies. Thus, my DWL estimate can be compared to any purported cost-savings claimed by the Parties. As detailed in Section 7.6.1, prices in the second-score auction are based on the incremental value derived from a customer's

[257] Harington Affidavit, [RCFD00001_000000014] ¶ 17 [redacted] see also the line items classified as not "tied to volume" in a. 04-27-2021 SES Analysis (003).xlsx [RBBC00003_000000004].

most preferred facility relative to a customer's next-best alternative. Thus, the variable profit reflects the DWL of closing the facility in my calculation. . Note that because the closing facilities overall were economically profitable (i.e., their variable costs are higher than their fixed costs), the merger will lead to a DWL larger than claimed efficiencies from fixed cost savings.

153. The first row of **Exhibit 24** describes the DWL from facility closures using the method described above. In particular, the first row quantifies the DWL from facility closures using the profit-based method that assumes firms are able to extract the surplus from negotiating waste service prices with individual customers, and the closed facility profits quantify that surplus. I predict that DWL from facility closures could reach around $78 million. The estimates account for harm to oil and gas producers from losing access to their most preferred facilities, which may increase their transportation costs, result in longer wait times to deliver wastes, and require building new relationships with customer service representatives, among other factors. See my Appendix (Section 7.1.2) and backup materials for the market-level results.

EXHIBIT 24
DWL to customer from facility closures

	DWL
Based on profits of closed facilities ***(Accounts for all closed facility customers)***	$78.12 million
Based on market-share approach ***(Accounts for customers in overlapping draw areas)***	$40.05-$55.14 million

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL – 05282021.xlsx: RBEK00004_000000068; Appendix (Section 7.7); Harington Affidavit [RCFD00001_000000014]

Note: The range of DWL estimates reflects the underlying demand model. DWL based on the second score auction is $55 million, and the DWL based on the Bertrand model is $41 million. The DWL is greater when using the profits-based approach because it accounts for all revenue (and profits) generated by each of the closed facilities across all customers, whereas the share-based approaches exclude revenue generated by customers that are not located in the closed facilities' overlapping draw areas. Customers of the closed facilities are excluded if they are located outside of the closed facilities' 10-percent draw areas or if they are located in areas that are not one of the Parties' overlapping draw areas.

154. I also quantify the DWL for the set of customers I analyzed in Section 5 using another estimation technique (*share-based approach* to valuing customer options) to calculate DWL, which is reported in the second row of **Exhibit 24**. In particular, I focus on measuring the DWL for customers located in my relevant market that are affected by closures, which is mechanically smaller than the profit-based DWL calculation that accounts for revenue from

1 **MR. HOOD:** Does it -- do those facility
2 closures impact everybody equally?
3 **DR. MILLER:** No. I wouldn't say that's true
4 just as a matter of interpreting what I see in the market,
5 but also, it's not true in the model. You know, the model
6 takes into account the locations of the customers and the
7 distances between those customers and the facilities. So,
8 you know, it maps out the area pretty well and customers
9 that are going to lose access to sort of, a facility that's
10 right next to them are going to -- are going to lose more
11 than a customer that is not going to lose access to a
12 facility.
13 **MR. HOOD:** So can you contextualize that answer
14 in the context of your model, just with reference then to
15 how that impacts someone on a 2:1 -- who had two options
16 and then has one, versus someone who might have four
17 options and now has three?
18 **DR. MILLER:** Sure. Well, we're talking about
19 the facility closure, okay? So keep in mind that in a 2:1
20 market, there's not necessarily a deadweight loss due to a
21 facility closure. It would depend on whether one of those
22 facilities is being closed.
23 But let's suppose that you're in a 2-to-1
24 market and one of the facilities is closed. You would
25 expect to see a fair amount of loss -- you could see a loss

1 of value if, in that market, you sort of match well with
2 one and you much less well with the other. Okay?
3 So when we think about the facility closures,
4 really the question is going to be, is if a facility
5 closes, sort of how much worse does the match quality get
6 between the oil and gas well site and the facility that
7 we're talking about?
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89. In my Initial Affidavit, I also reported estimates of DWL from facility closures using another standard modeling framework, that of Bertrand competition. In this model, facilities do not price discriminate among customers in the same market (but prices can vary across markets). Therefore, the Bertrand model is not subject to the concerns that Dr. Duplantis raises about whether the second-score auction overstates price discrimination. Dr. Duplantis does not directly comment on my DWL estimate from the Bertrand model.

90. My Initial Affidavit obtains an estimate of DWL due to facility closures of $40 million with the Bertrand model using the market share-based approach. This estimate represents effects within the geographic markets that I delineate, and so are comparable to results from applying the second-score auction model in the share-based approach (which yields DWL estimate of $55 million).[138] If I adjust margins for the additional variable costs claimed by Mr. Harington, then the DWL estimate from the Bertrand model is $37 million (see Exhibit 2).

91. It is not surprising that both the second-score auction model and the Bertrand model obtain comparable levels of DWL from facility closures ($55 million versus $40 million). Both estimates are driven by the fact that many of the closing facilities have large market shares and set prices that are well above

[138] These estimates only measure the DWL in the relevant markets (facilities overlapping draw areas). It does not consider the DWL to customers who may be outside the closed facility's draw area or customers who may be located in parts of the closed facility's draw area that do not overlap with the other merging party's draw areas.

1 Bertrand model, the facilities are setting a price, a
2 separate price, to each anti-trust market, but not
3 discriminating among consumers within that market. So it’s
4 more of a geographic-based price discrimination, not a
5 customer-specific discrimination.
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89. In my Initial Affidavit, I also reported estimates of DWL from facility closures using another standard modeling framework, that of Bertrand competition. In this model, facilities do not price discriminate among customers in the same market (but prices can vary across markets). Therefore, the Bertrand model is not subject to the concerns that Dr. Duplantis raises about whether the second-score auction overstates price discrimination. Dr. Duplantis does not directly comment on my DWL estimate from the Bertrand model.

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91. It is not surprising that both the second-score auction model and the Bertrand model obtain comparable levels of DWL from facility closures (\$55 million versus \$40 million). Both estimates are driven by the fact that many of the closing facilities have large market shares and set prices that are well above

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[138] These estimates only measure the DWL in the relevant markets (facilities overlapping draw areas). It does not consider the DWL to customers who may be outside the closed facility's draw area or customers who may be located in parts of the closed facility's draw area that do not overlap with the other merging party's draw areas.

3. RESPONSES TO CRITICISMS OF PRICE EFFECTS

3.1. The findings in my Initial Affidavit fundamentally rest on market features (high market shares and margins), not specific modeling assumptions

6. Dr. Duplantis critiques the findings in my report that the merger will create a significant price increase in waste service costs. Her critique of the estimated price effects largely rests on the modeling assumptions; she purports that the model (i.e., the second-score auction) has unrealistic assumptions.[1] Before I address her arguments in detail, let me clarify that my primary conclusion on the price impact of the merger follows directly from the fundamental economic characteristics of the industry, and not from the modeling assumptions that Dr. Duplantis criticizes.

7. In this industry, the Parties exhibit high market shares and margins. Customers view Secure and Tervita facilities as each other's closest substitutes relative to other options, indicating high diversion between them. Under these circumstances, economic models would generally predict substantial price effects from the merger of the largest two suppliers in the absence of significant mitigating factors.[2] Dr. Duplantis does not fundamentally dispute these market facts. She seems to agree that the Parties have large market shares, and she does not criticize the market definition from my report or estimates of market shares. She also does not claim that the diversion ratios between Secure and Tervita facilities are low. Relying on Mr. Harington, she seems to claim that the margin calculations should be revised (i.e., that there are additional variable costs that should be taken into account). Even if I incorporate these additional costs, margins remain high. With these market facts, economic theory indicates that the merger is likely to have significant price effects. That is, indeed, what I find with the baseline model that I used in my Initial Affidavit. I also discuss another common modeling framework that relaxes the assumptions Dr. Duplantis criticizes, and explain that it, too, would predict large price impacts with the observed market shares and margins.

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[1] Affidavit of Dr. Renée M. Duplantis, March 25, 2022 ("Duplantis Affidavit"), Section III.A.2.

[2] Miller, N.; Sheu, G., "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," Georgetown University McDonough School of Business Research Paper Series, July 2020. ("...effect of a merger on unilateral pricing incentives depends on two main objects: diversion and margins.").

8. To see the importance of market shares and margins, consider the pricing incentives from a merger.[3] Prior to the transaction, when a firm contemplates a price increase, it faces a trade-off. On the one hand, if the firm increases the prices of its service, it will earn more on its sales, increasing its revenue and profits. On the other hand, some customers will react by moving their purchases to competitors. These customers would be lost to the firm, reducing the profitability of its price increase. A profit-maximizing firm balances these two considerations when deciding its optimal pricing strategy.

9. A merger changes the calculus. When the firm acquires one of its competitors, it is able to recapture the customers who switch to the acquired firm's services in reaction to price increases. This reduces the profit loss associated with price increases. As a result, a price increase that was not profitable before the transaction can become profitable after the transaction. The incentive to raise prices after a merger is greater, the greater is the fraction of switching customers that the merged firm is able to recapture. Economists refer to this fraction as the "diversion ratio."[4] The incentive is also greater, the greater the merging firms' price-cost margins, as that determines the value of each customer that is recaptured through diversion. All else equal, the diversion ratios and margins are likely to be higher if the merging firms have large market shares.

10. Most models where the acquiring firm recaptures customers who switch from the acquired firm and will make positive profits from them will find price increases (in the absence of marginal cost savings).[5] The *magnitude* of such predicted price increases depends on the observed market shares and margins in the data. The fact that the model I used predicts a large price increase is a

[3] While in the following paragraphs I describe the merger incentives in the context of a standard posted-price framework, the same input variables, i.e., high margins and market shares, are the driving factors in my second-score auction framework regarding post-merger pricing incentives. With high margins and market shares, both modeling frameworks predict large post-merger price impacts, even if the underlying modeling mechanisms are different. In a second-score auction framework, the merger leads to a higher price increase if the merging firms are the best two options for many customers, as indicated by high diversion ratios (which can be estimated from market shares). I demonstrated that the merging parties are typically the best two options for many customers by presenting share-based diversion ratios in my Initial Affidavit that were generally large. See Affidavit of Nathan H. Miller, Ph.D., February 25, 2022 ("Miller Initial Affidavit"), Section 5.2.2. As such, higher market share leads to a higher predicted price increases. Higher margins lead to higher predict price increases because higher margins indicate more differentiated products, and therefore a bigger gap between the second and third options. Recall than in the second-score auction, prices increase from a merger between the first and second ranked bidders equals the difference between the valuations of the second and third-ranked bidder.

[4] Werden, Gregory J., and Luke M. Froeb. "Unilateral competitive effects of horizontal mergers," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927913 (2006): 1-95.

