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Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

Dear Chief of Case Administration:

Enclosed for e-filing in the above-referenced proceeding is a public version of BNSF Railway Company's Final Brief, with appropriate redactions that the Board can place on its docket. We are concurrently filing a highly confidential version of the Final Brief to be filed under seal.

Respectfully submitted,

/s/ Timothy J. Strafford
Timothy J. Strafford

Attorney for BNSF Railway Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42180

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

v.

BNSF RAILWAY COMPANY

FINAL BRIEF OF BNSF RAILWAY COMPANY

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Dated: February 23, 2026

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FINAL BRIEF OF BNSF RAILWAY COMPANY

I. Introduction

Evergy has failed to prove its allegations that BNSF's service to Evergy's Iatan and Lawrence facilities in 2022 violated the law. The 2022 service problems that are the subject of Evergy's complaint were the result of extraordinary events, primarily the after-effects of the COVID pandemic, that were beyond BNSF's control. As Evergy itself acknowledged at the time, {{ [REDACTED] } }¹ There is no evidence that Evergy was singled out for unfavorable treatment. In fact, virtually every shipper on every railroad in 2022 was affected by the supply chain disruptions in the post-COVID period.

Evergy is seeking a dramatic expansion of the common carrier obligation that would be inconsistent with agency and court precedent and the Rail Transportation Policy of 49 U.S.C. § 10101. Even before the Staggers Act and the mandate to minimize regulatory intervention, railroads were not held liable for external forces that were beyond their control. And through its request for massive damages, Evergy is seeking a windfall for its shareholders. All of Evergy's

¹ See, e.g., BNSF Reply at BNSF-426 (Counsel's Exhibit 43, EVERGY-0088877, at 882). For ease of reference, page numbers for BNSF's Reply cited herein correlate to its combined "BNSF-__" convention. Similarly, page numbers for Evergy's Rebuttal cited herein correlate to its "EVERGY-REB-__" convention.

claimed damages flow from its voluntary decisions to conserve coal even though coal conservation was never mandated or required by a lack of coal supply. The record is clear that BNSF acted reasonably in extraordinary circumstances, satisfying its common carrier obligation, and Evergy is not entitled to any damages.

If the Board were to accept Evergy’s novel legal theory, it would create dangerous precedent and bad policy. Evergy’s legal theory would incentivize railroads to favor the largest shippers, {{ [REDACTED] [REDACTED] }} by accepting their private trainsets on demand—irrespective of impacts on network fluidity—during times of congestion in order to avoid common carrier liability. Rather, railroads should be encouraged to focus on increasing network fluidity, as BNSF did in 2022, which benefits all shippers. The parochial interests of large shippers like Evergy should not be allowed to disproportionately influence service decisions for all customers in times of congestion caused by external shocks. This principle is particularly important when unprecedented circumstances arise, as was the case in 2022 when BNSF and the rest of the rail industry faced persistent supply chain disruptions, wild swings in rail service demand, and historical shifts in labor markets like the Great Resignation in the wake of COVID.

BNSF recognizes that rail customers are entitled to an effective common carrier remedy. But claims involving alleged violations of the common carrier obligation should be focused on the reasonableness of the carrier’s conduct in light of the existing circumstances—not a myopic focus on whether the railroad has delivered historical volume levels to a particular customer; irrespective of whether circumstances have changed, or whether those historical volumes were pursuant to committed contracts. As the case law recognizes, given the complexity of rail operations, the Board will not second guess reasonable choices made by a railroad in satisfying

service requests.² Here, the record evidence shows BNSF worked diligently to provide reasonable service to Evergy as BNSF sought to restore network fluidity in 2022, and that should be the end of the inquiry. Evergy's complaint should be denied.³

II. The governing law establishes that common carrier service is judged by a standard of reasonableness in the circumstances.

A. Evergy's continually evolving liability theory is based on a flawed and incorrect characterization of the governing law.

Evergy based its complaint and opening evidence on separate claims under 49 U.S.C. §§ 11101, 11121, and 10702, each with its different set of legal requirements.⁴ But now on rebuttal, Evergy appears to have collapsed its argument that BNSF violated its common carrier obligations into a single claim.⁵ While Evergy makes a half-hearted defense on rebuttal of its original reliance on 49 U.S.C. § 11121,⁶ Evergy effectively concedes that its car service claim is merely a repackaging of its common carrier claim.⁷ Similarly, Evergy's rebuttal makes it clear that it has not alleged an unreasonable practice claim under Section 10702 that is distinct from the common carrier claim.⁸

Evergy's theory has now merged into a single claim that BNSF was obligated to accept Evergy's private car sets into service on demand to deliver volumes commensurate with past

² *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 803, 807 (2004); *see also Mont. v. BNSF Ry.*, NOR 42124, slip op. at 7 n.28 (STB served Apr. 26, 2013) (noting that in general, "the Board tries to avoid micromanaging a carrier's operational decisions").

³ Because Evergy saved many arguments for its 489-page rebuttal, BNSF does not have an opportunity to fully respond to many of the self-serving and unsupported claims and purported evidence that Evergy presented therein. However, those points are not critical to a resolution of Evergy's complaint. *See, e.g.*, Fapp Reb. V.S. at EVERGY-REB-384-85 (discussion regarding BNSF's pre-2019 labor decisions).

⁴ *See* Evergy Complaint at ¶¶ 25-32; Evergy Opening at 16-30.

⁵ *See* Evergy Reb. at EVERGY-REB-17-39.

⁶ *See id.* at EVERGY-REB-14-16.

⁷ *See id.* at EVERGY-REB-14-15.

⁸ *See id.* at EVERGY-REB-16.

years—regardless of the circumstances or the effect on the wider BNSF network during a period of unprecedented strains on global supply chains, failures of railroad supply partners, and nationwide rail congestion.⁹ According to Evergy, BNSF was required to fulfill Evergy’s specific and { [REDACTED] } forecasts of service, so long as they were consistent with historical volumes.¹⁰ Evergy now downplays its previous reliance on the amounts Evergy nominated in BNSF’s Coal Forecasting Tool (“CFT”), effectively abandoning its claim that BNSF had an obligation to deliver specific quantities of coal over the course of 2022.¹¹ Indeed, BNSF showed on reply Evergy’s reliance on CFT nominations¹² was flawed in numerous respects, not least because Evergy did not view its own CFT nominations as binding two years later in 2024.¹³

Evergy’s legal theory is unsupported by precedent and is incorrect for at least three reasons.¹⁴ First, Evergy’s focus on historical volumes remains a version of strict liability that ignores the controlling case law’s admonition to evaluate the carrier’s performance based on present circumstances.¹⁵ Second, by using historical volumes delivered under prior contract as

⁹ See *id.* at EVERGY-REB-12, 14-16.

¹⁰ See Evergy Opening at 16-18; Tucker Opening V.S. at 8-10.

¹¹ See Tucker Reb. V.S. at EVERGY-REB-133-34 n.3; Evergy Reb. at EVERGY-REB-12. BNSF demonstrated in its reply evidence why CFT nominations are not “reasonable requests” for service triggering specific volume obligations. See BNSF Reply at BNSF-82-100.

¹² BNSF requires coal shippers to provide an annual volume declaration (“Annual Declaration”) of the coal they intend to ship for the following year, broken down by month. BNSF uses these Annual Declarations to plan for and to allocate resources for the coming year. BNSF also requests that shippers enter “nominations” each month into BNSF’s CFT to show details on coal mine supplier choices, anticipated fluctuations in monthly demand from the annual declaration, and to account for temporary maintenance outages or other changes. These monthly nominations can be entered up to two weeks before the start of the month and help BNSF plan and manage the coal transportation network on an ongoing basis, but they do not amount to “requests” for service that create a legal obligation that a shipper can enforce through a damages action. See BNSF Reply at BNSF-12.

