

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

DOCKET NO. NOR 42180

EVERGY, INC., EVERGY METRO, INC. and
EVERGY KANSAS CENTRAL, INC.

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
REPLY IN SUPPORT OF ITS MOTION TO COMPEL**

On September 26, 2024, BNSF Railway Company (“BNSF”) filed a motion to compel with the Surface Transportation Board (“STB” or “Board”) requesting that Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. (collectively, “Evergy”) be compelled to produce and disclose certain information in response to BNSF’s written discovery requests. Evergy filed its reply on October 16, 2024.

Evergy’s reply largely *confirms* the basis for BNSF’s motion: Evergy is refusing to provide a significant volume of information and materials requested in discovery, and accordingly the Board’s intervention is necessary to compel production and provide reasonable extensions so as not to prejudice BNSF’s defense of this matter. Moreover, though buried in two footnotes in its reply, Evergy reveals that after BNSF filed its motion, Evergy twice supplemented its prior response to Interrogatory No. 34 to disclose that it will use two different types of production cost modeling software in its opening evidence. *See* Evergy Reply at 5 n.6 and at 22, n.27; Ex. 1 and 2. The Board’s rules at 49 C.F.R. § 1104.13(c) do not permit a reply to a reply, but BNSF

submits this brief filing to address these new facts, clarify the record, and correct mischaracterizations of BNSF's motion and misstatements of law in Evergy's reply.¹

In its complaint, Evergy alleges that it suffered at least \$55 million in damages: specifically, \$20 million in "lost profits and opportunity costs attributable to Iatan and Lawrence due to BNSF's trainset limitations and related service failures in 2022" and \$35 million in "additional costs" "as a direct result of BNSF's failures to deliver necessary coal volumes to Iatan and Lawrence in 2022," which caused "Evergy [to] experience[] a reduction in the dispatch of electrical power across the system." See Complaint at 3. Presumably, Evergy had a factual basis for those allegations, or it would not have included them in its complaint. BNSF is entitled to discover that factual basis now, and need not wait until Evergy submits its opening evidence. And BNSF is entitled to this information even if Evergy now claims that those figures were only an "estimate"—a position that (a) strains credulity, since Evergy had thirteen months to determine its 2022 damages before filing suit in January 2024, and (b) in any event, is irrelevant because Evergy must still disclose the underlying factual basis for its supposed "estimate."

To avoid proper discovery, Evergy creates a strawman and argues that Federal Rule of Civil Procedure 26(a) does not apply, citing the Board's decision in *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007). But BNSF never contended that Rule 26 applies. While the Board's discovery and procedural rules are not governed by federal practice, the Board regularly looks to

¹ To the extent that the Board deems it necessary, BNSF hereby seeks leave to file this limited response.

the Federal Rules as a guide to Board practice—a matter noted in the very decision Evergy cites, where the Board stated that “our discovery rules follow generally those in the FRCP.” *Id.* slip. op. at 69. The Federal Rules are designed to ensure fairness and due process protections for defendants, and to avoid trial by ambush. For that reason, the Federal Rules offer compelling guidance for assessing discovery requirements and ensuring that constitutional protections are properly upheld. As such, they should inform the Board’s discovery process here, particularly given the nature of this case, where Evergy seeks more than \$55 million in damages purportedly sustained in a complex industry outside the Board’s jurisdiction and expertise. *See Navajo Transitional Energy Co. v. BNSF Rwy.*, NOR 42179, slip op. at 5 (STB served Sept. 7, 2023) (allowing discovery in the interest of “fairness and due process”).

Moreover, Evergy does not address the fact that the bulk of the Board’s experience with complex discovery has been in the context of rate reasonableness cases that are very different from this case:

- *All* of the damages data are in Evergy’s possession. Evergy did not require anything from BNSF to prepare its damages calculations—but nearly all the data that BNSF needs to prepare its own defense on damages must come from Evergy. This is the opposite of the typical STB rate case, where the relevant data are in the possession of the *defendant*. In such cases, the defendant is given 60 days to prepare its reply evidence. It makes little sense to use the same time period when the data is solely in the *claimant’s* possession, preventing the defendant from performing any real analysis until it receives the claimant’s opening evidence.
- Evergy’s claimed damages exceed \$55 million. This is significantly higher than a non-rate case STB proceeding, and comparable to the damages claimed in commercial disputes in federal court.