[5] Dr. Duplantis points out that "every simulation model will predict price increases as long as margins are positive and there is some diversion between the merging firms." Duplantis Affidavit, ¶ 105. Note that other factors such as marginal cost efficiencies can offset this upward price pressure.

byproduct of the data. If, hypothetically, the market shares of the merging Parties were lower, the price impact estimates would be lower.[6]

11. The economics literature widely recognizes that high market shares (and relatedly high diversion between the Parties) and margins are indicators of market power and the most important conditions that create incentives to increase prices post-merger.[7] Mergers between firms with high market shares magnifies their market power even more and can create strong incentives to increase prices. For example, the Merger Enforcement Guidelines recognize that market shares are informative of merger price effects: "…information about market share and concentration can inform the analysis of competitive effects when it reflects the market position of the merged firm relative to that of its rivals."[8] My analysis shows that, in many local markets, the market shares of the merging firms significantly exceed the 35-percent threshold level set in the Guidelines.[9]

12. To further demonstrate that high market shares and margins, not modeling assumptions, are the primary driver of the predicted price impact, I consider an alternative model in which suppliers set posted prices in each market. That is, suppliers can charge different prices to customers in different markets, but do not price discriminate between buyers within the same market. The pricing incentives that arise from a merger in this setting can be characterized by a measure of upward pricing pressure ("UPP") and its closely related statistic, the gross upward pricing pressure index ("GUPPI").[10]

13. UPP and GUPPI statistics quantify the intuition behind the most basic theory of consumer harm associated with horizontal mergers—the incentive for the merging parties to raise their prices. Both are tools discussed in the

[6] In particular, I predicted price effects after reducing the Secure and Tervita market shares by 50 percent in each market and re-apportioning that revenue to some other third-party competitor. The predicted price impacts are significantly lower when the Parties' shares are smaller, ranging from less than 1 percent to around 6 percent. See my workpapers.

[7] See, e.g., Shapiro, C., "Mergers with Differentiated Products," Antitrust, Spring 1996 ("The principle here is that high Gross Margins and high Diversion Ratios suggest large post-merger price increases.").

[8] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 5.8.

[9] Competition Bureau Canada, "Merger Enforcement Guidelines," October 6, 2011, ¶ 5.9.

[10] Upward pricing pressure is closely related to merger simulation models. For example, Roy J. Epstein & Daniel L. Rubinfeld, "Understanding UPP," *The BE Journal of Theoretical Economics* 10(1), 2010.

academic literature and are often used in merger review to approximate the incentive for the merging parties to unilaterally raise price.[11]

14. Both UPP and GUPPI rest on two import factors that influence merging parties' pricing decisions:

- Diversion ratio from itself to its merging partner; and
- Markup of its merging partner.

15. Specifically, if two firms, i and j, were to merge, then the UPP of firm i is defined as follows:

$$UPP_i = Diversion\ ratio_{i \to j} \times Markup_j$$

16. GUPPI reports the upward pricing pressure as a percentage of the starting price and is defined as follows:

[11] Farrell, Joseph, and Carl Shapiro, "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition," *The BE Journal of Theoretical Economics* 10(1), 2010, pp. 1–39 at p. 2 ("This approach, based directly on the underlying economics of pricing, asks whether the merger will generate net upward pricing pressure (UPP). This involves comparing two opposing forces: the loss of direct competition between the merging parties, which creates upward pricing pressure, and marginal-cost savings from the merger, which create (offsetting) downward pricing pressure."); Miller, Nathan H., and Marc Remer et al., "Upward pricing pressure as a predictor of merger price effects." *International Journal of Industrial Organization*, 52, 2017, pp. 216–247. Bailey. E. M., Leonard, G. K., Olley, G. S., Wu, L. Merger Screens: Market Share-Based Approaches versus "Upward Pricing Pressure," *The Antitrust Source*, February 2010. ("UPP is a measure of the strength of the merged firm's incentive to increase price above pre-merger level.") Miller, N.; Sheu, G., "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," Georgetown University McDonough School of Business Research Paper Series, July 2020. ("The UPP framework allows for a micro-founded analysis of post-merger pricing incentives if reasonable estimates of diversion and markups can be obtained for the merging firms.") Moresi, S., "The Use of Upward Pricing Pressure Indices in Merger Analysis," *The Antitrust Source*, February 2010. In a workshop of International Competition Network Chief/Senior Economists Workshop held at University of British Columbia, Vancouver in 2016, a discussion of merger unilateral effects included the use of UPP and GUPPI (https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/AEWG_EconWorkshop2016Report.pdf). While Canada has used upward pricing pressure as a "screening" tool, UPP has an extensive role in U.S. antitrust, which includes citations by courts, e.g. *Cigna/Anthem*. See Government of Canada, "Competition Bureau statement regarding Evonik's proposed merger with PeroxyChem," January 28, 2020, available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04519.html, ("The Bureau's analysis of likely competitive effects was also informed by upward pricing pressure and merger simulation analyses conducted by its economic expert.") (accessed on September 2, 2020); Memorandum Opinion, *United States of America, et al., v. Anthem, Inc., et al.*, United States District Court for the District Of Columbia, Case No. 1:16-cv-01493-ABJ, February 21, 2017, pp. 1-140 at pp. 58-59 ("Using an Upward Pricing Pressure (UPP) analysis, Dr. Dranove predicted static harm totaling $383.8 million. And when he performed the UPP analysis again, this time incorporating the fact that win/loss data suggests that Anthem and Cigna are close competitors, the exercise led to a total of $930.3 million in static harm in the relevant market.") As part of the investigation into the proposed Reynolds American/Lorillard (2015) merger, the FTC used UPP to predict price effects, prior to negotiating a divestiture. The analysis is described in Hanner, D., G. Z. Jin, M. Luppino, and T. Rosenbaum, "Economics at the FTC: Horizontal mergers and data security," *Review of Industrial Organization*, 2016, 49, 613–631.

$$GUPPI_i = \frac{UPP_i}{P_i}.$$

17. The incentive to raise prices is higher when more customers will be recaptured—when the diversion ratio is higher.[12] Alternatively, the opportunity cost of attracting customers with lower prices is higher when many of them will be taken from the other merging party. Thus, the UPP at one party is proportional to the diversion ratio from that party to the other. In this matter, data, documents, and market shares indicate that diversion ratios between Secure and Tervita facilities are likely high.[13]

18. The markup of the other merging party measures the marginal profit, or value, of recapturing an additional customer. The incentive to raise prices is higher when this value is higher. Alternatively, the opportunity cost of attracting customers with lower prices is higher when the ones coming from the other merging party were generating very high profits. Thus, the UPP at one party is proportional to the markup at the other party.

19. The academic literature has shown that this measure approximates the price impact of a merger in markets, including those that do not necessarily have perfect price discrimination.[14]

20. GUPPI-predicted price effects do not rely on the assumptions of the second score auction that Dr. Duplantis criticizes. In particular, they do not assume perfect price discrimination (i.e., suppliers to identify customers' facility valuations and set prices accordingly). For this merger, where we observe high margins and diversion ratios (e.g., as indicated by market shares),[15] GUPPI

[12] In my Initial Affidavit, I described how over half of Secure's and Tervita's TRD and landfill customers in the transaction data have diversion ratios greater than [redacted], reaching as high as [redacted] and [redacted] percent for customers of Secure and Tervita TRDs, respectively. The weighted-average margins for TRDs ar[redacted] percent on the lower end. See Miller Initial Affidavit, ¶ 110; Miller Initial Affidavit back-up materials.

[13] See Section 5.2.2. in Miller Initial Affidavit. In my Initial Affidavit, I estimated the diversion ratios using market shares. This approach is often used. Shapiro, C., "Mergers with Differentiated Products," Antitrust, Spring 1996. Dr. Duplantis does not dispute my estimate of diversion ratios or claim that diversion ratios are likely low. In fact, she seems to think that Secure will recapture most if not all of the customers from closed facilities, implying high diversion ratios ("SECURE's integration plan involves shifting volumes from closing facilities to remaining facilities… This means that most if not all of SECURE's profits will be recaptured.") Mr. Harington, in his analysis of transportation costs, assumed that all customers of closing facilities will be recaptured by the remaining Party facilities. See Affidavit of Andrew Harington, March 25, 2022 ("Harington Affidavit, March 25, 2022"), fn. 3.

[14] For example, Miller, N. H., M. Remer, C. Ryan, and G. Sheu, "Upward pricing pressure as a predictor of merger price effects." *International Journal of Industrial Organization*, 2017, 52, 216–247.

[15] Market shares are often used as proxies for diversion ratios. Miller, N.; Sheu, G., "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," Georgetown University McDonough School of Business Research Paper Series, July 2020. ("…merger review often maintains the diversion-by-share assumption, at least as an analytical starting point.") Shapiro, C., "Mergers with Differentiated Products," Antitrust, Spring 1996. See the

would predict significant incentives to increase prices post-merger and hence large price effects. This discussion underscores that price effects I presented in my Initial Affidavit are driven by the market features as reflected in the data and are not dependent on particular modeling assumptions.[16]

21. Documents I reviewed (referenced in my Initial Affidavit) also indicate that the merger is likely to have significant price effects. Documents show that Secure and Tervita compete head-to-head in many markets and restrain each other's pricing. When competition between merging parties is stronger, the likelihood that the merger will result in large price effects is higher. For example, the Parties identify each other as their primary competitors in their Annual Information Forms,[17] internal analyses of competitive conditions identify each other as major competitors,[18] and documents show that they provide discounts to be competitive with each other's prices.[19] During Tervita's acquisition of Newalta, the parties identified Secure as their principal competitor and explained that its pricing was aggressive.[20]

22. It is also worth noting that Dr. Duplantis estimates positive price impact in many of the markets using her "natural experiment." In the markets that become a monopoly or go from three competitors to two because of the merger, she estimates a price impact of between 10 and 11 percent.[21] The magnitude of her price increases are typically considered non-negligible in merger review and

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Memorandum Opinion for H&R Block/TaxACT (2011) at page 76, or the demonstrative exhibit used by David Dranove during the Anthem/Cigna (2016) trial at page 48, available at https: //www.justice.gov/atr/page/file/914606/download, for example.

[16] In fact, in my work, I showed that simulation results from a second-score auction and its logit Bertrand counterpart (which does not have the same assumptions as a second-score auction) are strongly positively correlated. Miller, N. and Gloria G. Sheu, "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," *Review of Industrial Organization*, Vol. 58, No. 1, 143-177 (2021). Special Issue: "The 2010 Horizontal Merger Guidelines after Ten Years." ("It is interesting to compare and contrast the logit second-score auction simulation with its logit Bertrand counterpart…In order to investigate this issue, we generated a series of logit second-score auction simulations in the same manner as for the Bertrand simulations discussed in Section 2. The resulting effect on prices across the two models is strongly positively correlated, with, for example, a correlation coefficient of 0.96 for markets with four pre-merger firms.")

