



Telecom Order CRTC 2015-341

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Determination of costs award with respect to the participation of OpenMedia.ca in the proceeding initiated by Telecom Notice of Consultation 2013-551

Application

1. By letter dated 16 January 2015, OpenMedia.ca (OpenMedia) applied for costs with respect to its participation in the proceeding initiated by Telecom Notice of Consultation 2013-551 (the proceeding).
2. On 26 January 2015, TELUS Communications Company (TCC) filed an intervention in response to OpenMedia's application. OpenMedia filed a reply on 2 February 2015.
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 Canadian consumers who want competitive, high-quality Internet services. OpenMedia also submitted that its arguments and evidentiary submissions were distinct from those of other parties, and that it provided a unique perspective on the issues raised in the proceeding. As an example, OpenMedia noted that it operated a campaign to generate input from over 30,000 Canadians regarding their interest in the proceeding, which formed part of the record for the proceeding and directly informed OpenMedia's submissions.
5. OpenMedia requested that the Commission fix its costs at \$29,631.55, consisting of \$26,085 for analyst fees and \$3,546.55 for disbursements. OpenMedia's claim included the federal Goods and Services Tax (GST) on fees less the rebate to which OpenMedia is entitled in connection with the GST. OpenMedia filed a bill of costs with its application.
6. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answer

7. In response to the application, TCC submitted that costs should only be awarded as necessary to ensure the participation of an intervener that would not otherwise be able to participate. TCC questioned whether OpenMedia would have been unable to participate in the proceeding without a costs award given that it conducts fundraising and receives corporate sponsorships and individual donations. Accordingly, TCC asked the Commission to investigate whether OpenMedia received any financial assistance in connection with its participation in the proceeding.
8. TCC also questioned whether OpenMedia represented subscriber interests. In particular, TCC noted the close relationship OpenMedia has with Teksavvy Solutions Inc. and other Internet service providers that had an interest in the proceeding. TCC suggested that the commercial interests of OpenMedia's funders were prominent considerations in OpenMedia's participation in the proceeding. TCC submitted that if OpenMedia is eligible for an award of costs, then parties such as the Fiber to the Home Council of the Americas (the FTTH Council) ought to be considered eligible as well, despite their reliance on financial support from several commercial entities that also participated in the proceeding, such as TCC.
9. TCC argued that OpenMedia identified Cynthia Khoo as a volunteer, and that OpenMedia is also claiming analyst fees for Cynthia Khoo in its costs application. Thus, TCC questioned whether these analyst fees are eligible for the purpose of a costs award. TCC argued that if OpenMedia did not incur any salary or operational expenses because Cynthia Khoo was a volunteer, then no reimbursement would be appropriate.
10. TCC submitted that the incumbent wireline service providers and the principal independent Internet service providers that participated in the proceeding are the appropriate costs respondents.

Reply

11. In reply, OpenMedia argued that in the absence of cost recovery, its participation in Commission proceedings would not be viable. OpenMedia submitted that the vast majority of its fundraising was for general operational funding, and not for any specific activity. Furthermore, OpenMedia argued that none of the fundraising or donations were earmarked for, or contingent on, its participation in any Commission proceeding. OpenMedia argued that generalized operational funding, regardless of the source, does not constitute financial assistance in connection with participation in a particular Commission proceeding.
12. OpenMedia further submitted that it represents subscribers with an interest in Commission proceedings, given that its mandate is the advocacy of the public interest. OpenMedia stated that although its community of organizations does include both commercial and non-commercial entities, none of these entities has any control over OpenMedia's activities and regulatory submissions in the same way that

members of the FTTH Council do. OpenMedia submitted that the donations it has received have never disqualified it as a costs applicant in the past.

13. OpenMedia stated that Cynthia Khoo is both an employee and a volunteer and that her status as an employee or a volunteer would only become definite upon the Commission's decision regarding OpenMedia's costs application. OpenMedia submitted that the ability to recover costs is integral to facilitating robust public participation in Commission proceedings, and that a precedent Commission decision establishing ineligibility for costs based on an individual doing volunteer work on a contingency basis might end volunteer work in Commission proceedings or lead to an artificial arrangement of affairs.
14. Finally, OpenMedia noted that TCC did not claim that any of OpenMedia's costs were excessive in relation to the quality of its participation in the proceeding and that despite TCC's objection, OpenMedia's costs application should be approved without modification.

