

Reply to the Attention of François E.J. Tougas
Direct Line 604.691.7425
Direct Fax 604.893.2359
Email Address francois.tougas@mcmillan.ca
Date September 28, 2018

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

Canadian Transportation Agency
15 Eddy St
Gatineau, Québec
J8X 4B3

Re: Consultation on the Rail Modernization Initiative

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 rail transportation consultation (the “**Consultation**”) announced by news release on May 31, 2018 as part of the Agency’s regulatory modernization initiative.¹

In support of our submissions, we have appended letters from the Western Grain Elevator Association, the Canadian Canola Growers Association, the Western Canadian Shippers Coalition and the Mining Association of Canada, all of whose members have extensive dealings with Canadian National Railway (“**CN**”) and Canadian Pacific Railway (“**CP**”).

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

Documents

- “**Act**”: *Canada Transportation Act*
- “**ARCM Submission**”: McMillan LLP submission to Agency staff dated February 28, 2017 in response to the Agency’s Consultation on the ARCM
- “**Board’s Cost Order**”: Order No. 123994 issued April 5, 1967 of the Board of Transport Commissioners for Canada
- “**Decision R-6313**”: Reasons For Order No. R-6313 Concerning Cost Regulations made by the Railway Transport Committee of the Canadian Transport Commission dated August 5, 1969
- “**Discussion Paper**”: the Discussion Paper on Regulatory Modernization for Rail Transportation²
- “**Hellerworx Report**”: the expert report prepared by Hellerworx, Inc. entitled “CTA Regulatory Modernization Initiative Consultation” in response to the Consultation, as appended hereto as Schedule “A”
- “**Interswitching Regulations**”: Railway Interswitching Regulations (SOR/88-41)

¹ Agency news release dated May 31, 2018: <https://otc-cta.gc.ca/eng/content/canadian-transportation-agency-launches-consultation-rail-transportation>

² Available at: <https://www.otc-cta.gc.ca/eng/discussion-paper-regulatory-modernization-rail-transportation>

- **“Operational Terms Regulations”**: Regulations on Operational Terms for Rail Level of Services Arbitration (SOR/2014-192)
- **“Order R-6313”**: Order No. 6313 of the Railway Transport Committee of the Canadian Transport Commission, dated August 5, 1969
- **“Order R-91”**: Agency Determination in Order No. 2015-R-91
- **“Proposed LHI Guide”**: Agency’s proposed guidance document relating to long-haul interswitching applications³
- **“Proposed LHI Rules”**: Proposed Canadian Transportation Agency Rules of Procedure for Long-Haul Interswitching Adjudication⁴
- **“R-66”**: Agency Decision LET-R-66-2010 entitled “Review of the Railway Interswitching Regulations” dated April 21, 2010
- **“RCR”**: Railway Costing Regulations (SOR/80-310)
- **“UCA”**: Uniform Classification of Accounts and Related Railway Records

Defined Terms

- **“AMPs”**: administrative monetary penalties
- **“ARCM”**: Agency Regulatory Costing Model
- **“ARCM Consultation”** means the consultation on the Agency’s Regulatory Costing Model⁵
- **“Committee”**: Railway Transport Committee of the CTC
- **“CTC”**: Canadian Transport Commission
- **“EBS”**: EBS Management Consultants, Inc.
- **“FOA”**: final offer arbitration under sections 159 – 169.3 of the Act
- **“LHI”**: long-haul interswitching under sections 129 – 136.9 of the Act
- **“LRVC”**: long run variable cost
- **“Macpherson Commission”**: Royal Commission on Transportation commenced by the Order in Council dated May 13, 1959, chaired by Murdoch MacPherson
- **“NTA, 1967”**: *National Transportation Act, 1967*
- **“RIAS”**: Regulatory Impact Analysis Statement
- **“SLA”**: arbitration on level of services under sections 169.31 – 169.43 of the Act
- **“StatsCan”**: Statistics Canada
- **“STB”**: United States Surface Transportation Board
- **“URCS”**: the Uniform Rail Costing System prepared by the STB

³ Available at: <https://otc-cta.gc.ca/eng/long-haul-interswitching-proposed-guidance-material>.

⁴ Available at: <https://otc-cta.gc.ca/eng/proposed-canadian-transportation-agency-rules-procedure-long-haul-interswitching-adjudication>.

⁵ As initiated by the Agency conducted between January 9, 2017 and February 28, 2017, as described at: <https://www.otc-cta.gc.ca/eng/consultation/consultation-agencys-regulatory-costing-model-arcem>.

INTRODUCTION

1. Our submissions address Item 1 (Amendments to the *Railway Interswitching Regulations*), Item 2 (Administrative Monetary Penalties), Item 5 (Shipper Remedies) of the Discussion Paper, and, at the Agency's invitation, the Agency's mandate pertaining to the economic regulation of railway companies, which are interspersed throughout these submissions. Our submissions also address the Agency's request for feedback as to whether all of its rail-related regulations should be consolidated into a single regulation and some ways the Agency might expedite its contested processes.
2. Teck and the organizations supporting these submissions are interested in the outcome of the foregoing in that
 - a. in connection with Item 1, each of the railway costing processes in which the Agency engages (Interswitching, FOA, other processes) directly or indirectly affects them to a greater or lesser degree, largely in relationship to their degree of captivity and to the extent those processes are available and useful to them,
 - b. in connection with Item 2, undiminished access to statutory remedies remains critical to them, notwithstanding administrative monetary penalties that may or may not be imposed by the Agency,
 - c. in connection with Item 5, statutory remedies are vital to their ability to overcome, if only to some degree, the effects of CN's and CP's market power, unilateral imposition of terms that impair their viability and ability to supply customers in domestic and world markets and their requirement to forego remedies under the Act as a condition of contract, and
 - d. in connection with the Agency's mandate pertaining to the economic regulation of railway companies, they are reliant on the robustness, correctness and fairness of the Agency's processes and the execution of its mandate; indeed, they rely on the Agency to adequately regulate, at the very least, those parts of CN's and CP's rail systems that operate as natural monopolies or otherwise exhibit attributes of entities that can and do exercise market power, whether to extract rents, diminish levels of service or expend resources in preserving their market power.

INITIAL MATTERS:**Consolidation Of All Rail-Related Regulations**

3. The Agency seeks views on whether all of its rail-related regulations should be consolidated into a single regulation, for ease of reference.⁶ The Agency should not do so for the following reasons:
 - a. First, a consolidation of all of the Agency's rail-related regulations into a single regulation would necessarily require a renumbering of the provisions comprising the consolidated regulation. However, many decisions of the Agency and courts apply and interpret the various provisions of those individual regulations based on their current numbering. A consolidation and renumbering would cause unnecessary difficulty in tracking references in Agency and judicial decisions to a consolidated form.
 - b. A single consolidated rail regulation would be lengthy, making it difficult for a representative of an interested person, who may or may not be very familiar with the Agency's processes and regulations, to find a specific provision.
 - c. So long as all of the Agency's rail-related regulations are available at a single website, which they are and which has served interested persons well to date, consolidation achieves nothing of value, and is potentially harmful.⁷

Agency Proceedings

4. The Discussion Paper invites comments on any area relating to the Agency's mandate pertaining to the economic regulation of railway companies. In relation to Agency proceedings involving shipper remedies, some shippers express concern about the length of time it takes to obtain an Agency order. While we recognize that the timeframes provided in the Act⁸ for proceedings before the Agency are generally shorter than what would be required to bring civil litigation to a judgment, the potential for delay can discourage shippers from exercising remedies under the Act.

⁶ The Discussion Paper indicates the Agency "seeks views on whether all of its rail-related regulations should be consolidated into a single regulation, for ease of reference."

⁷ See <http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html>.

⁸ 120 days from the date on which the originating documents are received, except in the case of level of service complaints (90 days from receipt of an application under s. 116) and applications for LHI (30 business days from receipt of the application).

5. We recommend that the Agency consider making greater use of case conferences to assist in streamlining proceedings before it. An teleconference with parties may provide an important opportunity to manage the process and reduce delay by addressing, for example:

- a. Common procedural matters:

There are certain procedural matters that commonly arise in Agency proceedings, such as requests for confidentiality. To the extent that hearing submissions from the parties by way of conference call can expedite a determination in relation to routine procedural issues, a case conference may assist in facilitating an expeditious process.

- b. Time frames for various intermediate steps such as written questions and requests to produce documents and other preliminary objections or requests:

The *Dispute Adjudication Rules* permit both of these measures to be taken at any time before the close of pleadings. A party who serves written questions and requests to produce documents towards the end of the time allotted for the filing of a pleading may request an extension until a time after responses are received. Where such a request is then followed by a further request of a preliminary nature again filed at the end of the now extended timeframe, significant successive delays can result. A case conference early in the proceeding could provide an opportunity to clarify whether either party is contemplating these or similar steps and to set appropriate deadlines for such matters *in advance*, thereby reducing the need for successive extensions after the fact.

ITEM 1: AMENDMENTS TO THE RAILWAY INTERSWITCHING REGULATIONS

6. The Agency, in the Discussion Paper, has inquired about the four following sets of questions in connection with the Interswitching Regulations:
 1. What amendments, if any, to the *Railway Interswitching Regulations* would help ensure clarity on how the CTA calculates regulated interswitching rates?
 2. What guidance material would be useful in understanding the CTA's development of regulated interswitching rates?
 3. Taking into account that Long Haul Interswitching rates are to be set on a case-by-case basis, what type of guidance material would be useful in understanding how the remedy works and how the CTA will make rate determinations?
 4. Are any provisions of the *Railway Costing Regulations* of current relevance? What information would be useful regarding how costing is set by the CTA?

Consultation Question 1: What amendments, if any, to the *Railway Interswitching Regulations* would help ensure clarity on how the CTA calculates regulated interswitching rates?

7. We begin here with the need for costing data generally, including in connection with the statutory requirement to set interswitching rates on the basis of cost, within the context of the Agency's economic regulatory mandate. We then make submissions regarding the impact on stakeholders arising from the lack of data, the need for disclosures and possible amendments relating to the new statutory requirement relating to long term investments by railway companies.

Economic Regulation Mandate

8. There are several reasons why railway costing data is necessary for the Agency to fulfill its mandate pertaining to the economic regulation of railway companies:
 - a. *Compliance with the Act:* the Agency's processes require it to conduct costing exercises, not just for regulated interswitching, but also FOA and other processes. The Agency should not be impaired in any way, either by Transport Canada, StatsCan, other arms of the federal government, CN or CP or any other person, in the conduct of this particular aspect of its economic mandate. We submit that the Agency has been unduly constrained, either internally or externally, to the detriment of its mandate and the broader economy, and further submit that these constraints impair Canadian competitiveness. We do not agree that all information kept confidential by the Agency, as argued or demanded by CN and CP, is just or warranted, particularly in light of the disclosures CN and CP make in the United States.
 - b. *Stakeholder assurances:* to the extent that costing processes used by the Agency can be replicated outside the Agency, stakeholders enjoy a greater degree of comfort that the Agency is in compliance with the Act, that government bodies are assisting rather than hindering the Agency in its economic regulatory mandate, and that its processes are valid and costing determinations accurate.
 - c. *Shipper-carrier relations:* valid and accurate costing determinations that can be replicated help avoid unnecessary misunderstandings about CN's and CP's rates and levels of service, eliminate unnecessary resort to remedies under the Act and permit far better forward planning for development of shipper production facilities that are often exposed to information vacuums in which to advance large infrastructure projects, the result of which threatens Canadian economic output, growth and competitiveness.

Lack of Data

9. Insufficient publicly available information undermines third party ability to reproduce the Agency's regulatory cost determinations. In part, the availability of such information is diminishing due to the conduct of CN and CP. For example, one publicly available resource that was formerly useful to persons seeking to estimate railway costs was "Rail in Canada" published by StatsCan.⁹ Rail in Canada formerly contained detailed financial and statistical data disaggregated into cost categories. StatsCan discontinued this publication following the 2009 version, reportedly because CN or CP or both declined to provide permission to publish the data.¹⁰
10. Following the 2009 version of Rail in Canada, StatsCan discloses data for only 35 accounts for the operations in Canada of CN and CP combined, whereas before that time, it disclosed annual data for 112 accounts for CN and CP's operations in Canada separately.¹¹ This reduction in available data affects the degree to which third party railway costing models can be updated.
11. In cases where there are alternative, effective, adequate and competitive means of transporting all of a shipper's traffic, disclosure of railway costing information might not be needed, but disclosure is necessary to the extent effective competition is lacking. It is no answer to say that (a) the information CN or CP provides to the Agency for use in the ARCM is confidential to that railway company, or (b) that the information could be used in a statutory process, such as FOA or otherwise, by a shipper. First, substantial information about CN and CP is disclosed both inside and outside of U.S. rate proceedings, such that shippers in Canada are at a considerable disadvantage relative to U.S. shippers in their respective dealings with CN and CP. Second, statutory remedies exist for the very reason that CN or CP may exert market power as a result of the market structure in which they operate; the remedies may constrain the exercise of that market power in some circumstances.
12. The use of the ARCM in setting interswitching rates and other rate-setting purposes is opaque, especially to CN's and CP's customers. Customers rely on the ARCM and the Agency's processes to accurately set interswitching rates, and parties often rely on cost determinations in FOA proceedings and in rate negotiations. However, third parties can

⁹ *Rail in Canada, 2009*, Statistics Canada, Catalogue No. 52-216-X: <https://www150.statcan.gc.ca/n1/pub/52-216-x/2009000/part-partie1-eng.htm>.

