



Telecom Order CRTC 2021-143

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Determination of costs award with respect to the participation of Canadian Internet Policy and Public Interest Clinic/OpenMedia in the proceeding that led to Telecom Regulatory Policy 2021-130

Application

1. By letter dated 21 September 2020, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) and OpenMedia (collectively, CIPPIC/OpenMedia) applied for costs with respect to their participation in the proceeding that led to Telecom Regulatory Policy 2021-130 (the proceeding). In the proceeding, the Commission reviewed mobile wireless services in Canada.
2. Bell Mobility Inc. (Bell Mobility) and TELUS Communications Inc. (TCI) each filed interventions, both dated 1 October 2020, in response to CIPPIC/OpenMedia's application. CIPPIC/OpenMedia filed a reply dated 13 October 2020.
3. CIPPIC/OpenMedia submitted that they 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 (i) they themselves had an interest in the outcome of the proceeding in their own right and represented Canadian mobile subscribers who also had an interest in the outcome of the proceeding, (ii) they had assisted the Commission in developing a better understanding of the matters that were considered, and (iii) they had participated in a responsible way.
4. With respect to the specific methods by which CIPPIC/OpenMedia submitted that they represent Canadian mobile subscribers, they explained that they conducted an online survey that attracted 10,000 responses. Further, they submitted that they conducted research on retail pricing, comparative adoption, and usage of mobile wireless services to inform their distinctive submissions.
5. CIPPIC/OpenMedia requested that the Commission fix their costs at \$67,870.50, consisting of \$49,749 for legal fees, \$14,452.50 for in-house analyst fees, and \$3,669 for disbursements. CIPPIC/OpenMedia's claim included the federal Goods and Services Tax (GST) and Ontario Harmonized Sales Tax (HST) on fees less the rebate to which CIPPIC/OpenMedia are entitled in connection with the GST and HST. CIPPIC/OpenMedia filed a bill of costs with their application.

6. CIPPIC/OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).
7. TCI submitted that all participating telecommunications service providers (TSPs) should be named as costs respondents.

Issues

8. The Commission has identified the following issues to be addressed in this order:
 - Was the total amount claimed by CIPPIC/OpenMedia for in-house analyst fees for community engagement necessarily and reasonably incurred, and should it be allowed?
 - Should Mr. Tamir Israel's fees be considered in-house or external counsel fees?
 - Was the total amount claimed by CIPPIC/OpenMedia for legal fees necessarily and reasonably incurred, and should it be allowed?

Was the total amount claimed by CIPPIC/OpenMedia for in-house analyst fees for community engagement necessarily and reasonably incurred, and should it be allowed?

9. CIPPIC/OpenMedia claimed costs associated with two days of community engagement activities conducted by in-house analyst Ms. Marie Aspiazu.

Positions of parties

10. TCI submitted that CIPPIC/OpenMedia's claim for two days of community engagement by an in-house analyst is outside the scope of cost recovery given that the analyst's activities were not directly related to CIPPIC/OpenMedia's participation in the proceeding.
11. CIPPIC/OpenMedia submitted evidence on the record of the proceeding that the activities, while on social media, were directly related to engaging the community to participate in an online survey and an online statement portal, both of which OpenMedia hosted. CIPPIC/OpenMedia submitted that together, these two tools attracted 28,000 submissions from the community, which were used to inform CIPPIC/OpenMedia's submissions.
12. CIPPIC/OpenMedia argued that the activities fell within the scope of the proceeding because they were directly related to eliciting community participation in a survey to inform their intervention in the proceeding. CIPPIC/OpenMedia submitted that these activities should therefore qualify for cost recovery.

Commission's analysis and determinations

13. Given the volume of feedback through CIPPIC/OpenMedia's online channel that informed their submissions, the Commission concludes that the total amount claimed by CIPPIC/OpenMedia for community engagement was necessarily and reasonably incurred and should be allowed.

Should Mr. Tamir Israel's fees be considered in-house or external counsel fees?

14. Mr. Israel claimed a total of \$49,749 for external legal fees at \$206 an hour for a total of 241.5 hours.

Positions of parties

15. Both Bell Mobility and TCI submitted that the legal fees claimed by CIPPIC/OpenMedia should be based on the rate set for in-house counsel, not outside counsel, because Mr. Israel is internal counsel for CIPPIC. Bell Mobility and TCI added that the rate should be adjusted to reflect this. Bell Mobility further argued that CIPPIC/OpenMedia are not in a lawyer and client relationship, nor are they a large coalition, and they should therefore be viewed as a single organization for the purposes of the proceeding.
16. CIPPIC/OpenMedia argued that CIPPIC lawyers are not on staff with OpenMedia, and OpenMedia does not contribute to overhead, insurance, or bar fees for CIPPIC counsel. Further, CIPPIC/OpenMedia submitted that *Bell Canada v. Consumers' Assoc. of Canada*¹ affirms their position.
17. CIPPIC/OpenMedia submitted that the Commission has previously affirmed external counsel rates claimed under the same arrangement, in which CIPPIC represented OpenMedia in an external counsel arrangement, in Telecom Orders 2013-523 and 2019-168. CIPPIC/OpenMedia added that the choice to file jointly was for efficiency reasons. CIPPIC/OpenMedia further submitted that the costs respondents have not demonstrated on what basis the Commission should reach a different conclusion.

