

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

Complainants,

V.

BNSF RAILWAY COMPANY

Defendant.

Docket No. NOR 42180

PUBLIC VERSION

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Joint Rebuttal Verified Statement of Robert D. Mulholland
and Timothy D. Crowley

Verified Statement of Daniel L. Fapp

Rebuttal Verified Statement of Michael Crosby

Rebuttal Verified Statement of Hsin Foo

Verified Statement of Christopher J. Russo

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	)	
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	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

Complainants Evergy, Inc. (“Evergy”), Evergy Metro, Inc. (“Evergy Metro”) and Evergy Kansas Central, Inc. (“EKC”) (collectively “Evergy” or “Complainants” as the context indicates), in accordance with the revised Procedural Schedule adopted by the Board for application to this case, submit this Rebuttal Evidence. For the reasons and based on the evidence set forth herein and in Complainants’ Opening Evidence submitted on June 25, 2025, and pursuant to 49 U.S.C. §§ 11101(a), 10702(2), 11121(a) and 11704(b), Complainants are entitled to an award of damages, including applicable interest, against Defendant BNSF Railway Company (“BNSF”) for violation of their statutory obligations to Evergy in 2022. As explained in Part D, *infra*, those restated principal damages total \$22,862,177.65.

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together with their respective Exhibits and workpapers; the joint Rebuttal Verified Statement of Robert D. Mulholland and Timothy D. Crowley and the Verified Statement of Daniel L. Fapp, all of L.E. Peabody & Associates, Inc., together with their Exhibits and workpapers; and the Verified Statement of Christopher J. Russo of Charles River Associates, together with his Exhibits and workpapers. The Rebuttal Evidence is summarized, and Complainants' legal arguments in support of the relief sought are presented herein.

PROLOGUE

In a 967-page Reply presentation (not including workpapers) consisting almost entirely of opinions offered by retained consultants who had no involvement whatsoever in the real-life events of 2022 concerning BNSF's provision of rail common carrier coal transportation service to the Iatan Generating Station ("Iatan") and Lawrence Energy Center ("LEC") operated by Complainants Evergy Metro and EKC, BNSF endeavors to bury the relatively simple facts of this case in an avalanche of allegations regarding the U.S. and global impacts of the 2020 Covid-19 pandemic, the Russian invasion of Ukraine, the services offered by BNSF and other railroads to shippers of a wide variety of commodities with no ties to Evergy, Iatan or LEC, and a railroad-centric vision of who should control surface transportation in America.

But facts are stubborn things, and those at the heart of Evergy's case against BNSF remain: (1) in the years well before the 2020 Covid-19 pandemic, BNSF made a series of deliberate operational decisions that dramatically reduced its labor forces and related service capabilities; (2) those actions left BNSF ill-equipped to respond to Evergy's

reasonable requests for service in 2022; (3) as a result, BNSF deliberately refused to allow Evergy to place into service a sufficient number of private trainsets to transport its reasonably scheduled coal shipments to Iatan and LEC in a manner wholly consistent with the years-long history of the commercial relationship between the parties; and (4) as a direct consequence, Evergy was compelled to reduce coal-fired generation at Iatan and LEC and experienced proven, adverse economic impacts as a result.

It is true that this proceeding presents the Board with what in several respects is an unusual case. While the Board and its predecessor have adjudicated complaints brought under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) many times in the past, in this case the party lodging the complaint against a common carrier railroad's violation of those statutes is a public utility deprived of adequate supplies of coal essential to the generation of electricity for millions of residential, commercial, industrial and public service ratepayers.

The nature and measure of economic harm resulting from BNSF's failure to meet its statutory obligations in 2022 also is without ready recent precedent. Evergy's damages are assignable to well-known damages categories (*e.g.*, lost opportunity and otherwise avoidable additional costs) that the Board has recognized and approved in the past. However, unlike previous cases, the best evidence of the measure of most of that economic harm – model-based calculations of lost opportunity and net additional power purchase costs – is without specific precedent among previous cases brought under the governing statutes, emphasizing the need for decisions in this proceeding to be based on the *best* evidence presented and supported by reliable data and credible testimony.

While elements of this case may call upon the Board to decide certain questions for the first time, the importance of this proceeding is not confined to its specific facts. If a rail carrier is permitted to claim unilateral discretion to decide if, when and how it will respond to an electric utility's reasonable requests for coal transportation service – as BNSF did with respect to Evergy in 2022 – the threatened consequences would be economic distortion throughout the power sector, to the detriment of tens or even hundreds of millions of consumers. With federal energy policy now focused on promoting *increased* reliance on coal as a generation fuel, those risks are exacerbated. Likewise, if the only accurate means of calculating an electric utility's economic damages resulting from a rail carrier's violation of its statutory service obligations – modeling the generation system using recognized programs and methods – are considered to be beyond the scope of the Board's competence, as BNSF alleges in its Reply, then railroads such as BNSF effectively could ignore those obligations without liability or sanction.

Herein, Evergy demonstrates that the evidentiary challenges and arguments raised by BNSF in its Reply are unfounded and without merit. Upon consideration of the entire record in this case, the Board should find BNSF liable for violations of 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) in 2022, and grant the relief requested by Evergy.

A full exposition of the relevant facts giving rise to Evergy's Complaint was set forth in its Opening Evidence, and Evergy references those facts again in this Rebuttal only to the extent necessary to respond directly to claims and arguments advanced by BNSF.

ARGUMENT

A. Evergy Properly Invoked the Governing Statutes

BNSF begins the Argument portion of its Reply with the false claim that Evergy has proposed that the Board evaluate BNSF's actions in 2021 and 2022 under a "strict liability" test for 49 U.S.C. § 11101(a) and moves from there to deny altogether the application of 49 U.S.C. §§ 10702(2) and 11121(a) to this case. BNSF Arg. at BNSF-69.¹ BNSF assaults its own Straw Man with respect to Section 11101(a), and applicable case law dispels its dismissal of Sections 10702(2) and 11121(a). Viewed through the *proper* factual and legal lenses, the case for relief presented by Evergy is a sound and compelling one.

1. 49 U.S.C. § 11101(a)

BNSF correctly asserts that whether a request for rail transportation service is reasonable depends on "all the relevant facts and circumstances," and that a railroad's duty in response to such a request is to take all reasonable actions to provide "adequate" service under the same circumstances. BNSF Arg. at BNSF-70. As the record developed in Evergy's Opening Evidence showed, however, Evergy took due account of the prevailing circumstances and historic background of the parties' relationship when it proffered its requests for service in 2022 and its corresponding private trainset

¹ For ease of reference, page numbers for elements of BNSF's Reply cited herein correlate to its combined "BNSF-__" convention.

requirements.² Both the volumes of coal entered into BNSF’s CFT system and the requested seasonal deployment of Evergy trainsets were fully consistent with years of both parties’ experience (*see* Evergy Op. Arg. at 16-17) and BNSF had sufficient available physical capacity on its system (*id.* at 18-21; Op. V.S. Mulholland/Crowley at 9-10, 21-22, 27-28).³

BNSF asserts that how a railroad responds to a reasonable request for service is for the carrier to decide “in the first instance.”⁴ As Ms. Tucker relates, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² BNSF does not dispute Ms. Tucker’s testimony regarding the limited number of trainsets that BNSF allowed in Evergy’s service. Reb. V.S. Tucker at 9-14.

³ It is noteworthy that BNSF’s repeated stress on evaluating actions based on “circumstances at the time of the tender” (BNSF Arg. at BNSF-72) is a one-way street. When it comes to considering Evergy’s reasonable decisions regarding such matters as coal inventory management and coal conservation measures, BNSF repeatedly advocates for scrutiny based on 20-20 hindsight. *See, e.g.*, BNSF Arg. at BNSF-71, 101-102, 105; V.S. Baranowski/Zebrowski at BNSF-629-631, 644-646, 674-675; V.S. Hibbard at BNSF-772, 777, 811.

⁴ BNSF cites to the Board’s decision in *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 807 (2004) for this proposition, which actually only addressed the question whether a shipper could insist on the use of private equipment when the railroad stood ready to supply the necessary railcars, a circumstance not at all relevant to this case.

[REDACTED] } { [REDACTED]

[REDACTED]

[REDACTED] } } See Evergy Op. Counsel's

Exhibits 1 through 4.

BNSF's Argument and the Statement offered by its Witness Prince dwell considerably on the non-controversial notion that there is a difference between rail service under a contract and service under tariff.⁵ BNSF Arg. at BNSF-71-73; V.S. Prince at BNSF-450-451, 462-464. But at no point does BNSF allege that Evergy ever claimed that BNSF was obligated to follow the provisions of the contracts that previously applied to Iatan and LEC once transportation to those stations was subject to tariffs, and Evergy never did so. What Evergy *has* asserted, and what the law supports, is the principle that in determining both whether a request for transportation is reasonable and what would constitute "adequate" service in response,⁶ the pattern and practice of service provided in the past – whether under contract or in common carriage – is a strong source of guidance. See *Navajo Transitional Energy Co., LLC – Ex Parte Pet. for Emergency Service Order*, STB Docket NOR 42178 (STB served June 23, 2023) at 7; *Nat'l Grain and Feed Ass'n*, 5 F.3d at 308, 311. The volume of coal that Evergy scheduled for Iatan and LEC using the BNSF-prescribed CFT system and the number of trainsets that it

⁵ Evergy's Verified Statement of Daniel L. Fapp addresses the equally non-controversial point that the distinction between BNSF's service commitments under contract versus tariff has largely vanished such that the typical contract shipper finds itself in no better position than a tariff shipper with respect to service. See V.S. Fapp at 20-23.

⁶ See, e.g., *Nat'l Grain and Feed Ass'n v. United States*, 5 F.3d 306, 311 (8th Cir. 1993).

offered to BNSF for transporting that coal in 2022 were fully consistent with that past pattern and practice. Evergy asked nothing more of BNSF.

The idea that Evergy is advancing a “strict liability” approach to Section 11101(a) that calls for damages to be assessed whenever a rail carrier fails to transport every ton that a coal shipper asks for is purely a BNSF invention, set up solely to be knocked down. *See* BNSF Arg. at BNSF-76. Had BNSF accepted the requested number of trainsets and nevertheless come up short on CFT volumes because of, *e.g.*, unanticipated weather or track conditions, a miscalculation by Evergy of the trainsets needed, or genuine system congestion caused by circumstances beyond BNSF’s control, an Evergy complaint under Section 11101(a) would not have been well-founded, even though a “strict liability” standard (as the term properly is understood) still would have supported redress. Evergy’s actual claim is quite different and straightforward: BNSF violated Section 11101(a) by deliberately refusing to deploy available private trainsets that it knew were needed to transport scheduled tons and were fully consistent with the long history of BNSF service to Iatan and LEC.

It is not readily clear why BNSF brings up the circumstances of the conversion of Iatan and LEC from contract to tariff service (BNSF Arg. at BNSF-73-75), but at least it should be accurate in the telling. As Ms. Tucker explained in her Opening Verified Statement, Evergy made a legitimate commercial decision in 2020 to award contracts for coal transportation to its Jeffrey, La Cygne and Hawthorn generating facilities to the Union Pacific Railroad rather than BNSF. *Op. V.S. Tucker* at 6-7. Thereupon, Evergy attempted to negotiate new contracts with BNSF for service to Iatan and LEC, but those

efforts were not successful. *Id.* at 7-8. However, contrary to BNSF’s implication, Evergy did not endeavor to impose “contract-like” obligations on BNSF in 2022. BNSF Arg. at BNSF-74. Rather, Evergy followed BNSF’s tariff protocols and both scheduled shipments to Iatan and LEC in the manner prescribed by BNSF and proposed the deployment of the necessary private trainsets contemplated by the tariff rates consistent with historic practice. Op. V.S. Tucker at 8-15. BNSF’s unexcused refusal to accept those trainsets and resulting failure to transport the scheduled tons violated its obligations under 49 U.S.C. § 11101(a). Evergy Op. Arg. at 21-24; *Navajo Transitional Energy Co., LLC*, *supra* at 7; *Decatur County Comm’rs v. Surface Transp. Bd.*, 308 F. 3d 710, 715 (7th Cir. 2002); *Pejepscot Indus. Park, Inc. – Pet. for Decl. Order*, STB Docket FD 33989 (STB served May 15, 2003) at 13.

BNSF recites the principle that a rail carrier’s service is “adequate” for purposes of Section 11101(a) if the carrier “acted reasonably under the circumstances.” BNSF Arg. at BNSF-76. Throughout its Reply, BNSF advances the claims that its 2022 restrictions on trainsets in service to Iatan and LEC were reasonable because Evergy did not really need the coal that it had scheduled, {{ [REDACTED] [REDACTED] }} and that the lingering effects of the 2020 Covid-19 pandemic on BNSF’s labor cadre necessarily inhibited its ability to respond to Evergy’s trainset and service requests in 2022. Evergy’s evidentiary presentation in this Rebuttal shows each of those claims to be without merit and affirms Evergy’s demonstration in its Opening Evidence that BNSF’s actions in 2022 vis-à-vis Iatan and LEC were unreasonable, inadequate, and in violation of 49 U.S.C. § 11101(a).

2. 49 U.S.C. § 11121(a)

In expressing the view that Evergy cannot maintain a claim against BNSF based on a violation of 49 U.S.C. § 11121(a), BNSF wrongly asserts that the statute was *only* intended to “give the agency authority to ensure that common carriers acquired and maintained an adequate and efficiently sized fleet of railcars.” BNSF Arg. at BNSF-77. As Evergy showed on Opening, Section 11121(a) also applies to a railroad’s management of private cars,⁷ and specifically has been invoked to evaluate a railroad’s plan for the allocation of railcars that gave no consideration to the “historical demand” for those cars. *Nat’l Grain and Feed Ass’n*, 5 F.3d at 308. Evergy also referenced numerous proceedings where the Board considered railroad service-related shipper complaints under multiple statutory provisions, including Section 11121(a). *See* Evergy Op. Arg. at 15, n.15.

BNSF relies on three court decisions to support its overly narrow view of Section 11121(a), but none of them are apposite. *Peoria & P. U. Ry. Co. v. United States*, 263 U.S. 528 (1924) dealt solely with whether the Board’s predecessor had *emergency* powers to compel a carrier to provide switching service under the car-service statute. *Id.*, 263 U.S. at 534. The Court noted that “[i]t is conceded that the Commission could, under its general powers and ... after a full hearing,” order a terminal carrier to provide the service at issue. *Id.*, 263 U.S. at 531. Also, the case dealt specifically with an order affirmatively

⁷ *See APL Land Transp. Servs., Inc. v. Burlington N. and S.F. Ry.*, STB Docket NOR 42003 (STB served July 14, 1999) at 1,9; *Shippers Committee, OT-5 v. Ann Arbor R.R.*, 5 I.C.C.2d 856, 863-65 (1989).

directing the carriers to take specific action; no claim for damages for past violations was before it. Similarly, in *Atchison, Topeka and Santa Fe Ry. v. ICC*, 607 F. 2d 1199 (7th Cir. 1979), the court addressed the agency’s authority (or lack thereof) to order railroads to establish operating schedules under a section of the statute dealing with the reasonableness of *rates*. *Id.*, 607 F.2d at 1202. The court addressed a secondary argument that the orders could be justified under different sections of the law with the statement that “car service” had been held to mean “the use to which the vehicles of transportation are put; not the transportation service rendered,”⁸ but that is fully consistent with Evergy’s Section 11121(a) claim in this case. Evergy sought the *acceptance* into service of a sufficient number of otherwise available railcars to handle its scheduled coal shipments. Evergy is not claiming that BNSF should have been required to maintain specific transit or cycle times, follow specified procedures at junction points or in yards, or adhere to other desired operational criteria.

The Supreme Court’s decision in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) actually supports Evergy’s position regarding Section 11121(a). In that case, the Court *rejected* the argument that the Board’s predecessor could only exercise its car-service authority to promote “the optimum utilization of an existing fleet of freight cars,” and found the scope of the ICC’s authority under the statute to be considerably broader. *Id.*, 406 U.S. at 753-54. Consistent with the more recent case law

⁸ *Id.*, 607 F.2d at 1205.

cited by Evergy,⁹ it is entirely appropriate to consider BNSF's 2022 trainset limitations in the context of the requirements of 49 U.S.C. § 11121(a).

3. 49 U.S.C. § 10702(2)

BNSF purports to dismiss Evergy's unreasonable practices claim on the ground that it is not distinct from the demonstrated violation of 49 U.S.C. § 11101(a). BNSF Arg. at BNSF-81. While Evergy does not seek double recovery under both statutes, its Opening Evidence explained that the violation of Section 11101(a) arose from BNSF's trainset limitations and resulting failure to meet its obligations to respond affirmatively to Evergy's reasonable request for service. The violation of Section 10702(2), while related, is focused on BNSF's establishment of terms in the subject Tariffs BNSF-60024 and BNSF-60029 – specifically its arrogating to itself the “sole discretion” to determine if, when and how it would accept private sets and provide service in response to Evergy's requests – that were inherently unreasonable. *See* Evergy Op. Arg. at 24-25; *In re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri, and Illinois Freight Committee Territories*, 20 I.C.C. 307, 350-51 (1911). Previous Board decisions have recognized similar service-related complaints under both Section 11101(a) and Section 10702(2). *See Cent. Valley Ag. Grinding, Inc. v. Modesto and Empire Traction Co.*, STB Docket NOR 42159 (STB served July 25, 2018); *Grain Land Coop v. Canadian Pac., Ltd.*, STB Docket NOR 41678 (STB served Dec. 8, 1999).

⁹ Evergy Op. Arg. at 28-29.

B. BNSF Failed to Meet Its Common Carrier Obligations

Evergy's Opening Evidence demonstrated clearly that in 2022 BNSF failed to meet its obligations to Evergy under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a), principally by refusing to accept into service a sufficient number of Evergy trainsets to transport its reasonably requested and scheduled coal volumes, which were consistent with decades of established practice between the parties in connection with coal transportation to Iatan and LEC.

In its Reply, BNSF argues that Evergy's requests for service and trainset deployments were not "reasonable" and that BNSF was under no obligation to meet them. BNSF then insists that its actions vis-à-vis Evergy in 2022 were fair and reasonable and that it cannot be held liable for the consequences of those actions. BNSF is wrong on all counts.

1. Evergy's 2022 Service Requests Were Reasonable

Section 11101(a) requires a common carrier railroad to provide service on "reasonable request." In its Opening Evidence, Evergy quoted a Board decision finding that "a reasonable request is one that is specific as to the volume, commodity and time of shipment." Evergy Op. Arg. at 16 (quoting *Michael H. Meyer, Trustee v. North Coast R.R. Auth.*, STB Docket FD 34337 (STB served July 27, 2005)). Evergy went on to reference its 2022 entries into BNSF's prescribed Coal Forecasting Tool ("CFT") as representing Evergy's requests for service to Iatan and LEC, and to show that they – and the associated requests for trainsets to be placed into service – were reasonable when

measured against historic volumes of coal transported by BNSF to those stations. Evergy Op. Arg. at 16-18; Op. V.S. Tucker at 5-9, 14-21.

In its Reply, BNSF denies that CFT entries can constitute “requests” for service and points to claims by its witnesses Baranowski and Zebrowski that Evergy could not have used or stored the volumes represented in its early 2022 CFT entries as showing that they were not actually “requests.” BNSF Arg. at BNSF-84-88; V.S. Baranowski/Zebrowski at BNSF-642. However, nowhere does BNSF ever explain what it believes *would* qualify as a request under Section 11101(a). Considering the entirety of BNSF’s arguments concerning its liability to Evergy for its acts and omissions in 2022, one could infer that it would equate a shipper’s “requests” with whatever service BNSF itself chose to offer, but that stretches the limits of credulity to the border of absurdity. Item 260 of BNSF’s Price List 6041¹⁰ provides that a shipper “shall enter all coal tonnage that it intends to cause to be loaded for shipments on BNSF into the [CFT]” and goes on to state that the confirmed CFT “shall be used for purposes of train allocation.” { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ See Reb. Counsel’s Exhibit 1.

¹¹ BNSF_EVERGY_0004848 (Reb. Counsel’s Exhibit 2).

Inasmuch as BNSF offers no alternative to its CFT platform (which includes “volume, commodity and time of shipment”) as a manifestation of a coal shipper’s request for service, the Board should use the record of those entries as representing Evergy’s service requests, and the unchallenged evidence offered by Ms. Tucker as representing Evergy’s corresponding trainset requests. *See Op. V.S. Tucker at 14-21.*

As Ms. Tucker explains in her Rebuttal Statement, utility fuel planning is a forward-looking enterprise, and with BNSF having reduced the number of trainsets in service to Iatan and LEC in the second half of 2021 while advising Evergy that those sets were not likely to be restored or the overall number of trainsets increased in 2022, Evergy could not rest on early 2022 inventory levels when it came to CFT entries. *Reb. V.S. Tucker at 3-9.* Evergy’s expert Rebuttal witness Christopher J. Russo, Vice President in the Energy Practice at Charles River Associates with specific expertise in the electric utility sector, confirms that Evergy’s decisions in the Spring of 2022 with respect to fuels planning and ultimately coal conservation must be evaluated *ex ante*, based on the circumstances faced by Ms. Tucker and her colleagues at the time. *V.S. Russo at 10-15.*

BNSF’s and its retained consultants’ charge that variations and adjustments to CFT entries in the Spring of 2022 shows that they could not have been requests for service (BNSF Arg. at BNSF-85-88) ignores the realities of coal generation management. Even if a monthly CFT schedule exceeded Evergy’s burn needs for *that month*, it still would be a reasonable request when considered in the context of BNSF’s representations that the

number of trainsets in service would not change going forward and the approaching Summer peak season.¹²

BNSF next attempts to challenge the reasonableness of Evergy’s 2022 service and trainset requests by arguing that Evergy didn’t adhere to the applicable tariffs’ call for “ratability” in the tender of shipments. BNSF Arg. at BNSF-90-93. However, this litigation-case focus runs counter to the long history of BNSF’s own delivery performance. As Ms. Tucker shows in her Opening and Rebuttal Statements, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}.¹³ Op. V.S. Tucker at 22 and Op. Exhibit JT-5;

Reb. V.S. Tucker at 46-58. { [REDACTED]

[REDACTED] ■ [REDACTED]

[REDACTED]

[REDACTED] }

Reb. V.S. Tucker at 50-58 and Reb. Exhibit JT-5. In the governing tariffs for Iatan and

¹² BNSF refers to scheduling for Iatan and LEC in 2024 as somehow affirming its claims about Evergy’s requests two years earlier. BNSF Arg. at BNSF-89-90. Seemingly forgetting its own insistence that parties’ actions for purposes of Section 11101(a) should be evaluated based on facts and circumstances at the time, BNSF ignores differences in conditions, weather, generating unit availability and myriad other variables that can affect utility coal requirements.

¹³ See BNSF Arg. at BNSF-98; V.S. Prince at BNSF-464.

¹⁴ Op. V.S. Tucker at 22, Op. Exhibit JT-5.

LEC, BNSF claimed the right to deliver trains “at any time, 365 days a year,”¹⁵ and its exercise of that “right” { [REDACTED] } [REDACTED].¹⁶

BNSF further asserts that Evergy’s 2022 requests for service were unreasonable because {{ [REDACTED] }} and reflected Evergy’s preference to unload trains directly onto generation unit conveyor systems and avoid the costs of storing and reclaiming coal. BNSF Arg. at BNSF-93-94.

{{ [REDACTED] }}
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵ See Complaint, Exhibits 1 and 4.

¹⁶ Op. V.S. Tucker at 33, Op. Exhibit JT-13.

[REDACTED] } }.

Finally, BNSF argues that Evergy's 2022 CFT nominations and requests for service were not reasonable because they did not account for "prevailing circumstances" at the time that they were made, principally the alleged effects in 2022 of the 2020 Covid-19 event and the fact that Evergy in 2020 had awarded contracts for service to its La Cygne and Hawthorn stations to another rail carrier. BNSF Arg. at BNSF-95-100.¹⁷

{ [REDACTED]

[REDACTED]

[REDACTED] }, and as discussed further, *infra*, BNSF's claim

that "macro" conditions in the general U.S. and/or world economies entitle it to claim release from its common carrier obligations just as any other business might retrench in response is contrary to the "well-established principle that railroads 'are held to a higher standard of responsibility than most private enterprises.'" *GS Roofing Products Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998).¹⁸

¹⁷ BNSF also claims that LEC burned more coal in 2022 than LEC burned historically for that station (BNSF Arg. at BNSF-156), but that statement is false. As shown in Part C.2.b, *infra*, the 1,224,750 tons burned at LEC in 2022 were 16% *lower* than the 2015-2021 average. Reb. V.S. Tucker at 31-32. Similarly, the claim that BNSF delivered more coal in 2022 than LEC included in its initial 2021 declaration is irrelevant, as BNSF's own tariff (Price List 6041, Item 255) states that those declarations are "non-binding and ... not a guarantee of service by BNSF." See Reb. Counsel's Exhibit 1.

¹⁸ The fact that Evergy may have commented on general rail carrier performance in 2022 (BNSF Arg. at BNSF-97) hardly qualifies as some sort of waiver of its rights to service on reasonable request.

Evergy's 2020 decision to award business to Union Pacific – a subject that turns up frequently in BNSF's Reply – should have no bearing on the reasonableness of its CFT nominations for 2022. BNSF Arg. at BNSF-99-100. BNSF obviously played a major role in that decision, and it had plenty of time and opportunity to adjust to its new commercial relationship with Evergy. Likewise, the fact that shipments to Iatan and LEC in 2022 took place under tariffs instead of contracts was attributable to BNSF's actions, as Evergy expressed a strong preference to continue to ship under contracts. *See, e.g.,* Op. V.S. Tucker at 6-8.

Evergy's 2022 CFT nominations were reasonable and fully consistent with the record over many years of BNSF coal transportation to Iatan and LEC, and together with Evergy's offer of trainsets should be considered reasonable requests for service.

2. Any BNSF Capacity Constraints in 2022 Were Not Beyond Its Control

As Evergy predicted in its Opening presentation, BNSF seeks to excuse its failures to respond to Evergy's reasonable requests for service in 2022 by blaming circumstances beyond its control, principally Covid-19, its aftermath, and various impediments to its hiring enough operating crew members to handle overall rail service demand during that year. BNSF Arg. at BNSF-100-120. None of these excuses, all of which are offered in hindsight by retained consultants who were not involved with Evergy in 2022, are valid on the facts or on the law.

Citing the extensive public record in the Board's *Ex Parte No. 770* proceeding, Evergy showed that BNSF reduced its operating forces significantly in the years before

Covid-19 as part of a cost-cutting operating strategy that left it ill-equipped to respond to reasonable and predictable demands for rail service in 2022. *See* Evergy Op. Arg. at 30-37 and sources cited therein. While BNSF’s tune in its Reply is one of avoidance of accountability, when pressed in 2022 for an explanation of service deficiencies, its CEO acknowledged that BNSF had failed to have the “right resources” in place to meet customers’ requests. *See Urgent Issues in Freight Rail Service – Railroad Reporting*, STB Docket EP 770 (Sub-No.1) (STB served June 13, 2022) at 7-10. In its Reply, BNSF suggests that pre-Covid evidence is not relevant or even admissible because the record was made more than two years prior to Evergy’s Complaint,¹⁹ but this notion has no merit. 49 U.S.C. § 11705(c) provides only that a complaint against a common carrier must be filed within two years “after the claim accrues,” and there is no dispute that Evergy’s Complaint met this requirement. The statute says nothing about a temporal limitation on when *evidence* can be sourced. *See, e.g., Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket NOR 42142 (STB served Jan. 11, 2018) at 6-14 (Board considered the revenue adequacy status of the defendant over decades prior to the filing of the complaint).

BNSF offers considerable testimony and argument addressing the impact that Covid-19 had on the U.S. and world economies writ large, and in the process paints itself as just another company dealing with supply chain issues, early recovery of demand in 2020, and the implications of the “Great Resignation.” BNSF Arg. at BNSF-110-113.

¹⁹ BNSF Arg. at BNSF-116-117.

Left out of its litany of excuses, however, is any acknowledgement of the established principle that railroads “are held to a higher standard of responsibility than most private enterprises,”²⁰ and are charged with a duty to “anticipate problems and provide against them.” *Johnson v. Chicago, M., St. P. & P. R. R.*, 400 F.2d 968, 972 (9th Cir. 1968). *See also Pejepscot Indus. Park, Inc., supra*, at 13 (*citing Decatur County Comm’rs. v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002)). BNSF argues that it should be treated like any other private enterprise – such as a manufacturer or non-transportation service provider – whose only responsibility is to offer the public whatever it is willing to provide under whatever set of circumstances it finds itself, but the law is otherwise. BNSF, like other common carrier railroads, should be held to a higher standard. *General Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978); *State of Montana v. BNSF Ry.*, STB Docket NOR 42124 (STB served April 26, 2013) at 5.²¹

In their Rebuttal Statement, Evergy’s witnesses Mulholland and Crowley refute BNSF’s claims (BNSF Arg. at BNSF-110-116) that both the lack of crews coming into the Covid period and its difficulties in recalling or hiring new employees were circumstances beyond its control. *See* Reb. V.S. Mulholland/Crowley at 12-26. Messrs. Mulholland and Crowley demonstrate that in response to BNSF’s well-publicized 2014

²⁰ *GS Roofing*, 143 F. 3d at 391.

²¹ {

[REDACTED]

}

service crisis, which arose from another allegedly unanticipated rebound of traffic and one in which the Board heard from coal shippers that had literally run out of coal at some plants, BNSF responded to that crises by, among other things, increasing staffing levels to allow it to better respond to changes in traffic. *Id.* at 4. However, as they further demonstrate, BNSF, shortly thereafter, began reducing its T&E count (multiple times). For example, in 2016, BNSF cut T&E employees by 17%. *Id.* at 22. And while BNSF did bring some crews back in 2017 and 2018, crew availability remained below 2015 levels. In 2019, it began still more furloughs. *Id.* at 23-24. Thus, before COVID was even a factor, BNSF had already reduced its ability to respond to economic shifts – the same situation it found itself in only a few years earlier during its previous service crisis. BNSF only exacerbated this problem by furloughing 21% of its T&E employees, and that figure essentially stayed flat through 2022. *Id.* at 23.

Amid its extensive furloughs in 2020, BNSF froze compensation for its unionized employees in January 2020 (again, before COVID). Then in 2022, it implemented its so-called “Hi-Viz” employee discipline policy. At the same time, BNSF engaged in a high-stakes labor contract negotiation with those same crews, which only ended through action by Congress and President Biden. All these circumstances were within BNSF’s control.

The data presented by Mulholland and Crowley show that BNSF’s “Hi-Viz” employee discipline policy in 2022 and the freeze it imposed on crew wages in 2020 discouraged recalls and further contributed to BNSF’s self-imposed crew shortage. *Id.* at 14-26, 32, 42-43. In other words, the evidence demonstrates that, contrary to its assertions, BNSF was principally responsible for creating the staffing shortages that

prevented it from transporting Evergy's coal requirements, and not macroeconomic circumstances. Similarly, the evidence demonstrates that BNSF's deliberate crew reductions left it without the necessary resources for the inevitable rebound in coal traffic levels. *Id.* at 4-26. Moreover, Messrs. Mulholland and Crowley observe that the implementation of Hi-Viz in Spring 2022 and the failure to mediate a labor contract in Fall 2022 were coupled with significant increases in crew-related delays. *Id.* at 21.

The data retained by the Board confirms Messrs. Mulholland and Crowley's analysis. Employment data for BNSF in Column N of the STB's record (referencing operating personnel) shows that BNSF reduced forces by about 5,000 persons or 24% between 2015 and 2016, and again by about 4,000 persons or 20% between 2019 (the year before Covid-19) and 2020.²²

Mr. Fapp's Verified Statement also explains that BNSF could have attracted more staff, but its failure to do so was not attributable to collective bargaining restrictions or other circumstances (as BNSF suggests), but instead to BNSF's failure to utilize incentives that would have increased its ability to successfully recruit or recall crews. *See* V.S. Fapp at 34-35. Likewise, Mr. Fapp explains that BNSF's excuses posited in this case are directly contrary to BNSF's representations to the financial markets that it had sufficient crews to meet demand in 2021 and 2022. *Id.* at 35. Relatedly, as discussed below, Messrs. Mulholland and Crowley demonstrate that BNSF repeatedly revised its 2022 staffing requirement projections downward, so that even if BNSF had been

²² *See* www.stb.gov/EconomicData/EmploymentData/STB-1246-BNSF.

successful in hiring more crews, it likely still would have fallen short of the staffing levels required to meet demand for coal service because it deliberately reduced its target number of crews. *See* Reb. V.S. Mulholland/Crowley at 81-92.

3. BNSF Did Not Reasonably Allocate Its Resources in 2022

BNSF claims that its “constrained capacity” was allocated fairly among its shippers in 2022, but as shown by the public record and in the Rebuttal Statement of Messrs. Mulholland and Crowley, this simply is not true.

BNSF starts with an argument that its response to severe weather in 2014 showed that reducing railcars operating on its lines led to increased train speeds and “improvements in overall deliveries at that time.” BNSF Arg. at BNSF-121-122. Absent any other actions, the statement may be true. Yet, it is directly contrary to what BNSF told the STB, in 2014, that it was doing to move more traffic. Indeed, as Messrs. Mulholland and Crowley explain, BNSF specifically told the Board in 2014 that it had increased coal sets from 340 to 445 to increase its total volume of coal deliveries. *Id.* at 4. In other words, BNSF’s argument in this case cannot be reconciled with its own statements and operating plan from that time. *See* Reb. V.S. Mulholland/Crowley at 4-6.

BNSF’s argument in favor of reducing trainsets also says nothing about whether BNSF had acted reasonably as a common carrier to respond to requests for service during that time period or changed its practices to prevent recurrence. Indeed, as Messrs. Mulholland and Crowley point out and the Board’s own statistics confirm, promptly after “recovering” from the 2014 winter challenges BNSF reduced its operating forces by nearly 20%, something that was repeated in 2019, just before Covid-19 emerged. Reb.

V.S. Mulholland/Crowley at 22-23. Particularly with the experience of 2014 firm in recent memory, BNSF in 2022 ignored the longstanding admonitions that it “must anticipate problems and provide against them.” *Johnson v. Chicago, M., St. P. & P. R. R.*, 400 F.2d at 972. BNSF should not get “credit” for re-running a 2014 capacity rationing plan after again putting itself into a position vis-à-vis operating forces where such a plan was even needed.

BNSF next attempts to defend its limitations on trainsets to Iatan and LEC despite Evergy’s repeated requests by pointing to Evergy’s increased CFT nominations in the late Spring of 2022. Apparently, the right to adjust operations in response to changing market dynamics only accrues to BNSF (*e.g.*, BNSF Arg. at BNSF-110-114). { [REDACTED]

[REDACTED]

[REDACTED]}. *Id.* at BNSF-123. However, as Ms. Tucker showed in her Opening Verified Statement, { [REDACTED]

[REDACTED]

[REDACTED]}. *See* Op. V.S. Tucker at 11-12; *see also* Reb. V.S. Tucker at 9-14.

{{ [REDACTED]

[REDACTED] }},²³

{ [REDACTED]

²³ *See* Evergy Op. Arg. at 22 and Op. Counsel’s Exhibits 1, 2 and 3.

[REDACTED]}. See
BNSF Arg. at BNSF-125.²⁴

In their Opening Verified Statement, Messrs. Mulholland and Crowley showed that during the 2019-2022 period {{ [REDACTED]
[REDACTED]
[REDACTED] }}. Op. V.S. Mulholland/Crowley at 16-17, 35-36. Their showing went unchallenged by BNSF in its Reply. Instead, BNSF argued that its actions limiting Evergy's trainsets in service in 2022 {{ [REDACTED] }}. BNSF Arg. at BNSF-126-128. As Messrs. Mulholland and Crowley demonstrate in their Rebuttal Statement, a proper evaluation of BNSF's *systemic* response to circumstances in 2022 reveals that

{{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]}.
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

BNSF next attributes its “inability” to meet Evergy’s reasonable requests for the acceptance into service of an adequate number of trainsets in the second half of 2022 to {{ [REDACTED] }} and a crew shortage that was beyond BNSF’s control. BNSF Arg. at BNSF-129-137. As Evergy showed in its Opening Evidence and supplements herein, however, BNSF crew shortages in 2022 were attributable to its own deliberate force reduction decisions in 2015-2016 and again in 2019 and 2020, not to any external forces beyond its control. *See, e.g.,* Evergy Op. Arg. at 30-37; pp. 21-23, *supra*.

Messrs. Mulholland and Crowley also demonstrate in their Rebuttal Statement that data produced by BNSF indicate that {{ [REDACTED] }} [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ■ [REDACTED]

[REDACTED]}} Reb. V.S. Mulholland/Crowley at 81-92.

Messrs. Mulholland and Crowley also explain that {{ [REDACTED] }}

[REDACTED]

²⁵ *See* Reb. V.S. Mulholland/Crowley at 83-84; Ex Parte Nos. 770 and 770 (Sub-No.1), *Urgent Issues In Freight Rail Service*, Supplemental Comments of Rail Unions, May 22, 2023 at 5-8.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} Reb. V.S.

Mulholland/Crowley at 85.

BNSF also claims unusual {{ [REDACTED] }}, the facts are that increased coal demand in response to a rise in natural gas prices is a recurring phenomenon familiar to railroads and utilities alike, and witnesses Baranowski and Zebrowski's Figure 46 (BNSF Arg. at BNSF-131) compares {{ [REDACTED] [REDACTED] }}.

Reb. V.S. Mulholland/Crowley at 14-14. Messrs. Mulholland and Crowley showed in their Opening Statement that throughout 2022, BNSF had more than adequate physical system capacity to meet Evergy's reasonable coal shipment and trainset deployment

requests,²⁶ which were fully consistent with previous years.²⁷ The issue was labor forces, which BNSF deliberately had depleted in the years prior to 2020 and against which BNSF had enforced attendance and performance mandates that discouraged recalls and returns.

This is apparent in the “metrics” that BNSF cites to justify its refusal to restore a fourth trainset for Iatan. BNSF Arg. at BNSF-132. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ■ [REDACTED]

[REDACTED] }}

BNSF claims that it balanced the service needs of all its coal customers and that Evergy had no cause to object because there were other utility shippers with fewer inventory days than Iatan (BNSF Arg. at BNSF-137-138, 140-141), but a failure to meet the needs of other coal shippers should not excuse BNSF’s failures vis-à-vis Evergy, lest the common carrier obligation turn into a “race to the bottom.” In the same vein, BNSF

²⁶ Op. V.S. Mulholland/Crowley at 6-23.

²⁷ Op. V.S. Tucker at 4-10.

²⁸ Reb. V.S. Mulholland/Crowley at 56-66.

²⁹ *Id.* at 81-92. BNSF again refers to unloading delays at Iatan (BNSF Arg. at BNSF-135-136), but as already shown, { [REDACTED]

[REDACTED] }. See Reb. V.S. Tucker at 62-66.

alleges that its service to Iatan always was sufficient to sustain “normal” operations because coal inventory levels didn’t fall below a 20-day “threshold” and never would have been “fully depleted” even if Evergy had not applied coal conservation measures.

Id. at BNSF-138-139, 145. However, as Ms. Tucker explains, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} Reb. V.S. Tucker at 20. Moreover, running out of coal cannot be considered a standard for measuring compliance with an electric utility’s reasonable request for service as such an extreme exigency can never be allowed to occur and represents a “nightmare scenario,” not a limit on what is “reasonable.” *Id.* at 3-9, 23.

Finally, BNSF invites the Board to evaluate the unreasonableness of its responses to Evergy’s reasonable trainset and service requests {{ [REDACTED]

[REDACTED]

[REDACTED] }}. BNSF Arg. at BNSF-142-145. BNSF goes on to claim that if it is liable to Evergy for damages arising from its statutory violations in 2022, “then *all* shippers on *all* Class I railroads would be entitled to damages for 2022.” BNSF Arg. at BNSF-152 (emphasis in original). *See also* V.S. Baranowski/Zebrowski at BNSF-684-685. The Board should ignore BNSF’s references to other rail carriers’ performance.

Agency and court decisions addressing various rail-related issues (including demurrage and maximum rates) confirm that BNSF’s 2022 compliance with its statutory obligations vis-à-vis Evergy should be based on the specific facts of the Evergy-BNSF

relationship, not how BNSF's conduct compared with that of Union Pacific or any other rail carrier.

In *Dana Corp. v. ICC*, 703 F.2d 1297 (D.C. Cir. 1983), the Court of Appeals considered a challenge to an ICC decision that rejected claims that rail carriers' imposition of certain railcar storage charges amounted to an unreasonable practice. One of the issues concerned whether the idleness of a special type of car (which was the basis for the charges) was due to the carrier's fault. The ICC had overruled an administrative law judge's finding that the carriers were at fault, holding that "the service problems were caused in part by deteriorated equipment and physical plant which may be attributable to Conrail's predecessors, not Conrail or Conrail's actions." 703 F.2d at 1302. In rejecting this justification, the Court found that "even if the findings were valid it would only apply to Conrail and not to the other carriers against whom the charges were sought." *Id.* In essence, the Court determined that the reasonableness of the non-Conrail carriers' actions could not be evaluated based on whether Conrail's actions were reasonable. Even as to Conrail, the Court went on to find that "[a]ll carriers subject to the jurisdiction of the Commission are required by law to 'provide...transportation or service on reasonable request'" and that "justifications for inadequacy of service do not include inheritance of controllable conditions from one's predecessors." *Id.*

Similarly, in *The Prince Manuf. Co. v. Norfolk & W. Ry.*, 365 I.C.C. 702 (1978), the Board's predecessor examined whether a shipper had exercised sufficient "due diligence" in minimizing delays in releasing railcars to excuse it from paying the penalty portion of demurrage charges. The ICC rejected the standard that a shipper should do

“everything in its power” to avoid or abate equipment detention, ruling instead that in each individual case “the focus should be on what is reasonable under the circumstances....” 365 I.C.C. at 706 (emphasis in original). The Commission went on to explain that this duty entailed efforts to “avoid demurrage where detention was reasonably foreseeable or special efforts to abate detention if it was not foreseeable.” *Id.* This is a very fact-specific standard that depends on the particular circumstances of each case, and not on how another shipper may have acted under another set of circumstances. More generally, Courts of Appeals reviewing STB or ICC decisions under 49 U.S.C. § 11101 consistently have held that the determination whether a carrier has provided adequate service on “reasonable request” requires a “case-by-case” analysis, a “complex, fact-intensive inquiry” focused on the circumstances of each case. *Chlorine Institute, Inc. v. Soo Line Railroad*, 792 F.3d 903, 912 (8th Cir. 2015); *Nat’l Grain and Feed Ass’n*, 5 F.3d at 310.

The Board’s methodology for adjudicating claims of rate unreasonableness under 49 U.S.C. § 10701 also contradicts the notion that the reasonableness of one carrier’s behavior should be guided by what other carriers do. For decades, the ICC evaluated the reasonableness of a challenged rate by examining the rates on other “comparable” traffic charged to similarly situated shippers. Beginning in the late 1970s, the ICC abandoned this approach, with court approval. *See, e.g., San Antonio, Tx. v. U.S.*, 631 F. 2d 831 (D.C. Cir. 1980). Over time, the rate practices of carriers other than a defendant became completely irrelevant to the question whether the defendant’s challenged rate was reasonable. *West Texas Utilities. v. Burlington Northern R.R.*, 1 S.T.B. 638, 655 (1996)

(“Under the SAC constraint, the rate at issue could be no higher than what the hypothetical carrier would have to charge to provide the needed service to the complaining shipper....”). *See also Consumers Energy Co. v. CSX Transp., Inc., supra*, at 22.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}. As Evergy showed in its Opening Evidence and further demonstrates in this Rebuttal, BNSF’s professed labor constraints were a consequence of pre-2019 operational decisions and changes in labor relations practices, not the Covid pandemic that was not even cited in 2022 by BNSF’s principal representative in the Evergy commercial relationship in year’s long correspondence with Ms. Tucker. BNSF has no basis to claim that a finding of liability on its part vis-à-vis Evergy would amount to {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} The Board should reject this model.

4. BNSF's Other Defensive Arguments Are Without Merit

BNSF argues that Evergy hasn't shown that any language in the tariffs governing 2022 service to Iatan and LEC was unreasonable because the "sole discretion" feature of both tariffs had no effect on Evergy and only reflected the "uncontroversial truth" that a rail carrier is entitled to make decisions in the first instance about how it will fulfill its obligations. BNSF Arg. at BNSF-145-147. { [REDACTED]

[REDACTED] } See Op. V.S.

Tucker at 11 and Op. Exhibit JT-3. BNSF claims that the "sole discretion" language did not affect car supply (BNSF Arg. at BNSF-147), but its actions clearly showed otherwise. BNSF asserts that the language cited by Evergy only served the purpose of stating an "uncontroversial truth," but BNSF has been in the business of crafting tariff language for many decades, and if its intent was to say only that it would decide about trainset deployments and service levels "in the first instance," it knew how to do so.

BNSF next asserts that it never experienced a locomotive shortage in 2022, only a shortage of crews to operate them. *Id.* at BNSF-147-148. However, as Messrs. Mulholland and Crowley point out, BNSF shut down major coal inspection yards at Guernsey, Donkey Creek and Edgemont, {{ [REDACTED] [REDACTED] }} Reb. V.S.

Mulholland/Crowley at 103. Their locomotive analysis focused on the number of power units *in use* at given points in time, not the total number that BNSF possessed. As they

show, {{ [REDACTED] }}
[REDACTED] }} *Id.*

Finally, BNSF knocks down another Straw Man with the argument that it could not have treated Evergy's traffic as lower in priority to other traffic {{ [REDACTED] }}
[REDACTED] }}

BNSF Arg. at BNSF-149. As Messrs. Mulholland and Crowley showed in their Opening Statement and reaffirm on Rebuttal, {{ [REDACTED] }}
[REDACTED] }} Op. V.S. Mulholland/Crowley at 17-20;
See, e.g., Reb. V.S. Mulholland/Crowley at 29-32, 69-81.³⁰

C. Evergy Has Established Its Entitlement to Damages

The evidence and legal authorities presented by Evergy in its Opening Evidence and in this Rebuttal firmly establish its entitlement to a damages award under 49 U.S.C. § 11704(b).

1. Evergy Properly Linked BNSF's Actions to Its Damages

BNSF argues that Evergy has not established that it suffered any damages as a result of a "specific" act or omission on BNSF's part, and that the damages calculations that Evergy has presented depend on "external factors" for which BNSF should not be

³⁰ On Reply, BNSF seeks to congratulate itself for placing an additional set in Iatan service "a mere two business days" after learning of Evergy's inventory situation. BNSF-9. Ms. Tucker demonstrates in her Rebuttal Statement that BNSF's claim is substantially misleading. Tucker Reb. V.S. at 45-46; *id.* at 45({ [REDACTED] }).

held accountable. BNSF Exec. Sum. at BNSF-2, 15; BNSF Arg. at BNSF-149-151. At its heart, this claim essentially is a denial of any liability for the trainset limitations and related service failures that Evergy experienced in 2022, which Evergy elsewhere shows is not supported by the facts and relevant law. On its own, however, BNSF’s “linkage” argument is without merit.

In its Opening Evidence, Evergy specifically demonstrated that BNSF’s refusal to accept sufficient private trainsets into service at Iatan and LEC constituted a violation of 49 U.S.C. § 11101(a), and that its tariff terms claiming a unilateral right to decide if, when and how it would accept trainsets and provide service to Evergy were violations of 49 U.S.C. §§ 10702(2) and 11121(a). Op. Evergy Arg. at 16-17, 22-23, 25-26, 27-29. Evergy also showed that BNSF had ample track capacity in 2022 to meet Evergy’s requests,³¹ and that if BNSF had met Evergy’s trainset requests it could have delivered 100% of the 2022 CFT scheduled coal volumes. Op. V.S. Tucker at 15. Finally, Evergy presented extensive data from the public record showing that the labor constraints that BNSF blamed for its failures were a predictable consequence of its own pre-Covid decisions and could not excuse the carrier from liability. Op. Evergy Arg. at 30-36.³² See also *Navajo Transitional Energy Co., LLC – Ex Parte Pet. for Emergency Service Order*, STB Docket NOR 42178 (STB served June 23, 2023) at 4 n.6, n.7.

³¹ Op. Evergy Arg. at 18-19; Op. V.S. Mulholland/Crowley at 9-10, 21-22, 27-28, 30-33.

³² Additional publicly available evidence drawn from the Board’s own data records is referenced in note 22, *supra*.

Evergy's Opening Evidence also directly linked BNSF's actions in violation of the governing statutes to the coal conservation measures implemented by Evergy, which resulted in lost opportunity (profits) damages and higher net costs to meet system load requirements, manage coal inventory and store railcars that BNSF refused to put into service. *See* Op. V.S. Tucker at 38-39, 40-49; Op. V.S. Crosby at 9-19; Op. V.S. Foo at 6-10; Op. Evergy Arg. at 38-45. All of these damages fall into categories recognized by previous Board, court and Interstate Commerce Commission decisions as legitimate sources of redress. *Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, 5 I.C.C. 2d 542, 547-49 (1989); *GS Roofing Products Co. v. Surface Transp. Bd.*, 262 F.3d 767, 777-78 (8th Cir. 2001); *Johnson v. Chicago, M., St. P. & P. R.R.*, 400 F.2d at 975. *See also Overbrook Farmers Union Coop. Ass'n v. Missouri Pac. R.R.*, 21 F.3d 360, 365 (10th Cir. 1994).

BNSF endeavors to minimize or escape liability for damages by arguing that various "external factors" and "factors associated with Evergy itself" played a role in determining the measure of BNSF's coal shortfalls at Iatan and LEC and, thus, the measure of Evergy's damages. BNSF Exec. Sum. at 14. Evergy rebuts BNSF's arguments blaming Evergy for the shortfalls in Section 7, *infra*. BNSF's "external forces" claim ignores the rule that so long as the wronged party makes reasonable efforts to mitigate its damages (as Evergy did here), the offending party is responsible for all damages that are reasonably foreseeable at the time of its violation. *See, e.g., Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, 7 I.C.C. 2d 30, 33-34 (1990). In this case, {{ [REDACTED] [REDACTED]

}}},³³ and as a transportation company well-acquainted with electric utility operations and the functioning of regional transmission organizations such as SPP, BNSF also knew the consequences of coal conservation in terms of generation revenues and costs to meet load. BNSF may not have known the precise measure of those impacts, but that is hardly exculpatory under agency precedent. In the maximum utility coal rail rate context, for example, the Board consistently measures reparations awards by reference to the amount by which the rate charged exceeded a reasonable maximum and the total number of tons shipped under the unreasonable rate. *Consumers Energy Co. v. CSX Transp., Inc.*, *supra* at 73; *San Antonio, Texas v. Burlington Northern, Inc.*, 1 I.C.C.2d 561, 577 (1986). The agency does not inquire into the reasons why the utility shipped the number of tons that it did during the reparations period, even though the defendant rail carrier may have had little if any direct control over those volumes.

Evergy properly linked its liability claims to specific actions by BNSF, and its damages claims to the resulting statutory violations.

2. BNSF Is Liable for Coal Shortfall Damages at Lawrence

In its Opening Evidence, Evergy demonstrated that BNSF's refusal to accept a sufficient number of private trainsets into service for LEC in violation of 49 U.S.C. §§ 11101(a), 10702 (2) and 11121(a) resulted directly in a coal delivery shortfall of

³³ See, e.g., Op. V.S. Tucker at 21; Op. Counsel’s Exhibit 4.

more than 256,000 tons and economic damages related to that station in the form of lost opportunity and increased net cost of load across the Evergy system. *See* Op. Arg. at 13, 21-30, 38-44; Op. V.S. Tucker at 28-30; Op. V.S. Crosby at 14-20; Op. V.S. Foo at 5-10. In Reply, BNSF argues that it has no liability with respect to LEC because it delivered “coal volumes in excess of its annual declaration and at least Evergy’s original CFT nominations for 2022.” BNSF Arg. at BNSF-153. BNSF then presents several subsidiary arguments intended to support its blanket declaration. *Id.* at BNSF-154-161. BNSF’s claims are without merit, and Evergy clearly is entitled to damages as a remedy for BNSF’s statutory violations with regard to LEC.

a. BNSF Did Not Meet LEC’s Reasonable Coal Requirements

BNSF posits Evergy’s non-binding, initial estimate of its 2022 coal requirements at LEC, which were provided before 2022 even began, as an effective ceiling on BNSF’s common carrier obligations to Evergy, arguing that because BNSF delivered more coal to LEC in 2022 than was stated in Evergy’s original declaration BNSF cannot be held liable for damages resulting from LEC’s actual coal shortfalls. BNSF Arg. at BNSF-154-155. The fact that BNSF’s trainset limitation led directly to a 256,019-ton shortfall in deliveries as measured against the more precise monthly volumes set out in the BNSF-prescribed CFT scheduling program is dismissed on the alleged ground that Evergy’s final CFT numbers were not reasonable. *Id.* at BNSF-158-159. The Board should reject this manufactured excuse.

Annual declarations are estimates that both BNSF and Evergy have understood are subject to change as actual coal requirements become more refined and a pattern of rail

deliveries emerges. They are in no sense a “request for transportation” that sets the limits of BNSF’s service obligations, as Ms. Tucker’s description of { [REDACTED] }, and as BNSF’s own Price List 6041 (incorporated into the LEC Tariff BNSF-60024) provides.³⁴ *See* Reb. V.S. Tucker at 36-38, 67-68. Elsewhere, BNSF asserts that CFT schedules are not requests for service,³⁵ but as discussed *supra*, BNSF never explains just what it believes *is* such a request. Evergy submits that Item 260 of BNSF’s Price List 6041 indicates an answer, as it provides that a shipper “shall enter all coal tonnage that it intends to cause to be loaded for shipments on BNSF into the [CFT]” and goes on to state that the confirmed CFT “shall be used for purposes of train allocation.”³⁶

At BNSF’s own direction, the CFT is the program through which a coal shipper subject to a common carrier tariff requests service.³⁷

³⁴ Item 255 of Price List 6041 states that the annual estimate “shall be non-binding and is not a guarantee of service by BNSF.” *See* Reb. Counsel’s Exhibit 1.

³⁵ BNSF Arg. at BNSF-82-83.

³⁶ *See* Reb. Counsel’s Exhibit 1.

³⁷ {{ [REDACTED] }}

b. LEC's 2022 Coal Burns and Generation Were Not "Historic"

BNSF falsely claims that LEC burned more coal and generated more electricity in 2022 than it did "historically," apparently in an effort to amplify its unsupported argument that delivering the station's initial 2021 tonnage estimate absolved BNSF from any liability for its acts and omissions in 2022. BNSF also falsely asserts that it never reduced the number of trainsets in service to LEC. BNSF Arg. at BNSF-156-158.

In fact, the actual *history* of annual coal burns at LEC shows that the 1,224,750 tons burned there in 2022 were 16% *lower* than the 2015-2021 average of 1,457,567 tons, and that the 2022 burn figure trailed the 2015, 2016, 2017, 2018, and 2019 burns by 17%, 19%, 21%, 30%, and 21%, respectively.³⁸ Similarly, the 1,908,757 (coal-fired) MWhs generated by LEC in 2022 were 17% *lower* than the 2,307,976 MWh average for the 2015-2021 time period.³⁹ BNSF's intentionally truncates its sense of "history" in order to produce a desired result, as BNSF's Mr. Hibbard himself admits in a footnote. *See* V.S. Hibbard at BNSF-786 n.100 ("I exclude 2019 [*and older data*] from the historic comparison period to avoid the exogenous impacts of COVID-19 on electricity demand and supply between 2019 and 2020"). Accordingly, BNSF's analysis shows only that the

³⁸ *See* Reb. V.S. Tucker at 31-32.

³⁹ *Id.* at 32-33. LEC's 2022 coal-fired generation figure trailed the 2015, 2016, 2017, 2018, and 2019 figures by 20%, 22%, 23%, 32%, and 20%, respectively.

2022 coal burn and generation levels at LEC were “historic” as long as the analysis ignores the portions of history that do not agree with BNSF’s claim.⁴⁰

The same limited “look back” informs its claim about trainsets in service to LEC. While it may be true that BNSF did not { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}⁴² As Ms. Tucker shows in her Rebuttal Statement, BNSF’s refusal to

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }.

Reb. V.S. Tucker at 38-40, 41-43 and Tables 12, 14.

c. Evergy’s 2022 CFT Adjustments Were Not Unreasonable

BNSF takes the position that Evergy’s final CFT volumes for LEC cannot be a basis for awarding damages because they were not reasonable. The justifications offered

⁴⁰ BNSF is similarly mistaken in its claims (*see, e.g.*, BNSF-11, BNSF-144) that Iatan’s summer 2022 and October 2022 coal burns were “consistent with” or “exceeded” historic levels. Reb. V.S. Tucker at 23-29.

⁴¹ *See* Op. V.S. Tucker at 11.

⁴² BNSF_EVERGY_0008866 (Reb. Counsel’s Exhibit 4).

market participants such as Evergy and close observers such as BNSF of the likelihood of another episode of gas price volatility.⁴⁵ It is not credible for BNSF to suggest that the increase in natural gas prices – as well as the predictable following effect on utility coal demand – were a complete surprise that could not have been foreseen.⁴⁶

In her Rebuttal Statement (Reb. V.S. Tucker at 36-44), Ms. Tucker shows that BNSF is wrong to attempt to excuse its trainset limitations based on the difference between the LEC Annual Declaration and the LEC CFT Nominations. *See* BNSF Arg. at BNSF-4; BNSF-154. In particular, Ms. Tucker: (i) identifies the disparities between the Annual Declaration and the CFT Nominations; (ii) breaks down those differences by time period within 2022; and (iii) shows that during the critical summer months, BNSF’s LEC deliveries were extremely poor { [REDACTED] [REDACTED] }. Reb. V.S. Tucker at 36-44; *id.* at 44 (“BNSF does not deserve credit for ‘overperforming’ for the final four months of the year relative to an outdated declaration, particularly when BNSF’s deliveries in the three immediately preceding summer months had been so poor. And that September-through-December

⁴⁵ *See, e.g.*, <https://csis.org/analysis/Russia-as-possible-invasion-Ukraine>; *The Independent*, “Ukraine says Russia amassed over 94,000 troops at border,” Associated Press, Dec. 3, 2021; *Politico*, “Russia builds up forces on Ukraine border,” Janes, Dec. 10, 2021; *U.S. Business Standard*, “US Intelligence finds Russia planning military offensive against Ukraine,” Associated Press, Dec. 4, 2021; *NY Times*, “Russia Thins Out Its Embassy In Ukraine, a Possible Clue to Putin’s Next Move,” D. Sanger, Jan. 31, 2022.

⁴⁶ As one BNSF official remarked in August 2021, { [REDACTED] [REDACTED] } BNSF_EVERGY_0016255 (Reb. Counsel’s Exhibit 6).

‘overperformance’ makes up the entirety of BNSF’s claimed overperformance relative to our Annual Declaration.”).

BNSF’s newfound focus on “ratability” (BNSF Arg. at BNSF-159) also runs counter to the long history of both Evergy’s CFT schedules and BNSF’s own delivery performance. As Ms. Tucker shows in her Rebuttal Statement, { [REDACTED]

[REDACTED] } . See Reb. V.S.

Tucker at 46-58, Reb. Exhibit JT-5. { [REDACTED] }⁴⁷ In the governing tariffs for Iatan and LEC, BNSF claimed the right to deliver trains at any time, 365 days each year,⁴⁸ and its { [REDACTED]

[REDACTED] }⁴⁹

By the same token, BNSF’s assertion that regular modifications to Evergy’s 2022 CFT schedules amounted to { [REDACTED] } that released BNSF from its statutory obligations (BNSF Arg. at BNSF-159) { [REDACTED] } . As Ms. Tucker explains, while initial CFT entries at the beginning of a year are more likely to track the preliminary declaration estimates, those entries can change and be updated as a year unfolds and circumstances change. Factors such as weather and natural gas price shifts might play a role, along with BNSF’s own performance record. Delivery shortfalls

⁴⁷ See Op. V.S. Tucker at 22, Op. Exhibit JT-5.

⁴⁸ Complaint, Exhibits 1 and 4.

⁴⁹ See Op. V.S. Tucker at 33, Op. Exhibit JT-13.

measured against CFT entries in early months typically would result in increases in CFT schedules for later months to make up the difference. *See* Reb. V.S. Tucker at 37-38.

Significantly, however, Ms. Tucker also shows that { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }. BNSF knew to expect that Evergy's CFT entries for LEC would change – perhaps substantially – over the course of 2022, and it was well-acquainted with the factors that could prompt that change (*e.g.*, weather shifts, natural gas prices, etc.). The fact remains that had it honored Evergy's reasonable requests for the deployment of private trainsets in a pattern consistent with many years of commercial history, BNSF could have delivered 100% of Evergy's final 2022 CFT volumes. *See* Op. V.S. Tucker at 15.⁵⁰

3. Evergy's Damages Were a Direct Result of BNSF's Service

As Evergy showed in its Opening Evidence and further summarizes in this Rebuttal, BNSF's unreasonable 2022 limitations on trainsets allowed in service to Iatan and LEC led directly to predictable (and predicted) coal delivery shortfalls. Faced with mounting shortfalls, resistance from BNSF to the addition of any trainsets, and projected

⁵⁰ { [REDACTED] } BNSF Arg. at BNSF-159, Counsel's Exhibit 24. Evergy has never argued otherwise. Evergy's consistent position has been – and is – that BNSF was obligated to meet shipping nominations established through its own prescribed CFT platform, and to accept into service available private trainsets sufficient to transport those volumes consistent with historic patterns and practices.

increases in the demand for electricity and the cost of purchasing it in the months ahead, Evergy – { [REDACTED] }⁵¹ – made the reasonable decision in the Spring of 2022 to implement coal conservation measures at Iatan and LEC, measures which led directly to the lost opportunity and increased net cost to load damages claimed in this proceeding. Op. Arg. at 38-44; Reb. V.S. Tucker at 3-9. In his Statement, Evergy witness Russo catalogues some of the causes of market volatility and uncertainty prevailing at the time and explains how those factors combined with Evergy’s regulatory mandates and SPP responsibilities showed Evergy’s coal conservation decisions to be quite reasonable. V.S. Russo at 12-15. Emphasizing that it was Evergy that made the decision to conserve, BNSF tries to argue that Evergy’s damages resulted solely from those decisions, not BNSF’s service. BNSF Arg. at BNSF-162-154. The argument is without merit.

BNSF first takes certain statements in Evergy’s pleadings and Opening Evidence about conservation being “necessary” or “required” and argues that no “authority” such as SPP or state regulators ever “ordered” Evergy to conserve coal. *Id.* at BNSF-164-165. However, as Evergy Witness Hsin Foo notes in her Rebuttal Statement, the point is a red herring. SPP does not direct utilities to conserve coal; it gives them discretion to do so

⁵¹ BNSF discounts the role that “a BNSF employee” played { [REDACTED] }
[REDACTED]
[REDACTED] }. See Op. V.S. Tucker at 21-23, Op. Arg. at 22-23 and n.18; Reb. V.S. Tucker at 2-3.

and when requested can assist in the process. Reb. V.S. Foo at 15-16.⁵² *See also* V.S. Russo at 21. Similarly, the Missouri and Kansas state utility regulators do not order utilities to conserve coal (or refrain from doing so). They can exercise after-the-fact review of costs incurred and may consider the prudence of actions taken, but they do not direct those actions. V.S. Foo at 16; *see also* Reb. V.S. Tucker at 21-22.

Ms. Foo addresses BNSF's next point as well: that Evergy's damages were not foreseeable because sometimes coal conservation can lead to a month where a utility's additional revenues exceed increased costs. BNSF Arg. at BNSF-167-169. As she points out, the total cost to load calculation is a *net* calculation over the entire conservation period, and because conservation is a response to projected fuel constraints and not a business strategy,⁵³ the expected net consequence is negative. Reb. V.S. Foo at 8. BNSF claims that it could not have known that Evergy would incur economic harm, but this simply isn't true. { [REDACTED]

[REDACTED] } See Op. V.S. Tucker at 23-25, Op. Exhibit JT-7.

BNSF asserts that because Evergy would not have run out of coal at Iatan or LEC absent conservation, it should have no liability to Evergy. BNSF Arg. at BNSF-169-170.

52 {{ [REDACTED] }} See SPP-001504, SPP-001660 and SPP-001666 in Evergy's Rebuttal Workpapers.

⁵³ Evergy addresses and debunks BNSF’s suggestion that Evergy could have elected to conserve coal in order to “make money” in Section 8, *infra*.

BNSF goes on to argue that because Evergy opted to begin coal conservation when there were certain levels of coal inventory at the stations, BNSF should not be held responsible. *Id.* at BNSF-170-173. As Evergy referenced *supra* (at p. 30), the nightmare scenario of running out of coal cannot legitimately serve as the standard for meeting a reasonable request for service. Reb. V.S. Tucker at 3-9, 23. Moreover, BNSF’s assertion is only possible because of 20-20 hindsight. Viewed from the perspective of the Evergy Fuels Department in the Spring of 2022⁵⁴ – with accumulating coal shortfalls, Summer peak power demand projections, rising prices for purchased electricity and no prospect for additional trainsets – the decision to begin coal conservation was a reasonable one. *See* Op. V.S. Tucker at 38-39; Reb. V.S. Tucker at 3-9. After independent consideration of the market conditions at the time, Mr. Russo arrived at the same conclusion. V.S. Russo at 11-15. In that regard, as Ms. Foo points out, electric utility resource management is a long-term proposition, with decisions having to be made based on projected conditions months into the future. Reb. V.S. Foo at 13-14; *see also* Reb. V.S. Tucker at 3-9. A manager cannot wait until coal inventory is in crisis to begin conservation; the reasonable and responsible course is to act despite a current “snapshot” of inventory if the forecast is for fuel constraints in peak months. *Id.*

BNSF’s actions were the cause of Evergy’s damages.

⁵⁴ The “circumstances at the time,” to use one of BNSF’s favorite phrases. *See, e.g.*, BNSF Arg. at BNSF-72.

4. Evergy Has Proved Its Damages

a. PROMOD Is the Only Model to Determine Increased Net Cost to Load

In order to estimate the increased net cost incurred by Evergy in 2022 to purchase its load commitments from SPP as a consequence of coal conservation at Iatan and LEC, it is necessary to model the behavior of the entire SPP marketplace, which includes more than 750 individual generating units. As Evergy witness Hsin Foo explained in her Opening Verified Statement, PROMOD is the premier and widely accepted tool for this purpose. Op. V.S. Foo at 2-5. Evergy witness Russo agrees, describing the production cost modeling approach as the method used by responsible energy price forecasters and multiple independent system operators, including SPP. V.S. Russo at 15-17. PROMOD simulates the flow of electricity through the SPP footprint and identifies the most cost-effective approach to generating and distributing electricity while adhering to reliability and transmission limitations. Reb. V.S. Foo at 3. As used by Ms. Foo, PROMOD employs a broad range of SPP system inputs, including generating unit availability, fuel costs, demand for electricity, transmission constraints, and operation and maintenance costs, among other components. *Id.*⁵⁵ Evergy's PROMOD analyses are regularly accepted by SPP and the state regulatory authorities with jurisdiction over Iatan and LEC. *Id.*

⁵⁵ Ms. Foo's Opening Statement workpapers detailed the inputs used to forecast Locational Marginal Prices ("LMP") in her analysis.

PROMOD cannot run using “actual” input data (fuel costs, variable operation and maintenance costs, regional weather, unplanned unit outages, etc.) for the 750+ generating units in SPP because that data is not available to the individual user. Evergy would not and does not have access to such data for non-Evergy generators, and to mix “actual” input data for Evergy units with PROMOD model inputs for the other 700+ units in SPP would produce distorted results. *Id.* at 19-21. Because of these data limitations, PROMOD-based modeling of the SPP system is the best method available to reproduce the functions of the SPP market in 2022 with and without the specific conservation measures in place at Iatan and LEC.⁵⁷

As is explained elsewhere in this Rebuttal, coal conservation as practiced by an electric utility such as Evergy within a system like SPP is a response to projected generation fuel constraints⁵⁸, not a business strategy. *See* Section 8, *infra*. Based on her extensive experience, Ms. Foo confirms that when a decision is made to conserve coal, such as through market price adders or SPP’s Opportunity Cost Calculator, the expectation is that net costs to purchase load during the conservation period will increase.

⁵⁷ BNSF also misrepresents the implications of Ms. Foo’s PROMOD-based approach to increased net cost to load for Mr. Crosby’s lost opportunity calculation. BNSF Arg. at BNSF-178. For example, the PROMOD-produced LMP data used by Ms. Foo to compare “with conservation” and “without conservation” scenarios were not used by Mr. Crosby. Since he was analyzing only two (2) Evergy units he was able to use actual LMPs as reported by SPP. *See* Reb. V.S. Crosby at 2. To make his calculation more precise and conservative, he adjusted the “but for” LMPs downward using a differential provided by Ms. Foo, but the SPP prices themselves were actual prices. *Id.* at 7-8.

⁵⁸ Mr. Russo discusses how Evergy was facing those projected constraints and other market uncertainties when it made its reasonable coal conservation decisions. V.S. Russo at 10-15.

Reb. V.S. Foo at 20. PROMOD is the only recognized tool that can estimate those increased net costs. BNSF's arguments against its validity⁵⁹ based on alleged data requirements that are impossible to meet amount to claiming a "free pass" to avoid redress for the adverse economic consequences of its own federal statutory violations. The Board should reject this position and hold BNSF accountable.

b. Evergy's Models Are Reliable

In their Opening and Rebuttal Verified Statements, Mr. Crosby and Ms. Foo explain why GenTrader and PROMOD are the models best suited to the calculation of an electric utility's lost opportunity and increased net cost to load, respectively, attributable to coal conservation measures. *See* Op. V.S. Crosby at 14-15; Op. V.S. Foo at 2-4; Reb. V.S. Crosby at 2-5; Reb. V.S. Foo at 16-18. BNSF claims that the model results somehow are speculative because they rely on multiple inputs (BNSF Arg. at BNSF-181), but all of the inputs used by Evergy's witnesses are sourced and catalogued in their Statements and workpapers and the models cannot be manipulated internally, so there is no "speculation" at all.

BNSF also suggests that the Board should not accept Evergy's damages evidence because the models used are "within the expertise of other agencies" that do not have jurisdiction over Evergy's claims, not the Board. *Id.* This amounts to arguing that if the best and only tools available for measuring damages that the evidence showed occurred

⁵⁹ The fact that PROMOD results are widely and regularly accepted by SPP and state regulators belies BNSF's referral to it as a "made-for-litigation" model. BNSF Arg. at BNSF-177.

are models “beyond the expertise” of the Board (*id.*), then the Board should deny relief and BNSF should not face any consequences for its statutory violations. That is an untenable and wholly inequitable position.

In prior litigation the Board has followed a “best evidence” rule and accepted a complainant’s evidence, calculations and methodologies even when there were claimed uncertainties or imprecisions if the defendant either failed to offer contrary evidence or presented a position that was poorly supported. *See, e.g., Sunbelt Alkali Partnership v. Norfolk So. Ry.*, NOR 42130, 2014 WL 2805254 (STB served June 20, 2014), at *33, 67; *AEP Texas North Co. v. BNSF Ry.*, NOR 41191 (Sub- No. 1), 2007 WL 2680223 (STB served September 10, 2007), at *17-18, 29, 58; *Georgia Power Co., et al. v. Southern Ry., et al.*, NOR 40581, 1993 WL 455296 (ICC served November 8, 1993), at *8. The Board should apply the rule in this case and accept Evergy’s sourced and supported model results in preference to BNSF’s lack of a counter-presentation.

Referring to the Board’s May 14, 2025 Decision on BNSF’s Motion to Compel in this case, BNSF argues that because Evergy’s damages based on coal conservation require “interpreting Evergy’s obligations under Missouri and Kansas law,” the Board should consider the damages calculations to be outside the scope of this proceeding. BNSF Arg. at BNSF-182. The obvious flaw in this position is that Evergy’s claim is made under federal statutes exclusively within the province of the Board and applicable to common carrier railroads, not state law. BNSF does not identify any Missouri or

Kansas laws or regulations that apply to the calculation of Evergy's coal conservation damages in this case, as there are none.⁶⁰

c. Every Model Relies on Inputs

BNSF seeks to prove too much when it asserts that the Board should not accept Evergy's modeling results because the models rely on inputs. BNSF Arg. at BNSF-183. The rather unremarkable fact is that *every* computer model or program run is dependent upon input data. BNSF's real argument seems to be that because Evergy personnel discussed different potential model inputs at various times in 2022, the inputs used by Mr. Crosby and Ms. Foo in Evergy's Opening Evidence are unreliable. *Id.* at BNSF-184. There is no merit to BNSF's position.

It is hardly surprising that as Evergy employees were considering the economic consequences of BNSF's 2022 trainset limitations, they discussed different approaches that might be taken or alternative ways to present certain data. Such preliminary efforts would be expected in any similar set of circumstances. The inputs ultimately used by Mr. Crosby and Ms. Foo represent the culmination of internal review and research, and they are fully explained and sourced in their Exhibits and workpapers.⁶¹ BNSF's attempt to

⁶⁰ As explained *supra* at p. 46-47 and in the Rebuttal Verified Statement of Hsin Foo (at 16), Missouri and Kansas regulators do not direct or pre-approve utilities' coal conservation decisions. *See also* V.S. Russo at 11.

⁶¹ BNSF points to the fact that Evergy's final net cost to load damages figure in its Opening Evidence was lower than the "additional costs" of power referenced in the Summary section of the Original Complaint as allegedly undercutting Evergy's damages claim. BNSF Arg. at BNSF-183. As Evergy explained in its Opening Argument (at 49), the adjustment produced a more precise calculation of actual total *net increased cost to*

use preliminary, incomplete and unverified work product to undermine final and fully supported calculations fails.

d. Changing Modeling Inputs

In her Rebuttal Statement, Ms. Foo explains that because coal conservation is a response to a projected shortage of generation fuel and not a business strategy, the operative assumption is that overall net costs to serve load will increase as a result of conservation. Reb. V.S. Foo at 20. She refutes the notion that such adverse impacts are only a “happenstance.” BNSF nevertheless clings to the argument that because changing some of the inputs to Ms. Foo’s analysis could generate “positive” net cost to load impacts, the Board should reject the model. BNSF Arg. at BNSF-184-185.

Putting to one side the obvious fact that any model’s outcomes potentially could be changed if inputs were manipulated, Ms. Foo explained the process by which she executed PROMOD in both the “with conservation” and “without conservation” scenarios, including that removing the coal conservation adders was the only adjustment that she made to the base case model run. Op. V.S. Foo at 6-10. She showed that the results were a net increase in Evergy’s cost to serve load in 2022 due to coal conservation. *Id.* at 10. In her Rebuttal Statement she explains that the results were not “random” at all. Reb. V.S. Foo at 8. BNSF can speculate that an operator could change the results of a model run by manually manipulating the input data, but since nothing of the sort happened in this case BNSF’s point is irrelevant.

load. That adjustment has no relevance to the integrity of the inputs in Ms. Foo’s PROMOD analysis.

e. BNSF’s “Past Modeling” Claim

BNSF argues that the Board should ignore the results of Evergy’s GenTrader and PROMOD analyses in its Opening Evidence – analyses that were fully supported by data sources and workpapers filed with the Board – because the lost opportunity component of Evergy’s damage calculation does not match a January 2023 internal spreadsheet prepared by a former Evergy employee. BNSF Arg. at BNSF-185-187. The Board should reject this argument.

Evergy Witness Michael Crosby is familiar with the estimate that BNSF references, and as he explains in his Rebuttal Statement, it was a preliminary calculation performed manually using an Excel spreadsheet that did not accurately capture operations at LEC and used certain inputs that were not derived from actual generation offers into SPP. Reb. V.S. Crosby at 8. His label for the estimate is “primitive.”

It is not unusual for a party contemplating presentation of a claim for redress of a counterparty’s failure to meet obligations to engage in one or more preliminary iterations of the potential economic consequences. The 2023 spreadsheet to which BNSF refers is an example of just such a preliminary review. Given Mr. Crosby’s explanation and the lack of any input data or calculation mechanics accompanying BNSF’s claim, there is no basis to assert that it undermines the results of a recognized algorithmic dispatch program such as GenTrader, which were supported by disclosed input data and workpapers.

f. Damages at LEC

BNSF’s assertion that the inclusion of damages related to 2022 operations at LEC makes Evergy’s modeling programs “flawed” (BNSF Arg. at BNSF-187-188) is easily

disposed. As explained in Section 2, *supra*, it is entirely appropriate for Evergy to claim and the Board to award damages for the adverse impacts of BNSF's statutory violations on LEC. Since there is no basis to exclude LEC from Evergy's damages calculations, its inclusion has no negative implications for the overall integrity and validity of those calculations.

g. Evergy's Use of Two Models

BNSF criticizes Evergy for relying on two (2) models "where one would have sufficed"⁶² without actually explaining which of the two (2) it would have preferred. In fact, Evergy elected to use both GenTrader and PROMOD because each is best-suited to address the category of damages to which it is addressed.⁶³ In his Rebuttal Statement, Mr. Crosby testifies based on his experience that if the task at hand is to calculate lost opportunity caused by coal conservation measures at two (2) generating stations where the analyst has access to actual SPP offers and other unit data for the time period studied, GenTrader is the superior model to use. Reb. V.S. Crosby at 5. If the goal is to calculate increased net cost to meet load in SPP for the company controlling those units, however, the implications of changing LMPs (with and without conservation) and other factors apply across the SPP system, requiring the modeling of that entire system. It is

⁶² BNSF Arg. at BNSF-189.

⁶³ BNSF's claim that they "build on top" of each other with "outputs from one model (PROMOD) becoming inputs for the other" (*id.*) is a gross exaggeration. As Mr. Crosby explained, the only output from PROMOD that he used was a LMP differential that he employed to adjust *downward* the actual LMPs in his "but for" lost opportunity case. Op. V.S. Crosby at 16; Reb. V.S. Crosby at 7-8.

impossible to execute GenTrader for each of the 750+ generating units in SPP, due both to the breadth of such a task and the fact that actual input data would not be available for the hundreds of units not controlled by Evergy. PROMOD is the best (and only) recognized program suitable for that calculation. Reb. V.S. Foo at 16-20. In his Statement, Mr. Russo – who has extensive experience and expertise in electric utility analyses – specifically endorses Evergy’s choice of models, describing each as appropriate for its intended purpose. V.S. Russo at 15-17.

h. Corroboration of Evergy’s Damages Calculations

In his Statement, Evergy’s witness Russo rebuts BNSF witness Hibbard’s arguments that Evergy’s damages calculations are unreliable and based on random “exogenous” factors by showing how it is possible to corroborate Evergy’s results through an independent analysis principally using publicly available data. He explains that both the data and the analytical approach were available to Mr. Hibbard, had he chosen to attempt to test Evergy’s lost opportunity damages conclusions. V.S. Russo at 22.⁶⁴ Mr. Russo makes clear that his analysis does not constitute an alternative damages calculation, and that the more precise data-based and model-driven damages calculated by Mr. Cosby represents the best evidence. *Id.* at 25. Using a standard Excel spreadsheet and accumulated data from SPP, the Federal Energy Regulatory Commission and various

⁶⁴ Mr. Russo focuses on the lost opportunity component of Evergy’s damages because, as he points out, execution of PROMOD requires access to input data from across SPP. V.S. Russo at 22. However, PROMOD is a system that cannot be manipulated internally, so any operator using Ms. Foo’s input data would replicate her outputs as well. Op. V.S. Foo at 3, 10.

public databases, admittedly a more generalized methodology than those used by Evergy, Mr. Russo nevertheless produced results which approximated Evergy's final lost opportunity damages. *Id.* at 25. His results and conclusions strongly indicate why Mr. Hibbard may have demurred himself from undertaking a similar effort.

5. BNSF's "Overstatement" Claims are Without Merit

BNSF lodges a group of additional (and in some cases repetitive) claims opposing Evergy's proven case for a damages award, but each one falls well short of the mark.

BNSF first repeats its argument that Evergy was not compelled to conserve coal by SPP, this time adding that {{ [REDACTED] }} BNSF Arg. at BNSF-190-191. Again relying on 20-20 hindsight, BNSF asserts that coal conservation was not necessary to avert disaster, which is the wrong standard for assessing whether a railroad met its common carrier obligations. *See also* Reb. V.S. Tucker at 23. As Evergy showed in its Opening Evidence and confirms herein, the facts and circumstances *at the time the conservation decisions were made* showed those decisions to be reasonable. *See* Op. V.S. Tucker at 38-40; Reb. V.S. Tucker at 3-9; V.S. Russo at 3, 10-12.

BNSF next asserts that Evergy should not be entitled to damages related to the application of "market adders" to offer prices into SPP because Evergy made the decision to apply them. BNSF Arg. at BNSF-191-192. As shown *supra* and in the testimonies of Evergy Witnesses Tucker, Foo and Russo, conservation decisions in 2022 had to be made well in advance of the time periods when conserved generation would be needed most, and Evergy communicated with SPP throughout the process to ensure that proper

protocols were followed. Reb. V.S. Tucker at 3-9; Reb. V.S. Foo at 14-17; V.S. Russo at 14-15. *See also* pp. 47-48, *supra* and note 52. There is no legitimate reason to restrict Evergy's damages to those resulting from conservation adders calculated by SPP.⁶⁵

Third, BNSF makes the rather bizarre claim that Evergy should not be entitled to damages related to Iatan Unit 1 that are attributable to a period when the Unit had been *scheduled* to be on outage, even though that schedule was subsequently changed and the Unit actually ran in October 2022. BNSF Arg. at BNSF-193-194. BNSF seems to be suggesting that Evergy shifted the Iatan Unit 1 outage *in 2022* in order to enhance damages that it could claim in 2025 and 2026. It would be conservative to label this a "stretch." Mr. Crosby explains the simple reality that the outage – which originally was scheduled in 2019 – was moved forward by a couple of months as a matter of ordinary utility resource management. Reb. V.S. Crosby at 8-9. He also confirms that Evergy is not claiming damages related to Iatan Unit 1 during the period when it actually was on outage. *Id.* at 9. BNSF's claim is wholly without merit.

BNSF raises a number of additional issues in its Argument Section C.5, which are addressed in Section 7, *infra*.

⁶⁵ BNSF also is wrong in its effort to avoid liability on the grounds that Evergy's coal inventories would not have been fully depleted even if it had not decided to impose coal conservation measures. BNSF-139. Ms. Tucker explains that BNSF sets far too low a threshold for measuring its own performance, adding that "[i]t would be unthinkable for anyone at Evergy to have reported to senior management during the course of 2022 that our fuel supply was acceptable because, after all, we had not actually run out of coal." Reb. V.S. Tucker at 23.

6. Evergy's Coal Inventory and Railcar Storage Claims Are Supported By the Evidence

In its Opening Evidence, Evergy demonstrated that BNSF's 2022 trainset limitations directly caused Evergy to incur substantial additional costs for coal inventory reclamation and restoration and for the storage of idle trainsets, neither of which would have been necessary but for BNSF's actions. *See* Op. V.S. Tucker at 40-49.

BNSF's Reply denies liability for inventory management or railcar storage costs, initially on the ground that Evergy is not entitled to any damages of any kind. BNSF Arg. at BNSF-200. As shown herein and in Evergy's Opening Evidence, BNSF's broad assertion has no merit. Its more specific allegations are addressed below.

BNSF's objections to Evergy's bulldozer fuel cost claim rests on the dual notions that coal inventory reclamation and restoration are an "ordinary part of operating a coal plant" and that Ms. Tucker's fuel cost calculations are not supported. *Id.* at BNSF-200-202. However, BNSF offers nothing more to tie this vanilla observation to Evergy's actions in 2022. As Ms. Tucker explained, the *only* inventory reclamation costs that are the subject of Evergy's claim are for the tons of coal that had to be taken from inventory to cover the delivery shortfalls caused by BNSF's trainset limitations (and the tons of coal subsequently moved back to restore inventory); but for those actions, the costs would not have been incurred. Op. V.S. Tucker at 40-45; Reb. V.S. Tucker at 59-60. Ms. Tucker also sourced her fuel costs to Evergy's own records. Op. V.S. Tucker at 42 n.8. Since BNSF offers only an argument and no alternative data, Ms. Tucker's presentation

represents the best evidence on record. *See, e.g., Otter Tail Power v. BNSF Ry.*, NOR 42071, 2006 WL 275904 (STB served Jan. 27, 2006) at *19 (Board accepted complainant’s evidence when BNSF offered only criticism without data).

Similarly, BNSF objects to liability for railcar storage on the ground that such expenses are incurred “in the ordinary course” of utility operations,⁶⁶ ignoring Ms. Tucker’s showing that the storage expenses claimed by Evergy only related to the trainsets that would have been in service in 2022 but for BNSF’s imposed limitation, and that in each case Evergy selected the lowest cost storage option. *Op. V.S. Tucker* at 46-47; *Reb. V.S. Tucker* at 60. Evergy’s evidence is well-supported, and as BNSF offers only rhetoric, that evidence should be accepted.

7. Evergy Took Reasonable Steps to Mitigate Its Damages

Through its Reply witnesses Baranowski, Zebrowski, Hibbard and Morehouse – three of whom are outside consultants and none of whom actually were involved in the direct interactions between Evergy and BNSF with respect to coal transportation to Iatan and LEC in 2021 and 2022 – BNSF advances several claims that Evergy failed to take available steps that would have mitigated its damages resulting from the BNSF statutory violations that are at the center of this case. Both applicable law and incontrovertible facts show these claims to be without foundation.

From its earliest decades, the Board’s predecessor recognized the “general principle” that one who suffers general damages due to a rail carrier’s actions that were

⁶⁶ BNSF Arg. at BNSF-202.

not related to the reasonableness of rates must use “reasonable diligence” to try to minimize their losses. *Becker v. P.M.R.R.*, 28 I.C.C. 645, 657 (1914). The ICC relied on the “familiar rule that a party suffering loss from a breach of duty ought to do what a reasonable man would do to mitigate his loss. *Brady v. Baltimore & Ohio R. Co., et al.*, 152 I.C.C. 327, 332 (1929) (citing *U.S. v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 512 (1915)).

More recently, *Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, *supra* focused on damages due to a shipper for what had been found to be an unlawful cessation of common carrier rail service. Citing both *U.S. v. U.S. Fidelity & Guaranty* and *Brady*, the ICC confirmed that “[a] party suffering loss from a breach of duty must do what a reasonable man would do to mitigate his loss.” 7 I.C.C. 2d at 34. However, the ICC went on to hold that “[t]here are limits to what constitutes reasonable mitigation” and quoted from the Restatement (Second) of Contracts § 350 Comment (g):

[T]he injured party is not expected to arrange a substitute transaction although he may be expected to take some steps to avoid loss due to a delay in performance. Nor is it reasonable to expect him to take steps to avoid loss if those steps may cause other serious loss. He need not, for example, make other risky contracts, incur unreasonable expense or inconvenience or disrupt his business.

Id. The ICC examined the defendant’s principal arguments on mitigation – that the shipper should have curtailed business activity and laid off employees to save money, or funded necessary track repairs itself in order to restore rail service – and rejected both, finding that the shipper was justified in retaining employees because it had a reasonable expectation that service would be restored (7 I.C.C. 2d at 39-42), and that the defendant’s

track funding theory was contradicted by the court's ruling in *I.C.C. v. Baltimore & Annapolis R. Co.*, 398 F. Supp. 454, 465 (D. Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir. 1976):

B&A cannot equitably be heard to complain that its customer refused to advance the funds necessary to aid in doing that which B&A was otherwise legally bound to do, i.e., cease its unlawful abandonment.

