



25 November 2016

Canadian Transportation Agency
Determinations
15 Eddy Street
Gatineau, Quebec J8X 4B3
Submitted by email to determinations@otc-cta.gc.ca

RE: Agency Case #16-03348 – Response by Moose Consortium Inc. to the Canadian Transportation Agency Staff Letter Dated 24 October 2016

This document provides the response by Moose Consortium Inc. (Moose) to a request by the Canadian Transportation Agency (the Agency) for additional information regarding this company's application for a comprehensive certificate of fitness to develop a 400 km passenger railway undertaking throughout Canada's Greater National Capital Region, and to rebuild or enhance required railway works owned by other companies.

Moose Directors would like an opportunity to make a presentation to the Agency staff who are assigned to this determination, to assist their understanding of our proposal, and of the supporting work our company has underway.

The company's responses are provided in sections, each of which begins with the relevant excerpts of the Agency's letter quoted in bold text.

EXCERPT: Subsection 90(1) of the Canada Transportation Act (CTA) provides that no person shall construct or operate a railway without a certificate of fitness. Section 87 of the CTA defines a "railway", in part, as a railway within the legislative authority of Parliament. Paragraph 92(1) (a) of the CTA provides that the Agency will issue a certificate of fitness for the proposed operation of a railway that relates to a passenger rail service or for the proposed construction of a railway if the Agency is satisfied that there is adequate liability insurance coverage for the proposed operation or construction.

Moose has applied to the Agency to become a "railway company". Section 87 of the CTA states a "railway company means a person who holds a certificate of fitness under section 92, a partnership of such persons, or a person who is mentioned in subsection 90(2)".

The proposed service would operate on existing railway corridors in a six-pointed star pattern radiating from the urban core of Ottawa/Gatineau to termini in semi-rural areas in both Ontario and Québec:

- Smiths Falls ON — Ottawa ON — Gatineau QC — La Pêche (Wakefield) QC;
- Arnprior ON — Ottawa ON — Gatineau QC — Montebello QC;
- Alexandria ON — Ottawa ON — Bristol QC.

Annex F illustrates the termini and routes of each line of the proposed railway undertaking. Annex G is a spreadsheet with more detailed information about the railway lines that Moose would use.

This proposed inter-provincial undertaking invokes Section 92(10)(a) of the Constitution of Canada as

a railway within the legislative authority of Parliament. Also the planned use of the Prince of Wales Bridge, which Parliament has declared to be “for the general advantage of Canada”, and other sections of the Ellwood Subdivision and the Lachute Subdivision, invoke Section 92(10)(c) of the Constitution as a railway within the legislative authority of Parliament.

EXCERPT: 1) Bona fide "railway" operation. As stated in Agency Decision No. 213-R-2001, the proposed construction or operation must concern a bona fide railway operation. ... indicating, conceptually, where and how Moose proposes to use railway infrastructure/assets and the nature of the rail services to be offered...

The Agency cites Decision No. 213-R-2001 as providing criteria for a CTA Section 92(1)(a) application (certificate of fitness), although that case is related to a CTA Section 138 application (running rights). Moose has not applied to the Agency in relation to running rights. However Moose calls attention to the Agency’s approval of the prior 92(1)(a) application for a certificate of fitness by Ferroequus Railway Company Limited in Decision No. 388-R-1999, based upon the straightforward criteria expressed in the Act:

"The Ferroequus Railway Company Limited has applied to the Canadian Transportation Agency (hereinafter the Agency) for the certificate set out in the title. The application was received on March 17, 1999. The Agency has reviewed the material filed and is satisfied that there will be adequate third party liability insurance coverage for the proposed operation of the line of railway." <https://www.otc-cta.gc.ca/eng/ruling/388-r-1999>

The “Analysis and Findings” section of Decision No. 213-R-2001 also addresses issuance of certificates of fitness as follows:

The new market entry provisions for federal railway companies are limited, requiring only a determination by the Agency that an applicant has sufficient third party liability insurance coverage (section 92) for a proposed railway operation or construction.

Prior to a determination of adequate insurance, the Agency must first be convinced that the applicant proposes to operate a railway. Section 87 of the CTA defines both the terms "operate" and "railway". The term "operate", with respect to a railway, is defined, in part, as, "... (including) any act necessary for the maintenance of the railway or the operation of a train", while the term "railway" is defined in part as "meaning a railway within the legislative authority of Parliament and includes...".

The term "propose" is not, however, defined under the statute. In the decisions issued to date by the Agency whereby a certificate of fitness is issued as a result of an application for a proposed operation, the Agency has relied upon statements of intention filed by the applicant. Evidence in support of a proposal has varied from case to case, yet the Agency in each case has been convinced, based upon the information before it, that there is a bona fide proposal to operate a federal railway.

Accordingly, the Agency must determine whether Moose’s CTA Section 92(1)(a) application submitted on 29 June 2016 as credible and is being submitted in good faith.

Moose Consortium Inc. together with its participating companies have invested more than \$300,000 of professional work in good faith towards this proposal to date. This figure can be documented upon request. The participating companies indeed have a *bona fide* intention to expand our consortium with additional firms of appropriate scale and competencies to proceed through to the proposed operation. To this end, on 1 November 2016, Moose issued a formal Request for Expression of Interest (REOI) to four pre-qualified global systems engineering firms. A copy of the REOI letter is attached here as

Annex R for your reference. The relevant sequence in Moose's plan is outlined in the following excerpts from the letter provided to the engineering firms:

On 29 June 2016 MOOSE submitted an application for a certificate of fitness to the Canadian Transportation Agency, with a determination expected before the end of 2016. Expressions of interest from one or more global systems engineering firms are sought by the end of November 2016, after which as Moose Consortium Inc. plans to pursue first round investment of approximately \$10M in order to complete feasibility, planning, consultation and approvals work. ...

