



Telecom Costs Order CRTC 2004-2

Ottawa, 19 January 2004

Public Interest Advocacy Centre's application for costs – Public Interest Advocacy Centre's Part VII Application regarding basic toll schedule disclosure

Reference: 4754-217 and 8665-P8-01/02

1. By letter dated 28 August 2002, the Public Interest Advocacy Centre (PIAC), within a Part VII application regarding basic toll schedule (BTS) disclosure by incumbent local exchange carriers (ILECs) (the BTS Disclosure Proceeding), applied for costs for its investigation and pursuit of the matter. By letter dated 24 March 2003, PIAC filed a costs application that confirmed its earlier costs request and that specifically addressed the criteria for an award of costs.
2. On 4 April 2003, Aliant Telecom Inc. (Aliant Telecom) filed comments in answer to PIAC's application for costs. Bell Canada, on behalf of itself, MTS Communications Inc. (MTS) and Saskatchewan Telecommunications (SaskTel) (collectively, the Companies), filed comments on 9 April 2003 and TELUS Communications Inc. (TELUS) filed comments on 3 April 2003.¹ PIAC filed reply comments on 28 October 2002 and 8 April 2003.

The application

3. PIAC submitted that it had met the criteria for an award of costs set out in subsection 44(1) of the *CRTC Telecommunications Rules of Procedure* (the Rules) as it had represented a significant body of subscribers that had an interest in the outcome of the BTS Disclosure Proceeding, that is, all subscribers, since disclosure of BTS rates would be potentially relevant to all, it had participated responsibly, and it had contributed, through its application, to a better understanding of the issues related to the importance of BTS disclosure as a consumer safeguard.
4. In particular, PIAC submitted that it had acted responsibly in initiating the Part VII proceeding by thoroughly investigating the matter and by filing the application only after repeated frustration in obtaining BTS rate information from the Companies, after informing each company of the problem and of PIAC's intention to take action should the problem remain unresolved and giving the Companies ample opportunity to correct the problem. PIAC also submitted that the initiation of the Part VII proceeding was necessitated by the ILECs ongoing negligence and/or disregard of regulatory requirements, which required a significant amount of time for PIAC to investigate.

¹ Bell Canada, SaskTel, MTS, TELUS and Aliant Telecom, in their responses to the Part VII application dated 28 August 2002, had also addressed PIAC's application for costs. Those comments are incorporated in the Position of ILECs, where appropriate.

5. PIAC requested that the Commission fix its costs at \$16,689.98, consisting of \$15,139.98 for legal fees, \$1,350.00 in legal assistant fees and \$200.00 in analyst fees. PIAC's claim included the Federal Goods and Services Tax (GST) on fees less the rebate to which PIAC is entitled in connection with GST. PIAC filed a bill of costs with its application.
6. PIAC submitted that the appropriate respondents in this case were the Companies, Aliant Telecom and TELUS.

Position of ILECs

7. Aliant Telecom submitted that the process of awarding costs fell under Part III of the Rules and that PIAC's Part VII application could not logically be considered to fall under that Part. However, Aliant Telecom recognized that the Commission had, in the past, awarded costs to applicants outside the context of Part III of the Rules, pursuant to the Commission's general power to award costs under section 56 of the *Telecommunications Act* (the Act).
8. Noting that section 44 of the Rules provides for the awarding of costs to interveners, Aliant Telecom submitted that in its Part VII application PIAC was not merely an intervener but, rather, was the applicant and that it was not clear what group or class of subscribers PIAC was representing. Aliant Telecom submitted that awarding costs to PIAC for its research in this matter, with no obvious benefit or detriment to any group of subscribers with the apparent motive to catch the ILECs in non-compliance with a directive made by the Commission five years ago, would be inconsistent with the Rules.
9. Aliant Telecom submitted that if the Commission did consider awarding costs to PIAC to be paid by the ILECs, any financial assistance to PIAC from other sources should be considered. In this regard, Aliant Telecom submitted that PIAC's researcher had requested information from Aliant Telecom to assist in the completion of PIAC's 'ten-year review', which was contracted and funded by Industry Canada. Aliant Telecom submitted that if PIAC's Part VII application was based, in whole or in part, on information collected as part of PIAC's 'ten-year review', then any funding obtained from Industry Canada, or any other source, should be reflected in the taxation of costs, pursuant to subsection 44(7) of the Rules.
10. Bell Canada, on behalf of the Companies, submitted that the Commission should not award costs to PIAC for its Part VII application because it was unwarranted and unnecessary and PIAC had made serious unsubstantiated allegations of deliberate misconduct. The Companies submitted that, in the context of civil litigation, unsubstantiated allegations of deliberate misconduct may disentitle a party to costs, even if that party was successful. The Companies submitted that, in the circumstances, it would be inappropriate to award costs to PIAC.
11. SaskTel, in its answer to the Part VII application, had submitted that not only was PIAC's Part VII application unwarranted and unnecessary, but that PIAC had not acted in a responsible and constructive manner. SaskTel submitted that PIAC had failed to support its serious allegations in the Part VII application that SaskTel knowingly misrepresented its services and had somehow compelled customers to subscribe to its toll plans, thereby making material gain at the customers' expense.

