

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Public Record

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DOCKET NO. NOR 42180

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

v.

BNSF RAILWAY COMPANY

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**BNSF RAILWAY COMPANY'S  
PETITION FOR SUBPOENA**

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Pursuant to 49 U.S.C. § 1321(c), 49 C.F.R. §§ 1113.2(b), and 1117.1, BNSF Railway Company (“BNSF”) hereby petitions the Surface Transportation Board (“STB” or “Board”) to issue a subpoena directed to Southwest Power Pool (“SPP”) located at 201 Worthen Drive, Little Rock, AR 72223 for production of documents (the “Petition”). The specific information sought is detailed in the proposed subpoena attached as Exhibit 1. These requests relate to Evergy Inc.’s, Evergy Metro Inc.’s, and Evergy Kansas Central, Inc.’s (together, “Evergy”) liability and damages claims in the above-captioned proceeding, including Evergy’s claim that “BNSF’s deliberate failure to adequately provide for the transportation of coal upon reasonable request” to Evergy’s Iatan and Lawrence generating stations resulted in “lost profits and opportunity costs” to Evergy. Compl. at 3.

A third-party subpoena directed to SPP is necessary because Evergy’s claims rely on Evergy’s obligations to SPP. *See* Compl. at 3. In particular, Evergy claims

that BNSF's actions impacted Evergy's ability to meet its obligations to provide electricity to SPP, and that this contributed to Evergy's lost profits. The requests directed to SPP, which are identified in Exhibit 1, are directly related to integral issues in Evergy's Complaint, are narrowly drafted so the benefit of production far outweighs any burden on SPP, and are plainly "relevant to the subject matter involved in [this] proceeding" and thus discoverable under 49 C.F.R. § 1114.21(a). BNSF has already sought all available information from Evergy and has tailored its request to SPP to be as unobtrusive and non-duplicative as possible. And as BNSF notes below, BNSF is not seeking documents or information that is publicly available or that Evergy has possession of and has agreed to produce to BNSF.

## **I. BACKGROUND**

The present Petition arises from a complaint filed by Evergy before the Board on January 31, 2024, alleging that BNSF violated the common carrier obligation in relation to rail service transporting coal from the Southern Powder River Basin ("SPRB") region in Wyoming to Evergy's generation facilities located near Lawrence, KS and Iatan, MO. In its Complaint, Evergy alleges that the volume of coal transportation service BNSF provided to Evergy in 2022 (1) violated BNSF's obligation to provide adequate common carrier service on reasonable request, (2) violated BNSF's obligation to provide "safe and adequate car supply," and (3) resulted from unreasonable practices by BNSF. Compl. at 3-4. Additionally, Evergy requests that the Board issue a declaratory order "specifying the scope of BNSF's common

carrier coal transportation obligations with respect to service to the Iatan and Lawrence generating stations.” Compl. at 4.

In its Complaint, Evergy states that SPP, a regional transmission organization, requires its members (including Evergy) to meet certain requirements so that consumer demand for electricity is met, and so that consumers have access to affordable and reliable power.<sup>1</sup> According to the Complaint, these requirements include, in relevant part, ensuring that Evergy has adequate resources to “supply SPP with enough available generating capacity to serve the demand within their operating service territories, along with a reserve margin.” Compl. at 12. Evergy alleges that, in order to satisfy SPP’s requirements, Iatan and Lawrence must maintain certain minimum levels of coal inventory. If Iatan or Lawrence have a shortfall, Evergy may be required to implement “coal conservation measures.” *Id.* at 7-8, 12-13. According to Evergy, coal conservation measures may include “forc[ing] a utility to increase the prices at which its coal-fired generation is offered so that the market passes on the utility’s generation in favor of another source.” *Id.* at 13. Evergy alleges that in 2022, it was forced to implement coal conservation measures because BNSF did not allow Evergy to put the requisite railcars in service. As a result, Evergy purportedly “missed an opportunity for revenue and profits.” *Id.* In total, Evergy claims it is owed more than \$20 million in lost profits and opportunity

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<sup>1</sup> Regional Transmission Organizations are voluntary organizations that administer the electric transmission grid on a regional basis throughout North America (including Canada). See <https://www.ferc.gov/power-sales-and-markets/rto-and-isos>.

costs and more than \$35 million in “additional power purchase and other incurred costs.”

