



Telecom Order CRTC 2017-164

PDF version

Ottawa, 19 May 2017

File numbers: 8663-C12-201503186 and 4754-531

Determination of costs award with respect to the participation of the First Mile Connectivity Consortium in the proceeding leading to Telecom Regulatory Policy 2016-496

Application

1. By letter dated 13 July 2016, the First Mile Connectivity Consortium (FMCC) applied for costs with respect to its participation in the proceeding leading to Telecom Regulatory Policy 2016-496, in which the Commission reviewed its policies regarding basic telecommunications services in Canada (the proceeding).
2. The Commission received answers from Bell Canada,¹ TELUS Communications Company (TCC), and Xplornet Communications Inc. (Xplornet), all dated 29 July 2016. The Commission also received answers from Bragg Communications Incorporated, operating as Eastlink (Eastlink), dated 21 July 2016; and Vaxination Informatique (Vaxination), dated 25 July 2016. The FMCC filed a reply dated 5 August 2016.
3. The FMCC 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 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, the FMCC submitted that it (i) provided timely submissions developed through ongoing collaboration with its member organizations, and (ii) structured its submissions to respond to questions raised by the Commission in areas where it has expertise. The FMCC added that it offered a distinct point of view by representing communities and Indigenous groups located in the northern territories and in the northern parts of the provinces.

¹ Although Bell Canada filed an answer solely on its own behalf, it participated in the basic telecommunications services proceeding on its own behalf, and on behalf of its affiliates Bell Aliant Regional Communications, Limited Partnership (which, effective 1 July 2015, is operated as a division of Bell Canada); Bell Mobility Inc.; Câblevision du Nord du Québec inc.; DMTS; KMTS; NorthernTel, Limited Partnership; Northwestel Inc.; Ontera; and Télébec, Limited Partnership.

5. With respect to the group or class of subscribers the FMCC submitted that it represents, the FMCC explained that it represents the interests of broadband Internet service providers that are established by residents of First Nations communities in rural, remote, and northern regions of Canada and that primarily provide telecommunications services to such communities. The FMCC noted that while it emphasizes the interests of northern Indigenous communities, it also prioritizes the interests of unserved and underserved communities and regions across the country.
6. With respect to the specific methods by which the FMCC submitted that it represents this group, the FMCC explained that it conducted a number of research and consultation activities with First Nations organizations. The FMCC also noted that it worked directly with its members and other Indigenous technology organizations and governments to develop its interventions, and that it undertook regular consultations through phone calls, videoconference meetings, email discussions, and face-to-face meetings.
7. The FMCC requested that the Commission fix its costs at \$98,325.25, consisting of \$53,073.50 for consultant fees, \$43,050.00 for expert witness fees, and \$2,201.75 for disbursements. The FMCC's claim included the federal Goods and Services Tax (GST) on fees. The FMCC filed a bill of costs with its application.
8. With respect to its three consultants, the FMCC claimed 80 hours at the external rate of \$225 per hour (\$18,000) for senior consultants, 59.5 hours at the external rate of \$110 per hour (\$6,545) for junior consultants, and another 247 hours at the external rate of \$110 per hour (\$28,528.50 with GST) for junior consultants.
9. With respect to its expert witness fees, the FMCC claimed 184 hours at the rate of \$225 per hour for its expert witness, as well as \$1,650 per day for the expert witness's attendance at the oral hearing for one day (\$43,050 in total).
10. The FMCC submitted that Bell Canada; MTS Inc. (MTS); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Rogers Communications Canada Inc. (RCCI);² Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); the SSi Group of Companies; TCC; Telesat Canada; Xplornet; and any other telecommunications service providers that participated in the proceeding are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answer

11. Bell Canada argued that the FMCC had sufficient financial interest to participate in the proceeding. In Bell Canada's view, the FMCC represented the private interests of its member telecommunications service providers, such as K-Net, and participated in

² In the proceeding, submissions were received from Rogers Communications Partnership (RCP). However, on 1 January 2016, RCP ceased to exist. All of RCP's business activities, including its assets and liabilities, are now held by RCCI.

the proceeding to advance those interests. Bell Canada submitted that as a result, the FMCC should not be eligible for a costs award.