- The damages here are of a type, and purportedly sustained in an industry, with which the Board is not familiar: lost profits, opportunity costs, and other costs in electric power generation. *See Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Domination Determinations for Coal Transported to Utility Generation Facilities*, EP 717, slip op. at 8-9 (STB served Mar. 19, 2013) (describing the Board’s lack of expertise in wholesale power markets).
 - The parties’ damages cases will require expert testimony from experts familiar with these types of damages in this type of industry—not the usual expert testimony that the Board and the parties employ in rate cases, where damages are limited to reparations for payment of unreasonable rates.
 - The parties’ damages models using production cost modeling will be highly complex, as BNSF’s expert Paul Hibbard attested.² Evergy mentions in a footnote, Reply at 22 n.27, that it twice supplemented its answer to Interrogatory 34. In so doing, Evergy disclosed two different types of production cost modeling software that it intends to use in presenting its damages: PROMOD IV and PCI GenTrader. Mr. Hibbard contacted the licensors for both types of software. It will cost more than [REDACTED] to license PROMOD and PCI GenTrader for one year. Ex. 3. Mr. Hibbard and his firm are not pre-licensed to run either software. *Id.*
 - In rate cases where the damages may be complex but are mathematical functions of the reasonableness analysis, there is no issue with fairness of parties presenting their damages cases after the close of discovery. Here, such a schedule enables Evergy to hide core elements of its damages case—including the damages *figures themselves* and its calculations, methodologies, inputs, and assumptions—until after discovery is over. The result is that BSNF will have no opportunity to propound interrogatories or requests for production following Evergy’s disclosures.

Evergy complains that BNSF is asking for the production of information protected by the attorney-client or attorney work-product privilege. To be clear, BNSF is not seeking any privileged material. BNSF is simply requesting discovery

² Evergy did not submit any evidence with its reply, and as such, Mr. Hibbard’s declaration is uncontroverted.

of the basis of Evergy's damages claims and a reasonable opportunity to respond to them. Due process and fundamental fairness require no less. Evergy, on the other hand, is asking the Board to condone its prejudicial strategy of trial by ambush. BNSF asks the Board to ensure a fair process by (i) requiring disclosure of Evergy's damages assumptions and calculations at a sufficiently early period to allow BNSF to adequately respond, (ii) extending BNSF's reply evidence deadline, or (iii) some combination of the two.

Similarly, Evergy contends that "how the application of a 'price adder' to Evergy's SPP generation offer prices in 2022 impacted Evergy's profits" is a privileged matter on which it need not disclose information. *See* Reply at 11. Nonsense. How Evergy's generation decisions—which were supposedly motivated by BNSF's rail service—impacted its profitability is a *factual* matter on which BNSF is entitled to discovery. Evergy does not dispute that it conducts production cost modeling in the ordinary course of its business. Evergy has no basis to withhold the results of any modeling it performed in 2022 in connection with its decisions to submit bid adders or otherwise withhold generation.

It is odd that Evergy spends so much time on 49 C.F.R. § 1114.31(a)'s 10-day rule—going so far as to lead with this argument—when Evergy acknowledges that the rule is met for the discovery requests relevant to the issues BNSF raised. *See* Reply at 7-8.³ Evergy's position is also contradicted by its own counsel's claims on

³ Once again, Evergy's arguments suggest that it seeks to deploy the STB's rules as a means to prejudice BNSF's constitutional and due process rights. If Evergy plans to use the 10-day rule as a pass to conceal responsive documents—whether those that refute its damages, *see* BNSF Request for Production No. 14, or any others—BNSF will address any such

behalf of other coal shipper organizations, including the Western Coal Traffic League, of which Evergy is a member.⁴ In *Expediting Rate Cases*, Evergy’s counsel (a) stated that it was unresolved whether or not the 10-day rule applies to requests for production, and (b) asked the Board to rule that the 10-day rule does **not** apply to such requests.⁵ (The Board declined to rule on the issue.) These positions are inconsistent with Evergy’s position here.