As articulated in BNSF’s Answer and Motion to Dismiss, BNSF disagrees with Evergy’s position. BNSF’s evidence and argument in this proceeding will show that BNSF fulfilled its common carrier obligation and any other relevant obligation under the governing statute, and did not cause Evergy to sustain any damages.

In discovery, BNSF requested documents and information from Evergy about Evergy’s claims relating to SPP. Specifically, BNSF requested that Evergy provide documents and information relating to Evergy’s obligations to SPP, coal conservation measures that Evergy was required to take during the relevant period, documents relating to SPP’s resource adequacy requirements, communications between SPP and Evergy, and documents or data submitted by Evergy to SPP, among other requests. *See* BNSF’s First Set of Interrogatories and Requests for Production to Evergy, served May 24, 2024.

On June 24, 2024, Evergy responded to BNSF’s requests. In Evergy’s Responses and Objections to BNSF’s First Set of Interrogatories and Requests for Production (“Evergy’s Responses and Objections”), Evergy agreed to provide some substantive information in response to BNSF’s requests relating to SPP, but declined to provide other such information. On July 22, 2024, BNSF and Evergy met and conferred to discuss BNSF’s discovery requests. Evergy clarified that it intends to produce certain relevant information about SPP, but either does not have or will not

produce other information and indicated that some information was in the sole possession of SPP.

To date, Evergy has not produced responsive and non-privileged information relating to SPP that BNSF needs to rebut Evergy's claims.

The information that BNSF requests from SPP is directly relevant to the issues in this dispute. BNSF does not believe that the information it seeks from SPP is information already in Evergy's possession, custody, or control.<sup>2</sup> As a result, BNSF now seeks certain documents and information from SPP directly. Since this material is in SPP's possession, custody, or control, and cannot otherwise be produced by Evergy, BNSF can only obtain it through a third-party subpoena. BNSF has also narrowly tailored these requests and does not anticipate collection and production of responsive, non-privileged material will unnecessarily burden SPP.

## **II. THE BOARD SHOULD ISSUE THE REQUESTED SUBPOENA**

The Board is authorized to "subpoena witnesses and records related to a proceeding of the Board from any place in the United States." 49 U.S.C. § 1321(c)(1). Under the Board's rules, a party requesting a subpoena to compel the production of documentary evidence must show "general relevance and reasonable scope of the

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<sup>2</sup> In Evergy's Responses and Objections, Evergy objected to a substantial portion of BNSF's First Set of Interrogatories and Requests for Production. BNSF does not have clear insight into whether Evergy has certain categories of documents in its possession, custody, or control that are non-privileged and responsive to the requests identified in Exhibit 1. To the extent Evergy confirms it has documents or information in its possession, custody, or control that is non-privileged and responsive to BNSF's requests directed to SPP, and is willing to produce the responsive documents and information, BNSF will work with SPP to narrow its requests so as not to seek duplicative information.

evidence sought.” 49 C.F.R. § 1113.2(b)(2). In deciding whether to issue a subpoena, the Board considers “the relevance of the material sought, and the burden on the nonparty.” *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 5 (STB served June 25, 2012). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Ballard Terminal R.R.—Aquis. & Operation Exemption—Woodinville Subdivision*, FD 35731 et al. slip op. at 2 (STB served May 17, 2013) (citing *Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty. et al., Me.*, AB 124 (Sub-No. 2), (STB served Nov. 14, 2003).)

The standards for issuance of a subpoena under the Board’s discovery rules are met here. *See* 49 U.S.C. § 1321(c). The Board’s Rules of Practice permit “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a). It is also well-settled that the Board’s discovery rules are to be liberally construed. *See, e.g., Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002) (“The Board’s rules generally provide for liberal discovery of non-privileged matter that is reasonably calculated to lead to discovery of admissible evidence.”).