¹⁰ Comments Prepared for the Western Canadian Shippers Coalition and the Coalition of Rail Shippers by Hellerworx, Inc. dated January 31, 2013 in the Canadian Transportation Agency's Staff Consultation on Amendments to the Uniform Classification of Accounts: <https://www.otc-cta.gc.ca/sites/all/files/consultations/wwcms-cra.pdf>.

¹¹ ARCM Submission, page 9.

neither see the inputs nor how they are used, to say nothing of their ability to reproduce results or to contest the correctness of the inputs or the results of the ARCM cost determinations.

13. The ARCM situation contrasts sharply with other regulated rate environments, where regulators often facilitate stakeholder access to data and cost models, while protecting commercially sensitive information.
14. The asymmetry of access to data between railways and shippers is rather striking in the FOA setting, in which the railway company has all of the necessary information, the shipper has a few bits of it and the arbitrator has none. An FOA arbitrator can obtain an estimate of the LRVC from the Agency, on whom parties rely to provide an objective determination of the LRVC of a subject movement of goods, based on the service units provided by the parties. The shipper can engage third party consultants, who may make observations to calculate service units. Thus, the shipper's means of obtaining service unit information results in an estimate based on observations over time, making the FOA process that much more expensive and time-consuming. The unit costs must be estimated by other third party consultants. However accurate those estimates may be, they are calculated in an asymmetrical, opaque, incontestable setting. On the other hand, a railway company knows the actual costs, but is not subject to examination, again unlike other regulated rate settings not dissimilar to rail.
15. In the context of regulated interswitching, the asymmetry of information is no less. There is no opportunity to contest the rates, the inputs used to determine the rates, the costs on which those rates are based, or the methodology used to determine them.

Amendments to the Interswitching Regulations

16. In order to bring some semblance of balance to the asymmetry of information between railway companies and shippers in the interswitching context, the Agency should disclose all information regarding its costing inputs, processes, methodology and supporting information.
17. Following the implementation of the *Transportation Modernization Act*, the Agency is now required to make its determination of the interswitching rates annually, in advance of the year for which the rates are to apply, and is required to publish the method that it followed for determining the rates,¹² both of which reflect the importance of those rate determinations

¹² Subsection 127.1(1) of the Act states: "The Agency shall, no later than December 1 of every year, determine the rate per car to be charged for interswitching traffic for the following calendar year."

to shippers that use them directly, as well as those who may be subject to them under the LHI remedy.

18. We further submit that the Agency should amend the Interswitching Regulations to disclose its actual methodology and the inputs the Agency used for that year, as contemplated by subsection 127.1(4):

“The Agency shall, when it makes its determination under subsection (1), publish the method that it followed for determining the rate.”

19. We submit that advance publication of the Agency’s methodology, by amendment to the Interswitching Regulations, would increase public confidence (i) in the Agency’s interswitching rate setting process, (ii) that the process is consistent, and (iii) that the process is seen to be consistent, from year to year. Doing so would increase transparency, thereby allowing shippers to be confident, in advance, that the rates will be determined in a valid, predictable and accurate manner, thus enabling shippers to plan accordingly.

Long-term Investment

20. The *Transportation Modernization Act* imposes a new requirement for the Agency to consider “any long-term investment needed in the railways” in setting interswitching rates.¹³ The Agency already takes into account that investment requirement in the cost of capital calculated for CN and CP; consequently, the Agency should not add any amount to the cost basis for long term investment that is already taken into account in the cost of capital. To the extent there is an amount that is not taken into account, the Agency should disclose, in its annual publication of interswitching decisions:

- a. the factors the Agency considered in taking such costs into account;
- b. a description of amounts taken into account or added to the rate, separated from the variable cost and the margin above variable cost added to derive the rate;
- c. confirmation that any such costs were taken into account at book value for new capital items only.

21. As a matter of transparency, the Agency also should disclose, in advance, by amending the Interswitching Regulations, how the Agency will meet the requirement in s.127.1(2) of the

¹³ Paragraph 127.1(2)(b) of the Act.

Act, including the factors it will consider.¹⁴ As indicated in the Hellerworx Report, the Agency should also disclose the methodology for applying the long-term investment costs to the interswitching rates.¹⁵

22. We submit that there are numerous considerations that should and should not be taken into account in this examination, keeping in mind that long term investment is already accounted for in the cost of capital. We refer to five such considerations.
- a. The Agency should disclose and justify the duration of the “long-term” investments by reference to actual plans that are consistent with past practice. Too often, both CN and CP have announced but failed to implement infrastructure projects and conflated announcing new capital projects with expenses for sustaining capital. Therefore, no amount for long term investment not already in the cost of capital should be entertained until actually spent and then only to the extent of such capital cost, without double counting an amount in the cost of capital.
 - b. “Long-term investment needed in the railways” should be discrete and considered only to the extent that such investment is required to provide interswitching services, and not in any way should the Agency consider the overall long-term investment needed across the networks of CN and CP to provide service across the networks. The Agency should identify how such investments are not otherwise captured in the Agency-determined cost of capital, and disclose why the long-term investments are required for interswitching services.¹⁶
 - c. If the Agency determines the “long-term investment needed in the railways” is to be applied on an interchange by interchange basis, the Agency should disclose why each specific interchange requires long-term investment.¹⁷
 - d. “Long-term investment needed in the railways” should be limited to such investment in Canada.
 - e. The Agency perhaps should account for a significant investment in information technology that may not be allocable to a particular jurisdiction, not by some remote

¹⁴ Subsection 127.1(2) of the Act states: “In determining an interswitching rate, the Agency shall take into consideration (a) any reduction in costs that, in the opinion of the Agency, results from moving a greater number of cars or from transferring several cars at the same time; and (b) any long-term investment needed in the railways.”

¹⁵ Hellerworx Report, pages 10 - 11.

¹⁶ *Supra*, note 15.

¹⁷ *Supra*, note 15.

connection but only to the extent it is applicable to regulated interswitching and not accounted for or duplicated by an amount in the cost of capital.¹⁸

23. In our view, all of these factors should be published in the Interswitching Regulations. If the Agency decides not to amend the Interswitching Regulations as described above in respect of the “long-term investment needed in the railways”, at the very least, it should publish a guidance document that describes the method for calculating interswitching rates, as described in the Hellerworx Report:

“Each year, as part of its required publication of the method for calculating interswitching rates, the Agency should include the specific investment items included in determination of the interswitching rate, the amount of investment costs and how any contribution margin used to determine each of the interswitching rates is modified to account for the addition of long term investments not otherwise captured in the Agency-determined cost of capital.”¹⁹

24. Again, if the Agency prefers a guidance document over amendments to the Interswitching Regulations, guidance is preferable in advance of issuance of a decision as described in §21.

Consultation Question 2: What guidance material would be useful in understanding the CTA's development of regulated interswitching rates?

25. Below we identify the various material, information, documents and other disclosures that would be useful in understanding the Agency's development of interswitching rates.

Disclosure of the ARCM

26. We do not see that the Act prevents the Agency from disclosing the ARCM or related information regarding its processes or methodology for regulatory costing. Public disclosure of the ARCM would serve many useful purposes, including
- a. advancing transparency and increasing stakeholder engagement and empowerment, which is lacking at present,
 - b. increasing certainty regarding the correctness of the ARCM, thereby minimizing the potential for disputes, including during the course of proceedings, the setting of

¹⁸ For example, CN's 2017 Annual Report indicates that in 2017, CN spent “\$0.4 billion on strategic initiatives to increase capacity and support growth opportunities, including line capacity upgrades and information technology initiatives, \$0.4 billion on implementation of Positive Train Control (PTC)...”

¹⁹ Hellerworx Report, page 11.

- regulated interswitching rates and any revision to the annual MRE determination that might involve a re-examination of its premises in relation to cost,
- c. allowing a shipper to better estimate the extent to which its traffic contributes to a railway company's constant costs, and thereafter assess that contribution in light of the service that it is receiving, and
 - d. allowing a shipper to make better-informed decisions as to whether to seek a remedy in respect of its traffic, and if so, which remedy is most appropriate.
27. The secretiveness surrounding the ARCM contrasts sharply with the regulatory system of the United States. We have testified before surprised members of the House Standing Committee on Transport, Communities and Infrastructure and the Senate Standing Committee on Transportation and Communications regarding this contrast. We think the issue deserves a fresh look.
28. As described in the Hellerworx Report, the STB's website allows a person to download and use URCS, which is a general purpose railroad costing system. The STB uses URCS for a variety of statutory and non-statutory functions, including "to provide the railroad industry and shipper community with a standardized costing model".²⁰ URCS allows shippers and their representatives to apply railroad unit costs to user-defined rail carrier shipments, and thereby assess rail freight rate competitiveness. URCS has allowed third parties to determine revenue and variable cost ratios and contribution margins on individual movements and allowed interested parties to make informed decisions as to whether to challenge a rate before the STB.
29. While there are many important differences between railway price and output regulation in Canada and the United States, and quite different policy objectives, the disclosure of costs under URCS represents a much more common and proven approach to the regulation of network industries, such as rail transportation, even in Canada, that starts with transparency. In this respect, Canadian rail regulatory practice is out of step with other Canadian regulatory environments, as described in detail in our ARCM Submission.
30. For these reasons, the Agency should make the ARCM publicly available, in its present form, just as the STB has done in respect of URCS. The possibility that third parties will learn something about CN's or CP's costs cannot be a reason to withhold such information from disclosure, since both CN and CP are required to make such disclosures in the United

²⁰ Hellerworx Report, page 6 and Appendix 1. Also, see: <https://www.stb.gov/stb/industry/urcs.html>.

States. The resulting dichotomy puts shippers in Canada at a distinct disadvantage to their American counterparts.

31. In any event, the increased disclosure of railway costing information in URCS and its components in the United States has not caused a decrease in the number of revenue adequate railroads; in fact, as the Hellerworx Report indicates, the profitability of railroads in the United States has increased significantly since 2005 despite greater disclosure.²¹
32. As described in the Hellerworx Report, it is not clear that changes to the ARCM, or its underlying components, are necessary.²² Accordingly, we recommend that the Agency not change the ARCM. However, if the Agency determines that changes to, or a recalibration of, the ARCM are required, it should make such changes only after fulsome consultation with interested stakeholders during which those stakeholders are provided with access to sufficient information and data to provide meaningful submissions.²³ If, following that consultation, the Agency determines that changes to the ARCM and its components are required, the Agency should issue a report that discloses any such changes, including, as described in the Hellerworx Report, any “changes in cost/operating statistics relationships, cost calculation methodology, unit costs and cost variability by individual account or groups of accounts for CN and CP”, together with the rationale for each such change.²⁴ The report should also contain a description of the likely impact each change will have on the ARCM and the determination of interswitching rates.²⁵
33. If the Agency determines that it will not disclose the information described above, we recommend that the Agency decline to change the ARCM.²⁶

Economic Regulation Mandate (Disclosure of the ARCM):

The disclosure of the structural form of the ARCM is important, because to the extent information is not freely and fully available to all parties, the inefficiencies of market failure

²¹ Hellerworx Report, Appendix 1.

²² Hellerworx Report, pages 8 – 9.

²³ Hellerworx Report, page 8. The Hellerworx Report describes “recalibration” as meaning “the fundamental relationships between the operating and cost parameters would remain intact, but the constants and regression coefficients on the independent variables could change as a result of updated data and analyses.”

²⁴ Hellerworx Report, page 9. The Hellerworx Report describes the following example of a potentially satisfactory disclosure in respect of a change to the ARCM as: “For example, the report could state that, when implemented, a specific change in the ARCM will cause the variability of gross tonne mile costs to increase by X percent for CN and Y percent for CP.”

²⁵ Hellerworx Report, page 9. The Hellerworx Report provides the following example of a potentially satisfactory description of the likely impact of a change to the ARCM: “For example, a particular change will decrease the variability percent of unit cost per gross tonne mile, which is likely to have an X percent change in the interswitching rates in the next update.”

²⁶ Hellerworx Report, pages 8 – 9.

will remain.²⁷ The most basic of the Agency's mandate pertaining to the economic regulation of railway companies is economic efficiency, which is no different than the basic mandate of other economic regulatory bodies and federal schemes to regulate competition. In this regard, the disclosure of information makes both competition and efficiency feasible. The Agency's mandate is not to protect railways from competitive and efficiency-enhancing processes. Several of the following disclosure submissions fall also within this mandate.

