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PUBLIC VERSION

March 28, 2025

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**Re: STB Docket NOR 42180, Evergy, Inc. Evergy Metro, Inc., and Evergy Kansas
Central, Inc. v. BNSF Railway Company**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of the Motion to Compel of BNSF Railway Company, with appropriate redactions that the Board can place in its docket. BNSF is concurrently filing a CONFIDENTIAL version of the Motion to Compel to be filed under seal.

Respectfully submitted,

/s/ Timothy J. Strafford

Timothy J. Strafford
Anthony J. LaRocca
Justin M. Waggoner
Alexander M. Wolf

Attorneys for BNSF Railway Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42180

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

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY'S
SECOND MOTION TO COMPEL

Pursuant to 49 C.F.R. § 1117.1, BNSF Railway Company (“BNSF”) respectfully petitions the Surface Transportation Board (“STB” or “Board”) for an order compelling Evergy, Inc., Evergy Metro, Inc. (“Evergy Metro”), and Evergy Kansas Central, Inc. (“EKC”) (collectively, “Evergy”) to produce certain discoverable documents and information that Evergy continues to refuse to produce despite the Board’s order of March 4, 2025 on BNSF’s first motion to compel. These documents and information were generated in the ordinary course of business, are relevant to Evergy’s claim that it incurred damages due to BNSF’s conduct, and are being wrongfully withheld from BNSF in the discovery of this matter. An order from the Board is therefore, again, necessary to compel their production.

BNSF seeks production of two classes of items that Evergy continues to withhold: (1) modeling software inputs and results generated and used by Evergy in the normal course of business, and (2) documents related to Evergy’s management

of its coal inventories. BNSF asks the Board to issue an order requiring the production of these classes of evidence as further described herein.

I. EXECUTIVE SUMMARY

On March 4, 2025, the STB issued a decision in this matter granting in part BNSF's first motion to compel, but denying BNSF's request that the Board compel Evergy to disclose privileged assumptions, calculations, and methodology underlying its damages claim. The STB denied BNSF's request based, in part, on the STB's understanding that Evergy had not objected to producing data generated in the ordinary course of business that bears on the issue of damages. *See* Decision at 6 n.11. In fact, Evergy *has objected* to producing such documents and data, even after the STB issued its decision. The items sought in this second motion to compel are not privileged or the result of expert opinions generated for this litigation, but are data that Evergy generated in the ordinary course of business and used in its decision-making process for operating its facilities. Evergy's refusal to produce these documents and data necessitates this Motion.

This Motion focuses on two areas that are central to Evergy's damages claims:

Economic Modeling: Documents that Evergy produced in discovery reveal that it used PROMOD, a production cost modeling program, in the ordinary course of business to make decisions about coal inventories and generation. **Yet Evergy has not produced, and refuses to produce, any of its PROMOD runs or supporting data from the year 2022—the very year for which Evergy is seeking damages. Moreover, Evergy has disclosed that it intends to**

support its damages claims in this matter using both PROMOD and another production cost modeling program, GenTrader. The modeling runs that Evergy generated in 2022 are in no way privileged, and should be ordered produced in discovery now.

Internal Communications and Documents Related to Coal Stockpiles and Inventory: BNSF requested that Evergy produce all documents and communications related to the adequacy of coal stockpiles, consideration of options to increase storage capacity for coal stockpiles at its plants, and decisions to burn coal. *See* BNSF Requests for Production 58 & 71, *infra*. Evergy has *only* produced responsive, non-privileged documents *sufficient to show* the levels of coal inventory at its Iatan and Lawrence plants from January 1, 2019 through December 31, 2022. Evergy's production of only coal inventory levels is far more limited than BNSF's request, and BNSF is entitled to discover the internal documents and communications that underlie Evergy's management of its coal inventory. The parties recently met and conferred, and Evergy now takes the position that it need not search for or produce any communications regarding these subjects. Evergy's position is untenable.

Finally, in the course of discovery conferrals with Evergy's counsel, BNSF learned that Evergy failed to preserve at least one relevant PROMOD run {{
[REDACTED]} } —notwithstanding that the PROMOD run was performed after Evergy appears to have anticipated the instant litigation against BNSF (see below). When BNSF requested that Evergy produce the run—which is

discussed in Evergy’s internal emails—Evergy advised that “the inputs/outputs have not been retained,” i.e., the run had not been preserved. Given Evergy’s position that it will not produce *any* additional modeling data, BNSF is unable to determine if other potentially relevant materials and model runs were not preserved. Accordingly, in addition to the orders compelling production discussed above, BNSF requests that the STB order Evergy to provide a full explanation of its retention and deletion of information and the circumstances surrounding the destruction of this potentially relevant data.

II. BACKGROUND

Evergy’s January 31, 2024 Complaint contends that it is entitled to more than \$55 million in damages because of alleged acts or omissions by BNSF in 2022. *See* Complaint at 3. Specifically, Evergy claims that these alleged acts or omissions violated BNSF’s common carrier and car service obligations or otherwise constituted an unreasonable practice and caused Evergy to incur “lost profits and opportunity costs,” additional costs due to “a reduction in the dispatch of electrical power across the system,” and other costs related to “railcar utilization and storage, purchased power requirements, and the reclamation of coal from station inventories.” *Id.*

BNSF strongly disputes these allegations. In the evidentiary phase of this proceeding, BNSF will show that it met its common carrier obligation and took reasonable steps to accommodate Evergy during a period of network congestion. But more than a year after Evergy filed its complaint, BNSF is still seeking basic and critical documents and data related to Evergy’s damages claims, despite timely

and repeated requests for this information and clear direction from the Board to produce such discovery.

BNSF has probed the basis of Evergy's damages claims from the outset of the proceeding, including asking about damages software, models, and data,¹ as well as documents related to the adequacy of Evergy's coal stockpiles, consideration of options to increase storage capacity for coal stockpiles at its plants, and decisions to burn coal.² Relevant to this motion, in Evergy's reply to BNSF's first motion to compel, Evergy represented that it has "not objected to producing documents in response to those of BNSF's Second Requests that seek data retained by Evergy, Evergy Metro and/or EKC in the ordinary course of business that could bear on the issue of damages." Evergy's Reply to Motion to Compel at 12 (filed Oct. 16, 2024).

In October 2024, Evergy disclosed for the first time that in its opening evidence it would use PROMOD IV, version 11.1.13, and PCI GenTrader, User Interface Version 5.11.0.28. Ex. 1. As a result, BNSF's third set of written discovery requests sought modeling conducted in the ordinary course of business

¹ See BNSF First Set of Interrogatories and Requests for Production to Evergy ("BNSF's First Requests") (served on May 24, 2024) [RFPs 22, 32]; BNSF Second Set of Requests for Production of Documents to Evergy (served on August 15, 2024) [RFPs 58, 71, and 81]; BNSF's Motion to Compel at Ex. 2 (BNSF First Set of Interrogatories and Requests for Production to Evergy), Ex. 3 (Evergy's Response to BNSF's First Set of Interrogatories and Requests for Production to Evergy), Ex. 6 (BNSF Second Set of Interrogatories and Requests for Production to Evergy), Ex. 7 (Evergy's Response to BNSF's Second Set of Interrogatories and Requests for Production to Evergy) (filed Sept. 26, 2024).

² See RFP 58 and 71. RFP 58 requests: "All Documents and Communications relating to coal stockpiles at each of Evergy's coal plants, including, but not limited to, daily coal inventory or stockpile volume for each day from January 1, 2019 to present (including tons and heat content), monthly coal inventory or stockpile volume for each month from January 1, 2019 to present, adequacy of coal stockpiles, configuration of the coal stockpiles, and consideration of options to increase storage capacity for coal stockpiles." RFP 71 requests: "All Documents relating to Evergy's decisions to burn coal inventory at its plants."

between 2019 and 2023, in order to compare the inputs and results of this historical modeling with the modeling that Evergy will offer in its opening evidence.³ In Evergy's November 20, 2024 response, Evergy objected and stated that it would "consider a narrower and modified version of this Request should BNSF elect to propound one." Ex. 2. BNSF then sent a letter to Evergy seeking "further clarification regarding Evergy's objections and productions to date that relate to Evergy's historical modeling data." Ex. 3. BNSF reiterated that it was seeking "discovery of the modeling that Evergy conducted in the normal course of its business," not disclosure of its damages theories, and that this information was highly relevant to Evergy's claim of damages.

The parties met and conferred on December 17, 2024 and discussed the requested models, including the level of burden associated with their production. Evergy agreed to produce a sample of input and output files from PROMOD and PCI GenTrader runs from 2022 related to coal conservation and/or generating decisions. BNSF sent Evergy a summary of the meet and confer, which Evergy agreed was a "generally accurate rendition of the substance of our discussion."

From November 2024 through January 2025, Evergy made four additional productions. Evergy's January 29, 2025 production consisted of input and output files for {{ [REDACTED] }}

[REDACTED] }}⁴

³ See Ex. 10, BNSF Third Set of Interrogatories and Requests for Production (served on October 31, 2024), Requests 90 and 91.

⁴ On March 14, 2025, Evergy informed BNSF that the {{ [REDACTED] }}

On February 14, 2025 and February 20, 2025, BNSF followed up with Evergy regarding Evergy's original representation, during the December 2024 meet and confer, that it would produce sample PROMOD and GenTrader runs from 2022. BNSF specifically noted that it "would like to receive the {{ [REDACTED] }} PROMOD run that we see reference to in Evergy's produced materials." On February 21, 2025, Evergy responded:

After further internal review, we can confirm that Evergy does not have any retained GenTrader or PROMOD run files from 2022 that relate to coal conservation or generation. The {{ [REDACTED] }} PROMOD run that you referenced in your request apparently was performed by a former Evergy employee, and the inputs/outputs have not been retained. After reasonable inquiry, Evergy was not able to determine the reason for the run or the hypothetical inputs used.

Ex. 4. On March 4, 2025, the Board issued its decision, which relied in part on Evergy's representation that it has "not objected to producing documents requested in BNSF's second set of discovery requests that seek data retained by Complainants in the ordinary course of business that could bear on the issue of damages." *See* Decision at 6 n.11. The decision directed Evergy to produce information related to its other plants and to rail service by other carriers in 2022. The decision also directed the parties to meet and confer "to coordinate the exchange of information and documents in accordance with the determinations in this decision."

The parties conferred again, following the Board's order, on March 10, 2025. At the meet and confer, BNSF renewed its request for production of modeling runs

from 2022 and noted that it appeared that Evergy had not produced any standalone emails or other communications regarding coal stockpiles or coal inventory management. Evergy maintained many of its objections to producing key modeling and other information.⁵ Evergy stated that it does not plan to produce any additional PROMOD runs because the burden of producing them is too great. In a follow-up email to the meet and confer, Evergy noted:

We confirm, as we previously advised, that Evergy does not have retained inputs and outputs for any PROMOD runs executed in 2022 **for purposes related to coal conservation or generation planning**. During our meeting, we speculated that Evergy might have retained data for PROMOD runs executed for other purposes, but we have no actual knowledge that this is the case. We also confirm, as we advised on February 20, that the time and effort expended in producing the sample PROMOD and GenTrader runs that were provided on January 29 confirmed that any requests for multiple additional runs would be overbroad and unduly burdensome.

Ex. 5 (emphasis added). Evergy did not indicate whether Evergy has retained PROMOD runs executed in 2022 for other purposes.

Evergy also confirmed that it does not plan to produce the requested PCI GenTrader models from 2022, and further noted that {{ [REDACTED]

[REDACTED] }} Ex. 5 (March 14, 2025 email, cited above). Evergy stated that it would not collect or produce any materials in response to RFP No. 58, which sought communications concerning the adequacy of Evergy's coal stockpiles, consideration

⁵ BNSF sent Evergy a summary of the meeting on March 10, 2025, to which Evergy responded on March 14, 2025. See Ex. 5.

of options to increase storage capacity for coal stockpiles at Evergy's plants, and Evergy's decisions to burn coal, beyond the limited data it had previously produced, noting: "Evergy's production in response to Document Request No. 58 was limited to documents sufficient to show the information described in the Request, and we do not plan to supplement that production." *Id.*

Evergy stated that it will produce other materials (to which it did not object) by the new close of discovery deadline on April 3, 2025. *Id.*

III. ARGUMENT

A. Under the Board's rules, Evergy is required to produce relevant data and documents created in the ordinary course of business.

Under the Board's rules, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). Information is relevant when it "might be able to affect the outcome of a proceeding." *See Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry.*, FD 35743, slip op. at 8 (STB served Sept. 23, 2014). Discovery is not limited to "the information that [a party] believes is sufficient" to prove its case. *See Seminole Electric Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009). Instead, a party is generally entitled to all relevant and potentially admissible information. *Id.*

The Board's March 4 Decision recognizes these principles. The Board acknowledged the relevance of data and documents regarding Evergy's full portfolio

of generating facilities in any potential damages calculation.⁶ Moreover, in considering BNSF's ability to seek discovery regarding data and documents that are relevant to Evergy's claims, the Board distinguished between data and documents reflecting anticipated damages claims, on the one hand, and data and documents generated in the ordinary course of business, on the other hand. Decision at 6 n.11 (citing Complainants Reply at 12-13, 25). The latter set of documents are a valid subject of discovery, and this motion is now necessary because Evergy refuses to produce such data and documents.

B. Evergy must produce production cost modeling performed in the ordinary course of business.

The data and documents that BNSF requests are relevant, date from the period when Evergy claims it incurred damages, and were created in the ordinary course of business. Evergy should be required to confirm that it preserved them and to produce them. Indeed, the historical modeling data sought in this Motion involve *the same models* that Evergy has said it plans to use to support its damages claims, yet Evergy refuses to produce historical information involving those models.

Electric utilities like Evergy routinely employ production cost models—like the PROMOD and PCI GenTrader models that Evergy plans to use to support its damages claims here—to understand the effects of certain variables on generating

⁶ The Board concluded that “[i]t is plausible, as BNSF contends, that Complainants may have adjusted operations at their other plants to account for a change in the amount of coal burned at the Iatan and Lawrence facilities, or that the regional wholesale price for electricity earned by the other plants increased due to reduced output at the Iatan and Lawrence facilities. (BNSF Mot. 21-22 & n.11.) Any such adjustments could have impacted Complainants’ revenues and are therefore potentially relevant to Complainants’ damages claims, which are based in part on lost profits and opportunity costs. (See Compl. 3.)” Decision at 8.

decisions and power plant revenues. Because Evergy's damages claims are based on its allegations about how BNSF's conduct impacted those generating decisions and revenues, BNSF sought discovery of the modeling that Evergy conducted for its power plants in the ordinary course of business. *See* RFPs 22, 71, 81, 90, and 91, *supra*.

