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December 14, 2016

Donnie Kopp, Clerk  
Harrison County Circuit Court  
301 E Main Street  
Bridgeport, WV 26330

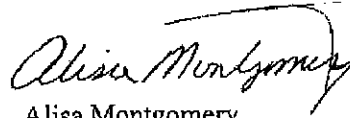
Re: *Riley Natural Gas Company v. Berry Energy, Inc.*  
Civil Action No. 16-C-365

Dear Mr. Kopp:

Enclosed for filing, please find the original "Answer" regarding the above-referenced matter. Please see that this document is placed in the appropriate Court file.

Thank you for your attention to this matter. If you have any questions, please contact me at (304) 345-6555.

Sincerely,

  
Alisa Montgomery  
Paralegal

Enclosure

cc: Judge James A. Matish  
Nicholas S. Preservati, Esq.

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

**RILEY NATURAL GAS COMPANY,  
A West Virginia corporation,**

**Plaintiff,**

**v.**

**Civil Action No. 16-C-365  
Judge James A. Matish**

**BERRY ENERGY, INC.,**

**Defendant.**

**Answer**

Berry Energy, Inc. ("Berry") sets forth the following for its Answer and Counterclaims.

**Nature of Action**

1. Berry admits that Riley asserts a claim for breach of contract and denies any remaining allegations in Paragraph 1 of the Complaint.
2. Berry admits that Riley seeks a declaratory judgment, denies that Riley is entitled to such relief, and denies the remaining allegations in Paragraph 2 of the Complaint.
3. Berry admits that Riley seeks monetary relief, denies that Riley is entitled to such relief, and denies the remaining allegations in Paragraph 3 of the Complaint.
4. Berry admits that Riley is a West Virginia corporation and has its principal place of business in Bridgeport, West Virginia.
5. Berry admits the allegations in Paragraph 5 of the Complaint.

**Jurisdiction and Venue**

6. Paragraph 6 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry denies the allegations in Paragraph 6.

7. Paragraph 7 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry denies the allegations in Paragraph 7.

#### Facts

8. Berry admits that Riley is a marketer of natural gas, but lacks knowledge or information sufficient to form a belief about the truth of the allegations of the remainder of Paragraph 8 of the Complaint and those allegations are therefore denied.

9. Berry admits that its business includes the production of natural gas and denies any remaining allegations in Paragraph 9 of the Complaint.

10. Berry admits that it has or had agreements with Riley. Allegations in Paragraph 10 of the Complaint regarding the purpose or meaning of those agreements constitute legal conclusions to which no response is required and are therefore denied. Any remaining allegations contained in Paragraph 10 of the Complaint are denied.

11. Berry admits that DTI made statements regarding the purpose of the DTI Gateway but denies the truth of those statements and therefore the allegations contained in Paragraph 11 of the Complaint are denied.

12. Berry admits that DTI entered precedent agreements with shippers with respect to the DTI Gateway that contained charges related to the reservation of space on the pipeline but lacks knowledge or information sufficient to form a belief about DTI's reliance and denies all remaining allegations of Paragraph 12 of the Complaint.

13. Berry admits that DTI announced an "open season" for the Gateway Project between April 1, 2008 and April 25, 2008 pursuant to which shippers of natural gas wishing to subscribe to the "non-binding" offering had to, *inter alia*, request the maximum daily

transportation quantity it wished to transport and Berry lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 13 of the Complaint and those allegations are therefore denied.

14. Berry admits that Riley and DTI entered into a precedent agreement but lacks knowledge or information sufficient to form a belief about the specifics of that agreement and those allegations are therefore denied.

15. Berry admits that Riley attached a document as "Exhibit 1" to the Complaint and further states that the document speaks for itself and Berry denies all allegations that are inconsistent with or contrary to the terms of that documents. Berry denies all remaining allegations contained in Paragraph 15 of the Complaint.

16. Berry lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 16 of the Complaint regarding what Riley would have agreed to and those allegations are therefore denied. Berry denies any remaining allegations in Paragraph 16 of the Complaint.

#### The Agreement

17. Paragraph 17 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the

terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 18 of the Complaint.

19. Berry lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 19 of the Complaint regarding what Riley agreed to and those allegations are therefore denied. Berry denies any remaining allegations in Paragraph 19 of the Complaint.