[17] Miller Initial Affidavit ¶¶ 92-93.

[18] Miller Initial Affidavit ¶¶ 94-96.

[19] Miller Initial Affidavit ¶ 97.

[20] Miller Initial Affidavit ¶¶ 98-99.

[21] Duplantis Affidavit, ¶ 79 ("I show that for my baseline specification prices increased on average as a result of the Tervita/Newalta transaction by up to 11.0% for "2-to-1" markets, up to 9.8% for "3-to-2" markets, and 0.9% for "4-to-3 or more" markets.").

the academic literature.[22] Furthermore, as I discuss below, there are reasons why her analysis may not capture the full impact of this merger.

3.2. The model and modeling inputs I use reasonably capture the salient features of this industry

23. Dr. Duplantis claims that some of the modeling assumptions underlying the price impact I have estimated are unrealistic and thus asserts that the price impacts and DWL due to facility closures are "unreliable" and "overestimated."[23] Among the modeling assumptions she criticizes are the extent to which the Parties are able to price discriminate among customers,[24] waste services facilities are differentiated,[25] oil and gas producers are able to negotiate prices across markets (or the extent to which there is buyer power),[26] and oil and gas producers can self-supply, creating a source of price discipline for the Parties' prices.[27] I disagree with Dr. Duplantis' assessment that the model I use is unreliable or yields inflated results simply because it does not precisely reflect all industry details or nuances.

24. Economic models, including merger simulation models, in general, are meant to capture the salient features of markets. As I explain in my 2020 paper "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," they cannot be expected to capture all details and complexities of markets.[28] For example, when estimating the DWL from lower volumes that higher post-merger pricing will create, Dr. Duplantis uses a linear demand curve to model oil and gas producers' demand for waste services.[29] She does not claim or

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[22] See, e.g., Coloma, Germán. "The effect of the Repsol-YPF merger on the Argentine gasoline market." *Review of Industrial Organization* 21, no. 4 (2002): 399-418. While the Canadian Merger Enforcement Guidelines does not specify the numerical threshold for a "material price increases," it states that "[a] material price increase is distinct from (and will generally be less than) the 'significant and non-transitory price increase' that is used to define relevant markets," which is typically considered to be a 5-percent price increase over a one year period. See Canadian Merger Enforcement Guidelines, Section 2.14, fn. 14, Section 4.3.

[23] Duplantis Affidavit, Section IV.C; Section III.

[24] Duplantis Affidavit, Section III.A.2.

[25] Duplantis Affidavit, Section III.A.3.

[26] Duplantis Affidavit, ¶ 62.

[27] Duplantis Affidavit, Section III.A.3.

[28] Miller, N. and Gloria G. Sheu, "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," *Review of Industrial Organization*, Vol. 58, No. 1, 143-177 (2021). Special Issue: "The 2010 Horizontal Merger Guidelines after Ten Years." ("Models by their nature are simplified representations of the world. Their purpose is to isolate the most important ways that mergers affect economic incentives, and they need not account for secondary and tertiary details... Furthermore, as parametric assumptions are necessary to make predictions, some uncertainty is inevitable. Thus, our view is that modeling should not be expected to provide precise estimates of merger effects, but rather should be used to assess countervailing forces and provide an overall sense of magnitudes.").

[29] Duplantis Affidavit, ¶ 152, fn. 185.

3. **RESPONSES TO CRITICISMS OF PRICE EFFECTS**

3.1. The findings in my Initial Affidavit fundamentally rest on market features (high market shares and margins), not specific modeling assumptions

6. Dr. Duplantis critiques the findings in my report that the merger will create a significant price increase in waste service costs. Her critique of the estimated price effects largely rests on the modeling assumptions; she purports that the model (i.e., the second-score auction) has unrealistic assumptions.[1] Before I address her arguments in detail, let me clarify that my primary conclusion on the price impact of the merger follows directly from the fundamental economic characteristics of the industry, and not from the modeling assumptions that Dr. Duplantis criticizes.

7. In this industry, the Parties exhibit high market shares and margins. Customers view Secure and Tervita facilities as each other's closest substitutes relative to other options, indicating high diversion between them. Under these circumstances, economic models would generally predict substantial price effects from the merger of the largest two suppliers in the absence of significant mitigating factors.[2] Dr. Duplantis does not fundamentally dispute these market facts. She seems to agree that the Parties have large market shares, and she does not criticize the market definition from my report or estimates of market shares. She also does not claim that the diversion ratios between Secure and Tervita facilities are low. Relying on Mr. Harington, she seems to claim that the margin calculations should be revised (i.e., that there are additional variable costs that should be taken into account). Even if I incorporate these additional costs, margins remain high. With these market facts, economic theory indicates that the merger is likely to have significant price effects. That is, indeed, what I find with the baseline model that I used in my Initial Affidavit. I also discuss another common modeling framework that relaxes the assumptions Dr. Duplantis criticizes, and explain that it, too, would predict large price impacts with the observed market shares and margins.

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[1] Affidavit of Dr. Renée M. Duplantis, March 25, 2022 ("Duplantis Affidavit"), Section III.A.2.

[2] Miller, N.; Sheu, G., "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," Georgetown University McDonough School of Business Research Paper Series, July 2020. ("…effect of a merger on unilateral pricing incentives depends on two main objects: diversion and margins.").

facility closure effect based on the variable profits of facilities that SECURE has closed or plans to close as part of its integration plan, which he claims reflect the "value [oil and gas producers] derived from delivering wastes to that facility over other alternatives."[6] (See Section IV.A.)

17. Dr. Miller's facility closure effect methodology and analyses are flawed and unhelpful for assessing the impact of the Transaction. Critically, Dr. Miller's finding that there is a facility closure effect from closing profitable facilities ignores SECURE's profit-maximizing plan to shift waste services to other nearby facilities. In particular, under Dr. Miller's own price discrimination framework of his second-score auction model, SECURE would only choose to close facilities if its own profits (and thereby total surplus) were going to increase after the closure, not decrease. There is no reduction in customer volumes that are handled post-Transaction, and by shifting volumes SECURE realizes efficiencies at the absorbing facilities that Dr. Miller ignores. Dr. Keith Waehrer identified this flaw in a comment he issued on Dr. Miller's auction model paper.[7] This, alone, renders his facility closure effect analysis untenable. Relatedly, despite finding that the Parties' services are close substitutes (the central premise of the Commissioner's case), Dr. Miller necessarily relies on significant differentiation between the Parties – even between two facilities of the same party – in order to arrive at his facility closure effect. However, if there was such high differentiation in how customers "value" facilities, it would not be in SECURE's interests to close those facilities in the first place. (See Sections IV.B.1 and IV.B.2.)

18. I also understand from SECURE that the shifting of volume from closed facilities to remaining facilities is consistent with its approach to its ongoing integration plan, and I highlight several examples of quality improvements and cost reductions that I understand are being implemented at the remaining facilities that will benefit customers. (See IV.B.3)

19. Relatedly, Dr. Miller's asserted facility closure effect does not flow from the Commissioner's asserted competitive harm in the form of higher prices or any purported change in market power. Rather, the asserted facility closure effect flows strictly from SECURE's facility closures contemplated in its integration plan. (See IV.B.4)

20. Next, even if I were to accept for argument's sake that SECURE was irrationally closing facilities as Dr. Miller assumes, I explain why Dr. Miller's facility closure effect is substantially

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[6] Miller Report, ¶ 148.

[7] Keith Waehrer, "Modeling the effects of mergers in procurement: Comment," September 9, 2021, https://waehrer.net/Comment_on_Miller__2014.pdf.

4 Conclusion

An interesting question is what do we make of a situation where the intention of the merged company is to do away with one of the product lines following the merger, but we think that the mode of price discovery is an efficient auction (e.g., second-price or open auction)? Three possibilities come to mind, though this list is unlikely to be exhaustive. (1) One of the product lines is really not profitable and would have been discontinued even without the merger. (2) Merger efficiencies result in a higher surplus in one of the product lines decreasing the value of continuing to operate the other. (3) When it discontinues one of the products, the merger firm plans on shifting some or all of the production capacity from the discontinued product to the retained product and thus increasing the contribution to total surplus from the retained product. Each of these possibilities is associated with lower anticompetitive effects than the approach to a discontinued product taken in Miller (2014, 2017).

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3 **MR. HOOD:** Dr. Miller, you have modelled price
4 effects for markets of varying concentration, as we can see
5 up here. We see customers in a 2:1 market will experience
6 a 23.9 percent price increase for water, while customers in
7 the 4:3 market will experience a price increase of 10.3
8 percent. And we're going to get into the deadweight loss
9 from facility closures shortly. But the criticism is that
10 your deadweight loss from facility closure affects everyone
11 equally, regardless of whether the customer is in a 2:1, a
12 3:2, or a 100:99.
13 My first question, is your deadweight loss an
14 effect of the merger?
15 **DR. MILLER:** I think the answer to that is yes.
16 Let me pause there. I'm getting a message that my internet
17 connection is unstable. You can hear me okay?
18 **MR. HOOD:** Yes, we can.
19 **DR. MILLER:** Okay. The reason is to my
20 understanding these facilities are economically profitable.
21 And what I mean by that is that Tervita and Secure had
22 plans to operate them going forward, and in that sort of
23 setting, where the merger is what allows for the facilities
24 to be closed, yes, to me the facility closures are an
25 effect of the merger.

