

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 081294

VIRGINIA ELECTRIC AND POWER COMPANY

and

OLD DOMINION ELECTRIC COOPERATIVE,

Appellants,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellee.

OPENING BRIEF OF APPELLANTS

**from the Circuit Court
of the County of Halifax**

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to rule that the parties' April 5, 1989 Coal Transportation Agreement ("CTA") unambiguously requires the application of the Interstate Commerce Commission ("ICC") Rail Cost Adjustment Factor, which since April 1, 1989, had been adjusted for railroad productivity ("RCAF-A").

2. The trial court erred by ruling that the CTA unambiguously requires the application of the "unadjusted RCAF" ("RCAF-U") and by failing to rule that if the CTA does not require the application of RCAF-A, it contains a latent ambiguity.

3. The trial court erred in denying Virginia Electric and Power Company's and Old Dominion Electric Cooperative's ("VP/ODEC") motion for leave to amend and in striking VP/ODEC's affirmative defenses.

4. The trial court erred in granting Norfolk Southern Railway Company's ("NS") motion for a protective order and its motion for scheduling order, both of which foreclosed otherwise proper discovery.

5. The trial court erred in denying VP/ODEC's motion to vacate its September 1, 2006 Order.

6. The trial court erred in denying VP/ODEC's motion to strike NS's evidence, in refusing to receive evidence proffered by VP/ODEC

relating to damages, and by awarding \$77,708,000 in past damages and in ordering future payments calculated using RCAF-U.

7. The trial court erred in refusing to receive evidence proffered by VP/ODEC relating to prejudgment interest and by awarding \$8,476,222 in prejudgment interest.

8. The trial court erred by awarding post-judgment interest at the annual rate of 7.5%.

QUESTIONS PRESENTED

1. Whether the CTA unambiguously requires the application of RCAF-A? (Assignments of Error Nos. 1-2.)

2. Whether the CTA contains a latent ambiguity which requires the consideration of extrinsic evidence? (Assignment of Error No. 2.)

3. Whether the trial court erred in denying VP/ODEC's motion for leave to amend and in striking VP/ODEC's affirmative defenses? (Assignment of Error No. 3.)

4. Whether the trial court erred in denying discovery? (Assignment of Error No. 4.)

5. Whether the trial court erred in denying VP/ODEC's motion to vacate its September 1, 2006 Order? (Assignment of Error No. 5.)

6. Whether the trial court erred in denying VP/ODEC's motion to strike NS's evidence, in refusing to receive evidence proffered by VP/ODEC relating to damages, and in awarding \$77,708,000 in past damages and ordering future payments computed by retroactively adjusting rates applying RCAF-U from the inception of the CTA? (Assignment of Error No. 6.)

7. Whether the trial court erred in refusing to receive evidence proffered by VP/ODEC relating to prejudgment interest, and by awarding \$8,476,222 in prejudgment interest? (Assignment of Error No. 7.)

8. Whether the trial court erred by awarding post-judgment interest at the annual rate of 7.5%. (Assignment of Error No. 8.)

**STATEMENT OF THE NATURE OF THE CASE
AND MATERIAL PROCEEDINGS BELOW**

The Nature of the Case

This appeal arises from a series of substantive and procedural errors in what may be the largest contract action ever brought in a state court of the Commonwealth. If allowed to stand, the trial court's judgment will result in more than one half billion dollars in additional fuel shipment costs to VP/ODEC, most of which is likely to be paid by VP/ODEC's customers.

At issue is a rate adjustment provision in a long-term contract for the transportation of coal to VP/ODEC's Clover power station. (JA 205-36.)

The CTA provides for quarterly adjustments in coal per ton rates based upon the "ICC generated Rail Cost Adjustment Factor" ("RCAF".) (JA 208; 221.) When the parties signed the CTA in 1989, the "ICC generated RCAF" was computed each quarter by the ICC by adjusting an index of railroad costs for railroad productivity.

For fourteen years, from 1989 until 2003, NS adjusted its quarterly transportation rates under the CTA using the official RCAF which included the productivity adjustment. In 2003, despite this consistent course of conduct, NS's explicit acknowledgement of the applicability of the RCAF adjusted for productivity, and after VP/ODEC's refusal on three occasions to amend the contract to eliminate the adjustment for productivity from the rate calculation, NS notified VP/ODEC that it intended to begin using the RCAF unadjusted for productivity, a separate tracking index published by the ICC. (JA 172-73.) In its letter, NS acknowledged that it had employed the adjusted RCAF since 1989. It claimed that it had done so "to confer a short-term benefit" on VP/ODEC which had continued because of its "attention to other matters." Despite its admitted intentional waiver, NS stated that henceforth it would apply the unadjusted RCAF as if it had been in effect since the contract's inception. (*Id.*)

Material Proceedings Below

VP/ODEC disputed NS's interpretation of the CTA. Concerned that NS might discontinue coal shipments, VP/ODEC filed a Bill of Complaint on November 26, 2003 for anticipatory breach of the CTA. (JA 1-12.) They sought a declaration of the parties' rights and specific performance of the CTA. NS filed an Answer, Counterclaim (later designated a Cross-Bill or Cross-Complaint), and Demurrer. (JA 13-31.)

Ruling on NS's Demurrer, the trial court erroneously concluded that the CTA calls unambiguously for the use of the unadjusted RCAF to set the quarterly transportation rates. The trial court also erred by rejecting VP/ODEC's alternative argument that if the court concluded, as it necessarily did, that there is more than one RCAF, then the CTA contains a latent ambiguity that can be resolved only by extrinsic evidence. (JA 242; 487.)

After the trial court's ruling, VP/ODEC sought leave to amend the Bill of Complaint to assert claims of equitable estoppel and waiver. (JA 335-71.) The trial court denied VP/ODEC's motion, but then granted them leave to file an amended answer to NS's counterclaim and to pursue these claims as affirmative defenses, effectively realigning the parties. (JA 480-81.) However, after VP/ODEC filed the Amended Answer, the trial court

denied VP/ODEC any discovery on liability or damages, and then struck their affirmative defenses of equitable estoppel and waiver on the basis of judicial estoppel and alternative grounds. The court also struck the statute of limitations defense. (JA 632-38.)

The court then entered its September 1, 2006 Order requiring VP/ODEC to compute and make payments under the CTA as if the unadjusted RCAF had been applied from the inception of the CTA. (JA 694-96.) The September 1, 2006 Order was, by its terms, based on the trial court's erroneous conclusion that its November 1, 2005 Decree and prior orders "disposed of the whole subject of the action and left nothing to be done in the case except to superintend ministerially the execution of the above noted orders and decree." (JA 695.)

VP/ODEC filed a notice of appeal. (JA 698.) This Court dismissed the petition for appeal on May 11, 2007, ruling that neither the November 1, 2005 Decree nor the September 1, 2006 Order were final, appealable orders and that the "dismissal is without prejudice to the right of the appellants to appeal a final order of the trial court." (JA 701.)

Following remand, VP/ODEC moved to vacate the September 1, 2006 Order. (JA 703-30.) VP/ODEC also moved for entry of a scheduling order that provided for discovery as to the calculation of damages. (*Id.*)

NS opposed both motions. (JA 739-41.) The trial court entered a scheduling order tendered by NS, which again barred discovery. (JA 762-63.) It further directed the parties to exchange computations of the difference between the amount payable by VP/ODEC to NS from December 1, 2003 to November 30, 2007 by applying the unadjusted RCAF to set the rates from the inception of the CTA, and the amount which VP/ODEC actually paid, plus interest on the difference. (*Id.*) VP/ODEC objected to computing the rates from the inception of the contract, and reserving its objections, stipulated with NS a difference of \$77,708,000 and interest of \$8,476,222. (JA 772-76.)

Pursuant to the trial court's direction to identify any remaining disputed matters, VP/ODEC informed the court that it disputed NS's entitlement to any damages and prejudgment interest and to calculating damages by adjusting base rates from the inception of the CTA. (JA 773-75.) VP/ODEC noted that the CTA explicitly mandates quarterly rates to be adjusted only from the previous quarter. NS had announced its intention in September 2003 to apply the "unadjusted" RCAF beginning on December 1, 2003. Applying the unadjusted RCAF from the previous quarter to the rates effective December 1, 2003 produced a difference of \$3,816,000 as

of November 30, 2007 on which prejudgment interest, if allowed, would be \$357,000. (JA 779.)

A bench trial was conducted on April 8, 2008. (JA 1047-1107.) NS tendered only the stipulation. (JA 1051.) VP/ODEC moved to strike. (JA 1067.) The trial court denied the motion and reaffirmed its prior rulings. (JA 1087.) The trial court refused to admit testimony and exhibits offered by VP/ODEC to show that the CTA permitted rates to be adjusted only as of the prior quarter and that prejudgment interest was not payable by the CTA's terms. (*Id.*)

On April 17, 2008, the trial court entered the Final Order and Decree tendered by NS which awarded damages and prejudgment interest. (JA 793-800.) The Order also denied VP/ODEC's motion to vacate the September 1, 2006 Order, declared NS entitled to specific performance of future payments under the CTA and awarded post-judgment annual interest of 7.5%. (*Id.*) This timely appeal followed. (JA 801.)

STATEMENT OF THE FACTS

A. The Parties

Norfolk & Western Railway Company ("N&W") and ODEC were the initial parties to the CTA. (JA 436.) NS is the successor-by-merger to N&W. On May 31, 1990, VP acquired an undivided one-half interest in the

proposed Clover power station and in the CTA. Thus, the parties in interest are VP/ODEC and NS.

B. The Coal Transportation Agreement.¹

In the 1980s ODEC explored the construction of a coal-fired electric generating facility in Clover, Virginia. ODEC negotiated with N&W for a long-term coal transportation contract. ODEC also considered building at another location where CSXT provided competitive rail service. Ultimately, ODEC and NS entered into the CTA on April 5, 1989. (JA 436.) There was no obligation to perform unless and until the Clover facility was built and became operational. (JA 210.) That occurred in 1994.

The CTA established base transportation rates which were to be adjusted quarterly "based upon the ICC generated RCAF." (JA 421.) The CTA specifically provides that whenever the term RCAF appears in the CTA, it means "Rail Cost Adjustment Factor, as prescribed by the ICC in Ex Parte No. 290." (JA 408.)

In addition, the CTA states in Article 25 that:

The amount of each adjustment shall be determined according to the applicable procedures prescribed by the ICC in Ex Parte No. 290 (Sub-No. 2) and published in Title 49 C.F.R., Part 1102, Section 1102.1 and Interstate Commerce Act, Section

¹A copy of the CTA is appended to the Opening Brief for the Court's convenience.

10707, *as may be amended*, incorporated herein by reference. (Italics supplied.)

(JA 422.)²

The CTA provides that the rates "shall be retained or adjusted up or down on a quarterly basis. . . . The first such adjustment shall be made on July 1, 1989, and subsequent adjustments shall be made thereafter on the first day of each October, January, April, and July, or whenever the adjustment factor becomes available thereafter." (JA 421-22.)

The CTA's initial term is twenty years from December 31, 1994, the year in which coal shipments were first made to the Clover facility. (JA 409-10.) With certain limitations, either party may extend the term of the CTA for up to five consecutive five-year periods. (*Id.*) Thus, the CTA can remain in effect through 2039.

C. The Rail Cost Adjustment Factor.

The Rail Cost Adjustment Factor is a product of statute. It was created in 1981 by the Interstate Commerce Act, Section 10707a. This

²On November 1, 1982, the ICC had re-designated its regulations. 47 Fed. Reg. 49534 (Nov. 1, 1982). The parties agreed below that when the CTA was executed, Part 1102, Section 1102.1, had been redesignated Part 1135, Section 1135.1. The CTA also erroneously refers to 49 U.S.C. § 10707, which at the time governed certain unrelated aspects of rate filings with the ICC, rather than 49 U.S.C. § 10707a, which established the RCAF. In 1996, 49 U.S.C. § 10707a was recodified at 49 U.S.C. § 10708.

section is incorporated by reference into the CTA by the last paragraph of Article 25 quoted above.

49 U.S.C. § 10707a(a)(2)(B) of this Act provided:

Commencing with the fourth quarter of 1980, the Commission shall as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor....

Congress further provides in § 10707a(a)(2)(B)(b)(2):

A rate increase authorized under this subsection may not be found to exceed a reasonable maximum for the transportation involved.

The ICC explained that the rail cost adjustment factor is “an index established by statute intended to reflect the impact of inflation. Rail rates that rise no faster than the index are generally protected from challenge as to their reasonableness.” *R.R. Cost Recovery Procedures – Productivity Adjustment*, 5 I.C.C.2d 434 (1989) (internal footnote omitted).

The statute calls for “a rail cost adjustment factor” that sets “a reasonable maximum.” Under the statute there could be only one reasonable maximum and, therefore, only one rail cost adjustment factor.

