

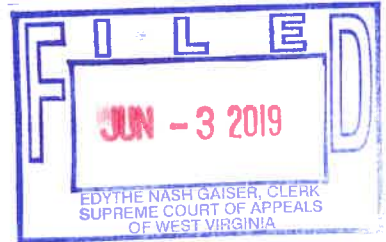
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NORFOLK SOUTHERN RAILWAY COMPANY,  
Plaintiff,**

**v.**

**Raleigh County Circuit Court  
Civil Action No. 19-C-80 K**

**VIRGINIA ELECTRIC AND POWER COMPANY, INC.,  
OLD DOMINION ELECTRIC COOPERATIVE, and  
DYNAMIC ENERGY, INC.,  
Defendant.**



**TO: THE HONORABLE CHIEF JUSTICE**

**MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Plaintiff Norfolk Southern Railway Company by counsel, J.H. Mahaney, Esq. and T. Matthew Lockhart, Esq., respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
- ☐ now pending
  - or
  - ☐ may be filed in the future. (Please list case style, number, and Court if any)

This action involves: (Please check all that apply)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;  | <input type="checkbox"/> Non-compete Agreements;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;  | <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate;                                     | <input type="checkbox"/> Commercial Torts;   |
| <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; | <input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies;   |
| <input type="checkbox"/> Terms of a Commercial Lease;  | <input type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity; |
| <input type="checkbox"/> Commercial Non-consumer debts;  | <input type="checkbox"/> Anti-trust Actions between Commercial Entities;   |
| <input type="checkbox"/> Internal Affairs of a Commercial Entity;  |  |
| <input type="checkbox"/> Trade Secrets and Trademark Infringement;                                       |  |

- ☐ Injunctive and Declaratory Relief Between Commercial Entities;
- ☐ Liability of Shareholders, Directors, Officers, Partners, etc.;
- ☐ Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;
- ☐ Shareholders Derivative Claims;
- ☐ Commercial Bank Transactions;
- ☐ Franchisees/Franchisors;
- ☐ Internet, Electronic Commerce and Biotechnology
- ☒ Disputes involving Commercial Entities; or
- ☒ Other (Describe) Express Indemnification

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described here:

On May 14, 2016, a Norfolk Southern Railway Company train derailed in Wyoming County, West Virginia at Dynamic Energy's Coal Mountain Loadout. The derailment occurred because, unbeknownst to anyone, doors on a railcar in the train opened during the loading process approximately 375 feet from the Loadout, causing tons of coal to spill on the track. Investigation revealed that the doors on the railcar had not been locked by Virginia Electric and Power Company, Inc. and Old Dominion Electric Cooperative ("VEPCO/ODEC") at their Clover (Va.) Power Station, despite a contractual requirement to do so. After the railcar had been loaded with coal by Dynamic Energy four days earlier, its doors eventually opened due to the weight of the coal and the resulting spill caused the derailment. As a result of the derailment, a Norfolk Southern conductor who was on the train's caboose filed a lawsuit against Norfolk Southern in the Circuit Court of Mingo County pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51 et. seq. ("FELA") claiming he was severely and permanently injured. The Mingo County lawsuit, which alleged Norfolk Southern was vicariously liable for the actions of VEPCO/ODEC, was settled on the fourth day of trial. Only the injured employee and Norfolk Southern were parties to the Mingo County lawsuit.

Norfolk Southern and Dynamic Energy and Norfolk Southern and VEPCO/ODEC are parties to industry and rail specific contracts that incorporate indemnification obligations as it relates to the relevant facts underlying the Mingo County lawsuit. As a result of their failure to accept Norfolk Southern's tender with respect to the Mingo County lawsuit, Norfolk Southern has filed this breach of contract action for indemnification against Dynamic Energy and VEPCO/ODEC.

The claims are independent of each other, as Dynamic Energy and VEPCO/ODEC owe different contractual obligations to Norfolk Southern.

Dynamic Energy is a shipper of coal at its Coal Mountain Loadout and its indemnification obligation is rooted in an agreement that authorized the construction and ultimate use of the Loadout on Norfolk Southern's property in exchange for an agreement by Dynamic Energy to provide broad form indemnification to Norfolk Southern for any matters relating to the Loadout regardless of any negligence on the part of Norfolk Southern.

VEPCO and ODEC receive shipments of coal from Dynamic Energy that are delivered by rail from Norfolk Southern. VEPCO/ODEC unload the coal at the Clover (Va.) Power Station. While the doors are designed to automatically close and lock, VEPCO and ODEC are contractually obligated to ensure that all railcar doors are locked after they are unloaded. The cars are released to Norfolk Southern, which in turn routinely delivers the cars to Dynamic Energy for loading and then returns the cars back to VEPCO/ODEC for unloading. By virtue of numerous agreements and amendments to those agreements over the years, VEPCO/ODEC agreed to indemnify Norfolk Southern with respect to its operations at the Clover Power Station. It is anticipated that the numerous contracts in this case will need to be analyzed and interpreted under the law of more than one state, including Virginia and West Virginia.

Moreover, railroad operations are heavily regulated by the Federal Railroad Administration ("FRA") through industry-specific federal regulations that were authorized by Congress to ensure national uniformity. 49 U.S.C. §20101 et. seq. In so doing, Congress expressly provided that the FRA's issuance of regulations pursuant to the authority delegated to it would expressly and broadly preempt all state law covering the subject matter of the regulations in the interest of national uniformity. 49 U.S.C. §20106. The FRA exercised this authority by enacting the

“Federal safety standards for railroad freight cars” in 49 C.F.R. Part 215, titled *Railroad Freight Car Safety Standards*. 49 C.F.R. § 215.1. Given that the FRA, through power vested in it by Congress, has promulgated federal regulations that cover the field of railcar inspections, the issue of federal preemption of state laws is necessarily implicated when it comes to the actions and duties of Norfolk Southern. This case therefore requires both the application of industry-specific agreements and preemptive federal law unique to railroads. The business court was created to handle complex commercial litigation between business entities and this case fits squarely within that rubric.

In further support of this Motion, please find attached hereto an accurate copy of the following documents: Complaint, Answers and Docket Sheet.

In regard to expedited review, the Movant:

- ☒ DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.
- ☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following  
constitutes good cause to do so:

**WHEREFORE**, the undersigned hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 31<sup>st</sup> day of May 2019.



J.H. Mahaney, Esquire (WV Bar #6993)  
T. Matthew Lockhart, Esquire (WV Bar #11058)  
DINSMORE & SHOHL LLP  
611 Third Avenue  
P.O. Box 2185  
Huntington, WV 25722  
Telephone: (304) 529-6181  
Facsimile: (304) 522-4312  
*Counsel for Defendant*  
*Norfolk Southern Railway Company*

CERTIFICATE OF SERVICE

I, J.H. Mahaney, do hereby certify that on this 31<sup>st</sup> day of May, 2019, I have served the foregoing "Motion to Refer Case to Business Court Division," with attachments by first class mail to the following:

David K. Hendrickson, Esq.  
H. Jerome Sparks, Esq.  
Hendrickson & Long, PLLC  
214 Capitol Street  
Charleston, West Virginia 25301  
*Counsel for Defendants*  
*Virginia Electric and Power Company, Inc.,*  
*and Old Dominion Electric Cooperative*

Stephen W. Ball, Esquire (WVSB #8776)  
302 S. Jefferson Street  
Roanoke, VA 24011  
*Counsel for Defendant*  
*Dynamic Energy, Inc.*

Raleigh County Circuit Clerk  
222 Main Street  
Beckley, WV 25801

Honorable H.L. Kirkpatrick III  
Raleigh County Circuit Court  
222 Main Street  
Beckley, WV 25801

Business Court Division Central Office  
Berkeley County Judicial Center  
380 West South Street, Suite 2100  
Martinsburg, WV 25401



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J.H. Mahaney, Esquire (WV Bar #6993)  
T. Matthew Lockhart, Esquire (WV Bar #11058)  
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Facsimile: (304) 522-4312  
*Counsel for Defendant*  
*Norfolk Southern Railway Company*

# **EXHIBIT A**



## NAVIGATION

CivilCase InformationTenth Judicial Circuit of Raleigh County

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19-C-80Judge: H. L. KIRKPATRICK, III  
NORFOLK SOUTHERN RAILWAY COMPANY VS. VIRGINIA ELCTRIC AND POWER

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Plaintiff(s) - (If Name is blue then point to name for additional information)  
Plaintiff Attorney(s)  
NORFOLK SOUTHERN  
J.H. MAHANEY

