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Canadian Transportation Agency
60 Laval Street, Unit 1-117
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***Re: 2025-26 Interswitching Consultation (LET-R-34-2025)***

We are solicitors for the FAIR Rail Coalition ("**FAIR**")[1] in connection with the Canadian Transportation Agency's Consultation on commercial market factors to be considered in determining fair and reasonable Interswitching rates (the "**Consultation**") announced on November 10, 2025 in Agency Determination LET-R-34-2025.[2]

The members of the associations comprising FAIR have extensive dealings with Canadian National Railway ("**CN**") and Canadian Pacific Railway Company d.b.a. Canadian Pacific Kansas City ("**CP**" or "**CPKC**"). FAIR and its members have devoted substantial human and financial resources in making submissions in various venues that emphasize the significance of regulated interswitching ("**RIS**") to their members and the rail shipping community more generally.

Throughout these submissions, we refer to the following documents and defined terms:

Documents[3]

- "**2024-25 Consultation**" means the Agency's 2024-25 Interswitching Consultation[4]
- "**2025 FAIR Submission #1**" means the McMillan LLP submissions to Agency staff dated February 10, 2025 on behalf of FAIR in connection with the 2024-25 Consultation[5]

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1 FAIR is a coalition of associations consisting of the Canadian Canola Growers Association, the Forest Products Association of Canada, the Mining Association of Canada, Pulse Canada, the Western Canadian Shippers Coalition, the Western Grain Elevator Association, and other interested stakeholders.

2 The Agency also created a website regarding the Consultation: https://otc-cta.gc.ca/eng/consultation/consultation-on-commercial-market-factors-to-be-considered-in-determining-fair-and-reasonable-interswitching-rates

3 To the extent this submission cites documents for which a hyperlink is not available, we would be pleased to make such documents available to the Agency upon request.

4 The Agency's consultation paper and parties' submissions in the 2024-25 Consultation are available at: https://otc-cta.gc.ca/eng/consultation/2024-interswitching-consultation.

5 Available at: https://otc-cta.gc.ca/sites/default/files/consultations/is2025/is2025_fair.pdf.

- "**2024 Agency RIS Determination**" means Agency Determination No. R-2023-237 (Determination by the Canadian Transportation Agency of the 2024 regulated Interswitching rates) dated November 24, 2023[6]
- "**2025 Agency RIS Determination**" means Agency Determination No. R-2024-181 (Determination by the Canadian Transportation Agency of the 2025 regulated interswitching rates) dated November 29, 2024[7]
- "**2026 Agency RIS Determination**" means Agency Determination No. R-2025-197 dated November 28, 2025[8]
- "**2025 FCA Decision**" means the decision of the Federal Court of Appeal in *Canadian National Railway Company v. Canadian Transportation Agency* (2025 FCA 184) dated October 9, 2025[9]
- **"Act"** means the *Canada Transportation Act*, as amended

Defined Terms

- "**Bureau**" means the Competition Bureau of Canada
- **"RIAS"** means Regulatory Impact Analysis Statement
- **"RIS"** means regulated interswitching
- **"STB"** means the United States Surface Transportation Board

## INTRODUCTION

1. We are pleased to make these submissions to the Agency on behalf of FAIR.

2. The Agency's work is important to a great many shippers, who rely on the effectiveness of national transportation policy and look to the Agency to uphold its principles. FAIR and its member associations, including the shippers who comprise those associations, are interested in the outcome of the Consultation for the same reasons articulated in FAIR Submission #1.[10]

3. As explained in further detail below, substantial Agency reliance on so-called "commercial market factors", which the 2025 FCA Decision defines as "evidence concerning relevant commercial markets, including any interswitching rates in other markets, and commercial market prices"[11] in the setting of RIS rates risks substantially undercutting the purpose of RIS, thus further entrenching the market power of both CN and CPKC. To the extent the Agency is persuaded to accept that RIS rate setting could be aided in any way by reference to such factors, which primarily would consist of duopolistic market factors, we urge the Agency

