



Telecom Decision CRTC 2016-336

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Xplornet Communications Inc. – Application to review and vary Telecom Orders 2015-441 and 2015-442

*The Commission **denies** Xplornet Communications Inc.'s (Xplornet) application to review and vary Telecom Orders 2015-441 and 2015-442, in which the Commission directed that Xplornet pay 25% of the costs incurred by the First Mile Connectivity Consortium and 25% of the costs incurred by the Public Interest Advocacy Centre, respectively, in connection with their participation in the Satellite Inquiry.*

Application

1. The Commission received an application from Xplornet Communications Inc. (Xplornet), dated 24 December 2015, in which the company requested that the Commission review and vary its costs award determinations set out in Telecom Orders 2015-441 and 2015-442 (the orders).
2. In the orders, which were issued on 24 September 2015, the Commission required that Xplornet pay 25% of the costs incurred by the First Mile Connectivity Consortium (FMCC) and 25% of the costs incurred by the Public Interest Advocacy Centre (PIAC) with respect to their participation in the Satellite Inquiry, which was launched through Telecom Notice of Consultation 2014-44.
3. Xplornet argued that the Commission made an error in law (i) by issuing the orders without providing notice to Xplornet that it was a potential costs respondent, and (ii) on the general grounds that there is substantial doubt as to the correctness of the Commission's orders to award costs against Xplornet.
4. The Commission received an intervention regarding Xplornet's application from the Canadian Network Operators Consortium Inc. (CNOc). The public record of this proceeding, which closed on 8 February 2016, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Background

5. On 22 December 2014, PIAC filed an application for costs in connection with its participation in the Satellite Inquiry. PIAC did not name Xplornet as a proposed costs respondent. Despite being required by the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure)

to send a copy of its costs application to all parties that participated in the Satellite Inquiry, PIAC sent a copy of its application only to those parties it identified as costs respondents.

6. The FMCC filed a similar costs application, completed on 27 January 2015, in which it submitted that the costs respondents should be the same as those identified in PIAC's costs application. Consistent with the Rules of Procedure, the FMCC served a copy of its costs application on all parties to the Satellite Inquiry.
7. In the orders, the Commission identified the following parties as having a significant interest in the outcome of the Satellite Inquiry and as having actively participated in that inquiry: Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Bell Mobility Inc., Northwestel Inc., and Télébec, Limited Partnership; Ice Wireless Inc. and Iristel Inc.; MTS Inc. and Allstream Inc.; O.N. Tel Inc., operating as Ontera; Saskatchewan Telecommunications; the SSi Group of Companies; Telesat Canada; TELUS Communications Company; and Xplornet.
8. The Commission recognized that it generally allocates the responsibility for payment of costs among costs respondents based on their telecommunications operating revenues (TORs). However, the Commission determined that given the focus of the Satellite Inquiry, such an approach would not reflect the interests or degree of participation of the parties. Accordingly, the Commission took into account both the degree of use of fixed satellite services, as expressed through the parties' payments to satellite operators for fixed satellite services, as well as the parties' TORs. As a result of this approach, Xplornet was held responsible for 25% of the costs payable to each of the FMCC and PIAC.
9. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the *Telecommunications Act*. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to
 - an error in law or in fact;
 - a fundamental change in circumstances or facts since the decision;
 - a failure to consider a basic principle which had been raised in the original proceeding; or
 - a new principle which has arisen as a result of the decision.

Issues

10. The Commission has identified the following issues to be addressed in this decision:
 - Should the Commission exercise its discretion to extend the filing deadline for the review and vary application?

- Was Xplornet provided with sufficient notice that it was being considered as a potential costs respondent?
- Should the Commission vary the orders due to there being substantial doubt as to their correctness?

Should the Commission exercise its discretion to extend the filing deadline for the review and vary application?

Positions of parties

11. Xplornet filed its application on 24 December 2015. The company justified its delay in filing by stating that it learned about the orders only on 23 December 2015, when it was contacted by Commission staff who enquired as to whether payment had been made. Xplornet therefore requested that the Commission exercise its discretion to extend the filing deadline.

Commission's analysis and determinations

12. Subsection 71(1) of the Rules of Procedure states that an application to review, rescind, or vary a decision of the Commission must be filed with the Commission within 90 days after the date of the decision. In this case, the deadline to file such an application was 23 December 2015.
13. Subsection 71(2) of the Rules of Procedure states that the Commission may extend the above-mentioned deadline if it is of the opinion that it is just and equitable to do so.
14. In the circumstances, it is just and equitable for the Commission to accept Xplornet's application despite the one-day filing delay.

Was Xplornet provided with sufficient notice that it was being considered as a potential costs respondent?

Positions of parties

15. Xplornet submitted that since PIAC did not send the company a copy of its costs application, and that since neither PIAC nor the FMCC named the company as a potential costs respondent, it had no notice that it was being considered as a potential costs respondent. In Xplornet's view, such lack of notice constitutes a breach of the laws of natural justice and thus an error in law.
16. CNOC supported the legal principle expressed in Xplornet's application that procedural fairness requires a party to an administrative proceeding whose rights or interests are to be affected by an order of the tribunal to know the case to meet and to have an opportunity to respond.

