



Telecom Order CRTC 2017-376

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File numbers: 1011-NOC2016-0192 and 4754-546

Determination of costs award with respect to the participation of OpenMedia in the proceeding that led to Telecom Regulatory Policy 2017-104

Application

1. By letter dated 10 January 2017, OpenMedia 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. Bell Canada and TELUS Communications Company (TCC) filed interventions, both dated 20 January 2017, in response to OpenMedia's application. OpenMedia filed a reply dated 30 January 2017.
3. OpenMedia 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, OpenMedia submitted that it represents the interests of Canadian Internet service subscribers, or would-be subscribers, and of individuals who care about the future of the Internet and telecommunications in Canada. OpenMedia also submitted that it incorporated useful relevant sources in support of the positions it put forward, which were focused on the central issues of the proceeding and reflected the perspectives of everyday Canadians. Finally, OpenMedia submitted that it had met all deadlines, followed procedural rules, engaged fully with the Commission, and relied on staff, both internal and external, to only a necessary degree.
5. With respect to the group or class of subscribers represented, OpenMedia submitted that it represents over 60,000 Canadians across the country. According to OpenMedia, this group is composed of signatories to the petition it submitted to the Commission in the context of the proceeding and commenters who participated in Open Media's consultation process through its Internet Voice Tool. With respect to the specific methods by which OpenMedia represents this group or class,

OpenMedia explained that it engaged in direct consultation with community members, incorporated their input into its participation in the proceeding, and drew on crowdsourced policy reports.

6. OpenMedia requested that the Commission fix its costs at \$86,745.46, consisting of \$63,517.50 for legal fees, \$17,732.50 for consultant and analyst fees, and \$5,495.46 for disbursements. OpenMedia's claim included the federal Goods and Services Tax (GST) on fees, less the rebate to which OpenMedia is entitled in connection with the GST. OpenMedia filed a bill of costs with its application.
7. OpenMedia claimed 470.5 hours for junior external counsel at a rate of \$135 per hour (\$63,517.50 in total), 40.5 hours at the junior external consultant rate of \$110 per hour (\$4,455 in total), and 28.25 days for four in-house analysts at the internal rate of \$470 per day (\$13,277.50 in total including tax, less applicable rebates).
8. With respect to disbursements, OpenMedia claimed travel costs for three representatives appearing at the hearing and hotel accommodations for two of those representatives. Although OpenMedia claimed \$473.96 in intra-city car travel, it provided receipts for only \$423.93 worth of car travel.
9. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents) and indicated that it would abide by the Commission's determinations according to the appropriate costs allocations in the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963.

Answer

10. TCC did not dispute OpenMedia's entitlement to costs, but it argued that the amounts claimed were excessive and should be reduced to \$28,408.45. First, TCC argued that a reasonable accommodation expense for a half-day appearance would be two nights per person, the night before the appearance and the night after, and suggested reducing the accommodation disbursements accordingly. Further, TCC noted that five- and ten-night hotel stays per person were unnecessary and unreasonable expenses given the short appearance of these two persons before the Commission.
11. Second, TCC argued that the number of hours of work claimed was both excessive and out of proportion with the number of hours claimed by other costs applicants, even taking into account the relative experience levels of the claimants. Therefore, TCC suggested that the number of hours claimed for external counsel should be reduced by 50%. TCC also submitted that overtime is not eligible for reimbursement, but four hours of overtime were claimed by OpenMedia.
12. Third, TCC argued that the time claimed for attendance at a five-day hearing totalled almost 12 days of work and was therefore excessive. It suggested that the attendance costs should be reduced to one staff member to attend the entirety of the hearing and

one half-day for the remaining staff for OpenMedia's appearance before the Commission.

13. Fourth, TCC argued that the rates claimed for external counsel, Ms. Cynthia Khoo, should be claimed at the internal rather than external counsel rates, since there were clear indicia of Ms. Khoo's status as internal counsel – such as her self-description as “Legal Counsel (External) at Open Media” on her LinkedIn page profile.
14. Fifth, TCC argued that OpenMedia sought reimbursement for non-reimbursable costs. TCC argued that the 25 hours claimed for preparing the costs application should not be eligible, since that work did not assist the Commission in developing a better understanding of the relevant issues in the proceeding. Further, TCC argued that the 10.5 days spent on citizen outreach was not consultation, but rather a lobbying attempt, and that, therefore, the associated costs should not be recoverable. In addition, TCC suggested that the 13.5 hours claimed for research on broadcasting matters be disallowed, since broadcasting matters are not eligible for reimbursement.
15. TCC argued that the Commission should inquire into the sources of OpenMedia's funding, submitting that it appeared that donations received were solicited and used for specific purposes and were therefore received in connection with a proceeding.
16. TCC also argued that the Rules of Procedure do not provide for a right of reply to an answer to a costs application, but noted that it would not oppose a request from OpenMedia for leave to reply if the reply is served and filed within five days.
17. Finally, 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)¹ 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 Inc.'s and Videotron's mobile TV services.
18. Bell Canada argued that OpenMedia should not be eligible for costs since it is a non-commercial entity that had sufficient incentive and resources of its own to participate in the proceeding. Moreover, the issues discussed in the proceeding made it a key activity for OpenMedia to participate in to further its mandate. According to