¹³ As BNSF established in its reply, Evergy told BNSF in its Annual Declaration in 2024, that it would need { [REDACTED] } tons of coal over the year, but Evergy later departed significantly from that Annual Declaration. The { [REDACTED] } in coal tonnage that Evergy “requested” in 2024 closely mirrors the supposed shortfall in coal deliveries in 2022 that is the subject of Evergy’s complaint. BNSF Reply at BNSF-14; Prince V.S. at BNSF-465.

¹⁴ See BNSF Reply at BNSF-69-81 and cases cited therein. Evergy admits that “this proceeding presents the Board with what in several respects is an unusual case.” Evergy Reb. at EVERGY-REB-7.

¹⁵ See BNSF Reply at BNSF-70-77.

the standard by which common carrier service is judged, Evergy’s liability case is based on a flawed and incorrect characterization of the governing law.¹⁶ Third, Evergy ignores the fact that historical experience in this case was under contracts with { [REDACTED] } than the common carrier tariff applicable in 2022 and also involved additional plants.¹⁷

B. Contrary to Evergy’s novel theory of the common carrier obligation, common carrier service is judged based on a standard of reasonableness in the circumstances.

The governing statute is clear and straightforward. By its plain language, 49 U.S.C. § 11101 requires that, if a rail customer makes a reasonable request for service, a common carrier must establish rate and service terms and provide service pursuant to those terms. BNSF clearly met this statutory requirement. The statute sets out no specific service standards or obligations. And the case law interpreting the statute makes clear that the carrier is not subject to liability simply because it does not provide the frequency or volume of service that the shipper desires or has historically obtained; the carrier need only take reasonable actions under the present circumstances to provide the service that it has held itself out to provide.¹⁸

The case law also establishes that a common carrier must make reasonable efforts to provide “adequate” service. But “adequate” service is not defined by what a shipper wants or

¹⁶ See *Navajo Transitional Energy Co.—Ex Parte Petition for Emergency Service Order*, NOR 42178, slip op. at 33 (STB served June 23, 2023) (Member Fuchs, dissenting). To the extent that the injunction decision issued in NOR 42178 creates the misimpression that contract service establishes a standard for common carrier service, the Board should take this opportunity to clarify that it does not.

¹⁷ See BNSF Reply at BNSF-97-99.

¹⁸ See BNSF Reply at BNSF-69-81. Evergy spends several pages in its rebuttal arguing that the Board should ignore the prevailing circumstances that affected all rail carriers in 2022 and ignore evidence that BNSF submitted regarding { [REDACTED] } See Evergy Reb. at EVERGY-REB-34-38. But as the Board has already itself noted, the performance of other carriers during this period is relevant to evaluating the reasonableness of BNSF’s actions. *Evergy v. BNSF Rwy.*, NOR 42180, slip op. at 9 (STB served Mar. 4, 2025).

requests.¹⁹ Instead, it is defined by the reasonableness of the carrier’s actions and efforts under the circumstances.²⁰ Common carriers are not guarantors of service. Their obligation is to act reasonably to provide the service they hold themselves out to provide.²¹ Thus, contrary to Evergy’s arguments, neither the statute nor the common law establishes a legal obligation on the part of a common carrier to provide a particular, historical volume of service irrespective of the present circumstances.²²

As the Board has stated, “common carriers serve the public generally, and the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.”²³ This obligation to serve the broader public interest is the “higher standard” expected of common carrier railroads.²⁴ It is incongruous that Evergy relies on its own “fundamental responsibility to serve the public,”²⁵ while simultaneously asking the Board to ignore BNSF’s responsibility to the broader network and public as a common carrier.²⁶ This service obligation to its entire customer base and the public requires that the common carrier

¹⁹ See, e.g., *Winnebago Farmers Elevator Co. v. Chi. N.W. Transp. Co.*, 354 I.C.C. 859 (1978) (a railroad is not required to provide service in covered hopper cars, notwithstanding the shipper’s desire for such service).

²⁰ *Granite State Concrete Co. v. STB*, 417 F.3d 85 (1st Cir. 2005).

²¹ For example, a common carrier is only obligated to act reasonably in providing an adequate fleet of cars. If circumstances outside of a railroad’s control prevent the supply of cars requested by a shipper, the railroad is not liable. *I.C.C. v. Martin Bros. Box Co.*, 219 F.2d 811 (9th Cir. 1955); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981).

²² See, e.g., *Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Cap. Cargo, Inc.*, FD 34920 (STB served May 30, 2008).

²³ *Id.*, slip op. at 9, citing *De Bruce Grain Co., Inc. v. Union Pacific Railroad Company*, NOR 42023 (STB served Dec. 22, 1997).

²⁴ See, e.g., *General Foods Corp. v. Baker*, 451 F.Supp. 873, 875 (D. Md. 1978).

²⁵ Evergy Reb. at EVERGY-REB-151.

²⁶ See *Bhd. of Ry. & Steamship Clerks, Freight Handlers, Express & Station Emps., AFL-CIO v. Fla. E. Coast Ry. Co.*, 384 U.S. 238, 244-45 (1966) (explaining that the common carrier obligation “runs not to shippers alone but to the public”). Railroads do not have an obligation to accept shipper-owned cars when doing so will cause congestion. *Shippers Comm., OT-5 v. The Ann Arbor R.R.*, 5 I.C.C. 2d 856, 864 (1989), *aff’d sub nom. Shippers Comm., OT-5 v. ICC*, 968 F.2d 75 at 79, 81 (D.C. Cir. 1992).

railroad's service be judged by a reasonableness standard that turns on the prevailing circumstances.²⁷

III. The record in this case establishes that BNSF acted reasonably in the prevailing circumstances.

- A. The prevailing circumstances surrounding Evergy's 2022 service were persistent global supply chain disruptions and nationwide rail congestion; variable, surging demand; and unprecedented labor market tightness following the COVID crisis.

On reply, BNSF submitted extensive evidence showing that the entire global supply chain, including BNSF and other Class I railroads, faced capacity constraints in 2022 due to circumstances beyond the reasonable control of common carriers.²⁸ The North American rail system faced unprecedented challenges, including constant supply chain disruptions, dramatic swings in demand, and historical shifts in labor markets.²⁹ All sectors of the global economy were severely impacted in the aftermath of COVID. The Russian invasion of Ukraine in February of 2022 sent further shocks throughout the economy, including triggering natural gas price surges that impacted demand for coal transportation.³⁰

On rebuttal, Evergy downplays the unprecedented circumstances and global events of 2022 as mere "excuses."³¹ Yet Evergy offers no evidence or analysis to refute the reality of those circumstances and the impact they had on the entire rail industry.³² Evergy's lack of evidence on

²⁷ See, e.g., *B.J. Alan Co., Inc. v. United Parcel Service*, 5 I.C.C. 2d 700, 711 (1989) ("[T]he determination of what level of service is reasonable under the prevailing circumstances can vary depending on what the prevailing circumstances are.").

²⁸ See BNSF Reply at BNSF-100-20; Morehouse V.S. at BNSF-935-36; Prince V.S. at BNSF-475-81; Baranowski/Zebrowski V.S. at BNSF-621-24.

²⁹ See Carter V.S. at BNSF-873-77; Morehouse V.S. at BNSF-935-37; Prince V.S. at BNSF-468-99; Baranowski/Zebrowski V.S. at BNSF-619-36; Johnson V.S. at BNSF-535-51.

