



Telecom Decision CRTC 2016-80

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The Consumers' Association of Canada and the Public Interest Advocacy Centre – Application to review and vary Telecom Order 2015-342

The Commission varies Telecom Order 2015-342 such that the Consumers' Association of Canada and the Public Interest Advocacy Centre are awarded the full costs claimed for senior counsel for their participation in the proceeding initiated by Telecom Notice of Consultation 2013-551 (the wholesale wireline proceeding).

Background

1. In Telecom Order 2015-342, the Commission approved in part the Consumers' Association of Canada (CAC) and the Public Interest Advocacy Centre's (PIAC) [collectively, CAC/PIAC] application for costs with respect to their participation in the proceeding initiated by Telecom Notice of Consultation 2013-551 (the wholesale wireline proceeding).
2. In that order, the Commission stated that it was not persuaded that CAC/PIAC had demonstrated that all of the time claimed with respect to senior legal counsel should be allowed. Specifically, the Commission noted that,
 - the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963, encourage costs applicants to rely on junior counsel and articling students to the greatest extent possible;
 - for the same proceeding, another costs applicant (OpenMedia.ca) claimed fewer hours of work and used in-house analysts, who charge a lower rate than senior legal counsel; and
 - senior legal counsel would be expected to spend less time on the file than a junior lawyer or an analyst, given their experience.
3. Accordingly, the Commission determined that the time allowed in respect of CAC/PIAC's senior legal counsel should be reduced from 317.6 hours to 250 hours, and that the 67.6-hour difference should be allocated to the more junior external counsel. In the Commission's view, this reallocation of time between senior and junior legal counsel constituted a more appropriate assessment of their respective roles for the purpose of determining allowable costs.

4. In Telecom Information Bulletin 2011-214, the Commission set out the test it applies in determining whether to grant an application made pursuant to section 62 of the *Telecommunications Act* (the Act) to review and vary a previous Commission decision:

5. In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to

- an error in law or in fact;
- a fundamental change in circumstances or facts since the decision;
- a failure to consider a basic principle which had been raised in the original proceeding; or
- a new principle which has arisen as a result of the decision.

5. The criteria for an award of costs are set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (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.

Application

6. The Commission received an application from CAC/PIAC, dated 1 August 2015, in which they requested that the Commission review and vary its costs award determinations set out in Telecom Order 2015-342.
7. CAC/PIAC submitted that the Commission made errors in law and in fact that cause substantial doubt as to the correctness of Telecom Order 2015-342. They also submitted that the Commission exercised its discretion unreasonably, and that its determinations introduce a new principle, which will have wide-ranging and harmful policy and participative effects on Commission proceedings.

8. The Commission received interventions regarding CAC/PIAC's application from the Canadian Internet Policy and Public Interest Clinic (CIPPIC), and the Forum for Research and Policy in Communications (FRPC). CAC/PIAC did not file a reply.
9. The public record of this proceeding, which closed on 3 September 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file numbers provided above.

Issues

10. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission err in law and/or in fact in Telecom Order 2015-342?
 - Did the Commission introduce a new principle in Telecom Order 2015-342?
 - Should CAC/PIAC receive the full costs award for their participation in the wholesale wireline proceeding?

Did the Commission err in law and/or in fact in Telecom Order 2015-342?

Comparison of different interveners' costs applications

11. CAC/PIAC, supported by CIPPIC, submitted that the Commission erred in law by improperly comparing their participation in the wholesale wireline proceeding with that of another intervener, OpenMedia.ca (OpenMedia). CAC/PIAC submitted that costs applications should be considered on their own merits without reference to the participation of other interveners.

Commission's analysis and determinations

12. Pursuant to section 56 of the Act, the Commission has a broad discretion in awarding costs, fixing the amount of costs awarded, and ordering to whom and by whom the costs are to be paid.¹
13. Pursuant to paragraph 18 of the Guidelines, in evaluating whether or not the time spent by a claimant is excessive under the circumstances, the considerations that the Commission will generally take into account include the time claimed and awarded in the proceeding or in other similar proceedings. Accordingly, the Commission may look at the time claimed by and awarded to other interveners in the same proceeding. Further, paragraph 19 of the Guidelines clearly states that the considerations listed are not exhaustive, and that the factors to be considered are within the Commission's discretion depending on the circumstances of each case.

