



## Telecom Order CRTC 2017-128

PDF version

Ottawa, 3 May 2017

*File numbers: 8663-C12-201503186 and 4754-530*

### **Determination of costs award with respect to the participation of OpenMedia.ca in the proceeding leading to Telecom Regulatory Policy 2016-496**

#### **Application**

1. By letter dated 13 July 2016, OpenMedia.ca (OpenMedia) applied for costs with respect to its participation in the proceeding leading to Telecom Regulatory Policy 2016-496, in which the Commission reviewed its policies regarding basic telecommunications services in Canada (the proceeding).
2. The Commission received answers from Bell Canada<sup>1</sup> and TELUS Communications Company (TCC), both dated 25 July 2016. The Commission also received answers from Bragg Communications Incorporated, operating as Eastlink (Eastlink); Vaxination Informatique (Vaxination); and Xplornet Communications Inc. (Xplornet), dated 21, 25, and 29 July 2016, respectively. OpenMedia filed a reply dated 12 August 2016.
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 participated throughout the proceeding and provided a unique perspective on the matters that were considered.
5. With respect to the group or class of subscribers OpenMedia submitted that it represents, OpenMedia explained that its participation reflected the views of Internet users across Canada, including over 383,000 of its Canadian “community members.” With respect to the specific methods by which OpenMedia submitted that it represents this group or class of subscribers, OpenMedia explained that it directly

---

<sup>1</sup> Although Bell Canada filed an answer solely on its own behalf, it participated in the basic telecommunications services proceeding on its own behalf, and on behalf of its affiliates Bell Aliant Regional Communications, Limited Partnership (which, effective 1 July 2015, is operated as a division of Bell Canada); Bell Mobility Inc.; Câblevision du Nord du Québec inc.; DMTS; KMTS; NorthernTel, Limited Partnership; Northwestel Inc.; Ontera; and Télébec, Limited Partnership.

consulted its community members to develop its positions in the proceeding. OpenMedia submitted that it engaged over 45,000 Canadians as part of an awareness campaign related to the proceeding and that, through its participation, submissions from thousands of Canadians were placed on the public record.

6. OpenMedia requested that the Commission fix its costs at \$143,374.18, consisting of \$137,432.50 for consultant fees and \$5,941.68 for disbursements. OpenMedia's claim included the federal Goods and Services Tax (GST) and the Ontario Harmonized Sales Tax (HST), as applicable, less the amounts of sales tax that it is otherwise able to recover. OpenMedia filed a bill of costs with its application, and then filed a revised bill of costs dated 31 August 2016.
7. OpenMedia claimed 509.5 hours at a rate of \$225 per hour for external consultant fees, and 48.5 days at a rate of \$470 per day for four internal consultants.
8. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents), or as to the appropriate allocation of costs.

### **Answer**

9. Bell Canada and Xplornet argued that OpenMedia should not be eligible for an award of costs. Citing Telecom Costs Order 2008-1, Bell Canada submitted that OpenMedia had sufficient interest to participate in the proceeding without being awarded costs and that it was general Commission practice to deny costs to such parties. Bell Canada also submitted that OpenMedia had not demonstrated that it represented a group or class of subscribers that had an interest in the outcome of the proceeding.
10. Xplornet submitted that since a number of for-profit Internet service providers (ISPs) contribute to OpenMedia financially, it would not be appropriate for other ISPs to pay costs to OpenMedia.
11. Bell Canada and Eastlink argued that the time OpenMedia claimed for consultant fees was excessive and should be reduced. TCC did not oppose this amount of time, but argued that costs for a significant portion of the time OpenMedia claimed for its external consultant should instead be awarded at the internal rate on the basis that OpenMedia did not sufficiently demonstrate that its reliance on an external consultant was justified in the circumstances.
12. With respect to the allocation of costs, TCC submitted that the Commission should not apportion costs based on telecommunications operating revenues (TORs)<sup>2</sup> unless it is appropriate and equitable to do so in a given case. In TCC's view, apportioning costs based on TORs may be appropriate in this case, but the Commission must

---

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

ensure that it calculates TORs in an accurate and competitively neutral manner. Specifically, TCC submitted that the Commission should allocate costs based on the TORs of the parent companies of those costs respondents that have them.

13. Bell Canada added that OpenMedia must disclose any financial assistance it has received to support its participation in the proceeding.
14. Xplornet supported the positions of Bell Canada, Eastlink, and TCC.