³⁰ See *id.*

³¹ See, e.g., Evergy Reb. at EVERGY-REB-23-25.

³² Evergy suggests that the BNSF representative who communicated regularly with Ms. Tucker in 2022 { [REDACTED] } See Evergy Reb. at EVERGY-REB-22, 144. But the after-effects of the pandemic on supply chains and the rail industry were widely known in 2022 when the Board convened its hearing on rail service. See *Urgent Issues in Freight Rail*

this matter is unsurprising, as the extraordinary circumstances of 2022 cannot be seriously disputed. In April 2022, the Board convened a public hearing to discuss urgent issues in freight rail service.³³ The Board has acknowledged the substantial impacts of 2022 supply chain and labor market challenges on rail transportation.³⁴ In addition, an October 2022 Rail Energy Transportation Advisory Committee Utility Update, based on input from 45 power plants, reflected the power industry’s recognition that rail service problems were industry-wide and were not limited to individual shippers.³⁵ Indeed, Evergy itself acknowledged in internal communications that {{ [REDACTED] [REDACTED] }}³⁶

B. The circumstances affecting Evergy’s service in 2022 were beyond BNSF’s reasonable control.

Nevertheless, Evergy now asserts that the service problems in 2022 were within BNSF’s control and that BNSF is therefore responsible for them.³⁷ The record evidence overwhelmingly refutes Evergy’s implausible claim.³⁸ BNSF’s inability to accept into service the total number of trainsets Evergy desired was the result of a combination of surging demand and unprecedented

Service, EP 770, Hr’g Tr. 9:13-21 (Apr. 26, 2022) (Secretary of Transportation commenting on “the unprecedented challenges of the past two years” and the “fact of a global pandemic, and the disruptions it created throughout our supply chains.”). *See also* Prince V.S. at BNSF-469-81 (documenting the effects on the pandemic on supply chains); Johnson V.S. at BNSF-539-40, 544, 557 (discussing the effects of the pandemic on the “Great Resignation”). Evergy offers no explanation of why { [REDACTED] [REDACTED] }

³³ *Urgent Issues in Freight Rail Service*, EP 770 (STB served Apr. 7, 2022).

³⁴ *See, e.g., Reciprocal Switching for Inadequate Rail Service*, EP 711 (Sub-No. 2) (STB served Apr. 30, 2024) (recounting service issues across the rail industry).

³⁵ *See* BNSF Reply at BNSF-96-97.

³⁶ *See* BNSF Reply at BNSF-426 (Counsel’s Exhibit 43, EVERGY-0088877, at 882) ({{ [REDACTED] [REDACTED] }}).

³⁷ *See, e.g.,* Evergy Reb. at EVERGY-REB-23-26.

³⁸ BNSF Reply at BNSF-100-20.

labor market circumstances well beyond BNSF’s control.³⁹ On rebuttal, Evergy asserts that “BNSF failed to maintain any reserve capacity” going into 2022.⁴⁰ But this assertion is unsupported and wrong. BNSF had reserve capacity and used it to increase deliveries over the amount forecasted in 2021 for 2022, but demand exceeded the reserve capacity.⁴¹ Despite working aggressively to increase deliveries, surging demand—coupled with nationwide labor shortages and network congestion during this period—made it impossible for BNSF to provide every shipper with variable, fluctuating volumes requests. BNSF allocated capacity across its network to serve the broader public interest in accordance with its common carrier obligations, rather than favoring any single shipper at the expense of others. Messrs. Crowley/Mulholland also falsely claim that BNSF reduced its hiring targets when faced “with an internally projected crew shortage,” which is the opposite of what actually happened.⁴² Contrary to these made-for-litigation arguments, Evergy itself internally recognized that {{ [REDACTED] [REDACTED] }}⁴³

Perhaps recognizing the absurdity of its argument that the supply chain crisis and the Great Resignation were BNSF’s fault, Evergy also claims that BNSF labor practices from as far

³⁹ *Id.*

⁴⁰ Mulholland/Crowley Reb. V.S. at EVERGY-REB-251.

⁴¹ See Baranoski/Zebrowski V.S. at BNSF-Reply-664 (Fig. 45). For demand forecast in 2021, see Baranowski/Zebrowski V.S reply workpapers “BNSF Nominations 2019-2022.xlsx” at tab “2020-2022 Forecasts Compiled” at columns A-D and J. For actual deliveries in 2022, see “Waybill Deliveries.xlsx” at tab “SQL Output” at columns A, D, and E.

⁴² Mulholland/Crowley Reb. V.S. at EVERGY-REB-251. Messrs. Mulholland and Crowley observe that {{ [REDACTED] [REDACTED] }} *Id.* at EVERGY-REB-320-327. This interpretation is wrong, as demonstrated by the fact that throughout 2022 BNSF was actively trying to hire the staff required to close the gap identified in the forward-looking December 2021 report, and in fact did so as soon as it was able. See Johnson V.S. at BNSF-558-73. BNSF’s monthly reports reflect {{ [REDACTED] [REDACTED] }}

⁴³ BNSF Reply at BNSF-22-23 (Counsel’s Executive Summary Exhibit 01, EVERGY-0052860).

back as 2014 caused BNSF to be unable to accept additional Evergy train sets into service in 2022.⁴⁴ In fact, the record in this proceeding shows that, unlike other Class I rail carriers, BNSF's crew levels remained consistent in the years leading up to the COVID pandemic.⁴⁵ Even the testimony by representatives of organized labor in EP 770, which Evergy cites, demonstrates that BNSF did not dramatically cut headcount relative to traffic in the years prior to 2020 and that BNSF maintained significantly higher employee levels than other large railroads in this timeframe.⁴⁶ In any event, Evergy offers no explanation of how BNSF's pre-pandemic staffing decisions could have any causal connection to post-pandemic staffing efforts, as Evergy does not and cannot dispute that the massive drop in demand during COVID necessitated dramatic work force reductions.

C. In the face of these unprecedented circumstances, BNSF acted reasonably to serve Evergy while also protecting network fluidity for all of its customers.

BNSF's efforts to address the service problems created by the after-effects of COVID were reasonable and fell into three broad categories, as BNSF explained in its Reply. First, facing a surge in demand starting in the second half of 2021, BNSF recognized the need to hire and took aggressive measures to expand its work force. BNSF, like the rest of the economy, faced extreme labor market challenges in 2022, but despite these challenges, BNSF moved aggressively to hire and retain workers, as explained by Ms. Carter.⁴⁷ In addition to its hiring efforts, during this time, BNSF took steps to incentivize employees to increase productivity. The Hi-Viz program was one

⁴⁴ Evergy Reb. at EVERGY-REB-25-27.

⁴⁵ See, e.g., BNSF Reply at BNSF-6-8. See Baranowski/Zebrowski V.S. at BNSF-648-68; Johnson V.S. at BNSF-535-551; Carter V.S. at BNSF-879-880; Morehouse V.S. at BNSF-935-937.

⁴⁶ BNSF Reply at BNSF-6; Johnson V.S. at BNSF-574-75 (Fig. 10) (data on carloads per employee for Class I carriers shows BNSF's metrics remained stable from 2015 to 2019).

