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Date October 27, 2020

BY EMAIL TO: ferroviaire-rail@otc-cta.gc.ca

Canadian Transportation Agency
15 Eddy St
Gatineau, Québec
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***Re: Consultation on the Agency's Approach to Setting Regulated Interswitching Rates:
Submissions in response to Consultation – Proposed Amendments to Railway
Interswitching Regulations***

1. As previously noted, we are solicitors for Teck Resources Limited and its affiliates Teck Coal Limited and Teck Metals Limited (collectively, “**Teck**”) in connection with the Agency’s Consultation on the CTA Approach to Setting Regulated Interswitching Rates (the “**Consultation**”) announced on June 20, 2019.¹ These submissions are further to our submissions of August 21, 2019 and January 16, 2020.
2. All capitalized terms in these submissions use the same definitions ascribed to those terms in our prior submissions in this Consultation.
3. The Agency proposes to amend the Railway Interswitching Regulations, named Proposal 1, 2, 3 and 4 further below in our submissions, as follows (see the August 28, 2020 communication from Allan Burnside, Senior Director, Analysis & Regulatory Affairs):
 - To simplify interswitching, we would have **one zone with one rate**.
 - To keep rates fair for high-volume shippers, there would be one block rate for 60-99 cars, and a new, **lower rate for blocks of 100 cars or more**.
 - To be accurate, we would **define "car"**. It would be clear that for interswitching intermodal traffic, “car” includes “platform”.
 - To be transparent, railway companies would have to **show the regulated interswitching rate** on the waybill.

¹ The Agency’s news release dated June 20, 2019 is available at: <https://www.otc-cta.gc.ca/eng/content/cta-launches-consultations-its-approach-setting-regulated-interswitching-rates>

4. The context for our submissions is that Teck is utterly dependent on RIS services to access its own and other facilities, not only for westbound steelmaking coal shipments from Southeast British Columbia to export position at North Vancouver, but also for zinc concentrates from North Vancouver to the Trail smelter, and copper concentrates to North Vancouver.
5. The Agency is, of course, well aware of the purpose of RIS services as a competitive access remedy that is easy to use. Teck also acknowledges that CN and CP require adequate compensation to provide those services. Like many others, Teck relies on the viability of those services, both operationally and economically. That is why Teck relies so heavily on the Agency's monitoring of RIS-related variable costs and the appropriate markup to those costs. As we understand it, there is no danger whatsoever that either CN or CP are in danger of receiving inadequate compensation for RIS services they provide. On that basis, we conclude that the policy aim of RIS services as a competitive access mechanism is easily attainable, that there is no danger of RIS rates becoming non-compensatory with any of the Agency's proposed measures and that, in any event, there is a significant incentive to reward those with the most efficient operations, shippers and carriers alike, with rates most approximating those that would prevail under conditions of effective competition.
6. As a significant user of RIS services, as the single largest rail shipper in Canada, and owing to its well-recognized exposure to CP and CN market power, at origin and destination, the Agency's work in this and other areas of rail costing and rate regulation, is vitally important to Teck's success as a viable Canadian enterprise. We make these submissions in that context.

Proposal 1

7. Teck is concerned about any increase in its rates due to aggregation of zones with differing rates. The Agency states, at page 5 of its Consultation Paper of August 28, 2020 appended to the email communication from the Agency's Allan Burnside:

It is important to note that there will also be drawbacks. For shippers, the rates for some movements will go up, including movements in Zones 3 and 4, whereas for railways, rates for some movements will go down.

However, there would not be a dramatic change in rates for any movement, and the rate would still be fair and reasonable. This is why we believe the benefits of having one zone outweigh the drawbacks.

8. This means that Teck, as a large Zone 3 shipper, is being asked to shoulder a large share of the burden associated with the aggregation of zones into a single rate. The sheer volume of Teck's traffic that uses Zone 3 RIS services today, both in manifest and long train shipments, make

an increase in the RIS rates imposed on Teck, for the sake of administrative convenience, disproportionate.

