



Telecom Order CRTC 2015-132

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Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding leading to Telecom Decision 2015-131

1. By letter dated 14 October 2014, the DiversityCanada Foundation, on behalf of itself and the National Pensioners Federation¹ (Diversity Canada), applied for costs with respect to its participation in the proceeding that it initiated for the Commission to review and vary Telecom Order 2014-220 (the review and vary proceeding), which led to Telecom Decision 2015-131. In Telecom Order 2014-220, the Commission denied DiversityCanada's costs application related to its participation in an earlier Commission proceeding, in which DiversityCanada applied for the Commission to review and vary Telecom Regulatory Policy 2013-271.
2. On 24 October 2014, the Canadian Wireless Telecommunications Association (CWTA) filed an intervention in response to DiversityCanada's present costs application. On 27 October 2014, TELUS Communications Company (TCC) also filed an intervention in response to the application. DiversityCanada filed a reply on 6 November 2014.

Application

3. DiversityCanada submitted that it had met the criteria for an award of costs set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) because it represented a group or class of subscribers that had an interest in the outcome of the review and vary 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.
4. In particular, DiversityCanada submitted that it works to protect the rights and promote the interests of the disadvantaged, while the National Pensioners Federation aims to stimulate public interest in the welfare of aging Canadians and to help seniors and retirees have a life of dignity, independence, and financial security.
5. DiversityCanada stated that its submissions in the review and vary proceeding highlighted public policy considerations and provided the Commission with legal

¹ Formerly known as the National Pensioners and Senior Citizens Federation

precedents that underscore the importance of costs awards in facilitating public participation in the Commission's proceedings.

6. DiversityCanada requested that the Commission fix its costs at \$25,705.81, consisting of \$2,655.50 for legal fees, and \$23,050.31 for outside consultant and analyst fees. DiversityCanada's claim included the federal Goods and Services Tax (GST) and the Ontario Harmonized Sales Tax (HST). DiversityCanada filed a bill of costs with its application.
7. DiversityCanada made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission.

Answer

8. In response to the application, the CWTA and TCC submitted that DiversityCanada did not meet the criteria for an award of costs, and that its application for costs should therefore be denied.
9. Specifically, the CWTA and TCC submitted that DiversityCanada did not assist the Commission in developing a better understanding of the matters that were considered. TCC stated that the legal precedents that DiversityCanada cited focused on the denial of costs based on a provincial legislative regime.
10. The CWTA submitted that the arguments that DiversityCanada presented in the review and vary proceeding were based entirely on a misinterpretation of Telecom Order 2014-220 and referred to jurisprudence and public policies of which the Commission is already well aware.
11. TCC argued that DiversityCanada's filing of a flawed review and vary application and its subsequent application for costs constituted an abuse of process. TCC added that the current costs application was the product of a series of applications and claims by DiversityCanada that had been denied on substantive legal grounds by the Commission.
12. TCC submitted that DiversityCanada's participation in the review and vary proceeding did not constitute responsible participation in a Commission proceeding. TCC stated that DiversityCanada's attempt to create regulatory concern where there was none surrounding costs award procedures by administrative tribunals is the exact opposite of responsible participation.
13. The CWTA submitted that if the Commission were to determine that DiversityCanada met the criteria for an award of costs, the amount claimed should be reduced to reflect the limited assistance DiversityCanada provided to the Commission through its participation in the review and vary proceeding. The CWTA added that any award of costs should reflect a reasonable use of resources for the proceeding. Specifically, the CWTA submitted that the time DiversityCanada claimed in relation to its outside consultant was not necessarily or reasonably

incurred, and that any costs award should reflect this excessive and unreasonable time claim.

Reply

14. In reply, DiversityCanada argued that the CWTA provided little analysis of how DiversityCanada misinterpreted Telecom Order 2014-220, and an inaccurate portrayal of the application to review and vary Telecom Order 2014-220.
15. DiversityCanada submitted that TCC's objection related to the outcome of the review and vary proceeding and not to the quality of DiversityCanada's submissions.
16. DiversityCanada stated that the precedent decisions it cited in the review and vary proceeding mirrored issues that both the Commission and the Supreme Court of Canada have considered with respect to the Commission's costs awards procedure.
17. DiversityCanada submitted that its outside consultant was competent in the work required, under the supervision of legal counsel, to enable DiversityCanada to participate in the review and vary proceeding. DiversityCanada added that the quality of its submissions in the review and vary proceeding and the amounts of the costs claimed reflect that DiversityCanada participated in a responsible way.

Commission's analysis and determinations

18. The Commission notes that this is a highly unusual situation since it involves two related review and vary proceedings and associated cost applications, all initiated by the same costs applicant. Given the number of interrelated proceedings, a brief synopsis is in order.
19. The first costs application related to the applicant's participation in the proceeding it initiated to review and vary Telecom Regulatory Policy 2013-271. In Telecom Order 2014-220, the Commission denied costs to the applicant for the reasons set out in that order.
20. The applicant then filed an application to review and vary Telecom Order 2014-220, which was denied by the Commission in Telecom Decision 2015-131.
21. The present costs application relates to the applicant's participation in the proceeding leading to Telecom Decision 2015-131.
22. The Commission has repeatedly stated that costs applications are treated on their merits, regardless of the outcome of the proceeding for which the costs are sought. 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.

23. The Commission accepts that DiversityCanada represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding. However, for the reasons that follow, the Commission finds that DiversityCanada has not satisfied the criterion for an award of costs set out in paragraph 68(b) of the Rules of Procedure.
24. Specifically, the Commission considers that DiversityCanada's arguments in the review and vary proceeding did not raise genuine issues for the Commission's consideration. As well, the Commission considered the legal precedents that DiversityCanada cited in the review and vary proceeding and dismissed them since they were based on a separate legislative framework.
25. The Commission considers that DiversityCanada's submissions in the review and vary proceeding did not offer a distinct point of view and therefore did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding. As well, the Commission considers that DiversityCanada's initiation of multiple proceedings that essentially relate to the same issues has resulted in an unreasonable use of Commission resources.
26. Given that the test for an award of costs requires that DiversityCanada must satisfy all three criteria set out in section 68 of the Rules of Procedure, it is not necessary for the Commission to determine whether DiversityCanada participated in the review and vary proceeding in a responsible way.

Directions regarding costs

27. In light of the above, the Commission **denies** the application by DiversityCanada for costs with respect to its participation in the review and vary proceeding.
28. Had the Commission awarded any costs, it would likely have reduced the amounts claimed for the following reasons:
 - the outside consultant fees set out in the supporting documentation to DiversityCanada's application for costs are excessive;
 - DiversityCanada provided minimal background information as to why outside consultant fees were claimed. No resumes were provided, nor were any

professional certifications that would indicate that the outside consultant had expertise in the field of wireless telecommunications, the economics underlying prepaid cards, or telecommunications regulation; and

- DiversityCanada also failed to provide evidence to support the necessity of retaining an outside consultant with special knowledge.

29. The Commission wants to hear consumers' voices and encourages contributions by consultants that will guide its analysis more fully. In making representations on behalf of a consumer group, an outside consultant must provide more than a just a voice. An outside consultant must provide qualified expertise that will enable the Commission to properly weigh the basis of their opinion.

Secretary General

Related documents

- *DiversityCanada Foundation – Application to review and vary Telecom Order 2014-220*, Telecom Decision CRTC 2015-131, 9 April 2015
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding initiated by the Foundation's application to review and vary Telecom Regulatory Policy 2013-271*, Telecom Order CRTC 2014-220, 8 May 2014
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013