The ICC exercised powers delegated to it by Congress through proceedings resulting in regulations published in the Code of Federal Regulations (“CFR”). The reported proceedings in the various dockets of the ICC take effect when they are published in the CFR. Knowing this, the

parties incorporated by reference not only Section 10707a of the Interstate Commerce Act but also the CFR in which the adjustment "shall be determined." Significantly, the parties specifically incorporated this statute and these regulations "as may be amended." (JA 422.)

The reference in Article 25 of the CTA to Title 49 C.F.R., Part 1102, Section 1102.1 was almost seven years out of date as of the time the contract was executed. On November 1, 1982, this CFR section had been amended and re-designated as 49 C.F.R., Part 1135, Section 1135.1 See 47 Fed. Reg. 49534, 49576 (Nov. 1, 1982). The parties conceded this in the lower court. NS's counsel made this point in oral argument before the Circuit Court:

So getting 49 C.F.R. 1102 incorrect or misstated because it has been superseded doesn't change the underlying statement of the parties that this is what we intended as the formula, as the benchmark.

(JA 828.)

The parties could have chosen any index they wanted. But they picked the RCAF established by statute. And to make it clear, they incorporated the statute and the regulations as they may be amended into the CTA.

On November 23, 1988, nearly five months before the CTA was executed, the ICC announced that it was "proposing to adjust the quarterly

rail cost adjustment factor (RCAF) for changes in [railroad] productivity. This proposal reflects a decision to change the RCAF from an input index . . . to an output index . . .” *R.R. Cost Recovery Procedures – Productivity Adjustment*, 53 Fed. Reg. 47558 (Nov. 23, 1988) (emphasis added). Thus, the parties expected when negotiating the CTA that “the ICC generated RCAF” would likely include a productivity adjustment.

The ICC implemented its decision on March 22, 1989 as follows:

The Commission’s regulations at 49 C.F.R. Part 1135 govern railroad cost recovery procedures. In this decision, we are modifying those regulations to provide for an index of rail costs adjusted for productivity.

R.R. Cost Recovery Procedures, 5 I.C.C.2d at 434. The ICC explicitly adopted the productivity adjusted RCAF (“RCAF-A”) as the RCAF:

Effective April 1, 1989, the ceiling for tariff increases taken under these procedures will be the RCAF (Adjusted).

Id. at 473. It cannot be disputed that as of April 5, 1989, the date the CTA was executed, *the* RCAF, as prescribed by the ICC in Ex Parte No. 290, was RCAF-A. When the ICC revised the RCAF to include the productivity adjustment, it announced that it would continue to calculate and publish an unadjusted RCAF (“RCAF-U”), not as the statutory RCAF but as a tracking index to “provide the Commission and the public with readily available

information necessary to monitor the course and impact over time of the decisions taken here." *Id.* at 471.

In a decision issued November 17, 1989, the ICC again reiterated that RCAF-A was the rail cost adjustment factor and that although the ICC referred to one step in the calculation process as RCAF-U, that did not make RCAF-U the statutory rail cost adjustment factor. *R.R. Cost Recovery Procedures*, 1989 WL 246870, at *2 (Nov. 17, 1989).

Congress acknowledged the action of the ICC and codified the RCAF-A as the one and only RCAF when it abolished the ICC and created the Surface Transportation Board ("STB"). At 49 U.S.C. § 10708, Congress recodified § 10707a (cited in Art. 25 of the CTA):

Rail cost adjustment factor

- (a) The Board shall, as often as practicable, but in no event less often than quarterly, publish a rail cost adjustment factor
- (b) The rail cost adjustment factor published by the Board under subsection (a) of this section shall take into account changes in railroad productivity. The Board shall also publish a *similar index* that does not take into account changes in railroad productivity.

Id. (emphasis added). Thus by statute, "the rail cost adjustment factor" is the RCAF-A, whereas RCAF-U is merely a "similar index."

The decisions of the ICC, and the applicable statutes and regulations, all confirm that as of the execution of the CTA, "the ICC generated RCAF" was, and continues to this day to be, RCAF-A.

D. The Course of Performance.

After the ICC adopted RCAF-A, but before the CTA was executed, NS confirmed by letter in 1989 that the rate adjustment factor in the CTA was RCAF-A. (JA 268-69, ¶¶ 76-83.) Thereafter, until its October 17, 2003 letter to VP/ODEC, NS consistently applied RCAF-A to adjust the rates for fifty-six quarters over fourteen years. It sent VP/ODEC a quarterly statement in each of those fifty-six quarters with rates adjusted by RCAF-A.³ (JA 271, ¶¶ 90-91; JA 1099; 1197-1360.) Furthermore, the parties conducted periodic audits. NS confirmed that for each audit period all rate issues had been fully resolved. (JA 279, ¶¶ 128-132; JA 331.)

Other conduct of NS during those fourteen years confirmed the parties' clear understanding that the CTA called for RCAF-A. For example, William Bales, an NS officer and one of the chief negotiators of the CTA, wrote to ODEC acknowledging that RCAF-A was the applicable index. (JA 270, ¶ 87; JA 323.) ("As you know, your Transportation Contract provides

³ Although NS began sending the quarterly statements upon the execution of the CTA in 1989, it was not until the first coal shipment was made in 1994 that invoices were prepared. VP/ODEC prepared the invoices based on the NS quarterly rate adjustment statements.

for an adjustment of 50% of the *adjusted* RCAF to the contract rates”) (emphasis added). In 1992, NS proposed amending the CTA to substitute the Gross Domestic Product Implicit Price Deflation for RCAF-A. (JA 276, ¶¶ 113-115.) VP/ODEC rejected this proposal. (*Id.* at ¶ 114.) In 1993, NS offered to construct, at its own cost, a multi-million dollar rotary dumper at Clover to enhance operations if VP/ODEC would agree to amend the contract to substitute 75% of RCAF-U for RCAF-A. (JA 276-77, ¶¶ 115-117.) VP/ODEC also rejected this proposal. (JA 277, ¶ 117.)

In 1998, NS asked ODEC’s new chief executive officer, Jackson Reasor, whether VP/ODEC would consider replacing RCAF-A with an alternative index. After investigating the issue, Mr. Reasor responded that the use of RCAF-A was a valuable asset of VP/ODEC which they did not wish to change. (JA 277-78, ¶¶ 120-126.) For five years thereafter, NS continued to adjust the rates using RCAF-A. (*Id.*)

The course of performance confirms what the clear and unambiguous language of the CTA provides: that the rates are to be adjusted according to “the ICC-generated RCAF” which is now, and has been since April 1, 1989, the RCAF adjusted for productivity — RCAF-A.

SUMMARY OF THE ARGUMENT

VP/ODEC ask this Court to interpret the CTA *de novo* and find that it clearly and unambiguously provides for rates to be adjusted by RCAF-A. There can be only one RCAF, regardless of how many other alternative indices exist. The RCAF-A was the ICC generated RCAF before the CTA was executed, and neither the language of the CTA nor the applicable statutes and regulations incorporated by reference permit the conclusion that RCAF-U is the contractually agreed upon rate adjustment factor. Should this Court agree, it need not consider the other issues presented by this appeal.

If this Court concludes that the CTA is ambiguous because the ICC continues to publish two indices, or even if this Court were to conclude that the CTA unambiguously provides for the use of RCAF-U to adjust the quarterly rates, it would then also be necessary for the Court to address the trial court's other errors, including the striking of VP/ODEC's defenses and the denial of discovery. Either finding would require remand for a new trial on the fact issues relating to the negotiation of the CTA and the course of performance.

Finally, the damages award based on the computation of rates using RCAF-U from the inception of the CTA is contrary to the CTA and to the

parties' course of performance, and runs afoul of the applicable statute of limitations. Likewise, the award of pre-judgment interest is contrary to the CTA and was otherwise an abuse of discretion, and the award of post-judgment interest was set at an unlawful rate.

In short, the trial court decided this entire matter on a demurrer standard at the inception of the case. The series of rulings that followed, from the denial of leave to amend, the striking of affirmative defenses, the refusal to allow discovery on liability or damages, and the refusal to consider VP/ODEC's evidence at trial, all followed the same course and exacerbated that fundamental error. These errors entitle VP/ODEC to reversal and final judgment, or to reversal and remand for further proceedings on VP/ODEC's fact-based claims and defenses.

ARGUMENT

I. **The CTA Unambiguously Requires The Application Of RCAF-A.**
(Assignments of Error Nos. 1 and 2)

The interpretation of a contract presents a question of law subject to *de novo* review. *First Am. Bank of Va. v. J.S.C. Concrete Constr., Inc.*, 259 Va. 60, 66-67, 523 S.E.2d 496, 500 (2000). The intention of the parties controls. *Am. Realty Trust v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 403, 281 S.E.2d 825, 831 (1981). To discern the parties' intent, the court views the agreement as a whole, without particular emphasis on isolated

terms, and adopts an interpretation that gives meaning to *all* of the contract's provisions. See, e.g., *PMA Capital Ins. Co. v. U.S. Airways, Inc.*, 271 Va. 352, 358, 626 S.E.2d 369, 372-73 (2006).

As of April 5, 1989, there was only one ICC generated RCAF – the RCAF-A. See *R.R. Cost Recovery Procedures*, 5 I.C.C.2d at 473, and *R.R. Cost Recovery Procedures*, 1989 WL 246870 at *2. Thus when the CTA refers to the “ICC generated RCAF,” that term is capable of but one interpretation, the legally recognized “ICC generated RCAF” then in effect.

The CTA in Article 1, “Definitions,” states that whenever the term “RCAF” is used in the document, it shall mean the “Rail Cost Adjustment Factor, as prescribed by the ICC in Ex Parte No. 290.” (JA 208.) This is RCAF-A. Article 25 of the CTA states: “Rate adjustments shall be based upon the ICC generated RCAF.” (JA 221.) This is also RCAF-A.

The last paragraph in Article 25 of the CTA is a reference to the procedures that produce RCAF-A. It provides:

The amount of each such adjustment shall be determined according to the applicable procedures prescribed by the ICC in Ex Parte No. 290 (Sub-No. 2) and published in Title 49 C.F.R., Part 1102, Section 1102.1 and Interstate Commerce Act, Section 10707, as may be amended, incorporated herein by reference.

(JA 222.)

The ICC's March 22, 1989 amendment to its regulations, effective April 1, 1989, substituted RCAF-A for RCAF-U as the ICC generated RCAF. Therefore, not one of the references to the RCAF in the CTA can be read as RCAF-U – a “similar index” published solely for informational and tracking purposes.

In its argument below, NS ignored all of the pertinent provisions of the contract that defined the rate adjustment factor and incorporated the related regulations and statute and amendments, all of which refer to RCAF-A. NS focused the court solely on a single reference to Sub. No. 2 of Ex Parte 290 which it plucked from a citation in the last paragraph of Article 25 that even NS conceded was outdated. (JA 222.) NS argues that the productivity adjustment was adopted in Sub. No. 4 of Ex Parte 290, not Sub. No. 2, and therefore the contract calls for RCAF-U.

The trial court erred in adopting NS's position. “Sub” refers to the subdockets which the ICC created within Ex Parte 290, which NS concedes were solely for the convenience of the ICC. The railroad's argument that the ICC cannot amend the RCAF as originally published in one subdocket of Ex Parte 290 by action taken in another subdocket of Ex Parte 290 has no basis in law.

NS also concedes that the parties agreed to a published index. At the time the contract was executed, both RCAF-A and the tracking index, RCAF-U, were published in Sub. 5 of Ex Parte 290, not Sub. 2. In fact, RCAF-U had not been published in Sub. 2 since 1987, two years before the contract. The reference to Sub. 2 simply does not have the significance that NS attributed to it and the demurrer should not have been granted.

As the CTA specifies, amendments to the RCAF control rate adjustments, specifically those published in the C.F.R. and in the Interstate Commerce Act. Both the C.F.R. and the Act were amended to require a productivity adjustment to the ICC generated RCAF. See *R.R. Cost Recovery Procedures*, 5 I.C.C.2d 434, 478 (1989); 49 U.S.C. § 10708. The CTA specifies that these amendments govern and, thus, RCAF-A must be used to adjust rates under the CTA.⁴

The parties to the CTA were not required to adopt the ICC generated RCAF. They could have selected any index to adjust rates, including the

⁴The history of amendments to 49 C.F.R. Part 1102.1, Section 1102 is found in the current 49 C.F.R. 1135.1. It includes the I.C.C. decision published in Ex Parte 290 (Sub. No. 2) on April 20, 1981 relating to RCAF-U. It also shows that the I.C.C. decision published in Ex Parte 290 (Sub. No. 4) on March 29, 1989, effective April 1, 1989 (5 I.C.C.2d 434 (1989)) and published at 54 F.R. 12920 is in the direct line of amendments to Section 1102.1. This decision in Sub. No. 4 created the I.C.C. generated RCAF that became effective April 1, 1989, and continues in effect today. It requires a productivity adjustment. Other amendments before and after March 29, 1989 were made in various subdockets.