20. Berry lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 20 of the Complaint regarding what Riley agreed to and those allegations are therefore denied. Berry denies any remaining allegations in Paragraph 20 of the Complaint

21. Paragraph 21 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 21 of the Complaint.

22. Paragraph 22 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 22 of the Complaint.

#### **COUNT 1 – Breach of Contract**

23. Berry re-asserts and incorporates by reference all responses to the allegations of Paragraphs 1 through 22 of the Complaint.

24. Paragraph 24 of the Complaint constitutes a legal conclusion and therefore requires no response.

25. Paragraph 25 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 25 of the Complaint.

26. Paragraph 26 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 26 of the Complaint.

27. Paragraph 27 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 27 of the Complaint.

28. Paragraph 28 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that Riley accurately quotes one portion of one section of one document and further states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 28 of the Complaint.

29. Paragraph 29 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that Riley purports to quote one portion of one section of one document and further states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 29 of the Complaint.

30. Paragraph 30 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with the terms of the Agreement. Berry admits that it has received invoices from Riley and denies all remaining allegations contained in Paragraph 30 of the Complaint.

31. Paragraph 31 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 31 of the Complaint.

32. Paragraph 32 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that Riley purports to quote one portion of one section of one document and further states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 32 of the Complaint.

33. Paragraph 33 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 33 of the Complaint.

**Count II – Declaratory Relief**

34. Berry re-asserts and incorporates by reference all responses to the allegations of Paragraphs 1 through 33 of the Complaint.

35. Paragraph 35 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent that a response is deemed necessary, Berry states that the Agreement speaks for itself and denies all allegations that are inconsistent with or contrary to the terms of the Agreement. Berry denies all remaining allegations contained in Paragraph 35 of the Complaint.

**Count III – Monetary Relief**

36. Berry re-asserts and incorporates by reference all responses to the allegations of Paragraphs 1 through 35 of the Complaint

37. Paragraph 37 of the Complaint constitutes a legal conclusion and therefore requires no response. Berry denies all remaining allegations contained in Paragraph 37 of the Complaint.

38. Paragraph 38 of the Complaint constitutes a legal conclusion and therefore requires no response. Berry denies all remaining allegations contained in Paragraph 38 of the Complaint.

## **AFFIRMATIVE DEFENSES**

As for Berry's separate and additional affirmative defenses, which apply to all of Riley's claims unless specified below, Berry alleges as follows. Berry hereby expressly incorporates the allegations of its Answer as set out above and the allegations asserted against Riley and other entities in the lawsuit filed in the Circuit Court of Marshall County, West Virginia, *Adkins Energy, Inc. et al. v. Dominion Transmission, Inc., et al.*, Case No. 16-C-92 ("Adkins action"), and currently pending in the Northern District of West Virginia while that court decides plaintiffs' motion to remand, with respect to each affirmative defense. In addition, Berry incorporates the facts alleged as to each affirmative defense as to all other affirmative defenses. All references to Riley include, without limitations, any of Riley's agents, employees, officers, legal counsel, and others under their control. Berry hereby reserves and asserts all affirmative defenses available under the law of West Virginia and/or any other applicable jurisdiction. These defenses are asserted without conceding the burden of proof to any of the following, and without waiving the right to have Riley prevent prima facie evidence in support of each and every action alleged against Berry.

### **First Affirmative Defense** **(Failure to State a Claim)**

Riley's claims are barred, in whole or in part, because Riley fails to state claims upon which relief may be granted.

### **Second Affirmative Defense** **(Compulsory Counterclaim)**

As explained in greater detail in Berry's motion to dismiss, Riley's Complaint should be dismissed and/or stayed because Riley's claims should have been filed as a counterclaim in the currently pending litigation related to the Adkins action.

**Third Affirmative Defense**  
**(Illegal and Fraudulent Purpose)**

To the extent Riley asserts rights against Berry, no such rights exist because the activities of Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with Riley were for an illegal and fraudulent purpose, as alleged in the Adkins action.

**Fourth Affirmative Defense**  
**(Fraud in the Course of Performance)**

To the extent Riley asserts rights against Berry, no such rights exist because the activities of Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with Riley, including Riley's course of performance under the Gas Sales Contract and the Firm Transportation Contract, were for an illegal and fraudulent purpose, as alleged in the Adkins action.