Disclosure of Rail in Canada information

34. As discussed above and in the Hellerworx Report, the information that was provided in the former Rail in Canada publication in 2009 and earlier is important to ensure that third party costing models have sufficient data, including in respect of the relationships between cost and operating statistics, to produce reliable cost estimates.²⁸ We recommend disclosure of past or archived information, including cost and operational data, formerly contained in the Rail in Canada publication. While the Agency may lack jurisdiction to make such information public, we recommend that the Agency request, in writing, that StatsCan and Transport Canada resume the disclosure of this information, and that such disclosure would assist the Agency in its efforts to increase the transparency of the Agency's costing processes.²⁹ If StatsCan and Transport Canada determine not to release current information, we recommend that StatsCan and Transport Canada could release three year old information, thereby addressing any reasonable confidentiality concerns, while disclosing useful information that railway costing experts might use to calibrate their costing models and estimates.³⁰

Disclosure of Unit Costs

35. The Hellerworx Report indicates that the CN and CP unit costs are critical to enabling shippers and other parties to calculate railway variable costs.³¹ We recommend that the Agency, as part of its annual interswitching decisions, disclose the unit costs by account or account grouping that it calculates for each of CN and CP, as part of updating the ARCM. We also recommend that it do so in the context of FOA costing determinations, made from time to time.

²⁷ ARCM Submission, Gillen Report, pages 6 – 7.

²⁸ Hellerworx Report, pages 3 – 4, 7.

²⁹ Hellerworx Report, pages 5, 7.

³⁰ Hellerworx Report, page 6.

³¹ Hellerworx Report, page 5.

36. To the extent that the Agency determines that it cannot disclose the unit costs by individual carrier or cost category, we request that the Agency disclose unit cost information by cost account grouping.³²

Disclosure of Drivers and Variabilities

37. We understand that the extent to which a railway cost, as identified in the UCA, varies with various drivers thought to have caused that cost, forms the basis of the ARCM. We fail to see why the identity of the drivers for each cost account or the variabilities are considered confidential information.
38. A non-railway party in possession of all of the drivers and variabilities without access to that railway company's UCA filing lacks the base data from the UCA with which to use the drivers and variabilities to produce the unit costs for the requisite railway cost components. Third party rail costing consultants currently perform this exercise, based on proprietary railway costing models. Those consultants then assess and use observations and data in respect of a subject movement to produce the service units for the movement, to which the consultant applies unit costs in order to produce an estimate of the LRVC.
39. Full disclosure of the drivers and variabilities would allow shippers and their representatives to confirm that a costing model, such as the ARCM or a third party model, uses the most accurate information possible at a given time. Disclosure of the actual disaggregated costs provided in a railway company's UCA filings would lead to even more accurate estimates. Disclosure of the drivers and variabilities would reduce the potential for disputes between shippers and railway companies as to the quality of the shipper's LRVC estimates, whether in negotiations or otherwise.
40. At a minimum, we see no reason why the drivers could not be disclosed in their entirety and in detail and submit that the Agency should release such information regularly and, in any event, no less than annually.

Disclosure of Agency Manuals

41. The Agency has disclosed that it possesses at least the following manuals that are relevant to railway costing matters:
- CN and CP Costing Manuals

³² Hellerworx Report, page 5.

- CN Procedures for the Annual Statutory Determination of CN Revenue and Revenue Caps;
 - CN and CP Procedures for the Annual Statutory Determination of the Volume-Related Composite Price Index (VRCPI Procedure);
 - CP Procedures for the Annual Statutory Determination of CP Revenue and Revenue Caps;
 - The Revenue Cap Program: An Overview of the Agency's Internal Program which fulfills the legislated mandate contained in the Canadian Transportation Agency (Revenue Cap Program Manual);
 - The Volume-related composite price index: A Component of the Revenue Cap – An overview of the Agency's internal program which fulfills the legislated mandate contained in the Canadian Transportation Agency (VRCPI Program Manual);³³ and
 - Generalized Regulatory Costing Manual.³⁴
42. The shipping and receiving stakeholders that rely on interswitching should be able to review the various manuals that are relevant to the Agency's regulatory costing functions. The Agency should disclose Agency manuals that allow the Agency to make its own determinations of the cost variabilities and unit costs to be used in the ARCM, and analyses supporting unit cost determinations.³⁵
43. To the extent the Agency has prepared Agency manuals that do not contain the confidential information of CN and CP, the Agency should disclose these in their entirety, including any analyses supporting Agency decisions regarding unit cost determinations.
44. To the extent that manuals relevant to the determination of interswitching rates may contain a mixture of information prepared by the Agency and information provided by CN or CP that is in fact confidential under the Act, which we conclude must be a small set, the Agency should redact the confidential information and release the remaining portion. If the Agency determines that such disclosure is not permissible, the Agency should disclose a public version of the Agency manual that contains (a) average causal relationships for accounts rolled up into larger groupings than used by the ARCM, and (b) combined cost/operating statistics for CN and CP by account or by account group, all as described in the Hellerworx Report.³⁶

³³ The Agency's website discloses the existence of these manuals on its "Sources of Federal Government and Employee Information" page: <https://www.otc-cta.gc.ca/eng/publication/sources-federal-government-and-employee-information>.

³⁴ The Agency's Generalized Regulatory Costing Manual is referenced in the title of the consultation document the Agency issued in connection with the ARCM Consultation.

³⁵ Hellerworx Report, page 5.

³⁶ Hellerworx Report, page 7.

45. As we understand it, CN and CP costing manuals describe the form of analysis (e.g., regression, direct assignment, etc.) that relate costs to operating parameters. While it is possible that stakeholders could understand generally how revised analyses would be performed, they would not allow others to easily produce unit costs. Stakeholders should know how the Agency receives information from CN and CP and how the Agency will direct CN and CP, using its authority under subsection 157(5), especially the “form and manner” language, to specify how they are to capture, process and produce information. For example, will the Agency require divisional data? To the extent that CN and CP produce the processed inputs relied on by the Agency for modeling (e.g., unit costs), the more important it is for stakeholders to know what is in the CN and CP costing manuals.
46. To the extent that the Agency determines that it is unable to disclose one or more manuals or such disclosed manuals can only contain a high level non-quantitative description of the relationships between the cost and operating accounts, we recommend that the Agency issue a public supplement to the Agency manual that discloses the (a) average causal relationships for accounts rolled up into larger groupings than used by the ARCM, or (b) cost/operating statistic relationships for CN and CP by account or by account groups.³⁷

Disclosure of CN and CP Costing Manuals

47. The Agency’s website describes the railway costing manuals as follows:

“The railway companies’ *costing manuals* document the identified causal relationships between expenses and operating statistics....

In accordance with the *Railway Costing Regulations*, railway companies are required to prepare and file with the Agency a costing manual containing complete descriptions of the costing methods and procedures it follows in the development of its costs. The Agency is responsible for confirming the costing manual as filed, or with such changes as the Agency may direct.

The manuals identify the grouping of the expenses for cost analysis purposes (*dependent variable expenses*), the causal factors (*independent variables*), the years of analysis and the method of cost development (direct assignment, direct analysis, regression analysis).”³⁸ [italics in original]

48. We understand that these manuals specify the account aggregations used in the costing process, the driver(s) to which each cost or cost aggregate is related, and the procedure used

³⁷ Hellerworx Report, page 7.

³⁸ According to the Agency’s website entitled “Overview of the Agency’s regulatory costing model”: <https://www.otc-cta.gc.ca/eng/overview-agencys-regulatory-costing-model>.

to quantify the relationship. We understand that numeric values for these quantifications are not included in the manuals.

49. To the extent that the railway manuals contain information that is not confidential under the Act, the Agency should redact the confidential information and disclose the remainder of the railway manuals, at the very least to shippers or intermediaries who rely on the uses to which railway company variable costs are put.

Disclosure of Interswitching Rate Setting Methodology

50. To the extent, if at all, that the amended Interswitching Regulations do not address portions of the Agency's methodology for the determination of interswitching rates, the Agency should disclose that methodology in detail in guidance documents. Such methodological information should include, for each interswitching rate determined and for each interchange location analyzed, the identity and average amount of each service unit. The public will not have access to CN or CP unit costs; they will be unable to determine the variable cost incurred by each, although such disclosure would allow third parties to make reasonable estimates of such costs. We address this topic in more detail below in response to Item 1, Question 4, Part 2.

Disclosure of Form and Manner of Reporting of Unit Costs

51. Subsection 157(5) of the Act requires CN and CP, each year, to provide to the Agency "in the form and manner specified by the Agency" all unit costs, output units and other financial, statistical and supporting information for the preceding calendar year that is required for the Agency's costing processes. The Agency should disclose the form and manner in which it will require CN and CP to provide the requisite information; we do not believe that doing so would involve disclosure of confidential information.

Fixed vs. Variable Costs

52. Certain other clarifications would be helpful to ensure clarity on how the Agency calculates regulated interswitching rates. Order R-91 summarized the Agency staff's review of the variability factors used in the ARCM, including the variable and fixed portions of railway cost accounts. Issue #5 of Order R-91 changed the Agency's determination of the system average contribution to fixed (constant) costs that must be applied to system variable costs to cover system total costs for each of CN and CP.³⁹

³⁹ Paragraph 30 of Order R-91 states: "This means, for CN, the system average contribution to fixed (constant) costs that must be applied to system variable costs to cover system total costs increases from 19 percent to 56 percent, and for CP, it increases from 20 percent to 61 percent. These higher contribution levels are also in better alignment with U.S. practice,

53. As discussed in the Hellerworx Report, the Agency should publish guidance that addresses how the change in the ratio of variable costs versus fixed costs would differentially affect line haul costs and interswitching costs, and whether the ratio is expected to act similarly on each.⁴⁰ Similarly, the Agency should explain the reason for any future changes in the overall ratio of variable costs versus fixed costs for each of CN and CP, and any differential impact on line-haul costs versus interswitching costs.⁴¹
54. In addition, the Agency has made various pronouncements regarding the contribution markup above the LRVC, which was calculated using the “old” variable/constant ratio, required to cover CN’s and CP’s system wide total costs. Guidance as to the effect under the “new” variable/constant cost ratio is necessary so that parties know how to interpret the “old” variable/constant ratio statements, including in the context of interswitching.⁴² The Agency should also issue guidance as to how any future changes in variabilities would impact these ratios and how the change will affect the determination of interswitching rates.⁴³

Economic Regulation Mandate (Fixed vs. Variable Costs):

The present uncertainty regarding the interpretation of the fixed costs versus variable costs ratio is not workable. Agency staff has provided guidance regarding how to make adjustments and account for the effects of R-91 currently. If the Agency makes changes that disturb this guidance, the Agency should issue equally useful guidance. The Agency’s costing processes, particularly in the interswitching and FOA contexts, are intended to provide relief to captive shippers, in the forms of competitive access and more attractive rates and conditions of service, respectively. To advance clarity and to allow shippers to gain confidence in the exercise of remedies under the Act, the Agency should issue guidance on the interpretation of variable versus fixed cost ratios.

Consultation Question 3: Taking into account that Long Haul Interswitching rates are to be set on a case-by-case basis, what type of guidance material would be useful in understanding how the remedy works and how the CTA will make rate determinations?

where by legislative mandate a contribution of up to 80 percent on the calculated variable costs is not eligible for rate disputes before the Surface Transportation Board.”

⁴⁰ Hellerworx Report, page 5.

⁴¹ *Ibid.*, note 40.

⁴² *Ibid.*, note 40.

⁴³ *Ibid.*, note 40.

55. The Agency has already prepared and circulated to interested stakeholders the Proposed LHI Guide and the Proposed LHI Rules. In general, the Proposed LHI Guide provides some useful guidance, although it could be improved by addressing certain other items.
56. To avoid unnecessary confusion, it would be helpful for the Agency to clarify that the overall approach to determining LHI rates is limited to the LHI process, and it is not intended for use in other Agency processes, including FOA or regulated interswitching.
57. The Proposed Guidance Material for LHI applications should reflect amendments made to Bill C-49 regarding access to LHI orders for facilities within 30km of an interchange as well as those that are dual served. As it stands, the Guidance Material definitions of “local carrier” and “Long-haul interswitching point” state require that the point of origin or the point of destination be *exclusively* served by the Class 1 rail carrier. Likewise, under the “Eligibility” section, the Guidance Material states that a shipper may apply for an LHI order if *the shipper has access to the lines of only that railway company at the LHI point*, which is repeated again at point 8.a. in the “What to include in an application” section of the Guidance Material. In fact, C-49 was amended such that the points of origin or destination do not have to be exclusively served by a Class 1 rail carrier. Rather, the amended s.129(1)(a) requires a “shipper has access to the lines of only that railway company at the point of origin or destination of the movement of the shipper’s traffic in the reasonable direction of the traffic and its destination.”
58. An example of how the Guidance Material, and indeed the guidance referred to in Item 5 of our submissions, might be improved by using plain language as follows:
- “Typically, a facility would only have access to an LHI order if it is served by only one Class 1 rail carrier. However, in some circumstances there are facilities that are served by two Class I rail carriers or have access to interswitching and are nevertheless eligible for LHI. The key is whether such a shipper has access to only one Class I rail carrier at origin or destination that is in the reasonable direction of the traffic and the destination of that traffic. Interested shippers should speak with Agency staff before applying for an LHI order.”*
59. Subsection 135(4) of the Act requires the Agency, in setting the LHI rate, to have regard to “the density of the traffic on the lines of the local carrier on which the traffic is to be moved and any long-term investment needed in those lines”.⁴⁴ The Proposed LHI Guide should be

⁴⁴ Subsection 135(4) of the Act states: “The Agency shall determine the rate described in paragraph (1)(b) by having regard to the factors described in subsection (3), the density of traffic on the lines of the local carrier on which the traffic is to be moved and any long-term investment needed in those line.”

expanded to describe how the Agency will use density data in setting LHI rates, how it will determine the extent of the long-term investment needed in the relevant railway lines that is not already captured elsewhere, including how such costs may be amortized, and any related matters.