7 I.C.C. 2d at 38. *See also U.S. Department of Energy v. Baltimore & Ohio R.*, 1991 WL 149186 (ICC). Measured against these standards, BNSF's "mitigation" claims all fail.

a. The Shift of La Cygne and
Hawthorn Business to Union Pacific

BNSF's witnesses state that if Evergy had not made the decision *in 2020* to enter into a contract with UP rather than BNSF for coal transportation service to the La Cygne and Hawthorn generating stations, BNSF's delivery shortfalls in 2022 could have been reduced. *See* V.S. Baranowski/Zebrowski at BNSF-683; V.S. Hibbard at BNSF-817; V.S. Morehouse at BNSF-942. *See also* BNSF Arg. at BNSF-196-197. That Evergy somehow should be held responsible for not considering in 2020 that its commercial judgment regarding La Cygne and Hawthorn would have an adverse impact on BNSF service to Iatan and LEC two years later is absurd on its face. Additionally, however, BNSF's claim runs afoul of the rule in *Louisiana Railcar* and the Restatement (Second) of Contracts. In selecting between two competing coal transportation contract proposals, it is rational to assume that a shipper would choose the proposal that represented the better overall value. To argue in hindsight that the shipper should have selected the *less* valuable (*i.e.*, more costly) option in order to "mitigate" some future loss resulting from the originally

unsuccessful bidder’s failure to meet its common carrier obligations is to violate the rule that the shipper need not “make other risky contracts, incur unreasonable expense or inconvenience or disrupt his business.” *Louisiana Railcar*, 7 I.C.C. 2d at 34.

b. Moving LEC Trainsets to Iatan

BNSF’s witnesses claim that the BNSF coal shortfalls at Iatan in 2022 could have been mitigated if Evergy had agreed to shift a trainset from LEC service to Iatan. *See* V.S. Baranowski/Zebrowski at BNSF-682; V.S. Morehouse at BNSF-942; BNSF Arg. at BNSF-198. BNSF does not explain how this move would have benefitted coal deliveries to Iatan without increasing the risk of under-deliveries to LEC, a risk that mitigation principles do not require a party to take. *See* Restatement (Second) of Contracts § 350. Moreover, when BNSF first suggested such a shift in 2022, Evergy’s Jessica Tucker explained that Iatan and LEC are located in different regulatory jurisdictions with different ratepayer bases, and physical assets attached to one cannot simply be moved to benefit the other.⁶⁷ The regulatory issues and procedural hurdles raised by such a shift represented an additional burden that Evergy was not legally compelled to bear.

Louisiana Railcar, 7 I.C.C. 2d at 34; Restatement (Second) Contracts § 350.

c. Investments to Reduce Unloading Times

The regular times allowed for unloading coal trains at Iatan and LEC in 2022 were established by written agreements between Evergy and BNSF and exceeded the

⁶⁷ See Op. V.S. Tucker, Op. Exhibit JT-13; *see also* Reb. V.S. Tucker at 7-9 (Figure 4)

“standard” time of six (6) hours provided in most BNSF coal tariffs.⁶⁸ Nevertheless, BNSF takes the position that Evergy’s damages should be reduced to account for the additional coal that BNSF claims (without actual support) could have been delivered to the stations if “Evergy had invested in the infrastructure” to allow for unloading within six (6) hours. BNSF Arg. BNSF-195. *See also* V.S. Baranowski/Zebrowski at BNSF-682-684; V.S. Hibbard at BNSF-818-819. BNSF does not offer an estimate of the cost of this new infrastructure, but in light of the facilities typically associated with a utility coal unloading facility (*e.g.*, rail tracks, railcar indexers, dumping equipment, signals, etc.), it is likely to have been quite significant. There is no merit to BNSF’s claim.

Properly understood, “mitigation” refers to measures that an injured party reasonably can take *after* a statutory or contractual violation in an effort to minimize the resulting economic harm. BNSF’s argument that Evergy should be held responsible to its detriment for not having made investments at LEC and/or Iatan *in advance* of the carrier’s 2022 violations to preemptively mitigate possible future losses finds no support in applicable law. To the contrary, consistent with the court’s decision in *ICC v. Baltimore & Annapolis R. Co.*, *supra*, BNSF has no grounds to complain that Evergy failed “to advance the funds necessary to aid in doing that which [BNSF] was otherwise legally bound to do;” *i.e.*, fulfill its statutory responsibility to transport Evergy’s reasonably scheduled coal shipments. *Id.*, 398 F. Supp. at 465.

⁶⁸ *See* Letter Agreements dated December 30, 2020 (LEC) and November 22, 2021 (Iatan) (Reb. Counsel’s Exhibit 7).

BNSF also ignores the fact that { [REDACTED]

[REDACTED]}. Ms. Tucker’s Opening Verified Statement recounted these incidents,⁶⁹ which are traceable to { [REDACTED]

[REDACTED]}.⁷⁰ BNSF cannot legitimately argue that Evergy should have mitigated its damages { [REDACTED] [REDACTED] }.

d. Building Additional Inventory

In the same vein as its infrastructure investment argument, BNSF asserts that Evergy could have (and should have) predicted BNSF’s extended 2022 trainset limitations and preemptively mitigated the adverse impacts by requesting the delivery of more coal to fill LEC’s inventory in 2021 and scheduling additional shipments to increase the coal stockpile at Iatan at the beginning of 2022. *See* V.S. Hibbard at BNSF-818-820. This assertion both contradicts the testimony of BNSF’s own witnesses to the effect that Evergy’s stations were awash in coal at the beginning of 2022,⁷¹ and itself is contradicted by the relevant facts.

As Evergy showed in its Opening Evidence and BNSF did not challenge, { [REDACTED]

⁶⁹ *See* Op. V.S. Tucker at 33; *see also* Reb. V.S. Tucker at 65-66.

⁷⁰ *See* Complaint, Exhibits 1 and 4.

⁷¹ *See, e.g.,* V.S. Baranowski/Zebrowski at BNSF-636-637.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e. Sharing Confidential Inventory Information

Finally, BNSF claims that Evergy's reluctance to regularly provide BNSF with confidential information regarding its coal inventory levels at Iatan and LEC contributed to the 2022 coal shortfalls. *See* V.S. Morehouse at BNSF-940; BNSF Arg. at BNSF-199. Mr. Morehouse acknowledges that the reason why BNSF sought this information was to allow the carrier to prioritize service for utilities facing the biggest threats to their fuel supplies. *See* V.S. Morehouse at BNSF-939. In other words, and as BNSF's other

⁷² *See* Op. V.S. Tucker at 11.

⁷³ BNSF claims without supporting evidence that Evergy *deliberately* allowed its inventory at LEC to drop below previous target levels at the end of 2021. *See* V.S. Hibbard at BNSF-818; BNSF Arg. at BNSF-174. With the station in operation { [REDACTED]

⁷⁴ *See* Op. V.S. Tucker at 13.

⁷⁵ *See* Letter from P. Moynihan to J. Tucker, December 23, 2021 (BNSF Counsel's Exhibit 7).

witnesses confirm, BNSF saw its common carrier obligation as limited to ensuring that a utility shipper did not run out of coal – that it “kept the lights on” – and that BNSF claimed for itself the right to decide whether requests for service were “reasonable” based on comparative coal inventory levels. *See also* V.S. Baranowski/Zebrowski at BNSF-675-676. As Evergy showed in its Opening Evidence and emphasized again in Part B.1, *supra*, the law under 49 U.S.C. § 11101(a) calls for an objective determination of what is reasonable under the circumstances of a particular case; it is not the unilateral province of a rail carrier to make that determination.

Evergy was very open with BNSF about the reasons why it safeguards generating station coal inventory information. It is competitively sensitive within the power sector as it can affect pricing offers into SPP, and its disclosure to rail service providers can lead to a second-guessing of Evergy’s transportation service requests, or as was proven to be the case in 2022, a purported basis for refusing those requests.⁷⁶ Inventory levels at Iatan and LEC would have been of no real concern to BNSF if it had sufficient resources – particularly labor – to accommodate Evergy’s reasonable requests for trainset deployments that both matched its scheduled coal volumes and were consistent with historic practices for both stations. That BNSF now argues it should have been given that information in order to manage the allocation of its resources to prevent crisis conditions effectively is an admission that it did not have those resources available, a shortcoming that Evergy has shown is the result of BNSF’s own deliberate operational decisions.

⁷⁶ *See, e.g.*, BNSF Arg. at BNSF-199.

BNSF's witness Hibbard makes a number of speculative adjustments to Evergy's overall damages calculations predicated on the various "mitigation" claims addressed *supra*. See V.S. Hibbard at BNSF-817-820. Since those claims have been shown to be wholly without merit in law or fact, it is not necessary to investigate the accuracy (or lack thereof) of his adjustments. They all should be rejected.

8. Any Fuel Adjustment Clause Applicable to Evergy's Provision of Electricity Is Irrelevant to This Proceeding

In an apparent effort to ascribe an improper motive to the coal conservation that Evergy was compelled to implement in 2022 as a result of BNSF's trainset limitations and consequential coal shortfalls, and their impact on meeting projected power demand, BNSF's witness Hibbard references a fuel adjustment clause that applies to Evergy's regulator-approved rates for the delivery of electricity to customers in Missouri and Kansas. Mr. Hibbard states that because state regulatory authorities permit Evergy to recover costs associated with fuel, fuel transportation and market purchased power, Evergy "has already recovered all costs incurred in 2022 associated with operating its power plants and meeting load...." V.S. Hibbard at BNSF-765. See also V.S. Hibbard at BNSF-741 ("fuel adjustment clause proceedings ensure Evergy is not financially harmed by higher-than-expected net costs to serve load or lower-than-expected net market revenues from its power plants, which are the focus of Evergy's damages claims in this matter."). See also V.S. Hibbard at BNSF-764-768, 815. BNSF clearly seeks to imply that since Evergy allegedly has recovered in rates the losses and costs that underlie its

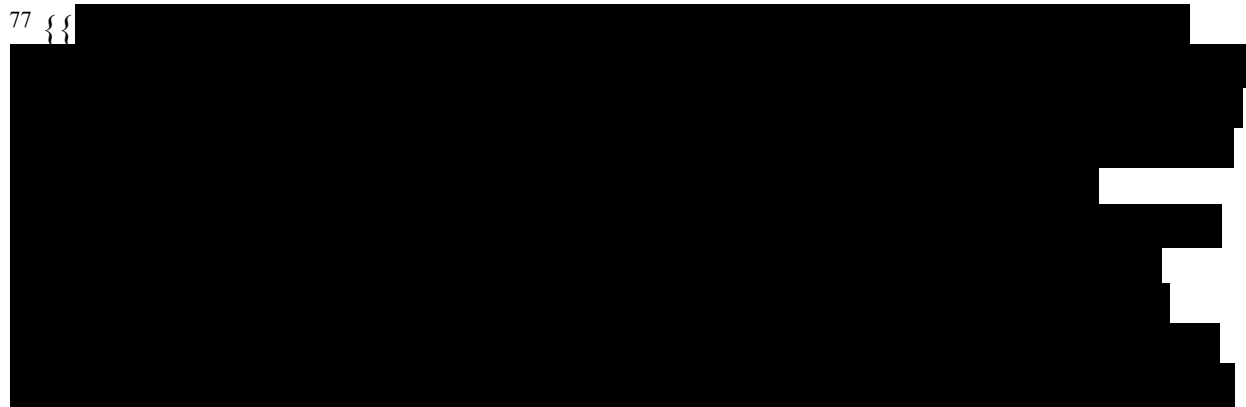
damages claim, the Board should absolve BNSF from any responsibility to satisfy that claim.

Mr. Hibbard goes on to assert that because (in his view) the fuel adjustment clause insulates Evergy from any adverse consequences of coal conservation, it has an incentive to “be conservative” in determining whether to conserve coal and therefore has an incentive to do so in an effort to increase Evergy’s profits. *Id.* at BNSF-769. BNSF’s counsel echoes this assertion in its Argument:

Evergy’s conservatism likely derives both from the fact that it might make money from conserving and from the fact that if it loses money, its state regulators will allow it to recover those costs.

BNSF Arg. at BNSF-171. Applicable law makes clear that any cost recovery that Evergy experiences through a fuel adjustment clause does not absolve BNSF of its liability for damages in the least, and the facts of regulation by the Missouri Public Service Commission and Kansas Corporation Commission and market monitoring by SPP completely preclude the kind of conservation-for-profit that BNSF alludes to. The Board should give no credence to BNSF’s theory.⁷⁷

⁷⁷ {}



Early in the last century, the U.S. Supreme Court considered a case in which a rail carrier sought to escape liability for the payment of reparations as a remedy for an unreasonable rate finding by arguing that the shipper had passed along the cost impact of the unreasonable rate to its customers. Squarely answering the question in the negative, the Court per Justice Holmes held:

As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiff suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Southern Pacific Co. v. Darnelltaenzer Lumber Co., 245 U.S. 531, 533-34 (1918). To the same effect, the Supreme Court in *Adams v. Mills*, 286 U.S. 397, 407 (1932) found that “the claim for damages arose at the time the extra charge was paid...[and] [n]either the fact of the subsequent reimbursement by the plaintiffs from funds of the shippers nor the disposition which may hereafter be made of the damages recovered is of any concern to the wrongdoers.” See also *McCarty Farms, Inc. v. Burlington Northern, Inc.*, 91 F.R.D. 486, 488 (D. Mont. 1981). Of more direct relevance to the instant proceeding, the Board and its predecessor on multiple occasions have awarded reparations to electric utility complainants who – like Evergy – had the ability to recover their damages through the consumer electric ratemaking process. See, e.g., *Consumers Energy Co. v. CSX Transp., Inc.*, *supra* at 73; *Western Fuels Ass’n, Inc. v. BNSF Ry.*, STB Docket NOR 42088 (Sub-No. 1) (STB served Oct. 22, 2009) at 2; *San Antonio, Texas v. Burlington Northern, Inc.*,

}}

1 I.C.C. 2d 561, 577 (1986). Any suggestion that a fuel adjustment clause provided
Evergy with recovery such that the Board can pass on awarding damages is groundless.

Equally groundless – if not absurdly scandalous – is BNSF’s thinly veiled accusation that Evergy might have deliberately conserved coal in 2022 in order to “make money.” BNSF Arg. at BNSF-171. BNSF’s own witness testimony belies the notion that an electric utility in Evergy’s position could engage in such behavior, and {{ [REDACTED] }}

} }

BNSF's witness Hibbard opened his Statement with a discussion of the state regulatory regime within which Evergy's subsidiary utilities operate and the role played by SPP's Market Monitoring Unit. Referring to the concept of utility cost recovery, he states:

[P]rovided the utility demonstrates the need for investments and expenses, regulators set electricity rates for customers that allow the utility to recover the costs it reasonably incurs to discharge its public service obligations.

V.S. Hibbard at BNSF-736-737. Higher costs resulting from a profit motive-driven coal conservation plan could not be shown to be reasonably incurred in the discharge of a public service obligation, nor would the utility be able to legitimately demonstrate the need for the additional expenses. Mr. Hibbard goes on to specifically focus on the roles played by the MPSC and the KCC, state regulators with jurisdiction over Iatan and LEC:

[T]he MPSC and KCC have statutory obligations to ensure that electric rates are just and reasonable. Subject to regulatory approval, each of Evergy's subsidiary utilities are allowed to recover their costs to supply electricity to customers....

V.S. Hibbard at BNSF-739. The regulatory review process typically includes an analysis of the prudence of costs incurred and the utility practices that contributed to them. Faced with the predictable inability to justify the prudence of coal conservation implemented in order to “make money,” and the oversight and other consequences that would result, a utility in Evergy's position would not even seriously consider such an action. *See also* Reb. V.S. Foo at 8-9; *see also* Reb. V.S. Tucker at 16-19.

Turning to SPP, Mr. Hibbard again describes an environment where coal conservation that is not driven by necessity would be highly unlikely – if not precluded outright:

SPP's Market Monitoring Unit (“MMU”) is responsible for monitoring SPP's markets to ensure that markets are competitive, and that participants are not taking actions that would inappropriately raise electricity prices higher than they otherwise would be (e.g., through the exercise of market power and/or the withholding of generation output.

V.S. Hibbard at BNSF-748. Among the ways that SPP executes its oversight responsibility is through the “review of the behavior of market participants.” *Id.* at BNSF-749.

As discussed in Section 1, *supra* and in the Rebuttal Verified Statement of Ms. Tucker (at 3-9), the coal conservation measures that Evergy undertook in 2022 were in direct response to under-deliveries of essential coal fuel to Iatan and LEC that resulted

from BNSF's limitation on trainsets in service to those stations, a limitation that was squarely within BNSF's control. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} The idea that Evergy at any point considered conservation to

⁷⁸ See note 52, *supra*.

be a cost-free opportunity provided by the existence of a fuel adjustment clause in the customer ratemaking process is nothing more than a figment of BNSF's imagination.⁷⁹

D. RESTATEMENT OF EVERGY'S DAMAGES

Evergy's Rebuttal Evidence and accompanying Argument clearly show that BNSF's challenges to Evergy's damages calculations and presentations are without merit, and that those calculations remain the best evidence of record. As Mr. Crosby and Ms. Foo explain in their Rebuttal Statements, however, they each agree that a few very minor adjustments to the calculations that they presented as part of Evergy's Opening Evidence are in order. Specifically, Mr. Crosby has adjusted his lost opportunity calculation to (1) reflect the fact that SPP prices for LEC changed at 9 am rather than midnight in his "actual" case; and (2) account for the switch to daylight savings time on November 6, 2022 in his "actual" case. Reb. V.S. Crosby at 13 n.15. Ms. Foo has adjusted her increased net cost to load calculation to stop the computation on December 20, 2022, when coal conservation at Iatan ended. Reb. V.S. Foo at 27-28.

Witnesses Crosby and Foo show the impacts of the foregoing adjustments. Mr. Crosby's restated lost opportunity total is \$16,914,540,⁸⁰ and Ms. Foo's restated increased cost to load equals \$5,326,774.⁸¹ Together with the inventory management and railcar storage damages calculated by Ms. Tucker and discussed in Part C.6, *supra*, these

⁷⁹ As Mr. Russo notes in his Statement, any cost recoveries by Evergy that ultimately may be found to exceed actual costs are refunded to ratepayers under both the Missouri and Kansas regulatory regimes. V.S. Russo at 11.

⁸⁰ Reb. V.S. Crosby at 16.

⁸¹ Reb. V.S. Foo at 28.

restatements show a revised total principal damages amount that is due Evergy from BNSF of \$22,862,177.65.

CONCLUSION

On the basis of the evidence presented and legal authorities summarized herein and in Evergy's Opening Evidence, the Board should find that BNSF violated 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a)(1) in connection with its provision of coal transportation service to Evergy's Iatan and LEC generation facilities in 2022, and that Evergy is entitled to an award of damages under 49 U.S.C. § 11704(b) in the principal amount of \$22,862,177.65, together with interest calculated from January 31, 2024 until the date paid in accordance with 49 C.F. R. § 1114.1.

Respectfully submitted,

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Dated: January 20, 2026

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

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of January 2026, I have caused copies of the foregoing to be served electronically upon counsel for Defendant BNSF Railway Company.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III

Rebuttal Counsel's Exhibit 1

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Rebuttal Counsel's Exhibit 2

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Rebuttal Counsel's Exhibit 3

Rebuttal Counsel's Exhibit 4

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Rebuttal Counsel's Exhibit 5

Rebuttal Counsel's Exhibit 6

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REDACTED

Rebuttal Counsel's Exhibit 7

REDACTED

REBUTTAL VERIFIED STATEMENT OF
JESSICA L. TUCKER

My name is Jessica L. Tucker. I submitted a Verified Statement in support of Evergy's Opening Evidence. In my Statement, I described the very serious difficulties and harm that Evergy experienced in 2022 due to BNSF's refusal to allow sufficient trainsets into service for our Iatan and Lawrence Energy Center ("LEC") electric-generating stations. In this Rebuttal Verified Statement, I respond to the portions of the BNSF's Reply Evidence in which BNSF and its various witnesses dispute my opening testimony.

My Rebuttal Statement addresses the following points:

- A. BNSF's Reply Relies on Retained Witnesses Rather than the BNSF Employee with Whom I Interacted Regularly in 2022
- B. Utility Fuel Planning is Necessarily Forward-Looking
- C. BNSF Does Not Dispute My Testimony Regarding the Limited Number of Trainsets Allowed in Our Service
- D. BNSF's Reliance on COVID as an Excuse for its Inability to Accept Trainsets is Inconsistent with My Experience in 2022
- E. { [REDACTED] }
- F. BNSF's Assertions of a Supposedly Minimal Impact Upon Evergy are Misleading and Wrong
- G. BNSF's Claims of a Prompt Response are Mistaken
- H. { [REDACTED] }
- I. My Damage Calculations are Reasonable
- J. BNSF's Various Other Criticisms are Unfounded

A. BNSF's Reply Relies on Retained Witnesses Rather than the BNSF Employee with Whom I Interacted Regularly in 2022

I devoted considerable attention on Opening to the extensive written and oral communications that I (or members of my team) exchanged with my counterpart, Patrick Moynihan, who at the time was BNSF's Director of Coal Marketing. *See* Op. Exhibits JT-1 through JT-5 and Op. Exhibits JT-7 through JT-17. In my letters and emails over the fifteen-month period from August 2021 through the fall of 2022, I repeatedly stressed Evergy's desperate need for additional train sets. We needed BNSF to allow our historic trainset counts so that we could maintain adequate inventory levels for (and during) the summer peak season and prepare for the 2022-2023 winter season. Having lived through the BNSF-caused difficulties of 2022, I can vividly recall the extent of our concern about the prospect of depleting our coal supply; an outcome which is very unsettling for any electric utility.

BNSF's Reply does not include any testimony from Mr. Moynihan, but instead, addresses my testimony (1) principally through hired witnesses Mr. Michael Baranowski and Mr. Nathaniel Zebrowski; and (2) also through retained witnesses Professor Jeffrey Prince and Mr. Paul Hibbard. BNSF's internal operating witness, Mr. Craig Morehouse, makes some reference to my correspondence in his very brief statement, but Mr. Morehouse is not an individual with whom I recall having had any contact in 2022 and, to the best of my knowledge, he was not an identified recipient of any of Mr. Moynihan's communications to me. Obviously, I do not know why BNSF elected to refrain from submitting testimony from Mr. Moynihan himself, but I can confirm that

he is the one individual at BNSF who had the most direct and extensive knowledge of the difficulties that Evergy faced in 2022.¹

In any event, my overall impression in reading BNSF's Reply is that it describes a set of supposed circumstances that are inconsistent with what we actually experienced in 2022. BNSF's witnesses suggest that Evergy had sufficient volumes of coal, that it engaged in coal conservation in order to maximize profits, and that BNSF immediately responded to our request for additional railcars upon learning of our inventory levels. Those after-the-fact claims are simply wrong. We faced a genuine crisis in 2022. BNSF would not maintain the number of sets in service that we historically had needed (and had received), and we were gravely concerned about our ability to prepare for peak season operations given the anticipated shortfall in coal deliveries. My 2022 letters confirm that view and BNSF's own replies confirm that BNSF recognized the seriousness of the situation. Statements from outside consultants crafted three years afterward do not prompt me to doubt my recollection of what Evergy actually experienced.

B. Utility Fuel Planning is Necessarily Forward-Looking

Utility fuel management is necessarily a forward-looking exercise. Loads vary seasonally, and we need to be prepared to serve those loads when they arise. Having full inventory in the spring, for example, is of limited use if we know that BNSF's summer coal deliveries will lag badly behind summer generation demand. A utility simply does not have the luxury of focusing solely upon present inventory levels and cavalierly resigning itself to the fact that, if future circumstances happen to take a turn for the worse, it will do its best with whatever coal happens to be on-site at the time. It would be nothing short of irresponsible for a utility to fail to consider

¹ When recounting my summary of a critical April 2022 conversation, BNSF refers to Mr. Moynihan anonymously (and seemingly dismissively) as "a BNSF employee" who had "no experience in electricity markets or insight into Evergy's internal stockpile goals." BNSF-172-73.

current and forecasted operating environments when assessing the future outlook for fuel, particularly as to preparation for the summer and winter peak seasons.

In the Reply, BNSF's witnesses repeatedly observe that the inventory levels at Iatan and LEC were relatively high in the early spring of 2022. That observation is of very little relevance to anyone familiar with or having actual experience with utility fuel management. While many different analogies may be appropriate, one reasonable comparison is to consider the situation of a driver beginning an extremely long drive through a remote area with a full tank of gasoline. That initial full tank of gasoline will be of no ongoing value if many of the gas stations along the intended route will not have any gas available when the driver arrives. As an electric utility, Evergy must plan for its entire "journey" through the calendar year. We need to know that we will be able to "refuel" as we move through the year in a manner that will allow us to meet the load demands that routinely arise in June, July, August, and September and in December, January, and February. Having an abundance of coal in March may be a helpful starting point, but if summer demand is such that burns will exceed anticipated coal receipts by 35,000 or more tons *per week* (or by 150,000 or more tons *per month*), then we know that we will encounter serious problems.²

Effectively, BNSF's repeated refusals to allow more trainsets into our service sent the message to us that many of the "gas stations" on our figurative journey through 2022 would be unavailable for us. We knew that we faced a serious risk that we could be left stranded without any means of meeting our need for coal.³

² In my Table 7 below, I show that, for the months of June through September of 2022, our Iatan burns exceeded BNSF's deliveries by an aggregate total of [REDACTED]

³ In a related matter, BNSF is wrong in its characterization of Evergy's principal argument. Evergy does not claim that BNSF was required to transport the "specific amount" of coal that Evergy nominated in the CFT tool (*cf.* BNSF-12). The issue here is not that BNSF failed to provide the

In 2022, the biggest concern we faced was the impact of BNSF's refusal to deliver the coal we required in the summer and fall months including but not limited to how that refusal would impact our ability to be prepared for the upcoming 2022-2023 winter season. {{ [REDACTED]

[REDACTED]

[REDACTED] }}

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

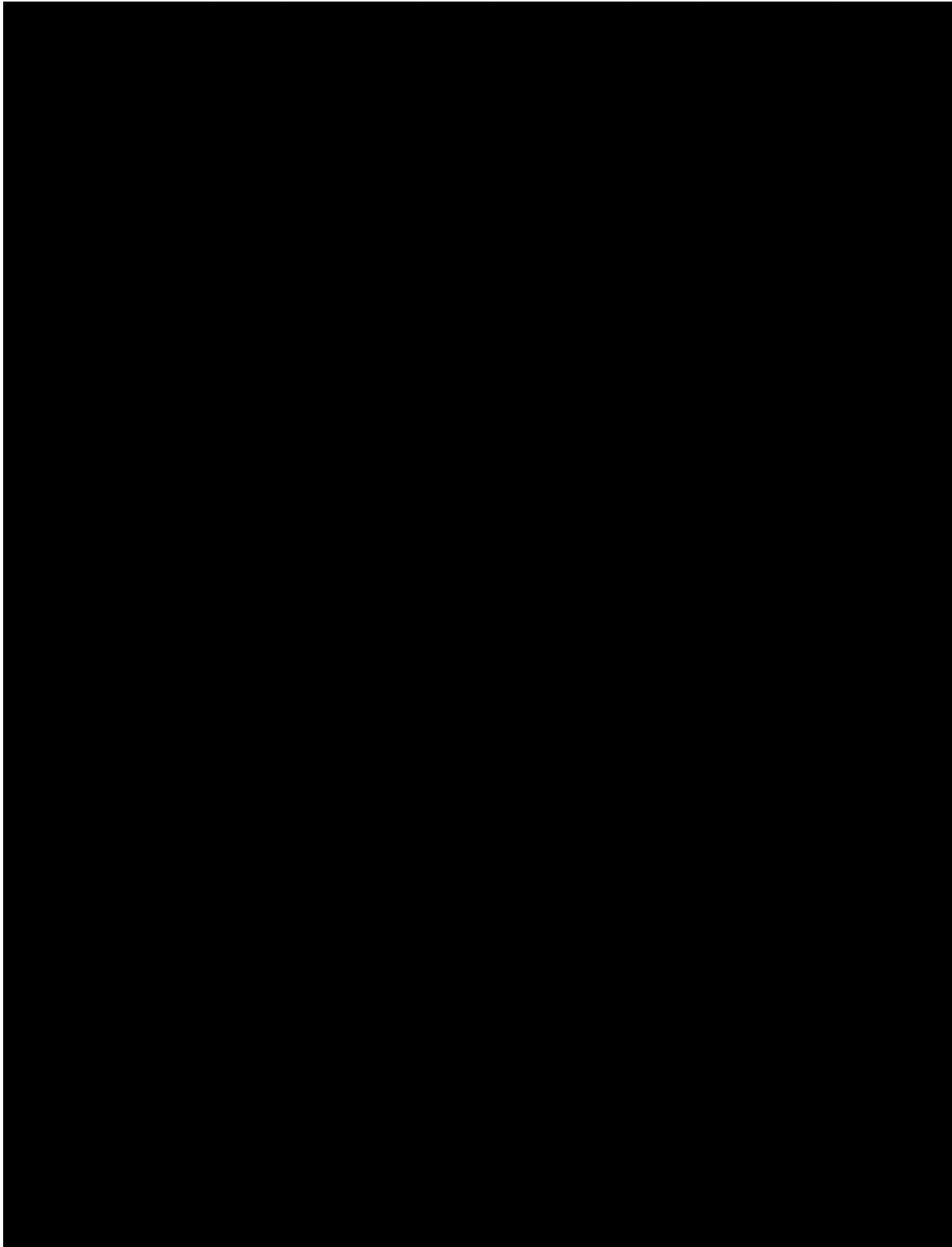
[REDACTED]

[REDACTED] }}⁴

specific amount of coal that Evergy nominated. Instead, the issue is that BNSF did not come close to delivering coal at historic levels at the times of our greatest need because BNSF elected to cut our set count in half relative to prior years.

⁴ Each of the four following figures appears in my Op. Exhibit JT-6. I have identified the period of greatest concern on each image for purposes of this Rebuttal Statement.

Figure 1{{



}}

{{ [REDACTED]

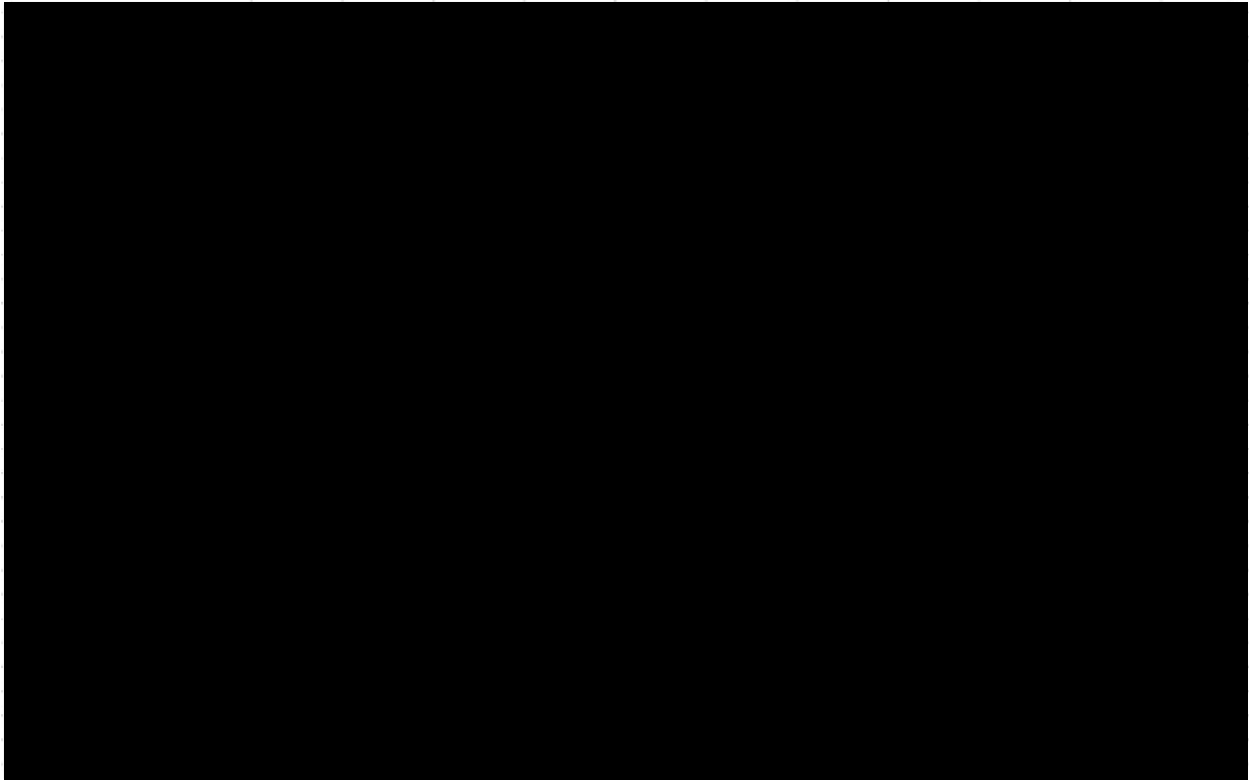
[REDACTED]

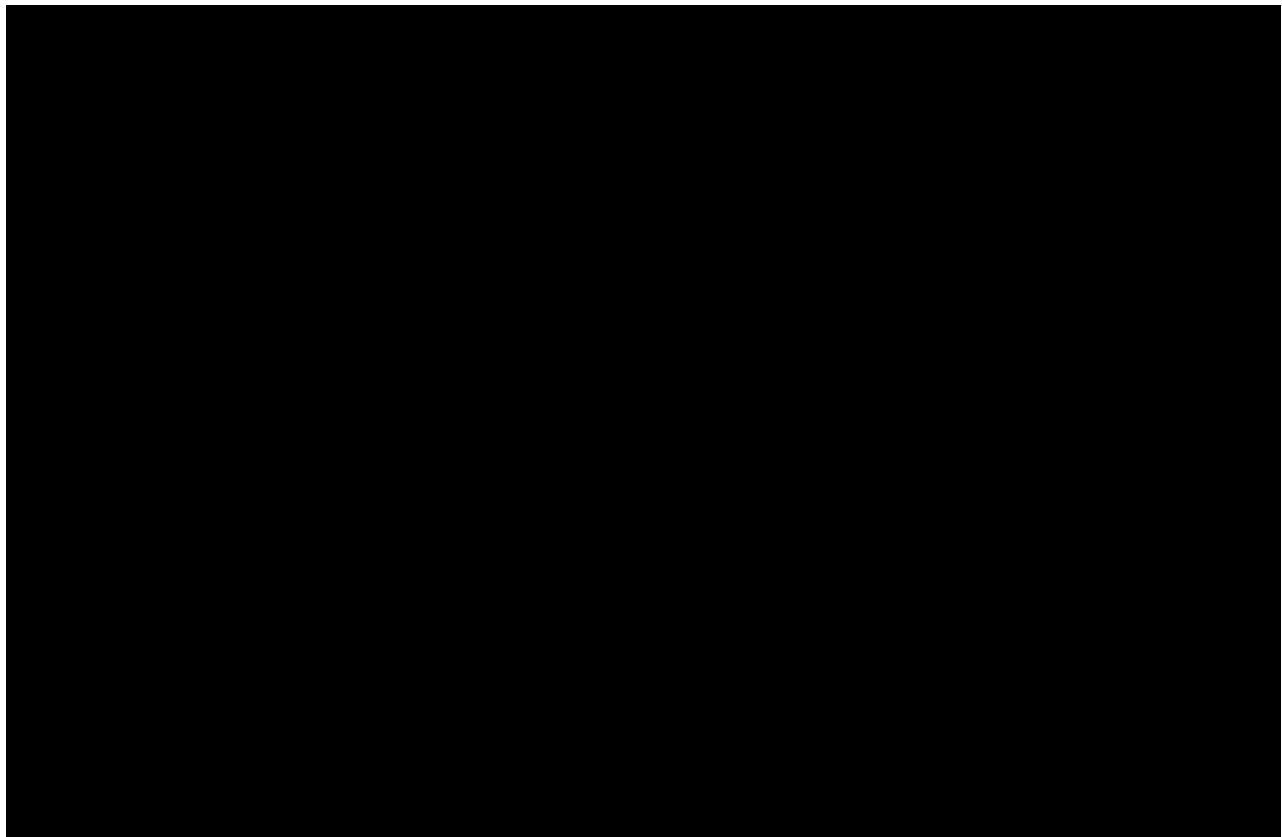
[REDACTED]

[REDACTED]

[REDACTED] }}:

Figure 3{{





}}

Given the potential to be in a precarious inventory situation (which we projected based on the best information available at the time { [REDACTED] [REDACTED] })), we made the decision { { [REDACTED] [REDACTED] }} to conserve coal in order to avoid a potential disaster of being unable to generate reliably when most needed. As extreme weather events in recent years have reminded us, adequate fuel inventory is critical to generation reliability when it matters most. In that regard, Winter Storm Uri (Feb 2021) and Winter Storm Elliott (Dec 2022) were stark reminders of how critical fuel inventory is for maintaining reliability.⁵

⁵ While low inventory is a problem at any time of the year, low inventory in the winter can be particularly precarious because of the impact that moisture and cold temperatures can have on the ability to use coal from a stockpile and even more so as the stockpile shrinks in size. Larger piles

To summarize, the whole point of coal conservation is to avoid getting to dangerously low inventory levels. We took it upon ourselves to conserve coal to prevent an emergency. Absent our proactive action to conserve coal {{[REDACTED]}}, our situation would have been even worse in terms of inventory {{[REDACTED]}}.

C. BNSF Does Not Dispute My Testimony Regarding the Limited Number of Trainsets Allowed in Our Service

BNSF's refusal to allow (or to maintain) sufficient trainsets in service constituted BNSF's principal 2022 service failure. I described this failure at length at the outset of my initial Statement. In particular, I first summarized the overall effect of the set limitations on Evergy, commenting that "BNSF's total 2022 deliveries to Iatan and LEC fell far below our needs, principally because BNSF refused to allow sufficient trainsets into our service." Tucker V.S. at 8. I next documented the substantial disparities in the numbers of trainsets that BNSF permitted in Iatan and LEC service between 2022 and 2021 and between 2022 and 2019. *Id.* at 11-21. In each instance, I showed that BNSF's 2022 set-count restrictions marked a substantial departure from BNSF's historic service level. And as I noted above, I also recounted my extensive correspondence with Patrick Moynihan in which I repeatedly requested that BNSF allow those historic levels of sets into our service. *Id.* at 22-25, 30-36.

I am not aware of any instance in the Reply in which BNSF disputes the accuracy of my set-count figures. Instead, BNSF's witnesses attempt to dispute the relevance of my historic set

are more likely to have dry coal underneath any wet coal which would be less likely to freeze while smaller piles do not have as much coal to work with and may be more susceptible to freezing issues. This sort of freezing situation can create challenges such as having to manually break up frozen chunks of coal using jack hammers, rods, and heavy equipment in order to safely feed coal up to a generator. Frozen chunks of coal can wreak havoc on equipment and thereby increase risks for generation derates or trips.

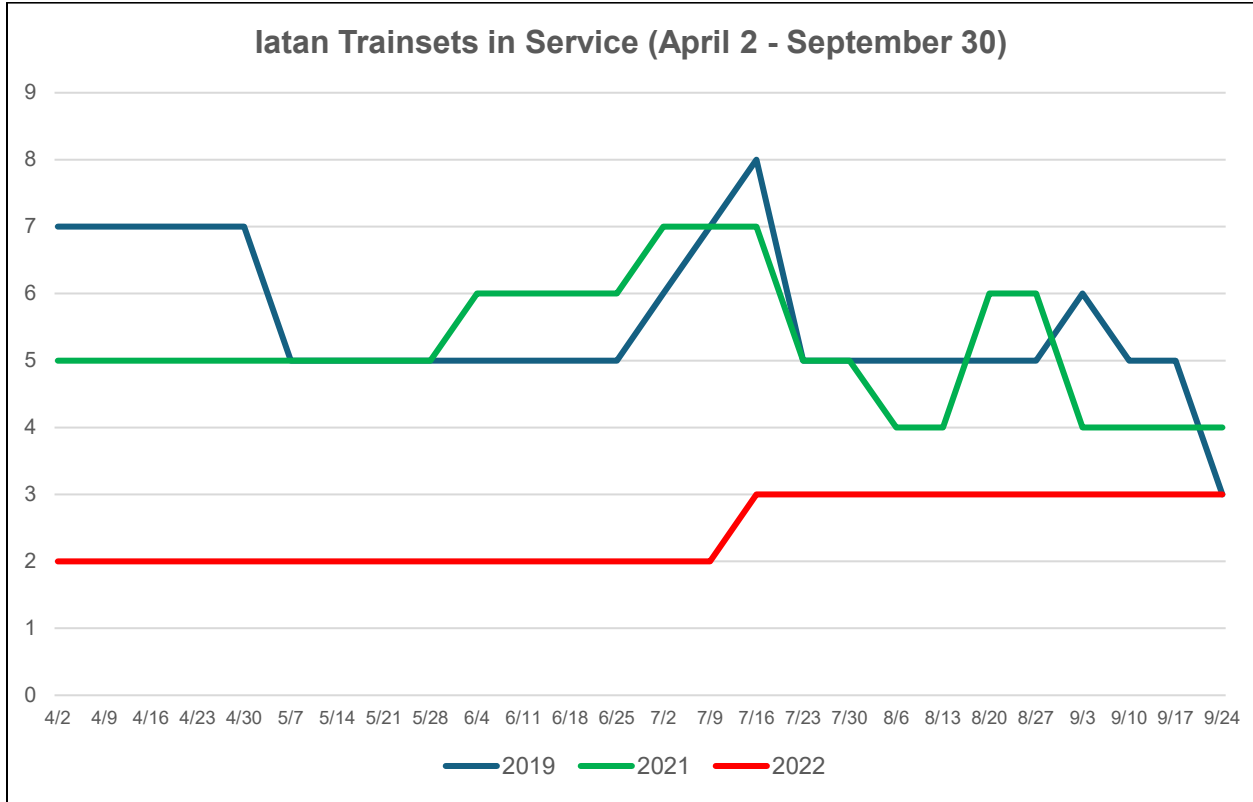
counts (*see* Baranowski/Zebrowski at BNSF-688) and BNSF's Reply Argument actually relies for support on a figure from my set-count Table. BNSF Argument at 89 n.222 (BNSF-157).

In their testimony, BNSF's witnesses claim that BNSF's set restrictions were reasonable, that Evergy was not entitled to more sets, that we would have received better service if we had not elected to give our competitive Hawthorn and La Cygne business to Union Pacific,⁶ or even that Evergy was better off having fewer trainsets in service. Those claims are not correct.

I showed in my Statement that BNSF cut Iatan's 2022 trainset levels by more than half of the 2019 and 2021 trainset levels for the important summer months. During the same critical months of 2019 and 2021, BNSF had allowed as many as five, six, seven, or even eight sets in Iatan service. BNSF capped our 2022 Iatan set allotment at two trains (supplemented only by a third trainset beginning in mid-July):

⁶ *See* BNSF-100, 196-97 (Argument); BNSF-683 (Baranowski/Zebrowski); BNSF-817 (Hibbard).

Table 1



Quantifying this history in terms of “trainset-weeks,” BNSF allowed Iatan only 43-46% of the trainset-week service in the April-to-September 2022 time period that it had allowed for us during those same months in 2019 and 2021 (*i.e.*, 63 trainset-weeks in 2022 relative to 136 or even 145 trainset-weeks in prior years):

Table 2

Trainsets in BNSF Service for latan					
Week	Start	End	2019	2021	2022
14	4/2	4/8	7	5	2
15	4/9	4/15	7	5	2
16	4/16	4/22	7	5	2
17	4/23	4/29	7	5	2
18	4/30	5/6	7	5	2
19	5/7	5/13	5	5	2
20	5/14	5/20	5	5	2
21	5/21	5/27	5	5	2
22	5/28	6/3	5	5	2
23	6/4	6/10	5	6	2
24	6/11	6/17	5	6	2
25	6/18	6/24	5	6	2
26	6/25	7/1	5	6	2
27	7/2	7/8	6	7	2
28	7/9	7/15	7	7	2
29	7/16	7/22	8	7	3
30	7/23	7/29	5	5	3
31	7/30	8/5	5	5	3
32	8/6	8/12	5	4	3
33	8/13	8/19	5	4	3
34	8/20	8/26	5	6	3
35	8/27	9/2	5	6	3
36	9/3	9/9	6	4	3
37	9/10	9/16	5	4	3
38	9/17	9/23	5	4	3
39	9/24	9/30	3	4	3
Total "Trainset-Weeks"			145	136	63

BNSF’s summer 2022 set count for our LEC station likewise lagged well behind our set counts for 2019 and 2021, with the 2022 “trainset-week” total for June through August amounting to only 67% and 78%, respectively, of those that BNSF allowed for us in 2019 and 2021:

Table 3

Trainsets in BNSF Service for LEC					
Week	Start	End	2019	2021	2022
22	5/28	6/3	3	1	2
23	6/4	6/10	3	1	2
24	6/11	6/17	3	2	2
25	6/18	6/24	3	2	2
26	6/25	7/1	3	3	2
27	7/2	7/8	3	3	2
28	7/9	7/15	3	3	2
29	7/16	7/22	3	3	2
30	7/23	7/29	3	3	2
31	7/30	8/5	3	3	2
32	8/6	8/12	3	3	2
33	8/13	8/19	3	3	2
34	8/20	8/26	3	3	2
35	8/27	9/2	3	3	2
Total "Trainset-Weeks"			42	36	28

In its Reply, BNSF comments that it did not { } our LEC set count at any point in time during 2022. *See, e.g.*, Reply Argument at 89 (“BNSF never { } the number of trainsets at Lawrence. . . . At no point in 2022 did BNSF { } a trainset from service to Lawrence.”), BNSF-157. This observation misses the point of my opening testimony and distorts the actual history of LEC service. BNSF did not { } our LEC set count “in 2022” because { }.

Moreover, BNSF historically had allowed three sets in LEC service during peak summer periods, but in 2022, BNSF declined to allow that customary set increase for the time period in which we most needed to receive coal deliveries. For example, I showed on opening that in 2021, there were sixteen (16) weeks from late March through the beginning of September in which BNSF allowed three trainsets in LEC service. Tucker V.S. at 17. Similarly, I showed that in 2019, there were twenty-six (26) consecutive weeks (*i.e.*, half of the entire year) from late April through late

October in which BNSF allowed three trainsets in LEC service. Tucker V.S. at 19-20. Stated differently, BNSF previously had allowed fifty percent more LEC trainsets in spring and summer service than it allowed in 2022. By maintaining only a “consistent” set count throughout 2022, BNSF actually degraded our set counts relative to what BNSF had allowed in prior years.⁷

D. BNSF’s Reliance on COVID as an Excuse for its Inability to Accept Trainsets is Inconsistent with My Experience in 2022

BNSF argues that COVID prevented it from accepting the trainsets that Every wanted and BNSF complains that I did not devote what it regards as sufficient attention to COVID in my Statement. *See, e.g.*, BNSF-442 n.19 (“Ms. Tucker only mentions Covid once, acknowledging ‘...volume aberrations attributable to the Covid pandemic.’ Verified Statement of Jessica L. Tucker, p. 4.”); BNSF-101 (“Every’s opening evidence utterly fails to acknowledge the impacts of COVID and the post-COVID recovery on the freight railroad industry in 2022. In fact, Every’s witness Jessica Tucker, goes so far as to testify that ‘[t]he principal difference of which I am aware regarding 2022 (as opposed to prior years) pertains to the fact that BNSF provided service to Iatan and LEC on a common-carrier basis rather than on a contract basis.’”).

As I showed on Opening and as I show in this Rebuttal, BNSF’s post-COVID trainset allowance for us in 2021 was far higher than BNSF’s allowance for us in 2022. I do not see any

⁷ BNSF’s Mr. Morehouse creates a strawman argument about “additional” trainsets that is not relevant to the Every situation. In particular, he comments that “[w]hile adding car inventory, or requesting additional service, is an understandable reaction from a shipper, it has repeatedly proved over my long career to have the opposite of the intended effect.” BNSF-936. Significantly, however, Every did not want to add additional trainsets over and above historical levels to its service. We wanted BNSF to allow the same number of sets in our service that BNSF routinely had allowed in prior years. Along those same lines, our concern was not that BNSF took one trainset out of Iatan service in March during a blizzard situation. *Cf.* BNSF-629 (Baranowski). Our concern pertained to BNSF’s indication that, throughout the year and especially in the summer and fall, BNSF would prevent us from utilizing what had been our normal number of trainsets in those peak periods.

reason to believe that COVID prevented BNSF from accepting our sets into service when BNSF had been able to accept those same sets into service in 2021. BNSF's inability or unwillingness to accept our sets into service instead seems to have resulted from BNSF's own actions or omissions.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Reb. Exhibit JT-1, Moynihan June 24, 2022 email, BNSF_EVERGY_0006197 (emphasis added).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } It also is worth noting again that BNSF did not include Mr. Moynihan as a witness in this proceeding.

Also noteworthy is that BNSF { [REDACTED]

E. { [REDACTED] }

In its Reply, BNSF makes very serious allegations regarding the motivations for Evergy's coal-conservation process, suggesting that Evergy may have implemented such measures to { [REDACTED] }. "Evergy's coal conservation measures were designed, at least in part, to maximize Evergy's profits." BNSF-172 (citing Counsel's Executive Summary Exhibit 09, EVERGY-0086316, at 317); BNSF-166 ("Instead, Evergy chose to conserve coal, knowing that burning the coal later in the year might be more profitable"); *id.* at 166 n.252 ({ [REDACTED]

} }⁸ I cannot stress enough how wrong BNSF is in making these charges. { [REDACTED]

⁸ See also BNSF-192 ("Another potential reason for employing market bid adders is to boost revenues by reducing electricity supply and *increasing the LMP paid to all SPP generators*—and as noted above, Evergy's application of the adders resulted in higher net profits in many months at both Iatan and Lawrence."). (emphasis added); BNSF-769 ("*Evergy has an incentive to be conservative when making coal conservation decisions*, because (a) Evergy is effectively insulated from any financial losses due to excessive coal conservation since recovery of associated costs is very likely through fuel adjustment clause proceedings, and (b) *in many cases (as described above)*

only did Evergy have every reason to be concerned, but we also had the responsibility to take action to prevent it from becoming a reality.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

A winter period in which Evergy lacked sufficient coal to burn would expose Evergy and its customers to higher purchased power costs. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} We did not want to be in the dire situation that certain utilities had faced in recent years where they paid extremely high prices to purchase electricity when they lost or did not have their own ability to generate power. Importantly, I am not aware of any instance in which someone at Evergy suggested that conserving coal during the summer and fall would allow us to increase profits either at the time of conservation or when winter arrived.

BNSF's related efforts to disclaim any knowledge that Evergy experienced (or could have experienced) harm due to coal conservation are equally flawed. According to BNSF's Reply Argument, "[t]he only thing BNSF knew" when Evergy implemented coal conservation measures was that "Evergy might decide to conserve coal." BNSF-169. According to BNSF, "[t]hat decision could have produced profits for Evergy, and BNSF would never have known in advance that coal conservation would cause harm." *Id.* BNSF adds that it "should not be responsible for harms that it could not have known about in advance." *Id.* BNSF was all too aware of the concerns we had around winter operating reliability and I had explained that we could be facing costly coal conservation measures absent sufficient coal deliveries. For example, I had communicated to Mr. Moynihan on April 27, 2022 that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

BNSF also is entirely mistaken in its effort to mischaracterize statements {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} BNSF's claims to this effect are entirely inconsistent with my experience and with BNSF's own filing.⁹

As BNSF's Reply confirms, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

⁹ {{ [REDACTED]

[REDACTED]

[REDACTED] } BNSF-304.

F. BNSF’s Assertions of a Supposedly Minimal Impact Upon Evergy are Misleading and Wrong

Throughout its Reply, BNSF claims that its trainset limitations did not have a meaningfully adverse impact upon Evergy. As expressed in various different forms, BNSF and its witnesses state that:

1. Neither SPP nor any regulatory body ever actually ordered Evergy to conserve coal in 2022;
2. Even without coal conservation, Evergy would not have entirely run out of coal in 2022;
3. Iatan burned coal in the summer of 2022 at a level that was “consistent” with history and Iatan burned coal in October of 2022 at a level that “exceeded” historic levels;
4. BNSF delivered more coal to LEC in 2022 than in a “normal” or “historic” year; and

5. [REDACTED]

Each one of these efforts to downplay the severity of the 2022 situation is inaccurate, misleading, or irrelevant and each is contrary to my own experience regarding the impact of BNSF’s 2022 trainset limitations. I will address each claim in turn.

1. BNSF Mischaracterizes the Nature of Utility Regulation and Operation

BNSF and its witnesses repeatedly state that neither FERC, the Kansas Corporation Commission (“KCC”), the Missouri Public Service Commission (“MPSC”), nor SPP itself ever “ordered” Evergy to conserve coal.¹⁰

¹⁰ See, e.g., BNSF-165 (“Evergy was never required to conserve coal. No regulator ordered Evergy to conserve coal and neither did SPP.”); *id.* at 165-66 (“Evergy has not suggested, and no produced documents suggest, that the Federal Energy Regulatory Commission (‘FERC’), which oversees SPP, ordered or requested that Evergy conserve coal. The same is true for Evergy’s state regulators, the Kansas Corporation Commission (‘KCC’), and the Missouri Public Service Commission (‘Mo.

Neither the MPSC nor the KCC ordered us to conserve coal because issuing that sort of prospective restriction is not their function. To the contrary, these entities do not make managerial decisions regarding these types of matters, leaving it to the utility itself to make those determinations. However, the utility is subject to post-event scrutiny for failing to act in a prudent manner. And while SPP monitors its members closely, it does not issue any sort of orders requiring generators to engage in adder-based coal conservation measures.

In any event, Evergy has a responsibility to operate in a manner that protects the interests of its customers. We have a fundamental responsibility to serve the public; we are not a completely unregulated business that has free license to take risks with respect to our fuel supply. The fact that no regulator affirmatively forced us to begin conserving coal does not in any way indicate that we were wrong in taking such measures or that the regulators themselves regarded our situation as unworthy of serious concern. As I showed above, we saw in April of 2022 that – in the absence of coal conservation – BNSF’s trainset limitations were projected to drive us into an entirely unacceptable situation in which we would either exhaust or very nearly exhaust our coal supply. It was incumbent upon us to take decisive action at that point in time. We did not have the luxury of waiting until after the fact to see if, in fact, we actually would have depleted our entire inventory. BNSF’s effort to exercise 20-20 hindsight to second-guess our coal conservation decision ignores the realities of utility operation.

PSC’)); *id.* at 166 (none of “these authorities . . . ever ordered Evergy to conserve coal”); *id.* at 733 (“Evergy was never directed or requested by its regulators or the Southwest Power Pool (‘SPP’) to conserve coal”); *id.* at 771 (“Evergy’s decision to conserve coal was always voluntary, and was never directed or requested by state regulators, SPP, or FERC”); *id.* at 776 (“Evergy was never directed by state regulatory authorities in Missouri or Kansas to conserve coal”); *id.* at 821 (“Evergy was never directed by its regulators or the SPP to conserve coal”).

2. BNSF Sets Far Too Low of a Threshold for Gauging Whether it Has Met its Obligations

BNSF also comments that “[u]nder no case would Evergy’s inventories have been fully depleted even if it hadn’t decided to impose coal conservation measures.” BNSF-139.¹¹ BNSF similarly suggests that “Evergy’s customers were never in any danger of experiencing a shortage in electricity.” BNSF-10.

I will leave it to other Evergy Rebuttal Witnesses to respond to the modeling-related aspects of these BNSF claims, but I strongly disagree with the implicit suggestion that simply having at least *some* coal on the ground constitutes sufficient protection for an electric utility and demonstrates that BNSF has met its common carrier obligations. This sort of thinking is entirely unimaginable to anyone with knowledge of the utility industry and the manner in which utilities operate and are regulated. Electric utilities have a fundamental responsibility to ensure that they remain able to generate electricity.

It would be unthinkable for anyone at Evergy to have reported to senior management during the course of 2022 that our fuel supply was acceptable because, after all, we had not actually run out of coal. From the perspective of a utility fuel manager, it is evident that we expect more of our railroad than merely keeping us from running out of coal entirely. BNSF’s present willingness to try to justify its 2022 operations in this manner seems to be consistent with the underlying BNSF mindset that led to the 2022 difficulties in the first place.

3. BNSF 2022 Deliveries to Iatan Fell Far Below Historic Levels

In its Reply, BNSF claims without support that its “reasonable” actions and its “close communication” with Evergy allowed it to “succeed[.]” in “increasing its fluidity” to such an extent

¹¹ See also BNSF-145, BNSF-169.

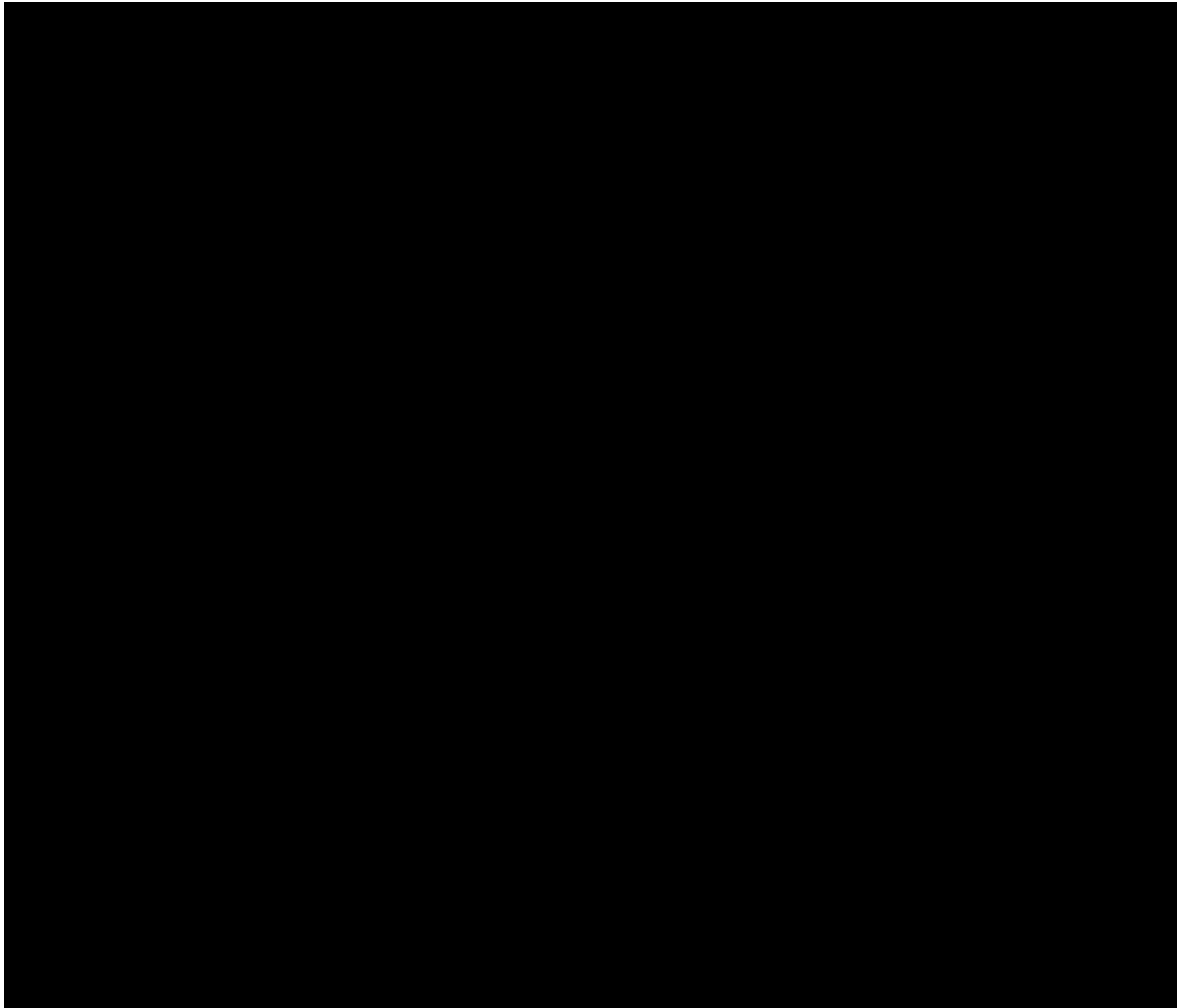
that “Iatan was . . . able to burn coal in the peak summer months [of 2022] *consistent* with historical levels and even *exceeded* historical levels in October.” BNSF-8, 10, 11, 144 (emphasis added); *see also id.* at BNSF-144 (“Iatan was also able to maintain coal consumption during peak summer months at levels consistent with its historical operations and burned at historically high levels in October.”). BNSF cites ¶ 39 of the Verified Statement of Paul J. Hibbard in support of this assertion, but that particular paragraph does not even address the subject. *See* BNSF-757-58. I am not aware of any other portion of the BNSF Reply in which BNSF attempts to provide support for its flawed assertions about the 2022 summer and October burns at Iatan relative to prior years.

Even beyond the absence of any support, these BNSF assertions regarding the Iatan coal-burn levels simply are not correct. Iatan’s summer 2022 coal burn was not “consistent with historical levels,” and Iatan’s October 2022 coal burn did not “exceed[] historical levels.”

**a. Iatan’s 2022 Summer Burn Level
Was Not “Consistent” with Historic Levels**

Iatan’s summer 2022 burn level lagged badly behind typical summer burn levels. For example, Iatan’s June-September 2022 coal burn of {REDACTED} was only {REDACTED} of the average June-September coal burn for the seven preceding years (*i.e.*, {REDACTED}). The 2022 summer burn certainly was not “consistent” with Iatan’s historic burn levels. BNSF’s claim does not match our actual history. Even more importantly, as I explain in greater detail below, Iatan only burned as much coal as it did in the summer of 2022 by profoundly depleting its inventory despite conservation efforts because of BNSF set limitations.

Table 4¹²{



} While the Iatan 2022 summer burn exceeded the 2020 summer burn level (*i.e.*, in the midst

¹² Source: Tucker Rebuttal electronic workpaper “Iatan Burn_Received.xlsx.”

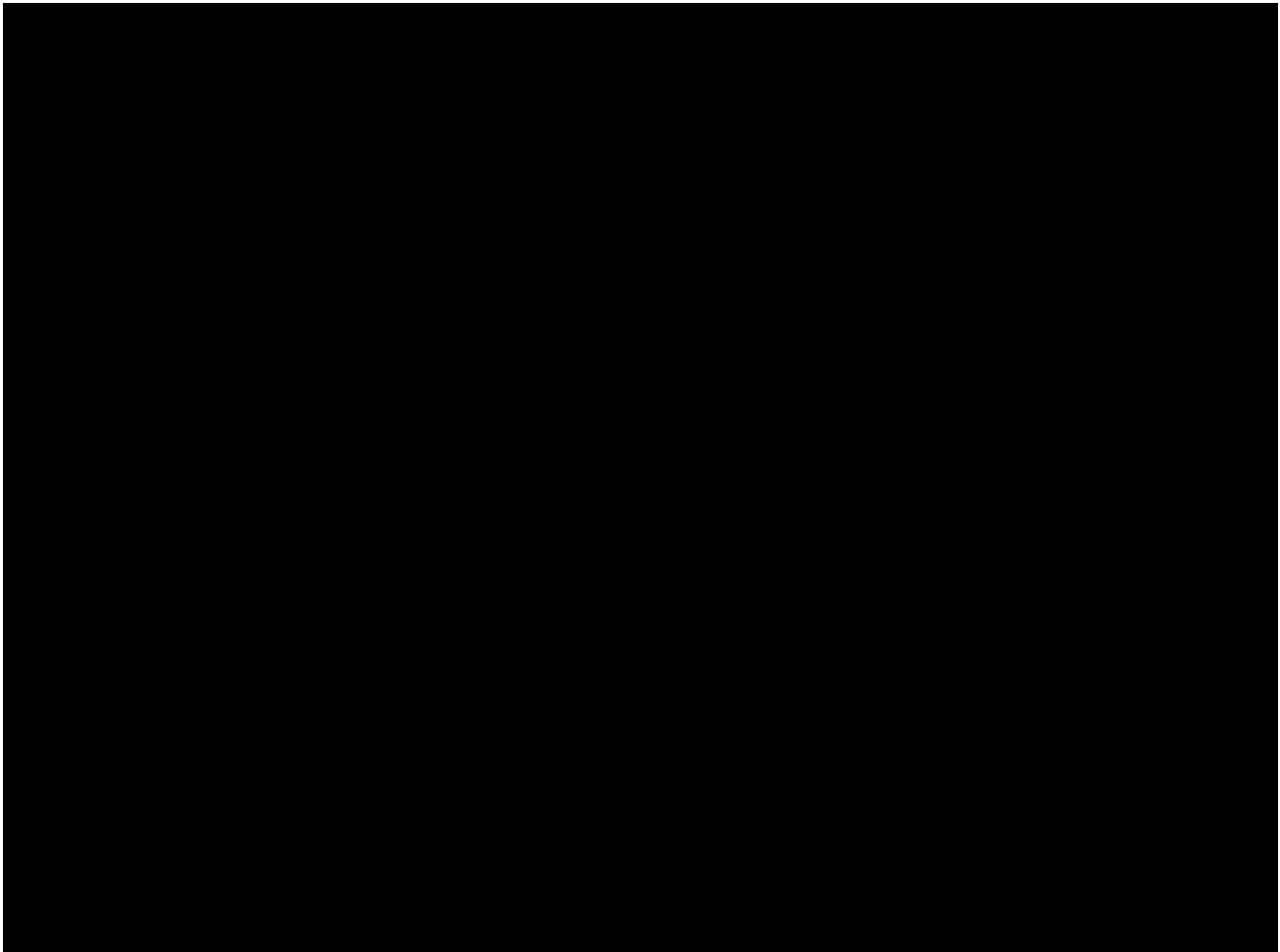
of the actual COVID year), that certainly does not justify BNSF's claim that the 2022 summer burn was "*consistent* with historical levels."

**b. Iatan's 2022 October Burn Levels
Did Not "Exceed" Historic Levels**

BNSF's unsupported claim that Iatan's October 2022 coal burn supposedly "exceeded" historical levels similarly contradicts actual history. *See* BNSF-11 (Iatan's coal burn "even exceeded historical levels in October"). Contrary to BNSF's claim, Iatan's October 2022 burn level fell well below historic levels. Iatan's October 2022 coal burn of {REDACTED} tons was only {REDACTED} of the average October coal burn for the seven prior years (*i.e.*, {REDACTED}). There was no prior year from 2015 through 2021 in which the Iatan October coal burn fell below the 2022 level.

BNSF's assertion is simply wrong.

Table 5¹³{



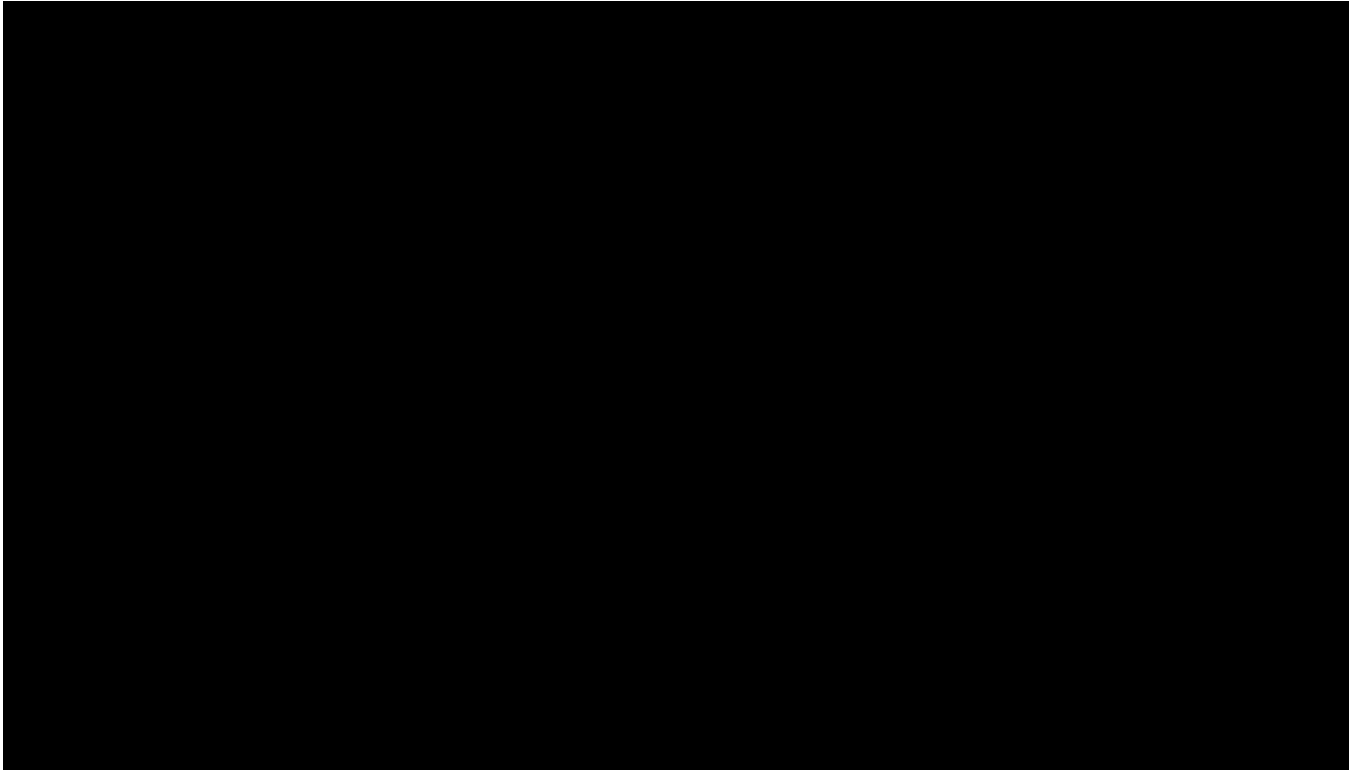
} c. Iatan Inventory Depletion

While the BNSF argument that I address above focuses on the Iatan 2022 burn level, it also is important to recognize the role that our substantial inventory depletion played in facilitating even the “below-historic” Iatan burn levels that we saw in 2022. Over the course of the four months extending from June 1 through September 30, 2022, Iatan experienced a net { [REDACTED] } depletion of its coal inventory due to BNSF’s trainset limitations and notwithstanding our reduced 2022 coal burn. From January through May of 2022, Iatan had burned { [REDACTED] } *fewer*

¹³ Source: Tucker Rebuttal electronic workpaper “Iatan Burn_Received.xlsx.”

tons than it had received to date in 2022. By the end of September, however, Iatan had burned { } tons *more* than it had received YTD in 2022, for a net inventory depletion of { } tons during the time period from the end of May through September of 2022:

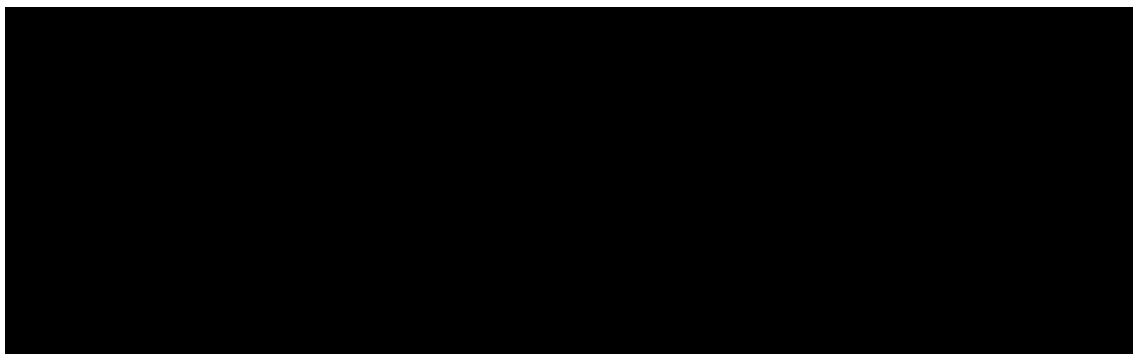
Table 6¹⁴{



{ Looking at each of those four critical months individually, BNSF’s deliveries amounted to only { } to { } of the coal that we actually burned. The monthly shortfalls of coal that BNSF delivered relative to the coal that we burned ranged from a minimum of { } tons in September up to a maximum of { } tons in August, with the grand-total shortfall of { } tons that I mentioned above. On average, BNSF under-delivered the coal that we needed at Iatan by more than { } tons per month relative to our *constrained* coal burn. That average shortfall equates to roughly { }.

¹⁴ Source: Tucker Rebuttal electronic workpaper “Iatan Burn_Received.xlsx.”

Table 7¹⁵{

A large rectangular area of the document is completely redacted with a solid black box, obscuring the content of Table 7.

{ At the average burn rate of { } tons per day for this four-month period (*i.e.*, { } tons divided by 122 days equals an average of { } tons burned per day), our net inventory depletion of { } tons amounted to the removal of { } worth of average coal burn at Iatan { }
{ }.

The removal of { } worth of coal inventory over the span of four summer months would constitute a major problem for any electric utility. The scale of that inventory depletion undermines any suggestion that BNSF’s trainset limitations did not impose a meaningful hardship on us.

4. **LEC’s 2022 Coal Burn and Generation Fell Far Below Historic Levels**

BNSF’s characterization of its 2022 LEC service suffers from the same sorts of exaggerations or misstatements I have described relative to BNSF’s characterization of its 2022 Iatan service. In that regard, BNSF’s Reply Argument includes the assertion that “Lawrence burned more coal and generated more electricity in 2022 than it did historically.” BNSF-156.

¹⁵ Source: Tucker Rebuttal electronic workpaper “Iatan Burn_Received.xlsx.”

BNSF adds that “the evidence shows that Lawrence operated in excess of historical levels in 2022.”

Id. These statements are incorrect.¹⁶

a. LEC’s 2022 Burn Level and Generation Did not Exceed Historic Levels

LEC’s 2022 generation and coal burn fell far below historic levels. In order to justify its claim as to 2022 operations, BNSF limits its evaluation of LEC’s history to only two years; namely, 2020 and 2021. That two-year snapshot does not begin to provide an accurate picture of LEC’s operating history. Instead, the 2020 and 2021 figures fell well below the 2015-2019 levels. Essentially, BNSF’s comparison shows only that 2022 LEC generation and coal burn were near or slightly above two profoundly low years.

Acknowledging that he limited his review of history solely to 2020 and 2021, BNSF’s Mr. Hibbard explains that he intentionally “exclude[d] 2019 from the historic comparison period *to avoid the exogenous impacts of COVID-19* on electricity demand and supply between 2019 and 2020.” BNSF-786 (emphasis added).¹⁷ As I understand that explanation, Mr. Hibbard looked only at years with low generation and low coal burns to determine whether the 2022 LEC generation and coal burn were above historic levels. From my perspective, I do not believe that it is appropriate to ignore pre-COVID data in order to gauge whether post-COVID coal burns and generation have exceeded historic levels.

¹⁶ As I explain below, BNSF admits that its LEC “history” only includes 2020 and 2021.

¹⁷ In his analysis, BNSF’s Mr. Hibbard utilizes EIA 923 data for burn and generation levels. BNSF-786. He also mistakenly combines each listed portion of the LEC generation for each year (*i.e.*, both coal-fired generation and gas-fired generation). *Id.* at BNSF-786 n.100 (identifying the 2022 LEC generation level as 1,992,285 MWh). The EIA-923 data for LEC indicates that the station generated 1,908,757 MWh from coal and 83,528 MWh from natural gas. The sum of those two figures matches Mr. Hibbard’s 1,992,285 MWh generation figure. This portion of my Rebuttal uses EIA 923 data but identifies only coal-fired generation. Importantly, however, Mr. Hibbard’s claim about 2022 LEC generation relative to history is wrong under either my approach or his mistaken approach.

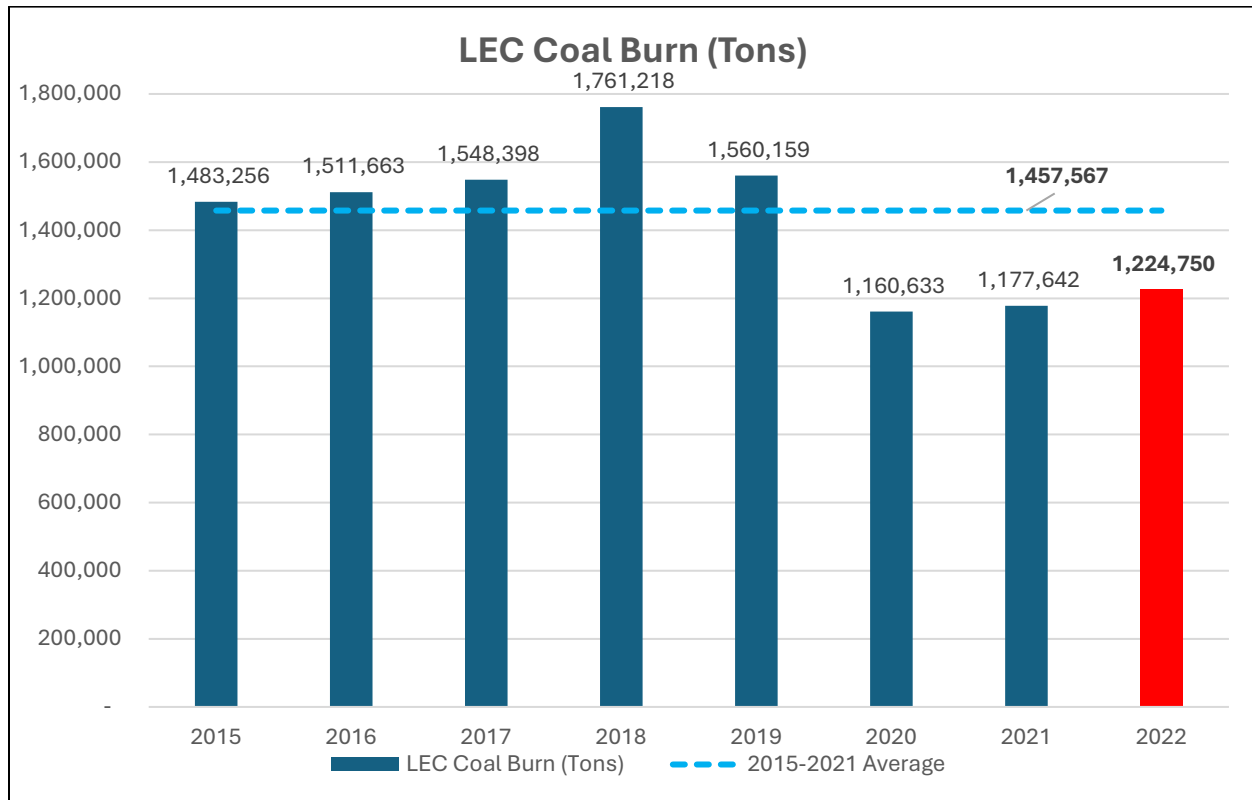
As shown in Table 8 below, even if one were to expand the scope of evaluation to include only one more year, the LEC coal burn in 2019 was 1,560,159 tons, a figure substantially higher than our 2022 coal burn. In fact, our 2019 LEC coal burn was 27.4% higher than our 1,224,750-ton LEC coal burn in 2022.¹⁸ That is a meaningful difference. Mr. Hibbard's effort to suggest that our 2022 LEC coal burn was historically high is misleading and inaccurate.

LEC's 2019 generation shows a similar pattern. Our 2019 LEC coal-fired generation was 2,385,153 MWh. *See* Table 9, below. That figure was 25.0% percent higher than the 1,908,757 MWh LEC coal-fired generation figure for 2022. Stated differently, the 2022 coal-fired generation level was only 80.0% of the 2019 level.

Looking back even further in time, it is evident that the historic LEC coal burn and generation levels routinely exceeded the 2022 levels by substantial amounts. From 2015 through 2021, LEC burned an average of 1,457,567 tons of coal per year. The 2022 LEC coal-burn figure of 1,224,750 tons was only 84% of that historic average:

¹⁸ The 2022 LEC coal burn therefore was only 78.5% of the 2019 LEC coal burn.

Table 8¹⁹



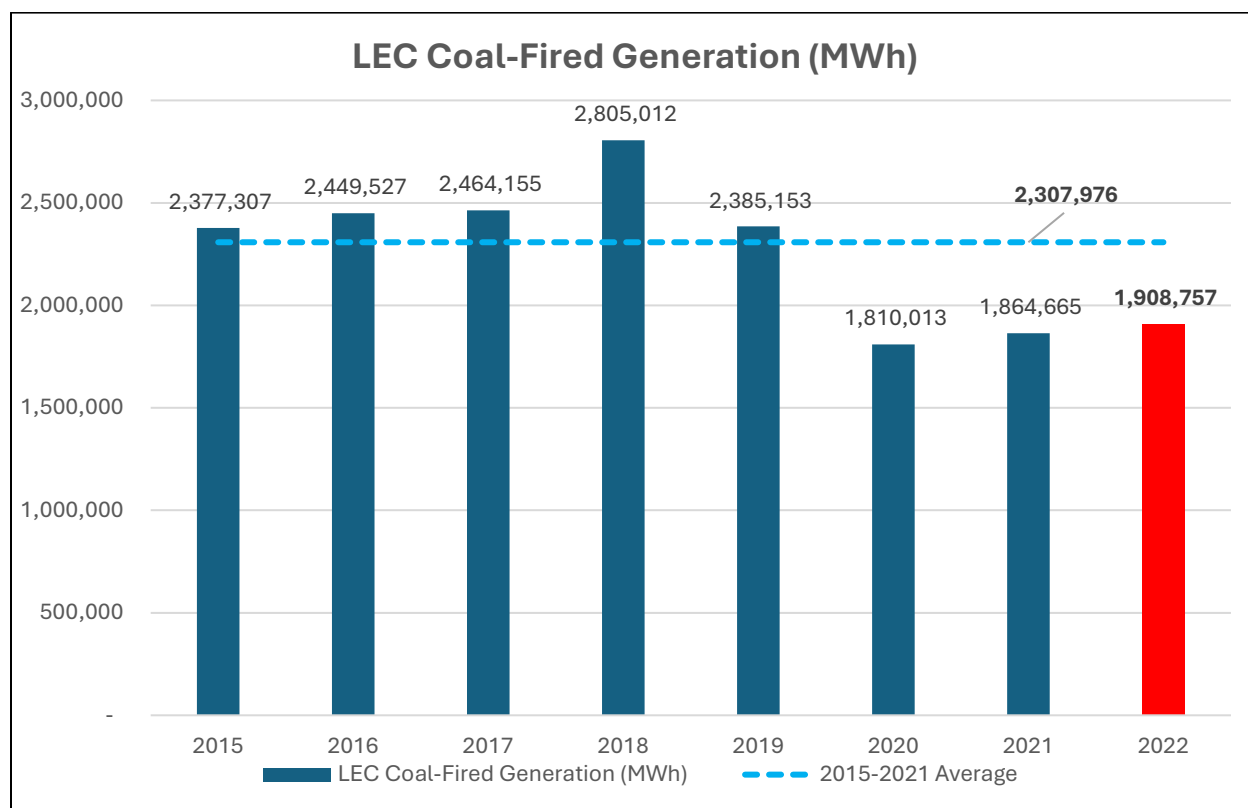
	LEC Coal Burn (Tons)							
Year	2015	2016	2017	2018	2019	2020	2021	2022
Tons	1,483,256	1,511,663	1,548,398	1,761,218	1,560,159	1,160,633	1,177,642	1,224,750

LEC's 2022 coal-burn figure trailed the individual 2015, 2016, 2017, 2018, and 2019 burns by 17%, 19%, 21%, 30%, and 21%, respectively.

Over that same 2015-2021 time period, LEC coal-fired generation averaged 2,307,976 MWh per year. The 2022 LEC figure was only 83% of that historic average:

¹⁹ Source: EIA 923 (Generation and Fuel Data).

Table 9²⁰



	LEC Coal-Fired Generation (MWh)							
Year	2015	2016	2017	2018	2019	2020	2021	2022
MWh	2,377,307	2,449,527	2,464,155	2,805,012	2,385,153	1,810,013	1,864,665	1,908,757

LEC's 2022 coal-fired generation figure trailed the individual 2015, 2016, 2017, 2018, and 2019 coal-fired generation figures by 20%, 22%, 23%, 32%, and 20%, respectively.

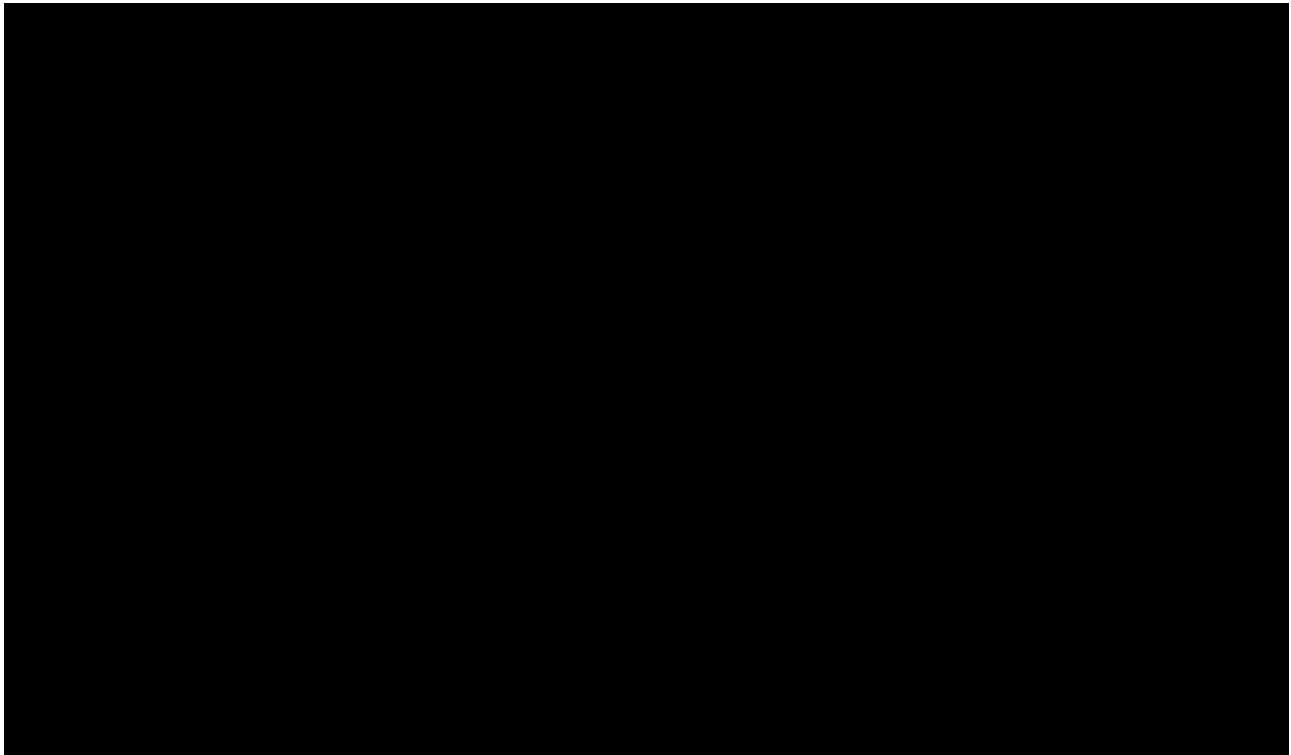
b. LEC Inventory Depletion

As was the case with respect to Iatan, BNSF's claim that the 2022 LEC operations exceeded historic levels is simply inaccurate. And once again, BNSF's claim overlooks the need for substantial inventory depletion at LEC to enable even our reduced 2022 burn and generation levels. Over the course of the eight months from the start of January through the end of August of 2022,

²⁰ Source: EIA 923 (Generation and Fuel Data).