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. OpenMedia has satisfied these criteria through its participation in the proceeding. In particular, OpenMedia represented subscribers that had an interest in the outcome of the proceeding. OpenMedia's submissions and the campaign it operated to generate input from over 30,000 Canadians regarding their interest in the proceeding assisted the Commission in developing a better understanding of the matters that were considered. Without the submissions from OpenMedia and its campaign, the Commission would not have had as detailed and diverse an understanding of the views of Canadians regarding the issues in the proceeding. Furthermore, OpenMedia's submissions were distinct from those of other parties and provided a different perspective on the issues raised in the proceeding.

17. Based on the record of the proceeding, the Commission is satisfied that the funding that OpenMedia received supported its general operational activities and was not specific to any activity such as the proceeding.
18. While OpenMedia consists of a community of organizations that provide it with corporate and individual donations, it is distinguishable from the FTTH Council whose members are mostly corporations that have a direct economic interest in the deployment of broadband. Unlike the FTTH Council members, OpenMedia members have no direct economic interest in the outcome of the proceeding. Accordingly, the Commission disagrees with TCC's submissions that if OpenMedia is eligible for a costs award, the FTTH Council should also be eligible.
19. With respect to the issue of whether the work of a volunteer should be eligible for a costs award, the *Telecommunications Act* (the Act) gives the Commission broad discretion with respect to costs award determinations. Costs have been awarded for the work of a volunteer in the past. Consistent with the Commission's approach in Taxation Order 1980-1, costs should be awarded for work done by volunteers who participated actively in the proceeding in question and whose participation assisted the Commission in understanding the matters considered. If the Commission deemed the work of volunteers to be ineligible for costs awards simply because of their status as volunteers, organizations that wish to participate in Commission proceedings and raise matters of public interest might be prevented from doing so. As a result, the Commission's desire to hear a broad cross-section of views in its proceedings could be undermined.
20. There is no suggestion on the record of the proceeding that the work of the volunteer in question, Cynthia Khoo, fell short of the criteria necessary to justify costs being awarded. Therefore, the Commission disagrees with TCC's submission that the time attributable to Cynthia Khoo should be considered as ineligible for costs.
21. Given the Commission's determinations above, the rates claimed in respect of analyst fees and disbursements 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. As well, the total amount claimed by OpenMedia was necessarily and reasonably incurred and should be allowed.
22. 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.
23. 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 following parties to the proceeding had a significant interest in the outcome of the proceeding and participated actively throughout the proceeding: Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies); Bragg Communications Incorporated, operating as Eastlink; the Canadian Network Operators Consortium Inc.; Cogeco Cable Inc.; MTS Inc. (MTS)

and Allstream Inc. (collectively, MTS Allstream); Quebecor Media Inc., on behalf of its affiliate Videotron G.P. (Videotron); Rogers Communications Partnership (RCP); Saskatchewan Telecommunications; Shaw Cablesystems G.P. (Shaw); and TCC.

24. 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),¹ as an indicator of the relative size and interest of the parties involved in the proceeding. However, in Telecom Order 2015-160,² the Commission considered \$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. Accordingly, the Commission finds that, in this case, the appropriate costs respondents are the Bell companies, MTS Allstream, RCP, Shaw, TCC, and Videotron, and that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
TCC	30.3%	\$8,978.36
RCP	28.2%	\$8,356.10
The Bell companies	26.9%	\$7,970.89
Shaw	5.2%	\$1,540.84
Videotron	4.9%	\$1,451.94
MTS Allstream	4.5%	\$1,333.42

25. 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, and MTS responsible for payment on behalf of MTS Allstream. The Commission leaves it to the members of the Bell companies and MTS Allstream to determine the appropriate allocation of the costs among themselves.

Directions regarding costs

26. The Commission **approves** the application by OpenMedia for costs with respect to its participation in the proceeding.
27. Pursuant to subsection 56(1) of the Act, the Commission fixes the costs to be paid to OpenMedia at \$29,631.55.

¹ 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.

² See paragraph 21 of Telecom Order 2015-160.

28. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by Bell Canada on behalf of the Bell companies, by MTS on behalf of MTS Allstream, by RCP, by Shaw, by TCC, and by Videotron according to the proportions set out in paragraph 24 above.

Secretary General

Related documents

- *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*
- *Review of wholesale services and associated policies, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013, as amended by Telecom Notice of Consultation CRTC 2013-551-1, 8 November 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*
- *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*