



Telecom Order CRTC 2016-132

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Determination of interim costs award with respect to the participation of the Affordable Access Coalition in the proceeding initiated by Telecom Notice of Consultation 2015-134 concerning the Commission's review of basic telecommunications services

*The Commission **denies** an application by the Affordable Access Coalition (AAC) for interim costs with respect to its participation in the proceeding to review basic telecommunications services (the proceeding). The Commission considers that the AAC has not demonstrated that it does not have sufficient financial resources to continue participating effectively in the proceeding without an interim costs award.*

However, given the length and complexity of the proceeding, in order to minimize the time that applicants would need to wait for receive final costs, the Commission intends to dispose of final costs applications prior to the release of its decision flowing from the proceeding.

Application

1. By letter dated 23 October 2015, the Affordable Access Coalition (AAC)¹ applied for interim costs with respect to its participation in the proceeding initiated by Telecom Notice of Consultation 2015-134 concerning the Commission's review of basic telecommunications services (the proceeding).
2. On 2 November 2015, Bell Canada et al.² and TELUS Communications Company (TCC) filed interventions in response to the AAC's application. The AAC filed a reply on 9 November 2015.

¹ The Affordable Access Coalition consists of five large public interest organizations: the Association of Community Organizations for Reform Now, Canada; the Consumers' Association of Canada; the Council of Senior Citizens Organizations of British Columbia; the National Pensioners Federation; and the Public Interest Advocacy Centre.

² Bell Canada filed a submission in this proceeding on behalf of itself and its affiliates Bell Mobility Inc.; Câblevision du Nord du Québec inc.; DMTS; KMTS; NorthernTel, Limited Partnership; Northwestel Inc.; Ontera; and Télébec, Limited Partnership (collectively referred to in this order as Bell Canada et al.).

3. The AAC submitted that it had met the criteria for an interim costs award set out in section 63 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) because it represents a group or class of subscribers that have an interest in the outcome of the proceeding, it can assist the Commission in developing a better understanding of the matters to be considered, it undertakes to participate in a responsible way, and it lacks the financial resources to participate effectively in the proceeding.
4. In this regard, the AAC submitted that it represents a large cross-section of Canadians, in particular low-income Canadians and seniors. The AAC submitted that its participation in the proceeding to date has been extensive, in terms of filing both evidence and perspectives that will assist the Commission in its deliberations, including proposals of two funding models relating to the availability and affordability of broadband Internet access services.
5. The AAC submitted that it does not have sufficient financial resources to continue participating effectively in the proceeding without interim costs, particularly since considerable time will elapse until the completion of the proceeding and the granting of final costs. It submitted that failure to obtain interim costs to pay its expert witness will impair its ability to provide further expert evidence on matters where specialized knowledge is needed, thus impairing its ability to continue participating effectively in the proceeding.
6. The AAC claimed \$285,801.03 in interim costs, consisting of \$126,067.30 in legal fees for in-house and outside counsel, \$29,140.30 in legal fees for articling students, \$1,997.50 for analyst fees, \$106,057.77 for expert witness fees, and \$22,538.16 for disbursements. The AAC's claim included the Ontario Harmonized Sales Tax (HST) on fees less the rebate to which the AAC is entitled in connection with the HST. The AAC filed a bill of costs with its application.
7. Further, the AAC clarified that it is not requesting interim costs in addition to whatever final costs are awarded at the end of the proceeding. Rather, any interim costs awarded would be subtracted from any final costs that the AAC might claim.
8. The AAC submitted that the 20 largest telecommunications service providers party to the proceeding are the appropriate parties to be required to pay any costs awarded by the Commission (the interim costs respondents). It submitted that the interim costs should be paid in proportion to the interim costs respondents' telecommunications operating revenues (TORs).³

³ TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

Answer

9. In response to the application, Bell Canada et al. and TCC objected to the AAC's request for interim costs, arguing that it had not demonstrated, supported by evidence, that it lacks sufficient financial resources to continue participating in the proceeding. For instance, there was no evidence presented that the AAC's expert witness has requested payment from the AAC.
10. Bell Canada et al. and TCC also argued that the AAC's participation and behaviour to date in this proceeding indicates that it does not lack financial resources. In Bell Canada et al.'s view, the AAC would likely have undertaken its participation even without an interim costs award, with the expectation of being compensated through final costs as is usually the case. In TCC's view, the fact that the AAC hired counsel and an expert witness demonstrates that it has the resources to pay them, and therefore that it would be inconsistent to grant interim costs in order to allow the AAC to meet its payroll obligations in the ordinary course.
11. In addition, TCC argued that, as demonstrated by the Commission's past practice, interim costs are restricted to disbursements only (e.g. airfare to the hearing, accommodation).
12. Both Bell Canada et al. and TCC submitted that the resources expended by the AAC appear to exceed those necessary to meaningfully participate in the proceeding, and expressed concern that such a large team was leading to inflated costs through redundant work. For its part, TCC submitted that the amount of time devoted specifically to "File Review" was excessive, while Bell Canada et al. argued that the AAC wrongly classified certain resources, resulting in inflated claims (i.e. the articling students ought to have been classified as in-house resources, and the summer student's time should have been classified as that of an in-house legal assistant).