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13 **DR. MILLER:** I'm sorry. I fixed the problem.
14 As a general matter, it will be more profitable
15 to close a facility if you're able to recapture the
16 customers of that facility. Now, that refers to recapture
17 as isomorphic to a concept we call diversion. As a matter
18 of economic theory, you expect it to be more profitable to
19 close a facility all else equal, if the firm doing the
20 purchasing of the facility is a close competitor.
21 In this particular instance I've measured high
22 diversion, and my understanding is that the parties intend
23 to recapture many of the customers of the closed facility.
24 And so to my mind the closing of the facility is in fact
25 related to the increase in the market power that's created

1 by the transaction.
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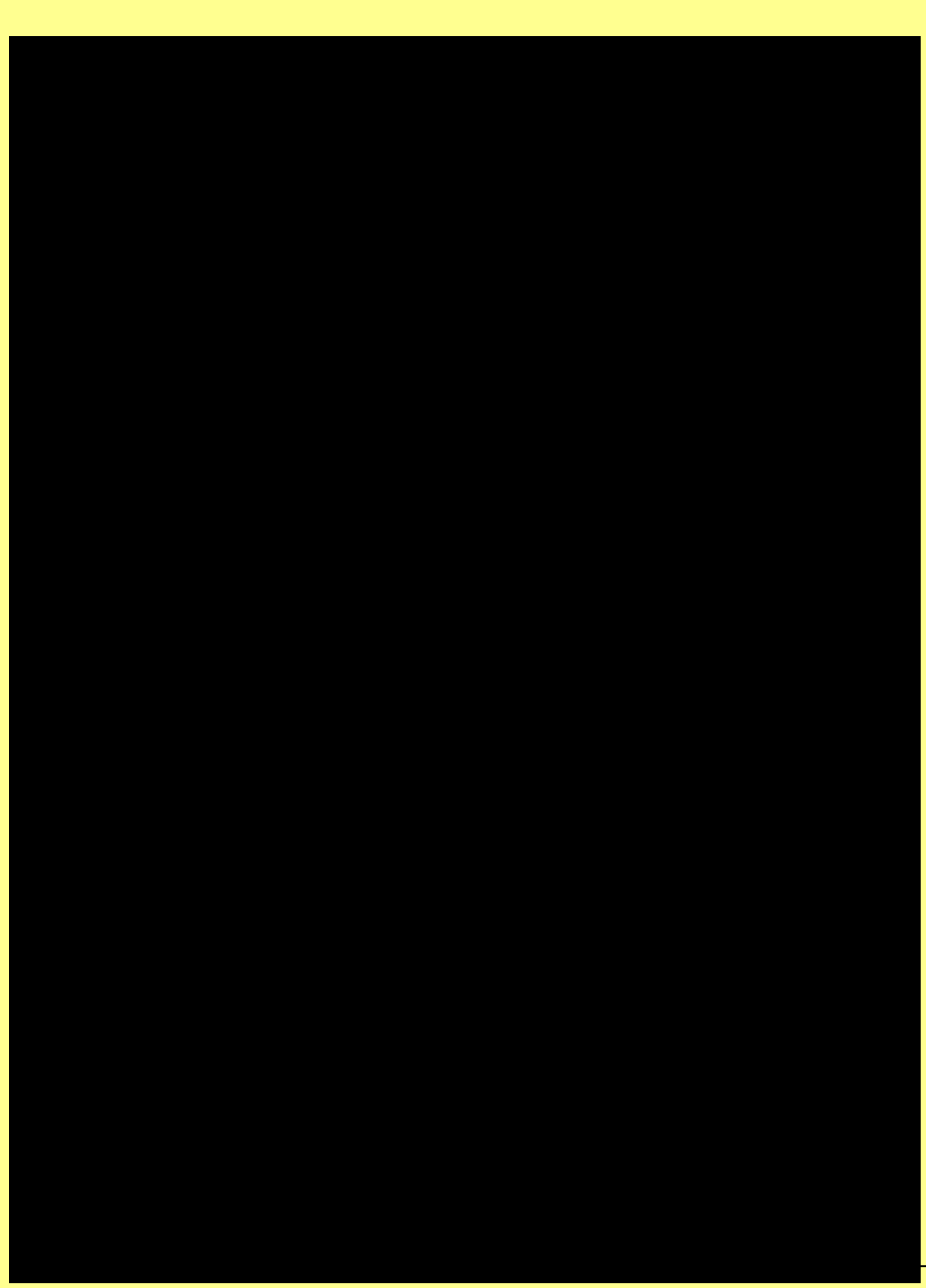
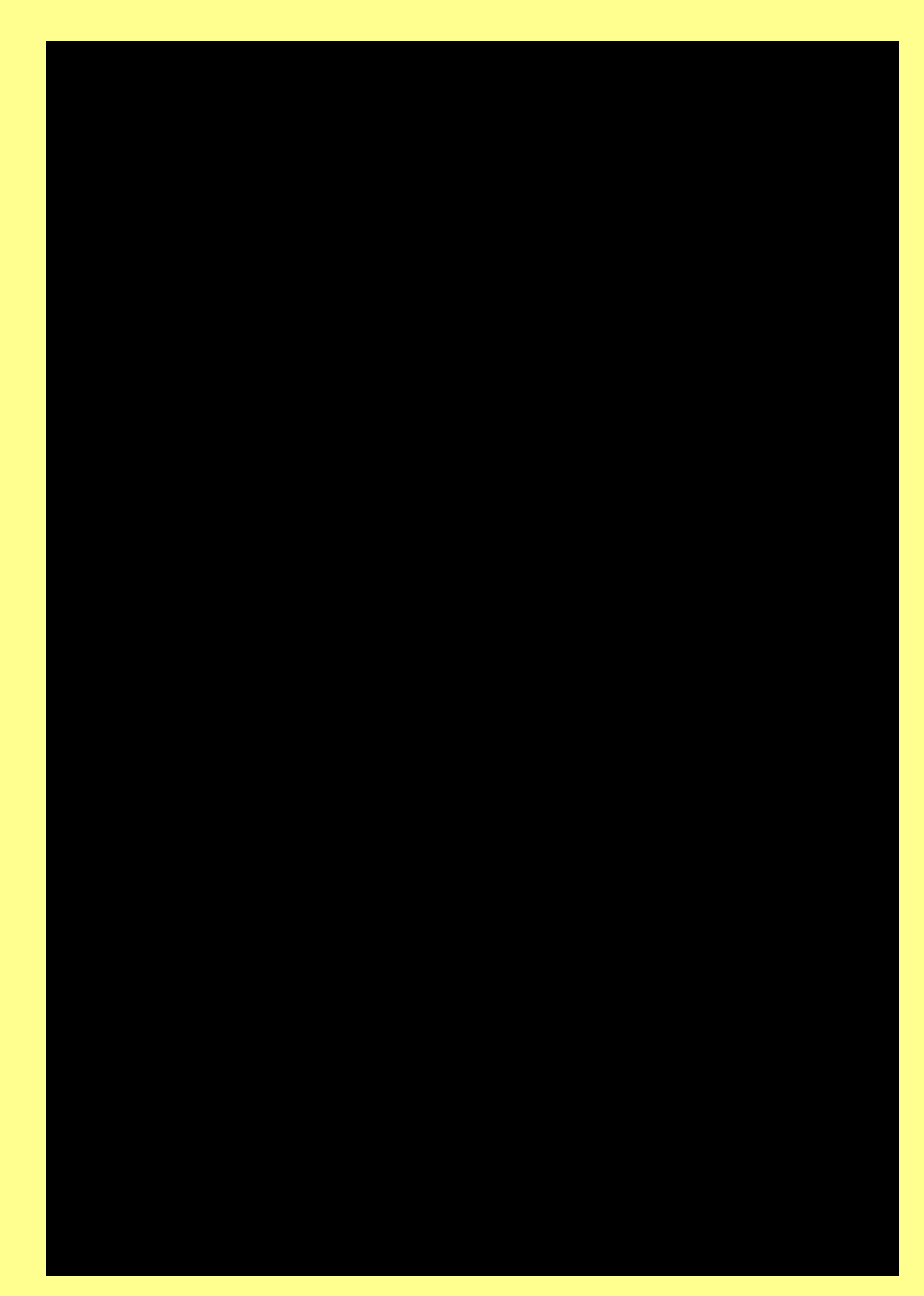
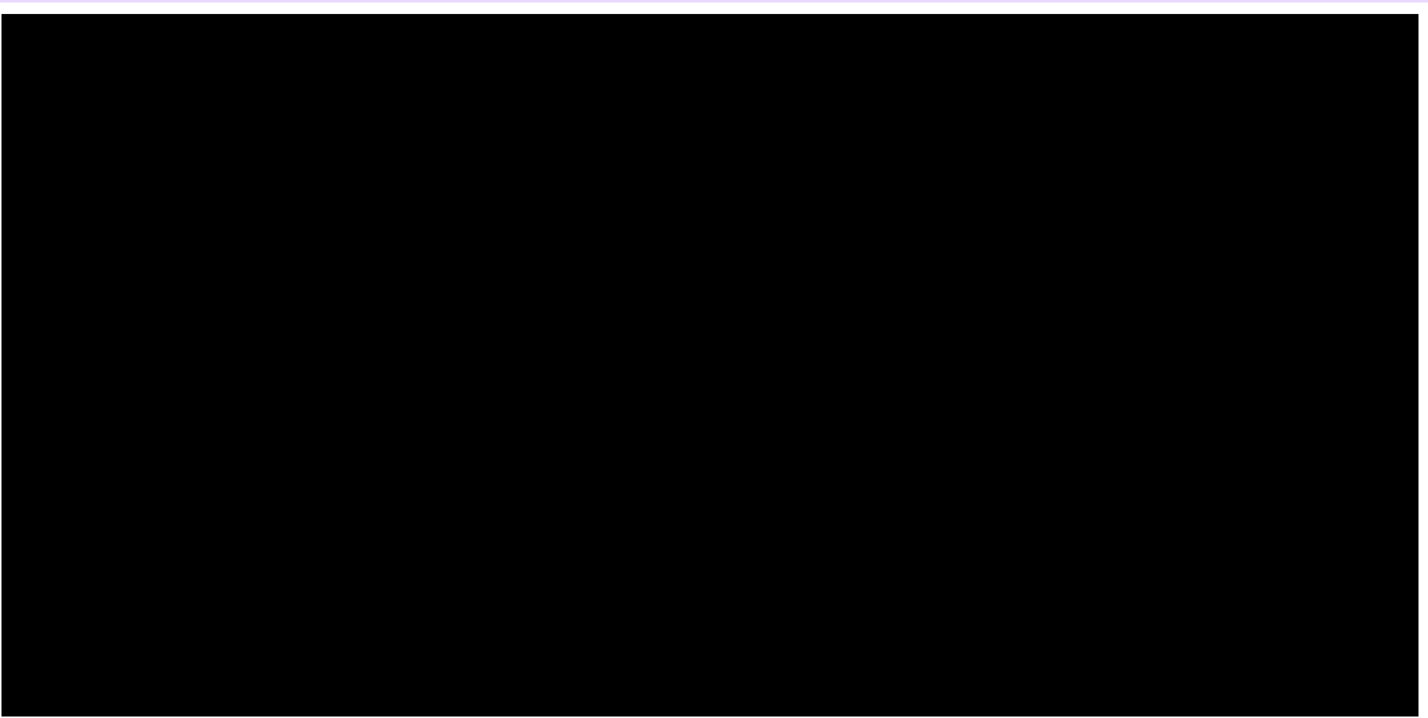




Moreover, these additional costs only account for the added wait-times incurred by customers of the closing facilities. Existing customers of the absorbing facilities may also experience increase in wait-times because of the facility closures. Consequently, my estimate could under-represent the total potential loss caused by increased wait-times.

