

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NORFOLK SOUTHERN RAILWAY CO.,

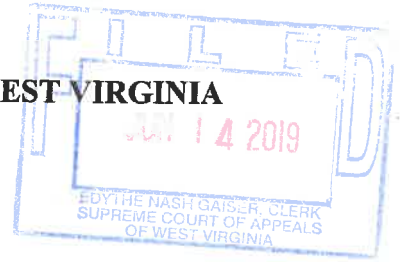
Plaintiff,

v.

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

Defendants.

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



**VIRGINIA ELECTRIC AND POWER COMPANY AND
OLD DOMINION ELECTRIC COOPERATIVE'S RESPONSE
TO PLAINTIFF'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

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 Electric Cooperative ("ODEC"), by undersigned counsel, and submit the following response in opposition to Norfolk Southern Railway Company's ("NSRC") motion to refer this matter to the Business Court Division. These Defendants state that, while this matter does involve a breach of contract claim, it does not involve complex business issues or elaborate contractual terms. In fact, the key issue at the heart of this dispute are factual allegations involving injuries sustained by an employee of NSRC and whether acts or omissions of employees or agents of ODEC or VEPCO were a proximate cause of the same.

Furthermore, these defendants state that the expedited process promoted by the Business Court Division would place them at a disadvantage. This is because NSRC was involved in an internal investigation into the causes leading up to the derailment on May 14, 2016, which is at issue here, as well as a lawsuit filed against them by a former employee of NSRC on May 23, 2017. Trial in that case, to which neither VEPCO nor ODEC were parties, began on March 25,

2019 and concluded on March 28, 2019 with a settlement agreement between NSRC and their former employee. *See* "Complaint," attached hereto as Exhibit A. Given the fact that NSRC has had a number of years to investigate the underlying factual basis for the claim, as well as had an opportunity to interview and/or depose numerous witnesses and work with various expert witnesses, an expedited process would be to NSRC's benefit and the detriment of VEPCO and ODEC.

In further support of their position, these Defendants state as follows:

STATEMENT OF FACTS

On May 14, 2016, after loading coal into empty coal cars at a facility owned by another party and located in Coal Mountain, West Virginia, the bottom doors on certain coal cars unexpectedly opened and dumped coal onto the train tracks, leading to a derailment. NSRC owned and operated the train and coal cars which suffered that derailment.

Matthew John Graham ("Graham"), who was working as a conductor and riding in the caboose of the train at issue, was allegedly injured during the derailment.

On May 23, 2017, Graham filed a lawsuit against his employer, 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") and the negligence of NSRC.¹

¹ On April 19, 2018, Graham amended his complaint to include allegations that, if VEPCO and/or ODEC employees were somehow negligent and such negligence led to the derailment at issue, then such negligence was imputed to NSRC given the fact that NSRC had a non-delegable duty to inspect and maintain the coal cars to protect NSRC's employees from injury. *See* "Amended Complaint," attached hereto as Exhibit B.

NSRC issued a letter dated June 6, 2018, to VEPCO and ODEC, claiming that employees of VEPCO/ODEC caused the derailment when the VEPCO/ODEC employees at the Clover Power Station located in Clover, Virginia, unloaded coal from the same NSRC train at issue in the Graham Civil Action, and allegedly failed to close and lock the bottom doors on one or more coal cars owned by NSRC.² This unloading of the coal cars at issue in the Graham Civil Action occurred on May 10, 2016, some four days prior to the derailment at Coal Mountain, West Virginia. Pursuant to contractual agreements between NSRC, VEPCO and ODEC, NSRC sought indemnification for the alleged injuries sustained by Graham during the derailment on May 14, 2016.

VEPCO and ODEC declined NSRC's request for indemnification, denying that any employees of VEPCO and/or ODEC were the proximate cause of the derailment, thereby negating any claim for contractual indemnification. *See* "Answer of Virginia Electric and Power Company and the Old Dominion Electric Cooperative to Plaintiff's Complaint," attached hereto as Exhibit C.