60. In addition, paragraph 136.6(2)(a) of the Act makes the connecting carrier responsible for a prorated share of the costs of operating and maintaining the interchange during the period during which the LHI order applies.⁴⁵ The Proposed LHI Guide should be expanded to disclose the methodology and inputs that the Agency intends to use in making any determination of the costs of operating and maintaining any interchange, and how it will prorate the share among various users (by carloads, by gross ton-miles, etc.). The Proposed LHI Guide should also disclose whether the Agency will focus on (i) the location that CN and CP actually interchange railcars, or (ii) the place where the line of one railway company connects with the line of another railway company, in situations in which the two are not the same.
61. In addition, paragraph 136.6(2)(b) of the Act makes the connecting carrier responsible for the capital cost of making any change to the interchange that may be necessary for transferring the LHI traffic. The Proposed LHI Guide should identify how the Agency will determine if any changes to an interchange are required, and if so, what changes are required, as well as how the Agency will determine the requisite capital cost and whether and the extent to which those costs can be passed on by the paying railway company to other shippers, to other shippers that use the interchange or just the applying shipper. Failure to disclose on this latter point would simply shift cost burdens from one shipper to others without notice.
62. As the Agency determines a rate for comparable traffic, the basket of comparable traffic should include competitive rates for the remedy to have any value to the shipper seeking the rate and for the LHI remedy to have any meaning. To do so would require an assessment of the degree to which the rates are closely coupled to cost, failing which the rates would exhibit characteristics of monopoly rather than competition. The Agency should disclose the methodology for the determination of the variable cost and contribution margin for the comparable traffic, if not publicly, then to the parties.

⁴⁵ For reference, subsection 136.6(2) of the Act states: “(2) Subject to any agreement to the contrary, the connecting carrier is, in respect of the interchange referred to in paragraph 129(1)(c), responsible for (a) a prorated share, determined in accordance with subsection (3), of the costs of operating and maintaining the interchange during the period in which the long-haul interswitching order applies; and (b) the capital cost of making any change to the interchange that may be necessary for transferring the traffic that is the subject of the long-haul interswitching order.”

63. As the Agency builds a body of procedural and substantive decisions in respect of the LHI remedy, the Agency should publish a description of the issues determined, without disclosing the parties or confidential information, as it has done for the FOA remedy.⁴⁶ At the very least, the Agency should disclose its analysis of the factors it is statutorily required to consider in determining what traffic constitutes comparable traffic, its consideration of the traffic density on the relevant lines of the local carrier, and any long-term investment needed in those lines, and the justifications for each.
64. Certain items should be readily disclosable without issue, including the Agency's determination of the manner in which the local carrier is to fulfill its service obligations in respect of the subject traffic. That determination is no more confidential than an Agency decision following a level of service complaint, except to the extent that the service characteristics would disclose the identity of the applicant shipper.

Economic Regulation Mandate (LHI Guidance Material):

Parliament has determined that economic regulation of CN and CP in particular are required by section 5 of the Act, particularly in the absence of competition and market forces. The LHI remedy was implemented as an attempt to add some degree of balance to the relationship between railway companies and captive shippers. To advance the efficacy of the LHI remedy as an articulation of national transportation policy, and to make it as accessible, predictable and useful as possible for potential LHI applicants, the Agency should expand the Proposed LHI Guide to address the various matters identified above.

Consultation Question 4 (Part 1): Are any provisions of the Railway Costing Regulations of current relevance?

Background

65. The MacPherson Commission was a foundational proceeding in relation to railway costing matters during which CN and CP submitted extensive evidence to demonstrate their financial losses incurred in handling statutory grain and grain products. The MacPherson Commission ultimately led to the implementation of the NTA, 1967, sustained the Agency's costing work through deregulation, the *National Transportation Act, 1987*, and the Act as it stands today. Importantly, it informs the Agency's analysis of railway cost issues to this very day.⁴⁷ The NTA, 1967 established a new national transportation policy that

⁴⁶ Available at: <https://otc-cta.gc.ca/eng/publication/issues-determined-during-final-offer-arbitration>.

⁴⁷ See subsection 157(2) of the Act: "(2) The Agency may also consider (a) the principles of costing adopted by the Royal Commission on Transportation appointed by the Order in Council dated May 13, 1959 in arriving at the conclusions

represented a first step towards deregulation of the Canadian rail industry and made certain amendments to the then applicable *Railway Act*, including the grant of subsidies for uneconomic operations. One of the amendments to the *Railway Act* required that the “items and factors” relevant in the determination of costs for any of the purposes of the *Railway Act* be prescribed by regulation. Shortly thereafter, the Board of Transport Commissioners for Canada prescribed the regulations set out in the Board’s Cost Order. The Board’s Cost Order was controversial; the Provinces of Alberta, Manitoba and Saskatchewan petitioned the Governor-in-Council for an order to rescind it and to require the CTC to hold a public hearing into a replacement railway costing order. The Governor-in-Council ultimately dismissed the petition.⁴⁸

66. Following the formation of the Committee in September 1967, the CTC decided to hold a public hearing regarding the formulation of new costing regulations and to secure the services of a consulting firm, EBS, to obtain expert and independent advice. During the early winter of 1967-1968, the Committee met informally and consulted with interested parties, and recognized the complexity of the issues before it, leading ultimately to a significant public proceeding (the “**Proceeding**”) on February 5, 1968 to address railway costing matters. Shortly thereafter, the Committee assigned to the principal of EBS the task of assembling a technical committee comprised of representatives of railways, provincial governments, shippers, the trucking industry and other industry groups to support the Proceeding. Between February 5 and June 30 of 1968, the technical committee produced many working papers and exhibits, all of which were distributed to the parties participating in the Proceeding. Between June 30 and August 1 of 1968, the parties prepared and submitted their submissions to the Committee. The hearing in connection with the Proceeding started on September 10, 1968, continued through November 14, 1968, and culminated in the issuance of Decision R-6313 and Order R-6313.
67. The present-day RCR substantially codified Order R-6313. The RCR have not been significantly amended since they became effective in 1980 and not at all since the Act came into force.⁴⁹ Despite the outdated statutory references in the RCR, certain provisions and principles set out in the RCR undoubtedly remain useful for various Agency functions, including those not strictly governed by any law or regulation.

contained in its report; and (b) later developments in railway costing methods and techniques and current conditions of railway operations.”

⁴⁸ Order-in-Council P.C. 1967-2063, dated October 31, 1967.

⁴⁹ Section 5 of the RCR was amended by SOR/86-26 dated December 19, 1985 to permit the inclusion of income tax as a normal business expense in the determination as to whether a line or service is uneconomic, and by SOR/87-149 dated March 16, 1987 to eliminate a discrepancy between the English and French versions of the provision. Both revisions pre-date the implementation of the Act.

68. We acknowledge that the new subsection 157(5) of the Act, which came into force with the recent passage of the *Transportation Modernization Act*, crystallizes into the Act the Agency's ability to require CN and CP to provide costing information:

“No later than August 31 of every year, the Canadian National Railway Company and the Canadian Pacific Railway Company shall provide to the Agency, in the form and manner specified by the Agency, all unit costs, output units and other financial, statistical and supporting information for the preceding calendar year that is required for the determination of costs by the Agency under this Part.”⁵⁰ [underlining added]

69. We also acknowledge that the scope of subsection 157(5) of the Act largely replicates, with the exception of the word “financial”, the scope of information required under section 10 of the RCR:

“Railway companies shall make available to the Committee all unit costs, output units and other statistical and supporting information required by order from time to time by the Committee in determining whether cost submissions are acceptable for the purposes of the Act.” [underlining added]

70. Accordingly, at least in relation to CN and CP, so long as subsection 157(5) remains in the Act in its present form, we raise no objection to the repeal of section 10 of the RCR. However, subject to our acknowledgments at §68, §69 and §83, we oppose a wholesale or partial repeal of the RCR. Any such repeal could permit a railway company to argue that the CTC, when it enacted the RCR, considered it necessary to include the various other sections of the RCR in addition to section 10, so the repeal of some or all of the sections of the RCR other than section 10 may imply that the issues addressed in those repealed sections are beyond the scope of the Agency's jurisdiction under ss.157(5) of the Act. There is no reason to set up a potential jurisdictional limitation in this manner, unless addressed specifically in legislation.

71. We think the following provisions of the RCR remain particularly relevant and important for the reasons set out below.

⁵⁰ We also acknowledge that in the context of the rate per car to be charged for interswitching of traffic, the Agency also has a new power to require information in the new section 128.1 of the Act: “No later than August 31 of every year, a railway company shall provide to the Agency, in the form and manner specified by the Agency, the information or documents that the Agency considers necessary to exercise its powers or perform its duties or functions under section 127.1.”

Railway Manuals (Section 9 of the RCR)

72. As described in detail above, we understand that the railway manuals are an important source of railway costing information that may be lost if section 9 of the RCR were to be repealed. Decision R-6313 helpfully describes the purpose of railway costing manuals:

“He [W. B. Saunders of EBS] recommended that instead, each railway be required to file, as a document supplementary to the Cost Order, a complete description of the methods and procedures for applying the principles contained in the Cost Order.”

The recommendations of EBS in this respect were accepted in principle by all parties but some were of the opinion that such descriptive matter referred to herein as a “Costing Manual” should not be adopted for use in costing without the Committee’s prior approval thereof; others suggested that the Costing Manuals should be developed by the Committee as part of the Cost Order.

In our consideration of these suggestions, we are impressed not only with the desirability but also the necessity for such a Costing Manual. Section 387B of the *Railway Act* requires us to prescribe “items and factors” and we have done so in the Cost Order; the Act, however, does not similarly obligate us to prescribe the methods or procedures for applying such items and factors.

We recognize that it is essential for all concerned to be aware of the methods and procedures and that such methodology be in conformity with the regulations prescribed pursuant to section 387B. We also recognize that there can be no departure from the principles contained in the Cost Order through the medium of some provision in the Costing Manuals, nor can proposed amendments to the Costing Manuals suspend any proceedings pursuant to the *Railway Act* and the Cost Order.”^{51,52} [underlining added]

73. Accordingly, Order R-6313 included a provision that required preparation and submission of railway costing manuals.⁵³ That provision is substantially replicated in section 9 of the RCR:

⁵¹ Decision R-6313, page 410.

⁵² For reference, section 387B(1) of the *Railway Act* stated: “The Commission shall by regulation prescribe for any of the purposes of this Act the items and factors, including the factors of depreciation and the cost of capital as provided in subsection (1) of section 387A, which shall be relevant in the determination of costs, and, to the extent that the Commission deems it proper and relevant to do so, the Commission shall have regard to the principles of costing adopted by the Royal Commission on Transportation appointed by Order-in-Council dated the 13th day of May, 1959, in arriving at the conclusions contained in the report thereof, and to later developments in railway costing methods and techniques and to current conditions of railway operations.”

⁵³ Section 7 of Order R-6313 states: “Cost submissions made pursuant to this Order shall be prepared in accordance with such Costing Manuals as the Committee shall require.”

“Costing Manuals To Be Filed

Cost submissions made pursuant to these Regulations shall be prepared in accordance with such costing manuals as the Committee shall, by order, require.”

