



Telecom Order CRTC 2021-146

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File numbers: 1011-NOC2019-0057 and 4754-633

Determination of costs award with respect to the participation of EMF-OFF! and Marcel Durand in the proceeding that led to Telecom Regulatory Policy 2021-130

Application

1. By letter dated 17 August 2020, EMF-OFF! and Mr. Marcel Durand 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. In their submission, EMF-OFF! and Mr. Durand described EMF-OFF! as a not-for-profit that seeks to raise awareness of (i) the effects of electromagnetic fields, (ii) the potential health risks of 5G technology and networks to privacy and human health and safety, and (iii) the cumulative effects of electromagnetic fields on flora and fauna.
3. TELUS Communications Inc. (TCI) filed an intervention, dated 24 August 2020, in response to EMF-OFF! and Mr. Durand's application. Bell Mobility Inc. (Bell Mobility) filed an intervention dated 25 August 2020. EMF-OFF! and Mr. Durand filed a reply, which the Commission received on 1 September 2020.
4. EMF-OFF! and Mr. Durand requested that the Commission fix their costs at \$123,377.18, consisting of \$103,683.31 for legal fees, \$14,795.51 for expert witness fees, \$365.74 for in-house consultant and analyst fees, and \$4,532.62 for disbursements. EMF-OFF! and Mr. Durand filed a bill of costs with their application.
5. EMF-OFF! and Mr. Durand submitted that Bell Mobility; Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communication Canada Inc. (RCCI); Shaw Communications Inc. (Shaw); TCI; and Ville de Montréal are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answers

6. Bell Mobility and TCI argued that EMF-OFF! and Mr. Durand should not be awarded any costs. Their basis for this argument was that EMF-OFF! and Mr. Durand failed to meet the eligibility requirements, and that the legal fees charged by

Mr. Charles O'Brien are unreasonable to such an extent that they undermine the entirety of the costs claim.

7. TCI argued that EMF-OFF! and Mr. Durand failed to meet the eligibility requirements because (i) they did not represent a class of subscribers with an interest in the outcome of the proceeding, (ii) their submissions were out of scope and beyond the Commission's jurisdiction, and (iii) therefore were not capable of helping to provide the Commission with a better understanding of the issues in the proceeding.
8. TCI further argued that if EMF-OFF! and Mr. Durand are awarded costs, then
 - the legal fees should be reduced;
 - the request for reimbursement for Dr. Dominique Belpomme's report should be denied because it was not prepared in connection with the proceeding; and
 - the expert witness fees of Mr. Pedro Gregorio for preparation of an expert report in the amount of \$1,125 should be deducted, given that it does not appear that such a report was submitted.
9. Bell Mobility argued that EMF-OFF! and Mr. Durand failed to meet the eligibility requirements because (i) they did not represent a class of subscribers with an interest in the outcome of the proceeding, (ii) their submissions lacked focus and structure and ultimately failed to engage with the matters set out in Telecom Notice of Consultation 2019-57, and (iii) they failed to participate in the proceeding in a responsible way.

Reply

10. EMF-OFF! and Mr. Durand 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 represented a group or class of subscribers that 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.
11. In particular, EMF-OFF! and Mr. Durand submitted that they represent Canadians sensitive to electromagnetic fields, who they estimate represent at least three percent of all Canadians. Additionally, they submitted that the concerns they raised in regard to privacy extended to represent all subscribers.
12. EMF-OFF! and Mr. Durand submitted that the legal fees were reasonable and necessary given that their field does not have many available practicing lawyers, and that the law student they asked to help refused the offer.

13. On the issue of eligibility, EMF-OFF! and Mr. Durand submitted that they represent Canadians with electromagnetic hypersensitivity, they filed a relevant study, and they offered a distinct perspective in a responsible way.
14. EMF-OFF! and Mr. Durand suggested that the responsibility for payment of costs should be divided among the costs respondents, with a larger proportion of the costs being allocated to TCI. EMF-OFF! and Mr. Durand submitted that the reason for that is the unconscionable position and assertions contained in TCI's intervention. They proposed the following breakdown for payment of costs:
 - TCI: 43%
 - Bell Mobility: 23%
 - RCCI: 23%
 - Videotron: 5%
 - Shaw: 3%
 - Ville de Montréal: 2%¹

Commission's analysis and determinations

15. 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.
16. As set out in Telecom Regulatory Policy 2010-963, the *Guidelines for the Assessment of Costs* state that in evaluating whether an applicant has contributed to a

¹ As per EMF-OFF! and Mr. Durand's submission, these percentages total 99%.

better understanding of the issues, the considerations that the Commission will generally take into account include:

