



## Telecom Order CRTC 2017-374

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Ottawa, 23 October 2017

*File numbers: 1011-NOC2016-0192 and 4754-549*

### **Determination of costs award with respect to the participation of the Canadian Internet Policy and Public Interest Clinic in the proceeding that led to Telecom Regulatory Policy 2017-104**

#### **Application**

1. By letter dated 17 January 2017, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) applied for costs with respect to its participation in the proceeding that led to Telecom Regulatory Policy 2017-104 (the proceeding). In the proceeding, the Commission examined the policy issues surrounding the use of differential pricing practices by Internet service providers and established a framework for assessing these practices.
2. The Commission received interventions from Bell Canada and TELUS Communications Company (TCC), both dated 27 January 2017, in response to CIPPIC's application for costs. CIPPIC filed a reply dated 9 February 2017.
3. CIPPIC requested that its application for costs be accepted for consideration even though it was filed after the deadline, as stipulated in the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure), of 30 days following the filing of final representations in the proceeding. CIPPIC submitted that the delay in filing its application was not significant and that there was no prejudice to the other parties to the proceeding, because they still had an appropriate amount of time to file answers. CIPPIC argued that a denial of consideration of its costs application would unfairly prejudice it and would be contrary to the interest of justice.
4. CIPPIC submitted that it had met the criteria for an award of costs as set out in section 68 of the Rules of Procedure because it represented a group or class of subscribers that had an interest in the outcome of the proceeding, it had assisted the Commission in developing a better understanding of the matters that were considered, and it had participated in a responsible way.
5. In particular, CIPPIC submitted that it had a strong interest in the outcome of the proceeding, which intersected directly with its core mandate to "advocate in the public interest on matters arising at the intersection of law and technology." CIPPIC also submitted that its participation was focused on highlighting the instability of any attempts to mitigate the discriminatory impact of differential pricing practices through the establishment of predetermined categories of content. It also advanced

an alternative proposal for assessing competing differential pricing mechanisms that diminishes downstream discrimination and privacy losses, while arguing for a mechanism that would allow for the assessment at the formative stages of a given policy. Further, CIPPIC submitted that its contribution did not duplicate that of the other parties. Finally, CIPPIC asserted that its bill of costs reflected its responsible participation.

6. With respect to the group or class of subscribers represented, CIPPIC submitted that its participation in the proceeding was not on behalf of a particular group or class but rather on behalf of its own interests arising from its public interest mandate. In the alternative, CIPPIC explained that per its mandate, its participation in Commission proceedings has historically been on behalf of most subscribers, since Canadian subscribers across the country would benefit from a more innovative and neutral Internet.
7. With respect to the specific methods of representation, CIPPIC explained that it identified the positions it put forward as being reflective of the interests of Internet service subscribers by engaging with various stakeholders, advocating public interest positions before various bodies, and producing research and analytical reports.
8. CIPPIC requested that the Commission fix its costs at \$33,993, consisting entirely of legal fees. CIPPIC's claim included the Ontario Harmonized Sales Tax (HST) on fees, where applicable. CIPPIC filed a bill of costs with its application. CIPPIC claimed 7.5 days for junior internal counsel at a rate of \$600 per day (\$4,500 total with no HST claimed) and 104.4 hours for senior external counsel at a rate of \$250 per hour (\$29,493 total including the HST).
9. CIPPIC made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents), but noted that it agreed with the application of the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963, with respect to costs respondents in the present case.

## **Answer**

10. Bell Canada argued that a portion of the costs claimed by CIPPIC was not necessarily and reasonably incurred to ensure meaningful participation in accordance with subsection 70(2) of the Rules of Procedure. Bell Canada argued that CIPPIC's extensive reliance on external counsel was excessive and suggested that 50 hours claimed for external counsel should be attributed to internal counsel. This would reduce the total costs claimed from \$33,993 to \$23,918 and reflect an expectation that qualified internal resources should be leveraged as much as possible before applicants turn to external resources.
11. Further, Bell Canada argued that the Commission should seek evidence to support the rates claimed by CIPPIC. Bell Canada noted that the rates set out in the Guidelines are intended to be the maximum amount allowed and that applying for

the maximum amount is a common practice among costs applicants. The company argued that the Commission should seek evidence from applicants regarding the rates ordinarily charged by interveners to clients outside Commission proceedings. Bell Canada further noted that CIPPIC had not indicated whether it was eligible for sales tax rebates. Finally, Bell Canada submitted that the costs respondents should be determined in accordance with the Guidelines.