RCAF-U tracking index. But once they chose the "Rail Cost Adjustment Factor, as prescribed by the ICC in Ex Parte No. 290," once they provided that adjustments to rates "shall be based upon the ICC generated RCAF," and once they incorporated by reference into the CTA the ICC regulations and the Interstate Commerce Act relating to the ICC generated RCAF, as may be amended, they unambiguously chose RCAF-A.

In sum, NS's entire case rests upon an ICC sub docket number, which it has bootstrapped, although incorrectly, into a reinterpretation of the Agreement.

II. Alternatively, If More Than One RCAF Exists, The CTA Has A Latent Ambiguity. (Assignment of Error No. 2)

The trial court ruled that the "unadjusted RCAF" was the Rail Cost Adjustment Factor prescribed by the ICC in Ex Parte No. 290. In so doing, it effectively ruled that there are two RCAFs – not just two indices – prescribed by the ICC in Ex Parte No. 290. The existence of two RCAFs, one adjusted for productivity and one unadjusted, would create a latent ambiguity in Article 25 of the CTA which refers to "*the* ICC generated RCAF" (emphasis added).

Under Virginia law a latent ambiguity is one which:

does not appear on the face of the words used, nor is its existence known until those words are brought into contact with collateral facts. It is only when you

come to apply the words, bringing them alongside the facts which existed when used, and to read them in the exact light in which they were written that you make up the latent ambiguity.

Hawkins v. Garland's Adm'r, 76 Va. 149, 152 (1882) (citations omitted).

See also *Tuomala v. Regent Univ.*, 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996) ("An ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time.").

If two RCAF's exist, the term "RCAF" would be "a term which, upon application to external objects, is found to fit two or more of them equally." *Zehler v. E. L. Bruce Co., Inc.*, 208 Va. 796, 799 n.5, 160 S.E.2d 786, 789 n.5 (1968) (emphasis deleted) (citation omitted). It would be difficult to find a more classic latent ambiguity than that which follows from the trial court's contract interpretation.

Where a latent ambiguity exists, extrinsic evidence must be used to assist the fact-finder's determination of the parties' intent. *Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 502, 464 S.E.2d 349, 354-55 (1995). The best evidence to resolve the ambiguity is the practical construction the parties themselves have placed upon the ambiguous term. See, e.g., *Am. Realty Trust*, 222 Va. at 403, 281 S.E.2d at 831. See also *Robin v. Sydeman Bros., Inc.*, 158 Va. 289, 300, 163 S.E. 103, 106 (1932) ("When a written contract is capable of more than one construction, then

the courts will give to it that construction which the parties have placed upon it.") (citations omitted). Indeed, in Virginia, the construction placed upon the ambiguous term by the parties is practically conclusive. See, e.g., *Chesapeake & Potomac Tel. Co. v. Wythe Mut. Tel. Co.*, 142 Va. 529, 540, 129 S.E. 389, 392 (1925) ("No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves.") (citations omitted).

VP/ODEC alleged that the parties performed the CTA utilizing RCAF-A as their adjustment factor for fourteen years. This understanding was confirmed by NS pre-execution and reiterated through an unwavering course of conduct over fourteen years. On at least three separate occasions, NS sought to amend the CTA to utilize some other adjustment mechanism. NS offered to spend substantial sums of money to induce VP/ODEC to replace RCAF-A. These facts show that all parties construed the CTA to require RCAF-A. (JA 1-9.)

The trial court erred by sustaining NS's Demurrer and holding that RCAF-U applies, without recognizing the latent ambiguity its conclusion compelled.

III. The Trial Court Erred In Denying Leave To Amend And In Striking VP/ODEC's Properly Pled Affirmative Defenses.
(Assignment of Error No. 3)

Following the trial court's December 22, 2004 Letter Opinion granting NS's demurrer, (JA 241-42), VP/ODEC promptly filed their Motion For Leave To Amend, appending their proposed Amended Bill of Complaint. (JA 335-449.) VP/ ODEC pled additional facts and theories regarding new matters not contained in the original Bill of Complaint which presented material issues for trial. VP/ODEC's amended pleading requested much more than "an opportunity for reargument of the question already decided." *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 230 Va. 396, 403, 337 S.E.2d 744, 749 (1985), and they were presumptively entitled to file it. *Kole v. City of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994) (finding that the trial court abused its discretion in denying leave to amend absent prejudice to the defending party). Leave to amend should be liberally granted. R. Sup. Ct. Va. 1:8.

The Amended Bill of Complaint alleged new facts to establish estoppel, waiver and other theories in support of VP/ODEC's claims, none of which had been raised in the Bill of Complaint. (JA 372-403, ¶¶ 1, 3-4, 20-136, 141-55.) NS argued, and the trial court agreed, that these new theories must be presented as affirmative defenses, (JA 469-73), although

VP/ODEC were entitled to pursue them as independent claims to ensure that their rights were fully and finally declared, rather than be relegated to the status of cross-bill defendants. *See, e.g., Va. Iron, Coal & Coke Co. v. Roberts*, 103 Va. 661, 676-78, 49 S.E. 984, 984-85 (1905) (recognizing cause of action for estoppel). Absent any prejudice to NS, and absent any finding that VP/ODEC's new theories were legally deficient, the trial court abused its discretion in denying VP/ODEC leave to pursue them.

Although the trial court granted VP/ODEC leave to amend their Answer to incorporate their alternative legal theories as affirmative defenses, (JA 480-81), it then struck all the fact-based defenses based on its mistaken application of the doctrine of judicial estoppel and on other erroneous grounds. (JA 632-38.)

A. The Trial Court Misapplied The Doctrine Of Judicial Estoppel.

The doctrine of judicial estoppel grants limited discretion to a trial court. This Court has cautioned that its use be limited in light of its harsh results. *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 323-25, 327, 609 S.E.2d 49, 52-53, 55 (2005). Even where all of the elements of judicial estoppel are met, a court may nevertheless exercise its discretion and decline to apply the doctrine. Here, those elements were not present. The trial court misapplied the doctrine and, in so doing, improperly

“short-circuited” VP/ODEC’s right to pursue its defenses at trial. *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993).

The trial court’s November 1, 2005 Decree, adopted from a sketch order submitted by NS, applies the doctrine of judicial estoppel based on an inaccurate and incomplete account of the earlier proceedings and allegations. (JA 632-38.) The parties always had made clear to the trial court their mutual understanding that VP/ODEC were referring to RCAF-A in Paragraphs 17 and 27 of their Complaint, whereas NS was referring to RCAF-U in its Answer. (JA 98; 815.) It was thus clear that VP/ODEC’s initial legal position was that the CTA called for the application of RCAF-A and that the CTA had not been amended to call for the application of RCAF-U.

The November 1, 2005 Decree recounts that the trial court “accepted as true, for purposes of ruling on [NS’s] demurrer . . . VP/ODEC’s factual allegations set forth in paragraphs 17 and 27 . . . and based thereupon . . . ruled that the language of the Agreement is clear and unambiguous.” (JA 633.) The Decree states that VP/ODEC then took the inconsistent position that the CTA was amended after all, but because the court had “relied upon [VP/ODEC]’s factual assertions in construing the plain, unambiguous

meaning of the [CTA],” VP/ODEC were judicially estopped from raising their affirmative defenses based on the purported inconsistent position.

(Id.)

The party invoking judicial estoppel must establish by clear, precise, and unequivocal evidence, (1) successive positions of fact, not law or theory, that are inconsistent or mutually contradictory; (2) a successful judgment in favor of the nonmoving party on any such positions of fact; (3) a change of position by the moving party due to its being misled by the inconsistent positions; and (4) circumstances making it unjust for the moving party to allow the nonmoving party to change its position.

Richfood, Inc. v. Ragsdale, 26 Va. App. 21, 24 n.2, 492 S.E.2d 836, 837 n.2 (1997); *Bentley*, 269 Va. at 325-29, 609 S.E.2d at 53-55. NS failed to establish any of these elements.

VP/ODEC did not take inconsistent factual positions, having never taken a position contrary to their initial allegation that the parties never amended the CTA to change the rate adjustment factor from RCAF-A to RCAF-U. Once the trial court construed the CTA to call for RCAF-U as the operative index, VP/ODEC reasserted that, if so, the contract had since been amended by operation of law. The facts which VP/ODEC alleged to

support that claim are no different from those they have alleged from the time the Bill of Complaint was filed.

VP/ODEC did assert alternative legal theories to which judicial estoppel does not apply. See, e.g., *Bentley*, 269 Va. at 326, 609 S.E.2d at 54. It is a cornerstone of Virginia civil procedure that “[a] party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.” R. Sup. Ct. Va. 1:4(k). See also *Hoar v. Great E. Resort Mgmt., Inc.*, 256 Va. 374, 382, 506 S.E.2d 777, 782 (1998).

VP/ODEC’s alternative legal theories were well-known to the trial court before it considered or ruled on NS’s Demurrer. In their Answer to NS’s Cross-Complaint, filed before the Demurrer was heard, VP/ODEC alleged that if the CTA does not refer unambiguously to RCAF-A, then it is ambiguous and the ambiguity should be resolved in their favor. (JA 34, ¶ 12.) VP/ODEC asserted this position again at the demurrer hearing. (JA 835-36.) At that hearing, NS agreed that VP/ODEC should be allowed to pursue their alternative theories as defenses to NS’s counterclaim. (JA 809; 855.)⁵ NS adopted the same position in opposing VP/ODEC’s Motion

⁵ “If you grant this demurrer . . . [VP/ODEC] could raise all the matters that it’s now raising plus whatever others it may think of by way of . . . defenses

for Leave to Amend its Bill of Complaint. (JA 879.)⁶ Only later, after NS persuaded the trial court to adopt its position, and after the Amended Answer to Cross-Complaint was filed, did NS reverse course and argue that VP/ODEC should be estopped from pursuing the affirmative defenses which they had pled in their Amended Answer. Thus, it was demonstrably wrong to charge VP/ODEC with having adopted a new, inconsistent position in their Amended Answer.

Furthermore, judicial estoppel does not apply because VP/ODEC did not prevail below on their purportedly inconsistent prior position, nor was there any prejudice to NS from the alleged inconsistent positions. Each of the trial court's rulings touching upon the judicial estoppel issue was resolved in favor of NS. As such, by definition the doctrine of judicial estoppel cannot apply. *See, e.g., Bentley*, 269 Va. at 327-29, 609 S.E.2d at 54-55. *See also Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377,

to that breach of contract claim. . . . Vepco doesn't lose its day in court if you sustain this demurrer."

⁶ "They have already alleged waiver They have already alleged equitable estoppel. They have already alleged unclean hands. . . . We have said since the first day we were out here in front of you trying to get the demurrer set up . . . that there are issues of defense in this case, issues of defense, that are yet to be determined. . . . We have always said Virginia Power had a right to do it and we don't object and have never objected to their amending their answer to our cross bill and assert modification, novation, if they want to."

382, 601 S.E.2d 648, 651 (2004) (holding that the moving party must suffer some harm for the doctrine to apply).

B. The Trial Court Erred In Striking VP/ODEC's Affirmative Defenses Of Estoppel And Waiver On Alternative Grounds.

The trial court further erred by striking on alternative grounds VP/ODEC's affirmative defenses of estoppel and waiver, both of which were sufficiently pled to withstand a demurrer standard of review.

As an initial matter, VP/ODEC's defenses were each fact intensive and should not have been stricken on a demurrer standard. *See Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226-28, 541 S.E.2d 909, 913-15 (2001) (reversing denial of leave to amend following granting of demurrer where proposed amended motion for judgment presented matters for trial.) *See also Fox v. Deese*, 234 Va. 412, 424-25, 362 S.E.2d 699, 706 (1987) (reversing grant of a plea and demurrer sustaining an estoppel defense because plaintiff could conceivably offer evidence to support his claim); *Miller & Co. v. Lyons*, 113 Va. 275, 292, 74 S.E. 194, 201-02 (1912) (noting with approval that the jury was instructed first on the parties' contractual rights "unmodified and unaffected by the course of dealing," and then on waiver of those rights by express agreement or conduct) (quotation at 292, 74 S.E. at 201).

This error is perhaps best illustrated by NS's reliance on *Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 306 S.E.2d 870 (1983). This Court held in *Stanley's* that certain lease terms were not modified either expressly or impliedly, noting that mere acquiescence is insufficient to establish waiver. *Id.* at 72-75, 306 S.E.2d at 872-74. This Court rejected the lessee's implied modification claim because it failed to produce any evidence at trial of either valuable consideration or any reliance on the lessor's conduct. Here, by contrast, the case was still at the pleading stage when the trial court struck VP/ODEC's defenses, barring them from developing evidence in support of their defenses.