⁴⁷ See BNSF Reply at BNSF-110; Carter V.S. at BNSF-874-77; Johnson V.S. at BNSF-555-72.

aspect of this effort. While Evergy criticizes the Hi Viz program,⁴⁸ BNSF explained that the intent behind the program was to ensure that BNSF could address crew shortages and staff trains needed to serve shippers.⁴⁹ The fact that BNSF’s ratio of crew members to car loads moved remained consistently higher than all other Class I railroads at all relevant times proves that the program did not have the deleterious effects Evergy belatedly ascribes to it on rebuttal.⁵⁰

Second, because hiring and qualifying rail employees takes time, BNSF had to take operational steps to decongest the network.⁵¹ BNSF’s operational steps to restore network fluidity included {{ [REDACTED] }} from service across the coal network in March 2022. The {{ [REDACTED] }} were spread among BNSF’s customers, and { [REDACTED] } from Iatan, and none from Lawrence.⁵² As Mr. Morehouse explained, Iatan was a reasonable candidate for {{ [REDACTED] }} because of its relatively low burn rate and healthy stockpile levels, as well as certain issues Iatan had faced in January and February 2022, and its location on the critical St. Joseph’s subdivision.⁵³ At the time, Evergy internally recognized that {{ [REDACTED] }}

⁴⁸ See, e.g., Evergy Reb. at EVERGY-REB-26-27.

⁴⁹ See Johnson V.S. at BNSF-580-583 (explaining that BNSF implemented the Hi-Viz program to increase crew availability and improve transparency for employees); see also *Urgent Issues in Freight Rail Service*, EP 770, Hr’g Tr. 791:11-17 (Apr. 27, 2022).

⁵⁰ BNSF Reply at BNSF-118-20; Johnson V.S. at BNSF-574-76 (Figs. 10-11).

⁵¹ Evergy repeatedly complains about the inclusion of the term “sole discretion” in the relevant tariffs. As BNSF explained in its Reply, this language reflected the uncontroversial idea that a railroad must manage its network in the first instance within its legal obligations as common carriers. BNSF removed the language from tariffs because the language created confusion. See BNSF Reply at BNSF-145-47.

⁵² Morehouse V.S. at BNSF-938-39. Evergy acknowledges that no train sets were removed from Lawrence service in 2022 but points to a trainset reduction in 2021. Evergy Reb. at EVERY-REB-46. But the number of trainsets in service in 2021 was driven by circumstances in 2021 that are not the subject of Evergy’s complaint, which focuses on service in 2022. In any event, a trainset was removed from Lawrence service in response to { [REDACTED] } in 2021.

⁵³ Morehouse V.S. at BNSF-939.

{}⁵⁴ Indeed, Evergy does not dispute that BNSF was tactically correct to reduce train sets in the face of what its witnesses acknowledge as “practical capacity” limitations during parts of 2022.⁵⁵

BNSF’s efforts to decongest its network in the first half of 2022 were successful.⁵⁶ By removing trainsets traversing St. Joseph’s subdivision, BNSF improved velocity, benefitting all shippers on the subdivision.⁵⁷ Thus, when Evergy { [REDACTED] [REDACTED] }, network conditions were improving to the point that BNSF was able to approve the { [REDACTED] } set for Iatan.⁵⁸ While the addition of the { [REDACTED] } set contributed to some reduced velocity on the Evergy route, nevertheless by late September, Evergy was {{ [REDACTED] [REDACTED] }}⁵⁹

Third, consistent with the common carrier obligation, BNSF did not put the interest of any one shipper—{{ [REDACTED] [REDACTED] }}—above the interests of the broader network. In the coal network, BNSF made extensive efforts to protect the interests of all of its shippers. BNSF took steps to carefully monitor its customers’ coal stockpile levels and prioritized customers with the most critical needs.⁶⁰ As Mr. Morehouse explained, BNSF’s approach was applied in a non-

⁵⁴ See, e.g., BNSF Reply at BNSF-43-46 (Counsel’s Executive Summary Exhibit 07, EVERGY-0082975).

⁵⁵ Messrs. Mulholland and Crowley admit that “BNSF knew that adding traffic to its system in 2022 would result in train holds due to insufficient crew.” Mulholland/Crowley Reb. V.S. at EVERGY-REB-242, 245.

⁵⁶ See BNSF Reply at BNSF-123; Morehouse V.S. at BNSF-939; Baranowski/Zebrowski V.S. at BNSF-634-35 (Fig. 17).

⁵⁷ Morehouse V.S. at BNSF-939.

⁵⁸ BNSF Reply at BNSF-123-25.

⁵⁹ See BNSF Reply at BNSF-10, 617, 819.

⁶⁰ Evergy’s refusal to provide BNSF with information on its coal stockpiles contributed to the difficulties that BNSF had in monitoring its service. Although BNSF has repeatedly explained to Evergy that this lack of transparency makes it difficult to optimize operations to meet the needs of Evergy and all BNSF shippers, Morehouse V.S. at

discriminatory manner. BNSF “did not single out any utility for preferential treatment simply because of its size, type of service (contract versus common carrier service), or profitability. Instead, [its] objective was to deliver the maximum amount of coal under constrained capacity and address the needs of individual shippers as much as possible.”⁶¹ By carefully managing resources across its network, BNSF successfully increased its fluidity, and it was able to move more coal for its customers, despite significant challenges that were outside of BNSF’s control.⁶²

In seeking to improve fluid operations across the rail network, Evergy claims without any basis that “BNSF sacrificed coal to provide improved service to other shipper groups,” primarily intermodal, and that “BNSF’s actions created winners (non-coal) and losers (coal).”⁶³ The record before the Board, including the testimony of Evergy’s own witnesses, proves otherwise. First, Evergy’s witnesses themselves acknowledged that {{ [REDACTED]

[REDACTED] }}⁶⁴ Second, rather than allocate constrained crew resources away from the Evergy route to non-coal services, BNSF witness Dr. Johnson showed {{ [REDACTED]

BNSF-940, Evergy continues to treat its plants’ inventory levels – even for past years – as a closely guarded secret. See Evergy Reb. at EVERGY-REB-73-75.

⁶¹ Morehouse V.S. at BNSF-939. Additionally, as BNSF established in its reply, “[d]uring the critical second half of 2022, when Evergy expressed the most concern, Evergy received service {{ [REDACTED] }} BNSF Reply at BNSF-10.

⁶² See *id.*

⁶³ Evergy Reb. at EVERGY-REB-308.

⁶⁴ See Mulholland/Crowley Opening Exhibit 11 at 1-2, 4 (showing that {{ [REDACTED] }}; see also Mulholland/Crowley Opening Exhibit 11 at 4, line 13, columns (20) and (23)) (showing that {{ [REDACTED] }}).

{}⁶⁵ Third, BNSF witnesses Messrs. Baranowski and Zebrowski demonstrated that {{ {}⁶⁶ Indeed, BNSF showed on reply that Evergy {{ {}⁶⁷ Finally, the only evidence Messrs. Mulholland and Crowley purport to offer in support remotely related to their assertion that {{ {} shows the opposite.⁶⁸

D. BNSF was not obligated under the tariff at issue to provide the highly variable service that Evergy sought.

Evergy has no valid complaint about BNSF's service under the relevant tariff because Evergy did not even try to meet the requirements of that tariff. Evergy's rebuttal makes it clear that its complaint in this case is that BNSF did not increase service during the high demand summer months when Evergy's burn rate {{ {}⁶⁹ But under the tariff that defined the service that BNSF held itself out to provide, BNSF was not obligated to provide such highly

⁶⁵ Johnson V.S. at BNSF-566-68, 572.