LEC experienced a net [REDACTED] } depletion of its coal inventory due to BNSF's trainset limitations, notwithstanding our reduced 2022 coal burn:

Table 10²¹ {

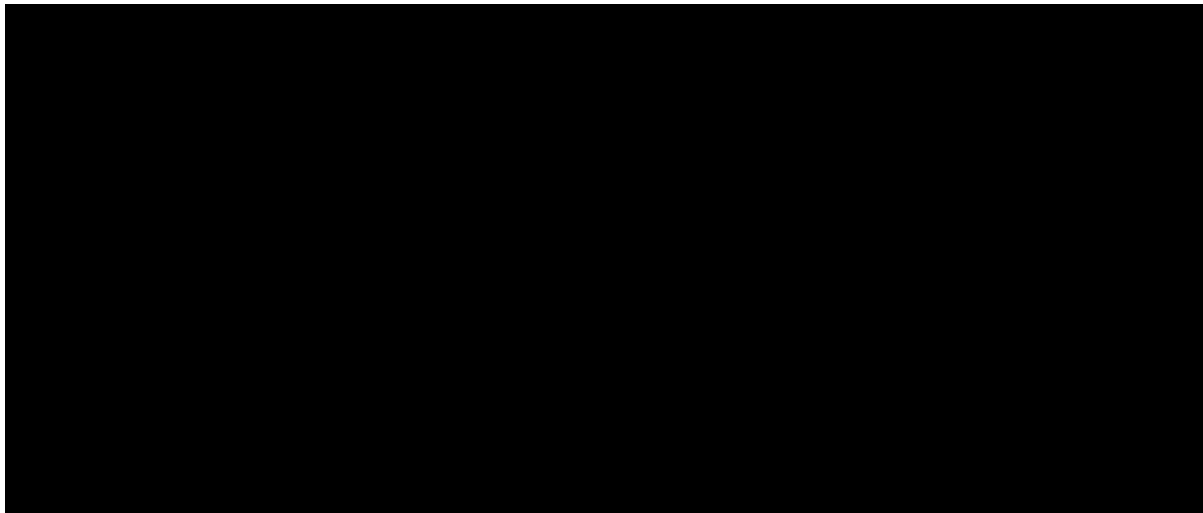


} Looking at each of those eight months individually, BNSF's deliveries fell below our burn levels in every month except February. For the other seven months, BNSF's deliveries amounted to as little as [REDACTED] } or [REDACTED] } of our coal burn in certain months. Overall, BNSF delivered only [REDACTED] } of the coal volume that we burned from January through August of 2022. The monthly shortfalls of: (1) the coal that BNSF delivered; relative to (2) the coal that we burned ranged from a minimum of [REDACTED] } tons in March up to a maximum of [REDACTED] } tons in July, with

²¹ Source: Tucker Rebuttal electronic workpaper "LEC Burn_Received.xlsx." Note: The Tons-Received figure for October 2022 in "LEC Burn_Received.xlsx" (and in Evergy's 2022 EIA 923 reporting) includes approximately [REDACTED] } tons that Evergy trucked from the JEC plant to the LEC plant, given BNSF's lack of deliveries. See Tucker Op. Electronic Workpaper "LEC 2022 Aligned Inventory On Hand by Date.xls," Tab "Inventory on Hand by Date," October 26-27. Accordingly, BNSF did not deliver those tons.

the grand-total shortfall of { } tons that I mentioned above. On average for January through August of 2022, BNSF under-delivered the coal that we needed at LEC by { } tons per month relative even to our *constrained* coal burn { } { }. That average shortfall equates to roughly { } per month.

Table 11 ²² {



{ At the average burn rate of { } tons per day for this eight-month period (i.e., { } tons burned divided by 243 days equals an average of { } tons burned per day), our net inventory depletion of { } tons amounted to the removal of { } { } worth of average coal burn at LEC { } { } { }

Consistent with what I observe above with respect to the Iatan inventory depletion, the removal of { } worth of coal inventory at LEC – with much of that depletion occurring over the span of the critical summer months – would constitute a major problem for any electric utility. Again, the scale of the inventory depletion at LEC undermines any suggestion that BNSF’s trainset limitations were inconsequential.

²² Source: Tucker Rebuttal electronic workpaper “LEC Burn_Received.xlsx.”

5. Review of Actual Service Patterns Undermines BNSF's Effort to Justify its LEC Service on the Basis of An Outdated Annual Declaration

In October of 2021, Evergy submitted its Annual Declaration for LEC 2022 volumes. That Annual Declaration amounted to a total of { } tons.²³ Through BNSF's monthly CFT Nomination process, Evergy updated its original declaration. Our monthly CFT Nominations for LEC ultimately totaled { } tons for 2022.²⁴

By the end of 2022, BNSF had delivered more tons than Evergy had declared on October 1, 2021, but BNSF delivered far fewer tons than Evergy had nominated throughout the course of 2022 using the BNSF monthly CFT Nomination process (*i.e.*, a shortfall of over { } tons). *See* Table 12, below. In its Reply, however, BNSF repeatedly seeks to compare its 2022 deliveries to the October 1, 2021 declaration. *See, e.g.*, BNSF-4; BNSF-154.

Importantly, BNSF ignores the facts that: (a) BNSF's own rules contemplate that shippers will update the volumes of their requests for service through their monthly CFT Nominations; and (b) meeting an outdated Annual Declaration (especially in months more than one year after the date of that declaration) does not amount to meeting Evergy's actual delivery need. It also is the case, as I explain in detail below, that during the critical summer portion of 2022, Evergy's updated CFT Nominations actually were substantially lower than Evergy's Annual Declaration, and BNSF's summer deliveries fell well below each of those measures. BNSF's effort to excuse its trainset refusal on the basis of the outdated LEC Annual Declaration therefore does not match the actual 2022 facts.

One additional point is worth noting at the outset of my discussion. I am not aware of any instance in BNSF's Reply or in my communications with BNSF in which BNSF indicated that it

²³ Tucker Rebuttal Workpaper "2021_10_01 LEC Annual Declaration (EVERGY 0014430).pdf."

²⁴ Tucker Rebuttal Workpaper "Evergy CFT Nominations 2020-2022.pdf."

took any action (or declined to take any action) in response to our LEC Annual Declaration that in any way made it more difficult for BNSF to meet Evergy's subsequent CFT Nominations for LEC. For example, I have not seen any BNSF suggestion that it furloughed additional operating employees specifically in response to LEC's October 1, 2021 Annual Declaration. Similarly, I have not seen any indication from BNSF to the effect that it would have been able to accept the full number of trainsets into service for LEC in the summer of 2022 if BNSF had only known on October 1, 2021 that our requested volume for 2022 was going to be { } tons rather than { } tons.

a. BNSF Allows Shippers to Modify their Annual Declarations through the CFT Nomination Process

The terms associated with BNSF's common carrier rate authorities require Evergy to submit an Annual Declaration of anticipated tenders (by month) and then to submit monthly updates through the CFT process to reflect changes in intended volumes. In other words, BNSF has built its entire CFT Nomination process on the expectation that, over time, shippers will change the volume of monthly coal transportation service that they initially requested from BNSF.

While it is more likely that CFT Nominations would track Annual Declaration figures at the outset of a year, there are many reasons that, over time, a utility might use the CFT Nomination process to revise the volume of coal that it seeks to receive during a given month relative to what the utility had estimated previously in an Annual Declaration. Those reasons can include unanticipated changes in the weather, shifts in prices of competing fuels, unexpected variations in the demand for electric generation, plant outages or other instances of unplanned maintenance, and the impact of BNSF's own performance. We make our Annual Declarations based on the best information we have at the time, however the process necessarily is a difficult one that has to account for a multitude of factors, each one of which can be a challenge to predict several months

(or a year or more) out into the future. It regularly has been the case that our historic CFT Nominations (on a month-to-month basis) have varied from our initial Annual Declarations and BNSF certainly never would have expected those initial Declaration figures to remain unchanged each and every month for each and every year.

In addition, BNSF should not expect that these monthly variations will only move downward. I can confirm that no BNSF employee ever has told me that BNSF only expects to see shippers making downward adjustments through the CFT Nomination process.

In any event, BNSF repeatedly has observed that it relies upon CFT Nominations to make its operating decisions. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

b. The Pattern of Summer 2022 LEC Deliveries Shows Poor BNSF Service Even Relative to the Superseded LEC Declaration

A review of BNSF's actual monthly service shows that – during the critical summer portion of 2022 – BNSF fell even farther behind our initial Annual Declaration than it did relative to our updated monthly CFT Nominations.

Most of the variation between the LEC Annual Declaration and the LEC CFT Nominations occurred in the first half of the year { [REDACTED]

[REDACTED]

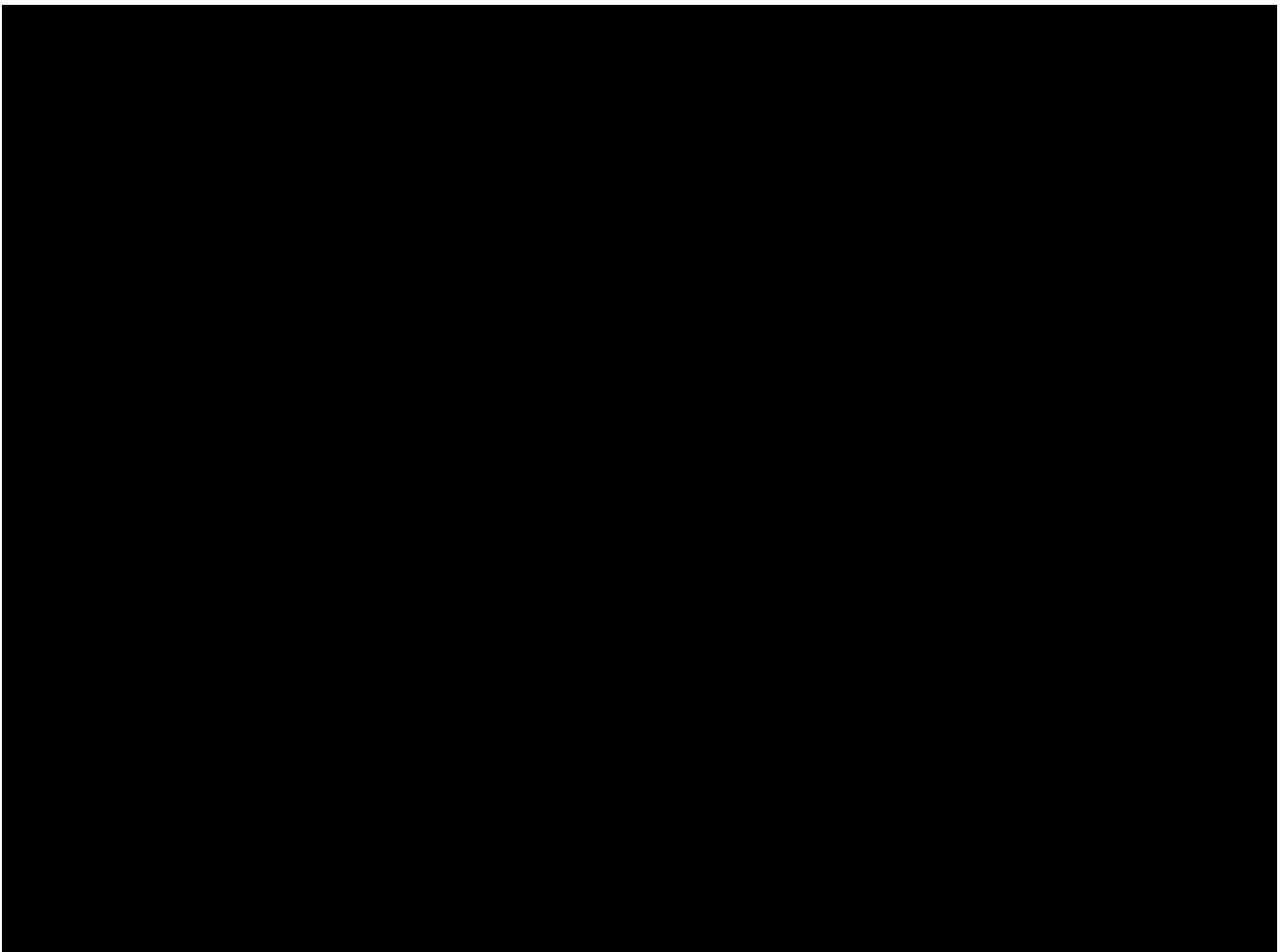
[REDACTED]

[REDACTED] }. During the critical summer months,

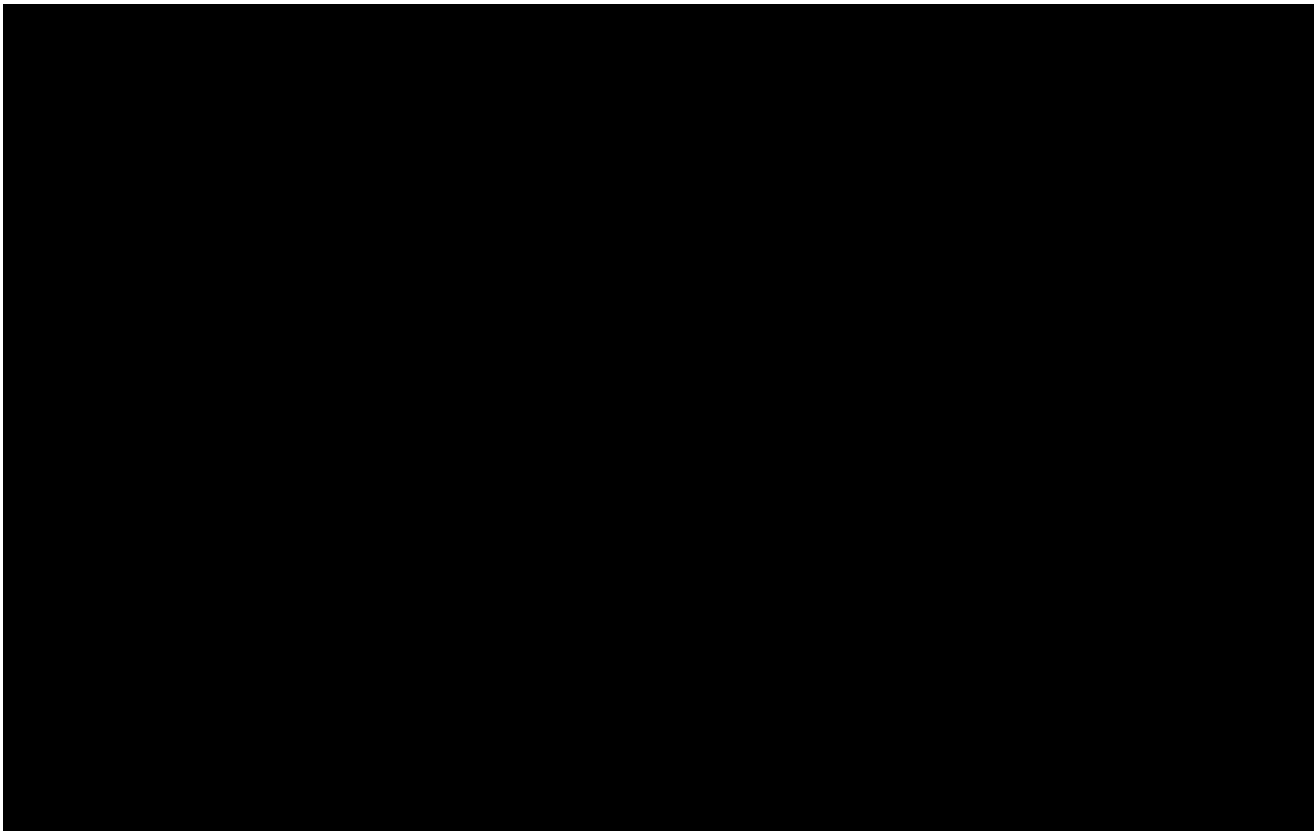
however, { [REDACTED] }.

[REDACTED]. In other words, our actual experience in 2022 shows that it is not correct for BNSF to suggest that it should be excused from responsibility for its trainset refusals because of full-year performance relative to a long-superseded Annual Declaration. My Table 12, below, shows this overall pattern. I will explain the relevant sequence of events in the following subsections with respect to each portion of the year.

Table 12²⁵ {



²⁵ Sources: 1. *Annual Declaration* - Tucker Rebuttal Workpaper “2021_10_01 LEC Annual Declaration (EVERGY 0014430).pdf”; 2. *Monthly CFT Nominations* - Tucker Rebuttal Workpaper “Evergy CFT Nominations 2020-2022.pdf”; 3. *BNSF Deliveries* - Tucker Rebuttal electronic workpaper “LEC Burn_Received.xlsx” and Tucker Op. Electronic Workpaper “LEC 2022 Aligne



} Note: Months shaded in blue reflect instances in which our Monthly CFT Nominations fell below our Annual Declaration levels. Months shaded in yellow reflect the summer period in which BNSF’s deliveries fell well below both our CFT Nominations and our Annual Declarations.

1. January through May

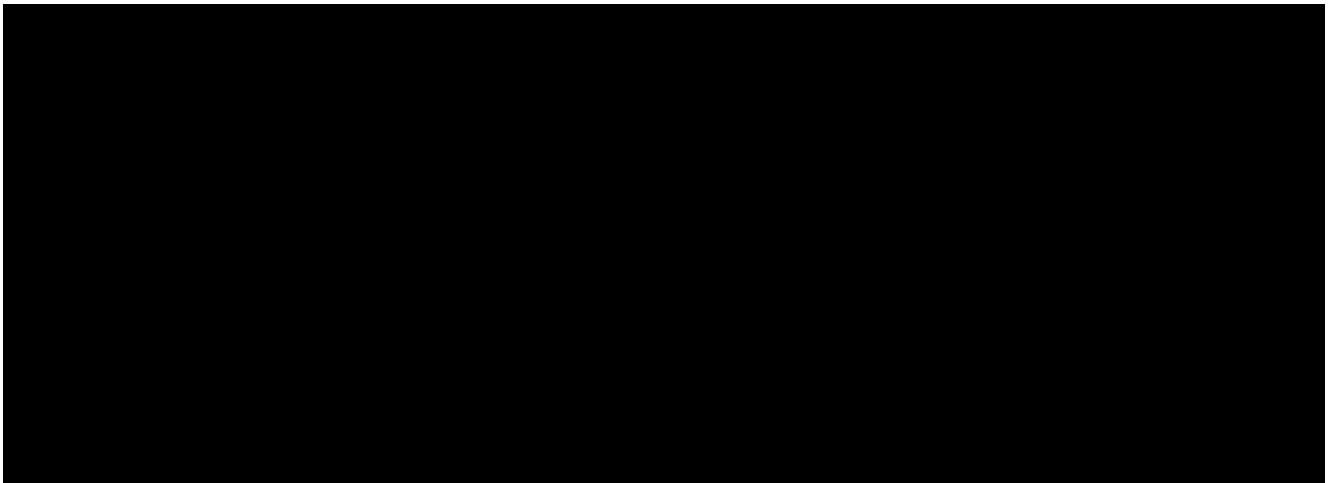
For the first five months of 2022, Evergy’s CFT Nominations exceeded its Annual Declaration [REDACTED]

[REDACTED]. BNSF delivered more than our Annual Declaration for this period but less than our

Inventory On Hand by Date.xls” to adjust for the October 2022 trucked coal, as noted above. All of the Tables in this Section 5.b utilize data from these same workpapers.

CFT Nominations. As of the end of May, BNSF had delivered { } of our YTD CFT Nominations at LEC, creating a shortfall of { } tons.

Table 13{



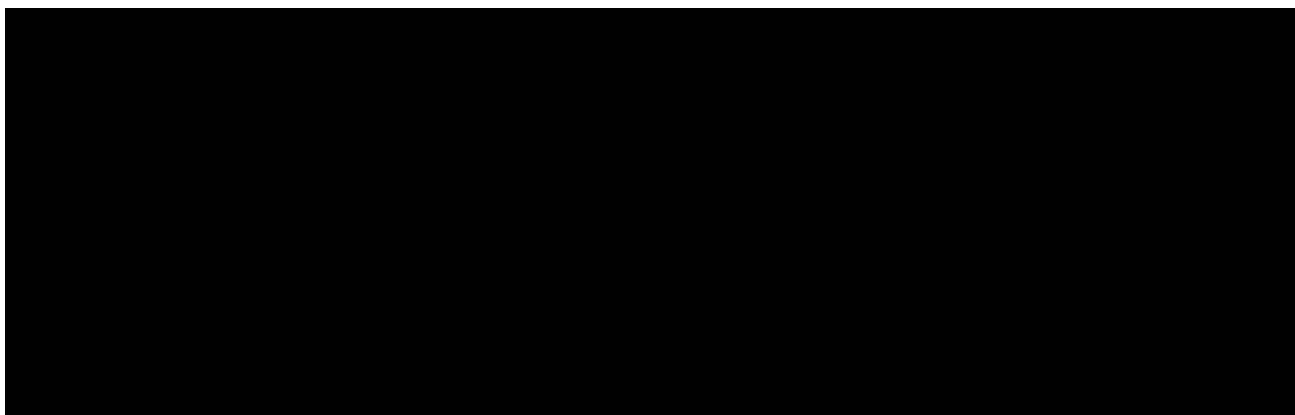
{ While we would prefer to see BNSF deliver the entirety of our CFT Nomination each month, we understand that some variation in deliveries will occur from month to month. I should also note the existence of an offsetting deficit and surplus of about { } each for January and February. On balance, therefore, BNSF missed our CFT Nominations for the first five months of the year by { }.

2. June through August

The summer months of 2022 (*i.e.*, June through August) show a different situation. With respect to those three high-demand months, we actually had reduced our CFT nominations meaningfully below our October 1, 2021 Annual Declaration (*i.e.*, a reduction of { } tons with virtually the entire reduction applying to July and August).²⁶ Nevertheless, BNSF's deliveries fell far below what we had requested under either the declaration figures or under our updated nominations.

²⁶ { }

Table 14{

A large rectangular area of the document is completely redacted with a solid black box, obscuring the content of Table 14.

} As to June, our CFT nomination was nearly identical to our declaration for the month, with the nomination amounting to { } of the declaration figure. Significantly, however, BNSF incurred its first major 2022 shortfall during June, with BNSF's delivery of { } tons falling { } tons short of our nomination ({ }). Nothing about any variation in Evergy's CFT Nominations (relative to our Annual Declaration) made any meaningful impact on the question of whether BNSF's June 2022 deliveries to LEC were adequate. Those deliveries were not adequate under either measure.

July and August present similar results, subject only to the difference that our July and August CFT Nominations each fell far below the July and August entries in our Annual Declaration. BNSF delivered { } fewer tons, respectively, than we had nominated for July and August (*i.e.*, a total two-month shortfall of { }). When compared to our Annual Declaration figures for July and August, however, BNSF's deliveries were short by { }.

Accordingly, BNSF's preferred comparison of its LEC deliveries against the Annual Declaration (rather than against the CFT Nominations) shows an even greater delivery shortfall during the three-month summer period when we faced substantial demand for generation. BNSF's

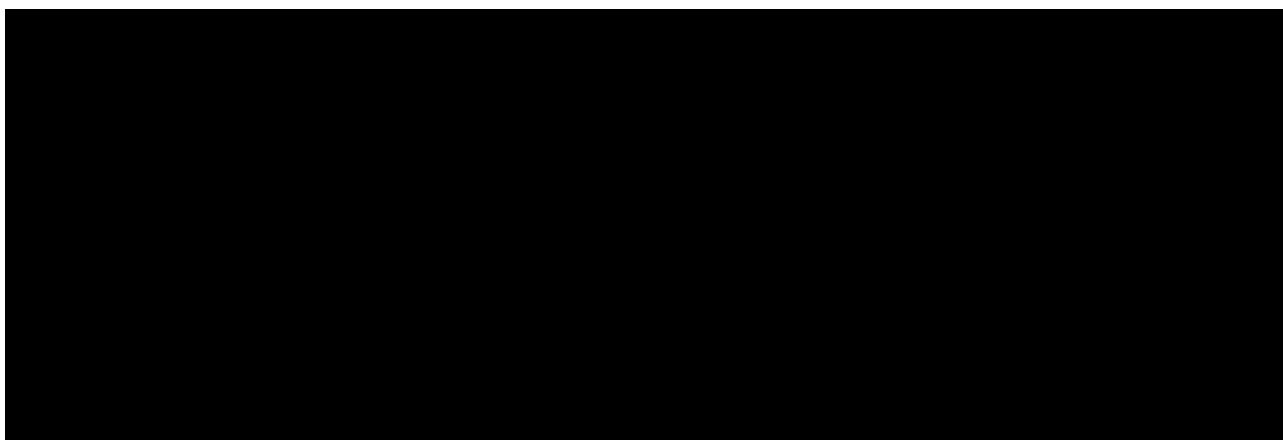
summer 2022 LEC deliveries created a shortfall of { } tons against the CFT Nominations and a much larger shortfall of { } tons against the October 1, 2021 Annual Declaration.

3. September through December

The beginning of September is a key time period for understanding what we experienced with regard to BNSF's LEC deliveries and the declaration/nomination distinction. As of the start of September, BNSF was { } tons behind our CFT Nominations in the aggregate for the year. *See* Tables 13 and 14 above.

Faced with insufficient summer deliveries and the need to conserve coal, we increased our CFT Nominations for September through November relative to what had appeared in our Annual Declaration. Conversely, we actually reduced our December CFT Nomination relative to our Annual Declaration. It is important to observe that this September to December 2022 time period was a full year (and in part more than a full year) after we had submitted our October 1, 2021 Annual Declaration to BNSF. In any event, BNSF's September through December deliveries at LEC fell well below the volumes that we had nominated:

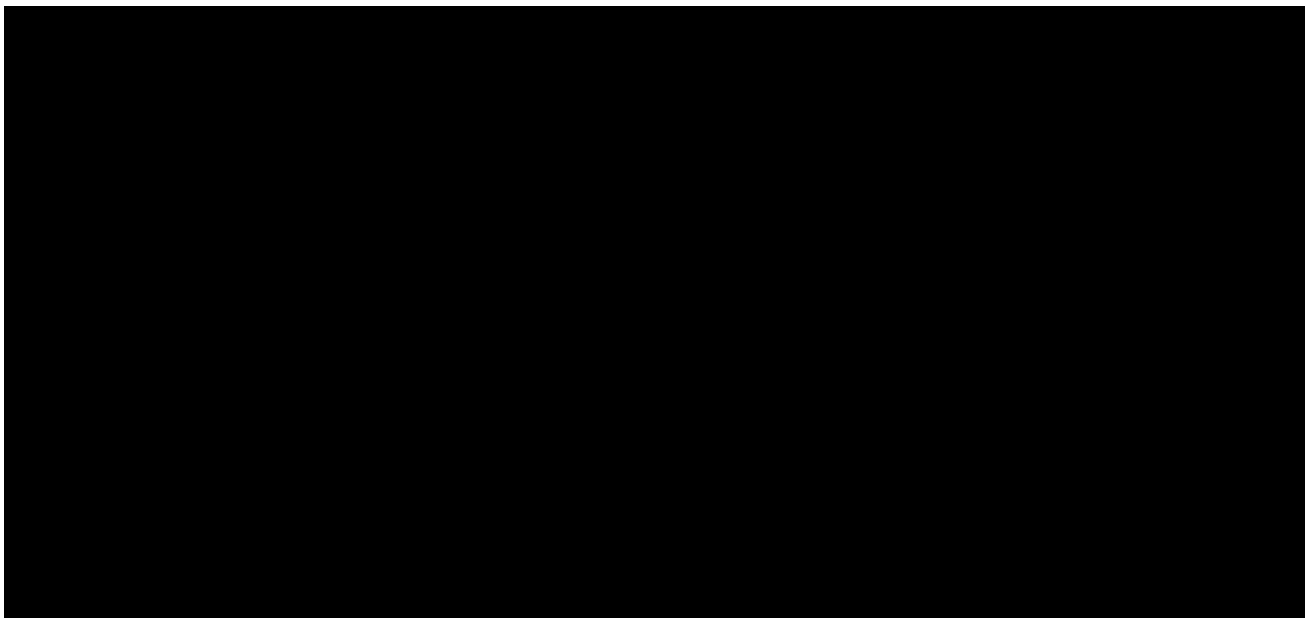
Table 15{



} I am not aware of any reason why – for the time period beginning with September 2022 – BNSF should be entitled to excuse its trainset limitations based solely on the levels we had

identified a year earlier rather than upon updated nominations. BNSF’s tariff certainly gives us the ability to update our tonnage requests through the CFT process, and its Tariff-6041 makes clear that the CFT values are the ones that BNSF uses for planning and resource allocation. In my view, BNSF does not deserve credit for “overperforming” for the final four months of the year relative to an outdated declaration, particularly when BNSF’s deliveries in the three immediately preceding summer months had been so poor. And that September-through-December “overperformance” makes up the entirety of BNSF’s claimed overperformance relative to our Annual Declaration.

Table 16{



}

*** * ***

By way of summary, each one of BNSF’s efforts to downplay the impact of the 2022 trainset limitations is contradicted by the facts that we experienced at the time.

G. BNSF Did Not Respond Promptly to Our Requests for Additional Trainsets

BNSF claims that it added an extra trainset to Iatan service in July within two business days of learning that { [REDACTED] } BNSF-9 (“[W]hen Every {

[REDACTED]
[REDACTED] }, BNSF was able to approve the { [REDACTED] } set for Iatan a mere two business days later.”). That claim is substantially misleading. { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] }

For example, I wrote to Patrick Moynihan on { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } We had spent months requesting that BNSF allow multiple additional sets in service, and we had explained that BNSF’s refusal to allow sets into service at historic levels was imposing a significant hardship on us.

H. { [REDACTED] }

In its Reply, BNSF suggests that it was not at fault for failing to allow sufficient trainsets in service because we supposedly did not comply with the tariffs’ ratability requirement; namely, BNSF’s tariff instruction that our requests for service must be roughly equivalent in volume from month to month.²⁷

²⁷ BNSF-13; *see also* BNSF-14 (“BNSF was not obligated to meet the { [REDACTED] } of Evergy’s CFT nominations, which { [REDACTED] } of the tariff under which the transportation was provided”); BNSF-90-91 (“BNSF’s tariffs for both Iatan and Lawrence were clear that { [REDACTED] }”) (emphasis added).

I will not attempt to offer any thoughts on the legal significance of the ratability language in BNSF's tariffs, but I will explain that {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, I will show that {

[REDACTED]

[REDACTED]

[REDACTED]

28 {

[REDACTED]

1. { [REDACTED] }

The overall variability in Evergy's 2022 CFT Nominations { [REDACTED]

[REDACTED] }²⁹

First, as to Iatan, our 2022 CFT Nominations { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁹ In this portion of my Rebuttal, I compare our 2022 CFT Nominations to our CFT Nominations for 2020 and 2021, in each case using data drawn from BNSF's online CFT system. Records showing CFT Nominations for years prior to 2020 are not available to us on BNSF's CFT system.

[REDACTED]

} The history at LEC is very much the same, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

} 2. { [REDACTED] }

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Significantly, however, the {

[REDACTED]

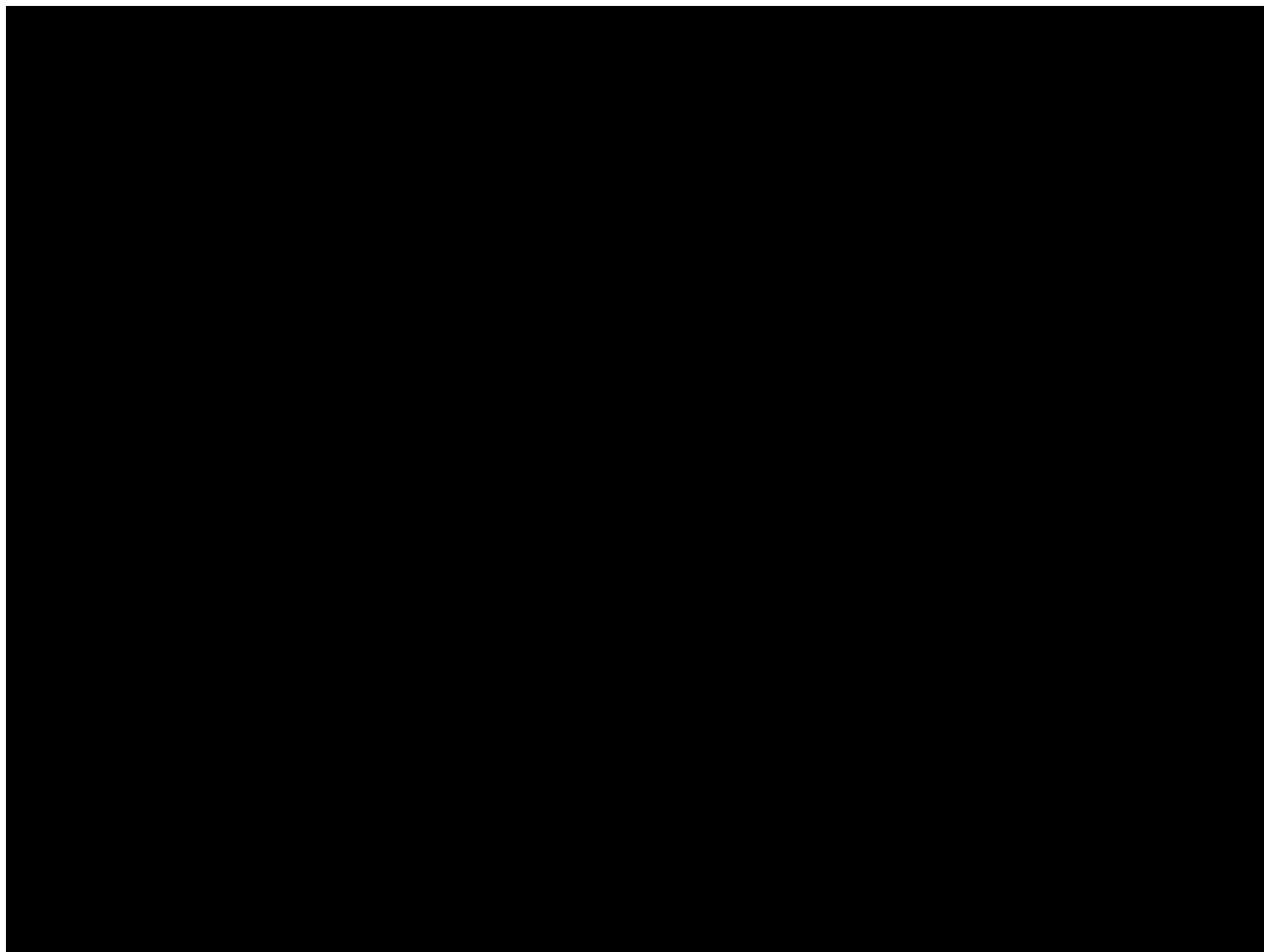
[REDACTED]

[REDACTED]

}

³⁰ Tucker Rebuttal Electronic Workpaper “Iatan Burn_Received.xlsx.”

Table 20³¹{



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

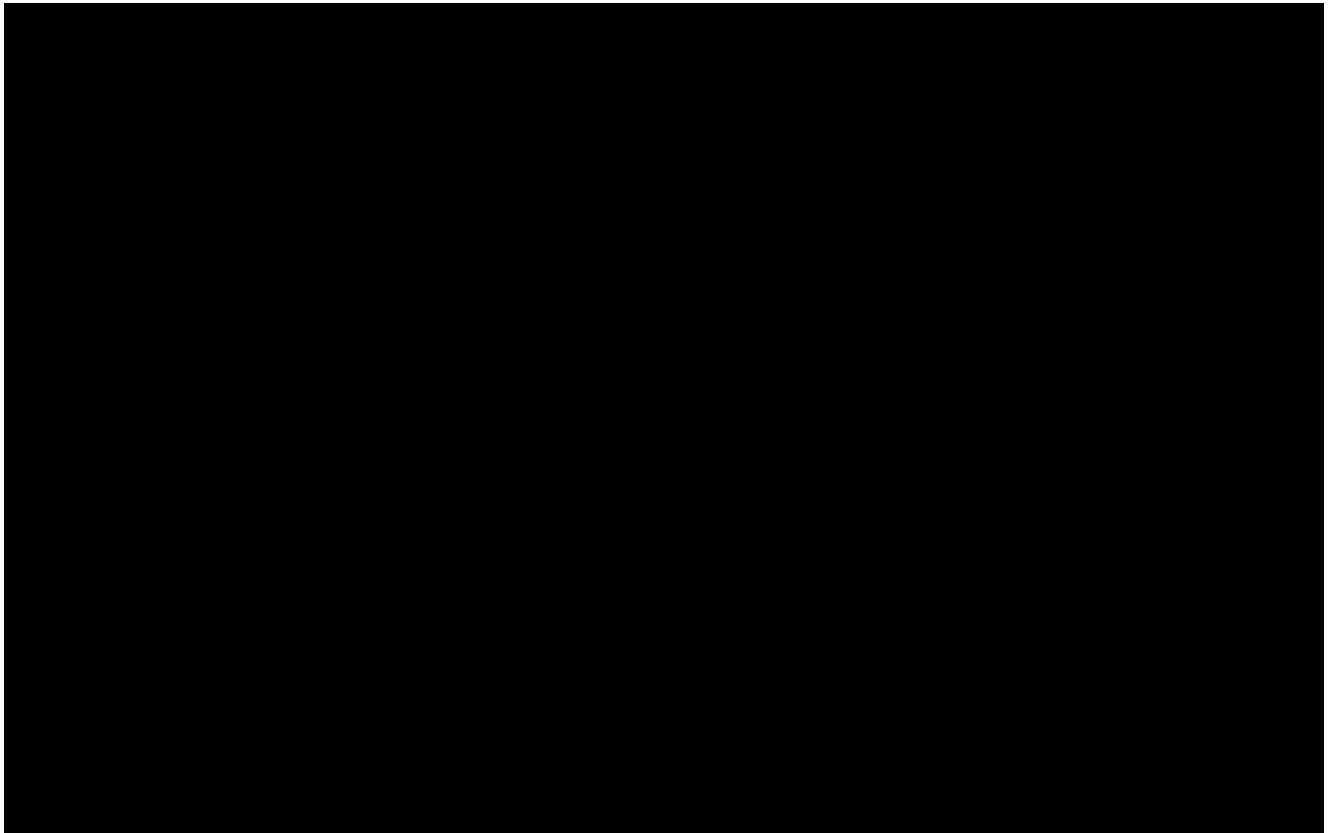
[REDACTED]

³¹ Tucker Rebuttal Electronic Workpaper “Iatan Burn_Received.xlsx.”

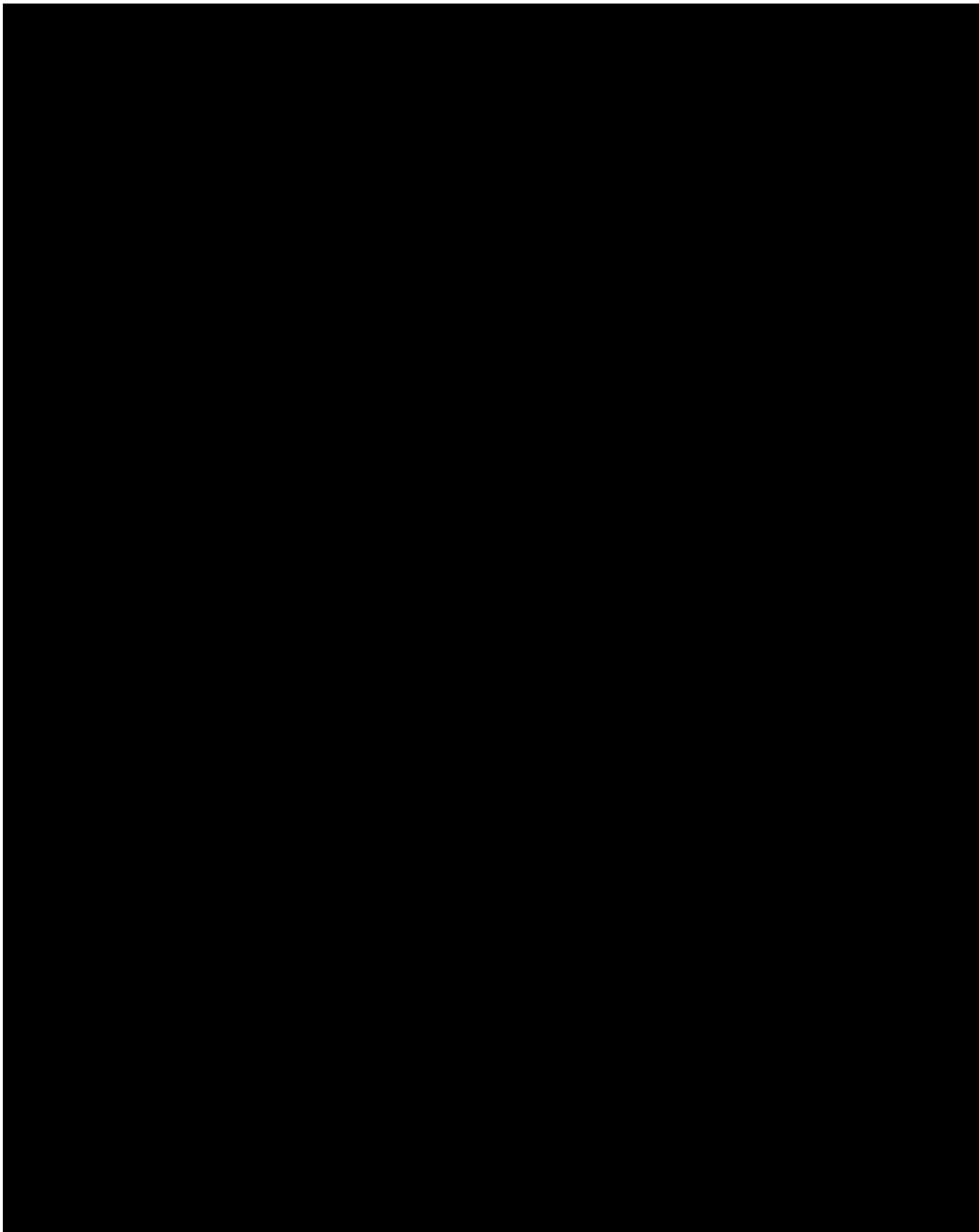
[REDACTED]

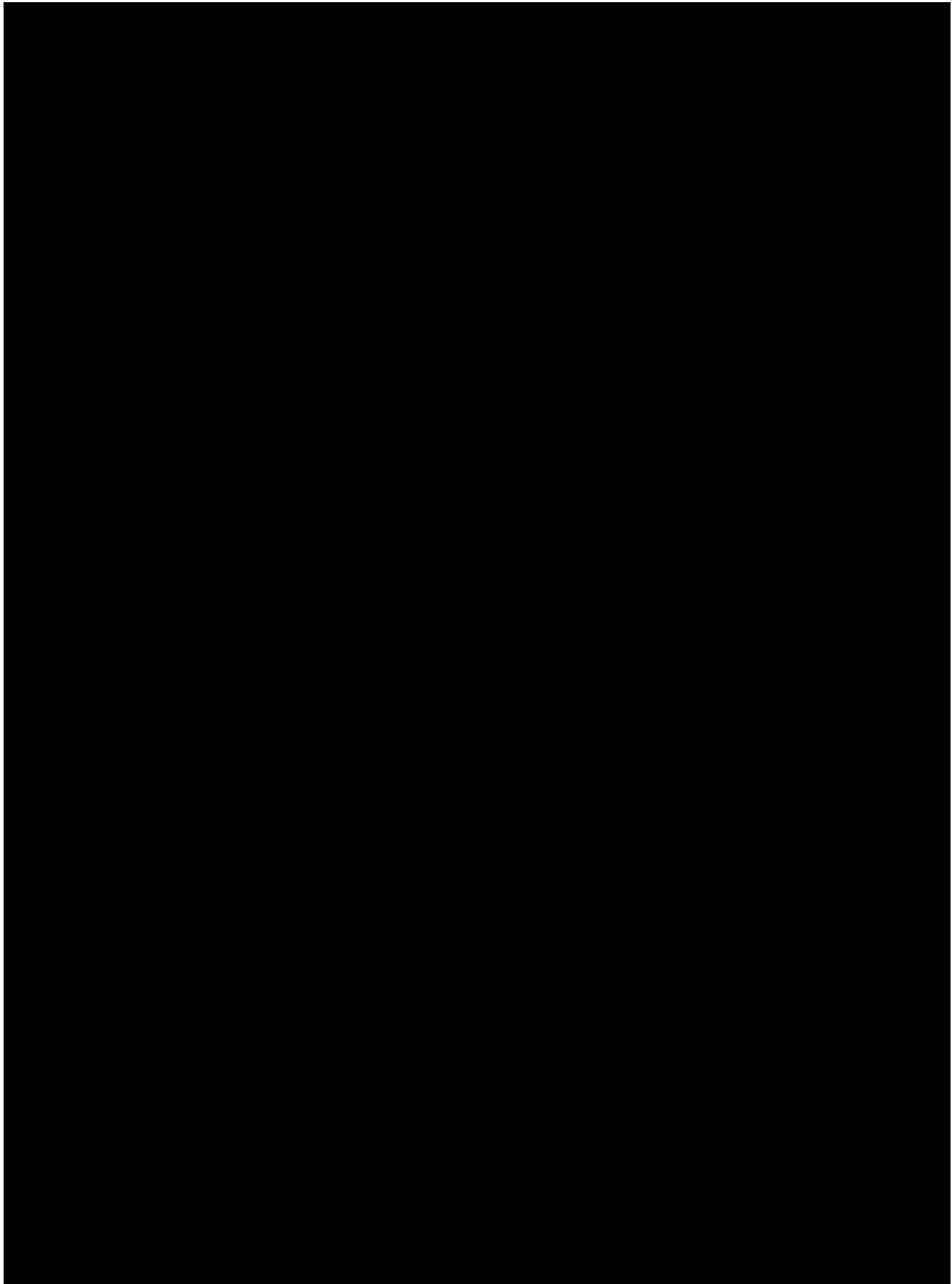
[REDACTED] }³²

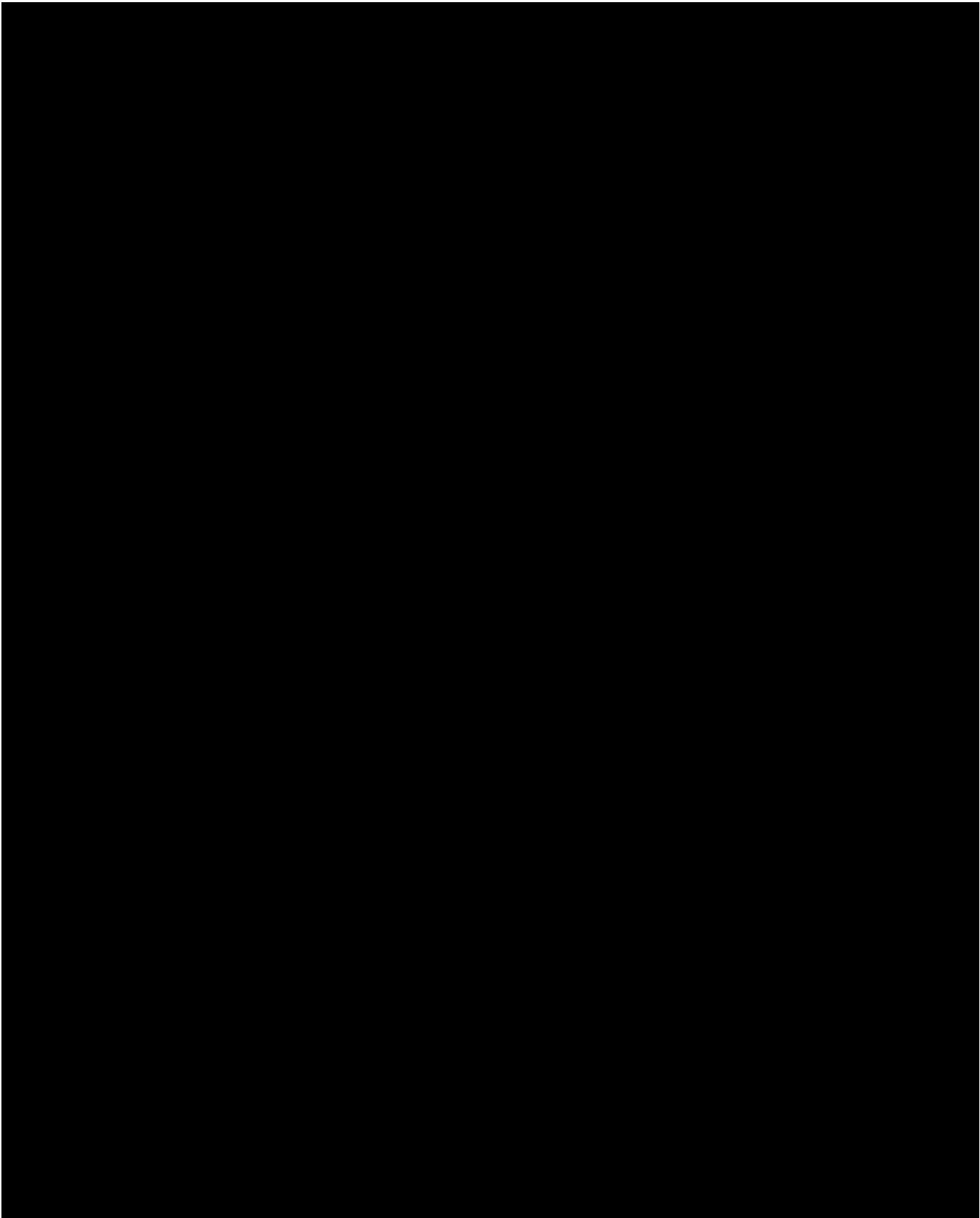
Table 21 {



³² The source data for each of the following Tables is Tucker Rebuttal electronic Workpaper “Iatan Burn_Received.xlsx.”





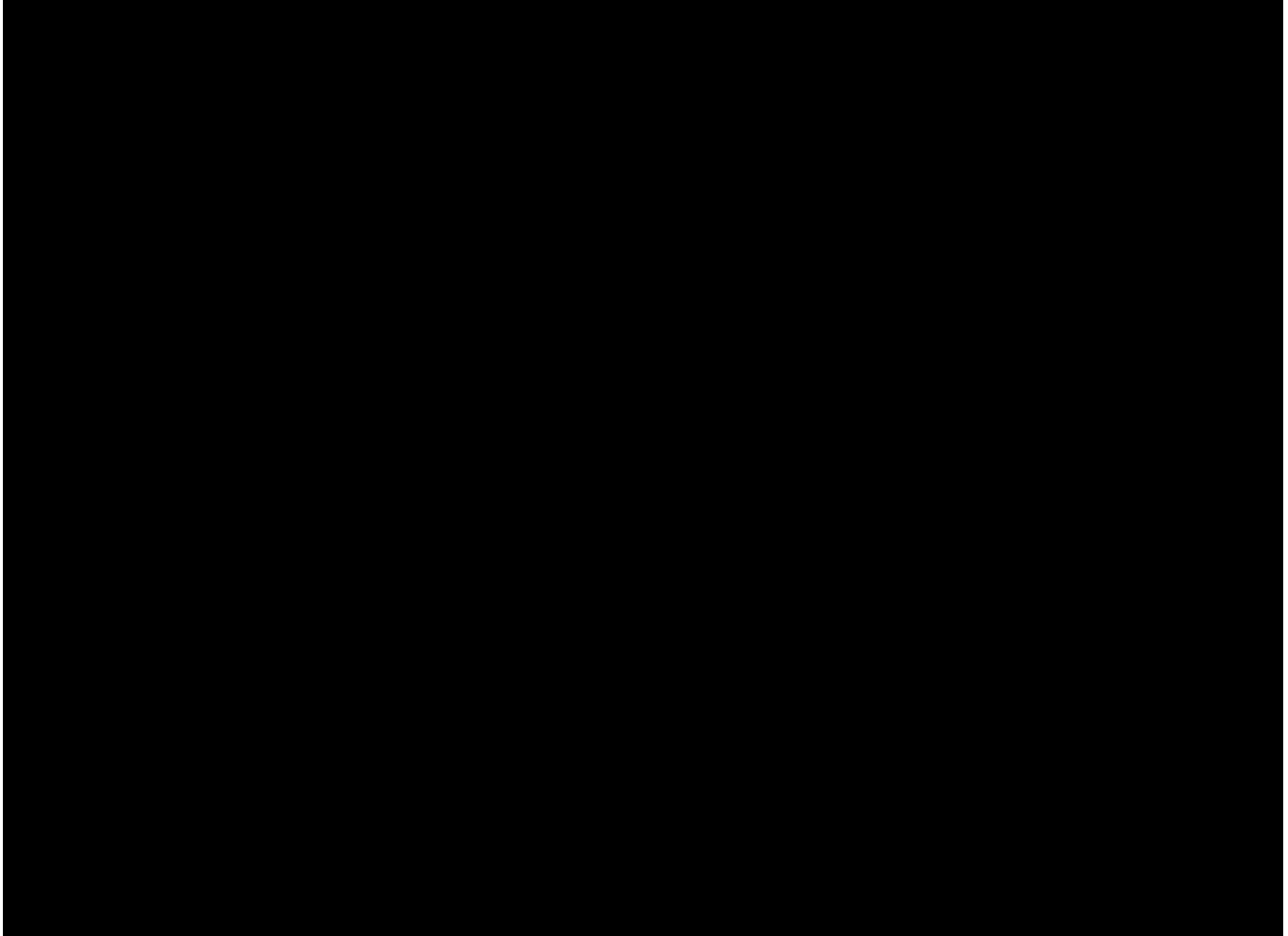


}

That same pattern existed at LEC, which I show below for 2019-2022. {

}

Table 28³³{



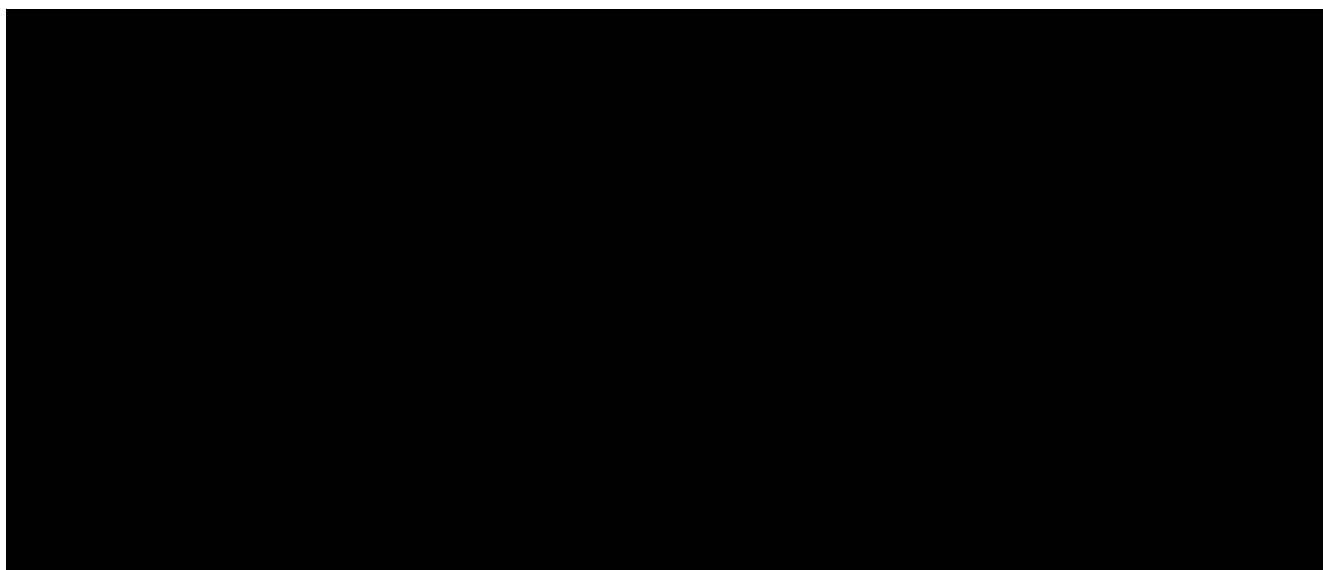
³³ Source: Tucker Rebuttal Electronic Workpaper “LEC Burn_Received.xlsx” and Tucker Op. Electronic Workpaper “LEC 2022 Align Inventory On Hand by Date.xls” (identifying October 2022 adjustment for approximately { } of trucked coal).

[REDACTED]

[REDACTED]

Our internal records of LEC coal receipts date back only to 2019. In order to show that BNSF’s deliveries to LEC showed substantial “non-ratability” over a longer period of time, I have made the same sort of comparison dating back to 2015 using EIA 923 data showing monthly tons received. Table 29, below, includes those results for LEC:

Table 29³⁴ {



} In addition, graphs showing the wide monthly variation in BNSF’s LEC deliveries (for each of the years 2015 through 2021) as compared with 2022 appear in my Reb. Exhibit JT-5.

³⁴ Source: EIA923 Report (Fuel Receipts and Costs) and Tucker Op. electronic Workpaper “LEC 2022 Align Inventory On Hand by Date.xls.” As noted above, the Tons-received figure in Evergy’s EIA 923 reporting for October 2022 includes approximately { [REDACTED] } tons that Evergy moved via truck from the JEC plant to the LEC plant given BNSF’s lack of deliveries. *See* Tucker Op. Electronic Workpaper “LEC 2022 Align Inventory On Hand by Date.xls,” Tab “Inventory on Hand by Date,” October 26-27. For purposes of the present summary of Tons moved via BNSF, those tons have been removed.

J. My Damage Calculations are Reasonable

In the Reply, BNSF takes issue with my calculation of damages associated with inventory management and railcar storage. Tucker V.S. at 40-48; BNSF-200-202; BNSF-707-709. BNSF contends that I have assumed that inventory always should remain in place, which is incorrect as is shown by the limited time period for which I calculated inventory-management damages. Similarly, BNSF contends that Evergy normally would have incurred railcar storage expenses, even absent the BNSF trainset limitations. Again, BNSF's arguments miss the point of my calculations.

Evergy does not seek damages for *all* inventory-management expense and Evergy does not seek damages for *all* railcar-storage expense. Instead, I calculated demonstrably modest damages in response to BNSF's ongoing refusals to allow our historic set counts in service. Those ongoing refusals led to the significant under-delivery of coal (even relative to our reduced 2022 coal burns) that I documented above.

As for the details of my dozer-fuel calculation, BNSF's brief quibbling fails to recognize the very limited scope of damages that I calculated. As I noted in my Opening Statement, my total inventory-management expense amounted to { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Nevertheless, BNSF objects to my use of the "high" consumption values for our CAT dozers, claiming that I have failed to provide a basis for my selection. Importantly, however, the manufacturer's fuel-consumption data that I relied upon distinguishes fuel use on the basis of the

percentage of idle time for the given dozer use, with higher consumption rates per hour associated with work involving lower idle time percentages. Our dozer use involved the movement of thousands of tons of recently unloaded coal into inventory or the withdrawal of thousands of tons of coal from inventory when train arrivals were far too infrequent due to the absence of sufficient trainsets in service.

Similarly, BNSF is wrong to assert that Evergy has not “offered any reason” why railcar storage expenses should be BNSF’s responsibility. I explained at length in my Opening Statement that BNSF had refused to allow our historic trainset counts into service. We spent a substantial portion of the year asking BNSF to restore those sets into service, but instead, they sat in storage due to BNSF’s unwillingness to restore them to service. These were not trainsets that went beyond our historic levels. These were the same numbers of trainsets that we routinely had needed and had been permitted to utilize in our service.

K. BNSF’s Various Other Criticisms are Unfounded

BNSF’s Reply includes many other claims and arguments that relate to my Opening Statement and to the circumstances that we faced in 2022. I address certain of those BNSF criticisms briefly, in turn, below.

1. Inventory Calibration

BNSF’s Reply Argument notes that we made inventory adjustments in the summer of 2022 at both Iatan and LEC, and BNSF argues that those adjustments somehow reflect a misjudgment on Evergy’s part. BNSF-197-98. Inventory surveys (along with any resulting adjustments) are a routine part of our obligatory annual operating procedures. These sorts of annual physical surveys and inspections are essential to verify or calibrate our ongoing recorded volumes with actual coal volumes. I would be surprised to learn of any large electric utility that does not engage in a similar

2. Unloading Delays and Bunching Issues

BNSF attempts to excuse its own failure to accept sufficient trainsets into service by claiming that certain unloading delays at Iatan and LEC reduced the volume of coal that the existing sets in service were able to deliver. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

BNSF's delay-related excuses do not justify BNSF's refusal to accept sufficient trainsets for several reasons. As to the Iatan delays that BNSF references as occurring in February of 2022 (BNSF-633), BNSF's set limitations had not yet prompted us to begin coal conservation.

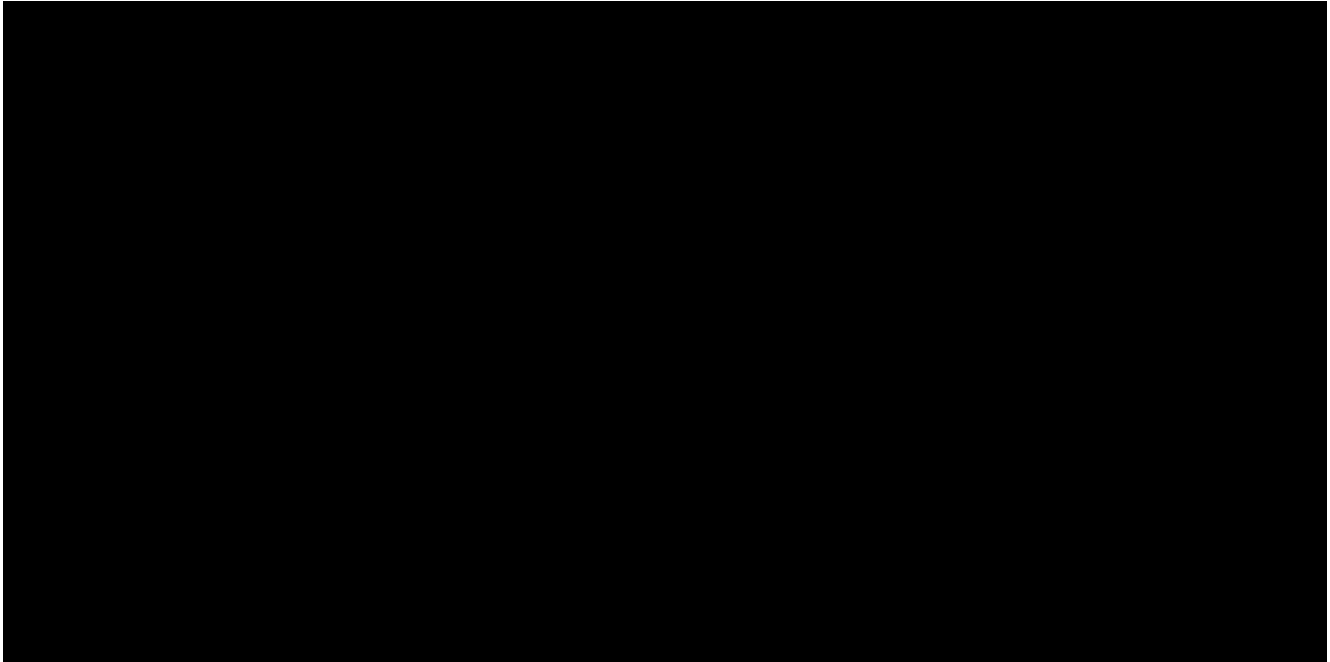
In any event, my review of Evergy's unloading records for early 2022 shows that { [REDACTED]

[REDACTED]

[REDACTED] } we received 14 trains at Iatan in February with a total Elapsed Time at the station of { [REDACTED] } hours for an average of { [REDACTED] } hours per train.

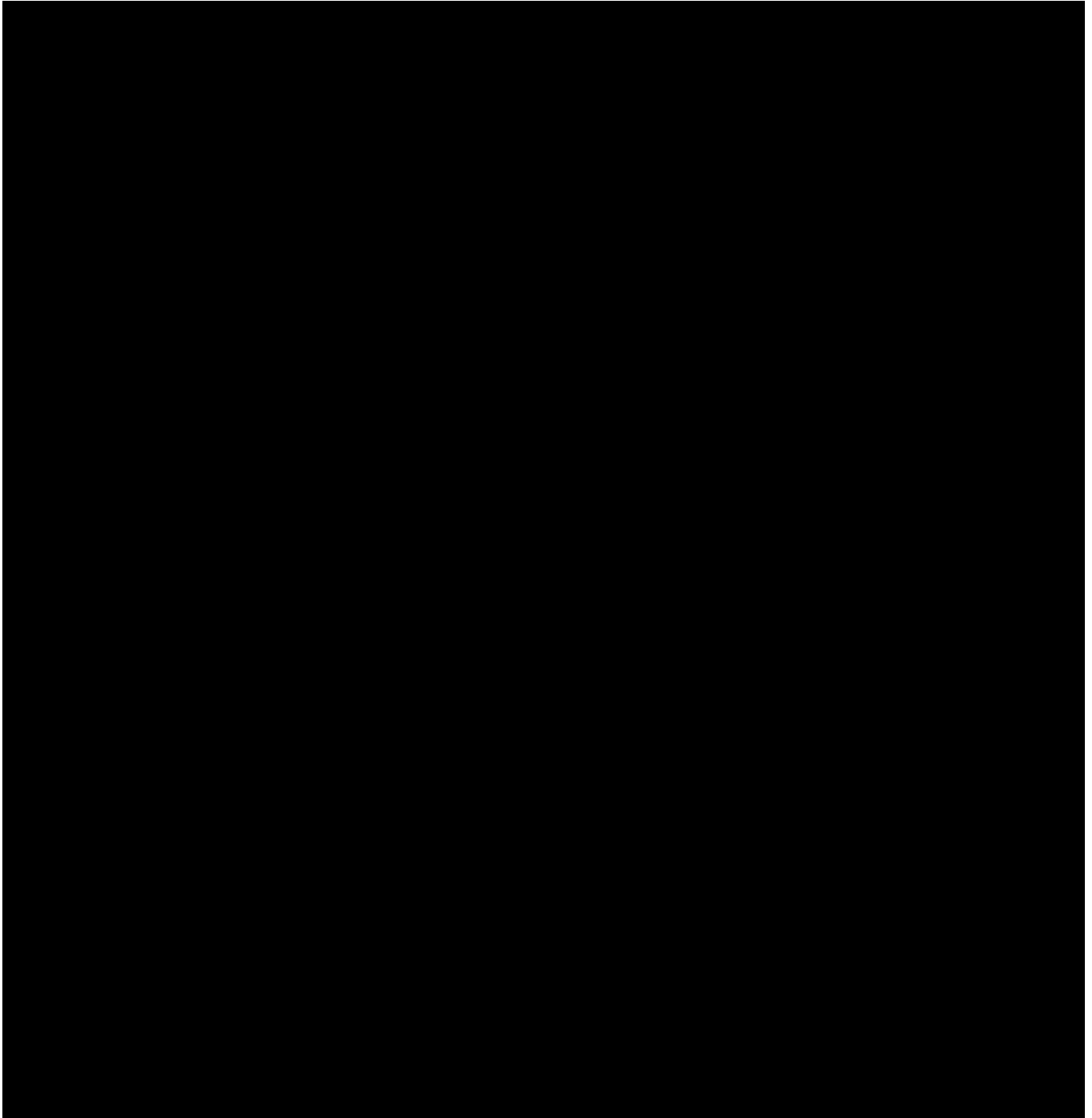
{ [REDACTED] } reduces our average February unloading time at Iatan to { [REDACTED] } hours:

Table 30{



} Likewise, BNSF's comparison of the April to June and July to September time periods (BNSF-672) ignores the fact that { [REDACTED] } Our records show those average times as being { [REDACTED] } arriving in the April to June time period and { [REDACTED] } arriving in the July to September time period. Eliminating those { [REDACTED] } reduces the July to September average time down to { [REDACTED] }:

Table 31{



} With regard to LEC, BNSF cannot fairly complain about {

}. Reb. Exhibit JT-7; BNSF-194-95

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Significantly, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. The Claim that Evergy Should Not Have Given Competitive Business to UP

BNSF argues that its deliveries to Evergy could have been higher in 2022 if Evergy had not decided to award its competitive business to Union Pacific in 2020. *See* BNSF-196-97 (Argument); BNSF-683 (Baranowski/Zebrowski); BNSF-817 (Hibbard). BNSF suggests that, absent such an Evergy decision to enter into an agreement with UP, BNSF could have diverted tons from Hawthorn and La Cygne service to Iatan as it had done on occasion in years past.

We were not obligated to continue using BNSF service for Hawthorn and La Cygne. It should not be necessary to make a commercial decision over competing proposals based on the prospect of later needing to divert shipments from competitively served plants in order to obtain reasonably historic levels of service at the captive Iatan and LEC stations.

4. The Claim that CFT Nominations are Not Requests for Service

In its Reply, BNSF says that our CFT Nominations do not constitute “requests” that could obligate BNSF to provide common carrier service. *See, e.g.*, BNSF-82-85. I will not address the legal implications of that suggestion, but I will provide my reaction here simply based upon my experience as a shipper representative interacting with BNSF.

There are three separate steps that we were required to take to obtain BNSF common carrier service. First, we submitted formal requests for the disclosure of a common carrier rate for each of our plants. In each of those letters, we made reference to the terms to which the requested rate would apply. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }³⁵

Second, we submitted our Annual Declaration of Volumes in accordance with BNSF’s instruction. And third, we submitted the monthly CFT Nominations that BNSF also requires. There are many instances, including instances in the BNSF Reply, in which BNSF has emphasized

³⁵ We submitted our request for an LEC common carrier rate a year earlier on September 10, 2020. Reb. Exhibit JT-10 (BNSF EVERGY 0005038). [REDACTED]

[REDACTED] }

the importance of these CFT Nominations to BNSF’s planning process. Moreover, in at least some of those instances, BNSF arguably refers to the CFT Nominations as “requests”:

- “These monthly [CFT] nominations help BNSF plan and manage the coal transportation network on an ongoing basis” BNSF-12.

- “Every sought transportation service under a common carrier tariff which explicitly stated that *requests* for service must be { [REDACTED] }.” BNSF-13 (emphasis added).

- “*Entries made in the CFT* are meant to support the complicated logistics of shipping coal from mines to power plants and to resolve any discrepancies between a shipper’s *request* and the coal available to ship at mines.” BNSF-85 (emphasis added).

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

CONCLUSION

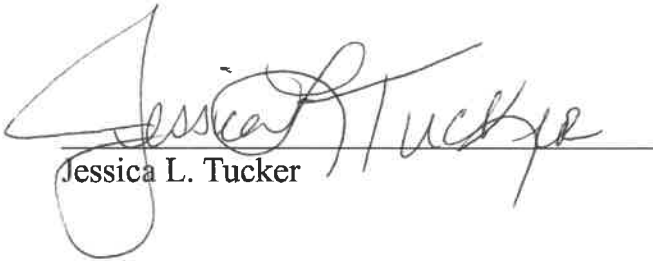
As I explained in my opening Statement, BNSF’s refusal to allow sufficient trainsets into our 2022 service prevented us from receiving all of the coal that we needed and that we had scheduled. Through its Reply, BNSF seeks to create the impression that Evergy had little actual need for additional coal in 2022, and that if it did, that need arose entirely from Evergy’s voluntary actions. As I have shown in this Rebuttal, the narrative that BNSF’s experts and counsel present

with respect to 2022 is inconsistent with my own experience dealing with all of the many difficulties that BNSF's set limitations caused.

Evergy experienced substantial difficulty and harm in 2022 due to BNSF's refusal to allow our historic set counts into service.

VERIFICATION

I, Jessica L. Tucker, state under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement. Executed on January 20, 2026.


Jessica L. Tucker

Rebuttal Exhibit JT-1

REDACTED

REDACTED

Rebuttal Exhibit JT-2

REDACTED

REDACTED

Rebuttal Exhibit JT-3

REDACTED

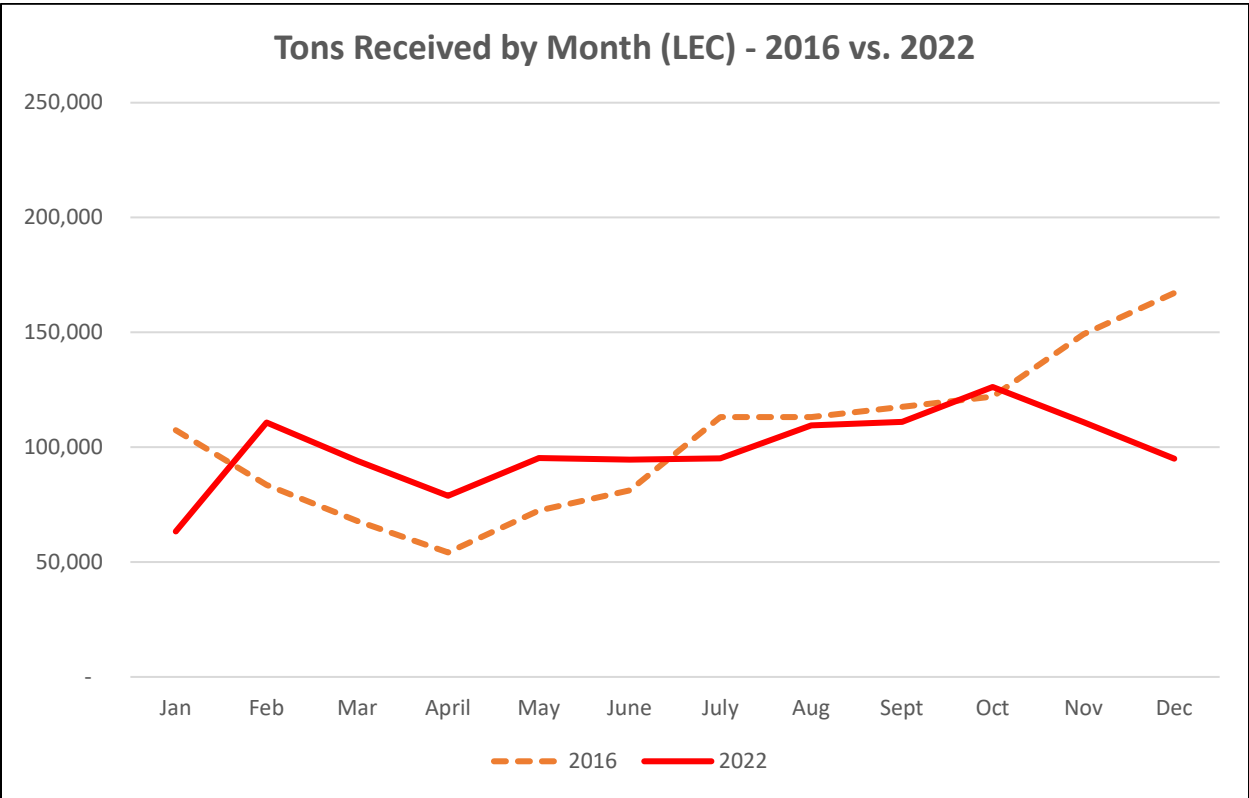
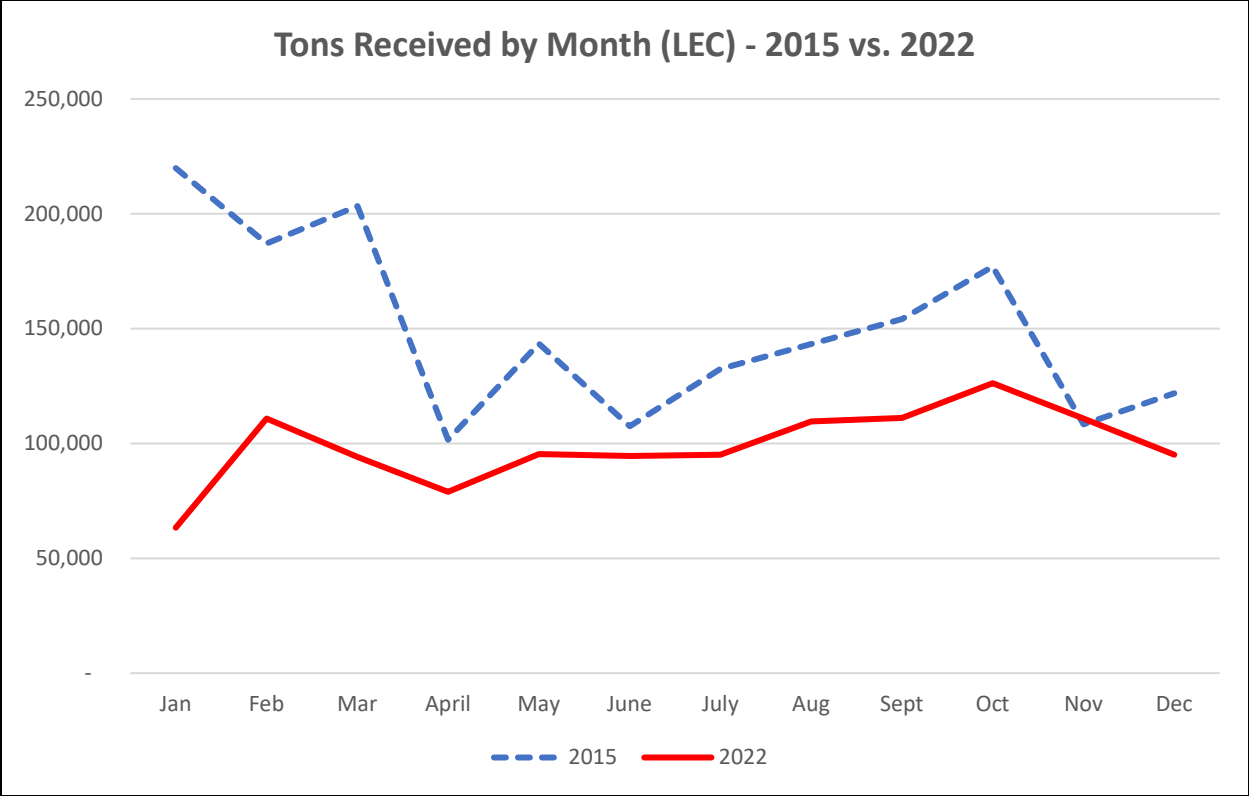
REDACTED

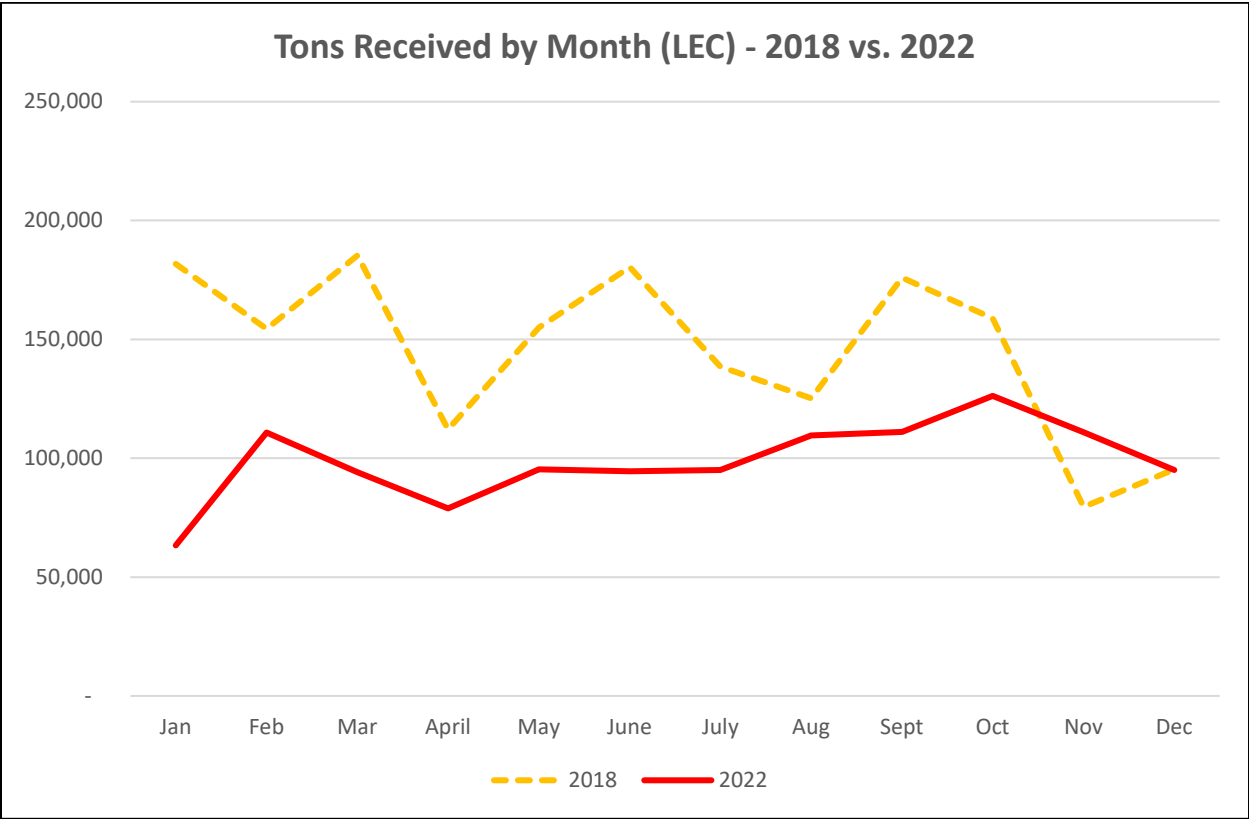
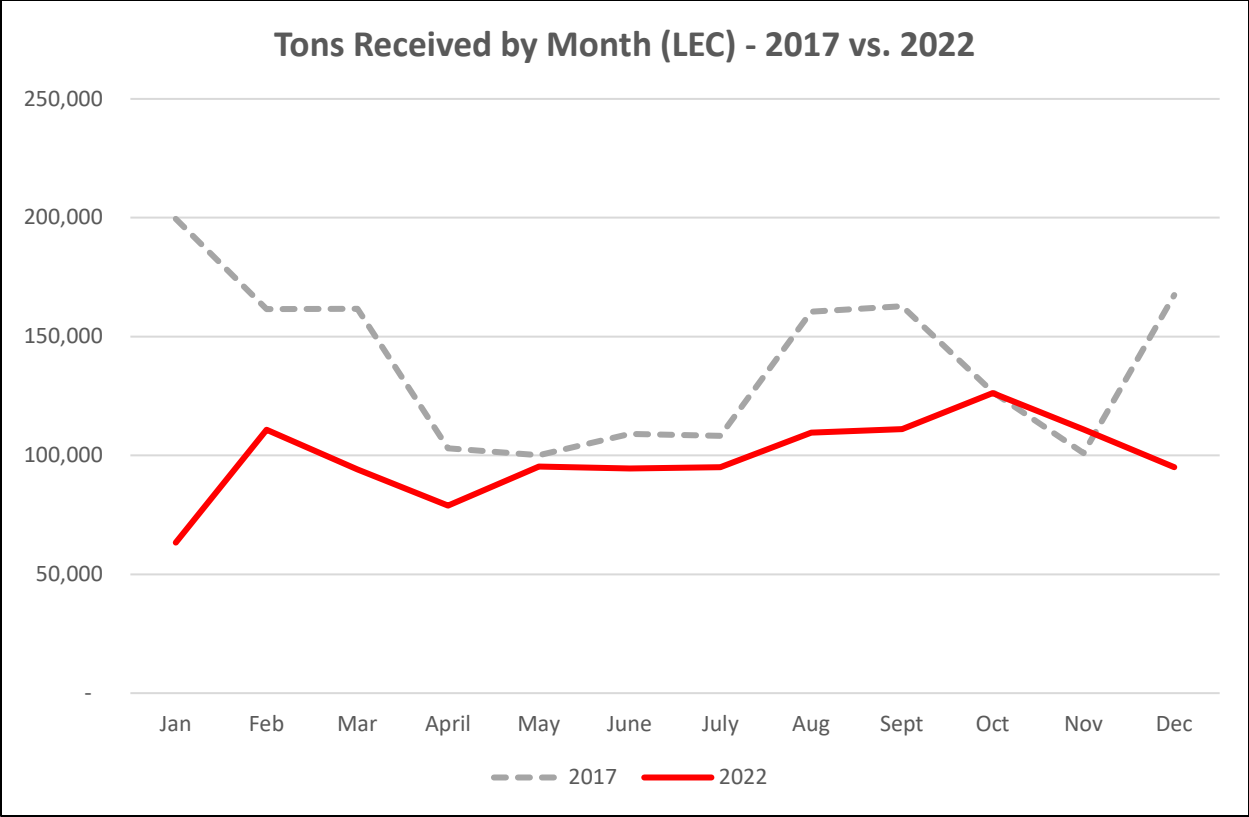
Rebuttal Exhibit JT-4

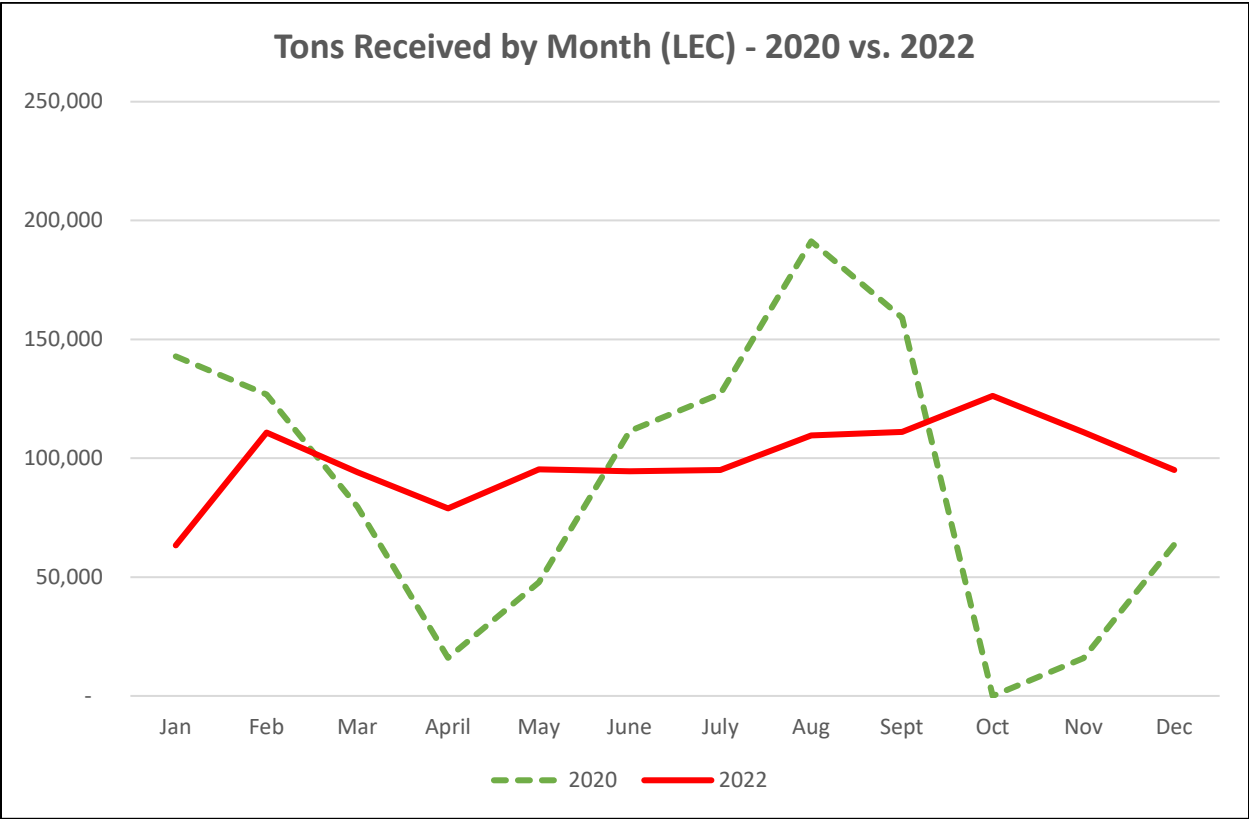
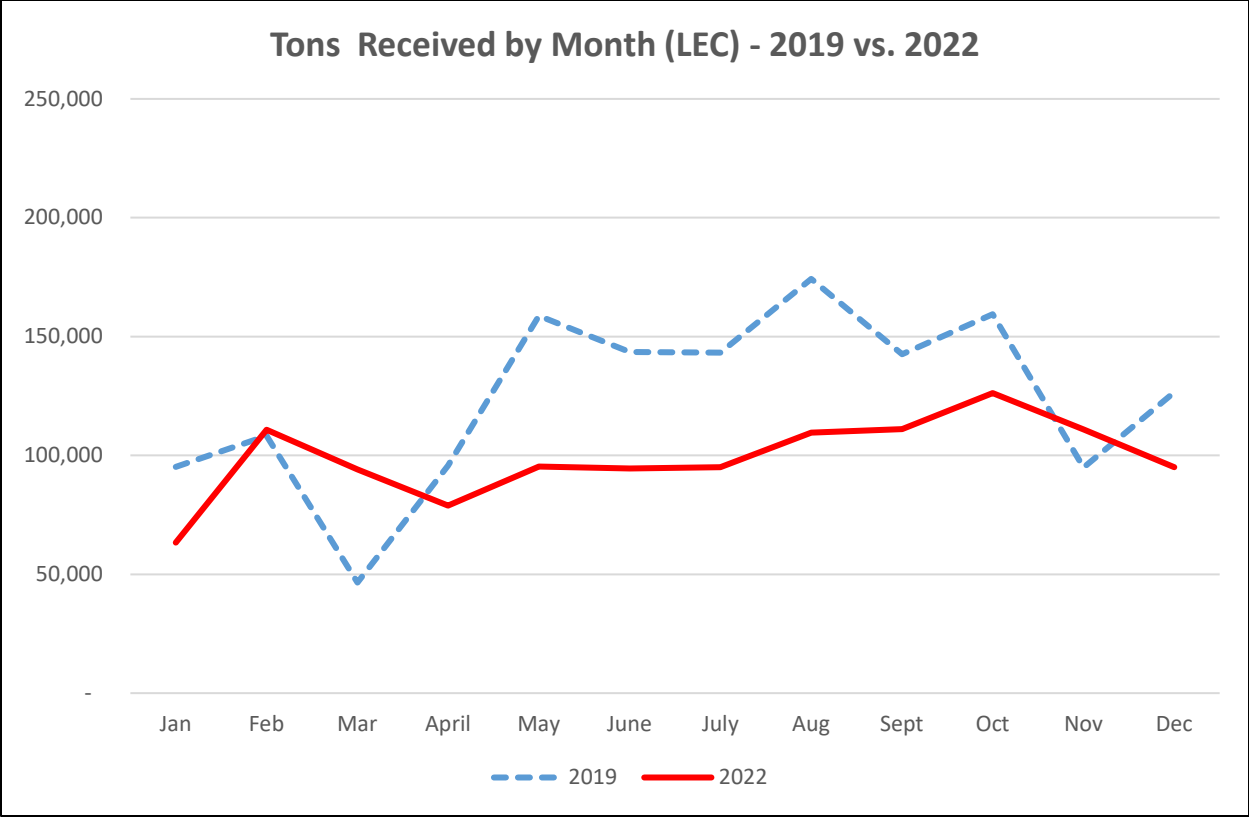
REDACTED

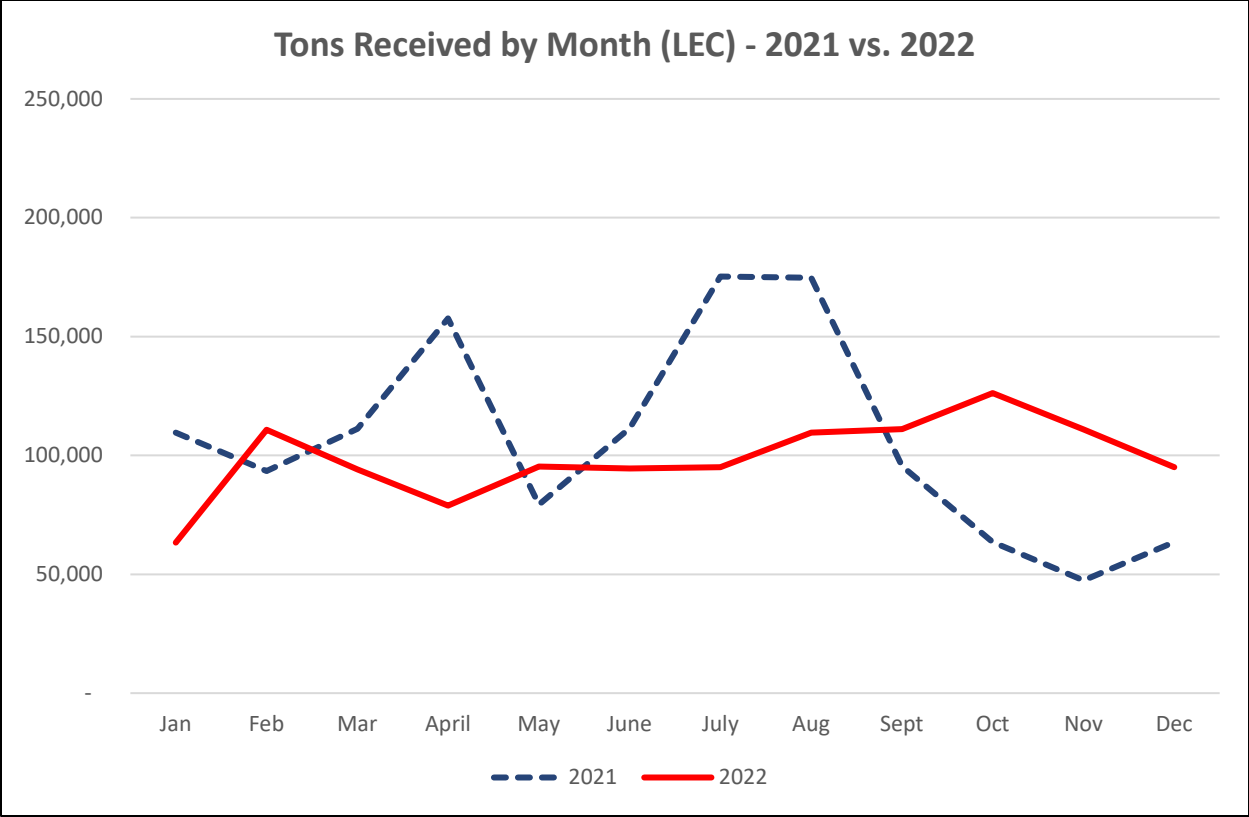
REDACTED

Rebuttal Exhibit JT-5









Rebuttal Exhibit JT-6

REDACTED

Rebuttal Exhibit JT-7

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Rebuttal Exhibit JT-8

REDACTED

Rebuttal Exhibit JT-9

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Rebuttal Exhibit JT-10

REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REBUTTAL VERIFIED STATEMENT

of

Robert D. Mulholland
Executive Vice President

and

Timothy D. Crowley
President



On Behalf Of

EVERGY INC., EVERGY METRO, INC. and EVERGY KANSAS CENTRAL, INC.
(“EVERGY”)

Date: January 20, 2026

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LIST OF EXHIBITS

Exhibit No.	Exhibit Description
20	2019 to 2022 Midwest Region Plants Monthly Burn – Percentage Over or Under Annual Average Monthly Burn

I. INTRODUCTION

We are Robert D. Mulholland and Timothy D. Crowley, Executive Vice President and President, respectively, of L. E. Peabody & Associates. We are the same Robert D. Mulholland and Timothy D. Crowley who submitted a Verified Statement in support of Evergy's opening evidence in this proceeding. Our credentials were included as Exhibit Nos. 1 and 2 to our June 25, 2025, Opening Verified Statement (OVS).