BNSF requires the information described in Exhibit 1 to respond to claims made by Evergy regarding the impact of BNSF’s service on Evergy’s profits and opportunity cost. The scope of the requested subpoena is reasonable, and compliance would not be unduly burdensome for SPP. The subpoena is reasonable because the requests seek information that is directly at issue in this proceeding, including

information about SPP's policies and procedures relating to coal management, resource adequacy, operation of coal generating facilities, and dispatch data for the time period in which Evergy claims it incurred damages. The subpoena is not unduly burdensome because the documents BNSF requests from SPP are documents that SPP maintains in its ordinary course of business. The subpoena is narrowly tailored to seek relevant documents and information related to Evergy's claims about BNSF's transportation of coal to electricity generating facilities in SPP's territory and dispatched by SPP, and lost profits allegedly suffered by Evergy due to SPP's requirements relating to coal inventory. Evergy's Complaint expressly states that its inability to meet these SPP requirements was a reason why it experienced lost profits and revenue in 2022.

The Board has previously granted petitions for a subpoena ordering a non-party to produce relevant information that may be used by a party in its evidentiary presentation. *See, e.g., Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 1 (STB served Feb. 27, 2012) (Board found that individual members of the Western Coal Traffic League were subject to discovery under the Board's subpoena power); *Navajo Transitional Energy Company, LLC v. BNSF Railway Company*, NOR 42179 (STB served Sept. 7, 2023). (granting in part BNSF's motion seeking Letters Rogatory for discovery from third-party foreign entities. related to the proceeding).

Finally, BNSF has tailored its requests to be as unobtrusive as possible. While BNSF does not expect that compliance with the subpoena will present any significant

burdens for SPP, it stands ready to work with SPP to address any concerns as to burden that may be raised.

### III. CONCLUSION

For the foregoing reasons, BNSF moves that the Board issue a subpoena directed to SPP for production of documents that are responsive to the requests specified in Exhibit 1, and stipulate that the protective order in this case governs the production of all documents in response to those requests.

Respectfully submitted,

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*Counsel for BNSF Railway Company*

Dated: August 5, 2024



**CERTIFICATE OF SERVICE**

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

*/s/ Tara A. Woods*  
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*Attorney for BNSF Railway Company*  
August 5, 2024

# **EXHIBIT 1**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. NOR 42180

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EVERGY, INC., EVERGY METRO, INC. and  
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v.

BNSF RAILWAY COMPANY

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**SUBPOENA**

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Pursuant to 49 U.S.C. § 1321(c), the Surface Transportation Board (“Board”) hereby issues this Subpoena directing the Southwest Power Pool (“SPP” or “You”) to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

**I. Instructions**

1. The documentary evidence requested in this Subpoena shall be produced within thirty days of service of the Subpoena on SPP, unless otherwise agreed by counsel to the parties. SPP should produce responsive documents to counsel for Defendant BNSF Railway Company (“BNSF”), at the offices of Steptoe LLP, 1330 Connecticut Avenue, NW, Washington, DC 20036, or via electronic delivery means.

2. Responsive documents that are confidential or highly confidential may be produced in accordance with the terms of the Board's May 31, 2024 Protective Order in the above-captioned proceeding.

3. In responding to the following document requests, furnish all available documents in SPP's possession, custody, or control.

4. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

5. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

6. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not

overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

7. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

8. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

9. If any information called for by one of these document requests is withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

10. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

11. Unless a different time period is specified, you are required to produce responsive documents created on or after January 1, 2019.

## **II. Definitions**

1. “Action” shall mean *Evergy, Inc. Evergy Metro, Inc. and Evergy Kansas Central, Inc. v. BNSF Railway Company*, Docket No. NOR 42180, filed before the Surface Transportation Board.

2. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.

3. “Any” shall be construed as “all” and vice versa, as necessary to bring within the scope of the Request all information that might otherwise be construed to be outside of its scope.