---

Defendant(s) - (If Name is blue then point to name for additional information)  
Defendant Attorney(s)  
DYNAMIC ENERGY INC OLD DOMINION ELEC VIRGINIA ELECTRIC  
N/A

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Date	Filed:	02/25/2019
Case	Type:	CONTRACT
Appealed:		0
Final	Order	Date: N/A
Statistical	Close	Date: N/A

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Line  
Date  
Action / Result  
Documents

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0001  
02/25/2019  
CASE FILED-ISSUED SUMMONS AND COMPLAINT SENT TO SEC OF STATE  
[View Document](#)

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0002

FOR SERVICE.MBS (CC)

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0003  
03/04/2019  
REC RTN OF SERV FROM SOS ON BEHALF OF VIRGINIA ELECTRIC & POWER

[View Document](#)

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0004

CO 02/26/19 (AP) (LS)

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0005

03/04/2019

REC RTN OF SERV FROM SOS ON BEHALF OF DYNAMIC ENERGY, INC

[View Document](#)

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0006

02/26/19 (AP) (LS)

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0007

03/04/2019

RECRTN OF SERV FROM SOS ON BEHALF OF OLD DOMINION ELECTRIC CORP

[View Document](#)

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0008

02/26/19 (AP) (LS)

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0009

04/04/2019

ANSWER OF VIRGINIA ELECTRIC & POWER CO. & THE OLD DOMINION

[View Document](#)

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0010

ELECTRIC COOPERATIVE TO PLAINTIFF'S COMPLAINT / CERTIFICATE

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0011

OF SERVICE. (AP) (VLS)

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0012

04/10/2019

CERT OF SERV "DISCOVERY REQUESTS OF DEFTS VIRGINIA ELECTRIC &

[View Document](#)

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0013

POWER COMPANY & OLD DOMINION ELECTRIC COOPERATIVE TO PLTFS

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0014

1ST SET" (AMY) (LS)

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0015

04/09/2019

ANSWER & AFFIRMATIVE DEFENSES W/ CERT OF SERV. DP (VLS)

[View Document](#)

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0016

05/10/2019

STIPULATION EXTENDING TIME TO ANSWER DISCOVERY / CERTIFICATE

[View Document](#)

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0017

OF SERVICE. (AP) (VLS)

## **EXHIBIT B**



*Legal Counsel.*

DINSMORE & SHOHL LLP  
611 Third Avenue  
Huntington, WV 25701  
www.dinsmore.com

*J.H. Mahaney, Esquire*  
Direct: (304) 691-8320  
Fax: (304) 522-4312  
john.mahaney@dinsmore.com

February 25, 2019

Paul Flanagan  
Raleigh County Judicial Center  
222 Main Street  
Beckley, WV 25801

Re: Norfolk Southern Railway Company v. Virginia Electric and Power Company, Inc., et al.  
Circuit Court of Raleigh County, WV  
Civil Action No:

Dear Mr. Flanagan:

Enclosed for filing please find the "*Civil Case Information Statement*" and the "*Summons and Complaint*". Please file in your usual manner.

If you should have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,



J.H. Mahaney  
JHM/tnv

*Enclosures*

**CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES**

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

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**I. CASE STYLE:**

**PLAINTIFF(S)**

NORFOLK SOUTHERN RAILWAY COMPANY

v.

CIVIL ACTION NO.:

19-C-8D-K

**DEFENDANT(S)**

VIRGINIA ELECTRIC AND POWER COMPANY, INC.,  
OLD DOMINION ELECTRIC COOPERATIVE, and  
DYNAMIC ENERGY, INC.,

DAYS TO  
ANSWER: 30

TYPE OF  
SERVICE: **Sec. of State**

**II. TYPE OF CASE:** Contract

RALEIGH COUNTY  
RECEIVED AND FILED

**III. JURY DEMAND:** Yes

FEB 25 2019

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): 11/2019

PAUL H FLANAGAN  
CIRCUIT CLERK

**IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?** No

**ATTORNEY NAME:**

J.H. Mahaney, Esquire (WV Bar #: 6993)  
T. Matthew Lockhart, Esquire (WV Bar #: 11058)

**FIRM:**

**ADDRESS:**

**TELEPHONE:**

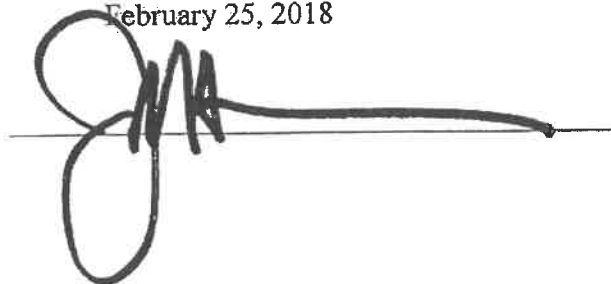
**REPRESENTING:**

DINSMORE & SHOHL LLP  
611 Third Avenue, Huntington,  
West Virginia 25701  
(304) 529-6181  
NORFOLK SOUTHERN RAILWAY COMPANY

**DATED:**

February 25, 2018

**SIGNATURE:**



**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

**NORFOLK SOUTHERN RAILWAY COMPANY,**  
**Plaintiff,**

v.

Civil Action No. 19-C-80-K

**VIRGINIA ELECTRIC AND POWER COMPANY, INC.,**  
**OLD DOMINION ELECTRIC COOPERATIVE, and**  
**DYNAMIC ENERGY, INC.,**  
**Defendant.**

RALEIGH COUNTY  
RECEIVED AND FILED

FEB 25 2019

PAUL H FLANAGAN  
CIRCUIT CLERK

**COMPLAINT**

The Plaintiff, Norfolk Southern Railway Company ("NSRC"), for its Complaint against Defendants Virginia Electric and Power Company, Inc., Old Dominion Electric Cooperative and Dynamic Energy, Inc., states as follows:

**FACTS APPLICABLE TO ALL COUNTS**

1. Plaintiff NSRC is a Virginia corporation having its principal place of business in Norfolk, Virginia.
2. Defendant Virginia Electric and Power Company, Inc. ("VEPCO") is a Virginia corporation having its principal place of business in Richmond, Virginia. VEPCO is registered to conduct business in West Virginia, and regularly and routinely conducts such business in West Virginia.
3. Defendant Old Dominion Electric Cooperative ("ODEC") is a Virginia company having its principal place of business in Glen Allen, Virginia. ODEC is registered to conduct business in West Virginia, and regularly and routinely conducts such business in West Virginia.
4. Defendant Dynamic Energy is a West Virginia corporation having its principal place of business in Daniels, Raleigh County, West Virginia.

5. At all relevant times hereto, NSRC was engaged in the business of transporting goods and commodities by rail in Virginia, West Virginia and other states.

6. At all relevant times hereto, Dynamic Energy owned and operated coal mining, processing and loading facilities in or near Coal Mountain, Wyoming County, West Virginia.

7. At all relevant times hereto, VEPCO and ODEC owned and operated a coal-fired electrical power generating plant known as the Clover Power Station in Clover, Virginia (hereinafter the "Clover Plant").

8. The underlying May 14, 2016 incident that gives rise to NSRC's contractual indemnity claims in this case arose directly from the activities and/or operations of Defendants Dynamic Energy, VEPCO and ODEC.

9. This Court has jurisdiction over the parties to, and subject matter of, this case. Jurisdiction and venue are proper in Raleigh County, West Virginia pursuant to W. Va. Code § 56-1-1 and § 51-2-2. The amount of damages in question exceeds the minimal jurisdiction amount and therefore this Court has original and general jurisdiction over this matter. Venue is proper in this Court in that, *inter alia*, Dynamic Energy's principal place of business is located in Raleigh County, West Virginia.

**A. VEPCO and ODEC Operations at the Clover Plant**

10. As part of, and in furtherance of, its operations at the Clover Plant, VEPCO and ODEC from time to time purchase coal from Dynamic Coal. Coal purchased by VEPCO and ODEC from Dynamic is "flood loaded" into coal hoppers at Dynamic's Coal Mountain facility, and then transported by rail by NSRC to the Clover Plant.

11. Once loaded coal hoppers arrive at the Clover Plant, VEPCO and ODEC take custody of the railcars and empty the coal from the railcars by moving the cars through or over

an unloading pit or chute. When each car reaches the point where it is to be unloaded, the bottom-dump doors on the car are activated by VEPCO and ODEC to open and discharge its contents. Once empty, the car's doors are re-activated by VEPCO and ODEC to close and lock so that they can be returned to NSRC and transported to a coal facility for reloading.