⁶⁶ Baranowski/Zebrowski V.S. BNSF-635 n.37, Fig. 18 (showing {{ {}⁶⁷ Baranowski/Zebrowski V.S. at BNSF-634-635, Fig. 17 (showing that over 10,000 cars online were removed as part of BNSF's 2022 efforts to decongest the network and restore service –{{ {}⁶⁸ See BNSF Reply at BNSF-97 (citing to {{ {}⁶⁹ Mulholland/Crowley Reb V.S. at EVERGY-REB-268 n.59 (citing to their opening exhibits 8, 11, and 18). Critically, all these cited exhibits show that {{ {}⁶⁹ See, e.g., Evergy Reb. at EVERGY-REB-50.

variable service. Instead, the relevant tariffs required Evergy to tender traffic in { [REDACTED] } amounts.⁷⁰

At the time, Evergy internally acknowledged that {{ [REDACTED] [REDACTED] }}⁷¹ However, Evergy now complains that BNSF did not accept sufficient train sets to provide a level of service sufficient to meet the { [REDACTED] [REDACTED] } in Evergy's coal-burn pattern. Evergy seems to believe that its desire to ramp up the number of train sets in service during peak burn periods places it at the front of the line during times of congestion regardless of the language of the tariff or Evergy's lack of compliance therewith.⁷² Evergy's witness, Ms. Tucker, admitted in her opening statement that Evergy thinks it is entitled to ignore the ratability terms of the tariff and that Evergy's preference is to unload deliveries directly from trains into its generating units rather than stockpiling coal.⁷³ On rebuttal, Ms. Tucker attempts to extrapolate a common carrier obligation based on past BNSF efforts to accommodate Evergy's desires for highly variable service.⁷⁴ But Evergy cannot unilaterally override the terms of BNSF's tariffs.

BNSF did what it could to accommodate Evergy's desire for increased service in peak demand periods in 2022, but BNSF was not obligated to meet those { [REDACTED] } demands. BNSF was in close communication with Evergy throughout 2022 and took reasonable measures to keep up with Evergy's { [REDACTED] } demand for coal, consistent with the needs of

⁷⁰ See, e.g., BNSF Reply at BNSF-13, 90-94.

⁷¹ BNSF Reply at BNSF-48-52 (Counsel's Executive Summary Exhibit 08, EVERGY-0082386).

⁷² See BNSF Reply at BNSF-92-94; see also Evergy Reb. at EVERGY-REB-30. ({{ [REDACTED] [REDACTED] }}).

⁷³ Tucker Opening V.S. at 6, 8.

⁷⁴ Tucker Reb. V.S. at EVERGY-REB-175-87.

BNSF’s broader coal transportation network.⁷⁵ Additionally, Evergy’s comparisons to service that BNSF provided under contracts that { [REDACTED] } are not valid and do not establish a common carrier service standard.⁷⁶

IV. Evergy failed to prove that it is entitled to any damages.

Evergy has failed to show that BNSF acted unreasonably in the circumstances of 2022, as shown above. Evergy has also independently failed to carry its burden to prove damages—and seeks to distract from this failure by trying to shift the burdens of proof and persuasion to BNSF.⁷⁷ Even if Evergy could establish a violation of the common carrier obligation, evidence of such a violation alone is not sufficient to establish a right to damages.⁷⁸ Because Evergy has failed to meet its burden, the Board cannot award damages in this case.⁷⁹

- A. Nearly all of Evergy’s claimed damages flow from voluntary business decisions to conserve coal and consist of associated costs for which Evergy has already been fully compensated.

In its complaint and opening evidence, Evergy tried to create the impression that its actions in conserving coal were required by its regulators or market organizations.⁸⁰ BNSF

⁷⁵ BNSF Reply at BNSF-10-14.

⁷⁶ Prince V.S. at BNSF-450, 462-64.

⁷⁷ *Michael H. Meyer, Trustee in Bankruptcy for California W. R.R., Inc. v. North Coast R.R. Authority, d/b/a Northwestern Pac. R.R.*, FD 34337 (STB served Jan 31, 2007).

⁷⁸ *United States Steel Corp. et al. v. The Baltimore & Ohio RR. Company et al.*, 325 I.C.C. 430, 434 (1965) (“Evidence sufficient to establish a violation of the act is not necessarily sufficient to support an award of reparation.”). *See also War Materials Reparation Cases*, 294 I.C.C. 5, 48-49 (1955) (“Shippers seeking damages for violation of the act assume the burden of proving such violation, and [the agency’s] power to award damages by way of reparation is confined to instances of such proof.”); *Booth Fisheries Corp. v. Chesapeake & Ohio Ry. Co.*, 222 I.C.C. 287, 289 (1937) (“[I]n order to be entitled to an award of reparation, complainant must show, with the same certainty as would be required to sustain recovery in a court of law, that it has been damaged by the wrong committed by the carrier, and the amount of his damage.”).

⁷⁹ *Groome & Assocs., Inc. v. Greenville Cnty. Econ. Dev. Corp.*, NOR 42087, slip op. at 15-16 (STB served July 27, 2005)(citing *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184, 204 (1913)); *United Iron Works (Inc.) v. A., T. & S. F. Ry.*, 63 I.C.C. 184, 192 (1921); *Hylton Flour Mills, Inc. v. Los Angeles & Salt Lake R.R. Co. et al.*, 152 I.C.C. 81, 84 (1929) (“In the absence of a sufficient showing of damages, the agency has consistently denied reparation.”).

⁸⁰ BNSF Reply at BNSF-164-65 (quoting Complaint at 12-13).

explained that this was not the case.⁸¹ As a result, Evergy now admits that “SPP does not direct utilities to conserve coal; it gives them discretion to do so and when requested can assist in the process.”⁸² Although Evergy seeks to downplay this point as a “red herring,”⁸³ its admission is fundamentally a concession that Evergy’s coal conservation measures were all voluntary business decisions.⁸⁴ As such, BNSF cannot be made responsible for damages that flow from the consequences of those decisions.

Evergy’s voluntary decisions to conserve coal were based on regulatory considerations that encouraged a degree of conservatism that is inconsistent with market forces. Evergy does not dispute that it participates in a regulated market where it is made whole for costs, including lost opportunity costs, incurred through fuel adjustment clauses.⁸⁵ The result is that Evergy does not face the same risks as participants in an unregulated market, and is therefore incentivized to act conservatively in making fuel decisions. As explained by BNSF witness, Mr. Hibbard, “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.”⁸⁶

Evergy’s conservatism – for which it now seeks to hold BNSF responsible – can be seen by looking at the two months where Evergy claims the largest damages, May and October 2022. In May 2022 when Evergy experienced {{ [REDACTED] }} of its purported damages, Iatan and Lawrence

⁸¹ BNSF Reply at BNSF-164-66.

⁸² EVERGY-REB-51-52.

⁸³ *See, e.g.*, Foo Reb. V.S. at EVERGY-REB-425.

⁸⁴ Evergy manages a portfolio of generating assets including power plants fueled by coal, natural gas, oil, and nuclear fuel, as well as wind and solar resources. Jackson Opening V.S. at 2-3. Evergy routinely makes decisions regarding fuel sources and generation assets. *See* Tucker Reb. V.S. at EVERGY-REB-132-38.

⁸⁵ BNSF Reply at BNSF-171.

⁸⁶ Hibbard V.S. at BNSF-741.

were both flush with coal.⁸⁷ In October 2022, when Evergy experienced {{ [REDACTED] }} of its purported damages, BNSF had already { [REDACTED] } and {{ [REDACTED] [REDACTED] }} because of increased BNSF service.⁸⁸ Indeed, Evergy had {{ [REDACTED] [REDACTED] }}.⁸⁹ It is clear that in these two critical months, there was no need for Evergy to conserve coal to meet demand.

