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May 5, 2023

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **FD 36627**
TGS Cedar Port Railroad LLC — Operation
Exemption — Track in Chambers County, Tex.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is **TGS Cedar Port Railroad LLC's Reply to the American Chemistry Council.**

If you have any questions regarding this filing, please contact me. Thank you for your assistance on this matter.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Attorney for TGS Cedar Port Railroad LLC

RAW:bjs

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC'S REPLY TO
THE AMERICAN CHEMISTRY COUNCIL**

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**ATTORNEYS FOR TGS CEDAR PORT
RAILROAD LLC**

Dated: May 5, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC’S VERIFIED REPLY TO
THE AMERICAN CHEMISTRY COUNCIL**

On April 24, 2023, the American Chemistry Council (“ACC”) filed in the above-captioned proceeding what it called a “Reply” to Union Pacific Railroad Company’s (“UP”) petition to revoke TGS Cedar Port Railroad LLC’s (“TGSC”) July 7, 2022 Notice of Exemption (the “Notice”), effective as of August 6, 2022. Although characterized as a reply, ACC’s filing (the “April 24 Filing”) articulates a new revocation theory, and is therefore an independent petition to revoke. Accordingly, TGSC is entitled to respond, and it does so here. As TGSC will demonstrate, ACC’s April 24 Filing fails to justify revocation of TGSC’s exemption authority, and, like UP’s revocation request, ACC’s request should be denied.

OVERVIEW

The April 24 Filing is peculiar. Its title page and signature block each indicate that the filing has been made on ACC’s behalf, yet the April 24 Filing’s narrative nowhere mentions ACC or any of its interested members by name. Especially odd are the filing’s many gaps. ACC – (1) does not explain its interest in this proceeding; (2) takes no clear position on TGSC’s recent commencement of railroad common carrier service under the color of its

exemption; and (3) avoids sharing its view of the substance of the dispute among UP, BNSF and TGSC.¹ As best TGSC can tell, the April 24 Filing reflects ACC's concern that the proceeding could lead to its members losing direct access to BNSF Railway Company ("BNSF") line-haul service. TGSC has already explained that it sees such an outcome as highly unlikely, given UP's discrete arguments and the legal and factual circumstances surrounding TGSC's exemption.²

ARGUMENT

ACC seeks revocation under a mashup of two distinct theories (a melding of the theories that the proposed transaction is controversial, hence unsuited for the class exemption process, and that TGSC's Notice is materially misleading, hence void *ab initio*), each usually presented and addressed separately as a matter of Board practice. TGSC's Notice is not misleading. Furthermore, neither UP nor ACC can rely on any newfound "controversy" to revoke TGSC's exemption *ab initio*.

ACC's argument is tautological. According to ACC, TGSC's Notice is materially misleading (but *not false*) because the transaction encompassed by the class exemption has become controversial in ACC's eyes. And the other way around; the Notice is controversial

¹ Regrettably, ACC did not approach TGSC in advance of its filing to seek resolution of its (still unknown) concerns. TGSC serves many of ACC's members within the TGS Cedar Port Industrial Park (the "Park"), is very protective of those customers, and, thus, would have much preferred that ACC had conferred in advance with TGSC to share views on the case and to seek common ground where possible.

² See TGSC's Reply to UP's Petition to Revoke ("Reply"), 8-11 (under the heading, "The substance of UP's Petition, and what it would mean for service and competition for traffic to and from the Park if UP's position were deemed to be correct."). Here also, it is evident that TGSC-ACC consultation in advance of ACC's unexpected April 24 Filing would have been helpful to both parties in clarifying ACC's misunderstandings about the case, TGSC's interest in common carrier-hood, and other such matters.

because someone (ACC does not say who) might be misled by the Notice to think there would never be any controversy surrounding the common carrier operation.

Tautology aside, TGSC's Notice is not misleading now. It was not misleading when the Notice was filed, and it is not misleading when filed or now – notwithstanding UP recently ginning up legal questions from its 1996 merger with Southern Pacific. Furthermore, ACC cannot rely on any newfound “controversy” – ten months after TGSC filed its Notice, and nine months after the exemption became effective over the extended silence of UP (and ACC) – to leverage out-of-hand revocation *ab initio* of TGSC's exemption. That is particularly the case where UP and ACC each knew for months about TGSC's stated understanding of its rights to effectuate direct BNSF interchange and said nothing.³ ACC's April 24 Filing leaves one guessing about whether ACC agrees that there is really a controversy. Does ACC actually agree that UP would be (and should be) legally entitled to block TGSC-BNSF interchange under the RASA? ACC indicates it does not, rejecting UP's argument that the Notice contains *false* statements. If ACC were to agree with TGSC that there is no reasonable dispute about TGSC's