6. RESPONSES TO MEASURING DWL FROM VOLUME CHANGE

105. In Section 5 of her report, Dr. Duplantis acknowledges that there is DWL that arises due to the increase in prices (and decrease in volume) caused by the merger and puts forth an estimate of DWL. She estimates that the merger will result in $1.2 to $1.6 million DWL depending on the scenario she considers (two divestiture scenarios versus full transaction).[153] Dr. Duplantis' estimates are based on the price impact she calculates from her natural experiment analysis.[154] If the price impact of the transaction is larger (as I estimated in my analysis), her estimates of the DWL from volume reduction would increase. For example, even if the price impact is between my estimates and her estimates, the DWL from the full transaction is around $6 million annually (see **Exhibit 3**).



[153] Duplantis Affidavit, Figure 20.
[154] Duplantis Affidavit, ¶ 168.

Jurisdiction and Powers of the Tribunal

Jurisdiction

8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

Costs

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Award against the Crown

(3) The Tribunal may award costs against Her Majesty in right of Canada.

Costs adjudged to Her Majesty in right of Canada

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from

Compétence et pouvoirs du Tribunal

Compétence

8 (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

Pouvoirs

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Outrage au Tribunal

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Couronne

(3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

Frais adjugés à Sa Majesté du chef du Canada

(4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

not necessary to decide this issue in this appeal. Indeed, I am of the view that if that presumption applies, it has been rebutted. Consequently, in my view, *Superior Propane Inc. #2* determined in a satisfactory manner that the standard of correctness is the appropriate standard of review on questions of law arising in an appeal from the Competition Tribunal.

57 Without repeating here the entire analysis carried out in *Superior Propane Inc. #2*, it is useful to point out that questions of law which arise in the course of proceedings before the Tribunal are determined only by the judicial members of the Tribunal sitting in those proceedings: paragraph 12(1)(*a*) of the *Competition Tribunal Act*. These judicial members are appointed from among the members of the Federal Court: paragraph 3(2)(*a*) of the *Competition Tribunal Act*. These decisions on questions of law are themselves subject, as of right, to appeal to this Court as if they were a judgment of the Federal Court: subsection 13(1) of the *Competition Tribunal Act*. As noted by Evans J.A. in *Superior Propane Inc. #2* at para. 68, "the existence of an unrestricted right of appeal on questions of law, and of a modified right of appeal on questions of fact, must be entered into as a factor indicative of Parliament's intention that the Tribunal's determinations on questions of law should be reviewable on appeal on a correctness standard."

58 To underline this point, it is useful to point out that subsection 28(2) and section 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 specifically exclude judicial review when an Act of Parliament expressly provides for an appeal to the Federal Court of Appeal, in which case the decision is to be reviewed or otherwise dealt with in accordance with that Act. In subsection 13(1) of the *Competition Tribunal Act*, Parliament has clearly and unambiguously provided for an appeal as of right to this Court from a decision of the Tribunal on a question of law "as if it were a judgment of the Federal Court." I do not believe that it is possible for Parliament to use any clearer language as to its intent. Since judgments of the Federal Court on questions of law are reviewed in appeal on a standard of correctness, decisions from the Tribunal on such questions are also to be reviewed on the same standard.

59 The determination of the appropriate standard of review is essentially a search for legislative intent: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at pp. 589-590; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 26; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.) at para. 21, *Dunsmuir*, at para. 30. Where, as here, that intent is clear, the judiciary should comply unless this offends the rule of law or some other constitutional principle.

(b) Questions of fact and of mixed law and fact

60 Since the decision of the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) ("*Southam*"), it is clear that the findings of the Tribunal on questions of fact and on questions of mixed law and fact from which a question of law cannot be extricated are owed particular deference on appeal: *Southam* at paras. 34 and 54. This is so notably because Parliament has provided for a limited right of appeal on questions of fact by requiring that an appeal on such questions only lies with leave of this Court: subsection 13(2) of the *Competition Tribunal Act*.

61 The Tribunal holds expertise in the economic and commercial issues which are at the heart of its mandate under the *Competition Act*. This Court sitting in appeal of its decisions should thus defer to its findings on these issues, including the inferences it draws from the evidence. Contrary to most trial courts, which are essentially concerned with ascertaining the facts relating to past events, the Tribunal's role under sections 92 and 96 of the *Competition Act* requires it to project into the future various events in order to ascertain their potential economic and commercial impacts. The role of the Tribunal is thus to identify and remedy market problems that have not yet occurred. This is a daunting exercise steeped in economic theory and requiring a deep understanding of the economic and commercial factors at issue. Because an appellate court may encounter difficulties in fully understanding the economic and commercial aspects of the Tribunal's decision, it must defer to its findings of fact and of mixed law and fact on these issues.

62 Some controversy has however developed in the case law as to the appropriate standard of deference owed to the Tribunal over questions of fact and of mixed law and fact from which a question of law cannot be extricated: is it the "reasonableness" standard of deference used in judicial review or the standard of deference which applies in an appeal as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) ("*Housen*")?

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(*c*), the Tribunal has serious concerns with respect to the weight to be given to this particular evidence in light of the numerous inaccuracies and discrepancies in the figures and analyses that were revealed on cross-examination.

B. Alleged late amendments to pleadings

162 The second preliminary issue relates to late amendments allegedly made by the Commissioner to his pleadings.

163 In his closing submissions, counsel for the Commissioner advanced the alternative argument that a bundled "In-flight Catering" market, comprising both Catering and Galley Handling services, may be relevant for the purposes of his abuse of dominance allegations. Counsel for VAA objected and argued that the Commissioner very clearly pleaded two and only two relevant markets in his Application, namely, the Airside Access Market and the Galley Handling Market. Counsel for VAA raised an issue of procedural fairness, and submitted that liability under section 79 could only be imposed on VAA if the Tribunal finds that Galley Handling, not In-flight Catering, is the relevant market, as the latter was not a relevant market pleaded by the Commissioner.

164 Counsel for VAA also took issue with the fact that, in his closing submissions and final argument, the Commissioner referred to a third ground demonstrating the existence of VAA's PCI in the relevant market. In support of his position on VAA's PCI, the Commissioner pointed to evidence showing that VAA would earn additional aeronautical revenues from the new flights or the incremental additional flights that it would be able to attract as a result of avoiding a disruption of competition in the relevant market and ensuring a stable and competitive supply of in-flight catering services. Counsel for VAA argued that the Commissioner has only pleaded two facts supporting VAA's competitive interest in the Galley Handling Market at YVR, namely, the Concession Fees and the land rents it receives from in-flight catering firms. Counsel for VAA thus submitted that the Commissioner cannot suddenly rely on a third fact in final argument, as it was not part of his pleadings. VAA therefore asked the Tribunal to disregard any attempt by the Commissioner to prove a PCI based on facts other than the Concession Fees and the land rents that were pleaded.

165 The Tribunal does not agree with either of these two objections advanced by VAA.

(1) Analytical framework

166 It is well established that, as long as there is no "surprise" or "prejudice" to the parties when an issue that was not clearly pleaded is raised, a court or a decision-maker like the Tribunal can issue a decision on a question that does not fit squarely into the pleadings. In other words, a court or the Tribunal may raise and decide on a new issue if the parties have been given a fair opportunity to respond to it. A breach of procedural fairness will only arise if considering a new issue inflicts prejudice upon a party.

167 In *Canada (Commissioner of Competition) v. CCS Corp.*, 2013 FCA 28 (F.C.A.) ("*Tervita FCA*"), rev'd on other grounds 2015 SCC 3 (S.C.C.), the FCA provided a useful summary of this principle, at paragraphs 71-74:

> [71] In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues. [...]
>
> [72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced. [...]
>
> [73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it. [...]

[74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. [...]

[citations omitted]

168 Furthermore, in order to analyze whether there is a "new issue," courts have considered all aspects of the trial and have not limited themselves to what was pleaded in the statement of claim and other pleadings. This includes the evidence adduced during the hearing and the arguments made at the hearing, as long as the parties have been given a fair opportunity to respond.

(2) Expansion of relevant markets

169 In this case, the Tribunal has no hesitation to conclude that a bundled "In-flight Catering" market was a live issue throughout the case at hand, even though it was not specifically pleaded by the Commissioner.

170 Although the Commissioner did not identify a market broader than Galley Handling services in his initial pleadings, an expanded market comprised of Catering and Galley Handling was put in play by VAA in its Amended Response to the Commissioner's Application, as well as in its Concise Statement of Economic Theory and in its final written argument. Moreover, in his Reply to VAA's initial pleadings, the Commissioner asserted that "VAA has engaged in and continues to engage in an abuse of dominant market position relating to the supply of *In-flight Catering* at the Airport" [emphasis added] (Commissioner's Reply, at para 19), which he defined to include both Galley Handling and Catering services.

171 The issue of a bundled or combined "In-flight Catering" market was also discussed at various stages in the evidentiary portion of the hearing. In his first report, Dr. Niels considered the issue of separate or bundled Galley Handling and Catering markets. Dr. Niels opined that it did not matter how one delineates the downstream markets because the essential input of airside access was required no matter what definition was adopted to be able to put food on an airplane. He therefore left the issue open. During the hearing, Dr. Niels was explicitly cross-examined on the issue of whether the relevant product market is for Galley Handling and Catering bundled together, rather than each constituting a separate relevant market.

172 In addition, Dr. Reitman recognized the issue and commented on it in his report, ultimately concluding that if the Commissioner's definitions are accepted, he viewed Galley Handling and Catering services as being in separate markets.

173 Moreover, as a result of the differences between the parties concerning the linkage between Galley Handling and Catering services, the panel explicitly requested the parties to clarify the legal and factual link between those complementary services, at the outset of the hearing of this Application. The Tribunal further observes that on discovery, VAA asked whether or not the Commissioner considered "catering services provided to airlines" to be a relevant market and whether the contention was that VAA had restricted competition in that market. The Commissioner's representative replied in the negative to both of those questions (Exhibits R-190, CR-188 and CR-189, Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3), at pp 129-130).

174 In summary, VAA cannot say that it was taken by surprise by the relevancy of this expanded "In-flight Catering" market. Rather, it actually maintained that some form of a bundled "In-flight Catering" market, including both the preparation of food and its loading/unloading onto the aircraft, was the relevant market based on the evidence provided by the market participants. In the circumstances, the Tribunal is satisfied that VAA had a fair opportunity to address the issue of whether the relevant market in which Galley Handling services are supplied includes some or all Catering services, and that VAA was not prejudiced by the fact that the Commissioner did not plead such a broader relevant market in the alternative to a relevant market consisting of Galley Handling alone (*Tervita FCA* at paras 72-73; *Husar Estate v. P. & M. Construction Ltd.*, 2007 ONCA 191 (Ont. C.A.) at para 44).

175 The cases cited by VAA in support of its objection can be distinguished. First, the *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528, 117 O.A.C. 193 (Ont. C.A.) matter dealt with a failure to plead

Analysis

Alleged errors in the Tribunal's analysis under section 92

(1) Did the Tribunal base its decision on a theory of the case that had not been pleaded?