Once the initial capital market commitments are secured, Moose Consortium Inc. plans to issue a Call for Proposals only to the firms that submitted a valid Expression of Interest to this present REOI. The requirement would be for a systems engineering company to coordinate all the required feasibility, planning, consultation and approvals work.

Should the project prove to be feasible, and it attracts the larger capital investment required to proceed with implementation, the same company as was selected to undertake the feasibility, planning, consultation and approvals work will have first right of refusal to continue forward in providing integrated project management, systems engineering and general contractor roles.

In support of Parliament's intent in Section 5 of the CTA, the Agency is asked to take into account that Moose is pursuing a 100% commercial private sector approach to passenger railway development, as described in detail in Annex M: "The Property-Powered Rail Open Market Development Model". This is a substantially different method of financing metropolitan railway development than has been pursued in Canada for more than half a century, and it is understandable that the CTA may at first doubt its potential. Moose will be pleased to arrange a conference call with nationally and internationally recognized experts in metropolitan railway finance and in property value methodology who can speak to overall coherence of the fully-commercial model we have developed. As with any business model whether conventional or innovative, some aspects of the concept will need to be adjusted to circumstances as the initiative proceeds.

Our proposed development sequence is summarized in the section of our present reply related to our implementation schedule. Approximately \$10 million to be invested in detailed transportation system modeling, feasibility, planning, consultation and approvals work, third-party business agreements, and capital market financing agreements for such a commercial proposal in a highly regulated sector must logically occur only after the regulator has allowed the business opportunity to be pursued. Taking normal business risk into account, such work can only be reasonably financed after a certificate of fitness has been obtained under CTA Section 92(1)(a), but all such work must be completed before a Railway Operating Certificate can be issued.

In presenting Decision No. 213-R-2001 on a running rights application as relevant to Moose's certificate of fitness application, Moose requests that the Agency avoid inadvertently attaching excessive requirements to this certificate of fitness application beyond the intent of Parliament. We note that with reference to the CTA Section 138 application of Ferroequus Railway Company Limited, in a February 27, 2015 Submission to the Canada Transportation Act Review Panel, Canada's Commissioner of Competition wrote in relation to a later Agency decision involving the same company:

"In the Agency's most recent decision relating to running rights, the 2002 Ferroequus decision, the Agency characterized running rights as an "exceptional remedy" that should be granted only if there is evidence of market abuse or market failure. Despite having received a number of applications for running rights, the Agency has yet to grant one."

Further, the Commissioner of Competition wrote:

"The rail sector is characterized by high barriers to entry. ... These high barriers to entry make it unlikely that a new facilities-based railway will enter the Canadian market, and limit the ability of existing Canadian or foreign railways to expand into additional markets."

There are some natural high barriers to entry in any capital-intensive and highly-regulated business such as railways. However the overall thrust of the Competition Commissioner's 2015 submission was to call attention to whether the Canadian Transportation Agency was indeed facilitating competition as per its mandate under Section 5 of the CTA. On the same day that Moose submitted its application to the Agency of a certificate of fitness, the company also initiated formal communications with the Competition Bureau towards an assessment of the degree of accessibility versus exclusivity of the metropolitan passenger railway market in Canada's Greater National Capital Region. A copy of that letter was provided to the Agency on 29 June Annex Q to its application for a certificate of fitness. It includes the following observations:

[V]arious subject matter experts have described shortcomings in the competitive character of Canadian railway markets, for example:

- *Lawyers Siobhán O'Sullivan (McMillan LLP) and François Tougas (McMillan LLP & Adjunct Professor in Competition Law & Policy, UBC) described the Canadian rail sector as "an industry with very high barriers to entry and a bias against new entry" ("Running Rights and the Public Interest", 47th Annual Proceedings of the Canadian Transportation Research Forum, 2012).*
- *Joseph Monteiro, an economist with the Competition Bureau, Industry Canada, and Gerald Robertson of the Industry Sector, Industry Canada, have observed that even though new shortline railways have been formed in Canada, "one noticeable aspect of this development was the concentration of the ownership of these shortlines" ("Railways in Canada and the Experience with Regulatory Reform, with Emphasis on the Competitive Provisions", 45th Annual Proceedings of the Canadian Transportation Research Forum, 2010).*
- *Considering more specifically the prospects for metropolitan passenger railway in any country, the 2014 global "Future of Urban Mobility" report by the consulting firm A.D. Little observes that in most areas, "the management of urban mobility operates in an environment that is too fragmented and hostile to innovation. Our urban management systems do not allow market players to compete and establish business models that bring demand and supply into a natural balance". <http://www.adlittle.com/future-of-urban-mobility.html>*

The Agency has asked that Moose "clearly demonstrates a bona fide intention to proceed with the proposed operation if its application is successful". Correspondingly, Moose asks that the Agency describe a credible process by which independent start-up companies may enter the inter-provincial metropolitan passenger railway market in Canada's Greater National Capital Region. Our expectation is that the Agency will actively pursue Parliament's intent as expressed in CTA Sections 5(a) and (e), and also that the Agency will take prompt and decisive action to enforce the requirements of CTA Division V when railway works within the legislative authority of Parliament, and which Moose requires for its operations, are informally dismantled and/or obstructed.