BNSF should not be held financially responsible for Evergy’s conservative, voluntary decisions to conserve coal for several reasons. First, Evergy’s decisions were clearly driven by regulatory considerations, including policy choices, in electricity markets that are beyond the Board’s experience or expertise to evaluate. Utility rate cases at state commissions – not proceedings before the Board – are designed to evaluate the prudence of utility decisions.

Second, the regulatory system in which Evergy operates includes a trade-off for the conservatism it encourages by compensating Evergy for its fuel decisions. Under the relevant regulatory schemes, “Evergy is also fully reimbursed for costs associated with stockpiling coal. Specifically, Evergy is permitted to include costs associated with meeting its target level of coal inventories in its rate base. As such, Evergy is guaranteed both a ‘return of’ and ‘return on’ all costs associated with its coal inventory included in the rate base.”⁹⁰

Evergy does not deny that it already recovered all costs underlying its damages claims.⁹¹ And Evergy’s rebuttal provides no indication that Evergy would have any obligation to refund

⁸⁷ *Id.* at BNSF-757-58.

⁸⁸ *Id.* at BNSF-757-58; BNSF Reply at BNSF-123-25.

⁸⁹ *See* BNSF Reply at BNSF-161, 191, 819.

⁹⁰ Hibbard V.S. at BNSF-768.

⁹¹ *See* EVERGY-REB-76; *see also* Tucker Reb. V.S. at EVERGY-REB-145-149.

any portion of a damages award it receives in this proceeding to rate payers.⁹² Evergy tacitly concedes that any damages recovery permitted here would therefore constitute a double-recovery for its shareholders – an obvious windfall – but claims that the case law permits such double recovery.⁹³ But the cases cited by Evergy for this proposition are all cases regarding reparations for the payment of unreasonable rates.⁹⁴ Those cases do not address the question of double recovery, and they are not relevant to Evergy’s lost profit claims here. In a rate case, the difference between the charged rate and the maximum lawful rate is the measure of reparation. Reparations do not flow from the consequences of paying an unlawful rate, but simply from the payment of the rate itself. In contrast, Evergy’s lost profit theory in this case is based on a long series of far more remote events, namely that (1) Evergy was { [REDACTED] }⁹⁵ (2) Evergy raised its electricity pricing offers into the SPP market so that it would burn less coal, and (3) the net result of that decision over the period it kept those inflated prices in place means that Evergy purportedly made less money overall than it would have made if it did not conserve coal. This is not a claim of direct damage from the collection of an unreasonable rate; it is an invitation to the Board to

⁹² Mr. Russo notes that Evergy is only 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.” Russo Reb. V.S. at EVERGY-REB-460. Evergy offers no evidence that this standard would require it to refund any portion of a recovery in this proceeding to its customers.

⁹³ EVERGY-REB-76.

⁹⁴ *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142 (STB served Jan. 11, 2018); *Western Fuels Ass’n, Inc. v. BNSF Ry.*, NOR 42088 (Sub-No. 1) (STB served Oct. 22, 2009); *San Antonio, Texas v. Burlington Northern, Inc.* 1 I.C.C. 2d 561, 577 (1986).

⁹⁵ Evergy admits that it made its 2022 coal conservation decisions based on April 2022 calculations, even though those figures became less relevant as the year went on. See Tucker Reb. V.S. at EVERGY-REB-134-37.

speculate about what electricity markets may have done if Evergy did not decide to increase its offer prices.⁹⁶

Third, Evergy does not dispute that coal conservation can result in profits, not loss. Its own modeling shows that {{ [REDACTED] [REDACTED] }}⁹⁷ After considering the profitability of its other plants due to its conservation decisions, Evergy reduced its damage claim by over a half, even under Evergy’s own flawed calculations.⁹⁸ BNSF should not be made responsible for voluntary decisions that, at the time they were made, could result in substantial profits to the utility.⁹⁹

Indeed, were the Board to adopt Evergy’s damages theory, it would be making BNSF Evergy’s financial guarantor: BNSF would be responsible for the full extent of *any* harm that Evergy supposedly suffered from its business decisions regarding (1) when to implement bid adders to electricity it generated at Iatan and Lawrence and (2) the level at which it chose to set those adders. That theory is flawed and unprecedented.¹⁰⁰ It would place all downside risk on BNSF while Evergy takes none for itself, despite Evergy’s admission that bid adders can have the result of increasing Evergy’s profits and that its models show that this occurred in

⁹⁶ Evergy wrongly argues that rejecting its damages claim here would give railroads a “free pass” from liability for violations of the common carrier obligation. Evergy Reb. at EVERGY-REB-57. But Evergy’s claimed damages are primarily based on alleged lost profits (opportunity costs), and the case law makes clear that claims for lost profits have not been favored because they are inherently speculative. See n.118 *infra*. Lost profits must be based on direct and non-speculative evidence. See *G.S. Roofing v. STB*, 262 F.3d 767 (8th Cir. 2001). Here, rejecting Evergy’s speculative and remote damages claims that flow from its own voluntary business decisions would not preclude future claims, including future lost profit claims, that are based on more direct and less speculative evidence.

⁹⁷ BNSF Reply at BNSF-166-67.

⁹⁸ Evergy Opening at 48-50.

⁹⁹ Contrary to Evergy’s strawman arguments, BNSF did *not* accuse Evergy of purposefully manipulating markets by implementing bid adders to its prices. BNSF only observed that BNSF should not be responsible for market outcomes following this form of coal conservation, because those outcomes depend on numerous exogenous factors and can be either positive or negative. See BNSF Reply at BNSF-166-67.

¹⁰⁰ See BNSF Reply at BNSF-149-200.

{{ [REDACTED] }} in 2022.¹⁰¹ It would make the measure of damages the outcome of electricity markets that are affected by a myriad of factors beyond rail service and would ignore the realities of the rail network congestion and national supply chain failures in 2022.

Finally, even if the financial consequences of Evergy’s voluntary decisions to conserve coal could constitute recoverable damages in an STB proceeding, Evergy’s conservative decisions violated its obligation to mitigate those damages. Evergy acknowledged on rebuttal that it has such an obligation, but claims that it made “reasonable efforts to mitigate its damages.”¹⁰² But it is fundamentally inconsistent with the obligation to mitigate damages for Evergy to conserve coal when it did not need to do so. If Evergy were entitled to any damages – which it is not – it should recover only to the extent those damages could not be avoided. But Evergy began conserving coal {{ [REDACTED] }} and continued conserving coal even once inventories {{ [REDACTED] }}.¹⁰³ Even if Evergy *wanted* more coal in its inventory, BNSF should not be responsible for voluntary conservation decisions beyond those *needed* to avoid injury. Evergy did not even try to meet this mitigation requirement.

A similar problem relates to the foreseeability requirement. Evergy acknowledges that “the offending party is responsible for all damages that are reasonably foreseeable at the time of its violation.”¹⁰⁴ Because Evergy’s damages claims are wholly dependent on outcomes in the electricity markets, it was not foreseeable that Evergy would suffer damages in April/May when

¹⁰¹ BNSF Reply at BNSF-166-69.

¹⁰² Evergy Reb. at EVERGY-REB-41 (citing *Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, 7 I.C.C. 2d 30, 33-34 (1990)).

¹⁰³ BNSF Reply at BNSF-170-71.

¹⁰⁴ Evergy Reb. at EVERGY-REB-41 (citing *Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, 7 I.C.C. 2d 30, 33-34 (1990)).

{{ [REDACTED] }} or in October when BNSF { [REDACTED] } and {{ [REDACTED] }} Indeed, as noted above, Evergy’s modeling says Evergy made profits in {{ [REDACTED] }} of the modeled hours when it conserved coal. Not even Evergy could have known at any particular time whether its voluntary decision to conserve coal would produce profits or losses. BNSF should not be made responsible for those unforeseeable consequences of Evergy’s business decisions.¹⁰⁵

B. Evergy’s damages claims are fatally speculative and remote because they are based on modeling that is wholly unreliable.

