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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REPLY TO MOTION TO COMPEL

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Dated: October 16, 2024

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Evergy Kansas Central, Inc.*

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

BACKGROUND

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

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

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

² Motion, Exh. 3.

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

B. THE GOVERNING LEGAL STANDARDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Friday, November 1, 2024: Discovery closes.

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

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

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

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

Id. at 1-2.²⁸

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

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

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

CONCLUSION

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

Respectfully submitted,

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Dated: October 16, 2024

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Evergy Kansas Central, Inc.

CERTIFICATE OF SERVICE

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

/s/ Kelvin J. Dowd
Kelvin J. Dowd