



Telecom Order CRTC 2015-213

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Determination of costs award with respect to the participation of the Public Interest Advocacy Centre and the Consumers' Association of Canada in the proceeding initiated by their application regarding Rogers Communications Partnership's "Rogers Next" and TELUS Communications Company's "T-UP!" early upgrade programs

1. By letter dated 27 August 2014, the Public Interest Advocacy Centre (PIAC) and the Consumers' Association of Canada (CAC) [collectively, PIAC/CAC] applied for costs with respect to their participation in the proceeding initiated by their Part 1 application regarding Rogers Communications Partnership's (RCP) "Rogers Next" and TELUS Communications Company's (TCC) "T-UP!" early upgrade programs.
2. On 8 September 2014, TCC filed an intervention to PIAC/CAC's application for costs. On 11 September 2014, PIAC/CAC filed a reply.

Application

3. PIAC/CAC 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 they represented a group or class of subscribers that had an interest in the outcome of the proceeding, they had assisted the Commission in developing a better understanding of the matters that were considered, and they had participated in a responsible way.
4. In particular, PIAC/CAC submitted that they had filed the Part 1 application as a result of complaints from subscribers about early upgrade programs, of which RCP's "Rogers Next" and TCC's "T-UP!" are examples. They submitted that their application exposed evidence of a practice that warranted Commission attention in light of the Wireless Code,¹ and that potentially involved significant amounts of money from subscribers. PIAC/CAC added that they combined two potential applications into one, supported an extension request by RCP for the submission of answers, and ensured that their reply focused on the core issues.

¹ See Telecom Regulatory Policy 2013-271.

5. PIAC/CAC requested that the Commission fix their costs at \$12,406.38, consisting entirely of external legal fees. PIAC/CAC's claim included the Ontario Harmonized Sales Tax (HST) on fees less the rebate to which PIAC/CAC are entitled in connection with the HST. PIAC/CAC filed a bill of costs with their application.
6. PIAC/CAC submitted that Bell Mobility Inc. (Bell Mobility), RCP, and TCC are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents). PIAC/CAC submitted that this proposal was based on RCP's and TCC's engagement in the practice at issue in the Part 1 application, along with Bell Mobility's admission of a direct interest in defending the practice and its support for the practice.
7. PIAC/CAC made no submission regarding the allocation of costs among the costs respondents.

Answer

8. In response to the application for costs, TCC submitted that PIAC/CAC's claims about "T-UP!" reflected a major misunderstanding of the program. TCC submitted that as a result, it was forced to significantly correct the record about its program in its answer to the Part 1 application. TCC argued that PIAC/CAC's misconceptions could have been easily corrected through basic due diligence, the absence of which led, in TCC's view, to an application that contained factual misrepresentations and baseless allegations. As a result, TCC proposed that 50% of the costs claim be denied.
9. TCC submitted that the Commission's custom of apportioning costs by way of telecommunications operating revenues (TORs)² sometimes leads to unfair results, because TCC's TORs include wireless and wireline revenues. TCC argued that, in contrast, Bell Mobility and RCP often participate in regulatory proceedings under corporate entities that exclude either wireless or wireline services, which leads to TCC paying what it considers to be a disproportionate share of costs. TCC requested that any costs apportionment in the present case be based on each costs respondent's wireless revenues or, alternatively, on fixed percentages.

Reply

10. In reply, PIAC/CAC argued that TCC's answer attempted to relitigate the merits of the Part 1 application, which was not appropriate at the costs stage of the proceeding. PIAC/CAC also submitted that there were considerable ambiguities surrounding the programs at issue, and that their understanding of TCC's program was based on information available in the public domain.
11. PIAC/CAC submitted that it would be unreasonable for the Commission to require perfect information about a particular program, and that construing such a program may be a matter of interpretation. Consequently, PIAC/CAC argued that costs should not be

² TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

denied or reduced due to the possibility that information available in the marketplace did not allow for an applicant to achieve an understanding of a program consistent with that of the provider. PIAC/CAC submitted that the issue at hand in evaluating the application for costs is whether they behaved reasonably.

12. In response to TCC's request that any costs apportionment in this proceeding be based on wireless revenues, PIAC/CAC submitted that this is a request for a policy change that would require a broader public consultation.

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. The Commission finds that PIAC/CAC have satisfied these criteria through their participation in the proceeding. They made arguments and provided evidence that raised legitimate questions about whether the programs in question contravened aspects of the Wireless Code. In particular, PIAC/CAC made submissions with a view to demonstrating that the programs violated the Wireless Code's limitation on early cancellation fees by requiring customers to prepay for a device on the basis that the fees paid into the program are never refundable.

15. In reply to the Part 1 application, PIAC/CAC retracted a specific contention that the "T-UP" program created a literal obligation to renew, which necessarily results in a perpetual cycle of contract renewals. The Commission considers that this particular inaccuracy did not significantly inform PIAC/CAC's conclusions, and did not contribute appreciably to their costs. The majority of PIAC/CAC's arguments in support of its conclusions would be better characterized as reflecting alternative, arguable interpretations of early upgrade programs. For these reasons, the Commission finds that PIAC/CAC assisted it in developing a better understanding of the matters that were considered, and that they participated in the proceeding in a responsible way.

16. The Commission notes that the rates claimed in respect of external legal fees are in accordance with the rates established in the Commission's *Guidelines for the Assessment of Costs*, as set out in Telecom Regulatory Policy 2010-963. Further, due to PIAC/CAC's satisfaction of the criteria set out above, the Commission is not persuaded by TCC's

submission that the costs award should be reduced. The Commission therefore finds that the total amount claimed by PIAC/CAC was necessarily and reasonably incurred and should be allowed.

17. 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.
18. The appropriate costs respondents to PIAC/CAC's costs application are Bell Mobility, RCP, and TCC.
19. The Commission generally allocates 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. The Commission notes TCC's submissions in this regard. However, as explained in Telecom Order 2013-521, the Commission considers that to allocate costs in a proceeding solely on the basis of revenues related to the issues discussed in the proceeding would introduce significant inefficiencies into the costs award process. It is not always clear what classes of telecommunications revenue are related to which issues in a given proceeding, and creating new issues to litigate with each set of costs applications would unacceptably slow the costs award process. The Commission further considers that the allocation of costs by TORs does not base responsibility for costs solely on the relative interest of costs respondents in the outcome of a proceeding, but also on the relative size of costs respondents and their ability to absorb said costs.
20. The Commission therefore considers that, in the present circumstances, it is appropriate to apportion the costs among the costs respondents in proportion to their TORs, based on their most recent audited financial statements. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
TCC	39.7%	\$4,925.33
RCP	37.0%	\$4,590.36
Bell Mobility	23.3%	\$2,890.69

Directions regarding costs

21. The Commission **approves** the application by PIAC/CAC for costs with respect to their participation in the proceeding.
22. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to PIAC/CAC at \$12,406.38.
23. The Commission **directs** that the award of costs to PIAC/CAC be paid forthwith by TCC, RCP, and Bell Mobility according to the proportions set out in paragraph 20 above.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Consumers Council of Canada in the proceeding leading to Telecom Regulatory Policy 2013-271*, Telecom Order CRTC 2013-521, 27 September 2013
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *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