9. We expect the Agency is aware that the volume of traffic headed to North Vancouver in the near and medium term is expected to rise dramatically, such that the Zone 3 rate will represent much of the weighted average. Among other things, Teck is spending approximately \$800 million on developing Neptune terminals to increase its handling capacity well beyond its existing levels. We foresee increases in other Zone 3 traffic to North Vancouver that also will rely on RIS services.
10. Teck does not seek to under-compensate CN or CP for costs incurred in providing RIS services, but alleviating the administrative burden on either CN or CP is not so compelling when a few shippers are paying for it. We submit that a better rationale for rate changes would reference and be tested against the well-recognized purpose of RIS. Perhaps more importantly, Teck requests that the Agency explain in sufficient detail
 - a. the relationship between the RIS activities and the associated LRVC, and
 - b. why the markup over LRVC at the same level required to cover a carrier's system wide total costs makes a sufficient contribution.

Proposal 2

11. We have reason to believe that shippers who ship traffic in longer trains allow CN and CP to achieve productivity gains that both CN and CP are frequently able to keep due to their market power in respect of many shipments on many parts of their respective systems, instead of passing them on through the normal and well understood effects that competitive markets require of all participants in such markets. From that premise, it follows that traffic shipped in longer trains should benefit, absent other considerations, from lower rates, achieved by applying a percentage contribution to lower variable costs than less efficient trains.
12. We also understand that the gains achieved through longer trains are not linear, that there are step functions in the form of minimum horsepower to haul particular train lengths and train weights over like routes, using similar train configurations. That is to say, for example, that a 100-car train may require, say, two AC4400 HP locomotives to haul the train from A to B, and that a 130-car train may require, say, three such locomotives for that train over the same route. While it is obvious from observing train shipment data and actual observations over the years, as we have, that these step functions exist, we do not profess to say that all steps in increasing lengths are equal in cost. But, it is clear from CN's and CP's conduct and their expenditure of financial and other resources to increase train lengths, and to announce them

with some fanfare, and observing their own reported metrics measuring the efficiencies arising from those efforts, that train length corresponds rather directly with lower LRVCs and increased profitability.

13. Therefore, we conclude that the longest trains should receive the benefit of lower RIS rates. Whether that means there should be a 100-car rate, a 130-rate and a 150-car rate is a question best answered by the Agency, relying on the data it can and does receive from CN and CP through its regulatory powers and otherwise. We think it reasonable that 100 car trains should benefit from a RIS rate discount over 60 car blocks, and it is likely in our view that at some point even longer trains (130?, 150?) should benefit from the efficiencies associated with those increased train lengths, rather than lumping all trains over 100 into one lot.

Proposal 3

14. We offer no recommendations on behalf of Teck.

Proposal 4

15. While we are not in a position to assess the consequences of, nor to divine CN's and CP's reactions to, a requirement to separate the RIS rate charges on each waybill, it strikes us as a reasonable requirement, perhaps for the same reasons that sales, value-added or other consumption taxes and levies are broken out on purchases. In that manner, the line haul rates are more easily ascertained by the shipper as a matter of accounting diligence and verification.

16. Subsection 128(1) of the Act provides:

128(1) The Agency may make regulations

- (a) prescribing terms and conditions governing the interswitching of traffic, other than terms and conditions relating to safety; and
- (b) establishing distance zones for the purpose of determining the interswitching rate.

17. The wording of paragraph 128(1)(a) above is broad and indicates a legislative intent to exclude only safety-related terms and conditions. Although the Supreme Court of Canada has held that it is an error of law to rely only on this *exclusio unius* approach to statutory interpretation, we are of the view that the breadth of paragraph (a) is consistent with and supportive of the purpose of regulated interswitching.

18. Even if a regulation requiring separate publication of the RIS rate on a waybill is not explicitly authorized by the Act, there is a rather obvious implicit authorization for such a requirement that is incidental to the power in paragraph 128(1)(a). Providing for greater transparency in the

RIS rates imposed on shippers allows those shippers to know that they are in fact being charged the correct amount – why would CN or CP not want it disclosed? If either of them does not want it disclosed, that fact alone would be enough to confirm the need.

19. Further, that disclosure promotes the overall purpose of regulated interswitching, which we discussed at length in our submissions of August 21, 2019, at paragraphs 8 through 14, reproduced as an appendix to these submissions for ease of reference.
20. In sum on this point, the longstanding and well-recognized purpose of regulated interswitching supports the basis of the disclosure the Agency is now considering, a carrier objection to such disclosure only makes the case for such disclosure that much more obvious and there is at least implicit statutory authorization for doing so.