EXCERPT: Moose's application must demonstrate that it is a railway company and is in a position to operate a railway, as defined in section 87 of the CTA.

This part of the Agency's letter deviates from the wording and meaning of Sections 91 and 92 of the CTA. This divergence, which has also arisen in previous communications with Agency, was addressed directly in paragraphs 2 and 4 of Moose's 29 June 2016 letter of application which was attached to Moose's original email to determinations@otc-cta.gc.ca. The original letter is re-submitted, and the relevant paragraphs are reproduced here (underlining is in the original). Moose requests that the Agency respond explicitly to our comments on this matter:

2. This letter and its package of attachments constitute Moose Consortium Inc.'s application to the Canadian Transportation Agency for a certificate of fitness. Section 87 of the Canada Transportation Act (CTA) states that "railway company means a person who holds a certificate of fitness under section 92, [or] a partnership of such persons". Subsection 91(1) provides that "Any person may apply for a certificate of fitness for a railway". And Subsection 92(1) of the Act states that "The Agency shall issue a certificate of fitness ... if the Agency is satisfied that there will be adequate liability insurance coverage for the proposed operation or construction, as determined in accordance with the regulations" (emphasis added). Moose notes that 92(1) employs the future tense rather than the present, which is to say, it is clear that the Act does not require full operational coverage to already be in place in order for the Agency to issue a certificate of fitness. Moose also notes that Section 94 anticipates "changes to the construction or operation that may affect the liability insurance coverage". ...

4 Moose has confirmed with its insurance broker of record, Aon Reed Stenhouse Inc. (AON) that there will be adequate liability insurance for the company's operation of the proposed passenger railway undertaking, and for its proposed repair and enhancement of various existing railway works, within all applicable federal laws and regulations. The Agency is asked to promptly notify Moose of any additional information steps or assurances the Agency may require in order to issue a certificate of fitness towards this proposal in accordance with its criteria.

By requiring that Moose's present application demonstrate "that it is a railway company", we believe the Agency puts forward a logical paradox whereby *a person can only obtain a certificate of fitness to become a federal railway company if the person already is a railway company*. This seems to present a complete barrier to entry which makes it impossible for independent start-up companies to enter into the passenger railway sector.

It may be that Agency holds the position that any person applying for a certificate of fitness must first demonstrate that it already is a railway company and is in a position to operate a railway, because it assumes that any start-up must team up with some other incumbent railway company which already holds a certificate of fitness. Moose suggests that such a stance would reduce market competition, unfairly incentivize industry concentration, and impede Parliament's intent in CTA Section 5.

Moose instead asks that the Agency observe the logical order implied in CTA Sections 91 and 92, and that it build into its assessment the commercial business development requirements of independent start-up companies. The Agency should ensure that it offers a workable process to accommodate the entry of new independent start-up companies in all segments of the railway industry. To facilitate market entry, for example, there is nothing in the CTA which prevents the Agency from issuing a certificate of fitness with conditions requiring that before commencing railway operations, the required insurance coverage must come into force. This is precisely what Moose's insurance company Aon Reed Stenhouse outlined in its letter to the Agency, originally provided on 29 June as Annex E, and re-submitted here.

EXCERPT: Information and supporting evidence that Moose should provide in its application includes... a copy of its business plan describing the service to be operated, including: a) the frequency of the service, b) the expected passenger loads, c) the total passenger train-miles, d) the types of population areas served, e) the number of level crossings, f) the speed of trains, g) train crew training and the method of train control ... Information and supporting evidence that Moose should provide in its application includes... that it has or is in a position to obtain (purchase and/or lease) the railway assets and equipment necessary to operate the proposed railway, including rail infrastructure, locomotives and other rolling stock. ...

Details on these matters will be available at the completion of Moose's planning Phase 1(b), with the involvement of systems engineering firm. See the section of this document on the implementation schedule. Very basic answers are provided here, with reference to additional details in some of the Annexes.

(a) Frequency of the service

Moose will provide train service to stations approximately every hour from 5:30 am to midnight. The practical constraints of each line remain to be negotiated with other railway operators.

(b) Expected passenger loads

Each train will consist of three bi-level coaches, for a total seated capacity of 480 per train. It is expected that the entire system will carry more than 30,000 passengers per day.

(c) Total passenger train-miles

Passenger train-miles can only be estimated properly with modeling which has not yet been undertaken. Moose plans to operate on approximately 400 km (250 miles) of existing railway corridors, therefore a preliminary estimate is just over 2 million passenger train-miles per day.

(d) Types of population areas served

Both urban and semi-rural areas of Canada's Greater National Capital Region will be served, including residential, commercial and light industrial localities. Commuters, tourists, recreational and social travellers, major events attendees and ad hoc travellers will be accommodated.

(e) Number of level crossings

The number of level crossings can only be determined at a later date as part of Phase 1b. In the semi-rural areas, level crossings on some of the tracks include private roads.

(f) Speed of trains

Train speed will be suited to circumstances along each railway section. Railway infrastructure upgrades and re-building are being planned for several sections to ensure a minimum of Class 3 throughout. Moose's business model ensures that passenger time on the train is useful time (i.e. with reliable Internet, cafe service, etc.), and therefore does not require high speed despite the distances planned on this network..

(g) Train crew training

Annexes J, Ka, Kb, and L describe the operational and safety requirements for train crews, as well as for contractors and their sub-contractors.

(h) Method of train control

Moose is budgeting for and will require Positive Train Control (PTC) on all its trains.