³ The existence of an after-the-fact controversy is not rare in, or itself is not grounds for revoking, a class exemption. In fact, that is the entire point of the revocation remedy. *See, e.g., Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, EP 392 (Sub-No. 1), 1 I.C.C. 2d 810, 812 (“Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke . . . In light of the explicit legislative directive to grant exemptions and then rely on after-the fact remedies, including revocation . . . [w]e reject protestants' argument that an after-the fact-remedy is not satisfactory.”); *FRVR Corporation — Exemption Acquisition and Operation — Certain Lines of Chicago & North Western Transportation Company — Petition for Clarification*, FD 31205 (ICC decided Jan. 28, 1988) [1988 WL 225767 at * 2] (“Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.”). Rather, as discussed below, a revocation proceeding is exactly the forum for addressing and resolving a newly-emerged controversy.

rights to an uninterrupted interchange with BNSF, then, logically, it would seem that ACC would admit to the absence of a legitimate controversy.

TGSC's Notice is neither false, as UP would have it, nor *merely misleading*, as ACC has argued.

To sort out ACC's circular argument, it is best to disassemble ACC's awkward fusion of two distinct legal arguments, and address each in turn to see that ACC's call for revocation must fail. Turning first to the notion that TGSC's Notice is misleading (but not false), one must start by recognizing that TGSC nowhere explicitly asserted that there would not be, or could not be, any disagreement with UP over TGSC's rights to directly interchange with BNSF. Simply, there is no statement, no passage in TGSC's Notice that ACC identifies as being materially misleading.

That is enough to reject ACC's revocation request. In order to claim a statement is misleading, ACC must identify the allegedly misleading statement and explain how it misleads. "To justify revocation, a petitioner must meet its burden of proof by articulating reasonable, specific concerns" ⁴ Yet ACC does not explain why or how it or any of its members have been misled by any passage in the Notice. Perhaps ACC feels misled by TGSC's confidence that it will be able to effect direct interchange with BNSF going forward (such that UP/BNSF competition will be maintained under the new operating regime). But TGSC's view of competitive access (one, incidentally, that the Board noted in serving notice of the exemption)⁵ is either true, in which case the Notice is not misleading, or it is false, in which case

⁴ *Indiana Hi-Rail Corporation — Lease and Operation Exemption — Norfolk & Western Railway Company Line between Rochester and Argos, IN, and — Exemption from 49 U.S.C. § 10761, 10762, and 11144*, FD 32162 (STB served Jan. 30, 1998), 2 ("Indiana Hi-Rail").

⁵ *TGS Cedar Part Railroad LLC — Operation Exemption — in Chambers County, Tex.*, FD 36627 (STB served July 22, 2022), 2.

the Notice is void *ab initio* (as TGSC acknowledged in its Reply). But whatever the passage at issue here might be, it cannot be simultaneously true *and* misleading.

Again, TGSC's exemption took effect on August 6, 2022. TGSC commenced common carrier operations pursuant to the exemption over a month ago. TGSC agrees that if its commencement of common carrier operations would deprive Park customers of direct access to BNSF line-haul service via a TGSC-BNSF interchange, then a fundamental premise of TGSC's Notice would be materially false, and, in turn, the Notice would be void *ab initio*. Whether TGSC's exemption should be voided based on the allegedly false premise of direct TGSC-BNSF interchange, UP, BNSF and TGSC have presented that issue squarely to the Board.

UP's anticompetitive take on the RASA does not necessarily mean that there is a *meaningful* controversy—the Board may find that the issue UP has elected to raise can be easily, quickly, and definitively addressed on the current record.