12. Bell Canada argued that in the alternative, if the Commission determines that the FMCC is eligible for a costs award, the costs should be reduced to reflect the dual purpose of the FMCC's participation. Specifically, Bell Canada stated that the FMCC's costs claim should be reduced by at least 50% to ensure that the FMCC's participation in the proceeding on behalf of telecommunications service providers is not recovered through the costs award process.
13. Bell Canada added that the FMCC had improperly claimed costs for its external consultant and expert witness fees. Specifically, Bell Canada argued that the costs for these resources should be calculated based on the in-house daily rates. Bell Canada indicated that, according to the FMCC's website and its presentation at the oral hearing, each of these resources is explicitly affiliated with the FMCC. For example, one of the FMCC's consultants was introduced at the hearing as holding the position of coordinator for the FMCC.
14. TCC submitted that the FMCC is ineligible for costs, since it is not representative of a specific group or class of subscribers, but rather of a number of Internet service providers that have sufficient commercial incentives to participate in Commission proceedings. In this regard, TCC pointed out that the FMCC stated in its costs application that it represents First Nations broadband Internet service providers operating in rural, remote, and northern regions of the country.
15. With respect to the allocation of costs, TCC submitted that the Commission should not apportion costs based on telecommunications operating revenues (TORs)³ unless it is appropriate and equitable to do so in a given case. In TCC's view, apportioning costs based on TORs may be appropriate in this case, but the Commission must ensure that it calculates TORs in an accurate and competitively neutral manner. Specifically, TCC submitted that the Commission should allocate costs based on the TORs of the parent companies of those costs respondents that have them.
16. Eastlink raised a general concern regarding the number of consultants and expert witnesses retained by the FMCC. Eastlink also submitted that the nature of some of the organizations that the FMCC purported to represent was unclear, since they appeared to be telecommunications service providers or other organizations that may receive funding from other government organizations.
17. Xplornet supported the positions of Bell Canada, Eastlink, and TCC. Xplornet argued that the Commission should deny or reduce the FMCC's costs since it had sufficient financial resources to participate effectively in the proceeding. Xplornet noted that among the FMCC's members are Xplornet's direct competitors, K-Net and the Western James Bay Telecom Network.

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

Reply

18. The FMCC submitted that it is a non-profit organization with members that include community communications-related organizations that serve residents of Indigenous communities and advocate on their behalf. The FMCC argued that Indigenous communities consider that these intermediary communications organizations are best qualified to represent them on policy and regulatory matters in terms of the organizations' expertise and understanding of the communities' communications needs. The FMCC added that, given the Indigenous communities' small populations, geographically dispersed nature, and limited human resources, they require such organizations to advocate on their behalf.
19. The FMCC noted the example of K-Net, which is a division of Keewaytinook Okimakanak, a First Nations council that is responsible for providing a variety of support services to its communities.⁴ The FMCC argued that its member organizations therefore represented the interests of a group of subscribers, namely Indigenous community members in remote areas who subscribe to telecommunications services.
20. The FMCC also confirmed that it did not and will not receive any financial assistance in connection with its participation in the proceeding, and that it receives no financial assistance from its member organizations, aside from a lifetime membership fee of \$5.
21. With respect to Bell Canada's submission that the FMCC's costs should be calculated based on in-house daily rates, the FMCC submitted that it does not employ any of its resources and that it does not have any permanent staff. The FMCC added that all of its consultants and its expert witness were properly categorized as external resources, given that they have provided services to other entities than the FMCC.
22. The FMCC stated that its Board of Directors' responsibilities do not include participation in regulatory proceedings. Specifically, the FMCC argued that its Board of Directors is not responsible for preparing submissions to the Commission, but that it provides direction to the consultants and expert witnesses who prepare the submissions. The FMCC argued that the members of its Board of Directors who participated in the proceeding did so in their capacity as consultants. Further, regarding the individuals who are not on the Board of Directors, but who appeared to be internal to the FMCC according to Bell Canada, the FMCC clarified that these individuals are FMCC research associates, a designation for academics and professionals who have offered their services to the FMCC.