12. TELUS submitted that PIAC's request for costs was unfounded because PIAC's allegations in the Part VII application of TELUS's misconduct with regard to BTS Disclosure were misguided and erroneous. TELUS submitted that PIAC did not demonstrate to the Commission that there was any substance to PIAC's application and that there was no evidence to warrant Commission intervention.
13. TELUS submitted that PIAC's application for costs was at odds with the Commission's consistent approach to costs awards, pursuant to the Rules, in that while the purpose of the Commission's costs awards regime is to fund interventions in proceedings, PIAC was seeking funding for the initiation of the Part VII application. TELUS further submitted that the Commission's approach regarding costs awards was that parties were not granted compensation for expenses undertaken in vindicating their private rights, as occurs with the granting of costs in a judicial setting. Rather, as TELUS submitted, the Commission's focus was on the determination of the public interest, which occurs, in part, via informed public participation in hearings.
14. TELUS also submitted that while the Commission has not adopted the judicial model of granting costs in adversarial proceedings, PIAC's costs application would invoke such a model to be applied. For these reasons, TELUS submitted that PIAC's application for costs with respect to PIAC's Part VII application should be denied.

Reply

15. In reply, with regard to Aliant Telecom's submission that any funding obtained from Industry Canada, or any other source, should be reflected in the taxation of costs, PIAC submitted that it did not intend to charge for any time spent on the investigation of this matter or on its Part VII application that was already funded by other sources.
16. With regard to SaskTel's submission that PIAC did not act responsibly in bringing the Part VII application, PIAC submitted that while the harm caused to consumers in the case of SaskTel is significantly less than that in other cases, the problem of inadequate disclosure nevertheless existed for SaskTel customers and that PIAC provided substantial evidence to support these serious allegations.
17. With regard to TELUS's submission that parties who initiate proceedings could not be compensated via a costs award, PIAC submitted that the Commission did have the power under section 56 of the Act to award costs in any proceedings before it and that the Commission clearly had the power to award costs with regard to PIAC's Part VII application. PIAC submitted that even though awarding costs to a party who initiated the proceeding was unprecedented, this did not mean that it was inappropriate or "at odds with" the Commission's past approach, but merely reflected the fact that the Commission had not previously been asked to award costs in such a circumstance.
18. With regard to TELUS's statement that the purpose of costs awards was "informed public participation in public hearings", PIAC submitted that this statement did not suggest that costs awards should be limited to proceedings brought by other parties or initiated by the Commission. PIAC submitted that a Part VII proceeding was a public proceeding and that

costs had been awarded to an intervener in this very proceeding in *Public Interest Law Centre's application for costs – Public Interest Advocacy Centre's Part VII Application regarding Basic Toll Schedule Disclosure*, Telecom Costs Order CRTC 2003-4, 25 March 2003. PIAC submitted that TELUS's submission failed to appreciate the significance of changes to the regulatory regime over the past decade to the application of costs awards whereby many public interest issues are being dealt with by way of Part VII proceedings.

19. With regard to TELUS's submission that PIAC was invoking a judicial model of granting costs in an adversarial proceeding, PIAC submitted that this distinction was immaterial. PIAC submitted that many Commission proceedings for which costs awards had been granted were highly adversarial. PIAC submitted that the relevant material issue was whether the substance of the litigation was a private matter or a public matter and in this respect, PIAC's application concerned an important public matter, as opposed to a private dispute.