- (i) Purchase and/or lease of railway assets, equipment necessary to operate the proposed railway, including rail infrastructure, locomotives and other rolling stock.

All railway corridors to be used by Moose will be leased, not owned. Moose has had collaborative initial discussions with the existing operators on the lines which the company proposes to use. These and other stakeholders cannot work toward formalizing conditional agreements until the Agency issues Moose authorization with a certificate of fitness to represent itself as a railway company.

It should be noted that all stations in the “Property Powered Rail: Open Market Development Model” are independent enterprises. They would typically be structured as “common elements freehold commercial condominium corporations”. These condominium corporations would purchase train service on a conditional subscription basis. The rationale and operation of this approach is explained in detail in Annex M. Details on the business arrangements relating to the trains will be determined through Phase 1(a) and concluded in Phase 2. Please see the section of this document on the implementation schedule.

EXCERPT: Information and supporting evidence that Moose should provide in its application includes... an implementation schedule for the proposed operation;

Enforcement of CTA Division V is the Primary Determinant of Moose’s Implementation Schedule

Annex P outlined Moose’s original implementation schedule for 2016 and 2017. But Moose’s actual implementation schedule depends primarily on whether or not the Agency chooses to promptly enforce or to casually overlook violations of CTA Division V in relation to railways that Moose depends upon to operate that are within the legislative authority of Parliament.

The Agency is aware that in 2016 the City of Ottawa was informally allowed to dismantle an approximately 250 meter section of the Ellwood Subdivision, and to build permanent obstructions to this railway, without conformance to requirements under Division V of the CTA. The Agency’s inaction to prevent the severing this sole railway connection between the Ontario and Quebec portions of the National Capital Region has thrown off Moose’s original implementation schedule. The dismantlement and obstruction of the Ellwood Sub at Bayview Station now makes interprovincial rail physically impossible, unless remedied with a by-pass track estimated to cost about \$20 million.

For the time being, a significant part of Moose’s continued business development efforts must be diverted into an attempt, through Agency Case #16-03784, to convince the Agency to fulfill its statutory duty to enforce Division V of the CTA on a railway within the legislative authority of Parliament.

Therefore in the implementation schedule below, Moose’s own target dates have been removed from the sequence because it is the Agency itself which will determine when the interprovincial railway connection will be functionally restored and be serviceable to the benefit of Canada’s National Capital Region.

RESEARCH: Moose Consortium Project 125

Phase 1(a): (Completed as of June 2016) \$250K in-kind or funds, with convertible Promissory Notes. Preliminary research, feasibility and planning, Class D estimates. Decisions on Phase 1(b).

- Moose initiated insurance coverage and negotiated on-going incremental arrangements with Aon Stenhouse Reed.
- Moose applied to the Agency on 29 June 2016 for a certificate of fitness.

Phase 1(b): (Underway as of July 2016) \$5.0M with convertible Promissory Notes. Expanded research, feasibility and planning. Class C estimates. Investor Prospectus to fund Phase 2.

- On 1 November Moose issued a “Request for Expression of Interest” to four prequalified international class systems engineering firms. Responses are invited by 30 November 2016.
- With at least one positive response in hand, beginning in December 2016 Moose will pursue first-round investment of approximately \$10M in order to complete feasibility, planning, consultation and approvals work.

DEVELOPMENT: Moose 125 Consortium & Moose Linked Localities Consortium

Phase 2: \$5.0M in shares. Stakeholder and time commitments and permissions. Complete plans, insurance agreements, certificate of fitness , public relations/marketing. Class B then Class A cost estimates. Investor Prospectus V2 and detailed Phase 3-4-5 plans.

- Once the initial capital market commitments are secured, Moose Consortium Inc. plans to issue a Call for Proposals, which will be open only to the engineering firms that submitted a valid expression of interest. The requirement would be for a systems engineering company to coordinate all the required feasibility, planning, consultation and approvals work.
- Should the project prove to be feasible, and it appears likely to attract the full commercial capital investment required to proceed with implementation, the same company as was selected to undertake the feasibility, planning, consultation and approvals work will have first right of refusal to continue forward in providing integrated project management, systems engineering and general contractor roles.
- Phase 2 development planning studies should be sufficiently advanced that preparatory arrangements for upgrade work on the Prince of Wales Bridge can begin.
- Moose plans to pursue second round investment to finance \$50M of improvements to the Prince of Wales Bridge. Negotiations will be pursued with Ottawa, Gatineau, the Canadian Transportation Agency and other federal stakeholder departments and agencies regarding the bridge upgrade. A “Federal Land Use Application” will be submitted through the NCC.
- Public relations/marketing communications and events will be launched in collaboration with diverse stakeholders to solicit input.

Phase 3: \$500M in shares and fixed-term credit. Core railway infrastructure upgrades and enhancements, terminus and transfer stations. Numerous grade level crossings throughout the 400 km network will be made safe, exceeding safety standards with additional features. Physical work will proceed as approvals are obtained. Detailed plans for Phases 4-5.

Phase 4: \$400M in shares and fixed-term credit. Core equipment and maintenance facilities, additional stations and operational arrangements. Physical work will proceed as approvals are obtained. Moose plans to start operations with readily available reconditioned trains, is planning on about 3 years to order, receive and outfit its preferred train sets. Detailed operational plans will be finalized. Start-up equipment and facilities will be prepared. System/schedule testing will be increased.