69 The Tribunal found that Tervita's acquisition of the Babkirk Site would substantially prevent competition since the Vendors would have turned the site into a competing secure landfill once their bioremediation operation would have failed.

70 The appellants allege that the Commissioner did not plead this theory, and that it was consequently an impermissible error of law for the Tribunal to have determined the case based on this theory. They add that they had no reason to believe that the future viability of the bioremediation operation was at issue, and that they were thus precluded from adducing evidence regarding this matter.

71 In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues: *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.) at paras. 60 to 63; *Nunn v. R.*, 2006 FCA 403, 367 N.R. 108 (F.C.A.) at paras. 23 to 26; *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677 (Ont. C.A.) at paras. 4 to 9 and 21.

72 However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced: *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] 3 F.C. 40 (Fed. C.A.) at paras. 14 to 16; *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 (Ont. C.A.) at paras. 18 to 22; *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138 (Ont. C.A.) at paras. 42 to 47.

73 A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it: *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC*, 2012 FCA 103, 430 N.R. 326 (F.C.A.) at para. 27; *Murphy v. Wyatt*, [2011] EWCA Civ 408, [2011] 1 W.L.R. 2129 (Eng. C.A.) at paras. 13 to 19; *R. v. Keough*, 2012 ABCA 14, [2012] 5 W.W.R. 45 (Alta. C.A.).

74 These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. Accordingly, the *Competition Tribunal Rules*, SOR/2008-141 ("*Rules*") provide that an application to the Tribunal must be made by way of a notice of application setting out, *inter alia*, a concise statement of the grounds for the application and of the material facts on which the applicant relies, as well as a concise statement of the economic theory of the case: *Rules* at paras. 36(2)(*c*) and (*d*). Similar provisions apply to a response and to a reply: *Rules* at paras. 38(2)(*a*)(*b*) and (*c*) and subsection 39(2). The *Rules* also set out a detailed and complete system of pre-hearing disclosures: *Rules* at sections 68 to 74 and 77-78.

75 In order to resolve the first ground of appeal raised by the appellants, it must be first determined whether the pleadings encompassed the eventual failure of the bioremediation service and the subsequent transformation of the Babkirk Site into a full service secure landfill. If the pleadings did not encompass these matters, we must determine whether the appellants' right to a fair hearing was prejudiced by the manner in which the Tribunal proceeded.

76 In its notice of application filed with the Tribunal, the Commissioner alleged that Complete had obtained the regulatory approvals to operate a secure landfill at the Babkirk Site, that it was a "poised entrant" into the market for hazardous waste disposal into secure landfills, and that it would have competed directly with Tervita had it not been for the merger: paras. 1, 19 and 21 of the notice of application reproduced at AB vol. 1, pp. 112, 115 and 116. The Commissioner added that "[i]f the

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157 Turning to the evidence, Virginia Cirocco gave much the same evidence as she did in *Alendronate 2012* in which Justice Hughes found the witness to lack candor and to show a propensity to play games. However, before me, I saw none of those features and aside from being annoyed at having to appear and interrupt her holidays, her evidence was straightforward. However, it was not particularly helpful because her knowledge of Apotex's rebate rate was that of a blended rate across all products. She did not have knowledge of the rebate rate Apotex gave internally on a given product.

158 With respect to Michael Blacker's evidence, he testified that he received a minimum 20% rebate on sole source products, that rebate rates fluctuated and that he received a 20% rate on Apo-pantoprazole in a competitive environment. His evidence was significantly local and anecdotal and it is difficult to draw general propositions regarding rebate levels from it.

159 Apotex argues that Takeda should not be permitted to assert and rely on evidence to support the proposition that Apotex would have offered a 60% rebate. It complains that Takeda breached the rule in *Browne v. Dunn* [(1893), 6 R. 67 (U.K. H.L.)] by not confronting Sherman or Hardwick with this evidence during cross-examination.

160 The so-called rule in *Browne v. Dunn* is not strictly a rule. It is a principle based on fairness and is open to exceptions and to court discretion. In the present case the evil of unfairness to which *Browne v. Dunn* is directed, is completely ameliorated by Apotex's right as Plaintiff to call, in reply evidence, either or both of these witnesses to address the suggestion made by Takeda. Apotex did not do so. Takeda's evidence is admissible but not particularly persuasive.

161 With respect to rebates in a single source market, I accept the evidence that the absence of competitive pressure and the "at risk" feature would keep the rate low. Harington's rate was 3.9% while Hamilton's was 28.3%; neither of which seems reasonable in the circumstances. The most persuasive evidence was the example of a molecule single sourced but "at risk" which attracted a rate of 8.9% (per Sherman).

162 This rebate rate of 8.9% is neither *de minimus* nor is it approaching the competitive rate (per Hamilton). It is the most reasonable rebate rate advanced in this case in the sole generic circumstance.

163 In the competitive or multi-source environment, the parties accept that rebate rates would be higher. Apotex advocates for a 44.7% rate which is based on real world competition where Apotex was competing against Teva across Canada and where the sales force of those two companies were large and competitive.

164 In the circumstances, where Apotex is competing against Ranbaxy, the evidence shows Ranbaxy's sales force is considerably smaller (as is the company itself) than Apotex. I accept the logic that Ranbaxy would focus on the larger accounts, the chains, because of the efficiency of marketing to larger companies with large demand. Ranbaxy would, consequently, be less aggressive in pursuit of independents/banners.

165 To make the calculation of the impact of rebates on Apotex's hypothetical world damages, it is necessary to determine the size of the market held by the various purchaser types. On this matter, the evidence is diverse and dispersed. The evidence showed a range of 55%-84% of the market was occupied by chains.

166 However, the calculation of 55% market share for chains and 45% for independents/banners, advanced by Apotex, was an average that most witnesses, even some called by Takeda, supported.

167 In a multi-source market, a 44.7% rebate rate applied to the chains (55% of the market) is reasonable. However, with respect to independents/banners, Apotex's suggestion of 0-10% is too low particularly given the 8.9% found to apply in a sole generic source situation. Blacker's 20% is too unsubstantial as a bench-mark to be applied across the market. A rate of 15% is more reasonable and, applying the "broad axe" approach, is the rate applicable to the damages calculation.

H. Issue 8 — Prejudgment Interest

168 The issue concerns two related matters: the amount of interest and the date that interest begins to run. It is common ground that the Ontario *Courts of Justice Act*, RSO 1990 sc C43 s 127 should be applied. Section 127 reads:

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5 **DR. EASTMAN:** Well, I don't know that I would
6 say that I haven't considered that in my analysis, but it
7 is the case that the acquirers are -- will need to be able
8 to handle the ARO. And so yes, that retirement obligation.
9 So it's -- it is the case that, you know --
10 that you know -- you know, the -- public policy dictates
11 that you want these facilities to be cleaned up and closed
12 up when they're finished, right, and so that's why you have
13 rules that require they do that, right. And in order to
14 ensure that happens, they're going to have -- you know, the
15 owner of the facility has an asset retirement obligation to
16 be able to do that properly.
17 There is, you know, subsequent liability that
18 could belong to somebody else if they somehow fail to do
19 it, right. From a public policy perspective, you want
20 somebody to do this, right. You don't want it to just fall
21 back on the government in order to have to do that.
22 **CHIEF JUSTICE CRAMPTON:** Thank you very much.
23 Those were my questions.
24 I don't know whether counsel have any follow-up
25 questions as a result of questions that we just posed from

1 the Panel. Either one of you can feel free to go first.

2 **MS. HENDERSON:** I don't have any questions.

3 Thank you, Chief Justice.

4 **MR. KLIPPENSTEIN:** I don't, either. Thank you

5 very much.

6 **CHIEF JUSTICE CRAMPTON:** Okay. Well, thank you

7 very much, then.

8 So Dr. Eastman, thank you for joining us. That

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Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(2) Il est entendu que le présent article ne s'applique pas à l'égard de l'acquisition d'éléments d'actif d'une association d'intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l'article 92 à l'égard d'un fusionnement qui est essentiellement complété depuis plus d'un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l'endroit d'une personne ne peut être présentée au titre de l'article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

by this reasoning and therefore accepts Mr. Harrington's conclusion that the annual overhead efficiencies which are cognizable under section 96 are reasonable but are probably somewhat less than the *[CONFIDENTIAL]* that CCS has claimed.

276 As a practical matter, given the conclusion that the Tribunal has reached with respect to the "offset" element of section 96, discussed below, the fact that a more precise estimate of the cognizable overhead efficiencies is not available does not affect the Tribunal's overall determination with respect to the efficiencies defence in section 96.

The Qualitative Efficiencies

277 As discussed above, Dr. Kahwaty identified eight types of qualitative efficiencies that he claimed would likely result from the Merger. The Tribunal is not persuaded that any of these efficiencies "would not likely be attained if the Order were made," as provided in subsection 96(1). Ultimately, the answer to that question is dependent upon the expertise, financial resources, and reputation of the purchaser under the Order. Given that the purchaser may well have the same expertise, financial resources and reputation as CCS, the Tribunal cannot give significant weight to these claimed efficiencies. Indeed, given that the purchaser will have to be approved by the Commissioner, the Tribunal is of the view that all, or virtually all, of these claimed efficiencies are likely to be achieved by that purchaser.

278 Regardless of the identity of the purchaser, some of the types of qualitative efficiencies identified by Dr. Kahwaty will be achieved, including those related to the Roll-off Bin Business, the reduction of risks related to the transportation of Hazardous Waste over long distances and the increased site remediation that will benefit residents, wildlife, and the overall environment. In fact, to the extent that the Merger is likely to substantially prevent competition, as the Tribunal has found, we conclude that it is entirely appropriate to take into account, in the trade-off assessment, the likelihood that there will be less site clean-up and tipping of Hazardous Waste in Secure Landfills than otherwise would have occurred if an Order were made. This will be described below when non-quantifiable effects are considered.

279 The Tribunal concludes that the only efficiencies claimed by CCS that are cognizable under section 96 are a maximum of *[CONFIDENTIAL]* in annual overhead efficiencies, having a net present value of approximately *[CONFIDENTIAL]*, using a discount rate of 5.5%.

280 If, contrary to the Tribunal's conclusion, the Order Implementation Efficiencies are also cognizable under section 96, then it would be appropriate to include in the trade-off assessment further amounts of approximately *[CONFIDENTIAL]* to *[CONFIDENTIAL]* (i.e., one year of transportation cost savings) plus *[CONFIDENTIAL]* (i.e., one year of annual market expansion efficiencies).

What are the Effects for the Purposes of Section 96 of the Act?

281 As CCS noted in its Final Argument, the total surplus approach remains the starting point in assessing the effects contemplated by section 96. Under that approach, the cognizable quantifiable efficiencies will be balanced against the DWL that is likely to result from a merger. In addition, the Tribunal considers any cognizable dynamic or other non-quantifiable efficiencies and *anti-competitive* Effects. Where there is evidence of important dynamic or other non-quantifiable efficiencies and anti-competitive effects, such evidence may be given substantial weight in the Tribunal's trade-off assessment.