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6 Available at: https://otc-cta.gc.ca/eng/ruling/r-2023-237
7 Available at: https://otc-cta.gc.ca/eng/ruling/r-2024-181
8 Available at: https://otc-cta.gc.ca/eng/ruling/r-2025-197
9 Available at: https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/521706/index.do
10 2025 FAIR Submission #1, paragraphs 2 - 4.
11 2025 FCA Decision, paragraph 6.

to apply its usual rigour to scrutinize claims that any market factors differ from monopoly and duopoly rail freight services.

Purpose of RIS

4. FAIR submits that the 2025 FCA Decision does not diminish the long-standing purpose of RIS; indeed, the 2025 FCA Decision acknowledged the problem of shipper captivity and that without price regulation many origins in Canada remain "captive" and subject to the monopoly pricing power of the railway.[12]

5. The Agency, the courts, members of Parliament, and other policy makers consistently and explicitly recognize RIS as a *competitive access mechanism for the protection of shippers*. For example, in a 2013 RIAS, the Agency confirmed that RIS is a pro-competitive remedy intended to allow shippers to negotiate suitable terms and conditions of carriage:

> "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,

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[12] 2025 FCA Decision, paragraph 3: "First, a word or two about interswitching. In many places in Canada, a shipper, such as a shipper of grain, can hire only one railway company to take grain to an interchange. At an interchange, another railway company can take the grain to its destination. In this situation, the railway company taking the grain to the interchange often enjoys a monopoly—the shipper is captive to the railway line of that railway company—and, but for price regulation under the *Canada Transportation Act*, the railway company can charge a monopoly rate."

which reflect the total costs but not the commercial profits, are below the unregulated market rates."[13]

[underlining added]

6. Schedule A contains several other representative examples of the Agency, the courts, members of Parliament, and other policy makers explicitly recognizing RIS as a competitive access mechanism for the protection of shippers.

7. It is in the context of the long-standing history and purpose of RIS that we address below each of the questions set out in the Discussion Paper in sequence. The Agency, to its credit, has consistently rejected railway submissions that seek to diminish the utility of RIS and we strongly encourage the Agency to continue to do so in this Consultation.

**Question 1: What are the commercial market factors that the Agency should consider in its determination of regulated interswitching rates? Provide data and a rationale for your response.**

**Question 2: What additional data should railways provide in order for the Agency to consider these market factors? Provide a rationale for your response.**

8. FAIR hereby answers questions 1 and 2 together.

9. FAIR submits that the Agency's consideration of "commercial market factors" must be done in a manner that preserves the long-standing purpose of RIS as a pro-competitive remedy for captive shippers, together with a coherent and rigorous definition of the market, and a careful analysis of the extent to which "commercial market factors" are subject to effective competition, both as described in further detail below.

Market Definition

10. FAIR submits that the Agency's consideration of "commercial market factors" in the Agency's determination of RIS rates must start with a coherent and rigorous definition of the "market", including both the geographic market and the product market.[14] That is an

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[13] 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.

[14] Bureau submission dated February 27, 2015 to the *Canada Transportation Act* Review Panel (https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/submission-canada-transportation-act-review-panel-rail-air-and-marine-transportation). See the discussion under heading B (Competition analysis applied to rail transportation), 1 (Market definition).

unassailable starting point in virtually all competition/antitrust proceedings, the omission of which renders any discussion of the "market" incoherent.

11. In the present context, FAIR submits the relevant product market is reasonably uncontroversial and straightforward: freight transportation services. Any analysis of the extent to which one or more alternative freight transportation services may be available to a shipper should include both intramodal and intermodal shipping alternatives, must consider both their effectiveness and adequacy, and must be analyzed at "competitive price levels"[15] on a quality-adjusted basis.