4. “BNSF Railway Company” or “BNSF” shall mean BNSF Railway Company, and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

5. “Communication” shall mean every manner or means of disclosure,

transfer, or exchange of information (in the form of facts, ideas, inquiries, or otherwise) whether oral, written, visual, or electronically stored, including letters, memoranda, electronic mail, invoices, interviews, discussions, text messages, messages sent via Internet-connected application, telephone conversations, face-to-face meetings, and other similar forms of communication or correspondence.

6. “Complaint” shall mean the Complaint and Petition for Declaratory Order that Evergy filed before the Surface Transportation Board on January 31, 2024, in the Action.

7. “Concerning” shall mean relating to, referring to, describing, reflecting, evidencing, constituting, or comprising.

8. “Contracts” or “Agreements” is used in the broadest possible sense permissible, and includes agreements, purchase orders, pricing authorities, or contracts in any form, howsoever made, including all documents referred to in the said Contracts or Agreements which set out the rights and obligations of the parties thereunder.

9. “Describe” shall mean to identify the date, sender or author of the requested information, Person or Persons involved, a complete and detailed description and explanation of the facts, circumstances, context, analysis, and any other information relating to the subject matter of the specific Request.

10. “Document” or “Documents” is used in the broadest possible sense permissible and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of

underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether printed or recorded (through a sound, video, or other electronic, magnetic, or digital recording system) or reproduced by hand, of the following: letters, correspondence, telegrams, telexes, memoranda, records, text messages, communications via Internet-connected application, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, “Post-It” or similar notes, stenographic notes, notes, notebooks, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronic messages, voice mail messages, interoffice communications, advertising, packaging and promotional materials, material of any sort and in any format maintained or available at any time on the World Wide Web (whether formerly, currently, or both), and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out.

11. “Including” shall mean “including, without limitation” and “including



but not limited to.”

12. “Identify,” when used in reference to a natural Person, means to state the Person’s: (a) full name; (b) present (or last known) home and business address; (c) present (or last known) occupation, current business affiliation and job title; (d) business affiliation and job title from 2019-present; (e) present (or last known) business phone number (including direct dial number); (f) present (or last known) business and personal email address; (g) present (or last known) mobile telephone number and (h) present (or last known) counsel’s contact information to the extent relevant.

13. “Evergy” shall mean Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. and their predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

14. “Iatan” refers to the Iatan Generating Station in Missouri.

15. “Lawrence” refers to the Lawrence Energy Center in Kansas.

16. “Hawthorn” refers to the Hawthorn Station in Missouri.

17. “La Cygne” refers to the La Cygne Generating Station in Kansas.

18. “LRE” refers to a load responsible entity.

19. “Union Pacific” refers to Union Pacific Railroad, including its predecessors and successors in interest, predecessors, successors, parents,

subsidiaries, affiliates, divisions, area offices, and regional offices.

20. “Person” or “Persons” shall mean any natural person or any entity including, but not limited to: any corporation, partnership, association, company, estate, business, governmental entity, or agency (public or private), having a separate identification, which is recognized either in law or in fact.

21. “Relating to” as used herein with reference to a subject shall mean both of the following:

- Containing, compromising, constituting, stating, setting forth, recording, contradicting, referring to, evidencing or in any way pertaining to, in whole or in part, that subject; and
- Describing, discussing, reflecting, interpreting, identifying, concerning, in any way pertaining to, in whole or in part, that subject, or to be in any way logically or factually connected with the matter discussed.

22. “SPP” shall refer to the Southwest Power Pool and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

23. “STB” or “Board” shall mean the Surface Transportation Board.

24. “Tariff” shall mean a publication issued by carriers or their agents,

showing rates, fares, charges, classifications, or rules of the carrier covering common carrier shipments.

25. “You” and “Your” shall refer to SPP as defined above.

26. The use of the singular shall be deemed to include the plural, as appropriate in context.

### **III. Documentary Evidence to Be Produced**

1. Please provide all of Your Open Access Tariff references, Market Protocols references, Business Practice references, policies and procedures, operational rules, or guidance relating to the management of coal inventory and coal conservation that are relevant or applicable to owners of coal generation facilities located within SPP. For any such documents that are publicly available, please indicate where to find them.