12. After the railcars are emptied, but before they are returned to NSRC, VEPCO and ODEC are required and obligated to ensure that the bottom-doors are closed, latched and locked.

13. If for any reason the doors on each coal hopper cannot be closed, latched and locked, VEPCO and ODEC are required/obligated to notify NSRC before releasing the railcars back to NSRC for transport.

14. At all times relevant hereto, VEPCO and ODEC were required and obligated to comply with NSRC's Conditions of Carriage #2-P, which provided that:

Consignee shall be responsible for the proper and complete unloading of commodity out of each railcar. It shall be the *sole responsibility of the consignee to . . . close, latch and lock all doors on each hopper railcar before releasing railcars to NS*. In the event consignee is unable to close, latch, and lock all doors due to wear or damage to the doors consignee shall, prior to release of the empty railcars, notify NS of the involved railcar(s) by initial and number and shall provide a description of the problem with the doors.

15. In certain instances, including the circumstances at issue in this case, once VEPCO and ODEC release the railcars back to NSRC, NSRC transports the empty coal hopper back to Dynamic's Coal Mountain loading facility to be reloaded and then transported back to the Clover Plant.

**B. Dynamic Energy's Operations at Coal Mountain, West Virginia and Coal Loading Operations on the Cub Creek Branch**

16. In August of 2005, NSRC entered into a series of agreements with Dynamic Energy that would allow Dynamic to construct its coal loading facility on NSRC's Cub Creek

Branch line and to begin loading coal into railcars at Coal Mountain, West Virginia. Specifically, NSRC and Dynamic entered into a Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyor Agreement.

17. Under the Track Improvement Agreement, NSRC agreed to make repairs and improvements to the Cub Creek Branch such that it would accommodate up to 105 standard coal hoppers for loading operations at Dynamic's Coal Mountain loadout.

18. Under the Facility Improvement Agreement, Dynamic agreed to construct a coal weighing and batch-load management facility on the Cub Creek Branch in accordance with certain specifications agreed upon by both NSRC and Dynamic.

19. Under the Overhead Conveyor Agreement, Dynamic was given the right to construct, maintain and operate a conveyor system and supporting structures, which includes but is not limited to the loadout, to bring coal from Dynamic's preparation plant to the point where it would be loaded into NSRC's railcars.

20. In the Overhead Conveyor Agreement, Dynamic expressly warranted and agreed that:

Industry assumes all risk in connection with the construction, maintenance, use, presence, operation and removal of the Conveyor, including but not limited to activities associated with any coal loading operations and car inspections performed in the vicinity of the Conveyor, and covenants and agrees to indemnify and save harmless Railway, its officers, agents and employees, from and against any and all liability for injury to any person or persons, including death, as well as damage to or loss of property, including the Conveyor, or claims in connection herewith, resulting from or happening in connection with the exercise of the privileges herein granted, or the presence of the Conveyor, regardless of the negligence of the Railway, its officers, agents or employees, and the fact that the construction, maintenance, repair, or alteration of the Conveyor shall have been approved by or performed under the supervision of and to the satisfaction of the chief engineering officer of Railway, or his designated representative, shall not relieve Industry from responsibility or liability herein undertaken for any injury, death or damage to property that

may arise or occur as a result of the construction, maintenance, presence, use, operation and removal of the Conveyor.

21. The conveyor system and supporting structures were subsequently constructed and placed into operation, and later continued in operation through and including May 14, 2016, pursuant to the agreements.

22. In the course of performances of the agreements, and in furtherance of its operations as a coal company, Dynamic Energy has from time to time requested that NSRC deliver trains containing empty railcars to its Coal Mountain loadout so that coal could be loaded into the cars and then delivered by NSRC to Dynamic Energy's customers, including but not limited to VEPCO and ODEC.

23. Because the Coal Mountain loadout is located on a single-track rail line that dead-ends just beyond the loadout, coal loading operations at Dynamic's loadout involve several steps.

24. NSRC's trains typically enter the Cub Creek Branch with locomotives on the lead or head end. A train engineer and conductor are, in most instances, positioned in the lead locomotive. This is referred to as a "pull" or pulling movement. Empty railcars follow behind the locomotives, and a caboose or "shoving platform" is often situated at the end of the train.

25. When the empty coal car closest to the locomotives is "spotted" underneath the loadout, Dynamic Energy employees operate the conveyor system to load tons of coal into the empty railcars from overhead as NSRC employees pull the train slowly forward. This is referred to as "flood loading". The train is flood loaded one railcar at a time until all are loaded.

26. The final component of the coal loading process involves NSRC employees reversing the train's movement and backing it under Dynamic Energy's loadout, and eventually off of the Cub Creek Branch and onto NSRC's main line. This is referred to as a "shove" or a

shove movement, as the locomotives are now located at the rear of the train and are shoving the railcars forward for this step in the movement.

27. To comply with regulations promulgated by the Federal Railroad Administration and NSRC's Operating Rules, a train conductor is positioned on the caboose (or the lead car if no caboose is in use) as the shoving movement through the loadout and off of the Cub Creek Branch occurs. The purpose of this placement is to provide visual protection to the leading portion of the train as the shove movement is executed.

28. As the train shoves off of the Cub Creek Branch, each of the now-loaded coal cars and the locomotives passes through and under Dynamic's loadout.

### **C. The May 14, 2016 Derailment**

29. On or prior to May 10, 2016, NSRC delivered a train of loaded coal cars to VEPCO and ODEC at the Clover Plant. VEPCO and ODEC took custody of the cars, and subsequently emptied or dumped the coal from the cars. On or about May 10, 2016, VEPCO/ODEC returned the cars to NSRC to be transported to Dynamic's Coal Mountain loadout, loaded with coal purchased from Dynamic, and then returned to VEPCO and ODEC at the Clover Plant.

30. On or prior to May 14, 2016, NSRC delivered the 100 empty coal hoppers returned to it by VEPCO and ODEC to Dynamic's Coal Mountain loadout so that Dynamic could load the cars with coal for delivery back to VEPCO and ODEC's Clover Plant.

31. Flood loading of the train began on the afternoon of May 14, 2016. As the cars were being flood loaded, the bottom-dump doors on railcar NS 391368 (car number 88 from the locomotive) opened and spilled tons of coal onto the tracks underneath the loadout. By this time, more than 80 railcars had already been loaded without any apparent issue.

32. NSRC subsequently sent one of its mechanical supervisors to Dynamic's loadout to inspect railcar NS 391368. Based on his inspection, the supervisor determined that the spill occurred because the doors of the railcar had not been properly latched and locked by VEPCO and ODEC. The supervisor instructed that the car not be re-loaded with coal, but instead sent to a repair facility for further inspections to make sure that the door mechanism was in proper working order.

33. Before releasing the train so that the remaining empty railcars could be loaded, the mechanical supervisor inspected the remaining 12 railcars that had not yet been loaded to check that the bottom dump doors were properly closed, latched and locked by VEPCO and ODEC. The mechanical supervisor found no issues with the remaining empty railcars.

34. After the flangeways on the track were cleared of coal by Dynamic's employees, Dynamic loaded the remaining empty railcars with coal.

35. To complete the loading process, NSRC conductor Matthew Graham positioned himself on the caboose, which became the leading end of the shove movement. As the conductor, Graham controlled the movement of the train, and began the process of moving the train through and under the loadout.

36. As the loaded cars began to pass under the loadout, a NSRC employee observing the cars as he stood near the loadout discovered that NS 391368 had derailed and was travelling or riding on the ties instead of the rail. The employee reported the situation to Conductor Graham, who in turn radioed the engineer to stop the train.

37. According to Conductor Graham, as the train was coming to a stop, he was knocked to the floor of the caboose platform and injured as a result of "slack action" that occurred in slowing the train.

38. After the train came to a stop, NSRC discovered that two other cars that had been loaded prior to the first spill – NS 391031 and NS 391083 – had opened during movement because their doors were not properly latched and locked by VEPCO and ODEC, causing and allowing coal to spill onto the track from those cars as well.

39. As the train approached and passed under the loadout, NS 391368 and NS 391031 derailed as a result of coal spilling onto the track from NS 391031. NS 391083 did not derail.

40. On May 23, 2017, Graham filed a lawsuit against NSRC in the Circuit Court of Mingo County, West Virginia, Civil Action No. 17-C-95, under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq., alleging that he was injured as a result of the derailment (the "Graham Civil Action").