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

Bell Canada, OpenMedia's unique position, with a narrower mandate and greater financial resources than other interveners, meant that its ability to meaningfully participate was not contingent on its ability to claim costs. Bell Canada further argued that OpenMedia received substantial benefits from its participation in the proceeding, since it leveraged this participation as a marketing platform for fundraising.

19. In the alternative, Bell Canada submitted that OpenMedia's costs should be reduced, arguing that the hours claimed for legal counsel were excessive and not comparable to those of the other costs applicants. Bell Canada applied conversion factors to the work of counsel to OpenMedia, accounting for level of experience, to show that OpenMedia's hours relative to experience exceeded those claimed by other applicants. Bell Canada submitted that the time claimed for legal counsel should be adjusted from 511 hours to 365 hours, reflecting the average time claimed by the other applicants using Bell Canada's converted hours.
20. With respect to the use of external counsel, Bell Canada submitted that the Commission should inquire into whether Ms. Khoo should be considered internal counsel. In this regard, the company noted that Ms. Khoo's LinkedIn page profile seemed to suggest that she is an employee of OpenMedia. Bell Canada argued that the Commission's past practice of relying on how an individual reports to the law society encourages counsel to structure their practices to be considered external counsel and, therefore, eligible for higher rates. Bell Canada suggested that the Commission adopt a test to determine the status of counsel similar to the one used to determine the employment status of consultants. Bell Canada submitted that if the Commission finds that Ms. Khoo was in fact internal counsel, the costs claimed for her should be reduced to \$28,685.
21. Further, Bell Canada suggested that the Commission investigate the rates claimed because, like most applicants, OpenMedia sought the maximum allowable rates under the Guidelines. Bell Canada argued that the Commission should seek evidence from applicants regarding the rates ordinarily charged by interveners to clients outside Commission proceedings. Finally, Bell Canada argued that since Ms. Khoo provides legal services to OpenMedia outside Commission proceedings, the Commission should inquire into the rates she charges for that work.
22. In the event that the Commission determines that Ms. Khoo is external counsel, Bell Canada argued that OpenMedia's reliance on her was excessive, since the proceeding was within the core mandate of OpenMedia. According to Bell Canada, OpenMedia had qualified internal resources capable of advancing its participation in the proceeding, and an organization should be expected to leverage internal resources before seeking external resources. Bell Canada argued that only 17.1 hours were dedicated to legal research, and the remainder of time claimed for legal counsel was associated with work that could have been completed by internal resources. Bell Canada argued that the Commission should attribute one third of the legal counsel time claimed to an internal resource, resulting in a deduction of \$28,047.50 from the total amount claimed.

23. Bell Canada argued that OpenMedia's disbursement claims are not reasonable. Specifically, Bell Canada argued that accommodation for 10 nights for one individual is unreasonable for a five-day proceeding. Therefore, Bell Canada submitted that four nights of accommodation, totalling \$784.12, should be removed from the claim.
24. In addition, Bell Canada argued that OpenMedia had incorrectly described the practice of zero-rating to its subscribers, and the fact that members of OpenMedia's community supported its position was therefore based on an incorrect understanding and was not reliable. Bell Canada submitted that, given this situation, the time dedicated by OpenMedia to this work did not contribute to a better understanding of the issues and that OpenMedia should not be eligible for costs. Bell Canada argued that 10.5 days' worth of time, totaling \$4,395, should therefore be deducted from the costs claimed.
25. Bell Canada submitted that the costs respondents should be determined in accordance with the Guidelines.

