



Telecom Order CRTC 2017-362

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Determination of costs award with respect to the participation of the Forum for Research and Policy in Communications in the proceeding that led to Telecom Regulatory Policy 2017-200

Application

1. By letter dated 18 April 2017, the Forum for Research and Policy in Communications (FRPC) applied for costs with respect to its participation in the proceeding that led to Telecom Regulatory Policy 2017-200 (the proceeding). In the proceeding, the Commission undertook a review of the Wireless Code (the Code).
2. TELUS Communications Company (TCC) filed an intervention, dated 28 April 2017, in response to the FRPC's application. The FRPC filed a reply dated 3 May 2017.
3. The FRPC 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, the FRPC submitted that it advocated on behalf of Canadian wireless subscribers in the proceeding. The FRPC also submitted that it made evidence-based recommendations on a wide range of issues relevant to the proceeding.
5. With respect to the specific methods by which the FRPC has submitted that it represented subscribers, the FRPC explained that it conducted empirical research, consulted with its members before and during the proceeding, and commissioned a national phone survey.
6. The FRPC requested that the Commission fix its costs at \$62,476.16, consisting of \$52,306.16 for legal fees, and \$10,170.00 for disbursements related exclusively to the survey it commissioned. The FRPC's claim included the Ontario Harmonized Sales Tax (HST) on fees. The FRPC filed a bill of costs with its application.
7. The FRPC submitted that the telecommunications service providers that participated in the proceeding are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

8. The FRPC proposed that the responsibility for payment of costs be allocated among the costs respondents on the basis of their telecommunications revenues.
9. In response to a Commission staff letter to potential costs respondents seeking comment on how any costs awarded in this case should be allocated, Bell Mobility Inc. (Bell Mobility); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); and TCC provided additional comments.

Answer

10. TCC argued that the FRPC's application should be rejected, as it was filed well beyond the deadline prescribed by the Rules of Procedure for costs applications, with no explanation for the delay.
11. Alternatively, TCC argued that the FRPC is ineligible for an award of costs as it did not represent a group or class of subscribers with an interest in the outcome of the proceeding. In particular, TCC submitted that a bald assertion, on the FRPC's part, that it represents all subscribers does not sufficiently discharge the burden of demonstrating eligibility for costs.
12. On the subject of allocation, TCC submitted that, if the Commission does determine that the FRPC is eligible for an award of costs, the award should be allocated among cost respondents on the basis of wireless revenues rather than telecommunications operating revenues (TORs),¹ given that the subject matter of the proceeding focused exclusively on wireless services. It noted that certain information regarding wireless revenues appears in the Commission's annual *Communications Monitoring Report*.
13. Videotron agreed with TCC. In its view, it would be unreasonable under the circumstances of this case to allocate costs on the basis of telecommunications revenues that did not stem from the provision of wireless services.
14. Bell Mobility argued that there was no reason to deviate from the Commission's general practice of allocating costs on the basis of TORs. It submitted that potential costs respondents are free to structure their affairs such that separate entities report telecommunications revenues to the Commission for wireless and wireline business segments respectively.

Reply

15. The FRPC acknowledged that its application was filed late, but submitted that this was due to the unavailability of key resources during the relevant time period. Further, it argued that the late filing had not prejudiced any party.

¹ TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

16. With respect to its eligibility for an award of costs, the FRPC argued that its application for costs demonstrated that its positions in the proceeding were in line with substantial segments of respondents to the survey that it had commissioned. The FRPC argued that this furthered the view that it represented all subscribers across a wide spectrum of demographic groups.

Commission's analysis and determinations

Procedural matters

17. The Rules of Procedure provide that applications for final costs must be filed within 30 days of the close of the record of the proceeding in respect of which costs are being claimed. Nonetheless, the Commission has the discretion to dispense with or vary the Rules of Procedure where considerations of the public interest and fairness permit, including by accepting late-filed applications.
18. In the present case, though the FRPC's application for costs was filed beyond the prescribed deadline, there is no evidence that any party to the proceeding has been prejudiced as a result. The Commission notes that TCC, in particular, was able to file an answer in response to the application.
19. In the circumstances, there is a public interest in having the application resolved on its merits on the basis of a full record. Accordingly, the Commission accepts the application filed by the FRPC.