Conclusion

21. As we have stated in our prior submissions, it is our strongly-held view that the current system of applying a markup (contribution to constant costs) equal to or less than the average markup required for CN and CP to achieve the Agency's finding at paragraph 79 of Agency Determination R-2019-230², is the most administratively feasible and economically defensible. We can see no reason why any greater markup could be justified to increase CN's and CP's already supra-competitive contributions above LRVC, particularly from captive shippers.
22. To that end, we express Teck's need generally for rates that are closely coupled to cost to overcome the harmful effects of the use by carriers of their market power. For at least the small portion of the overall price of shipping represented by RIS rates, we recommend measures that achieve and maintain the integrity of that coupling to achieve the purpose of RIS as a competitive access mechanism.

² Paragraph 79 of Agency Determination R-2019-230 states: "The Agency sets those rates to cover total operating costs (marginal costs plus a contribution to fixed costs)—which includes an allowance for cost of capital—so that the railway companies can operate indefinitely while being able to continue to raise capital in the markets."

Thank you for the opportunity to participate in the Consultation and for receiving our submissions in connection therewith. Please do not hesitate to contact us if we can be of further assistance in the Consultation.

Yours truly,

A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned below the closing text.

François Tougas

cc: Teck Resources Limited

PROPOSAL 4

Submissions from August 21, 2019

8. Of greater concern is the language now being used by the Agency in its public-facing materials, which on its face changes its policy and orientation, and adopts CN's and CP's interpretation and construction of the Act in relation to remedies under the Act. For example, none of the Discussion Paper, the Agency's news release in respect of the Consultation, or the Agency's most recent RIS rate determination (Agency Determination No. R-2018-254) refer to RIS as a "competitive" access mechanism for the protection of shippers or a way to increase competition (or similar). The language, for reasons unknown, and certainly without foundation, now reads as follows:

"Interswitching is a practice that gives some shippers access to the services of railway companies that do not directly serve their facilities or sidings, by requiring that a railway company that does provide such direct service transfer cars with a shipper's traffic at an interchange to a different railway company with which the shipper has made transportation arrangements."

9. Until the foregoing statement, both the Agency and the courts consistently and explicitly recognized RIS as a *competitive access mechanism for the protection of shippers*. Examples follow:

"To ensure fair and reasonable access to the entire railway system, interswitching has been regulated in Canada since 1904. The *Railway Interswitching Regulations* (Regulations) set the rates to be charged for interswitching services provided by the terminal carrier, thereby establishing a predictable and fair pricing regime that is applied equally to all terminal carriers providing interswitching services. Interswitching allows shippers to negotiate, through normal commercial processes, suitable terms and conditions of carriage with competing carriers from the interchange point onward, for the line haul portion of the overall car movement.

...Interswitching represents an important part of the competitive access provisions that are available under the CTA. Regulated interswitching rates benefit shippers by extending their access to the lines of competing railway companies at rates that cover the cost of moving the traffic to or from the interchange point. Regulated rates thus ensure that rail shippers derive, where available, the benefits of price competition, improved service levels and varying routing options. The railway companies receive, in turn, compensation for the costs in providing interswitching services.

...The economic impact of these Regulations on shippers is generally positive because it allows more competitive shipping options. Moreover, the regulated interswitching rates,

which reflect the total costs but not the commercial profits, are below the unregulated market rates.”³ [underlining added]

10. The Agency’s 2014 slide presentation to industry stakeholders in respect of the Agency’s temporary increase of RIS limits to 160 kilometres from an interchange stated the proposition succinctly:

“Interswitching is a competitive access provision of the Canada Transportation Act for the benefit of shippers.”⁴

11. The Agency reconfirmed the point in a 2014 RIAS:

“Regulated in Canada since 1904, interswitching is a competitive access provision of the *Canada Transportation Act* (CTA) for the benefit of shippers. It is a service where a carrier picks up a shipper’s traffic at either its origin or destination, and conveys it to an interchange point with a second carrier, which then completes the movement to its ultimate destination. This ensures that captive shippers (i.e. shippers with only one choice of railway) have fair and reasonable access to the rail system at a regulated rate.