282 After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., DWL) and non-quantifiable *anti-competitive* Effects of the merger, it will assess any evidence that has been tendered with respect to the other effects contemplated by section 96 and the purpose clause in section 1.1 of the Act. It is at this point that the Tribunal's assessment will proceed beyond the total surplus approach. In brief, at this stage of the Tribunal's assessment, it will determine whether there are likely to be any *socially adverse* effects associated with the merger. If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects that are likely to result from the merger. In a merger among sellers of products, that wealth transfer will be from the merging parties' customers to the merged entity. Of course, to the extent that the merging parties' rivals may be likely to follow such price effects, the wealth transfer would need to be calculated across the sales or purchases of such rivals as well.

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did not require that claimed gains in efficiency not be achievable in another, less anti-competitive way, although this was the requirement of the Commissioner's Merger Enforcement Guidelines ("MEGs").

149 The Commissioner may require that efficiency gains be merger-specific when deciding whether to challenge a merger. However, once an application is brought under the Act, included efficiency gains are "order-driven" rather than "merger-specific". Since an order of the Tribunal is formulated based on its findings under section 92 of the Act, efficiency gains are evaluated in light of the order. Hence, efficiencies can have no influence on the order that the Tribunal formulates.

I. American Commentary

150 The Court refers approvingly (Appeal Judgment, at paragraph 137) to American commentators who clearly articulate consumer protection as the overriding objective of U.S. antitrust laws. However, the merger provisions of Canada's Act are not so focussed on consumer protection. It appears to the Tribunal that American commentators have generally not realized this. Instead, they have been quick to attack section 96 of Canada's Act, and always on the basis that it diverges from the approach under American antitrust law. In this, the commentators are entirely correct, but they ignore Canadian economic conditions and concerns, in particular, the comparatively small size of the Canadian economy.

151 For example, in his analysis of the Act, Professor Ross advocates that the phrase "prevention or lessening of competition" in subsection 96(1) be interpreted in the same way as the phrase "restrain or injure competition unduly" in section 45 (presumably paragraph 45(1)(d)) and hence prevent redistributions of wealth from anti-competitive mergers as Parliament intended for criminal conspiracy (S. Ross, *Afterword-Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So That The World Can Be More Efficient*?, Antitrust Law Journal, vol. 65, Issue 1, Fall 1996 at 641) [hereinafter, *Ross*]. The Tribunal disagrees with this view. If Parliament had intended the same meanings to these phrases, it would have used the same language when it added section 96 to the Act in 1986.

152 Secondly, Professor Ross notes the concern that the Consumer Surplus Standard would "...effectively read an efficiency defence out of the Competition Act" (Ross, at 647). Referring to the *obiter dicta* comments of Reed J. in the *Hillsdown* decision, he concludes that that standard would permit mergers where the efficiency gains are "...almost certain" and the "threat of substantially lessened competition is only likely..." (Ross, at 648). However, nothing in the Act suggests this, and in the Tribunal's view, the requirement that efficiency gains be shown on a balance of probabilities applies equally to any effects that are asserted.

153 Professor Ross may be correct to conclude that subsection 96(2) is inconsistent with the Total Surplus Standard (Ross, at 648), but it is also inconsistent with the Consumer Surplus Standard and the Modified Surplus Standard.

154 Professor Ross defines and criticizes a "total Canadian welfare model" because, when it results in blocking a merger by excluding efficiency gains and effects outside of Canada, it violates the non-discrimination requirements under international treaties and agreements (Ross, at 643-644). In the Tribunal's understanding, the "total Canadian welfare model" as defined by Professor Ross includes consideration of the deadweight loss to the Canadian economy and losses due to income transfer from Canadian consumers to foreign shareholders. Accordingly, it is a version of the Consumer Surplus Standard in which effects are limited to those experienced in Canada. As discussed below, the Tribunal disagrees with his conclusion regarding Canada's international obligations and his interpretation of the purpose clause of the Act.

155 In the Tribunal's view, Professor Ross appears to be antagonistic to any approach that differs from the approach adopted in the United States. Indeed, although his position is not entirely clear, his view appears to the Tribunal to be that no harm from an anti-competitive merger should be tolerated, regardless of proven efficiency gains. Although he refers to a consumer welfare standard, he appears to articulate the Modified Price Standard, which was criticized by Professor Townley at the first hearing.

156 The Court's reliance on Professor Brodley's article is puzzling since that article does not discuss Canadian law at all (Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress* (1987) 62 N.Y.U. Law Review, 1020) [hereinafter, *Brodley*]. It cites neither the Act nor the Canadian MEGs, and it does not express surprise at the interpretation of section 96 adopted in the MEGs. Instead, addressing the on-going debate within American

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Debates, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; and Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (ibid., at pp. 15-17).

(2) Jurisprudential History of Section 96

88 The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev'd on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii(S.C.C.); redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417Competition Trib. (“Superior Propane III”), aff'd2003 FCA 53[2003] 3 F.C. 529 ("*Superior Propane IV*"). Although this Court is not bound by these decisions, the *Superior Propane* cases considered a number of factors relevant to the efficiencies defence and its application.

89 The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).

90 The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other" (para. 95).

(3) Methodological Approaches to Section 96

91 There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the "total surplus standard" and the "balancing weights standard". For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.

92 Producer surplus "measures how much more producers are able to collect in revenue for a product than their cost of producing it" (p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is "a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price" (ibid.). Consumer surplus therefore represents the savings that accrue to consumers from what they would have been willing to pay.

93 The term "total surplus" refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.

94 The total surplus standard involves quantifying the deadweight loss which will result from a merger — "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied" (Facey and Brown, at pp. 256-57). Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" (*Superior Propane IV*, at para. 13). Estimates of the elasticity of demand — or the degree to which demand for a product varies with its price — are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).

95 Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any

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Consideration of the evidence is the function of the Tribunal. I cannot say that the Tribunal's conclusion in this case is contrary to the overwhelming weight of evidence or that it ignored evidence or that the inferences that it drew were unreasonable. The methodology and analysis that it adopted were within the discretion conferred upon the Tribunal by the Court.

59 For these reasons, I cannot say that the Tribunal failed to respect the principle of *stare decisis*. It did not just pay lip service to the directions of the Court, nor did it defy its directions.

v) Did the Tribunal Err in its Allocation of the Onus of Proof?

60 The Court placed the onus of proving the extent of anti-competitive effects on the Commissioner. The respondent had the onus of proving efficiency gains, as well as the onus of persuading the Tribunal that the efficiency gains were likely to be greater than, and to offset the anti-competitive effects.

61 In addition to deadweight loss, the Commissioner argues that the entire wealth transfer of $40.5 million should initially be included in the anti-competitive effects of the merger for the purposes of the subsection 96(1) analysis. He says that if the respondent disagreed, it was up to the respondent to prove that the amount should be reduced.

62 I cannot see how the Commissioner's approach is consistent with the direction of the Court. The Commissioner's approach can only be correct if he had satisfied the Tribunal that *prima facie*, the entire wealth transfer should be considered as an adverse effect of the merger. He did not. The onus of proving the extent of the anti-competitive effects is on the Commissioner. According to the Tribunal's socially adverse effects approach to the wealth transfer, the Commissioner had to persuade the Tribunal of the extent of those effects. The Commissioner satisfied the Tribunal that only $2.6 million, representing the socially adverse effects on low income households, could be considered.

63 The Commissioner says that the socially adverse effects approach essentially eliminates any burden on the respondent of persuading the Tribunal on the ultimate issue, that the efficiencies exceed and outweigh those effects. I do not agree. In the first place, the Court left it open to the Tribunal to decide upon the methodology for determining the extent of the anti-competitive effects of the merger. The socially adverse effects approach is the methodology chosen by the Tribunal and it is not inconsistent with the Court's directions. The burden on the Commissioner under this approach may be greater than under a different approach, but there is no evidence to suggest that it is impossible to meet.

64 In any event, the burden of proving that the efficiencies exceed and outweigh the anti-competitive effects may be relatively straightforward where the efficiencies and effects are quantified and there is significant disparity between the two. However, when qualitative considerations are to be taken into account, the determination of whether efficiency gains exceed and offset those effects may be more difficult to assess. Either way, the burden will be on the respondent to satisfy the Tribunal that the efficiency gains are greater than and offset the socially adverse effects of a merger.

Natural Justice

65 The Commissioner says the Tribunal considered academic studies and articles that were not properly before it through witnesses who could be cross-examined. Where an error of natural justice has occurred, the relief to be granted is to remit the matter to the Tribunal for redetermination. However, in oral argument, the Commissioner expressly waived that relief if the Court found that the Tribunal's only error was one of natural justice.

66 As I do not find that the Tribunal committed other errors which would justify intervention by this Court, it is not necessary to address the natural justice issue.

Standard of Review

67 I also do not think it is necessary to address the standard of review. Even on a correctness standard, I have not found error on the part of the Tribunal.

Conclusion

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bears in practice an evidential burden, that is the burden of leading evidence as to both components of the efficiency defence to alert the Tribunal to what the real, as opposed to the alleged, gains and effects are. In the end, however, the legal burden is on the merging parties to convince the Tribunal, first, that the efficiency gains are of the amount that they have contended, second, that the effects of the lessening of competition are those that they have identified and not those submitted by the Commissioner, and third, that the efficiency gains are greater than, and will offset, the effects.

177 I agree with the respondents that the Commissioner, with his statutory investigative powers, may be in a better position to gather information relevant to the effects and, indeed, that it would have done so in the context of the application of section 92 to which section 96 is a defence. The availability of statutory investigative powers will, indeed, enable the Commissioner to assume his evidentiary burden of gathering and filing relevant evidence to counter and rebut the allegations and evidence of the merging parties as to the effects of the lessening of competition. However, this is not sufficient to transfer the legal burden of proving these effects on the Commissioner. Indeed, there is no rationale and justification for putting on the Commissioner the burden of persuasion on one of the three components of the efficiency defence.

178 In conclusion, I would dispose of the matter as proposed by my colleague, except as to costs where I would make no apportionment in view of my conclusion that the Tribunal also erred on the issue of the legal burden of proof.

Appeal allowed in part.

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157 The Commissioner has the legal burden of proving the extent of the relevant effects, while the respondents have the burden, not only of proving the scale of the efficiency gains that would not have occurred but for the merger, but also of persuading the Tribunal on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects.

158 The appellant should have his costs, but because the respondents were successful on the burden of proof issue, I would reduce the costs awarded by 20% of those otherwise allowable.