Trial in the Graham Civil Action began on March 25, 2019 before the Hon. Darrell Pratt, sitting by designation in the Circuit Court of Mingo County, West Virginia. However, on March 28, 2019, Graham and NSRC entered into a settlement agreement before the matter went to the jury for deliberation.

² NSRC based their claim for indemnification, in part, upon contractual agreements entered into between itself and VEPCO/ODEC. The "Coal Transportation Agreement," entered into between NSRC and ODEC on April 5, 1989, stipulated that "ODEC shall indemnify and hold [NSRC] 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 . . ." and "ODEC and [NSRC] shall bear all Costs in proportion to their negligence due to their joint or concurring negligence." On August 25, 1997, NSRC and VEPCO entered into a "Siding Agreement," which stipulated that "[NSRC] shall indemnify and hold [VEPCO] harmless for all costs and expenses arising from [NSRC's] willful or gross negligence, sole negligence, or joint or concurring negligence with a third party, or any or all of them" and "[VEPCO] shall indemnify and hold [NSRC] harmless from all costs and expenses arising from [VEPCO's] willful or gross negligence, sole negligence, or joint or concurring negligence with a third party, or any or all of them."

NSRC filed suit against VEPCO and ODEC on February 25, 2019, alleging they breached their contractual obligations to NSRC by declining to indemnify NSRC for Graham's injuries. *See* NSRC's "Complaint," attached hereto as Exhibit D.

**ARGUMENT 1: CHIEF CLAIMS AT ISSUE INVOLVE
PROXIMATE CAUSE AND NOT COMPLEX CONTRACT TERMS**

The West Virginia Legislature created the Business Court Division by enacting W.Va. Code § 51-2-15, which explained the creation of the division by stating:

The West Virginia Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes between businesses.

(Emphasis supplied.) *See* W.Va. Code § 51-2-15(a). The key dispute between the parties here are not complex and do not involve highly technical commercial issues.

The heart of NSRC's claims against VEPCO and ODEC are factual allegations concerning the proximate cause of Matthew John Graham's physical injuries and not the terms of the indemnification agreement between the parties. A review of NSRC's complaint against VEPCO and ODEC, as well as the answer filed by VEPCO and ODEC, makes that abundantly clear.

Neither VEPCO nor ODEC dispute the contractual indemnification language cited by NSRC. *See* Exhibit C, at ¶s 14, 61 and 64. However, both denied the allegations that the actions or inaction by employees of either VEPCO or ODEC proximately caused the derailment at issue. These allegations involve an event on May 10, 2016, when the NSRC train and coal cars at issue were delivered to the Clover Power Station located in Clover, Virginia, and coal from the coal cars was unloaded by VEPCO/ODEC employees. *See* Exhibit D, at ¶ 29.

In its Complaint, NSRC alleges that the injuries sustained by Graham “. . . 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 . . .” and that VEPCO/ODEC are contractually obliged to indemnify NSRC. *See* Exhibit D, at ¶s 66 and 67. In response, neither VEPCO nor ODEC take issue with the contractual language cited by NSRC, but both deny the factual allegations giving rise to NSRC’s claim for indemnification. Specifically, VEPCO and ODEC stated as follows:

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.

See Exhibit C, at ¶ 66.

Again, the litigation here does not involve a complex issue of highly technical contract language. It involves a factual dispute of proximate cause, which West Virginia’s circuit courts have handled without fail since their creation.

ARGUMENT 2: AN EXPEDITED PROCESS FAVORS NSRC OVER VEPCO AND/OR ODEC

The West Virginia Legislature created the Business Court Division by enacting W.Va. Code § 51-2-15. Pursuant to W.Va. Code § 51-2-15, the West Virginia Supreme Court organized a Business Court Division and promulgated rules for the establishment and jurisdiction of the division. One of the rules promulgated by the West Virginia Supreme Court, West Virginia Trial Court Rule 29.08(g), states that:

The Business Litigation *should proceed to final judgment in an expedited manner.* The time standards for general civil cases set forth in Trial Court Rule 16.05 shall apply; provided, however, that the Presiding Judge shall make all reasonable efforts to conclude Business Litigation *within ten (10) months* from the date the case management order was entered. All other time standards for service of notices and entry of order set forth in the West Virginia Rules of Civil Procedure shall apply unless modified by order entered by the Presiding Judge.