Phase 5: Moose rail’s inaugural passenger rail service will open with an annual budget of approximately \$200M for operational expenses, capital maintenance, financed with property revenues. Moose would proceed with incremental growth in regular operations expenses and revenues.

EXCERPT: Information and supporting evidence that Moose should provide in its application includes... agreements in support of essential strategic relationships, such as running rights and access, repair and construction, operating, and maintenance agreements, (the agreements, if not executed in final form, must be sufficiently advanced and can include agreements-in-principal, conditional agreements or memorandums of understanding).

Agreements, agreements in principle, conditional agreements and memoranda of understanding relating to rights, access, repair, construction, operations and maintenance are typically negotiated and committed to, as per normal sequencing in business, after a proponent obtains basic regulatory authorization to develop the proposed project.

Existing railway companies, municipalities, and suppliers generally cannot sign agreements for railway development with a company that is not yet a “railway company” under the CTA. Moose’s 29 June 2016 letter of application which was attached to Moose’s original email to determinations@otc-cta.gc.ca explains that “Moose seeks a certificate of fitness from the Agency pursuant to the purposes and criteria of Sections 91 and 92 of the CTA, in order to be accredited as a federal railway company. This is required in order for Moose to proceed with its core business, financial, technical, regulatory and various stakeholder arrangements involved in developing this initiative, and to negotiate formal agreements to rebuild or enhance required railway works owned by other companies.”

To expect that an independent start-up must have dozens of complex operational agreements in place prior to obtaining initial accreditation as a railway company, particularly where multiple municipal stakeholder rivalries are involved, would undermine the primary rationale for constitutional exemptions from provincial railway prerogative. This was explained succinctly in 1882 by then Prime Minister John A. Macdonald:

"The language cannot be clearer, and the object of this clause, the object of the Imperial Parliament in passing the Act was to prevent the absurdity and expense and obstruction to material progress by compelling every person introducing a great undertaking in each other Province for the general advantage -- to go to the several Provincial Legislatures. They might get power in one, they might be refused in another; they might get restricted powers in one and large powers in another; they might be compelled to submit to conditions varying and inconsistent in their nature. All these obstructions were present in the legislative mind at the time this clause was adopted and it would really introduce some of the worst and most inconvenient features of the Federal system if we were driven to this necessity. It was for the very purpose of avoiding such obstructions that this law was so framed. I say again that we have acted upon that principle." (House of Commons Debates, 20 March 1882, pp 434)

Nonetheless, at a 27 October 2016 meeting of several Mayors and Chief Administrative Officers from multiple municipalities of the Greater National Capital Region, hosted by the Town of Smiths Falls, officials from several of the participating municipalities offered to write letters of support to the Agency toward Moose’s application for a certificate of fitness. This takes time as each of the municipalities must draft and review the text with their respective Councils and staff. We anticipate that these letters will be sent directly to the Agency by the various municipal governments.

Moose also has positive ongoing discussions with commercial railway companies relating to running privileges and dispatch arrangements, including VIA Rail, Genesee Wyoming, Nylene and CN, and with the dispatch and maintenance firm Railterm, amongst others. Contact information can be provided on request. Again, however, such companies await the results of Moose’s certificate of fitness application before they can put in place formal agreements on use of railways and related works and services.

On 1 November 2016, Moose issued a formal Request for Expression of Interest (REOI) to four pre-qualified global systems engineering firms, with a deadline of end-of-day 30 November, provided here as Annex R. The results of this process will be provided to the Agency as supporting documentation.

EXCERPT: The information is also relevant to identifying the scope of the proposed operation and its associated risks in the Agency's evaluation of the adequacy of the third party liability insurance coverage.

Please see Moose's reply below regarding "Adequate third party liability insurance".

EXCERPT: 2) Railway within the legislative authority of Parliament. Moose should provide an explanation and supporting evidence with regards to which of the following criteria it considers applies to the proposed railway, making it subject to federal jurisdiction. A railway may be within the legislative authority of Parliament if it: (i) operates across provincial/territorial or international boundaries; (ii) is owned, controlled, operated or leased by a federal railway; (iii) has been declared by Parliament to be for the general advantage of Canada; or, (iv) is an integral part of an existing federal undertaking.

EXCERPT: Information and supporting evidence that Moose should provide in its application includes... the termini and route of every line of railway proposed to be operated;

As stated in Moose's letter of application submitted on 29 June 2016, Annex F broadly illustrates the termini and routes of each line of the proposed railway undertaking on existing railway works. The system involves a six-pointed star pattern radiating from the urban core of Ottawa/Gatineau to termini in semi-rural areas in both Ontario and Québec:

- Smiths Falls ON — Ottawa ON — Gatineau QC — La Pêche (Wakefield) QC;
- Arnprior ON — Ottawa ON — Gatineau QC — Montebello QC;
- Alexandria ON — Ottawa ON — Bristol QC.

Also as explained in our 29 June letter, Annex G is a work-in-progress spreadsheet entitled "*Railway Infrastructure of Operational Interest to the Moose Consortium*" which contains ongoing updated information about the entire set of railway lines that Moose plans to operate on. Some sections of railway that Moose plans to use have been discontinued, but would be brought back into service (i.e. the Beachburg Sub to Bristol, Quebec).