12. With respect to the geographic market, FAIR submits that any assessment must be done on an origin/destination pair basis, as the Competition Bureau has explained:

> "For freight transportation, the Bureau generally considers origin and destination pairs to be individual geographic markets. This is because, especially in Canada, many shippers produce commodities in relatively remote locations (e.g. coal mining operations, forest products), and are thus limited to a single origin point. At the other end, shippers that produce bulk commodities for export often have a limited number of ports or other destinations from which they can ship their goods overseas."[16]

13. The Agency should afford no weight whatsoever to vague railway references to "the market" in the absence of a coherent attempt to define that "market". It makes no difference to a captive shipper that other shippers at some other origin or destination may have access to a switching service at some non-RIS rate; it is the effectiveness of the competition for the shipper's traffic that is relevant.

Effective Competition

14. FAIR submits that to the extent the Agency ascribes any weight to "market rates", "commercial market factors" or similar expressions in its setting of RIS rates, it is critical that the Agency ensures that such rates or factors were established in geographic markets characterized by effective competition for freight transportation services. Doing otherwise ignores the purpose of RIS in breaking down CN's and CPKC's monopolies for freight transportation services that prevail in the absence of RIS, which at its best provides access to duopolies for those services.

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[15] See footnote 14, in Part II (Rail transportation), under heading B (Competition analysis applied to rail transportation), 1 (Market definition): "Any analysis of the substitutability of other modes of transportation must be conducted at competitive price levels."

[16] See footnote 14, under heading B (Competition analysis applied to rail transportation), 1 (Market definition).

15. FAIR emphasizes that shipper captivity occurs on a spectrum whereby certain shippers are captive, while other shippers may be less captive, due to the differential existence of effective, adequate and competitive intramodal and intermodal shipping alternatives, as explained in more detail in 2025 FAIR Submission #1.[17] For example, it is incorrect to conclude that access to trucking for some of a shipper's traffic from origin to destination means that shipper has access to effective competition. Quite apart from the question whether that shipper can use the trucking alternative for all of its traffic, such an analysis must be done at "competitive price levels", as the Bureau has explained.[18]

16. FAIR submits that effective competition is not merely a "commercial market factor" to be lumped in with others; it is a foundational principle of national transportation policy. Indeed, the primary goals of national transportation policy are to create a "competitive, economic and efficient national transportation system" and the policy states those goals are most likely to be achieved when "competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services". When those outcomes cannot be achieved satisfactorily by competition and market forces, regulation and strategic public intervention are necessary, as the Act states; in this context, regulation and strategic public intervention occurs in the form of RIS rates.

**Question 3: What weight, if any, should the Agency give to commercial market factors in its rate-setting methodology? Provide data and a rationale for your response.**

17. While the 2025 FCA Decision says that the Agency must receive evidence relevant to commercial market factors and consider those factors,[19] the 2025 FCA Decision clearly leaves it open to the Agency to give commercial market factors "little or no weight".[20] FAIR submits that, even if such evidence exists, the Agency should give "commercial market factors" no weight, unless the Agency is satisfied after thorough analysis that such "commercial market factors" reflect conditions of effective competition.

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17 See 2025 FAIR Submission #1, paragraphs 47 - 49.

18 See footnote 14, in Part II (Rail transportation), under heading B (Competition analysis applied to rail transportation), 1 (Market definition): "Any analysis of the substitutability of other modes of transportation must be conducted at competitive price levels."

19 2025 FCA Decision, paragraph 28: "Overall, the three elements of section 112—"fair and reasonable", "to all parties", and "commercially"—all lead to the conclusion that when setting interswitching rates, the Agency must receive evidence relevant to the commercial market factors and consider those factors."

20 2025 FCA Decision, paragraph 40: "This does not mean that the Agency will always have to give significant weight to commercial market factors. Far from it. The assessment of weight is entirely for the Agency to decide on the evidence in each case, relying upon its industry appreciation, regulatory experience, and transportation expertise. As well, in some cases, the Agency may find the evidence concerning the commercial market factors to be unhelpful or deserving of little or no weight."