- a. whether the applicant filed evidence;
 - b. whether the contribution was focused and structured; and
 - c. whether the contribution offered a distinct point of view.
17. The Commission adds in that regulatory policy that the above list of considerations is not exhaustive and the factors considered are entirely within the discretion of the Commission, depending on the circumstances of each case.
18. In Telecom Notice of Consultation 2019-57, the Commission invited submissions related to three key areas:
- competition in the retail mobile wireless service market;
 - the current wholesale mobile wireless service regulatory framework, with a focus on wholesale mobile virtual network operator (MVNO)² access; and
 - the future of mobile wireless services in Canada, with a focus on reducing barriers to infrastructure deployment.
19. Additionally, the Commission included a section for other matters, in which it asked if there are any other matters, issues, or proposals related to mobile wireless services, beyond those listed in the notice of consultation, that the Commission should be aware of and potentially make determinations on as part of that proceeding. The Commission invited interveners to identify and explain why those issues are relevant and include proposed regulatory solutions. Further, the Commission stated that its overall focus in the proceeding was to ensure that its mobile wireless service regulatory framework facilitates sustainable competition that provides reasonable prices and innovative services, as well as continued investment in high-quality mobile wireless networks in all regions of the country.
20. EMF-OFF! and Mr. Durand submitted that their submission for the proceeding fell under the scope of the third key area: the future of mobile wireless services in Canada. EMF-OFF! and Mr. Durand submitted that if the Commission was not willing to accept that their submission fell under this area, it would fall under other matters.
21. However, in their submission for the proceeding, EMF-OFF! and Mr. Durand raised two main policy concerns that ultimately did not lead to facilitating a better

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.

understanding of matters in the proceeding, even under this broad and general question.

22. In their submission for the proceeding, EMF-OFF! and Mr. Durand focused principally on exposure to radiofrequency electromagnetic energy from wireless facilities. They related this issue to the regulation of spectrum and antenna siting and how they may affect public health and safety. While the Commission does have some jurisdiction to determine technical standards for telecommunications facilities, it has no jurisdiction over decisions regarding spectrum use and allocation, the imposition of conditions on spectrum licences, or antenna siting, per se. Those issues are the proper jurisdiction of the Minister of Industry under the *Radiocommunication Act*.³ Moreover, EMF-OFF! and Mr. Durand's submission did not generally contain concrete proposals for how the Commission might exercise its jurisdiction to address the concerns raised. Accordingly, the submission does not relate to the scope of the proceeding and could not help the Commission gain a better understanding of any mobile wireless service issues on which it called for comment.
23. EMF-OFF! and Mr. Durand's submission for the proceeding also related to privacy matters. The Commission's jurisdiction with respect to privacy generally only extends to the practices of Canadian carriers and telecommunications service providers (TSPs). However, in their submission, EMF-OFF! and Mr. Durand were concerned with uses of 5G networks and technologies by third parties (e.g. manufacturers of Internet of Things devices). EMF-OFF! and Mr. Durand did not focus on the collection, use, and disclosure of personal information by TSPs themselves. Given the Commission's jurisdiction, EMF-OFF! and Mr. Durand's submission on this subject was necessarily outside the scope of the proceeding.
24. In light of the above, EMF-OFF! and Mr. Durand have not satisfied the eligibility requirement, and the Commission therefore finds that they are ineligible for costs.
25. Accordingly, the Commission **denies** the application by EMF-OFF! and Mr. Durand for costs with respect to their participation in the proceeding.

2019 Policy Direction

26. The Governor in Council issued a policy direction in which it directed the Commission to consider how its decisions can promote competition, affordability,

³ Under the *Radiocommunication Act*, the Minister of Industry may issue spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area, as per clause 5(1)(a)(i.1); fix the terms and conditions of any such licence, as per subparagraph 5(1)(a); plan the allocation and use of the spectrum, as per subparagraph 5(1)(e); and approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures, as per subparagraph 5(1)(f).

consumer interests, and innovation (the 2019 Policy Direction).⁴ The Commission considers that denying the awarding of costs in this instance is consistent with subparagraph 1(a)(iv) of the 2019 Policy Direction.

27. By facilitating the participation of a group that represents consumers with an interest in the proceeding and whose submissions contribute to a better understanding of the issues, the awarding of costs 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 enables such groups to provide their perspectives on how consumer interests may be affected by the outcomes of the proceedings. However, given the Commission's findings that EMF-OFF! and Mr. Durand's submission for the proceeding were out of scope and did not contribute to a better understanding of the proceeding, the denial of costs in this case promotes consumer interests and ensures efficient and effective processes.

Secretary General

Related documents

- *Review of mobile wireless services*, Telecom Regulatory Policy CRTC 2021-130, 15 April 2021
- *Review of mobile wireless services*, Telecom Notice of Consultation CRTC 2019-57, 28 February 2019; as amended by Telecom Notices of Consultation CRTC 2019-57-1, 28 October 2019; 2019-57-2, 20 March 2020; and 2019-57-3, 23 June 2020
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010

⁴ *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