Even if the Board were persuaded that (1) BNSF’s service to Evergy in 2022 violated the common carrier obligation, and (2) that BNSF should be held responsible for the financial consequences of Evergy’s voluntary coal conservation decisions, Evergy’s efforts to quantify those consequences are still wholly unreliable and cannot be the basis for a damages award.¹⁰⁶

BNSF showed in its Reply evidence that Evergy’s lost opportunity damages are too speculative to support a damages award and rely on modeling software “that is not designed for determining damages.”¹⁰⁷ Evergy’s response, that because its modeling inputs “are sourced and catalogued in their Statements and workpapers and the models cannot be manipulated internally . . . there is no ‘speculation’ at all,”¹⁰⁸ is purposefully obtuse. Evergy cannot disprove that its models are inherently speculative; small changes in assumptions can cause huge swings in modeled damages.

¹⁰⁵ See BNSF Reply at BNSF-169. As in *Ark. Elec. Coop. Corp.—Petition for Declaratory Order*, FD 35305 (STB served Mar. 3, 2011), where the Board determined that it was improper to hold shippers responsible for harms they did not know—and could not know—were going to occur, BNSF would never have known in advance when Evergy’s coal conservation decisions would cause harm.

¹⁰⁶ BNSF also demonstrated that Evergy is not entitled to compensatory damages for bulldozer fuel costs or train set storage costs. See BNSF Reply at BNSF-200-02.

¹⁰⁷ *Id.* at BNSF-180 *et seq.*

¹⁰⁸ Evergy Reb. at EVERGY-REB-57.

BNSF catalogued the extensive problems with Evergy’s modeling in its Reply evidence.¹⁰⁹ Nonetheless, Evergy continues to rely on complex modeling to attempt to compare (1) market outcomes that resulted because of coal conservation at Iatan and Lawrence in a “real-world” case with (2) outcomes that supposedly would have resulted “but-for” Evergy’s decision to apply bid adders to offers from those plants. But as BNSF demonstrated and Evergy now concedes, Evergy’s “real-world” PROMOD modeling looks nothing like actual real-world outcomes in 2022.¹¹⁰ Evergy admits now that PROMOD was “not designed to replicate historical outcomes,”¹¹¹ and that Evergy’s damages modeling is “without specific precedent among previous cases brought under the governing statutes.”¹¹² Evergy also confirms that it used two models (PROMOD and GenTrader) and that Ms. Foo’s PROMOD results were used to adjust actual, historical data in GenTrader.¹¹³ This is exactly the sort of “Garbage In, Garbage Out” problem previously recognized by the courts with regard to PROMOD.¹¹⁴

Undeterred by the many flaws exposed in its modeling, Evergy claims that it is significant that “neither BNSF nor its witness puts forward any alternative, workable model or

¹⁰⁹ See BNSF Reply at BNSF-177-200.

¹¹⁰ See also *id.* at BNSF-177-180 and associated cites; Russo Reb. V.S. at EVERGY-REB-466-67 (Fig. 6 from Mr. Russo’s report clearly illustrates {{ [REDACTED] }}). See also Foo Reb. V.S. at EVERGY-REB-433-34 (admitting that PROMOD “cannot simulate the type of intra-hour fuel switching that [Lawrence] performed during periods of coal conservation . . . [and is] not capable of modeling fuel switching on an hour-by-hour basis.”); Foo Reb. V.S. at EVERGY-REB-436 (admitting that inconsistencies related to maintenance, outage, and derate are {{ [REDACTED] }}) since “PROMOD can only accept maintenance and derate related starts and stops on a daily basis, whereas in reality a unit’s availability can change hourly.”).

¹¹¹ Evergy Reb. at EVERGY-REB-55.

¹¹² *Id.* at EVERGY-REB-7.

¹¹³ Crosby Reb. V.S. at EVERGY-REB-395-96. Mr. Crosby explains that he input actual historical data into the GenTrader model with the sole exception of the LMP adjustment, which is supplied from Ms. Foo’s modeling output. *Id.* at EVERGY-REB-396.

¹¹⁴ *Indiana Pub. Serv. Co. v. Colorado Westmoreland, Inc.*, 667 F. Supp. 613, 625 (N.D. Ind. 1987). Evergy relied on this case in its opening evidence.

other tool that would replicate the 2022 ‘market’ outcomes across SPP that BNSF references.”¹¹⁵

But this is yet another example of Evergy attempting to shift its burden of proof onto BNSF.

Evergy’s advocacy for a “best evidence” rule is a telling admission: Evergy’s modelled damages evidence cannot withstand scrutiny. Evergy argues that its speculative estimate should nevertheless be accepted because BNSF did not undertake to model the outcome of electricity markets in every hour of every day for eight months in 2022.¹¹⁶ BNSF has no such responsibility.

Evergy’s cited cases in support of a best evidence rule are all stand-alone cost cases or rate reasonableness cases,¹¹⁷ which are subject to special rules and procedures that do not apply in this proceeding. In those cases, the Board has been specifically granted authority to make a regulatory determination of the maximum lawful rate.¹¹⁸ The “best evidence” rule makes sense in those cases because the Board must act and rely on the best available evidence to make a regulatory determination. However, in non-rate cases, like this one, “[a] complainant has the burden of showing that it is entitled to relief.”¹¹⁹ BNSF is not obligated to prove the negative. The Board should decline Evergy’s invitation to err by using the “best evidence” rule in deviation from precedent. Evergy is not entitled to a damages award by default simply because the only estimate of damages in the record is Evergy’s based on speculative and unreliable modeling.

¹¹⁵ Evergy Reb. at EVERGY-REB-55.

¹¹⁶ *Id.* at EVERGY-REB-62.

¹¹⁷ *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; and *Georgia Power Co., et al. v. Southern Ry., et al.*, NOR 40581, 1993 WL 455296 (ICC served November 8, 1993), at *8.

¹¹⁸ *See Duke Energy Corp. v. Norfolk S. Rwy.*, NOR 42069 (STB served Nov. 6, 2003).

¹¹⁹ *Meyer v. N. Coast R.R. Auth.*, FD 34337, slip op. at 4 (STB served Jan. 31, 2007) (citing the Administrative Procedure Act at 5 U.S.C. 556(d) and denying a complaint for damages). *See* BNSF Reply at BNSF-150; *see also cases cited n.117-18, infra.*

The unreliability of Evergy’s modeling strikes a fatal blow to its attempt to prove lost profits, which are inherently speculative – what profits would have existed in the but-for world? – and therefore require a higher degree of evidence to prove.¹²⁰ Evergy tries to obfuscate its attempt to dramatically expand the Board’s damages precedent by contending that its opening evidence “directly linked BNSF’s actions in violation of the governing statutes to the coal conservation measures implemented by Evergy,” and that all of the resulting damages “fall into categories recognized by previous Board, court and Interstate Commerce Commission decisions as legitimate sources of redress.”¹²¹ Evergy has not met the high bar required for lost profits damages.