Finally, Evergy’s disclosure that it will conduct production cost modeling confirms the relevance of Evergy’s other plants to this proceeding. As BNSF explained in its motion, the modeling of any changes at one of Evergy’s plants would necessarily affect the price earned by all power plants operating at the same time, including Evergy’s. These changes would therefore also change the revenues earned

shortcomings in Evergy’s productions if and when it learns of them. Evergy’s position that the Board strictly enforces the 10-day rule in the context of document requests ignores the practical reality that a party often does not know if an objection is needed until it receives the document production and identifies deficiencies. **BNSF notes for the record that it has received none of the requested data needed for modeling at this juncture and as such, cannot know if Evergy’s productions will be objectionable or not.** See also *Finch Paper LLC*, FD 35981, slip op. at 1 (STB served Aug. 15, 2016) (“Consistent with the regulation, the Board prefers prompt filing of motions to compel. Here, however, given that discovery was ongoing through the period, and resolution of the discovery dispute should not unduly delay the proceeding, we will accept Finch’s motion to compel.”).

⁴ See *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2), Comments of the Western Coal Traffic League, at 1-2 (filed Nov. 7, 2023) (listing Evergy, Inc. as a member).

⁵ “Specifically, Coal Shippers/NARUC also suggest that the Board confirm that the 10-day rule does **not** apply to requests for document production. (Coal Shippers/NARUC Comments 51-52.)” *Expediting Rate Cases*, EP 733, slip op. at 6 (STB served Mar. 31, 2017) (emphasis added); see also Joint Reply Comments of the Western Coal Traffic League et al., EP 733, at 17 (filed June 14, 2017) (arguing that the “Board should permit the parties in a SAC case to agree to toll the 10-day rule set forth in 49 C.F.R. § 1114.31(a) as applied to interrogatory and deposition answers, as well as to document production requests, if the Board concludes that § 1114.31(a) applies to document production requests, or amends § 1114.31(a) to cover document production requests”).

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by Evergy at those other plants, impacting any alleged damages. So if Evergy tries to show less revenue generated at Iatan and/or Lawrence, there may be corresponding increases in revenue being earned at other Evergy plants. *See* BNSF Motion at 22 and Ex. 1 at ¶ 16 (Hibbard declaration). BNSF is entitled to probe those facts in discovery.

CONCLUSION

The Board should order Evergy to disclose the requested damages information before submission of its opening evidence, and to provide BNSF with adequate time to prepare its reply evidence. BNSF is committed to an efficient resolution of the dispute and does not seek unnecessary delay, but seeks only to ensure that the process is fair. Acceptance of Evergy's entreaty to deny BNSF the reasonable discovery it seeks would prejudice BNSF and violate its constitutional rights, countenance trial by ambush, and infect this proceeding with reversible error. *See CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C.*, FD 36727, slip op. at 19 (STB served Oct. 16, 2024) (Member Schultz concurrence) (noting the importance of fair process and predictability).

Accordingly, BNSF requests that the Board:

- Order Evergy to produce and disclose all damages calculations, including any production cost modeling, inputs, and assumptions, reflecting damages that Evergy claims to have sustained as a result of BNSF's rail service;
- Order Evergy to produce responsive documents concerning its other coal-fired plants;
- Order Evergy to produce the remaining discovery that remains outstanding from BNSF's requests;

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- Set BNSF's reply evidence deadline at 6 months after BNSF receives all the above damages calculations and information from Evergy;
- If the Board deems it necessary or appropriate, BNSF asks that the Board appoint an administrative law judge to adjudicate the issues raised by BNSF's motion.