RIS Rates are Consistent with Average U.S. Margins

18. Publicly available STB data regarding the average revenue to variable cost ratio ("**R/VC**") for certain traffic groups is instructive in the present circumstances. In particular, the STB's two-digit commodity revenue stratification report ("**CRSR**") allows a user to calculate, among other things, the volume of traffic that generates a R/VC (i) above 180%, which is the threshold in the United States below which a shipper has not satisfied a key component of the 'market dominance' test, (ii) between 100% and 180%, and (iii) below 100%. Figure 1 below uses that data to calculate the average R/VC across all traffic in the dataset, delineated into (i) traffic that has an average R/VC above the 180% threshold; that is, potentially captive traffic, and (ii) at or below the 180% R/VC threshold.

**Figure 1 – R/VC for Captive vs. Non-Captive Traffic in the United States[21]**

| Year | Column A<br>Average R/VC For All Traffic (%) | Column B<br>Average R/VC if R/VC Less Than or Equal to 180% (%) | Column C<br>Average R/VC if R/VC Greater Than 180% (%) |
|---|---|---|---|
| 2023 | 1.58 | 1.21 | 2.53 |
| 2022 | 1.62 | 1.22 | 2.51 |
| 2021 | 1.62 | 1.20 | 2.52 |
| 2020 | 1.72 | 1.23 | 2.55 |
| 2019 | 1.62 | 1.23 | 2.50 |
| 2018 | 1.47 | 1.18 | 2.44 |
| 2017 | 1.53 | 1.21 | 2.44 |
| 2016 | 1.58 | 1.23 | 2.43 |
| 2015 | 1.55 | 1.22 | 2.39 |
| 2016 | 1.57 | 1.24 | 2.39 |

19. Two relevant trends are apparent from Figure 1.

20. First, the average R/VC for potentially captive traffic, *i.e.*, traffic that satisfies the U.S. >180% market dominance threshold shown in Column C, is far higher than the average R/VC for all traffic (Column A) and the average R/VC for non-captive traffic, *i.e.*, traffic that is below the U.S. 180% market dominance threshold, shown under Column B.

[21] Data for this Figure was compiled from the STB's Commodity Revenue Stratification Reports, which are available at: https://www.stb.gov/reports-data/economic-data/commodity-revenue-stratification-reports/

21. Second, the average R/VC for all traffic is roughly consistent with the Agency's determination of the average revenue required to cover all of CN's and CPKC's constant costs, specifically 61.34% for 2025[22] and 66.70% for 2026.[23]

22. Further, CN and CPKC actually receive more revenue than required to cover their constant costs (that is, CN and CPKC actually receive more revenue than 66.7% above variable costs). In other words, if the CRSR data were corrected to show the percentage contribution *required* to cover U.S. Class I railroad constant costs, as opposed to the contribution the U.S. Class I railroads actually achieve, the numbers in Figure 1 very likely would be lower.

23. On these two points alone, the data in Figure 1 confirm that the Agency's current methodology for determining RIS rates is commercially fair and reasonable to CN and CPKC.

Commercial Rates Should Not be Framed as an Upper Limit to RIS Rates

24. There is no law or policy that rates under RIS must approach or consider rates established under monopoly or duopoly. Although the 2025 FCA Decision suggests that so-called "market rates" might form a "ceiling" for RIS rates,[24] that passage of the 2025 FCA Decision is clearly *obiter dictum* and not binding on the Agency. Further and no less important, the passage does not endorse the use of, or reliance on, any or all unregulated rates for traffic similar to RIS movements in setting RIS rates.