Turning to ACC's other revocation argument, ACC fails to show that a *newfound dispute* among UP, BNSF and TGSC – one that neither UP nor ACC raised during the pendency of the class exemption proceeding⁶ – warrants, by itself, revocation of TGSC's exemption. ACC has offered no case where this agency has revoked as void *ab initio* a months-old class exemption, also since exercised, based on a newly-emerged disagreement over the intent and

⁶ Indeed, UP did not raise the dispute at all until eight months after the effective date of TGSC's exemption, and then only after TGSC commenced common carrier operations. As with any class exemption, the Board provided here for the filing of a petition to stay the effectiveness of the exemption during the exemption pendency period. Had any party felt then as it claims to now, it could have presented its views in a formal stay request, which would have, among other things, addressed the likelihood of UP prevailing on the merits of its interpretation of the RASA. *Montana Rail Link, Inc. — Discontinuance of Service Exemption — in Yellowstone, Stillwater and Sweet Grass Counties, et al.*, AB 575 (Sub-No. 2X) (STB served Apr. 6, 2023), 2 (citing *Washington Metropolitan Area Transit Comm'n v. HolidayTours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). UP should have done so, its misleading explanation that it wanted to pursue “good faith” negotiations notwithstanding. Reply, 7-8.

purpose of past agency decisions as ACC would have the Board do here. Having searched, TGSC is unaware of any agency precedent supporting the long-after-the-fact *ab initio* revocation of a class exemption on the basis of a controversy between or among rail carriers and shippers, such as the one UP has chosen to advance months after it (and ACC, for that matter) became aware of TGSC's position.⁷ Here again, ACC appears to argue that an existing exemption should be revoked *strictly because* UP and TGSC disagree now about specific provisions in the RASA, and *not* because ACC disagrees with TGSC's position on competitive access.

Meanwhile, ACC purposely has chosen not to address the substance of the dispute, noting merely that a disagreement exists, and adding, vaguely, that the Board should avoid resolving that disagreement, at least for now. But if TGSC's interpretation of the RASA and applicable agency precedent happen to be correct – or, for that matter, if the Board were to conclude, at a minimum, that TGSC's position was likely to prevail – then tossing the exemption simply because of the existence of a superficial, UP-fabricated “controversy” that would force TGSC to start again – would amount to throwing the baby out with the bathwater. TGSC believes that a ruling favorable to TGSC and BNSF would be welcome news to ACC and its members. Furthermore, TGSC submits that the issue before the agency is very clear-cut, that UP's RASA-based argument is plainly incorrect, and that the Board has sufficient record

⁷ *Indiana Hi-Rail* at 4-5 (“No specific time limits apply to the filing of petitions to reopen and revoke exemptions . . . However, the time elapsed is relevant and may be a factor in ruling on the merits of a request to reopen and revoke an exemption.”). UP has been aware of TGSC's position on its access to BNSF for many months, and ACC cannot deny having had constructive notice of the same, as the issue of third-party interchange was mentioned in the Board-issued notice served and published in the *Federal Register* on July 22, 2022. Also, UP's final position with respect to TGSC's commencement of common carrier operations was not known until shortly before UP filed its revocation petition on April 4, 2023, after months of not questioning the substance of the Board-served notice on July 22, 2022. It would be far-fetched to argue that TGSC *knew* that its statement on competitive impacts in its Notice would engender a dispute.

evidence to dispense of the case quickly and definitively in TGSC's favor. If the matter UP has raised is not a close call, as TGSC and BNSF have posited, then there really isn't any meaningful controversy warranting a more searching analysis simply for searching analysis' sake.

If, on the other hand, any genuine controversy exists, and the Board agrees that a more fully-developed record is needed to resolve it, then this revocation proceeding is the correct vehicle.

On careful review, ACC's revocation argument rests entirely on the presumption of a genuine and meaningful "controversy," since ACC points to no misleading passage in the Notice. Having since discussed the matter with ACC, it appears that ACC's concern is that the Board might render a decision with potentially far-reaching anticompetitive consequences (if, for example, the STB were to uphold UP's position) without the benefit of a more fully-developed record than now exists.⁸ Granted, ACC does not indicate in its April 24 Filing how that record could only be more fully developed through some other, more searching authorization process; why TGSC's transaction should be subjected to heightened regulation; or why ACC would want TGSC to undertake a new authorization proceeding. While ACC's interest in a more developed record may be understandable, ACC simply assumes that the revocation proceeding that UP has attempted to put in motion (now joined, strangely enough, by ACC) is *not* a suitable platform for resolving a controversy (if one indeed exists). That assumption is mistaken. ACC has not offered how the presumed controversy over continued BNSF access warrants a different type of consideration than ACC could have otherwise afforded itself of in this revocation proceeding,

⁸ ACC's concern presupposes that the Board would tend to agree that the issue before it cannot be easily resolved in favor of TGSC and competition. Again, if the Board were to hold (on the basis of the current record) that TGSC's commencement of common carrier operations does not trigger the loss of competitive rail access for Park customers as UP claims, then TGSC strongly suspects that ACC would be content with such a competition-preserving outcome, and with the favorable precedent such a finding would offer.

particularly had it requested and obtained more time to formulate a response, as agency practice would suggest was a viable option.