1. VP/ODEC Adequately Pled Estoppel.

The trial court struck VP/ODEC's estoppel defense on the alternative grounds that VP/ODEC "cannot establish the reliance element of estoppel because their reliance on a putatively ambiguous contract and a legally ineffective side-letter would be wholly unreasonable." (JA 635.) In so ruling, the trial court ignored the allegations of NS's other representations, and consistent conduct, over a period of fourteen years, that the freight charges would be adjusted applying RCAF-A. (JA 257-80, ¶¶ 21, 78, 81, 87, 91, 97, 113-26, 128-33.)

In particular, the trial court ignored the allegations that VP/ODEC relied on NS's representations that the rates would be adjusted by RCAF-A, when: (1) ODEC decided to execute the CTA, (JA 268-69, ¶¶ 76-81); (2) ODEC built the facility at Clover rather than an alternate location serviced by CSXT, with whom ODEC had executed a similar contract, (JA 257, ¶ 22; JA 272, ¶¶ 92-93); (3) VP decided to acquire an undivided, one-half interest in the Clover facility and the CTA, (JA 257, ¶ 22; JA 272-74, ¶¶ 94-103); and (4) VP/ODEC spent over \$1 billion to build the facility, and rejected millions of dollars worth of track improvements offered by NS if they would agree to substitute some other index in place of RCAF-A. (JA 257, ¶ 22.) Properly construed under the pleading standard, NS's repeated representations and VP/ODEC's reliance on them is more than sufficient to support VP/ODEC's theory that NS is estopped from claiming that RCAF-U now applies. See, e.g., *Cardinal Dev. Co. v. Stanley Constr. Co.*, 255 Va. 300, 497 S.E.2d 847 (1998). Whether reliance was "reasonable" is a determination to be made by a finder of fact.

2. VP/ODEC Adequately Pled Waiver.

The trial court struck VP/ODEC's waiver defense on the alternative grounds that they alleged no facts tending to show that NS waived or otherwise agreed to modify the Non-Waiver provision in Article 5 of the

CTA. (JA 636.) The trial court ruled that VP/ODEC's allegations "show nothing more than [NS's] acceptance of less than full performance over a period of time, which as a matter of law is insufficient to give rise to a reasonable inference that NS intended to relinquish the right to enforce full performance for the remaining term of the Agreement." (*Id.*)

Waiver is defined as the "voluntary, intentional abandonment of a known legal right, advantage, or privilege." *Fox*, 234 Va. at 425, 362 S.E.2d at 707. The Non-Waiver provision of the CTA was itself subject to waiver, express or implied. *Stanley's Cafeteria*, 226 Va. at 73-74 & nn. 1-2, 306 S.E.2d at 873 & nn. 1-2; *Roenke v. Va. Farm Bureau Mut. Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968) ("Waiver applies to any right conferred by law or contract.") (citation omitted). Waiver also arises when a party takes a position inconsistent with a contractual right. *Fawcett v. Richmond Leather Mfg. Co.*, 155 Va. 518, 527, 155 S.E. 714, 716 (1930).

VP/ODEC pled two waiver defenses: (1) that NS had waived *ab initio* in 1989 any right to claim that RCAF-U would control under the CTA, (JA 267, ¶¶ 71-83; JA 270-75, ¶¶ 85-112), as confirmed by its ultimate course of conduct; and (2) that because NS did not assert that RCAF-U would apply until October 17, 2003, any non-waiver could only apply prospectively, and NS could not apply the RCAF-U retroactively to its

quarterly adjustment statements submitted to VP/ODEC before that date. (JA 286-87, ¶¶ 168-171.) Significantly, NS's position is that it believed that the RCAF-U applied to the CTA all along, but it "applied this index [RCAF-A] for what was intended to be the short term benefit of Clover." (JA 11-12; JA 23, ¶ 10.) *NS's own case rests on an admitted intentional waiver conceded in the letter, and thus the only dispute in this regard is whether RCAF-U was absolutely waived, or waived for a limited period. That is a fact issue not susceptible to resolution on the pleadings.*

Mere acquiescence is insufficient to establish a waiver. *Stanley's Cafeteria*, 226 Va. at 74, 306 S.E.2d at 873-74. However, if a course of dealing establishes more than mere acquiescence, a waiver may be proven. *See, e.g., Cocoa Prods. Co. v. Duche*, 156 Va. 86, 96, 158 S.E. 719, 722 (1931); *Va. Polytechnic & State Univ. v. Interactive Return Serv., Inc.*, 267 Va. 642, 652-53, 595 S.E.2d 1, 6-7 (2004). Unlike the lessor in *Stanley's Cafeteria*, NS's conduct, as alleged in the Amended Answer and addressed in detail above, demonstrated more than acquiescence. The record is replete with instances of NS not only confirming that RCAF-A applies, but also knowingly and intentionally relinquishing any purported right to charge RCAF-U adjusted rates. VP/ODEC, by their pleadings, took

this matter out of the realm of mere acquiescence, and the trial court abused its discretion in striking their waiver defense.

C. The Trial Court Misconstrued The Five-Year Statute Of Limitations As To NS's Claims.

In striking VP/ODEC's statute of limitations defense, the trial court treated the CTA as an installment contract for the payment of money and ruled that the five-year limitations period applicable to written contracts accrued and ran anew from each of VP/ODEC's alleged underpayments. (JA 636-37.) See Va. Code § 8.01-246(2). Because NS did not seek recovery of alleged underpayments predating December 1, 2003, the trial court ruled that NS's claims were timely.

The gravamen of NS's Cross-Complaint, including its claim for declaratory relief, is not VP/ODEC's failure to pay freight charges for a particular month, or their failure to pay in full a correctly calculated monthly installment based on an agreed adjustment provision. Instead, the focus of NS's Cross-Complaint is the interpretation of the contract's rate adjustment provision.

VP/ODEC believed from the outset that the CTA called for the use of RCAF-A. (JA 256-57, ¶ 20; JA 270, ¶ 86.) NS, by contrast, states in its October 17, 2003 letter that it believed from the beginning that the CTA called for the use of RCAF-U. (JA 11-12; 23.) Thus, assuming that the

CTA did call for RCAF-U, NS believed from the beginning that VP/ODEC were misinterpreting the CTA. (JA 257, ¶ 22; JA 273, ¶¶ 97-101; JA 274-75, ¶¶ 104-109.)

All of the elements of NS's Cross-Complaint existed in 1994 when VP/ODEC first calculated invoices based on RCAF-A. NS's cause of action accrued then, and it is "not material that all the damages resulting from the act should have been sustained at that time" *Westminster Inv. Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 546, 379 S.E.2d 316, 318 (1989) (citation omitted).

The trial court's resolution of this issue through analogy to an installment contract was misplaced. Even in contracts where some performance is divisible, questions of basic contract interpretation are not. The cause of action accrues when the plaintiff has notice "that definitively expressed defendants' interpretation of [the contract]." *Air Transp. Ass'n of Am. v. Lenkin*, 711 F. Supp. 25, 27 (D.D.C. 1989) (internal footnote omitted); see also *Norwest Bank Minn. Nat'l Ass'n v. F.D.I.C.*, 312 F.3d 447 (D.C. Cir. 2002).

Norwest Bank involved a dispute between Norwest and the F.D.I.C. relating to the premiums paid by Norwest for deposit insurance. In 1989, Congress established a formula for such payments for certain banks

insured by both the Savings Association Insurance Fund ("SAIF") and the Bank Insurance Fund ("BIF"). Under the formula, some percentage of Norwest's deposits was covered by SAIF, and the remainder by BIF.

The formula was amended by Congress in 1991, but Norwest continued to pay the F.D.I.C. using the old formula. The substantive dispute was whether the new formula should have taken effect for Norwest in 1993, as the F.D.I.C. contended, or in 1992. Because the insurance rates for SAIF and BIF were the same in 1992 and 1993, there was no financial consequence for Norwest in those years. However, the formula included a carry-forward provision that resulted in a change in Norwest's premiums in later years depending on the inception date of the new formula. *Id.* at 450.

Norwest first disputed its rate calculations in a letter to the F.D.I.C. in 1998, and it filed suit in 2000. The trial court entered summary judgment for Norwest, holding that it was entitled to a refund of \$2.8 million with interest. The appeals court reversed, holding that Norwest's claim was barred by the applicable six year statute of limitations.

Like NS, Norwest argued that since each assessment is a separate payment, it was entitled to recover all payments made within the statute of limitations period. Noting that "one of the policies underlying statutes of

limitations is repose," the appeals court rejected this argument. *Id.* at 452. Where, as here, all "the factual and legal prerequisites for filing suit" were in place in 1992, that is when Norwest's cause of action accrued. *Id.* at 451. Although Norwest could not have recovered any money damages if it had prevailed in an action against the F.D.I.C. at that time, "it still would have brought about a determination of the proper construction of the 1991 statutory amendment." *Id.* at 451-52.

In support of its position, Norwest relied on *Keefe Co. v. Americable Int'l, Inc.*, 219 F.3d 669 (D.C. Cir. 2000), which involved a series of installment payments relating to cable television contracts. However, as noted in *Norwest Bank*, in deciding *Keefe*, the Court of Appeals "recognized that the outcome might have been different if there had been a dispute over the interpretation of the contract that would 'govern through the life of the contract.'" *Id.* at 452 (quoting *Air Transp. Ass'n*, 711 F. Supp. at 27). The same can be said about the issue in this case. As in *Norwest Bank*, the statute of limitations here should run from the time of the first payment and the alleged miscalculation, and NS should not be permitted to change the rate structure years into the contract.

The facts in *Air Transp. Ass'n*, a rent escalation case, are also closely on point. Seventeen years after the plaintiff signed an office lease

agreement with an escalation clause, it sought a declaration that the interpretation which the lessors had placed upon the escalation clause was incorrect, and that it had overpaid its rent. Noting that the plaintiff had a right to maintain the action fourteen years earlier when it first learned that the lessors' interpretation of the escalation clause was at odds with its own, the court held that the action was time-barred. In so doing, it rejected the plaintiff's suggestion that it treat the case as one for nonpayment of an installment obligation, instead holding that "[t]he statute of limitations bars all of the causes of action in the complaint." *Id.* at 27. See also *Garden Isles Apartments No. 3, Inc. v. Connolly*, 546 So. 2d 38, 41 (Fla. Dist. Ct. App. 1989).

The principles articulated in *Air Transp. Ass'n* are particularly pertinent to escalation clauses in long-term contracts. Escalation clauses are employed to mitigate risks associated with future economic uncertainty. NS's argument, and the trial court's conclusion, would undermine the most fundamental purpose of escalation clauses, namely, to provide the parties with a settled method for allocating known risks, and then to govern their affairs accordingly. In essence, the trial court's rulings were tantamount to granting NS with an option, unbeknownst to VP/ODEC, to select whichever index had moved in its favor.

It is settled law in Virginia that a plaintiff is not permitted to suspend the running of the statute of limitations by its own acts. "This is based upon the principle that it is not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another." *Chesapeake & Ohio Ry. Co. v. Willis*, 200 Va. 299, 306, 105 S.E.2d 833, 838 (1958) (citations omitted). NS has admitted its neglect by reason of its "attention to other matters." (JA 11-12; JA 23, ¶ 10.) NS is now unhappy with its fourteen-year old bargain, and it has persuaded the trial court to misinterpret the statute of limitations.

D. NS Is Time-Barred From Applying RCAF-U To Any Quarterly Rates Announced By NS More Than Five Years Prior To The Commencement Of Its Cross-Complaint.

Even were the CTA an installment contract, NS is barred by the statute of limitations from seeking adjustment of the rates for the period predating January 15, 1999, five years before it filed its Cross-Complaint. NS seeks to take advantage of the compounding effect of the rate adjustments from 1989 forward. NS is not entitled to the benefit of the rate compounding that occurred during the time period for which it is admittedly barred from seeking damages.

On NS's motion, the trial court ordered VP/ODEC to pay the RCAF-U adjusted rate beginning on December 1, 2003 "as if [RCAF-U] had been properly applied *from the inception of the Agreement*" (JA 696) (emphasis added). The trial court adopted this ruling in its Final Order and Decree. (JA 793.) In ordering the retroactive application of rates adjusted by RCAF-U to the inception of the CTA, the trial court required the adjustment of quarterly rates for the full fourteen year period during which NS voluntarily adjusted the rates using RCAF-A, including rates announced by NS more than five years before NS commenced its claims against VP/ODEC. Because of the compounding effect of the quarterly adjustments, the trial court's ruling produces the anomalous result that while NS is barred from seeking recovery for payments made prior to December, 2003, it nevertheless can revisit and revise the quarterly adjustments announced during those same years resulting in a substantially escalated transportation rate as of December 1, 2003. Even accepting the installment contract analogy adopted by the trial court, NS is time-barred from seeking the adjustment of rates prior to January 15, 1999.

