



Telecom Order CRTC 2018-351

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File numbers: 1011-NOC2017-0112 and 4754-588

Determination of costs award with respect to the participation of OpenMedia Engagement Network in the Telecom Notice of Consultation 2017-112 proceeding

Application

1. By letter dated 5 February 2018, OpenMedia Engagement Network (OpenMedia) applied for costs with respect to its participation in the proceeding initiated by Telecom Notice of Consultation 2017-112 (the proceeding). In the proceeding, the Commission examined matters related to the establishment of the broadband funding regime, including its governance, operating, and accountability frameworks, as well as eligibility and assessment criteria for proposed projects.
2. TELUS Communications Inc. (TCI)¹ and Xplornet Communications Inc. (Xplornet) filed interventions, both dated 15 February 2018, in response to OpenMedia's application. OpenMedia filed a reply dated 26 February 2018.
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 subscribers seeking more affordable broadband Internet services. OpenMedia indicated that its broader community includes about 250,000 people across Canada and – specifically for the proceeding – over 7,200 Canadians who signed a petition for community broadband initiatives in relation to the Commission's broadband funding regime.
5. With respect to the specific methods by which OpenMedia has submitted that it represents this group or class, OpenMedia explained that it (i) consulted directly with community members through social media, email, and its website; (ii) considered

¹ In the proceeding, submissions were received from TELUS Communications Company (TCC). However, effective 1 October 2017, TCC's assets were legally transferred to TCI and TCC ceased to exist. For ease of reference, "TCI" is used in this order.

community feedback; (iii) implemented an online petition; and (iv) drew on two telecommunications policy reports.

6. OpenMedia requested that the Commission fix its costs at \$40,589, consisting of legal and analyst fees. OpenMedia claimed 278.9 hours for junior external counsel at a rate of \$135 per hour (\$37,651.50 plus the Ontario Harmonized Sales Tax, less a 100% tax rebate) and 6.25 days in total for the work of five in-house analysts at a rate of \$470 per day (\$2,937.50).
7. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answer

8. Xplornet submitted that the Commission should carefully assess whether OpenMedia satisfies the criteria for a costs award and either deny or reduce OpenMedia's costs accordingly. In particular, Xplornet noted that among OpenMedia's financial contributors are web service providers and small start-up Internet service providers (ISPs), including Distributel Communications Limited and Start Communications, which compete with potential costs respondents, such as Xplornet. The company argued that it should not be subsidizing the participation of its competitors.
9. TCI submitted that the Commission should disallow OpenMedia's costs related to its proposed supplemental filing because the Commission excluded the filing from the evidence and record of the proceeding. TCI argued that since the Commission excluded the proposed supplemental filing, the filing did not assist the Commission in developing a better understanding of the matters that were considered, as required by the Rules of Procedure.

Reply

10. OpenMedia submitted that the Commission should reject Xplornet's and TCI's arguments.
11. In response to Xplornet's submission, OpenMedia submitted that its supporters fund the organization's general operations and that its business donors have no control on how OpenMedia spends the funding. OpenMedia also noted that it did not receive financial assistance in connection with the proceeding. Further, OpenMedia argued that if two interveners share similar positions in a proceeding, this does not necessarily mean that they have submitted a joint intervention.
12. In response to TCI's claim, OpenMedia noted that the Commission has considered that the assessment of a costs application is independent of the outcome of the substantive proceeding and argued that the same principle should apply to procedural requests. OpenMedia argued that awarding costs only for the procedural requests that are successful would have a chilling effect on public interest groups because they would submit only those procedural requests that are very likely to succeed.

Commission's analysis and determinations

13. 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.

14. OpenMedia's eligibility for costs was challenged because it receives financial contributions from for-profit ISPs and because its request to file supplementary comments and evidence was denied. These arguments challenge OpenMedia's satisfaction of the first and second eligibility criteria.

15. Regarding the first eligibility criterion, OpenMedia stated that it received no financial assistance in connection with the proceeding. Further, there is no evidence on the record of the costs proceeding that OpenMedia coordinated its submissions in the proceeding with a commercial entity or an industry group, or that any of its private contributors influenced its participation in the proceeding. The Commission is satisfied that the funding that OpenMedia received supported its general operational activities and was not specific to the proceeding.

16. 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 particular, OpenMedia identified the group or class of subscribers as consisting of over 7,200 Canadians who signed a petition for community broadband initiatives in relation to the Commission's broadband funding regime. OpenMedia also explained the specific methods by which it represented this group or class of subscribers, such as (i) directly consulting community members through social media platforms, email, and its website; (ii) considering community feedback; (iii) implementing an online petition; and (iv) relying on relevant research.

17. Accordingly, the Commission finds that OpenMedia has satisfied the first eligibility criterion regarding representation. Specifically, OpenMedia has demonstrated that it represents the interests of a group or class of subscribers and how its participation in the proceeding reflected the interests of those subscribers.

18. Regarding the second eligibility criterion, the Commission's revised costs award practices and procedures, as set out in Telecom Regulatory Policy 2010-963, provide that in evaluating whether a costs applicant has contributed to a better understanding of the issues, the Commission may consider

- whether the applicant filed evidence;
- whether the contribution was focused and structured; and
- whether the contribution offered a distinct point of view.

This list is not exhaustive or binding, and the Commission will consider all factors relevant to a specific proceeding.