Commission's analysis and determinations

18. As set out in Telecom Regulatory Policy 2010-963, the *Guidelines for the Assessment of Costs* (the Guidelines) state that the status of legal counsel as in-house or external counsel is determined by how the lawyer reports to the law society. In past decisions, the Commission has reiterated that this criterion is primarily one of efficiency, stating in Telecom Order 2017-364 that the manner in which a lawyer reports to the appropriate law society constitutes an objective evidentiary piece of information and enables the Commission to avoid resource-intensive analysis on the status of the lawyer. However, the Commission added in the same order that the

¹ *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190.

Guidelines do permit a departure from this test in cases where the applicant demonstrates that exceptional circumstances exist.

19. The Commission considers that Mr. Israel reports to the Law Society of Ontario as being an employee of CIPPIC and reflected this status in his costs application forms. However, the costs application cover page indicates that the costs applicant is CIPPIC/OpenMedia and includes a reference to joint filings by CIPPIC and OpenMedia. A strict adherence to the Guidelines could suggest he should be considered in-house counsel for the purpose of this application, at least with respect to the costs incurred by CIPPIC. However, as set out in the Guidelines, the costs assessment process must maintain the flexibility necessary to ensure that costs are awarded in light of the particular circumstances of a proceeding or intervention. In this case, the circumstances, while not exceptional, reflect a reality that is not captured in a strict adherence to the Guidelines and could lead to a rejection of costs essentially on a technicality.
20. The joint filing by CIPPIC and OpenMedia are the only connection demonstrated between the two organizations. While the two organizations note this arrangement on the first page of their application, Form V – Summary of Fees and Disbursements indicates that OpenMedia is the sole applicant. The only form on which CIPPIC and Mr. Israel are both mentioned is Form I – Summary of Legal Fees. In CIPPIC/OpenMedia’s filing, the only amount claimed by CIPPIC in the application was for Mr. Israel’s legal fees. This is logical because CIPPIC is a law clinic, and Mr. Israel is employed as a staff lawyer there. No disbursements or other fees were attributed to CIPPIC.
21. In the present application, CIPPIC submitted its bill of costs directly to the Commission. All the hours in the bill of costs are typical of external counsel and are not outside the scope of that role. CIPPIC/OpenMedia submitted they filed jointly for efficiency reasons, which is a guiding principle in a costs assessment.
22. Therefore, the Commission finds the claim for external counsel fees and a departure from the Guidelines to be reasonable.

Was the total amount claimed by CIPPIC/OpenMedia for legal fees necessarily and reasonably incurred, and should it be allowed?

Positions of parties

23. TCI submitted that CIPPIC/OpenMedia’s claim for legal counsel fees should be reduced for the failure to use junior resources or to explain why they were not used.
24. CIPPIC/OpenMedia argued the categorization of counsel as senior is incorrect given that CIPPIC’s most junior counsel managed most of the proceeding and fell within the Commission’s second-highest legal counsel category. Further, CIPPIC/OpenMedia submitted that CIPPIC did not have articling students during the proceeding but did use student volunteers. However, CIPPIC/OpenMedia noted that it did not claim costs for that time.

Commission's analysis and determinations

25. The Commission considers that CIPPIC assigned its most junior lawyer to manage the proceeding. CIPPIC did not have articling students at the time of the proceeding and relied on law students' participation to the extent it was able to. Further, much of the work on the intervention was conducted by analysts rather than legal counsel. Moreover, the costs claimed are proportionate to the size and complexity of the proceeding. As a result, the Commission considers that the costs applicant's counsel choice was both necessary and reasonable.
26. The Commission considers that rates claimed in respect of analyst and legal fees are in accordance with the rates established in the Guidelines. The Commission finds that the total amount claimed by CIPPIC/OpenMedia was necessarily and reasonably incurred and should be allowed.

Criteria for an award of costs

27. 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.

28. 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, CIPPIC/OpenMedia have demonstrated that they meet this requirement. CIPPIC/OpenMedia had an interest in the outcome of the proceeding in their own right and represented the interests of Canadian mobile wireless service subscribers.
29. CIPPIC/OpenMedia have also satisfied the remaining criteria through their participation in the proceeding. They provided a detailed report on retail pricing and competitive adoption and usage of mobile wireless services that included extensive and recent research. Further, they conducted an online survey of 10,000 Canadians, which enriched their submissions. Both the report and survey informed their submissions to the Commission and assisted the Commission in developing a better understanding of the matters before it.