Evergy's documents from 2022 reflect that Evergy was conducting PROMOD runs on a regular basis, and using the runs to inform its power generation decisions. For example:

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Evergy has not produced any of these modeling runs. The only runs that Evergy produced are from *2021—before* Evergy claims it suffered damages or engaged in coal conservation measures. Evergy’s 2022 modeling is plainly relevant to this proceeding. Modeling conducted for business purposes during the relevant time period provides a real-world check on made-for-litigation models used to calculate damages. Without the historic modeling, BNSF would be unfairly disadvantaged in this matter. BNSF is clearly entitled to see the modeling inputs and results that guided Evergy’s business decisions during the time period for which it is claiming damages. **This information is relevant and discoverable, and BNSF is entitled to all the modeling runs that Evergy conducted in the ordinary course of business.**

During the meet and confer process, the parties discussed the possibility of BNSF narrowing its original request for all 2019-2023 modeling data. Evergy agreed to produce samples of 2022 modeling runs for BNSF to evaluate. *See infra* n.8. Evergy instead produced a sample of 2021 modeling runs, and has refused to

produce any 2022 modeling runs, as discussed above. BNSF did not agree that Evergy need produce only one PROMOD run from 2021 and one GenTrader run from 2021.

As matters currently stand, Evergy has failed to produce *any* runs from 2022 and professes not to have retained any 2022 runs undertaken for a purpose related to coal conservation or generation planning. Even if Evergy had produced a run from 2022, the purpose of the limited agreement during the meet and confer was for BNSF to have an opportunity to review a 2022 run to inform its position on how many of Evergy's 2022 runs it will need to test Evergy's damages calculations. BNSF never got that chance, and Evergy's apparent failure to satisfy its document retention obligations necessitates broader production of whatever modeling data Evergy created in 2022 in the ordinary course of business.⁷

Evergy should not be permitted to sidestep its discovery obligations by claiming that none of its 2022 PROMOD or GenTrader runs were for "coal conservation or generation planning" purposes, and therefore it need not produce them. Evergy itself suggested that it could produce samples of "coal conservation or generation planning" runs from 2022. And regardless of the purpose for which Evergy now claims its 2022 runs were created, the documents that Evergy has produced indicate that *all* of Evergy's 2022 runs—regardless of their purported

⁷ The 10-day rule in 49 C.F.R. § 1114.31 does not apply to BNSF's RFPs that are at issue. BNSF is not seeking to compel a response to any interrogatory; it is seeking an order under 49 C.F.R. § 1117.1 compelling Evergy to produce modeling runs conducted in 2022. Evergy stated that it would consider a narrowed and modified version of BNSF's request for production of modeling data, the parties met and conferred regarding narrowing and modifying the request, and Evergy agreed to produce sample 2022 modeling runs based on the meet and confer. BNSF only resorted to filing this motion to compel after it became clear that Evergy would not produce any 2022 modeling runs.

purpose—“estimate the coal burn” at its facilities. Ex. 6 (EVERGY-0082386); *see also* Ex. 7 (EVERGY-0082893) {{ [REDACTED]

[REDACTED]

[REDACTED] {{ [REDACTED] }} And, of course, Evergy’s 2022 estimates of coal burn are relevant to Evergy’s claimed damages here.

Evergy claims that it is unduly burdensome to produce its 2022 modeling runs. BNSF disagrees. Under 49 C.F.R. § 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought. *See, e.g., FMC Wyo. Corp. v. Union Pac. R.R.*, NOR 42022, slip op. at 5 (STB served Feb. 5, 1998). However, Evergy’s claim of undue burden does not withstand scrutiny. The single PROMOD run that Evergy produced consists of only 140 files, totaling around 16 GB (a small fraction of the discovery produced between the parties in this matter). *See* Hibbard Declaration ¶ 16. Similarly, the single GenTrader run that Evergy produced consists of a single file totaling around 100 MB. *Id.* ¶ 17. Because PROMOD and GenTrader files have unique file extensions, it is easy to identify them in electronic searching. *See id.* ¶ 18. Thus, these are modest numbers of files that are easy to locate and easy to produce. Moreover, one of the employees identified in the 2022 emails as being actively involved in preparing PROMOD runs remains employed at Evergy, according to information available on his LinkedIn profile. *Infra*. Finally, as a regulated utility, Evergy is already obligated to retain certain modeling runs and data files associated with

resource planning. *See* Hibbard Declaration ¶ 15. For all these reasons, Evergy's claim of burden is overstated.

C. Given Evergy's acknowledgement that it did not preserve a relevant PROMOD run {{ [REDACTED] }} and its position that it will not produce *any* PROMOD runs from 2022, the Board should require Evergy to provide information about its retention of potentially relevant materials.

As noted above, in the course of discovery discussions with Evergy's counsel, BNSF learned that at least one PROMOD run {{ [REDACTED] }} relating to the impact of coal conservation was not preserved in anticipation of litigation. This is troubling, particularly because Evergy's documents indicate that Evergy {{ [REDACTED] }}
[REDACTED]
[REDACTED] {{ *See* EVERGY-0082678 and EVERGY-0014812 at 0014826, *infra*.

And Evergy's refusal to provide further modeling information makes it impossible to determine the full scope of Evergy's document retention problem.

Accordingly, BNSF requests that the STB order Evergy to provide information about its retention of potentially relevant data relating to its damages claims and the circumstances surrounding the destruction of potentially relevant data. BNSF requests that this order address *all* of Evergy's 2022 PROMOD and GenTrader runs, and not be limited to runs that Evergy professes to have conducted for purposes that Evergy deems relevant to these proceedings. *All* of Evergy's 2022 PROMOD and GenTrader runs contain inputs and outputs that are relevant to damages. *See* Hibbard Declaration ¶ 14.

D. Evergy must produce communications and documents created in the ordinary course of business related to the management of Evergy’s coal inventory.

As described above, BNSF sought discovery of documents related to the adequacy of Evergy’s coal stockpiles, consideration of options to increase storage capacity for coal stockpiles at its plants, and decisions to burn coal. Evergy stated that it would only produce documents “sufficient to show” inventory levels at Iatan and Lawrence. Ex. 8 (Evergy’s Reply to Motion to Compel at 12). Given Evergy’s objections, it was unclear what Evergy would produce until BNSF received Evergy’s four productions in December 2024 and January 2025. In reviewing Evergy’s documents, BNSF identified two emails that were embedded in an Excel spreadsheet, and not produced as stand-alone documents. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

These emails are directly relevant to damages issues in this case. Yet, Evergy did not produce the emails in email form, but only as embedded images in another Excel file. The existence of these two emails, not produced as stand-alone documents, indicates that there are likely to be other internal communications about this critical issue that Evergy has decided not to produce in discovery. Indeed, Evergy did not produce *any* emails or communications regarding the decision-making concerning these changes in target coal inventory levels, despite

the obvious importance of the issues in dispute. **Evergy informed BNSF during the parties' March 2025 meet and confer that it did not search for such emails and will not do so.**

Evergy has no basis to refuse to produce these relevant communications. The management of Evergy's coal inventories is relevant to both the reasonableness of its requests for transportation and its claims of damages. Evergy made its decisions to conserve coal in 2022 central to its claims of both liability and damages. Moreover, Evergy cannot limit its production to documents "sufficient to show" what inventory levels were in 2022. *See Seminole Electric Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009). BNSF is entitled to discover how Evergy's decision-making affected coal inventory levels and whether Evergy acted to mitigate any loss. The obligation to mitigate damages, long recognized in the common law, clearly applies in cases involving alleged violations of a railroad's duties: "A party suffering loss from a breach of duty must do what a reasonable man would do to mitigate his loss." *Louisiana Railcar, Inc. v. Missouri Pacific R.R. Co.*, 7 I.C.C.2d 30, 1990 ICC LEXIS 304 at *8 (1990). BNSF is therefore entitled to discovery of communications regarding coal inventory levels in 2022.

IV. CONCLUSION

For the foregoing reasons, the Board should order Evergy (i) to identify and produce all 2022 PROMOD and PCI GenTrader runs that it retained, regardless of the purpose of the run, and (ii) to identify any such runs that Evergy performed but no longer retains and explain why these files were not preserved. The Board should

also order Evergy to produce communications and other relevant documents related to the management of Evergy's coal inventory.⁸

Dated: March 28, 2025

Tamara R. Middleton
Adam Weiskittel
Kevin W. Baldwin
BNSF Railway Company
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Respectfully submitted,

/s/ Timothy J. Strafford
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⁸ The March 4 Decision stated that “[a]s a practical matter, the close of discovery provides an outer limit for the filing of motions to compel document production.” Decision at 5. BNSF is currently reviewing Evergy's most recent productions to determine if Evergy has complied with its representations and the Board's March 4 Decision. BNSF is mindful of the Board's admonition to “endeavor to promptly resolve discovery disputes, including by seeking help from the Board, if necessary, to promote the orderly adjudication of their cases.” *Id.* Nonetheless, BNSF reserves the right to seek a further order to compel for a reasonable time after April 3, 2025, should it prove necessary.

CERTIFICATE OF SERVICE

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

/s/ Tara A. Woods

Tara A. Woods
Attorney for BNSF Railway Company
March 28, 2025

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**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

I. QUALIFICATIONS AND ASSIGNMENT

1. I am a Principal at Analysis Group, an economic, financial and strategy consulting firm, headquartered in Boston, Massachusetts. I provide consulting services to clients in the areas of energy and environmental markets, regulation, and policy. I set forth my qualifications in my declaration that accompanied the Motion to Compel filed by BNSF Railway Company (“BNSF”) on September 26, 2024.¹ My qualifications remain unchanged.

2. I was asked by counsel for BNSF to respond to certain claims by Complainants Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. (collectively, “Evergy”). Specifically, Evergy claims that any requests for additional PROMOD and GenTrader runs would be “overbroad and impose an undue burden on Evergy personnel.”²

II. PROMOD AND GENTRADER MODELING DATA ARE RELEVANT FOR ASSESSING EVERGY’S CONTEMPORANEOUS DECISION-MAKING AND ALLEGED DAMAGES

A. Evergy Employed Production Cost Modeling Software When Making Key Decisions about System Planning and Power Plant Operations

3. Evergy routinely employed PROMOD in 2022, including for regulatory filings to the Kansas Corporation Commission and Missouri Public Service Commission.³ These PROMOD runs included various input assumptions about potential coal conservation measures and modeled

¹ Evergy Inc. et al. v. BNSF Railway Company, Declaration of Paul J. Hibbard, Before the Surface Transportation Board (“STB”), Docket No. NOR 42180, September 26, 2024 (hereafter, “September 26th Declaration”).

² February 20, 2025 email from Kelvin J. Dowd to Alex Wolf, Daniel M. Jaffe, and Andrew B. Kolesar III, cc’d Justin Waggoner, Anthony LaRocca, Tara Woods, and Timothy Strafford; March 14, 2025 email from Kelvin J. Dowd to Timothy Strafford, cc’d Alex Wolf, Justin Waggoner, Tara Woods, Andrew B. Kolesar III, and Daniel M. Jaffe.

³ [BEGIN CUI//PRIV] [REDACTED] [END CUI//PRIV] EVERGY-0082907. See also EVERGY-0085936; EVERGY-0086145; EVERGY-0086177; EVERGY-0086202; EVERGY-0086247.

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outputs of generation, revenues, and profits at every Evergy-owned generator.⁴ I note that regardless of why Evergy ran a specific production model on a specific date in 2022, both the inputs and the outputs from the models, by their nature, reflect assumptions about coal conservation (e.g., whether or not to restrict operations or add an Opportunity Cost Calculation (“OCC”) adder to their offers), and created outputs related to Evergy’s revenues and profits.

4. Evergy relied on PROMOD runs to inform key decisions about coal conservation measures. For example, on October 4th and 5th, 2022, John Carlson, Senior Manager of Market Operations, requested updated coal inventory charts [BEGIN CUI/PRIV] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CUI/PRIV]⁵ Evergy executives were consulted regarding the inputs of these PROMOD runs – for example, Evergy’s PROMOD team were [BEGIN CUI/PRIV] [REDACTED]

[END CUI/PRIV]⁶ Evergy also produced its Excel-based “Coal Inventory Models,” which used coal generation projections from PROMOD runs to forecast coal burn and future coal inventory levels.⁷

5. Based on Evergy’s productions to date, I have identified at least six instances in which Evergy ran PROMOD in 2022 for the purpose of projecting future coal inventory levels,

⁴ [BEGIN CUI/PRIV] [REDACTED]

[REDACTED]

[REDACTED] [END CUI/PRIV] EVERGY-0082933.

⁵ EVERGY-0082907 (bracketed text added for clarity).

⁶ EVERGY-0082907.

⁷ EVERGY-0014393; EVERGY-0014542.

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including on June 24, 2022, July 27, 2022, July 29, 2022, August 2, 2022, September 14, 2022, and September 28, 2022.⁸ These runs included alternative – and presumably changing – assumptions about forecasted coal use and data highly relevant to potential coal conservation measures, including expected wholesale electricity market drivers of coal use, as well as the presence of market and OCC adders.⁹

B. PROMOD and GenTrader Input Files Will Be Relevant for Evaluating Key Assumptions Underlying Evergy’s Forthcoming Damages Claims

6. Explicitly or implicitly, Evergy’s forthcoming damages claims will likely make numerous assumptions about the electrical power system during periods in which damages were purportedly incurred. For example, Evergy has produced inputs for a single PROMOD run conducted in November 2021, which included projections for 2022. These inputs contain Evergy’s assumptions about many key variables, including:

- Coal, oil, and natural gas prices;
- Generator capacity ratings, availability, planned outage schedules, and forced outages;
- Carrying capacity and thermal ratings of bulk transmission lines;
- Wind capacity and production profiles;
- Bilateral power contracts including power sales and purchase agreements between utilities and neighboring regions;
- Hydroelectric production;

⁸ See, e.g., EVERGY-0086816, [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV]; EVERGY-0082894, [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV]; EVERGY-0082893, [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV]; EVERGY-0014393, [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV]; EVERGY-0082933 [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV]

⁹ [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV] EVERGY-0082933.

Public Version – CUI//PRIV Redacted

- Load for every utility located in SPP; and
- Heat rate and efficiency for every thermal generating plant located in SPP.

7. The assumptions that are used for these input variables will affect model run projections of coal unit operations and profitability. Critically, the November 2021 PROMOD run that Evergy produced indicates that Evergy customized the input assumptions for its production cost modeling rather than using PROMOD's default inputs.¹⁰ Similarly, in this case, the assumptions that Evergy uses for its model runs when calculating damages will impact the damages figures. Without production of Evergy's contemporaneous input assumptions from 2022, it would be very difficult for the Board to assess the reasonableness of the input assumptions that Evergy will be using in this case for its forthcoming damages claims.