25. Any commercial rates that are not proven to be established under conditions of effective competition, that at minimum yield competitive price levels, must be excluded from any approach that considers unregulated rates to establish RIS rates. Certainly, they cannot be used as a means to discern a "ceiling" of what is reasonable. Just because a rate is below the average of unregulated rates for traffic with otherwise comparable characteristics to RIS movements does not make it reasonable. The Agency must take care not to allow supra-competitive rates to drive its determination of RIS rates, contrary to the central purpose of RIS.

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22 2025 Agency RIS Determination, Appendix A, Section 5.0 (Contribution to fixed costs): "For 2025, the average contribution to fixed costs is 61.34%...".

23 2026 Agency RIS Determination, Appendix A, Section 5.0 (Contribution to fixed costs): "For 2026, the average contribution to fixed costs is 66.7%...".

24 2025 FCA Decision, paragraph 35: "As well, in the real world, the rates a railway company can charge in the market can further the Agency's determination of what is "commercially fair and reasonable to all parties". While, as discussed above, the considerations set out in section 127.1 of the Act can set a floor for "commercially fair and reasonable" rates, evidence of the market price can serve as a ceiling. The Agency's task of setting "commercially fair and reasonable" rates is no doubt furthered by knowing both the floor and the ceiling."

26. The essence of comparability of price is the degree to which the rate for one set of traffic resembles the rates for traffic that would prevail under conditions of effective competition. All captive traffic must be ignored in such comparisons, and even rates charged for duopolized traffic are safely ignored unless they can be proven to be subject to effective competition from origin to destination. That is why the Bureau asserts that "[a]ny analysis of the substitutability of other modes of transportation must be conducted at competitive price levels."[25] In the absence of those competitive influences, the only way to test the competitiveness of the price levels is against long run variable cost, which is the tried and true methodology the Agency has employed for several decades now. If the unregulated rates meet those criteria, only then are they legitimately comparable.

**Question 4: What methodology should be used to apply these weights to calculate interswitching rates? Provide a calculation and a rationale for your response.**

27. FAIR submits that whatever methodology the Agency determines to apply to commercial market factors in its setting of RIS rates, it must respect the purpose of RIS. FAIR also submits that both the Agency's methodology and the "commercial market factors", if any, upon which the methodology relies, must be transparent to all stakeholders, including the shippers who ultimately must pay the RIS rates.

28. In particular, the Agency should require CN and CPKC to publicly disclose any commercial rates they advance in this Consultation as support for their positions, and prove that any such commercial rates (a) were established under conditions of effective competition, and (b) are actual rates at which traffic moves, as opposed to tariff rates at which little or no actual traffic moves. On the latter point, railways routinely publish rates that shippers do not use and thus rarely move and often do not move <u>any</u> traffic. To the extent the Agency relies on published tariff rates and all other alleged commercial market rates, the Agency should not draw any conclusions about the competitiveness or even the relevance of those rates, unless it can independently verify that (i) the volume of actual traffic shipped pursuant to those rates is in some way meaningful, and (ii) the rates are at the very least representative of rates set under conditions of effective competition.

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[25] See footnote 18.

**OTHER ISSUES**

No Cross-Subsidization

29. The 2025 FCA Decision suggests that higher RIS rates might "allow railway companies to reduce their rates elsewhere, improve their services, or make new capital investments."[26] FAIR is unaware of any evidence that CN and CPKC would use increased revenue from higher RIS rates to decrease rail freight rates for others, improve services or increase capital investment. Such increased revenue will go more easily to railway shareholders, whether in the form of dividends or increased share prices.

30. In any event, the mere possibility of charging at levels above the competitive rate indicates market power, regardless of the use to which such revenues from such overcharging is put. If CN and CPKC are cross subsidizing in the way described by the court, that is a different point about which captive shippers will be that much more concerned, given that it could only go one way: from captive shippers to those with competitive options for at least some of their traffic.