In our OVS, we demonstrated that:

1. Train volumes declined, and train speeds increased (while infrastructure remained unchanged) over the Evergy route from 2019 to 2022;¹
2. Notwithstanding observed increases in train performance, BNSF's reductions in train crew staffing levels exceeded its reduction in train volumes;
3. BNSF's coal corridor crew change locations along the Evergy route saw greater crew reductions than BNSF's network as a whole;
4. Crew shortages on the BNSF system and over Evergy's route (together with reductions in equipment maintenance staff) resulted in a decline in the number of BNSF road locomotives in operation (i.e., BNSF's crew shortage limited its ability to efficiently deploy its available equipment to meet shipper demand);
5. While the number and duration of delays in total and along the Evergy route decreased, the number and duration of delays attributed to crew-related and equipment-related delays sharply increased;
6. Coal trains saw greater increases in crew-related delays than other traffic groups; and,
7. Despite the decrease in overall locomotives in service, BNSF was able to ensure locomotive supply to its intermodal and manifest train services by reducing the number of unit coal trains in service, including unit coal trains moving in common carrier service.

¹ See, Mulholland/Crowley Opening VS at Exhibit No. 6.

We concluded that:

[T]here was sufficient track capacity on the BNSF routes between the Powder River Basin (“PRB”) and Evergy’s Iatan Generating Station and Lawrence Energy Center to handle Evergy’s requested tonnage in 2022. BNSF’s failure to provide the requested coal transportation services to Evergy was attributable primarily to BNSF’s decision to reduce its pool of train crews available to provide the requested service, and to a lesser extent, BNSF’s decision to reduce its locomotive power pool and equipment maintenance staffing at the same time. During 2022, BNSF did not have adequate human resources and equipment to move its trains efficiently, and consequently train delays attributed by BNSF to crew, power, and mechanical-related causes increased sharply. BNSF allocated its reduced resources in greater numbers to its non-coal lines of business, and Evergy did not receive its requested and scheduled volumes.²

BNSF’s Reply argument alleges that BNSF was a victim of circumstance, and that its inability to increase crew supply to meet rising demand in 2022 was entirely attributable to a historically tight labor market following the COVID shutdowns and commodity price swings related to foreign wars.

We have been asked by Evergy to review and evaluate claims made by BNSF in its Reply that: (1) BNSF acted reasonably in 2022 “under the circumstances,” and (2) the circumstances under which BNSF was operating in 2022 were completely outside of BNSF’s control and were unforeseen/unforeseeable.

² *Id.* at p. 3.

II. BNSF IS RESPONSIBLE FOR ITS SERVICE FAILURES IN 2022

In its Reply, BNSF admits that it failed to deliver Evergy’s coal nominations in 2022.³ BNSF admits that the primary reason for its failure was its lack of adequate crews to efficiently move traffic for all shippers seeking to use its network. BNSF admits that when faced with the imbalance between crew supply and transportation demand in 2022, it elected to ration access to its network – by {{ [REDACTED] }}.⁴ BNSF claims that its actions were required to “decongest its network.”⁵

In other words, BNSF removed trains from service in 2022 because it lacked the crews necessary to meet overall demand for contract and common carrier traffic. BNSF’s actions deprioritized coal service, creating a system of tiered access to capacity, wherein the volume of coal traffic BNSF moved became dependent on, and second to, the demand for other scheduled traffic, as well as BNSF’s discretionary allocation of crews to serve BNSF’s coal corridor versus other traffic. Within the coal traffic group, BNSF implemented a triage system to allocate its remaining capacity based on its perception of the likelihood that a particular facility would run out of coal before another facility (i.e., serve the most desperate plants first).

However, as we demonstrated in our OVS, BNSF had ample physical capacity (mainline track and sidings) to move Evergy’s requested coal nominations. Therefore, its network was not “congested” in 2022. Rather, BNSF intentionally limited its *practical* capacity by reducing its workforce in the years leading up to 2022 (with notable contractions in 2016 and 2019), and then hindered its own ability to recall furloughed workers in 2022 by freezing wages in 2020, implementing an unpopular attendance policy in February 2022, and participating in a drawn-out

³ See, STB Docket NOR 42180, *Evergy, Inc., et al. v. BNSF Railway Company*, Reply of BNSF Railway Company Executive Summary, filed November 20, 2025 (Reply Executive Summary), at p. ES-13.

⁴ *Id.* at p. ES-8.

⁵ *Id.*

and well-publicized labor dispute that was ongoing leading up to and during the 2022 service failures.

A. BNSF'S STAFFING AND OPERATIONAL CHANGES

BNSF experienced a significant and prolonged service crisis in 2014. The well-documented issues included several coal-fired electric generating stations running out of coal during this period. During that period, the Board initiated a proceeding to identify the causes and proposed solutions to the service failure.

During a hearing on April 10, 2014, BNSF's representative identified several ways BNSF sought to improve service in its Northern tier. One of the main strategies that BNSF implemented at that time was adding trainsets to its system.

And the substantial run up of coal that occurred last year in both train sets and associated locomotives from the second quarter to the third quarter, we responded to increased demand with coal with an increase of 30 percent of cars and locomotives. Increasing those sets dedicated to movement of coal from 340 sets to 445 sets.⁶

This is diametrically opposed to BNSF's current argument that cars and trains need to be removed from the system to alleviate "congestion":

Going into 2022, there was mounting congestion across the United States freight rail network, and rail carriers implemented service recovery plans that correctly identified the necessity of reducing cars on line. As part of its overall service recovery plan, BNSF removed {{[REDACTED]}} coal trainsets from service on its network in March 2022, including { [REDACTED] } [REDACTED] }.⁷

⁶ See, STB Docket Ex Parte No. 724, *United States Rail Service Issues*, Public Hearing Transcript, BNSF witness Lease (Lease EP 724), April 10, 2014 hearing at p. 190.

⁷ See, STB Docket NOR 42180, *Evergy, Inc., et al. v. BNSF Railway Company*, Verified Reply Statement of Michael R. Baranowski and Nathaniel S. Zebrowski, filed November 20, 2025 (Baranowski/Zebrowski Reply VS), at p. 8.

BNSF's 2021-2022 operational plan is strikingly similar to that articulated by one of its competitors when BNSF was adding trainsets in 2014. Canadian Pacific's (CP) plan for resolving its service issues included a car removal strategy. At the time, CP was aggressively implementing a Precision Scheduled Railroading (PSR) model under its CEO E. Hunter Harrison, the "founder" of PSR.

In the 2016 news release on the CP white paper, *Precision Railroading: Using the CP Model to Build a Leading Transcontinental Railway*, CP explained:

The prevailing view in the rail industry is that more locomotives, more cars and more crews allow for the movement of more volume. Precision railroading challenges this view. Because track and yard capacity is finite, adding more equipment creates congestion and slows down the system. While it may sound counterintuitive, reducing fleet size actually enables a railroad to move more volume. By running fewer and heavier trains, faster and on schedule, assets can be utilized far more productively and can yield significant savings.⁸

The difference between BNSF's approach in 2014 and its approach in 2022 suggests it abandoned its 2014 solution (one which apparently worked at the time). As BNSF's representative indicated during the 2014 Ex Parte 724 hearings:

Tons delivered is largely a product of velocity and equipment sets. **As velocity degraded more sets were added.** As velocity begins to rebound less sets are needed to deliver the same tons. There certainly is a clear cut lag in what our customers see and experience. But on balance, our coal train business is improving.⁹

⁸ See, Rebuttal workpaper "CPKC - Precision railroading philosophy...pdf", CPKC news release, *Precision railroading philosophy can build a leading transcontinental railway, CP argues in white paper*, accessed from <https://investor.cpkcr.com/news/press-release-details/2016/Precision-railroading-philosophy-can-build-a-leading-transcontinental-railway-CP-argues-in-white-paper/default.aspx>.

⁹ See, Lease EP 724 at p. 199, **emphasis added**.

In 2014, BNSF's approach increased train volumes in response to transit-time degradation such that the same tonnage could be delivered despite reduced train speeds. BNSF viewed its options through the prism of its physical plant capacity. The operating plan was a function of demand.

By 2022, BNSF viewed its options through the prism of its crew resource capacity. Supply became a function of the operating plan. In 2022, BNSF's approach reduced the volume of trains loaded in response to transit-time degradation to protect service levels for the shippers that continued to receive service.

In order to move these {{ [REDACTED] }} levels of grain in a period of crew shortages and simultaneously move {{ [REDACTED] }} levels of coal demand, it was imperative that BNSF maintain fluid operations and **avoid the risk that train holds reduce the throughput** of this [St Joseph Sub] segment, which was already near capacity.¹⁰

BNSF knew that adding traffic to its system in 2022 would result in train holds due to insufficient crews. In less than a decade, BNSF transformed its business practices to align with the prevailing industry model that emphasizes operating on tight schedules for its consumer and industrial traffic to maximize productivity while failing to maintain operating buffers to ensure resiliency for critical coal traffic. Although BNSF has never publicly acknowledged adopting PSR, its actions demonstrate that BNSF has implemented several of its tenets.

1. BNSF's Operating Ratio is Not a Measure of Reasonableness for Its Staffing Decisions

BNSF criticizes our assessment of revenues and operating expenses in Opening:

¹⁰ See, Baranowski/Zebrowski Reply VS at p. 54, **emphasis added**.

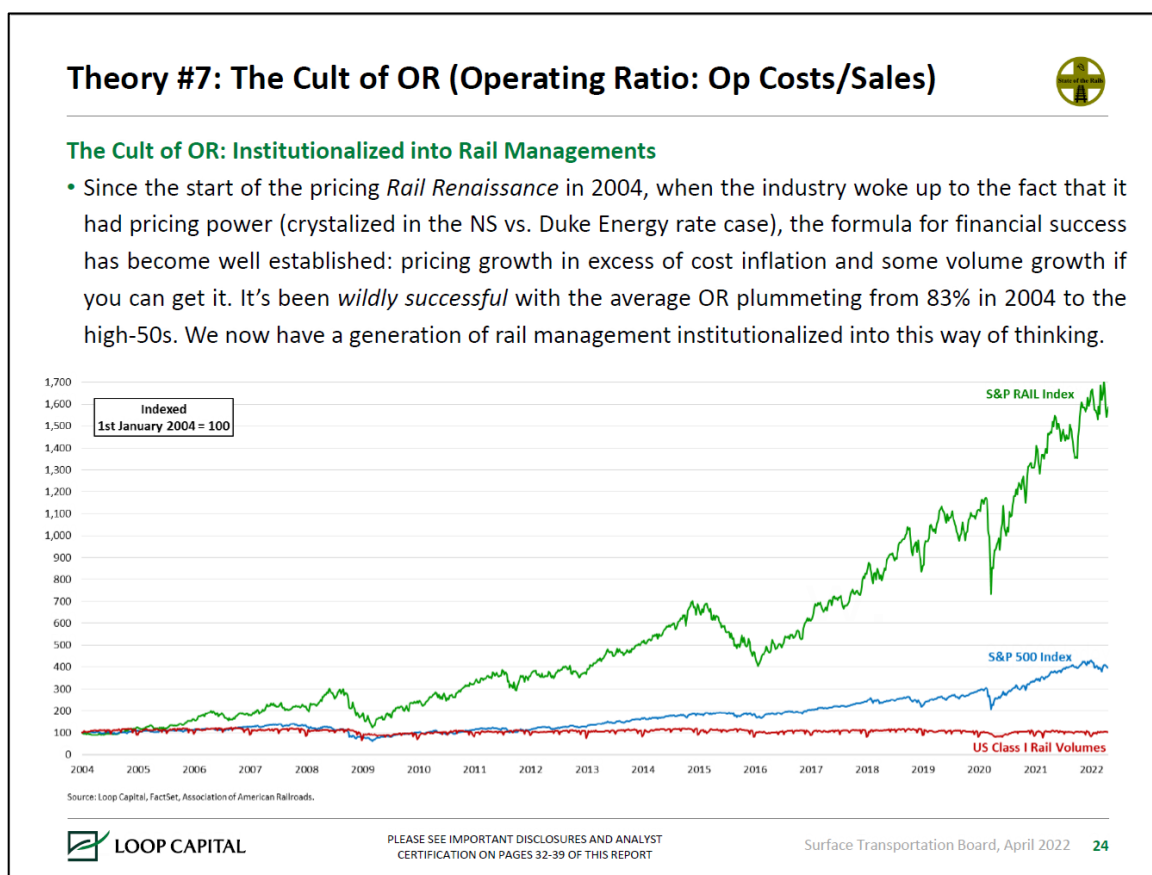
Messrs. Mulholland and Crowley analyze increases in revenues and expenses independently, but do not put two metrics together, which shows that BNSF's operating ratio increased from 65%[] to 67%[] from 2019 to 2022. This fact does not support allegations that BNSF irresponsibly cut resources over this period, which they fail to recognize.¹¹

The increasing operating ratio (OR) cited by BNSF merely demonstrates that there was increasing pressure on BNSF to maintain its OR at investor-acceptable levels without reference to its ability to meet customer demand and fulfill its common-carrier obligations. BNSF's management approach led to BNSF furloughing crews as a means of controlling the numerator in its OR calculation (i.e., operating expenses). In other words, BNSF's personnel decisions resulted in inadequate crew resources in 2022 – as we have previously explained in our OVS and detail further herein.

BNSF's focus on OR is not unique among the Class I railroads. Although it is not publicly traded like the other railroads, BNSF's parent company is, and BNSF ultimately answers to investors who evaluate performance using common financial metrics. The pressures on railroad management were succinctly explained by Rick Patterson, a rail analyst, during the Ex Parte 770 hearings before the Board, which were held concurrently with the service failures at issue in this proceeding:

¹¹ *Id.* at pp. 93-94.

[T]he cult of OR. Since the start of the pricing rail Renaissance in 2004 when the industry woke up to the fact that it had pricing power the formula for financial success has become well-established. Pricing growth [in excess of cost inflation and some] volume growth if you can get it. It's been [wildly] successful with the average [operating] ratio plummeting from 83 percent in 2004 to the high 50's. We now have a generation of our management's institutionalized into this way of thinking. You can see how successful it's been in the chart. In blue you see the performance of the S&P 500, the index that almost no portfolio manager can consistently beat. The railroads are being hit by a factor of four to one since 2004. As an aside I'll draw your attention to sad red line at the bottom. That's U.S. Class I volume growth which is at exactly 0.6 percent since January 2004.... that's .6 total.¹²



13

¹² See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Public Hearing Transcript, witness Rick Patterson (Rick Patterson EP 770), April 26, 2022 hearing at pp. 205-206.

¹³ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Loop Capital Markets Exhibits (Loop Capital Markets EP 770), April 26, 2022, p. 24.

Turning back to the Cult of OR it's also become the norm that when an investor [asks] a rail CEO or CFO where the operating ratio is going over the next 12 months, the only acceptable answer is lower. Additionally in the background is a constant threat of shareholder activism if any of the railroads operating ratios become analyzed on the high side.¹⁴

Clearly what customers want from the railroads is resilient operations able to provide consistent service across all parts of the economic cycle. What they've been getting instead is fragile operations resulting in roller coaster service with what they no doubt regard as insult to injury price increases. So the question is why. Why are the railroads too often caught with too few crews? One reason may simply be human nature, and over confidence when things are going well. This is a bit of a satirical take on how CEO's think, but the point is that when the network is run well they're more likely to assume it will stay that way, and they can train crews, rather than worry about putting through buffers.¹⁵

[A]re furloughs too easy? There are two issues with the current furlough system that may be counterproductive to healthy crew capacity. Number one it makes crews quick and easy to fire, and therefore enticing in that it cuts costs by the management. Secondly, it might provide a false sense of security when furloughed crews are out there. The problem of course is that you don't know how many are going to come back when you call making for some unpleasant surprises.¹⁶

In response to the service crisis of 2014, BNSF briefly increased its crew counts, but that was short-lived. Indeed, BNSF implemented a series of furloughs in 2015,¹⁷ 2019,¹⁸ 2020,¹⁹ and 2021.²⁰ Then in 2022, when demand increased following a downturn, for the second time in a decade, BNSF found itself unable to recall or hire sufficient crews to meet that demand. Faced

¹⁴ See, Rick Patteron EP 770 April 26, 2022 hearing at p. 207.

¹⁵ *Id.* at pp. 201-202, **emphasis added**.

¹⁶ *Id.* at pp. 204-205.

¹⁷ See, workpaper "BNSF_EVERGY_0023097_Rebuttal.xlsx" at tab "Furlough Summary" at Cell E51.

¹⁸ *Id.* at Cell E55.

¹⁹ *Id.* at Cell E56.

²⁰ *Id.* at Cell E57.

with that shortage, the evidence we presented shows that BNSF made a business decision to sacrifice coal service to maintain service levels for other shipper groups. However, this business decision cannot be uncoupled from the prior ones that made it necessary.

BNSF's repeated force reductions and, as Reply witnesses note, emphasis on OR "chasing" caused (or at the very least significantly contributed to) the crew shortage it faced in 2022. As we demonstrated in our OVS, absent the crew shortage, BNSF had sufficient capacity to move more traffic, including Evergy's requested unit coal trains.

BNSF's Reply position is essentially that its common carrier obligation is defined by the very capacity limitation that it imposed by reducing its crew supply. If BNSF's position is accepted, all common carrier obligation case-by-case empirical evaluations of railroad capacity, historical patterns, traffic handling, etc., would be rendered meaningless because railroads can game the answer.²¹

As Vice Chairman Mulvey observed in the 2008 Oral Hearing regarding the common carrier obligation of railroads:

If the railroad is the organization that decides how much capacity is going to be offered, then the reasonableness of the service is bounded by that capacity. In a sense the railroad is determining what is reasonable, what a reasonable offering is rather than this Board or any other group. Is that true? I mean, basically you determine how much capacity so, therefore, you can determine what is reasonable.²²

²¹ The Board, in the stand-alone cost case context, recognized that a regulatory procedure that is readily gamed by the railroad is not a reasonable one. Ex Parte No. 657 (Sub-No. 1), *Major Issues In Rail Rate Cases*, Oct. 30, 2006 ("Under the percent reduction approach, a carrier can manipulate the outcome before the agency with the stroke of a pen and with very little risk of detection. We conclude that it is improper to keep this loophole open when alternatives are available that remove the ability of railroad to manipulate the outcome of a rate case").

²² See, STB Docket Ex Parte No. 677, *Common Carrier Obligation of Railroads*, Public Hearing Transcript, Vice Chairman Mulvey, April 24, 2008 hearing at p. 151.

In response to former Vice Chairman Mulvey’s question regarding who should determine the level of service offered by a railroad, BNSF’s representative stated, “We have the responsibility to grow capacity from the standpoint of our shareholders and our company and our customers when the return is justified.”²³

BNSF’s actions prior to 2022 left it unable to respond to cyclical increases in demand. Chairman Fuchs has recently observed (in a case involving BNSF) that self-selected crew shortages are not an absolute excuse to claims that a carrier has not met its common carrier obligation:

In anticipation of the vagaries of markets, extreme weather events, and other factors that constantly change a rail carrier’s capacity, a carrier should have crew, trainsets, or track space that might appear unallocated or in excess at a given moment or even as projected for the year.²⁴

The Board in the same case also ruled that:

[S]elf-imposed capacity constraints, such as voluntary reductions in crew levels, likely would not automatically be considered a justifiable basis for refusing otherwise reasonable requests for service.²⁵

Chairman Fuchs, in the same case, further opined:

[I]f a rail carrier were indeed engaged in monopolistic behavior and artificially restricting supply to maximize profits, then a Board order making increased service contingent on voluntary resource expansion might not alter the planned behavior. In other words, the carrier might not voluntarily increase its resources (e.g., make more crews and trainsets available than planned) if monopolistic profit maximization called for restriction in the first place.²⁶

²³ See, STB Docket Ex Parte No. 677, *Common Carrier Obligation of Railroads*, Public Hearing Transcript, BNSF’s witness Mr. Weicher, April 24, 2008 hearing at p. 152.

²⁴ See, STB Docket NOR 42178, *Navajo Transitional Energy Company, LLC—Ex Parte Partition For Emergency Service Order*, Fuchs dissent, Dec. 13, 2023 (Fuchs Dissent NTEC NOR 42178) at p. 3.

²⁵ See, STB Docket NOR 42178, *Navajo Transitional Energy Company, LLC—Ex Parte Partition For Emergency Service Order*, Decision, June 22, 2023, p. 4, footnote 6.

²⁶ See, Fuchs Dissent NTEC NOR 42178 at p. 4.

The facts here show that BNSF failed to maintain any reserve capacity. As we discuss in the following sections, the evidence points to BNSF restricting its crew supply (primarily through furloughs) and contemporaneously freezing wages and imposing a controversial and unpopular crew on-call policy, while it was simultaneously engaged in long-term labor negotiations with the railroad labor unions, in the years leading up to and during 2022. We further show that when faced with an internally projected crew shortage as of late 2021, BNSF responded by adjusting its internal crew demand figures downward to reflect a reduced traffic base, rather than by increasing resources to meet market demand.

2. BNSF Mischaracterizes Its Role in Creating the Crew Shortage

Despite admitting that it failed to move Evergy's coal nominations in 2022, BNSF argues that it honored its statutory common carrier obligations because it acted reasonably "under the circumstances" in responding to Evergy's request for coal transportation. BNSF's position relies heavily on its portrait of the circumstances under which it was operating, and who or what caused the circumstances. BNSF attempts to absolve itself of any responsibility to establish and maintain an operating plan that ensures responsiveness and reliability through market volatility caused by geopolitical and other forces.

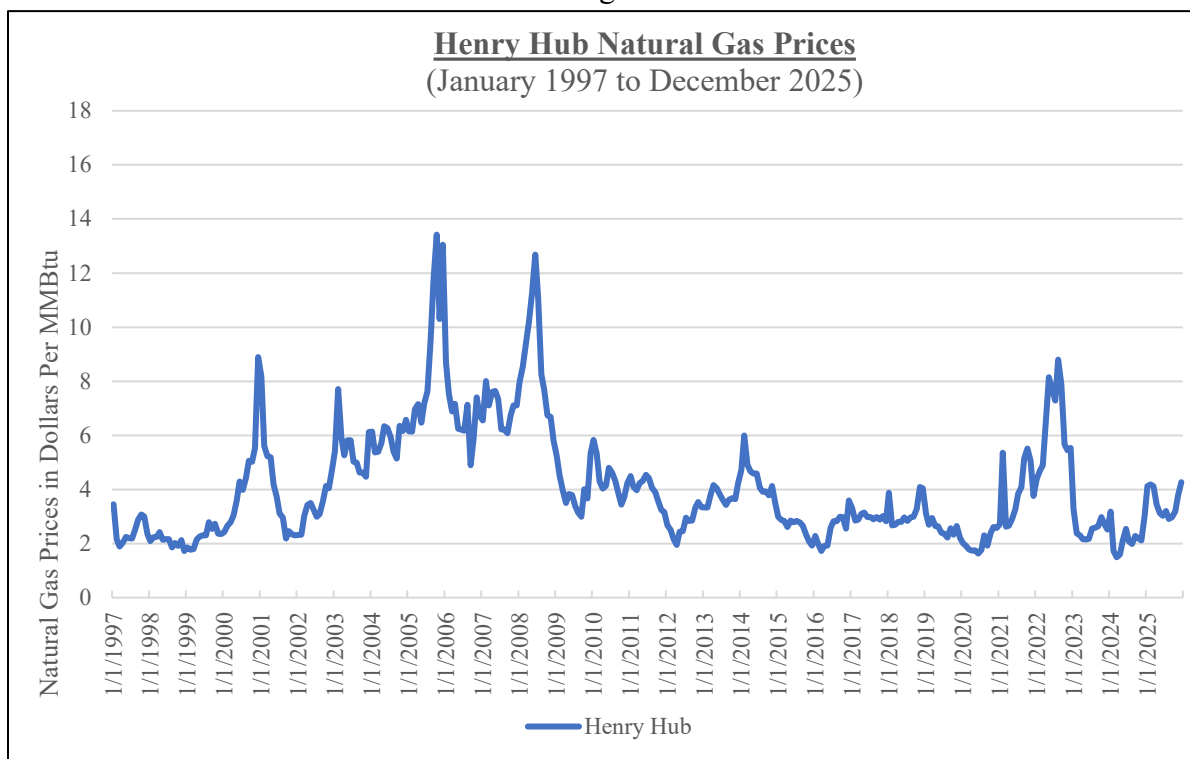
BNSF claims that it was unable to address its human resources shortage in a timely manner because (1) transportation demand in general rebounded faster than expected after a dip during the COVID pandemic shutdowns, (2) the labor market was tight two years after the COVID shutdowns, and (3) demand for coal increased sharply in response to a spike in natural gas prices following Russia's invasion of Ukraine. BNSF claims that this confluence of events was unforeseen and unforeseeable, so it could not possibly have been expected to meet shipper demand.

BNSF makes no mention of its 2016 or 2019 labor force reductions – reductions that reflect a departure from its 2014 service recovery plan, and which were not tied to any of the events or circumstances BNSF relies on in its Reply. BNSF also makes no mention of the fact that during its 150+ years of existence, and even the 30 years since it became BNSF Railway, significant cyclical demand changes are a regular part of the railroad business (i.e., dynamic demand is always foreseeable, even if the exact causes change.)

There is no dispute that COVID had an impact on the global workforce, but BNSF's actions, policies, and negotiating posture caused its difficulties in recalling crews. BNSF's recent and repeated history of placing significant numbers of crews on furlough, and BNSF's participation in negotiations with labor unions that required Presidential intervention to avert a strike, worked against it in the labor market.

There is no dispute that the Russia-Ukraine war affected natural gas prices, but to the extent that demand for coal increased, BNSF's inability to respond was of its own doing. Rather than using wage increases and perks to entice workers in a tight labor market, BNSF froze wages and implemented draconian leave policies. Moreover, the natural gas market is well known for its volatility, as shown in Figure No. 1 below.

Figure No. 1



Source: Rebuttal workpaper “Henry_Hub_Natural_Gas_Spot_Price.xlsx” at tab “NG Price Chart”

That the mix of fuel might require more coal in a given season, due to changes in natural gas prices or otherwise, is nothing new or extraordinary.

a. **BNSF’s Labor Policies**

Messrs. Baranowski and Zebrowski, along with Dr. Johnson, blame a tight labor market for BNSF’s inability to hire sufficient staff. However, BNSF was not just trying to find additional staff to accommodate increased demand; it was trying to find replacement staff for the crew who departed (or refused to return) in response to BNSF policies.

BNSF crew stats show that BNSF began cutting its workforce, first in 2016, and again in 2019 – before COVID.²⁷ BNSF then froze pay for train crew staff in 2020,²⁸ and further deterred

²⁷ See, Rebuttal workpaper “BNSF_EVERGY_0023097_Rebuttal.xlsx” at tab “Furlough Summary” at Cells E51 and E55.

²⁸ See, Loadsmart Blog post, *2022 Railroad Labor Negotiations: A Review of Major Events and Potential Long Term Impacts*, accessed from <https://blog.loadsmart.com/2022/12/08/2022-railroad-labor-negotiations-a-review-of-major-events-and-potential-long-term-impacts>.

potential recalls and hires in January 2022 when it announced a new attendance policy (effective February 1, 2022) called “Hi-Viz” that included strict availability requirements.²⁹

This policy created a point system where employees were given 30 starting points and docked between 2 and 25 points for missed callouts.

BNSF witness Johnson claims that:

The program was successful in meeting [its] stated goal of increasing the transparency of attendance expectations and of each employee's real-time status relative to those expectations. This is evidenced by the decrease in attendance incidents after its introduction.

Her observation that attendance incidents decreased following the program’s introduction is missing an important qualifier. Her supporting analysis considers only the attendance performance of the crew who remained active in spite of the unpopular rules; it completely disregards the incentive the program created to seek employment elsewhere.

In May 2022, Brotherhood of Locomotive Engineers and Trainmen (BLET) National President Dennis Pierce said of the program:

Hi-Viz has been an abject failure. This unreasonable policy, which keeps locomotive engineers and other railroaders on call day after day, around the clock, has caused hundreds of BNSF’s employees to quit and it has made recruitment of new employees a nightmare.³⁰

The program was so unpopular that by May 2022, only three months after its inception, BNSF had already offered revisions to the policy based on employee feedback, with the VP of Transportation, Matt Garland, stating:

²⁹ See, Railway Age article, *BNSF Modifying ‘Hi-Viz’ Attendance Policy (UPDATED)*, by Marybeth Luczak, accessed from <https://www.railwayage.com/news/bnsf-modifying-hi-viz-attendance-policy/>.

³⁰ *Id.*

We've especially heard your concerns about the initial conjunction penalty associated with vacation and personal days. We've also heard a lot of thoughtful suggestions about 'good performers' having the ability to earn bonus points and the possibility of being able to bank more than 30 points. So considering your input and what we've learned ... we're going to make a few changes to the current Hi-Viz program.³¹

However, the National President of the BLET saw these proposed changes as "little more than fluff."

The sad fact is that the nation's supply chain challenges are partially due to a 29% cut in rail labor at the Class I railroads over the past six years. The Hi-Viz attendance policy exacerbates the breakdown in the supply chain and drives more railroaders away at a time of critical need. Not only is the supply chain failing, but this abusive and punitive attendance policy is breaking apart families and causing locomotive engineers and other railroaders to come to work dangerously fatigued.³²

When BNSF announced the Hi-Viz policy, approximately 17,000 employees represented by BLET and the Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART-TD) signaled their intent to strike on the date the policy became effective.³³ Union leadership criticized the program for being "more restrictive, incentivizing going to work fatigued or ill, and increasing threats of discipline."³⁴ Although a federal judge ultimately enjoined the unions from striking, the court nevertheless held: "Simply stated, the Hi Viz attendance standard is harsh."³⁵

³¹ *Id.*

³² *Id.*

³³ See, The Guardian article, '*Completely demoralized*': US railroad workers pushed to the brink, by Michael Sainato, accessed from <https://www.theguardian.com/us-news/2022/mar/14/completely-demoralized-us-railroad-workers-pushed-to-brink>.

³⁴ *Id.*

³⁵ See, Vice article, '*The Worst and Most Egregious Attendance Policy*' Is Pushing Railroad Workers to the Brink, by Aaron Gordon, accessed from <https://www.vice.com/en/article/the-worst-and-most-egregious-attendance-policy-is-pushing-railroad-workers-to-the-brink/>.

Whereas Dr. Johnson stated that “BNSF T&E jobs provide lucrative compensation and benefits packages and opportunities for training, advancement, [and] seniority,”³⁶ BNSF’s T&E employees’ statements at the STB’s Ex Parte 770 hearings in 2022 flatly contradict these claims. A BNSF crew member with over two-decades of experience who was furloughed in June 2020 stated:

I was not called back to work until January of 2022. I was only one of many employees furloughed during that time and upon returning I learned that most of my fellow coworkers opted not to return due to finding other employment with better benefits, better pay, better structure, and better opportunities overall. Also upon returning I learned that we have had a lot of employees from our shop quit due to the same reasons. Some of these employees had 10-20+ years of working for this employer.³⁷

We are forced to choose between our health and families or going to work. I had to work over a year to qualify for one week of paid vacation time and was offered no sick or other paid time off. Because I was furloughed for over a year, I have come back to work only to realize that because I was furloughed for more than a year that I did not have the opportunity to work enough qualifying hours to earn my paid vacation for the year. I am once again forced to work an entire year with absolutely no paid time off to care for my family or health.³⁸

Another 15-year BNSF Locomotive Engineer stated that BNSF’s implementation of its Hi-Viz policy caused “well over 900 employees [to] leave... Many of whom had over 10 years and were some of the hardest working employees I know. This seems to be the Class I’s way of creating an “emergency” to get 1 man crews. Again, all to reduce operating ratios.”³⁹

³⁶ See, STB Docket NOR 42180, *Evergy, Inc., et al. v. BNSF Railway Company*, Reply Verified Statement of Dr. Erin Johnson, filed November 20, 2025 (Johnson Reply VS) at p. 5 (BNSF-534). See also, *Id.* at pp. 53-54.

³⁷ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Aron Ross Comments, April 27, 2022, p. 1.

³⁸ *Id.* at pp. 1-2.

³⁹ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Eric Gruber Comments, April 22, 2022, p. 4.

b. 2022 Labor Standoff

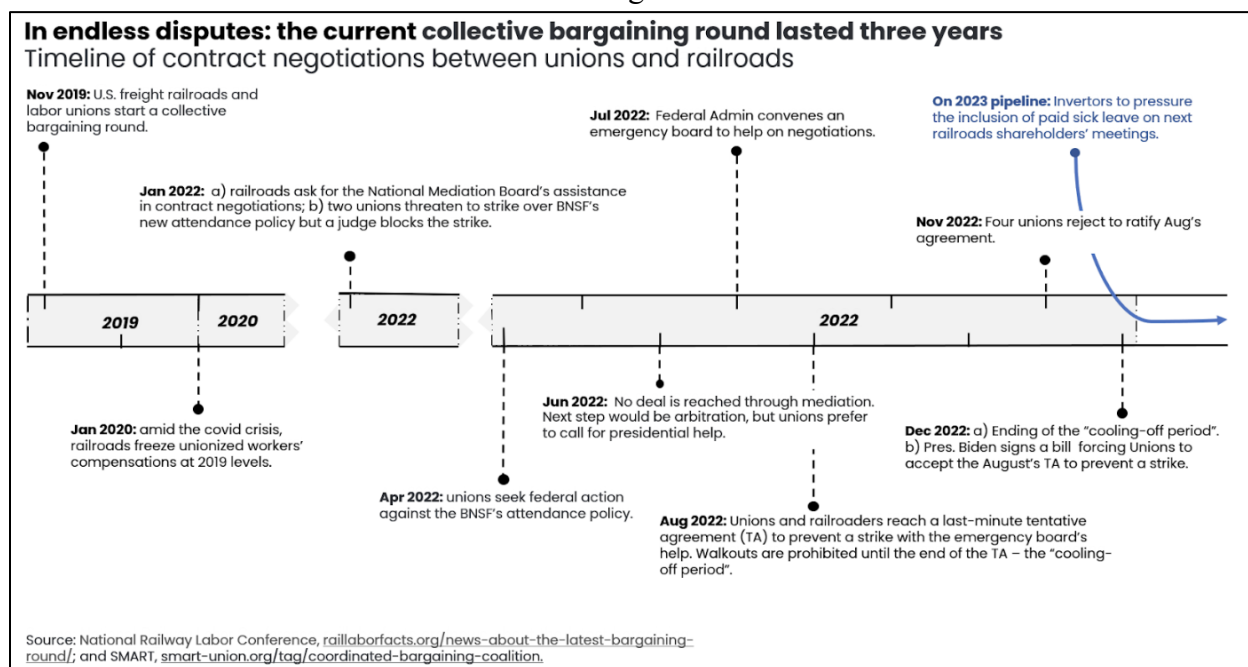
The railroads blamed unexpectedly high attrition rates (and low recall rates) for their inability to hire sufficient crews in 2022. During this time, the railroads (including BNSF) were nearing the crescendo of contentious years-long labor negotiations with the railroad labor unions. BNSF employees were interviewed in a Burlington, IA, newspaper in May 2022 regarding their frustration that the unions had been in negotiations with BNSF since January 2020, when BNSF froze wages. “‘There’s no pay raises. There’s no nothing,’ Loveland said. ‘It’s like you’re in never-never land. You’re just in limbo.’”⁴⁰

An industry publication article from December 2022 summarizes the course of the 2022 railroad labor negotiations, which resulted from conflict between unions and railroaders.⁴¹ The article provides a figure that outlines the timeline of these events from November 2019 to December 2022.

⁴⁰ See, The Hawk Eye article, ‘*Like you’re in never-never land:’ BNSF workers frustrated after 2.5 years of failed negotiations*, by Michael Niehaus, accessed from <https://coltswire.usatoday.com/story/business/2022/05/23/tensions-bnsf-railway-unions-labor-negotiations/9823181002/>.

⁴¹ See, Loadsmart Blog post, *2022 Railroad Labor Negotiations: A Review of Major Events and Potential Long Term Impacts*, accessed from <https://blog.loadsmart.com/2022/12/08/2022-railroad-labor-negotiations-a-review-of-major-events-and-potential-long-term-impacts>.

Figure No. 2



Source: Loadsmart⁴²

As shown in Figure No. 2 above, BNSF took at least three critical actions that directly contributed to its inability to hire and recall crews. Specifically, BNSF (1) froze unionized workers' wages in January 2020, (2) implemented the strict Hi-Viz policy in February 2022, and (3) participated in drawn-out and ultimately unsuccessful mediation.

By November 2022, the unions began voting regarding a strike. On December 2, 2022, President Biden signed legislation stopping a strike. The deal included a 24% wage increase over a five-year period, and it awarded back pay to train crews.⁴³ This wage adjustment and backpay distribution indicate that BNSF crews were undercompensated throughout 2022.

⁴² See, Loadsmart Blog post, *2022 Railroad Labor Negotiations: A Review of Major Events and Potential Long Term Impacts*, accessed from <https://blog.loadsmart.com/2022/12/08/2022-railroad-labor-negotiations-a-review-of-major-events-and-potential-long-term-impacts>.

⁴³ See, The New York Times Article, *Biden Signs Legislation to Avert Nationwide Rail Strike*, accessed from <https://www.nytimes.com/2022/12/02/us/politics/rail-strike-biden.html>.

BNSF cites wage rates and benefits that were effective **after** the December 2022 legislation to support its claim that “T&E jobs at BNSF are highly compensated and provide generous benefits as well as paid training and advancement opportunities.”⁴⁴ Specifically, Dr. Johnson states that,

A review of conductor trainee job postings along the Evergy route with expected start dates in early 2023 shows that BNSF offered an average daily compensation rate during training of approximately { [REDACTED] } per day and an annual salary range following training of { [REDACTED] }⁴⁵

This level of compensation was not offered to BNSF crews during the 2022 service failures. Ultimately, BNSF’s policy choices materially contributed to its inability to hire, retain, or recall sufficient crews, thereby exacerbating the service failures that followed.

Figure No. 3 below identifies the timing of critical actions affecting railroad labor in 2022 in relation to BNSF’s quantification of its 2022 crew-related service deficiencies, as depicted in Baranowski/Zebrowski’s Figure 48.

⁴⁴ See, Johnson Reply VS at p. 53.

⁴⁵ *Id.* at p. 54.

Figure No. 3 {{



As shown in Figure No. 3, changes in crew performance along the Every Route did not occur in a vacuum; they were affected by BNSF and other Class I railroads' actions during the concurrent labor dispute. In particular, crew-related delay {{ [REDACTED] }} twice: First in late Spring 2022, two labor unions filed suit against BNSF challenging its "Hi-Viz" labor policy immediately after it was implemented in February, and second in early Fall, after mediation failed. It was not until early 2023, after federal intervention was required to avert a nationwide rail strike, that crew-related delay minutes {{ [REDACTED] }} to pre-Hi-Viz levels.

BNSF's insistence that external forces caused its crew deficiencies ignores labor conflicts that it perpetuated.

3. BNSF's Actions Since the 2014 Service Failures

BNSF's arguments regarding unprecedented market volatility are contradicted by the events of the preceding decade, during which BNSF muddled its way through a similar service crisis that was (1) related to unusual and unprecedented economic conditions, including significant natural gas price swings, and (2) made worse by BNSF's inadequate train crew staffing levels, particularly along its major coal and grain corridors.

When the Board initiated its Ex Parte 724 proceeding in 2014, BNSF's performance – for grain and coal shippers in particular – was historically poor.

Backlogged grain car orders and grain shipping delays and the resulting problems have been particularly acute on the systems of CP and BNSF ... BNSF has committed to moving last year's crop prior to the fall harvest.⁴⁶

During the Board's two rail service hearings, and in its recent filings, BNSF generally acknowledges that it has not met customer expectations with regard to its movement of coal. It also notes that it has been working aggressively towards remedying ongoing service issues to meet customer demand.⁴⁷

As discussed in Section II.A above, BNSF's 2014 recovery plan included aggressive deployment of additional trains (and the crews required to operate them) – targeting the line segments that were experiencing the worst performance – so that it could ensure deliveries despite longer transit times. Subsequent volume reductions through 2015 helped enable BNSF's recovery, but just as BNSF was coming out of the service crisis in 2016, it made significant cuts to its train crew staff (on the order of 17 percent).⁴⁸ Figure No. 4 below shows BNSF Train and Engine (T&E)

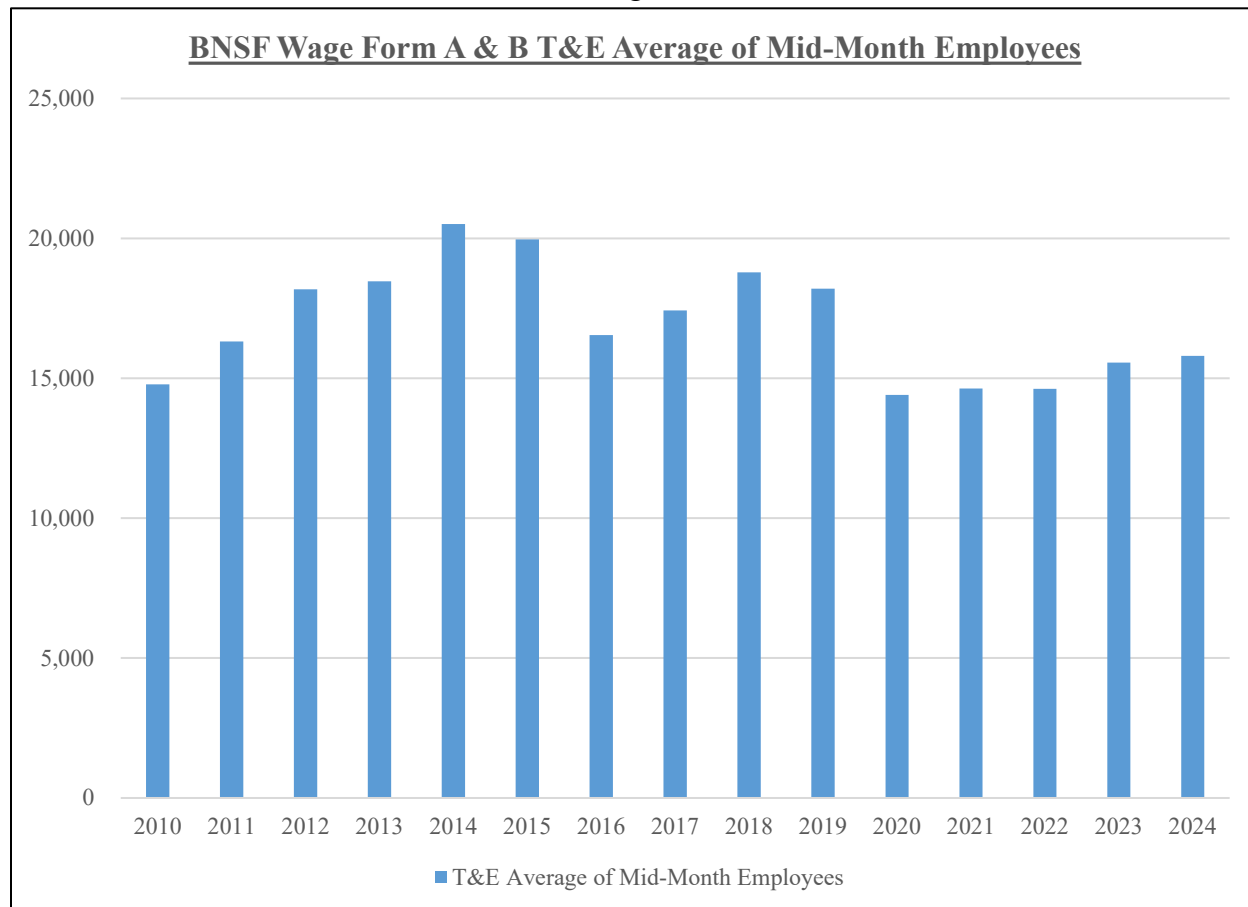
⁴⁶ See, STB Docket Ex Parte No. 724 Sub No. 4, *United States Rail Service Issues - Grain*, STB Decision, June 20, 2014, p. 2, footnotes removed.

⁴⁷ See, STB Docket Ex Parte No. 724, *United States Rail Service Issues*, STB Decision, December 30, 2014, p. 3, footnotes removed.

⁴⁸ See, Rebuttal workpaper "Class I Operating Inputs_2010-2024_Rebuttal.xlsx" at tab "Annual Operating Inputs" at Cell I13.

crew data as reported in BNSF Annual Wage Form B (reflecting annual average mid-month crew statistics) for the 2014-2024 time period.

Figure No. 4



Source: Rebuttal workpaper “Class I Operating Inputs_2010-2024_Rebuttal.xlsx” at tab “BN_Employees Chart”

As shown above, following the significant cuts in 2016, BNSF gradually increased its train crew headcount once more from January 2017 to April 2019⁴⁹ as volumes increased, but never returned to 2014-2015 staffing levels, before additional significant cuts. The chart above demonstrates a pattern of (1) hiring staff to catch up with cyclical demand peaks, (2) cutting staff to remain lean and protect OR in response to economic shifts causing demand dips, and then (3)

⁴⁹ See, Rebuttal workpaper “HC BNSF Internal Crew Data Combined.xlsx” at tab “People Supply Chart”.

hiring additional staff (or recalling furloughed staff) to return to equilibrium when demand rebounds.

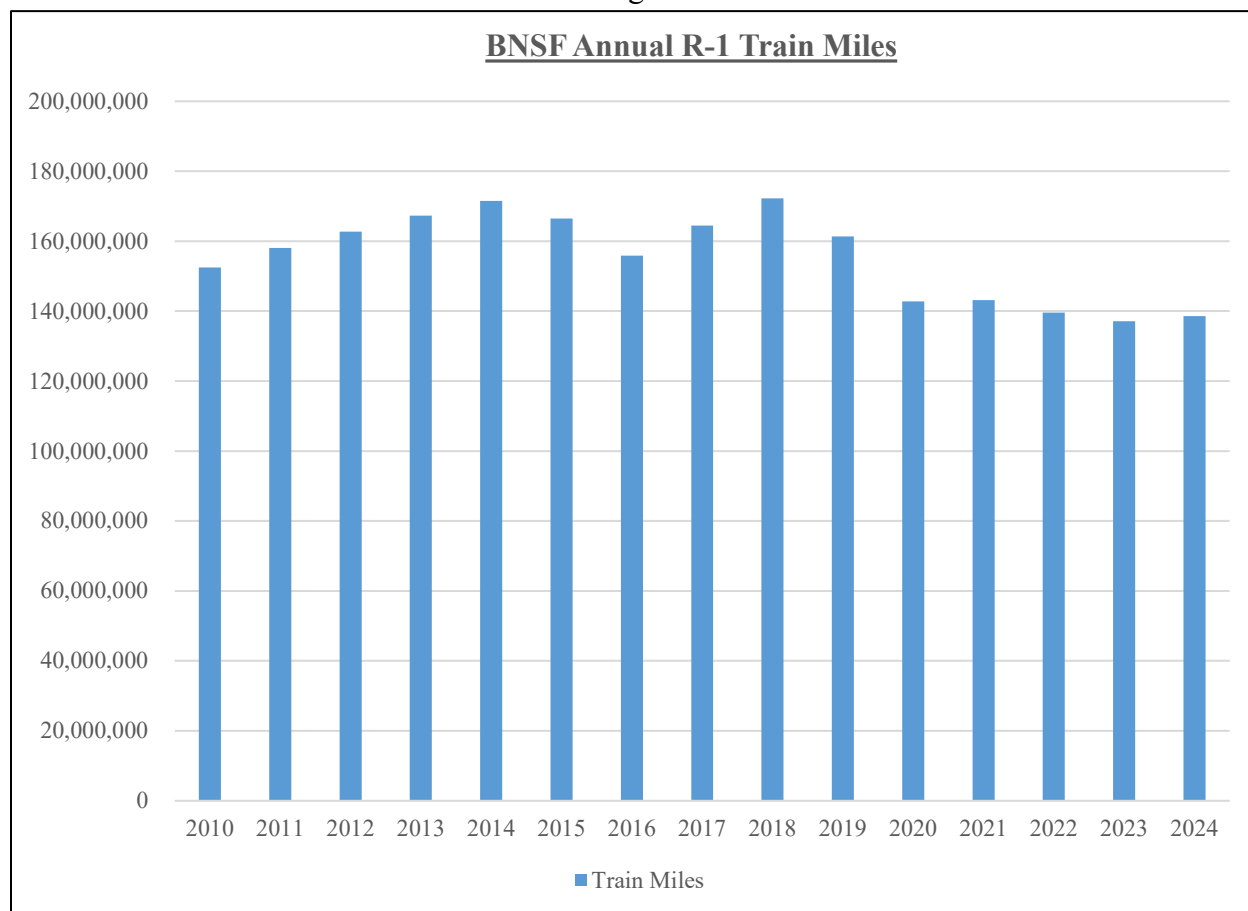
BNSF's monthly data show that it started aggressively furloughing staff in 2019,⁵⁰ and then when COVID hit, and volumes briefly dipped, BNSF made another round of significant headcount cuts (on the order of 21 percent compared to the prior year). However, the 2020 volume dip was short lived, leaving BNSF short-staffed once again. But this time, BNSF claims it could not find sufficient staff to hire in a timely manner despite its best efforts. Even a casual observer might conclude that BNSF's pattern of implementing sharp staffing cuts as part of its recent business cycles contributed to BNSF's hiring difficulties.

BNSF claims it "faced unpredictable and surging demand in 2021 and 2022."⁵¹ However, BNSF's 2021 and 2022 volumes were hardly unprecedented, as shown in Figure No. 5 below.

⁵⁰ *Id.* at tab "Furlough Chart".

⁵¹ *See*, BNSF Reply, Executive Summary at p. ES-4.

Figure No. 5



Source: Rebuttal workpaper “Class I Operating Inputs_2010-2024_Rebuttal.xlsx” at tab “BN_Train Miles Chart”

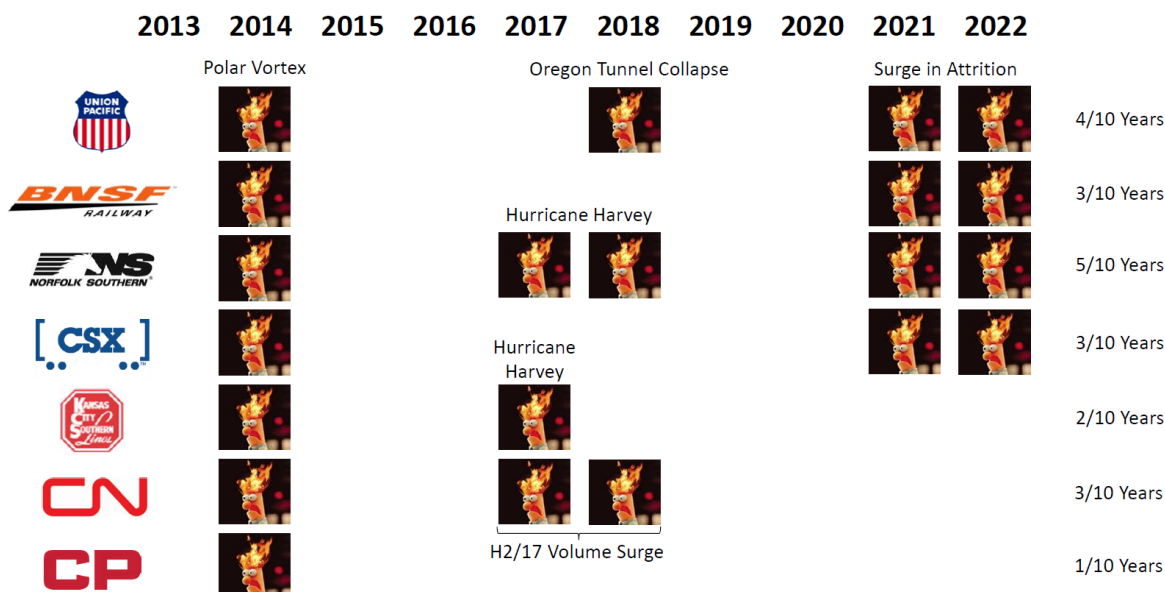
Moreover, the volume swings and resulting service issues over the preceding decade should have led to BNSF modifying its operating plan to better accommodate the dynamic volume demand that has always existed in the railroad industry. The pattern of BNSF crew reductions and service failures in 2019-2022 was not an anomaly. This pattern was discussed by Rick Patterson⁵² during the Ex Parte 770 hearings, where he stated that “crew-driven meltdowns are not a one-off problem.” Rather, they had “been happening all the time.”

⁵² See, Loop Capital Markets Exhibits EP 770 at p. 14.

Back to Crews, and Here's the Problem...



The current crew-driven meltdowns are not a 'one-off' problem. The railroads aren't always just "unlucky". This has been happening *all the time*. Here's the industry's track record on crew shortages that significantly impacted service over the last 10 years:



Source: Loop Capital and The Muppets



PLEASE SEE IMPORTANT DISCLOSURES AND ANALYST
CERTIFICATION ON PAGES 32-39 OF THIS REPORT

Surface Transportation Board, April 2022 14

BNSF's HR practices from 2018-2022 show that it learned no lessons from the 2014 service failures it just recently overcame. BNSF did not adjust its operating plan to ensure it maintained a buffer to accommodate disruptive events or respond to changes in demand. Economic shocks, while differing in cause, form, and severity, are a normal part of cyclical markets.

B. BNSF PRIORITIZED ITS INTERMODAL FRANCHISE

BNSF actively defended its intermodal franchise in 2022, while the STB reviewed the proposed CP-Kansas City Southern (KCS) merger. One of the primary goals of the merger was to increase intermodal volumes on the merged network. CPKC aimed to do this by pulling trucks from the highways and by capturing intermodal traffic from other rail networks.

The Transaction will generate competitive benefits and cause no competitive harm. The CP/KCS combination is purely “end-to-end” and will strengthen competition among rail carriers and with trucks in every market served by the integrated CPKC network. **Shippers will gain new single-line routing options, and benefit from new competition into North-South lanes dominated today by UP, BNSF, and CN.**

CPKC will continue to support, both operationally and commercially, KCS’s existing interline routes with other railroads, such as... KCS-BNSF routes via Robstown, TX, Kansas City, and Shreveport.... Likewise, CPKC will continue to support CP’s existing interline routes, such as... CP-BNSF routes via Chicago, Coumts, BC, and Noyes, MN. **CPKC will not hesitate to compete aggressively against these interline routes where its new single-line routes offer advantages for customers in terms of better service or economic terms, or both.**⁵³

Messrs. Baranowski and Zebrowski never mention this competitive pressure on BNSF’s intermodal franchise as an economic factor that affected BNSF’s crew deployment decisions in 2022, despite Mr. Zebrowski co-sponsoring a verified statement in support of the merger that studied this very competition:

CP/KCS will make possible a new single-line intermodal service between Dallas and Chicago, **creating new head-to-head competition with existing services offered by BNSF and UP.** CP/KCS’s concentration on providing efficient and reliable north-to-south movements through its core mainline **will create an attractive service alternative to the existing intermodal services between Chicago and Dallas** that are a comparatively small part of a much larger group of east-to-west focused intermodal services. A reliable third-morning availability offering, tapping CP’s efficiently located Bensenville intermodal facility on the northwest side of Chicago, offers the promise of attracting a meaningful share of the traffic moving in this lane despite the longer CP/KCS route.⁵⁴

⁵³ See, STB Docket FD 36500, *Application for Authority to Control Kansas City Southern*, CPKC Merger Application Vol. 1 (CPKC Merger Application), October 29, 2021, at pp.1-20, **emphasis added.**

⁵⁴ See, CPKC Merger Application Vol I. Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski (Brown/Zebrowski Verified Statement), October 29, 2021, at p. 31, **emphasis added.**

The critical Kansas City to Holliday, KS segment, a choke point on the Evergy route, lies right in the middle of the BNSF intermodal route between Chicago and Dallas, which CP and KCS singled out as ripe for diversion in 2022.

Indeed, CP and KCS projected that the merged entity would divert more than 45,000 intermodal units from other carriers in the first year following the merger, accounting for \$49 million in incremental revenue from diverted intermodal revenue. They projected that by year 3 post-merger, this amount would more than triple, to more than 137,000 units and nearly \$149 million.⁵⁵

CP and KCS also predicted that they would be able to divert truck traffic to intermodal rail service as a result of the merger.

The diversion of trucks to intermodal is expected to reduce long-haul truck miles in the United States by 86.2 million annually, while requiring an additional 3.4 million miles of local dray to the ramps, for a net reduction of 82.8 million annual truck miles.⁵⁶

We anticipate that the integrated single-line intermodal service that a combined CP/KCS system will create will compete much more effectively with interstate trucking and joint railroad routes currently available, such as KCS-UP or KCS-BNSF. The analysis presented by Mr. Mutén demonstrates that new single-line CPKC intermodal offerings will attract many tens of thousands of shipments away from trucks to railroad intermodal service – reducing congestion on America’s interstate highway system and at U.S.-Mexico border crossings.⁵⁷

This theme has again been prominently discussed by investors and analysts in relation to the currently proposed merger between the Union Pacific and Norfolk Southern. For example:

⁵⁵ See, CPKC Merger Application Vol 2. Brown/Zebrowski Verified Statement, October 29, 2021, at p. 54, Table 28.

⁵⁶ See, CPKC Merger Application Vol 2. Verified Statement of Bengt Mutén, October 29, 2021, at p. 22.

⁵⁷ See, CPKC Merger Application Vol 1. Verified Statement of Jonathan Wahba and Michael J. Naatz, October 29, 2021, at p. 17.

The merger will ease highway congestion by diverting more shipments from road to rail. When the then-majority-Democratic Surface Transportation Board approved the Canadian Pacific-Kansas City Southern merger in 2023, regulators concluded that the deal created “a more environmentally friendly and less carbon-intensive North American transportation network.” The same holds here. The Association of American Railroads estimates that switching from roads to rails lowers greenhouse gas emissions by around 75%.⁵⁸

The railroads’ collective ability to divert truck traffic to rail hinges on the railroads’ ability to maintain schedules for intermodal traffic. As operational emphasis shifts to minimizing delay to intermodal rail traffic, resources are allocated to that effort, and away from less time-sensitive traffic groups, i.e., coal.

C. BNSF’S SOLUTION TO BALANCE DEMAND WITH SUPPLY WAS TO RESTRICT ACCESS FOR COAL SHIPPERS

BNSF’s Reply argument fails to address the points raised in Evergy’s opening evidence, which demonstrated that BNSF was able to maintain and even improve intermodal service at the same time its coal service (in general and specific to Evergy) deteriorated.

BNSF elected to sideline coal trains and allocate train crews first to its scheduled (intermodal and merchandise) traffic.⁵⁹ BNSF argues that it acted rationally by {{ [REDACTED] }} to improve network fluidity during a period of labor shortages. As proof of BNSF’s alleged success in improving fluidity, it points to the {{ i [REDACTED] }}.

BNSF’s overall service recovery plan also succeeded, although the network remained fragile in the second half of 2022 due to the effects of a temporary crew shortage that was {{ [REDACTED] }}.⁶⁰

⁵⁸ See, Wall Street Journal Opinion Article, *America Needs a Transcontinental Railroad* January 5, 2026, accessed from <https://www.wsj.com/opinion/america-needs-a-transcontinental-railroad-fe969a0d7>.

⁵⁹ See, Mulholland/Crowley Opening VS at Exhibit No. 8, Exhibit No. 11, and Exhibit No. 18.

⁶⁰ See, Baranowski/Zebrowski Reply VS at pp. 8-9.

This merely exposes BNSF's lack of adequate resources to meet demand. The relationships between train volume and train speed are not as simple as BNSF portrays them to be. The missing element is resources available (in this case, crews).

Railroads obviously return assets, but they also turn train crews, if time is improved by 10 percent the oversimplified math means they require 10 percent fewer crews to move the same amount of freight.

If network train speeds slows by 10 percent that would require 10 percent more crews. An easy way to think about this is that a Class I network that's decelerating like with a magnet, sucking these two resources [crews and] locomotives in addition to freight cars.

An accelerating network is like a centrifuge spinning out and spinning out, crews and cars. The situation you therefore need to avoid at all costs is a slowdown that [takes] in crews or power triggering an unrecoverable meltdown. So let's walk through a crew capacity crunch and we'll see why it typically takes a year to restore service.

The railroad will often be running well, but with too lean a crew capacity we'd then have a triggering event that begins to slow the network. This could be a major weather event, a volume surge, or the current problem which was an unexpected surge in attrition. As the system slows it compresses crew capacity, and management has to react quickly by deploying all crews, maximizing overtime, recalling furloughs, and trying to bring in crews from other districts.

If all this fails the railroad will at some point run [out of] crew capacity at a critical location. Congestion radiates out, and network speeds plummet because you're now in this vicious cycle where slow speed reduces crew capacity, which reduces speed and so on.

At this point there's nothing operations management can do **except pick up the phone to HR, and ask them to find [and] train 1,000 train conductors or trainees**. That's a six month process by itself, but the real delay comes from what I call the painful crew capacity math.

If the meltdown has pushed speed down 10 percent you need to offset that with 10 percent more crews than you had prior to the triggering event before the network will unlock and begin [to] spin up again. The managing part is that once system velocity is fully restored you've now got 10 percent too many crews which invariably get furloughed.⁶¹

The bolded text above is indicative of BNSF's (and other railroads') crew management practices. However, the above passage is also missing one critical option available to management, which is that it can limit access to its network by removing traffic to match its limited supply of critical resources. This is the option BNSF exercised in 2022, which caused Evergy's reduced service.

We acknowledged BNSF's improved system train speeds and reduced overall system delay in our Opening evidence.⁶² However, the number and duration of trains held for crews increased markedly during this period.⁶³ BNSF did not have sufficient crew buffers to accommodate increasing demand, and it could have removed train sets from any of its commodity groups. It chose to sacrifice coal⁶⁴ volumes to provide adequate service to its other traffic groups with insufficient resources. This was a business decision. For whatever reason, BNSF decided to elevate the priority of moving its scheduled trains at the expense of its coal franchise.

BNSF claims that it acted "aggressively, fairly, and reasonably to serve the needs of all of its customers [...] with its available capacity."⁶⁵ Yet, BNSF did not meet Evergy's needs in 2022. Even if sidelining coal traffic was a net positive for BNSF, it created winners and losers among BNSF's shipper group. Baranowski/Zebrowski focus heavily on system statistics to support their

⁶¹ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Public Hearing Transcript, Patterson, hearing pp. 195-197, **emphasis added**.

⁶² See, Mulholland/Crowley Opening VS at Exhibits 12 and 17.

⁶³ *Id.*, Exhibit 18.

⁶⁴ See, example in Mulholland/Crowley Opening VS at Exhibit No. 6 PRB loadings vs plan.

⁶⁵ See, BNSF Reply, Executive Summary at p. ES-1.

position that BNSF did not alter its operating plan to rely on irresponsibly low resource levels.⁶⁶ But our more granular analysis showed that, whatever the cause of the crew shortage, BNSF addressed it by prioritizing other traffic over coal.

D. BNSF PREVIOUSLY PUBLICLY ACKNOWLEDGED ITS FAILURES

Public statements made during the Ex Parte 770 hearings demonstrate BNSF's knowledge that its actions – not external market forces – caused the service failures. For example, Matt Garland stated that “[w]e’re not here to make excuses. Our service is our responsibility, and we simply have not met our customers’ expectations in recent months.”⁶⁷

Public statements in EP 770 also demonstrate BNSF's knowledge that its Hi-Viz policy directly led to increased attrition rates among its crew:

“We are seeing slightly higher than normal attrition, but when we did a sample of approximately 300 TY&E employees, who have resigned this year, we found that a majority hadn't worked a shift in over six months.”⁶⁸

This statement leaves out the context that those who hadn't worked a shift were furloughed for far longer than six months. BNSF's data shows that in 2022, recalled employees who returned to work averaged {{ [REDACTED] }}, while those who did not averaged {{ [REDACTED] }}.⁶⁹

BNSF's assertions in its Reply that it was still reeling from COVID-related attrition and caught off guard in 2022 are also belied by a statement made in 2021 by its CEO, Katie Farmer,

⁶⁶ See, Baranowski/Zebrowski Reply VS pp. 88-90.

⁶⁷ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Public Hearing Transcript, witness Matt Garland (Matt Garland EP 770), April 27, 2022 hearing at p. 783.

⁶⁸ *Id.* at pp. 793-794.

⁶⁹ See, BNSF_EVERGY_0023097_Rebuttal.xlsx at tab “Furlough Summary” at Cells L58:M58.

when she declared that “everything was going to be running efficiently” in a letter dated June 9, 2021.⁷⁰

⁷⁰ See, STB Non-Docketed Public Correspondence, BNSF Response Letter to Chairman Oberman Regarding Rail Service, June, 9, 2021 at pp. 1-3.

III. BNSF’S ANALYSES ARE FLAWED AND MISLEADING

BNSF and its witnesses Messrs. Baranowski and Zebrowski offer several statements and figures in their narrative that are intended to support BNSF’s claims that it did not “irresponsibly cut resources over the years,”⁷¹ and that BNSF’s service failures in 2022 were entirely attributable to “a temporary crew shortage during the pandemic” that was unforeseeable and unpreventable.

Although Baranowski/Zebrowski dismiss our Opening statement and supporting analyses based on an assertion that our work “includes major oversights, misinterpretations, and flawed conclusions,”⁷² they never directly rebut many of our analyses or conclusions. Rather, they offer a series of unrelated analyses intended to distract from BNSF’s failure to manage its resources, especially crews, such that it could meet its common carrier obligation to Evergy. Ultimately, BNSF argues that it has sole discretion regarding which shippers receive service when its management decisions leave it with insufficient capacity.

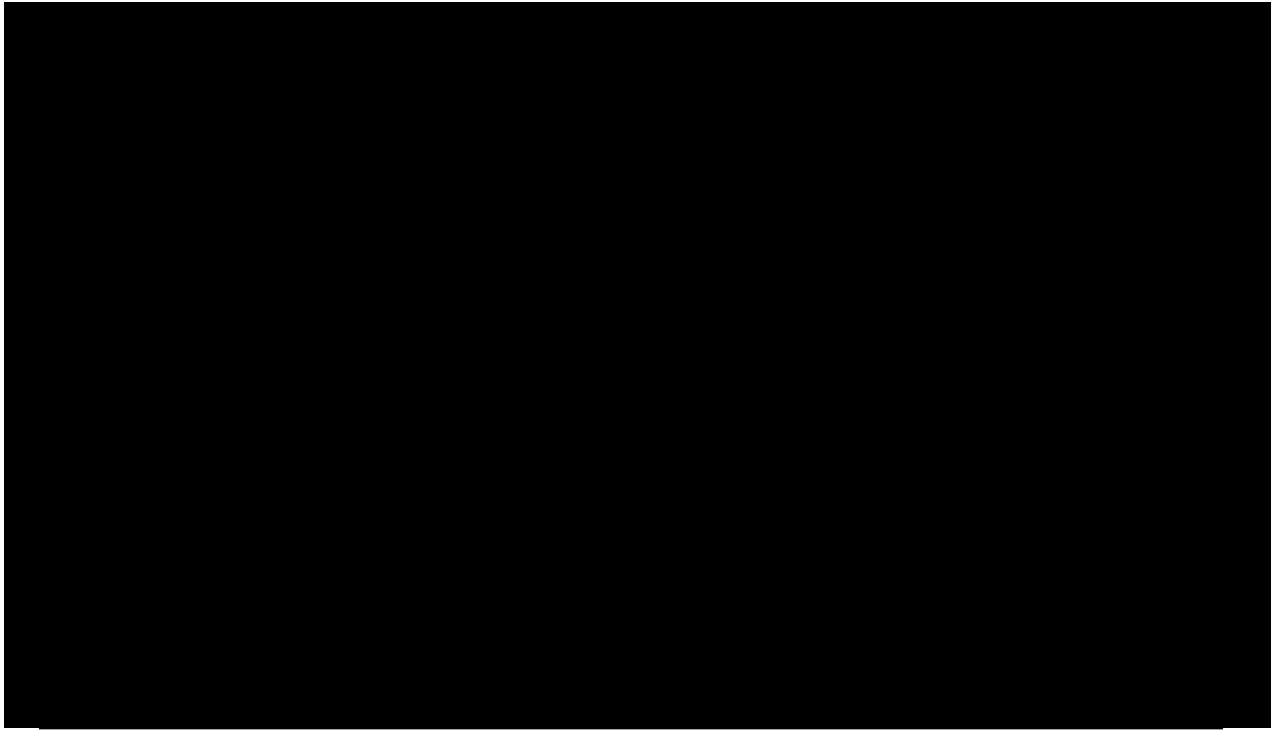
Many of BNSF’s conclusions rely on analyses framed by overly narrow or otherwise inappropriate time periods, and many of BNSF’s presentations of its findings rely on manipulation of scale to overstate the impact of its claims. Baranowski/Zebrowski’s Figure 43⁷³ provides a useful example.

⁷¹ See, Baranowski/Zebrowski Reply VS at p. 6.

⁷² *Id.*

⁷³ Note: Baranowski/Zebrowski Reply VS Figure 43 and 75 are the same.

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}

First, this figure is cropped such that the bottom of the Y-axis is set to { [REDACTED] } train miles. According to BNSF's calculation, this statistic { [REDACTED] } percent from 2019 to 2021 (from { [REDACTED] } train miles per employee). BNSF's presentation of the change makes the { [REDACTED] } seem much larger than { [REDACTED] } percent. When shown to scale, the significance of the change is fairly represented, as shown in Figure No. 6 below.

Figure No. 6 {{



}}

BNSF argues that the { [REDACTED] } in train miles per employee that was observed in 2020-2022 was a symptom of its inability to locate sufficient crews “during the unique and temporary pandemic and post-pandemic periods.”⁷⁴ BNSF admits that as the “ratio between train miles and train and engine employees that existed in 2019 [] returned in 2023 and 2024, [] service metrics such as {{ [REDACTED] [REDACTED] }}.”⁷⁵

⁷⁴ See, Baranowski/Zebrowski Reply VS at p. 49.

⁷⁵ *Id.* at p. 50, footnote omitted.

BNSF fails to mention that the improvement in productivity shown in the 2020-2022 time period may have been viewed as a positive by BNSF management, at least initially, before the wave of shipper backlash peaked.

Second, this presentation implies that the chosen Y-axis lower bound represents a floor for the statistic. However, when the time-period is extended, we can see that the metric has often and recently been below the floor selected by Baranowski/Zebrowski, further amplifying their misdirection.

As shown in Figure No. 7 below, train miles per T&E employee were below { [REDACTED] } in 2014 and 2015. Of course, this was when BNSF added resources so it could add trains and deliver the same amount of coal traffic at reduced velocity. At the time, BNSF declared that because of these remedial actions, “on balance, our coal train business is improving.”⁷⁶

⁷⁶ See, Lease EP 724 at p. 199.

Figure No. 7 {{

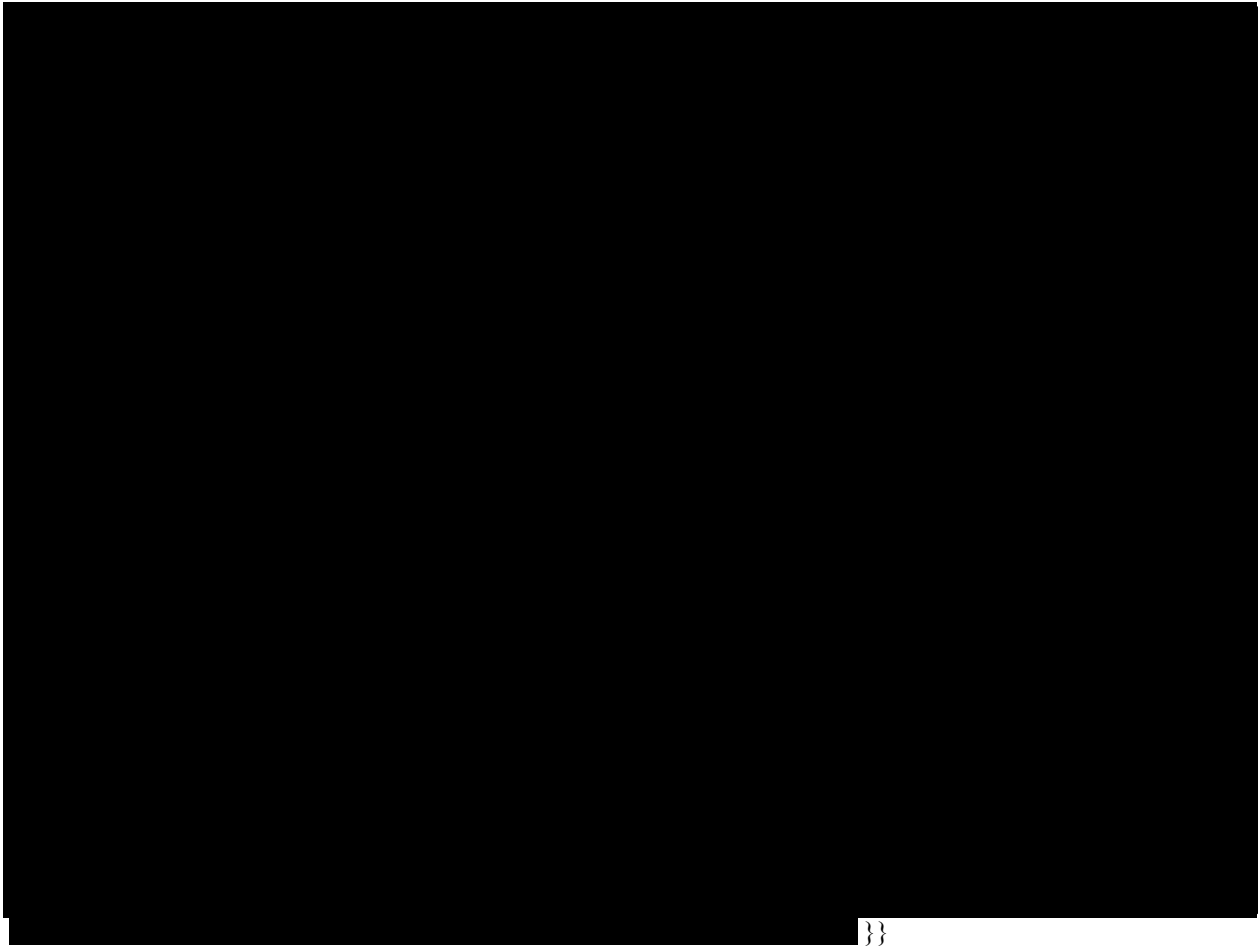


Figure No. 7 above also shows that the ratio of train miles to T&E staff has been volatile across multiple business cycles. The 2019 ratio does not represent a baseline. Once this broader historical pattern is acknowledged, the implication that 2023–2024 reflects a “return to normal” is untenable.

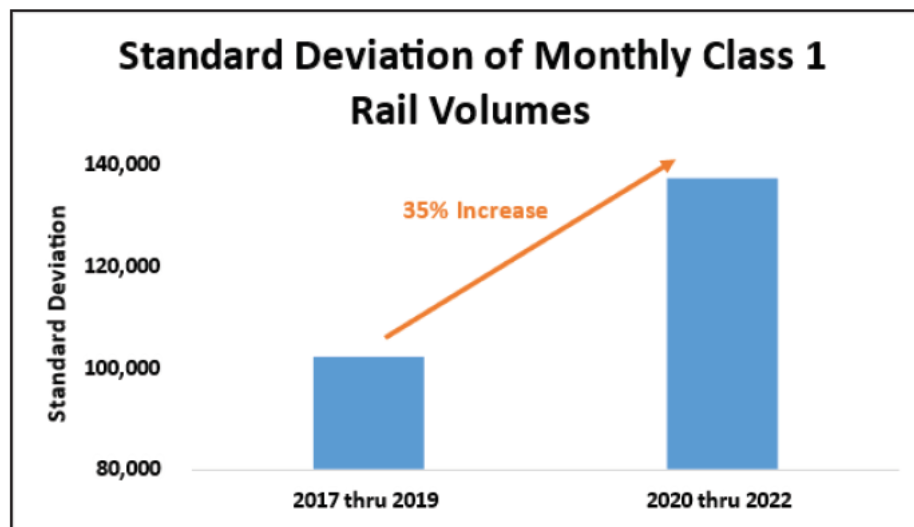
The expanded Figure 43 above shows that BNSF has twice undermined service reliability for coal shippers by {{ [REDACTED] }}, first in 2016 (when crews were {{ [REDACTED] }} by more than {{ [REDACTED] }} as train miles {{ [REDACTED] }} by less than {{ [REDACTED] }}) and again in 2020 (when crews were again {{ [REDACTED] }} by more than {{

██████████ } } as train miles { { ██████████ } } by around { { ██████████ } }⁷⁷. The expanded figure also shows that these cuts have put BNSF in a position where it had to dramatically { { ██████████ } } crews when demand rebounded, highlighting the predictable consequences of BNSF’s repeated labor-cutting practices, which Baranowski/Zebrowski’s narrowed analysis fails to capture.

Another example of BNSF’s deceptive analyses, which use varying base periods depending on the statistic being evaluated and the point BNSF is attempting to support, is BNSF’s contention that Iatan stockpiles were { { ██████████ } } in 2022 compared to 2019-2021,⁷⁸ ignoring the fact that Iatan’s 2022 stockpiles were { { ██████████ } } than its 2016-2017 stockpiles. BNSF uses 2021 as the benchmark without acknowledging that Iatan’s 2021 stockpiles were { { ██████████ } }.

In another example, Baranowski/Zebrowski claim that, “the standard deviation of monthly rail traffic units in the three years following the outbreak of the pandemic was approximately 35% higher than in the three years prior,”⁷⁹ and show the following graphic in support:

Figure 6: Standard Deviation of Monthly Class I US Rail Volumes (2017 - 2022)¹⁹



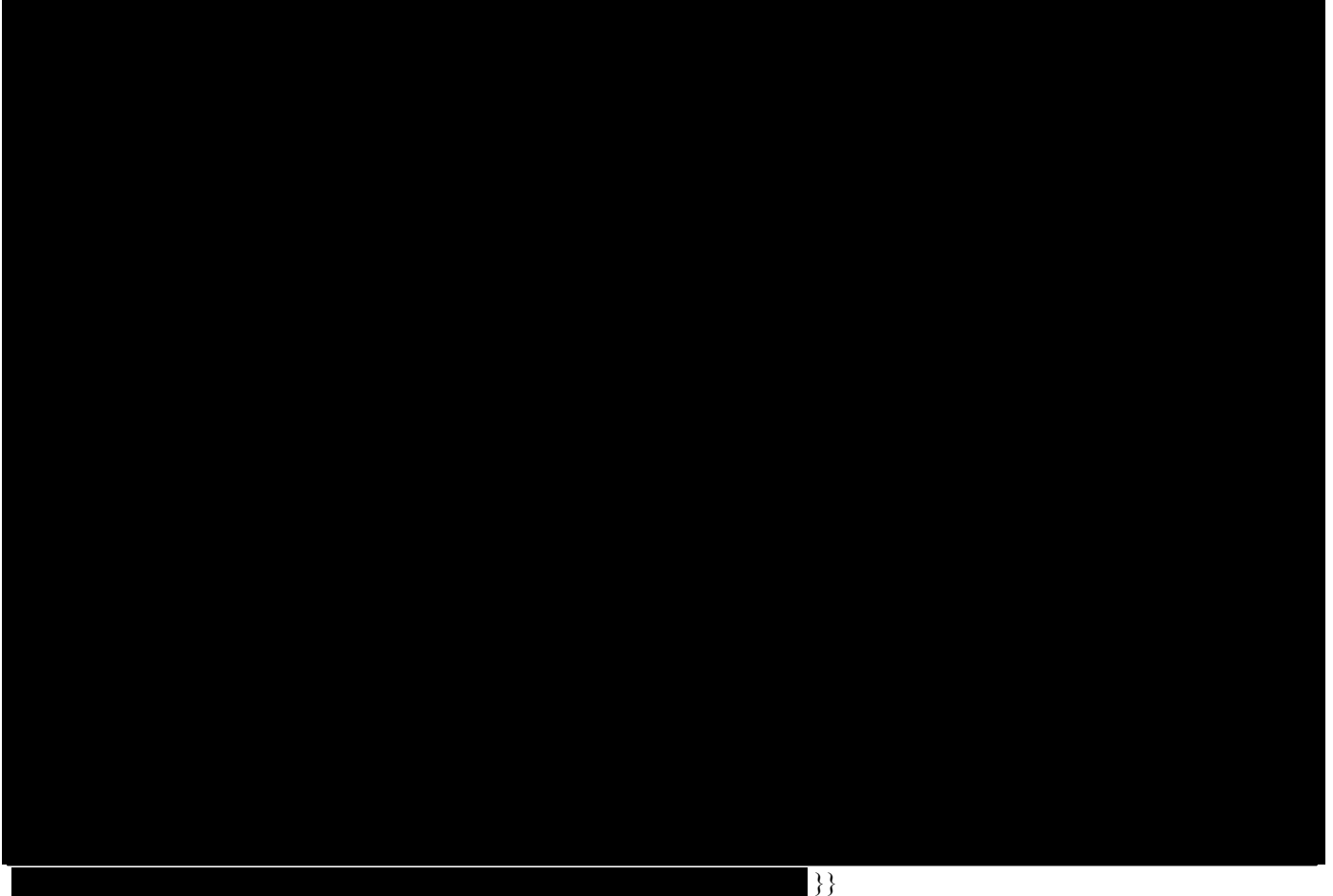
⁷⁷ See, Rebuttal workpaper “HC Section 3.4_Rebuttal.xlsx” at tab “F43” aat cells I11:J11 and I15:I15.