41. In the Graham Civil Action, Graham claimed, *inter alia*, that the derailment that allegedly caused his injuries was caused by VEPCO and ODEC's failure to properly close, lock and latch the locking mechanism on the hopper cars' bottom-dump door and by NSRC's alleged failure to properly inspect the railcars, both prior to and after arrival at Dynamic's Coal Mountain loadout.

42. Graham did not name VEPCO and ODEC as a party to the lawsuit, but instead claims that NSRC is vicariously liable for VEPCO/ODEC's failure to ensure the railcar doors were properly closed, locked and latched.

43. NSRC has denied that it was negligent as Graham has alleged, and has affirmatively asserted that Graham's injuries, if any, were caused by his contributory fault.

44. As a result of the derailment, Graham claims that he has sustained serious and permanent injuries to his back, including a surgical fusion of his low back.

45. Graham seeks significant damages from NSRC as a result of his alleged injuries, and claims that he is totally and permanently disabled from future employment.

46. Trial is currently scheduled in the Graham Civil Action for March 25, 2019 before the Hon. Darrell Pratt, sitting by designation in the Circuit Court of Mingo County, West Virginia.

**COUNT I – Express Indemnity/Breach of Contract against Dynamic Energy**

47. NSRC reincorporates and realleges the allegations asserted in paragraphs 1 through 46 of its Complaint as if they were fully asserted herein.

48. At the time of the Incident, Dynamic Energy owned and operated the coal loading facility at issue in the Graham Civil Action.

49. At the time of the Incident, NSRC and Dynamic Energy were parties to the Overhead Conveyor Agreement, which governed the respective activities and operations at issue by NSRC and Dynamic Energy.

50. As part of the Overhead Conveyor Agreement, Dynamic Energy agreed to provide NSRC broad indemnity for any incidents that occurred in connection or in association with coal loading operations, car inspections and/or the maintenance, use, presence or operation of the loadout:

Industry assumes all risk in connection with the construction, maintenance, use, presence, operation and removal of the Conveyor, including but not limited to activities associated with any coal loading operations and car inspections performed in the vicinity of the Conveyor, and covenants and agrees to indemnify and save harmless Railway, its officers, agents and employees, from and against any and all liability for injury to any person or persons, including death, as well as damage to or loss of property, including the Conveyor, or claims in connection herewith, resulting from or happening in connection with the exercise of the privileges herein granted, or the presence of the Conveyor, regardless of the negligence of the Railway, its officers, agents or employees, and the fact that the construction, maintenance, repair, or alteration of the

Conveyor shall have been approved by or performed under the supervision of and to the satisfaction of the chief engineering officer of Railway, or his designated representative, shall not relieve Industry from responsibility or liability herein undertaken for any injury, death or damage to property that may arise or occur as a result of the construction, maintenance, presence, use, operation and removal of the Conveyor.

51. The indemnity obligations assumed by Dynamic in the Overhead Conveyor Agreement are valid and fully enforceable by NSRC with respect to the allegations made against it in the Graham Civil Action.

52. All activities that occurred on the Cub Creek Branch on May 14, 2016, and the allegations made by Graham in the Graham Civil Action based on and arising from those activities, fall within the scope of the indemnity obligation owed by Dynamic to NSRC under the terms of the Overhead Conveyor Agreement.

53. Under the terms of the Overhead Conveyor Agreement, Dynamic Energy is contractually obligated to indemnify and save NSRC harmless for all costs incurred in connection with the Graham Civil Action, including but not limited to any amounts that NSRC may become obligated to pay to Graham by virtue of a good faith settlement or judgment, and for any and all attorneys' fees and costs incurred in connection with the Graham Civil Action.

54. Despite NSRC's demand to Dynamic Energy that it fully defend and indemnify NSRC with respect to the Graham Civil Action, Dynamic Energy has failed and refused to do so.

55. Dynamic Energy has therefore breached its indemnity obligations under the Overhead Conveyor Agreement to NSRC.

56. As a direct and proximate result of Dynamic Energy's breach of its obligations, NSRC has incurred, and will continue to incur, significant legal fees, expenses, costs and losses as a result of the Graham Civil Action.

57. Based upon the foregoing, NSRC is entitled to the following relief from Dynamic:

- a. A declaration that Dynamic Energy is required to indemnify and save harmless NSRC with respect to all costs and expenses incurred in the Graham Civil Action;
- b. A declaration that Dynamic Energy has breached its contractual obligation to indemnify and save harmless NSRC with respect to the Graham Civil Action;
- c. A declaration that Dynamic Energy is financially responsible for any amounts that NSRC may become obligated to pay to Graham by virtue of any good faith settlement made or judgment entered against it in connection with the Graham Civil Action;
- d. A declaration that Dynamic Energy is financially responsible to NSRC for any and all attorneys' fees and costs incurred in connection with the Graham Civil Action;
- e. Judgment against Dynamic Energy for all costs and expenses incurred by NSRC, any good faith settlement made by NSRC, and/or any judgment entered against it in connection with the Graham Civil Action;
- f. An award of attorneys' fees and costs incurred by NSRC obtaining indemnity from Dynamic and in prosecuting this lawsuit in this Court;
- g. An award of pre- and post- judgment interest; and
- h. Any other relief that this Court deems just and appropriate.

**COUNT II – Express Indemnity/Breach of Contract against VEPCO/ODEC**

58. NSRC reincorporates and realleges the allegations asserted in paragraphs 1 through 57 of its Complaint as if they were fully asserted herein.

59. In April of 1989, prior to the construction of the Clover Plant, ODEC entered into a Coal Transportation Agreement with NSRC with respect to planned operations at the Clover Plant.

60. As part of the Coal Transportation Agreement, ODEC agreed to indemnify save harmless NSRC for incidents arising out of, or resulting directly or indirectly from, transportation services provided by NSRC to ODEC.

61. The Coal Transportation Agreement provides in pertinent part that:

(b) ODEC shall indemnify and hold [Railroad] harmless from all Costs arising from ODEC's willful or gross negligence, sole negligence, or joint or concurring negligence with a third party, or any or all of them.

(c) ODEC and [Railroad] shall bear all Costs in proportion to their negligence due to their joint or concurring negligence.

62. VEPCO later became a party to the Coal Transportation Agreement through amendment, and thereby assumed all indemnity obligations owed to NSRC in that Agreement.

63. In August of 1997, VEPCO and NSRC entered into a Siding Agreement relative to NSRC's provision of rail service on, and VEPCO's use of, the industrial track that serves the Clover Plant.

64. The Siding Agreement provides in pertinent part that:

(b) Industry shall indemnify and hold Railroad harmless from all costs and expenses arising from Industry's willful or gross negligence, sole negligence, or joint or concurring negligence with a third party, or any or all of them.

(c) Industry and Railroad shall bear all costs and expenses in proportion to their negligence due to their joint or concurring negligence.

65. In September of 1998, an Attachment for the Coal Transportation Contract titled Virginia Power's Clover Plant Use of NS Power was entered into. It provides in pertinent part that VEPCO is permitted to use NSRC locomotive power to unload coal shipments, that once unloaded VEPCO will tender the empty train to NSRC as an operable train and that "NS shall not be liable for, and Virginia Power shall indemnify NS against, any loss, damage, or injury in connection with the supply of NS Power to Clover."

66. Plaintiff claims that the derailment and his resulting alleged injuries were caused by the failure of VEPCO and ODEC to properly close, lock and latch the doors on the bottom-dump coal hoppers provided to VEPCO and ODEC in violation of NS Conditions of Carriage #2-P. That provision provides in pertinent part that:

Consignee shall be responsible for the proper and complete unloading of commodity out of each railcar. It shall be the *sole responsibility of the consignee to . . . close, latch and lock all doors on each hopper railcar before releasing railcars to NS*. In the event consignee is unable to close, latch, and lock all doors due to wear or damage to the doors consignee shall, prior to release of the empty railcars, notify NS of the involved railcar(s) by initial and number and shall provide a description of the problem with the doors.

67. Under the terms of the agreements with VEPCO and ODEC, VEPCO and ODEC are contractually obligated to indemnify and save NSRC harmless with respect to the Graham Civil Action, including for any amounts that NSRC may become obligated to pay to Graham by virtue of a good faith settlement or a judgment and for any and all attorney's fees and costs incurred in connection with the Graham Civil Action.

68. Despite NSRC's demand that VEPCO and ODEC fully defend and indemnify NSRC with respect to the Graham Civil Action, VEPCO and ODEC have failed to do so.

