



Telecom Decision CRTC 2016-79

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The Consumers' Association of Canada and the Public Interest Advocacy Centre – Application to review and vary Telecom Order 2015-194

*The Commission **denies** an application from the Consumers' Association of Canada and the Public Interest Advocacy Centre to review and vary Telecom Order 2015-194.*

Background

1. In Telecom Order 2015-194, the Commission approved in part the application for costs filed by the Consumers' Association of Canada (CAC) and the Public Interest Advocacy Centre (PIAC) [collectively, CAC/PIAC] regarding their participation in the proceeding leading to Telecom Decision 2015-70.¹ The costs application was approved in part because the Commission considered the amount of time claimed by CAC/PIAC to be excessive in light of the nature of the proceeding and the degree of the costs applicants' participation in it. In light of this, the Commission reduced the time claimed by the costs applicants by 40%, and awarded costs in the amount of \$6,402.29 instead of the \$10,670.48 claimed.²
2. In Telecom Information Bulletin 2011-214, the Commission set out the test it applies in determining whether to grant an application made pursuant to section 62 of the *Telecommunications Act* (the Act) to review and vary a previous Commission decision:
 5. In order for the Commission to exercise its discretion pursuant to section 62 of the Act, 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;

¹ The proceeding, which culminated with the issuance of Telecom Decision 2015-70, was initiated by an application from Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Télébec, Limited Partnership concerning proposed rate reductions and customer rebates resulting from the expiry of certain time-limited exogenous factors.

² See paragraphs 8 and 9 of Telecom Order 2015-194.

- 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.

Application

3. The Commission received an application from CAC/PIAC, dated 26 May 2015, in which they requested that the Commission review and vary Telecom Order 2015-194.
4. CAC/PIAC argued that there is substantial doubt as to the correctness of the Commission's determinations in Telecom Order 2015-194 because of errors of fact and of law and the negative impact of the decision regarding the participation of consumer groups in Commission proceedings. As such, CAC/PIAC requested that the Commission vary its determination and order payment of the full amount of costs claimed.

Interventions

5. The Commission received interventions regarding CAC/PIAC's application from the Forum for Research and Policy in Communications (FRPC) and TELUS Communications Company (TCC).
6. The FRPC submitted that the proceeding was complex and that the applicants clearly required the time set out in their costs application to accomplish the required work. This also required knowledge of complex telecommunications matters. The FRPC also submitted that the brevity of the intervention did not mean that the submission could have been researched, drafted, reviewed, revised, and finalized in less time. A less-experienced counsel might well have submitted a longer draft that in turn would have consumed more of the applicants' and the Commission's time. Further, it submitted that counsel with specialized expertise save time in complex proceedings.
7. TCC argued that CAC/PIAC failed to appreciate that the Commission has a wide discretion with respect to costs applications. It noted that the Commission's *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963, mention that the factors considered to assess excessive time are entirely within the discretion of the Commission, depending on the circumstances of each case. It also cited Telecom Decision 2015-131 where the Commission ruled that 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* are subjective, and it is the Commission's role to determine whether, in a given case, an applicant has satisfied them.³

³ See paragraph 16 of Telecom Decision 2015-131.

Reply

8. In reply, CAC/PIAC argued that the Commission also has a wide authority to review and vary its determinations, and submitted that TCC had not disagreed with the arguments of errors of fact and law identified in their review and vary application.

Issues

9. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission make errors of fact in Telecom Order 2015-194 raising substantial doubt as to its correctness?
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10. CAC/PIAC submitted that the Commission made two errors of fact in reaching its determinations set out in Telecom Order 2015-194. They argued that the Commission made an error in its finding that the “application was narrowly focused and not unduly complex,” noting that the application filed by Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Télébec, Limited Partnership (collectively, Bell Canada et al.) was more than 90 pages long, included five technical appendices and six attendant tariff applications, and dealt with historical price cap determinations and basket constraints.
11. CAC/PIAC also argued that the Commission made an error in determining that less senior counsel could have managed the file more economically. Legal Counsel needed to understand the price cap regime, the exogenous factor concept, and have knowledge of the history and existence of the deferral accounts. Given this, only senior counsel could efficiently absorb and respond to the application without excessive time to research and understand the underlying conditions and rules and rulings necessary to formulate a response in the time allotted by the Commission.

Commission’s analysis and determinations

12. The Commission is not persuaded that it made errors of fact. It is true that Bell Canada et al.’s application was reasonably long and included numerous attachments. However, the proceeding itself was straightforward, consisting of only one round of interventions and no interrogatories. Further, the Commission remains of the view that the issues raised in the application were narrowly focused, which meant that the intervention necessarily raised a limited number of issues. CAC/PIAC’s intervention was very short, consisting of five pages, two of which provided introductory information summarizing the application.

13. Further, the Commission is not persuaded by CAC/PIAC's argument that the Commission made an error of fact when it determined that, while complex, the proceeding was not unduly so. In making this finding, the Commission was making a contextual assessment by having regard to the fact that a senior counsel experienced in telecommunications matters was working on the file. Given his experience, it is reasonable to expect that such a senior counsel would be familiar with the price cap regime and the impact of exogenous factors.
14. Similarly, CAC/PIAC's argument that the Commission made an error of fact in finding that less senior counsel could have handled the file is misplaced. By referring to the use of less senior counsel, the Commission was having regard to the Guidelines which state that "applicants are encouraged to rely on junior counsel and articling students to the greatest extent possible." The Commission considers that CAC/PIAC drew an erroneous inference that the Commission considered that this was a file that could have been exclusively handled by junior counsel. By referring to the Guidelines, the Commission was reminding CAC/PIAC that every effort should be made by applicants to keep costs down. In this case, the Commission found that the equivalent of a full week on the file was excessive for a senior counsel in the circumstances. Accordingly, the Commission considers that CAC/PIAC did not demonstrate the alleged error of fact.
15. In light of the above, the Commission finds that it did not make errors of fact that raise substantial doubt as to the correctness of Telecom Order 2015-194.

