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November 21, 2024

**By Email and E-File**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
November 21, 2024  
Part of  
Public Record

**Re: *Evergy v. BNSF Rwy.*, NOR 42180**

Dear Ms. Brown:

BNSF Railway Company (“BNSF”) is writing to inform the Surface Transportation Board (“Board”) that on November 11, 2024, 10 days after the close of the original discovery period, BNSF received a production of 34,797 documents from Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. (collectively, “Evergy”). This document production was 67 times larger than the total number of documents produced by Evergy within the original discovery period.

BNSF has been unable to properly search Evergy’s production because of significant issues with missing metadata. Once BNSF is able to do so, it will identify deficiencies and address them promptly with Evergy. If needed, BNSF will then raise any outstanding problems with the Board and request any necessary relief.

Evergy has previously taken the position in this proceeding that 49 C.F.R. § 1114.31(a) strictly requires that challenges to a party’s document production must be made within 10 days of the production. *See* Evergy’s Reply to Motion to Compel at 6-7. BNSF does not believe that the Board’s rules require BNSF to raise any objections to this production within 10 days for the reasons explained in BNSF’s October 23, 2024 Reply in Support of its Motion to Compel. But BNSF submits this letter out of an abundance of caution, to ensure that BNSF’s right to challenge the sufficiency of Evergy’s document production is preserved.

\* \* \*

Evergy’s last production of documents within the original discovery period specified in the Board’s procedural schedule (which ended on November 1, 2024) was on October 31, 2024. With that production, Evergy had produced a total of 517 documents within the original discovery period. On November 1, 2024, the Board tolled the close of discovery pending further order of the Board.

Surprised by the paucity of data and documents that had been produced within the original discovery period, BNSF sent a letter to Evergy on November 8, 2024 outlining the obvious deficiencies with Evergy's productions. This letter identified several issues arising from the small number of documents that Evergy had produced as of that time, including the fact that Evergy had produced only a handful of internal Evergy emails and a total of 4 internal emails from the entirety of the 2022 calendar year—the year that is the focus of Evergy's complaint and in which it claims to have sustained \$55 million in damages as a result of BNSF's purportedly deficient rail service. Evergy's continuing refusal to produce data supporting its damages claim remains pending before the Board.

The next business day following BNSF's letter, on November 11, 2024, Evergy produced the 34,797 additional files referenced above.

On November 14, 2024, BNSF's counsel emailed Evergy's counsel regarding pervasive issues with the metadata in Evergy's November 11 production, including the following: (i) nearly 9,000 documents appear to be emails, but do not have any email metadata (such as fields for "to," "from," "cc," and "bcc"); (ii) most of the documents in the production do not have file extension metadata; and (iii) many of the documents do not have any custodian listed. These deficiencies were inconsistent with an ESI protocol that the parties agreed to at the start of discovery. Counsel for Evergy indicated by reply email that counsel would contact Evergy's discovery vendor to investigate the issue.

The first two metadata issues above prevent BNSF from performing basic searches within Evergy's production, such as identifying internal Evergy emails or segregating emails from PDFs. The original close of discovery was nearly three weeks ago, and these problems impair BNSF's ability to prepare its defense. BNSF's counsel received an updated production link today that may resolve these metadata issues, but BNSF's counsel will not know for at least another day.

Once the metadata issues are resolved and BNSF can properly search the production, BNSF anticipates meeting and conferring with Evergy's counsel about deficiencies in the production. For example, from the files that BNSF's counsel has reviewed with the currently limited search functionality, it appears that Evergy's production continues to contain few internal Evergy emails. BNSF also anticipates conferring with Evergy regarding both missing data and problems with the limited data that Evergy has produced—but again, BNSF cannot readily identify data in the production without file extension metadata, and thus cannot determine to what extent Evergy has complied with its discovery obligations.

BNSF will also need to confer with Evergy's counsel regarding Evergy's responses to BNSF's supplemental written discovery requests, which BNSF received yesterday, seeking information about Evergy's historical use of production cost modeling software. Evergy objected and did not provide a substantive response.

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Once BNSF has had an opportunity to evaluate Evergy's production and further confer with Evergy, BNSF will update the Board.

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Sincerely,

/s/ Timothy J. Strafford

Timothy J. Strafford