⁷⁸ See, Baranowski/Zebrowski Reply VS at pp. 17-18.

⁷⁹ *Id.* at p. 12.

However, expanding the analysis period demonstrates that the increase from 2017-2019 to 2020-2022 was not unusual.

Figure No. 8 {{



BNSF selectively includes context only when it helps its argument. BNSF makes no mention of the labor dispute that was ongoing leading up to and throughout 2022 or BNSF crews' reaction to its Hi-Viz policy, but there are several other factors that BNSF selectively included in its evidence. For example, when defending its {{ [REDACTED] }} of coal trainsets to maintain train performance, BNSF couches its actions as necessary due to demand for coal in 2022 being much higher than anticipated.⁸⁰ However, when attempting to demonstrate the success of its actions,

⁸⁰ See, BNSF Reply, Executive Summary at p. ES-4.

BNSF boasts that Lawrence was able to burn {{ [REDACTED] }} coal in 2022 than in 2020 or 2021,⁸¹ ignoring the higher-than-expected demand.

Moreover, BNSF simultaneously argues that adjusting its own operating plan based on its judgment in response to allegedly unforeseen and unprecedented market dynamics was reasonable, but Evergy (and other shippers) altering their operating plans and coal nominations in response to those same market dynamics and expecting to receive common carrier service was not.

Below, we discuss BNSF’s misrepresentations and other unsupported claims under the following headings:

- A. BNSF’s Reliance on External Factors to Explain Network Conditions
- B. Duration of the Evergy Service Failure
- C. Capacity, Congestion, and Resources
- D. BNSF Actions Created Winners and Losers
- E. BNSF Failure to Move Evergy's Coal Nominations in 2022
- F. BNSF’s Forecasting Practices and Misrepresentations Regarding Crew Demand and Staffing Levels
- G. BNSF’s Assessment of its Capacity Rationing is Misleading
- H. BNSF’s Train Volume, Speed, and Throughput Analyses are Flawed
- I. BNSF’s Claims Regarding Locomotive Availability and The Role of Crew Shortages

A. BNSF’S RELIANCE ON EXTERNAL FACTORS TO EXPLAIN NETWORK CONDITIONS

Baranowski/Zebrowski cite analyses conducted by BNSF witnesses Johnson and Prince that argue BNSF is not responsible for its failure to adequately staff its railroad in 2022. Specifically, Baranowski/Zebrowski claim that “unforeseen rapid resurgence in demand following COVID” coupled with “unprecedented instability in the global supply chain” and “novel effects of the ‘Great Resignation’ on labor markets” led to “unsustainable congestion on the U.S. rail network.”⁸² They further claim that, regardless of the crew shortage, BNSF has no obligation to

⁸¹ *Id.* at p. ES-15.

⁸² *See*, Baranowski/Zebrowski Reply VS at p. 2.

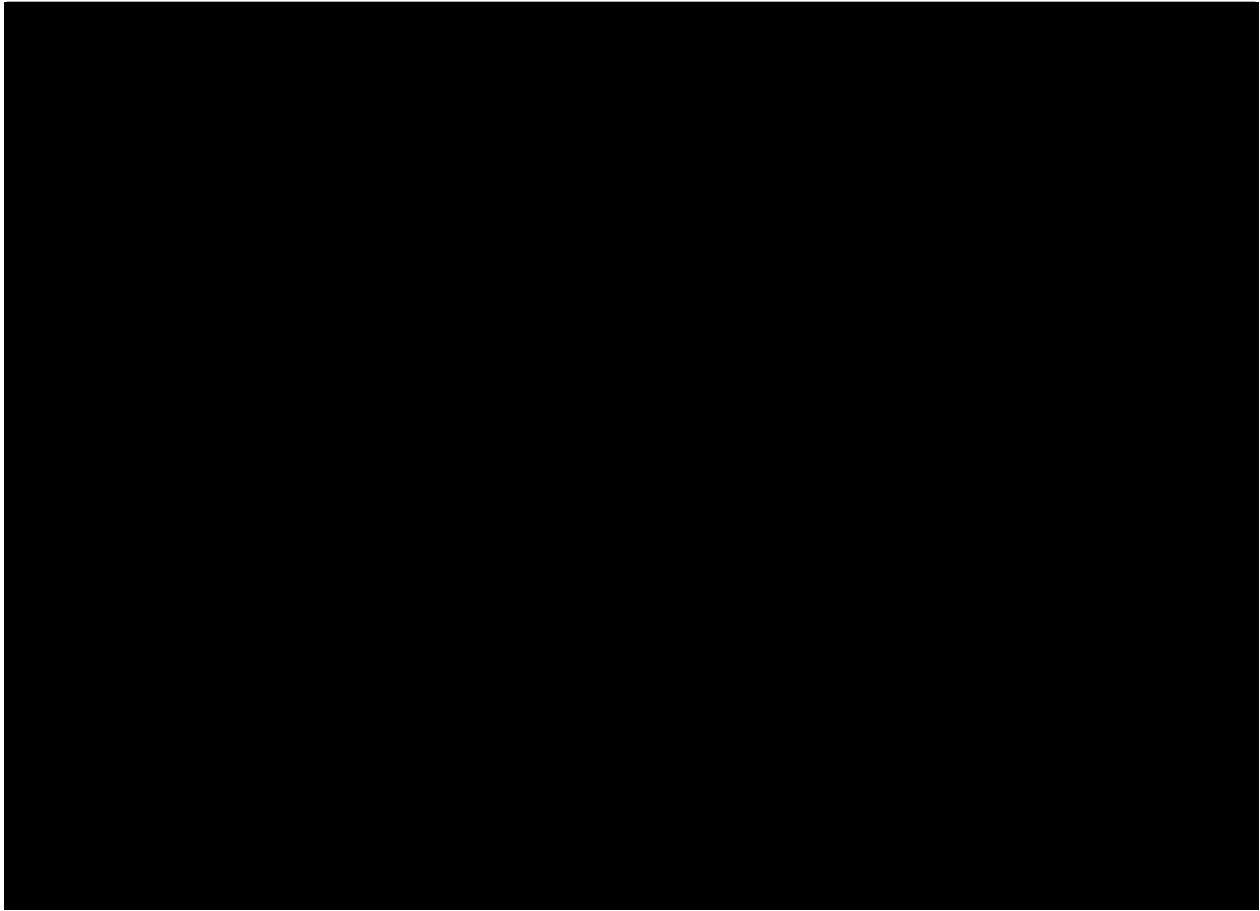
meet any service standard whatsoever when moving common carrier traffic. These claims are addressed in detail in the Verified Statement of Daniel Fapp presented in Rebuttal.

BNSF's claims ring hollow. The "temporary crew shortage" was two years **after** the pandemic, and it was challenging to overcome in large part because of BNSF's repeated furloughs, its Hi-Viz policy, and its protracted and controversial labor negotiations. First, BNSF alone is responsible for its repeated cycle of sidelining too many employees during downturns and being unable to recover when the inevitable upturn comes. Second, in a tight labor market, employers can entice workers through wage and benefit incentives. However, instead of increasing wages or offering incentives, BNSF froze compensation for unionized workers in January 2020 and later implemented its restrictive Hi-Viz policy.

Dr. Johnson claims that "had Evergy undertaken an analysis of BNSF's T&E jobs, it would have found that the Hi-Viz Attendance Program did not cause a large {{ [REDACTED] }} in the number of shifts worked by employees (as would be expected if Hi-Viz caused the jobs to become more onerous)."⁸³ However, Figure No. 9 below demonstrates that resignations and refused recalls {{ [REDACTED] }} immediately after BNSF implemented its controversial Hi-Viz policy.

⁸³ See, Johnson Reply VS at p. 53.

Figure No. 9 {{



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Even if the number of shifts for the employees who remained at BNSF was {{ [REDACTED], }} as claimed by Dr. Johnson, BNSF's policy directly led to {{ [REDACTED] [REDACTED] }} in the first half of 2022.

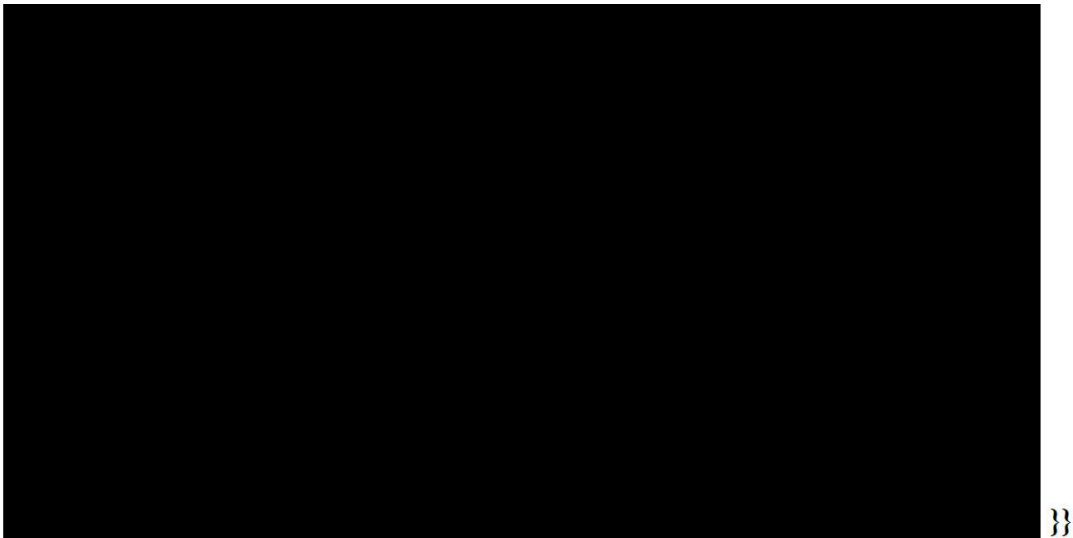
BNSF also cites {{ [REDACTED] }} grain demand as an unexpected contributing factor to explain its actions:

In addition to the unprecedented challenges in adding and retaining crew during the pandemic period, {{ [REDACTED] }} coal and grain demand in 2022 further contributed to BNSF's temporary crew shortage. The effects of this {{ [REDACTED] }} demand were especially pronounced on the Evergy route, both because {{ [REDACTED] }} {{ [REDACTED] }}, and because the {{ [REDACTED] }} grain demand specifically involved grain flows also traveling southbound {{ [REDACTED] }} {{ [REDACTED] }} -- the only segment on the route that is not {{ [REDACTED] }} {{ [REDACTED] }} and where Iatan is located.⁸⁴

First, less than a decade removed from its recovery from service failures caused in large part by BNSF's inability to accommodate similar {{ [REDACTED] }} in grain, coal, and crude oil, BNSF's operating plan was not structured to accommodate any {{ [REDACTED] }} in grain or coal traffic. Second, BNSF's presentation of the facts in Baranowski/Zebrowski Figure 46 is again deceptive.

Figure 46 below shows there was {{ [REDACTED] }} grain traffic traversing {{ [REDACTED] }} {{ [REDACTED] }} than in the prior three years, and that this {{ [REDACTED] }} {{ [REDACTED] }} from May to September.⁸⁵

Figure 46: BNSF Monthly Grain Carloads Traversing the St. Joseph's Subdivision (2022 vs. 2019-2021 Average)⁸⁶ {{



⁸⁴ See, Baranowski/Zebrowski Reply VS at p. 51.

⁸⁵ *Id.* at pp. 53-54.

As with their Figure 43, Baranowski/Zebrowski's Figure 46 portrays a cropped y-axis that starts at {{ [REDACTED] }} carloads instead of {{ [REDACTED] }}, which exaggerates the perceived differences between 2019-2021 and 2022 volumes.

Figure No. 10 below puts the volume fluctuations for coal and other traffic traversing the {{ [REDACTED] }} in perspective.

Figure No. 10 {{



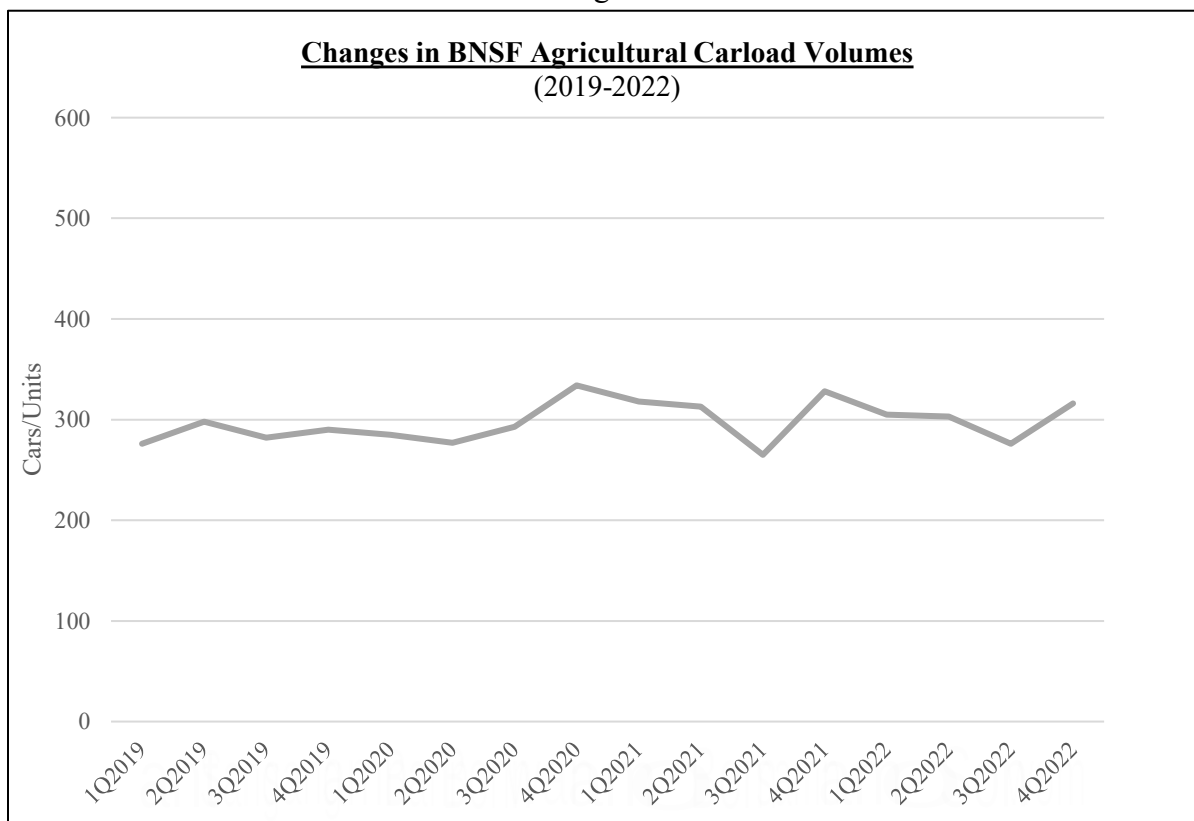
As shown above, the {{ [REDACTED] }} in grain carloads on the {{ [REDACTED] }} was on par with the {{ [REDACTED] }} in intermodal traffic over the same segment in early 2022. In fact, the intermodal {{ [REDACTED] }} surge was {{ [REDACTED] }} on a percentage basis in several months. For example, intermodal carloads {{ [REDACTED] }} in May and June 2022, respectively, compared to the 2019-2021 average, while grain carloads {{ [REDACTED] }}, respectively, compared to the 2019-2021 average. BNSF's allocation of

crews to intermodal service precluded it from meeting its common carrier obligations for other shippers.

Moreover, the St. Joseph Subdivision connects to the Emporia subdivision at Kansas City, so it is directly adjacent to BNSF’s primary intermodal corridor connecting Chicago to the South and West. Train performance on the Emporia subdivision benefited from BNSF’s “decongestion” efforts on tangential corridors, including the {{ [REDACTED] }} St. Joseph subdivision.

Additionally, while BNSF focuses on a {{ [REDACTED] }} in grain traffic over the {{ [REDACTED] }} {{ [REDACTED] }}, Figure No. 11 below shows that systemwide BNSF agricultural traffic volumes in 2022 were on par with 2020 and 2021.

Figure No. 11



Source: Rebuttal workpaper “10K Revenues and Volumes.xlsx” at tab “Ag Chart”

Baranowski/Zebrowski also point to a faster than expected rebound of industrial production following the COVID lockdowns in early 2020 as an excuse for BNSF’s crew shortage in 2022. However, their Figures 4 and 5 demonstrate that the industrial production rebound was nearly complete by mid-2020, two years before the height of the 2022 service crisis. This is shown in Figure No. 12 below.

Figure No. 12 {{



BNSF’s critical crew shortage did not occur during the “pandemic period,” as BNSF claims. It occurred two years after the pandemic recovery, as shown above.

B. DURATION OF THE EVERGY SERVICE FAILURE

BNSF attempts to minimize the impact of its service failures by defining them as temporary:

Messrs. Mulholland and Crowley failed to identify that the shortage in crew resources was temporary. When looked at correctly, their analysis corroborates this finding. While they focused on crew-related delays being {{ [REDACTED] }} in 2022 than in 2019, they neglected to recognize that soon after the temporary crew shortage the extent of these delays {{ [REDACTED] }}.⁸⁶

The temporary nature of BNSF's failure does not negate its existence. BNSF does not dispute that we demonstrated its failure to transport Evergy's coal requirements in 2022, or that a primary cause of BNSF's failure in 2022 was its insufficient train crew staffing levels, but complains that we only selectively included 2023 data in our Opening analyses.

analysis covering the period from when BNSF first began reporting train hold data to the STB at the end of 2014 through present confirms the finding that operational issues due to crew shortages spiked during the pandemic period and have since returned to normal levels (after the industry recovered from the 2015 and 2016 service challenges which led to the reporting of this data).⁸⁷

We did not selectively include 2023 data in our OVS analysis. In fact, nearly all of our Opening Exhibits covered the full five-year time period from 2019 to 2023 for which BNSF data were provided. The limited number of exhibits that did not visually display all five years nevertheless incorporated the complete five-year dataset in the underlying supporting workpapers.⁸⁸ As such, we directly acknowledged that BNSF's crew shortage was temporary. Our

⁸⁶ *Id.* at p. 50

⁸⁷ *Id.* at p. 90.

⁸⁸ Of the 16 Exhibits attached to the OVS which included empirical data, 12 (75%) of them covered 2019-2023, however 100% (16/16) of the Exhibits included data for 2019-2023 in the supporting workpapers referenced within each exhibit.

analysis rightly focused on 2022, when BNSF service was unacceptable, and this is the time period associated with the damages sought by Evergy in this proceeding.

Moreover, the 2015 and 2016 service challenges cited by Baranowski/Zebrowski actually began in 2014, when BNSF's (and CPKC's) service to grain and coal shippers was so poor that the STB initiated a proceeding to identify the root causes and implement a recovery plan.⁸⁹ The causes identified by BNSF included an admission that it was short-staffed, and particularly short-staffed in its coal corridor.⁹⁰

Unlike in 2022, the solution identified and implemented by BNSF in 2014 included a concerted hiring effort to ensure that trains could be added to the system to accommodate demand, despite reductions in train speed and increases in delay. Hirings that BNSF effectively reversed in subsequent years. BNSF's 2022 operating plan simply didn't include enough staffing margin to absorb cyclical changes in volume.

Furthermore, Baranowski/Zebrowski's Figures 76 and 77 confirm our conclusion in our OVS that BNSF allocated resources away from its coal corridor to the detriment of shippers that use that trunk of BNSF's network. In fact, the impact is even more pronounced than Baranowski/Zebrowski's analysis implies, because the Evergy route delays are included in their quantification of system-wide delays. Figure No. 13 below compares delays to trains traversing the Evergy route to trains traversing other parts of BNSF's system.

⁸⁹ See, Progressive Railroad article, *STB addresses Chicago rail performance, BNSF's utility coal service*, January 2, 2015, accessed from https://www.progressiverailroading.com/federal_legislation_regulation/news/STB-addresses-Chicago-rail-performance-BNSFs-utility-coal-service--43030.

⁹⁰ See, BNSF Comments to Minnesota Legislative Energy Commission, December 10, 2014, accessed from <https://www.lec.mn.gov/meetings/2014/121014BNSF.pdf>.

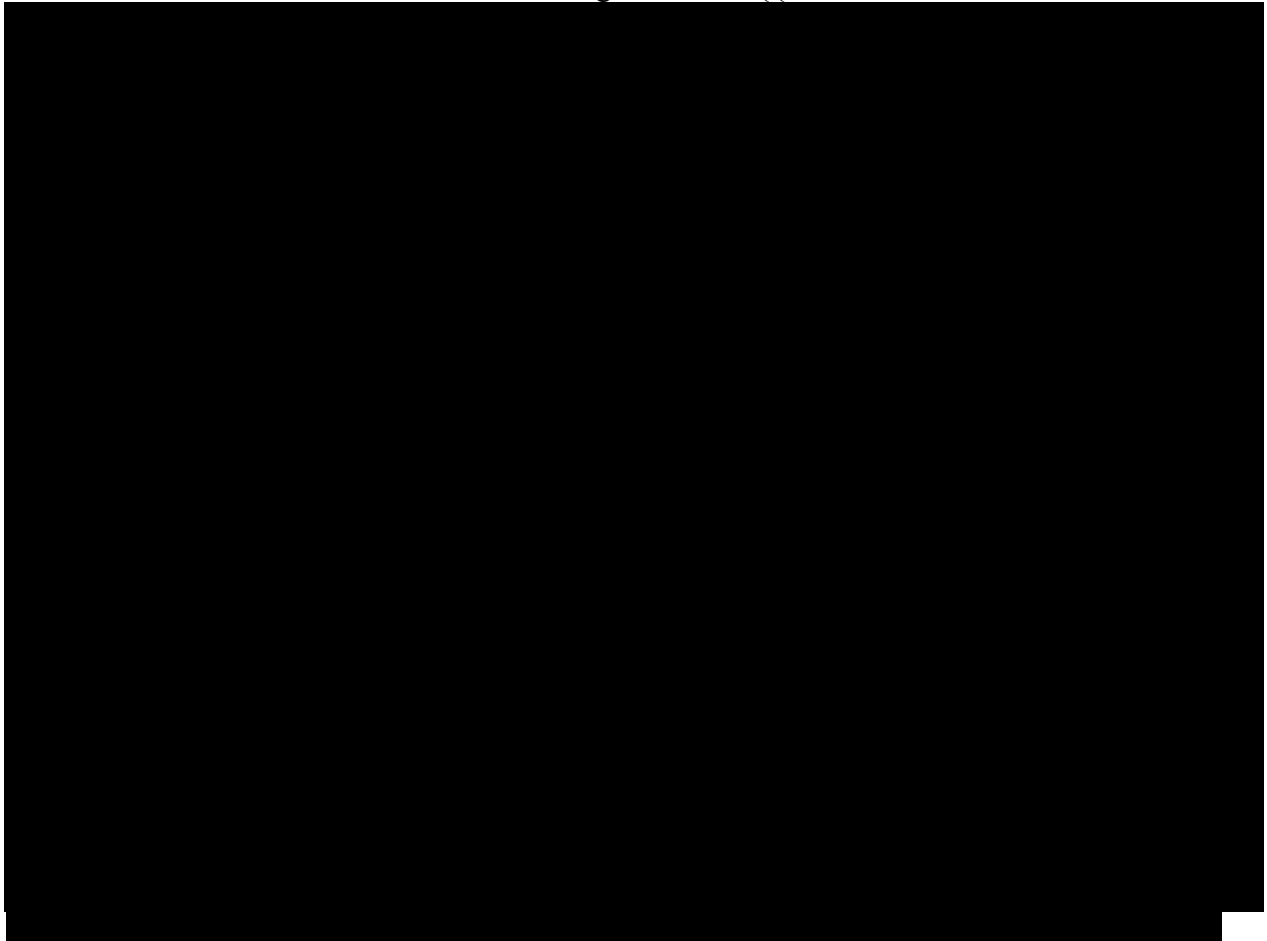
Figure No. 13 {{



As shown above, trains traversing the Everygy Route experienced crew-related delays approximately {{ [REDACTED] }} than trains traversing other parts of the BNSF system. The disparity was most pronounced in 2022, when trains traversing the Everygy Route incurred approximately {{ [REDACTED] }} of crew-related delay per train, nearly {{ [REDACTED] }} times the approximately {{ [REDACTED] }} of crew-related delay per train across the remainder of BNSF's system.

Moreover, even on a system-wide basis, the {{ [REDACTED] }} in crew-related delays for coal and grain trains significantly exceeded the comparatively modest {{ [REDACTED] }} for other traffic groups, as shown in Figure No. 14 below.

Figure No. 14 {{



}}

The 2022 {{ [REDACTED] }}, depicted in Figure No. 14 above, and a corresponding {{ [REDACTED] }}, occurred despite {{ [REDACTED] }}, as shown in Figure No. 15 below.

Figure No. 15 {{



**C. CAPACITY,
CONGESTION, AND RESOURCES**

BNSF attempts to explain away the impact of its service failures on Evergy by claiming that removing {{ [REDACTED] }} unit coal trainsets from service was a necessary part of BNSF’s larger effort to “successfully decongest its network.”⁹¹

First, BNSF errs by arguing that its system was congested. It was not. Congestion occurs when the volume of equipment deployed over a network or segment approaches the physical plant capacity of that network or segment (i.e., congestion increases as volume increases relative to

⁹¹ See, Baranowski/Zebrowski Reply VS at p. 2.

physical capacity). As shown in our Opening Figure No. 4, depicted again in Figure No. 16 below, 2022 train volumes were {{ [REDACTED] }} compared to 2019, but crews were {{ [REDACTED] }} even more, causing crew-related delays to {{ [REDACTED] }}, even as train speeds were {{ [REDACTED] }}.

Figure No. 16 {



What BNSF calls congestion was really the effect of a deficiency of resources required to operate at (or even near) capacity (i.e., there was ample room for more trains, but nobody to operate them).

Railroads often use the analogy that you “don’t build the church for easter Sunday.”⁹² This saying is meant to imply that maintaining sufficient physical infrastructure to move traffic on the busiest day of the year with no delays would result in excess capacity for the remaining days of the year. However, it doesn’t matter how big the church is if there are not enough ushers to seat the congregation for service during typical Sunday attendance.

⁹² See, STB Docket NOR 42180, *Evergy, Inc., et al. v. BNSF Railway Company*, Reply Verified Statement of Dr. Jeffrey Prince, filed November 20, 2025 (Prince Reply VS), at p. 3.

BNSF now insists that the way to improve service to shippers, *regardless of volumes or actual physical capacity*, is to {{ [REDACTED] }} from service (which it wrongly calls “decongesting the network”). This is a departure from the approach to service recovery that it espoused in 2014, when BNSF added assets to make up for longer transit times caused by declining train speeds, as discussed in Section II.A. above.

Baranowski/Zebrowski attempt to justify BNSF’s failure to serve Evergy by showing that delays caused by other than crew-related issues decreased in 2022 relative to 2019.

“For one, while Messrs. Mulholland and Crowley focus on increases in crew, mechanical, and locomotive power related delays in 2022 compared to 2019, these three categories together comprise {{ [REDACTED] }} of all delay minutes recorded along the Evergy route in 2022. Stated differently, while there are approximately {{ [REDACTED] }} delay minutes related to crew, mechanical, and power along the Evergy route in 2022 compared to 2019, overall 2022 delay minutes were {{ [REDACTED] }} compared to 2019, representing a {{ [REDACTED] }} in total delays.[] This is not consistent with Evergy’s allegation that BNSF has changed its operating plan to rely on irresponsibly low resource levels.”⁹³

On the contrary, this demonstrates that the crew shortage effectively limited BNSF’s practical capacity despite adequate physical capacity to move {{ [REDACTED] }}. BNSF metered access to coal shippers to protect its operating plan for scheduled traffic with a lean pool of T&E crews. But for the crew shortage, {{ [REDACTED] }} traffic would have been online, {{ [REDACTED] }} throughput. Relatively {{ [REDACTED] }} train meets and delays would have occurred with {{ [REDACTED] }} traffic on the line, but the cause of the delays would have been attributed to physical capacity limitations, not crew shortages. The statistics cited by Messrs. Baranowski and Zebrowski plainly demonstrate that BNSF’s system was not “congested” in 2022. Insufficient staffing prevented BNSF from operating anywhere close to full capacity.

⁹³ See, Baranowski/Zebrowski Reply VS at p. 91.

Nor is BNSF witness Prince’s testimony compelling on this point. He includes an analysis of other transport sectors to justify BNSF’s failure to move Evergy’s traffic. Specifically, at Prince Exhibit 19 he cites congestion and long queues at U.S. ports as an example of transportation industry challenges. We agree there was an {{ [REDACTED] }} in congestion at U.S. ports. That showing has no bearing on the issue here. BNSF was not “congested.” BNSF simply lacked the resources to move {{ [REDACTED] }} traffic, and thus it {{ [REDACTED] }} selected traffic – mainly coal – to protect other lines of business.

Baranowski/Zebrowski also mischaracterize BNSF’s actions to improve productivity as a function of declining volumes and increasing speeds, when the opposite was true.

“Neither does Messrs. Mulholland & Crowley’s analysis of the number of trains and the number of train crew support Evergy’s allegations that BNSF cut too many crew resources. While they observe that between 2019 and 2022 along the Evergy route the number of train crew employees {{ [REDACTED] }},[] in other parts of their analysis they identify that the number of trains {{ [REDACTED] }}[] and train speeds {{ increased by 12 percent }}.[] **They fail to recognize how the observed {{ [REDACTED] }} in train employees is consistent with the combined effects of the observed {{ [REDACTED] }} in the number of trains and {{ [REDACTED] }} in train productivity.** The below hypothetical calculation [Table 4] demonstrates this using crew counts, train counts, and average speeds taken from the Mulholland and Crowley V.S. and distance assumptions representative of operations along the Evergy route.”⁹⁴

This is a circular argument. Baranowski/Zebrowski’s table⁹⁵ simply shows that productivity per crew member remained relatively {{ [REDACTED] }} from 2019 to 2022. Baranowski/Zebrowski imply that {{ [REDACTED] }} were required because there were {{ [REDACTED] }}. But it was the {{ [REDACTED] }}

⁹⁴ *Id.* at p. 92, **emphasis added.**

⁹⁵ *Id.* at p. 92, Table 4.

}} BNSF's practical capacity and caused the {{ [REDACTED] }} (and resulting {{ [REDACTED] }}).

BNSF's hypotheticals regarding crews, trains, and train miles are a shell game that turns our Opening analysis on its head. Baranowski/Zebrowski imply that BNSF merely staffed its network to efficiently move a given number of trains. In reality, the {{ [REDACTED] }} in service was a function of BNSF's {{ [REDACTED] }}. As discussed above, BNSF's 2022 capacity supply was a function of its operating plan.

**1. BNSF's Calculation of Increased Held Trains on
the Everygy Route Contains Technical Errors**

BNSF claims that it was justified in refusing to { [REDACTED] } to Iatan service in summer 2022 because when it added train sets for other coal shippers (including a { [REDACTED] } in service to Iatan), "disproportionately {{ [REDACTED] }} **ended up holding** as is depicted on Figure 49 and Figure 50 below."⁹⁶

⁹⁶ *Id.* at p. 57, **emphasis added**.

Figure 49: Trains per Day Traversing the St. Joseph's and Ravenna Subdivisions (June 2022 - September 2022)⁹⁴ {{

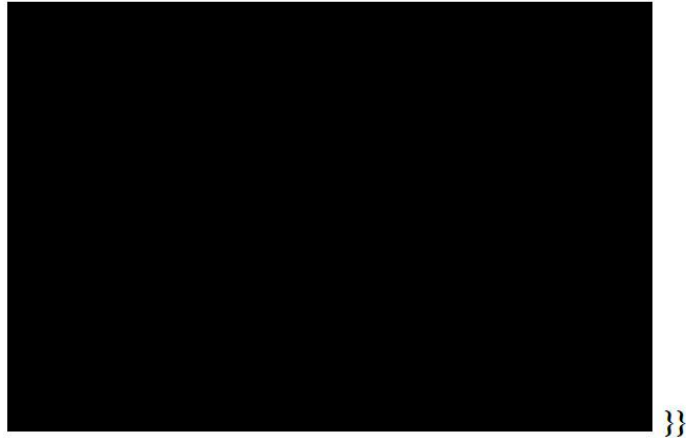


Figure 50: Train Holdings per Day on St. Joseph's and Ravenna Subdivisions (June 2022 - September 2022)⁹⁵ {{



However, Baranowski/Zebrowski's figures do not support their claim because their Figure 50 does not show the number of trains held; it shows the number of hold events.

BNSF's presentation {{ [REDACTED] }} in trains held following the {{ [REDACTED] }} in train volumes, because the code developed by Baranowski/Zebrowski counts the total number of train-hold data records rather than the number of trains held. As shown in Figure No. 17 below, correcting this misnomer substantially {{ [REDACTED] }} the alleged {{ [REDACTED] }}

}} in trains held, from {{ [REDACTED] }} on the {{ [REDACTED] }}, and from {{ [REDACTED] }} on the {{ [REDACTED] }}.

Figure No. 17 {{



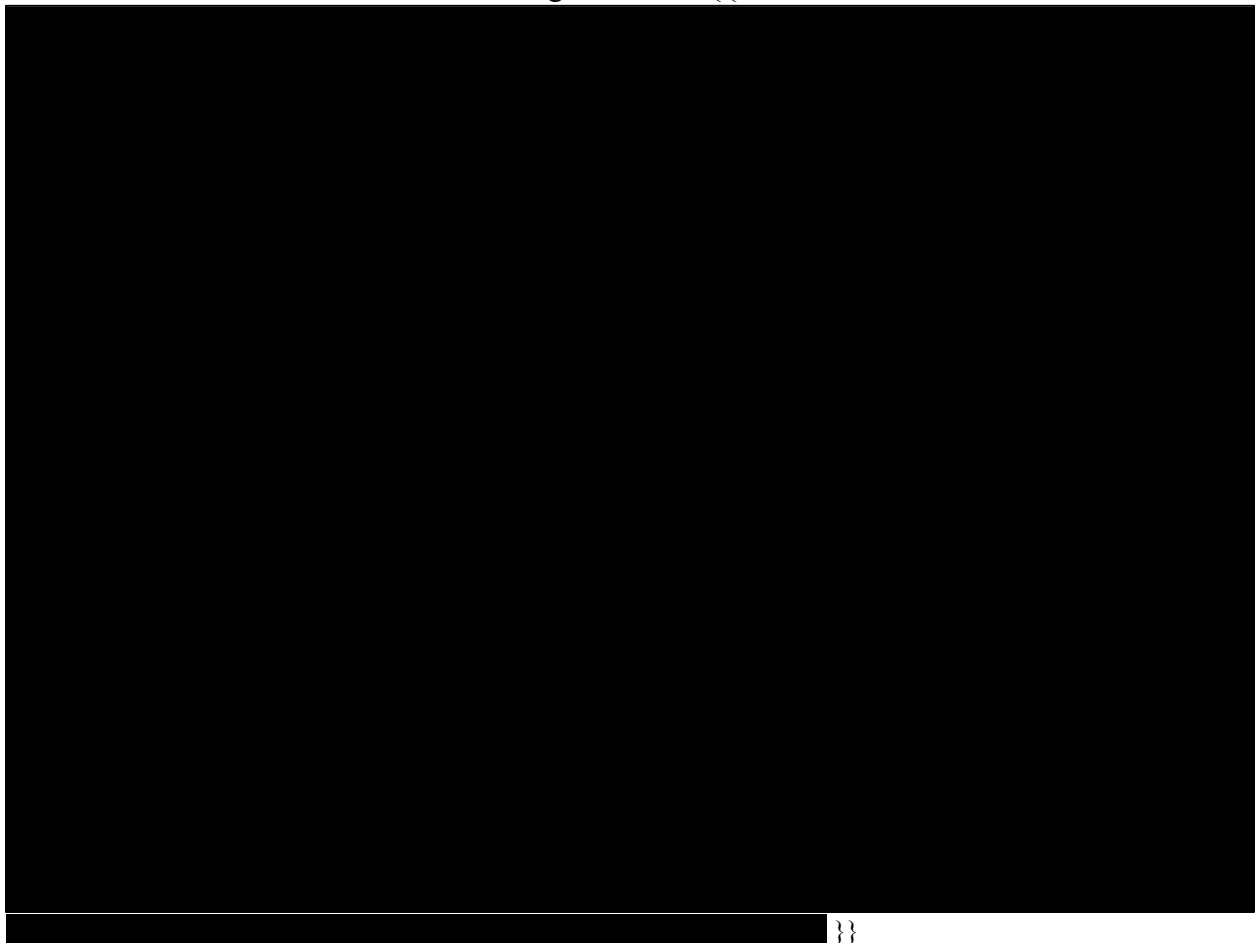
As shown in the figures above, BNSF's analysis misrepresents the impact on the number of trains held by adding train sets to serve coal shippers. Moreover, {{ [REDACTED] }} the number of trains held does not by itself indicate that service was {{ [REDACTED] }} from the perspective of coal shippers. As BNSF itself attested in the Ex Parte 724 hearings, "[t]ons delivered is largely a product of velocity and equipment sets."⁹⁷

⁹⁷ See, Lease EP 724 at p. 199.

2. BNSF's Discussion of Volumes and Train Performance is Missing Context

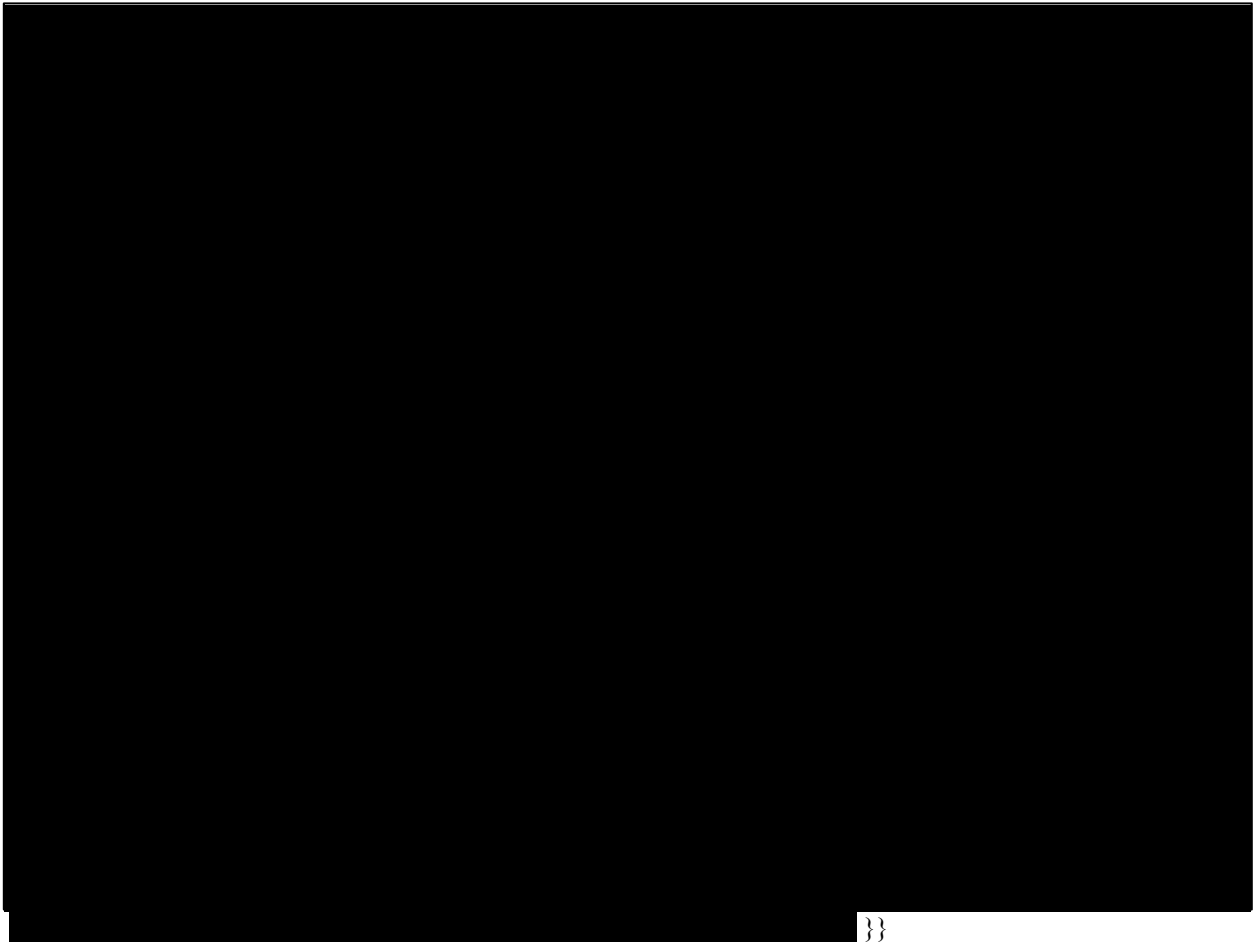
Baranowski/Zebrowski's Figures 49 and 50 focus on the narrow period from June through September 2022. When the analysis is expanded to include all of 2022, two things become clear. First, {{ [REDACTED] }} from June through September were needed just to temporarily return to the volumes that were moving over the subject subdivisions at the beginning of 2022, as shown in Figure No. 18 below.

Figure No. 18 {{



The number of daily trains held in September was also {{ [REDACTED] }} with the number at the beginning of the year, as shown in Figure No. 19 below.

Figure No. 19 {{



Second, comparison of the two figures immediately above reveals that there were multiple instances in which train volumes and trains held moved in {{ [REDACTED] s }}, demonstrating the influence of operational factors other than train volumes on performance.

For example, on the {{ [REDACTED] }}, the average number of trains per day {{ [REDACTED] }} between February and March 2022, yet the number of trains held {{ [REDACTED] }}. Conversely, between October and November 2022, the number of trains per day {{ [REDACTED] }} while the number of trains held {{ [REDACTED] }}. A similar pattern appears on the {{ [REDACTED] }}, where the number of trains per day {{ [REDACTED] }} between February and April 2022, even as trains held {{ [REDACTED] }} during the same period.

These observed outcomes demonstrate that conclusions regarding capacity and performance cannot be reliably drawn by examining train counts and train holds in isolation, without consideration of restraints on operating capacity that are unrelated to physical capacity and train volumes.

To validate this point, we reviewed BNSF’s train delay data for all of the trains held in Baranowski/Zebrowski’s analysis, as shown in Table No. 1 below.

[illegible]

While BNSF's provided train-holding data is absent of any description or explanation of why a given train was held, BNSF's train-delay data includes delay descriptions and notes regarding the cause of delays on the network. We reviewed the train delay data associated with the held trains included in Messrs. Baranowski and Zebrowski's Figure 50 and summarized the top 10 causes of delay in Table No. 1 above. Table No. 1 shows that Baranowski/Zebrowski's contention that these trains were delayed solely due to congestion is unsupported by BNSF's delay data. Specifically, approximately {{ [REDACTED] }} in place at the time.⁹⁸ By contrast, only {{ [REDACTED] }}⁹⁹

Baranowski/Zebrowski further contend that the {{ [REDACTED] }} in trains per day from June through September 2022 resulted in {{ [REDACTED] }} average train speeds on the {{ [REDACTED] }} {{ [REDACTED] }}, expressed as miles per day, as shown in their Figure 51.

Figure 51: Train Miles per Day on Ravenna Subdivision (June 2022 - September 2022)⁹⁷ {{



⁹⁸ See, Table No. 1, Line 1, Column (4).

⁹⁹ See, Table No. 1, Lines 4 and 7, Column (4).

It is notable that the {{ [REDACTED] }} is omitted from the analysis Baranowski/Zebrowski present in their Figure 51, particularly because they identify the {{ [REDACTED] }} as the major choke point on the Evergy Subdivision.

The effects of this {{ [REDACTED] }} demand were especially pronounced on the Evergy route, both because {{ [REDACTED] }}, and because the {{ [REDACTED] }} grain {{ [REDACTED] }} over {{ [REDACTED] }} -- the only segment on the route that is not {{ [REDACTED] }} and where Iatan is located.¹⁰⁰

To address this unexplained omission, we applied the same methodology Baranowski/Zebrowski used to generate Figure 51 to the {{ [REDACTED] }}. The results of that analysis are presented in Figure No. 20 below.

¹⁰⁰ See, Baranowski/Zebrowski Reply VS at p. 51.

Figure No. 20 {{



As discussed above, {{ [REDACTED] }} the number of trains per day on a rail network does not by itself result in {{ [REDACTED] }} performance. As shown in Figure No. 20 above, despite an {{ [REDACTED] }} in trains per day on the {{ [REDACTED] }} and an {{ [REDACTED] }} in the number of trains held, average train speed {{ [REDACTED] }}.

Messrs. Baranowski and Zebrowski also point to an { [REDACTED] } in Iatan cycle days as proof that service declined as trains were added.¹⁰¹ As discussed in Section III.C.1 above, coal shippers are concerned about total volumes received, which is a function of both cycle time and

¹⁰¹ *Id.* at p. 59, Figure 52.

train sets in service. {{ [REDACTED] }} cycle times do not by themselves indicate {{ [REDACTED] }} service to coal shippers.

Baranowski/Zebrowski claim that the { [REDACTED] } to Iatan was part of a system-wide initiative to reduce cars on line, which “had a positive impact on network fluidity and service performance.”¹⁰² {{



}}

The selected data displayed in Messrs. Baranowski and Zebrowski’s Figure 17 omits the concurrent and well-documented deterioration in crew availability, which directly affected BNSF’s ability to meet demand for rail transportation.

Moreover, the number of cars online is a function of the type of trains in service, and the type of equipment that makes up those trains. A typical coal car is 53.1 feet long.¹⁰³ A typical unit

¹⁰² *Id.* at pp. 22-23.

¹⁰³ See, BNSF Website, *Coal Cars*, accessed from <https://www.bnsf.com/ship-with-bnsf/ways-of-shipping/equipment/coal-cars.html>.

coal train contains 115-150 cars.¹⁰⁴ In contrast, a 5-well articulated intermodal flat car, which are widely used in BNSF intermodal service, can approach 265 feet in length.¹⁰⁵ Railroads, including BNSF, routinely operate intermodal trains approaching and even exceeding 10,000 feet in length.¹⁰⁶ A 10,000-foot intermodal train made up of articulated flat cars would include approximately 38 railcars.¹⁰⁷ Replacing a 135-car unit coal train with a 38-car intermodal train would have no effect on the number of trains in service, but would reduce carloads in service by approximately 100 units.

Because cars do not move across the network as part of train consists, a better metric would compare train speed to train starts, because trains are not homogeneous. For example, adding 1,000 carloads to a rail network could entail adding 10 unit coal trains, 15 grain shuttle trains, 25 intermodal trains, or 20 local and manifest trains. Each of which would have a different impact on network fluidity.

3. BNSF's Discussion of Change in Coal Demand is Misleading

Messrs. Baranowski and Zebrowski claim that “{{ [REDACTED] }} in demand for coal transportation on BNSF's network were far {{ [REDACTED] }} than in prior years.”¹⁰⁸ They portray 2020–2022 BNSF coal demand internal forecasts and final nominations in Figure 45, shown below.¹⁰⁹

¹⁰⁴ See, BNSF Website, *Dedicated Train Service*, accessed from <https://www.bnsf.com/ship-with-bnsf/ways-of-shipping/dedicated-train-service.html>.

¹⁰⁵ See, The Greenbrier Companies, *Maxi-Strack I*, October 2019, accessed from <https://www.gbrx.com/wp-content/uploads/2022/11/MAXI-STACK-I.pdf>.

¹⁰⁶ See, TransPro article, *RailState data shows prevalence of long trains on BNSF, UP in Southwest*, January 6, 2025, accessed from <https://www.trains.com/pro/freight/class-i/railstate-data-shows-prevalence-of-long-trains-on-bnsf-up-in-southwest/>.

¹⁰⁷ 10,000 feet ÷ 265 feet per car = 37.7 cars.

¹⁰⁸ See, Baranowski/Zebrowski Reply VS at p. 51.

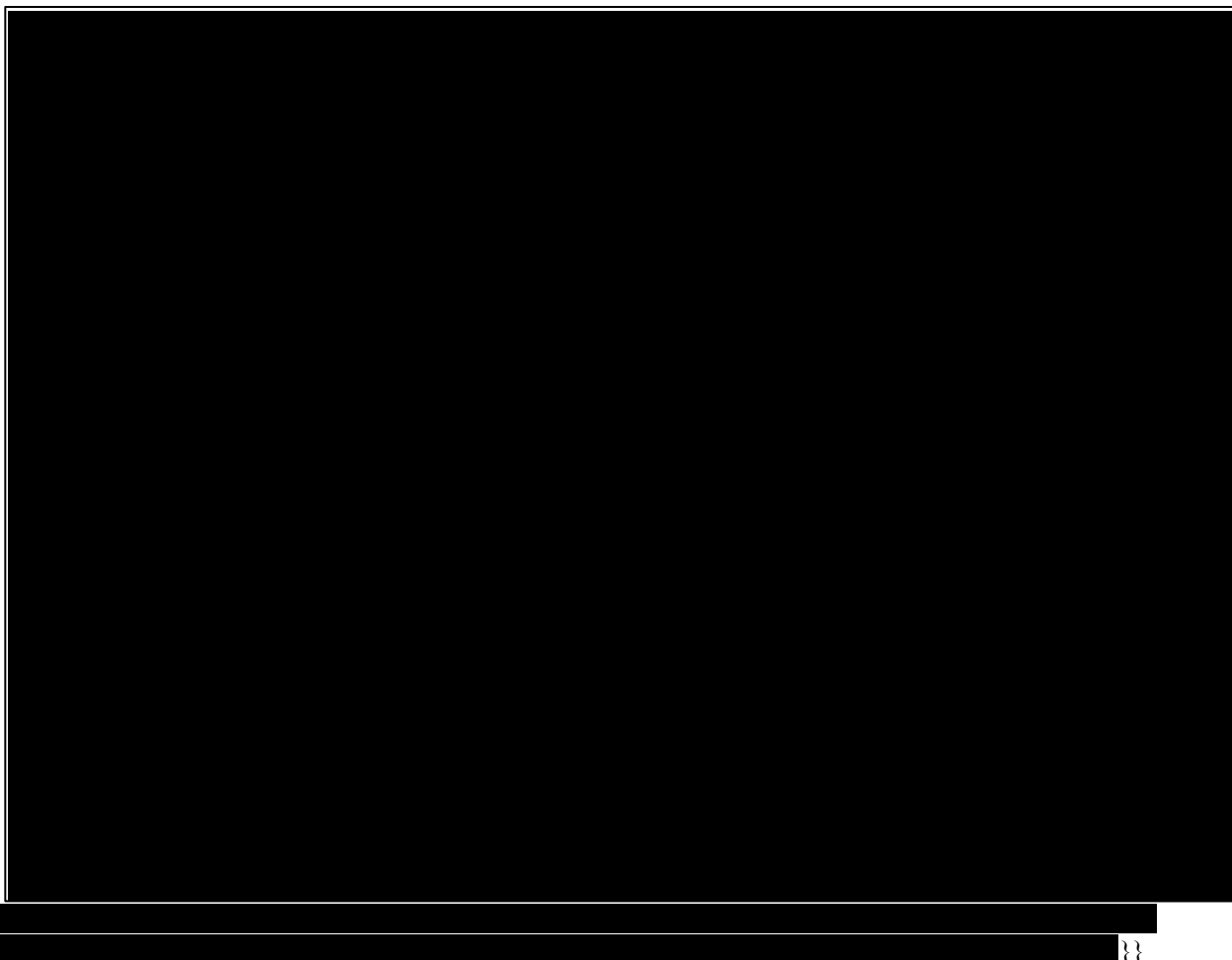
¹⁰⁹ *Id.* at p. 52.

Figure 45: Change in BNSF Network's Coal Demand for Second Half of Year (2020 vs. 2021 vs. 2022)⁸³ {{



This figure is misleading because it obscures an unexplained {{ [REDACTED] }} in BNSF's internal coal forecast volumes in August 2021, which gives the appearance of a {{ [REDACTED] }} in demand for the August to November 2021 time period (the first portion of the line labeled 2022 in the chart above). Displaying the volumes sequentially over the 3-year period reveals the missing context, as shown in Figure No. 21 below.

Figure No. 21 {{



As shown above, despite consistent CFT nominations between {{ [REDACTED] [REDACTED] }} from May through July 2021, BNSF’s internal forecasts for August 2021 inexplicably {{ [REDACTED] [REDACTED] }}, an {{ [REDACTED] }}.¹¹⁰ Baranowski/Zebrowski’s claim of dramatically {{ [REDACTED] }} demand in the first part of 2022 is revealed to be a dramatic {{ [REDACTED] }}.

BNSF’s Figure 45 relies on the inconsistent inclusion of plants in its demand quantification. For example, the August 2021 BNSF forecast for July–December 2022 included {{ [REDACTED] }} plants,

¹¹⁰ See, Rebuttal workpaper “HC BNSF 2019-2022 Nominations_Rebuttal.xlsx” at tab “Revised Demand Evo For Chart” at Cell H26.

but Baranowski/Zebrowski's calculation reflects only {{ [REDACTED] }} of them.¹¹¹ BNSF's flawed analysis of 2022 coal demand distorts the interpretation of the data by selectively including plants mixing disparate data sources.

D. BNSF ACTIONS CREATED TIERED ACCESS

BNSF does not deny that it treated its coal franchise—including Evergy—as a pressure relief valve to overcome its resource deficiency in 2022.

As part of its overall service recovery plan, BNSF removed {{ [REDACTED] }} coal trainsets from service on its network in March 2022, including { [REDACTED] }¹¹²

Baranowski/Zebrowski identify no other significant “part” of BNSF's service recovery plan. The plan was rather simple. BNSF limited access to its network based on its resource limitations. BNSF sacrificed coal to provide improved service to other shipper groups. BNSF's actions created winners (non-coal) and losers (coal). Evergy is in the latter group.

BNSF claims that the crew shortage does not indicate a strategic change in underlying resource levels relative to resource needs. Rather, BNSF claims it indicates that BNSF experienced a shortage of crew, and as a result, was not able to provide the amount of service it desired until obtaining additional crew.¹¹³ This is incorrect. BNSF provided the amount of service BNSF elected to provide as a business decision, just not the amount of service its customers desired. Because BNSF's lean operations precluded it from managing supply to meet demand, it rationed supply and limited the capacity it offered to coal shippers.

Baranowski/Zebrowski justify reduced service to Evergy because it had to serve other plants with {{ [REDACTED] }} than Iatan.¹¹⁴ However, the presence of plants with even

¹¹¹ *Id.* at tab “Revised Demand Evo Summary” at Cells H31 and K31.

¹¹² *See*, Baranowski/Zebrowski Reply VS at p. 8.

¹¹³ *Id.* at pp. 92-93.

¹¹⁴ *Id.* at pp. 61-62.

{{ [REDACTED] }} does not absolve BNSF of its obligation to provide adequate service to Evergy. Rather, it underscores the systemic nature of BNSF’s crew deficiencies. Baranowski/Zebrowski’s Figure 55 (below) demonstrates that BNSF frequently left its customers with {{ [REDACTED] }} levels.

BNSF claims it prioritized coal shippers with the most rapidly {{ [REDACTED] }}, but fails to acknowledge that few if any of BNSF’s coal shippers had {{ [REDACTED] }}. Figure No. 22 below compares the inventory of the {{ [REDACTED] }} BNSF-served plants on the Alliance Corridor with Iatan’s inventory from July to November 2022.¹¹⁵

Figure No. 22 {{

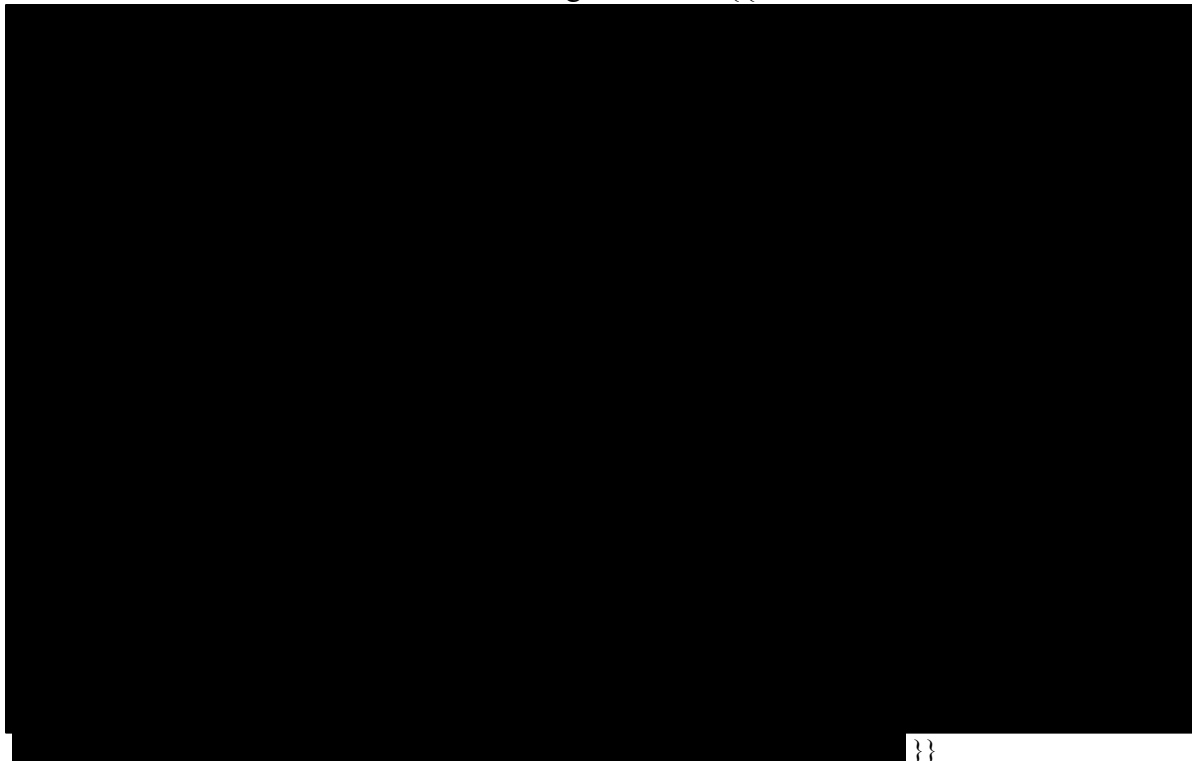


Figure No. 22 above shows that relatively few plants had more {{ [REDACTED] }}, indicating a systematic issue in BNSF’s coal deliveries to all plants along the corridor.

¹¹⁵ BNSF_EVERGY_0011035 data does not record the inventory for every plant at every weekly report. Totals count those that were reported with numeric values. For some plants, BNSF’s report notes {{ [REDACTED] }} or {{ [REDACTED] }} for some reporting periods

Baranowski/Zebrowski also argue that { [REDACTED] }
[REDACTED]
[REDACTED] }.¹¹⁶ They claim that before this change, { [REDACTED] }
[REDACTED] } and if “this option been available in 2022, Evergy would have similarly had opportunities to coordinate with BNSF and increase deliveries to Iatan.”¹¹⁷ This argument overstates the impact of diversification on deliveries.

BNSF data shows that utilities with { [REDACTED] } served by BNSF nearly universally experienced {{ [REDACTED] }} and operated with {{ [REDACTED] }} in 2022.¹¹⁸ The lone exception was {{ [REDACTED] }}, which consistently maintained {{ [REDACTED] }}, making it an outlier along the corridor.¹¹⁹

Figure No. 23 below compares Evergy’s trainsets to {{ [REDACTED] }} plants during 2022.

¹¹⁶ See, Baranowski/Zebrowski Reply VS at p. 71.

¹¹⁷ *Id.*

¹¹⁸ See, “HC Inventory Days_Rebuttal.xlsx” at tab “Fig55 Plant Review”.

¹¹⁹ *Id.* at rows 54 and 56.

Figure No. 23 {{



Figure No. 23 above shows that while Iatan was experiencing significant {{ [REDACTED] [REDACTED] }} through 2022, {{ [REDACTED] }} plants were experiencing {{ [REDACTED] }} compared to their 2021 averages.

1. BNSF Incentives to Move Traffic

BNSF claims that its decision to sideline coal traffic was not affected by {{ [REDACTED] }}.

Figure 59: 2022 BNSF Revenues over Variable Costs by Traffic Group¹⁰⁹ {{

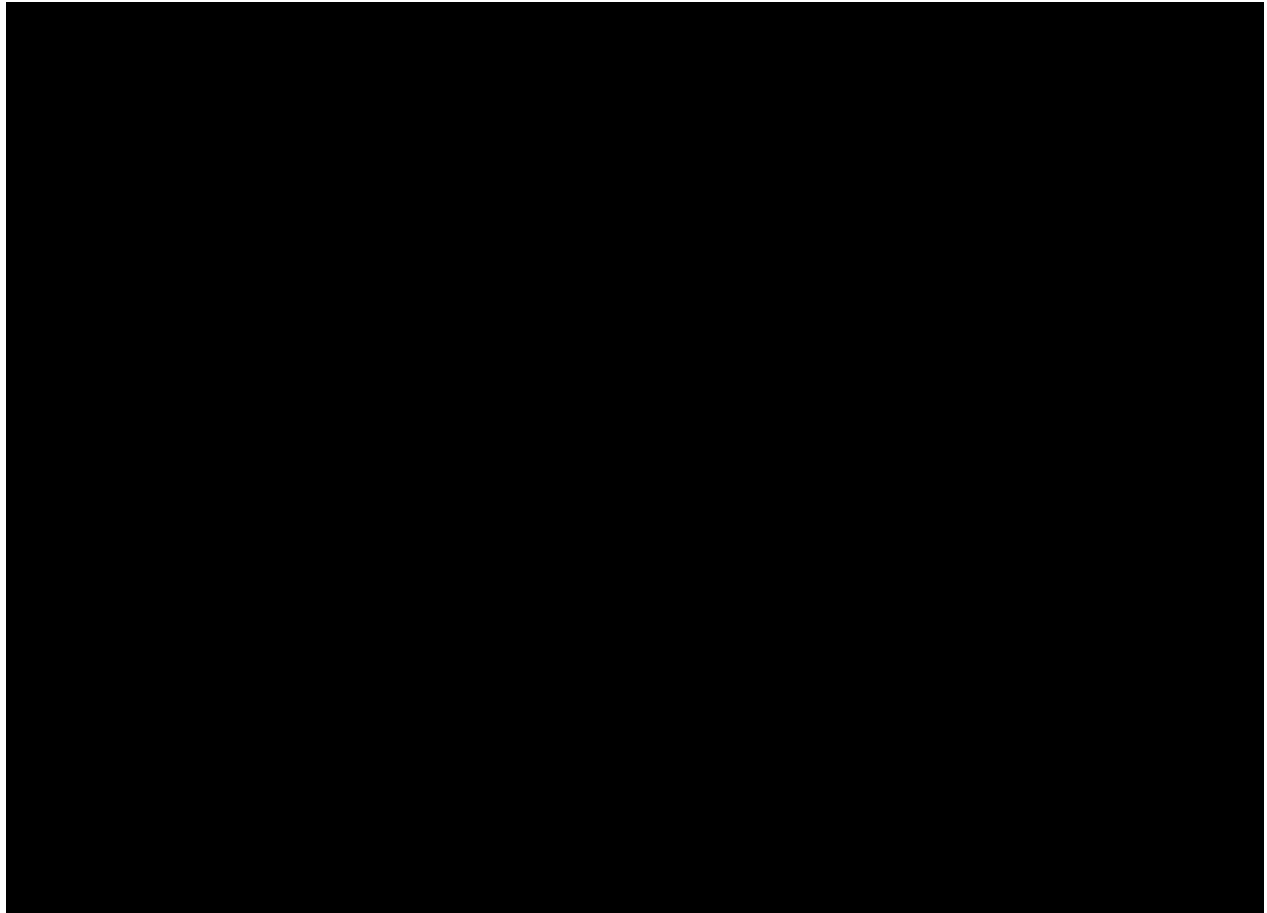


BNSF's argument is misleading for two reasons. First, Baranowski/Zebrowski's Figure 59 compares the R/VC for shipments to *individual* Evergy coal plants against averages for *entire* commodity groups (e.g., all grain; all non-grain/non-coal), and infers Evergy's traffic was {{ [REDACTED] }} than shipments of non-coal commodities. However, BNSF's analysis clearly shows that grain {{ [REDACTED] }} and other commodities {{ [REDACTED] }} are {{ [REDACTED] }} than coal {{ [REDACTED] }} on average. BNSF had a {{ [REDACTED] }} to allocate its crew resources {{ [REDACTED] }}.

BNSF's comparison of a single coal movement against an average for composite traffic categories that aggregates thousands of heterogeneous origin-destination pairs spanning different commodities, corridors, service types, and cost bases is apples-to-oranges.

Figure No. 24 below shows the Evergy moves compared to origin-destination pairs R/VCs for the BNSF grain shipments.

Figure No. 24 {{

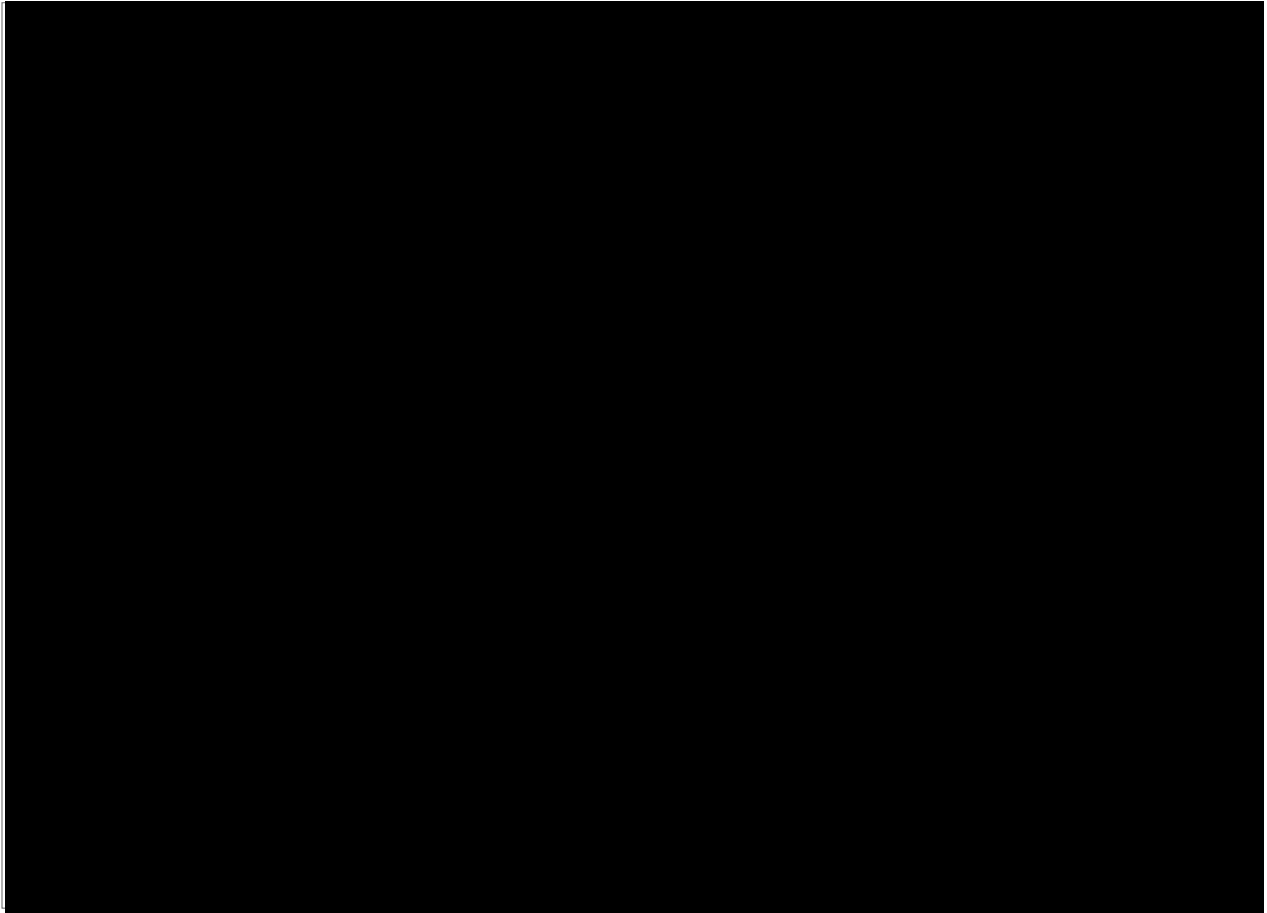


}}
}}

As shown above, {{ [REDACTED] }} of {{ [REDACTED] }} ({{ [REDACTED] }}) of grain carloads shipped under R/VC ratios {{ [REDACTED] }} than Iatan, and {{ [REDACTED] }} of {{ [REDACTED] }} ({{ [REDACTED] }}) of grain carloads shipped under R/VC ratios {{ [REDACTED] }} than Lawrence. BNSF's inference that the Evergy moves are {{ [REDACTED] }}
{{ [REDACTED] }}.

Figure No. 25 below presents the distribution for BNSF's non-grain, non-coal traffic group.

Figure No. 25 {{



_____}}

Figure No. 25 above shows that more than a {{ _____ }} ({{ _____ }} of {{ _____
_____ }}) of BNSF's non-grain, non-coal carloads shipped under R/VC ratios {{ _____ }} than
Iatan, and that nearly a {{ _____ }} ({{ _____ }} of {{ _____n }}) of non-grain, non-
coal carloads shipped under R/VC ratios {{ _____ }} than Lawrence.

Second, like all railroads, BNSF evaluates traffic based on both {{ _____
_____ }} and its volume projections, weighing both potential short-term margin gains and a steady
base of traffic over time. As resources became scarce, BNSF gave preference to its perceived long-
term interests.

In the BNSF 2022 Intermodal Guide, BNSF states “[a]s we continue to invest in our network and intermodal facilities, we’ll look to create additional capacity.”¹²⁰ Additionally, BNSF’s Tom Williams, then Group VP for Consumer Products, gave a presentation on May 10, 2022, to the North American Rail Shipper Association, highlighting the intermodal network expansions and “multi-year intermodal growth initiative.”¹²¹



E. BNSF’S FAILURE TO MOVE EVERGY’S COAL NOMINATIONS IN 2022

Baranowski/Zebrowski claim that BNSF’s { [REDACTED] } of a trainset serving Iatan was necessary because Evergy was struggling to productively use its { [REDACTED] } sets in service, blaming the inefficiencies entirely on { [REDACTED] } issues at the plant and ignoring the impact of crew

¹²⁰ See, Rebuttal workpaper “Intermodal Guide 2022_BNSF.pdf”, 2022 BNSF Intermodal Guide, page 8, accessed from <https://bnsf.com/ship-with-bnsf/intermodal/intermodal-flipbook/?page=8>.

¹²¹ See, Rebuttal workpaper “BNSF_Intermodal-Panel_NARS-2022.pdf”, NARS BNSF Intermodal Overview, May 10, 2022, accessed from <https://www.railshippers.com/wp-content/uploads/2022/05/Intermodal-Panel-NARS-2022.pdf>.

shortages on the running segments of the cycle.¹²² They use this alleged difficulty to claim that BNSF’s historical ability to operate “between { [REDACTED] } sets in service at Iatan between March and June in 2019 and 2021 are irrelevant.” This is nonsensical. Evergy’s (and other coal plants’) planning process is determined in part by past performance.

Baranowski/Zebrowski further claim that BNSF delivered more coal during the period in which { [REDACTED] } sets were in service compared to the prior period in which { [REDACTED] } sets were in service.

Figure 16: Improvement in Cycle Days and Average Monthly Deliveries (February vs. March-June 2022)³⁵ {{



¹²² They further attempt to justify the { [REDACTED] } based on Iatan’s stockpile and nominations relative to other BNSF coal shippers. *See*, Baranowski/Zebrowski Reply VS at pp. 2-3. However, this just underscores that BNSF was {{ [REDACTED] }} coal service across the board despite its acknowledgement that its customers’ coal stockpiles were being {{ [REDACTED] }} and nominations {{ [REDACTED] }}. Baranowski/Zebrowski also incorrectly state that Evergy’s nominations throughout the first half of the year were { [REDACTED] } because Iatan’s stockpile was allegedly {{ [REDACTED] }}. This is an extension of their argument that Evergy should have no right to adjust its operations, including burn rates, in response to the dynamic energy market that BNSF claims was unforeseeable.

This comparison is based on a very short service window following removal of the { [REDACTED] } set. Moreover, BNSF's analysis uses a partial month in its baseline statistics. When the entire relevant time periods are included in the evaluation, the claimed relationship is shown to be anomalous.

As shown below in Figure No. 26, a more fulsome analysis of the relationship between trainsets and deliveries shows that { [REDACTED] } trainset { [REDACTED] } cycle times only marginally ({ { [REDACTED] } }) while yielding a substantial { { [REDACTED] } } in deliveries ({ { [REDACTED] } }).

Figure No. 26 { {



BNSF's data demonstrate that {{ [REDACTED] }} trainsets substantially {{ [REDACTED] }} deliveries even if cycle times are {{ [REDACTED] }}, consistent with BNSF management's claims in 2014.

Baranowski/Zebrowski further claim that after BNSF subsequently reinstated a {{ [REDACTED] }} set in response to Iatan's rapidly {{ [REDACTED] }} stockpile, the resulting {{ [REDACTED] }} in deliveries to Iatan (shown above in Figure No. 26) was {{ [REDACTED] }} than to other BNSF-served coal plants.¹²³ It is not surprising that BNSF's belated {{ [REDACTED] }} in trainsets serving Iatan produced an {{ [REDACTED] }} in deliveries relative to other facilities that were in {{ [REDACTED] }} positions. BNSF was merely attempting to put out the fire that it had ignited. Moreover, this acknowledgement that {{ [REDACTED] }} contradicts Baranowski/Zebrowski's prior claim (discussed above) that BNSF improved service to Iatan by {{ [REDACTED] }} a trainset (discussed below). It also underscores the impact of BNSF's departure from the recovery approach it deployed in 2014.

Baranowski/Zebrowski also claim that BNSF provided {{ [REDACTED] }} service to Lawrence throughout the year, while acknowledging that BNSF had to {{ [REDACTED] }} deliveries after Lawrence's inventories {{ [REDACTED] }}. They further claim that after the change in service, deliveries to Lawrence {{ [REDACTED] }} by relatively more than other coal shippers whose inventories were also {{ [REDACTED] }}.¹²⁴ This merely shows that other coal shippers may have received {{ [REDACTED] }} service, not that Evergy's service met BNSF's common carrier obligation.

BNSF is essentially positing that equivalent failures to provide requested service means that it acted reasonably in response to Evergy's common carrier request for service (i.e., poor

¹²³ See, Baranowski/Zebrowski Reply VS at pp. 8-9 and pp. 3-4.

¹²⁴ *Id.* at p. 18.

service for all means its service was reasonable). BNSF's approach would make all case-by-case analysis in cases such as this essentially meaningless.

Baranowski/Zebrowski attempt to excuse BNSF's service failures on the grounds that stockpiles at Iatan were {{ [REDACTED] }} in 2022.¹²⁵ However, the time period they use to define historical levels in their comparison (2019-2021) saw {{ [REDACTED] }} stockpiles when compared to the immediately preceding years, as shown in Figure No. 27 below.

Figure No. 27 {{



As shown above, Iatan's winter stockpiles were {{ [REDACTED] }} in 2016 and 2018 than they were in 2022, so the 2022 stockpile was not historically {{ [REDACTED] }} as BNSF claims.

¹²⁵ *Id.* at p. 3.

BNSF claims that because other shippers with {{ [REDACTED] }} inventories than Evergy also {{ [REDACTED] }}, BNSF's failure to add a {{ [REDACTED] }} to Iatan service was justified.¹²⁶ Failure to serve other coal shippers does not excuse BNSF from its obligation to serve Evergy. Additionally, BNSF fails to acknowledge the operational differences at these other plants, including 2 plants {{ [REDACTED] }} during the comparison period and others' average {{ [REDACTED] }} (July 2021 through December 2022).¹²⁷

F. BNSF'S FORECASTING PRACTICES AND MISREPRESENTATIONS REGARDING CREW DEMAND AND STAFFING LEVELS

Baranowski/Zebrowski claim that Evergy was a victim of circumstance because the Iatan increase in demand happened to coincide with the height of BNSF's crew shortage, and that despite BNSF's best effort to follow its "traditional and logical process for projecting crew need that was responsive to changing conditions," it was short by over {{ [REDACTED] }} crew on the Evergy route.¹²⁸

After {{ [REDACTED] }} in July 2022, BNSF could not accommodate Evergy's request to {{ [REDACTED] }} in service to Iatan until December due to a temporary crew shortage along the Evergy route in 2022 that was at its height during this time. This temporary crew shortage occurred due to a confluence of unprecedented changes in labor markets during the pandemic period, as well as major unforeseen increases in {{ [REDACTED] }}. This temporary crew shortage was not the result of changes to BNSF's resource planning processes or target resource levels, and other than crew BNSF had sufficient resources, including locomotive and track capacity.¹²⁹

¹²⁶ *Id.* at pp. 69-70.

¹²⁷ *See*, Rebuttal workpaper "HC Inventory Days_Rebuttal.xlsx" at tab "Fig55 Plant Review", rows 13, 15 and 30.

¹²⁸ *See*, Baranowski/Zebrowski Reply VS at p. 4.

¹²⁹ *Id.* at p. 45.

This is a gross misrepresentation of BNSF’s data and process. The alleged shortage results from a comparison of the average crew demand for all of 2022 that BNSF had projected in late 2021 (approximately {{ [REDACTED] }}), to the crews that were operating in the summer of 2022 ((less than {{ [REDACTED] }}). However, BNSF revises its projected crew demand figures every month. The monthly revisions reveal a very different story of BNSF’s process.

BNSF asserts that its inability to staff its railroad to accommodate the rising demand reflected in its internal forecasts as of December 2021 occurred in spite of BNSF’s efforts to {{ [REDACTED] }} in the months leading up to December.

Figure 41: Evergy Route Projected 2022 Crew Shortage vs. Hiring & Recall Attempts (as of December 2021)⁷⁷ {{



In the right-side bar in the chart above, Baranowski/Zebrowski aggregate planned hires, attempted recalls, and new trainee class cohorts over the second half of 2021. This aggregation obscures the timing and nature of BNSF’s actions. As shown in Figure No. 28 below, while BNSF attempted to {{ [REDACTED] }} in August 2021, BNSF did not initiate a {{ [REDACTED] }} until December 2021.

Figure No. 28 {{



BNSF's late {{ [REDACTED] }} in December 2021 {{ [REDACTED] }} to produce the manpower required to meet BNSF's then-current internal demand projections. As discussed below, BNSF's internal planning documents show that when confronted with internal forecasts projecting that crew demand would {{ [REDACTED] }} supply over its 12+ month planning horizon, and BNSF was {{ [REDACTED] }} to hire sufficient crews in a timely manner to address the {{ [REDACTED] }} it predicted, BNSF brought supply and demand inline by {{ [REDACTED] }} planned train starts to align with its staffing levels.

Specifically, as Baranowski/Zebrowski acknowledge, BNSF's normal-course-of-business projections identified a {{ [REDACTED] }} in December of 2021. The following month, as BNSF was preparing to launch its strict Hi-Viz policy to squeeze more productivity from

existing crews, BNSF {{ [REDACTED] }}. The abrupt change in BNSF demand projections is most evident at Alliance, NE, where BNSF {{ [REDACTED] }} its projected crew demand by {{ [REDACTED] }} (from {{ [REDACTED] }} in its December 2021 forecast (the forecast upon which Baranowski/Zebrowski rely in their analysis) to {{ [REDACTED] }} in the January 2022 forecast).¹³⁰

BNSF data for subsequent months shows that it did in fact hit its then-current (i.e., {{ [REDACTED] }}) crew projections in 2022, while still {{ [REDACTED] }} of the demand level it had projected in December 2021. In other words, BNSF changed its “traditional and logical” process for projecting crew need in response to changing demand into a process that adjusts projected need in response to crew availability. Throughout the course of 2022, {{ [REDACTED] [REDACTED] }}, such that the {{ [REDACTED] }} relative to BNSF’s concurrent plan during the summer of 2022 was less than {{ [REDACTED] }} crew on the Evergy route.¹³¹

¹³⁰ See, Baranowski/Zebrowski Reply VS workpaper “HC BNSF Internal Crew Data.xlsx” at tab “Alliance” cells O11 and P12, respectively.

¹³¹ See, Rebuttal workpaper “Figure 19 Rebuttal.xlsx” at tab “F19 Chart Restatement Data” at Cells H5-J5.

Baranowski/Zebrowski's summary chart depicting the 2022 {{ [REDACTED] }} it had projected in December 2021 (Figure 19, included below) is meaningless because BNSF adjusted its operating plan to limit supply in response to its projections.

Figure 19: Evergy Route vs. BNSF System: Monthly Crew Shortage - Forecasted People Need (as of December 2021) vs. Actual Crew Supply (January 2022 - December 2022)³⁹ {{



When Baranowski/Zebrowski's analysis is repeated using BNSF's adjusted 2022 crew demand figures, a different story emerges, as demonstrated in Figure No. 29 below.

Figure No. 29 {{



As shown in Figure No. 29 above, BNSF had {{ [REDACTED] }} to implement its {{ [REDACTED] }} operating plan across the BNSF system in {{ [REDACTED] }} in 2022.¹³² The Evergy Route {{ [REDACTED] }}, but still showed that BNSF had {{ [REDACTED] }} crews to implement its {{ [REDACTED] }} in the last quarter of 2022. The Evergy Route never experienced a crew {{ [REDACTED] }} relative to the staffing levels required by its {{ [REDACTED] }} operating plan. Additionally, the chart above shows that there was a {{ [REDACTED] }} on the Evergy route from May through September, when there was a system-wide crew {{ [REDACTED] }}.

¹³² January, February, May, June, July, August, and September.

BNSF’s own hiring data further undermines BNSF’s claim. As shown in Table No. 2 below, from December 2021 through November 2022, BNSF’s actual hires {{ [REDACTED] }} its planned hires in total. In short, BNSF {{ [REDACTED] }}—precisely enough to staff the {{ [REDACTED] }} it chose to operate.

Table No. 2 {}

{} {}

For the reasons described above, Baranowski/Zebrowski's contention that BNSF consistently operated with at least {{ [REDACTED] }} than its resource planning process identified as necessary *throughout* 2022 is incorrect.

Even if BNSF had not substantially modified its December 2021 crew demand forecast {{ [REDACTED] }} throughout 2022, its hiring activity does not reflect adherence to the staffing levels that the forecast purportedly required.

Figure No. 30 below recasts the alleged {{ [REDACTED] }} depicted in Baranowski/Zebrowski's Figure 42 by plotting the alleged {{ [REDACTED] }} (defined as the difference between the projected demand line and the actual supply lines in Figure 42) alongside BNSF's 2022 hiring activities over the same period.

Figure No. 30 {{

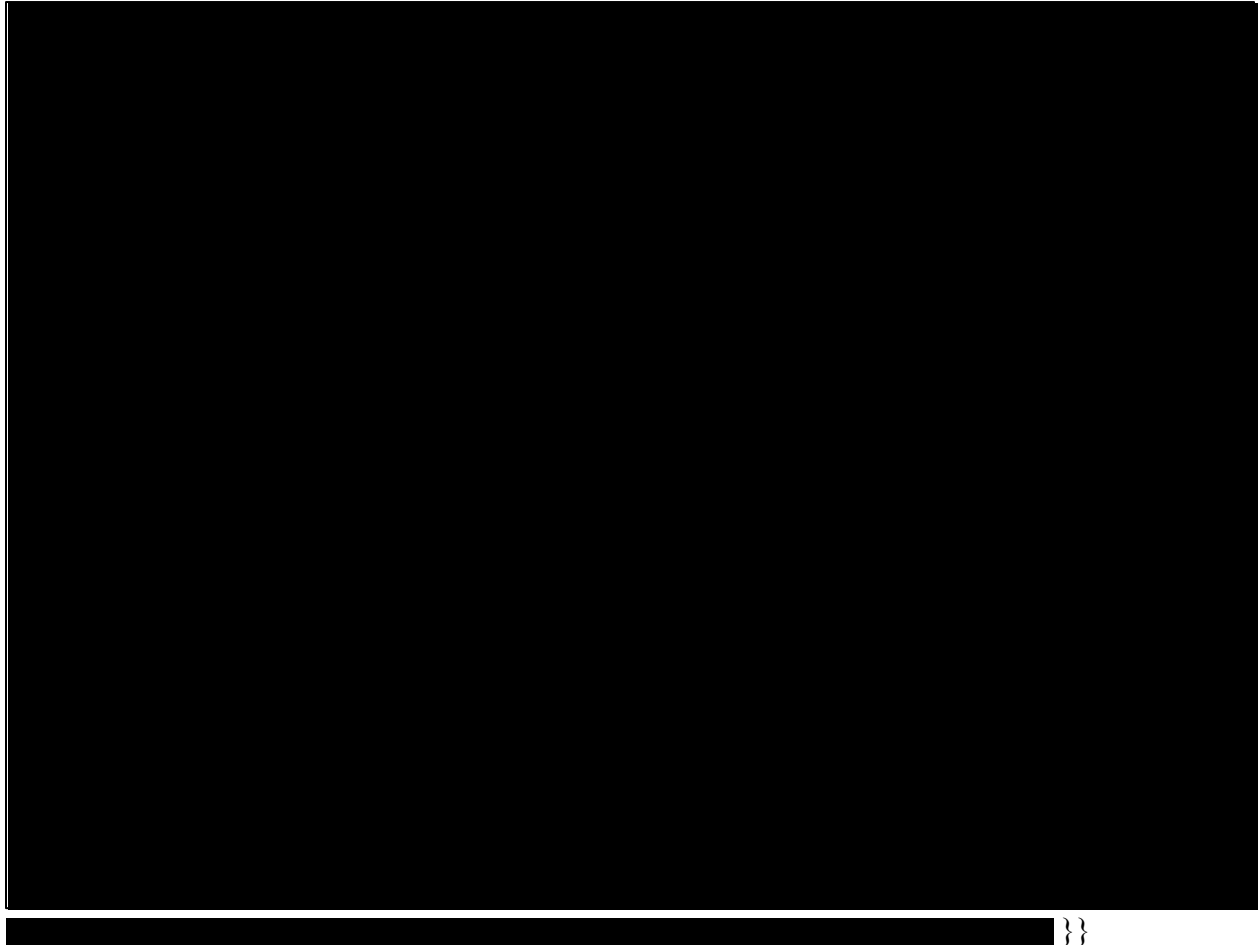


This comparison demonstrates that BNSF's hiring behavior was inconsistent with the magnitude and persistence of the {{ [REDACTED] }} asserted in its analysis.

BNSF also fails to acknowledge that many of its efforts to address its {{ [REDACTED] }}. BNSF should have known, based on recent historical precedent, that {{ [REDACTED] }} to crew availability constraints.