Eligibility

20. 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.

21. In Telecom Information Bulletin 2016-188 (the Information Bulletin), the Commission provided guidance regarding how an applicant may demonstrate that it satisfies the first criterion with respect to its representation of interested subscribers.
22. In the present case, the FRPC submitted that it should be found to satisfy this criterion in part because it commissioned a national phone survey in order to inform the views it presented during the proceeding. In the survey, a representative sample

of Canadians was asked questions regarding the Code and related matters. The FRPC argued that the results of the survey indicated that its views reflect those of a substantial portion of subscribers.

23. However, the survey in question was commissioned by the FRPC in January 2017 and was only completed once the proceeding was already well underway. As a result, many of the FRPC's views on the matters under consideration had already been submitted to the Commission prior to the survey being undertaken. No explanation was offered as to how the FRPC could have known whether these views corresponded to those of survey respondents at the time these submissions were made. In the circumstances, the Commission does not consider that the survey is supportive of the FRPC's claim that it satisfies the first eligibility criterion.
24. Nonetheless, the Information Bulletin stresses that there are various ways through which an applicant can demonstrate that it represents subscribers. In this case, the Commission notes the FRPC's submissions that it also engaged in consumer-focused research and consulted its own membership prior to participating in the proceeding.
25. Accordingly, in the present case, the Commission is prepared to accept that the FRPC has met the first criterion. However, the Commission notes that, in the future, it may insist on additional evidence in this regard. As set out in the Information Bulletin, an applicant is to make clear how it determines that its positions in a proceeding reflect the interests of a group or class of subscribers; if it fails to do so, the Commission may not be able to conclude that this eligibility criterion for an award of costs has been met.
26. As for the remaining eligibility criteria, the FRPC has satisfied these requirements through its participation in the proceeding. For instance, the FRPC's submissions, including those regarding the interaction between data add-ons and the Code's caps, and measures that could be taken to improve the awareness of the Code, assisted the Commission in developing a better understanding of the matters that were considered.

Rates and amounts

27. The rates claimed in respect of legal fees are in accordance with the rates established in the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963.
28. However, the Commission considers that the time claimed is excessive in one particular respect and should be reduced. The FRPC claimed over 18 total hours of work related to the preparation of its application for costs. The great majority of this time (over 16 hours) was claimed by its senior counsel. For a sophisticated party such as the FRPC, with considerable experience in Commission proceedings, the preparation of an application for costs should be a routine matter.

29. While it is important to ensure that the application is accurate and while the Commission appreciates that diligence in this regard is necessary, care must be taken not to claim an amount that is out of proportion to what is reasonable in the circumstances. In this case, the time claimed by the FRPC is significantly greater than the other costs applicants in the proceeding who claimed time for this task.²
30. Accordingly, the Commission reduces the claim of the FRPC's senior counsel by half in this respect.
31. The Commission finds that the amount of \$50,399.69 for the FRPC's legal fees was necessarily and reasonably incurred and should be allowed.
32. With respect to disbursements, the FRPC claimed \$10,170 related to its survey. As noted above, this survey was commissioned in January 2017. This was approximately six months after the initiation of the proceeding and after multiple rounds of submissions had already been made.
33. In its application for costs, the FRPC submitted that it received the survey results prior to its appearance before the Commission at the public hearing associated with the proceeding. However, none of its submissions from the hearing mention the survey. Indeed, considering that the purpose of the presentations at the public hearing was to allow parties to elaborate on positions that had already been submitted on the record, it would have been inappropriate for the FRPC to introduce this new evidence at that point in the proceeding without leave of the Commission. The FRPC made no attempt to seek such leave at any point prior to the closure of the public record of the proceeding on 6 March 2017. Instead, the FRPC published the survey results on its own website on 24 February 2017 and later submitted a copy as part of its application for costs on 18 April 2017.
34. As a result of the above, no other parties to the proceeding were able to respond to these survey results or take them into account in making their own submissions. Similarly, the Commission did not have the benefit of this information in making its determinations in the proceeding.
35. Accordingly, the Commission finds that the costs claimed for disbursements related to the survey were not necessarily and reasonably incurred in connection with the FRPC's participation in the hearing and should not be allowed.
36. 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.