19. In the present case, OpenMedia failed to fully satisfy the second eligibility criterion.

20. As part of the proceeding, OpenMedia filed evidence, offered focused and structured contributions from the distinct point of view of Canadian Internet users, and assisted the Commission by providing consumer and public interest perspectives as well as alternative solutions to broadband funding issues.

21. However, OpenMedia also made a procedural request, received on 18 August 2017, to file supplementary comments in order to remedy a gap in its intervention to the proceeding, dated 28 June 2017. This request drew attention to reported struggles that the Village of Kaslo, British Columbia, faced in obtaining high-speed broadband Internet access, involving both Kaslo infoNet (KiN), an ISP, and, purportedly, TCI. OpenMedia attached to its procedural request KiN's statement and evidence in relation to the procedural request.

22. OpenMedia explained that it had expected that KiN would intervene on its own behalf to provide the Commission, and the record, with substantiating details regarding such reported struggles, but learned after the first intervention deadline that KiN had not intervened. By letter dated 29 August 2017, OpenMedia argued that KiN's statement and evidence are materially relevant to issues central to the proceeding and requested that the Commission accept the supplemental filing.

23. By letter dated 1 November 2017, the Commission denied OpenMedia's supplemental filing, because the further details provided regarding the alleged interactions between TCI and KiN were anecdotal and unsubstantiated; therefore, the supplemental filing did not add to the record and was not required to further support OpenMedia's general position.

24. In general, the outcome of a procedural request should not determine whether the costs associated with such a request are allowed. However, in the present case, the procedural request and proposed supplemental filing failed to assist the Commission in developing a better understanding of the matters that were considered.

25. As noted above, the supplemental filing was inadequate and it was excluded from the evidence and record of the proceeding. Therefore, given the specific facts of this case, the Commission uses its discretion to determine that the costs associated with the procedural request and supplemental filing should be disallowed.
26. The time docket of OpenMedia's junior external counsel shows that the hours and costs associated with the procedural request and proposed supplemental filing amount to 16.1 hours at a rate of \$135 per hour, that is, \$2,173.50. According to the time docket, these costs comprise the following:
- Draft supplementary filing; call with LT; research; look up Commission staff (5.5 hours).
 - Prepare supplementary intervention (0.3 hours).
 - Revise and finalize supplementary comments; think through case management; file supplementary comments (3.4 hours).
 - Draft/review/send email; check Rules of Procedure; consult; decide how to proceed; serve supplementary filing (4.5 hours).
 - Respond to emails; send follow-up email; amend supplementary comments; create abridged version of Appendix A; create redacted Exhibit B; review and finalize (2.0 hours).
 - File amended supplementary comments; serve on distribution list; reply to counsel (0.4 hours).
27. Based on this time docket, it is not possible to distinguish the time spent on the procedural request from the time spent on the proposed supplemental filing. Given this, and that 16.1 hours to file a procedural request seems excessive, the Commission disallows the full 16.1 hours.
28. Accordingly, the Commission reduces the costs claimed in OpenMedia's costs application for its junior external counsel from \$37,651.50 to \$35,478.00 and the total costs from \$40,589.00 to \$38,415.50.
29. Regarding the third eligibility criterion, OpenMedia participated in the proceeding in a responsible way.
30. The rates claimed in respect of analyst and legal fees are in accordance with the rates established in the *Guidelines for the Assessment of Costs*, as set out in Telecom Regulatory Policy 2010-963. The Commission finds that the total amount claimed by OpenMedia, as adjusted above, was necessarily and reasonably incurred and should be allowed.

31. 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.
32. 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. The Commission considers that all the telecommunications service providers that participated in the proceeding had a significant interest in the outcome of the proceeding and participated actively in the proceeding.
33. The Commission considers that, consistent with its practice, it is appropriate to allocate the responsibility for payment of costs among costs respondents based on their telecommunications operating revenues (TORs) as an indicator of the relative size and interest of the parties involved in the proceeding.² 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.
34. Accordingly, the Commission finds that the following parties are responsible for payment of costs: Bell Canada, on its own behalf and on behalf of Bell Mobility Inc., NorthernTel, Limited Partnership, Northwestel Inc., and Télébec, Limited Partnership (collectively, the Bell companies); Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Shaw Cablesystems G.P. (Shaw); and TCI. The Commission finds that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
Bell companies ³	40.4%	\$15,519.86
TCI	26.3%	\$10,103.28
RCCI	24.8%	\$9,527.04
Videotron	5.0%	\$1,920.78
Shaw	3.5%	\$1,344.54

² TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services. In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

³ Bell Canada's TORs include those of MTS Inc. On 1 April 2017, Bell Canada amalgamated with MTS Inc., which is now operating as Bell MTS, a division of Bell Canada.

35. 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. The Commission leaves it to the members of the Bell companies to determine the appropriate allocation of the costs among themselves.

Directions regarding costs

36. The Commission **approves, with changes**, the application by OpenMedia for costs with respect to its participation in the proceeding.

37. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to OpenMedia at \$38,415.50.

38. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by Bell Canada, on behalf of the Bell companies; TCI; RCCI; Videotron; and Shaw according to the proportions set out in paragraph 34.

Secretary General

Related documents

- *Development of the Commission's broadband funding regime*, Telecom Notice of Consultation CRTC 2017-112, 25 April 2017; as amended by Telecom Notice of Consultation CRTC 2017-112-1, 24 July 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
- *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