C. PROMOD and GenTrader Output Files Are Relevant for Assessing Portfolio Effects, and Will Be Relevant for Evaluating Evergy's Forthcoming Damages Claims

8. As described in my September 26th Declaration, Evergy’s purported coal conservation measures at Iatan and Lawrence would have impacted generation, revenues, and profits at all Evergy power plants. As such, I explained that generation, revenues, and profits for Evergy’s other power plants are or will be relevant to assessing Evergy’s purported damages arising from “lost profits and opportunity costs” and “additional costs” due to “a reduction in the

[illegible]

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dispatch of electrical power across the system.”¹¹ In its March 4th, 2025 Decision, the STB agreed that these portfolio effects are potentially relevant to assessing Evergy’s damages claims:

“It is plausible, as BNSF contends, that Complainants may have adjusted operations at their other plants to account for a change in the amount of coal burned at the Iatan and Lawrence facilities, or that the regional wholesale price for electricity earned by the other plants increased due to reduced output at the Iatan and Lawrence facilities. Any such adjustments could have impacted Complainants’ revenues and are therefore potentially relevant to Complainants’ damages claims, which are based in part on lost profits and opportunity costs.”¹²

9. PROMOD and GenTrader outputs from 2022 contain relevant information for assessing Evergy’s potential damages, including contemporaneous estimates of potential portfolio effects – i.e., the degree to which changes in generation at Iatan or Lawrence impact generation, revenues, and profits at Evergy’s other generating facilities, including La Cygne and Hawthorn.

10. Evergy has produced outputs for a single PROMOD run conducted in November 2021 with projections for 2022. The PROMOD outputs include market prices, transmission flows, and unit-level generation and profits for every modeled generator.¹³ **Figure 1**, below, depicts the produced PROMOD outputs with generation, capacity, profits, and revenue for Iatan Unit 1 and Unit 2 for a single day and hour.¹⁴ Specifically, as can be seen in columns 3, 4, 6, and 11 for Iatan as an example,¹⁵ these modeling exercises generate – for every single unit owned by or under contract to Evergy, and for every hour of the year under study – expected plant capacity, operating

¹¹ Evergy Inc. et al. v. BNSF Railway Company, Complaint and Petition for Declaratory Order, Before the Surface Transportation Board, Docket No. NOR 42180, January 31, 2024, p. 3.

¹² Evergy Inc. et al. v. BNSF Railway Company, STB Decision, Docket No. NOR 42180, March 3, 2025, p. 8 (citations omitted).

¹³ See, e.g., [BEGIN CUI/PRIV] [END CUI/PRIV]

¹⁴ [BEGIN CUI/PRIV] [END CUI/PRIV]

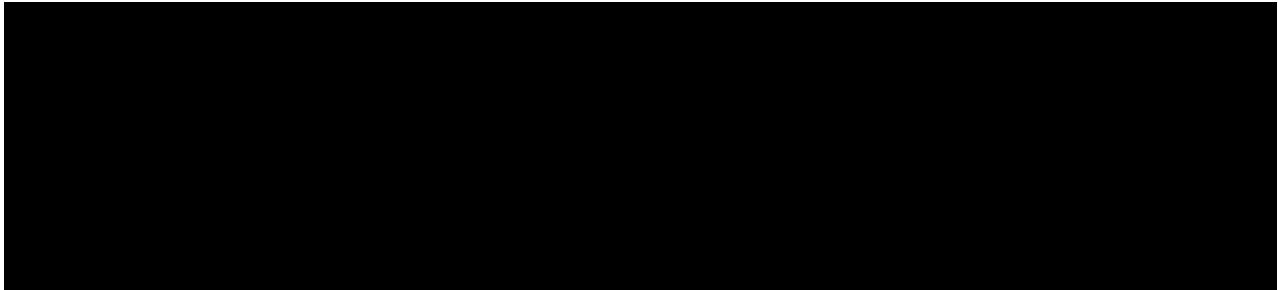
¹⁵ **Figure 1** includes 11 total columns that are delimited by commas. Column numbers were added to the figure for clarity.

Public Version – CUI//PRIV Redacted

level, revenues earned, and net profit (revenues less costs). This same information is available for all other modeled generators, including Lawrence, La Cygne, and Hawthorn.

Figure 1. Example PROMOD Output

[BEGIN CUI/PRIV]



[END CUI/PRIV]

11. By comparing modeled generator profits for two scenarios (one with coal conservation measures and one without), it is possible to directly evaluate Evergy's potential or estimated change in profits due to coal conservation measures. As discussed in my September 26th Declaration, coal conservation measures at Iatan and Lawrence could result in an increase in SPP's market prices and a net increase in revenues and associated energy market profits for Evergy's other power plants. This is true for La Cygne and Hawthorn. But importantly, it is also true for every single other unit owned and operated by or under contract to Evergy, and the operation of every single one of these units is relevant to any evaluation of purported damages.

12. Evergy has also produced information from a single GenTrader run from November 2021.¹⁶ I understand that, like PROMOD, GenTrader is production cost optimization

¹⁶ EVERGY-0087903.g3z.

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software that would similarly contain information on unit-level generation, revenues, and profits and, as such, portfolio impacts from changes in generation at Iatan and Lawrence.¹⁷

III. EVERGY’S EXCUSES FOR NOT PRODUCING CONTEMPORANEOUS PRODUCTION COST MODELING DATA ARE UNREASONABLE

A. All of Evergy’s PROMOD and GenTrader Runs from 2022 Contain Information Related to Coal Generation

13. Evergy has suggested that it does “not have any retained GenTrader or PROMOD run files from 2022 that relate to coal conservation or generation.”¹⁸ This could mean that Evergy failed to retain any modeling files from 2022. It could also mean that Evergy has retained 2022 modeling files, but Evergy has taken a narrow view of what it means for modeling to “relate to coal conservation or generation.”

14. If Evergy has retained PROMOD and GenTrader modeling files from 2022, then these files necessarily contain information related to coal generation, the cost of coal generation, the known and forecasted timing and extent of coal unit dispatch, the revenues earned or forecasted to be earned through coal-fired generation, and how coal generation operations affect the operation and profits of all other (non-coal) generation facilities. Fundamentally, PROMOD and GenTrader are portfolio optimization tools that identify the least-cost generation mix to meet Evergy’s load obligations given Evergy’s entire generation portfolio, including Iatan, Lawrence, La Cygne, and Hawthorn, as well as all other Evergy generating units. As such, every single PROMOD and GenTrader run from 2022 includes information on generation, revenues, and profits for Iatan, Lawrence, La Cygne and Hawthorn, and Evergy’s full generation portfolio, regardless of what purpose the run was created for. Moreover, as described above, Evergy produced documents

¹⁷ PCI Energy Solutions, “Portfolio Optimization,” available at <https://www.pcienergysolutions.com/solutions/energy-trading-and-optimization/portfolio-optimization/>.

¹⁸ February 21, 2025 email from Kelvin J. Dowd to Alex Wolf, Daniel M. Jaffe, and Andrew B. Kolesar III, cc’d Justin Waggoner, Anthony LaRocca, Tara Woods, and Timothy Strafford.

Public Version – CUI//PRIV Redacted

showing that it conducted numerous PROMOD runs in 2022. If Evergy has retained modeling files from any of these PROMOD runs, then those files contain all of this relevant information related to coal generation and/or forecasted coal generation, and from different points of time throughout 2022.

B. Evergy Overstates Its Alleged Burden to Produce Additional Modeling Data

15. Evergy has claimed that any further requests from BNSF for additional information on PROMOD or GenTrader runs would be “overbroad and impose an undue burden on Evergy personnel.”¹⁹ I disagree. Regulated utilities like Evergy are expected to routinely conduct system planning through modeling efforts and produce similar modeling information within the context of public utility commission proceedings. Regulated utilities are often required to retain the underlying information supporting regulatory filings for a period of time (as is the case here).²⁰ In my experience, it would be unusual for a regulated utility to not retain the inputs and outputs of routine system planning exercises (such as PROMOD and GenTrader analyses) for a significant period of time. Moreover, Evergy has already demonstrated that it is feasible to identify and

¹⁹ February 20, 2025 email from Kelvin J. Dowd to Alex Wolf, Daniel M. Jaffe, and Andrew B. Kolesar III, cc’d Justin Waggoner, Anthony LaRocca, Tara Woods, and Timothy Strafford; March 14, 2025 email from Kelvin J. Dowd to Timothy Strafford, cc’d Alex Wolf, Justin Waggoner, Tara Woods, Andrew B. Kolesar III, and Daniel M. Jaffe.

²⁰ For example, Evergy is obligated to preserve all supporting information for its IRPs in Missouri for nine years. This requirement would apply to data and modeling files and results such as those related to PROMOD or GenTrader analyses. Missouri Code of State Regulations, Department of Commerce and Insurance, Division 4240 Public Service Commission, 20 CSR 4240-22.080 (11), available at <https://www.sos.mo.gov/CMSImages/AdRules/csr/current/20csr/20c4240-22.pdf> (“(11) All workpapers, documents, reports, **data, computer model documentation, analysis**, letters, memoranda, notes, test results, studies, recordings, transcriptions, and any other supporting information relating to the filed resource acquisition strategy within the electric utility’s or its contractors’ possession, custody, or control shall be preserved and submitted within two (2) days of its triennial compliance or annual update filings in accordance with any protective order to the staff and public counsel, and to any intervenor within two (2) days of the intervenor signing and filing a confidentiality agreement, for use in its review of the periodic filings required by this rule. All information shall be labeled to reference the sections of the technical volume(s) to which it is related, and all spreadsheets shall have all formulas intact. **Each electric utility shall retain** at least one (1) readable copy of the officially adopted resource acquisition strategy **and all supporting information for at least the prior three (3) triennial compliance filings.**” (emphasis added))

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produce relevant files by producing modeling files for PROMOD and GenTrader runs from November 2021.

16. The PROMOD files that Evergy produced forecast market outcomes for 2022 given a set of 2021 inputs. This production consisted of only 140 files: 35 input files and 105 output files.²¹ The combined size of the produced PROMOD files is only 16.2 GB. Information in these files can be viewed without a PROMOD license.

17. Evergy produced a single GenTrader run conducted in November 2021. The production consists of a single file that also is not large – 118.35 MB. However, unlike PROMOD, it is not possible to open this file without licensing GenTrader. As such, Evergy should also produce .xlsx or .csv versions of all GenTrader inputs and outputs, along with any derivative work products (e.g. spreadsheets or presentations) providing information on GenTrader's outputs.

18. Finally, it should not be difficult for Evergy to identify relevant PROMOD or GenTrader files relatively quickly, to the extent such runs were retained due to regulatory requirements or otherwise exist. Both modeling platforms use specific file extensions that could be readily located through electronic searches.²² Moreover, a single Evergy employee [BEGIN CUI/PRIV] [REDACTED] [END CUI/PRIV], who evidently still works at Evergy, was responsible for all PROMOD modeling runs in 2022 that I have seen in Evergy's production so far.²³

²¹ [BEGIN CUI/PRIV] [REDACTED]
[REDACTED]
[END CUI/PRIV]

²² For PROMOD, these file extensions include .dat, .pff, .rab, .run, .BUS, .CON, .DIA, .DLG, .ERR, .FLO, .FUL, .LIB, .LOD, .LOL, .MLG, and .OUT. For GenTrader, the relevant file extension is .g3z.

²³ See, e.g., [BEGIN CUI/PRIV] [REDACTED]
[REDACTED] [END CUI/PRIV]

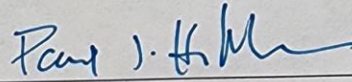
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IV. CONCLUSION

19. The inputs, assumptions, and outputs of any 2022 modeling exercises are relevant to assessing Evergy's damages claims in this matter. The most relevant information is not what Evergy says now about what happened in 2022, but what Evergy was thinking about system planning and operations *contemporaneously*, in 2022, including what data and assumptions it was using. PROMOD and GenTrader data, inputs, and assumptions used by Evergy in 2022 will provide this evidence and help BNSF and the Board evaluate the claims made by Evergy in this case. Moreover, Evergy overstates the burden associated with producing additional PROMOD and GenTrader modeling files that would allow for proper evaluation of Evergy's claims in 2022.

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 blue 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: March 28, 2025

EXHIBIT 1

From: Kelvin Dowd <kjd@sloverandloftus.com>
Sent: Monday, October 14, 2024 11:27 AM
To: Wolf, Alex; Andrew B. Kolesar III; Daniel M. Jaffe
Cc: Strafford, Tim; LaRocca, Anthony; Woods, Tara; Waggoner, Justin
Subject: [EXTERNAL] RE: Evergy, Inc., Et Al. v. BNSF Railway Company, STB Docket NOR 42180

Alex:
Complainants anticipate using PROMOD IV, version 11.1.13.
Regards,
Kelvin

KELVIN J. DOWD
Slover and Loftus LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
kjd@sloverandloftus.com
202,454.4414 (direct)
202.347.7170 (general)

This email may contain confidential information protected by attorney-client or attorney work product privilege. If you are not the intended recipient or believe that you have received this email in error, please call 202.347.7170

From: Wolf, Alex <awolf@steptoe.com>
Sent: Friday, October 11, 2024 6:00 PM
To: Andrew B. Kolesar III <abk@sloverandloftus.com>; Kelvin Dowd <kjd@sloverandloftus.com>; Daniel M. Jaffe <dmj@sloverandloftus.com>
Cc: Strafford, Tim <tstrafford@steptoe.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Woods, Tara <twooods@steptoe.com>; Waggoner, Justin <jWaggoner@steptoe.com>
Subject: RE: Evergy, Inc., Et Al. v. BNSF Railway Company, STB Docket NOR 42180

Counsel:

On October 8, 2024, you disclosed that Complainants will use “the PROMOD IV modeling software in their Opening Evidence.” Please advise us which engine Evergy is using in PROMOD IV—e.g., version 11.3, 11.4, 11.5.

Sincerely,

Alex

Alexander Wolf
Partner



Steptoe LLP | 717 Texas Avenue Suite 2800 | Houston, TX 77002

[+1 713 221 2309](tel:+17132212309) direct | [+1 617 694 9458](tel:+16176949458) mobile | awolf@steptoe.com | www.steptoe.com | [Steptoe Bio](#)

From: Candace Jones <CEF@sloverandloftus.com>

Sent: Tuesday, October 8, 2024 10:28 AM

To: Strafford, Tim <tstraftford@steptoe.com>

Cc: kara.larson@evergy.com; Andrew B. Kolesar III <abk@sloverandloftus.com>

Subject: [EXTERNAL] Evergy, Inc., Et Al. v. BNSF Railway Company, STB Docket NOR 42180

Please find the attached letter from Kelvin J. Dowd, Esq.

This message and any attached documents contain information from the law firm Steptoe LLP that may be confidential and/or privileged. If you are not the intended recipient, please do not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.

EXHIBIT 2

BEFORE THE
SURFACE TRANSPORTATION BOARD

EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	

**COMPLAINANTS' ANSWERS AND OBJECTIONS
TO BNSF'S THIRD SET OF INTERROGATORIES**

Pursuant to 49 C.F.R. § 1114.26, Evergy, Inc. ("Evergy"), Evergy Metro, Inc. ("Evergy Metro") and Evergy Kansas Central, Inc. ("EKC") (collectively "Evergy"), hereby provide these Answers and Objections to the Third Set of Interrogatories ("Interrogatories") that BNSF Railway Company ("BNSF") served on October 31, 2024.