Reply

26. OpenMedia noted that section 27 of the Rules of Procedure provides for 10 days to file a reply to an answer and that applicants have regularly replied to answers in the past. In the alternative, OpenMedia argued that the Commission would violate procedural fairness by denying the standard 10-day timeline, because this would be a change without notice to the established process.
27. OpenMedia argued that the overall amount of the costs it claimed is reasonable in light of the duration and complexity of the proceeding, the range of interrelated issues, the number of parties involved, and the far-reaching implications of the resulting decision. OpenMedia submitted that there was little to no duplication between its intervention and those of the other parties.
28. OpenMedia noted that its disbursement claim for accommodations was incorrect and was the result of an inadvertent oversight. However, OpenMedia disagreed with TCC's argument that it was unreasonable for its representatives to stay more than two nights for the five-day hearing. OpenMedia argued that it participated near the end of the hearing and that it was important for the participants to be able to discuss issues in person and prepare for their appearance at the hearing. OpenMedia further argued that the Commission has previously granted costs for multiple counsel to attend and monitor a proceeding.
29. OpenMedia amended its claim for disbursements to account for six nights' accommodation for two panelists, including the night before and the night of the last day of the proceeding, resulting in a deduction of \$702.95 from the original claim.
30. OpenMedia referred to the Guidelines to argue that the organizations intended to be excluded from costs eligibility are those that have a direct financial stake in a proceeding, not those whose participation furthers their core mandate. OpenMedia

submitted that its participation was not used to leverage other funding because, like all non-profit organizations, it regularly publicizes and informs individuals of the work it does to demonstrate that it is fulfilling its mandate. OpenMedia argued that the donations in question were for general operational purposes and that it did not receive any direct financial assistance in connection with its participation in the proceeding. Further, OpenMedia submitted that it could not have participated in the proceeding without the recovery of its costs.

31. OpenMedia submitted that its costs and time claimed for counsel were within a reasonable range compared to those of other costs applicants. OpenMedia assumed that time spent preparing costs applications was eligible for an award of costs due to the inclusion of this time on the Commission's costs claim forms, but that OpenMedia would abide by the Commission's determinations if this was an error.
32. OpenMedia argued that Bell Canada's conversion of hours was an arbitrary comparison that made incorrect assumptions about productivity in relation to experience. Further, OpenMedia submitted that it is inappropriate to compare its participation with other costs applicants because other costs applicants have varying mandates and corporate structures. In response to TCC's argument that hours claimed for counsel were excessive because one individual from OpenMedia billed more hours than those claimed by other applicants for all their teams' costs, OpenMedia argued that one individual did the work of an entire team. In light of this, OpenMedia argued that the number of hours it claimed was within a reasonable range of difference.
33. OpenMedia argued that its use of external counsel was not atypical of public interest interveners. It submitted that its internal resources were engaged on other projects during the course of the proceeding and that it would not have been able to participate without external assistance.
34. With respect to Ms. Khoo's status as external counsel, OpenMedia submitted that it is the right to act for other clients that makes counsel external, not whether they exercise that right. OpenMedia stated that Ms. Khoo did act for other clients. OpenMedia argued that the Law Society of Upper Canada's (LSUC) directory entry is a more appropriate determination of status than social media accounts. Finally, OpenMedia stated that the Commission had previously accepted that a person such as Ms. Khoo be treated as external counsel, and that the same designation should apply here.
35. OpenMedia disputed that its characterization of zero-rating in its citizen outreach was incorrect. It argued that its description of zero-rating was central to the arguments in its submissions. OpenMedia also stated that it had integrated its outreach results in its submissions and that these results should not be discounted. Finally, OpenMedia argued that the Commission has previously recognized that public consultation can include solicited feedback.

36. With respect to broadcasting issues, OpenMedia argued that its research was not undertaken for broadcasting purposes but to present a more informed position on telecommunications matters. It submitted that its costs related to that research should therefore be recoverable.

Commission's analysis and determinations

37. Subsection 27(1) of the Rules of Procedure provides for a right to reply to an answer to a costs application within 10 days after the deadline for the filing of the answer or the deadline for intervening in the proceeding, as the case may be. In the present case, OpenMedia filed a reply 10 days after the deadline for the filing of answers. Therefore, the Commission considers that OpenMedia's reply to the answers was filed in accordance with subsection 27(1).
38. 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.
39. 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. In the present case, OpenMedia has demonstrated that it meets this requirement, since it represented the interests of Canadian Internet subscribers through its incorporation of the views of those subscribers into its submissions.
40. OpenMedia has also satisfied the remaining criteria through its participation in the proceeding. In particular, OpenMedia's submissions, especially regarding user participation in online creation and innovation, consumer choice, and the differential pricing of administrative and promotional functions, as well as Canadian content, assisted the Commission in developing a better understanding of the matters that were considered.
41. Regarding the arguments that the Commission should inquire into the sources of OpenMedia's donations, the Commission finds that such inquiry is unnecessary. The Commission is satisfied with OpenMedia's claim that its donations are of a general operational nature, regardless of the different campaigns it implements to solicit such funding, and that donors do not control how their contributions are spent.