⁴ Keewaytinook Okimakanak serves First Nations communities in Deer Lake, Fort Severn, Keewaywin, McDowell Lake, North Spirit Lake, and Poplar Hill.

Commission's analysis and determinations

Eligibility

23. 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.

24. Parties challenged the FMCC's eligibility for costs on the basis that the FMCC does not meet the first eligibility criterion.

25. While organizations such as K-Net and the Western James Bay Telecom Network are telecommunications service providers, these entities can be distinguished from general commercial providers in that they are community-based organizations with the specific objective of providing rural and remote First Nations communities with Internet services. For example, K-Net provides services to First Nations communities in remote regions in Canada and is a program of Keewaytinook Okimakanak, a First Nations council. Rather than serving commercial interests, these community-based organizations focus on the interests of First Nations communities in rural and remote areas, and provide them with Internet services. In this way, these organizations were uniquely able to represent the views of First Nations community members with respect to the issues raised in the proceeding. Further, the FMCC confirmed that it received no financial assistance in connection with its participation in the proceeding.

26. 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 an interested subscriber group. The FMCC has demonstrated this representation by, for example, working directly with its members and other Indigenous technology organizations and governments to develop its submissions in the proceeding, as well as by disseminating information about its ongoing activities to its members. Accordingly, the Commission finds that the FMCC represented the interests of Indigenous community members in remote areas who subscribe to telecommunications services and that, therefore, the FMCC has met the first eligibility criterion for costs.

27. The FMCC has also satisfied the remaining criteria through its participation in the proceeding. In particular, the FMCC's submissions, especially regarding the importance of broadband Internet services for the social, cultural, and economic development of remote Indigenous residents, assisted the Commission in developing a better understanding of the matters that were considered. The FMCC provided focused and structured evidence in areas where it had direct experience and expertise.

Rates and amounts

28. The Commission recognizes the important contribution that non-profit organizations with volunteer Boards of Directors make to its ability to better understand the issues in a proceeding and how these issues affect the Canadians represented by the organizations. In these organizations, it is common for Board of Directors members to take on two roles: (i) providing oversight as a director regarding the organization's governance and operations, and (ii) conducting work traditionally undertaken by paid staff or consultants, including researching and drafting the organization's submissions to the Commission. It would not be in the public interest to prevent these organizations from recovering costs simply because the work was completed by a volunteer Board member, since it is unlikely that the organization would be able to participate in Commission proceedings without this cost recovery.
29. However, it remains important for the Commission to ensure that such directors acting in their consultant roles, as well as other resources, are properly categorized as in-house or external. The costs that can be reasonably claimed for external consultants or expert witnesses are higher than those for in-house resources. This is because it is presumed that in-house resources are part of the organization and providing services as part of their regular duties, the costs for which are covered by the organization's regular operating costs. However, external consultants and expert witnesses are presumed to be charging the organization industry rates for specific expertise.
30. In Telecom Order 2014-351, the Commission provided a number of factors to consider in assessing consultants' independence from costs applicants, including whether the consultant has other clients in the communications field and whether they used their own resources and equipment to complete their work. These criteria can be adapted to this case regarding the FMCC's consultants and expert witness.
31. The FMCC is a non-profit national association with no paid employees, no permanent staff, and a volunteer Board of Directors. Some Board of Directors members participated directly in the preparation and presentation of the FMCC's submissions in the proceeding. The work conducted by these members is normally undertaken by paid staff or external consultants. Accordingly, the Commission considers that the time they spent on this work was not in their role as directors but as consultants.