A. GENERAL OBJECTIONS

Evergy hereby incorporates by reference each of the General Objections set forth in its June 24, 2024 Answers and Objections to BNSF's First Set of Interrogatories.

B. SPECIFIC OBJECTIONS AND ANSWERS

INTERROGATORY NO. 36:

Identify every instance in which You employed, used, or conducted an analysis using PROMOD or PCI GenTrader between January 1, 2019 to December 31, 2023.

ANSWER:

Evergy incorporates its general objections, including specifically Nos. 1 and 2. Evergy objects to the Interrogatory as overbroad, unduly burdensome and not proportional to the needs of this matter, particularly insofar as it seeks information regarding “every instance” when an analysis meeting the description in the Interrogatory was conducted. Evergy further objects to this Interrogatory on the ground that it is impossible to provide a substantive Answer to this Interrogatory as propounded because it would require the review of potentially thousands of pages of documents and/or massive amounts of electronic data. Evergy will consider a narrower and modified version of this Interrogatory should BNSF elect to propound one.

INTERROGATORY NO. 37:

For every instance identified in Interrogatory 36, identify the purpose of the analysis, the individuals responsible for conducting the analysis, the modeling software and version number relied upon, the input data files relied upon, and the output data files produced by the analysis.

ANSWER:

Evergy hereby incorporates its Answer to Interrogatory No. 36.

INTERROGATORY NO. 38:

Identify every instance in which You employed modeling software of any type between January 1, 2019 to December 31, 2023 to identify hours in which coal

conservation was actually or potentially required at Your electric generating facilities, calculate associated bid adders, or evaluate potential lost profits.

ANSWER:

Evergy hereby incorporates its Answer to Interrogatory No. 36.

INTERROGATORY NO. 39:

For every instance identified in Interrogatory 38, identify the purpose of the analysis, the individuals responsible for conducting the analysis, the modeling software and version number relied upon, the input data files relied upon, and the output data files produced by the analysis.

ANSWER:

Evergy hereby incorporates its Answer to Interrogatory No. 36.

Respectfully submitted,

By: /s/ Kelvin J. Dowd
Kelvin J. Dowd
Andrew B. Kolesar III
Daniel M. Jaffe
SLOVER & LOFTUS LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 347-7170

Counsel for Complainants

Dated: November 20, 2024

EXHIBIT 3

Timothy Strafford
+1 202 429 8170
tstrafford@Step toe.com

Step toe

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.step toe.com

November 26, 2024

By Email

Mr. Kelvin J. Dowd
Mr. Daniel M. Jaffe
Mr. Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036

Re: *Evergy v. BNSF*, STB Docket NOR 42180

Dear Counsel:

BNSF Railway Company (“BNSF”) writes now to follow up on BNSF’s discovery requests related to historical modeling conducted by Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. (together, “Evergy”). BNSF is still reviewing the documents produced by Evergy—including last week’s re-production—and may have additional questions after we complete our review, but in light of Evergy’s responses and objections to BNSF’s Third Set of Interrogatories and Document Production Requests dated November 20, 2024, we seek further clarification regarding Evergy’s objections and productions to date that relate to Evergy’s historical modeling data.

It is apparent that Evergy has conducted modeling of data directly related to the damages claims that Evergy is asserting in this case in the ordinary course of its business. In addition to PROMOD and PCI GenTrader, there are references in Evergy’s and Southwest Power Pool Corporation’s productions to Evergy’s use of the Opportunity Cost Calculator (“OCC”) to calculate bid adders and to perform modeling functions, and Evergy witnesses have testified regarding Evergy’s use of the Utility Fuel Inventory Model (“UFIM”) to model coal conservation measures.

BNSF has sought discovery of the modeling that Evergy conducted in the normal course of its business. This modeling is highly relevant to Evergy’s claims of damages in this proceeding, and Evergy has even represented to the Surface Transportation Board (“Board”) that it has “not objected to producing documents in response to those of BNSF’s Second Requests that seek data retained by Evergy, Evergy Metro and/or EKC in the ordinary course of business that could bear on the issue of damages.” Evergy’s Reply to Motion to Compel at 12 (filed Oct. 16, 2024). In addition, Evergy stated that it would produce “[d]ocuments sufficient to show the calculations and modeling used for coal inventories at Iatan and LEC (Motion, Exh. 7, Document Response Nos. 67 and 68).” *Id.* at 13. RFP 67 expressly requested documents related to UFIM.

November 26, 2024

Page 2

Thus, BNSF was surprised by Evergy's objection to BNSF's Third Set of Interrogatories and BNSF's document requests relating to Evergy's historical modeling efforts. While Evergy did allow that it would consider a narrower and modified version of the interrogatories and document requests should BNSF elect to propound them, Evergy did not explain why it believes it does not have an obligation to provide a substantive response. Given the direct relevance of the data that BNSF seeks, Evergy's objection seems misplaced. Please explain your objection that "it is impossible to provide a substantive Answer to this Interrogatory as propounded because it would require the review of potentially thousands of pages of documents and/or massive amounts of electronic data."

As this objection appears to contradict Evergy's previous statements about producing documents related to historic modeling, please confirm if Evergy has produced any data files or documentation related to its use of the OCC or UFIM models (RFP 67, 68, and 91).

If so, please direct BNSF to such files in your productions. If Evergy has not produced such files, please clarify if Evergy intends to do so. Please also disclose whether Evergy intends to identify other modeling software that Evergy used during the relevant period.

Finally, in BNSF's November 8, 2024 letter, BNSF asked Evergy to confirm whether Evergy has produced all the data that it intends to produce in response to BNSF's First and Second Set of Document Requests. Evergy has not yet responded to this question.

* * *

We appreciate your prompt attention to the above concerns. If helpful, we are available to confer. We reserve all rights to raise these issues with the Board at the appropriate time.

Sincerely,

/s/ Timothy J. Strafford

Timothy J. Strafford

Timothy Strafford
+1 202 429 8170
tstrafford@Steptoe.com

Steptoe

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
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December 9, 2024

By Email

Mr. Kelvin J. Dowd
Mr. Daniel M. Jaffe
Mr. Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036

Re: *Evergy Inc. et al v. BNSF Railway*, STB Docket NOR 42180

Dear Counsel:

We received your letter dated December 2, 2024, that responds to BNSF's letter of November 26, 2024, regarding BNSF's discovery requests related to Evergy's historical use of economic modeling.

First, you are wrong that the subject of BNSF's request for historical modeling information overlaps with or somehow implicates our separate request, which is the subject of a pending motion to compel, for information on the damages claims that you made in the complaint and that you intend to pursue in your evidence. In your letter, you state that "BNSF appears to be conflating Evergy's production of data retained in the ordinary course of business that could relate to the calculation of damages in this case with the execution of production cost models for internal purposes as well as in connection with the preparation of Evergy's Opening Evidence in this case." To the contrary, the modeling information that is the subject of BNSF's November 26, 2024, letter relates to *historical* data and information actually used and generated for internal business purposes during the relevant time period. Regardless of how the STB resolves the pending motion to compel, this data and information is directly relevant to the claims you have made in this proceeding, and BNSF is clearly entitled to this information in discovery. BNSF is entitled to discovery, before the submission of the parties' evidence to the Board, concerning whatever production cost modeling or other analysis supports the damages Evergy claims in its complaint. But irrespective of whether the Board accepts that contention and grants BNSF's motion, there is no question that BNSF is entitled to discovery concerning historical modeling. Such information will allow BNSF to test whether the assumptions and inputs used in whatever modeling Evergy ultimately presents to the Board in support of its damages calculation deviate from those that Evergy used for ordinary business purposes, since such deviation would bear upon the reliability of whatever modeling exercise supports Evergy's damages calculation.

Second, BNSF's November 26 letter noted that there are references in Evergy's and Southwest Power Pool Corporation's productions to Evergy's use of the Opportunity Cost Calculator

December 9, 2024

Page 2

(“OCC”), and that Evergy witnesses have testified regarding Evergy’s use of the Utility Fuel Inventory Model (“UFIM”). Both models are used to assess coal conservation measures, including the potential costs of conserving coal. Your December 2, 2024 letter conspicuously ignores both models and the historical information that relates to Evergy’s use of those models during the relevant time period. Instead, your letter identifies two documents—[REDACTED] and [REDACTED]—as examples of produced documents related to modeling coal inventory. [REDACTED], the third page of [REDACTED], does not appear to be data related to coal inventory management. While [REDACTED] references UFIM, it clearly is not a UFIM run. As to the OCC model, Evergy produced documents that reference the OCC, but it does not appear that Evergy has produced any of the runs of the OCC that were conducted during the ordinary course of business during the relevant time period or any of the input assumptions used to generate OCC results. We cannot see any justification for withholding this information. Unlike the PROMOD and related models discussed below, these models were used for discrete purposes, during limited time periods, and relate directly to the damages claims Evergy has made in this case. We repeat our request that you fully comply with our requests for disclosure of information relating to Evergy’s use of those models during the relevant time period.

Third, with regard to production cost modeling, including your use of the PROMOD model and other related models, your response letter reiterates Evergy’s position that “the sheer number of model runs and enormous volume of related data falling within the temporal terms and broad descriptions in the requests make substantive responses virtually impossible.” We understand that Evergy uses production cost models for a number of different business purposes. Indeed, precisely because Evergy’s use of those production cost models is so important to Evergy’s business, the information relating to those models we are requesting is likely to be highly relevant in assessing the damages claims Evergy intends to make in this case and is therefore clearly discoverable. Evergy’s refusal to date to provide *any* of this modeling is unreasonable and inconsistent with BNSF’s due process rights. However, without conceding the validity of your burden assertion, we recognize the possibility that Evergy’s widespread use of those models in the ordinary course could create burdens in producing all information relating to them. Therefore, BNSF proposes that the parties meet and confer by the end of this week regarding the appropriate parameters that would allow a timely response by Evergy. In the interim, Evergy should produce samples of the requested production to assist us with evaluating the range of inputs and assumptions Evergy has employed in performing such modeling.

BNSF reserves all rights to raise these issues with the Board at the appropriate time, although we hope that will not be necessary. We appreciate your prompt attention to the above concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Strafford", is written over a light blue horizontal line.

Timothy J. Strafford

EXHIBIT 4

From: Kelvin Dowd <kjd@sloverandloftus.com>
Sent: Friday, February 21, 2025 5:41 PM
To: Wolf, Alex; Daniel M. Jaffe; Andrew B. Kolesar III
Cc: Waggoner, Justin; LaRocca, Anthony; Woods, Tara; Strafford, Tim
Subject: [EXTERNAL] RE: NOR 42180 - meet and confer

Good evening, Alex:

After further internal review, we can confirm that Evergy does not have any retained GenTrader or PROMOD run files from 2022 that relate to coal conservation or generation. The [REDACTED] PROMOD run that you referenced in your request apparently was performed by a former Evergy employee, and the inputs/outputs have not been retained. After reasonable inquiry, Evergy was not able to determine the reason for the run or the hypothetical inputs used.

Please let us know if you have any questions or would like to confer.

Regards,
Kelvin

KELVIN J. DOWD
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From: Wolf, Alex <awolf@steptoe.com>
Sent: Thursday, February 20, 2025 2:21 PM
To: Kelvin Dowd <kjd@sloverandloftus.com>; Daniel M. Jaffe <dmj@sloverandloftus.com>; Andrew B. Kolesar III <abk@sloverandloftus.com>
Cc: Waggoner, Justin <jWaggoner@steptoe.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Woods, Tara <twoods@steptoe.com>; Strafford, Tim <tstrafford@steptoe.com>
Subject: RE: NOR 42180 - meet and confer

All,

Just following up on the below.

Thanks,
Alex

From: Wolf, Alex
Sent: Friday, February 14, 2025 3:30 PM
To: 'Kelvin Dowd' <kjd@sloverandloftus.com>; 'Daniel M. Jaffe' <dmj@sloverandloftus.com>; 'Andrew B. Kolesar III' <abk@sloverandloftus.com>
Cc: Waggoner, Justin <jWaggoner@steptoe.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Woods, Tara <twoods@steptoe.com>; Strafford, Tim <tstrafford@steptoe.com>
Subject: RE: NOR 42180 - meet and confer

Counsel,

We received Evergy's 12th production of documents on January 29, 2025, which we understand contains input and output files for a PROMOD run from [REDACTED], and a GenTrader run on [REDACTED]. In our December meet and confer, Evergy agreed to produce a sample of input and output files from PROMOD and PCI GenTrader runs in **2022** that were related to coal conservation and/or generating decisions. We have not seen these materials. Can you please let us know the status of them? In particular, we'd like to receive the [REDACTED] PROMOD run that we see reference to in Evergy's produced materials.

Now that you have a better understanding of how Evergy maintained its historical runs and how to produce them, what is your position on producing additional runs from 2022?

Additionally, related to our discussion of the UFIM runs during this time period, could you please produce information/documents sufficient to understand the basis for, and replicate the calculation of, the target inventory figures for Iatan and Lawrence that are referenced in EVERGY-0014393, under the "k-Targets" tab?

Regards,
Alex

From: Kelvin Dowd <kjd@sloverandloftus.com>
Sent: Wednesday, December 18, 2024 1:09 PM
To: Strafford, Tim <tstrafford@steptoe.com>; Daniel M. Jaffe <dmj@sloverandloftus.com>; Andrew B. Kolesar III <abk@sloverandloftus.com>
Cc: Waggoner, Justin <jWaggoner@steptoe.com>; Wolf, Alex <awolf@steptoe.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Woods, Tara <twoods@steptoe.com>
Subject: [EXTERNAL] RE: NOR 42180 - meet and confer

Tim:
Thank you for your email.
We agree that it is a generally accurate rendition of the substance of our discussion, and we have initiated steps to investigate the availability of the information and/or documents and data that we agreed to address with our client. We will keep you posted on our progress.
Best regards,
Kelvin

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From: Strafford, Tim <tstrafford@steptoe.com>
Sent: Wednesday, December 18, 2024 1:53 PM
To: Kelvin Dowd <kjd@sloverandloftus.com>; Daniel M. Jaffe <dmj@sloverandloftus.com>; Andrew B. Kolesar III <abk@sloverandloftus.com>
Cc: Waggoner, Justin <jWaggoner@steptoe.com>; Wolf, Alex <awolf@steptoe.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Woods, Tara <twoods@steptoe.com>
Subject: NOR 42180 - meet and confer

Kelvin,

Thank you for meeting with us yesterday. This email memorializes our conversation and follows up on a few of the items we discussed.