As shown in Figure No. 31 below, BNSF's {{ [REDACTED] }} was not unique to 2022. Figure No. 31 below displays the number of conductors and engineers placed on furlough who were later recalled, by quarter.

Figure No. 31 {{ [REDACTED] }}



Beginning in 1Q 2015 through 4Q 2016, BNSF placed a total of {{ [REDACTED] }} employees on furlough who were later recalled in 2017 or 2018.¹³³ Of the {{ [REDACTED] }} attempted recalls in 2017 only {{ [REDACTED] }} returned to work ({{ [REDACTED] }} percent) failed.¹³⁴

¹³³ See, workpaper “BNSF_EVERGY_0023097_Rebuttal.xlsx” at tab “Furlough Summary” at Cell J17.

¹³⁴ *Id.* at Cells F53, H53 and O53.

BNSF again began furloughing people by the {{ [REDACTED] }} in 1Q19 and continued into the first quarter of 2022, when BNSF furloughed nearly {{ [REDACTED] }}.¹³⁵ In 2022, BNSF issued {{ [REDACTED] }} recall requests; of those, {{ [REDACTED] }} failed and {{ [REDACTED] }} were successful.¹³⁶ For employees recalled in 2022, those who failed recall averaged {{ [REDACTED] }} days ({{ [REDACTED] }}) on furlough, while those who were successful averaged {{ [REDACTED] }} days on furlough.¹³⁷

Dr. Johnson ignores BNSF's {{ [REDACTED] }} in her discussion of BNSF's actions in 2022. Dr. Johnson's Exhibit No. 13 figure, which shows Furlough Recalls along BNSF and the Evergy Route, is shown below.

¹³⁵ *Id.* at Cells E26:E38.

¹³⁶ *Id.* at Cells F58:H58.

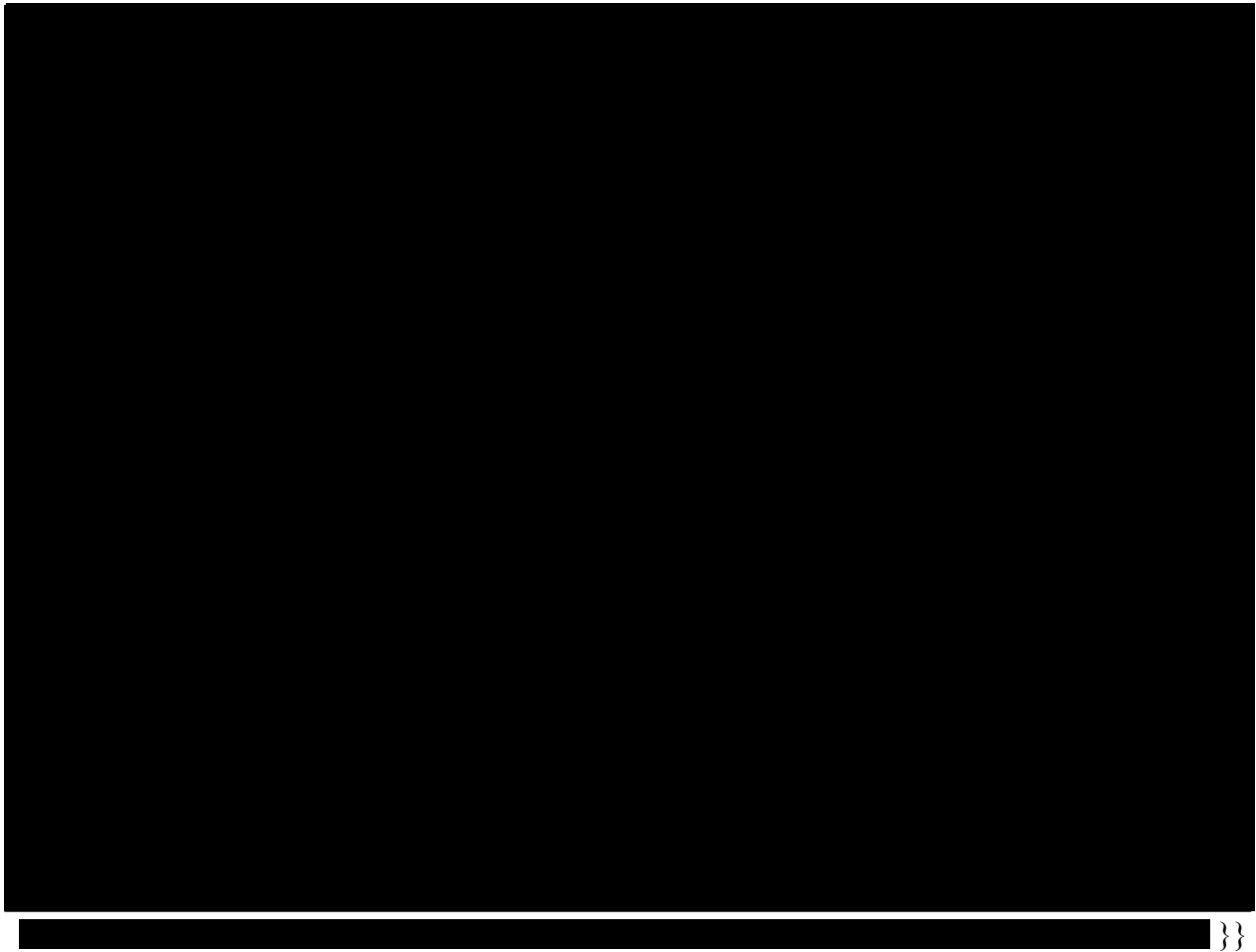
¹³⁷ *Id.* at Cells L58:M58.

Figure No. 32 {{



Figure No. 33 below adjusts Dr. Johnson's chart to show successful recalls only.
As shown below, BNSF's recall requests were largely unsuccessful.

Figure No. 33 {{



**G. BNSF’S ASSESSMENT OF ITS
CAPACITY RATIONING IS MISLEADING**

In defense of BNSF’s failure to deliver Evergy’s 2022 nominations, Baranowski/Zebrowski include a comparative analysis meant to demonstrate that Evergy’s 2022 winter stockpile was {{
■■■■■■}} relative to its average 2019-2021 stockpiles than those of other coal shippers:

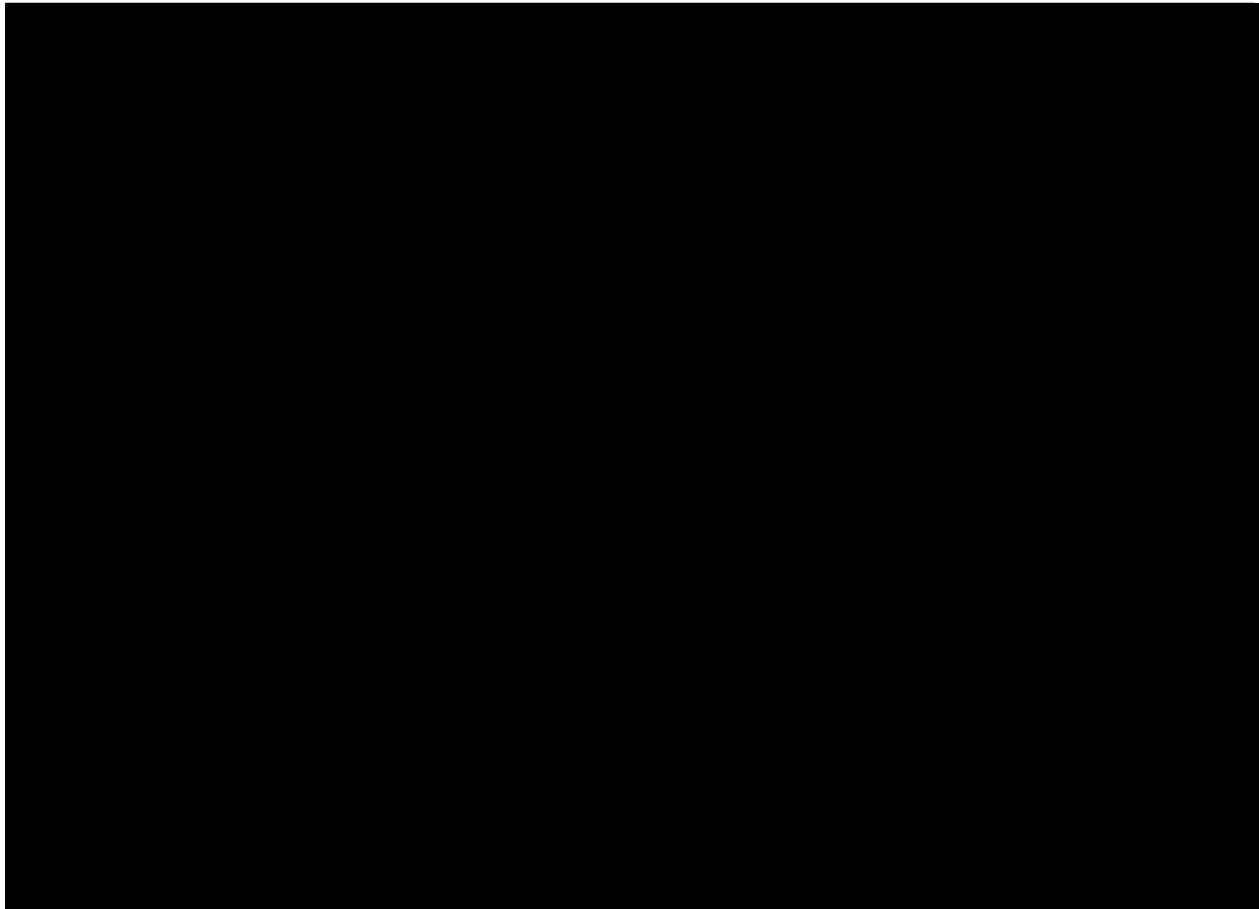
Figure 12: Percent Difference - Average Winter 2022 Stockpile vs. Average Winter 2019-2021 Stockpile²⁹ {{



BNSF's analysis does not take into account closures and does not consider wide operational and regional differences among the facilities included in the comparison.

First, Baranowski/Zebrowski include plants with all or significant portions of their generating capacity retired during the study period. Closing power plants naturally reduce stockpiles leading up to retirement. Figure No. 34 below identifies the closing facilities included in Baranowski/Zebrowski's analysis.

Figure No. 34 {{



Of the {{ [REDACTED] }} included in the comparison,¹³⁸ {{ [REDACTED] }} plants closed a portion or all of their capacity during or shortly after the analysis period. One of the plants in this analysis, {{ [REDACTED] }}, closed 25% of its capacity in {{ [REDACTED] }} as reported in EIA Form 860. Additionally, {{ [REDACTED] [REDACTED] }}. Yet, Baranowski/Zebrowski appears to have included {{ [REDACTED] }} in many of these analyses with no acknowledgement of this shift.

¹³⁸ Note, numerous Baranowski/Zebrowski Figures rely on the same closed plants. *See*, Rebuttal workpaper "HC EIA Burn, Stockpile, Deliveries_Rebuttal.xlsx" at tab "Plants Included" for full analysis of plants included in each analysis, including flags for plants that closed or changed carriers.

Second, Iatan stockpiles were not {{ [REDACTED] }} in the winter of 2022 as Baranowski/Zebrowski contend¹³⁹; they were {{ [REDACTED] }} in both 2019 and 2021. As shown in Figure No. 27, in Section III.E. above, 2016 and 2018 average stockpile tons were {{ [REDACTED] }} than the average in 2022. Stockpiles in 2021 were {{ [REDACTED] }} than the average of the prior five years.¹⁴⁰

When Baranowski/Zebrowski Figure 12 is restated to compare the winter 2022 stockpiles to all winters 2013 through 2021, rather than 2019 through 2021, Iatan and Lawrence both shift to the right of the chart as shown in Figure No. 35 below.

¹³⁹ See, Baranowski/Zebrowski Reply VS at p. 55.

¹⁴⁰ See, Rebuttal workpaper “HC EIA Burn, Stockpile, Deliveries_Rebuttal.xlsx” at tab “Winter Stockpile Comparison” at Cell BQ58.

Figure No. 35 {{



As shown above, Lawrence's 2022 winter stockpile was {{ [REDACTED] }} than the average stockpile for 2013 through 2021.

1. BNSF Misrepresents Evergy's Burn Rates in Relation to Other Plants in BNSF's Alliance Corridor

Messrs. Baranowski and Zebrowski state that:

Evergy's belated { [REDACTED] } was shortly thereafter followed by a dramatic increase in burn at Iatan starting in June 2022. This increase was greater than practically {{ [REDACTED] }} as Baranowski/Zebrowski Figure 32 below shows.¹⁴¹

Figure 32: 2022 Monthly Burn - Percentage Over or Under Annual Average Monthly Burn (January 2022 - December 2022)⁵⁹ {{



Messrs. Baranowski and Zebrowski paint Evergy's increase in burn as belatedly reversing course rather than responding in real time to market forces they elsewhere acknowledge.¹⁴² Moreover, while they identify Iatan's ramp up as the {{ [REDACTED] }} highest among coal plants in BNSF's Alliance Corridor, they ignore the fact that the other plants with comparable increases were in the same Midwest region and responding to the same regional surge in demand.

The comparison presented in Baranowski/Zebrowski Figure 32 evaluates Iatan's 2022 burn pattern against quartiles derived from a highly heterogeneous fleet of BNSF-served coal plants, many of which differ markedly from Iatan in geography and dispatch conditions. By aggregating

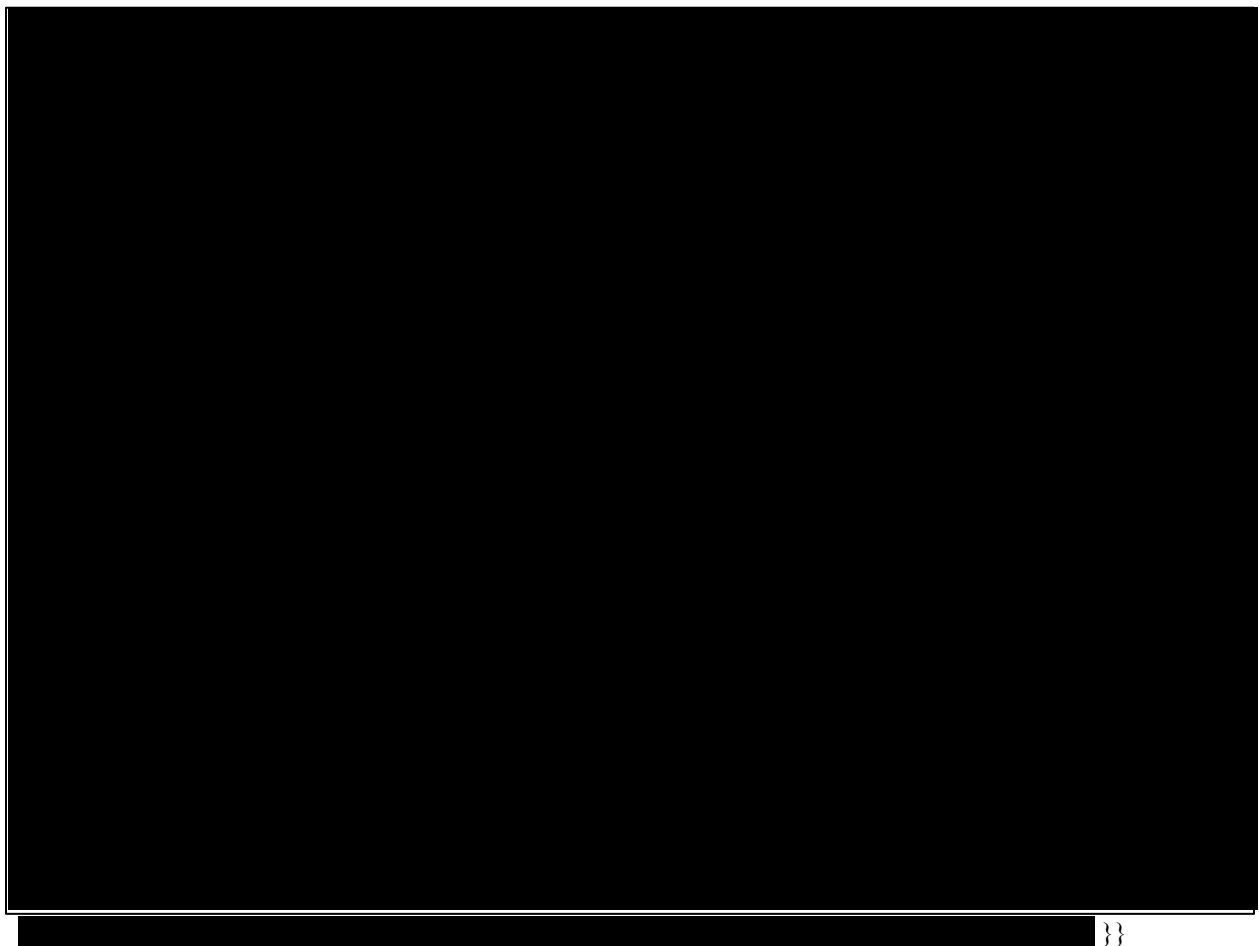
¹⁴¹ See, Baranowski/Zebrowski Reply VS at pp. 37-38.

¹⁴² *Id.* at p. 3.

units from widely dispersed regions into a single statistical distribution, the quartile presentation obscures common market and weather-driven factors that affected plants in the central Midwest during 2022.

When Iatan's burn pattern is compared to a set of geographically proximate peer plants, a very different and more accurate picture emerges, as illustrated in Figure No. 36 and Figure No. 37 below.

Figure No. 36 {{



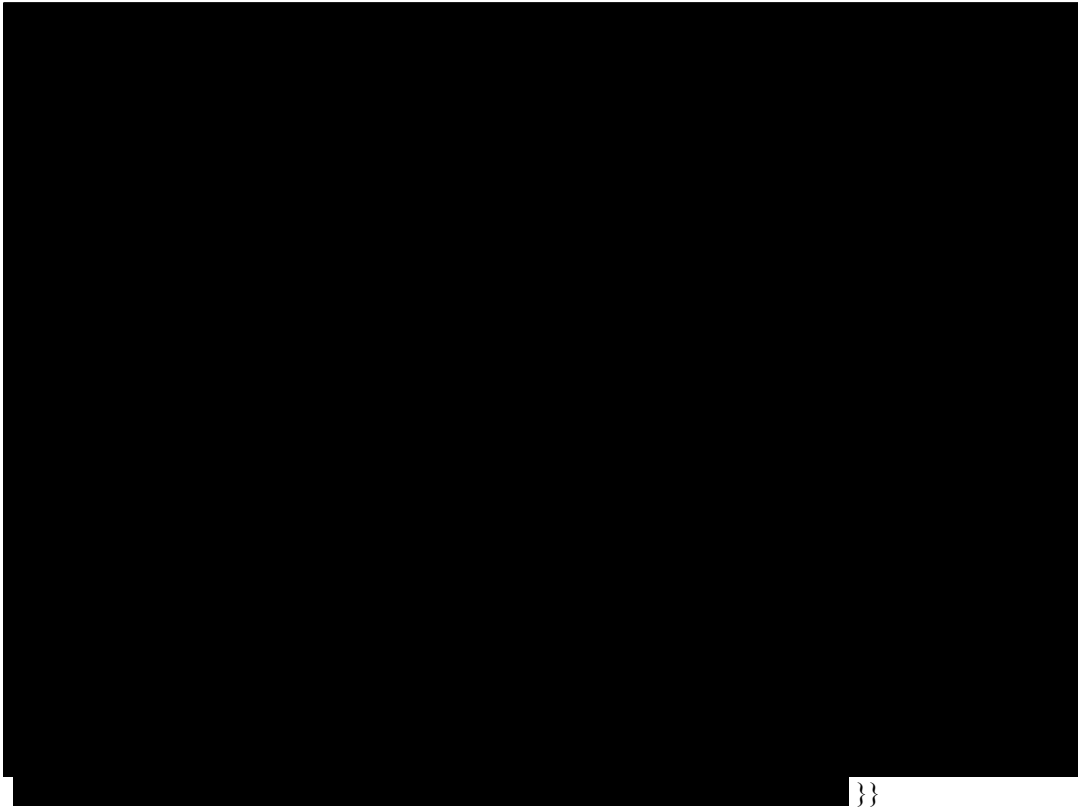
As shown, plants such as {{

all

experienced similar summer 2022 burn spikes.

Figure No. 37 below shows the location of the relevant facilities.

Figure No. 37 {{



These plants all followed nearly the same trajectory of spring burn reductions, pronounced increases in June through August, and subsequent normalization in the fall. This peer-group comparison demonstrates that Iatan's burn profile was not anomalous, but rather part of a broader regional response to shared conditions. Baranowski/Zebrowski's approach benchmarks Iatan's operations against an inappropriate comparison group, rather than against similarly situated units experiencing the same regional drivers.

As shown in Exhibit No. 20¹⁴³ to this RVS, Evergy's burn rates were on par with its peer facilities over the entire 2019-2022 time period.

¹⁴³ Exhibit Nos. 1 through 19 were included in our OVS filed in this proceeding on June 25, 2025.

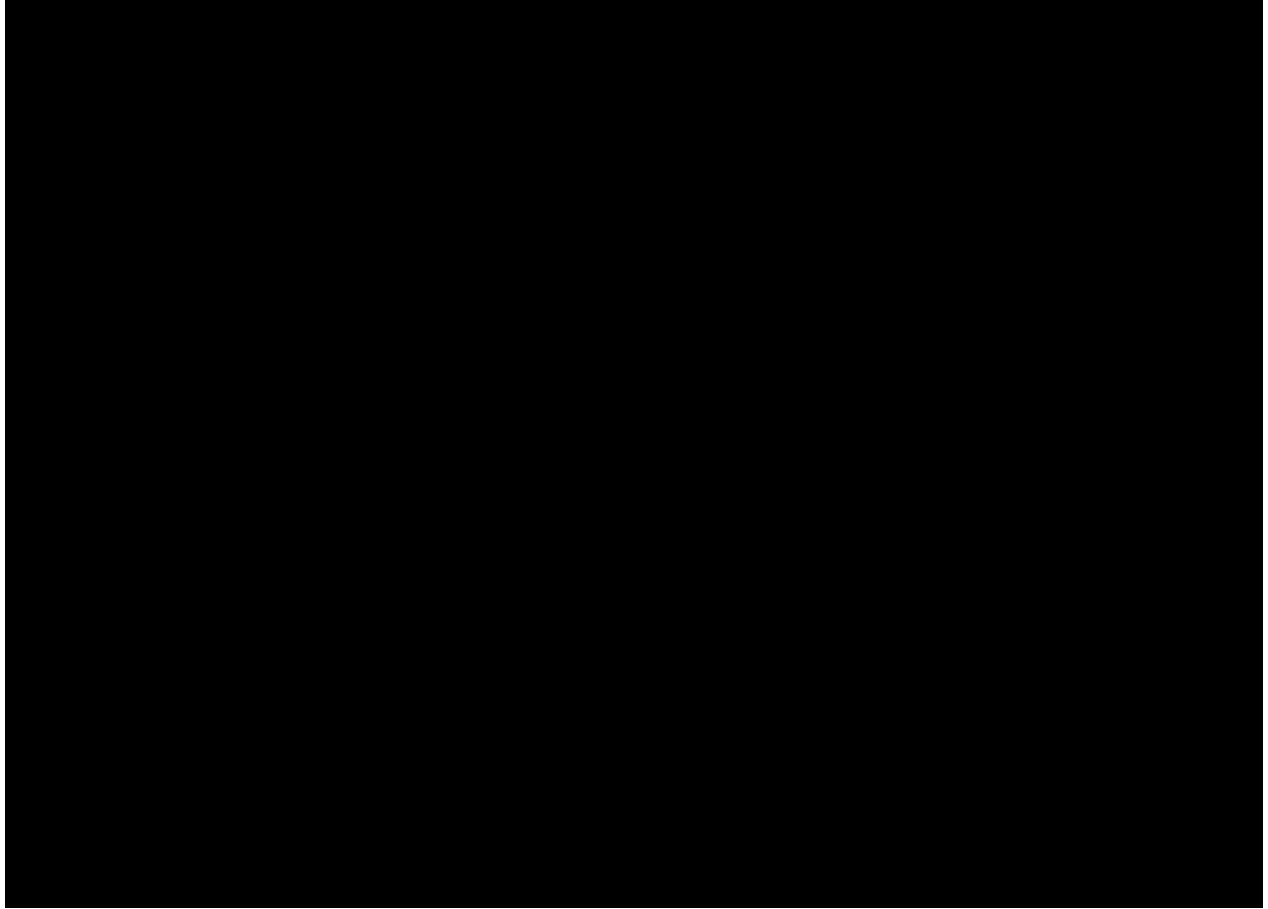
2. BNSF Misrepresents Its Service to Lawrence After Reported Inventory Levels Dropped Below 20 Days

Baranowski/Zebrowski assert that { [REDACTED] } treatment compared to other plants that landed on BNSF's "hot list" { [REDACTED] } in 2022. According to Baranowski/Zebrowski, { [REDACTED] } by { [REDACTED] } in the three months after it appeared on the hot list compared to the three months before. They compare this statistic to an average increase of { [REDACTED] } for other plants on BNSF's "Hot List."¹⁴⁴

Baranowski/Zebrowski's analysis falsely implies that Lawrence did { [REDACTED] } than all other plants in the comparison group. The comparison group comprises 28 plants, with significant differences in the volume of coal received. Lawrence received an average of { [REDACTED] } monthly tons before appearing on the hot list and { [REDACTED] } monthly tons afterwards. For the other plants, in the 3 months before appearance on the hot list, average monthly tonnages ranged from { [REDACTED] } to { [REDACTED] } tons, with an overall average of { [REDACTED] }. In the 3 months after appearing on the hot list, the plants' monthly average tonnages ranged from { [REDACTED] } to { [REDACTED] } tons, with an overall average of { [REDACTED] }. Of course, few if any of the other plants observed the average { [REDACTED] } calculated by Baranowski/Zebrowski. Some fared better and some fared worse. The range of outcomes is depicted in Figure No. 38 below.

¹⁴⁴ *Id.* at p. 64.

Figure No. 38 {{



145 }}

H. BNSF'S THROUGHPUT ANALYSIS IS FLAWED

Baranowski/Zebrowski include an out-of-context comparison of carloads and gross ton-miles (GTM)¹⁴⁶ to support their claim that throughput {{ [REDACTED] }}. This is nonsensical as well. As the name of the metric implies, GTM is a function of both volume (as measured by weight) and distance travelled. To the extent that relatively shorter-haul moves are

¹⁴⁵ {{ [REDACTED] }}

¹⁴⁶ See, Baranowski/Zebrowski Reply VS at Figure 9.

added to a system, GTM relative to carload volume will decrease. A 125-car train could traverse an 800-mile route or a 1,000-mile route. The second train would generate 20% more GTM than the first. Either way, the throughput is 125 cars. However, the longer route would consume more resources (locomotive hours and crew starts), all else being equal. Therefore, the question is not just how many cars were added, but also where they are moving.

In addition, to the extent that relatively lighter shipments are added to a system, GTM relative to carload volume will decrease. Laden coal cars are among the heaviest carloads moving on BNSF's system. Replacing heavy coal cars with lighter cars would also reduce GTM, even over identical routes.

Finally, different traffic groups have different empty-return ratios. Unit coal trains remain intact for a complete cycle, moving loaded from the mine to the plant, and then returning empty. This creates an empty-return ratio of 2.0, as unit coal train cars are cycled, so the route miles are incurred twice. In contrast, carloads carrying commodities moving in manifest and intermodal service do not generally return to their origin empty. Rather, they are often repositioned and reloaded for the next revenue shipment. As a result, they have empty-return ratios less than 2.0.¹⁴⁷ Therefore, replacing coal traffic with other commodities will result in fewer GTM, despite moving the same number of loaded shipments, even if the loaded route miles are the same for both services.

¹⁴⁷ See, STB URCS user manual "*Empty Loaded Ratio* –This parameter reflects the amount of empty car movement before spotting for another shipment, which results from the loaded shipment distance. The two ratio extremes for the empty/loaded ratio are: 1.0 that implies no empty return mileage and 2.0, which implies a 100 percent empty return of the freight car."

**I. BNSF’S CLAIMS REGARDING
LOCOMOTIVE AVAILABILITY AND
THE ROLE OF CREW SHORTAGES**

Baranowski/Zebrowski claim that we “mistakenly assert there was a locomotive shortage in 2022.”

“Messrs. Mulholland and Crowley observed {{ [REDACTED] }} and wrongly concluded this was due to BNSF lacking sufficient locomotive resources. Had Messrs. Mulholland and Crowley conducted a more robust analysis, they would have found that the correct interpretation of the observed {{ [REDACTED] }} is that BNSF did not have enough crew resources in place to productively use the additional locomotive resources that were in ample supply.”¹⁴⁸

First, we correctly analyzed locomotives in use, not total locomotives. Locomotives are only useful assets if they are operational and deployed strategically throughout the network. In 2022, BNSF acknowledged “five miles of engines stored” sitting at Donkey Creek.¹⁴⁹

When there was a slight temporary downturn in coal production, BNSF shut down major coal inspection yards at Guernsey, Donkey Creek, and Edgemont. With these shutdowns, the process for refueling locomotives went from “2 to 4 hours” to between “24 and 48 hours.”

In places that we inspected these when they thought coal was going to go away they shut down [Guernsey], Wyoming, Donkey Creek, Wyoming, Edgemont, South Dakota, and said we don't need these anymore, and they moved these two sitings in different locations where the train would pull in, would pull the power off and would run it to the nearest gas station, and they're 24 to 48 hours.¹⁵⁰

BNSF’s crew shortage caused it to store locomotives, so those locomotives were not in service. This demonstrates that a shortage in a single operating input effectively reduces the capacity of the entire system. Under a Leontief production function,¹⁵¹ output is determined by the

¹⁴⁸ See, Baranowski/Zebrowski Reply VS at p. 56.

¹⁴⁹ See, STB Docket Ex Parte No. 770, *Urgent Issues In Freight Rail Service*, Public Hearing Transcript, witness Matthew Burkart (Matthew Burkart EP 770), April 26, 2022 hearing at p. 144.

¹⁵⁰ *Id.* at p. 139.

¹⁵¹ See, EconGraphs Textbook, Christopher Makler, 2.6 *Leontief (Fixed Proportions) Production Functions*,

scarcest required input, because complementary inputs—such as locomotives, crews, and track capacity—must be used in fixed proportions to produce a train movement.

Assume running one train requires one crew and one locomotive. The railroad's maximum trains per day equals the minimum of the available input bundles. With 100 locomotives, 100 crews, and sufficient track capacity, the railroad can operate 100 trains per day because all required inputs are available in matching quantities. But if crew availability falls from 100 to 70, while all other inputs remain unchanged, the production function becomes:

$$\text{Trains per day} = \min (100 \text{ locomotives}, 70 \text{ crews}) = 70.$$

Even though 30 locomotives remain physically available, they cannot be used because crews are the binding constraint. As a result, system capacity contracts to 70 trains per day, demonstrating the key Leontief principle: *extra units of any non-limiting input (locomotives, track capacity) have zero marginal effect on output when one essential input (crews) becomes insufficient.*

BNSF's argument simply demonstrates that BNSF's crew shortage served to cap its operating capacity below its physical capacity.¹⁵²

accessed from

https://www.econgraphs.org/textbooks/intermediate_micro/scarcity_and_choice/production/leontief.

¹⁵² See, Mulholland/Crowley Opening VS at Exhibits No. 11 and 15.

VERIFICATIONS

I, Timothy D. Crowley, verify under penalty of perjury that I have read this Rebuttal Verified Statement on behalf of Evergy, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Timothy D. Crowley

Executed on 1/20/26

* * *

I, Robert D. Mulholland, verify under penalty of perjury that I have read this Rebuttal Verified Statement on behalf of Evergy, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

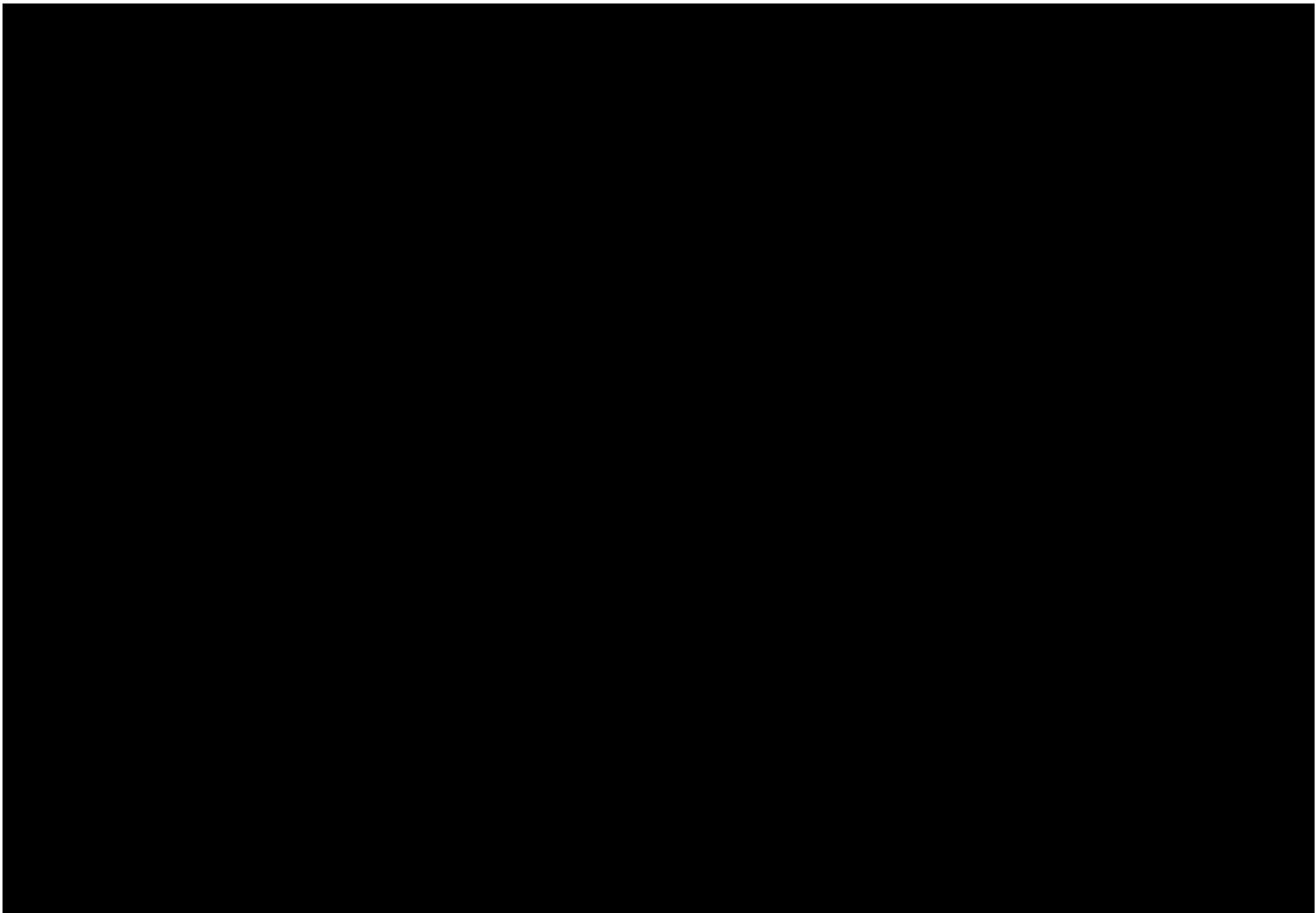


Robert D. Mulholland

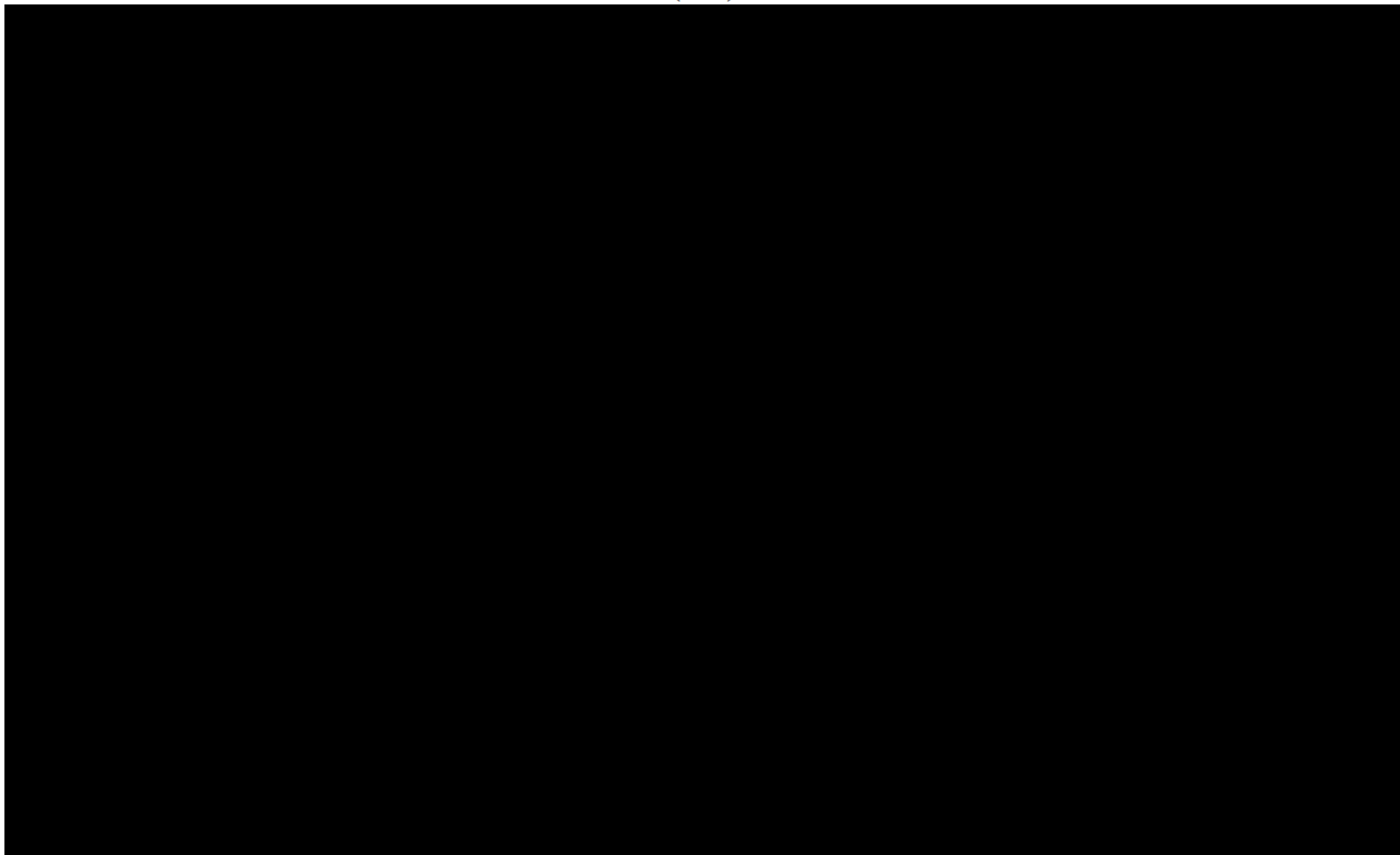
Executed on 1/20/26

LIST OF EXHIBITS

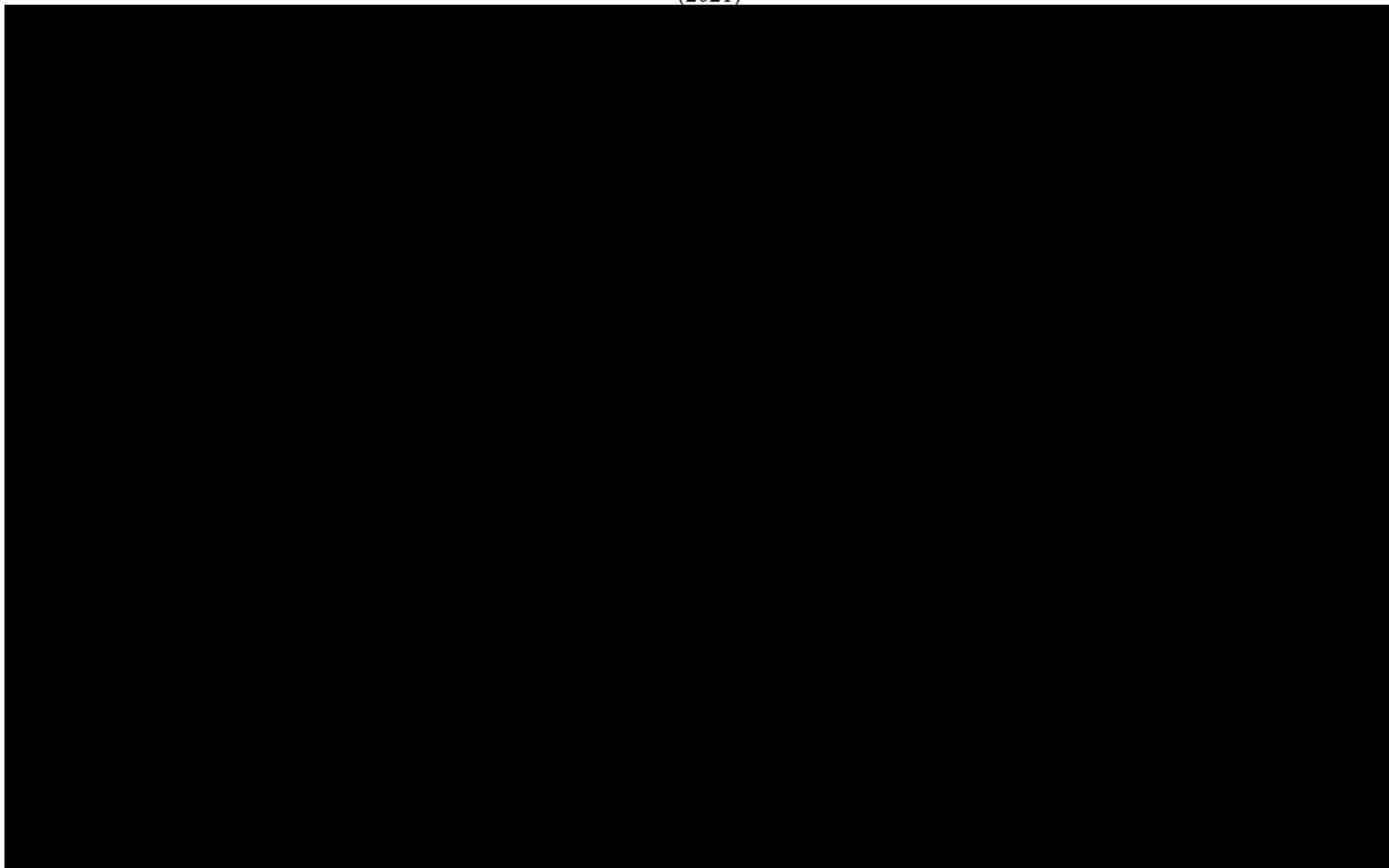
Exhibit No.	Exhibit Description
(1)	(2)
20	2019 to 2022 Midwest Region Plants Monthly Burn – Percentage Over or Under Annual Average Monthly Burn



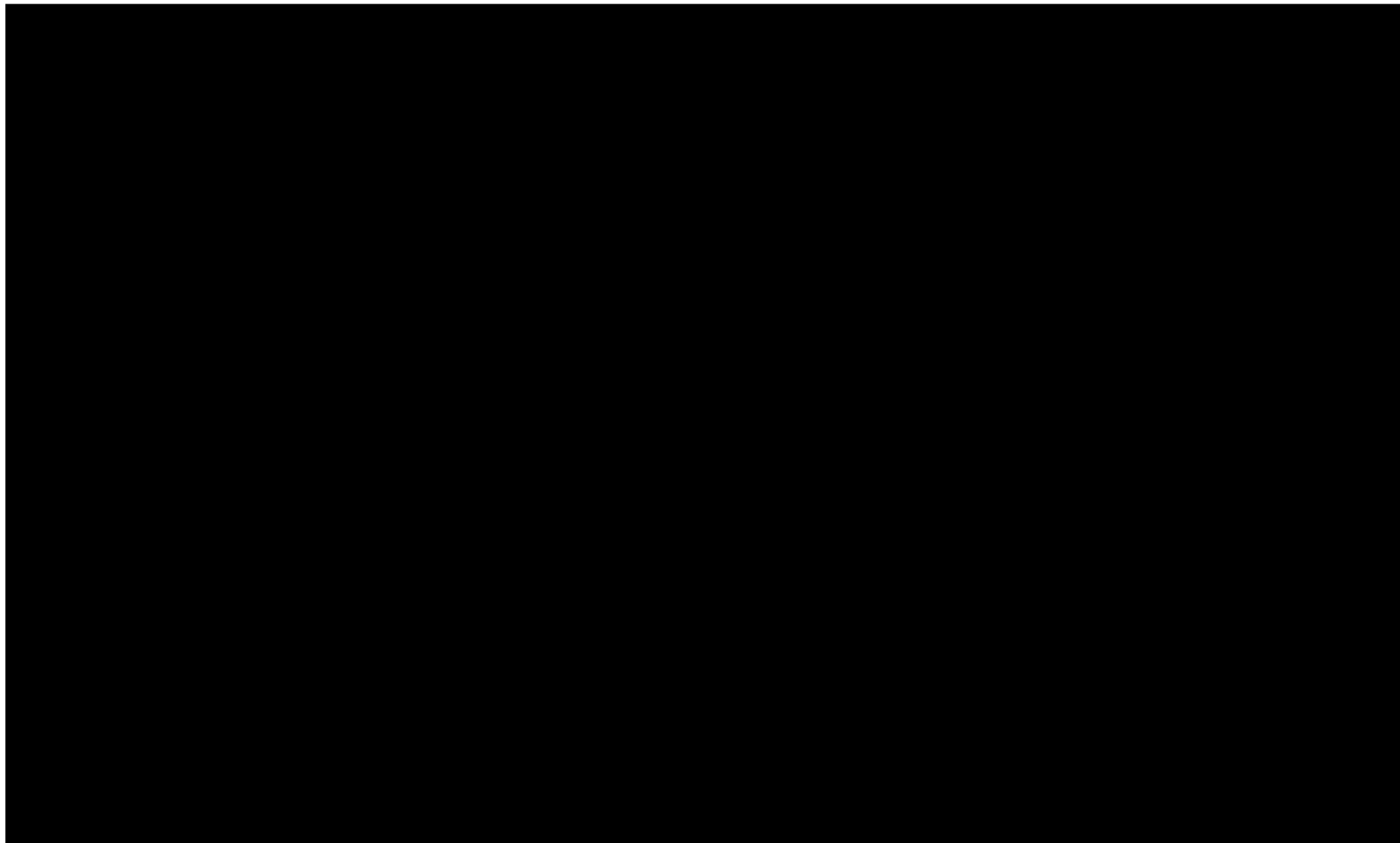
2019 to 2022 Midwest Region Plants Monthly Burn - Percentage Over or Under Annual Average Monthly Burn
(2020)



2019 to 2022 Midwest Region Plants Monthly Burn - Percentage Over or Under Annual Average Monthly Burn
(2021)



2019 to 2022 Midwest Region Plants Monthly Burn - Percentage Over or Under Annual Average Monthly Burn
(2022)



BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT

of

Daniel L. Fapp
Senior Vice President



On Behalf Of

EVERGY INC., EVERGY METRO, INC. and EVERGY KANSAS CENTRAL, INC.
(“EVERGY”)

Dated: January 20, 2026

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LIST OF EXHIBITS

<u>Exhibit No.</u>	<u>Exhibit Title</u>
(1)	(2)
1	Daniel L. Fapp Qualifications

I. INTRODUCTION

My name is Daniel L. Fapp. I am a consultant and Senior Vice President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting, and fuel supply problems. I have been employed by L. E. Peabody & Associates, Inc. since 1997. During this time, I have worked on numerous projects dealing with railroad revenue, operational, economic, and financial issues. Prior to joining L. E. Peabody & Associates, Inc., I was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, where I also served as an officer of the three (3) BHP Copper Inc. subsidiary common carrier railroads. A copy of my credentials is included as Exhibit 1 to this Verified Statement (“VS”).

I was requested by Counsel for Evergy to respond to BNSF Railway Company’s (“BNSF”) Reply filed November 20, 2025, in the instant proceeding, including specifically responding to the Verified Statement of Dr. Jeffery T. Prince (“Prince VS”) and the Verified Statement of Dr. Erin M. Johnson (“Johnson VS”) included with the BNSF Reply.

The results of my findings and analyses are summarized in the remainder of this VS under the following topical headings:

II. Summary of Findings

III. BNSF’s Common Carrier Obligation

IV. The Impact of the COVID Pandemic on BNSF Crew Availability

II. SUMMARY OF FINDINGS

Based on my review and analyses of BNSF's Reply statements in this proceeding, I reached the conclusions set forth below:

1. In 2022, Evergy was a common carrier shipper of the BNSF. It sought to ship certain volumes of coal to its Iatan and Lawrence generating stations, which volumes were typical annual volumes of coal that Evergy had shipped in the past. There was nothing extraordinary or unusual about Evergy's common carrier request.
2. Dr. Prince overstates the impact of competition in the railroad industry and fails to include the impact of the difference between competitive and captive shippers.
3. Dr. Prince's claim that railroad prices declined over time due to competition fails to recognize that railroad rates have fallen in large part because of railroads transferring costs to their shippers in ways other than pricing.
4. Dr. Prince's conclusion that competitive pressures in downstream markets for commodities moved by rail held rail rates stable is a mischaracterization of an STB analysis. A more likely conclusion from the STB analysis is that the railroads reached the zenith of their market power and that extracting any further monopoly rents might have begun to erode their revenues.
5. Dr. Prince does not recognize that in many situations, railroads create their own negative circumstances, which impact their operations and investment choices. Rail carriers make strategic decisions about capacity, crew levels, equipment, and infrastructure investment and maintenance, which directly create the supply conditions they later cite as constraints on their operations.
6. Allowing circumstance-based evaluation of their common carrier obligations would allow carriers to benefit from their own underinvestment, e.g., cutting costs during good times, then claiming constrained circumstances during challenging periods.
7. The railroads' decisions to repeatedly cut crew levels led to poor service.
8. Adjusting railroad industry service obligations in response to changing circumstances will create perverse incentives that are contrary to the national transportation policy.
9. The inherent economic "bargain" in the common carrier statutory scheme, coupled with the STB's recognition of differential pricing, is that the railroad will actually provide the service for which it extracts the monopoly pricing. Dr. Prince's approach renders that bargain meaningless.

10. Dr. Prince's excess capacity argument is flawed. While Dr. Prince focuses on the potential issues of overinvestment in railroad capacity, he does not take into consideration the issues raised with the underinvestment in capacity. The efficient capacity level from the railroad's private perspective is not the socially efficient level when shortage costs fall primarily on customers with no alternatives.
11. The cost of being caught short-handed during a demand peaks vastly exceeds the cost of maintaining some idle capacity during demand troughs. The temporary cost of idle equipment and furloughed workers is dwarfed by the irreversible loss of trained personnel and the harm to shippers and downstream consumers that results from sustained service failures.
12. Common carriers have obligations that may require maintaining capacity beyond the pure profit-maximizing level. The essence of the public utility concept is the enforcement of the obligation to serve all upon reasonable request. This obligation may require capacity in excess of that which would maximize profits in the short run.
13. Dr. Prince overstates the information sharing and efficiency differences between railroad contracts and common carrier tariffs.
14. The type of information gathering tools that Dr. Prince states are not included in common carrier pricing authorities are, in fact, included in the common carrier pricing authority at issue in this proceeding.
15. Dr. Prince does not recognize that a common carrier tariff provides an outside option to the railroad to change the terms of the common carrier tariff, including raising the transportation rates, unilaterally.
16. Dr. Prince ignores the reciprocal obligations on shippers in common carrier tariffs.
17. Shippers are not co-managers of a railroad's network and have no ability or responsibility to ensure the availability of capacity for other shippers on a rail line.
18. Private rail networks, such as the BNSF, are not "commons" from an economic perspective. The U.S. freight railroad system operates under a vertically integrated private-ownership model rather than as a shared common resource. Class I railroads in the U.S. own, maintain, and operate their own infrastructure, making them fundamentally different from a "commons" where multiple actors share unrestricted access to a finite resource.
19. It is not the responsibility of shippers to take into consideration the interests of other shippers on a privately owned railroad. The railroad owns and operates the infrastructure on its network and has the right to manage it as it sees fit, within its statutory obligations.

20. Dr. Prince's discussion of other industries' supply chain problems in 2022 never equates those issues with the U. S. railroad industry and BNSF specifically.
21. Well before March 2020, when the COVID pandemic began, BNSF was experiencing labor issues, primarily due to their cost-cutting operations, reductions in force and enhanced focus on increasing profits.
22. BNSF instituted furloughs in 2019 that put them in a position from which they could not readily recover. In 2019, BNSF had 40,750 employees. By 2021, the number of employees had dropped to 35,125.
23. Dr. Johnson's own data shows that the other Class I railroads brought back furloughed employees or hired new employees at a higher rate than BNSF.
24. In both BNSF's 2021 and 2022 SEC Forms 10-K, BNSF told its investors that it had the personnel required to serve its current customers.
25. Both Dr. Johnson's and Dr. Prince's credentials lack any specific railroad industry or individual railroad experience.

Based on the above summarized findings, I conclude that the evidence provided by Dr. Prince and Dr. Johnson is not sufficient to conclude that BNSF did not have the ability to serve Evergy under its common carrier obligations.

III. BNSF’S COMMON CARRIER OBLIGATION

The common carrier obligation is a well-established principle requiring that railroads, such as BNSF, provide service to shippers upon reasonable request. In 2022, Evergy was a common carrier shipper of the BNSF. It sought to ship certain volumes of coal to its Iatan and Lawrence generating stations, and those volumes were, as shown in Evergy’s Opening Evidence, typical volumes of coal that Evergy had shipped in the past. Likewise, Evergy sought to utilize additional trainsets to ship that coal, given that it was unlikely that BNSF would provide the requested common carrier service without those additional trainsets. There was nothing extraordinary or unusual about Evergy’s common carrier request.

BNSF’s witness, Dr. Prince, takes this bedrock principle of the United States railroad industry and suggests that fulfilling Evergy’s common carrier service request, and effectively any enforcement of the common carrier obligation by the STB, would somehow bring the railroad industry to its knees – despite having been a principle of such regulation for nearly 150 years.

Dr. Prince opines that the railroad industry’s common carrier obligation is a regulatory principle that requires railroads to make only reasonable efforts to meet a shipper’s reasonable request to transport traffic. He also asserts that in fulfilling this obligation, railroads must take measures to ensure an efficient rail network that remains competitive and economically viable.¹

Dr. Prince also claims that to avoid negative economic impacts to the rail network, including the risk of entering a downward spiral in which declining efficiency and performance undermine railroads’ competitiveness and ultimately hurt shippers and consumers, the STB should be mindful of certain economic principles, or “guardrails,” when considering railroads’ common carrier obligations. Dr. Prince’s guardrails include evaluating service levels based on the

¹ See, Prince VS at pages 2-4.

reasonableness of the railroad's circumstances (and effectively not the reasonableness of the shipper's request), not requiring railroads to maintain capacity sufficient to meet supply and demand during peak periods, recognizing that railroad service under transportation contracts is different than under common carrier tariffs such that the Board should effectively punish common carrier shippers, and placing a burden on individual shippers and, effectively the Board, to anticipate how a shipper's common carrier request may conflict with the overall network health of the carrier.²

Dr. Prince states that Evergy's claim that BNSF did not meet its common carrier obligation contradicts his economic guardrail principles. He asserts that Evergy failed to recognize the circumstances impacting BNSF's network during the issue period, including the impact of the COVID pandemic and economic recovery. Dr. Prince also claims that Evergy's alleged definition of the STB's common carrier obligation would force BNSF to operate with "inefficient" capacity, which would subsequently harm shippers on the BNSF network by raising prices and harm BNSF by pushing some BNSF customers to use other transportation modes. Dr. Prince additionally asserts that Evergy's alleged definition of the STB's common carrier obligation confuses BNSF's obligations under what he calls "contract service" and the railroad's obligations under common carrier service, and that under Evergy's alleged definition of common carrier service, BNSF would have to reserve capacity for Evergy without any reciprocal commitment on Evergy to utilize the capacity. Finally, Dr. Prince states that Evergy's alleged definition of the railroad's common carrier obligation would increase the risk of the so-called "tragedy-of-the-commons" outcome

² *Id.*

whereby Evergy would have little incentive to consider the impact on other shippers and on BNSF's rail network.³

Dr. Prince's "guardrails" fail to take into account the numerous regulatory guardrails in place to prevent the adverse outcomes he suggests. He also creates a world in which there is only a binary choice between contract services and common carrier services without recognizing, as the STB has in its prior decisions, that the railroad industry is much more complex than a simple binary arrangement and that contract and common carrier services are essentially the same in many cases. Dr. Prince's guardrails are also, in many instances, completely contradictory to prior STB decisions and precedents and to BNSF's own statements and operations. Finally, Dr. Prince incorrectly conflates the world of common resource allocations with private networks and effectively attempts to fit a round peg into a square hole.

Each of the above Prince missteps is the result of Dr. Prince's misstatements of how the railroad industry functions. A review of Dr. Prince's credentials clearly demonstrates the large void in his experience regarding individual railroads or the railroad industry.⁴

A. DR. PRINCE OVERSTATES THE COMPETITIVENESS OF THE RAILROAD INDUSTRY

Dr. Prince asserts that a railroad's common carrier obligation must recognize and account for the railroad's need to be economically and operationally efficient to effectively compete. This means that regulation of railroads should reflect market economics as much as possible, and not the bedrock principle that the railroad provide service upon reasonable request. Dr. Prince contends that if STB common carrier obligations impose significant inefficiencies, then railroads will not

³ See, Prince VS at page 4.

⁴ *Id.*

be able to compete effectively, harming rail customers and the public interest.⁵ Dr. Prince also claims that greater inefficiencies in a rail network impose costs on all railroad participants, including shippers, who may experience these inefficiencies in terms of higher prices, or lower quality of service, or both.⁶ He states that this can lead to railroads entering a “downward spiral” in which declining efficiency undermines their competitiveness and ultimately further hurts shippers and consumers.⁷

Dr. Prince portrays railroads, like BNSF, as existing in a competitive environment because of the existence of intramodal and intermodal competition and geographic and product competition.⁸ He claims that railroads face intense competition because rail rates have fallen since 1985 when measured on a real basis. Dr. Prince concludes that railroads such as BNSF must be efficient to compete effectively and any common carrier obligation must recognize and account for a railroad’s need to compete.⁹ What Dr. Prince fails to include in this discussion is the difference between competitive and captive shippers.

While BNSF is impacted by competitive forces, Dr. Prince overstates the impact of competition on railroads. The STB and its predecessor agency, the Interstate Commerce Commission (“ICC”), have long recognized that the railroad industry is not as competitive as other transport industries due to the high barriers to entry and exit from the industry. The Board has, nevertheless, taken the competitive aspects of the railroad industry into consideration when developing regulations. Dr. Prince provides no rationale for rewriting the statutes or regulations

⁵ See, Prince VS at page 10.

⁶ *Id.* at page 7.

⁷ *Id.*

⁸ *Id.* at pages 7-8.

⁹ *Id.* at page 10.

to fit his incorrect view of the competitive circumstances that BNSF faces nor the workings of the common carrier obligation, especially not retroactively.

Dr. Prince's claim that railroad prices have declined over time due to competition fails to recognize that railroad rates have fallen in large part because of railroads transferring costs to their shippers in ways other than pricing. Dr. Prince's claim is another red herring. Rail rates may have fallen, but they have also surged back (as I note later in this VS). The investor community loves the railroads' nearly unfettered pricing power. The railroads have effectively shed unwanted traffic and barely grown traffic over 20 years, despite all the hyperbolic claims by the railroads of how mergers would lead to more traffic moving by rail.¹⁰

1. Railroad Competition

Dr. Prince paints a picture in which the railroads face competition from all sides. He contends that while simultaneously facing competition from other railroads and trucking companies, railroads also must deal with product and geographic competition. Dr. Prince fails to recognize that while railroads face competition, in many cases, they do not.

Many shippers, including many coal shippers, are served by only a single railroad and have no other effective modes of transporting coal. The ICC defined these shippers in Ex Parte No. 347 (Sub-No.1), *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, (1985) ("*Coal Rate Guidelines*") as "captive shippers" and sought to protect these shippers from discriminatory pricing. The ICC defined the lack of competition as "Market Dominance," which the ICC explicitly defined as the absence of effective competition.¹¹ Dr. Prince's own evidence indicates that up to 20 percent of rail shippers are captive to a single railroad.¹²

¹⁰ See, Mulholland/Crowley RVS at p. 8.

¹¹ See, *Coal Rate Guidelines* at page 553.

¹² See, Prince VS at page 8.

Railroads also face limited competition from trucking companies, especially on longer movements. It has long been recognized that trucking is only effective competition to railroads on movements of 500 miles or less.¹³ In contrast, the average freight railroad movement in the United States is over 1,030 miles according to the Bureau of Transportation Statistics (“BTS”).¹⁴ In recent filings with the STB, CSX Transportation, Inc. (“CSXT”) stated that trucks are not an effective competitor to rail on movements over 500 miles.¹⁵ Moreover, it has long been recognized that the movement of coal by rail is one of the most demand-inelastic commodities railroads haul, and that intermodal competition for captive coal shippers is essentially non-existent.¹⁶

BNSF’s own publications and filings related to the proposed Union Pacific Railroad Company and Norfolk Southern Railway Company merger (“UP/NS Merger”) infer that railroads face little competition from trucking firms.¹⁷

¹³ See, workpaper “Freight Transportation Modal Shares - Scenarios for a Low-Carbon Future.pdf,” U.S. Department of Energy Office of Energy Efficiency and Renewable Energy, March 2013 at page 1 available at <https://docs.nrel.gov/docs/fy13osti/55636.pdf> (accessed on January 7, 2026).

¹⁴ See, workpaper “BTS Report on Length of Haul.xlsx,” U. S. Department of Transportation, BTS, *Average Length of Haul, Domestic Freight and Passenger Modes* available at <https://www.bts.gov/content/average-length-haul-domestic-freight-and-passenger-modes-miles> (accessed on January 3, 2026).

¹⁵ See, CSX Transportation Inc.’s Evidence and Argument in Opposition to the NS Control Application in STB Docket No. FD 36836, *Norfolk Southern Corporation & Norfolk Southern Railway Company – Acquisition of Control – Norfolk & Portsmouth Belt Line Railroad Company*, filed September 18, 2025 at page 64.

¹⁶ See, workpaper “CRS Report - Rail Transportation of Coal.pdf,” “*Rail Transportation of Coal to Power Plants: Reliability Issues*,” Congressional Research Service, September 26, 2007 at page 55, and workpaper “STB Christensen Report Volume 1.pdf,” “*Description of the U.S. Freight Railroad Industry*,” Laurits R. Christensen Associates, Inc. Revised Final Report Prepared for the Surface Transportation Board, November 2009, Volume 1 at pages 2-3.

¹⁷ See, workpaper “UP-NS Merger - A Monopoly in the Making.pdf,” “*The UP-NS Merger: A Monopoly In The Making*.” “One railroad controlling nearly half of U.S. rail freight = 10,000 facilities served by only one railroad with unchecked market power.” Also see “Customers with limited shipping alternatives – especially in chemicals, agriculture, and metals – would likely face higher rates and reduced service reliability” available at <https://www.bnsf.com/ship-with-bnsf/preserve-rail-competition/index.html> (accessed on January 17, 2026).

2. Historic Rail Rates Declined in Large Part Due to Railroads Transferring Costs to Shippers

Dr. Prince alleges that competitive pressures in the downstream markets for commodities moved by rail, i.e., product and geographic competition, may effectively prevent a railroad from exercising market power. As evidence for this competitive pressure, Dr. Prince references Exhibit 1 to his VS, which is an analysis prepared by the STB showing the change in average Class I railroad revenue per ton-mile on a real basis between 1985 through 2022. Dr. Prince states the STB's analysis shows real rail rates holding stable between 2016 and 2021, and 2022 being lower than 2012.¹⁸

Dr. Prince's conclusion that competitive pressures in downstream markets for commodities moved by rail held rail rates stable is a mischaracterization of the STB's analysis. The STB analysis shows real revenue per ton-mile and *not real rates*. Dr. Prince fails to understand that revenue per ton-mile statistics are affected not only by changes in revenue but also by changes in railcar lading and tare weights, distance traveled, and changes in empty return ratios resulting from changes in traffic mix. According to the United States Bureau of Transportation Statistics ("BTS"), the average length of haul for railroads increased between 2012 and 2023.¹⁹ Increasing the length of haul can lower average revenue per ton-mile, when holding revenues and railcar loadings and tare weight constant. Therefore, attributing the stability of prices over time to competitive pressures ignores all of the factors implicitly included in Dr. Prince's Exhibit 1.

In addition, Dr. Prince's claim that rail rates are constrained by competition ignores the change in average real revenue per ton-mile from years prior to 2011. Dr. Prince's VS points

¹⁸ See, Prince VS at pages 8-9.

¹⁹ See, workpaper "BTS Report on Length of Haul .xlsx," *Average Length of Haul, Domestic Freight and Passenger Modes* available at <https://www.bts.gov/content/average-length-haul-domestic-freight-and-passenger-modes-miles> (accessed on January 3, 2026).

toward a period between 2011 and 2023 when the change in average revenues per ton-mile was relatively flat. Dr. Prince ignores the years between 2004 and 2011. Then the railroads exerted significant market power vis-à-vis the competition, Dr. Prince alleges. Real revenue per ton-mile increased 37.8 percent between 2004 and 2011.²⁰ It is also illogical for Dr. Prince to conclude that competitive forces constrained rates between 2011 and 2023, but not between 2004 and 2011. Dr. Prince identified no new competitive threats that entered the industry in 2011 to constrain rates that were not already present in 2004. No new Class I railroads entered into the industry to create new intramodal competition, and trucks and barges were also running prior to 2011, providing intermodal competition. The railroads also faced product and geographic competition prior to 2011.

Dr. Prince has simply not provided support for his contention that some unknown competitive factors led to little change in average revenue per ton-mile between 2011 and 2023. A more likely conclusion from Dr. Prince's analyses is that the railroads reached the zenith of their market power and that extracting any further monopoly rents might have begun to erode their revenues.

²⁰ $[(77.3 \text{ in } 2011 \div 56.1 \text{ in } 2004) - 1] \times 100 = 37.8 \text{ percent}$. Dr. Prince's Exhibit 1 also shows average revenue per ton-mile falling from the mid-1980s through 2004. As the STB has explained, this decline was due to railroad's shedding inefficient parts of their operations from the years prior to the passage of the Staggers Act and the transferring operating costs to shippers. *See*, workpaper "Senate Hearings on Rail Economics, Service and Capacity.pdf," Senate Hearing 109-1159 June 21, 2006 hearing before the Subcommittee on Surface Transportation and Merchant Marine of the Committee on Commerce, Science and Transportation, "*Economics, Service, and Capacity in the Freight Railroad Industry*," available at <https://www.congress.gov/109/chrg/CHRG-109shrg71842/CHRG-109shrg71842.pdf>.

B. EVALUATING RAILROAD SERVICE LEVELS BASED ON EVER-CHANGING CIRCUMSTANCES IGNORES RAILROADS’ CONTROL OVER THEIR NETWORKS AND CREATES PERVERSE INCENTIVES

Dr. Prince opines that because demand and supply conditions inherently influence a railroad’s economics, and these conditions can and do change with circumstances, evaluating a railroad’s service levels based on their reasonableness under the relevant circumstances helps maintain an optimized and efficient network.²¹ There are several issues with Dr. Prince’s opinion that ignore real-world railroad economics, operations, and regulations.

1. Railroads Can Create Their Own Adverse Circumstances

Dr. Prince claims that railroads, such as BNSF, must respond to changing circumstances, implying that these circumstances are all external to the railroad. He does not recognize or consider that in many situations, railroads create their own negative circumstances that impact their operations and investment choices.

Rail carriers make strategic decisions about capacity, crew levels, equipment, and infrastructure investment and maintenance, which directly create the supply conditions they later cite as constraints on their operations and efficiencies. Allowing circumstance-based evaluation of their common carrier obligations would allow them to benefit from their own underinvestment—cutting costs during good times, then claiming constrained circumstances during challenging periods.

For example, in announcing the April 2022 emergency hearing undertaken as part of Ex Parte No. 770, *Urgent Issues in Freight Rail Service* (“EP770”), STB Chairman Martin Oberman

²¹ See, Prince VS at page 11.

explicitly stated that over the previous six (6) years, Class I railroads collectively reduced their workforce by 29 percent, or approximately 45,000 employees cut from payrolls, and that these cuts were driven by railroads' focus on lowering operating ratios and satisfying shareholders even at the cost of customers.²² The workforce reductions were directly tied to the implementation of Precision Scheduled Railroading ("PSR"). Transportation Trades Department ("TTD") President Greg Regan testified at the STB April 2022 hearing that PSR's core strategy involved deep workforce cuts, with railroads endeavoring to operate with minimal headcount that frequently imperiled their ability to operate and maintain their business, and that eliminating a third of the workforce in less than a decade made it impossible to provide equivalent service levels.²³ According to the TTD, BNSF alone cut its train and engine workforce by 27 percent from 2016-2022.²⁴

The railroads' decisions to cut staff reduced operating buffers and led to poor service. The railroads, including BNSF in this proceeding, then cited these self-imposed capacity constraints as "circumstances" justifying poor service and, here, an inability to fulfill its common carrier obligation. The STB proceedings demonstrate that regulatory oversight was necessary precisely because railroads were creating their own supply constraints through cost-cutting, then invoking those same constraints to excuse service failures—the very definition of benefiting from their own underinvestment.

²² See, workpaper "STB Press Release No. 22-21.pdf," April 7, 2022 STB Press Release available at <https://www.stb.gov/news-communications/latest-news/pr-22-21/> (Accessed on January 3, 2026).

²³ See, workpaper "TTD Article on STB Rail Service Hearings.pdf", TTD website "*STB Rail Service Hearing Exposes Insufficient Service, Poor Worker Morale*," May 2, 2022 available at <https://ttd.org/news-and-media/stb-rail-service-hearing-exposes-insufficient-service-poor-worker-morale/> (Accessed on January 3, 2026).

²⁴ See, workpaper "TTD Article on Rail Labor Calls To Act on Poor Rail Service.pdf," TTD website "*Rail Labor Calls on STB to Act on Poor-Quality Rail Service*," April 13, 2022 available at <https://ble-t.org/news/rail-labor-calls-on-stb-to-act-on-poor-quality-rail-service/> (Accessed on January 3, 2026).

2. Adjusting Service Obligations Based on Circumstances Leads to Perverse Incentives

Adjusting railroad industry service obligations in response to railroad-manufactured circumstances will create perverse incentives that are contrary to national transportation policy. If railroads can adjust service obligations based on demand conditions, they face a perverse incentive to prioritize traffic with the most competitive options since this is the traffic a railroad is most likely to lose if service degrades. However, in most cases, shippers with the most transportation options pay the lowest rates. Captive shippers, on the other hand, pay the highest rates but would face degraded service because of their lack of competitive options. This is the antithesis of the purpose behind the common carrier obligation, which requires a railroad to provide “service” upon reasonable requests not just service to its most demand-sensitive traffic, especially when the railroad is responsible for the scarcity of resources in the first instance.

The ICC recognized the need for railroads to use demand-based differential pricing to promote a healthy rail industry.²⁵ Differential pricing permits a railroad to recover its joint and common costs across its entire traffic base by setting higher rates for traffic with fewer transportation alternatives than for traffic with more alternatives.²⁶ The ICC and STB have long noted that, on average, captive shippers contribute more to a railroad’s fixed and common costs than do shippers with competitive options because the railroad charges shippers with competitive options less than captive shippers.²⁷

²⁵ See, *Coal Rate Guidelines* at page 526.

²⁶ *Id.*

²⁷ See, workpaper “STB 2018 Performance and Accountability Report.pdf.pdf,” STB “*Performance and Accountability Report: Fiscal Year 2018*,” at page 24, available at <https://www.stb.gov/wp-content/uploads/STBFY2018PAR.pdf> (Accessed January 4, 2026).

With the railroads' privilege of monopoly power to price such captive traffic, such that it can effectively cross-subsidize lower-margin traffic, comes the statutory obligation to provide service to those customers upon reasonable request. Dr. Prince's approach, as noted above, flips these obligations on their head. Indeed, under Dr. Prince's approach, BNSF can price Every's traffic, and other captive traffic, at the maximum differential rate permitted, provide service based entirely on its self-created supply, favor any other traffic it elects, and then claim it met its common carrier obligation and it owes no more duty or compensation to the aggrieved shipper. In other words, the inherent economic "bargain" in the common carrier statutory scheme, coupled with the STB's recognition of differential pricing, is that the carrier will actually provide the service for which it extracts the monopoly pricing. Dr. Prince's approach renders that bargain meaningless. Indeed, his approach creates an incentive to maximize extraction from captive shippers during high-demand periods when captive shippers most desperately need reliable service, all to save the marginal traffic from being lost to other modes or carriers – when the carrier itself created the very limitation.

**C. DR. PRINCE'S ARGUMENT THAT
RAILROADS DO NOT "BUILD A
CHURCH FOR EASTER SUNDAY"
IGNORES STB PRECEDENT AND REAL-
WORLD APPLICATIONS**

Dr. Prince asserts that industries routinely experience positive and negative shocks to both demand and supply, and railroads are no exception. He also asserts that, as a general principle, it is inefficient to "build a church for Easter Sunday," that is, to maintain capacity on hand to meet the peak demand. Dr. Prince concludes that even with an efficient level of capacity, railroads and

other industries should be expected to, at times, experience shortages due to capacity constraints, particularly when there are unexpected shocks to the economy.²⁸

Dr. Prince's excess capacity argument is flawed. Most importantly, the uptick in demand in 2022 was not unprecedented or unexpected. BNSF had moved greater volumes of traffic before, and it had been caught out with a similar "shortage" of resources, less than a decade before. In any event, while Dr. Prince focuses on the potential issues of overinvestment in railroad capacity, he does not take into consideration the issues raised with the underinvestment in capacity. Dr. Prince's argument also does not consider the unique nature of rail operations and railroad investment. In addition, Dr. Prince's argument incorrectly assumes all shippers are impacted equally, which was not the case with Evergy.

1. Dr. Prince Does Not Recognize the Costs of Underinvestment in Capacity

Dr. Prince states that it is economically inefficient to maintain sufficient capacity to meet demand when the railroad faces unique supply or demand shocks, and to do so would harm all shippers on the network.²⁹ This is not the case, though. Instead, these costs are disproportionately borne by captive shippers such as Evergy. Moreover, there was nothing unique about the circumstances in 2022.

The standard economic argument that maintaining excess capacity is always inefficient assumes that shortage costs from not having sufficient capacity are borne by the railroad itself through lost revenues and defection by shippers that have other options. Captive shippers, on the other hand, cannot defect from the railroad as they have no alternatives for transporting their products. This means that railroads can extract the costs of capacity constraints from shippers who

²⁸ See, Prince VS at page 16.

²⁹ *Id.*

cannot move their product by other options, while capturing all the benefits of cost minimization. The efficient capacity level from the railroad's private perspective is not the socially efficient level when shortage costs fall primarily on customers with no alternatives.

In addition, the approach implicitly advocated by Dr. Prince does not take into consideration the inherent asymmetry of adding and removing capacity within the railroad industry. When it is more costly to add capacity than to reduce it, optimal capacity can exceed the level that would be chosen if adjustments were costless in both directions.³⁰ For railroads, this asymmetry is pronounced because adding capacity requires months or years to hire and train qualified personnel, manufacture locomotives, and improve infrastructure. However, reducing capacity can be accomplished quickly through furloughs, equipment storage or retirement, and deferred maintenance. This asymmetry means that the cost of being caught short-handed during a demand peaks vastly exceeds the cost of maintaining some idle capacity during cyclical demand troughs. The temporary cost of idle equipment and furloughed workers is dwarfed by the irreversible loss of trained personnel, customer relationships, and the harm to shippers and downstream consumers that results from sustained service failures.³¹

2. The “Don’t Build a Church for Easter Sunday” Assumptions Do Not Necessarily Apply to Common Carrier Railroads

Any economic analysis of railroad capacity cannot ignore the institutional and legal framework within which railroads operate. Unlike ordinary commercial enterprises, railroads accepted public common carrier obligations in exchange for substantial private benefits, including

³⁰ See, workpaper “Optimal Investment with Costly Reversibility.pdf,” “*Optimal Investment with Costly Reversibility*,” Andrew Abel and Janice Eberly available at https://www.researchgate.net/publication/4917938_Optimal_Investment_with_Costly_Reversibility.

³¹ See, workpaper “The Hidden Cost of Downsizing.pdf,” the Industrial Marketing Management, Volume 40, 2011 “*Customer Dissatisfaction and Defection: The Hidden Costs of Downsizing*”.

eminent domain powers, limitations on liability, and regulatory protection from competition and certain antitrust laws. This regulatory compact fundamentally alters the optimal capacity calculation. Common carriers have obligations that may require maintaining capacity beyond the pure profit-maximizing level.³² The essence of the public utility concept is the enforcement of the obligation to serve all comers, upon reasonable request. This obligation may require capacity in excess of that which would maximize profits in the short run.

Even absent regulatory obligations and in industries with significant externalities and market power, private profit-maximizing capacity levels diverge from socially optimal levels.³³ For railroads, this divergence is substantial. Private costs of excess capacity are borne entirely by railroad shareholders through higher operating ratios and reduced short-term profits. Private costs of capacity shortages are minimal for captive traffic, as shippers cannot defect. Social costs of capacity shortages are borne by shippers (production curtailments, lost revenues), downstream customers (higher prices, supply disruptions), and the broader economy (reduced productivity, supply chain fragility). Because railroads do not internalize the full social costs of capacity shortages for captive shippers, they will systematically underinvest in capacity relative to the social optimum. This inevitable market failure provides the economic justification for regulatory intervention to require capacity buffers.

³² See, workpaper “The-Economics-Of-Regulation.pdf,” “*The Economics of Regulation: Principles and Institutions*,” Alfred Kahn, available at <https://ia801901.us.archive.org/12/items/in.ernet.dli.2015.146714/2015.146714.The-Economics-Of-Regulation.pdf> (Accessed on January 7, 2026).

³³ See, workpaper “Optimal Departures From Marginal Cost Pricing.pdf,” the American Economic Review, Volume 60, Issue 3, June 1970 “*Optimal Departures from Marginal Cost Pricing*,” William Baumol and David Bradford, available at <https://pages.stern.nyu.edu/~wbaumol/OptimalDeparturesFromMarginalCostPricing.pdf>.

**D. DR. PRINCE’S ARGUMENTS ON
CONTRACT AND TARIFF MOVEMENTS
ARE MISGUIDED**

Dr. Prince claims that a railroad’s obligations under common carrier service are different from its obligations under contract service because, for certain types of shipments, the common carrier obligation forms a floor of obligations for the railroad without any reciprocal obligations for the shipper.³⁴ He states that the alleged difference in railroad obligations under common carrier tariffs and transportation contracts creates an outside option for shippers in which the railroad has an obligation to ship traffic tendered by a shipper, but a shipper has no obligation to ship with the railroad.³⁵ He also indicates that requiring railroads to adhere to the same level of service obligations under common carrier tariffs as transportation contracts could lead to a perverse incentive to not enter into transportation contracts.³⁶

Dr. Prince asserts that unlike common carrier tariffs, contracts reflect negotiated terms, including risk sharing between the parties, and are reciprocal in nature. He also asserts that transportation contracts provide important information gathering that allows railroads to more efficiently operate over their networks. He states that common carrier tariffs do not provide the same level of information as contracts and effectively operate similarly to a spot market, which limits a railroad’s ability to make efficient investment allocations and decisions.³⁷

Dr. Prince overstates the information sharing and efficiency differences between railroad contracts and common carrier tariffs. As the STB has previously found, railroad contracts and common carrier tariffs in many cases carry the same traits and obligations, including minimum volume requirements. In addition, Dr. Prince fails to recognize the options available to railroads

³⁴ See, Prince VS at page 20.

³⁵ *Id.*

³⁶ *Id.* at page 21.

³⁷ *Id.* at page 22.

under their common carrier tariffs and the obligations shippers face under common carrier tariffs. Finally, Dr. Prince's assertions on service obligations on common carrier movements are contradictory to BNSF's prior statements on their common carrier obligations.

1. Common Carrier Tariffs Can Contain the Same Information Content as Contracts

Dr. Prince states that rail transportation contracts facilitate information gathering and risk sharing, thereby increasing efficiency. He contends contracts enable shippers to signal information downstream by articulating their expected demand for railroad services and sharing risk with respect to future traffic by committing to service volumes. Commitments by shippers in rail transportation contracts also give shippers skin in the game by incentivizing communication of accurate forecasts due to contractually imposed costs when forecasts are inaccurate. He asserts that, under common carrier tariffs, railroads operate with less (and less reliable) information and less commitment, which limits the railroads' ability to make efficient allocation and investment decisions. He contends that if BNSF's common carrier obligation reduces the incentive to enter into confidential transportation contracts, then network efficiency will decrease and reduce the ability of railroads to compete.³⁸

Dr. Prince's statement relies on the incorrect assumption that common carrier tariffs contain none of the information content of confidential transportation contracts. This is not the case. The STB, railroads, and shippers have long recognized that common carrier pricing arrangements contain many of the same information-gathering and sharing elements as private transportation contracts, including minimum-volume information and service commitments. These include, but are not limited to:

³⁸ *Id.* page 24.

- **Unit Train Transportation Arrangements** – Arrangements within common carrier pricing instruments that provide the terms and conditions for transporting unit train traffic;³⁹
- **Annual Volume Rates** – Provisions within a tariff that provide rates without any volume commitment and rates with volume commitments from both the railroad and the shipper;⁴⁰
- **Unit Train Commitment Certificate** – Certificates contained in common carrier pricing authorities that require a shipper to commit to a certain volume of shipments in return for certain rates; and⁴¹
- **Certificates of Transportation** – Guarantees sold through public auctions for the future availability of rail cars to transport product on a railroad.⁴²

The type of information gathering tools Dr. Prince states are not included in common carrier pricing authorities are, in fact, included in the common carrier pricing authority at issue in this proceeding. BNSF Tariff 60024, which governs the movement of coal from the Powder River Basin to Evergy’s generating stations, shows that BNSF’s common carrier tariff includes an annual coal volume nomination requirement:

Tonnage Nomination. Within five (5) business days of Shipper notifying Railroad that Shipper intends to ship tonnage under this price authority, and by each October 1 thereafter for which Shipper intends to continue shipping, Shipper shall provide to Railroad a written nomination for Shipper's Plant of the tonnage it intends to load or cause to be loaded during the next calendar year for transportation pursuant to this price authority by month, by Origin ("Annual Tonnage Nomination").⁴³

The rules included in the Evergy tariff provide information to BNSF in a manner similar to that contained in transportation contracts. While these types of provisions are not included in every

³⁹ See, “Opening Comments of the Western Coal Traffic League” in STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, filed June 4, 2007 at pages 18-19.

⁴⁰ See, STB Ex Parte No. 676, *Rail Transportation Contracts Under 49 U.S.C. 10709*, served January 6, 2009 (*EP 676 2009*) at page 3, note 2.

⁴¹ See, Navajo Transitional Energy Company, LLC’s Post Hearing Certificate in STB Docket No. 42178, *Navajo Transitional Energy Company, LLC v BNSF Railway Company*, filed May 11, 2023 at NTEC Counsel’s Exhibit 4.

⁴² See, “Opening Comments of BNSF Railway Company” in STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, filed June 4, 2007 at pages 2-3.

⁴³ See, Complaint and Petition for Declaratory Order, BNSF 60024 Exhibit 1 at page 2, Exhibit 2 at page 2, Exhibit 3 at page 2, Exhibit 4 at page 2, and Exhibit 5 at page 2.

BNSF tariff, it is abundantly clear that they are included in a large portion of the railroad's common carrier pricing authorities across different commodity groups.⁴⁴

Dr. Prince concludes that because transportation contracts materially increase the efficiency of railroad networks through better information signaling, a railroad's common carrier obligation should not degrade contracting incentives by requiring a railroad to provide the same level of service under common carrier tariffs.⁴⁵ Dr. Prince's conclusion is clearly misplaced as much of the information signaling tools contained in transportation contracts can be and are currently included in BNSF common carrier pricing authorities. There is simply no loss of incentive to enter into transportation contracts.⁴⁶

Dr. Prince further claims that the railroads have no obligation with respect to service and volume levels for shipments moving in common carrier service, and that if the STB were to impose any, it would risk severely degrading or eliminating contracting incentives.⁴⁷ In a 2014 BNSF filing in the Ex Parte 724 proceeding, BNSF articulated a similar position but for *contract* coal shippers:

Another serious flaw in the WCTL Petition is that it goes far beyond the Board's jurisdiction by asking the Board to impose service obligations and service-related remedies relating to transportation that is provided under rail transportation contracts entered into under 49 U.S.C. § 10709. The vast majority of BNSF's coal transportation is provided under contracts. The statute states unambiguously that "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." 49 U.S.C. § 10709(b). The Board does not have authority to impose service

⁴⁴ See, STB Ex Parte No. 676, *Rail Transportation Contracts Under 49 U.S.C. 10709*, decision served March 12, 2008 ("EP 676 2008") at page 3.

⁴⁵ See, Prince VS at page 24.

⁴⁶ Dr. Prince also fails to acknowledge that many rail transportation contracts entered into by BNSF do not include the minimum annual volume commitments and other information sharing tools he states confer special importance to transportation contracts.

⁴⁷ See, Prince VS at pages 20-21.

recovery obligations on BNSF that would over-ride any obligations and remedies that the parties have negotiated in their contracts.⁴⁸

While BNSF agrees that the level of coal service has not met all customer expectations, that service is governed by the terms of the transportation contracts with individual customers. When transportation is being provided under a contract, the Board does not have authority to enforce existing contractual obligations, let alone impose new service obligations on either party to a contract through fines or penalties.⁴⁹

In today's rail transportation environment, railroad contracts generally do not contain service obligations. The removal of specific rail service obligations from transportation contracts has been at the railroads' insistence during contract negotiations.

2. Dr. Prince Ignores the Outside Option Available to BNSF Under Common Carrier Tariffs

Dr. Prince opines that to preserve incentives for shippers to enter rail transportation contracts, a railroad's common carrier obligation should limit its service requirements to efforts that are reasonable under the circumstances. He contends obligations beyond that threshold would create an outside option that reduces shippers' willingness to enter transportation contracts, risking lost improvements to network efficiency that contracts can achieve via reciprocal obligations.⁵⁰

An outside option in economics refers to the best alternative available to a party if it walks away from a negotiation or agreement.⁵¹ From an economic perspective, outside options set a minimum threshold for what someone will accept an offer. In other words, during negotiations, a party will not accept terms less than its best alternative option.

⁴⁸ See, BNSF's Reply to WTCL in STB Docket Ex Parte No. 724, *United States Rail Service Issues*, filed November 3, 2014, at p. 13.

⁴⁹ *Id.* at p. 15.

⁵⁰ See, Prince VS at page 21.

⁵¹ See, "The Power of Outside Options" available at <https://gametheory101.com/courses/bargaining-101/the-power-of-outside-options/> (Accessed January 18, 2026).

There are several flaws in Dr. Prince's position that need clarification. First, Dr. Prince does not recognize that a common carrier tariff provides an outside option to the railroad to change the terms of the tariff, including raising the transportation rates, unilaterally. Under 49 CFR 1300.4, a rail carrier subject to the jurisdiction of the STB may change the terms of its common carrier tariffs on 20-days' notice. This means that if during the course of contract negotiations, the railroad is not satisfied with the reciprocal terms offered by the shipper, it can publish a common carrier rate utilizing its own terms and conditions. Such an ability to unilaterally invoke prices, terms and conditions on a shipper provides a clear incentive for the shipper to enter a contract.