¹ Section 56 of the Act provides that (1) the Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed; and (2) the Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.

14. In light of the above, the Commission did not err in law on the basis alleged.

Opportunity to comment on the comparison

15. CAC/PIAC argued that the Commission did not provide them with a clear opportunity to justify their decisions regarding the allocation of work, and that in so doing, the Commission breached the rules of procedural fairness.

Commission's analysis and determinations

16. TELUS Communications Company (TCC) filed an answer to CAC/PIAC's costs application, in which TCC submitted that CAC/PIAC could have allocated work more cost effectively among the professionals they engaged. TCC asked the Commission to consider whether these fees were necessarily and reasonably incurred, and suggested that more economic resourcing options were available to CAC/PIAC. CAC/PIAC had an opportunity to reply to TCC and did so.²

17. Accordingly, the issue of excessive time and allocation of work to senior counsel was on the record of the proceeding leading to Telecom Order 2015-342. Given this, the rules of procedural fairness were not breached because CAC/PIAC had a clear and reasonable opportunity to make meaningful submissions in their reply comments.

18. In light of the above, CAC/PIAC have failed to establish that the Commission erred in law on the basis alleged.

Reallocation of time between senior and junior counsel

19. CAC/PIAC submitted that the Commission erred in law when it reallocated time between senior and junior counsel, arguing that the Guidelines and section 68 of the Rules of Procedure do not permit the Commission to substitute its view on how time ought to have been allocated.

Commission's analysis and determinations

20. As noted above, section 56 of the Act gives the Commission a broad discretion in awarding costs, fixing the amount of costs awarded, and ordering to whom and by whom the costs are to be paid. This discretion includes the authority for the Commission to modify a costs claim to arrive at an appropriate amount.

21. In arriving at an appropriate amount, the Commission follows the Rules of Procedure and the Guidelines. Both reflect the notion that the Commission has the discretion to fix the amount of costs, including awarding only a proportion of costs. However, neither direct the Commission as to the means by which it can modify (or reduce) a costs award.

22. In light of the above, the Commission did not err in law on the basis alleged.

² See paragraphs 9 and 12 of Telecom Order 2015-342.

Equating of interveners' contributions

23. CAC/PIAC argued that the Commission erred in fact when it found that OpenMedia's contribution to the wholesale wireline proceeding was just as effective as theirs. CAC/PIAC submitted that OpenMedia's participation consisted mostly of opinion evidence through form letters. Conversely, CAC/PIAC's submissions were focused and structured, provided a distinct consumer point of view, and included key evidence and legal arguments on the main issues in the wholesale wireline proceeding.
24. CIPPIC submitted that the Commission failed to properly account for how much more fully CAC/PIAC participated in the wholesale wireline proceeding than OpenMedia, and that CAC/PIAC's submissions required a greater degree of analysis and more time to generate.
25. The FRPC submitted that the Commission did not provide any evidence in Telecom Order 2015-342 regarding why the quality of participation in the wholesale wireline proceeding by OpenMedia and by CAC/PIAC was equal.

Commission's analysis and determinations

26. The Commission agrees that CAC/PIAC's submissions in the wholesale wireline proceeding were more complex than those of OpenMedia, since CAC/PIAC's submissions had greater emphasis on legal and regulatory arguments. CAC/PIAC's submissions therefore required more time and expertise than those of OpenMedia. For this reason, the Commission found in Telecom Order 2015-342 that CAC/PIAC's use of senior legal counsel was warranted and that they should be entitled to costs for a greater number of hours of work than OpenMedia.
27. However, the effectiveness of a party's participation is not synonymous with the degree of their participation. Different degrees and forms of participation in Commission proceedings can be similarly effective.
28. In light of the above, CAC/PIAC have failed to establish that the Commission erred in fact on the basis alleged.

Did the Commission introduce a new principle in Telecom Order 2015-342?

29. CAC/PIAC, supported by CIPPIC and the FRPC, argued that the Commission's comparison of the time spent by different interveners in a proceeding constitutes a new principle. As a result, the time incurred by experienced interveners, when compared to that of less experienced interveners, will be called into question. To avoid the risk of a costs claim being denied, advocacy groups may choose to no longer use senior counsel, resulting in inferior representation from public interest groups.