Agency's RIS Rates Are Fully Compensatory

31. Neither CN nor CPKC can be heard to complain that RIS rates are insufficient to adequately compensate for their costs, including cost of capital. Indeed, the 2026 Agency RIS Determination confirms that RIS rates are "fully compensatory" to railway companies, including a normal return on capital:

> "The amount of fixed costs is calculated as the total system cost (which is derived from financial reports provided to the Agency) less the system variable cost (calculated by the Agency's costing model). The system contribution to fixed costs is the amount of fixed costs expressed as a proportion of the system variable costs. The interswitching rates are fully compensatory to railway companies and cover railway total cost, including all variable costs, plus a contribution to railway fixed costs equal to the system average contribution to fixed costs, all of which include a profit component sufficient to provide a normal return on capital to railway companies.

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[26] 2025 FCA Decision, paragraph 32: "Given these purposes, how can the Agency say that commercial market factors are always irrelevant as a matter of law to the setting of interswitching rates under section 127.1 of the Act? For one thing, in some circumstances, might higher interswitching rates allow railway companies to reduce their rates elsewhere, improve their services, or make new capital investments, all of which might further a "competitive, economic and efficient national transportation system"? CN is correct that commercial market factors are relevant in the sense that as a matter of law they must be considered—though, as will be discussed, they may not be deserving of weight in particular cases or a class of cases."

> For 2026, the average contribution to fixed costs is 66.70%, compared to the 2025 value of 61.34% as set out in Determination R-2024-181."[27]
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> [underlining added]

32. Railways' misleading characterizations of RIS rates, such as seeking to frame them as "below market", or representing them as a "subcompensation"[28] or similar, by CN, CPKC and others should fall on deaf ears.

Shipper Fear of Retribution

33. Shippers depend on remedies that work. RIS works, as is, with the current methodology for applying a markup above variable cost, for some shipments, some of the time, for some shippers. There are several ways in which it could be improved, but that is not the subject of this Consultation. One of the reasons RIS works is because there is no need to commence a regulatory proceeding ex post; the remedy is available ex ante. That is important because of frequently expressed concerns that if a shipper initiates an adversarial proceeding, they run the risk of retaliatory measures by the rail carrier on whose ongoing service they depend. Railways have told shippers that they should withdraw complaints if they want to avoid harm to the commercial relationship or that, unless the shipper agrees to hold a proceeding in abeyance for mediation, the railway will refuse to engage in rate negotiations and impose tariff rates. Railways have shut down essential communication avenues, such as regular weekly or daily operational and planning conference calls, with shippers who launch proceedings or express the possibility of doing so. That is why individual shippers are unlikely to make submissions in this or any other consultation, and part of the reason for FAIR's existence.

## CONCLUSION

34. National transportation policy has for the last several decades emphasized the importance of an efficient transportation system and the use of competitive market forces to ensure this efficiency, failing which regulation is necessary. We applaud the Agency's efforts to achieve the goals of national transportation policy, and encourage the Agency to guard against erosions to those objectives.

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[27] 2026 Agency RIS Determination, Appendix A, section 5.0 (Contribution to fixed costs).

[28] For example, Eric Harvey (of CN at the time, now CEO of the Railway Association of Canada) testified on December 5, 2024 before the Standing Committee on Agriculture and Agri-Food (https://www.ourcommons.ca/DocumentViewer/en/44-1/AGRI/meeting-122/evidence) as follows: "Remuneration based on a cost that is below market would result in a subcompensation that would ultimately lead to a reduction in the quality of service and safety." (underlining added)

Please do not hesitate to contact us if we can be of further assistance.