² For instance, Media Access Canada and the Consumers Council of Canada each claimed between three and four hours in this regard.

Costs respondents and allocation

37. 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.
38. The Commission considers that Bell Mobility; Bragg Communications Incorporated, operating as Eastlink (Eastlink); Freedom Mobile Inc. (Freedom Mobile); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); TCC; and Videotron had a significant interest in the outcome of the proceeding and participated actively throughout the proceeding. Therefore, these parties are the appropriate costs respondents to the FRPC's application for costs.
39. It is the Commission's general practice to allocate the responsibility for the payment of costs among costs respondents based on their TORs. In general, the Commission considers that TORs are indicators of the relative size and interest of the parties involved in proceedings.
40. However, TCC and Videotron argued that it would be inappropriate, in the circumstances, to allocate costs on the basis of revenues derived from the provision of all telecommunications services. Rather, they advocated for costs to be allocated on the basis of wireless revenues.
41. In the particular circumstances, the Commission agrees that there are more suitable indicators than TORs of the appropriate basis on which to allocate costs. On the record of the costs proceeding, Commission staff sought comments on whether revenue figures contained in section 5.5 of the Commission's 2015 *Communications Monitoring Report* (the report)³ would constitute an appropriate basis for the allocation of costs. Bell Mobility opposed the proposal on the grounds that TORs remain the appropriate basis for allocation.
42. The Guidelines set out the key principles that the Commission seeks to implement through its costs regime. These include ensuring that the process has the flexibility to take account of particular circumstances where they are relevant and that the approach taken is fair, efficient, and effective.
43. The report was part of the record of the proceeding, and parties referred to it at length during that proceeding. In the circumstances, the Commission considers that a deviation from the use of TORs is justified, and that it would be appropriate to refer to the revenue figures from the most recent time period detailed in the report.
44. Consequently, the Commission considers that it would be appropriate to allocate 92% of the FRPC's costs between Bell Mobility, RCCI, and TCC, drawing upon the allocation of wireless revenue market share from the most recent time period detailed in the report.

³ As of the initiation of the proceeding, this was the most current volume of the report.

45. It follows that the remaining 8% of the FRPC's costs should be allocated between the remaining costs respondents. However, the individual subscriber and revenue levels of these companies do not appear on the record of the proceeding. In the circumstances, the Commission considers that the similar levels of participation of these parties can be used as a proxy for their similar levels of interest in the proceeding. Further, given the relatively low amounts to be paid by these respondents, the Commission considers that requiring these four costs respondents to bear an equal portion of the FRPC's costs best serves the objective of fairness, efficiency, and effectiveness in the circumstances.
46. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

| Company | Percentage | Amount |
|----------------|-------------------|---------------|
| RCCI | 35% | \$17,639.91 |
| Bell Mobility | 29% | \$14,615.91 |
| TCC | 28% | \$14,111.91 |
| Eastlink | 2% | \$1,007.99 |
| Freedom Mobile | 2% | \$1,007.99 |
| SaskTel | 2% | \$1,007.99 |
| Videotron | 2% | \$1,007.99 |

Directions regarding costs

47. The Commission **approves, with changes**, the application by the FRPC for costs with respect to its participation in the proceeding.
48. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to the FRPC at \$50,399.69.
49. The Commission **directs** that the award of costs to the FRPC be paid forthwith by the costs respondents according to the proportions set out in paragraph 46.

Secretary General

Related documents

- *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200, 15 June 2017
- *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188, 17 May 2016
- *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