## **Reply**

15. OpenMedia reiterated that it was eligible for an award of costs. It argued that it did not have a pre-existing financial incentive to participate in the proceeding, and that while it may receive contributions from commercial enterprises, such donors do not control its participation in Commission proceedings.
16. Further, OpenMedia argued that the group of subscribers it claimed to represent, namely all Internet subscribers in Canada, and its method of representation, including the circulation of an open letter articulating general policy positions, were appropriate in the circumstances.
17. Regarding its consultant fees, OpenMedia submitted that, given the pre-existing commitments of its internal resources, it would not have been able to participate in the proceeding had it not hired an external consultant. According to OpenMedia, the time it claimed for its internal consultants related mainly to its public awareness campaign and its appearance at the oral phase of the hearing, as well as general coordination with its external consultant. OpenMedia added that all of its consultant fees were necessarily and reasonably incurred and that it did not claim excessive time considering the length and scope of the proceeding.
18. Finally, OpenMedia submitted that it had received no financial assistance in connection with its participation in the proceeding.

## **Commission's analysis and determinations**

### **Eligibility**

19. 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.

20. OpenMedia's eligibility for costs was challenged on several bases, including that it had sufficient interest to participate in the proceeding without an award of costs and that it receives financial contributions from for-profit ISPs. In essence, these arguments challenge OpenMedia's satisfaction of the first eligibility criterion.
21. In Telecom Costs Order 2008-1, the Commission denied costs to the Canadian Jewish Congress (CJC) regarding a proceeding to consider certain Commission powers related to unsolicited telecommunications (referred to hereafter as the Telecom Public Notice 2007-15 proceeding). The Commission determined that CJC was a telemarketer and thus had a direct financial interest in the outcome of that proceeding. However, in Telecom Decision 2008-90, the Commission varied this determination, finding that it was an error to characterize the CJC as a telemarketer that had a direct financial interest in the outcome of the Telecom Public Notice 2007-15 proceeding.
22. In any event, it is not appropriate to draw a parallel between a telemarketer in the unsolicited telecommunications context and OpenMedia in the present case, since neither OpenMedia, nor the group it purports to represent, has a direct financial interest in the outcome of the proceeding.
23. While OpenMedia acknowledged that certain for-profit telecommunications companies are among its financial contributors, it stated that it received no financial assistance in connection with the proceeding. Further, there is no evidence on the record of the costs proceeding that OpenMedia coordinated its submissions in the proceeding with a commercial entity or an industry group, or that any of its private contributors influenced its participation in the proceeding.
24. In Telecom Information Bulletin 2016-188, the Commission provided guidance on how an applicant may demonstrate that it satisfies the first criterion set out in section 68 of the Rules of Procedure regarding its representation of interested subscribers.
25. OpenMedia has at least demonstrated that it represents Canadian Internet users who are OpenMedia community members and who either endorsed OpenMedia's open letter or provided submissions in the proceeding through OpenMedia. In either case, this accounts for thousands of Internet users across Canada.
26. In Telecom Regulatory Policy 2010-963, the Commission stated that costs awards are intended to encourage the participation of individuals and groups who represent subscriber interests, rather than private interests.
27. Accordingly, the Commission finds that OpenMedia has satisfied the first eligibility criterion regarding representation. Specifically, OpenMedia has demonstrated that it

represents the interests of a group or class of subscribers and how its participation in the proceeding reflected the interests of those subscribers.

28. OpenMedia has also satisfied the remaining criteria through its participation in the proceeding. For instance, OpenMedia made focused and structured submissions over the course of a lengthy hearing with multiple stages. As well, no party challenged OpenMedia's satisfaction of those criteria.
29. Accordingly, OpenMedia is eligible for an award of costs for its participation in the proceeding.

### **Rates and amounts**

30. The rates claimed in respect of consultant fees are in accordance with the rates established in the Commission's *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963. However, some parties argued that the amount of these fees should nonetheless be reduced.
31. Potential cost respondents argued that a substantial portion of the time OpenMedia claimed for its external consultant should be recovered at the internal rate, and that not all the fees claimed were necessarily and reasonably incurred.
32. OpenMedia indicated that due to the unavailability of internal resources during the proceeding, it would not have been able to participate substantively had it not hired an external consultant. This was a reasonable solution in the circumstances. A public interest participant should not be precluded from recovering costs for its participation in important regulatory proceedings simply because it lacks available internal resources at the time.
33. Accordingly, it would not be appropriate to award costs to OpenMedia for its external consultant at the internal rate.
34. Further, as noted above, the proceeding was lengthy, involving multiple rounds of written submissions both before and after the oral phase of the hearing. OpenMedia participated in many of these rounds and would have needed to monitor the record of the rounds in which it did not participate to inform its participation in subsequent rounds. These are precisely the types of activities for which it was reasonable for OpenMedia to rely principally on its external consultant.
35. Regarding OpenMedia's internal consultants, their time was generally spent on the following activities: preparing for and attending the oral phase of the public hearing, preparing and managing OpenMedia's public awareness campaign, and coordinating with and directing the external consultant.
36. In the circumstances, it was reasonable for OpenMedia to use internal consultants principally for these activities, notwithstanding its hiring of an external consultant. The time OpenMedia claimed for its internal consultants is significantly less than the

time claimed for its single external consultant, which is consistent with the more limited role that the internal consultants played, as described by OpenMedia.