(Emphasis supplied.) Thus, pursuant to the rules, the matters brought before the Business Court Division are meant to proceed based upon an accelerated time-table.

NSRC has been investigating and developing the underlying facts of this matter, upon which the entire case will turn, for a number of years. The derailment at issue occurred on May 14, 2016, at a facility owned by a party other than VEPCO or ODEC, and located in Coal Mountain, West Virginia. While NSRC presumably began investigating the derailment immediately, since an NSRC employee was injured and NSRC employees were operating the train, neither VEPCO nor ODEC were a party to that investigation.

Additionally, after Matthew John Graham filed suit on May 23, 2017, against NSRC for injuries he sustained during the derailment, NSRC was involved in an intense discovery process. NSRC had the opportunity to depose and/or interview a number of witnesses, as well as engage various experts who examined the coal cars involved in the derailment and the events leading up to the derailment.

While NSRC has been intimately involved with the investigation and evaluation of the facts and events leading up to the derailment since May 14, 2016, neither VEPCO nor ODEC were made aware of any purported acts or omissions by their employees which allegedly gave rise to the derailment until June 6, 2018. On that date, NSRC issue a letter request VEPCO and ODEC indemnify NSRC. And NSRC did not file suit against VEPCO or ODEC until February 25, 2019.

Thus, NSRC has had a number of years to develop their case against VEPCO and ODEC, while VEPCO and ODEC has not had a chance to review any of the deposition transcripts or expert reports from the Graham Civil Action, much less develop a full defense to NSRC's factual allegations against them. Therefore, an expedited time-table, as was contemplated by the West Virginia Supreme Court of Appeals when enacting the rules governing the Business Court Division, would benefit NSRC to the detriment of VEPCO and ODEC.

CONCLUSION

WHEREFORE, for the foregoing reasons, Virginia Electric and Power Company and Old Dominion Electric Cooperative respectfully request that the Court deny the request to refer the matter styled *Norfolk Southern Railway Company v. Virginia Electric and Power Company, Inc., et al.*, Civil Action No. 19-C-80K, pending in the Circuit Court of Raleigh County, West Virginia, to the Business Court Division.

**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

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NORFOLK SOUTHERN RAILWAY CO.,

Plaintiff,

v.

**Raleigh County Cir. Court
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 Defendants, Virginia Electric and Power Company and Old Dominion Electric Cooperative hereby certifies that the foregoing “**VIRGINIA ELECTRIC AND POWER COMPANY AND OLD DOMINION ELECTRIC COOPERATIVE’S RESPONSE TO PLAINTIFF’S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**” was filed and notice was served to all counsel of record on this 13th day of June, 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
Counsel for Norfolk Southern Railway Company

Stephen W. Ball, Esquire
302 S. Jefferson Street
Roanoke, VA 24011
Counsel for Defendant, Dynamic Energy, Inc.

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

Honorable H.L. Kirkpatrick, III
Raleigh County Judicial Center
222 Main Street
P.O. Box 2518
Beckley, WV 25802

Berkley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, WV 25401

A handwritten signature in black ink, appearing to read 'H.L. Kirkpatrick', is written over a horizontal line.

