



Telecom Decision CRTC 2017-435

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Bell Canada – Application to review and vary Telecom Order 2017-95

*The Commission **denies** an application from Bell Canada to review and vary Telecom Order 2017-95 regarding costs awarded to the Affordable Access Coalition.*

Application

1. The Commission received an application from Bell Canada, dated 7 July 2017, in which the company requested that the Commission review and vary Telecom Order 2017-95. In that order, the Commission directed the costs respondents to pay the Affordable Access Coalition (AAC) costs in the amount of \$455,046.82. Bell Canada was responsible for paying 34.8% or \$158,356.29 of those costs.
2. Bell Canada argued that there is substantial doubt as to the correctness of Telecom Order 2017-95 for two reasons. First, Bell Canada argued that the Commission erred in fact by applying the rates applicable to external articling students when the record of the proceeding leading to that order (the proceeding) included concrete evidence that the articling students were directly employed by, and therefore internal to, the Public Interest Advocacy Centre (PIAC). Second, Bell Canada argued that the Commission erred in law by failing to apply subsection 70(2) of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure), which provides that the total amount of the costs must not exceed the total amount of costs that were necessarily and reasonably incurred by the applicant.
3. Bell Canada therefore requested that the Commission vary the determinations set out in Telecom Order 2017-95 to ensure that the costs awarded to the AAC reflect the correct relationship between PIAC and its articling students, and that only costs that were necessarily and reasonably incurred are recovered through the Commission's costs recovery process. Given that the costs have already been disbursed, Bell Canada asked that the Commission direct the AAC to return any inappropriately awarded costs to the costs respondents.
4. The Commission received an intervention regarding Bell Canada's review and vary application from the AAC. The public record of this proceeding, which closed on 7 August 2017, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Background

Telecom Order 2017-95

5. In the proceeding, there was considerable debate regarding the professional status of Mr. Lawford and PIAC's articling students. In Telecom Order 2017-95, the Commission referred to the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963, which state that requiring a claimant practising law to attest to the manner in which the claimant reports his or her employment status to any law society of which he or she is a member is a reliable manner of assessing whether counsel may claim an outside-counsel rate for the purpose of claiming costs.
6. The Commission considered that the specific circumstances of the proceeding that led to Telecom Regulatory Policy 2016-496, in which the Commission conducted a review of basic telecommunications services, warranted an exception to the normal rate scale applicable under the Guidelines. For example, the proceeding was lengthy and complex, with high importance for consumer groups and the public interest. The Commission therefore found that the costs claimed at the external rates for Mr. Lawford and PIAC's two articling students, as adjusted, were necessarily and reasonably incurred and should be allowed.
7. The Commission also found that the AAC's allocation of work to senior and external counsel, as well as to the expert witness, was reasonable, and that the associated fees were necessarily and reasonably incurred. While the Commission acknowledged that the overall amount of costs claimed was large, it considered that awarding costs in the amount claimed, as adjusted, would not affect the ability or incentives of telecommunications service providers to participate in Commission proceedings, since (i) proceedings of similar size and scope, with such obvious and direct implications for consumers, are relatively rare; and (ii) when such proceedings do occur, they also have obvious and direct implications for telecommunications service providers sufficient to outweigh the potential costs that providers may be directed to pay.

Review and vary criteria

8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the *Telecommunications Act*. Specifically, the Commission stated that 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.

Issues

9. The Commission has identified the following issues to be addressed in this decision:

- Did the Commission err in fact in Telecom Order 2017-95 by applying the external rate for the articling students?
- Did the Commission err in law in Telecom Order 2017-95 by failing to apply subsection 70(2) of the Rules of Procedure in respect of the expert witness?

Did the Commission err in fact in Telecom Order 2017-95 by applying the external rate for the articling students?