IV. The Trial Court Erred In Granting A Protective Order And A Scheduling Order Limiting Discovery. (Assignment of Error No. 4)

The trial court granted NS's Motion for Protective Order, holding that in light of its prior rulings VP/ODEC's discovery requests regarding the

parties' communications, the circumstances surrounding the execution of the CTA, the course of performance, and the determination of damages fell outside the scope of any claim or defense they might assert. (JA 637-38.) Following the dismissal of the first appeal, the trial court, over VP/ODEC's objection, entered a scheduling order that required the parties to exchange information regarding the computation of certain amounts payable under the CTA. (JA 762.) The trial court refused VP/ODEC's proposed scheduling order that would have permitted discovery regarding damages, including the inception date for the RCAF-U adjustments. (JA 759-60.) VP/ODEC were entitled to pursue discovery into these matters, R. Sup. Ct. Va. 4:1-4:11, and the trial court erred in precluding such discovery.

V. The Trial Court Erred In Denying VP/ODEC's Motion To Vacate Its September 1, 2006 Order. (Assignment of Error No. 5)

By its September 1, 2006 Order, the trial court ordered VP/ODEC to make payments under the contract "as if the RCAF had been properly applied from the inception of the Agreement." (JA 696.) The relief ordered by this September 1, 2006 Order was, by its terms, based on the trial court's finding that its November 1, 2005 Decree and its prior orders disposed of the whole subject of the action. Assuming RCAF-U applied, however, neither the Decree nor any of the trial court's previous orders were based upon evidence as to how the rates were to be adjusted.

The issue of the finality of the November 1, 2005 order was placed before this Court by NS's motion to dismiss VP/ODEC's first appeal. The Court denied the motion, "[f]inding that the order entered by the trial court on November 1, 2005 is not a final, appealable order." (JA 701.) In so doing, this Court rejected the basic premise of the trial court's September 1, 2006 Order that its award of relief was only a "ministerial act." (JA 694.)

In light of this Court's ruling on NS's motion to dismiss the first appeal, the September 1, 2006 Order was a nullity and should have been vacated by the trial court.

VI. The Trial Court Erred In Denying VP/ODEC's Motion To Strike, In Refusing To Receive Evidence Proffered By VP/ODEC, And In Awarding Damages Of \$77,708,000 By Retroactively Adjusting Base Rates From The Inception Of The Contract. (Assignment of Error No. 6)

At trial, NS offered no evidence of the quantum of its damages apart from the parties' stipulated calculations. NS offered no evidence at all supporting the retroactive adjustment of the rates from the inception of the CTA. Because the trial court had not previously resolved the manner in which the payments should be calculated using RCAF-U outside of its defective September 1, 2006 Order,⁷ NS failed to establish its entitlement

⁷ In entering the September 1, 2006 Order, the trial court erroneously concluded that the adjustments should commence retroactively to the

to damages under the CTA, and thus the trial court erred in denying VP/ODEC's motion to strike NS's claim.

The trial court compounded its error by sustaining NS's objection to VP/ODEC's proffered evidence regarding damages. That evidence showed that use of RCAF-U to adjust the quarterly rates in the manner required by Article 25 of the CTA, and consistent with the parties' course of conduct, would reduce damages to \$3,816,000. (JA 1089-1097.) Pursuant to Article 25, NS must calculate the contractual Adjustment Factor each quarter based on the quarterly change in the RCAF and apply that Adjustment Factor to the prevailing rates from the prior quarter, adjusting them upward or down. (JA 306-07.) The CTA does not, by its terms, permit a readjustment of the rates to the beginning of the contract.

NS first advised VP/ODEC of its intent to begin using RCAF-U to adjust the freight rates in mid-October, 2003. Thus, by the CTA's terms, the next quarterly adjustment to be made was on the first day of January, 2004. The rates to be adjusted were those prevailing in the fourth quarter of 2003. Under the contractually required method employed by NS and VP/ODEC for every quarter since the inception of the Agreement, but substituting RCAF-U in place of RCAF-A for the first quarter of 2004 and

inception of the CTA without engaging in any analysis or taking any evidence on that point.

thereafter, the difference between what would be owed under the CTA and what was paid by VP/ODEC is \$3,816,000.

The trial court erred in refusing to accept the evidence offered by VP/ODEC regarding the calculation of damages, and further erred in awarding contract damages of \$77,708,000.

VII. The Trial Court Erred In Refusing To Accept Testimony And Exhibits Offered By VP/ODEC Relating To Prejudgment Interest, And By Awarding Prejudgment Interest Of \$8,476,222.
(Assignment of Error No. 7)

The award of prejudgment interest, and the date from which any interest should run, are matters submitted to the sound discretion of the trial court pursuant to Va. Code § 8.01-382. *See, e.g., Advanced Marine Enter. v. PRC, Inc.*, 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998).

However, prejudgment interest is generally inappropriate on unliquidated damages genuinely in dispute between the parties. *Id.* It is also well settled that a court cannot impose on a party an interest payment obligation that it has not contracted to assume. *See Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 632, 449 S.E.2d 799, 801 (1994); *Eascalco, Inc. v. Caulfield*, 220 Va. 475, 477, 259 S.E.2d 821, 822 (1979).

This case was filed in November, 2003. VP/ODEC continued thereafter to make monthly payments to NS using the RCAF-A generated Adjustment Factor to adjust the quarterly rates. VP/ODEC made all

undisputed payments in the time required under the CTA. (JA 1099.) During that time, NS could have, but did not, invoice VP/ODEC for the amounts it alleged were owed using the RCAF-U derived Adjustment Factor. (*Id.*) Not until December, 2007 did NS present VP/ODEC with a schedule of its alleged damages. (JA 777.) Because NS's alleged damages remained unliquidated until the eve of trial, the court abused its discretion in awarding prejudgment interest commencing in December, 2003.

The award of prejudgment interest was also contrary to the plain terms of the CTA. Under Article 30, interest is payable to NS only if VP/ODEC delay payment for the shipment of coal more than twenty days after the *latter* of receiving an invoice from NS or the actual shipment of coal. (JA 309-310.) VP/ODEC's proffered evidence established that at no time since this dispute arose did NS invoice VP/ODEC for the monthly amounts it alleged were due by applying RCAF-U. (JA 1099.) Thus, VP/ODEC never delayed payment of the invoiced amount, and the award of \$8,476,222 in prejudgment interest was error.

VIII. The Trial Court Erred By Awarding Post-Judgment Interest At The Rate Of 7.5% Annually. (Assignment of Error No. 8)

The trial court awarded post-judgment interest at the annual rate of 7.5%. NS argued that the rate was proper under Va. Code § 6.1-330.54

because the CTA purportedly calls for interest at that rate. Pursuant to Article 30 of the CTA, however, interest on delayed payments is calculated "based upon the Chase Manhattan short term prime rate in effect as of the first (1st) day after payment was due." (JA 310.) NS offered no evidence at trial of the Chase Manhattan Bank short term prime rate then in effect, and thus the trial court erred in awarding post-judgment interest of 7.5% rather than the 6.0% rate specified by Va. Code § 6.1-330.54.

CONCLUSION

For all the reasons set forth above, VP/ODEC respectfully request that this Court reverse the trial court and enter final judgment in their favor on their claims for declaratory judgment and specific performance. Alternatively, should the Court find that the CTA is ambiguous, or that it calls unambiguously for the application of RCAF-U, VP/ODEC respectfully request that this Court reverse the trial court and remand the case for further proceedings to consider VP/ODEC's fact based claims and defenses.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER
COMPANY and OLD DOMINION
ELECTRIC COOPERATIVE

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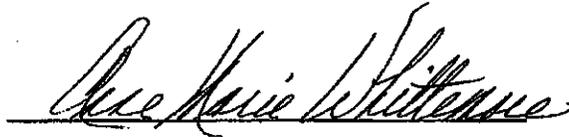
CERTIFICATE OF FILING AND SERVICE

The undersigned counsel hereby certifies that Rule 5:26(d) has been complied with in that the required copies of this Opening Brief of Appellants and of the Joint Appendix have been filed with the Clerk of this Court via hand delivery; an electronic copy of this Opening Brief of Appellants has been filed via electronic mail to scvbriefs@courts.state.va.us and an electronic copy of the Joint Appendix on CD has been filed with the Clerk of this Court via hand delivery; and the required copies of this Opening Brief of Appellants and the Joint Appendix have been served via hand delivery, with an electronic copy of the brief also served via electronic mail, upon:

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Dated: February 20, 2009



ADDENDUM

107-11-90

COAL TRANSPORTATION AGREEMENT

THIS COAL TRANSPORTATION AGREEMENT ("Agreement"), entered into pursuant to 49 U.S.C. Section 10713, on the fifth day of April, 1989, between OLD DOMINION ELECTRIC COOPERATIVE ("ODEC"), a Power Supply Cooperative with its offices at 4201 Dominion Boulevard, Glen Allen, Virginia, 23060, and NORFOLK AND WESTERN RAILWAY COMPANY ("N&W"), a Virginia corporation with its principal office at 8 North Jefferson Street, Roanoke, Virginia, 24042, provides as follows:

WHEREAS, ODEC is in need of reliable coal transportation service to transport coal from certain Origins on N&W's railway system, as well as from interconnections with other rail lines, to a planned electricity generating station; and

WHEREAS, N&W desires to transport such coal for ODEC; and

WHEREAS, the Parties wish to agree as to the terms and conditions for the rail transportation of such coal;

NOW, THEREFORE, in consideration of the premises and the mutual obligations hereinafter stated, the Parties hereto agree as follows:

I. General Provisions

1. Definitions. Whenever the following terms appear in this Agreement, whether in the singular or plural, present or past tense, they shall have the meaning stated below:

- (a) Car. A railroad car. When used for Shipments of Coal, Car shall mean a bottom dump open hopper railroad car of design and construction such that it is suitable for use at the Destination.
- (b) Coal. Bituminous Coal, as described by Standard Transportation Commodity Code No. 11-212-90, to be transported pursuant to this Agreement.

- (c) Consignee. ODEC, when named in a Bill of Lading or mine card/tag.
- (d) Consignor. A Coal supplier, when named in a Bill of Lading or mine card/tag as the entity from whom the Shipment has been received by N&W for transportation to Destination.
- (e) Contract. Synonymous with "Agreement".
- (f) Contract Summary. A summary prepared by N&W describing non-confidential information contained in this Agreement filed with the ICC pursuant to Section 208 of the Staggers Rail Act, 49 U.S.C. Section 10713.
- (g) Destination. ODEC's planned electricity generating station, to be located at either Clover, Virginia, N&W Freight Station Accounting Number 1626, or Sutherland, Dinwiddie County, Virginia, N&W Freight Station Accounting Number 1092.
- (h) Demurrage. Charges, as specified herein, imposed by N&W for the retention, by ODEC, of Cars furnished by N&W or another railroad, in excess of applicable Free Time.
- (i) Demurrage Credit. A unit of value earned by ODEC for each Car furnished by N&W or another railroad that is Released by ODEC at Destination prior to the expiration of the first twenty-four (24) hours of Free Time allowed for that Car. Only one Demurrage Credit may be earned for each Car in a Shipment and said credit may be applied to offset a Demurrage Debit accruing on another Car.
- (j) Demurrage Debit. A unit of liability that is chargeable against ODEC for a Car furnished by N&W or another railroad for each day or excess fraction thereof for each of the first four (4) days, including Saturdays, Sundays, Designated Holidays and Bank Holidays, that immediately follow the day on which the first Demurrage Debit begins to accrue. The first Demurrage Debit shall accrue at the expiration of Free Time. Demurrage Debits may be offset by Demurrage Credits earned on other Cars on a one-for-one basis.
- (k) Free Time. The time following Placement during which Demurrage charges shall not be incurred.
- (l) ICC. The Interstate Commerce Commission.
- (m) Holiday:
 - (i) Bank Holiday. The days on which banking institutions in the City of Richmond, Virginia,

are authorized by law to close.

- (ii) Designated Holiday. New Year's Day, President's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, as well as other days which may be considered holidays by N&W or ODEC or both. In the event that a Designated Holiday occurs on a Sunday, the following Monday shall also be considered a Designated Holiday.
- (n) Measurement Period. The calendar year beginning January 1 and extending through December 31, except that the first such Period shall commence with the start of Coal receipts at Destination and run through December 31 of the then current year. Accumulated tonnage of Coal Shipments delivered to Destination are measured during Measurement Periods.
- (o) Origin. The location of Coal tipples or Coal loading facilities served, now or in the future, by N&W.
- (p) Party or Parties. If used in the singular, "Party" shall mean N&W or ODEC. If used in the plural, "Parties" shall mean both N&W and ODEC.
- (q) Placement:
 - (i) Actual Placement. The completed act of N&W delivering one or more Cars to an area accessible to Consignee for handling or unloading at Destination.
 - (ii) Constructive Placement. The uncompleted act of Placement such that Cars are ready for Actual Placement, but are not in an area accessible to ODEC due to a cause or causes attributable solely to ODEC.
 - (iii) Placement. Either Actual or Constructive Placement.
- (r) RCAP. Rail Cost Adjustment Factor, as prescribed by the ICC in Ex Parte No. 290.
- (s) Release. A Car shall be considered to have been Released when it has been placed in an area accessible to N&W for handling and N&W has been so notified by telephone or other expedient means. In the case of Unit Train Shipments, a Car is not considered to have been Released until all Cars in that Shipment furnished by N&W have been Released.
- (t) Tender for Pick-up. The date that a Car shall be considered to have been Tendered for Pick-up at Origin for delivery to Destination shall be the latter of

presentation of a waybill for the Car or Cars to N&W or Release of the Car or Cars by Consignor.