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EXHIBIT A

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Charleston, WV 25305



Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
888-767-8883
Visit us online:
www.wvsos.com

Grant Preece
Mingo County Courthouse
78 EAST 2ND AVE., ROOM 232
Williamson, WV 25661-0435

Control Number: 196403

**Defendant: NORFOLK SOUTHERN RAILWAY
COMPANY**
611 Third Avenue
Huntington, WV 25701 US

Agent: Angela W. Konrad

County: Mingo

Civil Action: 17-C-95

Certified Number: 92148901125134100002094710

Service Date: 6/5/2017

I am enclosing:

1 Interrogatories, 1 request for production, 1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in the name and on behalf of your corporation.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in the name and on behalf of your corporation as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

Mac Warner

Mac Warner
Secretary of State

EXHIBIT A

SUMMONS

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

MATTHEW JOHN GRAHAM,

Civil Action No. 17C-95

Plaintiffs,

vs.


NORFOLK SOUTHERN RAILWAY COMPANY

**To: NORFOLK SOUTHERN RAILWAY COMPANY
ANGELA W. KONRAD
611 THIRD AVENUE
HUNTINGTON, WV 25701-1313
(SERVED THRU SECRETARY OF STATE)**

ACCEPTED FOR
SERVICE OF PROCESS
2017 JUN -5 A 9 34
SECRETARY OF STATE
STATE OF WEST VIRGINIA

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon BERT KETCHUM, plaintiff's attorney, whose address is GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL, 419 ELEVENTH STREET, POST OFFICE BOX 2389, HUNTINGTON, WEST VIRGINIA 25724-2389, an answer, including any related counterclaim you may have, to the complaint filed against you in the above-styled action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

Dated May 23, 2017


Clerk, Circuit Court of Mingo County

By Linda Meloy
Deputy

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

MATTHEW JOHN GRAHAM

Plaintiff,

vs.

NORFOLK SOUTHERN
RAILWAY COMPANY,

Defendant.

CIVIL ACTION NO.:

17-C-98
2017 MAY 23 PM 11:02
Mingo County Clerk

COMPLAINT

COMES NOW Plaintiff, Matthew John Graham, and files this Complaint against Defendants Norfolk Southern Railway Company ("Norfolk Southern"), stating as follows:

PARTIES - JURISDICTION - VENUE

1. At all times relevant to this Complaint Plaintiff Matthew John Graham (hereinafter "Plaintiff" or "Graham") was and is a natural person and citizen and resident of Raleigh County, West Virginia.

2. Defendant Norfolk Southern is a Virginia Corporation operating an interstate railroad, a common carrier, and Plaintiff's employer. Defendant regularly does business in West Virginia, including Mingo County, with its designated Registered Agent for service being Angela W. Konrad, 611 Third Avenue, Huntington, West Virginia 25701-1313.

3. This Court has jurisdiction and venue over the parties to this civil action as the acts, conduct, and injuries giving rise to this Complaint occurred in this county and Defendants do business in and/or reside in this county.

NATURE OF THE CASE

4. Plaintiff's cause of action against Defendant Norfolk Southern is brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (hereinafter referred to as the FELA).

5. At all times material to this Complaint, Plaintiff and Defendant Norfolk Southern were mutually engaged in acts and services substantially affecting interstate commerce.

6. At all times material to this Complaint, Plaintiff was an employee of Norfolk Southern acting within the line and scope of his employment.

FACTUAL ALLEGATIONS

7. On May 14, 2016, at or about 8:45 p.m., Plaintiff sustained serious injuries while working for Defendant Norfolk Southern as a conductor on Defendant's property and premises in Coal Mountain, West Virginia when Defendant's train derailed.

8. Plaintiff was working as a part of Defendant's train crew performing his duties by occupying a caboose on the shoving end of a movement at the time of the derail.

9. Prior to the shove movement, Norfolk Southern knew of multiple cars in the train with defective air dump doors.

10. In addition, prior to the movement when Plaintiff suffered his injuries, due to the defective air dump door on the cars in the train, tons of coal had been spilled on the track.

11. The spill was not properly and fully cleaned up and the rail cars in the train were defective, causing the derailment and resulting injuries to Plaintiff.