Commission analysis and determination

20. The Commission notes that TELUS and Aliant Telecom submitted that awarding costs to a party that initiated a proceeding was inconsistent with the Commission's costs awards regime as set out in the Rules and that TELUS submitted that PIAC's costs application would inappropriately require the Commission to adopt the judicial model of granting costs in adversarial proceedings. The Commission notes that under subsections 56(1) and (2) of the Act, it may award costs with respect to any proceeding before it and to order "by whom and to whom any costs are to be paid".
21. The Commission considers that the power under section 56 of the Act gives it wide discretion to award costs: (i) in relation to any proceeding before it, which includes Part VII proceedings and adversarial proceedings; and (ii) to be paid to persons other than interveners, which includes parties who initiate Part VII proceedings. The Commission has in the past awarded costs to an applicant who initiated a Part VII proceeding², pursuant to section 56 of the Act. The Commission also has in the past awarded costs to parties in adversarial proceedings.³
22. The Commission notes that Aliant Telecom submitted that if PIAC's Part VII application was based, in whole or in part, on information collected as part of PIAC's research, which was funded by Industry Canada, then such funding should be reflected in the taxation of costs, pursuant to subsection 44(7) of the Rules. Subsection 44(7) of the Rules states that the taxing officer appointed by the Commission shall take into account financial assistance from government or other sources in determining the amount of costs to be awarded under this subsection. This reflects the Commission's policy of encouraging interested or affected parties who lack sufficient funds to participate in Commission proceedings.

² See *Part VII application by Mr. Chris Stark respecting the provision of Fido service to persons who are blind*, Costs Order CRTC 2001-2, 6 February 2001, and *Application to review and vary Order CRTC 2000-531: Télébec ltée – Rate restructuring*, Costs Order CRTC 2001-7, 2 April 2001.

³ See, for example, *Challenge Communications Ltd. v. Bell Canada*, Telecom Decision CRTC 77-16, 23 December 1977 (which was upheld in the Courts, with statements to the effect that costs may relate to adversarial proceedings); *British Columbia Telephone Company – Tariff for the use of underground ducts by cable television licensees formerly served by Okanagan Telephone Company*, Telecom Decision CRTC 79-26, 27 December 1979; and *Colins Inc. et al v. Bell Canada: Application for Costs*; Telecom Decision CRTC 81-11, 28 May 1981.

23. The Commission notes that beginning in June 2002, PIAC had conducted research on long distance rates for a ten-year review of competition and deregulation in the telephone industry, which was funded by Industry Canada. The Commission is of the view that any amount of time claimed for the research conducted with funding from Industry Canada related to the ten-year review should not be allowed, as part of any costs awarded in the present case. The Commission finds, however, that the nature of the research for the ten-year review, funded by Industry Canada, was separate and distinct from the nature of the research relating to PIAC's Part VII application.
24. The Commission finds that PIAC has satisfied the criteria for an award of costs set out in subsection 44(1) of the Rules. Specifically, the Commission finds that PIAC is representative of a group or class of subscribers that has an interest in the outcome of the Part VII application, has participated in a responsible way by making its application only when it felt the results of its investigation warranted such a step, and has contributed to a better understanding of the issues by the Commission.
25. The Commission notes that the rates claimed in respect of analyst, legal and legal assistant fees are in accordance with the rates set out in the Legal Directorate's *Guidelines for the Taxation of Costs*, revised as of 15 May 1998. The Commission also finds that the total amount claimed by PIAC was necessarily and reasonably incurred and should be allowed.
26. The Commission is of the view that this is an appropriate case in which to fix the costs and dispense with taxation, in accordance with the streamlined procedure set out in *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5, 7 November 2002.
27. The Commission finds that the appropriate respondents to PIAC's costs application are the Companies, Aliant Telecom and TELUS.
28. The Commission notes that it has, in previous decisions, allocated the responsibility for the payment of costs among respondents on the basis of the respondents' telecommunications operating revenues (TORs), as an indicator of the relative size and interest of the parties involved in the proceeding. The Commission is of the view that, in the present circumstances, it is appropriate to apportion the costs among the respondents in proportion to their TORs, as reported in their most recent audited financial statements. Given the relative differences in telecommunications revenues between the respondents, the Commission finds that the responsibility for the payment of costs should be allocated as follows:

Aliant Telecom	9%
The Companies	68%
TELUS	23%

29. The Commission notes that Bell Canada filed submissions in the costs proceeding on behalf of the Companies. Consistent with its general approach articulated in *Action Réseau Consommateur, the Consumers' Association of Canada, Fédération des associations coopératives d'économie familiale and the National Anti-Poverty Organization application for costs - Public Notice CRTC 2001-60*, Telecom Costs Order CRTC 2002-4, 24 April 2002, the Commission makes Bell Canada responsible for payment on behalf of the Companies, and leaves it to the members of the Companies to determine the appropriate allocation of the costs among themselves.

Direction as to costs

30. The Commission **approves** the application by PIAC for costs with respect to its participation in the Part VII proceeding.
31. Pursuant to subsection 56(1) of the Act the Commission fixes the costs to be paid to PIAC at \$16,689.98.
32. The Commission directs that the award of costs to PIAC be paid forthwith by Aliant Telecom, TELUS and Bell Canada, on behalf of the Companies, according to the proportions set out in paragraph 28.

Secretary General

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