32. Moreover, the record indicates that all of the FMCC's consultants have also provided consulting services to other clients related to communications and First Nations issues. Likewise, the FMCC's expert witness has provided services to various other organizations, including those in the communications field.
33. In light of the above, the FMCC has appropriately claimed costs for its consultants at the external rate, and for its expert witness at the expert witness rate. These rates are in accordance with the rates established in the Commission's *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963.

Conclusion

34. The Commission finds that the total amount claimed by the FMCC was necessarily and reasonably incurred and should be allowed.
35. 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.

Costs respondents and allocation

36. 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 the proceeding, a large number of parties both had a significant interest in the outcome of the proceeding and participated actively in the proceeding.
37. 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.
38. Accordingly, Bell Canada, the Canadian Network Operators Consortium Inc. (CNOc), Cogeco Communications Inc. (Cogeco),⁵ Freedom Mobile Inc. (Freedom Mobile),⁶ MTS, RCCI, SaskTel, Shaw, TCC, and Videotron are the appropriate costs respondents in the circumstances.

⁵ In the proceeding, submissions were initially received from Cogeco Cable Inc. However, the company underwent a corporate name change during the proceeding and thereafter participated as Cogeco Communications Inc.

⁶ In the proceeding, submissions were received from WIND Mobile Corp. However, since then, the company underwent a name change and is now Freedom Mobile Inc.

39. It is the Commission's general practice to allocate the responsibility for payment of costs among costs respondents based on their TORs⁷ as an indicator of the relative size and interest of the parties involved in the proceeding.
40. No party disputed the appropriateness of using TORs in the present case, though TCC argued that the Commission should use the TORs of the parent companies of the costs respondents, where applicable, to ensure accuracy and competitive neutrality in the allocation of costs.
41. In this case, Bell Canada participated in the proceeding on its own behalf and on behalf of a number of affiliates. Accordingly, it is appropriate to calculate Bell Canada's allocation of costs with respect to the TORs of all of these Bell companies. Beyond this, taking the TORs of any parent companies into account would have little material impact on the allocation of costs in the present case. Consequently, the Commission does not consider it necessary to deviate from its general practice, which is to base its determinations regarding the allocation of costs on the TORs of the parties that actually participated in the proceeding, regardless of whether those parties are affiliated with other entities that provide telecommunications services in Canada and report TORs to the Commission.
42. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
Bell Canada	36.1%	\$35,495.41
TCC	24.7%	\$24,286.34
RCCI	22.5%	\$22,123.18
Videotron	4.4%	\$4,326.31
MTS	3.2%	\$3,146.41
Shaw	3.0%	\$2,949.76
SaskTel	2.5%	\$2,458.13
CNOC	1.4%	\$1,376.55
Cogeco	1.1%	\$1,081.58

⁷ In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

Freedom Mobile	1.1%	\$1,081.58
----------------	------	------------

43. Consistent with its general approach articulated in Telecom Costs Order 2002-4, the Commission makes Bell Canada responsible for payment on behalf of the Bell companies. Also consistent with this practice, the Commission makes CNOC responsible for payment on behalf of its members. The Commission leaves it to the members of these organizations to determine the appropriate allocation of the costs among themselves.

Directions regarding costs

44. The Commission **approves** the application by the FMCC for costs with respect to its participation in the proceeding.
45. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to the FMCC at \$98,325.25.
46. The Commission **directs** that the award of costs to the FMCC be paid forthwith by the costs respondents and according to the proportions set out in paragraph 42.

Secretary General

Related documents

- *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016
- *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
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding initiated by the application of Bragg Communications Inc., operating as EastLink, regarding 30-day notice requirements for service cancellations*, Telecom Order CRTC 2014-351, 3 July 2014
- *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

- *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*