12. Due to the derailment, Plaintiff sustained serious and permanent injuries to his back.

COUNT I - NORFOLK SOUTHERN - FELA NEGLIGENCE

13. Defendant Norfolk Southern is required under the FELA and owes a duty to Plaintiff to provide Plaintiff with a reasonably safe place to work.

14. Defendant Norfolk Southern had a duty to inspect and maintain the equipment (railcar) and track on which Plaintiff was working on May 14, 2016, to protect its employees from injury who are required to occupy and use its railcars.

15. This duty described above owed by Defendant Norfolk Southern to Plaintiff is nondelegable as a matter of law.

16. Defendant Norfolk Southern knew, or in the exercise of ordinary care should have known, that the track was not safe to operate upon and that the railcars were defective and unsafe, the area where Plaintiff would be and could be working and riding on May 14, 2016 was defective and unsafe, and Defendant Norfolk Southern failed to properly inspect and maintain the track and railcars involved where it was known that Plaintiff would be occupying the train and could be injured.

17. Defendant Norfolk Southern is liable to Plaintiff because these acts and failure to act constitute negligence and a failure to provide Plaintiff with a reasonably safe place to work in direct violation of the FELA.

**COUNT II – NORFOLK SOUTHERN – STRICT LIABILITY –
FEDERAL SAFETY APPLIANCE ACT**

18. Federal law requires that a railroad carrier can only use railcars on any of its railroad lines that are not defective and operate as they are intended and expected to operate.

19. The railcars in the train that Plaintiff occupied on May 14, 2016 at approximately 8:45 p.m. were defective and violated the Federal Safety Appliance Act (FSAA) and other applicable Federal laws and regulations.

20. As a result of the defect and the resulting violation of the Federal law, Defendant is strictly liable to Plaintiff for his injuries.

CAUSATION

21. As a direct and immediate result of the negligence and resulting violation of the FELA and Federal law by Defendant Norfolk Southern, Plaintiff has suffered injuries and damages for which he seeks compensation.

22. Pursuant to the FELA, Defendant Norfolk Southern is liable to Plaintiff for any and all injuries and damages which are caused in any manner, no matter how slight, by their negligence.

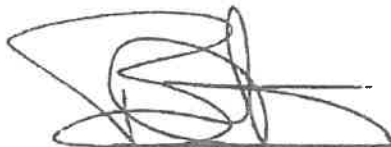
DAMAGES

23. As a direct and proximate result of the negligence and violations by Norfolk Southern, Plaintiff has suffered injuries and damages including but not limited to:

- a. Physical impairment which is permanent;
- b. Surgical procedures;
- c. Lost wages, past and future;
- d. Pain, suffering, mental anguish, both past and in the future.

WHEREFORE, the Plaintiff prays that he have judgment against Defendant Norfolk Southern in an amount to be shown by the evidence at trial, plus costs and other remedies as the Court may deem just and proper.

PLAINTIFF FURTHER DEMANDS A JURY TRIAL AS TO ALL ISSUES RAISED IN THE COMPLAINT.



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(*pro hac vice* to be filed)

EXHIBIT B

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

MATTHEW JOHN GRAHAM

Plaintiff,

vs.

**NORFOLK SOUTHERN
RAILWAY COMPANY,**

Defendant.

CIVIL ACTION NO.: 17-C-95

AMENDED COMPLAINT

COMES NOW Plaintiff, Matthew John Graham, and files this Amended Complaint against Defendant Norfolk Southern Railway Company ("Norfolk Southern"), stating as follows:

PARTIES – JURISDICTION – VENUE

1. At all times relevant to this Complaint Plaintiff Matthew John Graham (hereinafter "Plaintiff" or "Graham") was and is a natural person and citizen and resident of Raleigh County, West Virginia.

2. Defendant Norfolk Southern is a Virginia Corporation operating an interstate railroad, a common carrier, and Plaintiff's employer. Defendant regularly does business in West Virginia, including Mingo County, with its designated Registered Agent for service being Angela W. Konrad, 611 Third Avenue, Huntington, West Virginia 25701-1313.