Reply

13. In reply, the AAC argued that the financial resources criterion of the interim costs test does not require an applicant to demonstrate that they are nearly insolvent; rather, they need only demonstrate the need for interim funding "to participate effectively." In its view, it has demonstrated that its participation would be less effective without the benefit of interim costs. It further argued that limiting interim costs to disbursements, as proposed by TCC, would have the effect of limiting the participation of public interest interveners.
14. In response to the concerns regarding the possible misclassification of certain claims, the AAC reduced the amount claimed for its summer student by reclassifying the claim as an "in-house legal assistant." The AAC also acknowledged concerns that meetings among the team might be double-counted, and therefore reduced all meeting time claimed by half. As a result of these changes, the AAC's revised claim for interim costs totalled \$270,516.18.

Commission's analysis and determinations

15. The criteria for an award of interim costs are set out in section 63 of the Rules of Procedure, which reads as follows:

63. The Commission must determine whether to award interim costs and the amount that is to be awarded on the basis of the following criteria:

- (a) whether the applicant has, or is the representative of a group or a class of subscribers that has, an interest in the outcome of the proceeding;
- (b) the extent to which the applicant can assist the Commission in developing a better understanding of the matters to be considered;
- (c) whether the applicant has sufficient financial resources to participate effectively in the proceeding; and
- (d) whether the applicant undertook to participate in the proceeding in a responsible way.

16. The Commission finds that the AAC has satisfied three of the four criteria for an interim costs award. Specifically, the AAC represents a group of subscribers that has an interest in the outcome of the proceeding, it can assist the Commission in developing a better understanding of the matters that are under consideration in the proceeding, and has committed to participating in the proceeding in a responsible way.
17. With respect to the fourth criterion concerning financial resources, the Commission is not persuaded that absent interim costs, ACC will be unable to participate effectively in the proceeding.
18. The AAC has submitted that failure to obtain interim costs to pay its expert witness will impair its ability to develop primary and expert evidence, and thus impact its ability to participate effectively in the proceeding.
19. The Commission notes that the AAC retained its expert witness and a number of legal professionals, as well as an analyst, well before it filed its application for interim costs. Further, the AAC had these various professionals complete a significant amount of work before seeking interim costs, as evidenced by the AAC's submissions in the proceeding and as detailed in its costs application.
20. In the Commission's view, the onus was on the AAC to have applied for interim costs much earlier, prior to the completion of a significant amount of work. By waiting until it had incurred significant costs, the AAC's request is more in the nature of a request for an advance on an award for final costs than a request for interim costs.

21. The test for the award of interim costs is clearly set out in the Rules of Procedure. Interim costs do not consist of an advance on the payment of final costs and it would be inconsistent with the purpose of interim costs if they were awarded in the circumstances of this case.
22. Accordingly, the Commission finds that the AAC has not demonstrated that it does not have sufficient financial resources to continue participating effectively in the proceeding, and therefore it does not meet the criteria for an interim costs award under section 63 of the Rules of Procedure.
23. As required by section 68 of the Rules of Procedure, the Commission will evaluate requests for final costs in light of the criteria set out in that section and any interventions received, particularly with respect to the time and rates claimed by applicants.

Conclusions

24. In light of the above, the Commission **denies** the application by the AAC for interim costs with respect to its participation in the proceeding.
25. However, the Commission acknowledges that the proceeding is both lengthy and complex: begun in April 2015, the proceeding has involved multiple rounds of submissions and will involve a three-week oral hearing in April 2016. A proceeding of this magnitude has resulted in active and ongoing participation by several public interest interveners, including the AAC, over a significant period of time.
26. If the Commission's usual practice were followed, a decision on any final costs applications would only follow once the decision in the main proceeding is published. In order to help minimize the interval that costs applicants would need to wait to receive final costs, the Commission intends to dispose of final costs applications prior to the release of its decision flowing from the proceeding.
27. In addition, the AAC indicated in its application that the amount of hours claimed for certain tasks may appear excessive because the Commission's costs claim forms are not detailed enough to fully describe the varied actions undertaken. The pre-populated categories on the Commission's costs forms represent the most common activities performed by parties during a proceeding. Costs applicants are not, however, limited to using these categories; applicants can insert additional, more granular, categories as required. Complete and accurate costs forms aid in the efficient processing of costs applications by the Commission. When filing their applications for final costs, the AAC and all other costs applicants should therefore ensure that their costs forms are as reflective as possible of the work they undertook over the course of the proceeding.

Secretary General

Related document

- *Review of basic telecommunications services*, Telecom Notice of Consultation CRTC 2015-134, 9 April 2015; as amended by Telecom Notices of Consultation CRTC 2015-134-1, 3 June 2015; 2015-134-2, 22 December 2015; 2015-134-3, 14 January 2016; and 2015-134-4, 9 March 2016