69. VEPCO and ODEC have therefore breached their indemnity obligations owed to NSRC under this agreement.

70. As a direct and proximate result of VEPCO and ODEC's breach of their obligations, NSRC has incurred, and will continue to incur, significant legal fees, expenses, costs and losses as a result of the Graham Civil Action.

71. Based upon the foregoing, NSRC is entitled to the following relief from VEPCO and ODEC:

- a. A declaration that VEPCO and ODEC are required to indemnify and save harmless NSRC with respect to all costs and expenses incurred in the Graham Civil Action;
- b. A declaration that VEPCO and ODEC have breached their contractual obligations to indemnify and save harmless NSRC with respect to the Graham Civil Action;
- c. A declaration that VEPCO and ODEC are financially responsible for any amounts that NSRC may become obligated to pay to Graham by virtue of any good faith

settlement made or judgment entered against it in connection with the Graham Civil Action;

- d. A declaration that VEPCO and ODEC are financially responsible to NSRC for any and all attorney's fees and costs incurred in connection with the Graham Civil Action;
- e. Judgment against VEPCO and ODEC for all costs and expenses incurred by NSRC, any good faith settlement made by NSRC, and/or any judgment entered against NSRC in connection with the Graham Civil Action;
- f. An award of attorney's fees and costs incurred by NSRC in obtaining indemnity from VEPCO and ODEC and in prosecuting this lawsuit in this Court;
- g. An award of pre- and post-judgment interest; and
- h. Any other relief that this Court deems just and appropriate.

WHEREFORE, Plaintiff NSRC respectfully requests that this Court enter Judgment in its favor and against Dynamic, VEPCO and ODEC for the damages and other relief sought herein, along with such other and further relief as this Court may deem just and proper.

NSRC demands a trial by jury on all issues so triable.

  
NORFOLK SOUTHERN RAILWAY COMPANY

J.H. Mahaney (WVSB # 6993)  
T. Matthew Lockhart (WVSB # 11058)  
DINSMORE & SHOHL LLP  
P.O. Box 2185  
Huntington, West Virginia 25701  
Telephone: (304) 529-6181  
Facsimile: (304) 522-4312  
John.Mahaney@dinsmore.com  
Matt.Lockhart@dinsmore.com  
*Counsel for Norfolk Southern Railway Company*

# EXHIBIT C



Hendrickson & Long PLLC  
ATTORNEYS AT LAW

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Charleston, West Virginia 25301      Charleston, West Virginia 25339  
P: 304.346.5500      F: 304.346.5515      www.handl.com

April 1, 2019

Paul Flanagan, Clerk  
Circuit Clerk of Raleigh County  
222 Main Street  
P. O. Box 2518  
Beckley, WV 25802

**Re:    *Norfolk Southern Railway Co. v. Virginial Electric and Power, Inc.***  
***Old Dominion Electric Cooperative and Dynamic Energy***  
**Raleigh County Circuit Court / Civil Action No. 19-C-80 K**

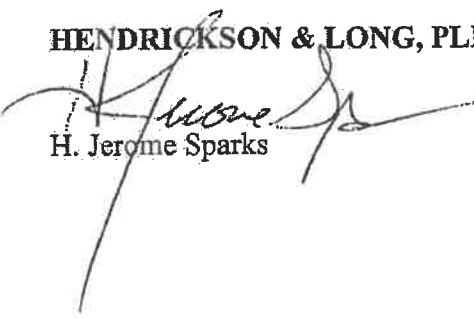
Dear Mr. Flanagan:

Enclosed for filing in the above-referenced matter is our original **Defendant's Answer to Plaintiff's Complaint** and **Civil Case Information Sheet** for filing in the above-referenced case. A copy of the same has been served on opposing counsel.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

**HENDRICKSON & LONG, PLLC**

  
H. Jerome Sparks

HJS/lkh  
cc: J.H. Mahaney, Esquire  
Enclosures

**DINSMORE & SHORE**

**APR - 3 2019**

**RECEIVED**

# CIVIL CASE INFORMATION SHEET

PLAINTIFFS: NORFOLK SOUTHERN RAILWAY CO.,	CASE NO.: 19-C-80 K
DEFENDANTS: VIRGINIA ELECTRIC AND POWER CO., INC. OLD DOMINION ELECTRIC COOPERATIVE and DYNAMIC ENERGY	JUDGE: Kirkpatrick

## II. TYPE OF CASE:

<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input checked="" type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (Month/Year):

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATION DUE TO A DISABILITY OR AGE?

☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

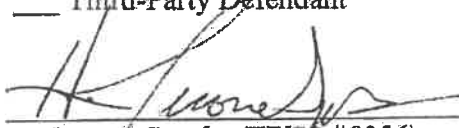
- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other:

Attorney Name: H. Jerome Sparks, Esq.  
Firm: Hendrickson & Long, PLLC

Representing:  
☐ Plaintiff ☒ Defendant  
**VIRGINIA ELECTRIC & POWER COMPANY  
AND OLD DOMINION COOPERATIVE**

Address: 214 Capitol Street, P.O. Box 11070  
Charleston, WV 25339  
Telephone: 304-346-5500

☐ Third-Party Defendant

  
H. Jerome Sparks (WVSB #9256)

Date: 4/1/2019

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**  
**NORFOLK SOUTHERN RAILWAY CO.,**

**Plaintiff,**

v.

**Civil Action No. 19-C-80 K**

**VIRGINIA ELECTRIC AND POWER CO., INC.**  
**OLD DOMINION ELECTRIC COOPERATIVE, and**  
**DYNAMIC ENERGY,**

**Defendants.**

**ANSWER OF VIRGINIA ELECTRIC AND POWER COMPANY AND THE  
OLD DOMINION ELECTRIC COOPERATIVE  
TO PLAINTIFF'S COMPLAINT**

COME NOW the Defendants; Virginia Electric and Power Company ("VEPCO"), erroneously named in the Complaint as Virginia Electric and Power Company, Inc., and Old Dominion Cooperative ("ODEC"), by undersigned counsel, and submit the following Answers and Affirmative Defenses in response to the Plaintiff's Complaint in the above-captioned action. Additionally, pursuant to W.Va.R.Civ.P. 8(b), VEPCO and/or ODEC generally deny each and every allegation of matter, fact and thing asserted against them which are contained in the Plaintiff's Complaint, unless otherwise admitted or qualified.

**FACTS APPLICABLE TO ALL COUNTS**

1. VEPCO/ODEC (which may also collectively be referred to herein as "these Defendants") are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint.

2. For its answer to Paragraph 2 of the Complaint, VEPCO admits that it is a corporation incorporated under the laws of the Commonwealth of Virginia with its principal place of business located in Virginia.

3. For its answer to Paragraph 3 of the Complaint, ODEC admits that it is a not-for-profit power supply cooperative that is organized and operates under the laws of the Commonwealth of Virginia with its principal place of business located in Virginia.

4. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint and, therefore, in as much as a response is required, must deny the same.

5. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and, therefore, in as much as a response is required, must deny the same.

6. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6 of the Complaint and, therefore, in as much as a response is required, must deny the same.

7. These Defendants admit that, at the times relevant to the matter before this Court, ODEC and VEPCO owned the electrical power generating plant known as the Clover Power Station which is located in Clover, Virginia. VEPCO, by agreement between ODEC and VEPCO, serves as the operating agent for the electrical power generating plant known as the Clover Power Station which is located in Clover, Virginia. As to all other allegations contained within Paragraph 7, these Defendants deny the same.

8. These Defendants deny both that the incident Plaintiff is referring to, which occurred on May 14, 2016, in any way gives rise to a contractual indemnity claim; and deny that the actions and/or operations of either of these Defendants gave rise to the alleged incident occurring that day. These Defendants are without knowledge or information with regard to Dynamic Energy sufficient to form a belief as to the truth of the allegations in as much as they apply to Dynamic Energy.

9. As the allegations contained in Paragraph 9 pertain to other defendants, these Defendants are without knowledge or information sufficient to form a belief as to the truth of those allegations and are unable to admit or deny the same. In as much as a response may be required, these Defendants must deny the same.

**A. VEPCO and ODEC Operations at the Clover Plant**

10. These Defendants admit that VEPCO purchases coal from time to time and that this coal is "flood loaded" into coal hoppers and transported by rail to the Clover Plant. These Defendants deny that there is any contractual agreement with Dynamic Coal.

11. These Defendants admit the allegations set out in Paragraph 11 of the Complaint in as much as employees of VEPCO empty the coal from Norfolk Southern's railcars into an unloading pit and/or chute.