3. This Court has jurisdiction and venue over the parties to this civil action as the acts, conduct, and injuries giving rise to this Complaint occurred in this county and Defendants do business in and/or reside in this county.

NATURE OF THE CASE

4. Plaintiff's cause of action against Defendant Norfolk Southern is brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (hereinafter referred to as the FELA).

EXHIBIT B

5. At all times material to this Complaint, Plaintiff and Defendant Norfolk Southern were mutually engaged in acts and services substantially affecting interstate commerce.

6. At all times material to this Complaint, Plaintiff was an employee of Norfolk Southern acting within the line and scope of his employment.

FACTUAL BACKGROUND AND ALLEGATIONS

7. Defendant Norfolk Southern provides rail service to Dominion Energy and related entities at its Clover, Virginia coal-fired power station ("Clover Plant").

8. Norfolk Southern transportation crews regularly load empty railcars (coal hopper cars) with coal at the designated "load-out" facility in Coal Mountain, West Virginia for delivery to the Clover Plant.

9. Once the railcars are loaded with coal, the train, consisting of locomotives and approximately 100 loaded railcars, is taken by Norfolk Southern transportation crews to Clover Plant.

10. At the Clover Plant, the cars are unloaded or "dumped" by Dominion Energy and related entity employees by opening the dump doors located on the bottom of each of the rail cars.

11. Once "dumped" or emptied the dump doors are closed and to be latched ("locked over center") on the empty railcars and the now empty railcars are taken by Norfolk Southern transportation crews back to Coal Mountain, West Virginia for loading and the process is repeated.

12. Prior to leaving the Clover Plant, Dominion Energy employees or agents are to inspect the dump doors to make certain that the dump doors are closed and latched.

13. Norfolk Southern delegated its duty of inspection of the dump doors to Dominion Energy at the Clover Plant and failed to have a system or process in place to inspect the dump doors after cars leave the Clover Plant and before they are loaded again at Coal Mountain.

14. Norfolk Southern is aware that If the empty railcars' dump doors are defective and/or are not properly closed and latched ("locked over center"), then an unintended dump of coal from a car may occur on and around the track once the railcars are loaded either at the time of loading or upon movement after loading.

15. Norfolk Southern is also aware that if an unintended dump occurs, then a derailment of the train may occur, which could cause personal injury to crew members, the public and/or property.

16. On May 14, 2016, at or about 8:45 p.m., Plaintiff sustained serious injuries while working for Defendant Norfolk Southern as a conductor on Defendant's property and premises in Coal Mountain, West Virginia when Defendant's train derailed due to an unintended dump of coal.

17. Plaintiff was working as a part of Defendant's train crew performing his duties by occupying a caboose and "protecting the shove" end of a shoving movement at the time of the derail.

18. Prior to the shove movement, Norfolk Southern or its agents or assignees as a part of its non-delegable duties knew or should have known of multiple cars in the train with defective air dump doors but failed to inspect or remedy the dump doors which would or could cause a derailment.

19. In addition, Norfolk Southern was fully aware that prior to the movement when Plaintiff suffered his injuries, due to the defective and/or unlatched air dump doors on the cars in the train, a prior unintended dump had occurred and tons of coal had been spilled on the track.

20. The first spill from the first unintended dump was not properly and fully cleaned up and the rail cars in the train were defective and not properly inspected prior to movement, causing the second unintended dump and derailment and injuries to Plaintiff.

21. Due to the derailment caused by the unintended dump due(s) to the defective and/or unlatched dump doors and the failure to properly inspect the dump doors by either Dominion Energy or Norfolk Southern, Plaintiff sustained serious and permanent injuries to his back.

COUNT I - NORFOLK SOUTHERN - FELA NEGLIGENCE

22. Defendant Norfolk Southern is required under the FELA and owes a duty to Plaintiff to provide Plaintiff with a reasonably safe place to work.