Commission's analysis and determinations

17. In the circumstances of this case, procedural fairness requires that Xplornet should have been given notice that the Commission was considering (i) designating the company as a costs respondent, and (ii) applying a method of allocation other than the one that is generally applied. Without such notice, Xplornet could not have known the case it had to meet.
18. Accordingly, the Commission finds that Xplornet received insufficient notice in the proceedings leading to the orders. However, in the context of this review and vary proceeding, Xplornet was given an opportunity to argue why it should not be named a costs respondent, and the company took full advantage of this opportunity. As such, the lack of notice at issue in the proceedings leading to the orders is now cured by the current review and vary proceeding.
19. In light of the above, the orders should not be varied because Xplornet was not originally afforded procedural fairness.

Should the Commission vary the orders due to there being substantial doubt as to their correctness?

Positions of parties

20. Xplornet argued that it is not a provider of satellite services to telecommunications service providers and that it was therefore not directly affected by the outcome of the Satellite Inquiry. It noted that the Commission has previously stated that costs are generally apportioned based on TORs, but that in this case, the Commission departed from this principle and based its apportionment on TORs and on the use of satellite services and payments to satellite operators.
21. Xplornet argued that the use of satellite services and payments to satellite operators were not appropriate criteria for the Commission to use to apportion costs. Xplornet submitted that the Commission was examining a particular type of use of satellite services (i.e. the provision of service to telecommunications service providers), an activity in which Xplornet is not involved. Xplornet added that its network is fully integrated and that its purchase arrangements for satellite capacity are fundamentally different from those of companies using satellites to provide services to telecommunications service providers. Finally, Xplornet stated that the majority of its payments to satellite operators relate to capacity in southern Canada, whereas the Inquiry Officer focused on issues in northern Canada.
22. Xplornet therefore submitted that there is substantial doubt as to the correctness of the orders.

Commission's analysis and determinations

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 actively participated in the proceeding. The Commission generally allocates the responsibility for payment of costs among costs respondents based on their TORs, as reported in their most recent audited financial statements.

24. However, the Commission has occasionally departed from this approach to make the collection of a costs award easier for applicants or to reflect situations in which an allocation based only on TORs would not be fair, for example, when such an approach would not reflect the interests or degree of participation of the parties.
25. While Xplornet argued that it did not have a significant interest in the outcome of the Satellite Inquiry, it did not address the second criterion mentioned above — whether it actively participated in that inquiry. In this regard, Xplornet identified itself as an interested party to the Satellite Inquiry and provided responses to the Inquiry Officer's questions on numerous occasions. Moreover, Xplornet's participation in the Inquiry was well reflected in the [Satellite Inquiry Report](#). As a result, Xplornet's participation in the Satellite Inquiry was both active and purposeful.
26. While Xplornet may configure its network differently and acquire satellite capacity for a different purpose than other companies, Xplornet is among the largest users and purchasers of fixed satellite services. The company therefore had a significant interest in the Satellite Inquiry, which focussed on (i) providing the Commission with a better understanding of the key factors influencing the current and future costs and availability of satellite transport services, (ii) informing the Commission on the role of satellite transport services in meeting Canadians' telecommunications service requirements, and (iii) examining whether the Commission's current regulatory framework for satellite services remains appropriate. Finally, the Satellite Inquiry informed the Commission on satellite services in Canada generally and not only in certain parts of the country.
27. Therefore, the Commission appropriately named Xplornet as a costs respondent and appropriately allocated the responsibility for payment of costs in proportion to the costs respondents' TORs, and based on the degree of use of fixed satellite services, as expressed through the parties' payments to satellite operators. Such an approach properly reflected the interests and degree of participation of the parties to the Satellite Inquiry.
28. Accordingly, Xplornet has failed to demonstrate that there was substantial doubt as to the correctness of the Commission's determinations to (i) name Xplornet as a costs respondent, and (ii) allocate to Xplornet the responsibility for payment of 25% of the costs to each of the FMCC and PIAC, based on the Commission's methodology.

Conclusion

29. In light of the above, the Commission **denies** Xplornet's application to vary the orders.
30. The Commission **directs** that Xplornet pay forthwith 25% of the award of costs to each of the FMCC and PIAC as set out in Telecom Orders 2015-441 and 2015-442.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the inquiry initiated by Telecom Notice of Consultation 2014-44*, Telecom Order CRTC 2015-442, 24 September 2015
- *Determination of costs award with respect to the participation of the First Mile Connectivity Consortium in the inquiry initiated by Telecom Notice of Consultation 2014-44*, Telecom Order CRTC 2015-441, 24 September 2015
- *Appointment of an Inquiry Officer to review matters related to transport services provided by satellite*, Telecom Notice of Consultation CRTC 2014-44, 6 February 2014; as amended by Telecom Notices of Consultation CRTC 2014-44-1, 2 June 2014; and 2014-44-2, 5 August 2014
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011