- (u) Single Car Shipment. One or more loaded Cars in a Shipment that is not a Unit Train Shipment.
- (v) Shipment. The rail transportation from Consignor to Consignee of one or more loaded Cars, each Car or group of Cars covered by a separate waybill.
- (w) Switching Charge. The charge applicable in transferring a Car or Cars at a specific location from a railroad that is not owned or operated by N&W to a railroad that is owned or operated by N&W.
- (x) Ton or Tonnage. Two thousand (2,000) pounds avoirdupois weight.
- (y) Unit Train Shipment. An integrated Shipment from one (1) Origin consisting of at least nine thousand (9,000) Tons of Coal in Cars furnished by ODEC or N&W or both.

2. Effective Date. The effective date of this Agreement shall be the date the Agreement is approved by the ICC pursuant to 49 U.S.C. Section 10713. N&W shall file a Contract Summary of this Agreement with, and request approval from, the ICC in no less than ten (10) days following the date first above written.

3. Duration. This Agreement shall continue in full force and effect for a period of twenty (20) years from December 31 of the year in which Coal Shipments are first received at Destination. The term of this Agreement shall be extended for up to two (2) consecutive additional five (5) year periods without additional action by either Party, provided that if ODEC gives notice that it does not desire such extension prior to the expiration of the original term of this Agreement or the expiration of the then current extension, such extension shall not occur. Thereafter, provided this Agreement is in full force and effect, the term of this Agreement shall be extended for up to three (3) consecutive additional five (5) year periods without additional action by either Party, provided that if either

ODEC or N&W gives notice that it does not desire such extension prior to the expiration of the then current extension, such extension shall not occur. Provided, however, that this Agreement shall not terminate until the term of years specified in Article 32 has expired in the event that ODEC has exercised its option of having N&W supply specialized Cars pursuant to said Article.

This Agreement shall remain in effect with respect to any Coal Shipped but not delivered to Destination prior to the termination of this Agreement, any liability incurred pursuant to Article 21, and any payments due pursuant to this Agreement.

ODEC and N&W agree that execution of this Agreement does not obligate ODEC to ship Coal to, or consume Coal at, Destination. However, if the first Shipment of Coal does not occur prior to December 31, 1999, both ODEC and N&W have the option to terminate this Agreement upon sixty (60) days written notice. Likewise, either Party may terminate this Agreement upon sixty (60) days written notice after construction of the planned electricity generating station has commenced and continued for a period of one year at a site other than Destination.

4. Notice. Unless specified otherwise herein, all notices under this Agreement shall be in writing and delivered by hand or sent by certified or registered mail addressed as follows:

if to ODEC,

Vice President - Engineering & Operations
Old Dominion Electric Cooperative
4201 Dominion Boulevard
Glen Allen, Virginia 23060

if to N&W,

Vice President - Coal Traffic
Norfolk and Western Railway Company
204 South Jefferson Street
Roanoke, Virginia 24042-0070

or such other address or representative as a Party may designate upon ten (10) days written notice

The date that any notice shall be deemed to be effective shall be the earlier of:

(a) when actually received by, or personally delivered during business hours to, the Party to be given such notice, at the appropriate address, or

(b) five (5) days after such notice shall have been deposited in the mail, postage prepaid, addressed to the Party at such address.

5. Non-Waiver. The failure of either Party to demand strict performance of any or all of the terms of this Agreement, or to exercise any or all rights conferred in this Agreement, shall not be construed as a waiver or relinquishment of that Party's right to assert or rely upon any such right in the future.

6. Assignment. Except as to permitted assigns as specified herein, neither Party may assign its rights, duties, obligations and interests in this Agreement without the other Party's written consent; said consent shall not be unreasonably withheld. Permitted assigns shall be wholly or jointly owned subsidiaries, successors-in-interest to all or a substantial portion of a Party's assets, affiliate corporations or cooperatives, and, in the case of ODEC, the Rural Electrification Administration and its successors, and any or all entities that may purchase all or a partial interest

in the first unit or any additional units of the planned electricity generating station or may enter into a partnership, joint operating, joint venture or joint enterprise agreement or any or all of them as to said first unit or any additional units. In the event of an assignment, the assigning Party shall not be thereby relieved of its responsibilities or obligations hereunder.

7. Confidentiality. Information about this Agreement that is not published in the Contract Summary shall be considered confidential. Neither Party shall disclose the contents of this Agreement or any confidential information obtained as the result of negotiation and performance of this Agreement to any other person without the written consent of the other Party. However, the Parties may disclose the contents of this Agreement in whole or in part when required by any court, government agency or proper discovery order, or to the extent necessary to secure governmental authorization, or to obtain financing; provided, however, that prior to making any such disclosure, the disclosing Party shall:

(a) to the extent practicable, provide the nondisclosing Party with timely advance notice of its intent to disclose;

(b) minimize the amount of information to be disclosed consistent with the interests of the nondisclosing Party and the requirements of the Court, government agency or discovery order or financial disclosure involved; and

(c) make reasonable efforts to secure confidential treatment of the information to be provided or to seek revision of the information request to minimize the amount of information to be supplied.

It is also agreed that from time to time ODEC may provide a

specific freight rate to its Consignors in order to comply with Coal quality adjustment procedures. In such event ODEC shall first obtain a confidentiality agreement with the affected Consignor.

8. Applicable Law. This Agreement is to be construed according to the laws of the Commonwealth of Virginia.

9. Enforcement. In the event of an alleged breach of this Agreement the Parties shall have the remedies available at law and in equity, including action in an appropriate state court or United States District Court, in addition to those remedies set forth in this Agreement. Such action as it applies to rates and applicable tariffs shall be taken only in United States District Court. In the event of any litigation, each Party shall be responsible for its own legal fees and court costs.

ODEC or N&W may terminate this Agreement in the event of default in performance hereunder by the other; provided, however, that written notice of such default is given to the defaulting Party and such default is not cured or corrected within sixty (60) days of the date of such notification. Delays or defaults in performance due to a Force Majeure shall not be considered a default for which this Agreement may be terminated.

10. Compliance with the Law. N&W and ODEC shall operate in compliance with all applicable laws, rules and regulations relevant to this Agreement, including but not limited to the provisions relating to Equal Employment Opportunity as provided in 41 CFR part 60-1.

11. Interpretation. No provision in this Agreement shall be interpreted for or against either Party because that Party or its legal representative drafted the provision.

12. Severability. In the event that any provision of this Agreement is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect as if the invalid provision did not exist; provided, however, that if such a determination involves a substantive provision of this Agreement, the Parties shall use their best efforts to negotiate an amendment that will preserve, to the extent legally permissible, the intent of the invalid provisions.

13. Relationship of Parties. The relationship between the Parties shall be that of independent contractors.

14. Succession. This Agreement shall be binding upon and inure to the benefit of the Parties, and their respective successors and permitted assigns.

15. Captions. Captions, headings and titles contained in this Agreement are inserted as a matter of convenience, and in no way define or describe the scope of this Agreement or any of its provisions.

16. Further Assurances. The Parties shall take all steps necessary to prepare and deliver any documents or other assurances that are reasonably required to give full force to this Agreement.

17. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same Agreement.

18. Incorporation. Shipments transported pursuant to this Agreement shall be subject to all tariffs or successor documents that would apply if this Agreement were not in effect. In the event of a conflict between this Agreement and published tariffs, rules and regulations, the terms of this Agreement shall control.

N&W has provided to ODEC copies of N&W's tariffs and a list of tariffs published by entities other than N&W, which, in the reasonable judgement of N&W, may be applicable to this Agreement. With respect to the tariffs so provided, N&W shall send to ODEC all updates or supplements, and N&W agrees to provide additional tariffs in the future if, in the reasonable judgement of N&W, additional tariffs are issued which may be applicable to this Agreement. With respect to tariffs published by entities other than N&W, N&W agrees to supplement the list provided to ODEC promptly as changes occur.

19. Gross Inequities. Any gross inequities that may result from unusual, unforeseeable or unexpected conditions not contemplated by the Parties hereto at the time of the execution of this Agreement or otherwise shall be the subject of negotiations by the Parties; provided that nothing contained herein shall be construed as relieving any Party from the performance of its obligations hereunder notwithstanding the existence of the claim of inequity or failure of the Parties to reach an agreement with respect thereto. The Party claiming the existence of a gross inequity shall notify the other Party in writing with an accurate and reasonably detailed statement pertaining to the nature of the gross inequity, and the Parties shall then negotiate in good faith to try to resolve the gross inequity.

20. Loss and Damage. Claims against N&W by ODEC, and against ODEC by N&W, for loss of or damage to Coal lading, shall be handled through the claims procedures as provided in the Uniform Freight Classification 6000-series tariff. In the event of a conflict between said tariff and this Agreement, this Agreement shall govern. N&W shall acknowledge all claims filed by ODEC within thirty (30) days of receipt of such claim.

21. Liability. Except for damage to or loss of Coal lading, all property damage and personal injury, including but not limited to death, and all expenses, including but not limited to reasonable attorney's fees, claims, lawsuits, judgments and interest ("Costs") arising out of or resulting directly or indirectly from transportation services rendered pursuant to this Agreement shall be divided between the Parties as follows:

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

(b) ODEC shall indemnify and hold N&W 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 N&W shall bear all Costs in proportion to their negligence due to their joint or concurring negligence.

The obligations of N&W as a common or contract carrier or as a bailee do not begin, whether picking up Cars at Origin or Destination, until N&W has coupled its locomotive to the Car or Cars. In the case of Shipments which are to utilize locomotives and crews furnished by N&W to provide motive power for unloading, the obligations of N&W as a common or contract carriers or as a bailee commence and custody of and responsibility for the Cars and their contents shall be transferred to N&W after the last Car in any such Shipment is pulled past the point of switch and off ODEC property.

N&W shall have achieved Actual Placement of any Car consigned to or ordered by ODEC when such Car shall have been delivered to

Destination so as to allow access by ODEC, and N&W's locomotive has uncoupled from the Car. In the case of Shipments which are to utilize locomotives provided by N&W to provide motive power for unloading, Actual Placement shall have been achieved when the entire Shipment crosses the point of switch into ODEC's property at Destination. At the time of Actual Placement, N&W shall be relieved of all liability as common or contract carrier or as a bailee, and custody of and responsibility for the Car and its contents shall be transferred to ODEC.

ODEC is responsible for the Car and its contents while in ODEC's custody and assumes the responsibility for payment on account of damage to the Car and its contents that may occur during that time if such damage is attributable to ODEC's negligence.

22. Entirety. This Agreement, together with Appendix A and B attached hereto and incorporated herein and the tariffs incorporated by reference, constitutes the entire Agreement between ODEC and N&W with respect to Coal transportation specified hereunder and supersedes any prior or contemporaneous agreement or understanding between the Parties for such transportation and may not be amended except by written agreement signed by duly authorized representatives of the Parties with the same formality as this Agreement.

23. Force Majeure. The term Force Majeure, as used herein, shall mean any cause, whether future or existing, foreseen or unforeseen, which is not within the reasonable control of the Party, its employees, agents or subcontractors asserting the Force Majeure, and the adverse effects of which are not due to the fault or negligence of said Party, employee, agent or other contracting Party. Force Majeure shall include, without limitation, acts of God; riot,

insurrection or war; fire, flood or explosion; strike or lockout; orders or acts, or absence thereof, of military or civic authority; governmental intervention; and breakdown, or mechanical restrictions on use, of equipment vital to the Coal loading or unloading operation or plant operation. Frozen Coal at Destination shall not be considered a Force Majeure event for purposes of this Agreement.