First, we covered the production cost modeling that Evergy conducted in the ordinary course of business during the relevant time period. You confirmed that Evergy has not produced any of the input and output files associated with the production cost models, PROMOD and PCI GenTrader, based on Evergy's objections due to the burden associated with volume of runs and the size of the data files. We asked you explain the burden associated with identifying the model runs and collecting the files related to them. You indicated that you did not know the number of times the models were run in the relevant time period and that Evergy may not have retained the input and output data related to the runs of the models. Following up, we asked about the quantity and practice of maintaining the past runs and the data related to them. You agreed to follow up with your client about retention of input and output files beyond your previous, initial query that indicated that Evergy may not have retained the data. You also agreed to produce a sample of input and output files from PROMOD and PCI GenTrader from 2022 related to coal conservation and/or generating decisions pending input from your client.

With regard to other modeling, we discussed both the Opportunity Cost Calculator ("OCC") and the Utility Fuel Inventory Model ("UFIM"). With regard to the OCC, you indicated that the Southwest Power Pool ("SPP") runs the OCC and that your understanding is that the only input to the OCC that Evergy provides to SPP is [REDACTED], regarding which you have produced responsive documents and data. We explained our understanding based on previously produced documents and publicly available sources that Evergy provides other inputs to SPP, including [REDACTED] among others. You agreed to follow up with your client and report back to us whether you have produced the inputs we have requested. Regarding UFIM, you stated that you have asked your client about UFIM runs. You indicated that if your client possesses the data, you will produce it subject to a reasonable burden limitation.

We also asked about power purchase agreements. You stated that you believe such information may be contained in annual reports or in reports to the Securities and Exchange Commission, but that you will inquire with your client regarding whether such agreements exist for 2022.

You asked if BNSF had finished production, and we stated that BNSF has substantially completed production, but that BNSF may produce additional documents if relevant documents become available. You confirmed that Evergy is in the same position.

We look forward to hearing back from you on the above listed items.

Regards,
Tim

Timothy Strafford

Partner

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Partner

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EXHIBIT 5

From: Kelvin Dowd <kjd@sloverandloftus.com>
Sent: Friday, March 14, 2025 9:16 AM
To: Strafford, Tim
Cc: Wolf, Alex; Waggoner, Justin; Woods, Tara; Andrew B. Kolesar III; Daniel M. Jaffe
Subject: [EXTERNAL] Meet and Confer Follow Up

Good morning, Tim:

This responds to your March 10 email summary of our meet-and-confer earlier that day in connection with the STB's March 4 Decision on BNSF's Motion to Compel in NOR 42180. In many respects, your summary is an accurate rendition of the substance of our discussion. However, there are a few points on which we apparently differ and others that can use some clarification.

1. We confirm that Evergy will produce generation revenue information for all Evergy stations, but we remind BNSF that the data is collated by operating company, not by individual plant. With respect to rail service to Hawthorn and La Cygne in 2022, some of the information to be produced will come through the removal of redactions from previously produced documents. Other information will be in the form of new production. And as we advised during our meeting, there will be minor redactions of terms applicable to service to the Jeffrey Energy Center in the contract between Evergy and Union Pacific Railroad.

2. The documents to be produced regarding service from other railroads in 2022 will include contracts (subject to the Jeffrey redactions noted above), coal nominations, delivery information and communications with the other carriers. [REDACTED]

[REDACTED] Evergy will produce cycle time and coal unloading documents to the extent that they can be located upon reasonable search in the time allotted.

3. We did not agree to produce additional documents related to the Utility Fuel Inventory Model. What we agreed to do is inquire as to the source of the target inventory figures in the "k-target" tab of document EVERGY-0014393, per Alex Wolf's request on February 14, 2025. [REDACTED]

[REDACTED] There are no separate documents showing the calculation of those figures. With respect to Hawthorn in 2022, we are advised that an Evergy-determined price adder was applied to Hawthorn generation [REDACTED]. However, the SPP Market Monitor was not consulted and [REDACTED].

4. You are correct that Evergy's production in response to Document Request No. 58 was limited to documents sufficient to show the information described in the Request, and we do not plan to supplement that production.

5. We confirm, as we previously advised, that Evergy does not have retained inputs and outputs for any PROMOD runs executed in 2022 for purposes related to coal conservation or generation planning. During our meeting, we speculated that Evergy might have retained data for PROMOD runs executed for other purposes, but we have no actual knowledge that this is the case. We also confirm, as we advised on February 20, that the time and effort expended in producing the sample PROMOD and GenTrader runs that were provided on January 29 confirmed that any requests for multiple additional runs would be overbroad and unduly burdensome.

6. We have been advised that the purpose of the 2021 sample PROMOD run produced on January 29 was related to budgetary planning. With respect to the [REDACTED] PROMOD run that BNSF referenced and we addressed previously, we did not agree to identify the former Evergy employee who executed it. To the contrary, when Justin explained that the identification could assist BNSF in discovering other 2022 runs, we explained that Evergy already had determined that there were no retained inputs and outputs for any conservation or generation planning PROMOD runs executed by anyone at Evergy in 2022.

7. We are looking into the reason why certain produced coal inventory and stockpile documents appear to include data that stops at the end of the Summer of 2022, and will advise you once our inquiry is completed.

8. We plan to complete Evergy's supplemental production by April 3. With respect to your final reference to GenTrader, as we advised on February 20 Evergy will not be producing any additional GenTrader runs. We can confirm, however, that [REDACTED] in connection with coal conservation or generation planning at any Evergy station.

All supplemental production will be limited to non-privileged documents or information and will be designated as Highly Confidential under the governing Protective Order.

Please let us know if you have any questions.

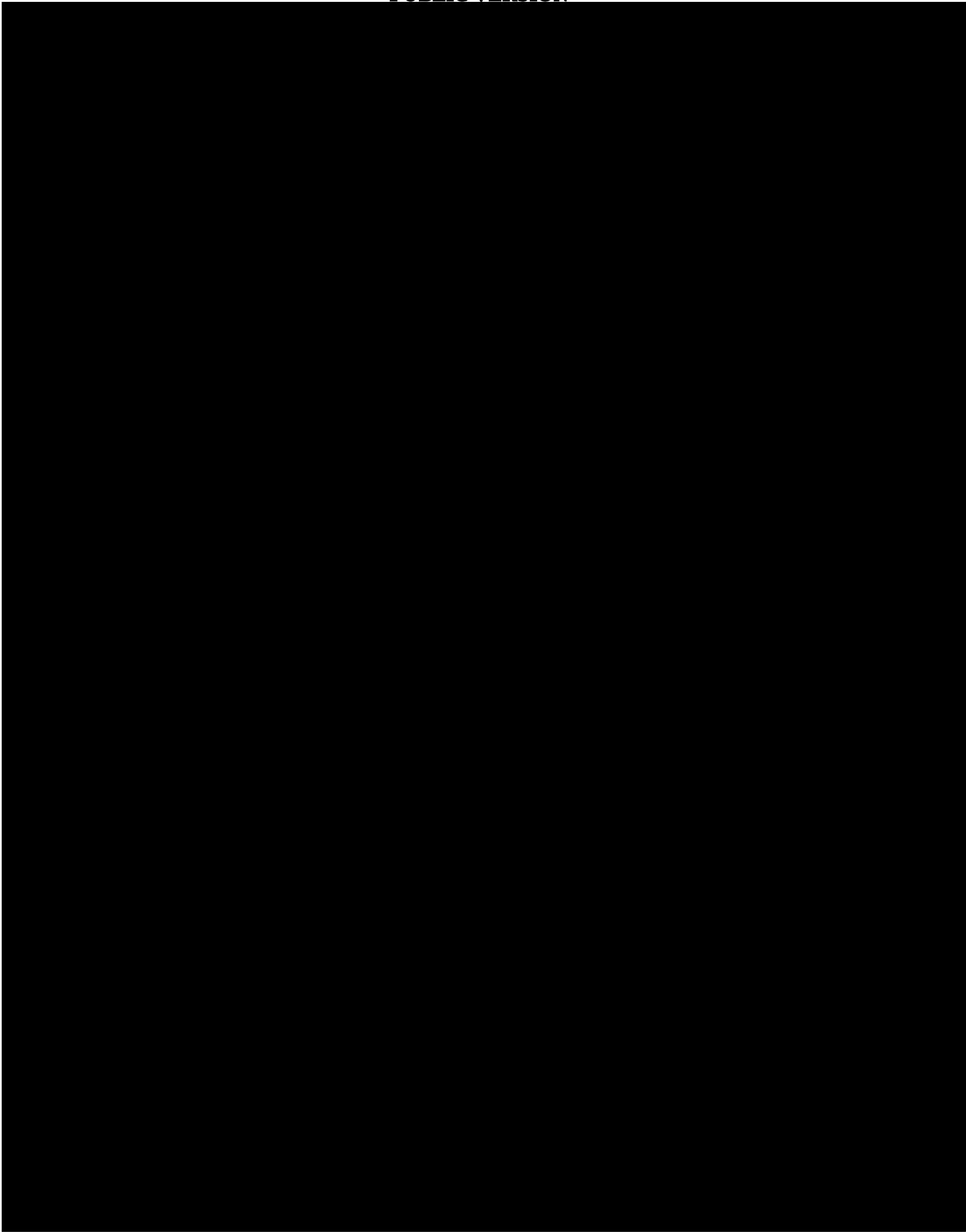
Regards,

Kelvin

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EXHIBIT 6



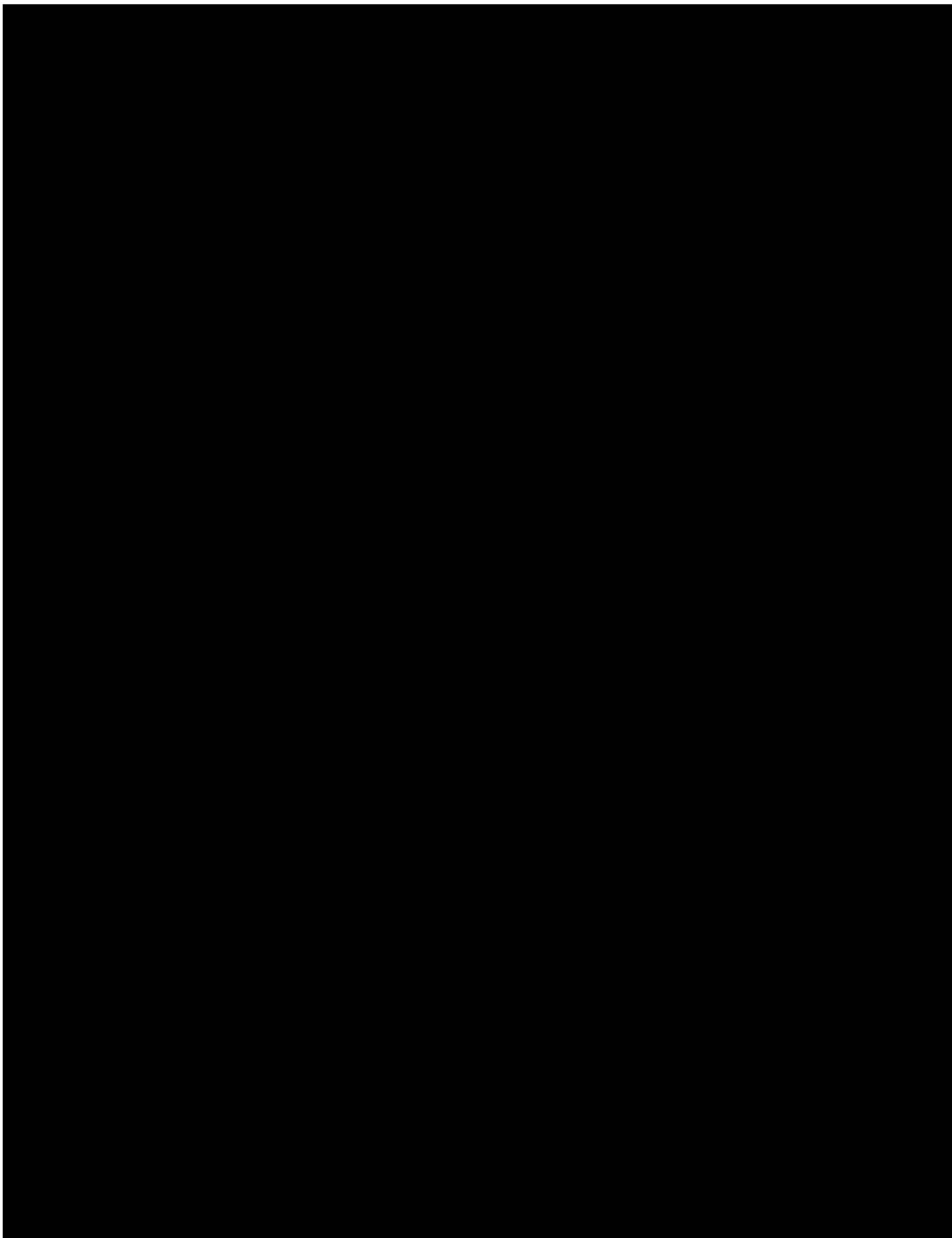


EXHIBIT 7

EXHIBIT 8

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Defendant.

[illegible]

Docket No. NOR 42180

*Attorneys for Evergy, Inc.,
Evergy Metro, Inc. and
Evergy Kansas Central, Inc.*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	

REPLY TO MOTION TO COMPEL

Pursuant to 49 C.F.R. §§ 1114.13 and 1114.31(a)(1), Complainants Evergy, Inc. (“Evergy”), Evergy Metro, Inc. (“Evergy Metro”) and Evergy Kansas Central, Inc. (“EKC”), hereby reply in opposition to the Motion to Compel (“Motion”) filed by Defendant BNSF Railway Company (“BNSF”) on September 26, 2024. Through overlong rhetoric that ignores relevant Board regulations and case law, BNSF seeks to violate well-established protections of the attorney-client and attorney work-product privileges, engage in a fishing expedition into Complainants’ commercial relationships with other rail carriers, and distort the current status of discovery in this case. In the process, BNSF inflates the matters in dispute to absurd proportions and tries to secure an extraordinary litigation advantage and procedural delay by tripling the allocated time for

the presentation of its Reply Evidence. The Motion is without merit and should be denied.

BACKGROUND

Evergy, Evergy Metro and EKC filed their Complaint in this proceeding on January 31, 2024, alleging violations by BNSF of three federal statutory provisions in connection with the provision of common carrier coal transportation service to Evergy Metro's Iatan Generating Station ("Iatan") and to EKC's Lawrence Energy Center ("LEC") (49 U.S.C. §§ 11101(a), 10702(2) and 11121(a)(1)), and seeking both an award of damages and limited declaratory relief. In accordance with the Board's regulation at 49 C.F.R. § 1111.2(a), the Complaint "set forth briefly and in plain language the facts on which it is based..." and included specific references to the statutory provisions alleged to have been violated. The Complaint also included a preliminary estimate of the measure of economic damages attributable to BNSF's violations. Obviously, however, the averments in the Complaint were not the equivalent of an evidentiary showing on the merits; the entire purpose of the procedure and related schedule adopted by the Board in this case is to allow for the development and presentation of evidence by Complainants in support of its claims (and for BNSF to respond). Likewise, the presence of a damages estimate in the Complaint did not imply the existence of a fully-developed set of calculations and supporting workpapers. As with the averments related to liability, Complainants' showing on damages would be a work-in-progress until the submission of Complainants' Opening Evidence.