In fact, as indicated above, revocation proceedings naturally encompass some, and oftentimes a significant level of, controversy. So, if the Board were to find that the discrete competitive access issue UP has raised is genuinely controversial (*i.e.*, that the Board cannot easily dispense with UP's arguments) and thus warrants a more robust development of the record than now exists, then agency precedent shows that a revocation proceeding intended to resolve such a controversy is exactly the forum for *any* other interested parties.⁹ For their part, BNSF and UP, along with TGSC, are content that the issue raised – whether, under the RASA, *UP/SP*, and (in BNSF's case) the trackage rights terms governing its operations in and around Baytown, UP is legally entitled to constrain BNSF access to a new short line at 2-to-1 Baytown (and the Park) – is appropriate for Board resolution as presently briefed, *and in this proceeding*. And each party agrees that the Board is vested with the authority to resolve that issue. From TGSC's

⁹ Note 3 above and *Iowa Chicago & Eastern — Acquisition and Operation Exemption — Lines of I&M Rail Link, LLC*, FD 34177 (STB served Jul. 22, 2002), 9 (“ . . . *Acquisition Exemption* contemplates that generally transactions may be consummated prior to our regulatory review and that concerns such as those that have been raised by petitioners here (uncertainty about the transaction's effect on the *railroad(s)*, *communities and existing shippers* along the existing IMRL lines, and railroad employees) *will be addressed through the revocation process of 49 U.S.C. 10502(d)*.” (emphasis supplied); *See also e.g., Soo Line Railroad Company — Acquisition and Operation Exemption — BNSF Railway Company*, FD 35068 (STB served Dec. 29, 2020), 4; *Missouri Pacific R. Co. — Abandonment Exemption — In Pittsburg, Hughes, and Seminole Counties, OK (Shawnee Branch)*, 9 I.C.C. 2d 18, 24 (1992) (“Interested parties may oppose . . . a class exemption by filing petitions to revoke.”; *Wisconsin Central Ltd — Exemption Acquisition and Operation — Certain Lines of Soo Line R.*, FD 31102 (ICC served Jul. 8, 1988) slip op. at 11 n. 11 (“A class exemption does not divest the Commission of jurisdiction to scrutinize a transaction and subsequently to revoke the exemption after the fact.”) and at 15 (“Our review of the overhead traffic restriction, Soo's retention of trackage rights, and related competitive concerns does not demonstrate cause to revoke this exemption . . .”) (considering weighty issues in the revocation proceeding).

perspective, and also from the perspective of the Park’s customers, that may be especially so, since none of them are parties to the RASA.

Therefore, if the Board were to find the discrete issue presented to be more challenging to resolve one way or the other than TGSC believes to be the case, then the Board has the discretion, consistent with the function of a revocation proceeding generally (and in this case specifically), to solicit the development of a more robust record, and, in the process, obtain more detailed perspectives from ACC and other potentially interested parties. TGSC is mindful of the broader ramifications to competition potentially flowing from Board resolution of the issue raised by UP.¹⁰ And TGSC contemplated a similar such possibility in its Reply, where it suggested that, if the Board regarded the issue as more complicated than TGSC believes it is, the Board could reopen *UP/SP* to explore the issue in greater detail, while leaving the exemption intact and holding UP to its representations on this record during the pendency of this dispute.¹¹

WHEREFORE, the Board should deny ACC’s call to revoke TGSC’s common carrier exemption authority. The record is already adequately developed and the issue is sufficiently discrete for the Board to rule that UP’s interpretation of the RASA is either gravely mistaken or disturbingly correct – thereby resolving whatever “controversy” UP created.

¹⁰ Reply, 21.

¹¹ Id.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

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**ATTORNEYS FOR TGS CEDAR PORT
RAILROAD LLC**

Dated: May 5, 2023

CERTIFICATE OF SERVICE

I certify that on May 5, 2023, I caused TGS Cedar Port Railroad LLC's foregoing Reply to the American Chemistry Council to be electronically filed with the Surface Transportation Board and served via electronic mail on the following persons:

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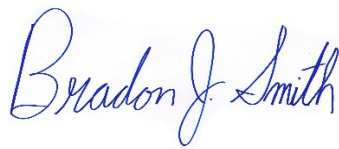
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