12. TCC opposed the costs application on the grounds that, contrary to TCC's own interpretation of section 68 of the Rules of Procedure, CIPPIC did not represent a group or class of subscribers. TCC argued that CIPPIC's mandate and prior history of representation are irrelevant to its current application, as is its interest in the proceeding when it does not represent the genuine interests of subscribers. Further, TCC noted that CIPPIC offered no explanation under section 7 of the Rules of Procedure to justify dispensing with the paragraph 68 requirement regarding representation of a group or class of subscribers that had an interest in the outcome of the proceeding.
13. TCC argued that the amounts claimed in respect of external counsel are inconsistent with the requirement for responsible participation. TCC suggested that, if CIPPIC is awarded costs, it be awarded costs for monitoring and appearing at the hearing at the internal counsel rate, plus four hours at the external counsel rate (\$4,000 in total). TCC also suggested that the Commission investigate whether alternative funding sources are available to CIPPIC through its association with the University of Ottawa.
14. With respect to the appropriate costs respondents, TCC referred to its submissions regarding the allocation of costs made in answer to the Equitable Internet Coalition's application for costs associated with its participation in the proceeding, namely that the Commission should ensure that the allocation of the responsibility for payment of costs truly reflects the relative interest and size of the costs respondents, as well as their ability to absorb the costs. According to TCC, the Commission must ensure that it calculates the costs respondents' telecommunications operating revenues (TORs)<sup>1</sup> in an equitable and competitively neutral manner. Specifically, TCC submitted that the Commission should allocate costs based on the TORs of the parent companies of each costs respondent. Further, TCC argued that the Commission should consider the special position of Bell Canada and of Quebecor Media Inc., Videotron Ltd., and Videotron G.P. (collectively, Videotron) with regard to costs, because the proceeding arose in light of the Unlimited Music service proceeding and the proceeding concerning Bell Mobility's and Videotron's mobile TV services.
15. TCC indicated that although the Rules of Procedure do not provide for a right of reply to an answer to a costs application, the company would accept a reply filed within five days of its answer.

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<sup>1</sup> TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

## Reply

16. CIPPIC argued that subsection 27(1) of the Rules of Procedure grants a right of reply, with a 10-day deadline, to all applicants that have received an answer to their application. It posited that the Rules of Procedure abridge the standard time limits for a section 65 application and answer, but they explicitly avoid abridging the subsection 27(1) timeline. CIPPIC suggested that while a five-day limit is an option for the Commission, it would be both unnecessary and inefficient.
17. CIPPIC argued that TCC's interpretation of eligibility for costs ignores the plain and ordinary meaning of paragraph 68(a) of the Rules of Procedure and the broader context of public interest intervention. Further, it argued that its application establishes its representation of a group or class of subscribers with an interest in the outcome of the proceeding. In addition, CIPPIC argued that a purposive interpretation of paragraph 68(a) favours the recognition of broader direct organizational public interest, such as that which CIPPIC advanced in its application.
18. CIPPIC noted that no party questioned the utility of its submissions during the proceeding and explained that the option to recover its costs played a significant role in its ability to participate in the proceeding. CIPPIC argued that neither the assistance it rendered to the Commission nor its capacity to provide that assistance is dependent on the nature of its representation of a group or class of subscribers. Regardless, CIPPIC argued that it did represent a class of subscribers, as evidenced by its alternative claim in its application for costs.
19. With respect to consultation, CIPPIC claimed that neither direct consultation nor a formal relationship with consumers is required, especially when an organization operates under a public interest mandate that aligns with the issues raised in a proceeding. CIPPIC asserted, as a question of fact, that it undertook meaningful consultation with subscribers as a component of its participation in the proceeding. CIPPIC reiterated that it had clearly identified the class of subscribers represented and argued that the Commission has previously endorsed the representation of subscribers in general.
20. CIPPIC submitted that its internal counsel responsible for telecommunications was fully committed to other proceedings both when the Commission launched the proceeding and during the public hearing. As a result, CIPPIC was faced with the choice of either engaging external counsel or not participating in the proceeding, and indicated that its reliance on external counsel was therefore necessary and reasonable. With regard to the rates claimed for external counsel, CIPPIC submitted that the rates established in the Guidelines are not a ceiling but are reflective of market rates. It argued that when the costs applied for are consistent with the Guidelines, the Commission should accept them without requiring further elaboration.

21. CIPPIC clarified that it does not receive rebates for sales tax and that it was largely dependent on external funding to operate. Moreover, any funding it does receive is typically attached to specific projects and cannot be repurposed for participation in Commission proceedings. Finally, CIPPIC confirmed that it did not receive financial support from the University of Ottawa for its participation in the proceeding.

### **Commission's analysis and determinations**

22. CIPPIC's application was filed after the deadline as set out in the Rules of Procedure. However, the Commission considers that the late filing did not prejudice any party to the proceeding, since parties were given notice of the application and a full and fair opportunity to file an answer. In the circumstances, it is appropriate to consider the costs application.
23. Subsection 27(1) of the Rules of Procedure provides for a right to reply to an answer to a costs application within 10 days of the deadline for filing answers or the deadline for intervening in the proceeding, as the case may be. Although CIPPIC's reply was filed 13 days after the deadline for filing answers, the Commission considers that it would be in the public interest to consider these submissions. In this regard, the Commission considers that the delay has not caused any party to suffer any significant prejudice and that acceptance of CIPPIC's reply submissions results in a more thorough record.
24. The criteria for an award of costs are set out in section 68 of the Rules of Procedure, which reads as follows:
68. The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:
- (a) whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;
  - (b) the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and
  - (c) whether the applicant participated in the proceeding in a responsible way.
25. In Telecom Information Bulletin 2016-188, the Commission provided guidance regarding how an applicant may demonstrate that it satisfies the first criterion with respect to its representation of interested subscribers. The Commission notes that the Guidelines require an applicant to provide an explanation as to how it determined that the positions it put forward represented a group of subscribers, even in circumstances where direct consultation or research was not undertaken.

