



Telecom Order CRTC 2017-163

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Ottawa, 19 May 2017

File numbers: 8663-C12-201503186 and 4754-528

Determination of costs award with respect to the participation of Manitoba Keewatinowi Okimakanak Inc. in the proceeding leading to Telecom Regulatory Policy 2016-496

Application

1. By letter dated 13 July 2016, Manitoba Keewatinowi Okimakanak Inc. (MKO) 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 each of Bell Canada,¹ MTS Inc. (MTS), and TELUS Communications Company (TCC), all dated 29 July 2016; and from Vaxination Informatique (Vaxination) and Xplornet Communications Inc. (Xplornet), dated 25 and 29 July 2016, respectively. MKO filed a reply dated 8 August 2016.
3. MKO 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, MKO submitted that it had participated in every stage of the proceeding in a focused and structured way by filing evidence, including an expert report, and submitting distinctive proposals. MKO also submitted that while it provided a distinct point of view, it coordinated with counsel for the Affordable Access Coalition (AAC) to minimize the duplication of submissions.
5. With respect to the group or class of subscribers MKO submitted that it represents, MKO explained that it is a non-profit organization that advocates on behalf of 30 First Nations in northern Manitoba, comprising approximately 65,000 individuals. MKO submitted that the issues dealt with in the proceeding were

¹ 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.

of great importance to the members of these First Nations and that the proceeding could concretely impact their daily lives. With respect to the specific methods by which MKO submitted it represents this group, MKO stated that it had initially consulted with certain First Nations individuals, as well as other groups, and then went on to conduct surveys of First Nations communities, both through questionnaires and in person.

6. MKO requested that the Commission fix its costs at \$102,610.76, consisting of \$56,756.80 in legal fees, \$15,075.00 in consultant fees, \$5,625.00 in expert witness fees, and \$25,153.96 in disbursements. MKO filed a bill of costs with its application.²
7. With respect to its legal fees, MKO claimed 19 hours at the external rate of \$290 per hour for a legal counsel in practice for 20 years or more, and 171.3 hours at the external rate of \$206 per hour for a legal counsel in practice for 6 to 10 years. MKO also claimed 152 hours at the external rate of \$70 per hour for an articling student. Since this articling student was called to the bar during the proceeding, MKO claimed 39.4 hours at the external rate of \$135 per hour for a legal counsel in practice for less than 3 years.
8. With respect to its consultant fees, MKO claimed 67 hours at the external rate of \$225 per hour applicable to senior analysts and consultants.
9. With respect to MKO's disbursements, almost all of these costs related to the surveys MKO undertook to support its submissions. Specifically, the claimed amounts included wages for individuals hired to assist MKO's expert witness in conducting the surveys, and honoraria of \$25 per person paid to incent participation in the survey. These honoraria were generally in the form of gift cards to stores located in the same areas as the First Nations survey participants. MKO also claimed as disbursements the wages paid to a law student working with MKO's legal counsel to monitor the oral hearing phase of the proceeding.
10. MKO submitted that all of the telecommunications service providers that participated in the proceeding should be required to pay any costs awarded by the Commission (the costs respondents), and that the Commission should allocate the responsibility for this payment according to its usual practice.

Answer

11. Bell Canada argued that certain costs claimed by MKO were unreasonable and unnecessary, and that they should be disallowed. In Bell Canada's view, MKO's disbursements should be reduced by \$14,566.44 to reflect amounts claimed that either do not represent true out-of-pocket expenses, or are unsupported by evidence, or both. Bell Canada took particular issue with the costs MKO claimed for honoraria paid to

² The total amount of \$102,610.76 is based on the revised bill of costs that MKO filed with its reply comments. MKO's initial bill of costs set out a total amount of \$104,389.79.

survey participants, and requested that the Commission closely scrutinize all of the amounts MKO claimed as disbursements.