Respectfully submitted,

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Counsel for BNSF Railway Company

Dated: October 23, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods
Attorney for BNSF Railway Company
October 23, 2024

EXHIBIT 1



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

KELVIN J. DOWD

October 8, 2024

VIA ELECTRONIC TRANSMISSION

Timothy Strafford
Steptoe LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036

Re: *Evergy, Inc., Et Al. v. BNSF Railway Company*, STB Docket NOR 42180

Dear Counsel:

Pursuant to 49 C.F. R. § 1114.29(c) and the parties' mutual understanding and agreement, Complainants submit the following supplement to their September 16, 2024 Answer to Defendant BNSF Railway Company's Interrogatory No. 34:

"For further Answer, and subject to and without waiver of the foregoing objection, Complainants anticipate using the PROMOD IV modeling software in their Opening Evidence."

Sincerely,

Kelvin J. Dowd

cc: Andrew B. Kolesar III
Kara Larson (Evergy)

EXHIBIT 2



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

KELVIN J. DOWD

October 15, 2024

VIA ELECTRONIC TRANSMISSION

Timothy Strafford
Steptoe LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036

Re: *Evergy, Inc., Et Al. v. BNSF Railway Company*, STB Docket NOR 42180

Dear Counsel:

Pursuant to 49 C.F. R. § 1114.29(c) and the parties' mutual understanding and agreement, Complainants submit the following additional supplement to their September 16, 2024 Answer to Defendant BNSF Railway Company's Interrogatory No. 34:

"Complainants also anticipate using the PCI GenTrader software, User Interface Version 5.11.0.28, in their Opening Evidence."

Sincerely,

Kelvin J. Dowd

cc: Andrew B. Kolesar III
Kara Larson (Evergy)

EXHIBIT 3

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Public Version – CUI//PRIV Redacted

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EVERGY, INC., EVERGY METRO, INC. and EVERGY KANSAS CENTRAL, INC. 1200 Main Street Kansas City, Missouri 64105 Complainants, v. BNSF RAILWAY COMPANY 2650 Lou Menk Drive Fort Worth, Texas 76131 Defendant.
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Docket No. NOR 42180

Declaration of Paul J. Hibbard

Public Version – CUI//PRIV Redacted

1. This declaration responds to certain statements in the Reply To Motion To Compel (“Reply”) filed by Complainants Evergy, Inc. Evergy Metro, Inc. and Evergy Kansas Central, Inc. (collectively, “Evergy”) related to my declaration that accompanied the Motion to Compel filed by BNSF Railway Company (“BNSF”) on September 26, 2024. I set forth my qualifications in my declaration accompanying BNSF’s Motion to Compel.

2. Evergy’s Reply states: “Mr. Hibbard makes no mention of whether he or his consulting firm already are ‘set up and pre-licensed’ to run PCM software” and “Mr. Hibbard already has the information needed to begin any required licensing process (to the extent that he does not already have access to the model that Complainants have identified).”¹

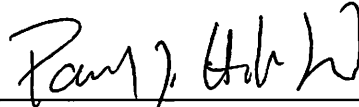
3. Analysis Group, Inc. does not have an active license for PROMOD or PCI Energy Solutions’ GenTrader. I have received quotes for a one-year license from each vendor. The total licensing and data costs for the models would exceed [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV] with additional charges at an hourly rate as needed for implementation, data book digestion, development of studies, and any necessary support and consulting required during the agreed upon timeframe.

¹ Evergy Inc. et al. v. BNSF Railway Company, Reply To Motion To Compel, Before the Surface Transportation Board, Docket No. NOR 42180, October 16, 2024, p. 22.

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VERIFICATION

I, Paul J. Hibbard, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

A handwritten signature in black ink, appearing to read "Paul J. Hibbard", is written over a horizontal line.

Paul J. Hibbard
111 Huntington Avenue, 14th Floor
Boston, MA 02199

Executed: October 23, 2024