26. In the present case, CIPPIC has demonstrated that it meets this requirement. It had an interest in the proceeding as a public interest intervener that advocates on matters of law and technology. Although CIPPIC's representation was not the result of a formal relationship with subscribers, the Commission accepts that CIPPIC represents Canadian subscribers through its public interest mandate. Further, CIPPIC undertook consultations with subscribers and used its own internal expertise gained through its public interest mandate and advocacy work to determine the positions it put forward.
27. CIPPIC has also satisfied the remaining criteria through its participation in the proceeding. CIPPIC's submissions, particularly regarding the effects of zero-rating on the innovative potential of the Internet, assisted the Commission in developing a better understanding of the matters that were considered.
28. The rates claimed in respect of legal fees for both external and internal counsel are in accordance with the rates established in the Guidelines. Given this, the Commission does not consider it necessary or advisable to make further inquiries into the rates charged outside Commission proceedings, because this would further delay the disposition of this application, place additional burden on the applicant, and likely result in little to no impact on the amount of costs to be awarded. The Commission considers that CIPPIC's reliance on external counsel was not excessive, given that internal resources were largely otherwise engaged. The Commission finds that the total amount claimed by CIPPIC was necessarily and reasonably incurred and should be allowed.
29. The Commission is further satisfied that CIPPIC did not receive funding from the University of Ottawa in connection with its participation in the proceeding, and that it was ineligible for sales tax rebates.
30. This is an appropriate case in which to fix the costs and dispense with taxation, in accordance with the streamlined procedure set out in Telecom Public Notice 2002-5.
31. The Commission has generally determined that the appropriate costs respondents to an award of costs are the parties that have a significant interest in the outcome of the proceeding in question and have participated actively in that proceeding. Given the scope of this general policy proceeding to establish a regulatory framework for the differential pricing practices of Internet service providers, a large number of parties had a significant interest in the outcome of the proceeding and participated actively in the proceeding.
32. As set out in the Guidelines, the Commission will generally name a maximum of 10 costs respondents for a costs award of up to \$20,000 and will add an extra respondent for each additional \$5,000 awarded. However, as set out in Telecom Order 2015-160, the Commission considers \$1,000 to be the minimum amount that a costs respondent should be required to pay due to the administrative burden that small costs awards impose on both the applicant and costs respondents.

33. In light of the above, the Commission considers that the following parties are the appropriate costs respondents in the circumstances: Bell Canada; Quebecor Media Inc., on behalf of Videotron G.P. (Videotron G.P.); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); and TCC.
34. It is the Commission's general practice to allocate the responsibility for payment of costs among costs respondents based on their TORs as an indicator of the relative size and interest of the parties involved in the proceeding.<sup>2</sup> The Commission is not persuaded by TCC's submission that it should allocate costs based on the TORs of the costs respondents' parent companies. In this case, costs respondents participated in the proceeding on their own behalf, and not on behalf of a number of affiliates.
35. Accordingly, consistent with the Commission's general practice, it is appropriate to calculate responsibility for payment of costs with respect to the TORs of the costs respondents that participated in the proceeding, and not based on the TORs of all of their companies. TCC has chosen to operate on the basis of a specific legal structure and must accept the consequences of such a structure in the matter of costs. Further, the Commission considers that it would not be appropriate to allocate a larger proportion of the responsibility to pay costs to both Bell Canada and Videotron than would otherwise be the case by reason of their respective TORs. Telecom Regulatory Policy 2017-104 is intended to provide guidance to the industry as a whole and, as such, all service providers stand to benefit. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

<b>Company</b>	<b>Percentage</b>	<b>Amount</b>
TCC	33.5%	\$11,387.65
RCCI	30.5%	\$10,367.87
Bell Canada	22.6%	\$7,682.42
Videotron G.P.	6.0%	\$2,039.58
Shaw	4.1%	\$1,393.71
SaskTel	3.3%	\$1,121.77

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<sup>2</sup> In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

## Directions regarding costs

36. The Commission **approves** the application by CIPPIC for costs with respect to its participation in the proceeding.
37. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to CIPPIC at \$33,993.
38. The Commission **directs** that the award of costs to CIPPIC be paid forthwith by the costs respondents according to the proportions set out in paragraph 35.

Secretary General

## Related documents

- *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104, 20 April 2017
- *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188, 17 May 2016
- *Determination of costs award with respect to the participation of the Ontario Video Relay Service Committee in the proceeding initiated by Telecom Notice of Consultation 2014-188*, Telecom Order CRTC 2015-160, 23 April 2015
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010
- *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5, 7 November 2002