12. These Defendants admit the allegations set out in Paragraph 12 of the Complaint in as much as employees of VEPCO close, latch and lock the doors on the Norfolk Southern railcars which release the coal at the Clover Plant.

13. These Defendants admit that they notify Norfolk Southern when employees of VEPCO are unable to close, latch and secure the doors releasing the coal from those Norfolk Southern railcars.

14. These Defendants state that no response is required to the allegations set out in Paragraph 14, in as much as the agreement cited by the Plaintiff speaks for itself and the allegations call for a legal conclusion with regard to the same. As to all other allegations contained within Paragraph 14, these Defendants deny the same.

15. As the allegations contained in Paragraph 15 pertain to the Plaintiff and other defendants, these Defendants are without knowledge or information sufficient to form a belief as

to the truth of those allegations and are unable to admit or deny the same. In as much as a response may be required, these Defendants must deny the same.

**B. Dynamic Energy's Operations at Coal Mountain, West Virginia and Coal Loading Operations on the Cub Creek Branch**

16. The allegations contained in Paragraph 16 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

17. The allegations contained in Paragraph 17 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

18. The allegations contained in Paragraph 18 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

19. The allegations contained in Paragraph 19 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

20. The allegations contained in Paragraph 20 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

21. The allegations contained in Paragraph 21 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

22. The allegations contained in Paragraph 22 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

23. The allegations contained in Paragraph 23 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

24. The allegations contained in Paragraph 24 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this

Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

25. The allegations contained in Paragraph 25 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

26. The allegations contained in Paragraph 26 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

27. The allegations contained in Paragraph 27 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

28. The allegations contained in Paragraph 28 of the Complaint are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph. For further answer to this Paragraph, these Defendants deny the allegations to the extent that they may be directed to these Defendants.

**C. The May 14, 2016 Derailment**

29. The Defendants admit the allegations in Paragraph 29 in as much as coal from Norfolk Southern railcars was emptied into unloading pits and/or chutes at the Clover Plant on May 10, 2016, and that employees of VEPCO acted pursuant to the agreement between the Defendants and Norfolk Southern. The remaining allegations contained in Paragraph 29 are not directed to these Defendants and these Defendants are without knowledge or information sufficient to form a belief as to the truth of those allegations. In as much as a further response may be required as to these remaining allegations, these Defendants must deny the same.

30. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 30 of the Plaintiff's Complaint.

31. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 31 of the Plaintiff's Complaint. In as much as a further response may be required as to these allegations, these Defendants must deny the same.

32. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 32 of the Plaintiff's Complaint with regard to inspections conducted by mechanical supervisors employed and/or acting under contract with Norfolk Southern. However, these Defendants deny all allegations that the doors of the railcar identified as NS 391368 were improperly latched and locked by either an ODEC and/or a VEPCO employee.

33. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 33 of the Plaintiff's Complaint with regard to inspections conducted by mechanical supervisors.

34. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 34 of the Plaintiff's Complaint.

35. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 35 of the Plaintiff's Complaint.

36. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 36 of the Plaintiff's Complaint.

37. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 37 of the Plaintiff's Complaint.

38. These Defendants deny all allegations that the doors of the railcars identified as NS 391031 and NS 391083 were improperly latched and locked by either a ODEC or VEPCO employee. As to the remaining allegations, these Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the same.

39. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 39 of the Plaintiff's Complaint.

40. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 40 of the Plaintiff's Complaint. In as much as a further response may be required as to these allegations, these Defendants admit Matthew Graham filed a lawsuit against NSRC in the Circuit Court of Mingo County, West Virginia, with a Civil Action number of 17-C-95.

41. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 41 of the Plaintiff's Complaint. However, these Defendants deny all allegations that the doors of the railcars at issue were improperly latched and locked by either a ODEC or VEPCO employee.

42. These Defendants state that no response is required to the allegations set out in Paragraph 42, in as much as the complaint filed by Matthew Graham, which is cited by the Plaintiff, speaks for itself. However, in as much as a response may be required, these Defendants deny any and all allegations that either ODEC and/or VEPCO failed to act properly.

43. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 43 of the Plaintiff's Complaint.

44. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 44 of the Plaintiff's Complaint.

45. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 45 of the Plaintiff's Complaint.

46. These Defendants admit that trial in the civil suit filed by Matthew Graham is currently set to begin on March 25, 2019 before the Honorable Darrell Pratt, Judge, sitting by designation in the Circuit Court of Mingo County, West Virginia.

#### **COUNT I – Express Indemnity/Breach of Contract against Dynamic Energy**

47. These Defendants incorporate and reallege by reference their answers contained in the preceding Paragraphs of this Answer as though each were fully set forth herein.

48. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 48 of the Plaintiff's Complaint.

49. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 49 of the Plaintiff's Complaint.

50. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 50 of the Plaintiff's Complaint.

51. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 51 of the Plaintiff's Complaint.

52. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 52 of the Plaintiff's Complaint.

53. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 53 of the Plaintiff's Complaint.

54. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 54 of the Plaintiff's Complaint.

55. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 55 of the Plaintiff's Complaint.

56. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 56 of the Plaintiff's Complaint.

57. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set out in Paragraph 46 of the Plaintiff's Complaint.

**COUNT II – Express Indemnity/Breach of Contract against  
VEPCO and/or ODEC**

58. These Defendants incorporate and reallege by reference their answers contained in the preceding Paragraphs of this Answer as though each were fully set forth herein.

59. These Defendants admit that, in April of 1989, ODEC entered into a Coal Transportation Agreement with Norfolk Southern with respect to the Clover Plant. These Defendants state that no further response is required to the allegations set out in Paragraph 59, in as much as the agreement cited by the Plaintiff speaks for itself.

60. These Defendants state that no response is required to the allegations set out in Paragraph 60, in as much as the agreement cited by the Plaintiff speaks for itself and the allegations call for a legal conclusion with regard to the same. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

61. These Defendants state that no response is required to the allegations set out in Paragraph 61, in as much as the agreement cited by the Plaintiff speaks for itself and the allegations call for a legal conclusion with regard to the same. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

62. These Defendants admit that VEPCO became a party to the Coal Transportation Agreement. These Defendants state that no further response is required to the allegations set out in Paragraph 62, in as much as the agreement cited by the Plaintiff speaks for itself.

63. These Defendants admit that, in August of 1997, VEPCO entered into a Siding Agreement with Norfolk Southern with respect to the Clover Plant. These Defendants state that no further response is required to the allegations set out in Paragraph 63, in as much as the agreement cited by the Plaintiff speaks for itself.

64. These Defendants state that no response is required to the allegations set out in Paragraph 64, in as much as the agreement cited by the Plaintiff speaks for itself and the allegations call for a legal conclusion with regard to the same. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

65. These Defendants state that no response is required to the allegations set out in Paragraph 65, in as much as the agreement cited by the Plaintiff speaks for itself and the

allegations call for a legal conclusion with regard to the same. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

66. These Defendants deny the allegations set out in Paragraph 66, in as much as they claim VEPCO and/or ODEC failed to properly close, lock and latch the doors on the bottom-dump coal hoppers at issue. These Defendants further state that no response is required to the remaining allegations set out in Paragraph 66, in as much as the agreement cited by the Plaintiff speaks for itself and the allegations call for a legal conclusion with regard to the same. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

67. These Defendants deny the allegations set out in Paragraph 67.

68. These Defendants deny they owe the Plaintiff any contractual obligations to defend and indemnify it for the Civil Action at issue as is alleged in Paragraph 68. Should a further response be deemed required by either ODEC and/or VEPCO, these Defendants deny any allegations which imply they breached the aforementioned agreement or are liable to the Plaintiff in any way.

69. These Defendants deny the allegations set out in Paragraph 69.

70. These Defendants deny the allegations set out in Paragraph 70.

71. These Defendants deny the allegations set out in Paragraph 71, including subparagraphs (a) through (h).

These Defendants deny the Plaintiff should be granted the relief sought in the paragraph following Counts I and II.

### **AFFIRMATIVE AND OTHER DEFENSES**

Having fully answered the allegations in the Complaint, ODEC and VEPCO assert the following affirmative and other defenses:

1. The Complaint fails to state a cause of action upon which relief may be granted against these Defendants.

2. To the extent discovery and facts warrant, these Defendants reserve the defenses of improper venue, insufficiency of process, lack of jurisdiction and any other applicable defenses under the West Virginia Rules of Civil Procedure.