If due to Force Majeure either Party is unable, wholly or in part, to carry out any of its obligations under this Agreement for a period of forty-eight (48) or more consecutive hours, other than the obligation to make payments for services performed under this Agreement, the obligations of the Party experiencing the effects of the Force Majeure, excepting those of Demurrage, shall be suspended to the extent made necessary by such Force Majeure and its effects. In the case of Demurrage caused by Force Majeure or the effects thereof, charges incurred shall be limited to ten dollars (\$10.00) for each twenty-four (24) hour period or excess fraction thereof that each Car furnished by N&W or another railroad so affected is held in excess of applicable Free Time. The Party suffering the Force Majeure shall incur no liability by reason of its failure to perform the obligations so suspended, provided that the Party experiencing the Force Majeure (1) promptly notifies the other Party of such Force Majeure, (2) promptly provides such information about the Force Majeure as may be reasonably requested by the other Party, and (3) exercises due diligence to remove the cause of the Force Majeure or lessen its effect. The notice required by this article may be either written or oral, but shall be given in the manner most likely to enable the other Party to act promptly to minimize any adverse effects. If oral notice is given, it shall be confirmed in writing

within seven (7) days. In the event that one Party's performance is suspended by Force Majeure, the other Party's obligations to perform hereunder shall be suspended for the duration of such Force Majeure and for such additional reasonable period as may be required to overcome the effects of such Force Majeure. If N&W claims a Force Majeure, and ODEC must obtain Shipments from a party other than N&W during the Force Majeure, the tonnage so Shipped shall not be subject to any interchange and switching charges which might otherwise be incurred.

II. Economic Provisions

24. Applicability of Rates. The rates applicable for the transportation of Coal are as set forth in Appendix A. Said rates are inclusive of charges for interchange and switching applicable for transportation of Coal or transfer of Cars within the N&W system, and said rates are also inclusive of charges for transporting Cars to Origin. The applicability of these rates is subject to the following conditions:

(a) The "Base Rates" are applicable to all Shipments except Unit Train Shipments, and have no Shipment size, number of Origins, or Tonnage conditions attached thereto.

(b) The "Unit Train Shipment with Cars furnished by N&W Rates" are applicable to Unit Train Shipments of from ninety (90) to one hundred-five (105) Cars, with Cars furnished by N&W to be of standard design then in use and available from N&W, except as provided in Articles 32 and 49. ODEC may schedule a Unit Train to load at different Origins, but the train shall be loaded at only one Origin for each trip. Free Time available at Origin for Unit Train

Shipments shall be four (4) hours. Free Time available to ODEC for unloading of Unit Train Shipments composed of Cars furnished by N&W shall be five (5) hours. ODEC shall notify N&W thirty (30) days in advance of requiring Unit Train Shipments so that N&W can assemble a suitable Train or Trains. Once such equipment has been placed in service transporting Coal pursuant to this Agreement, ODEC shall schedule, cycle, and fully use any such train for a minimum duration of six (6) months, except as provided otherwise herein.

(c) The "Unit Train Shipments with Cars furnished by ODEC Rates" are applicable to Private Car Unit Train Shipments of ninety (90) or more Cars furnished by ODEC of a design reasonably satisfactory to N&W. ODEC may schedule Private Car Unit Trains to load at different Origins, but the train shall be loaded at only one Origin for each trip. Except as provided in Article 37, no special unloading time restrictions apply, and Cars furnished by ODEC shall not be subject to Demurrage. N&W shall pay no time or mileage charges on Private Cars.

(d) The "Shipments originating at CSX TRANSPORTATION, INCORPORATED ("CSXT") origins interchange Rate" is applicable to Shipments composed of ninety (90) or more Cars, and an additional rate is applicable to such Shipments composed of less than ninety (90) Cars. Such Shipments transported pursuant to this Agreement shall be received by N&W at Glasgow, Virginia, and shall be subject to this Agreement enroute from said locations to Destination. CSXT-origin Shipments transported pursuant to the rates provided herein shall be subject to a penalty equal to thirty percent (30%) of the average of the Base Rates applicable on July 1 of the most recent Measurement Period multiplied by ODEC's CSXT-origin receipts where

ODEC's N&W-Origin receipts in any Measurement Period do not comply with the Percentage Requirement of Article 26. If such penalty is applied, the Tonnage subject to such penalty shall not be included in calculations relating to the Percentage Requirement in Article 26, the Deficit Charge in Article 27 and the certification in Article 28. If Private Cars are used in the CSXT Shipments, N&W shall not be responsible to CSXT for any time or mileage charges associated therewith in excess of the standard per diem charges that N&W would have paid on CSXT-furnished equipment, and ODEC shall be responsible for and pay any difference.

25. Rate Adjustment. Unless specified otherwise, all rates and charges in this Agreement shall be subject to adjustment in accordance with this Article. Rate adjustments shall be based upon the ICC generated RCAF. During the term of this Agreement, should the RCAF described in this Agreement or the initial or any subsequent replacement factors that are substituted pursuant to this Agreement be discontinued, or the definition or method of application of said factor be modified or changed other than renormalizing, a new factor which closely tracks the RCAF shall be agreed to by the Parties. If such substitute factor cannot be identified, the Parties will develop a new factor that represents the intent of the RCAF. If the Parties cannot agree, they shall select a mutually acceptable third Party to develop a factor which shall replace said discontinued or modified factor as of the date of such discontinuance or modification.

The freight rates provided in Appendix A and charges provided in this Agreement shall be retained or adjusted up or down on a quarterly basis by N&W in accordance with this Agreement. The first such adjustment shall be made on July 1, 1989, and subsequent

adjustments shall be made thereafter on the first day of each October, January, April, and July, or whenever the adjustment factor becomes available thereafter. Until January 1, 1993, the adjustment shall be limited to fifty percent (50%) of the quarterly adjustments herein. Beginning January 1, 1993, the full quarterly adjustments shall be applied. In computing the adjustment, should the publication of the factor be delayed, the previous adjustment value shall remain in effect until the factor is published; when the numerical value is established as "final" it shall become effective upon its release, and within thirty (30) days of said date, N&W shall provide an invoice or payment to ODEC for such sums required to correct prior applicable billings.

The amount of each such adjustment shall be determined according to the applicable procedures prescribed by the ICC in Ex Parte No. 290 (Sub. No. 2) and published in Title 49 C.F.R., Part 1102, Section 1102.1 and Interstate Commerce Act, Section 10707, as may be amended, incorporated herein by reference.

26. Percentage Requirement. ODEC agrees that at least ninety percent (90%) of receipts of Coal at Destination during each Measurement Period shall originate at N&W Origins for Shipment pursuant to this Agreement (the "Percentage Requirement"). If N&W claims a Force Majeure, and ODEC must obtain Shipments from a party other than N&W during the Force Majeure, the Tonnage so transported shall not be included in the calculations relating to the Percentage Requirement and shall not be subject to any interchange switching charges that might otherwise be incurred. If CSXT-origin shipments transported pursuant to Article 24(d) are subject to the penalty specified therein, the Tonnage so transported shall not be included

in the calculations relating to the Percentage Requirement.

27. Deficit Charge. If the Percentage Requirement as specified in Article 26 is not received by ODEC during any Measurement Period, then, except for the penalty assessed pursuant to Article 24(d), N&W's sole remedy shall be that ODEC shall pay N&W a charge ("Deficit Charge") which shall be the lesser of:

- (a) \$15.71 per Ton, as escalated per Article 25, on the Tonnage which was transported pursuant to this Agreement less amounts previously paid; or
- (b) The applicable rates herein for the Tonnage which was transported to Destination from N&W's Origins as specified herein plus thirty percent (30%) of the average of the Base Rates applicable on July 1 of the most recent Measurement Period multiplied by the difference between
 - (i) the tonnage which would have been transported in the Measurement Period pursuant to this Agreement had the Percentage Requirement of this Agreement been complied with, and
 - (ii) the Tons that were actually transported to Destination from N&W's Origins in the Measurement Period.

In the event that the Tonnage Shortfall is six percent (6%) or less of the ninety-percent (90%) requirement, then ODEC shall have the option to carry forward such shortfall into the next Measurement Period only, and, if completely made up in said ensuing Measurement Period in addition to the ninety-percent (90%) requirement, then no deficit charge shall apply.

ODEC shall pay any deficit charge due to N&W within sixty (60) days of the end of a Measurement Period.

28. Certification. Each year, within thirty (30) days of the conclusion of a Measurement Period, ODEC shall certify in writing the following:

- (a) The total number of Tons of Coal received at Destination by all transportation modes from all originating points (whether a N&W Origin pursuant to this Agreement or not) at Destination, less Tonnage acquired from entities other than N&W during periods of Force Majeure as provided herein and less Tonnage for which the penalty specified in Article 24(d) was assessed; and
- (b) The number of Tons of Coal which were transported by N&W pursuant to this Agreement from N&W Origins; and
- (c) The percent the Tons in (b) are to the total Tons in (a).

29. Inspection of Records During normal business hours and subject to conditions consistent with the conduct by a Party of its regular business affairs and responsibilities, each Party shall provide the other Party or its authorized representative access to books, records, and other documents directly related to the performance of obligations under this Agreement, and, upon request, copies thereof. If there is a dispute that, with the exercise of due diligence cannot be resolved, the Parties agree to designate a mutually acceptable accounting firm to conduct an audit. In the event that such audit determines that a Party has been improperly charged, the other Party shall bear the reasonable cost of such audit in an amount not to exceed the amount of the error that was verified by said audit.

30. Payment. Upon receipt of the information required to prepare invoices, N&W shall provide an invoice to ODEC for all Shipments and related charges. Except as provided in Article 27, payment shall be due by 5:00 P.M. on the twentieth (20th) day after the latter of receipt of invoices by ODEC or Placement of Cars. If said twentieth (20th) day falls on a Saturday, Sunday, Designated Holiday or Bank Holiday, the payment shall be due by 5:00 P.M. on the

next day that is not a Saturday, Sunday, Designated Holiday or Bank Holiday. Payment of any amounts due from ODEC to N&W pursuant to this Agreement shall be wire transferred to N&W at the address, routing number and account identification that N&W specifies in writing.

Payment of any amounts due from N&W to ODEC pursuant to this Agreement shall be wire transferred to ODEC at the address, routing number and account identification that ODEC specifies in writing.

If either Party fails to comply with the terms of this Agreement by delaying payment, the amount due shall be subject to an interest charge, compounded monthly, based upon the Chase Manhattan Bank short term prime rate in effect as of the first (1st) day after payment was due, from said first (1st) day until such delay is cured.

III. Service Provisions

31. Private Cars. ODEC may, at its sole and exclusive option, elect to furnish Cars at its own expense ("Private Cars") for the exclusive shipment of all or part of its Coal requirements in the form of Unit Train Shipments. If ODEC elects to furnish Private Cars, it must give N&W written notice of its intent to do so within two (2) years prior to the first Shipment of Coal pursuant to this Agreement. Thereafter, ODEC may furnish Private Cars only with approval of N&W which shall not be unreasonably withheld, said approval to be based upon N&W's investment in Cars for service pursuant to this Agreement, N&W's Car supply and N&W's Car acquisition plans. ODEC shall not introduce Private Cars during the fourteen (14) year period required for notice and use of specialized railway Cars pursuant to Article 32 if such Private Cars would

supplant said specialized Cars provided by N&W.

N&W shall designate, based on ODEC's planned receipts of Coal by Private Car Unit Train Shipments, a reasonable number of Cars and spare Cars that ODEC is to furnish to form one or more Unit Trains. In the event that, during any calendar month, N&W cannot operate said train with adequate dispatch to reach ninety-five (95%) of the Tonnage Shipment levels upon which N&W's designation of Cars to be provided to form said train or trains was based, N&W agrees to furnish additional Cars for Private Car Unit Train Shipments in numbers such that the Tonnage Shipment levels upon which said designation was based may be met and any shortfall in previous months may be eliminated. Said Cars furnished by N&W shall be treated for all purposes of this Agreement as if they had been furnished by ODEC. N&W's commitment pursuant to this provision shall be limited to assuring adequate transit time. N&W shall have no obligation to furnish additional Cars pursuant to this provision if ODEC fails to schedule, or ODEC's Consignors fail to load, a sufficient number of trains to transport the tonnage upon which said designation was based, in any calendar month.

When Cars furnished by ODEC for shipments pursuant to this Agreement are transported to or from repair facilities located on routes of movement governed by this Agreement ("in route of movement"), no charge shall be assessed by N&W on account of such transportation. In the event that the designated repair facilities or "home shop" for Cars furnished by ODEC is out of the normal route of movement, tariffs, and the charges provided therein, shall apply.

32. Specialized N&W Cars. ODEC may, anytime upon two (2) years written notice to N&W, request that N&W provide specialized

cars for Unit Train service compatible with the design and configuration of ODEC's planned electricity generating station. If such request is for rapid-discharge type hopper Cars, N&W agrees to supply such specialized cars at no additional charge. In the case of other specialized equipment designs requested by ODEC, N&W may elect to provide the specialized cars if design and cost are reasonably satisfactory to N&W.

If ODEC exercises this option, ODEC guarantees to ship ninety percent (90%) of its Coal requirements to Destination yearly pursuant to this Agreement for a period of twelve (12) years from the date that such Cars are placed in service. This percentage guarantee shall be reduced to the extent that either or both of the Parties are subject to Force Majeure conditions. In the event that ODEC fails to meet this guarantee, N&W's sole remedies shall be those expressed in Articles 27 and 24(d).