Second, Dr. Prince ignores the reciprocal obligations on shippers in common carrier tariffs. Dr. Prince assumes common carrier obligations are entirely one-sided against the railroad, but shippers under common carrier service also have reciprocal obligations. For example, they must pay the rates established by the railroad and follow tariff requirements. Shippers moving traffic under common carrier tariffs must accept whatever liability limitations are included in the tariff. The shippers also must comply with whatever accessorial fees and rates are invoked by the railroad.

Third, Dr. Prince's outside options argument assumes that all contract obligations represent "premium" service that requires special compensation. This is not the case as the railroads have, over the last two (2) decades, removed service obligations and guarantees from their transportation contracts.⁵² In other words, railroads have not provided minimum service levels even to shippers that have negotiated transportation contracts.

⁵² See, for example, workpaper "CRS Report - Rail Transportation of Coal.pdf", "Rail Transportation of Coal to Power Plants: Reliability Issues," *Congressional Research Service*, September 26, 2007 at page 43, "The trend toward increased stocks—though still not to the levels of the 1973-1990 period— suggests that power producers have decided to bear higher inventory costs to improve the reliability of their coal supplies. Given, as discussed below, the reported unwillingness of railroads to offer strong service guarantees, power companies may have had little choice except to increase coal stockpiles."

E. DR. PRINCE’S TRAGEDY OF THE COMMONS ARGUMENT DOES NOT APPLY TO PRIVATE FREIGHT RAIL NETWORKS

Dr. Prince asserts the railroad industry is a network industry with shared assets among numerous shippers, and the operator must determine how best to share them. He further states that individual shippers who use the common network are focused on their own interests and maximizing what they get out of the network and do not account for the cost to other shippers on the network, i.e., externalities. He alleges shippers’ self-interested requests for service may be contrary to the interests across all users of the network, which can lead to a tragedy of the commons, where a common resource is depleted and/or degraded by individual overexploitation.⁵³

There are several issues with Dr. Prince’s argument. While railroad networks facilitate the movement of products for a diverse group of shippers, they are not a “commons” in the economic sense as asserted by Dr. Prince. Also, shippers are not co-managers of a railroad’s network and have no ability or responsibility to ensure the availability of capacity for other shippers on a rail line.

1. Private Freight Railroads are not “Commons” From an Economic Perspective

A critical flaw with Dr. Prince’s argument is that private rail networks, such as the BNSF, are not “commons” from an economic perspective. The concept of the commons comes from research in the 19th century on the use of common grazing land.⁵⁴ Imagine a pasture that’s open to all members in a village. Each villager benefits from adding more animals to their flock, receiving all the profit from each additional animal. However, the cost of overgrazing, or degrading the

⁵³ See, Prince VS at page 24.

⁵⁴ See, workpaper “Hardin - The Tragedy of the Commons.pdf,” “*Tragedy of the Commons*,” Garret Hardin at pages 28-29, available at https://www.garretthardinsociety.org/articles_pdf/tragedy_of_the_commons.pdf.

pasture, is shared among all villagers. This creates an incentive for each person to keep adding animals, even as the collective overuse destroys the commons. The concept of the use of the commons was expanded to include examination of a wide range of other common-use resources open to all parties, including ocean fisheries, the atmosphere as a carbon sink, groundwater aquifers, and public forests.

There are two (2) key conditions for a tragedy of the commons to occur. First, the resource must be rivalrous, meaning where one party's use of a resource diminishes what is available to other parties wanting to use the same resource. Second, the resource must be non-excludable, meaning a party cannot easily prevent other parties from using the resource.⁵⁵ The second condition, commonly known as the "free rider" problem, alludes to a party being able to gain benefits without contributing to the costs of providing and maintaining the resource in use.⁵⁶

The issue with Dr. Prince's invocation of the tragedy of the commons paradigm relates to the free-rider issue included in the second condition. The U.S. freight railroad system operates under a vertically integrated private ownership model rather than as a shared common resource. Class I railroads in the U.S. own, maintain, and operate their own infrastructure, making them fundamentally different from a "commons" where multiple actors share unrestricted access to a finite resource. A shipper or another railroad cannot operate on BNSF's system without BNSF's and/or the STB's permission.

Moreover, the free-rider problem does not occur as rate levels for shipper products are ostensibly set to cover the railroad's variable cost of their operations plus a contribution to the

⁵⁵ See, workpaper "Glover - Public Transport as a Common Pool Resource.pdf.pdf," "*Public Transport as a Common Pool Resource*" Glover, L. (2011), Conference paper delivered at the 34th Australasian Transport Research Forum (ATRF) Proceedings held on 28 - 30 September 2011 in Adelaide, Australia at page 8, and Dolsak N and Ostrom E, "*The Commons in the New Millennium: Challenges and Adaptation*," Cambridge, MA, MIT Press (2003) at page 7.

⁵⁶ *Id.*

railroad's fixed costs and profit. While a railroad may move traffic at no charge in certain situations, the railroads govern when those situations occur. A shipper cannot unilaterally move traffic over a railroad's network without paying for the movement. In simple terms, shippers are not "free riding" on the network but are paying for railroad service.

2. Shippers Do Not Control or Manage the Rail Network

Dr. Prince contends the tragedy of the commons occurs in railroad settings when (1) shippers request shipments, without considering both the impact on other shippers by tying up too many network resources and preventing de-congestion, and/or (2) making nominations in their own interest.⁵⁷ There are several issues with Dr. Prince's contentions.

First, the "tragedy" occurs when one party cannot restrict another party from using the resource, as I discussed above. But, as Dr. Prince clearly states, a shipper can only "request" access to the railroad's network and cannot gain unrestricted access. A railroad has many methods to restrict access to its network, including through its ability to price shipments to reduce demand or to "demarket" traffic.⁵⁸ Shippers do not have such control and have no direct control over which other shippers ship on a railroad's lines. This is left to the full discretion of the operating railroad(s).

⁵⁷ See, Prince VS at page 25.

⁵⁸ See, workpaper "Supply Chains - Talking Freight - Freight Planning - Planning - FHWA.pdf.pdf," presentation of Paulo Dowell Ph.D., Vice President of Economic, Freight and Finance with Wilbur Smith Associates at the Federal Highway Administration's "Talking Freight Seminar" May 21, 2008 available at https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/may21transcript.cfm (accessed January 6, 2026). "A big part of the issue for the rail is that the network reduction that the industry undertook over the several decades in terms of the abandoning lines and selling off lines left them with a capacity crunch, especially for the fact intermodal train that is need more track space. Railroads have been responding with investments but using prices to also affect capacity as well, sometimes this is referred to marketing. They will demarket less profitable lines by increasing the prices and therefore making trucking more competitive relative to the rail simply because they know that they're going to have lower profit margins on those particular lines." See also, comments of The National Stone, Sand and Gravel Association in Ex Parte No. 770, "Urgent Issues in Freight Service," submitted April 22, 2022 at page 3, "We have heard from members that railroads are imposing pricing to discourage rail shipments from facilities, i.e., railroads are attempting to 'demarket' facilities."

Second, it is not the responsibility of shippers to take into consideration the interests of other shippers on a privately owned railroad. The railroad owns and operates the infrastructure on its network and has the right to manage it as it sees fit, within its statutory and regulatory obligations. Shippers are customers purchasing a service, not co-managers of a shared resource. Just as airline passengers are not expected to consider how their booking affects other passengers, rail shippers do not bear responsibility for the railroad's operational challenges. In addition, requiring shippers to consider others' interests would put the shipper at a competitive disadvantage. Businesses must optimize their own logistics and costs. If a shipper voluntarily restrains shipping its own products to help others, its competitors who do not do so will gain a competitive advantage.

**F. DR. PRINCE MISSTATES EVERGY'S
REQUEST FOR SERVICE**

Dr. Prince repeatedly claims Evergy asserted that BNSF's common carrier obligation requires the railroad to allocate full capacity and resources to Evergy regardless of circumstances, including during times of constrained capacity.⁵⁹ Evergy made no such assertion. Dr. Prince has created a strawman whereby he asserts Evergy seeks service from BNSF under any possible circumstance and then provides reasons for toppling his strawman.

In contrast to Dr. Prince's assertion, Evergy only sought to receive transportation services from BNSF on reasonable request.⁶⁰ Evergy's request was not unusual or extraordinary. As explained by Messrs. Mulholland and Crowley in their Verified Statements, BNSF's failure to meet its common carrier obligation was based on multiple factors, including but not limited to:

- The availability of BNSF crew assets along the Evergy route during the relevant period;

⁵⁹ See, Prince VS at pages 26 and 28.

⁶⁰ See, Complaint at page 2.

- The change in coal and non-coal rail volumes over the Evergy route; and
- The number of delays incurred by coal trains along the Evergy route as compared to non-coal trains.⁶¹

As further explained by Messrs. Mulholland and Crowley, BNSF placed coal shippers, like Evergy, at the back of the line when providing service, while promoting the service for intermodal traffic along the Evergy route.⁶²

Evergy's request for service upon reasonable request is consistent with BNSF's historic position on its common carrier obligations. In its testimony before the STB in Ex Parte No. 677, *Common Carrier Obligations of Railroads* ("EP 677"), BNSF stated:

A railroad's common carrier obligation is to respond to reasonable requests for service. Thus, when a railroad's capacity is constrained, **its obligation is to act fairly and reasonably** to provide service with its available capacity.⁶³

BNSF's position was clear in its EP 677 testimony that its responsibility under its common carrier obligation was to provide reasonable and fair service. BNSF's statement also aligns with Evergy's request for relief and is contradictory to Dr. Prince's strawman definition of the common carrier obligation.

G. DR. PRINCE'S COMPARISON OF RAILROAD SUPPLY LEVELS IS MISPLACED

Dr. Prince discusses at great lengths other industries' supply chain problems in 2022 but never equates those issues or other industries with the U. S. railroad industry and BNSF specifically.⁶⁴

⁶¹ See, Mulholland/Crowley Rebuttal VS at pages 1-2.

⁶² See, Mulholland/Crowley Rebuttal VS at page 28.

⁶³ See, Summary of Testimony on Behalf of BNSF Railway Company in Ex Parte No. 677, *Common Carrier Obligations of Railroads*, submitted April 17, 2008 (emphasis added).

⁶⁴ See, Prince VS at pages 45-68.

While Dr. Prince quotes numerous studies and papers underscoring the overall issues that manufacturers, trucking companies, and sea freight companies experienced in 2021 and 2022, he never connects these issues with BNSF's inability to provide service to Evergy. For example, it is unclear how demand outpacing supply at Texas Instruments affects BNSF or how General Motors and Ford's production stoppages had anything to do with BNSF.⁶⁵

Also, the use of global indexes and industry-wide comparisons belies Dr. Prince's lack of experience with and understanding of the railroad industry. Just because manufacturing supplier delivery times, in total, were higher than normal does not mean that BNSF could not serve Evergy consistent with its common carrier obligation. Messrs. Mulholland and Crowley's Opening analyses of BNSF's capacity available on Evergy route⁶⁶ are the only evidence needed to show that, but for BNSF's decisions to decimate their train crew workforce, BNSF could have served Evergy.

⁶⁵ *Id.* at page 46, fn. 115.

⁶⁶ *See*, Mulholland/Crowley Opening VS at pages 2-3.

IV. THE IMPACT OF THE COVID PANDEMIC ON BNSF CREW AVAILABILITY

Dr. Prince is joined by Dr. Erin Johnson in an attempt to blame the COVID pandemic as the reason for BNSF labor shortages that Dr. Prince and Dr. Johnson collectively claim resulted in BNSF's lack of service to Evergy's Iatan and Lawrence power stations. Dr. Johnson's credentials⁶⁷ mirror Dr. Prince's credentials in that she lacks any railroad industry or individual railroad experience.

Both Dr. Prince and Dr. Johnson's discussions of the COVID pandemic are based on high level summaries of this tragedy. However, their discussions fail to explain the specific labor problems BNSF was facing well before the pandemic struck America.

This section of my VS explains the labor problems BNSF realized long before the pandemic arrived, and that persisted through the pandemic. Specifically, BNSF was having labor problems prior to the COVID pandemic. Critically, BNSF began large-scale furloughs in 2019 prior to the COVID pandemic. These issues are explained in greater detail below.

A. BNSF WAS HAVING LABOR ISSUES PRIOR TO THE PANDEMIC

Well before March 2020, when the COVID pandemic began, BNSF was experiencing labor issues, primarily due to its cost-cutting operations, reductions in force, and enhanced focus on reducing its operating ratio. Some of the BNSF policies started in 2015, when the railroad industry saw reductions in freight volume. Other policies came later, in 2019, with BNSF's continued focus on achieving an ever-lower operating ratio. Examples of these BNSF policies can be found in BNSF's comments in EP 770,⁶⁸ where BNSF's CEO, Katie Farmer, admitted that BNSF did not

⁶⁷ See, Johnson VS Exhibit 1.

⁶⁸ See, BNSF Comments in EP 770, p. 834.

meet customer expectations. In the same filing, BNSF also claimed that changes in the Railroad Retirement Act induced more BNSF employees to retire.⁶⁹

1. 2015/2016 BNSF Furloughs

In 2015 and 2016, the railroad industry experienced a demand trough, largely driven by a drop in coal and crude oil shipments. A strong U.S. dollar reduced export competitiveness, while low energy and natural gas prices contributed to a shift away from coal products. These economic conditions led to reduced rail traffic and, in turn, fewer crews across Class I railroads. Indeed, BNSF furloughed 4,500 employees.⁷⁰

2. 2019 BNSF Furloughs

In 2017-2018, as demand returned some, BNSF brought back some employees, but that was short-lived. As explained in Evergy's opening evidence, BNSF instituted furloughs in 2019 that put them in a position from which they could not readily recover at the inevitable point when demand increased.⁷¹ In 2019, BNSF had 40,750 employees. By 2021, it had 35,125. The circumstances surrounding this drop in BNSF employment and its impact on the transport of Evergy's coal traffic are documented in the Mulholland/Crowley Rebuttal VS⁷² and will not be repeated here.

B. BNSF DELAYED BRINGING BACK FURLOUGHED EMPLOYEES

Contrary to Dr. Johnson's claims, BNSF did not bring furloughed employees back at the same pace as the other Class I railroads. Dr. Johnson stated that BNSF brought back furloughed

⁶⁹ See, *BNSF Comments in EP 770*, p. 782.

⁷⁰ See, "A Railroad Recession? Sluggish economy and a drastic drop in coal and oil shipments means cuts on Montana's railroads" Flathead Beacon, May 24, 2016 and available at <https://flatheadbeacon.com/2016/05/24/a-railroad-recession/> (Accessed on January 15, 2026).

⁷¹ See, Evergy Opening Argument at pages 31-34.

⁷² See, Mulholland/Crowley RVS at pages 4 through 24.

employees in 2021 and 2022 but faced headwinds from tight labor markets. Dr. Johnson's own data shows that the other Class I railroads brought back furloughed employees or hired new employees at a higher rate than BNSF.⁷³

Also, contrary to Dr. Johnson's claims, BNSF workers were leaving the company or not returning to work from furlough because of BNSF's new employee attendance policies. Specifically, on February 1, 2022, BNSF implemented a new point system attendance policy,⁷⁴ which was criticized by workers and unions as being more restrictive, incentivizing going to work fatigued or ill, and increasing threats of discipline. The impact of this new policy on BNSF employment was in addition to the furloughs in 2019 and 2020.

C. BNSF WAS NOT HAMPERED BY ITS COLLECTIVE BARGAINING AGREEMENTS

Dr. Johnson's claim that BNSF was hampered by its collective bargaining agreements rings hollow. BNSF and the other Class I railroads were in the process of renegotiating their labor contracts during the issue time period. BNSF could have sought additional terms as part of the negotiation to attract more workers, but it did not.

Dr. Johnson also ignores that most railroad labor agreements have a safe harbor provision that allow railroads like the BNSF to retain crews and not furlough them when the number of turns within a labor pool fell.⁷⁵

⁷³ See, Johnson VS, p. 46.

⁷⁴ See, Mulholland/Crowley RVS at pages 14 through 17.

⁷⁵ For example, the bargaining agreement between CSX Transportation Inc. and the Brotherhood of Locomotive Engineers and Trainmen (System Agreement CSXT No. 1-028-14) (CSXT Agreement) contains a clause that allows the railroad and the union to adjust pool assignments during times of abnormal demand fluctuations. See, workpaper "CSXT Agreement.pdf," Attachment A, Page 6, 2b.

**D. BNSF TOLD ITS INVESTORS AND THE
MARKET THAT IT HAD SUFFICIENT
LABOR CAPACITY**

In both BNSF's 2021 and 2022 SEC Forms 10-K, BNSF told its investors that BNSF had the personnel required to serve its current customers. Specifically, BNSF's 2021 SEC Form 10-K stated that "the Company believes that it has adequate personnel for the current business environment."⁷⁶ This statement was made after an increase in service demand beginning in 2020 and continuing on into 2021. Evergy was one of the customers requesting service from BNSF during this time period for the same annual volumes it had requested in prior years. Clearly, Evergy's business qualifies as the "current business environment."

BNSF's 2022 SEC 10K contained the identical language regarding its personnel and its "current business environment."⁷⁷

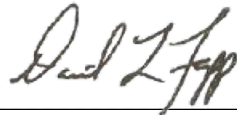
⁷⁶ See, workpaper "BNSF 2021 10k.pdf," BNSF 2021 SEC 10-K at page 5.

⁷⁷ See, workpaper "BNSF 2022 10k.pdf," BNSF 2022 SEC 10-K at page 5.

* * *

VERIFICATION

I, Daniel L. Fapp, verify under penalty of perjury that I have read this Verified Statement on behalf of Evergy, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in dark ink, appearing to read "Daniel L. Fapp", is written above a horizontal line.

Daniel L. Fapp

Executed on 1/20/26

LIST OF EXHIBITS

Exhibit No.	Exhibit Description
1	Daniel L. Fapp Qualifications

DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

My name is Daniel L. Fapp. I am a Senior Vice President of the economic consulting Firm of L. E. Peabody & Associates, Inc. The Firm's offices are located at 901 N. Stuart Street, Suite 1120, Arlington, VA 22203 and 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737.

I received a Bachelor of Science degree in Business Administration with an option in Marketing (cum laude) from the California State University, Northridge in 1987, and a Master of Business Administration degree from the University of Arizona's Eller College of Management in 1993, specializing in finance and operations management. I am also a member of Beta Gamma Sigma, the national honor society for collegiate schools of business.

I have been employed by L. E. Peabody & Associates, Inc. since December 1997. Prior to joining L. E. Peabody & Associates, Inc., I was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, and where I also served as an officer and treasurer of the three BHP Copper Inc. subsidiary common carrier railroads, The San Manuel Arizona Railroad, the Magma Arizona Railroad (also known as the BHP Arizona Railroad) and the BHP Nevada Railroad. I have also held operations management positions with Arizona Lithographers in Tucson, AZ and MCA-Universal Studios in Universal City, CA.

While at BHP Copper Inc., I was responsible for all financial and administrative functions of the company's transportation group. I also directed the BHP Copper Inc. subsidiary railroads' cost and revenue accounting staff and managed the San Manuel Arizona Railroad's and BHP Arizona Railroad's dispatchers and the railroad dispatching functions. I served on the company's Commercial and Transportation Management Team and the company's Railroad Acquisition Team where I was responsible for evaluating the acquisition of new railroads, including developing financial and economic assessment models.



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

I have directed and managed sourcing and core carrier engagements as both a consultant and as an industry practitioner. These engagements have involved the selection of primary and secondary rail, truckload, less-than-truck load, air express and parcel carriers. I have participated in and managed consortium sourcing projects in the small package express and fleet management fields. I have served on the management team overseeing the implementation of a core carrier program and have been involved in and directed negotiations with regional and national truckload carriers.

In my tenure at L. E. Peabody & Associates, Inc., I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, volume commitments, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

As part of my work for L. E. Peabody & Associates, Inc., I have performed and directed numerous projects and analyses undertaken on behalf of utility companies, short line railroads, bulk shippers, and industry and trade associations. Examples of studies which I have participated in organizing and directing include, traffic, operational and cost analyses in connection with the rail movement of coal, metallic ores, pulp and paper products, and other commodities. I have also analyzed multiple car movements, unit train operations, divisions of through rail rates and switching operations throughout the United States. The nature of these studies enabled me to become familiar with the operating procedures utilized by railroads in the normal course of business.



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

Since 1997, I have participated in the development of cost of service analyses for the movement of bulk and non-bulk commodities over all the major U.S. railroads. I have conducted on-site studies of switching, detention and line-haul activities relating to the handling of coal and chemicals. I have also participated in and managed projects assisting short-line railroads. In these engagements, I assisted short-line railroads in their negotiations with connecting Class I carriers, performed railroad property and business evaluations, and worked on rail line abandonment projects.

I have developed numerous variable cost calculations utilizing the various formulas used by the Surface Transportation Board (“STB”) for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System (“URCS”). I have submitted testimony on the behalf of complaining shippers before the STB which developed stand-alone costs, traffic forecasts, revenue and contract forecasts, and fuel surcharge forecasts.

I have been frequently called upon to perform financial analyses and assessments of railroad and other transportation companies. I have determined the Going Concern Value of privately held freight and passenger railroads, including developing company specific costs of debt and equity for use in discounting future company cash flows. My consulting assignments regularly involve working with and determining various facets of financial issues, including cost of capital determinations. In these assignments, I have calculated capital structures, market values, cost of debt, cost of preferred equity and common equity. I am also well acquainted with and have used financial industry accepted models for determining a firm's cost of equity, including Discounted



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

Cash Flow Model ("DCF") models, Capital Asset Pricing Model ("CAPM"), Cost Build-Up models and Arbitrage Pricing Models.

I have also lectured in graduate level finance, economics and supply chain classes and am a member of the Professional Advisory Council for the Eller School of Management Finance Department at the University of Arizona.

I have developed different economic analyses regarding transportation matters for numerous electric utility companies, manufacturing companies and government agencies located in all parts of the United States, and for major associations, including the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies major industries companies in solving various transportation-related problems.

In my tenure with L. E. Peabody & Associates, Inc., I have presented evidence in numerous proceedings before the STB and have presented evidence and testified and presented expert reports before state and Federal courts and in private arbitrations. In conjunction with other L. E. Peabody & Associates, Inc. officers, I have worked on and directed expert reports in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, operating procedures and other economic components of specific contracts.



REBUTTAL VERIFIED STATEMENT OF MICHAEL CROSBY

My name is Michael Crosby, and I am a Lead Reliability and Data Analytics specialist for Evergy, Inc. I submitted a Verified Statement as part of the June 25, 2025 Opening Evidence of Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. (collectively “Evergy”) in this Surface Transportation Board (“STB”) proceeding. My educational background and employment experience with Evergy were included in that Statement.

My Opening Verified Statement addressed, explained and calculated the “lost opportunity” experienced by Evergy in 2022 as a result of coal conservation measures that were implemented at Evergy Metro Inc.’s Iatan Generating Station (“Iatan”) and Evergy Kansas Central’s Lawrence Energy Center (“LEC”) in response to coal transportation service restrictions imposed by BNSF Railway Company (“BNSF”). I used a combination of common industry software tools – including GenTrader, Microsoft Excel and Microsoft Access – to determine the additional net revenues or “profits” that Evergy would have earned on sales of electric generation into the Southwest Power Pool (“SPP”) in 2022 had coal conservation not been implemented. I applied the GenTrader program using cost-based Evergy offers of Iatan and LEC generation that would have been submitted to SPP absent coal conservation. I calculated Evergy’s principal lost opportunity to be \$16,962,878, and I provided supporting Exhibits and workpapers that showed the sources of all data and the calculations process.

I am providing this Rebuttal Statement in order to respond to various claims made by BNSF’s witness Paul Hibbard challenging my approach to the calculation of lost

opportunity. I also am making some minor adjustments to my Opening calculations based on information received after my prior Statement was submitted, though my overall approach and results are unchanged.

A. GENTRADER ACCURATELY MEASURES LOST OPPORTUNITY

As I described in my Opening Statement, GenTrader is a publicly available software program that Evergy has used in the past for multiple purposes, including stochastic forecasting and generation unit dispatching analyses.¹ We chose GenTrader for the site-specific analysis at Iatan and LEC because the software is most suited for hourly Locational Marginal Price (“LMP”)-based commitment and dispatch, while having the ability to model the many hourly-specific derates and outages required and to closely synchronize with the same data that drives our inputs to the SPP Market. Mr. Hibbard alleges that my “actual case” for the 2022 lost opportunity calculation was based on modeling outputs and not historical data,² but this is not the case. As my Opening workpapers showed, the “actual case” inputs were based on historical data, including historical SPP Day-Ahead (“DA”) Cleared Output and DA LMP values.³ For the non-conservation or “but for” case, GenTrader produces outputs on an hourly basis, committing and dispatching resources as DA Cleared Output matching cost-based Day-Ahead SPP offer and award practices. As I explained in my Opening Statement, I began the process by populating the GenTrader program with cost-based inputs taken from

¹ Op. V.S. Crosby at 14-15.

² V.S. Hibbard at 29.

³ Op. V.S. Crosby at 11.

actual Day-Ahead offer inputs used to calculate the Iatan and LEC offers into SPP. Op. V.S. Crosby at 15. With the single exception of a LMP adjustment (downward) in the “but for” case discussed further below, model output values were not relied upon in my execution of the program.

Mr. Hibbard also focuses on the lost opportunity calculations for the months of May and October 2022, which are not peak months, noting that they showed higher percentages than other months when power demand tends to peak. He finds this “peculiar” and claims it is indicative of flaws in the analysis.⁴ However, the explanation is rather simple. SPP market pricing dynamics are not solely based on whether a particular month is considered a peak demand month. When comparing May and October average actual Day-Ahead prices at the load and Iatan and LEC generator locations, prices in May 2022 were on average 212% to 270% higher than the preceding two years, and on average 156% to 202% higher than the following two years. Similarly, prices in October 2022 were on average 144% to 173% higher than the preceding two years, and on average 182% to 341% higher than the following two years, as shown below:

⁴ V.S. Hibbard at 27.

Table 1				
Month	Location	Avg DA LMP	Avg 2022 DA LMP	2022 Over Current
May-2020	Iatan	14.5	39.2	270%
May-2020	LEC	16.3	37.9	233%
May-2021	Iatan	17.7	39.2	221%
May-2021	LEC	17.9	37.9	212%
May-2022	Iatan	39.2	39.2	100%
May-2022	LEC	37.9	37.9	100%
May-2023	Iatan	25.1	39.2	156%
May-2023	LEC	23.9	37.9	158%
May-2024	Iatan	19.4	39.2	202%
May-2024	LEC	20.9	37.9	181%
Table 2				
Month	Location	Avg DA LMP	Avg 2022 DA LMP	2022 Over Current
Oct-2020	Iatan	24.0	41.4	173%
Oct-2020	LEC	28.4	41.0	144%
Oct-2021	Iatan	28.5	41.4	145%
Oct-2021	LEC	28.5	41.0	144%
Oct-2022	Iatan	41.4	41.4	100%
Oct-2022	LEC	41.0	41.0	100%
Oct-2023	Iatan	22.1	41.4	188%
Oct-2023	LEC	22.6	41.0	182%
Oct-2024	Iatan	12.5	41.4	332%
Oct-2024	LEC	12.0	41.0	341%

Source: pubftp.spp.org//Markets/DA/LMP_By_SETTLEMENT_LOC

From a review of SPP capacity, outage and other data, the higher LMPs in May and October 2022 were attributable to a combination of high gas prices for both months, compounded by nuclear units on outage for October. Such phenomena occur periodically in SPP and other regional systems, and do not make my lost opportunity calculations “peculiar” in any way. Elsewhere in his Statement, Mr. Hibbard himself notes the increases in unit cycling and coal resource demand volatility in recent years. V.S. Hibbard at 32-33.

Actual opportunity at Iatan and LEC is most accurately captured using historic data, including SPP-calculated hourly LMPs and unit dispatch MWHs, and Evergy's actual costs of generation. This is the approach that I took. If one is looking to calculate lost opportunity arising from coal conservation measures at two of the 750+ generating stations within SPP, GenTrader is a superior model to use, as it calculates unit dispatch MWHs and generation costs in the "but for" scenario using LMPs as the driver. Mr. Hibbard does not show anything to the contrary.

B. RESOURCE ADEQUACY AND EVERGY BID PRACTICES

Mr. Hibbard argues that Evergy would have fulfilled its resource adequacy commitments to SPP in 2022 without coal conservation, apparently looking to draw the inference that conservation was never necessary.⁵ The decision to conserve coal was made within the Evergy fuels management groups and was not among my responsibilities. However, I can represent to the STB that resource adequacy and coal conservation are two very different concepts. Resource adequacy refers to the requirement that Evergy's operating subsidiaries, as load responsible entities in SPP, must show that they have sufficient generation capability available to meet forecasted demand. To satisfy that load requirement, however, Evergy purchases 100% of its electricity needs from SPP. It then offers generation to SPP in an effort to earn revenues to offset (or exceed) the power purchase costs. Ideally, the company would have full generation capability available during peak periods, when the LMPs for power purchased (and sold)

⁵ V.S. Hibbard at 42.

are high. If generation is constrained during those periods, the cost of load likely will exceed available offsetting revenue. Therefore, while a load responsible entity has generation resources adequate to meet overall load, it will balance the commitment of those resources in order to serve its customers at the lowest available cost during particular days or hours. If at a given point in time projections show generation constraints during a peak period (*e.g.*, due to restrictions on fuel supply) and LMP forecasts are rising, the entity well might decide to conserve coal in the short term to minimize the risk of higher net load costs in coming months. Aside from showing a misunderstanding of the concept of resource adequacy in the context of a utility within SPP, Mr. Hibbard's comment is informed exclusively by hindsight 20-20 and cannot judge the reasonableness of a conservation decision at the time that it was made.

In a related vein, Mr. Hibbard criticizes the use of models such as GenTrader in general, claiming that utility bidding behavior "deviates meaningfully from the theoretically 'pure' representations in the models." V.S. Hibbard at 30, 62. I cannot speak to other utilities that he might be familiar with, but Evergy's offer strategies for Day-Ahead energy coal units tend to be as straightforward as the models that we use. Typically, they are based on variable fuel and operations and maintenance costs. Any factors to account for contingencies such as transmission constraints, etc. are embedded in the actual DA LMPs determined by SPP; they are not part of Evergy's offers. As I stated above, the inputs that I used in the "actual case" were not products of GenTrader or any other model; they were taken from Day-Ahead Revenue derived from historic offers submitted to SPP for Iatan and LEC during the hours analyzed. The actual

opportunity calculation tracked actual Evergy offer behavior. GenTrader then was deployed to mirror the dispatch and revenue results for Iatan and LEC during those same hours in a scenario where coal conservation had not been in effect. That “but for” case showed Evergy’s lost opportunity.

C. THE LMPs USED IN THE GENTRADER ANALYSIS

In my Opening Statement, I explained how I made a conservative adjustment to the GenTrader “but for” case to account for the effect that having Iatan and LEC fully available to offer generation to SPP in 2022 without conservation bid adders would have had on hourly LMPs. Specifically, I adjusted the actual 2022 LMPs *downward* to reflect the impact of more lower-cost coal generation being available for offer. Op. V.S. Crosby at 16. The differentials that I used to make these adjustments were provided by Evergy Witness Hsin Foo, whose production cost model analysis calculated LMPs throughout the SPP footprint, both with and without coal conservation at Iatan and LEC.

Mr. Hibbard criticizes my adjustment approach (though he does not offer an alternative), claiming that I should have used higher differentials without quantifying them. V.S. Hibbard at 75-76. His purported basis is a table (Table 7) that shows a single hour out of the thousands in 2022 where my nominal LMP differential is the same as Ms. Foo’s, and an appendix (Appendix C) which he says shows that a “convex curve” should always apply to correlate LMP differentials with the levels of MWH prices. That construct does not describe how prices form in SPP’s current nodal market. Since SPP launched the Integrated Marketplace in 2014, LMPs are made up of three components – the marginal cost of energy, the cost of congestion, and marginal losses – not merely the

energy supply stack. Those features are codified in SPP's Market Protocols and underpin the LMP formation. An energy-only static supply curve, by definition, omits congestion and losses and therefore cannot represent modern SPP LMP behavior. That is the flaw in Mr. Hibbard's Appendix C. It is based on a 2012 source that did not account for the current features of LMPs within SPP.

Also invalid is his criticism that the lost opportunity calculation that I presented in my Opening Statement is not reliable because it differs from some internal Evergy calculations made in January 2023. V.S. Hibbard at 76-77. I am familiar with that early estimate, and it was quite primitive as compared to the analysis that I have presented in this case. It's "but for" case was a product of manual Excel spreadsheet calculations and a rudimentary manual commitment logic, rather than a recognized commitment and dispatch algorithmic program such as GenTrader. It also did not accurately capture dual fuel operations at LEC in the "actual" case, and it relied on unadjusted, higher LMPs in the "but for" case. Differences between my analysis and the January 2023 estimate simply confirm the inaccuracy of the latter.

D. RESPONSES TO OTHER CRITICISMS

In his Statement, Mr. Hibbard makes a number of other claims or advances criticisms that either have no validity or are of no meaningful consequence when it comes to the reliability of my lost opportunity calculations.

1. Iatan Unit 1 Outage

Mr. Hibbard alleges that lost opportunity (and increased net cost to load) damages calculations for Evergy included values for Iatan Unit 1 during a time period ({{ [REDACTED] }}

operators due to higher LMPs in those hours, but if (as was the case in 2022 and as I summarized in my Opening Statement⁷) Evergy experienced increased net costs overall throughout the conservation period, those adverse economic consequences should be recognized. Ms. Foo explains in her Rebuttal Verified Statement that coal conservation is a response to projected fuel shortages or other generation constraints, so the expectation is that conservation will result in increased costs to load.

3. GenTrader’s “Actual” Case Used Historic Data

Mr. Hibbard makes the assertion that Evergy’s modeling of an “actual” lost opportunity scenario “bears little resemblance to real-world outcomes,”⁸ but there is no foundation for such a statement. As I explained earlier in this Rebuttal Statement, the “actual” case in my lost opportunity analysis was based on historical data, including in particular historical DA Cleared Output and actual Day-Ahead LMP values.

4. Fuel Switching at LEC

In his Statement, Mr. Hibbard criticizes my “but for” lost opportunity scenario for not modeling the impact of LEC’s capability of burning natural gas as well as coal.⁹ However, there is no need to account for LEC’s fuel switching option in the “but for” analysis. The “but for” (*i.e.*, no coal conservation) scenario assumes that coal supplies for both Iatan and LEC are sufficient to fully meet generation demand. Since coal was a

⁷ Op. V.S. Crosby at 19-20.

⁸ V.S. Hibbard at 92.

⁹ *Id.* at 96.

lower cost fuel than gas for LEC throughout 2022, in the “but for” scenario the station would have run exclusively on coal.¹⁰

5. EIA Data Are Not Relevant to Lost Opportunity Calculations

Mr. Hibbard claims that certain of my GenTrader modeling inputs (*e.g.*, coal and gas fuel prices) are inaccurate because they differ in some respects from 2022 data reported by the Energy Information Administration. V.S. Hibbard at 99-100. As I explained earlier in this Rebuttal Statement, however, the fuel prices and other inputs that I used for the “actual” and “GenTrader” cases match what Evergy used in the SPP offers for Iatan and LEC in the hours analyzed.¹¹ EIA data – which is assembled and reported well after the end of each year – is not used to calculate Day-Ahead generation offers and therefore is not relevant either to the “actual” case or to the GenTrader “but for” case. I also would point out that Mr. Hibbard developed his gas prices by calculating the average price for the days in a month without weighting the results to reflect the fact that Evergy did not purchase or burn gas every day of every month. His simplistic averaging approach invalidates his comparison.

Similarly, Mr. Hibbard tries to fault my variable operations and maintenance (“O&M”) price inputs as being inconsistent with Evergy witness Hsin Foo’s PROMOD analysis. V.S. Hibbard at 100-101. The variable O&M prices that I used for the “actual” case and the GenTrader “but for” case match those that were used for Evergy’s 2022 SPP

¹⁰ See GenTrader Cost Data Entry.xls, Tab: LEC-GT on Opening Exhibit.

¹¹ See Actual Opportunity and Lost Opportunity and Startup Costs.xlsx Tab: ACTL-FUEL-PRICES on Opening Exhibit.

offers,¹² and were the only O&M prices used in the lost opportunity calculations. Ms. Foo discusses the PROMOD inputs in her Rebuttal Verified Statement.

6. LMPs and “Real World” Offers

Mr. Hibbard claims that my use of a LMP differential derived from Iatan Unit 1 for Iatan Unit 2 was a “mistake,”¹³ but the fact is that SPP LMP adjustments were nearly identical at both Units, as seen by the summary table below.

Table 3	
Month	IAT1 vs IAT2 Adjustment LMP Delta
Apr	(0.00)
May	(0.01)
Jun	(0.01)
Jul	0.00
Aug	0.00
Sep	0.00
Oct	(0.02)
Nov	0.01
Dec	(0.00)

Similarly, he claims that the GenTrader offers do not align with “hourly variations in unit offers.”¹⁴ Evergy’s energy offer prices principally consist of fuel prices and Variable O&M costs, as I explained above and in my Opening Statement. *See Op. V.S. Crosby at 10-15.* Coal prices used to calculate SPP Offers are re-calculated on a month-ahead basis using forecasted deliveries, and Variable O&M costs used to calculate SPP Offers are re-

¹² *See* GenTrader Cost Data Entry.xls, Tab: Var O&M on Opening Exhibit.

¹³ V.S. Hibbard at 101.

¹⁴ *Id.* at 102.

calculated yearly. These components of the offers are calculated in a way that is in compliance with SPP policies. It is true that SPP will accept hourly offers, but for Iatan and LEC the coal-based offers stay constant for at least a month and gas-based offers stay constant for 24 hours. There is no misalignment between the GenTrader offers in my analysis and the actual basis on which Iatan and LEC generation were offered into SPP in 2022.¹⁵

7. Maintenance, Outage and Derate Schedules

Mr. Hibbard significantly overstates the impact of supposed “differences” between outage and derate schedules used in GenTrader and PROMOD. V.S. Hibbard at 102-103.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}¹⁶ As a result,

while these hours are excluded from the lost opportunity damages calculation Mr.

Hibbard misleadingly suggests a larger discrepancy. The remaining differences between Mr. Hibbard’s “actual” values and GenTrader are minimal where GenTrader values are a

¹⁵ I note that in my “actual” case I switched coal prices for LEC at midnight instead of at 9 am and for Iatan 2, and I did not account for a switch to daylight savings time. V.S. Hibbard at 108. These have only a minimal impact on the lost opportunity calculation and are corrected in my restatement of lost opportunity damages.

¹⁶ See New Workpaper: SPP PCI Outage Management System Export.xlsx, Tab: April Iatan Outages.

direct reflection of what was submitted to the SPP Market. The differences between GenTrader and PROMOD values are negligible.

Mr. Hibbard's discussion of derates and his Table 10 claim that the GenTrader and PROMOD models derated Iatan Unit 1 to {{[REDACTED]}}. V.S.

[REDACTED] Hibbard at 102 and Table 10. However, Evergy's official sources for generation outages as reported to SPP show {{[REDACTED]}} to be the correct value,¹⁷ which also is reflected in the historical SPP Day-Ahead ("DA") Cleared Output found in my original workpapers in the "actual" case. Mr. Hibbard's source citation does not support his claim.

Additionally, he alleges "similar inconsistencies" at other units (*id.*) but offers nothing beyond a comparison of GenTrader and PROMOD. I note that a higher derate value such as Mr. Hibbard advocates only would increase the measure of lost opportunity damages.

8. Heat Rates and Coal Inventories

As with several of his other criticisms of input details for the GenTrader analysis, Mr. Hibbard's comments about heat rates and coal inventories overstate the significance of any differences between the GenTrader and PROMOD programs and certain data reported by EIA. V.S. Hibbard at 103-105. For example, his Tables 11 and 12 purport to compare fuel burns at Iatan and LEC as reflected in the two programs, but Mr. Hibbard neglects to recognize that total fuel cost as calculated in GenTrader excludes fuel for

¹⁷ See New Workpaper: SPP PCI Outage Management System Export.xlsx, Tab: Iatan 1 620 MW Derate.

start-up (those costs are entered separately into the program), so it is not surprising that his burn numbers would show lower values for GenTrader than PROMOD. Also, it appears that in deriving his values Mr. Hibbard divided GenTrader Fuel/MMBTU by an EIA “heat content” figure while using PROMOD heat content values for his comparison, which further explains any resulting differences. Interestingly, Mr. Hibbard does remove start-up fuel from his implied heat rate table (Table 13), and the result is negligible differences between GenTrader and PROMOD. As I explained earlier in my Rebuttal Statement, differences with reported EIA data are to be expected since the EIA hindsight numbers can be fine-tuned as compared to the actual SPP offers and other real time inputs used for GenTrader.

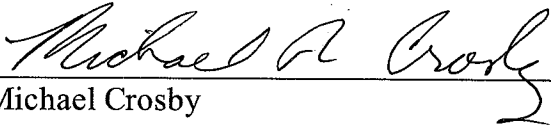
E. RESTATEMENT OF DAMAGES

After making the two corrections as noted in footnote 15 above, the following are the resulting lost opportunity damages, with Table 1 showing the new Actual Opportunity amounts, and Table 3 showing the new Lost Opportunity Impact. For consistency, Table 2 is included below, but remains unchanged. Details of these calculations are shown in my workpapers.

Table 1		Table 2		Table 3	
Unit	DA Actual P&L w/Startup (Actual Opportunity)	Unit	GenTrader Study P&L w/Startup (Lost Opportunity)	Unit	Lost Opportunity Impact
IAT1	57,129,888	IAT1	59,021,877	IAT1	1,891,989
IAT2	101,729,070	IAT2	110,197,325	IAT2	8,468,255
LEC4	9,668,283	LEC4	11,534,996	LEC4	1,866,713
LEC5	33,197,711	LEC5	37,885,294	LEC5	4,687,583
Total	201,724,952	Total	218,639,492	Total	16,914,540

VERIFICATION

I, Michael Crosby, state under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement. Executed on January 15, 2026.


Michael Crosby

REBUTTAL VERIFIED STATEMENT OF HSIN FOO

My name is Hsin Foo, and I am a Lead Quantitative Analyst at Evergy, Inc. I submitted a Verified Statement as part of the June 25, 2025 Opening Evidence of Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. (collectively, “Evergy”) in this Surface Transportation Board (“STB”) proceeding. My education and professional background were included in that Statement.

My Opening Verified Statement presented the calculation and explanation of the increased net costs incurred by Evergy to meet its electric load purchase requirements within the Southwest Power Pool (“SPP”) regional transmission organization in 2022, as a consequence of coal conservation measures implemented at the Iatan Generating Station (“IAT”) operated by Evergy Metro, Inc. and the Lawrence Energy Center (“LEC”) operated by Evergy Kansas Central, Inc. To quantify these impacts, I used PROMOD IV, a widely recognized production cost modelling tool that simulated electric generation across more than 750 production units within SPP under two scenarios: (1) with coal conservation measures applied, and (2) an alternative “but for” scenario in which no coal conservation measures were implemented. Comparing these scenarios allowed me to estimate the net additional costs Evergy incurred to meet its load obligation in 2022. Based on this analysis, I determined that Evergy’s net load purchase costs increased by \$4,627,883.00 as a result of the coal conservation measures at IAT and LEC.

The purpose of this Rebuttal Verified Statement is to address and correct certain claims and criticisms raised by Mr. Paul Hibbard, a consultant engaged by BNSF Railway Company (“BNSF”) for purposes of this proceeding, concerning my analytical approach and calculations.¹ It is important to note at the outset that Mr. Hibbard does not appear to present a net cost-to-load analysis of his own. Although he asserts various perceived flaws in my methodology, he does not identify how he believes the calculations should have been performed, nor does he offer an alternative model. As discussed later in this Rebuttal Statement, Mr. Hibbard presents an Appendix B to his Statement that outlines degrees of granularity that he says must be met by a valid model-based approach, but his outline actually presents a case for the use of a model such as PROMOD. His position appears to be that unless net cost-to-load impacts across all of SPP generating units can be calculated with perfect precision using perfectly complete real-world data regarding fuel pricing, system demand, weather patterns, power plant operations, bidding behavior, transmission constraints, and every other factor that impacts SPP operations at a minute-by-minute resolution – a standard that is neither realistic nor required – then the economic impact of coal conservation measures on Evergy cannot be quantified at all. As an experienced electric utility analyst, I firmly reject this premise. Perfect information is

¹ My Opening Verified Statement included detailed explanations of Evergy’s role within the SPP structure and the functions and uses of the PROMOD model, both within Evergy and in the larger electric utility community. I will not repeat those explanations in this Rebuttal Statement but they remain accurate and valid.

not a prerequisite for rigorous and reliable economic modeling, and his critique does not identify a viable alternative to the widely accepted methods I employed.

A. PROMOD IS A RECOGNIZED MODELING TOOL

As I described in my Opening Verified Statement, PROMOD is a widely used and industry standard production cost modeling tool routinely employed by Evergy and many other utility companies in the Midwest. PROMOD simulates electricity flows through the transmission grid and identifies the most cost-effective way to generate and distribute electricity while adhering to reliability and transmission limitations, and calculates the hourly generation levels at individual generating units and electric power prices across SPP during defined periods. PROMOD incorporates a broad set of system inputs including, but not limited to, generation unit and resource availability, fuel costs, hourly system demand for electricity, transmission constraints, variable operations and maintenance costs, and many other system variables. The workpapers submitted with my Opening Verified Statement detail the extensive inputs and assumptions that PROMOD uses to forecast SPP Locational Marginal Prices (“LMPs”). The results of Evergy’s analyses using PROMOD are regularly accepted by SPP and the state regulatory commission with jurisdiction over IAT and LEC – the Missouri Public Service Commission (“MPSC”) and the Kansas Corporation Commission (“KCC”).

In his Statement, Mr. Hibbard does not appear to challenge the integrity of PROMOD as a modeling platform per se – that would be a difficult position to defend given its widespread acceptance and long-standing use across the industry. Instead, he

claims that the version that I used (PROMOD IV) is “out-of-date” and no longer available.² This is incorrect. Although Hitachi Energy has released a newer “PROMOD V,” it has not been adopted by SPP as the standard for their long-term system planning. As such, PROMOD V is not in widespread use within the utility and regulatory communities in the SPP footprint. PROMOD IV remains fully consistent with the core functionality of later releases. The essential modeling architecture – unit commitment and security-constrained economic dispatch simulation – has not fundamentally changed. PROMOD IV continues to be accepted by SPP, the MPSC and the KCC, and remains the version regularly used throughout the industry.

Mr. Hibbard claims that if Evergy’s portfolio generation in a particular hour happened to equal its load obligation, then a change in SPP market prices would have no effect on Evergy because increased generator revenues would offset increased load costs.³ This assertion is grossly incorrect. Mr. Hibbard’s observation only holds true under the unrealistic assumption that the LMP at every Evergy generating unit is identical to the LMP at which Evergy serves its load. In the SPP market, the price of electricity at any given moment is not uniform across the entire region but will vary from location to location, depending on local supply and demand conditions and the presence of transmission constraints. For example, a generator in western Kansas will rarely have the

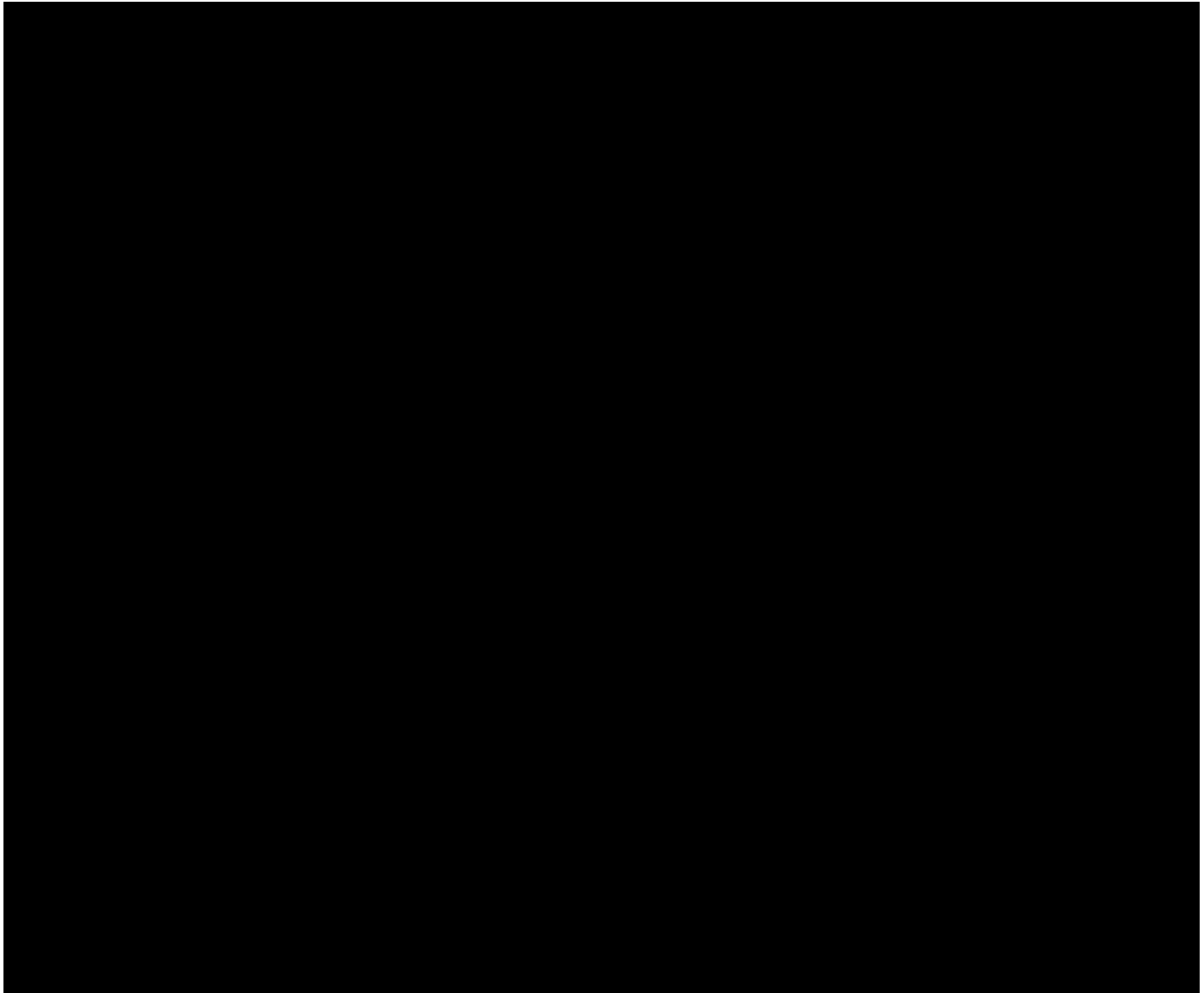
² V.S. Hibbard at 63.

³ *Id.* at 24.

same LMP as a generator in Northeast Kansas, even though both are within the SPP footprint.

These differences in LMP reflect the cost of delivering energy from each location to load and are an inherent feature of SPP's market. Figure 1 illustrates the range of LMP divergence between Evergy's IAT and LEC generating stations and Evergy's load during the coal conservation period. {{ [REDACTED] [REDACTED] }} Table 1 shows the percentage of hours during the coal conservation period in which the LMP differentials deviated from zero. At no point was the differential zero for either unit. This demonstrates that Mr. Hibbard's claim that Evergy's generation revenues and load costs move in equal and offsetting amounts does not reflect the operation or pricing realities of the SPP market.

Figure 1: Day Ahead LMP Differential Relative to Load During Coal Conservation{{



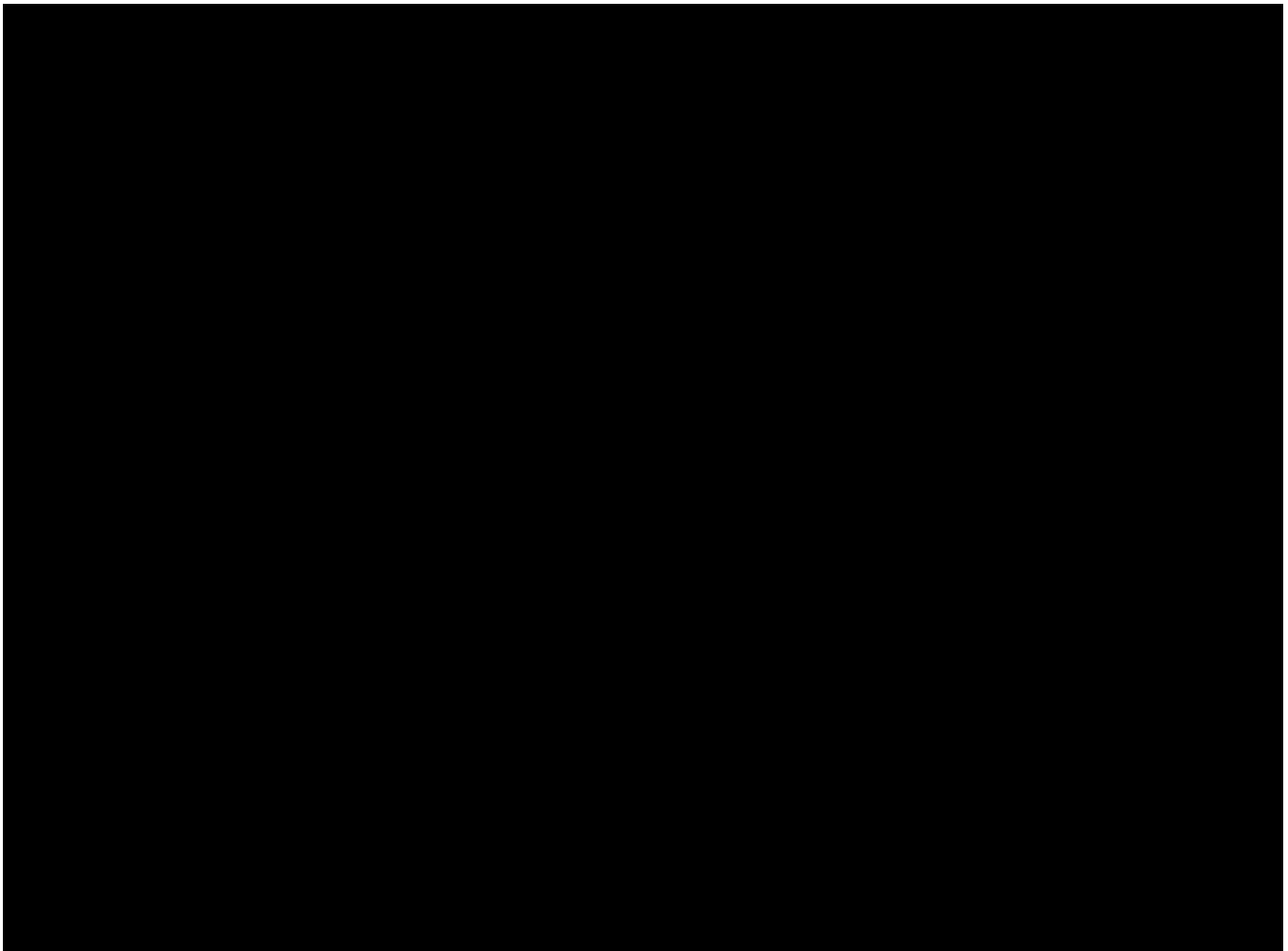
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Mr. Hibbard draws attention to the unremarkable fact that during *some* hours in 2022, the PROMOD runs that I presented show that higher LMPs resulting from coal conservation measures produced an apparent increase in Evergy's margin or profit.⁴ He references this observation multiple times, seemingly to imply that the PROMOD

⁴ *Id.* at 25.

analysis is unreliable or that net cost-to-load impacts cannot be meaningfully attributed to coal conservation measures caused by BNSF's actions in 2022. The fact that hourly price impacts can vary is neither surprising nor inconsistent. While it certainly can be true that in some hours conservation measures may increase Evergy's margins, it is equally true that in *other* hours Evergy experienced an *increased* net cost-to-load, as the following example shows:

Figure 2: Example Hour with Positive Damages {{



}}

The cost-to-load calculation is a *net* calculation over the course of the conservation period in 2022,⁵ an approach that, to my understanding, Mr. Hibbard endorsed earlier in this proceeding. Evaluated over the entire period, Evergy experienced a net increase of more than \$4,600,000 in the cost of meeting its SPP load obligations as a direct consequence of coal conservation measures implemented in response to BNSF’s restrictions on coal deliveries to the IAT and LEC stations. My “but for” analysis scenario simply modified the 2022 base case to remove those conservation measures; the results therefore are not “random” in any respect. They are directly attributable to BNSF’s actions. Mr. Hibbard posits that the overall results could just as easily could have been “positive,”⁶ but that scenario is highly implausible. Coal conservation is undertaken only in response to projected fuel constraints; it is not a strategic business choice and its consequences overwhelmingly create higher costs, not a balanced mix of gains and losses.

Mr. Hibbard claims that Evergy’s coal conservation decisions were always “voluntary” and implies that they may have been motivated by an effort to increase margins.⁷ BNSF goes even further, alleging that coal conservation may have been a strategy to “make more money.”⁸ Based on my professional responsibilities, which

⁵ As I note later in this Rebuttal Statement, I am making a modest adjustment to my original net cost-to-load total for 2022 to recognize that Evergy ceased coal conservation on December 20, 2022 and did not continue it for another 11 days.

⁶ V.S. Hibbard at 39.

⁷ *Id.* at 39-40.

⁸ BNSF Argument at 103.

involve regular and direct interaction with SPP and with state regulators, I can assure the STB that such a scenario would not and could not occur.

On the regulatory side, both the MPSC and the KCC closely scrutinize the costs incurred by Evergy's operating companies under their respective jurisdictions. Before approving retail rates that recover those costs, each commission requires a demonstration that expenditures were reasonable and in the best interest of ratepayers. The regulators' analyses center on the prudence of the incurred cost in light of the statutory obligation to ensure that retail electric rates are just and reasonable. Mr. Hibbard acknowledges these regulatory requirements early in his Statement.⁹ Coal conservation measures taken for the purpose of increasing margins or profits would not meet this prudence standard, and any utility attempting such conduct would face severe consequences. By the same token, the SPP Market Monitoring Unit ("MMU") is expressly responsible for ensuring that the SPP market remains competitive and free from manipulation, including any deliberate withholding of generation output for the intent of purposely raising prices or profits. BNSF's assertion that Evergy's 2022 coal conservation measures were profit-motivated is factually incorrect and inconsistent with both the regulatory oversight and market-monitoring framework under which Evergy operates.

Just as Mr. Hibbard's observation that PROMOD's calculation of the net cost-to-load in 2022 included months with "positive" net impacts has no bearing on the reliability of the calculation, his suggestion that higher net costs in May and October of 2022

⁹ V.S. Hibbard at 6-9.

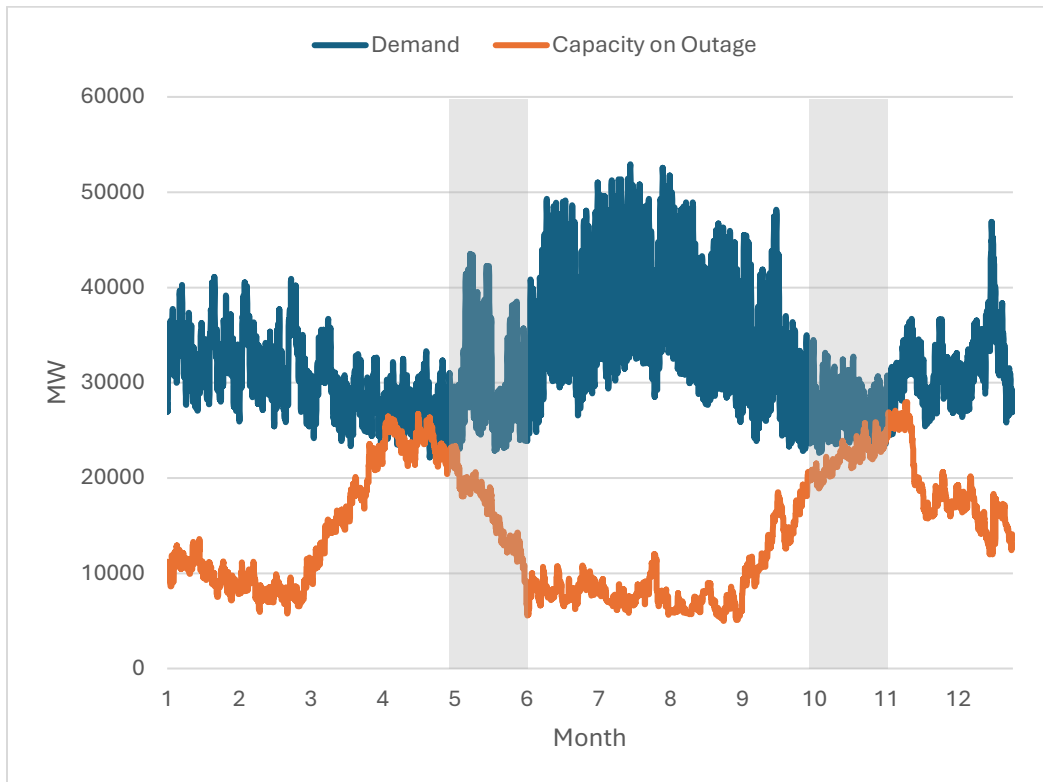
indicate something “peculiar” about the PROMOD analysis¹⁰ also lacks merit when the actual operating conditions in SPP during those months are taken into account. As Mr. Hibbard himself notes, May and October are not peak-demand months, and generators typically schedule maintenance outages during these periods. This in turn tightens supply and makes market prices significantly more sensitive to any change in available generation. When supply is constrained, even small variations in resource availability can have an outsized impact on LMPs because the system has less flexibility to absorb fluctuations.

In May 2022, approximately 42% of total generation in SPP came from wind resources,¹¹ and the intermittent nature of wind generation introduces additional volatility to the supply mix. Demand during that month was also higher than normal for a shoulder season. Figure 3 illustrates the 2022 hourly SPP demand alongside the total capacity on outage for each corresponding hour, highlighting the extent of supply constraints. When elevated outages are combined with higher-than-usual load and significant wind volatility, the SPP system becomes extremely sensitive to changes in supply. Figure 4 shows that natural gas prices in May 2022 were the highest of any May in the 2020-2024 period, further amplifying the sensitivity in LMPs to supply changes. Under such conditions, even modest reductions in available generation can produce significant impacts to power prices.

¹⁰ V.S. Hibbard at 27.

¹¹ SPP Marketplace Portal > Operations > Generation Mix Historical – GenMix_2022.csv
<https://portal.spp.org/pages/generation-mix-historical>.

Figure 3: 2022 Hourly SPP Demand and SPP Total Capacity on Outage



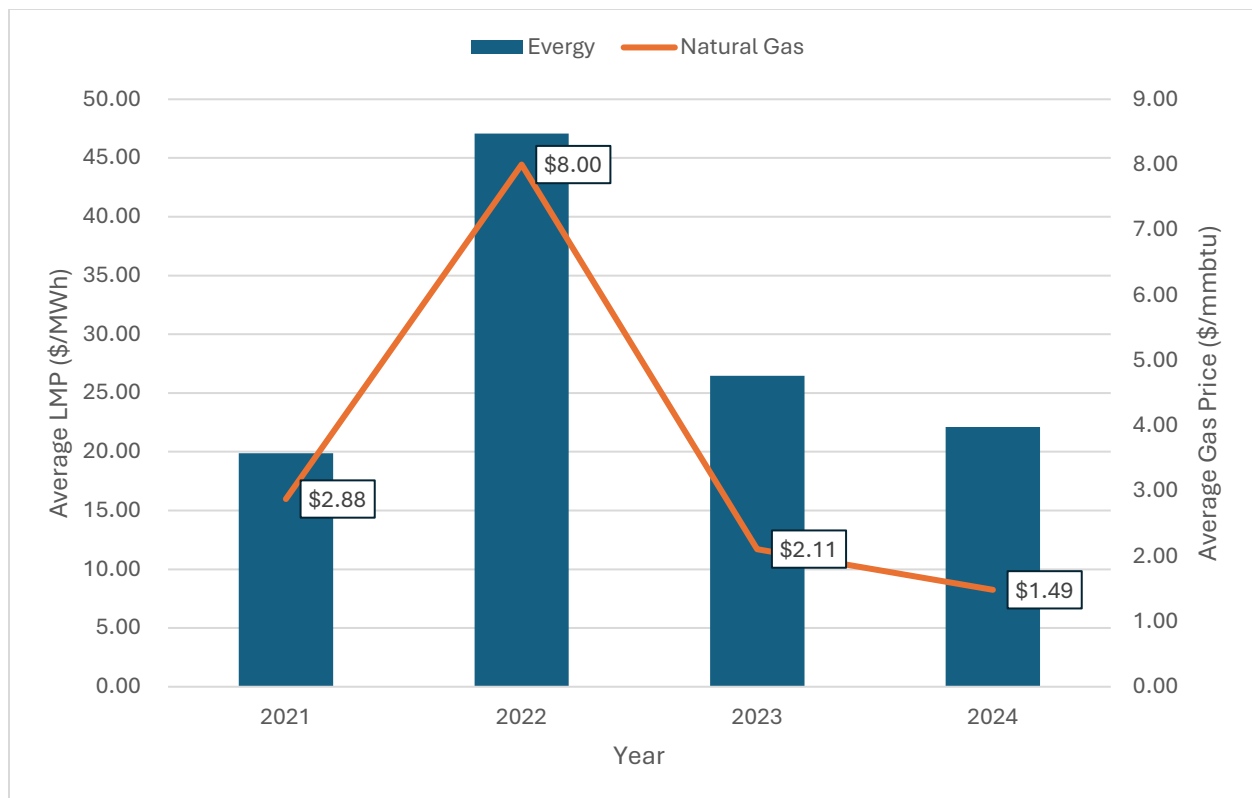
Note: [1] SPP Hourly Demand is from SPP published Hourly Load <https://portal.spp.org/pages/hourly-load> [2] SPP Total Capacity on Outage is from SPP published Capacity of Generation on Outage <https://portal.spp.org/pages/capacity-of-generation-on-outage> [3] The grayed out sections represent the months of May and October.

October 2022 exhibited similar dynamics. It is also a shoulder month, with relatively lower demand and increased generator outages. Critically, both nuclear units in SPP were undergoing their refueling outage during that period: the 820MW Cooper nuclear unit was out of service from October 2 to November 16, and the 1,241MW Wolf Creek unit was offline from October 6 to November 21.¹² The absence of these units

¹² U.S. Nuclear Regulatory Commission Power Reactor Status Reports for 2022; <https://www.nrc.gov/reading-rm/doc-collections/event-status/reactor-status/2022/index>.

removed roughly 5-6% of low-cost resources from SPP’s total generation,¹³ tightening the supply stack substantially and making market prices even more sensitive to marginal changes in available energy. This heightened sensitivity directly contributes to larger lost-opportunity impacts. The elevated net cost-to-load results in May and October are fully consistent with the underlying system conditions during those months, not evidence of any “peculiarity” in the analysis.

Figure 4: May Average Evergy Load Price vs Natural Gas Prices



Note: Natural gas prices are the average of NYMEX Gas Dailies, the daily prices of Henry Hub Natural Gas Futures. Henry Hub is the natural gas pipeline interconnection and distribution hub in Louisiana, and serves as the benchmark for natural gas pricing across North America.

¹³ Nuclear power accounted for approximately 6.75% of total SPP generation in April 2022, and 4.3% of total SPP generation in July 2022. SPP Generation Mix Historical – GenMix_2022.csv <https://portal.spp.org/pages/generation-mix-historical>.

B. RESOURCE ADEQUACY AND COAL CONSERVATION

Mr. Hibbard asserts that because SPP, MPSC and KCC did not direct Evergy to conserve coal in 2022, and because Evergy satisfied resource adequacy requirements, coal conservation was “voluntary” and not necessary.¹⁴ This argument conflates resource adequacy with operational fuel management. Coal conservation is a prospective response to projected fuel limitations and expected market conditions; it is not triggered by a failure of capacity planning, nor is it contingent on a formal directive from SPP or state regulators. The absence of such a directive says nothing about the reasonableness or necessity of conservation undertaken to avoid higher expected costs and operational risks.

Taking a single phrase from Evergy’s Complaint in this case out of context,¹⁵ Mr. Hibbard further contends that Evergy would have satisfied its resource adequacy obligations to SPP in 2022 even without coal conservation and therefore coal conservation “was not needed.”¹⁶ V.S. Hibbard at 42-43. But that conclusion is incorrect. Evergy *always* had sufficient accredited capacity to meet its SPP obligations as a load responsible entity; however, as I discussed in my Opening Statement, capacity sufficiency is only one part of the equation. Evergy purchases 100% of the electricity

¹⁴ V.S. Hibbard at 41-46.

¹⁵ Mr. Hibbard seizes on the phrase “Evergy can be required to implement ‘coal conservation measures’” (V.S. Hibbard at 42) to set up his argument that because Evergy was not *ordered* to conserve coal it need not have done so. As I explain in my text, SPP, MPSC and KCC do not issue such orders as part of their respective jurisdictional responsibilities, so the quoted phrase properly should be read as “Evergy could find it necessary” to implement coal conservation.

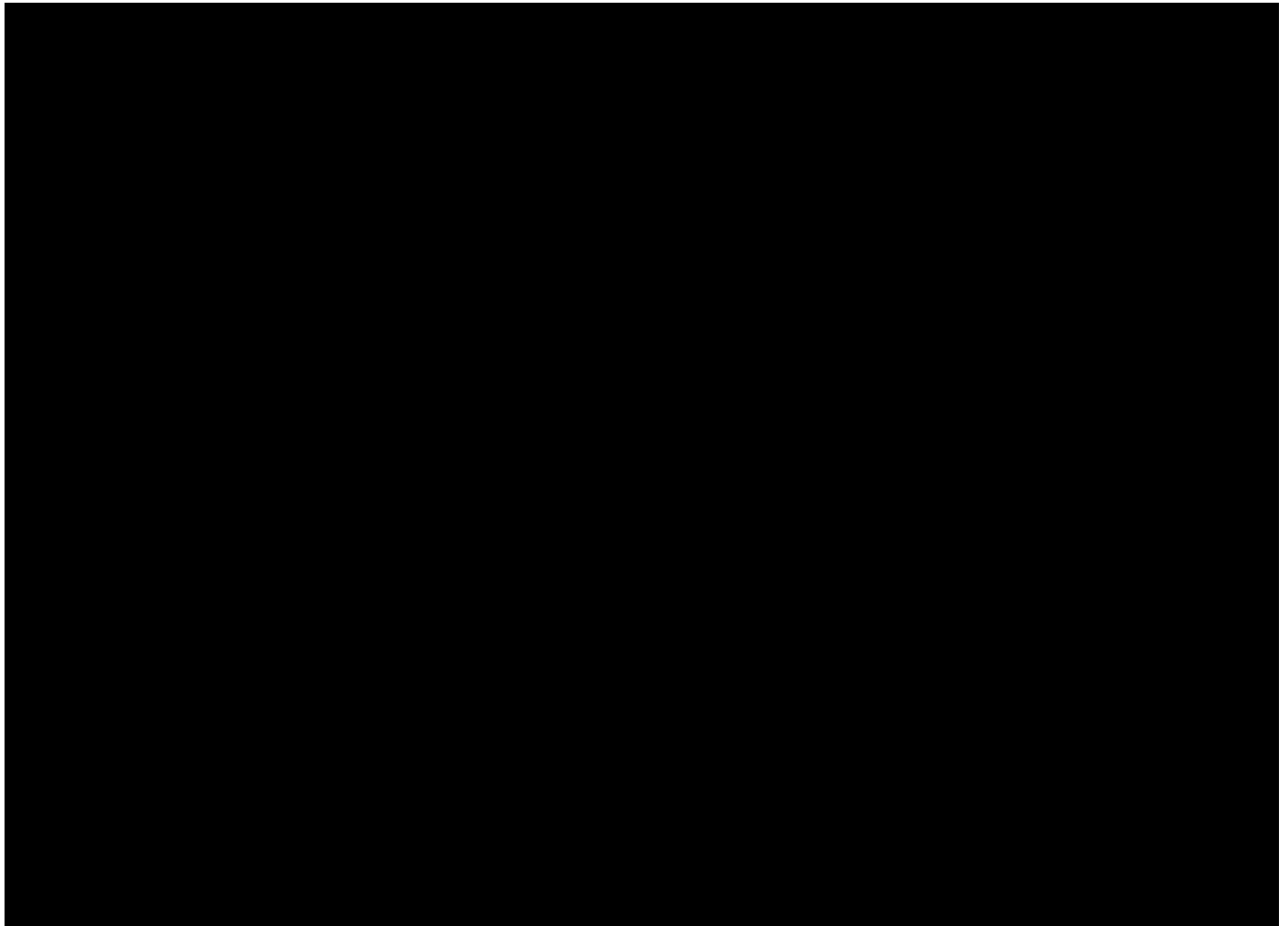
¹⁶ V.S. Hibbard at 42-43.

needed to meet load from SPP and offers generation into SPP to offset (or exceed) those purchase costs. In the Spring of 2022, with fuel constraints projected for the Summer – when SPP prices are typically higher – it was prudent for Evergy to conserve coal earlier at a lower expected net cost-to-load rather than risk more aggressive and costly actions later. Like most electric utilities, Evergy’s objective is to provide electricity on a *long-term basis* at the lowest available cost, and its offering decisions are aligned with that objective. Mr. Hibbard’s critique adopts a short-term view based entirely on hindsight,¹⁷ which in my experience, is both impractical and unwise.

To use an analogy, electric utility resource management is like piloting a large ocean tanker; operational decisions like course and speed must be made well before the ship reaches the point where those decisions take effect; the wake behind the vessel reflects choices made weeks earlier. Likewise, it is entirely reasonable for utility fuel managers to conserve coal despite a favorable snapshot of fuel inventory when forward indicators – including delivery risk and rising forward prices – signaled a higher-cost risk in the near term. As shown in Figure 5, forward SPP power prices for Summer 2022 increased dramatically during Spring 2022, confirming that conserving coal at that time was a reasonable risk-mitigation, forward-looking operational step to lower expected net cost-to-load.

¹⁷ *Id.* at 43.

Figure 5: Percent Change of Summer 2022 Forward SPPSOUTH_HUB power prices{{



}} Mr. Hibbard argues that Evergy was never “directed” by SPP or the state commissions to conserve coal in 2022,¹⁸ but that is a red herring. SPP does not “direct” utilities to conserve coal; its market protocols give utilities discretion to apply self-determined market price “adders” up to defined thresholds and to seek higher-level adders through the use of SPP’s “Opportunity Cost Calculator” (“OCC”). The SPP MMU is available for consultation and guidance on these processes. Evergy followed these

¹⁸ *Id.* at 44-46.

protocols in 2022 and while SPP did not issue an *order* for conservation (it never does), it also did not challenge or oppose the coal conservation measures Evergy adopted. Nor does the absence of system-wide “reliability events” during Evergy’s coal conservation period¹⁹ negate the reasonableness of conservation at IAT and LEC, which was based on projected coal delivery shortfalls and elevated forward SPP power prices.

Likewise, the fact that neither the MPSC nor the KCC directed Evergy to conserve coal or to maintain specific levels of coal inventory²⁰ is of no real consequence. State regulators do not issue such directives as part of their ordinary oversight. Rather, they review the prudence of utility actions after the fact as part of their rate-setting authority, and they may deny recovery of costs found to be imprudently incurred. Mr. Hibbard’s own description of the state regulatory framework does not suggest otherwise.²¹ The absence of orders to conserve from SPP, MPSC or KCC in 2022 therefore irrelevant to whether Evergy’s coal conservation measures were reasonable and necessary under the conditions then projected.

C. PROMOD IS A FUNDAMENTAL MODEL

The PROMOD modeling presented in my Opening Verified Statement is not intended to replicate historical outcomes hour by hour. Rather, it is a fundamental model that simulates system behavior by applying the physical, operational, and market rules

¹⁹ *Id.* at 45.

²⁰ *Id.* at 46.

²¹ *Id.* at 6-11.

that govern the SPP system, not by attempting to “fit” past data. A fundamental model produces results that reflect how the system should operate under specified inputs and constraints, rather than how it happened to perform historically under unique and sometimes irregular real-time conditions.

Running a simulation using a fundamental model requires consistent, uniform methods for developing the underlying assumptions and inputs. This prevents bias and ensures results are objective and reproducible. While the PROMOD scenarios I submitted incorporate as much actual operational and market data as is reasonably available, there are practical limits to what “actual” data exists in the public domain or can be accessed by third parties. Attempting to procure “actual” input data for every modeled generating unit and every market parameter across SPP – even if theoretically possible – would require commitments of time and expense that would make the exercise completely impractical. Moreover, much of this data is confidential and unavailable to any outside party.

Attempting to capture every single variable that influences real-world outcomes – such as hourly operational costs, unplanned outages, dynamic bid-offer strategies, ever-changing transmission conditions – would create a staggering data requirement and impossible computational load. For efficiency and practicality, certain inputs must be standardized using uniform methodologies. This approach ensures consistency across all modeled units and eliminates bias, while preserving comparability and still capturing the fundamental economics and principles of the system.

A clear example is natural gas pricing. In reality, gas prices are highly fluid and can vary significantly day to day, directly impacting the cost of gas-fired generation and, by extension, LMPs in SPP. PROMOD, however, only allows gas prices to be specified monthly. As a result, the monthly average is used to represent the cost of fuel for the entire month which inevitably smooths out short-term volatility. Consequently, PROMOD's LMP solution will differ from actual market outcomes whenever real-time gas prices deviate significantly from the monthly average – particularly during periods of extreme price swings. This difference does not indicate a flaw in the model; it reflects the inherent trade-off between modeling practicality and the granular variability of real-world markets. Likewise, SPP clears its real-time market every five minutes, whereas PROMOD solves on an hourly basis and accepts a majority of inputs on a monthly basis. These structural differences naturally produce variation between modeled and actual outcomes. Again, this is not a defect but a function of the model's purpose. PROMOD is designed to capture fundamental system behavior under specified conditions, not to replicate real-time fluctuations.

This is precisely why PROMOD is the best tool for “but-for” analysis. The objective is not to recreate history with perfect fidelity, which is impossible given data limitations and computational constraints. The aim is to isolate the differential impact of coal conservation by comparing two scenarios – one with conservation and one without – under identical assumptions. PROMOD does exactly that through uniform, unbiased methods applied consistently across the entire SPP footprint, producing the most defensible estimate of differential impacts available.

In practice, entities such as the MPSC and KCC routinely make decisions on retail electricity rates and utility cost-recovery based on fundamental, systemwide production cost modeling, including analyses developed in PROMOD, rather than an impossible reconstruction of every real-time data point. SPP likewise uses similar methodologies when determining measures such as the implementation of its Opportunity Cost Calculator for market oversight and planning. The standard is using fundamentals-based analysis grounded in the best available data, not perfect hindsight.

Mr. Hibbard devotes a substantial portion of his Statement highlighting differences between “actual outcomes” in 2022 – drawn from historic SPP and U.S. Energy Information Administration (“EIA”) records – and the model outcomes I presented.²² He offers these comparisons as reasons to disqualify my approach to calculating Evergy’s increased net cost-to-load in 2022 as a consequence of coal conservation necessitated by BNSF’s coal delivery shortfalls, yet he proposes no alternative method for measuring those economic impacts. His thesis appears to be that if the model results don’t exactly replicate “actuals,” then the adverse coal conservation impacts cannot be calculated precisely and should be ignored. This claim is entirely unreasonable and inconsistent with industry practice.

Historic records such as those compiled by EIA are retrospective and reflect ex post reporting practices, and they are assembled after (perhaps long after) the operational decisions at issue. It is therefore unsurprising that PROMOD, a prospective, ex ante

²² *Id.* at 63-73.

model, will not replicate retrospective EIA reported amounts. The purpose of the calculations presented in my Opening Statement was to present apples-to-apples production cost and power price comparisons for 2022 in which the only variable was the presence or absence of coal conservation measures implemented at IAT and LEC. While he never suggests how it would be done, Mr. Hibbard's criticism of my analysis is that it did not utilize actual, historic utility production cost inputs (e.g., fuel costs, variable operation and maintenance costs, unplanned outages, burn rates, etc.) taken from each generator in the SPP footprint (all 750+ of them), so that the ultimate systemwide outputs for the "actual" scenario (i.e. with conservation at Iatan and LEC) matched EIA records. Even putting aside prohibitive hypothetical time and cost burdens, it is impossible to perform such an analysis because of a lack of access to confidential data from all of the non-Evergy generators. The impossibility of completing such a task is one reason why SPP and state regulators rely on forward-looking production cost models.

As explained earlier in this Rebuttal Statement, coal conservation is a response to projected fuel or operational constraints during periods of elevated purchase costs; it is not a margin-enhancement strategy. Based on my extensive experience within the SPP system, a decision to conserve coal – whether via market adders or the use of the OCC – raises expected net costs to serve load during conservation periods. Those higher net costs are the adverse economic impact my analysis measures. The methodology I used – a direct, like-for-like comparison of projected costs from an SPP system analysis using a model accepted by the MPSC, KCC and SPP, and widely used throughout the industry – is the best available, given the data, computational and confidentiality constraints that

make Mr. Hibbard’s hypothetical historical reconstruction infeasible. His selective use of historic records to criticize my results, without offering any feasible substitute that meets his own preferences, underscores that the PROMOD results presented in my Opening Verified Statement are the best available estimate of the increased net cost-to-load resulting from Evergy’s 2022 coal-conservation measures at IAT and LEC.

D. REPONSES TO OTHER CRITICISMS

Mr. Hibbard lodges a number of other, individual criticisms of various elements of my Opening Statement presentation that do not detract from my core conclusions.

1. LMP Differential Provided to Mr. Crosby

As I explained in my Opening Statement, I provided Evergy Witness Michael Crosby with the differential in the LMPs that were, and would have been, in effect during the coal conservation periods in 2022, depending on whether coal conservation at IAT and LEC was implemented. PROMOD solves for and generates LMPs as an output of its unit commitment and security constrained economic dispatch, while the GenTrader model used by Mr. Crosby takes LMPs as an external input and does not calculate them. The purpose of providing the LMP differentials was to allow Mr. Crosby to adjust his lost opportunity calculations downward to account for the fact that SPP market prices would have been lower in the absence of coal conservation measures at IAT and LEC.²³ In his Table 7, Mr. Hibbard cherry-picks a single hour out of the thousands simulated in

²³ Op. V.S. Foo at 8-9.

PROMOD to argue that the LMP adjustment should have been larger because the nominal prices used in Mr. Crosby’s analysis were higher than the forecasted values from PROMOD.²⁴ *See* V.S. Hibbard at 74-75. A single hour comparison is non-probative and the relevant measure is the differential across the full study period. Differences between PROMOD calculated LMPs and market reported LMPs are unsurprising, for reasons I have described above. Mr. Hibbard references his Appendix C, which relies on a 2012, energy-only depiction of a “highly convex” supply curve that supposedly supports his criticism of the LMP differential calculations,²⁵ but that construct does not describe how prices form in SPP’s current nodal market. Since SPP launched the Integrated Marketplace in 2014, LMPs are made up of three components – the marginal cost of energy, the cost of congestion, and marginal losses – it does not merely rely on the energy supply stack. Network constraints can raise or lower power prices relative to the energy component, even when the energy supply curve is convex. An energy-only static supply curve, by definition, omits congestion and losses and therefore cannot represent modern SPP LMP behavior.

2. Iatan Unit 1 2022 Outage

Mr. Hibbard claims that Evergy’s damages calculations improperly included Iatan Unit 1 during a period in {{[REDACTED]}} when the unit was supposedly on outage,²⁶ but the facts do not support this claim. Iatan Unit 1 was initially *scheduled* for an outage

²⁴ V.S. Hibbard at 74-75.

²⁵ *Id.* at 75, note 107.

²⁶ *Id.* at 86.

(for example, 80% coal and 20% gas over 2 months), but it is not capable of modeling fuel switching on an hour-by-hour basis.

In all of my PROMOD simulations, LEC was modeled as operating as a 100% coal-fired unit. Given the generally higher cost of natural gas fired generation, incorporating gas use at LEC would have increased the net cost-to-load, not reduced it.

4. EIA and SPP Data

Mr. Hibbard returns to the subject of comparing PROMOD results to retrospective EIA and SPP records at pages 99-101 of his Statement. As I explained above, however, PROMOD is a fundamental production cost model that simulates system behavior using core market mechanics; it does not force a fit to past data. My analysis modeled the entire SPP system under two methodologically equivalent scenarios – “conservation” and “no conservation” at IAT and LEC – with all other variables held constant. No other practical methodology (and none suggested by Mr. Hibbard) can perform that systemwide, controlled comparison. Differences between components of the model and certain historical records from EIA and SPP are expected and do not undermine the validity of a prospective, fundamentals-based “but-for” analysis.

5. PROMOD and GenTrader

Mr. Hibbard argues that using PROMOD and GenTrader, two different models in scope and scale, creates unresolvable inconsistencies.²⁹ To the contrary, using both tools is purposeful and the appropriate methodology. PROMOD provides the system-level,

²⁹ *Id.* at 121.

fundamentals-based price-formation differential by solving across the SPP network; it captures holistic changes to unit commitment and security-constrained economic dispatch attributable to coal-conservation measures. GenTrader, in turn, focuses on unit-level revenues, costs and ultimately, lost opportunity using Evergy's actual, hour-by-hour, site-specific, offer and operating parameters that closely synchronize with the same data that drives inputs into the SPP market. Far from introducing inconsistency, this complementary, two-stage approach yields a more comprehensive measure of the "but-for" impact than attempting to use either model exclusively.

6. Fuel Costs

Mr. Hibbard points out that the coal and gas price inputs for IAT and LEC differ between Mr. Crosby's GenTrader and my PROMOD models, and from what is reported on EIA Form 923 ("EIA-923").³⁰ Upon closer review, the prices reported on EIA-923 are very close to those used in PROMOD, and any differences are attributable to timing of when the prices are recorded and what the prices represent. EIA-923 reports the cost of fuel as *delivered*, whereas PROMOD uses the cost of fuel as *consumed* during the month. This is also different from the fuel price used in GenTrader. Mr. Crosby's model incorporates the price embedded in the actual unit offer submitted into the SPP market. Those offer prices are based on forecasted fuel deliveries for the upcoming month and reflect Evergy's internal fuel policies for market offers under SPP rules. While these

³⁰ *Id.* at 99-100.

differences exist, they are entirely expected and illustrate the fundamental distinction between forward-looking and retrospective methodologies.

7. Maintenance, Outage and Derate Schedules

[illegible]

³¹ *Id.* at 102-103.

³² *Id.* at 102.

The Generating Availability Data System³³ (“GADS”) report confirms that IAT1 was derated to {{[REDACTED]}} and is correctly modeled as such. These errors undermine his criticism and demonstrate that his comparison is neither accurate nor reliable.

8. Mr. Hibbard’s Appendix B

In his Appendix B, Mr. Hibbard states that a net cost-to-load approach requires estimating “but for” prices for each hour of the conservation period and can lead to positive or negative revenue results in individual hours. As I pointed out earlier in this Statement, my damages calculation is a *net* calculation over the entire coal conservation period. There is no model available that is superior to PROMOD as a tool to analyze the entire SPP system in the manner necessary to estimate the increased net cost-to-load attributable to coal conservation measures implemented at specific individual generation units.