3. Plaintiff was guilty of negligence which proximately caused and/or proximately contributed to the alleged injuries and damages of which it complains.

4. Plaintiff's own negligence exceeds the negligence, if any, of these Defendants, or the other Defendants herein.

5. If there is any actionable liability of these Defendants, which liability is specifically denied, such liability should be compared to the fault of the Plaintiff and the other Defendant, parties and actors involved in the matters alleged in the Complaint. These Defendants allege that any award made to Plaintiff in this action must be proportionately allocated among Plaintiff, Defendants, parties or actors found to be culpable in accordance with the percentage of any negligence or fault attributable to each of said Plaintiff, Defendants, parties and actors. These Defendants further allege that any Defendant, party or actor found to be negligent or at fault with respect to Plaintiff's alleged claims must be required to satisfy any such claims only in accordance with its proportional share of negligence or fault to be determined in this action.

6. The alleged damages claimed by the Plaintiff were not proximately caused or contributed to by any act or omission of these Defendants. To the extent that the Plaintiff suffers

from any alleged damages, they were caused by the acts or omissions on the part of parties, individuals and entities other than these Defendants, which negligence supersedes the negligence, if any, of these Defendants.

7. The alleged claims or causes of action attempted to be asserted against these Defendants are barred by the applicable statutes of limitation.

8. Plaintiff is not entitled to recover from these Defendants because Plaintiff waived any claim it might have had against these Defendants.

9. Plaintiff is estopped from asserting any claim against these Defendants because of its actions and/or inactions.

10. If Plaintiff has received, or is now or subsequently becomes entitled to recover, any compensation or benefits from any source in connection with the harm alleged in the Complaint, the amount of damages, if any, which may be recoverable from this suit shall be diminished by the amount of said recovery, compensation or benefits.

11. To the extent applicable, or as may hereafter become applicable, these Defendants raise and incorporate by reference as though fully set forth herein each and every Affirmative Defense set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure.

12. The underlying claims asserted by Matthew Graham in the lawsuit he filed against NSRC in the Circuit Court of Mingo County, West Virginia, with a Civil Action number of 17-C-95, are brought pursuant to the Federal Safety Appliance Act ("FSAA") and/or the Federal Employees' Liability Act ("FELA"). To the extent that Norfolk Southern's current lawsuit stems from its liability, or lack thereof, to Matthew Graham, these Defendants assert that FELA and/or the FSAA may bar Norfolk Southern from now making a claim against ODEC and VEPCO for any alleged damages arising out of Norfolk Southern's statutory obligations to its employees.

13. These Defendants reserve the right to amend their answer and affirmative defenses if investigation, discovery and further information should warrant such amendment, and, further, to assert any applicable matters of law during the pendency of this action.

WHEREFORE, these Defendants demand that the Complaint be dismissed and that these Defendants recover the costs incurred in connection therewith, including reasonable attorneys' fees.

**THESE DEFENDANTS REQUEST A TRIAL BY JURY.**

**VIRGINIA ELECTRIC AND POWER COMPANY;  
AND OLD DOMINION ELECTRIC COOPERATIVE,**

By Counsel,



David K. Hendrickson, Esq. (W. Va. Bar #1678)

H. Jerome Sparks, Esq. (W. Va. Bar # 9256)

**HENDRICKSON & LONG, PLLC**

214 Capitol Street (25301)

Post Office Box 11070

Charleston, West Virginia 25339

(304) 346-5500 (phone)

(304) 346-5515 (facsimile)

DaveH@handl.com

JSparks@handl.com

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**  
**NORFOLK SOUTHERN RAILWAY CO.,**

**Plaintiff,**

**v.**

**Civil Action No. 19-C-80 K**

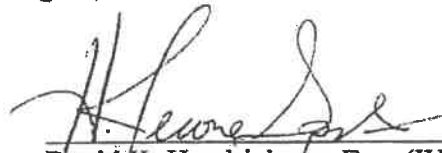
**VIRGINIA ELECTRIC AND POWER CO., INC.**  
**OLD DOMINION ELECTRIC COOPERATIVE, and**  
**DYNAMIC ENERGY,**

**Defendants.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Defendant Virginia Electric and Power Company hereby certifies that the foregoing "ANSWER OF VIRGINIA ELECTRIC AND POWER COMPANY AND THE OLD DOMINION ELECTRIC COOPERATIVE TO PLAINTIFF'S COMPLAINT" was filed and notice was served to all counsel of record on this 1<sup>st</sup> day of April, 2019, by depositing the same in the U.S. Regular Mail addressed as follows:

J. H. Mahaney, Esquire  
Dinmore & Shohl, LLP  
611 Third Avenue  
Huntington, WV 25701



David K. Hendrickson, Esq. (W. Va. Bar #1678)  
H. Jerome Sparks, Esq. (W. Va. Bar # 9256)  
**HENDRICKSON & LONG, PLLC**  
214 Capitol Street (25301)  
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Charleston, West Virginia 25339  
(304) 346-5500 (phone)  
(304) 346-5515 (facsimile)  
DaveH@handl.com  
JSparks@handl.com

# **EXHIBIT D**

**DYNAMIC ENERGY, INC.**

302 S. Jefferson St  
Roanoke, VA 24011  
(540) 776-7890

April 5, 2019

**Paul Flanagan, Clerk of Court  
Raleigh County Circuit Court  
Raleigh County Judicial Center  
222 Main Street  
Beckley, WV 25801**

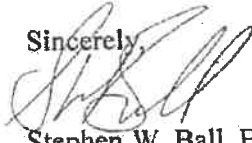
Re: *Norfolk Southern Railway Company v. Virginia Electric and Power Company, Inc., et al.*  
Raleigh County, WV Circuit Court  
Civil Action No. 19-C-80-K

Dear Mr. Flanagan:

Please find enclosed Dynamic Energy, Inc.'s Answer & Affirmative Defenses in the above-referenced matter, along with a Certificate of Service, which we respectfully request that you file with the other papers in this matter.

Thank you for your time and attention. Please do not hesitate to contact us with any questions or concerns which may arise.

Sincerely,



Stephen W. Ball, Esq.

Cc: J. H. Mahaney, Esquire  
T. Matthew Lockhart, Esquire

**DYNAMIC ENERGY, INC.**

302 S. Jefferson St  
Roanoke, VA 24011  
(540) 776-7890

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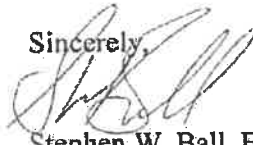
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Thank you for your time and attention. Please do not hesitate to contact us with any questions or concerns which may arise.

Sincerely,



Stephen W. Ball, Esq.

Cc: J. H. Mahaney, Esquire  
T. Matthew Lockhart, Esquire

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

NORFOLK SOUTHERN RAILWAY COMPANY,  
Plaintiff,

v.

Civil Action No. 19-C-80-K

VIRGINIA ELECTRIC AND POWER COMPANY, INC., et al.,  
Defendants.

**ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW the Defendant, Dynamic Energy, Inc., by and through its counsel, for its Answer and Affirmative Defenses, and in support thereof states as follows:

1. Defendant Dynamic Energy, Inc. ("Dynamic") ADMITS the allegations in paragraph 1 of the Complaint.
2. Dynamic admits that VEPCO is a Virginia corporation having its principal place of business in Richmond, Virginia. Dynamic is without sufficient information to either admit or deny the remainder of the allegations in paragraph 2 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.
3. Dynamic admits that ODEC is a Virginia company having its principal place of business in Glen Allen, Virginia. Dynamic is without sufficient information to either admit or deny the remainder of the allegations in paragraph 3 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.
4. Dynamic ADMITS the allegations in paragraph 4 of the Complaint.
5. Dynamic ADMITS the allegations in paragraph 5 of the Complaint.
6. Dynamic ADMITS the allegations in paragraph 6 of the Complaint.

7. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 7 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

8. Dynamic DENIES the allegations of paragraph 8 of the Complaint as to Dynamic. Dynamic is without sufficient information to either admit or deny the remainder of the allegations in paragraph 8 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

9. Paragraph 9 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations of paragraph 9 of the Complaint are DENIED.

10. Dynamic ADMITS that, from time to time, VEPCO and ODEC purchase coal from Dynamic, and that said coal is “flood loaded” into coal hoppers at the Coal Mountain mining facility, which is owned by Dynamic or its affiliates. Dynamic also ADMITS that NSRC transports coal by rail from the Coal Mountain facility. The remainder of the allegations in paragraph 10 of the Complaint are DENIED.

11. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 11 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

12. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 12 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

13. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 13 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

14. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 14 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

15. Dynamic ADMITS that NSRC transports empty coal hoppers to the Coal Mountain facility, where those coal hoppers are reloaded, and then at least some of those loaded coal hoppers are transported back to the Clover Plant. Dynamic is without sufficient information to either admit or deny the remaining allegations in paragraph 15 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

16. Dynamic ADMITS that it entered into the Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyer Agreement with NRSC. Dynamic DENIES any characterization by NRSC in paragraph 16 of the Complaint that conflicts with the plain meaning of the language in said documents. The remainder of the allegations in paragraph 16 of the Complaint are DENIED.

17. Dynamic ADMITS that it entered into the Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyer Agreement with NRSC. Dynamic DENIES any characterization by NRSC in paragraph 17 of the Complaint that conflicts with the plain meaning of the language in said documents. The remainder of the allegations in paragraph 17 of the Complaint are DENIED.

18. Dynamic ADMITS that it entered into the Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyer Agreement with NRSC. Dynamic

DENIES any characterization by NRSC in paragraph 18 of the Complaint that conflicts with the plain meaning of the language in said documents. The remainder of the allegations in paragraph 18 of the Complaint are DENIED.

19. Dynamic ADMITS that it entered into the Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyer Agreement with NRSC. Dynamic DENIES any characterization by NRSC in paragraph 19 of the Complaint that conflicts with the plain meaning of the language in said documents. The remainder of the allegations in paragraph 19 of the Complaint are DENIED.

20. Dynamic ADMITS that it entered into the Track Improvement Agreement, a Facility Improvement Agreement and an Overhead Conveyer Agreement with NRSC. Dynamic DENIES any characterization by NRSC in paragraph 20 of the Complaint that conflicts with the plain meaning of the language in said documents. The remainder of the allegations in paragraph 20 of the Complaint are DENIED.

21. Dynamic ADMITS the allegations in paragraph 21 of the Complaint.

22. Dynamic ADMITS the allegations in paragraph 22 of the Complaint.

23. Dynamic ADMITS that loading coal at Coal Mountain is a multi-step process.

The remainder of the allegations in paragraph 23 of the Complaint are DENIED.

24. Dynamic ADMITS the allegations in paragraph 24 of the Complaint.

25. Dynamic ADMITS the allegations in paragraph 25 of the Complaint.

26. Dynamic ADMITS that, after the coal loading process is completed, NRSC typically reverses the movement of the train so that the train moves off of the Cub Creek Branch and onto NRSC's main line. Dynamic DENIES that NRSC's reversing the train's movement,

following completion of the loading process, is a “component of the coal loading process.”

Dynamic DENIES the remaining allegations in paragraph 26 of the Complaint.

27. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 27 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

28. Dynamic ADMITS the allegations in paragraph 28 of the Complaint.

29. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 29 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

30. Dynamic ADMITS that, on or prior to May 14, 2016, NRSC delivered 100 empty coal hoppers to the Coal Mountain loadout to be loaded with coal for delivery. Dynamic is without sufficient information to either admit or deny the remainder of the allegations in paragraph 30 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

31. Dynamic ADMITS the allegations in paragraph 28 of the Complaint, with the exception of the railcar number and location or order within the series of cars in the train, of which Dynamic has insufficient knowledge to admit or deny, and therefore the same is DENIED.

32. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 32 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

33. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 33 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

34. Dynamic ADMITS the allegations of paragraph 34 of the Complaint.

35. Dynamic ADMITS that NRSC, by and through its agent(s) or employee(s), controlled the movement of the train under and through the loadout at Coal Mountain. Dynamic is without sufficient information to either admit or deny the remainder of the allegations in paragraph 35 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

36. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 36 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

37. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 37 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

38. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 38 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

39. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 39 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

40. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 40 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

41. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 41 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

42. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 42 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

43. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 43 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

44. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 44 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

45. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 45 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

46. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 46 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

**COUNT I – Express Indemnity/Breach of Contract against Dynamic Energy**

47. Dynamic incorporates its responses to the allegations in paragraphs 1 through 46 of the Complaint as if fully set forth herein.

48. Dynamic ADMITS the allegations in paragraph 48 of the Complaint.

49. Dynamic ADMITS the allegations in paragraph 49 of the Complaint.

50. Dynamic ADMITS that it entered into the Overhead Conveyor Agreement with NSRC, and DENIES any and all allegations in paragraph 50 of the Complaint which mischaracterize or are otherwise inconsistent with the plain language of the Overhead Conveyor Agreement. The remainder of the allegations in paragraph 50 of the Complaint are DENIED.

51. Dynamic DENIES the allegations in paragraph 51 of the Complaint.

52. Paragraph 52 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 52 of the Complaint are DENIED.

53. Paragraph 53 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 53 of the Complaint are DENIED.

54. Dynamic ADMITS that NSRC has made demand for indemnification, and that Dynamic has refused to indemnify NSRC. The remainder of the allegations in paragraph 54 of the Complaint are DENIED.

55. Paragraph 55 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 55 of the Complaint are DENIED.

56. Paragraph 56 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 56 of the Complaint are DENIED.

57. Paragraph 57 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 57 of the Complaint are DENIED.

**COUNT II - Express Indemnity/Breach of Contract against VEPCO/ODEC**

58. Dynamic incorporates its responses to the allegations in paragraphs 1 through 57 of the Complaint as if fully set forth herein.

59. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 59 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

60. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 60 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

61. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 61 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

62. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 62 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

63. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 63 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

64. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 64 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

65. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 65 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

66. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 66 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

67. Paragraph 67 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 67 of the Complaint are DENIED.

68. Dynamic is without sufficient information to either admit or deny the allegations in paragraph 68 of the Complaint, and therefore, to the extent a response is required, the same are DENIED.

69. Paragraph 69 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 69 of the Complaint are DENIED.

70. Paragraph 70 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 70 of the Complaint are DENIED.

71. Paragraph 71 of the Complaint calls for a series of legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 71 of the Complaint are DENIED.

72. Dynamic DENIES any and all allegations contained in the WHEREFORE clause of the Complaint.

73. Dynamic DENIES any and all allegations in the Complaint which are not expressly admitted in this Answer.

#### **AFFIRMATIVE DEFENSES**

74. Defendant demands strict proof of any and all of the Complaint's factual allegations which were denied by the Defendant in this Answer.

75. Defendant intends to rely upon the following affirmative defenses:

- a) The Complaint should be dismissed for failure to state a claim upon which relief can be granted.
- b) The claims against Defendants, or any of them, may fail because of Plaintiff's own conduct, and/or the Plaintiff's actions may be barred by the doctrine of "unclean hands."
- c) The claims against Defendant Dynamic may be prohibited or mitigated by the Plaintiff's own negligent or intentional conduct in the underlying personal injury litigation, including without limitation a failure to name VEPCO and ODEC as additional defendants and/or to assert appropriate defenses such as intervening/supervening cause.
- d) The claims against Defendants, or any of them, may be barred because they are contrary to public policy.
- e) Plaintiff's claims may be barred because Plaintiff has not been injured and/or suffered compensable damages.

76. Additionally, Dynamic intends to rely on the affirmative defense that neither the indemnification provision in the Overhead Conveyor Agreement, nor any other applicable agreement, operates to require Dynamic to indemnify or hold harmless NSRC for injury or

damages sustained in the incident(s) as alleged in the Complaint, including without limitation because:

- a) The incident as described occurred during the movement of the train and after the completion of "coal loading operations," and therefore expressly falls outside of the indemnification provision cited; and/or
- b) The improper latching of the coal car doors by VEPCO and/or ODEC as described in the Complaint is, upon information and belief, a supervening/intervening cause independent of the circumstances under which the indemnification provision in the Overhead Conveyor Agreement is or would be triggered.

77. Dynamic intends to rely upon any and all other affirmative defenses which may be supported by the information revealed in discovery.

WHEREFORE, the Defendant, Dynamic Energy, Inc., by and through its counsel, respectfully prays that this Court deny and dismiss with prejudice the Complaint in this matter; and that the court grant any and all relief in favor of Defendants the Court deems just and appropriate including an award of reasonable attorney fees and costs.

Respectfully Submitted,  
DYNAMIC ENERGY, INC.

BY: 

Counsel

Stephen W. Ball, Esq. (WVSB #8776)  
302 S. Jefferson Street  
Roanoke, Virginia 24011  
Telephone (540) 776-7890  
Facsimile (540) 776-7892  
*For Defendant Dynamic Energy, Inc.*