Allocation of costs

30. 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.
31. The Commission has generally determined that the appropriate costs respondents to an award of costs are the TSPs that have a significant interest in the outcome of the proceeding in question and have participated actively in that proceeding. Although the Commission dealt primarily with mobile wireless services in the proceeding, many service providers that do not currently provide mobile wireless services demonstrated an interest in the proceeding as potential customers of a mobile virtual network operator (MVNO) service.² Moreover, many parties made submissions related to the Commission's broader policies, including its test to determine whether a service should be mandated, which would have implications for more than the mobile wireless services specifically at issue in this proceeding. Furthermore, although Bell Mobility proposed a different mechanism for allocating costs, it did not provide a convincing reason to make an exception to the general rules, which are designed to ensure efficiency for costs applicants in collecting funds. Therefore, the Commission considers this an appropriate case in which to apply the Guidelines for the allocation of costs.
32. The Commission considers that the following parties had a significant interest in the outcome of the proceeding and participated actively in the proceeding: Bell Mobility; Bragg Communications Incorporated, carrying on business as Eastlink; Cogeco Communications inc. (Cogeco); Data on Tap Inc.; Distributel Communications Limited; Ice Wireless Inc.; Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Communications Inc.; SSI Micro Ltd.; TBayTel; TekSaavy Solutions Inc.; TCI; TNW Wireless Inc.; Tucows Inc.; Voyageur Internet Inc.; and Xplornet Communications Inc.
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.³

² An MVNO is a wireless service provider that does not own spectrum or operate its own radio access network (RAN); instead, it relies on the spectrum and RAN of a wireless carrier and, in some cases, other facilities and/or services, to provide mobile wireless services to consumers. MVNOs encompass a variety of service-based providers that rely on wholesale services to varying degrees to support their retail businesses.

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

34. 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.
35. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:⁴

Company	Proportion ⁵	Amount
RCCI	32.15%	\$21,818.86
TCI	31.96%	\$21,688.87
Bell Mobility	22.65%	\$15,372.34
Videotron	6.56%	\$4,449.83
SaskTel	2.95%	\$2,003.94
Cogeco	2.26%	\$1,532.13
Shaw	1.44%	1,004.53

2019 Policy Direction

36. The Governor in Council issued a policy direction in which it directed the Commission to consider how its decisions can promote competition, affordability, consumer interests, and innovation (the 2019 Policy Direction).⁶ The Commission considers that the awarding of costs in this instance is consistent with subparagraph 1(a)(iv) of the 2019 Policy Direction.
37. By facilitating the participation of a group that represents consumer interests, this order contributes to enhancing and protecting the rights of consumers in their relationships with TSPs. Since consumer groups often require financial assistance to effectively participate in Commission proceedings, the Commission is of the view that its practice of awarding costs, as exercised in this instance, enables such groups to provide their perspectives on how consumer interests may be affected by the outcomes of the proceedings. In light of the above, the Commission considers that its determination to award costs to CIPPIC/OpenMedia promotes consumer interests.

⁴ In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

⁵ The total proportion does not add to exactly 100% due to rounding.

⁶ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019

Directions regarding costs

38. The Commission **approves** the application by CIPPIC/OpenMedia for costs with respect to their participation in the proceeding.
39. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to CIPPIC/OpenMedia at \$67,870.50.
40. The Commission **directs** that the award of costs to CIPPIC/OpenMedia be paid forthwith by RCCI, TCI, Bell Mobility, Videotron, SaskTel, and Cogeco according to the proportions set out in paragraph 35.

Secretary General

Related documents

- *Review of mobile wireless services*, Telecom Regulatory Policy CRTC 2021-130, 15 April 2020
- *Determination of costs award with respect to the participation of the Canadian Internet Policy and Public Interest Clinic and OpenMedia Engagement Network in the proceeding that led to Telecom Decision 2018-475*, Telecom Order CRTC 2019-168, 21 May 2019
- *Determination of costs award with respect to the participation of the Coalition in the proceeding that led to Telecom Regulatory Policy 2017-200*, Telecom Order CRTC 2017-364, 16 October 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
- *Determination of costs award with respect to the participation of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic in the proceeding leading to Telecom Regulatory Policy 2013-271*, Telecom Order CRTC 2013-523, 27 September 2013
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010
- *Determination of costs awards with respect to the participation of certain parties in the Telecom Public Notice 2008-19 proceeding*, Telecom Order CRTC 2010-85, 12 February 2010
- *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5, 7 November 2002