EXCERPT: 3) Adequate third party liability insurance. In support of demonstrating that adequate third party liability insurance is in place and will remain in place, an application must include: (i) a completed Agency Certificate of Insurance covering the railway operation as proposed. This certificate must be signed by an authorized insurance agent or broker and also by an authorized officer of the applicant; (ii) if there is a self-insurance component (self-insured retention and/or deductible), evidence of Moose's financial capability to sustain the level of self-insurance involved, most reliably in the form of audited financial statements for the three most recent complete fiscal years; and, (iii) if the self-insurance amount is to be guaranteed by a party other than Moose, that party's name, its relationship to Moose (e.g., parent company) its audited financial statements for the three most recent complete fiscal years and an executed copy of an indemnity agreement to this effect between it and Moose must be provided. ... Applications involving passenger operations should also include a detailed rationale as to why the third party liability insurance coverage should be considered adequate for the proposed operation and its attendant risks. This assessment should address both the per-occurrence amount and any applicable annual aggregate limit.

The adequacy of insurance is to be calibrated to the actual operations. Insurance agreements covering operations will be negotiated as part of Phase 2, described in the section of this document relating to the implementation schedule. On 23 February 2016, Moose and Aon Reed Stenhouse signed a Commercial General Liability policy to cover the Moose's current operations, which consist of an office and regional travel. Moose's letter of application which was attached to its 29 June 2016 email to determinations@otc-cta.gc.ca included the following descriptions of annexes related to insurance.

Annex C is a completed certificate of insurance form obtained from the Agency's "Guide to Certificates of Fitness". Pursuant to Section 94 of the Act, details in this document will be updated from time to time as the development advances, after a certificate of fitness is issued.

Annex D provides a "Certificate of Insurance" (Ref.No. 320007384835, for Commercial General Liability) issued by Moose Consortium Inc.'s insurance broker of record, Aon Reed Stenhouse Inc. (AON). It is the world's second-largest risk management service insurance brokerage firm, and is also the largest such firm in Canada.

Annex E is a letter from Moose Consortium Inc's Account Executive in the Construction Services Group of Aon Reed Stenhouse Inc. attesting that the scope of Moose's insurance coverage with AON will expand in accordance with tangible implementation and risk exposure of this railway development.

Also the 29 June 2016 letter stated:

"Moose has confirmed with its insurance broker of record, Aon Reed Stenhouse Inc. (AON) that there will be adequate liability insurance for the company's operation of the proposed passenger railway undertaking, and for its proposed repair and enhancement of various existing railway works, within all applicable federal laws and regulations. The Agency is asked to promptly notify Moose of any additional information steps or assurances the Agency may require in order to issue a certificate of fitness towards this proposal in accordance with its criteria."

EXCERPT: Documents annexed to the application. Agency staff notes that Moose provided a hyperlink to its website to "documents annexed to the application", in lieu of filing the documents with the Agency. Please note that documents must be filed, hyperlinked documents do not form part of the Agency's record.

It is unfortunate and surprising that Agency staff waited four months before informing Moose that it would not accept the submission of supporting documents through use of the global open standard method of Uniform Resource Locators (URLs), for easy download by the Agency. No reason has been provided by the Agency regarding why waited almost the entire 120-day period to inform Moose that it would not accept this method of access to the formal documents described in the company's application letter attached to determinations@otc-cta.gc.ca.

Moose acknowledges that "Canadian Transportation Agency General Rules" (Section 7: Filing a Document) provide that: "Documents can be filed with the Agency and sent to the other parties by ... other electronic means made available by the Agency" and that "The Agency may specify the means by which documents must be filed." Yet Moose would like to inform the Agency that in 2011 during Complaint R8150-063-1 / Case11-05135 - MOOSE Inc. and City of Ottawa which resulted Decision No. 210-R-2012, Moose was served documents by the City of Ottawa's law firm Heenan Blaikie LLB via an approximately equivalent method as Moose used this past June to provide its documents to the Agency. On 12 November 2011 Nicholas Malone of Heenan Blaikie said in an email to Moose: "I have

checked with our paralegal, and proceeding by way of a FTP will not be a problem. Please provide me with the necessary information, and I will forward your instructions to her.”

The chronology of the Agency’s unexplained stance against the use of an open standard method of electronic document transfer follows, for the record (with emphasis added):

- On Wednesday 29 June, Moose submitted to the Agency (via the email determinations@otc-cta.gc.ca) a letter of application for a Certificate of Fitness for the development of an interprovincial railway. The application consisted of a cover letter attached to the email, and twelve annexes A through Q, each described in paragraphs 6 through 22. Since the set of attachments was too large for the Shared Service Canada (SSC) email firewall, Moose posted each of the annexes on a dedicated Web page for convenient download by Agency staff, and the company supplied a URL for access to the complete package of documents. None of the documents contain confidential information.
- On Wednesday 6 July, 2016 Moose received an email from Ms. Anne Banks, a Senior Analyst with the Agency, to notify the company that the application had been assigned case number 16-03348. Her email stated (emphasis added): "This is to acknowledge receipt, on June 29, 2016, of an application from Moose Consortium Inc. to the Canadian Transportation Agency to obtain a certificate of fitness for a railway. The application is being reviewed for completeness and Agency staff may be in further contact, should clarification or additional information be required. If you have any questions or concerns, please address them to: determinations@cta-otc.gc.ca.
- On Tuesday 11 October 2016 Moose sent an email to Ms. Banks to say (emphasis added): "The companies involved in Moose Consortium Inc. wish to know if you can estimate when we may expect to hear back from the Agency regarding our application for a Certificate of Fitness. ... As yet, the Agency has not asked Moose Consortium any questions nor sought any additional information. Does that imply the information we provided with our application is sufficient? Moose Consortium Inc and its member firms have considerable investment and communications ongoing with commercial and government stakeholders. Therefore we would be grateful if the Agency could provide some indication regarding the likely time remaining to issue the determination.”
- On Tuesday 11 October 2016 Moose received an email from the Agency which stated (emphasis added): “Please be assured that we are processing your application and intend to get back to you shortly.”
- On Monday 24 October 2016 Moose received a letter attached to an email from the Agency which stated (emphasis added): “Please note that documents must be filed, hyperlinked documents do not form part of the Agency's record.” In consequence, almost 120 days after the company’s submission of the application, evidently the Agency had not bothered to consult any of the twelve annexes to the cover letter, and thus had kept itself uninformed as to the details of this application. This indifference to the substance of Moose Consortium Inc’s application is inappropriate.
- On Wednesday 26 October 2016 Moose sent an email to the Agency acknowledging receipt of its letter. Moose also explained that its package of attachments with graphics were too large for the email firewall settings implemented by Shared Services Canada (SSC), therefore the Agency should provide a copy of the Agency's published policy on electronic filings or such submissions, as well as a method through which such files supporting an application can be uploaded.