The interswitching provisions of the CTA are considered to be competitive access provisions, allowing the shipper to choose their carrier despite having physical access to only one carrier.

Increasing the access that farmers and elevators and shippers of other commodities have to the lines of competing railway companies will increase competition among carriers for business and will give shippers more transportation options.

The Agency is now moving forward to meet the Government’s objective by amending the *Railway Interswitching Regulations* to extend the interswitching distances in the Prairie Provinces to 160 kilometres for all commodities in order to increase competition among railways and to give shippers access to alternative rail services.

The amendment to the *Railway Interswitching Regulations* will protect and advance the public interest in the economic well-being of Canadians, as expressed by Parliament in the legislation, and promote a fair and competitive market economy, specifically by increasing competition among railway companies and giving shippers access to alternative rail

³ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (2013), Canada Gazette Part II, February 28, 2013 (<http://canadagazette.gc.ca/rp-pr/p2/2013/2013-03-13/html/sor-dors28-eng.html>), page 585 - 587.

⁴ See slide 4 of the Agency’s presentation slides dated June 2014 and entitled “Determination of the Interswitching Rates For the Extended Distance Limits Under Bill C-30, Part 1: How Interswitching Rates Are Determined”. Although the presentation focuses on the no longer applicable 160 km Zone 5, its statements apply equally to the other four zones. There is, for example, the questionable assumption that 2 ½ locomotives of 4400 HP are used for switching of block trains (as low as 60 cars), and the tell-tale reference for single car movements that “rather than calculating diesel unit miles, car miles, train hours, crew wages, and the other costs directly, our methodology only involves calculating the minutes of switching activity performed per car.”

services, which will contribute to the ability of shippers of grain and other commodities to have improved access to domestic and export markets.

...The Agency notes, however, that regulated interswitching is a competitive access remedy for the benefit of shippers with access to only one railway carrier. Furthermore, the local railway always has the option of making more competitive offerings to retain the traffic base it currently has.⁵ [underlining added]

12. In 2017, the Agency described RIS as follows:

“Interswitching of traffic between railway companies has existed in Canada since the early 1900’s. The concept of interswitching was introduced to limit the proliferation of railway lines in urban areas serving manufacturing-based industries. However, limiting the number of railway lines in an area could create a monopolistic service and rate situation. The ability to exchange or interswitch traffic with another railway company or companies within certain limits was seen as a means to reduce exclusive control over traffic.

The interswitching provisions of the CTA today are meant to provide shippers with greater access to competitive services at known prices to alternate rail carriers within interswitching limits. An interpretation of the relevant legislation should support this objective.”⁶ [underlining added]

13. In dismissing CN’s appeal the foregoing Agency decision, the Federal Court of Appeal favourably quoted a passage of the Agency’s decision that characterizes RIS as a “statutory competitive access provision of the CTA...designed to relive against near monopolistic situations...”⁷

14. The Agency’s most recent pronouncement regarding the purpose of RIS is in a 2019 RIAS dealing with administrative changes to various railway regulations that characterized RIS as providing “shippers with options between railways, at a regulated rate”.⁸

⁵ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (2014), Canada Gazette Part II, August 1, 2014 (<http://www.gazette.gc.ca/rp-pr/p2/2014/2014-08-13/html/sor-dors193-eng.html>), page 2313-2314, 2322.

⁶ Agency Letter Decision No. CONF-6-2017 at paragraph 72, quoting Agency Decision No. 35-R-2009 at paragraphs 62-64. At paragraph 77 of Letter Decision No. CONF-6-2017, the Agency restated the purpose of the interswitching remedy: “...the purpose of interswitching (i.e., enhanced competition between railway companies and improved service for shippers)...”

⁷ *Canadian National Railway Company v. BNSF Railway Company and Canadian Transportation Agency*, 2018 FCA 135, at paragraph 22.

⁸ RIAS in respect of the Regulations Amending Certain Regulations Made Under the Canada Transportation Act (Rail Transport) (SOR/2019-254), Canada Gazette Part II, June 25, 2019 (<http://www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/html/sor-dors254-eng.html>).