74. At the same time as it issued Order R-6313, the CTC issued Order R-6314 that, among other things, required CN and CP to submit their costing manuals to the secretary of the Committee, serve a copy on all parties of record to the Proceeding, and prohibited changes to the manuals thereafter without the written leave of the Committee. Thus, we conclude that the costing manuals of CN and CP are significant documents without which one might be unable to correctly identify the methods and procedures applied to the underlying data. If section 9 of the RCR were to be repealed, the Agency’s ability to require CN and CP to disclose the methods and procedures for applying railway costing data may be diminished, or perhaps lost altogether, which creates an unnecessary risk of losing the valuable explanatory information contained therein.
75. The enduring value of section 9 of the RCR is apparent in a 2016 Agency decision regarding the maximum revenue entitlement for the movement of western grain:

“The Agency’s Costing Model is supported by the Agency’s *Railway Costing Regulations* (SOR/80-310), which updated the previous CTC Order No. R6313, originally issued in 1967. Section 9 of these regulations requires railway companies to maintain costing manuals that embody the costing approach used for regulatory purposes, and to prepare cost submissions in accordance with those manuals. CN’s costing manuals have always listed Yard Switching Minutes (YSMs) as a dependent variable for both below and above the wheel costs including certain crewing costs, and train maintenance costs.”⁵⁴

Economic Regulation Mandate (Railway Manuals):

In the absence of disclosure of the railway manuals, the Agency is the only party that is able to confirm the appropriateness of the methods and procedures applied by each of CN and CP. The continued requirement for CN and CP to prepare and submit manuals to the Agency should ensure a degree of rigour, consistency and fairness in the methods applied by the manuals that may be lost in the absence of Agency review. This is particularly crucial for shippers that are dependent on the Agency’s costing processes, including captive shippers. In any event, without appropriate oversight and review of the railway manuals, stakeholders will have no assurance that CN and CP are not modifying their costing processes to their respective benefit.

⁵⁴ Agency Decision No. 334-R-2016 (Determination by the Canadian Transportation Agency on whether the Maximum Revenue Entitlement (MRE) should include additional mileage for eligible grain movements to the ports of Vancouver, British Columbia and Thunder Bay, Ontario), endnote 2.

Definition of Variable Costs (Section 7 of the RCR)

76. Similarly, the definition of variable costs in section 7 of the RCR remains relevant. As recently as 2017, the Agency cited subsection 7(a) of the RCR as the applicable law regarding variable costs:

“...This question is addressed by reference to the definition of variable costs in the RCR, which is provided in subsection 7(a).”⁵⁵

77. Similarly, the 2004 RIAS in respect of Regulations Amending the Interswitching Regulations recognized the same point:

“The rules for determining railway variable costs are set out in the *Railway Costing Regulations* (SOR/80-310), which stipulate that variable costs shall include increases and decreases in rail operating expenses resulting from changes in the volume of traffic...”⁵⁶ [underlining added]

78. Agency Decision No. 425-R-2011 recently acknowledged the continued relevance of subsection 7(b) of the RCR in the context of the Agency determination of cost of capital rates for federally regulated railway companies:

“[16] Underlying all of these Decisions is a principle set out in the *Railway Costing Regulations*, which came into effect on December 10, 1980. Specifically, paragraph 7(b) of those Regulations requires the Agency, when setting rates for the carriage of goods, to apply the associated rate to the “variable portion of the net book value of the asset.””

[78]....Furthermore, paragraph 7(b) of the *Railway Costing Regulations* requires the Agency, when setting rates for the carriage of goods, to apply the associated cost of capital rate to the “variable portion of the net book value of the asset.”⁵⁷ [underlining added]

79. In our view, section 7 of the RCR retains its relevance in the modern freight rail context and, unless replaced by something of equal or better legislative authority, ought to be retained.

⁵⁵ See Agency Determination No. R-2017-198 (Determination by the Canadian Transportation Agency of the methodology to be used by federally-regulated railway companies to determine the working capital amounts and capital structure for regulatory purposes), at paragraph 18. See also paragraph 13.

⁵⁶ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2004-201), page 1409. See, also, the RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2013-28), page 587.

⁵⁷ Agency Decision No. 425-R-2011 (Review of the methodology used by the Canadian Transportation Agency to determine the cost of capital for federally-regulated railway companies), at paragraphs 16 and 78.

Economic Regulation Mandate (Definition of Variable Costs):

The definition of variable costs is foundational to the ARCM and railway costing generally. Without a uniform and generally accepted definition of variable costs, potential for varying interpretations of the term may exist, which may lead to inaccuracies in cost determinations. Any such potential is completely unnecessary, would significantly decrease the confidence of stakeholders in the Agency's rail costing, and could be avoided by simply retaining section 7 of the RCR. Rail participants that are subject to the market power of CN and CP require a robust railway costing regime to counteract, to some extent, that market power; the addition of any uncertainty to that process is likely to act to the detriment of those and other participants.

Section 8 (Use of Specific Costs)

80. The Agency's decision in Agency Decision No. 67-R-2008 confirmed that the principle set out in section 8 of the RCR that specific costs should be used when known or readily determinable remains relevant, even beyond the rail costing context:

“[107] The use of a system-wide or specific measure of inflation is different from Issue No. 3 (the contribution to constant costs applicable to 1992) as there is no legislation that provides clear direction here. That is, while the Revenue Cap provisions in the CTA direct that the VRCPI is to be developed and applied annually, Clause 57 provides no specific direction concerning the technical calculations that are required for the hopper car maintenance adjustment.

[108] It is appropriate to use specific measures of inflation in the determination of both "embedded" and "actual" hopper car maintenance costs. This is consistent with Clause 57 which calls for an adjustment to reflect costs relating to hopper car maintenance, and is consistent with section 8 of the *Railway Costing Regulations* which supports the use of specific information when such information is known or can be readily determined.”⁵⁸
[underlining added]

81. A further example of the use of section 8 of the RCR can be found in the determination of net salvage value in connection with a railway line discontinuance. In Agency Decision No. 530-R-1998, the Agency stated:

“In a valuation exercise involving net salvage value, the Agency is guided somewhat by the *Railway Costing Regulations*, promulgated pursuant to section 157 of the CTA. These Regulations prescribe items and factors that the Agency shall consider in considering railway costs in the course of carrying out its statutory duties under Part III of the CTA. Section 8 thereof states "Whenever specific costs are known or can readily be determined

⁵⁸ Agency Decision No. 67-R-2008 , paragraphs 107 and 108. See, also, paragraphs 113 and 160.

from [railway] company records, such costs shall be used in lieu of averaged or allocated costs." The Regulations, including section 8, have been and continue to be used for various regulatory purposes wherein the Agency and its predecessors have been called upon to calculate railway company costs. In this net salvage value determination, the Agency will use specific costs when they are known or can readily be ascertained as they are often the best evidence of 'value' in any given circumstance. However, if these costs are not known or cannot be substantiated, the Agency will rely on system-wide averaged or allocated costs. This approach is consistent with the Regulations and the definition of net salvage value as set out by the Agency, above. It is an approach which is respected in the industry and has provided objectivity and consistency over time."⁵⁹ [underlining added]

82. The principle that specific costs should be used when known or readily determinable remains relevant. While previous Agency decisions and adopted practices may preserve that principle, the Agency's decisions and practices would remain non-binding. In addition, the repeal of section 8 of the RCR without replacement may set up an argument that the repeal amounts to a diminishment or even repudiation of that principle, which we doubt is intended.
83. In stating the foregoing, we acknowledge that we have insufficient insight into Agency process and the bases on which the Agency asserts authority and jurisdiction to perform its costing functions. While we accept that subsection 157(5) confers broad authority to compel CN and CP to provide the breadth and depth of information conferred by the RCR, and then some, it is not obvious to us that no harm can or will come by its repeal, including, if only, the usual approach of CN and CP to raise the stakes of a shipper's pursuit of a remedy in order to discipline that and future shippers by pursuing spurious judicial review applications and appeals of Agency decisions, etc.
84. Consequently, we urge caution in contemplating the repeal of the RCR. Shippers rely on a robust Agency regulatory costing system and methodology and any change that impairs that vital Agency function, even to a minor extent, has the potential to operate to the detriment of shippers across Canada, especially for those many shippers who are in no position to bargain with either CN or CP due to the market power of those railway companies and their willingness and pattern of exercising it.
85. We recommend, however, that the Agency modernize the statutory references in the RCR, perhaps by replacing the RCR with a modernized version.

⁵⁹ Agency Decision No. 530-R-1998 (Application by the St. Lawrence & Hudson Railway Company Limited for a determination of the net salvage value of the Goderich Subdivision between mileage 31.75 and mileage 34.9....).

Economic Regulation Mandate (Use of Specific Costs):

The use of specific costs, where known or readily determinable, as opposed to averaged or allocated costs, is a common sense means to avoid unnecessary imprecision in rail costing estimates. No party could claim any harm by the principle remaining intact. However, its removal could easily lead to adverse results. In the present context in which CN and CP know all of their cost data, and shippers and other stakeholders have access to none, any move away from using specific costs can only give CN or CP, as the case may be, the opportunity to modify the applicable average or allocation to its advantage, thereby potentially harming the very stakeholders that rail costing processes are intended to protect.

Consultation Question 4 (Part 2): What information would be useful regarding how costing is set by the CTA?

86. As we explained in some detail above and in the ARCM Submission, insufficient publicly available information exists in respect of regulatory cost determinations under the Act. As a result, the few pieces of information that shippers and their representatives are able to glean from government and railway pronouncements regarding costs are particularly valuable.

Disclosure of Required Contribution to Fixed Costs

87. A particularly useful piece of information is the overall contribution to rail fixed costs that is required for all traffic for CN and CP to cover their respective total costs. For example, a 1997 RIAS described the fixed/variable cost ratio for the movement of western grain traffic, observed that contribution margins were lower for competitive traffic and determined that a 7.5% contribution margin to fixed cost was appropriate for interswitching rates.⁶⁰

88. More recently, a 2013 RIAS in respect of amendments to the Interswitching Regulations updated the required contribution to 20.3%⁶¹

89. Even more recently, the 2014 RIAS in respect of amendments to the Interswitching Regulations stated the following:

“The Agency calculates the system average contribution to fixed cost separately for each carrier. The amount of fixed cost is calculated as the total system cost (available from

⁶⁰ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (1997), Canada Gazette Part I, August 2, 1997, pages 2227 – 2228.

⁶¹ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2013-28), page 590.

financial reports provided to the Agency) less the system variable cost (calculated by the Agency costing model). The system contribution to fixed costs is the amount of fixed costs expressed as a proportion of the system variable costs (calculated for this exercise to be 24%).”⁶² [underlining added]

90. None of the total system cost, the system variable cost, or the ARCM itself is publicly available. The Agency should disclose, for each of CN and CP, the total system cost, broken down by total U.S. system cost and total Canadian system cost, and the system variable cost, again broken down by U.S. system variable cost and Canadian system variable cost. Disclosure of this information would allow shippers to determine the allocation of costs between fixed and variable costs for each of CN and CP in each jurisdiction, and thereby calculate a corresponding contribution required to cover CN or CP’s fixed costs in each jurisdiction, all of which would allow shippers to assess the reasonableness of railway freight rates.

Economic Regulation Mandate (Disclosure of Contribution Margins):

The separate breakdown of Canadian and U.S. total system costs and total variable costs, by railway company, also would allow the Agency and shippers to confirm that that neither CN nor CP are shifting variable or fixed costs from one jurisdiction to another to further their interests at the expense of shippers. Of course, the main rationale for this disclosure is to allow a shipper to get a sense of the economic bargain it achieves after rates and conditions of service are imposed by CN or CP. With sufficient information, that shipper may compare its rates to those paid on average, considering its particular level of and access to service. Without it, CN and CP both extract the producer surplus at the expense of the shipper and the broader economy and to the detriment of Canadian competitiveness.

In the context of rates for regulated interswitching, disclosure of this information allows all shippers to know that the remedy that was designed to make competitive access effective is, in fact, working to that result and that the Agency is safeguarding that access for the benefit of those intended.

Disclosure of Submissions of Interested Stakeholders

91. The Agency should expand its current practice of summarizing the submissions of interested stakeholders in its decisions and other pronouncements regarding costing,

⁶² Subsection 10(4) of the Transportation Information Regulations (SOR/96-334) states: “A class I rail carrier that transports freight must provide to the Minister railway costs and rate determination information, as well as supporting information, for the rail carrier’s Canadian operations, in respect of each annual reporting period, including (a) average long-term variable costs for the rail system; (b) operating statistics for the rail system and rail cost centres and by equipment type and type of service; and c) operating expenses for the rail system and rail cost centres and by equipment type and type of service.”

including amendments to the Interswitching Regulations. For example, the RIAS in respect of the 2004 amendments to the Interswitching Regulations includes the following:

“CN stated that the current contribution to fixed costs is inadequate to allow railways to earn their cost of capital. Rather, a contribution level of 50 percent would be commercially justified so that railways could recover their variable and fixed costs as well as earn their cost of capital...

CP submitted that in providing interswitching services to another railway, the switching railway should receive compensation that provides for full cost recovery. Since the interswitching rates are the same regardless of the commodity switched, the contribution level incorporated in the interswitching rates should therefore reflect at a minimum the average contribution required across all services for the railway to recover its constant costs. CP stated that this required average contribution level is in the order of 25 percent.”⁶³ [underlining added]

92. The disclosure of these contribution requirements, though not authoritative, is nevertheless informative. It is beneficial for a shipper to understand the rationale for CN’s or CP’s stated revenue requirements in any rate or service negotiation, where those are possible and not imposed by CN or CP.⁶⁴ A comparison of individual costs to system costs can become a subject of legitimate examination, both for the carrier and the shipper.
93. In the interest of increasing the transparency of the Agency’s processes, the Agency should disclose the entirety of any and all submissions it receives in respect of costing matters, with commercially sensitive information redacted to the extent necessary to protect relevant commercial interests. In any event, in each and every pronouncement the Agency makes regarding costing matters, the Agency should include a fulsome summary of the salient points made by interested parties in their submissions to the Agency.