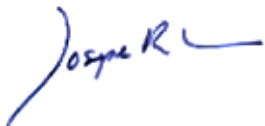
- Three weeks later, on Friday 18 November 2016 the Agency provided Moose a user account in a proprietary file transfer application at <https://tfs-sft.otc-cta.gc.ca>, and related instructions for uploading the documents associated with its application for a certificate of fitness. We observe that the Agency’s method of access to the files ends up to be approximately the same as what Moose provided in June, except that the transfer will now be encrypted, and the submission date is now time-stamped. The encryption is superfluous because none of these documents contain confidential information, and the Canadian Transportation Agency General Rules state that: “All documents filed with the Agency will be placed on the public record unless ... the party filing the document has made a request for confidentiality under section 29 at the time of filing”, which Moose has not done. And in any case, the Agency will be provided the latest versioned and dated working drafts throughout the review process, so it is not clear what material significance a file upload timestamps would carry.

EXCERPT: Next steps: Moose is requested to provide the required information by end of day November 25, 2016. If the necessary information is not provided by this deadline, the file will be closed. In the case of the latter, Moose may refile its application, at a future date, when Moose is in a position to provide all the necessary information.

No reason is given in the Agency’s 24 October 2016 letter or in the “Canadian Transportation Agency General Rules” for imposing a unilateral time limit of 30 days for completing all the required documentation, failing which the Agency will close an application. The Agency held back for four months before requesting any information from the company, and then has asked for excessive detail on a short timeline. There is no reason for the regulator to break off communications on a legitimate and potentially viable application pursued by the applicant and the participating companies in good faith.

Moose requests the opportunity to make a presentation to the Agency staff who are assigned to this determination, to assist with your understanding of our proposal. Also Moose requests that the Agency notify us without delay should the review team require any additional information.

Yours sincerely,



25 November, 2016

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LIST OF ANNEXES

The following attachments are provided to describe the proposed inter-provincial passenger railway service. Annexes H through Q, are supplied in draft form because detailed planning to advance this proposal continues.

- 1 Annex A provides corporate information relating to the Moose Consortium Inc., including a copy of the company's Articles of Incorporation, and of the Moose Consortium Agreement template which summarizes the consortium structure. Moose is a federally incorporated commercial firm with shares held by the member companies of the consortium.
- 2 Annex B outlines the Consortium's phased approach to development, referred to as "*Project 125*". Planning work is currently in Phase 1(b).
- 3 Annex C is a completed certificate of insurance form obtained from the Agency's "*Guide to Certificates of Fitness*". Pursuant to Section 94 of the Act, details in this document will be updated from time to time as the development advances, after a certificate of fitness is issued.
- 4 Annex D provides a "*Certificate of Insurance*" (Ref.No. 320007384835, for Commercial General Liability) issued by Moose Consortium Inc.'s insurance broker of record, Aon Reed Stenhouse Inc. (AON). It is the world's second-largest risk management service insurance brokerage firm, and is also the largest such firm in Canada.
- 5 Annex E is a letter from Moose Consortium Inc's Account Executive in the Construction Services Group of Aon Reed Stenhouse Inc. attesting that the scope of Moose's insurance coverage with AON will expand in accordance with tangible implementation and risk exposure of this railway development.
- 6 Annex F generally illustrates the termini and routes of each line of the proposed railway undertaking on existing railway works. The system involves a six-pointed star pattern radiating from the urban core of Ottawa/Gatineau to termini in semi-rural areas in both Ontario and Québec:
 - Smiths Falls ON — Ottawa ON — Gatineau QC — La Pêche (Wakefield) QC;
 - Arnprior ON — Ottawa ON — Gatineau QC — Montebello QC;
 - Alexandria ON — Ottawa ON — Bristol QC.

The Consortium's business model is based upon leasing rather than owning railway tracks and corridors. Subsection 91(2) of the Act states: "If a person proposes to operate in Canada primarily on the railway of another railway company, the application must indicate the termini and route of every line of railway proposed to be operated." The Consortium will need to rebuild and enhance of certain railway works in corridors owned by other companies. Before Moose can operate its trains on their tracks, these asset owners will necessarily require their own independent validation that Moose holds adequate project liability coverage proportionate to risk.