33. Scheduling of Shipments. Unit Train Shipments made pursuant to Articles 24(b) or 24(c) of this Agreement shall be scheduled by N&W following receipt of essential information from ODEC as to Origins and desired shipping dates. This information shall be furnished no later than the twentieth (20th) day of each month for the following calendar month to:

Director of Coal Transportation
185 Spring Street
Atlanta, GA 30303
Phone 404-529-1731

If the twentieth (20th) day falls on a Saturday, Sunday, or Designated Holiday, the notice shall be given on the next day that is not a Saturday, Sunday, or Designated Holiday. N&W shall use their best efforts to meet said schedule.

ODEC shall arrange with the Consignors to support the specific loading dates agreed on in the schedule, including arrangements for mines to load Unit Train Shipments upon Actual Placement at Origin regardless of time or date of arrival. ODEC recognizes that it may be necessary for N&W to adjust ODEC's schedule of desired loading dates for the month to take into account changes in anticipated cycle times.

N&W shall issue any permits it may require for all such Unit Trains.

34. Weighing. Rates provided herein include, at no additional charge, the service of weighing by N&W. In the event that N&W's scales are not in operation or N&W does not weigh Shipments as intended, transportation charges shall be based on average weights as reasonably determined by N&W from its latest quarterly records of average weight by cubical capacity of Cars shipped from each Origin. If insufficient Shipments from the same Origin precede the unweighed Shipment to be used for determination of average weights, the latest quarterly average of all ODEC shipments in Cars of like cubical capacity shall be used.

35. Routing. All Shipments transported hereunder shall be routed wholly over N&W's most expeditious routes except in emergency situations when the traffic is rerouted or detoured.

36. Diversion and Reconsignment. Charges for diversion and reconsignment shall be governed by the current published tariffs which would apply if this Agreement did not exist, except that, if ODEC's order of such diversion or reconsignment occurs while the Shipment is still west of the city of Roanoke, Virginia, the charge shall be \$38.00 per Car. ODEC shall not incur transportation charges

on diverted Shipments. Diverted Shipments shall not be included for purposes of computing the Percentage Requirement of Article 26.

37. Unloading Rapid Discharge Cars. Where rapid-discharge type hopper Cars are placed in service pursuant to this Agreement, N&W agrees, at the request of ODEC, to operate trains with N&W's locomotives and crews for unloading activities at Destination, and shall assess no additional charge for this service, provided that ODEC's facilities at Destination shall be designed for, and capable of, unloading ninety (90) Cars in a total of four (4) hours plus an additional two (2) minutes for each Car in excess of ninety (90) Cars, and that ODEC shall make available required personnel to commence unloading activities upon arrival.

38. Division of Shipments. Upon Actual Placement, N&W shall divide shipments into two (2) or three (3) groups of Cars if ODEC so requests.

39. Billing. Each Shipment shall be subject to the terms of the Uniform Straight Bill of Lading as set forth in Uniform Freight Classification 6000-series tariffs as amended from time to time. In the event of a conflict between this Agreement and said Uniform Straight Bill of Lading, the terms of this Agreement shall govern.

ODEC may, at its sole and exclusive option, elect to weigh Car loadings on certified weighing scales, reasonably acceptable to N&W, and to originate all Shipment invoices. If ODEC exercises said option, it shall enter into a destination weight agreement with N&W. In the event of a conflict between said destination weight agreement and this Agreement, this Agreement shall control.

40. Equipment Position & Status Reports. N&W shall, without additional service charge to ODEC, make equipment position and status

reports on all Cars transported pursuant to this Agreement continuously available through arrangements and using programs supplied by N&W for electronic data transfer.

In the event that said computerized information is not available or the normal progress of such shipments has been interrupted, N&W shall give its best efforts to provide twelve (12) hours notice of Placement of Shipments. Such notice may be delivered in the most expedient manner, including but not limited to facsimile transmission or computerized data exchange.

41. Loading at Origin. ODEC shall instruct Consignors to identify this Agreement on the Bill of Lading or mine card/tag. ODEC is not responsible for charges which arise from actions other than those of ODEC which may be assessed at Origin, including but not limited to Demurrage, underload or overload charges. N&W shall collect all charges, if any, which accrue at Origin from the Consignor responsible for loading.

42. Free Time and Placement. Placement of loaded cars by N&W at Destination may occur at any time. Following Actual or Constructive Placement at Destination, forty-eight (48) hours Free Time shall be allowed for each Car furnished by N&W or another railroad. In the event that Actual or Constructive Placement at Destination occurs between 7:00 A.M. and 4:00 P.M. on a day that is not a Saturday, Sunday, or Designated Holiday, Free Time shall commence at the time of Placement; otherwise, Free Time shall commence at 7:00 A.M. of the next day following Actual or Constructive Placement that is not a Saturday, Sunday, or Designated Holiday. Free Time shall neither commence on, nor include, a Saturday, Sunday, or Designated Holiday. When a Shipment is

Constructively Placed, the time spent in transporting such Shipment from the hold point to Actual Placement at Destination shall not be considered to be part of Free Time nor shall it be considered as chargeable time for purposes of assessing Demurrage or detention charges.

43. Frozen Coal. ODEC shall be allowed an additional twenty-four (24) hours Free Time for each Car furnished by N&W or another railroad that contains frozen Coal upon Placement at Destination provided that ODEC gives written notice to N&W of this condition within ten (10) days following Actual Placement.

44. Bunching. When Shipments are Tendered for Pickup on different days at the same Origin, or at different Origins within the same Origin district, and then any two (2) or more said Shipments are delivered to Destination during a single twenty-four (24) hour period, then all said Cars delivered during said twenty-four (24) hour period shall be considered to have been bunched. After the first Shipment of Cars that arrived at Destination is Placed in accordance with the provisions of this Article, the remaining Shipments of Cars shall be treated as having been Placed at 7:00 A.M. on successive days that are not a Saturday, Sunday, or Designated Holiday in the order in which they arrived at Destination.

In no case shall such relief for bunching be allowed unless N&W is notified in writing within thirty (30) days from the latter of the end of a calendar month or the presentment of invoices for Demurrage. Such notice shall be supported by a statement certifying each bunched Car's initial and number and the date of its Placement.

45. Rejection. ODEC may reject any Car placed which has sustained any abnormal loss of Coal loading or is mechanically

defective. Such rejected Cars shall not be subject to Demurrage or transportation charges until the defect has been cured by N&W and the Car again Placed. In any event, ODEC shall be liable only for transportation charges on the actual amount of coal that is delivered to and unloaded at Destination.

46. Demurrage. Except as otherwise provided, N&W shall be entitled to receive Demurrage charges from ODEC when Cars furnished by N&W or another railroad are not Released prior to the expiration of Free Time. Such Demurrage charges shall be handled under the average Demurrage agreement, with rules, provisions and charges, as set forth in Tariff PHJ 6004-0, as amended, incorporated herein by reference, except that, in the case of a conflict with this Agreement, this Agreement shall control. Said Demurrage agreement and the provisions of this Article shall apply to all Demurrage Credits, Demurrage Debits, and Demurrage charges for all rail transportation services provided by N&W to ODEC for all Coal and limestone Shipments, provided that limestone is transported in open top hopper Cars by N&W. .

Demurrage shall be assessed in the following manner:

(a) A Demurrage Credit shall be accrue for each Car furnished by N&W or another railroad that is Released prior to the expiration of the first twenty-four (24) hours of Free Time allowed for that Car. Only one Demurrage Credit may be earned for each Car in a Shipment.

(b) A Demurrage Debit shall accrue each day or excess fraction thereof for each Car furnished by N&W or another railroad for each of the first four (4) days, including Saturdays, Sundays, Designated Holidays and Bank Holidays, that immediately follow the

day on which the first Demurrage Debit begins to accrue. The first Demurrage Debit shall accrue at the expiration of Free Time.

(c) At the end of a calendar month, if accumulated Demurrage Credits equal or exceed Demurrage Debits, no charge shall be made for Demurrage. No payment shall be made by N&W on account of excess demurrage Credits; however, one-half of Demurrage Credits in excess of Demurrage Debits in any month in which an excess of Demurrage Credits exists may be carried forward to the immediately succeeding calendar month and used by ODEC, together with any Demurrage Credits earned in said succeeding month, to offset Demurrage Debits accrued in said succeeding month. However, no Demurrage Credits carried forward in such manner shall be included in the calculation of excess Demurrage Credits eligible to be carried forward into immediately succeeding month.

(d) In the event that a charge is made for Demurrage, the following charges shall accrue on each Car furnished by N&W or another railroad that is Released after Free Time has expired:

- \$20.00 for each excess Demurrage Debit day.
- \$30.00 for each of the following two days or excess fraction thereof.
- \$60.00 for each subsequent day or excess fraction thereof.

This provision notwithstanding, in the event that ODEC is subject to Demurrage charges and during the month that these charges accrued any Cars contained frozen Coal, the Demurrage charges for excess Demurrage Debits on said Cars to the extent that total Demurrage Debits exceed total Demurrage Credits and all other Demurrage charges on said cars shall not exceed ten dollars (\$10.00) per Car for each twenty-four (24) hour period or excess fraction thereof that said Cars were held, prior to their Release, in excess

of Free Time. Demurrage Debits paid for in such a manner shall be deducted from the excess Demurrage Debits, and only the remaining excess Demurrage Debits, if any, shall be subject to additional charge. ODEC must give written notice to N&W of the Cars that contained frozen Coal lading within ten (10) days following Placement of said Cars.

(v) For the purposes of this Article, the end of the calendar month shall be considered as occurring at the first 7:00 A.M. of the following month.

47. Unit Train Detention. In lieu of the free time and Demurrage provisions of Articles 42 and 46, ODEC shall pay to N&W a detention charge for untimely unloading of Unit Train Shipments, i.e., failure to meet the five (5) hour requirement of Article 24(b), or the Article 37 provision to unload in four (4) hours ninety (90) Cars plus an extra two (2) minutes for each additional Car. Except in the case of a Private Car Unit Train held on private trackage, ODEC shall also pay to N&W a detention charge where it becomes necessary for N&W to hold or lay down said Unit Train because ODEC has not arranged for loading of said Unit Train.

The Unit Train detention charge shall be \$75.00 per fifteen (15) minute period or excess fraction thereof. Where ODEC anticipates a protracted delay, ODEC shall have the option to release N&W's train crew at a charge of \$1,225.00. After release of the train crew, the Unit Train detention charge shall be reduced to \$40.00 per hour, or excess fraction thereof, and will be due in addition to the crew release charge and any detention charges which may have accrued prior to release of the train crew. Where N&W's train crew has been released, Unit Train detention charges for a

Private Car Unit Train held on N&W's trackage shall not exceed \$155.00 per day or excess fraction thereof.

48. Service. N&W shall have the same obligations with respect to transportation service as if transportation services governed hereby were regulated under the Interstate Commerce Act including but not limited to the duty of N&W to provide Cars upon reasonable request. The Parties shall work together to provide for efficient and effective transportation services, and N&W shall not unreasonably withhold transportation services from ODEC.

49. Car Specifications. N&W has provided ODEC with design criteria of those types of Cars which are to be provided for transportation services pursuant to this Agreement. In the event that ODEC designs Coal unloading facilities for its planned electricity generating station to accept all such Cars, N&W agrees to supply only Cars which are compatible with ODEC's Coal unloading facilities unless N&W pays for all necessary modifications to said unloading facilities to accommodate Cars of a different design.

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COPY

IN WITNESS WHEREOF, on April 5, 1989 the Parties hereto have caused this Agreement to be signed and sealed by their duly authorized representatives:

OLD DOMINION ELECTRIC COOPERATIVE

By: Ernest M. Jordan

Its President

Attest: [Signature]

NORFOLK AND WESTERN RAILWAY COMPANY

By: William B. Balu

Its VICE PRESIDENT - COAL & ORE TRAFFIC

Attest: Carole Ford

RTW Rec'd
8904.12 (Wed);
3 COPIES UNCL (R) SUMMARY
FILED w/ STARRON Page 31 of 31-

APPENDIX A

N&W - ODEC Contract, Executed April 5, 1989

RATES - Dollars Per Net Ton

<u>Origin District</u>	<u>Base Rate</u>	<u>Applicable Rate to Destination</u>	
		<u>Unit Trains</u>	<u>Shipments-Cars Furnished By</u>
		<u>N&W</u>	<u>ODEC</u>
Clinch Valley #1)	\$11.59	\$10.44	\$9.44
Pocahontas)			
Tug River)			
Upper Buchanan)			
Virginian)			
Clinch Valley #2)	\$11.85	\$10.69	\$9.79
Kenova)			
Thacker)			
Tiller)			
SW Virginia)			

CSXT Interchange - Dollars Per Net Ton

@ Glasgow, Va.	less than ninety (90) Cars	\$7.58
	ninety (90) or more Cars	\$6.28