12. Further, Bell Canada argued that the legal fees claimed by MKO should be reduced by \$10,839.16. This reduction would reflect several adjustments that, in Bell Canada's view, would make the amount more consistent with the Commission's *Guidelines for the Assessment of Costs* (the Guidelines). For instance, Bell Canada submitted that, in general, MKO's reliance on external legal counsel in the proceeding was excessive and that, in particular, the amounts claimed in respect of MKO's legal counsel were not justified in the circumstances.
13. Bell Canada argued that the costs claimed in respect of MKO's external consultant should be reduced by \$1,537.50 to reflect more accurately the invoices submitted to support that claim. The company added that MKO must disclose whether it received any funding to participate in the proceeding.
14. MTS also disputed the amount MKO claimed for disbursements, arguing that this amount should be reduced by \$7,480.54 to exclude claims for administrative staff and honoraria for survey participants.
15. MTS submitted that the recovery of legal fees at the in-house rate would appropriately compensate MKO's legal counsel and reflect the costs necessarily and reasonably incurred by MKO in the circumstances, given that MKO's legal counsel are employees of the Public Interest Law Centre (PILC), which is part of Legal Aid Manitoba. Accordingly, MTS submitted that MKO's legal fees should be reduced by \$31,295.55.
16. TCC argued that all of the disbursements MKO claimed in respect of honoraria for survey participants should be disallowed and that certain other disbursement amounts should be carefully reviewed. TCC submitted that MKO should recover only the amounts for legal counsel that these counsel actually make as employees of PILC, or alternatively, that MKO's costs for legal counsel should be recovered at the in-house rate.
17. With respect to the allocation of costs, TCC submitted that the Commission should not apportion costs based on telecommunications operating revenues (TORs)³ 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 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.

³ TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

18. Vaxination questioned whether, in general, it is appropriate to claim legal fees for participation in a proceeding that does not deal principally with legal issues.
19. Xplornet supported the positions of Bell Canada, MTS, and TCC.

Reply

20. With respect to its disbursements, MKO updated its claim to omit amounts it initially claimed for administrative staff. However, MKO argued that the amounts it claimed for honoraria were appropriate. MKO submitted that these costs were recommended by its expert witness as a means of helping to ensure a representative sample of survey participants and as being consistent with research principles that prioritize respect for First Nations.
21. With respect to its legal fees, MKO replied that its legal counsel are employed by PILC, a branch of Legal Aid Manitoba, which is external to MKO, and that accordingly, the recovery of costs at the external rate is appropriate. MKO also provided additional information regarding its legal representation by PILC counsel, including a copy of its retainer agreement.
22. MKO argued that the Guidelines promote a flexible and administratively efficient costs model that does not require legal counsel to claim hourly rates based on their actual annual salaries. MKO argued that this model is consistent with relevant Supreme Court of Canada jurisprudence.⁴ In MKO's view, the recovery of legal fees at the external rate would reflect its necessarily and reasonably incurred costs in the circumstances. Further, MKO submitted that if it were prevented from recovering costs at this rate, this could adversely affect its ability to retain counsel, and thereby to participate in future proceedings.
23. MKO asserted that its reliance on external counsel was not excessive, since its own internal staff spent a significant amount of time on the proceeding for tasks such as instructing external legal counsel, the costs of which MKO did not claim. With respect to its articling student, MKO argued that the Guidelines do not preclude the charging of fees at the legal counsel rate if an individual's professional status changes during the course of a proceeding.
24. MKO submitted that its claim in respect of its external consultant was appropriate. MKO acknowledged that this consultant invoiced MKO for several hours at a rate lower than that claimed, but that the same consultant also invoiced MKO for a substantial number of hours at a higher rate than that claimed. Finally, MKO clarified that it did not receive any outside financial assistance for its participation in the proceeding.

⁴ Specifically, MKO cited *Bell Canada v. Consumers' Association of Canada et al.*, [1986] 1 S.C.R. 190.

Commission's analysis and determinations

Eligibility

25. 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.

26. In Telecom Information Bulletin 2016-188, the Commission provided guidance regarding how an applicant may demonstrate that it satisfies the first criterion with respect to its representation of interested subscribers. MKO represents members of First Nations in northern Manitoba who subscribe to telecommunications services. In the present case, MKO has demonstrated this representation by, for instance, canvassing First Nations members to develop its submissions.

27. MKO has also satisfied the remaining criteria through its participation in the proceeding. In particular, MKO provided a valuable and unique perspective that helped the Commission understand how the issues under consideration could affect Indigenous Canadians living in remote areas. Further, MKO's coordination of submissions with the AAC to reduce duplication demonstrates responsible participation.