Yours truly,

François Tougas

cc: Canadian Canola Growers Association
Forest Products Association of Canada
Mining Association of Canada
Pulse Canada
Western Canadian Shippers Coalition
Western Grain Elevator Association

## Schedule A – Purpose of Regulated Interswitching

1. The Agency, the courts, members of Parliament, and other policy makers consistently and explicitly recognize RIS as a *competitive access mechanism for the protection of shippers*. For example, speaking in the House of Commons at second reading of what was then Bill C-18 (the *National Transportation Act, 1987*), the Honourable John Crosbie, then Minister of Transport, stated:

> "The Bill also has three competitive access provisions: extended interswitching limits, terminal running rights, and competitive line rates. All those provisions will assist captive shippers, that is, shippers which have access to only one railway. Those shippers will now have far greater bargaining power on rates and services, and railways will, in the future have to compete with one another for traffic from the captive shippers."[29]
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> [underlining added]

2. Mr. David Kilgour, then Parliamentary Secretary to the Minister of Transport, made similar comments when discussing the adoption of the *National Transportation Act, 1987*, showing the intent of Parliament to promote greater shipper access to competitive alternatives:

> "This Bill also takes the historic step of significantly altering the transportation environment for captive shippers, who have long been the forgotten players in our national rail system. Indeed, as a former Crown attorney, they remind me of victims who are all but ignored in our criminal justice system. Captive shippers are those without access to a practical, cost-effective alternative to a single railway carrier. There are captive shippers across Canada, in major urban centres as well as in outlying regions. As an Albertan, I am very well aware that many, if not most, of these shippers are in western Canada. It is no wonder that our reforms here are so strongly supported in my region.
>
> Did you know, Mr. Speaker, that more than half of the railways' revenues come from captive shippers? Among the shippers the most often and most seriously affected are western Canada's major resource industries, including potash, sulphur, coal, petrochemical and forest product operations.
>
> Our reforms to the National Transportation Act, address this problem in three ways: through increased inter-switching; through terminal running rights; and through competitive line rates.
>
> At present, the inter-switching of cars from one railway to another at a compensatory rate is guaranteed only within a four-mile radius of the point of interchange. The limitation was established in 1908 to provide for competition between railways within city limits, using

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[29] Canada, Parliament, *House of Commons Debates* (December 19, 1986), 33rd Parl, 2nd Session, Vol II, (December 19, 1986) at page 2323. Available online at: https://parl.canadiana.ca/view/oop.debates_HOC3302_02/933.

London, Ontario, as the Hon. Member for London East (Mr. Jespen), who is in the House, will know, as the model. Despite the phenomenal growth of our cities since that time, inter-switching limits have never been changed to reflect the new realities.

With the reformed National Transportation Act, we are extending interswitching limits to 30 kilometres. This will benefit virtually every shipper located on a rail siding in an urban area served by two railways. We estimate that there are thousands of such shippers across Canada. To maintain fair competition, inter-switching rates will be compensatory."[30]

3. Similarly, the report of the National Transportation Act Review Commission described the regulatory reforms introduced in 1987, as follows:

"Where there is little or no real competition to a single railway, the Act also sought to encourage competitive behavior. For instance, shippers of bulk commodities such as lumber, coal and potash are often served by only one rail line, and either have no access to other modes of transport or these modes are not economical for them. In such cases, the Act sought to encourage competitive behaviours with two main provisions. First, it extended the limit of interswitching – the maximum distance within which a railway must switch the freight cars of its competitors – from 6.4 kilometres (four miles) to 30 kilometres. Second, it introduced the provision of competitive line rates by which a railway, at the request of a shipper, must quote a rate to transport goods to a competitor's line…"[31]

[underlining added]

4. During the Agency consultations leading up to the 2004 amendments to the Railway Interswitching Regulations, CP submitted that, as a matter of general principle, RIS rates should be negotiated between railways on commercial terms rather than set by regulation.[32] In responding to these submissions, the Agency noted as follows:

"… an examination undertaken by the Agency of the rates charged by a local carrier for switching traffic in markets where competition does not exist indicates that, in most cases, the rates charged for switching traffic, whether for intra-plant, inter-plant, or inter-terminal switching, are substantially higher than the regulated interswitching rates for comparable movements. Accordingly, the Agency considers that the continued prescription of regulated interswitching rates is in conformity with the stated objectives of the National Transportation Policy, which stipulates, in part, that economic regulation should only occur in instances where regulation is necessary to serve the transportation needs of shippers.