The overly speculative and remote nature of Evergy’s claimed damages is further illustrated by the fact that its damages calculations have been a moving target throughout this proceeding. Evergy’s current damages figure is the *fourth* number it has submitted to the Board.¹²² And a *fifth number*, Evergy’s internal damages calculation from 2023, is telling, because {{ [REDACTED]

[REDACTED] }}¹²³ It is ironic that Evergy complains at length about BNSF’s purportedly “made-

¹²⁰ See, e.g., *Caddo Antoine & Little Missouri R.R. Co.—Feeder Line Acquisition—Arkansas Midland R.R. Co. Line Between Gurdon & Birds Mill, AR*, FD 32479, *et al.* (STB May 5, 2000) (noting that the ICC consistently rejected awarding damages based on estimates of lost profits); *Webb Coal v. New York Central R. Co.*, 278 I.C.C. 5, 15 (1950); *Crosby v. St. L.-F. Ry. Co.*, 112 I.C.C. 239, 243 (1926) .

¹²¹ Evergy Reb. at EVERGY-REB-41.

¹²² In its January 2024 complaint, Evergy claimed damages in excess of \$55 million. After BNSF refused to accept Evergy’s stonewalling discovery of damages-related material, Evergy was forced to reduce its claimed damages to \$22 million, a reduction of *sixty percent*. This reduction was entirely attributable to Evergy’s belated concession that it must account for the coal conservation at Iatan and Lawrence increased revenues Evergy. In its Rebuttal, Evergy presents a “restatement” of its damages, claiming that certain witnesses “agree that a few very minor adjustments . . . are in order.” Evergy Reb. at EVERGY-REB-81. To reach its new figure, Evergy removes from its calculation some weeks in December when it was not even engaged in coal conservation—yet the removal of those weeks counterintuitively (though conveniently for Evergy) *increases* its claimed damages total.

¹²³ See BNSF Reply at BNSF-177-190.

for-litigation” arguments (despite bringing litigation against BNSF)¹²⁴ while ignoring that its own damages calculations are (1) made for litigation, (2) {{ [REDACTED] }} than its pre-litigation figures, and (3) inconsistent with its prior concessions.¹²⁵

Evergy’s new rebuttal expert, Mr. Russo, offers yet another damages figure that differs from Evergy’s claims in the complaint, opening, and on rebuttal.¹²⁶ Evergy claims that Mr. Russo’s calculation corroborates Evergy’s modeling results, but in fact, it undermines them.¹²⁷ Mr. Russo “estimate[d] a lost opportunity at Iatan and Lawrence of \$14.6 million, relative to Evergy’s \$16.9 million estimate.”¹²⁸ Mr. Russo’s estimate is more than \$2 *million lower* than Evergy’s estimate. Rather than buttress Evergy’s modeling results, it shows that assumptions and methodologies have a significant impact on the figures. Mr. Russo’s figures, like those of Evergy’s other witnesses, also clearly illustrate the large deviation of Evergy’s calculations from real world data.¹²⁹

¹²⁴ Evergy makes this argument while claiming that BNSF’s COVID argument was “made-for-litigation,” Evergy Rebuttal at EVERGY-REB-10, and that BNSF’s arguments about ratability are a “litigation-case focus,” *id.* at EVERGY-REB-20.

¹²⁵ Evergy asks the Board to ignore this email exchange between {{ [REDACTED] }}
 {{ [REDACTED] }} Yet Evergy seeks to justify its
 coal conservation measures by repeatedly focusing on an email from {{ [REDACTED] }}
 {{ [REDACTED] }}

¹²⁶ Mr. Russo states that his analysis is “a ‘high level’ analysis, and explicitly not a new damages estimate, but is useful as a corroborating tool.” Russo Reb. V.S. at EVERGY-REB-472; *see id.* at 474 (“As noted above, my spreadsheet analysis is not an alternative damages calculation . . .”).

¹²⁷ Evergy contends that “Mr. Russo nevertheless produced results which approximated Evergy’s final lost opportunity damages.” Evergy Reb. at EVERGY-REB-64. Similarly, Russo stated that his “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.” Russo Reb. V.S. at EVERGY-REB-474.

¹²⁸ *Id.* at EVERGY-REB-474.

¹²⁹ Russo Reb. V.S. at EVERGY REB-466-67.

C. Evergy’s litigation choices have made it impossible for the Board to award damages in this case.

Evergy has elected to present a damages estimate based on the theory that BNSF was liable for every hour of every day for the entire period that Evergy implemented any form of bid adders – either “market adders” or “opportunity cost calculator adders” – at both Iatan and Lawrence from April until December. Because the vast majority of those alleged damages are based on its modeling of the outcomes of electricity markets in those periods, using models that are not available to the Board and, even if they were available, would be impossibly complex to adjust. Evergy has presented an all-or-nothing case and has not provided the Board with an ability to award damages for any other circumstances.

Most notably, Evergy’s modelling is based on the unsupportable assumption that it would be appropriate to award damages for service to Lawrence.¹³⁰ BNSF’s reply detailed the numerous flaws in Evergy’s damages theory,¹³¹ including Evergy’s choice to claim damages relating to service at Lawrence despite the fact that Lawrence received more coal in 2022 { [REDACTED] } and despite the fact that Evergy’s Vice President for Generation { { [REDACTED] } }¹³² Evergy argues that the fact that BNSF exceeded Evergy’s declared tons at Lawrence is “irrelevant,” since the declaration is “non-binding.”¹³³ This is a duplicitous position, since the

¹³⁰ BNSF Reply at BNSF-16-17, 187-88.

¹³¹ See *id.* at BNSF-154-61 (explaining that BNSF delivered more coal to Lawrence in 2022 { [REDACTED] } Lawrence burned more coal and generated more electricity in 2022 than it did historically, BNSF did not { [REDACTED] } the number of trainsets at Lawrence in 2022, awarding damages based on Evergy’s { [REDACTED] } CFT nominations at Lawrence would hold BNSF responsible for factors outside BNSF’s control, and the actual inventory at Lawrence in the second half of 2022 was significantly higher than the inventory level that { { [REDACTED] } }).

¹³² See *id.* at BNSF-19-20, 33.

¹³³ Evergy Reb. at EVERGY-REB-22 n.17.

crux of Evergy's entire case is that BNSF should be responsible for delivering the same volume of tons that BNSF historically delivered under contract – even though the parties are no longer under contract.¹³⁴ Despite this critical failure, Evergy never modeled outcomes that looked at the effects of coal conservation only at Iatan. The result is that the Board has no ability to calculate damages that removes Lawrence from consideration.

Similarly, Evergy's approach to modeling makes it impossible to address the mitigation requirement that Evergy itself acknowledges. Even if Evergy suffered some negative consequences from coal conservation, BNSF should not be financially responsible for Evergy's voluntary business decisions to increase coal stockpiles beyond the level that Evergy itself viewed to be adequate. But the damages model that Evergy presented makes it impossible to factor out any coal conservation damages for which BNSF should not be responsible. As a result, Evergy has not provided the Board with a path to calculate damages that corrects the many flaws and overstatements in Evergy's calculation.

V. Conclusion

The record evidence in this proceeding shows that BNSF acted reasonably to provide Evergy and other shippers with transportation service throughout 2022, in the face of capacity constraints, global supply chain disruptions, and other challenges outside of BNSF's control. The record evidence also shows that Evergy has failed to prove that it has sustained damages that are causally linked to specific violations of the statute. Because Evergy has failed to prove its liability claims and damages claims, the Board should deny Evergy's complaint.

¹³⁴ Evergy's historical figures are misleading. Evergy relies on the 2015-2021 period, Evergy Reb. at EVERGY-REB-22 n.17, but Evergy was under contract during the entirety of that period. BNSF's obligations as a common carrier are not the same as its obligations while under contract. Additionally, massaging the historical data to cover 2015-2021 results in a higher historical average than looking to recent figures, 2020-2021, which BNSF did. *See* BNSF Reply at BNSF-156-57 and associated cites.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Tara Woods

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