Positions of parties

10. Bell Canada submitted that regardless of the Commission's findings with respect to Mr. Lawford, the record of the proceeding provided clear evidence that PIAC's articling students were employed internally.
11. Bell Canada argued that the Commission failed to specifically address in its determinations the relationship between the articling students and PIAC, despite the fact that it noted Bell Canada's and TELUS Communications Company's (TCC)¹ arguments in this regard. Bell Canada noted that during the proceeding, PIAC had provided copies of the articles of clerkship for the articling students confirming that the positions were being offered internally. Bell Canada submitted that given this, it was an error in fact for the Commission to accept the AAC's claim that these individuals should be compensated using the external articling student rate.
12. The AAC submitted that the articling students' status does not depend solely on Mr. Lawford's reported status, and that several factors should be examined before determining if an articling student is internal or external. The AAC indicated that the Commission clearly did consider the status of the articling students, since the Commission noted Bell Canada's and TCC's arguments on the matter. However, the Commission simply did not agree with Bell Canada and TCC. The AAC argued that it is implicit in Telecom Order 2017-95 that the Commission accepted the articling students as being external resources. The AAC added that the Commission's determinations are not unreasonable and that they should stand.
13. Finally, the AAC referred to the financial hardship upon it and other public interest interveners, as well as the potential chill on intervener participation in Commission proceedings, should the Commission direct it to repay any monies.

¹ In the proceeding, submissions were received from TCC. However, effective 1 October 2017, TCC's assets were legally transferred to TELUS Communications Inc. and TCC ceased to exist.

14. In reply, Bell Canada noted that since Telecom Order 2017-95 was issued, Commission staff have requested additional information from PIAC in the context of other costs applications to determine whether PIAC's articling students should be considered internal or external resources. Bell Canada submitted that whatever determination is made concerning the status of PIAC's articling students in those proceedings should be applied to Telecom Order 2017-95.
15. Bell Canada argued that a reimbursement would not cause financial hardship to the AAC, since the full costs of the articling students' salaries were already paid for by the Law Foundation of Ontario's Public Interest Articling Fellowships program. Bell Canada submitted that as such, all funds for PIAC's articling students awarded to the AAC in Telecom Order 2017-95 were "bonus" revenue.

Commission's analysis and determinations

16. The Guidelines require legal counsel to report their employment status to the Commission as it is reported to any law society of which they are a member. In Telecom Order 2017-95, the Commission found as a matter of fact that Mr. Lawford reported to the Law Society of Upper Canada as "Practising Law – Employed." However, the Commission considered that the special circumstances of the proceeding that led to Telecom Regulatory Policy 2016-496 warranted an exception to the normal rate scale applicable under the Guidelines. Specifically, the Commission considered it appropriate to exercise its discretion not to apply the Guidelines and to allow costs to be claimed at the external rates for Mr. Lawford, as well as for the two articling students.
17. The Commission stated that the proceeding that led to Telecom Regulatory Policy 2016-496 was lengthy and complex, with high importance for consumer groups and the public interest. The Commission considered the AAC's contribution to that proceeding to be detailed, researched, and of particular importance in setting a baseline for debate on the funding models that could be adopted. Although the Commission did not make an explicit finding of fact in Telecom Order 2017-95 regarding the status of the articling students, such a finding was implicit in its rationale, given the Commission's decision to dispense with the Guidelines and allow the costs for the articling students to be claimed at the external rate.
18. The Commission set out in Telecom Order 2017-95 its explanation for departing from the Guidelines, and Bell Canada did not argue that the exercise of the Commission's discretion not to apply the Guidelines was unreasonable.
19. Accordingly, the Commission finds that it did not err in fact in Telecom Order 2017-95 by applying the external rate for the articling students.

Did the Commission err in law in Telecom Order 2017-95 by failing to apply subsection 70(2) of the Rules of Procedure in respect of the expert witness?