Economic Regulation Mandate (Disclosure of Submissions of Interested Stakeholders):

The Agency has not, and should not, accept the high contribution margins demanded by CN and CP, since there is no evidence that such margins are necessary to cover their respective fixed costs and cost of capital. As a matter of consistency with other industries that enjoy the market power associated with natural monopolies, no increase should transpire without stakeholder input. The Agency has sought stakeholder input to interswitching reviews it has previously conducted and should continue to do so. However, as part of its mandate, the

⁶³ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2004-201), page 1412.

⁶⁴ The RIAS in respect of the Regulation Amending the Railway Interswitching Regulations (SOR/2013-28), pages 590 – 594, contain a similarly helpful description of the submissions of the interested stakeholders.

Agency should ensure that it discloses information to interested stakeholders sufficient for them to make informed submissions.

Disclosure of Methodology and Assumptions

94. Detailed disclosure of the methodology used to determine railway costs, the assumptions on which the methodology relies, etc., and the rationale for any change to the methodology are all necessary to ensure the legitimacy and correctness of railway cost determinations. For example, the information contained in Order R-91 and its associated “Report – Development of Variabilities” disclosed certain methodological processes and reached particular conclusions that changed expectations of those who rely on the ARCM. Some were even surprising. Stakeholders need to understand the ARCM, the methodology and assumptions underlying it, and to have confidence in the determinations derived through use of the model, whether for negotiations, regulated interswitching decisions, FOA or other processes. That confidence can be achieved through disclosure of the methodologies and the data, assumptions, formulas, accounts, etc., used to make those determinations.
95. As set out in the Hellerworx Report and elsewhere in these submissions, the Agency should publish the variable costs considered in the development of the interswitching rate for each interswitching zone and disclose the detailed methodology used in calculating those variable costs.⁶⁵ Such disclosure would provide all parties with insight as to how to interpret the contribution margins associated with the interswitching rates relative to the costs that underpin those rates.
96. The Hellerworx Report also describes why the Agency should publish the methodology it used in making the determination of any reduction in costs resulting from moving multiple cars and how that methodology was applied to calculate the interswitching rates for car blocks, including how the minimum car block size was determined.⁶⁶ The Hellerworx Report also recommends that the Agency also publish the variable costs used in making the determination of interswitching rates for car blocks or other distinct types of interswitching movements in order to allow interested parties to know why the Agency selected various car block sizes, and how interswitching rates for various size car blocks vary relative to the costs that underpin those rates.⁶⁷ If the Agency adds or modifies the types of movements for which it calculates distinct interswitching rates, such as distinguishing between urban

⁶⁵ Hellerworx Report, page 9 and response to Item #1, Consultation Question #2 at paragraphs 25 – 54 above. Also, see subsection 127.1(3) of the Act.

⁶⁶ Hellerworx Report, page 10. See subsection 127.1(2)(a) of the Act.

⁶⁷ Hellerworx Report, page 10.

and non-urban railway yards, the Agency should disclose the same information for each type of movement.⁶⁸

97. As discussed in the Hellerworx Report, the Agency should disclose in its guidance material the contribution margin over variable costs used by the Agency to determine the interswitching rates, the Agency's method for calculating the contribution margin it applies to set the interswitching rates, and what that contribution margin represents (*e.g.* system average contribution for all carriers, or the average of CN and CP's average contribution margins, in which case the Agency should disclose what the individual margins would be).⁶⁹ As described below, the Agency has typically made similar statements in its occasional determination of interswitching rates, and such statements are of significant assistance to shippers and their representatives in seeking to assess the competitiveness of rail freight rates, so the somewhat increased disclosure described above should not represent a large departure from the Agency's current practice.
98. We submit that the Agency should disclose the number of movements for which the Agency determined the variable cost for each interchange. The Agency might also disclose the number of railcars interchanged at each interchange or, perhaps, a listing of the top ten interchange locations by annual number of railcars interchanged.
99. In addition, previous Agency decisions regarding interswitching rates have contained helpful information regarding methodology. We have excerpted examples of such decisions in Schedule "B". We recommend the Agency expand the disclosure of the Agency's analyses in such decisions.

Economic Regulation Mandate (Disclosure of Methodology and Assumptions):

At present, stakeholders are left with Order R-91 that contemplates the adoption of a "new Rail Costing System". No such system has been adopted, the ARCM Consultation has not been completed, and statements about the variable/fixed ratio are hanging in a vacuum. We very much encourage the adoption by the Agency of guidance materials to assist stakeholders in understanding the Agency's current methodology and underlying assumptions. We also encourage the Agency to increase the transparency of its railway costing processes, decisions and other public pronouncements.

⁶⁸ Hellerworx Report, page 10.

⁶⁹ Hellerworx Report, pages 9 - 10.

ITEM 2: ADMINISTRATIVE MONETARY PENALTIES

Consultation Question 1: What (if any) provisions of the Act and/or CTA orders should be designated as eligible for enforcement through AMPs?

100. To the extent that AMPs offer a simpler, less costly and timelier means of enforcing statutory obligations and Agency orders, the designation of contraventions as violations under section 177 in Part VI of the Act could provide a valuable additional tool to facilitate compliance with the rail-related provisions of the Act. At the same time, there is a potential that AMPs may not be effective in securing compliance in some circumstances and that the designation of certain rail-related provisions as violations may affect the operation or application of existing enforcement mechanisms.

AMPs in relation to matters not directly involving third parties

101. A number of the examples of rail-related provisions identified in the Discussion Paper for the potential application of AMPs involve non-compliance for which prosecution may be the only enforcement mechanism currently available. These provisions tend to relate to matters that may require an application to the Agency but ordinarily do not include a contested proceeding involving another party. We include in this group the provisions relating to certificates of fitness, approval of railway construction, and requirements to maintain or provide information to the Agency or the Minister. AMPs may offer a useful alternative to prosecution for these types of provisions.

AMPs in relation to matters involving third parties

102. Some rail-related provisions may be addressed through the use of statutory remedies or adjudicative proceedings initiated by third parties. These provisions include, for example, compliance with Agency orders issued on application by a shipper, the provisions governing regulated interswitching (including rates) and the requirement to issue a tariff on request by a shipper.

103. While the use of AMPs possibly could provide an *additional* enforcement mechanism in relation to these third party provisions, in the absence of statutory amendments, designating these provisions for the purposes of AMPs creates the potential for mischief and may in some cases run the risk of being ineffective. For the reasons set out below, we believe that before embarking on designating these types provisions as violations under section 177, the Agency should engage in a further, separate review of each individual potential candidate for designation, with a view to identifying any cases where it may be prudent to refrain from designation in the absence of statutory amendments ensuring that shippers' access to

existing enforcement mechanisms and remedies remains unaffected and that AMPs can function as effective deterrents.

Potential overlap with existing enforcement mechanisms

104. There are certain areas where the use of AMPs could potentially overlap with other enforcement mechanisms. For example, the Discussion Paper lists compliance with Agency orders related to railway service obligations as a potential candidate for enforcement through AMPs. The Agency's order is subject to appeal with leave, on questions of law or jurisdiction only, in accordance with the provisions of section 41.
105. If the shipper is of the view that the railway company is not complying with the Agency's order, the shipper may register the Agency's order in court and use the court's processes to enforce the order. In the case of an order under paragraph 116(4)(c.1) of the Act requiring a railway company to reimburse a shipper for expenses incurred as a result of the railway company's breach, this is a relatively straightforward process. The same would be true in the case of orders specifying readily measurable steps the Agency requires the railway to take.
106. The shipper may also decide to ask the Agency to take action under subsection 33(4) to enforce its order. For example, there may be a dispute over whether the railway company is continuing to breach its service obligations, whether as a result of not complying with the Agency's order or because the railway invokes circumstances arising after the issuance of the original order as justifying the level of service it is providing at that time, or both in combination.
107. In each of these scenarios, the availability or actual imposition of AMPs raises the potential of:
- a. separate review proceedings before the Transportation Appeal Tribunal of Canada (the "**Tribunal**"), in which the review panel has jurisdiction to make its own determination of whether the Agency order has been breached, rather than the more deferential review accorded Agency decisions under the appeal provisions in section 41;
 - b. preliminary motions in the context of any court or Agency proceedings requesting that the proceedings be stayed pending the outcome of review and appeal proceedings before the Tribunal;

- c. preliminary motions objecting to shipper-initiated proceedings on the basis that the AMP regime displaces other enforcement mechanisms in whole or in part;
- d. issues arising in the context of shipper-initiated proceedings as to the effect, if any, to be given to review panel findings of “mitigating circumstances” justifying a reduction in the amount of the AMP imposed;
- e. the Agency declining to take action under subsection 33(4) in favour of the AMPs process.

108. Regardless of the ultimate merits of any one or more objections and arguments that may be advanced, the designation of these kinds of rail related provisions as violations could result in unnecessary and costly hurdles and delay for a shipper seeking to use existing enforcement mechanisms. Given the lengthy process required to amend regulations, removing the designation if and when these issues arise is not a practical option. We submit that the Agency should seek and use express statutory language clarifying these issues and ensuring that a designation in no way affects a shipper’s right to invoke other remedies.

Insufficiency of Maximum Amounts

109. The effectiveness AMPs to secure compliance with rail-related provisions will also depend on the magnitude of the penalties that can be imposed and the provisions to which they are applied.

110. We understand that the Agency is planning to have a sufficient number of enforcement officers to expand all of the enforcement practices that are currently being used in relation to existing designated provisions to rail matters and that this would include targeted investigations, periodic inspections and consideration of AMPs based on findings of non-compliance by Agency members.

111. With respect to the magnitude of the penalties that can be imposed, section 177 sets the maximum amount the Agency can prescribe as an AMP applicable to a railway company at \$25,000. The Agency’s current enforcement regime contemplates a graduated approach to AMPs. In all but the most serious cases, a first violation attracts a formal warning rather than an AMP, and only at the more severe end of the spectrum and only in cases involving repeat violations will the maximum penalty ever be imposed. The deterrent effect of sanctions in this range will vary depending on the nature of the violation and on the potential gain from non-compliance.

112. Non-compliance with statutory or regulatory requirements or with an Agency order is not necessarily – or even typically – a single event; it often involves a continuing state of affairs. Unlike similar legislation⁷⁰, the current provisions governing AMPs do not address the issue of violations that are of a continuing nature. Once a violation has been found and an AMP imposed, the designation may provide little if any additional incentive to remedy ongoing non-compliance sooner rather than later. In the case of non-compliance with section 118, for example, a shipper who cannot ship any of its traffic until the railway issues the requested tariff will take little comfort in the fact that an AMP has been imposed.
113. Even in relation to non-compliance that can be characterized as a discrete event, AMPs may have limited deterrent effect if they are insignificant in comparison with the potential gain from non-compliance. For example, non-compliance with 127(3) by applying the single car rate rather than the car block rate to the movement of a multi-car shipment within interswitching limits could easily represent a difference of over \$20,000 in interswitching revenues. The application of Rule 11 rates published in an open tariff instead of regulated interswitching rates could multiply that difference several times. In comparison, the maximum amount that can be imposed under the current provisions of Part VI of the Act may not be an effective deterrent.
114. It is possible, perhaps likely, that the current magnitude of AMPs and the graduated enforcement approach is suitable for rail provisions involving no third party. However, we urge the Agency to consider AMPs involving third party provisions more thoroughly before beginning the process of designating those provisions as contemplated and to take into consideration the impacts and methods of applying AMPs in those circumstances.

⁷⁰ See, for example, subsection 40.13(2) of the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.) which provides as follows: “40.13(2) A violation that is committed or continued on more than one day constitutes a separate violation for each day on which it is committed or continued.”

ITEM 5: SHIPPER REMEDIES**Consultation Question 1: What tools or information would be useful in accessing and understanding the shipper remedies that are available, and understanding how they will be applied?**

115. We address below certain of the remedies specifically highlighted in the Discussion Paper, following which we identify some potentially useful guidance material and conclude by providing comments in relation to guidance generally.

Item 5, bullet 1: “A new definition of “adequate and suitable” rail service”

116. Any guidance the Agency issues in respect of what constitutes “adequate and suitable” rail service, including under the items enumerated in the new subsection 116(1.2) of the Act, should preserve the three step “Evaluation Approach” to the adjudication of level of service complaints established in *Louis Dreyfus Commodities Canada Ltd. vs. CN*:

“1. Is the shipper’s request for service reasonable?

2) Did the railway company fulfill this request?

3) If not, are there reasons that could justify the service failure?