Commission's analysis and determinations

30. As noted above, the Guidelines provide that a comparison of time claimed and awarded in a proceeding – including a comparison of interveners’ participation – is a relevant factor for the Commission to consider when assessing whether time claimed is excessive. This comparison helps to ensure that public interest groups are compensated for participating in Commission proceedings in a responsible way.
31. Accordingly, the comparison of interveners’ time does not constitute a new principle that raises substantial doubt as to the correctness of Telecom Order 2015-342.

Should CAC/PIAC receive the full costs award for their participation in the wholesale wireline proceeding?

32. CIPPIC submitted that the Commission’s determinations in Telecom Order 2015-342 diverge from those made in the context of past proceedings of comparable complexity, in which the Commission found similar allocations of senior/junior counsel to be reasonable. For example, the Commission recently approved PIAC’s costs application in relation to its participation in the comparably complex proceeding to review wholesale mobile wireless services,³ in which it relied significantly on senior counsel.

Commission’s analysis and determinations

33. The Commission recently awarded the full amount of costs claimed by PIAC, CAC, the Council of Senior Citizens’ Organizations of British Columbia, and the National Pensioners Federation in relation to their participation in the proceeding initiated by Telecom Notice of Consultation 2014-76 (the wholesale wireless proceeding).
34. The wholesale wireless proceeding was shorter in duration and less complex than the wholesale wireline proceeding. Further, CAC/PIAC relied significantly on senior counsel in both proceedings.
35. After reviewing CAC/PIAC’s submissions and the time claimed in both proceedings, the Commission determines that CAC/PIAC’s participation in the wholesale wireline proceeding was equally as responsible and effective as their participation in the wholesale wireless proceeding. Given the similarities in the two proceedings and the reliance by CAC/PIAC on senior counsel in both cases, the Commission is persuaded that there is substantial doubt as to the correctness of Telecom Order 2015-342 and that, consistent with the Commission’s finding in Telecom Order 2015-265, CAC/PIAC should be awarded the full costs claimed.
36. Accordingly, the Commission hereby varies Telecom Order 2015-342, such that CAC/PIAC are awarded the entire amount of costs claimed for senior counsel (\$117,181.13) for their participation in the wholesale wireline proceeding. The revised total amount of costs allowed is therefore \$117,534.13.

³ See Telecom Notice of Consultation 2014-76 and Telecom Order 2015-265.

37. The Commission therefore modifies the amounts of costs to be paid set out in paragraph 23 of Telecom Order 2015-342 as follows:

Company	Percentage	Amount
TCC	28.2%	\$33,144.62
Rogers Communications Partnership	26.3%	\$30,911.48
Bell Aliant Regional Communications, Limited Partnership and Bell Canada	25.0%	\$29,383.53
Shaw Cablesystems G.P.	4.8%	\$5,641.64
Videotron G.P.	4.5%	\$5,289.04
MTS Inc. and Allstream Inc.	4.2%	\$4,936.43
Saskatchewan Telecommunications	2.9%	\$3,408.49
Cogeco Cable Inc.	1.7%	\$1,998.08
The Canadian Network Operators Consortium Inc.	1.4%	\$1,645.48
Bragg Communications Incorporated, operating as Eastlink	1.0%	\$1,175.34

38. The Commission **directs** each of the costs respondents identified above to pay CAC/PIAC forthwith the balance of the costs awarded as a result of this decision.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Consumers' Association of Canada and the Public Interest Advocacy Centre in the proceeding initiated by Telecom Notice of Consultation 2013-551, Telecom Order CRTC 2015-342, 28 July 2015*

- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre, the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, and the National Pensioners Federation, in the proceeding initiated by Telecom Notice of Consultation 2014-76, Telecom Order CRTC 2015-265, 19 June 2015*
- *Review of wholesale mobile wireless services, Telecom Notice of Consultation CRTC 2014-76, 20 February 2014*
- *Review of wholesale services and associated policies, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013; as amended by Telecom Notice of Consultation CRTC 2013-551-1, 8 November 2013*
- *Revised guidelines for review and vary applications, Telecom Information Bulletin CRTC 2011-214, 25 March 2011*
- *Revision of CRTC costs award practices and procedures, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010*