42. With respect to the argument that OpenMedia's reliance on external counsel was excessive, the Commission accepts OpenMedia's claim that its internal resources were engaged in other projects during the course of the proceeding and that it would not have been able to participate without external assistance.
43. The Commission has determined that how a lawyer reports to their law society is an efficient and effective manner of establishing whether they are internal or external, given the serious repercussions of misrepresenting one's status to the law society. The parties have provided no reason why a more detailed review is necessary in this case.
44. With respect to Ms. Khoo's status, the Guidelines provide that claimants must report to the relevant law society as "In Private Practice" in order to claim external rates. Although Ms. Khoo attested that she was external counsel and OpenMedia argued in its reply that the status reported to the relevant law society is the appropriate measure to determine the status of counsel, OpenMedia did not explicitly state, with supporting documentation, how she reported to the relevant law society. The Commission has independently verified that Ms. Khoo does in fact report to the LSUC as "In Private Practice" and is satisfied that she is properly classified as external counsel to OpenMedia for the purpose of this costs application.
45. The rates claimed in respect of consultant and legal fees are in accordance with the rates established in the Guidelines, regardless of the fact that the rates claimed with respect to consultants are equal to the maximum allowable rates. 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. However, the Commission finds that the total amount claimed by OpenMedia was not necessarily and reasonably incurred, and has therefore adjusted the amount of costs to be allowed, as set out below.
46. In the present case, OpenMedia participated extensively in the proceeding, but its participation was comparable to that of other costs applicants, whose costs claims are for significantly fewer hours of work. The total amount of time claimed by OpenMedia ranges from approximately 250 to 550 hours more than that claimed by other costs applicants in connection with the proceeding. Much of this time was claimed in relation to legal fees for junior counsel. While it is to be expected that junior counsel will spend more time on a proceeding than, for instance, senior counsel, the Commission considers that the number of hours claimed for counsel in this case is excessive in light of the nature and scope of OpenMedia's intervention.
47. Although costs applicants are eligible for reimbursement for the costs in relation to the time spent preparing their costs application and allowable rates for certain tasks are not capped, the Commission considers that a claim of 25 hours for the preparation of the costs application is excessive, given the nature of the work involved in such an application. Similarly, while some research on broadcasting

matters was appropriate given the interplay of section 28 of the *Telecommunications Act* (the Act) with subsection 27(2) of the Act, the Commission considers that the number of hours that OpenMedia allocated to broadcasting matters is excessive given the fact that the proceeding dealt only with telecommunications matters.

48. In light of the above, the Commission finds that OpenMedia's costs claim for legal counsel should be reduced by 200 hours at the external-counsel hourly rate of \$135, for a total reduction of \$27,000.
49. Regarding TCC's argument that the number of nights for which OpenMedia was claiming hotel accommodation costs was excessive, OpenMedia amended its claim for disbursements to account for six nights' accommodation for each of two panelists, including the night before and the night of the last day of the five-day hearing (12 nights in total), resulting in a deduction of \$702.95 from the original claim. The Commission finds that, given the scope and nature of this proceeding, it was reasonable for panel members to meet in person in order to prepare for their scheduled appearance. However, accommodation for a total of 12 nights is unreasonable for a five-day hearing with no oral reply. In this case, the Commission finds that accommodation for three nights for two individuals (six nights in total) is reasonable.
50. Given the above, the Commission is adjusting the hotel disbursement amount based on the hotel rate of \$166.29 per night, for six nights (including room tax and omitting HST, since OpenMedia is claiming 100% of the HST rebate). Accordingly, the total approved amount for accommodation is \$1,161.27, and not \$2,183.81 as claimed in OpenMedia's reply.
51. The Commission also finds it appropriate to reduce the disbursements by \$50.03 for unsubstantiated intra-city car travel disbursements.
52. In light of all of the above, the Commission reduces OpenMedia's costs claim by \$28,072.57 and determines that the amount that was reasonably and necessarily incurred for its participation in this proceeding is \$57,969.94.
53. 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.
54. 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 examining 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.
55. 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.

56. 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.
57. 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.² 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.
58. Accordingly, consistent with the Commission’s general practice, it is appropriate to allocate 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, in the circumstances, 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.
59. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
TCC	33.5%	\$19,419.93
RCCI	30.5%	\$17,680.83
Bell Canada	22.6%	\$13,101.21
Videotron G.P.	6.0%	\$3,478.19
Shaw	4.1%	\$2,376.77

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

SaskTel	3.3%	\$1,913.01
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Directions regarding costs

60. The Commission **approves, with the above-mentioned deductions**, the application by OpenMedia for costs with respect to its participation in the proceeding.
61. Pursuant to subsection 56(1) of the Act, the Commission fixes the costs to be paid to OpenMedia at \$57,969.94.
62. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by the costs respondents according to the proportions set out in paragraph 59.

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