Did the Commission make errors of law in Telecom Order 2015-194 raising substantial doubt as to its correctness??

16. CAC/PIAC submitted that the Commission made an error of law in assuming that senior counsel time or the overall time spent was even in issue. They stated that no party questioned the amount of senior counsel's time spent on the file or the quality of the work. Given this, CAC/PIAC argued that the Commission, of its own motion, reviewed the costs claim on another basis, and must have decided that CAC/PIAC did not "assist the Commission in a better understanding of the matters that were considered." CAC/PIAC submitted that they were successful in their intervention and did assist the Commission, and thus it was an error to conclude that their efforts were not helpful to the Commission.
17. CAC/PIAC also submitted that the Commission made an error of law because it exercised its discretion unreasonably given that it did not base its determination of why the time spent was excessive on the factors set out under "Excessive Time" in the Guidelines. They further argued that had the Commission based its determination on other factors, it was incumbent on the Commission to demonstrate this in the costs order.
18. In addition, CAC/PIAC submitted that the Commission made an error of law because it did not give (i) notice that the amount of time claimed for senior counsel was an issue, and (ii) an opportunity to explain the use of senior counsel, contrary to

section 23 of the Guidelines.⁴ They argued that the applicants should have had an opportunity to be heard before the Commission made its determination with respect to the complexity of the proceeding and the use of senior counsel.

Commission's analysis and determinations

19. With respect to the submission made by CAC/PIAC that the Commission made an error of law in that the basis for its concern must have been that they had not met the second costs criterion by failing to “assist the Commission in a better understanding of the matters that were considered,” CAC/PIAC’s assumption is wrong, as there is no indication in Telecom Order 2015-194 that the applicants failed to meet this criterion. Indeed, the Commission explicitly found that CAC/PIAC had “raised reasonable concerns with respect to Bell Canada et al.’s application, including, in particular, the issue of whether rebates should include compound interest.” The Commission considers that it did not make an error of law on this basis.
20. The second error of law raised by CAC/PIAC is that the Commission exercised its discretion unreasonably given that it did not base its determination on why the time spent was excessive on the factors set out under “Excessive Time” in the Guidelines. The relevant sections of the Guidelines set out the following:

Excessive Time

18. In evaluating whether or not the time expended by a claimant is excessive under the circumstances, the considerations that the Commission will generally take into account include:

- (a) the extent of the applicant’s participation, the degree of complexity of the issues to which that participation related, and the amount of documentation involved in the proceeding;
- (b) the degree of responsibility assumed by the claimant;
- (c) the duplication of substantive submissions among claimants;
- (d) the experience and expertise of the claimant; and
- (e) the time claimed and awarded in the proceeding or in other similar proceedings.

19. 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.

⁴ Section 23 of the Guidelines states that “[w]hen senior counsel are relied on, applicants may be asked to demonstrate with supporting rationale why this reliance was necessary.”

21. The Commission has a very broad discretion as to whether or not to award costs, and, if so, whether in whole or in part. This is confirmed by section 19 of the Guidelines. Accordingly, the Commission disagrees with the premise underlying CAC/PIAC's argument, namely that the Commission is somehow confined to the matters explicitly set out in section 18 of the Guidelines. Not only is this premise inconsistent with section 19 of the Guidelines, it is also at odds with section 18 itself, which lists the factors as examples of the matters that the Commission may take into account. In any event, the Commission clearly had regard to factors (a) and (d) listed in section 18 of the Guidelines in making its determinations in Telecom Order 2015-194. The fact that CAC/PIAC disagreed with the Commission's application of these factors to the facts of the case is not evidence of an error of law. Accordingly, the Commission considers that it did not make an error of law.
22. With respect to CAC/PIAC's natural justice submission, CAC/PIAC ought reasonably to have known, based on the Guidelines, that they, like all costs applicants, bear the onus of demonstrating that the time claimed was justified. Accordingly, the Commission considers that the time claimed for their senior counsel was clearly an issue in the proceeding. Further, in the proceeding initiated by their review and vary application, CAC/PIAC had a full opportunity to argue why the time claimed for their senior counsel was justified.
23. In light of the above, the Commission finds that it did not make errors of law that raise substantial doubt as to the correctness of Telecom Order 2015-194.

Conclusion

24. Based on the above, the Commission finds that CAC/PIAC failed to demonstrate that there is substantial doubt as to the correctness of Telecom Order 2015-194. The Commission therefore **denies** CAC/PIAC's application.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Consumers' Association of Canada and the Public Interest Advocacy Centre in the proceeding leading to Telecom Decision 2015-70 regarding the expiry of certain time-limited exogenous factors*, Telecom Order CRTC 2015-194, 15 May 2015
- *DiversityCanada Foundation – Application to review and vary Telecom Order 2014-220*, Telecom Decision CRTC 2015-131, 9 April 2015
- *Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Télébec, Limited Partnership – Proposed rate reductions and customer rebates resulting from the expiry of certain time-limited exogenous factors*, Telecom Decision CRTC 2015-70, 27 February 2015

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010