E. CONCLUSION AND RESTATEMENT

As I noted in this Rebuttal Statement, I agree that the increased net cost-to-load calculation should have terminated on December 20, 2022, when coal conservation at Iatan and LEC ended. I have made this correction and restated the calculations that I presented in my Opening Statement, which are summarized in Exhibit A to this Statement

³³ GADS is a database produced by the North American Electric Reliability Corporation (“NERC”) and is the main source of power station outage data in North America. GADS is a mandatory industry program for conventional generating units 50MW and larger, and reports data pertaining to outages, equipment failures and maintenance schedules.

and are supported by the data included in my workpapers. The restated net additional costs incurred by Evergy in 2022 to fulfill its load commitments to SPP attributable to coal conservation at Iatan and LEC (net of impacts on other Evergy generators) is \$5,326,774.

VERIFICATION

I, Hsin Foo, state under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Rebuttal Verified
Statement. Executed on January 16, 2026.

A handwritten signature in black ink, appearing to read 'Hsin Foo', written over a horizontal line.

Hsin Foo

Exhibit A

REDACTED

REDACTED

REDACTED

REDACTED

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REDACTED

REDACTED

Verified Statement of Christopher Russo on behalf of Evergy Inc.

Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central,
Inc. v. BNSF Railway Company
Surface Transportation Board No. NOR 42180

Prepared By:

Charles River Associates
200 Clarendon Street
Boston, Massachusetts 02116

Date: January 20, 2026

CRA Project No. D91267

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1. Introduction

1.1. Purpose of this Statement

1. I have been asked by counsel for Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. (collectively "Evergy"), to offer my opinions rebutting testimony from BNSF witness Paul Hibbard in this proceeding.
2. This verified statement represents my independent opinion on the topics on which I have been asked to opine. In preparing my statement, I was assisted by team members at Charles River Associates ("CRA") who worked under my direction. I had some assistance from my team members with the production of this statement, but the opinions and conclusions represent my true and complete professional opinion. Neither I nor CRA have any stake in the outcome of these proceedings and my opinion is solely my own. For the avoidance of doubt, I am offering no legal opinions in my statement.
3. Mr. Hibbard makes a range of arguments, and I focus on rebutting his key arguments. My absence of a response to a particular argument of Mr. Hibbard's should explicitly not be construed as agreement with him on that or any other point.

1.2. Qualifications

4. I am a Vice President in the Energy Practice at CRA. I hold a BS in Mechanical Engineering from Tufts University and a MS in Technology and Policy from the Massachusetts Institute of Technology ("MIT") with a focus in Energy. I have more than twenty years of professional experience as an energy economist in the electricity sector. Subsequent to my academic training, I held an academic appointment as a Visiting Scientist at the MIT Energy Laboratory.
5. Since beginning my career as a power plant engineer, my academic and professional career has been focused on the economic analysis of electricity markets. I also served on the board of Neuco, a software firm headquartered in Boston which provides software to enable the AI control of power plants. A great deal of my work has focused on economic analysis and valuation of energy assets and companies in commercial contexts. I have provided expert testimony for corporations, utilities, generation owners, and governments in organized power markets. I wrote my thesis at MIT on modeling of electricity markets.
6. I have advised clients on a wide range of issues associated with power markets. This has involved evaluation of generating assets, the value of energy companies, transmission pricing and analysis, contract analysis, litigation support and other matters. Much of my work consists of developing and utilizing pricing models to support such analyses.
7. During my career, I have been an independent market advisor on over one hundred different transactions of energy assets, including renewable and conventional generating assets, transmission lines, energy technology companies, and intellectual property associated with generation. In this role, I have often prepared

market forecasts and offered opinions (in a proprietary commercial context) as an advisor to banks, private equity and infrastructure funds, and other investors.

8. I have analyzed many solid fuel plants in a commercial context, and have submitted testimony on numerous occasions in litigated proceedings related to coal-fired powerplants, and on the Southwest Power Pool ("SPP") marketplace.
9. CRA is a leading global consulting firm with approximately 1,000 employees that offers economic, financial, and business management expertise to law firms, utilities, industries, accounting firms, companies, and governments around the world. CRA specializes in applying economic principles to industries. Formed in 1965 from academic roots at MIT and Harvard, CRA has been engaged by clients for our unique combination of functional expertise and industry knowledge, and objective solutions to complex problems. CRA combines economic and financial analysis with expertise in litigation and regulatory support, business strategy and planning, market and demand forecasting, and policy analysis. Charles River Associates is a registered trade name of CRA International, Inc.

1.3. Statement Structure

10. My statement is structured as follows:
 - Section 1 introduces the purpose of this statement, my qualifications, and summary of conclusions.
 - Section 2 provides background to the dispute, including a discussion of key players, assets, and concepts.
 - Section 3 details my rebuttal to Mr. Hibbard's own statement
 - Appendix A sets forth my *curriculum vitae*.
11. I have also submitted a series of Workpapers which further detail my analysis discussed in this statement.

1.4. Summary of Conclusions

12. Evergy's decisions regarding coal conservation that are among the issues in this proceeding can only be evaluated in the context of their understanding in April of 2022, and not *ex post*. In April of 2022, given market conditions and Evergy's regulatory mandate, they had every incentive, and the duty, to act conservatively, and their decisions and actions to conserve coal were reasonable.
13. Hibbard's criticisms of Hsin Foo's and Michael Crosby's analyses are largely focused on numbers which are not part of Evergy's damages calculation and are not relevant. Looking at relevant metrics of Foo and Crosby's analyses indicate to me that their approach and results are reasonable and reliable.
14. The methodology employed by Evergy, production cost modeling, is the "gold standard" for analysis of electricity markets and is used nearly universally, including by Hibbard himself in his own analyses. Hibbard's characterizations and criticisms below of production cost modeling as "stick figure representations of the electricity

market” which “do not capture the complexity of actual power system operations, configuration and operation of the interconnected transmission system infrastructure, or complicated bidding and operating rules and procedures that change over time”¹ run counter to the near-universal prevalence of this approach to analysis of electricity markets worldwide.

15. In their analyses, Evergy’s witnesses use a combination of models for their analyses. There is nothing inherently wrong with using multiple tools. In this case, each tool used by Evergy was fit for its purpose, appropriate for the task, and leads to a reasonable and reliable outcome.
16. Hibbard criticizes Evergy’s modeling and results, but never offers his own estimate, nor does he offer a standard which he would use to judge when a model was sufficiently correct. To address this deficiency in Hibbard’s analysis, I performed a simple and independent calculation using public information that would have been available to Hibbard and corroborated Evergy’s damages analysis, demonstrating that he could have easily provided a damages estimate if he had so chosen.

2. Background

2.1. Parties

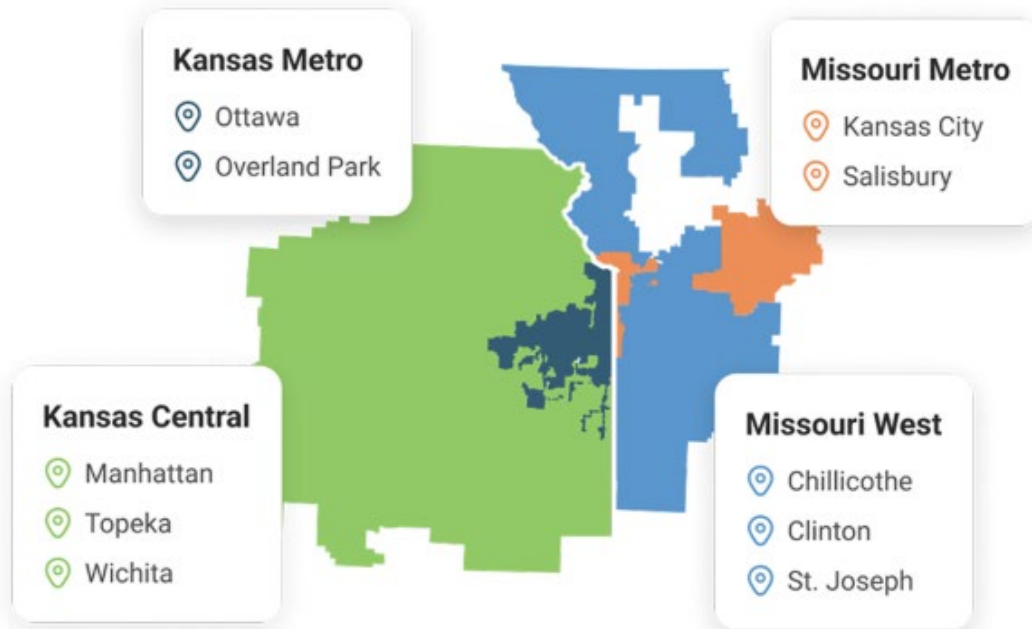
17. Evergy is a vertically-integrated investor owned utility (“IOU”) serving more than 1.7 million customers in the Kansas Metro, Kansas Central, Missouri Metro, and Missouri West regions. Evergy is a regulated utility, meaning its rates are regulated and approved by the Kansas Corporation Commission (“KCC”) and Missouri Public Service Commission (“MPSC”). The company’s footprint includes 62,000 miles of transmission and distribution lines, 800+ substations, and over 13,000 MW of generation, including coal, natural gas, fuel oil, wind, solar, nuclear, and biogas.² Evergy operates within the Southwest Power Pool (“SPP”), a regional transmission

¹ Paul J. Hibbard, *Verified Statement*, Surface Transportation Board, Docket No. NOR 42180 (Nov. 20, 2025) at Section II.C.2, p. 30.

² Russo electronic Workpaper “Company Facts.pdf.”

organization that oversees the bulk power grid and directs utilities in the area to address generation based on system conditions.

Figure 1: Evergy Service Territory



Source: Russo electronic Workpaper "Company Facts.pdf."

18. The BNSF Railway Company ("BNSF") operates a network of approximately 32,500 route miles across the western two-thirds of the United States and is one of the largest Class 1 freight railroads in North America. BNSF moves a wide range of freight, includes coal and other energy commodities.³ BNSF is regulated by the Surface Transportation Board ("STB"), and the Federal Railroad Administration ("FRA").

2.2. Summary of the Case and Filings

19. Evergy alleges that in 2022, BNSF violated multiple statutory obligations when transporting coal to its Iatan Generation Station ("Iatan") and Lawrence Energy Center ("LEC"), two major coal-fired plants in Missouri and Kansas, respectively, that are important to maintain grid reliability and fulfilling obligations within SPP.
20. I understand that Evergy is seeking an award of damages for:
 - a. lost generation revenues attributable to coal conservation;⁴

³ Russo electronic Workpaper "BNSF 2023 Impact Report.pdf."

⁴ Evergy Opening Evidence, STB Docket No. NOR 42180, at p. 41.

- b. net increased SPP market purchase costs resulting from elevated Locational Marginal Prices (“LMPs”) during conservation periods;⁵ and
 - c. direct operational costs associated with coal handling and railcar storage.⁶
- 21. Evergy alleges that BNSF’s actions and omissions in 2022 violated three provisions of Title 49:
 - a. 49 U.S.C. § 11101(a) - duty to provide transportation on reasonable request
 - b. 49 U.S.C. § 10702(2) - the prohibition on unreasonable carrier practices and
 - c. 49 U.S.C. § 11121(a)(1) - the requirement to establish and maintain reasonable and adequate car service practices.⁷
- 22. Evergy argues that because BNSF sharply restricted the number of trainsets permitted in service well below historic levels and below what Evergy contends was necessary to move its scheduled volumes, coal deliveries fell millions of tons short of 2022 requirements. As a result, coal stockpiles at both latan and LEC declined to critically low levels, which forced Evergy to implement coal conservation measures by increasing offer-price adders in the SPP Day-Ahead Market to suppress dispatch.
- 23. According to Evergy, these measures:⁸
 - a. reduced generation revenues Evergy otherwise would have earned;
 - b. raised SPP energy costs, because removing low-cost coal generation increased LMPs;
 - c. required costly inventory management, including reclaiming and pushing coal; and
 - d. required storage of idled Evergy-owned railcar sets that BNSF refused to place into service.

2.3. Testimony of Evergy’s Witnesses Foo and Crosby

- 24. Hsin Foo is a Lead Quantitative Analyst at Evergy. Foo’s statement quantifies the net increased costs that Evergy incurred in 2022 because of coal conservation at latan and LEC, reducing the availability of low-cost generation. Using PROMOD IV, Foo performed production cost modeling (“PCM”) using two scenarios: with coal conversation and but-for conservation. The with conservation scenario replicates 2022 operations, with coal conversation adders on latan and LEC bids, as well as 2022 loads, fuel prices, wind output, unit outages and derates, and other

⁵ *Ibid.* at p. 44.

⁶ *Ibid.* at p. 44-48.

⁷ *Ibid.* at p. 4.

⁸ *Ibid.* at p. 14-17.

components. The but-for conservation scenario was identical, except all coal conservation adders were removed and normal dispatch was assumed.

25. By comparing hourly LMPs and unit outputs between the scenarios, Foo computed net additional costs of electricity prices and extra (or reduced) revenue from Evergy's other generating units. She excluded lost opportunity impacts on Iatan and LEC to avoid double counting of impacts captured in Crosby's testimony.
26. Using this methodology, Foo found \$4,627,833 in net additional costs due to coal conservation.⁹ I understand that as a result of an adjustment to her calculations that Hibbard stated was necessary, the increased net cost to meet load on rebuttal is \$5,326,774.
27. Michael Crosby is a Lead Reliability and Data Analytics Specialist at Evergy. In his statement, Crosby provides an account of how Iatan and LEC were committed and dispatched in 2022, how coal conservation measures altered their market offers, and how these changes affect actual and lost economic opportunities at the two plants.
28. To understand the net impact, Crosby defined the "actual opportunity" as the day ahead ("DA") energy revenues minus DA costs (fuel, variable operations and maintenance costs, startup). This reflects what happened under conservation-constrained offers. The "lost opportunity" reflects the profit and loss ("P&L") that would have occurred absent coal conservation. Crosby used PCI GenTrader to simulate dispatch using mitigated cost-based offers and adjusted LMPs, which would have been lower if the units had been fully available. Conservative adjustments were applied, including derates, outages, ramp rates, and removal of real-time balancing market and ancillary services.
29. Crosby found the net lost opportunity impact of coal conservation to be \$16.96 million.¹⁰ I understand that as a result of certain adjustments made in response to Hibbard's statement, the lost opportunity on rebuttal is approximately \$16.91 million.

2.4. Testimony of BNSF's Witness Hibbard

30. Mr. Hibbard makes a number of key arguments in testimony. I summarize them here.
31. First, he argues that Evergy's decision to conserve coal at Iatan and Lawrence was a voluntary decision, not required or directed by SPP, the Federal Energy Regulatory Commission ("FERC"), or state regulators. He claims Evergy would have met all reliability and resource adequacy obligations even without conservation.¹¹ As I discuss later in my statement, he does this with the benefit of hindsight, which was not how Evergy made their decisions, and omits key facts.

⁹ Hsin Foo, Verified Statement, STB Docket No. NOR 42180 (Apr. 2025), at p.10.

¹⁰ Evergy Opening Evidence, STB Docket No. NOR 42180, at p. 48.

¹¹ Hibbard Verified Statement, STB Docket No. NOR 42180, at p. 39-41.

32. Second, he concludes that the impact of Evergy's actions could be affected by a "vast array of random, exogenous factors" unrelated to BNSF deliveries, including weather, outages, renewable output, fuel prices, and system load. He emphasizes that Evergy earned higher net revenues in certain conservation hours, which he says shows the ambiguous and non-causal nature of the alleged damages.¹²
33. Third, he asserts that Lawrence should be excluded from the damages calculation because BNFS delivered more coal than Evergy requested in a preliminary estimate prior to 2022. Additionally, he claims that Lawrence generated and burned more coal than historic levels, and the plant's offer adders overlap with latan's, making plant-specific impacts impossible to isolate.¹³
34. Fourth, he claims that Evergy's damages analysis is unreliable. He states that PROMOD IV results fail to accurately replicate actual 2022 generation, prices, or coal burn, with alleged errors concentrated in October 2022.¹⁴ Hibbard also argues that inputs are inconsistent across the PROMOD and GenTrader models, and challenges the LMP differentials from PROMOD in the analysis in GenTrader.¹⁵ Finally, he alleges calculation errors in fuel prices, DST handling, and startup costs.¹⁶ Hibbard argues that these flaws make the analysis incapable of determining damages.
35. Fifth and finally, he asserts that Evergy's analysis suffers from additional flaws. These include Evergy's use of "excessive" coal-conservation levels above SPP's own thresholds; its failure to account for inventory write-downs; its disregard of Lawrence's reduced coal-inventory targets; and its omission of coal that allegedly could have been secured through mitigation actions; its inclusion of damages during periods of planned outages; and its inclusion of damages occurring after inventories had exceeded certain alleged targets. He claims that correcting these issues would eliminate the damages. While Hibbard provides rough, order-of-magnitude ranges for each alleged flaw, he offers no supporting calculations or integrated modeling to substantiate his conclusions.
36. My statement is directed at Hibbard's criticism of Evergy's decisions to conserve coal, and his claims regarding the analytical tools used by Evergy to calculate its increased net cost to load and lost opportunity damages. Other aspects of Hibbard's statement are addressed by other Evergy witnesses and counsel.

¹² *Ibid.* at p. 39-41.

¹³ *Ibid.* at p. 54-62.

¹⁴ *Ibid.* at p. 70-72.

¹⁵ *Ibid.* at p. 73-76.

¹⁶ *Ibid.* at p. 108-110.

2.5. Iatan and Lawrence

37. Prior to conservation measures in 2022, Evergy operated Iatan and Lawrence units with SPP's standard economic dispatch model. The available operating capacity of the units was offered at their true variable cost, which comprises fuel cost (i.e. cost of delivered coal x heat rate, or \$/MMBtu x MMBtu/MWh = \$/MWh), plus any other operating and maintenance costs incurred on a variable basis. SPP then dispatched the units in merit order relative to all other units within SPP jurisdiction, subject to any transmission constraints or system reliability events. Evergy would also sometimes operate the units at lower output levels even when not economic to reduce cycling times and thermal cycling impacts on the equipment.
38. During 2022, the Evergy units operated as shown in Table 1 below.

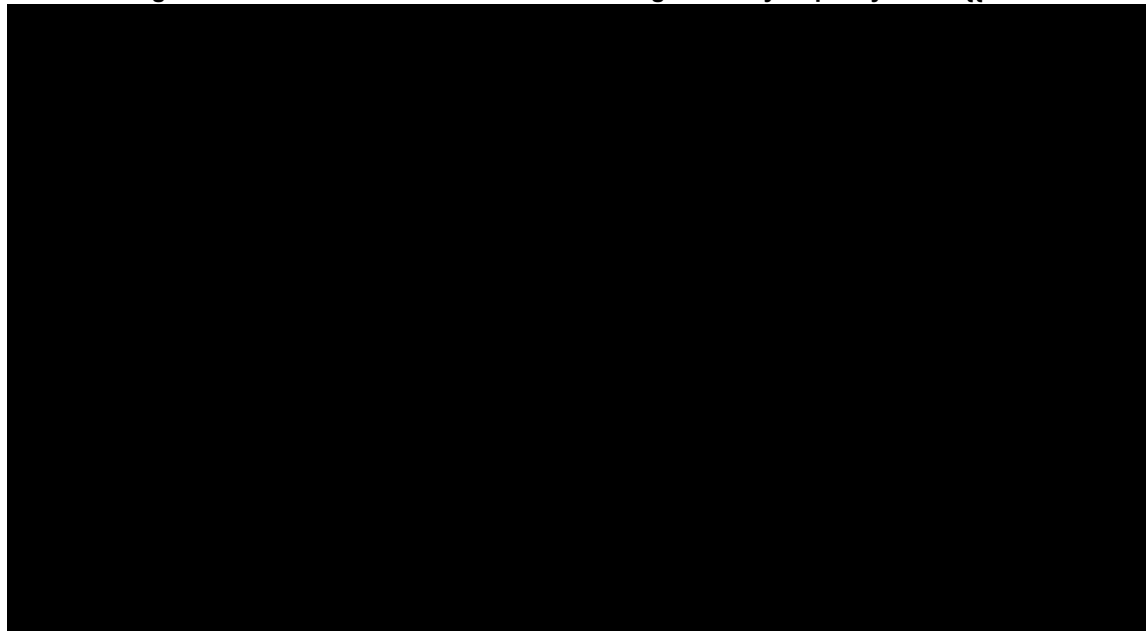
Table 1: Estimated 2022 Operating Parameters of Iatan and Lawrence Units

Parameter	Iatan	Iatan 2	Lawrence 4	Lawrence 5
Operating Capacity (MW)	702	844	111	374
Heat Rate (Btu/kWh)	11,136	9,463	11,402	11,488
Coal Type	Sub-bituminous/PRB	Sub-bituminous/PRB	Sub-bituminous/PRB	Sub-bituminous/PRB

Source: S&P Capital Pro

From 2019 to 2021, Iatan and Lawrence plants operated in response to market conditions, with highest output occurring during highest demand times of summer and winter, as demonstrated below in Figure 2.

Figure 2: Iatan and Lawrence Historical Average Monthly Capacity Factor}}



}}

3. Rebuttal Analysis

39. In this section of my statement, I summarize my responses to Hibbard's opinions. My lack of a response to a particular argument of his explicitly does not constitute agreement with his opinion.

3.1. Evergy's *ex ante* Decision to Conserve Coal

3.1.1. Evergy's Regulatory Mandate

40. A Load Responsible Entity ("LRE") with SPP has an obligation "to maintain capacity required to meet its load and planning reserve obligations."¹⁷ Notably, Evergy is obligated under Kansas and Missouri law to provide safe, adequate, and reliable electric service to all retail customers in its service territory. This obligation is continuous and cannot be curtailed for economic reasons.
41. As Evergy noted in their opening evidence, Evergy Metro and Evergy Kansas Central are designated as LREs within SPP, meaning that each has an obligation to meet a specified level of electrical load,¹⁸ and that a key concern for MPSC and KCC is energy resource reliability, i.e., ensuring that utilities in both states have adequate capacity to meet the consumer and commercial demand for electricity throughout a year, including during peak periods in each day and in peak seasons.¹⁹
42. As a LRE, a key concern is energy resource reliability, "ensuring that all that utilities in both states have adequate capacity to meet the consumer and commercial demand for electricity..." Failure to maintain resource adequacy could result in penalties or reliability violations.
43. Evergy is required by state commissions (KCC and MPSC) to provide safe, adequate, and reliable service. Decisions are judged under a "prudence" standard, meaning they must act reasonably given conditions at the time.
44. Reliability planning must account for uncertainties such as fuel supply disruptions, extreme weather, equipment failures, and market volatility. If Evergy plans too aggressively (assuming everything will go perfectly), any unexpected event could cause shortages and outages. Conservative planning provides a buffer against these risks and is congruent with Evergy's mission.
45. Evergy is a rate-regulated utility, meaning its revenues and costs are reviewed and approved by regulators to ensure fairness and compliance with public interest standards.²⁰

¹⁷ Russo electronic Workpaper "SPP Attachment AA Tariff.pdf" at p. 2.

¹⁸ Evergy Opening Evidence, STB Docket No. NOR 42180, at p. 6.

¹⁹ *Ibid.* at p. 4.

²⁰ Russo electronic Workpaper "Evergy Utility Regulation.pdf."

46. Its revenues are determined by a revenue requirement model, which allows recovery of reasonable costs plus an authorized return, not market-based profits.²¹ When Evergy raised offer prices in the SPP market, the purpose was to conserve coal for reliability, not to earn extra profit. Even if market revenues increased temporarily, state-approved mechanisms require Evergy to credit those gains back to customers. This ensures Evergy does not profit from fuel price changes or market volatility.
47. If Evergy collects more than its actual costs (i.e., due to higher market prices), those excess revenues are credited back to customers in subsequent rate adjustments. Under the Earnings Sharing Plan ("ERSP"), Evergy Kansas Central's and Evergy Metro's Kansas jurisdiction are required to refund to customers 50% of annual earnings in excess of their authorized return on equity of 9.3% to the extent the excess earnings exceed the amount of annual bill credits that Evergy Kansas Central and Evergy Metro agreed to provide in connection with the merger that resulted in the formation of Evergy.²²

3.1.2. SPP Market conditions in 2022

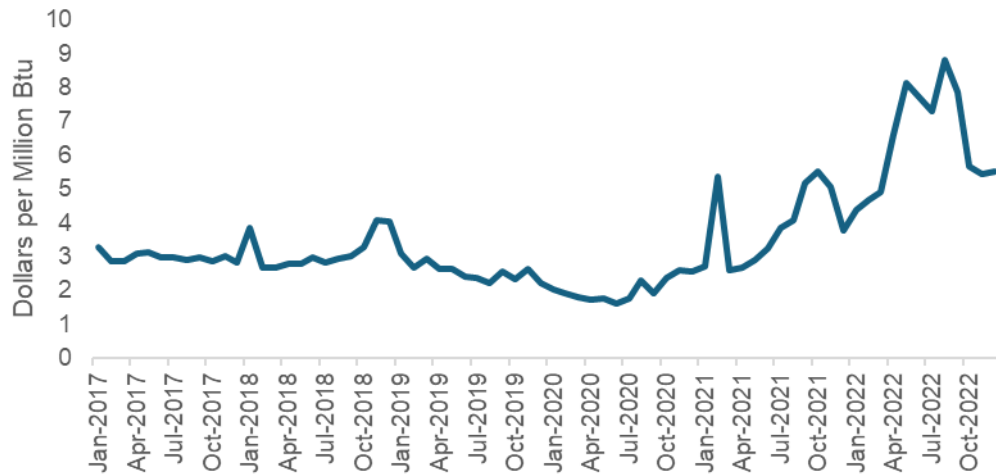
48. Hibbard omits important details regarding market conditions in 2022 which are important factors in this case. Evergy's coal conservation decisions occurred against a backdrop of particularly volatile and uncertain market conditions affecting both fuel supply and system reliability. Several interrelated factors support Evergy's choice to conserve coal during this period, which was a reasonable decision at the time.
49. First, natural gas prices rose sharply beginning in 2021 and remained elevated through 2022, driven in part by global energy market disruptions following Russia's invasion of Ukraine. As illustrated in Figure 3, 2022 natural gas prices were 66% higher than the year prior, and 121% higher than the average prices 2017 to 2021.²³ Higher natural gas demand and tighter global gas balances translated into materially higher domestic gas prices, including at hubs relevant to the SPP footprint. At the Panhandle Eastern hub, the 2022 gas prices was \$5.83/MMBtu, an increase of 69 percent over 2021 (with February prices excluded).²⁴
50. It is important to note that increased gas prices regularly lead to increased demand for coal generation, a fact that is well known to utility market participants and their service providers (such as railroads). This has been true for decades, and without regard to the reasons for the gas price increase (which have been many and varied). Russia's action in Ukraine may have been disruptive to the world order, but variation in gas prices, and the consequent impact on power markets, was an event with historical precedent.

²¹ *Ibid.*

²² Russo electronic Workpaper "Evergy 10-Q.pdf"

²³ Russo electronic Workpaper "Figure 3 - Henry Hub Natural Gas Spot Price, monthly 2017-2022.xlsx."

²⁴ Russo electronic Workpaper "2022 State of the Market Report (May 2023).pdf" at p. 131.

Figure 3: Henry Hub Natural Gas Spot Price, monthly 2017-2022

Source: Russo electronic Workpaper "Figure 3 - Henry Hub Natural Gas Spot Price, monthly 2017-2022.xlsx."

51. Market-implied heat rates, which reflect the efficiency of marginal resources setting market prices, rose sharply in mid-2022 across both SPP North and SPP South at the start of the period of coal conservation, as shown in Figure 4. Elevated implied heat rates indicate tighter system conditions and increased reliance on higher-cost marginal generation. These conditions increase the likelihood of extended thermal dispatch (such as Iatan and Lawrence) and heighten the value of maintaining fuel-secure, dispatchable resources during periods of operational uncertainty.

Figure 4: SPP Market Implied Heat Rate, May 2021-January 2023

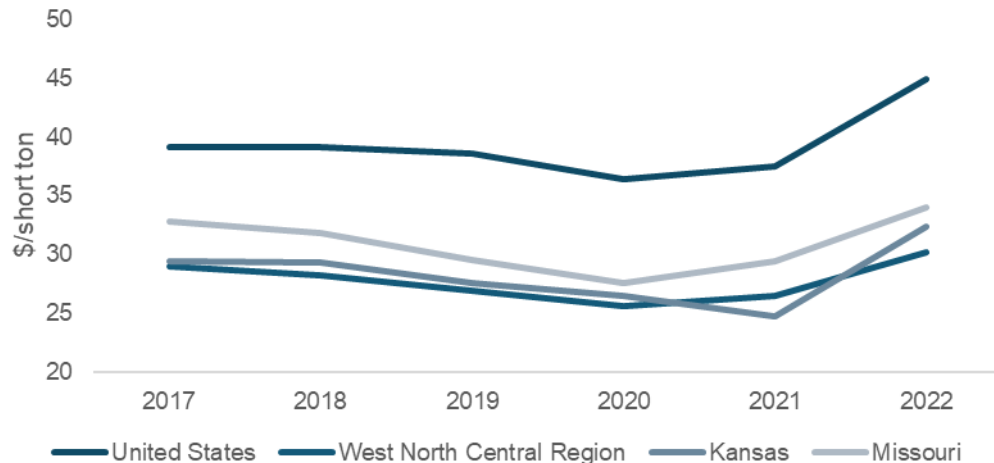
Source: Russo electronic Workpaper "Figure 4 - Market Implied Heat Rate.xlsx."

52. Second, increased reliance on coal generation in a high-gas-price environment translated directly into higher coal burn requirements. As stated by the SPP 2022

State of the Market Report, “[t]he increase in coal generation from 2020 to 2021 is primarily the result of higher gas prices in 2021 making coal generation more economic than some gas resources.”²⁵

53. SPP market data indicate that coal's share of total generation increased to 36% in 2021 and remained elevated at 33% in 2022, compared to the 2020 low of 31%, partially reversing a longer-term downward trend.²⁶ This heightened dispatch risk made preservation of on-site coal inventories more important, particularly given limited short-term flexibility to replace coal generation with gas during periods of fuel price stress. This gas/coal dynamic repeated a cycle that occurs routinely in the electric utility sector and is not a new dynamic in power markets.
54. Third, higher coal demand across the power sector placed upward pressure on delivered coal prices. As shown in Figure 5, in Missouri, where Iatan is located, delivered coal prices declined steadily from 2017 through 2020 before increasing by 7% in 2021. In 2022, prices in the state rose to nearly \$34 per short ton, representing a 16% increase from the prior year. Kansas, where LEC is located, experienced a similar downward delivered price trend through 2020, followed by an even more pronounced increase in 2022, with prices rising by approximately 31% relative to 2021.²⁷ In this environment, conserving existing coal stockpiles reduced exposure to fuel price risk and supply uncertainty.

Figure 5: Coal Prices Nationally and Evergy's Territory, 2017-2022



Source: Russo electronic Workpaper “Figure 5 - Coal Prices Nationally and Evergy's Territory, 2017-2022.xlsx.”

55. Fourth, resource adequacy concerns were elevated following Winter Storm Uri and other extreme weather events, increasing emphasis on fuel security and unit

²⁵ *Ibid*, at p. 5.

²⁶ *Ibid*, at 53.

²⁷ Russo electronic Workpaper “Figure 5 - Coal Prices Nationally and Evergy's Territory, 2017-2022.xlsx.”

readiness. SPP's comprehensive review of the February 2021 winter storm explains that as electricity and natural gas use increased during the cold weather, power producers faced fuel-supply issues alongside equipment malfunctions and other system constraints.²⁸

56. Consistent with these lessons learned, SPP's Market Monitoring Unit evaluated the February 2021 event and identified reliability risks associated with resource performance during extreme cold conditions.²⁹ Coal units provide firm, on-site fuel capability and play a critical role in maintaining system reliability during periods of fuel supply disruption or extreme demand. Maintaining adequate coal inventories was therefore consistent with heightened reliability planning and risk management practices across the industry.³⁰
57. SPP documents a sustained increase in net load volatility, reflecting growing operational uncertainty. Net load volatility increased by approximately eight percent from 2020 to 2021 and by an additional ten percent from 2021 to 2022, continuing a longer-term upward trend that has persisted since 2014.³¹ SPP attributes this trend in part to the increasing penetration of variable energy resources. In 2022, wind and solar generation accounted for approximately 38 percent of total generation in the SPP footprint.³² As SPP explains, because "the precise timing of the fluctuations of forecasted resources is unknown," these conditions increase short-term variability in net load and place greater demands on system flexibility.³³
58. Increasing net load volatility and forecast uncertainty raised the likelihood of unplanned or extended dispatch of thermal resources, heightening fuel management risk. SPP explains that growing variability in net load requires "rampable capacity [to] be committed and available throughout the day," particularly when forecasted resources do not perform as expected.³⁴ This increased reliance on dependable, dispatchable resources to maintain system balance under uncertain conditions. For coal units, these dynamics create heightened uncertainty regarding dispatch timing, duration, and cumulative fuel burn. In this environment, conserving coal inventories was a reasonable operational response to preserve fuel availability and mitigate the risk of fuel constraints during periods of elevated uncertainty, fuel supply stress, and heightened reliability concerns.
59. Consequently, Evergy had a reasonable expectation that their coal-fired plants such as Iatan and Lawrence would be called upon to operate more frequently, and thus

²⁸ Russo electronic Workpaper "A Comprehensive Review of SPP's Response to the February 2021 Winter Storm.pdf"

²⁹ Russo electronic Workpaper "Report on February 2021 Winter Weather Event.pdf"

³⁰ Russo electronic Workpaper "2022 State of the Market Report.pdf" at p. 4.

³¹ *Ibid.* at p. 103.

³² *Ibid.* at p. 40.

³³ *Ibid.* at p. 104.

³⁴ *Ibid.* at p. 104.

consume more coal, than in other years, and this was a strong contributing factor to their decision to ensure that they did not run short of coal. Given the increased risk posed by BNSF's trainset and service limitations, the decision was very reasonable under the circumstances and knowing what Evergy knew.

60. Hibbard states that Evergy would have had enough coal to operate but only looks at the question from an *ex post* basis with the benefit of hindsight, and does not consider how Evergy themselves had to look at the issue *ex ante*. That represents a significant flaw in Hibbard's approach.

3.2. Evergy's analyses are appropriate and suited to the question at hand

3.2.1 Simple Economic Logic Confirms the Existence of Lost Opportunities for Evergy

61. Hibbard questions whether there are damages at all, but simple economic logic is all that is necessary to confirm that Evergy lost the opportunity for greater margins from their assets. Put simply, if Iatan and Lawrence operated in the SPP market, it can be reasonably concluded that they were operating not to lose money, and therefore to earn margin. Running less in the marketplace because of their reasonable decision to conserve coal meant that they were unable to run in hours where they should have earned a profit.

3.2.2. Background on Production Cost Modeling

62. The market fundamentals model Foo relied upon is called the PROMOD Electric Market Model, a chronological production cost model. PROMOD is price forecasting and analysis software that is based on the fundamentals of the competitive electric market. It is an industry-standard tool that is widely used by utilities, system operators, and other market participants. I, and CRA, use similar models in my own analyses. Moreover, Hibbard himself has used production cost models in his own work, which he nevertheless alleges relies on a wide array of random and exogenous factors and are not reliable.
63. PROMOD utilizes economic principles and dispatch simulation to model the relationships of supply and demand, as well as the physical properties of the electric system, to produce forecast market prices. Based on unit-level marginal cost bids, the model performs a least-cost dispatch subject to thermal constraints and calculates hourly zonal prices for electricity.
64. There are several reasons why PROMOD is a good tool to use for modeling electricity market operations. The model's price calculation algorithm has been successfully benchmarked against the market price algorithm used in the SPP market. In other words, if the model is supplied with generation offers, demand, and transmission system parameters identical to those used by SPP, it would produce the market clearing prices calculated by SPP under those conditions.
65. Second, PROMOD is a widely accepted tool within the electric power industry. It has been used by system operators in studies conducted for their systems. The model is also used by many utilities and other industry participants to support their planning processes and commercial decisions. Analyses produced with the model

have been used in litigation and regulatory proceedings and accepted by the courts and regulatory agencies.

66. It is my opinion that production cost modeling methodology is the only reasonable way to accurately simulate hour-by-hour operation of modern electricity markets in order to forecast prices and thereby determine the market price changes due to coal conservation in 2022. I elaborated upon some of the key capabilities of PCM in section 3.2.4, and how it can capture the dynamics of markets.

3.2.3 Hibbard reveals his lack of familiarity with electricity market modeling

67. Mr. Hibbard does not appear to be familiar with software used to model electricity markets. He asserts that PROMOD and GenTrader are both production cost models ("PCMs"). He is incorrect, which indicates his lack of familiarity with analysis of electricity markets.
68. A PCM is a model used to simulate the hour-by-hour operation of electricity markets. PROMOD is a PCM;³⁵ GenTrader is not. PROMOD calculates market prices, GenTrader does not. When Hibbard claims that GenTrader is used less frequently to generate forecasts,³⁶ it is a confusing statement, because GenTrader cannot be used to generate price forecasts at all.
69. PROMOD is used to perform production cost modeling in a nodal or zonal market.³⁷ It is used to calculate LMPs, congestion, and system dispatch under various scenarios. PROMOD provides a macro view of the entire SPP system, while GenTrader provides a micro view of specific plant economics under different dispatch assumptions. I describe PROMOD and production cost models more generally, in section 3.2.2 of my statement
70. GenTrader is a commercial commitment and dispatch modeling tool developed by PCI Energy Solutions. It is commonly used for unit commitment and economic dispatch in wholesale power markets, not for production cost modeling. GenTrader works by taking unit-specific cost data and operational constraints to perform a price-based unit and dispatch simulation.³⁸
71. Crosby employs GenTrader to estimate how Iatan and LEC would have been scheduled in the SPP Day-Ahead Market under a "but-for" scenario without coal-conservation adders. This simulation calculates the lost opportunity revenues by comparing actual operations to modeled dispatch outcomes, using adjusted LMPs from Foo's PROMOD production cost modeling.

³⁵ Russo electronic Workpaper "Production Cost Model Fundamentals.pdf"

³⁶ Hibbard Verified Statement, STB Docket No. NOR 42180, at 62.

³⁷ Russo electronic Workpaper "Hitachi Energy Asset Modeling Software Solution.pdf"

³⁸ Russo electronic Workpaper "GenTrader: Power Generation Planning, Forecasting & Energy Asset Optimization Software.pdf"

72. In my experience, GenTrader is used frequently by market participants to make detailed decisions regarding operation of individual plants. I have encountered GenTrader in at least three prior litigated proceedings, and it was used for the dispatch of solid fuel plants such as Iatan and Lawrence.

3.2.4 Evergy's Approach was Suitable and Reasonable

73. The use of a production cost model for prices, and a generation dispatch model for dispatch is appropriate. Production cost modeling is used universally in the power industry, and is the method used by every credible price forecaster I am aware of. It has been used by organizations such as SPP³⁹ itself, the California Independent System Operator ("CAISO")⁴⁰, the New York Independent System Operator ("NYISO")⁴¹, and many other grid operators. It is also routinely used by consulting firms such as CRA, PA Consulting, S&P Capital Pro, ICF, and many others.
74. Hibbard has used a production cost model in his own published analysis, Carbon Pricing for New England Context, Key Factors, and Impacts (June 2020), citing it as the first of five key methodological tools in his analysis.⁴² In that report, Hibbard analyzed how the New England power system would operate under different scenarios of carbon pricing combined with electrification of other sectors, using the PCM to help estimate what carbon price levels would be needed to drive decarbonization while maintaining system reliability.
75. Hibbard's claim that PROMOD is "grossly inaccurate" is based on a misleading metric. His analysis focuses on the number of hours in which PROMOD prices deviate from actual SPP day ahead LMPs, but this approach exaggerates trivial differences and ignores whether the model accurately captures the magnitude and direction of market prices over time.
76. {{ [REDACTED] }} the model captures the timing, shape, and relative magnitude of market price movements throughout the period. In PCM, this directional accuracy is substantially more important than hour-by-hour exact matches, and it confirms that PROMOD reliably represents the market dynamics relevant to measuring the incremental price effects of coal conservation. In my experience, it is practically impossible to precisely replicate every hour of market outcomes in the real world.
77. Hibbard's reliance on hour-counting of absolute deviations mischaracterizes PROMOD's performance and ignores the fact that the model behaves consistently

³⁹ Russo electronic Workpaper "Benefit Metrics Manual.pdf"

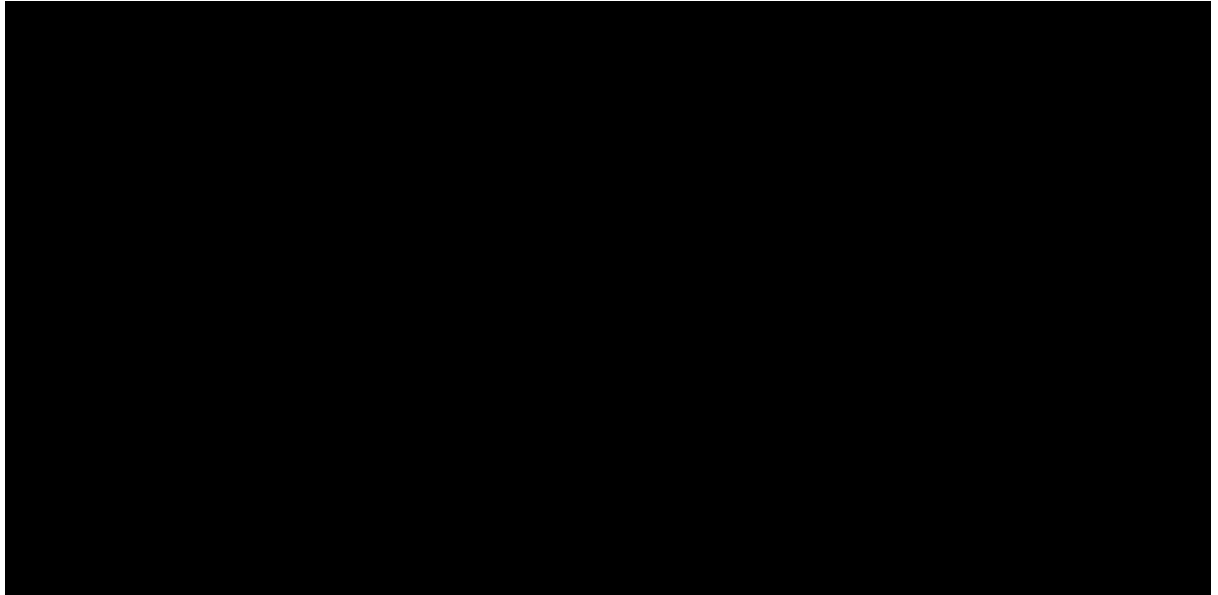
⁴⁰ Russo electronic Workpaper "CAISO Senate Bill 350 Study – Production Cost Analysis.pdf."

⁴¹ Russo electronic Workpaper "NYISO Clean Power Plan Assessment.pdf."

⁴² Russo electronic Workpaper "Carbon Pricing for New England.pdf."

and predictably across the entire period. As Hibbard concedes in his testimony, PROMOD is a stylized representation of real markets. As such, it is not designed to exactly match actual prices.

Figure 6: Foo's Modeled vs. Actual Day-Ahead LMP Prices{



}

78. As I describe further in section 3.1.2, 2022 was an unusual and volatile period for electricity markets in SPP and elsewhere, and a difference between modeled results and actual market outcomes is not unexpected. Hibbard describes Evergy's modeling approach as being influenced by exogenous variables but fails to realize the flaw in his statement. *Any* forward looking analysis can only model what can reasonably be predicted, and by definition cannot model events that are truly random or exogenous.
79. Additionally, the purpose of PROMOD in Evergy's analysis is to measure the incremental LMP effect caused by latan/Lawrence dispatch changes. Since PROMOD tracks market movements and relative changes well, the model is fit for its purpose. The precise match of PROMOD to market results is less important than the change in market prices from Evergy's coal conservation efforts. As I discuss later in my report, I use that method to check the validity of Evergy's lost opportunity analysis.

3.3. Evergy Had a Reasonable Basis to Conserve Coal

80. As part of SPP's resource adequacy requirements, a LRE, such as Evergy's operating subsidiaries, must "maintain adequate capacity to meet its Resource Adequacy Requirement..."⁴³ Within SPP's reporting framework, this involves:

⁴³ Russo electronic Workpaper "2022 SPP Resource Adequacy Report.pdf" at p. 1.

- a. By February 15th of each year: providing a workbook that demonstrates compliance with the Resource Adequacy Requirement for the upcoming Summer Season.⁴⁴ For each LRE, this includes:
 - i. A calculation of all accredited capacity, which considers historical performance in past years (in this case, Summer 2021).
 - ii. A summary of demand for the season, including Forecasted Peak Demand, Internal Firm Power Sales and Purchases, and Controllable and Dispatchable Demand Response.
 - iii. A requirement summary, which includes
 1. SPP's Resource Adequacy Requirement in the form of the relevant Planning Reserve Margins
 - a. In Summer 2022, the PRM for Evergy's subsidiaries (KCPL and Westar) was 12%, and the LRE PRM was 15.68% and 24.21%, respectively.
 2. Excess Capacity Available
 3. Deficient Capacity Available
 - b. By May 15th of each year: an update to its workbook to reflect any changes, as well as to resolve any deficiencies outlined in the initial workbook.⁴⁵
81. This required Evergy to aver that, with the information available to them as of February 15 2022, they could meet the demand with *all* of their resources, a mix of Coal, Natural Gas, Petroleum, Nuclear, Hydro, Wind, and Biomass.
82. As per SPP, "[t]he Planning Reserve Margin ("PRM") shall be set in the SPP Planning Criteria. Determination of the PRM will be supported by a probabilistic Loss of Load Expectation ("LOLE") Study, which will analyze the ability of the Transmission Provider to reliably serve the SPP Balancing Authority Area's forecasted Peak Demand."⁴⁶
- a. Notably, the LOLE Study takes into consideration: Generator capacity and new generation, historical operational experiences, uncertainties with resource mix and Peak SPP Demand, probabilistic events, ability to plan for assistance from neighboring regions, extreme weather, disruptive load growth, or policy work.⁴⁷
 - b. This does not take into consideration future fuel availability or factors that could affect fuel availability. Evergy, as a LRE, needs to make these

⁴⁴ Russo electronic Workpaper "SPP Attachment AA Tariff.pdf" at p. 20.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, at p. 10.

⁴⁷ *Ibid.*

decisions in order to comply with regulatory requirements and serve its customers, and these decisions fall within its mandate.

83. As previously mentioned, Evergy as a LRE and regulated utility, is required to provide generation as it is called up during peak demand. During peak demand, it is important for resources to be able to quickly dispatch service, especially when demand is unpredictable (see section 3.2). Coal and natural gas are most often dispatched during peak demand because of their ability to dispatch quickly.
84. As discussed in 3.2, rising natural gas prices in early 2022 *led to a pattern of preferential dispatch order* towards coal. When gas becomes the higher-cost marginal resource, coal units move up the dispatch stack and run in many additional mid-load and shoulder-load hours. This increased the expected coal burn across the season and substantially narrowed Evergy's margin for maintaining adequate on-site fuel.
85. Given this information, even though Evergy could theoretically have met demand using all of its resources, the uncertain peak demand along with their commitment as a LRE to serve load during summer peaks led to conservation of coal, ensuring that Evergy would be able to dispatch peaking resource when called up.
86. If coal had been dispatched at higher-than-expected rates earlier in the summer, leading to a lack of fuel availability during peak demand, Evergy would not have been able to serve peak demand when dispatched. Because elevated gas prices increased the likelihood of additional non-peak coal dispatch, Evergy faced a real risk that inventories would be drawn down prematurely. Without conserving coal early, these extra dispatch hours could have depleted the fuel needed for critical peak events, where Evergy's LRE obligations are most stringent and where resupply was already constrained by BNSF's delivery shortfalls.
87. As noted in section 3.2, higher natural gas prices led to higher coal dispatch to serve non-peak load. This increase in demand for coal led to a higher risk of not having coal available to serve peak load.
88. Understanding that coal is a preferred resource for serving peak variable demand, the decision to conserve coal to ensure fuel availability during peak demand is logical and reasonable.

3.4. Hibbard provides a distorted view of communication between Evergy and SPP

89. The idea that Evergy withheld supply to increase prices and make more money is undermined by the fact that { [REDACTED]

[REDACTED]}⁴⁸ In fact SPP never told Evergy to conserve coal, but SPP never tells anyone to conserve coal.

90. Hibbard suggests that Evergy economically withheld output from the marketplace to raise prices^{49, 50}, but his argument is undermined by the facts and by both the market manipulation monitoring done by SPP and the requirements of prudence and reasonable incursion of costs that state regulators focus on in setting consumer electric rates.

91. {[REDACTED]} The purpose of applying these price adders was to reduce the likelihood that SPP would commit these plants to generate.⁵¹

3.5. Hibbard mischaracterizes the nature of Evergy's coal reporting requirements

92. Both latan and LEC coal reserves fell below their desired inventory levels during each plant's coal conservation period ({[REDACTED]}

[REDACTED]
[REDACTED]
[REDACTED]}⁵³

93. {[REDACTED]}
[REDACTED]
[REDACTED]}⁵⁶

94. Based on my analysis,⁵⁷ coal inventories at Lawrence fell below the desired level

[REDACTED]
[REDACTED]

⁴⁸ Hibbard Verified Statement, STB Docket No. NOR 42180, at Section IV.B, p. 44.

⁴⁹ *Ibid.* at Section IV.B, p. 47.

⁵⁰ *Ibid.* at Section IV.A, p. 40.

⁵¹ Evergy Opening Evidence, STB Docket No. NOR 42180, at p. 14.

⁵² Hibbard Verified Statement, STB Docket No. NOR 42180, Figure 3 Inventory Data.

⁵³ Evergy Opening Evidence, STB Docket No. NOR 42180, at p. 37-38.

⁵⁴ *Ibid.* at Exhibit JT-9

⁵⁵ *Ibid.* at Exhibit JT-10

⁵⁶ *Ibid.* at Exhibit JT-9

⁵⁷ Russo electronic Workpaper "Coal Inventory Analysis.xlsx."

[REDACTED]

95. { [REDACTED] }
- As per SPP, “[a]s coal-fired steam units generally have adequate fuel reserves on site, placement of coal units in Reliability Status will be considered if coal reserves are less than 20 days at minimum generating capacity. The ultimate decision will be handled on a case-by-case basis based on system conditions and with appropriate coordination between the SPP BA and GOP (or Market Participant).”⁵⁹ Reliability Status is when units are off-line and only available for commitment by SPP if there is a reliability issue. Hibbard states that because SPP did not experience any reliability events during Evergy’s coal conservation period, conservation was unnecessary. Even if SPP does not formally place a coal unit in Reliability Status, low inventories are still a recognized fuel-limitation condition and signal that fuel risk is elevated under SPP’s operating framework, further supporting Evergy’s decision to have to conserve coal to maintain reliability, especially when viewed without the benefit of hindsight.

3.6. Cross-Check of Evergy’s Damages Analysis

96. Hibbard claims that Evergy’s damages analysis is unreliable and that it is based on random exogenous factors and seems to be suggesting that it is impossible to calculate any damages whatsoever. He is incorrect.
97. In order to rebut Hibbard’s opinion, I prepared a simple analysis of the electricity market using publicly available data.⁶⁰ The purpose of the analysis is to demonstrate that Hibbard could have, using publicly available data, roughly estimated Evergy’s lost opportunity damages, but elected not to do so. As noted above, cross-checking Evergy’s net cost to load calculations would require the use of PROMOD using input data from across SPP, to which I do not have access. By performing this analysis, however, I demonstrate that Evergy’s lost opportunity analysis is reasonable and similar to another independent method. This is not a new damages analysis, but rather a demonstration of the ease with which Hibbard could have done one to corroborate Evergy’s analysis.
98. To conduct my analysis, I used inputs sourced primarily from S&P Capital Pro, a common and easily accessible industry database which derives much of its data from public FERC filings. Hourly pricing was sourced directly from SPP’s public website.

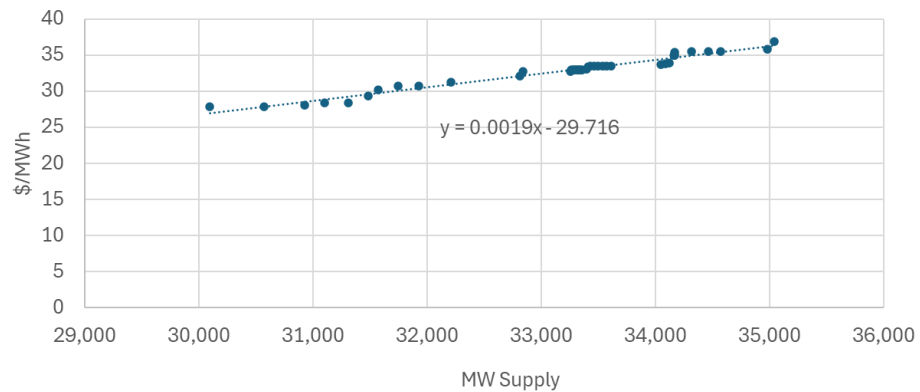
⁵⁸ *Ibid.* at p. 8.

⁵⁹ Russo electronic Workpaper “SPP BA Emergency Operating Plan v 8.1.pdf” at p. 16.

⁶⁰ Russo electronic Workpaper “CRA Damages Analysis.xlsx.”

Methodology

99. My analysis simulates the SPP energy market operations of the Iatan and Lawrence plants from May to December 2022, both as they were operated with coal conservation measures, and as they would have operated without these measures. This is a “high level” analysis, and explicitly not a new damages estimate, but is useful as a corroborating tool.
100. My analysis is performed using a standard Excel spreadsheet to determine operations on an hourly basis (i.e., one hour for each row). For each hour, the analysis compares the variable cost of each plant against the plant’s LMP price in that hour. If the price is higher than or equal to the variable cost, the full operating capacity of the plant is assumed to dispatch and generate revenue in that hour. If the price is lower than the variable cost, the plant is assumed to operate at an estimated minimum generation condition (30%) commonly used by operators to keep the boiler and other plant components within a consistent thermal window for reliability purposes and flexibility. The energy market margins are determined by subtracting the variable generation cost (output level in MW x variable cost in \$/MWh) from the revenue (output level in MW x LMP in \$/MWh).
101. I estimated the total generating margin impact for Iatan and Lawrence plants by comparing energy margin for cases with and without conservation measures.
102. For the case with coal conservation measures, I increased the variable cost using the adders specified by Evergy – 24% premium and OCC adder – within the timeframes outlined in Evergy’s opening evidence. For the case without measures, the plant is assumed to operate without these adders.
103. I also applied an adjustment to the LMP for the counter-factual but-for case where the coal conservation was not applied. This was done using the 2022 SPP short-run variable cost supply curve from S&P Capital Pro. The variable cost for each plant near the middle of the supply curve (roughly near average demand where the market spends the most time) was regressed against the MW supply level, yielding a relationship between \$/MWh and MW, shown in Figure 7. The total hourly output impact for Iatan and Lawrence (if any) was then used to derive a \$/MWh LMP reduction for each hour. Therefore, where there was a difference in output for a given hour due to conservation measures, the energy margin for the counter-factual but-for case was calculated using a lower LMP than the case with conservation measures applied.

Figure 7: 2022 SPP Mid-Supply Curve Regression (MW vs \$/MWh)

Source: Russo electronic Workpaper "Figure 7 - 2022 SPP Mid-Supply Curve Regression (MW vs \$/MWh).xlsx."

Key Assumptions

104. My corroborating analysis was intended to demonstrate a high-level approach, hence it included several simplifying assumptions. The key assumptions for the energy margin loss component of the analysis included the following, where Iatan and Lawrence units:

- Operate at full operating capacity when economic in a given hour, and at minimum generation levels when uneconomic in a given hour.
- Operate at a constant variable cost throughout the analysis period during 2022 (price of PRB coal and delivery costs are mostly stable).
- Dispatch as price takers relative to actual historical LMP, or the adjusted hourly LMP.
- Do not operate during periods of outage specified by Evergy.

105. Details of parameters used in the analysis are shown in Table 2.

Table 2: Summary of Key Assumptions

Parameter	Iatan	Iatan 2	Lawrence 4	Lawrence 5
Operating Capacity (MW)	703	844	111	374
Variable Cost (\$/MWh)	25.6	22.8	27.0	28.1
Minimum Gen Level	30%	30%	30%	30%
Base Adder Level (%)	24	24	24	24
Base Adder Time Frame	Apr 29 – Dec 21 (2022)	Apr 29 – Dec 21 (2022)	Apr 29 – Nov 23 (2022)	Apr 29 – Nov 23 (2022)
OCC Adder (\$/MWh)	53	48	50	50
OCC Adder Time Frame	Sep 28 – Oct 20 (2022)	Sep 22 – Oct 20 (2022)	Aug 19 – Oct 20 (2022)	Aug 19 – Oct 20 (2022)

Source: S&P, Evergy Jun-2025 Opening Evidence, CRA estimates

Analysis results

106. The results of my analysis are outlined below in Table 3. My analysis yields lost opportunity damages similar to the results of Evergy's analysis. I estimate a lost opportunity at Iatan and Lawrence of \$14.6 million, relative to Evergy's \$16.9 million estimate. This similar overall result indicates that Evergy's damage estimates can be replicated at a high level from easily accessible industry data and a simple spreadsheet analysis.

107. As noted above, my spreadsheet analysis is not an alternative damages calculation, and the more precise, actual data-based evidence presented by Evergy's Crosby using a recognized dispatch program such as GenTrader is a superior determination of Evergy's actual damages. What I show by my analysis is that Hibbard could have chosen to do more than simply lodge criticisms of Evergy's calculations, and that if he had done so, it would have been straightforward to confirm the level of lost opportunities.

Table 3: Results of Damages Cross-Check Analysis (\$million)

	Evergy Analysis Result	CRA Check Result
Iatan and Lawrence Generation Margin Loss	16.9	14.6

Source: Evergy, CRA analysis

4. Conclusion

108. The analysis presented herein represents opinions rendered according to the facts known to me in this case and according to my professional judgment.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'CR', followed by a horizontal line.

Christopher Russo

Boston, Massachusetts

January 20, 2026

VERIFICATION

I, Christopher J. Russo, state under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement. Executed on January 20, 2026.

A handwritten signature in black ink, appearing to read 'CJ Russo', with a long horizontal line extending to the right.

Christopher J. Russo

Appendix A: Curriculum Vitae

Christopher J. Russo

Vice President

MS, Technology & Policy (Energy)
Massachusetts Institute of Technology

BS, Mechanical Engineering
Tufts University

Christopher Russo is a Vice President in CRA's energy practice. He advises domestic and international clients in the electricity and gas industries in the areas of investment strategy and economic analysis, asset valuation, energy technology, and generation and transmission development. His expertise covers electricity and gas markets in North America, Europe, the Middle East, and worldwide.

He has testified in litigation and regulatory matters on issues regarding the economics, planning, operation, and manipulation of energy markets and has testified numerous times at trial in numerous countries. Mr. Russo also served on the Board of Directors of Neuco, a Boston-based company which provides software to enable neural network control of thermal power plants.

Prior to joining CRA, Mr. Russo was a senior consultant with Cambridge Energy Research Associates in Paris, and prior to that, owned his own energy consulting firm as well as working for ABB Corporate Research in the US and Switzerland. He started his career at MIT as the Plant Engineer for the campus cogeneration power plant, and later held an academic appointment as a Visiting Scientist at the MIT Energy Laboratory where he investigated electricity technology and energy policy.

Areas of Expertise

Mr. Russo is an energy economist and consultant with expertise in the following areas:

- The dynamics of electricity and gas markets in North America, Europe and worldwide, including market operations, regulatory economics, system planning, physical and economic grid characteristics, generation/dispatch system operations, power systems, and power plant operations. His experience covers nuclear, coal-fired, gas, hydroelectric and renewable (including solar, wind and hydro) generation resources and transmission projects.
- Expert witness testimony and reports related to energy disputes in multiple venues
- Strategic planning and advice for companies engaged in energy markets
- Financial valuations and assessments of generation and transmission assets
- Master planning for energy systems, including assessments of upstream supply sources, energy conversion, transmission, and demand sectors, and sustainability measurement and analysis.

Professional History

- 2007–Present *Vice President*, Charles River Associates, Boston
(Previously held positions as Associate Principal, Principal, Vice President, and Practice Leader)
- 2006 *Senior Consultant*, Cambridge Energy Research Associates (CERA), Paris, France
- 1999–2006 *Principal*, Russo & Associates LLC, Boston
- Worked with numerous market participants and regulators in markets in the US and abroad on the operations and software for restructured energy markets.
 - Provided economic analysis for market participants and regulators on generation and transmission assets.
- 1998–2002 *Consultant*, Department of Energy & Global Change, ABB Corporate Research Center, Baden-Dättwil, Switzerland
- Investigated CO₂ reduction strategies, new generation, and end-use technologies for decarbonization and helped to initiate the China Energy Technology Program. Acted as liaison between ABB and MIT. Worked closely with researchers from ETHZ and PSI. Held a Visiting Scientist appointment at the MIT Energy Laboratory.
- 1995–1998 *Plant Engineer*, MIT Cogeneration Project, Massachusetts Institute of Technology, Cambridge, MA
- Managed gas turbine and cogeneration plant operations, negotiated environmental permits, managed gas market purchases and contracts, and performed regular performance analyses for a cogeneration and district energy plant. Was a guest lecturer in the Department of Aeronautics teaching students about gas turbine technology.

Testimonial History, Litigation Consulting & Major Public Reports

- *Pentacon BV & Baltisse NV v. Guy Vanderhaegen, Guy Vanderhaegen Revocable Trust, Pelican Invest, LLC, Pelican International, LLC, and Origis USA LLC, United States District Court Southern District of New York, Case No. 1:23-cv-02172-KPF.* Testimony on behalf of Pentacon and Baltisse related to solar energy development, renewable energy financing and market conditions for solar energy. Expert report submitted December 2025.
- *Lansing Board of Water and Light v. Siemens Energy, Inc. & Siemens Corporation, State of Michigan Civil Action No. 24-0321-CB.* Testimony on behalf of Lansing Board of

Water & Light on damages relating from outages and underperformance of gas and steam turbines in the MISO electricity market. Expert report submitted December 2025, deposition January 2026

- *Comments of Christopher Russo & Seabron Adamson on Behalf of Constellation Energy, Commonwealth of Massachusetts Department of Public Utilities, dockets 25-133 (Petition of Eversource Gas Company of Massachusetts d/b/a Eversource Energy for Approval of a Firm Transportation Agreement with Algonquin Gas Transmission) and 25-134 (Petition of NSTAR Gas Company d/b/a Eversource Energy for Approval of a Firm Transportation Agreement with Algonquin Gas Transmission),* submitted October 2025
- *Affidavit on behalf of Xcel Energy Services Inc., International Transmission Company d/b/a ITCTransmission, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, and ITC Great Plains, LLC, Docket No. EL25-109-000., Federal Energy Regulatory Commission.* Testimony related to transmission planning methodology in the MISO and to rebut testimony of William Hogan. Affidavit filed September 2025.
- *Confidential AAA arbitration.* Testimony on behalf of a US utility defendant in a contract dispute regarding the economics of powerplant retirements, coal-supply contracts and electricity market dynamics. Expert report submitted January 2025, direct and cross-examination testimony at hearing, March 2025.
- *Grain Belt Express Holding, LLC v. Invenergy Transmission LLC and Grain Belt Express LLC,, Index No. 651445/2023, Supreme Court of the State of New York.* Testimony on behalf of Grain Belt Express Holding on issues related to wind power, HVDC projects, and the SPP power market. Expert report submitted November 2024, deposition December 2024.
- *Beth Israel Deaconess Medical Center, Inc. v. MATEP LLC, et al, Suffolk Superior Court, 2384CV01373-BLS2.* Testimony as a 30(b)(6) representative on behalf of Charles River Associates. Deposition August 2024.
- *Power Distribution Services Ghana Ltd v. Electricity Company of Ghana (ECG) Ltd., UNCITRAL international arbitration.* Expert report prepared on behalf of ECG in international arbitration on the quantum related to the cancellation of a transmission and distribution concession in Ghana. Prepared jointly with Ms. Laura Sochat, expert report submitted September 2022, answering reports submitted October 2023 and January 2024. Direct and cross-examination at hearing July 2024.
- *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program Large-Scale Renewable Program and a Clean Energy Standard, New York Public Service Commission Proceeding 15-E-0302.* Testimony on behalf of Champlain Hudson Power Express and Hydro Quebec on tariff adjustments for transmission construction based macroeconomic conditions. Expert report submitted August 2023.
- *Confidential JAMS Arbitration.* Testimony on behalf of a defendant in a damages case related to financial/virtual power purchase agreements and swaps for a wind power project. My testimony related to custom and practice for power trading in US electricity

markets, dynamics of power pricing, and mechanics of the swap agreement. Expert report submitted May 2023, direct and cross examination at hearing, June 2023

- *NECEC Transmission LLC et al. v. Maine PUC and NextEra Energy Resources, State of Maine Civil Action BCD-CIV-2021-00058*. Testimony on behalf of NextEra on issues of HVDC and AC transmission line construction and economic decisions. Deposition March 2023
- *NRG South Texas LP v. Matagorda County, District Court of Matagorda County, Case No. 21-F-0473*. Testimony on behalf of NRG and the South Texas Project nuclear powerplant on topics of electricity market modeling, and the ERCOT market. Expert report submitted November 2022, deposition December 2022.
- *Sjunde AP-Fonden and the Cleveland Bakers and Teamsters Pension Fund v. General Electric Company and Jeffrey Bornstein, United States District Court for the Southern District of New York, Case No. 17 Civ. 08457 (JMF) (GWG)*. Expert report prepared on behalf of General Electric in securities class action litigation on topics of global energy markets, the market for gas turbines, customer service agreements, and factoring of receivables. Expert report submitted May 2022, deposition June 2022. Case was ultimately settled.
- *Rainbow Energy Marketing Corporation v. DC Transco, LLC, United States District Court for the Western District of Texas, Austin Division, Civil Action 1:21-cv-313*. Expert report prepared on behalf of Rainbow Energy Marketing on the topics of energy management agreements, ISDA agreements, controllable transmission lines, and the ERCOT market. Expert report submitted April 2022, rebuttal report submitted May 2022.
- *Superior Court of Nassau County, Long Island Power Authority v. Nassau County, 403754/2016, 403760/2016, 403222/2017, 403227/2017, 402338/2018, 402348/2018, 403044/2019, 403046/2019, 401265/2020, 401267/2020 403757/2016, 403225/2017, 402347/2018, 403045/2019, 403739/2016, 403226/2017, 402354/2018, 403047/2019, 401264/2020*, Expert Report on behalf of the Long Island Power Authority in tax litigation projecting revenues and costs for the E.F. Barrett and Glenwood powerplants on Long Island. Expert Report filed October 2021.
- *Buckthorn Wind Project, LLC v. JPMorgan Chase Bank, N.A., United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 4:21-cv-562*. Expert report prepared on behalf of JP Morgan on the topic of wind power purchase agreements, ISDA hedges, and the ERCOT market. Expert report submitted August 2021, deposition October 2021.
- *Confidential AAA Arbitration*. Lead expert on electricity markets in a case involving costs associated with coal plant shutdowns and coal fuel supply contracts of behalf of defendant. Expert report submitted January 2021. Case settled during hearing.
- *Confidential JAMS Arbitration*. Lead expert on damages and electricity markets in a case involving wake effects on wind turbines and PPA and merchant market revenues in

California. Expert report submitted December 2020. Direct and cross examination at trial, February 2021.

- *Confidential AAA Arbitration*. Lead economic expert in a dispute related to miscalculation of payments under a power purchase agreement (PPA) between a US powerplant and an offtaker. Expert report submitted August 2019. Direct and cross-examination at trial November 2019.
- *Market Design Issues in the Alberta Capacity and Energy Markets*, Proceeding 23757, Application 23757-A001, *Alberta Utilities Commission*. Expert testimony filed on behalf of the Alberta Market Surveillance Administrator (MSA), February 2019, filed jointly with Dr. David Patton and Mr. Jordan Kwok. Cross-examination at hearing May 2019.
- *In the matter of Trina Solar Limited, Cause No. FSD 92 of 2017 (NSJ), Grand Court of the Cayman Islands*. Expert testimony related to the solar energy industry, solar manufacturing, and project development, submitted on behalf of Maso Capital Investments Limited and Blackwell Partners LLC in dissenting-shareholder litigation related to valuation of Trina Solar. Expert report submitted October 2018, rebuttal report January 2019. Cross-examination at trial May 2019.
- *Offer Behaviour Guidelines Prior to the Implementation of a Capacity Market*. Report prepared on behalf of the Alberta Market Surveillance Administrator (MSA), December 2018. Filed jointly with Dr. Adonis Yatchew, Dr. David Hunger, and Mr. Jordan Kwok. Presentation and oral appearance at Stakeholder Meeting January 2019.
- *Petition of Eversource & National Grid et al., for approval of long-term contracts for renewable energy, pursuant to Section 83D of An Act Relative to Green Communities, dockets DPU 18-64, 18-65 and 18-66, Massachusetts DPU*. Testimony related to the proposed Quebec- Maine New England Clean Energy Connect transmission line and power purchase agreement on behalf of NextEra Energy. Testimony filed jointly with Robert Stoddard and Stephen Whitley, December 2018. Cross-examination at hearing February 2019.
- *Affidavit on behalf of Vistra Energy Corp. & Dynegy Marketing & Trade, Docket Nos. EL16-49-000, ER18-1314-000, ER18-1314-001, EL18-178-000, Federal Energy Regulatory Commission*. Testimony related to proposed PJM capacity market reforms. Affidavit filed October 2018, answering affidavit filed November 2018
- *Hydro One Networks Inc. Lake Superior Link Project Leave to Construct Application, Ontario Energy Board, Docket EB-2017-0364 and EB-2017-0182*, Expert testimony submitted on behalf of NextBridge Infrastructure. Expert report filed April 2018. Testimony at hearing May 2018 and February 2021.
- *Request for Approval of CPCN for the New England Clean Energy Connect Consisting of a 1,200 MW HVDC Transmission Line from Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, State of Maine Public Utilities Commission, Docket 2017-00232*. Direct testimony on behalf of NextEra Energy Resources filed April

2018. Testimony and cross-examination at technical conference and hearings, June 2018, August 2018, and January 2018.

- *Massachusetts Superior Court*, Expert report submitted on behalf of a plant owner calculating damages from operational limitations on a district energy plant in the ISO-New England Market. Expert report submitted March 2018.
- *State of New Hampshire*, expert report submitted on behalf of a plant owner and operator in a tax certiorari proceeding in February 2018. Case was settled before hearing.
- *In re: Request for Advanced Ratemaking Principles by Interstate Power & Light Company*, Docket RPU-2017-0002, *Iowa Utilities Board*. Direct Testimony on behalf NextEra Energy Resources commenting on IPL's resource plan and the Duane Arnold Energy Center nuclear power plant. Direct, rebuttal and sur-rebuttal written testimony, and cross-examination at hearing, November 2017.
- *ABB AB v. Alstom Grid AB, Alstom Grid SAS and Alstom Grid UK Ltd., Stockholms Tingsrätt (Stockholm District Court), Cases 7403-15 and 11527-15*. Expert testimony submitted on behalf of Alstom related to economic damages resulting from the alleged IP infringement of HVDC technology. Expert report filed August 2017. Direct and cross-examination (in English with translation) at trial, October 2017.
- *State of California v. Coral Power LLC et al., Docket EL02-71-057, Federal Energy Regulatory Commission*. Testimony on behalf of Shell Energy North America (f/k/a Coral Power) related to the causes of the 2000-2001 California Power Crisis and alleged energy market manipulation. Written testimony filed February 2017, deposition March 2017, direct and cross-examination at trial April 2017.
- *Confidential AAA Arbitration*, Lead economic expert in a dispute related to the economics of environmental regulations, coal-fired power plants, and coal supply contracts in the US. Expert report filed September 2016, deposition November 2016, direct and cross-examination at trial December 2016.
- *In re: Direct Application of MidAmerican Energy Company For The Determination Of Ratemaking Principles*, Docket RPU-2016-001, *Iowa Utilities Board*. Direct Testimony on behalf of Google Inc., Facebook Inc., and Microsoft Corporation related to the economics of MidAmerican's Wind XI proposal, filed June 2016. Case was settled before hearing.
- *MAG Energy Solutions Inc. v. TEC Energy Inc. et al., Province de Québec, Cour Supérieure, Case No. 500-17-087823-152*. Expert report submitted on behalf of TEC Energy on issues related to energy trading and transmission scheduling in Canada and the United States, filed May 2016. Joint report with opposing expert filed June 2019
- *Northern States Power Company, Southern Minnesota Municipal Power Agency, Aegis Insurance Services et al., v. General Electric Company, State of Minnesota, Tenth Judicial District, Case 71-CV-13-1472*, Expert report submitted on behalf of GE

calculating damages related to the outage of the Sherburne county coal-fired power plant, filed March 2016. Deposition June 2016.

- *Entergy Nuclear FitzPatrick, LLC v. Town of Scriba, et al., Supreme Court of the State of New York*, Expert report of behalf of Entergy in a tax certiorari case projecting electricity revenue and nuclear fuel cycle costs for the James A. FitzPatrick Nuclear power plant, expert report filed January 2016. Case was settled before trial.
- *NRG v. State of Maryland, Case 09-RP-CH-261-265; 09-RP-CH-280-284; and 09-RP-CH-294-298*. Expert report on behalf of NRG projecting energy and capacity revenues for the coal-fired Mirant Mid-Atlantic Dickerson facility, 2014. Deposition March 2014, direct and cross-examination at trial, May 2014
- *In the Matter of Entergy Nuclear Indian Point 2, LLC & Entergy Nuclear Indian Point 3, LLC, DEC: 3-5522-00011/00004, SPDES: NY-0004472, DEC: 3-5522-00011/00030, DEC: 3-5522-00011/00031*, Direct and rebuttal pre-filed testimony on behalf of the City of New York related to the operations and economic impact of the Indian Point nuclear power plant, filed March 2014. Direct and cross-examination at hearing April 2014
- *NRG v. State of Maryland, Case 09-RP-CH-261-265; 09-RP-CH-280-284; and 09-RP-CH-294-298*. Expert report on behalf of NRG, jointly filed with Robert B. Stoddard, projecting energy and capacity revenues for the coal-fired Mirant Mid-Atlantic Morgantown facility, January 2014
- *ThyssenKrupp Companhia Siderúrgica do Atlântico v. CITIC Group, ICC Arbitration*, expert report for international arbitration submitted on behalf of CITIC group related to damages from improper operation of a coal-fired power plant in Brazil, filed July 2012. Case was settled before hearing.
- *Indian Point Energy Center Retirement Analysis*, Prepared for the City of New York, August 2011
- *Summary of economic effects for proposed Spectra NJ-NY gas pipeline*, Memo prepared for Spectra Energy, and submitted to the New Jersey Bureau of Public Utilities, March 2011
- *Confidential Arbitration*, Expert report provided on behalf of a power plant investor regarding the appraised value of a coal-fired power plant in the PJM market, August 2011. Case was settled before hearing.
- *Proceedings before the New York State Assembly on the economic and reliability impact of the potential closure of the Indian Point Nuclear Energy Center*. Direct testimony at hearing January 2012
- *Confidential Arbitration*, Expert report related to the valuation of a hydroelectric plant in California, which was settled before hearing, June 2013.
- *Coordination between Natural Gas and Electricity Markets, Docket AD12-12-000, Federal Energy Regulatory Commission*, Comments filed jointly with Dr. Richard Tabors and Scott Englander, 2012

- *In the Matter of Hudson Transmission Partners, LLC Case 08-T-0034*, direct and rebuttal pre-filed testimony on behalf of the City of New York before the New York State Public Service Commission in the Article VII proceeding for the proposed Hudson Transmission Partners HVDC cable. Direct and cross-examination at hearing April 2010
- *A Master Electrical Transmission Plan for New York City*, Prepared for the City of New York, May 2009
- *Public Utility Commission of Texas proceedings Cost-Benefit Analysis of the Texas Nodal Market*. Expert report on behalf of the Public Utilities Commission of Texas filed jointly with Alex Rudkevich and Ellen Wolfe December 2008. Direct testimony at hearing January 2009
- Mr. Russo was retained as an expert in civil litigation related the 2021 Texas Winter Storm on issues of market rules and dynamics. He was not disclosed before the case ended for legal reasons.
- Mr. Russo prepared an expert report calculating damages from the delayed construction of a gas-fired combined cycle power plant in the United States for a civil litigation matter. The case settled before his report was submitted and he was disclosed and thus remains confidential.
- Mr. Russo prepared testimony and analysis on behalf of a client accused of electricity market manipulation before the FERC. The case relates to alleged cross-product manipulation involving renewable and thermal assets and financial instruments. The case was settled before his testimony was submitted.
- Mr. Russo acted as an expert in a case concerning coal mines and fuel contracts with coal-fired power plants. The case was settled before his report was submitted and he was disclosed and thus remains confidential.
- Mr. Russo assisted in the damages analysis for a case litigated in federal court related to damages associated with renewable power plant revenue as a result of market rule changes in the MISO market.
- Mr. Russo assisted in analyzing how transmission upgrade costs were allocated in Quebec for new development in support of testimony before the Régie d l'Énergie.
- Mr. Russo performed analysis on behalf of a party in FERC litigation resulting from the California energy crisis, including simulation of the CAISO market clearing process and trading strategies employed by different parties.
- Mr. Russo is currently engaged as an as-yet-undisclosed expert witness in US Federal litigation related to cross-product manipulation of electricity markets.

Selected Commercial Consulting Experience

- Mr. Russo has directed the analysis of over one hundred generation, transmission, and district energy assets for utilities, equity and debt investors, infrastructure funds, regulators and market operators. He has analyzed assets in all major power markets, including ISO-NE, PJM, ERCOT, SPP, SERC, NYISO, CAISO, IESO, AESO, MISO and the Pacific Northwest. These include thermal (gas, coal, nuclear, oil), renewable (solar, wind, biomass), hydro, and storage (pumped, CAES, and battery) assets.
- Mr. Russo led an engagement for an investor developing a market entry strategy for investments in the US hydrogen market.
- Mr. Russo led a team investigating the difference in financing approaches that exist between different-sized nuclear reactors and construction approaches.
- Mr. Russo led the team to help an advanced Gen IV nuclear reactor technology company develop a commercial strategy for market entry and commercialization.
- Mr. Russo directed the team assisting a client in its efforts to bid battery storage into utility-sponsored RFPs in the Northeast US.
- Mr. Russo directed the diligence efforts for the purchase of two large district energy facilities in the Northeast US.
- Mr. Russo led the analysis for a major foreign investor entering the North American gas pipeline, processing and midstream market, consisting of strategic guidance and the analysis and due diligence of numerous North American and Mexican midstream assets.
- Mr. Russo supervised the analysis for the Alberta Electric System Operator on the development of new capacity market mechanisms in the provincial electricity market.
- Mr. Russo directed and lead due diligence efforts related to nuclear technology and power markets for a major private equity investor acquiring a nuclear fuel and services vendor in bankruptcy.
- Mr. Russo led the financial and transactional analysis for a group of investors on a combined heat and power gas-fired cogeneration plant.
- For a major renewable energy and transmission developer, Mr. Russo led the analysis of market impacts of proposed projects and assisted in developing commercial and regulatory strategy in New England and New York.
- Mr. Russo led the analysis for a major transmission project in PJM, including analysis of costs and benefits, production cost modeling, regulatory implications of FERC Order 1000 and other rules, and strategic advice on project development.
- For a transmission developer, Mr. Russo designed and directed the economic and technical analysis of a 2,000 MW HVDC project in the northeast US with detailed analysis of ISO-NE and NYISO markets.
- Mr. Russo directed the economic and technical analysis for a major offshore wind developer connecting into the NYISO and PJM markets for several proposed projects.

- For a worldwide operator of data centers, Mr. Russo directed a risk exposure analysis of multiple markets, commodities and assets to assess the company's exposure to global trends.
- For a private equity investor, Mr. Russo led the diligence on a potential acquisition of the services business of a gas turbine manufacturer. The work involved the analysis of the market for services, the market for service agreements, and an analysis of competitors.
- Mr. Russo directed the analysis of new regulatory approaches and energy technologies for a large African electric utility.
- Mr. Russo assessed the economic and technical suitability of large-scale photovoltaic technologies for a large Middle Eastern utility.
- Mr. Russo directed the analysis of renewable energy (solar and wind) procurement options for one of the largest renewable energy purchasers in the world. This evaluated technical, financial, and economic factors affecting the renewable technologies.
- Mr. Russo directed the analysis of capacity need and market conditions related to the siting of new capacity on Long Island for a client.
- Mr. Russo led a major review of new nuclear development strategy, including technical reviews, risk analyses, economic forecasts and prudence reviews for a US-based electric utility.
- Working for the mayor and city council of a major US city, Mr. Russo managed a due diligence effort to determine the feasibility of supporting new nuclear licensing applications for a municipally owned utility. This included a review of nuclear technology, market conditions, Nuclear Regulatory Commission (NRC) resource constraints, and federal regulatory policy related to nuclear loan guarantee programs.
- Mr. Russo led the analysis for a large industrial client of how electricity market rules related to reliability affected prices in installed capacity markets, including analyses of resource-adequacy and short-term grid contingency events.
- For a major municipal utility, Mr. Russo provided an independent review of the utility's investment analysis to retrofit emissions control equipment to a coal-fired power plant to comply with pending environmental regulations.
- For a transmission developer, Mr. Russo advised on the open-season transmission requirements and FERC process for a new merchant transmission line.
- Mr. Russo directed the analysis of the socioeconomic benefits of advanced coal technology in European, Chinese and South Asian markets, focusing on market effects, induced and indirect benefits and social impacts.
- Mr. Russo led the effort to develop an electrical market model for Europe for a Paris-based client. Working with the production-cost modeling software and his team, he assembled databases of resources, demand, fuel prices, and transmission network characteristics to build a comprehensive model of the EU grid.

- Mr. Russo designed and conducted a series of workshops to assist a major foreign investor with a market-entry strategy for offshore wind into the Northeast US.
- Mr. Russo directed and led a project to synthesize and summarize the nuclear technology risk and seismic hazard data for a two-unit nuclear reactor in North America.
- Mr. Russo directed an engagement for a client to assist in the purchase and contracting of large amounts of electricity to support aluminum smelting operations. This consisted of financial analysis of North American power markets including the MISO and PJM and financial evaluation of proposed contract structures.
- Mr. Russo managed a major effort for the City of New York to develop a Master Electrical Transmission Plan to address economic and reliability needs in the context of a multi-stakeholder process, incorporating the Mayor's Office, Economic Development Corporation, NYISO, ConEd, and the NYS Public Service Commission. The program addressed the economic and technical factors associated with AC and HVDC transmission, as well as the policy and financial impacts of public-private partnerships and equity investment strategies.
- For a major power development company, Mr. Russo led several projects to determine the optimal strategy for entering the gas-fired development market under pending environmental constraints and regulations. In a related project, he led efforts to investigate the feasibility of new and waste coal development in the PJM energy market.
- For the City of New York, Mr. Russo led a major effort to investigate the reliability and economic and environmental impact of the closure of the Indian Point Nuclear Energy Center on consumers and the economy. This comprised a report as well as testimony before various commissions.
- For a private equity firm, Mr. Russo directed the due diligence assessment of an energy storage technology manufacturer, focusing on the analysis of market opportunities for energy storage.
- For a major global semiconductor manufacturer, Mr. Russo led an effort to develop a global energy procurement strategy, analyze potential power contracts, and benchmark procurement activities against other similar firms
- Mr. Russo directed the review of the internal technical and financial modeling processes for an investor in the liberalized UK energy market.
- For a gas pipeline developer, Mr. Russo directed the analysis of a new pipeline project's impact on gas basis differentials.
- For a major European utility, Mr. Russo designed and managed a process to develop internally consistent analysis scenarios to enhance corporate planning. The effort involved soliciting input from different groups throughout the enterprise, designing scenarios, analyzing the results, and presenting the results to internal and external stakeholders.

- For a major Internet search provider, Mr. Russo directed the evaluation of potential sites for data centers in Europe and the US.
- For a major Asian utility, Mr. Russo managed an engagement to develop a growth strategy for a subsidiary of the parent firm, including a review of current operations, market positioning, potential risks, and strategic alliances, culminating in a concrete division growth plan.
- Working for the Executive Office of Sheikh Mohammed of Dubai, Mr. Russo was a principal in a major study examining the effectiveness of Dubai's current electric utility, petrochemical resources, and water resources. Working closely with local personnel, he spent significant time interviewing Dubai Electricity and Water Authority (DEWA) and Dubai Supply Authority (DUSUP) personnel, Emirati leaders, and stakeholders; evaluating petrochemical and water resources; and developing a comprehensive multi-attribute, multi-scenario energy system model of the emirate for evaluation of future energy strategies.
- Mr. Russo was a principal in a project to restructure a major utility in the United Arab Emirates, including long-term planning functions, regulatory efforts, customer service systems, IT architecture, and financial systems.
- Mr. Russo led a project for a major Hong Kong-based utility to help them adapt their management processes, planning infrastructure, and IT systems to pending emissions and energy trading regulations through performing needs assessments, sourcing strategies, and drafting RFPs.
- While with ABB, Mr. Russo helped design and organize the China Energy Technology Program, a joint ABB/AGS program to investigate sustainable energy systems in China, which included Electric Generation Expansion Analysis (EGEAS) modeling of the eastern China power network to identify long-term, cost-effective strategies for environmental improvement. The project was conducted in conjunction with the Swiss Federal Institute of Technology (ETHZ) and the Paul Scherrer Insitut (PSI).
- Working with the MIT Cogeneration Plant, Mr. Russo provided continuing guidance and expertise on cogeneration plant and gas turbine operations, as well as conducting several economic cost-benefit analyses to plan future plant expansion.
- For a major software firm and federal clients, Mr. Russo helped prepare and develop a wide-area synchronized phasor measurement system to measure phase angle and frequency perturbations across the Eastern Interconnection to enhance grid stability.
- For PJM, Mr. Russo developed software and systems to visualize market participant bidding behavior to assist market monitors and dispatchers.
- For New York ISO, Mr. Russo designed and implemented a PI data historian system for tracking all operational data. He also trained system operators on its use, played an integral part in the standard market design to implementation and EMS development and developed various software applications to analyze system operations.

- For the California ISO, Mr. Russo worked as a consultant during the startup, developing systems to track generator dispatch operations and identify anomalous generator behavior to assist market surveillance personnel. During the power crises and rolling blackouts, he managed and maintained a critical system in use by all ISO personnel and developed a system to analyze results of Stage 2 and 3 events.
- Mr. Russo began his career in power as an intern for the Trigen Energy Corporation analyzing the operations and economics of Trigen's fleet of cogeneration plants.

Additional Professional Training

- New York ISO Market Operations Course
- New York ISO DSS Market Participants Course
- California ISO Market Participants Course

Publications & Media Appearances

"EFLOPS >> MWs: The economics behind data center growth", September 2025, with Prof. Maxime Cohen

"Nuclear Renaissance, Redux", Tulane University Law School, September 2025, with Gabrielle Finger, Stephanie Fishman, Greg Hammond, Amy Roma and Frederic Sourgens.

"An Incomplete Compendium of Energy Disputes", July 2025

"Climate policies and investment: implications for disputes", co-authored with Rebecca Rowden and Laura Sochat. *Arbitration Review of the Americas* 2023.

"Economic Evidence of Market Manipulation," chapter in the *Guide to Energy Market Manipulation* with Robin Cohen, David Hunger and Brian Rivard. Published by Global Competition Review, March 2018

"Data Collection," chapter in *Integrated Assessment of Sustainable Energy Systems in China: The China Energy Technology Program*. Baldur Eliasson. Kluwer Academic Publishers, 2003.

Quoted in *"Ideas to Bolster Power Grid Run Up Against the System's Many Owners"*, New York Times, July 12, 2013.

Citizenship and Languages

Mr. Russo is a dual citizen of the United States and Italy.

- English (native)
- Italian (proficient)
- German and French (basic)