28. Accordingly, MKO is eligible for an award of costs in relation to its participation in the proceeding.

29. Although multiple parties challenged the rates and amounts claimed by MKO, no party to the costs proceeding requested that the Commission deviate from its general practice of fixing costs and dispensing with taxation. Accordingly, the Commission will fix the costs to be awarded to MKO in accordance with the streamlined procedure set out in Telecom Public Notice 2002-5.

Disbursements

30. A disbursement is an amount that represents an out-of-pocket expense. Paragraph 30 of the Guidelines, as set out in Telecom Regulatory Policy 2010-963, indicates that the Commission will generally allow disbursements if the amount claimed is

reasonable and has been necessarily incurred in connection with the applicant's participation in the proceeding.

31. Multiple parties challenged MKO's disbursement claims, especially with respect to those amounts claimed as honoraria to incent survey participation.
32. The Commission's consideration of whether any particular out-of-pocket expenses are necessary and reasonable depends on the specific circumstances of a given case. In the present case, the Commission accepts MKO's argument that a small pecuniary incentive helped to ensure a statistically significant and representative sample for its survey—thereby increasing the value of the survey to the record of the proceeding—given that MKO represents members of First Nations generally located in rural and remote areas.
33. The Commission generally supports innovative approaches to ensuring that the voices of a broad range of Canadians are heard in its proceedings. While it will not always be necessary or reasonable to compensate participants in a research survey monetarily, the Commission is persuaded that, in the circumstances of this case, the honoraria amounts should be allowed. Going forward, the Commission expects that any costs applicant claiming disbursements for similar expenses would clearly demonstrate that these expenses are consistent with the guiding principles for costs awards, including being necessary and reasonable in the circumstances.
34. The amount that would be appropriate to allow for honoraria is the amount required to compensate 168 individuals for their participation in the survey, which is the number of individuals cited in MKO's expert witness report filed on the record of the proceeding.
35. Regarding the remainder of the disbursements, the amounts claimed by MKO, while high, cannot be considered unreasonable in the circumstances, especially given the practical challenges faced by MKO in representing its disparately and remotely situated constituency.
36. In light of the above, after reviewing the application, including supporting documentation such as receipts, the Commission determines that the costs related to MKO's disbursements should be fixed at \$26,431.46. This reflects the amount that MKO has demonstrated represents actual out-of-pocket expenses that were necessarily and reasonably incurred.⁵

⁵ See the Appendix to this order for a full breakdown of the disbursement amounts that the Commission has allowed.

Fees

37. Some parties challenged the fees claimed by MKO for external legal counsel. Bell Canada argued that the fees claimed for MKO's external consultant should be reduced. No party challenged the fees claimed for MKO's expert witness.
38. For the reasons that follow, the Commission considers it appropriate to award the total amount claimed by MKO with respect to fees.
39. MKO has demonstrated that PILC legal counsel are employed by Legal Aid Manitoba, an entity clearly external to MKO. Further, MKO has provided evidence of the hours and amounts it was billed by PILC legal counsel, which correspond to those MKO claimed in its bill of costs. The amounts are in line with the scale of costs for professional legal fees set out in the Guidelines.
40. The potential costs respondents have not established how the salaries of PILC legal counsel are relevant to the determination of which costs have been necessarily and reasonably incurred by MKO, since MKO does not pay these salaries.
41. As MKO noted, the Supreme Court has held that the general purpose of the Commission's costs regime is not restricted to mere indemnification, and that the Commission has broad discretion in determining how to exercise its ability to award costs.
42. The Guidelines make clear that the Commission generally exercises its discretion regarding costs in ways that will implement certain key principles, including fairness to parties, efficiency and effectiveness, and certainty of result. These principles are embodied in many of the Commission's general practices with respect to costs as set out in the Guidelines, including the fixing of costs and the adoption of a scale of costs for professional fees.
43. An especially important principle is that an amount must be necessarily and reasonably incurred by the costs applicant for that applicant to be awarded costs.
44. MKO has provided sufficient evidence of the costs it has incurred for legal fees and, in the circumstances, it has established that these costs were incurred necessarily and reasonably.
45. The proceeding was both lengthy and complex. MKO participated throughout and filed extensive submissions, many of which were evidently prepared by legal counsel. Accordingly, in the circumstances, the amount MKO claimed for legal fees cannot be considered excessive.
46. Further, MKO was justified in claiming legal fees at the rate for junior legal counsel as of the date on which the former PILC articling student was called to the bar. The Guidelines state that years as a practising lawyer shall be calculated as at the date of the commencement of the proceeding. However, on a plain reading, this would not apply to an individual who becomes a lawyer during the course of a proceeding.