- 7 Annex G is a work-in-progress spreadsheet entitled "*Railway Infrastructure of Operational Interest to the Moose Consortium*" which contains ongoing updated information about the entire set of railway lines that Moose plans to operate on. A few sections of railway that Moose plans to use have previously been discontinued, and will be brought back into service.
- 8 Annex H is a preliminary engineering report entitled "*Prince of Wales Bridge & Lemieux Island Railway Link Improvement Including "Rails-with-Trails" Pedestrian & Cycling Pathways*" concerning the Chaudière Extension which links the Québec and Ontario railways of Canada's National Capital Region. This report was prepared by Moose Consortium member, REMISZ Consulting Engineers.

- 9 Annex I is a draft "*Preliminary Heritage Value Assessment: Prince of Wales Bridge*". This report is being prepared by Moose Consortium member, MTBA Associates Inc..
- 10 Annex J is Moose's preliminary "*Railway Operations and Maintenance: General Strategy & Preliminary Overview*". This describes Remote Multi-Purpose Terminals (RMPTs) located near each of the six terminus locations, and a Centralized Maintenance and Operations Centre (CMOC) located in an industrial zone of either in Ottawa or Gatineau, all of which will support the maintenance of trains and railway infrastructure. This report is being prepared by Greenspike (9620320 Canada Inc.), a Moose Consortium member in a train operations consulting.
- 11 Annex K is Moose's draft *Passenger Railway Health and Safety Management System: Requirements Manual*, and the *Moose Consortium Emergency Preparedness General Guide*. These and related documents will be completed and provided as part of Moose Consortium Inc's application to Rail Safety Branch, Transport Canada for a *Railway Operating Certificate* which is dependent upon the Consortium's safety management system (processes, procedures, plans, methods and rules of operation). The set of health and safety manuals will be maintained with regular updates. This work was prepared by Moose Consortium member, Dr. Bill Pomfret & Associates (which includes Safety Projects International Inc).
- 12 Annex L is Moose's *Environmental Management System Manual* based upon ISO14000. This manual will be completed and provided in operational form to the Canadian Environmental Protection Agency prior to the commencement of passenger rail operations. This report was prepared by Moose Consortium member, Firstwatch Consulting.
- 13 Annex M is a white paper that explains "*The Property-Powered Rail Open Market Development Model*". This business model has a dual purpose: (a) Return on investment optimization in real property; (b) Financing of metropolitan-scale railway transit systems and services. The business driver is to optimize return on investment in real property by delivering metropolitan-scale passenger railway systems and services, on a commercial open-market basis, to a limited number of "Linked Localities". Each station will be owned, developed and operated as an independent business, which could be autonomously or co-operatively owned; profit seeking or not-for-profit; private or public sector. In order to be provided train service, participating owners and investors in commercial and residential property would need to sign an agreement to assign to the railway operations fund a negotiated proportion of actual increments to realized property revenues (marginal increase in leases, rents) and capital gains (marginal increase in sales actually closed in the period) that are statistically attributable to the existence of the railway service. The formula will be calculated from all commercial and residential properties within 0.8 km (i.e. an easy walk) of each station. This document was prepared by Moose Consortium member, The Opman Company. At the Agency's request and under a non-disclosure agreement, Moose Consortium Inc can provide financial projections based on this approach, for the planned metropolitan passenger rail service.
- 14 Annex N is a "*Preliminary Development Concept Review: Moose Rail Transit Stations*" as the "mobility hubs" of each Linked Locality. This report outlines base principles, a modular flexible building system and a guiding framework for planning station sites within typical urban, suburban, village and rural localities of the Moose rail network. (A companion report addresses development around them.) The core urban and suburban stations will link with multiple other transportation modes and infrastructure in the cities of Ottawa and Gatineau. The rural town or recreational access stations will require automobile and shuttle networking. This report is being prepared by Moose Consortium member, MTBA Associates Inc.

- 15 Annex O is a “*Preliminary Development Concept Review: Moose Rail Linked Localities*”. The proposed Moose system currently anticipates early development of approximately 35 Linked Localities, growing to perhaps 50 over the 400 km set of railway routes as the system matures. In this system a Linked Locality is defined geographically as encompassing the area with an easy 5-to-7 minute walk, which is about 800 meters. This circumscribes a 2 km² development area. While the localities will be very diverse in character, they will all be guided by "form-based codes". (A companion report addresses the train stations.) Locations will be determined through a request-for-proposals process that optimizes for property revenues but that holds community socio-economic coherence, such as accommodating a diversity of income levels, as intrinsic development planning principles. This report is being prepared by Moose Consortium member, MTBA Associates Inc.
- 16 Annex P is a pair of brochures entitled: “*Ottawa: Nucleus of Canada's Capital*” and “*Gatineau une ville accueillante qui renforce la capitale du Canada*”. These have been prepared to summarize the public interest benefits of the Moose railway proposal for the cities of Ottawa and Gatineau respectively.
- 17 Annex Q is a letter submitted by Moose Consortium Inc. as a “*Preliminary Step in an Application by Moose Consortium Inc. to Canada's Competition Bureau for a Written Opinion of the Degree of Accessibility Versus Exclusivity of the Metropolitan Passenger Railway Market in Canada's Greater National Capital Region*”. Section 3 of the Canada Transportation Act upholds the federal Competition Act which has amongst its purposes: "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". This document builds upon the “Submission to the Canada Transportation Act Review Panel By the Commissioner of Competition (February 27, 2015)”.
- 18 Annex R is a 1 November 2016 “Request for Expression of Interest (REOI). Context: Management, Systems Engineering & General Contractor for a 400 km Railway Development Throughout Canada's Greater National Capital Region”, with a deadline of 30 November 2016.