(a) If there is a reasonable justification, then the Agency will find that the railway company has not breached its level of service obligations;

(b) If there is no reasonable justification, then the Agency will find that there has been a breach of the railway company’s level of service obligations and will look to the question of remedy.”⁷¹

117. The requirement at Step 3 for the railway company to demonstrate “that it was not reasonably possible for it to furnish adequate and suitable accommodation despite its efforts to do so and based on factors clearly not under its control” must not be disturbed.⁷² We do not think it would be difficult conceptually or otherwise for the Agency to continue to apply the Evaluation Approach in the context of the factors described in the new subsection 116(1.2). In particular, we think paragraphs (b), (c), and (d) of subsection 116(1.2) of the Act readily could be addressed at Step 1 of the Evaluation Approach, with the balance of

⁷¹ Letter Decision 2014-10-03, at paragraph 36.

⁷² *Supra*, note 71, at paragraph 56.

factors enumerated in paragraphs (a), (e), (f), (g), (h) and (i) of subsection 116(1.2) of the Act properly considered at Step 3.

118. With respect to paragraph 116(1.2)(g), that is, “the company’s obligations in respect of the operation of the railway under this Act”, we have already experienced shipper reluctance to use the LOS remedy due to this particular consideration. A shipper that contracts with a railway company for the carriage of its goods anticipates that its goods will be shipped. It is an unusual feature of rail regulation that allows a contract to be overridden by the obligations owed by one contracting party to third parties. Through the very common experience of a carrier’s service failure, shippers learn that they are usually left without an ability to enforce their contracts or fear retribution for doing so. Those who are required to ship under tariff, because the carrier imposes one-sided terms or compels the shipper to give up its remedies or otherwise, are even more prone. That is what the LOS remedy is supposed to cure, but the record demonstrates that shippers are expected to provide a lot of evidence about the railway’s business in order to succeed in LOS proceedings. The consideration in paragraph 116(1.2)(g) exacerbates that very problem. Shippers are in no position to attest to the carrier’s other obligations. As a consequence, they must hire outside experts to review those carrier obligations and assess how the Agency will allow those obligations to impact the level of service the Agency will determine is owed to the complaining shipper. If the opinion of the experts and counsel results in an indeterminate outcome, the greatest likelihood is that no complaint will be made. The Agency should address this problem through guidance, by setting out specific principles by which it will abide and providing concrete examples. All of these can be illustrative rather than part of some exhaustive set.

Item 5, bullet 3: “The ability for shippers to seek reciprocal financial penalties in the Arbitration on Level of Services”

119. The ability of a shipper to obtain reciprocal financial penalties in SLA proceedings may be beneficial if those imposed on CN or CP are significant enough to prevent poor service or otherwise reward adequate service. With that objective in mind, the Agency should issue guidance confirming that the discretion of an arbitrator in a SLA proceeding is very broad, and includes the power to impose terms the arbitrator deems appropriate, without fettering that arbitrator’s discretion in any way. Given that an arbitrator is not required to impose penalties at all, after hearing fulsome submissions on point, one consideration must be whether such penalties are significant enough to alter behaviour. Financial penalties that

are set too low⁷³ do not compare well to the harm suffered by shippers following railway service failures, which harms may include lost sales, re-handling costs, trucking costs, and other harms that might be on the order of millions of dollars or more. Any penalty imposed on a carrier must be meaningful to alter the carrier's behaviour, rather than just becoming the cost of business.

Item 5, bullet 4: “A permanent authority for the CTA to prescribe the operational terms of service that can be submitted to Arbitration on Level of Service”

120. The Act does not define the phrase “operational terms” or otherwise constrain the Agency's interpretation of that term. While the former Operational Terms Regulations identified the types of railway service matters that were eligible for SLA in a broad and generally satisfactory manner, they omitted certain other matters that could prevent shippers from securing the level of railway service required for their businesses.

121. For example, there are some contractual terms that would not arise in a competitive market structure. In practice, they unjustly deprive a shipper of needed rail service, excuse the rail carrier from performing its obligations or otherwise make the receipt of such service unjustly expensive.

122. The following is a non-exhaustive list of the kinds of provisions that should be open to contesting in an SLA setting, as well as in other settings:

- provisions giving a railway company the right to unilaterally increase contract rates on 30 days' notice, despite a stated contract term of one or more years;
- provisions giving a railway company the right to avoid its contractual commitments if the railway company embargoes, abandons, sells or otherwise disposes of a line of railway or facility on which service is provided;
- provisions requiring the parties to negotiate a modification to a contract if a ruling or action by a regulatory authority, such as the Agency, imposes significant additional costs to a railway company's operations and performance obligations under that contract and, if the parties fail to agree on a modification, giving the railway company the right to terminate the contract, thereby exposing the shipper to punitive tariff rates;
- provisions purporting to allow a railway company to unilaterally modify rates in response to such additional costs to its operations;

⁷³ For example, Item 5700 of CN tariff 9000 effective as of July 16, 2018 imposes a financial penalty on CN of a mere \$100 per railcar for orders that are in CN's Planned Service Report but not supplied on time.

- provisions incorporating a railway company's tariffs into a contract, some of which inappropriately purport to reduce a railway company's service obligations;
- provisions limiting a railway company's liability in respect of loss, damage or delay to the commodities to a certain monetary value, notwithstanding that negligence or breach of service obligations by the railway company may have caused the loss, damage or delay;
- provisions imposing onerous credit terms, which can be unilaterally modified by the railway company, and where breach of those terms gives a railway company the right to terminate a freight contract.

123. Any regulations that prescribe the scope of "operational terms" for the purposes of SLA should define that term broadly enough to allow a shipper to craft its submission to SLA in such a way that it is able to obtain the rail service it needs, while avoiding any unilateral ability of the railway company to avoid its service obligations or impose additional costs on the shipper, including as described above. We underscore that simply allowing a shipper to address such matters in its submission to SLA does not guarantee, or even imply, that a shipper would be successful on any such matter, because the arbitrator would retain jurisdiction to impose terms. However, inclusion of the foregoing under the heading "operational terms" would at least enable a shipper to make relevant submissions to an arbitrator.

124. Any regulations that prescribe the scope of "operational terms" for the purposes of SLA should avoid provisions that tend to relieve a railway company of its service obligations (*i.e.*, its obligation to comply with operational terms imposed by an arbitrator in SLA) due to circumstances that are in whole or in part of its own making. For example, the former Operational Terms Regulations included "circumstances that would make it impossible for the railway company to comply with an operational term..." as an "operational term", but went on to include "derailment", "a breakdown in a component of the railway", and certain other matters as comprising such circumstances, even though they do not make it "impossible...to comply with an operational term" in many cases.⁷⁴ While such events invariably affect a railway's ability to operate efficiently, they are not necessarily beyond the railway's control in every instance. Where they result from a failure by the railway to properly maintain infrastructure or equipment, for example, a railway should not be excused from service obligations. In addition, where there is a derailment, a railway company may be able to serve a customer via another route, or in the case of "a breakdown in a component

⁷⁴ Subsection 2(i)(iv) and (x) of the Operational Terms Regulations.

of the railway” involving equipment, the railway company might provide service using alternate equipment, or even pay for trucking.

125. We think there may be a question as to whether or not the Agency’s jurisdiction to make regulations in respect of operational terms extends to circumstances that make it impossible for a railway company to comply with an operational term; the scope of the new subsection 169.31(1.1) of the Act only allows the Agency to make regulations as to what constitutes an operational term for the purposes of subsections 169.31(1)(a) to (c) of the Act, none of which contemplate scenarios in which the railway company may not be able to comply with an operational term imposed by a SLA arbitrator.⁷⁵ However, if the Agency determines it has such jurisdiction, we submit that any description of the circumstances in which a railway company is relieved from its obligation to comply with an operational term should be crafted narrowly to avoid allowing the railway company to inappropriately avoid its service obligations.

Item 5, bullet 5: “The ability for shippers to extend, at the outset of the FOA process for rates disputes, the application of an arbitrated rate from one year to two years”

126. This bullet warrants correction, as it implies that the shipper must choose a period of application of either one year or two years. The Act actually allows a shipper to designate a period “not exceeding two years” for which the decision of the arbitrator is to apply, thereby leaving open the possibility that a shipper may designate ANY period less than two years for the application of the arbitral decision.⁷⁶ We ask that the Agency clarify the Discussion Paper and any other public materials to this effect.

Item 5, bullet 6: “A higher cap to use the streamlined FOA process (raised from \$750,000 to \$2 million)”

127. The summary process FOA sections of the Act have consistently lacked clarity as to how one should calculate the upper monetary limit. The Agency should issue guidance as to

⁷⁵ Subsection 169.31(1.1) of the Act states: “The Agency may make regulations specifying what constitutes operational terms for the purposes of paragraphs (1)(a) to (c).” In turn, paragraphs 169.31(1)(a) to (c) state: “...(a) the operational terms that the railway company must comply with in respect of receiving, loading, carrying, unloading and delivering the traffic, including performance standards and communications protocols; (b) the operational terms that the railway company must comply with if it fails to comply with an operational term described in paragraph (a); (c) any operational term that the shipper must comply with that is related to an operational term described in paragraph (a) or (b);...”

⁷⁶ Subsection 161(2)(b) of the Act states: “...(b) the period requested by the shipper, not exceeding two years, for which the decision of the arbitrator is to apply;”.

how one should interpret the phrase “involves freight charges in an amount of not more than \$2,000,000”.⁷⁷ Questions that arise include the following:

- a. Does the use of the word “charges” instead of “rates” mean that the Agency will include amounts paid or payable as incidental charges or as a fuel surcharge in the \$2,000,000 limit?
- b. While the language “the Agency determines that a shipper’s final offer...involves freight charges...” suggests that the determination is forward-looking, the Agency should confirm whether or not that is the case. If it is, the Agency should issue guidance as to how it will determine the quantum of
 - i. revenue from freight rates, which is dependent on the volumes that the shipper may or may not ship in the arbitral period in response to changes in the market for the shipper’s products,
 - ii. fuel surcharge revenue (if included at all), which can vary wildly with changes in fuel prices, and
 - iii. incidental charges (if included at all), which depends heavily on the behaviour of the shipper and the railway company.

128. Our view is that the Agency’s determination as to whether or not the shipper’s final offer “involves freight charges” of not more than \$2 million should be backward looking to allow shippers and their representatives to accurately assess whether summary FOA is available in any given set of circumstances. Any other approach is likely to involve highly speculative calculations that may leave the shipper uncertain as to whether or not the summary process FOA remedy is even available.

129. In addition, to increase the availability of the summary process FOA and thereby make it at least potentially more useful, the Agency might consider issuing guidance that interprets the phrase “involves freight charges in an amount of not more than \$2,000,000” to mean the differential between the total amount of the charges (however interpreted by the Agency) in the shipper’s final offer and those in the railway company’s final offer. To interpret the phrase otherwise significantly reduces the number of disputes that are eligible for summary

⁷⁷ Subsection 164.1 of the Act states: “If the Agency determines that a shipper’s final offer submitted under subsection 161.1(1) involves freight charges in an amount of not more than \$2,000,000, adjusted in accordance with section 164.2, and the shipper did not indicate a contrary intention when submitting the offer, sections 163 and 164 do not apply and the arbitration shall proceed as follows...”

process FOA, because any shipper's final offer that involves charges in the range of \$2 million would imply a differential between the charges in that offer and the railway company's final offer that is far, far less than the \$2 million, which lesser differential is quite possibly not high enough to warrant the costs of a contested proceeding.

Item 5, bullet 7: "A new recourse mechanism for shippers to challenge rail tariffs that allocate liability contrary to the Act"

130. The new remedy in section 137.1 of the Act raises a range of potential issues, and it is important for shippers to understand how this remedy may be useful.⁷⁸ Presumably, the remedy will allow a shipper to file a complaint with the Agency that asserts that a railway company has limited, or purported to limit, in some manner its liability in respect of the movement of the shipper's traffic other than by a written agreement signed by the shipper, perhaps by way of railway tariff.
131. A question remains as to whether the remedy is of any use to a shipper that is party to a contract that incorporates by reference all of the railway company's tariffs.
132. The *Canexus et al. vs. CP* proceedings that culminated, in part, in a Federal Court of Appeal decision confirmed that section 120.1 of the Act is unavailable to contest the reasonableness of provisions in a tariff that are not "associated with a charge" within the meaning of the Act.⁷⁹ In the absence of any further decisions of the Agency or the Federal Court of Appeal on the issue, it appears section 120.1 is unavailable to contest onerous liability terms in a tariff on the basis that they are not associated with a charge.
133. CN and CP tariffs impose onerous liability terms, albeit in somewhat different respects. To the extent that CN and CP insist on the incorporation of all of their tariffs into their confidential contracts, a shipper is exposed to liability for conduct and moral hazards they cannot control, such as indemnification by a shipper for third party liability claims against CN or CP. In the absence of a contract, CN and CP set punitive rates in their tariffs for captive shippers, including shippers of dangerous goods. There is nothing that prevents CN and CP from forcing shippers to agree to the incorporation of tariffs.