On May 24, 2024, BNSF served its First Set of Interrogatories and First Set of Document Requests.¹ BNSF propounded twenty-five (25) Interrogatories and forty-eight (48) Document Requests, many of which had multiple sub-parts. In their Answers and Responses served thirty (30) days later,² Complainants raised several general objections – including a standard objection to providing Answers or producing documents covered by the attorney-client or attorney work-product privileges – and in a number of cases interposed specific objections to an Interrogatory’s or Document Request’s substantive or temporal scope. For the most part, however, in the latter instances Complainants also agreed to provide responsive information and/or documents.³ In response to several other Requests which were either vaguely worded or so overbroad as to be prohibitively burdensome to respond to substantively, Complainants offered to confer with BNSF and/or to reconsider their objections if BNSF reasonably narrowed the scope of the Request.⁴ There were two (2) types of BNSF discovery inquiries, however, where Complainants objected to providing answers or documents entirely: (1) Interrogatories and Document Requests that asked for the identities of individuals who might appear as witnesses in the context of Complainants’ Opening Evidence or sought disclosure of Complainants’ work-in-progress with respect to the calculation of damages; and (2)

¹ See Motion, Exh. 2. For convenience, Complainants will refer to the discovery documents exchanged thus far by the Exhibit numbers used in BNSF’s Motion.

² Motion, Exh. 3.

³ See, e.g., Motion, Exh. 3, Interrogatory Answer Nos. 13 through 18, and Document Response Nos. 1, 3, 5-8, 15, 17-20, 25 and 27.

⁴ See, e.g., *id.*, Document Response Nos. 23, 24, 26, 30 and 31.

Interrogatories and Document Requests that sought information and documents related to Evergy Metro's or EKC's commercial dealings with rail carriers other than BNSF, including as much as two (2) years prior to 2022, the year that the events giving rise to the Complaint occurred.⁵

In response to BNSF's request (Motion, Exh. 4), counsel for the parties met and conferred regarding certain of Complainants' objections to BNSF's First Set of Interrogatories and First Set of Document Requests. The discussion covered both Complainants' expressed concerns over the broad scope of some of BNSF's discovery inquiries (which counsel for BNSF agreed to reconsider) and Complainants' objections to providing BNSF with a "preview" of its evidence on the merits of the case – including work-in-progress on the issue of damages – and their opposition to producing information and documents related to dealings with BNSF's competitors concerning coal transportation to generating stations other than those that are the subject of the Complaint. Significantly for purposes of its Motion, BNSF took no formal action with respect to Complainants' continuing objections within the time period set in the applicable Board regulation. *See* 49 C.F.R. § 1114.31(a).

On August 15, 2024, BNSF served a Second Set of Interrogatories and a Second Set of Document Requests (Motion, Exh. 6). In their Answers to eight (8) of the ten (10) new inquiries, Complainants either answered substantively or agreed to produce

⁵ *See, e.g., id.*, Interrogatory Answer Nos. 2-9, and 19, and Document Response Nos. 2, 9-14, 16, and 36-39.

responsive documents. Complainants objected entirely to only two (2): a request for information as to how any “price adders” applied by Evergy to its Southwest Power Pool (“SPP”) offer prices for generation impacted Evergy’s profits, and a request to disclose any “modeling software” that Complainants “anticipate using” in their Opening Evidence.⁶ Of the forty (40) additional Document Requests propounded by BNSF (many of which had multiple sub-parts), Complainants either agreed to produce responsive documents or pointed to documents being provided in response to earlier, redundant Requests in response to twenty-seven (27), and raised objections to production with respect to thirteen (13). These objections related to two (2) subject areas: documents related to commercial dealing with and service provided by rail carriers other than BNSF with respect to destinations other than those that are the subject of the Complaint,⁷ and requests for a documentary “preview” of Complainants’ work-in-progress on the issue of damages.⁸

Complainants served their Answers and Objections to BNSF’s Second Set of Interrogatories and Responses and Objections to BNSF’s Second Set of Document

⁶ See Motion, Exh. 7, Answer to Interrogatory Nos. 27 and 34. As to the former, Complainants did *not* object to producing documents and data showing the price adders that were applied during 2022. *Id.*, Document Response No. 52. Moreover, as referenced *infra*, on October 8 and 15, 2024, Complainants supplemented their prior response to Interrogatory No. 34, thereby rendering any dispute over that inquiry moot.

⁷ See *id.*, Document Response Nos. 50, 56, 59, 60, 62, 65, 70, 76 and 88.

⁸ *Id.*, Document Response Nos. 67, 77, 81, 86 and 89. The objection to Request No. 77 related to generation revenues at other Evergy operating stations relative to those for the stations at issue in the Complaint. BNSF will be provided with recorded revenue data for the other stations in response to Request No. 79.

Requests on September 16, 2024. BNSF did not propose to meet and confer with respect to Complainants' Answers and Responses. Instead, it simply filed its Motion on September 26, 2024, advising Complainants' counsel of the filing by email the previous evening.

ARGUMENT

A. ONLY COMPLAINANTS' OBJECTIONS TO BNSF'S SECOND SET OF DISCOVERY REQUESTS ARE PROPERLY BEFORE THE BOARD

BNSF's Motion describes in broad terms the *subject matter* of the discovery requests as to which it seeks an order compelling production by Complainants, but it does not specially identify which particular Interrogatories and Document Request are at issue. BNSF included both sets of its Interrogatories and Document Requests as Exhibits to the Motion, and in various places implied that all of them are properly before the Board.⁹ However, the Board's regulations clearly provide that only Complainants' objections to BNSF's second sets of requests can be challenged through the Motion.

49 C.F.R. § 1114.31(a) states that a motion to compel responses to discovery requests "must be filed with the Board and served on all parties ... within 10 days after the failure to obtain a responsive answer ... or within 10 days after expiration of the period allowed for submission of answers...". While the plain language of the rule refers

⁹ For example, in footnote 1 to the Motion BNSF refers to the parties' conference on July 22, 2024 as encompassing "the discovery at issue," and on page 9 decries Complainants' "failure to produce any of the requested data," clearly indicating all of the discovery requests to which Complainants have objected.

to interrogatories and deposition questions, the Board consistently has applied it to document production requests as well. *See, e.g., Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas and Missouri Railroad Company*, STB Docket AB-103 (Sub-No. 14) (STB served January 11, 1999). Unless parties to a proceeding agree to a longer time or the proponent of the motion requests an extension in advance, the 10-day rule has been strictly enforced. *Id.* at 2 (motion rejected when it was filed two (2) days after expiration of the 10-day period).

Whether measured from the date of Complainants’ responses and objections to BNSF’s first sets of discovery requests (June 24, 2024) or the date of the parties’ only meet-and-confer (July 22, 2024), BNSF’s Motion was filed well past the due date prescribed in 49 C.F.R. § 1114.31(a), and BNSF neither sought Complainants’ consent for a late filing nor made a request to the Board for an extension. By rule and precedent, BNSF has waived any right to move to compel answers or documents in response to its First Set of Interrogatories or First Set of Document Requests.¹⁰

Considering the subject matter of BNSF’s arguments in its Motion and Complainants’ responses and objections to BNSF’s Second Set of Interrogatories and Second Set of Document Requests, the disputed discovery requests now properly before

¹⁰ Following the parties’ July 22, 2024 conference, BNSF on August 5, 2024 served amended versions of its First Set of Interrogatories and First Set of Document Requests, to which Complainants responded on September 5, 2024. The Motion does not make reference to these amended requests, but 49 C.F.R. § 1114.31(a) would bar any motion to compel with respect to them as well.

the Board are limited to the following: Interrogatory No. 27 and Document Request Nos. 50, 56, 59, 60, 62, 65, 67, 76, 77, 81, 86, 88 and 89.

B. THE GOVERNING LEGAL STANDARDS

The Board's rules allow for discovery "regarding any matter, *not privileged*, which is relevant to the subject matter" of a formal proceeding. 49 C.F.R. § 1114.21(a) (emphasis supplied). Though relatively broad, the scope of permissible discovery is not unlimited. The Board requires "more than a minimal showing of potential relevancy" before granting a motion to compel discovery. *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket NOR 42123 (STB served Nov. 24, 2010) at 2; *Potomac Electric Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292 (1997). In addition to showing that the requested information is relevant, a party must "demonstrate a real, practical need" for the requested information. *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket NOR 42121 (STB served Nov. 24, 2010) at 2. The "practical need" requirement means that discovery requests cannot be "used for a general fishing expedition" or to make demands on a party's internal processes that may only be tangentially related to the dispute(s) in question. *See Duke Energy Corp. v. Norfolk So. Ry. Co.*, STB Docket NOR 42069 (STB served July 26, 2002) at 4; *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket WCC-104 (STB served Oct. 27, 2000) at 6.

In addition to the forgoing, the Board has rejected attempts to discover information "designed to identify and limit the scope of [the] case-in-chief in advance" of the opening evidence or otherwise seek to "preview" an opponent's case while it is still in development. *Capitol Materials, Inc. – Pet. For Declaratory Order – Certain Rates and*

Practices of Norfolk So. Ry. Co., STB Docket NOR 42068 (STB served Apr. 19, 2002) at 4; *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket NOR 42038 (STB served May 11, 1999) at 4.

Properly considered under governing law and Board principles, BNSF's Motion to compel additional responses to its Second Set of Interrogatories and Second Set of Document Requests should be denied.

C. COMPLAINANTS SHOULD NOT BE COMPELLED TO PRODUCE PRIVILEGED WORK-PRODUCT OR PREVIEW THEIR CASE PRIOR TO FILING THEIR OPENING EVIDENCE

The central theme of BNSF's Motion presumes that Evergy has in hand something akin to a fully developed evidentiary case on the damages which it experienced as a result of BNSF's statutory violations, and that BNSF has some sort of entitlement to receive that "case" many months before the due date for Complainants' Opening Evidence under the governing procedural schedule. *See* Motion at 11. BNSF is wrong on both counts.

As a veteran defendant in Surface Transportation Board complaint proceedings, BNSF is well aware that a complainant's initial filing contains averments that describe the nature of the substantive claims (including damages) at issue and an outline of the facts that would support them. However, the averments are not conclusions based on evidence that is already fully developed and ready for presentation; they are a representation of what the complainant *intends* to show once discovery is concluded and the complainant's case-in-chief is submitted. It seems too obvious to have to state that the reason why cases have procedural schedules in the first place is to allow for this kind

of evidentiary development. And it is particularly noteworthy that BNSF had the Complaint in this case in hand when it agreed to the current procedural schedule.¹¹

The Board's general discovery standard in 49 C.F.R. § 1114.21(a) allows for the discovery of information and/or documents that are "not privileged," and are related to a matter before the Board. It is well-settled that attorney-client and attorney work-product privileges are recognized in proceedings before the Board, and that "[d]ocuments protected by these privileges are never disclosed to other parties or to the Board," unless the privilege is waived (which has not occurred in this case). *Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin*, STB Docket FD 33407 (STB served Sept. 21, 2006) at 2. *See also FMC Wyoming Corp., Et Al. v. Union Pacific Railroad Co.*, STB Docket No. 42022 (STB served Feb. 5, 1998) at 3-4. The privileges apply both to activities in preparation for litigation and to communications and work-product during the course of that litigation. *See, e.g., U.S. v. Deloitte LLP*, 610 F.3d 129, 134-35 (D.C. Cir. 2010) (citing *Hickman v. Taylor*, 329 U.S. 495, 512 (1947)); *Paducah & Louisville Ry., Inc. – Acquisition and Operation Exemption – Illinois Cent. R. Co.*, STB Docket FD 30891, 1988 WL 224299 *2-3 (1988). In response to the BNSF Interrogatories and Document Requests that properly are the subject of the Motion, Complainants asserted a general objection to producing answers or documents that are

¹¹ BNSF suggests that it only agreed to the schedule because it assumed that it would be given a preview of Complainants' privilege-protected case preparations. Motion at 12 n.8. Given BNSF's extensive experience as a litigant before the Board, it is hard to take such a suggestion seriously.

covered by privileges, as well as specific objections related to BNSF's efforts to obtain a "preview" of Complainants' case-in-chief (discussed *infra*). See Motion, Exh. 3 and 7 (Complainants' General Objection No. 2).

The work-in-progress Interrogatories and Document Requests to which Complainants entirely objected all seek information protected by the attorney-client and/or attorney work product privileges. Interrogatory No. 27 asks for an explanation of how the application of a "price adder" to Evergy's SPP generation offer prices in 2022 impacted Evergy's profits. Evergy's lost opportunity attributable to BNSF's violation of 49 U.S.C. § 11101(a) are a legitimate category of recoverable damages,¹² and the preparation of evidence to support such a claim plainly involves attorney work-product.¹³

The same is true of BNSF's work-in-progress Document Requests. Request Nos. 81, 86 and 89 all seek documents and data that Complainants have used or are using to prepare their Opening Evidence, all with the assistance or under the direction of counsel. It is difficult to imagine a better definition of a request for attorney work-product than one which seeks "all data input, topology files, and assumptions...that You anticipate using in Your opening evidence due on December 24, 2024." See Motion, Exh. 6, Document Request No. 86. Through its Motion, BNSF argues for an order compelling Complainants to produce documents and data that is protected by attorney-client and

¹² See, e.g., *Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co.*, 5 I.C.C. 2d 542, 548-49 (1989).

¹³ Complainants have not objected to producing documents showing the price adders that Evergy actually applied during 2022. See Motion, Exh. 7, Document Response No. 52.

attorney work-product privileges. As a matter of law, BNSF is not entitled to such an order. *Dakota, Minnesota & Eastern Railroad Corp., supra*, at 2.

BNSF likewise is not entitled to a “preview” of Complainants’ case-in-chief through the discovery process. *See Capitol Materials Incorporated, supra*, at 4; *Minnesota Power, supra*, at 4. BNSF argues that *Minnesota Power* is not applicable to this case because its ruling was predicated on the complainant’s need to rely on discovery from the railroad defendant in order to prepare its case. Motion at 14. However, no such limitation appears in the actual language of the Board’s decision. To the contrary, the Board in *Minnesota Power* rejected the defendant’s request for a preview for reasons “[a]part from the fact that MPI will not know exactly what its case will look like” until it obtained discovery. *Id.* at 4 (emphasis supplied). The actual basis for the ruling was the fact that once the complainant completed its case preparations and filed its evidence, the defendant would have a fair opportunity to respond. BNSF will have the same opportunity in this case.¹⁴ Complainants are entitled to prepare their case-in-chief without unwarranted intrusion into the privileged process of evidentiary development.