47. With respect to the general question posed by Vaxination, applicants may apply for costs regardless of the nature of the Commission proceeding, provided it is initiated, in whole or in part, pursuant to the *Telecommunications Act*. Costs may be awarded if applicants are able to demonstrate their eligibility for a costs award. Further, it would not be realistic to expect costs applicants to claim fees for legal counsel only in respect of pure questions of law. Given the polycentric nature of the Commission's decision making, the issues raised before it involve a fusion of legal and policy considerations.
48. Accordingly, the Commission allows the total amount of costs claimed by MKO for legal fees. Such an award is consistent with the Guidelines and the Commission's general practice, as well as the purposes of the costs regime more broadly.
49. Regarding the fees claimed for MKO's external consultant, several of the invoices filed in support of this claim indicate that the consultant charged a lower rate than that set out in the scale of costs for a proportion of his work. However, other invoices indicate that this same consultant charged a rate higher than that set out in the scale of costs for a greater proportion of his work.
50. In the circumstances, it is reasonable and consistent with the purposes of the costs regime for MKO to have claimed all of the hours associated with its external consultant at the rate set out in the scale of costs.
51. In light of the above, the Commission fixes MKO's fees at \$77,456.80.

Costs respondents and allocation

52. 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.
53. 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.
54. Accordingly, Bell Canada; the Canadian Network Operators Consortium Inc. (CNOC); Cogeco Communications Inc. (Cogeco);⁶ Freedom Mobile Inc.

⁶ 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.

(Freedom Mobile);⁷ MTS; Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Rogers Communications Canada Inc. (RCCI);⁸ Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); and TCC are the appropriate costs respondents in the circumstances.

55. It is the Commission’s general practice to allocate the responsibility for payment of costs among costs respondents based on their TORs⁹ as an indicator of the relative size and interest of the parties involved in the proceeding.
56. 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.
57. 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 responsibility for payment of costs with respect to the TORs of all of these Bell companies. Beyond this, taking the TORs of any parent companies into account, as proposed by TCC, 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 responsibility for payment 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.

Company	Percentage	Amount
Bell Canada	36.1%	\$37,503.66
TCC	24.7%	\$25,660.40
RCCI	22.5%	\$23,374.86
Videotron	4.4%	\$4,571.08
MTS	3.2%	\$3,324.42

⁷ In the proceeding, submissions were received from WIND Mobile Corp. However, since then, the company underwent a name change and is now Freedom Mobile.

⁸ 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.

⁹ In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

Shaw	3.0%	\$3,116.65
SaskTel	2.5%	\$2,597.21
CNOC	1.4%	\$1,454.44
Cogeco	1.1%	\$1,142.77
Freedom Mobile	1.1%	\$1,142.77

58. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

59. 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

60. The Commission **approves, with changes**, the application by MKO for costs with respect to its participation in the proceeding.

61. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to MKO at \$103,888.26.

62. The Commission **directs** that the award of costs to MKO be paid forthwith by the costs respondents and according to the proportions set out in paragraph 58.

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

- *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*

Appendix to Telecom Order CRTC 2017-163

Disbursements

Nature of disbursement	Amount allowed
Phone/fax	\$375.46
Photocopies	\$82.50
Corporate records search	\$8.00
Access to research article	\$53.50
Monitoring of oral phase of hearing	\$1,497.00
Assistants for expert witness:	(Assistants total: \$2,985.00)
• statistics	\$2,355.00
• literature review	\$630.00
Survey costs:	(Survey total: \$21,430.00)
• coordination	\$8,895.00
• conduct	\$8,140.00
• shipping	\$195.00
• honoraria	\$4,200.00
Total	\$26,431.46