⁷⁸ Subsection 137.1 of the Act states: "If, after receiving a complaint, the Agency finds that a railway company is not complying with subsection 137(1), the Agency may order it to take any measures that the Agency considers appropriate to comply with that subsection." The relevant language of subsection 137(1) of the Act states: "Any issue related to liability, including liability to a third party, in respect of the movement of a shipper's traffic shall be dealt with between the railway company and the shipper only by means of a written agreement that is signed by the shipper..."

⁷⁹ *Canadian Pacific Railway Company v. Canexus Chemicals Canada, LP*, 2015 FCA 283.

134. The Agency should issue guidance as to how, if at all, the new section 137.1 of the Act could assist shippers in such circumstances.

Item 5, bullet 8: “Expanded informal dispute resolution services, including facilitation on an anonymous basis”

135. We are aware that the Agency and its staff currently assist parties in resolving potential disputes on an informal basis before the matter escalates to adjudication. We ask that the Agency clarify how, if at all, the new subsection 36.11(2) of the Act will change any of the Agency’s current processes or activities in respect of informal dispute resolution.⁸⁰

FOA

136. While FOA is one of the best tools available to captive shippers seeking relief from excessive rail freight rates and inferior conditions of service, it remains a somewhat opaque process from the shipper’s point of view. Shippers have benefitted from the Agency’s webpage that describes the Issues Determined During Final Offer Arbitration.⁸¹ However, the Agency could increase the transparency of its processes. Shippers would benefit from Agency guidance material that explains the Agency’s FOA processes and procedures in detail (“**FOA Guidance**”).

137. In particular, FOA Guidance should include an illustration of the timing of the various steps in FOA (*e.g.* notice, submission of final offers without dollar amounts, submission of final offers with dollar amounts, etc.), ideally in a readily understandable format, such as a timeline or calendar, using examples that straddle holidays and fall on weekends.

138. FOA Guidance should clarify the extent of the administrative, technical and legal assistance the Agency is able to provide at the request of the arbitrator under subsection 162(2) of the Act and that it may include a determination of the LRVC of the subject movement.⁸² Such guidance should clarify that an arbitrator appointed under section 162 of the Act need only request assistance from the Agency to receive it and, in particular, that agreement of both parties is not required, in accordance with the statements of the Minister of Transport:

“As part of this [FOA] process, an arbitrator is already allowed to request technical assistance, including costing and legal assistance, from the Canadian Transportation

⁸⁰ Subsection 36.11(2) of the Act states: “A member of the Agency or its staff may attempt to resolve in an informal manner with a railway company any issue raised by an interested person to whom it has provided information and guidance. In doing so, the member or staff shall not reveal the identity of the interested person without their consent.”

⁸¹ Available at: <https://otc-cta.gc.ca/eng/publication/issues-determined-during-final-offer-arbitration>.

⁸² Subsection 162(2) states: “The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.”

Agency. There is nothing in the act that obligates the arbitrator to seek the consent of railways for such assistance. The arbitrator can hold any failure on the part of the railways to disclose information against the railway when making a final decision.”⁸³
[underlining added]

139. Further, the document might include guidance as to how an arbitrator should understand and interpret an Agency LRVC determination, and how that determination relates to the final offers of the parties to the FOA in question.

140. When contemplating the extent to which it intends to issue further FOA guidance material, the Agency should be mindful of its present guidance. In that context we note that the Agency’s website entitled “Selecting an Arbitrator: A Resource Tool” contains some incorrect and misleading statements regarding the potential challenge of a FOA arbitrator following his or her appointment:

“Once the Agency has appointed an arbitrator, a party may challenge that appointment only if it becomes aware, after the appointment has been made, of circumstances that cause it to perceive bias or to doubt the arbitrator's impartiality or independence.

A party must challenge the appointment immediately: no later than three days after becoming aware of any circumstances that cause the party to perceive bias or to doubt the candidate's impartiality or independence.

A party wishing to challenge an arbitrator must notify the Agency, the other party and the arbitrator, giving reasons in writing for the challenge.

If one party challenges the arbitrator and the other party concurs with the challenge, the arbitrator will withdraw. The challenged arbitrator may also withdraw when the parties do not concur. In neither case does the withdrawal imply acceptance of the validity of the grounds for the challenge.”⁸⁴

141. While we do not in any way contend that the Agency should not express its position in relation to the foregoing, we submit that the appropriate place to do so is in the context of a properly-documented judicial review application. We do not believe that the Agency has jurisdiction to remove an arbitrator after making the appointment. We think that after the appointment of an arbitrator, the Agency is *functus officio*, and any challenge to the appointment of the arbitrator should properly be brought via a judicial review application to

⁸³ Bill C-49, An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts”, *House of Commons Debates*, 42-1, No 291 (3 May 2018) at 1025 (Hon. Marc Garneau).

⁸⁴ Agency’s website as accessed on September 28, 2018: <https://otc-cta.gc.ca/eng/publication/selecting-arbitrator-a-resource-tool>.

the Federal Court. If the Agency is in agreement, we ask that the Agency revise its webpage accordingly.

142. In addition, the Agency's website formerly contained a document that set out the Agency's rules of procedure for use in FOA (the "**Agency FOA Rules**") under subsection 163(1) of the Act, which provides that the Agency's rules of procedure apply if the arbitrator and the parties are unable to agree as to the procedure to be followed.⁸⁵ The Agency FOA Rules no longer appear on the Agency's website or anywhere else online that we have been able to identify. We think procedural fairness dictates that the parties know the procedure to be followed before embarking on a FOA, including those rules that are to apply if the parties and the arbitrator fail to agree on procedural rules. Consequently, we urge the Agency to make the Agency FOA Rules publicly available on the Agency's website.

Extended Interswitching

143. Shippers are generally aware that the Agency may permit an application for interswitching beyond the 30 kilometre interswitching limit where a point of origin or destination is "reasonably close" to an interchange.⁸⁶ Applications for extended interswitching have been relatively rare, and the decided cases indicate that the actual distance of the shipper facility from the interchange is not the sole determining factor.⁸⁷ If the Agency has any intention of making this remedy more accessible to shippers, it should publish guidance as to the circumstances in which the Agency will grant the remedy, including any clarifications regarding the Agency's interpretation of "reasonably close", together with a listing of points the Agency has determined to be "reasonably close" to an interchange.

General Comments

144. The new subsection 36.11(1) mandates the Agency to publish "general information on its Internet site" as a "measure to inform the public" about the provisions of Parts II and IV. While guidance materials are a valuable resource to anyone dealing with a railway issue or contemplating an application to the Agency, it is trite law that such materials must not fetter the discretion of Agency Members in deciding actual cases before them. The new

⁸⁵ Subsection 163(1) of the Act states: "In the absence of an agreement by the arbitrator and the parties as to the procedure to be followed, a final offer arbitration shall be governed by the rules of procedure made by the Agency."

⁸⁶ Subsection 127(4) of the Act states: "On the application of a person referred to in subsection (1), the Agency may deem a point of origin or destination of a movement of traffic in any particular case to be within 30 km of an interchange if the Agency is of the opinion that, in the circumstances, the point of origin or destination is reasonably close to the interchange."

⁸⁷ In Decision 269-R-1988, the Agency's predecessor granted an application where the radial distance from the shipper's facility to the interchange exceeded the 30 kilometre limit by over 23%. In Decision 165-R-1990, the shipper's facility was found not to be reasonably close to the interchange, even though the radial distance exceeded the limit by only 18%.

subsection does not contemplate the establishment of binding interpretations. Members must remain open to receiving and giving full consideration to arguments and submissions that advocate a departure from guidance materials in a particular case. The Agency might accordingly include in any guidance materials it issues a reminder of the purpose of guidance materials and of the fact that guidance materials are not legally binding.

145. At this time, the Agency does not have the benefit of prior experience with actual cases in relation to the new provisions of the Act. Particularly in relation to these new provisions, but also in connection with remedies that have been in place for some time, it will also be important to ensure that guidance materials are updated on a regular basis to reflect any new jurisprudence.

146. We also recommend that the Agency consider other important sources of guidance for the public and practitioners which are more appropriately suited for providing information about specific or narrower issues. In particular, the Agency should expand the information about decided and pending cases it makes available on its website. Many administrative tribunals offer on-line access to a comprehensive record in all matters before them.⁸⁸ These records include public filings by parties as well as procedural directions, and interim and final decisions issued. They are an important source of guidance for anyone with potential matters before these tribunals. While most of the Agency's final decisions are accessible in the "Decisions and Determinations" section of its website, many letter decisions are not. Non-confidential materials filed with the Agency in a matter can generally be obtained on request, but are not readily accessible on-line.

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

Yours truly,

François Tougas

cc: Teck Resources Limited
Western Grain Elevator Association
Canadian Canola Growers Association
Western Canadian Shippers Coalition
Mining Association of Canada

⁸⁸ For example, the National Energy Board and the Competition Tribunal.

Schedule “A” – Hellerworx Report

Schedule “B” - Excerpts of RIAS Regarding Interswitching Regulations

1. The RIAS in respect of the 2013 amendments to the Interswitching Regulations stated:

“The Agency, through its review of the *Railway Interswitching Regulations*, made changes to its methodology for calculating interswitching rates to better reflect costs associated with interswitching operations. Specifically, Agency staff eliminated the use of linear regression as it forces a relationship which the current data does not support. Linear regression was previously used in the development of interswitching rates to smooth out the results so that the rates increased proportionately with an increase in distance from the interchange. Agency staff found that rates do not necessarily increase proportionately with increases in distance from the interchange. The reasons for this include the fact that the rail network is composed of different grades of track and that customers and their sidings are not identical.

Also, in previous determinations, the Agency had based its assessment of the interswitching variable costs, in respect of trains of 1 to 59 cars, on a three-year moving average of the traffic counts to minimize the effect of the variations in the traffic distribution patterns and ultimately reduce the variability of the results. In the present proposal, the process was modified to use only data relating to the actual traffic interswitched from the most recent year available. This change will allow the analysis to more closely capture the evolving operational environment and respond to observed material changes in the work activities, and reflect more accurately the cost of interswitching.

...During this review, the Agency adopted a more robust methodology that captures the operating data of the railway companies more effectively. The 20.3% contribution reflects what the Agency considers to be “required” contribution. It is based entirely on railway costs and reflects the difference between the variable costs as calculated by the Agency’s Regulatory Costing Model and the total costs incurred by the railway companies as supplied to the Minister of Transport and used in the Agency’s variable cost calculations.”⁸⁹ [underlining added]

2. The RIAS in respect of the 2014 amendments to the Interswitching Regulations to introduce a new Zone 5 described the methodology in general terms, but without detail, without assumptions about changes in work activities in Zone 1 to 4 relative to Zone 5, and with possibly insufficient attention to the well-known cost-tapering effect to which distance gives rise:

⁸⁹ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2013-28), pages 588 - 589. Agency Decision LET-R-66-2010 makes substantially the same points in respect of the elimination of the use of linear regression and three-year versus single year moving average of traffic counts under the headings 2.2.1 (The use of linear regression) and 2.2.2 (Single-year results versus multi-year average), respectively.

“The Agency’s costs are based on a method that captures operating costs, as well as capital costs including depreciation of assets, and returns on investment in those assets. The returns on investment are a weighted average of the returns on debt and the returns on equity, and are determined by the Agency according to its cost of capital methodology....That is, the revenues from providing interswitching service are modeled to be equal to the expected variable cost of providing the service, including a return on debt and equity invested in providing rail service, plus a contribution to the fixed costs.

For all cost determinations, the Agency staff measures the quantity of each activity or process involved in the movement or service, multiplies the quantity of each activity or process by its pre-determined unit cost (including applicable overheads), and sums the costs of all activities or processes.

The measured workloads at each interchange location are multiplied by the unit workload costs. The estimated variable cost in a zone is a weighted average of the interchange variable costs in that zone for CN and CP. Weights are based on the number of cars interswitched at each interchange. A system average contribution to fixed costs is added to the variable costs for each zone to arrive at the interswitching rate for the zone.

The Agency calculates the system average contribution to fixed cost separately for each carrier. The amount of fixed cost is calculated as the total system cost (available from financial reports provided to the Agency) less the system variable cost (calculated by the Agency costing model). The system contribution to fixed cost is the amount of fixed costs expressed as a proportion of the system variable costs (calculated for this exercise to be 24%)⁹⁰

3. The 2013 amendments to the Interswitching Regulations made specific reference and allowed stakeholders to assess the difference between work activities and associated costs as between Zone 4 and Zone 3, down to two geographic centres:

“...The traffic originating or terminating in Zone 4 is highly concentrated in a limited number of interchanges in the Vancouver and Edmonton areas. The geography and the operational conditions prevailing at these interchanges and their associated rail yards are such that their inherent work activities and costs are either similar to or lower than the system weighted average cost for Zone 3 traffic.”⁹¹

⁹⁰ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2014-193), page 2318 - 2319.

⁹¹ RIAS in respect of the Regulations Amending the Railway Interswitching Regulations (SOR/2013-28), page 589.