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30 House of Commons Debates, 33rd Parliament, 2nd Session: Vol. 3, January 28, 1987, page 2796. Available online at: https://parl.canadiana.ca/view/oop.debates_HOC3302_03/30.

31 *Competition in Transportation: Policy and Legislation in Review*, Report of the National Transportation Act Review Commission, 1993, Volume 1, page 127.

32 Regulatory Impact Analysis Statement accompanying the publication of SOR/2004-201, Regulations Amending the Railway Interswitching Regulations, Canada Gazette Part II, Vol. 138, No. 20, page 1410, which is available at: https://gazette.gc.ca/rp-pr/p2/2004/2004-10-06/pdf/g2-13820.pdf.

> The alternative of not prescribing rates was therefore rejected because the Agency is not convinced that market forces could otherwise protect adequately shippers from the market dominance of one railway service provider, nor that market forces could ensure that the present level of competitive access to a second railway would be preserved without regulatory intervention."[33]
>
> [underlining added]

5. The Agency confirmed that RIS is a competitive access provision intended to benefit shippers 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 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

[33] See note 32, page 1411.

local railway always has the option of making more competitive offerings to retain the traffic base it currently has."[34]

[underlining added]

6. 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."[35]
>
> [underlining added]

7. In dismissing CN's appeal of 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 relieve against near monopolistic situations…."[36]

8. A 2019 RIAS dealing with administrative changes to various railway regulations characterized RIS as providing "shippers with options between railways, at a regulated rate".[37]

9. Each of the 2024 Agency RIS Determination, the 2025 Agency RIS Determination, and the 2026 Agency RIS Determination describe RIS as "part of the competitive access provisions

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34 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.

35 Agency Letter Decision No. CONF-6-2017 (https://otc-cta.gc.ca/eng/ruling/conf-6-2017) at paragraph 72, quoting Agency Decision No. 35-R-2009 (https://otc-cta.gc.ca/eng/ruling/35-r-2009) at paragraphs 62-64. At paragraph 77 of Agency 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)…"

36 *Canadian National Railway Company v. BNSF Railway Company and Canadian Transportation Agency*, 2018 FCA 135 (https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/316198/index.do), at paragraph 22.

37 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).

of the CTA that give some shippers, based on specific criteria set out in the CTA, access to the services of railway companies that do not directly serve their facilities or sidings."[38]

10. The Federal Court of Appeal has unequivocally endorsed the Agency's views on the purpose of RIS. The Court adopted the Agency's purposive analysis in dealing with an appeal from an interswitching decision, holding:

> "[10] In an earlier decision, Decision No. 35-R-2009, the Agency explained that interswitching of rail traffic between railway companies has existed in Canada since the early 1900s. Interswitching was introduced to limit the proliferation of railway lines in urban areas serving manufacturing-based industries where each railway constructed its own lines to its own customer's door. These customers then became captives of that railway, which created an opportunity for monopolistic service and rate situations.
>
> [11] Parliament introduced a number of measures to deal with these issues, including interswitching (s. 127 of the Act), competitive line rates (s. 129) and orders granting running rights (s. 138). All of these measures were intended to provide shippers with access to competitive alternatives."[39]
>
> [underlining added]

11. The Federal Court of Appeal's findings regarding the purpose of shipper remedies generally, and RIS in particular, are binding on the Agency.

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[38] 2024 Agency RIS Determination, paragraph 4, 2025 Agency RIS Determination, paragraph 4, and 2026 Agency RIS Determination, paragraph 4.

[39] *Canadian Pacific Railway Company* v. *Canada (Transport, Infrastructure and Communities)*, 2015 FCA 1 (https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/100330/index.do), at paragraphs 10 – 11.