2. Please provide all Documents relating to Your Open Access Tariff references, Market Protocols references, Business Practice references, policies and procedures, operational rules, or guidance that You provide to the owners of coal generation facilities when You direct them to reduce their output to manage coal inventory.

3. Please provide all Documents relating to Your Open Access Tariff reference, Market Protocols references, Business Practice reference, policies and procedures, operational rules, or guidance given regarding the availability and operational responsibilities of resources identified by LREs to be used to meet SPP’s Resource Adequacy demonstration.

4. Please provide any Documents (including emails or recordings of phone calls) showing any requests by You to the owner/operator of Iatan, Lawrence, Hawthorn, or La Cygne to reduce output in order to manage coal inventory in 2022.

5. Please provide any Documents (including emails or recordings of phone calls) in which Evergy requested permission to modify or discussed the possibility of modifying its energy and operating reserve bids to include a bid offer or adder to such an offer for the purposes of coal conservation in 2022.

6. For each instance in which You requested that the owner/operator of Iatan, Lawrence, Hawthorn, or La Cygne reduce output in order to manage coal inventory in 2022, please provide Documents sufficient to show (1) the date, time, and duration of the requested reduction in output; and (2) a copy of the document, email, or telephone log through which the request was made, as well as documentation of any response of the asset owner, to the extent not already produced in response to Request 4.

7. For each instance in which You requested that the owner/operator of Iatan, Lawrence, Hawthorn, or La Cygne reduce output in order to manage coal inventory in 2022, please provide Documents sufficient to demonstrate how any approved reduction in coal output from Iatan, Lawrence, Hawthorn, or La Cygne was reviewed by SPP's Market Monitoring Unit, and how such a request or approved reduction complied with SPP's market mitigation rules.

8. Please provide all Documents, including Open Access Tariff references, Market Protocols references, Business Practices references, and policies and

procedures, relating to the conditions under which You allow resource owners to submit offer prices in excess of the resource's variable costs, including any Documents reflecting whether You allow such increases to preserve fuel inventory.

9. Please provide Documents sufficient to show SPP's policies and procedures relating to issuing a modified offer price.

10. Please provide Documents sufficient to show SPP's policies and procedures relating to reviewing and approving a modified offer price.

11. Please provide Documents sufficient to show, for every hour since 12:00 AM January 1, 2020:

- a. All SPP unit commitment and dispatch instructions for all units at the Iatan and Lawrence generating facilities, including instructions related to the conservation of coal inventories;
- b. Price offers submitted by the Iatan and Lawrence generating facilities for energy and operating reserves;
- c. Bid adders submitted by the Iatan and Lawrence generating facilities to price offers for energy or operating reserves for the purposes of coal conservation; and
- d. Settled quantities and prices paid for energy and operating reserves at the Iatan and Lawrence generating facilities.

12. Please provide the 2020, 2021, 2022, and 2023 Resource Adequacy Requirement submissions to You by any LREs that identified capacity from the Iatan or Lawrence generating facilities as contributing to meeting their Resource Adequacy needs.

13. Please provide any contracts or agreements between SPP and Evergy relating to the transportation of coal to the Iatan and Lawrence facilities.

14. Please provide all Communications between SPP and Evergy relating to the transportation of coal to the Iatan, Lawrence, Hawthorn, and La Cygne facilities.

15. Please provide all Documents and Communications relating to BNSF's provision of rail services to Evergy for the transportation of coal to Evergy facilities.

16. Please provide all Documents and Communications, including internal SPP discussions and analyses, relating to the impact of rail transportation on the availability of electricity generation.

17. Please provide all Documents relating to the adequacy of coal supplies or coal inventories at any Evergy facilities.

18. Please provide all studies and analyses relating to the impact of natural gas prices on the generation of electricity from coal-fired plants in the SPP-served market in 2022.

19. Please provide all studies and analyses relating to the impact of wind power on the generation of electricity from coal-fired plants in the SPP-served market in 2022.

20. Please provide the settlement and resettlement statements of Evergy for 2022.