***Létourneau J.A.*:**

159 I have had the benefit of reading the reasons for judgment issued by my colleague, Evans J.A.. I agree with him that the interpretation of the word "effects" in section 96 of the *Competition Act* (Act) R.S.C. 1985, c. C-34 involves a pure question of law that falls to be decided on a standard of correctness.

160 I also agree with my colleague that the word "effects" in section 96 of the Act ought not to be limited, as the Tribunal did, to the effects identified by the total surplus standard. As my colleague has pointed out, the interpretation of section 96 of the Act involves balancing market power and efficiency gains. The approach taken in this matter both in the United States and in Canada is by no means free from ambiguity and harsh criticism: see Robert H. Lande, The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust (1988) 33 *Antitrust* 429; David B. Andretsch, Divergent Views in antitrust Economics (1988) 33 *Antitrust Bull.* 135; Alan A. Fisher, Frederick I. Johnson and Robert H. Lande, Price Effects of Horizontal Mergers (1989) 77 *Calif. L.R.* 777; Lloyd Constantine, An Antitrust Enforcer Confronts the New Economics (1989) 58 *Antritrust L.J.* 661; Roy M. Davidson, When Merger Guidelines Fail to Guide (1992), *Canadian Competition Policy Record* 44, at page 46; Stephen F. Ross, Afterword - Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so the World can be More Efficient? (1997) 65 *Antitrust Law Journal* 641, at pages 643-646; Tim Hazledine, Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy (1998) *Review of Industrial Organization* 243; Jennifer Halliday, The Recognition, Status and Form of the Efficiency Defence to a Merger: Current Situation and Prospects for the Future (1999) *World Competition* 91. A review of these authorities reveals that the provision is at best confusing and puzzling. At worst, it can defeat the very purpose of the Act. I reproduce sections 96 and 1.1 for convenience:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront:

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Competition Policy

This is plainly an area where public policy must tread warily, avoiding *per se* rules and simple *a priori* assumptions that mergers are generally good or generally bad. It would not be at all inconsistent, in Canadian circumstances, for public policy to act against certain mergers while positively encouraging certain others -- those which, for example, were regarded as part of a necessary reorganization of an industrial sector to meet changing world trading conditions. We would suggest that in instances where the federal government, through the Department of Industry, Trade and Commerce, might on occasion act as a marriage broker and actively seek to bring about certain mergers deemed to be in the public interest, prior consultations between this Department, the tribunal and the Department of Consumer and Corporate Affairs should take place. Such public sponsorship, provided it were based on adequate study of the particular industrial structures involved, would be entirely in accord with our general philosophy of approach to mergers. The precise machinery by which prior consultation might be arranged, we leave to others; for the present, our immediate concern is to recommend a procedure for safeguarding the public, to the greatest extent possible, against the adverse effects of mergers undertaken on the initiative of a firm or group of firms. The role of the Competitive Practices Tribunal in this regard would be to examine those mergers that appeared to contain a significant potential for harm, and where such a potential was found, to balance this off carefully against any potential for good that was also found (both good and bad potentials to be viewed, of course, from the standpoint of the economy as a whole and the general public interest). Having made its balancing assessment, the tribunal would, according to its findings, make one of three types of decision:

(1) block the merger unconditionally;

(2) allow it to proceed unconditionally; or

(3) allow it to proceed in altered form, or subject to other conditions designed to ensure that potential disadvantages were reduced to the point where they were outweighed by potential good effects.

Debates, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; and Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (ibid., at pp. 15-17).

(2) Jurisprudential History of Section 96

88 The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev'd on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii(S.C.C.); redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417Competition Trib. (“Superior Propane III”), aff'd2003 FCA 53[2003] 3 F.C. 529 ("*Superior Propane IV*"). Although this Court is not bound by these decisions, the *Superior Propane* cases considered a number of factors relevant to the efficiencies defence and its application.

89 The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).

90 The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other" (para. 95).

(3) Methodological Approaches to Section 96

91 There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the "total surplus standard" and the "balancing weights standard". For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.

92 Producer surplus "measures how much more producers are able to collect in revenue for a product than their cost of producing it" (p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is "a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price" (ibid.). Consumer surplus therefore represents the savings that accrue to consumers from what they would have been willing to pay.

93 The term "total surplus" refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.

94 The total surplus standard involves quantifying the deadweight loss which will result from a merger — "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied" (Facey and Brown, at pp. 256-57). Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" (*Superior Propane IV*, at para. 13). Estimates of the elasticity of demand — or the degree to which demand for a product varies with its price — are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).

95 Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any

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75 Subsection 96(1) directs the Tribunal to consider whether the efficiencies produced by an anti-competitive merger are greater than, and offset, its anti-competitive effects. This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other.

76 Writing of another provision in the *Competition Act* that called for the balancing of various factors, namely the determination of the scope of the relevant market, Iacobucci J. said in *Southam* (*supra*, at page 770, paragraph 43):

A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical. It would be dangerous in the extreme to accord certain kinds of evidence decisive weight. [...] A test would be stilted and impossible of application if it purported to assign fixed weights to certain factors.

Hence, since the efficiency defence requires the Tribunal to balance competing objectives, its operation should remain flexible and not stilted by an overarching and restrictive interpretation.

77 In referring to "the effects of any prevention or lessening of competition", subsection 96(1) does not stipulate what effects must or may be considered. When used in non-statutory contexts, the word, "effects", is broad enough to encompass anything caused by an event. Indeed, even though it does not consider the redistribution of wealth itself to be an "effect" for the purpose of section 96, the Tribunal recognizes, as all commentators do, that one of the *de facto* effects of the merger is a redistribution of wealth: paragraph 446.

78 In addition, section 5.5 of the *MEG* explicitly recognises that a merger may have more than one effect:

Where a merger results in a price increase, it brings both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada.

The *MEG* concluded, however, that:

The efficiency gains described above are balanced against the latter effect, i.e., the deadweight loss to the Canadian economy.

79 Thus, it is not doubted that the redistribution of resources is an effect of an anti-competitive merger, in the sense that it is caused by the exercise of market power created by the merger. Nevertheless, the Tribunal's interpretation of the word, "effects", as it is used in section 96, narrows it to a single effect, namely the loss or inefficient allocation of resources in the economy as a whole as measured by the deadweight loss.

80 Moreover, the statutory requirement that, for the section 96 defence to succeed, the efficiency gains must be greater than, *and offset*, the effects of a lessening of competition suggests a more judgmental assessment than is called for by the largely quantitative calculation of deadweight loss that the Tribunal held was statutorily mandated.

81 Of course, the precise meaning to be given to a word when it appears in a statute, especially if it is commonly used in everyday speech, must be determined by reference to its context. Hence, it was not necessarily an error of law for the Tribunal in this case to give to the word, "effects", a narrower meaning than would normally be ascribed to it in other contexts. The pertinent enquiry is whether, in the context of the *Competition Act*, the Tribunal was correct to narrow its meaning to the single effect of deadweight loss.

(b) subsection 96(3)

82 I attach some weight to subsection 96(3) of the *Competition Act*, which provides that the Tribunal shall not find that a merger or a proposed merger "is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons." Hence, subsection 96(3) expressly *limits* the weight accorded to redistribution in assessing the *efficiencies* generated by a merger.

[1]

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(ii) and this tribunal, acting within the powers hereinafter granted to it, should endeavour to impose and/or recommend means of removing or forestalling impediments to the effective working of competitive market forces (including notably competition with respect to price) for the benefit of the people of Canada.

On the basis of some such statement, and having regard to certain more specific considerations set out at appropriate points in the body of the legislation, the tribunal would perform the following principal functions:

(1) examine certain corporate mergers to determine whether any such mergers were on balance not in the public interest, and in cases where they were judged to be not in the public interest, impose or recommend appropriate remedies;

(2) examine certain types of proposed intercompany agreements respecting exports and the specialization of production to determine whether the agreements were on balance in the public interest, and in cases where they were judged to be in the public interest, place the agreements in a public register and designate them as "registered" export or specialization agreements;

(3) examine the employment of certain trade practices to determine whether such employment was on balance not in the public interest, and in cases where it was judged to be not in the public interest, impose or recommend appropriate remedies; and

(4) sponsor general inquiries similar in character to those now provided for in Section 42 of the Combines Investigation Act, and report on such inquiries.

The remedies that the tribunal itself would be empowered to apply would consist of the issuance of interim and final injunctions. Interim injunctions could be utilized in cases where it appeared desirable to prevent a merger from being consummated or a trade

144 The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

145 Together, the terms "greater than" and "offset" mandate that the Tribunal determine both quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. This approach is supported by the common understanding of the word "offset". *The Oxford English Dictionary* (2nd ed. 1989) defines the verb "offset" to mean "[t]o set off as an equivalent against something else ...; to balance by something on the other side or of contrary nature" (p. 738). Similarly, the *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) entry defines it to mean "to serve as a counterbalance for" (p. 862). This understanding supports the interpretation of the "offset" requirement in s. 96 as imposing a consideration of the qualitative aspects of the merger and a balancing of those qualitative aspects against the quantitative effects of the merger.

146 This is a flexible balancing approach, but the Tribunal's conclusions must be objectively reasonable. As the Federal Court of Appeal held, the overall analysis "must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*" (para. 147 (emphasis in original)). As such, in most cases the qualitative effects will be of lesser importance. In addition, the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence.

147 In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

148 It should be noted that this two-step analysis does not seek to define the methodological details of how quantitative efficiencies and anti-competitive effects are to be identified and compared. Instead, the two-step analysis preserves the ability of the Tribunal to select the quantitative methodology to be employed, provided this quantitative comparison is conducted within step one of the framework described above.

149 Justice Karakatsanis raises concerns that this framework unnaturally separates quantitative and qualitative considerations, and that doing so is "superfluous" in light of the final offset determination which considers both quantitative and qualitative factors (para. 189). Instead, she would instruct the Tribunal to weigh whether the quantitative and qualitative efficiencies, taken as a whole, outweigh the quantitative and qualitative anti-competitive effects, taken as a whole. I would emphasize that the above framework does not require the Tribunal to isolate quantitative and qualitative considerations such that they are never compared. The ultimate offset analysis does allow for consideration of both quantitative and qualitative effects. However, I would think that the Tribunal, even proceeding under Justice Karakatsanis's proposed single-step weighing, would at some point in that consideration ask how the quantitative factors lined up relative to each other, and would also examine how the qualitative factors compared to each other, before attempting to reconcile the whole universe of factors into an ultimate determination. The

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144 The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

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above framework merely guides the structure of that inquiry to ensure that the Tribunal's reasoning is as explicit and transparent as possible.

150 Respectfully, the assertion in the dissenting reasons that "simply tallying up 'mathematical quantifications', while important, cannot provide a complete answer" (para. 190) misreads these reasons. They do not say that quantitative considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

151 However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

152 Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

153 With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

154 Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

155 For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

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144 The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

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147 In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

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