Positions of parties

20. Bell Canada argued that by awarding the full amount sought by the AAC for its expert witness, the Commission failed to apply subsection 70(2) of the Rules of Procedure, which states that “the total amount of the costs must not exceed the total amount of costs necessarily and reasonably incurred by the applicant or the costs set out in the scale of costs established by the Commission under subsection 56(2) of the *Telecommunications Act*.”
21. Bell Canada reiterated the arguments it made in the proceeding that led to Telecom Order 2017-95, specifically that the time spent by the expert witness to draft and respond to interrogatories, prepare a report, and revise his own work, was excessive. Bell Canada argued that the amount the AAC claimed for this work was nearly double the largest amount claimed for any work by an expert witness in the last 11 years, and that much of the work could have been completed by internal and/or more cost-effective resources.
22. Bell Canada stated that the AAC made a number of admissions in response to the company’s arguments, for example, that 18 hours of the expert witness’s time could have been charged to a more cost-effective resource at a lower rate. Nevertheless, the Commission awarded the AAC the full amount of costs claimed for the expert witness. According to Bell Canada, the Commission ruled in Telecom Order 2017-95 that the AAC’s decision to retain the expert witness and to allocate to him the task of answering interrogatories was reasonable, but the Commission did not address whether the time he spent was reasonable. Bell Canada submitted that the Commission’s failure to apply subsection 70(2) of the Rules in this manner gives rise to an error in law.
23. The AAC submitted that Bell Canada mischaracterized the AAC’s explanations as concessions or admissions in response to the company’s arguments. The AAC indicated that its explanations in response to Bell Canada’s arguments were meant to be an alternative, i.e. if the Commission did not accept the AAC’s primary argument to award full costs, it requested that the Commission exclude the limited amounts cited by Bell Canada. The AAC added that Bell Canada was essentially re-trying this matter in an abusive way.
24. The AAC submitted that in Telecom Order 2017-95, the Commission considered the arguments raised by the parties and exercised its discretion in awarding costs based on the total amount of time spent by the expert witness. Regarding Bell Canada’s submission that the expert witness’s time was excessive, the AAC argued that it was not unreasonable for the expert witness to respond to interrogatories and to submit an updated, useful, and accurate report.

25. The AAC argued that it did not have to allocate work perfectly to meet the requirements of subsection 70(2) of the Rules of Procedure and that to do so would place a serious chill on public interest advocacy before the Commission.
26. The AAC indicated that it has already advanced the entire amount owing to its expert witness and that therefore, it would be placed in a difficult situation should its costs award need to be refunded. The AAC submitted that any repayment may need to be taken from its own funds, particularly those of PIAC.
27. Finally, the AAC suggested that the Commission modify its Rules of Procedure to require costs respondents to file review and vary applications such as the present one within two weeks of the approval any costs award. This would strike a balance between the ability to challenge the costs award and the financial hardship faced by public interest interveners.
28. In reply, Bell Canada submitted that both it and TCC advanced clear evidence in the proceeding that the costs the AAC claimed for its expert witness were in excess of those necessarily and reasonably incurred. Bell Canada added that as a result, by awarding full costs, the Commission failed to observe subsection 70(2) of the Rules of Procedure, resulting in an error in law.

Commission's analysis and determinations

29. In this review and vary proceeding, Bell Canada essentially reiterated the arguments it put forward during the Telecom Order 2017-95 proceeding.
30. In Telecom Order 2017-95, the Commission explicitly stated that the AAC's allocation of work to the expert witness was reasonable, and that the associated fees were necessarily and reasonably incurred. The Commission explained that the proceeding that led to Telecom Regulatory Policy 2016-496 was unusually large and complex, and that the retention of the expert witness resulted in concrete proposals that were the subject of significant debate and that clearly could not have been completed by in-house resources. While the Commission acknowledged that the overall amount of costs claimed was large, it found that the amount was not dissimilar to amounts claimed in past proceedings of similar scope or scale. The amount also reflected the AAC's particular choice to propose two concrete funding models, which were useful to the Commission.
31. The Commission considers that in Telecom Order 2017-95, it did respect subsection 70(2) of the Rules of Procedure in that it examined the total amount of costs claimed by the AAC for the expert witness and found, based on the record of that proceeding, that these costs were necessarily and reasonably incurred. While Bell Canada may not agree with the Commission's assessment, there is no error in law that raises substantial doubt as to the correctness of the Commission's decision.
32. With respect to the AAC's suggestion that the Commission modify the Rules of Procedure to require costs respondents to file review and vary applications such as the present one within two weeks of the approval of any costs award, this issue is not

within the scope of the present application and will therefore not be considered in this decision.

Conclusion

33. In light of all the above, the Commission finds that Bell Canada has not demonstrated that there is substantial doubt as to the correctness of Telecom Order 2017-95 and therefore **denies** the company's review and vary application. Accordingly, the award of costs set out in Telecom Order 2017-95 is to be maintained.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Affordable Access Coalition in the proceeding leading to Telecom Regulatory Policy 2016-496*, Telecom Order CRTC 2017-95, 11 April 2017
- *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016
- *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