It bears emphasis that Complainants have *not* objected to producing documents in response to those of BNSF’s Second Requests that seek data retained by Evergy, Evergy Metro and/or EKC in the ordinary course of business that could bear on the issue of damages. More specifically, Complainants have agreed to produce:

¹⁴ As shown in Part E, *infra*, BNSF’s exaggerated arguments for a tripling of the time currently allotted for the submission of its Reply Evidence are without merit.

1. Documents sufficient to show communications with the SPP Market Monitor related to coal conservation measures in 2022 (Motion, Exh. 7, Document Response No. 49).
2. Documents related to communications with SPP in 2022 regarding BNSF rail service (if they exist) (Motion, Exh. 7, Document Response No. 50).
3. Documents sufficient to show all coal conservation measures applied by Evergy in 2022 (Motion, Exh. 7, Document Response Nos. 52 and 53).
4. Documents related to outages at Iatan or LEC or limitations on coal deliveries to those stations (Motion, Exh. 7, Document Response Nos. 54 and 55).
5. Documents sufficient to show the calculations and modeling used for coal inventories at Iatan and LEC (Motion, Exh. 7, Document Response Nos. 67 and 68).
6. Documents sufficient to show the amounts of coal reclaimed from inventories and burned at Iatan and LEC in 2022 (Motion, Exh. 7, Document Response No. 71).
7. Resource Adequacy Requirement filings submitted to SPP for each Load Responsible Entity in the Evergy System over the 2020-2023 time period (Motion, Exh. 7, Document Response No. 83, which duplicated Document Request No. 28).
8. Documents sufficient to show how any approved reduction in coal generation output from Iatan or LEC was approved by the SPP Market Monitor (Motion, Exh. 7, Document Response No. 84).

Complainants also did not object to BNSF's efforts to seek third-party discovery from SPP, the potential source of hourly system operations data, member price offers, and other information that BNSF included in its Second Set of Document Requests (Motion, Exh. 7, Document Response Nos. 78, 79 and 85).¹⁵

¹⁵ See the Board Decision served in this proceeding on September 24, 2024, at 3.

Complainants’ production objections are to the BNSF requests that would intrude into a continuing evidentiary preparation process protected by the attorney work-product privilege, by seeking access to ongoing internal analyses associated with the preparation of Complainants’ case-in-chief.¹⁶ As the Board has held in analogous contexts, a party in BNSF’s position that is provided access to requested data is entitled to conduct its own analysis, but does not have a right to internal analyses being conducted by the producing party, or information protected by privilege. *See Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(E) – CSX Transp., Inc. and Norfolk Southern Ry. Co.*, STB Docket FD 36496 (STB served July 22, 2022) at 3 (access to an internal Norfolk Southern analysis was denied because “Amtrak already has access to the underlying data...from which its experts could calculate” the analytic product at issue). *See also Dakota, Minnesota & Eastern, supra*, at 2 (attorney work-product is “never disclosed to other parties or to the Board...”); *FMC Wyoming, supra*, at 4 (discovery techniques cannot be used to breach the privilege protecting attorney work-product).

BNSF devotes four (4) pages of its Motion to the red herring argument that if this proceeding were subject to Rule 26(a) of the Federal Rules of Civil Procedure (“FRCP”), Complainants would have been required to provide BNSF with evidence of their damages claims “shortly after filing its (sic) complaint.” Motion at 15. *See also* Motion at 15-18. It is well-established that the FRCP do not govern Board proceedings. *See, e.g.*,

¹⁶ *See* Motion, Exh. 6, Interrogatory No. 27 and Document Request Nos. 81, 86, and 89. Any dispute regarding BNSF’s Interrogatory No. 34 is now moot.

Intermountain Power Agency v. Union Pacific Railroad Co., STB Docket NOR 42127 (STB served Nov. 2, 2012) at 4 n.12 (citing *Am. Trucking Ass’n v. United States*, 627 F.2d 1313, 1320-21 (D.C. Cir. 1980)); *FMC Wyoming Corp.*, *supra* (STB served Feb. 5, 1998) at 3-4. Moreover, the Board previously has specifically considered and rejected the application of FRCP Rule 26(a) in agency proceedings.

In *Simplified Standards for Rail Rate Cases*, STB Docket EP No. 646 (Sub-No. 1), the Board adopted new rules to govern initial (post-complaint) disclosures in proceedings challenging the reasonableness of rail rates under the agency’s “simplified” captive rate standards. Those requirements currently appear in 49 C.F.R. § 1111.2(b). In its decision approving the new rule, the Board discussed FRCP Rule 26(a) and determined that “while broader initial discovery may be required in federal civil litigation, we will cabin the initial disclosures here only to require information” relied upon by the complainant in formulating its assessment of feasible transportation alternatives (for the purpose of establishing qualitative railroad market dominance) and determining inputs to the agency’s Uniform Rail Costing System model (to establish that the challenged rates exceed the Board’s “jurisdictional threshold” under 49 U.S.C. § 10707(d)(1)(A)).

Simplified Standards for Rail Rate Cases, STB Docket EP No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) at 69.

This is not a maximum rate proceeding, so the initial disclosure rule in 49 C.F.R. § 1111.2(a) has no relevance whatsoever. Even if Complainants somehow were challenging the level of BNSF’s rates under the *Simplified Standards*, however, FRCP Rule 26(a) would have no application. And there are no Board decisions suggesting that

a party could be compelled to produce information or documents subject to the attorney work-product privilege.¹⁷

BNSF follows its FRCP Rule 26(a) red herring with equally off-point references to previous Board decisions (mostly in maximum rail rate cases) where the Board addressed “challenges” related to the use of computer models and the production of underlying data and/or supporting calculations. Motion at 19-20. In each of the cited decisions, the Board was commenting on the quality of the parties’ submitted *evidence*; nowhere did the Board suggest that a party had an obligation to offer a preview of its work-in-progress during discovery. In the *Texas Mun. Power Agency* proceeding, for example, the Board emphasized the need for parties to make models and underlying data relied upon in their evidence on the merits available in conjunction with the submission of that evidence. *See Texas Mun. Power Agency v. Burlington N. Santa Fe Ry.*, 6 S.T.B. 573, 646 (2003). Likewise, in *AEP Texas*, the Board directed the parties to supplement their *evidence* to allow the Board to more effectively analyze it and make determinations based on a more complete record. *AEP Texas N. v. BNSF Ry.*, STB Docket NOR 41191 (Sub-No. 1) (STB served Mar. 17, 2006) at 2.¹⁸ Nothing in the decisions referenced by BNSF supports the

¹⁷ To the contrary, as noted *supra*, the Board has affirmed that documents protected by the privilege “are never disclosed.” *Dakota, Minnesota & Eastern*, at 2.

¹⁸ Somewhat quizzically, BNSF also refers to the Board’s March 27, 2013 decision in *E.I. Dupont de Nemours v. Norfolk S. Ry.*, STB Docket NOR 42125 (STB served Mar. 27, 2003). That decision addressed the issue of which party should pay the cost of licensing a model, not a dispute over the relevance of the model or when it should be produced. *Id.* at 2.

notion that a party should have an obligation to share its privileged work-in-progress with the opposing party during discovery.¹⁹

D. COMPLAINANTS SHOULD NOT BE COMPELLED TO PRODUCE THE DOCUMENTS AND INFORMATION REQUESTED BY BNSF RELATED TO OTHER GENERATING STATIONS AND OTHER RAILROADS

BNSF's stated justification for an order compelling Complainants to produce the documents described in the five (5) Document Requests in BNSF's Second Set that relate to Evergy system generating stations other than Iatan and LEC²⁰ is that "the Board cannot know the impact on Evergy of the alleged operational limitations at Iatan and Lawrence without knowing how it (sic) also affected the revenues at all the plants in Evergy's portfolio...". Motion at 20-21. The balance of its argument on this point essentially repeats the claim in slightly different ways. *Id.*, at 21-23. However, BNSF already has or will have data related to the revenues earned from generation at the Evergy stations other

¹⁹ Another relevant distinction between the cases relied upon by BNSF and the instant proceeding is that in proceedings utilizing the stand-alone cost methodology to assess the reasonableness of a challenged rail rate, the Board had a policy interest in standardizing the manner in which the same categories of evidence that appear in each case (e.g., traffic group selection, hypothetical competitive train routings, operating plan development, etc.) are presented. The nature of damages experienced by a shipper due to a carrier's violation of its obligations under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a)(1) will differ from case to case depending on such factors as the nature of the commodities involved and the specific circumstances of the carrier's violation. These cases do not lend themselves to standardization.

²⁰ See Motion, Exh. 6, Document Request Nos. 56, 58, 65, 71, and 88. Complainants objected to Document Request No. 77 insofar as it sought relative comparisons of revenue attributable to other stations as compared to Iatan and LEC in years prior to 2022. As discussed herein, BNSF has or will have access to the 2022 revenue data for all of the Evergy coal-fired resources.

than Iatan and LEC through documents produced in response to earlier BNSF Requests,²¹ and information on revenue settlements and resettlements that it can seek from SPP.²²

In contrast to BNSF's stated justification, the Document Requests at issue all relate to actions or conditions that *precede* generation (and revenue settlement), and therefore are not probative of or relevant to the evaluation or analysis that BNSF believes is necessary. Those Requests seek documents related to coal unloading times (Document Request No. 56), coal stockpiles (Document Request No. 58), annual coal shipment nominations (Document Request No. 65), coal inventory reclamation (Document Request No. 71), and daily coal deliveries (Document Request No. 88). If, as BNSF argues, the focus is on the impact of reduced generation at Iatan and LEC in 2022 on revenues earned from generation at other Evergy coal resources, the information contained in the documents sought through the above Requests to which Complainants have objected is not relevant to that impact and the revenue data that BNSF seeks is and will be accessible elsewhere. BNSF has not shown a "real, practical need" for those documents. *Total Petrochemicals USA, Inc., supra*, at 2.

BNSF's argument for compulsory production of the materials sought in its Second Set of Document Requests related to rail service from carriers other than BNSF²³ likewise is without merit.

²¹ See, e.g., Motion, Exh. 3, Document Response Nos. 33 and 34 (while the Requests identify Iatan and LEC, the data sets responsive to them include other Evergy stations).

²² Motion, Exh. 7, Document Response No. 79.

²³ Motion, Exh. 6, Document Request Nos. 59, 62, and 76.

BNSF is the only railroad that transports coal to a generating station within the Evergy fleet by common carriage under established tariffs. Coal to stations other than Iatan and LEC is delivered pursuant to negotiated private contracts. While *BNSF's* own 20+ year record of contract service to Iatan and LEC is highly relevant to the issue of BNSF's subsequent common carrier obligations, BNSF offers no authority for the notion that whether BNSF provided transportation to Evergy Metro and EKC on reasonable request in 2022 as required by 49 U.S.C. § 11101(a) should be assessed by reference to *another* carrier's performance under a contract to which BNSF is not party, and includes negotiated scheduling, equipment supply, service and other transportation terms that are exempt from Section 11101(a). *See* 49 U.S.C. § 10709(c). Moreover, the Complaint refers only to coal delivery shortfalls resulting from BNSF's actions and inactions with respect to Iatan and LEC in 2022. Complainants have not implicated other carriers in any way, and their evidence on the merits in this case will be directed at the impacts of BNSF's service inadequacies, not the service provided by any other railroads to any other destinations.²⁴

²⁴ BNSF closes with the statement that “evaluating the reasonableness of BNSF's actions may require comparison to practices of other railroads...to address circumstances in the transportation market.” Motion at 23. Complainants firmly reject this false equivalency standard of evaluation, but note that none of the Document Requests at issue here touches on such systemic or “market” conditions.

E. THE BOARD SHOULD REJECT BNSF’S UNPRECEDENTED AND UNWARRANTED PROCEDURAL SCHEDULE EXTENSION REQUESTS

In its Motion, BNSF makes two separate requests for modifications to the procedural schedule, neither of which is warranted under the present circumstances and neither of which enjoys any precedential support in Board practice. First, BNSF requests that the Board extend the Reply deadline in this case to allow BNSF a full six months “to assess and reply to the” information that it seeks through its Motion.²⁵ Second, BNSF requests – without elaboration or support – that the Board afford BNSF the unprecedented opportunity to engage in four months of unilateral discovery against Complainants *after* they file their Opening Evidence.²⁶ There is no basis for either form of procedural relief that BNSF seeks.

BNSF bases its request for modifications to the Board’s existing procedural schedule on the argument that BNSF should have been entitled to six months’ time to digest and analyze information and documents that BNSF claims Complainants should have provided in response to BNSF’s August 15, 2024 Second Set of Interrogatories and Requests for Production. BNSF observes that its Reply Evidence presently is due on

²⁵ BNSF Motion at 11; *id.* at 13 (“BNSF’s reply evidence will be due six months from the time that Evergy discloses the requested damages data (corresponding to the time period that would have existed if Evergy had responded to BNSF’s original requests) to give BNSF the ability to adequately test Evergy’s assumptions and calculations.”).

²⁶ *Id.* at 18 (“BNSF’s reply evidence should be due no sooner than June 20, 2025, with the deadline for BNSF to conduct additional discovery in the matter extended through at least April 25, 2025.”); *accord id.* at 2 (“The Board should also extend *the discovery* and evidence schedule in this matter to account for the delay that has already prevented BNSF from addressing Evergy’s damages claims.”) (emphasis supplied).

February 18, 2025, which is roughly five and one half months after the September 4, 2024 deadline that BNSF identified for production in response to BNSF's Second Set of Requests.

BNSF's six-month time interval is entirely contrived and self-serving. BNSF calculates the time period based upon the date on which it supposedly expected to receive privileged work-product and evidentiary work-in-progress from Complainants. For all of the reasons explained above, Complainants had no obligation to produce (and BNSF had no reason to expect to receive) documents previewing Complainants' developing case-in-chief, including their damages claim. No litigant is entitled to force a delay in a Board proceeding because it did not receive that which it had no right to receive.

If the Board were to allow BNSF to manufacture a justification for a delay in the due date for Reply Evidence through its Motion, then any defendant in a future Board proceeding simply would need to: (1) serve an improper discovery request seeking a preview of the complainant's evidence; and then (2) advise the Board that an extension of the due date for reply evidence is necessary in order to preserve whatever "analysis" time period the defendant elects to identify. The Board should not accept BNSF's invitation to undermine the integrity of Board proceedings in this manner.

BNSF's reliance on the statement of its expert witness, Mr. Paul J. Hibbard, and BNSF's associated claims of extreme complexity and burden are similarly unavailing.