**Fifth Affirmative Defense**  
**(Fraud in the Inducement)**

To the extent Riley's claims assert rights against Berry, no such rights exist because the activities of Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with Riley, including Riley's inducement of Berry to enter into the Gas Sales Contract and the Firm Transportation Contract, were for an illegal and fraudulent purpose as alleged in the Adkins action. Had Berry been aware of the fraud or falsity of the misstatements or omissions by Riley and its co-conspirators, Berry would not have accepted any purported obligations or duty to Colonial.

**Sixth Affirmative Defense**  
**(Frustration)**

To the extent Riley's claims assert rights against Berry, no such rights exist because the activities of Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with

Riley, substantially frustrated what Berry reasonably understood to be the purpose of any agreement between Berry and Riley, as alleged in the Adkins action. As a result, Berry's performance under any purported agreement or any duty or obligation purportedly owed to Riley was excused.

**Seventh Affirmative Defense**  
(Riley's Material Breaches/Failure to Perform)

To the extent Riley's claims assert rights against Berry, no such rights exist because Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with Riley, failed to perform their respective material obligations, as alleged in the Adkins action. As a result of these material breaches, Berry's performance of any duties or obligations owed to Riley were excused.

**Eighth Affirmative Defense**  
(Conduct of Riley and Others Preventing Performance)

To the extent the Riley's claims assert rights against Berry, no such rights exist because the activities of Riley, as well as DFS and other wrongdoers acting in concert or conspiracy with Riley, prevented Berry's performance of any obligations or duties owed to Riley, as alleged in the Adkins action.

**Ninth Affirmative Defense**  
(Estoppel)

Riley's claims are barred, in whole or in part, by the doctrine of estoppel.

**Tenth Affirmative Defense**  
(Waiver and Acquiescence)

Riley's claims are barred, in whole or in part, by the doctrines of waiver and acquiescence.

**Eleventh Affirmative Defense**  
(In pari delicto)

Riley's claims are barred, in whole or in part, because it or one or more parties through which Riley claims were *in pari delicto* as to the actions of which Riley complains, as alleged in the Adkins action.

**Twelfth Affirmative Defense**  
(Unclean Hands)

Riley's claims are barred, in whole or in part, by the doctrine of unclean hands, as alleged in the Adkins action.

**Thirteenth Affirmative Defense**  
(Mitigation)

Riley's claims are barred, in whole or in part, to the extent Riley has failed to mitigate damages, if any.

**Fourteenth Affirmative Defense**  
(Approval and Ratification)

Riley's claims are barred, in whole or in part, by Riley's approval and ratification of the conduct on which the claims are based.

**Fifteenth Affirmative Defense**  
(Force Majeure)

Riley's claims are barred, in whole or in part, under the doctrine and/or contractual terms of force majeure, as alleged in the Adkins action.

**Sixteenth Affirmative Defense**  
(Statute of Limitations)


Riley's claims are barred, in whole or in part, by the statute of limitations.

**Seventeenth Affirmative Defense**  
**(Unconscionability)**

Riley's claims are barred, in whole or in part, because the contracts at issue are unconscionable under the common law and/or the uniform commercial code, as alleged in the Adkins action.

WHEREFORE, Berry demands that it be accorded a trial by jury, requests that Riley's Complaint and all claims and causes of action contained therein be dismissed with prejudice and on the merits; that Riley receive nothing thereby; and that Berry receive such relief as is appropriate, including, to the extent recoverable, costs, attorneys' fees, all rights to indemnification, and such other and further relief as is just.

Respectfully submitted, this 14th day of December 2016.

  
Jonathan R. Marshall, Esq. (WV Bar ID # 10580)  
Bailey & Glasser, LLP  
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(304) 345-6555  
(304) 342-1110 *facsimile*

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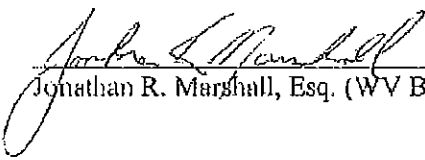
BERRY ENERGY, INC.,

Defendant.

Certificate of Service

The undersigned hereby certifies that a true copy of the Answer has been served via mail to the following, on this the 14<sup>th</sup> day of December, 2016:

Nicholas S. Preservati (WVSB # 8050)  
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Telephone: (304) 721-3437  
Facsimile: (304) 340-3801  
*Counsel for Plaintiff*

  
Jonathan R. Marshall, Esq. (WV Bar ID # 10580)