37. Accordingly, the work of OpenMedia's internal consultants justifies an award of costs in the amount claimed.
38. Regarding the amounts OpenMedia claimed in respect of its disbursements, which no party challenged, the Commission finds that these amounts were necessarily and reasonably incurred, and that they should be allowed in full.
39. In light of the above, the Commission fixes OpenMedia's costs at \$143,374.18, comprising the full amounts claimed.
40. 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.

### **Costs respondents and allocation**

41. 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. Given the scope of the proceeding, a large number of parties both had a significant interest in the outcome of the proceeding and participated actively in the proceeding.
42. As set out in the Guidelines, the Commission will generally name a maximum of 10 costs respondents for a costs award of up to \$20,000 and will add an extra respondent for each additional \$5,000 awarded. However, as set out in Telecom Order 2015-160, the Commission considers \$1,000 to be the minimum amount that a party should be required to pay due to the administrative burden that small costs awards impose on both the applicant and costs respondents.
43. In light of the above, Bell Canada; the Canadian Network Operators Consortium Inc. (CNOC); Cogeco Communications Inc. (Cogeco);<sup>3</sup> Eastlink; Freedom Mobile Inc. (Freedom Mobile);<sup>4</sup> MTS Inc. (MTS); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Rogers Communications Canada Inc. (RCCI);<sup>5</sup> Shaw Cablesystems G.P. (Shaw); Saskatchewan Telecommunications (SaskTel); TCC; and Telesat Canada (Telesat) are the appropriate costs respondents in the circumstances.

---

<sup>3</sup> In the proceeding, submissions were initially received from Cogeco Cable Inc. However, the company underwent a corporate name change during the proceeding and thereafter participated as Cogeco Communications Inc.

<sup>4</sup> In the proceeding, submissions were received from WIND Mobile Corp. However, since then, the company underwent a name change and is now Freedom Mobile Inc.

<sup>5</sup> In the proceeding, submissions were received from Rogers Communications Partnership (RCP). However, on 1 January 2016, RCP ceased to exist. All of RCP's business activities, including its assets and liabilities, are now held by RCCI.

44. It is the Commission's general practice to allocate the responsibility for payment of costs among costs respondents based on their TORs<sup>6</sup> as an indicator of the relative size and interest of the parties involved in the proceeding.
45. No party disputed the appropriateness of using TORs in the present case, though TCC argued that the Commission should use the TORs of the parent companies of the costs respondents, where applicable, to ensure accuracy and competitive neutrality in the allocation of costs.
46. In this case, Bell Canada participated in the proceeding on its own behalf and on behalf of a number of affiliates. Accordingly, it is appropriate to calculate Bell Canada's allocation of costs with respect to the TORs of all of these Bell companies. Beyond this, taking the TORs of any parent companies into account would have little material impact on the allocation of costs in the present case. Consequently, the Commission does not consider it necessary to deviate from its general practice, which is to base its determinations regarding the allocation of costs on the TORs of the parties that actually participated in the proceeding, regardless of whether those parties are affiliated with other entities that provide telecommunications services in Canada and report TORs to the Commission.
47. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

<b>Company</b>	<b>Percentage</b>	<b>Amount</b>
Bell Canada	35.4%	\$50,754.46
TCC	24.3%	\$34,839.92
RCCI	22.1%	\$31,685.69
Videotron	4.3%	\$6,165.09
MTS	3.2%	\$4,587.97
Shaw	2.9%	\$4,157.85
SaskTel	2.4%	\$3,440.98
CNOC	1.4%	\$2,007.24
Cogeco	1.1%	\$1,577.12

---

<sup>6</sup> In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

Freedom Mobile	1.1%	\$1,577.12
Eastlink	0.9%	\$1,290.37
Telesat	0.9%	\$1,290.37

48. 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. Also consistent with this practice, the Commission makes CNOC responsible for payment on behalf of its members. The Commission leaves it to the members of these organizations to determine the appropriate allocation of the costs among themselves.

### **Directions regarding costs**

49. The Commission **approves** the application by OpenMedia for costs with respect to its participation in the proceeding.

50. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to OpenMedia at \$143,374.18.

51. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by the costs respondents and according to the proportions set out in paragraph 47.

Secretary General

### **Related documents**

- *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016
- *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188, 17 May 2016
- *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
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010
- *Canadian Jewish Congress – Application to review and vary Telecom Costs Order 2008-1*, Telecom Decision CRTC 2008-90, 11 September 2008

- *Determination of costs award with respect to the Canadian Jewish Congress' participation in the Telecom Public Notice 2007-15 proceeding, Telecom Costs Order CRTC 2008-1, 28 March 2008*
- *Proceeding to consider the delegation of the Commission's investigative powers with regard to Unsolicited Telecommunications Rules complaints, Telecom Public Notice CRTC 2007-15, 22 August 2007*
- *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*