In his Declaration, Mr. Hibbard contends that running a production cost model ("PCM") is "complex, requires modeling expertise, involves time and expense for licensing of the model and associated data, requires substantial vetting of model inputs

and assumptions, and is time consuming.” Hibbard Decl. at 8. Notably, however, while he observes that “BNSF is not already set up and pre-licensed to run PCM software,” Mr. Hibbard makes no mention of whether he or his consulting firm already are “set up and pre-licensed” to run PCM software.²⁷ In fact, a review of Mr. Hibbard’s Declaration confirms: (1) that he has decades’ worth of experience analyzing energy markets; (2) that PCM’s are “ubiquitous in the energy industry” for purposes of “evaluat[ing] the impact of power market changes on power plant operations;” (3) that “PCMs are routinely used to simulate the operation of power systems on a state, regional, and national basis;” and (4) that “PCM Analysis is Commonly Employed in the Electric Power Industry.” *Id.* at 2, 6, 8. It therefore is reasonable to infer that the approach Complainants take in developing their final damages presentation (using the PCM tool that Complainants have identified) will not be foreign to Mr. Hibbard.

Moreover, while there certainly is some measure of complexity associated with modeling the operation of an electric power pool, BNSF has failed to demonstrate that such modeling is any more complex (or even nearly as complex) as the multi-faceted

²⁷ In any event, Mr. Hibbard also fails to provide any support for his assertion that “several weeks are often required by the vendor to arrange user agreements and prepare the model and data for delivery of the PCM software.” *Id.* at 10. In the present context, Complainants (not a model vendor) will be the source of the data relied upon in their damages calculations. Further, on October 8 and 15, 2024, respectively, Complainants supplemented their Answer to BNSF’s Interrogatory No. 34 and identified the PCM and related, additional software that Complainants have determined to use in their Opening Evidence. Accordingly, 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).

stand-alone cost modeling that parties (including BNSF) utilize and the Board analyzes as a means of gauging the reasonableness of captive railroad rates. *See, e.g., Rate Regulations Reforms*, STB Docket EP 715 (STB served July 25, 2012) at 9, 13-14 (describing the complexity and expense of the full SAC model). And in proceedings analyzing such rates, the Board's default procedural schedule is far more consistent with the existing procedural schedule in this case than with the skewed schedule that BNSF seeks through its Motion. *See, e.g., Revised Procedural Schedule in Stand-Alone Cost Cases*, STB Docket EP 732 (STB served March 9, 2016) at 2, 4; 49 C.F.R. § 1111.9(a). That default schedule in STB SAC cases allows sixty (60) days for the defendant carrier to file its Reply Evidence (*i.e.*, the same time period that exists in the existing procedural schedule in the instant case). *Id.* While the Board and parties to such cases often will modify the default schedule in some respects, a *tripling* of the time period allowed for the filing of reply evidence grossly exceeds those typical modifications.

Complainants also note that the Opening Evidence in this proceeding will greatly narrow any burden that Mr. Hibbard's statement appears to contemplate. BNSF will not be required to respond to all possible calculations of damages, only that which Complainants ultimately develop and present in their case-in-chief.

A fair reading of BNSF's Motion suggests that BNSF recognizes the unavailability of evidentiary "previews" in STB practice, and laments that the Board's rules differ from those applicable in federal courts, where parties must make preliminary disclosures and exchange pre-trial expert reports chronicling all of the opinions that the expert will offer. *See, e.g.*, BNSF Motion at 13 (alleging that Complainants' refusal to provide an

evidentiary preview to BNSF is “directly contrary” to federal litigation practice); *id.* at 15 (“In federal court, Evergy would have had to disclose its damages figures and calculations shortly after filing its complaint.”); *id.* at 17 (“[A] plaintiff’s failure to disclose damages information is prejudicial and typically results in the exclusion of the plaintiff’s damages theories at trial”).

As shown in Part C, *supra*, this is not a federal court proceeding and the obligation to make Rule 26(a) preliminary disclosures does not apply. There is no basis for BNSF to complain that the Board’s approach to resolving complaint disputes does not match the approach that federal courts follow.

Complainants also respectfully submit that the Board should give significant weight to the fact that BNSF agreed to the present procedural schedule. *See* June 4, 2024 Joint Report on Conference. That agreed-upon schedule, which was developed after the Complaint in this proceeding was filed, contemplated that BNSF would have a total of fifty-nine (59) days after Complainants’ Opening Evidence in which to file its Reply Evidence:

“The parties respectfully request that the Board adopt the following procedural schedule for this case:

Friday, November 1, 2024: Discovery closes.

Friday, December 20, 2024: Evergy Opening Evidence due.

Monday, February 17, 2025: BNSF Reply Evidence due.

Tuesday, March 24, 2025: Evergy Rebuttal Evidence due.

Wednesday April 23, 2025: Simultaneous Final Briefs, 30-page limit (including appendices), no new evidence.”

Id. at 1-2.²⁸

In its Motion (at 12 n.8), BNSF seeks to blunt the significance of its prior agreement by contending that BNSF agreed to such a schedule only because it anticipated that Complainants would produce privileged work product information. There is no basis for any suggestion that BNSF conditioned (explicitly or otherwise) its agreement to the proposed schedule on the assumption that Complainants would willingly agree to provide BNSF the sort of evidentiary preview that the Board never has required parties to provide. The Board should take due consideration of the fact that BNSF was willing to agree to a procedural schedule in this case without any explicit condition tied to Complainants' willingness to make federal court-style disclosures.

Finally, the Board should reject BNSF's request for what would constitute an entirely unprecedented novelty in Board practice: unilateral, post-evidentiary discovery. BNSF Motion at 2, 18. As noted above, BNSF does not offer any argument or citation in support of its request. Consistent with established Board practice, Complainants' Opening Evidence will include all relevant exhibits, supporting data and workpapers. Nothing in the procedural schedule in this case and nothing in prior Board complaint case practice justifies one-party discovery after the submission of Opening Evidence.

²⁸ In its June 10, 2024 Order approving the parties' requested schedule, the Board made a minor adjustment to move the February 17, 2025 Reply due date to February 18, 2025.

CONCLUSION

For all the reasons set forth herein, the Board should deny BNSF's September 26, 2024 Motion to Compel.

Respectfully submitted,

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Dated: October 16, 2024

*Attorneys for Evergy, Inc.,
Evergy Metro, Inc. and
Evergy Kansas Central, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of October, 2024, I have caused copies of the foregoing to be served electronically upon counsel for Defendant BNSF Railway Company.

/s/ Kelvin J. Dowd
Kelvin J. Dowd

EXHIBIT 9

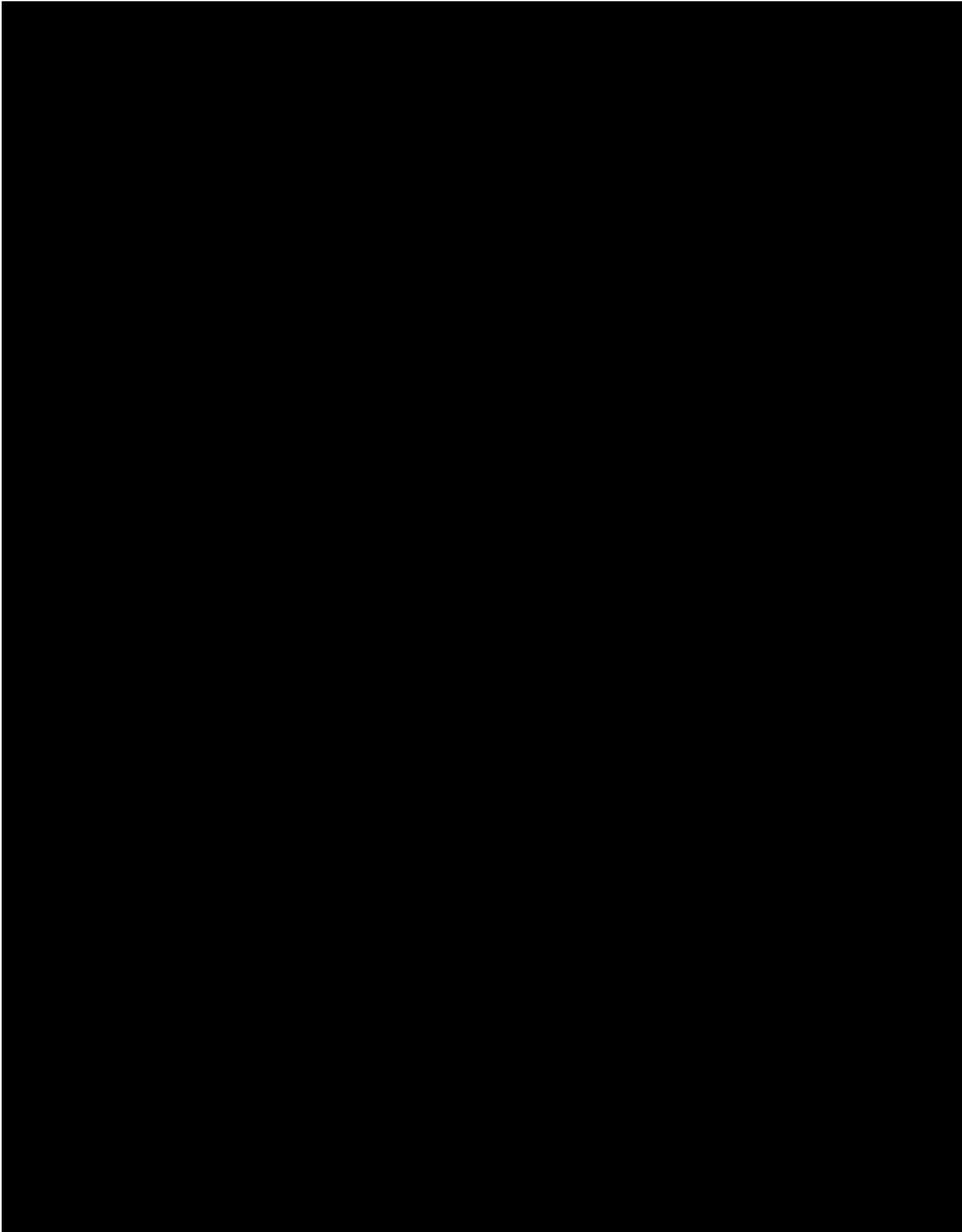


EXHIBIT 10

BEFORE THE
SURFACE TRANSPORTATION BOARD

EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	

**COMPLAINANTS' RESPONSES AND OBJECTIONS TO BNSF'S
THIRD SET OF DOCUMENT PRODUCTION REQUESTS**

Pursuant to 49 C.F.R. § 1114, Evergy, Inc. ("Evergy"), Evergy Metro, Inc. ("Evergy Metro") and Evergy Kansas Central, Inc. ("EKC") (collectively "Evergy"), hereby provide these Responses and Objections to the Third Set of Document Requests for Production ("Requests") that BNSF Railway Company ("BNSF") served on October 31, 2024.

I. GENERAL OBJECTIONS

Evergy hereby incorporates by reference each of the General Objections set forth in its June 24, 2024 Responses and Objections to BNSF's First Set of Document Production Requests.

II. RESPONSES AND SPECIFIC OBJECTIONS:

REQUEST FOR PRODUCTION NO. 90:

Provide all input data files, output data files, and sufficient documentation to replicate the results of any analysis employing PROMOD or PCI GenTrader between January 1, 2019 to December 31, 2023 as identified in Interrogatory No. 36.

This production should include, but not be limited to, the following input files:

1. Variable operations and maintenance costs, fixed operations and maintenance costs, start-up costs, minimum run times, minimum generation levels, and nameplate capacities for all generators included in the analysis.
2. The assumed transmission topology used in your model, and any other information needed to model transmission line capability between every generator node and load node included in the analysis.
3. Assumed fuel prices, heat rates, and total fuel costs, by plant, for all generators included in the analysis.
4. Assumed emissions pricing costs, by plant, for all generators included in the analysis.
5. Assumed maintenance, outage, and forced outage schedules, by plant, for all generators included in the analysis.
6. Assumed hourly generation for all renewable generators included in the analysis.

This production should include, but not be limited to, the following output files:

1. All unit commitment and dispatch outcomes for all generators included in the analysis.
2. Bid offers for all generating facilities included in the analysis.
3. All incremental bid adders, including those related to opportunity costs, limited fuel supply, or other transportation supply limitations, for price offers for energy or operating reserves for all generators included in the analysis.
4. Settled quantities and prices paid for energy and operating reserves for all generators included in the analysis.
5. Hourly electricity load by node assumed in the analysis.

6. Hourly electricity net generation for all generating facilities included in the analysis.
7. For any third-party power purchases included in the analysis, please provide the cost, quantity purchased, and the hours in which those purchases were used to meet load obligations in Your service territory.
8. For any third-party power sales included in the analysis, please provide gross revenues, net revenues, quantity sold, and the hours in which those sales were made by all of Your generating facilities.

RESPONSE:

Evergy incorporates its general objections, including specifically Nos. 2 and 4.

Evergy objects to this Request as overbroad, unduly burdensome and not proportional to the needs of this matter, particularly insofar as it seeks “all” data sources described in the Request. Evergy further objects to this Request on the ground that it is impossible to provide a substantive Response to the Request as propounded because it would require the review of potentially thousands of pages of documents and/or massive amounts of electronic data. Evergy will consider a narrower and modified version of this Request should BNSF elect to propound one.

REQUEST FOR PRODUCTION NO. 91:

Provide all input data files, output data files, and sufficient documentation to replicate the results of any analysis conducted between January 1, 2019 to December 31, 2023, as identified in Interrogatory No. 38.

This production should include, but not be limited to, the following input files:

1. Variable operations and maintenance costs, fixed operations and maintenance costs, start-up costs, minimum run times, minimum generation levels, and nameplate capacities for all generators included in the analysis.
2. The assumed transmission topology used in your model, and any other information needed to model transmission line capability between every generator node and load node included in the analysis.

3. Assumed fuel prices, heat rates, and total fuel costs, by plant, for all generators included in the analysis.
4. Assumed emissions pricing costs, by plant, for all generators included in the analysis.
5. Assumed maintenance, outage, and forced outage schedules, by plant, for all generators included in the analysis.
6. Assumed hourly generation for all renewable generators included in the analysis.

This production should include, but not be limited to, the following output files:

1. All unit commitment and dispatch outcomes for all generators included in the analysis.
2. Bid offers for all generating facilities included in the analysis.
3. All incremental bid adders, including those related to opportunity costs, limited fuel supply, or other transportation supply limitations, for price offers for energy or operating reserves for all generators included in the analysis.
4. Settled quantities and prices paid for energy and operating reserves for all generators included in the analysis.
5. Hourly electricity load by node assumed in the analysis.
6. Hourly electricity net generation for all generating facilities included in the analysis.
7. For any third-party power purchases included in the analysis, please provide the cost, quantity purchased, and the hours in which those purchases were used to meet load obligations in Your service territory.
8. For any third-party power sales included in the analysis, please provide gross revenues, net revenues, quantity sold, and the hours in which those sales were made by all of Your generating facilities.

RESPONSE:

Evergy hereby incorporates its Response to Request No. 90.

Respectfully submitted,

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Dated: November 20, 2024