23. Defendant Norfolk Southern had a duty to inspect and maintain the equipment (railcar) and track on which Plaintiff was working on May 14, 2016, to protect its employees from injury who are required to occupy and use its railcars.

24. This duty described above owed by Defendant Norfolk Southern to Plaintiff is nondelegable as a matter of law.

25. Norfolk Southern improperly attempted to delegate its duty owed to Plaintiff and is responsible to Plaintiff for any negligence of Dominion Energy.

26. Any action or inaction or negligence of Dominion Energy or its agents or employees at its Clover plant related to the railcars or inspection of same was a part of the operational activities of Norfolk Southern and therefore, as a matter of law, is imputed to Defendant Norfolk Southern.

27. Defendant Norfolk Southern knew, or in the exercise of ordinary care should have known, that the track was not safe to operate upon and that the railcars were defective, not properly inspected and unsafe.

28. In addition, the area where Plaintiff would be and could be working and riding on May 14, 2016 was defective and unsafe, and Defendant Norfolk Southern or its agents failed to properly inspect and maintain the track and railcars involved where it was known that Plaintiff would be occupying the train and could be injured.

29. Defendant Norfolk Southern is liable to Plaintiff because these acts and failure to act by Norfolk Southern and Dominion Energy and its related entities, which are imputed to Norfolk Southern constitutes negligence and a failure to provide Plaintiff with a reasonably safe place to work in direct violation of the FELA.

**COUNT II – NORFOLK SOUTHERN – STRICT LIABILITY –
FEDERAL SAFETY APPLIANCE ACT**

30. Federal law requires that a railroad carrier can only use railcars on any of its railroad lines that are not defective and operate as they are intended and expected to operate.

31. The railcars in the train that Plaintiff occupied on May 14, 2016 at approximately 8:45 p.m. were defective and violated the Federal Safety Appliance Act (FSAA) and other applicable Federal laws and regulations.

32. As a result of the defect and the resulting violation of the Federal law, Defendant is strictly liable to Plaintiff for his injuries.

CAUSATION

33. As a direct and immediate result of the negligence and resulting violation of the FELA and Federal law by Defendant Norfolk Southern, Plaintiff has suffered injuries and damages for which he seeks compensation.

34. Pursuant to the FELA, Defendant Norfolk Southern is liable to Plaintiff for any and all injuries and damages which are caused in any manner, no matter how slight, by their negligence.

DAMAGES

35. As a direct and proximate result of the negligence and violations by Norfolk Southern, Plaintiff has suffered injuries and damages including but not limited to:

- a. Physical impairment which is permanent;
- b. Surgical procedures;

c. Lost wages, past and future;

d. Pain, suffering, mental anguish, both past and in the future.

WHEREFORE, the Plaintiff prays that he have judgment against Defendant Norfolk Southern in an amount to be shown by the evidence at trial, plus costs and other remedies as the Court may deem just and proper. PLAINTIFF FURTHER DEMANDS A JURY TRIAL AS TO ALL ISSUES RAISED IN THE AMENDED COMPLAINT.

Respectfully submitted this 19th day of April, 2018.

By: 

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-And-

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ATTORNEYS FOR PLAINTIFF

EXHIBIT C

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)

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

Plaintiff,

v.

Civil Action No. 19-C-80 K

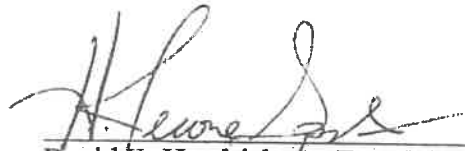
VIRGINIA ELECTRIC AND POWER CO., INC.
OLD DOMINION ELECTRIC COOPERATIVE, and
DYNAMIC ENERGY,

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 1st 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



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EXHIBIT D

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.**

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.

EXHIBIT D

RALEIGH COUNTY
RECEIVED AND FILED
FEB 25 2019
PAUL H FLANAGAN
CIRCUIT CLERK

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.

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