



## Telecom Order CRTC 2017-426

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Ottawa, 4 December 2017

*File numbers: 1011-NOC2016-0192 and 4754-547*

### **Determination of costs award with respect to the participation of the Equitable Internet Coalition in the proceeding that led to Telecom Regulatory Policy 2017-104**

#### **Application**

1. By letter dated 19 December 2016, the Equitable Internet Coalition (EIC) applied for costs with respect to its participation in the proceeding that led to Telecom Regulatory Policy 2017-104 (the proceeding). In the proceeding, the Commission examined policy issues surrounding the use of differential pricing practices by Internet service providers and established a framework for assessing these practices.
2. Bell Canada and TELUS Communications Inc. (TCI)<sup>1</sup> filed interventions, both dated 16 January 2017, in response to the EIC's application. The EIC filed a reply dated 20 January 2017.
3. As in the costs proceeding that led to Telecom Order 2017-364, there was additional process in this costs proceeding whereby Commission staff requested information from the Public Interest Advocacy Centre (PIAC), a member of the EIC, regarding the status of its legal counsel, Mr. John Lawford, and its articling students. In particular, Commission staff sought comments on whether it was appropriate for PIAC to claim legal fees for these individuals as internal or external resources. PIAC responded to the request, and Bell Canada and TCI provided comments.
4. The EIC 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 its member groups had a direct interest in the outcome of the proceeding, 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.
5. In particular, the EIC submitted that it represents the interests of its member groups: the British Columbia Public Interest Advocacy Centre; the Consumers' Association

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<sup>1</sup> In this proceeding, submissions were received from TELUS Communications Company (TCC). However, effective 1 October 2017, TCC's assets were legally transferred to TCI and TCC ceased to exist. For ease of reference, "TCI" is used in this order.

of Canada; the Council of Senior Citizens' Organizations of British Columbia; the National Pensioners Federation; and PIAC. The EIC provided information on the regions of Canada in which its member groups are located and details of the number of individuals making up the member groups being represented.

6. The EIC explained that the group or class of subscribers it represents and those under their umbrellas had various public interest mandates, across the country or in specific provinces, to represent about a million individuals, including consumers in general and seniors in particular. With respect to the specific methods through which the EIC represents its member groups, it explained that the senior management of all the member organizations reviewed its positions and interventions before they were put forward. It also noted that several member organizations were informed of, and agreed with, the positions it advanced.
7. The EIC also submitted that it had assisted the Commission in developing a better understanding through its participation at all stages of the proceeding and by responding directly to all the Commission's questions with relevant citations. Specifically, the EIC submitted that it had offered a distinct user- and public interest-focused perspective with a high level of expertise in its provision of solution-oriented proposals and that it participated responsibly by maximizing its use of junior counsel.
8. The EIC requested that the Commission fix its costs at \$80,484.69, consisting of \$61,656.93 for legal fees, \$16,687.50 for expert witness fees, and \$2,140.26 for disbursements. The EIC's claim included the Ontario Harmonized Sales Tax (HST) on fees less the rebate to which it is entitled in connection with the HST. The EIC filed a bill of costs with its application.
9. The EIC claimed 40.1 hours for senior external counsel (Mr. Lawford) at a rate of \$290 per hour (\$12,087.18 with the HST and the associated rebate); 197.2 hours for intermediate external counsel at a rate of \$206 per hour (\$42,223.75 with the HST and the associated rebate); one quarter of a day for internal counsel at a rate of \$600 per day (\$150, no HST claimed); 81.55 hours for an external articling student at a rate of \$70 per hour (\$5,708.50, no HST claimed); 8.5 days for a summer student at the legal assistant rate of \$175 per day (\$1,487.50, no HST claimed); and 70.5 hours for an expert witness at a rate of \$225 per hour for work preparing for the hearing and 0.5 days at a rate of \$1,650 per day for attending the hearing (\$16,687.50 in total, no HST claimed).
10. The EIC submitted that the telecommunications service providers that had a significant interest in the proceeding and participated actively are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents). It suggested that the responsibility for payment of costs should be apportioned, consistent with the Commission's practice, based on

telecommunications operating revenues (TORs)<sup>2</sup> and that any party required to pay less than \$1,000 should be dropped as a costs respondent and its share added to the total to be paid by the remaining costs respondents.

## Answer

11. Bell Canada submitted that it did not believe that the costs claimed by the EIC were necessarily and reasonably incurred to enable the EIC's meaningful participation in the proceeding.
12. In particular, Bell Canada suggested that the fees claimed for external counsel should be charged at internal rates. It argued that the Commission's practice of relying on how an individual reports to the law society encourages counsel to structure their practices in order to be considered external counsel and therefore eligible for higher rates. Bell Canada indicated that there were indicia that counsel to PIAC was not external. It suggested that the Commission adopt a test to determine the status of counsel similar to the test used to determine the employment status of consultants.
13. In the alternative, Bell Canada argued that it was not reasonable for PIAC to rely on external counsel to the extent it did while relying so sparingly on internal counsel. Bell Canada suggested that, in furtherance of the personal gain of its external counsel, PIAC intentionally does not employ a more cost-efficient business model for its participation before the Commission. Bell Canada argued that this is an abuse of the costs awards process and that the time claimed by external counsel should be converted to internal rates. Bell Canada argued that the articling student should also be classified as internal for costs purposes. Bell Canada argued that despite Mr. Lawford acting as a principal to the articling student, an employer-employee relationship exists between PIAC and the articling student for whom it claimed costs.
14. In light of the above, Bell Canada submitted that the EIC's costs should be reduced to \$43,350.26 to properly reflect the costs incurred by the EIC in relation to its participation in the proceeding.
15. Finally, Bell Canada submitted that costs respondents should be determined in accordance with the Commission's Guidelines for the Assessment of Costs, as set out in Telecom Regulatory Policy 2010-963 (the Guidelines).
16. TCI argued that the Commission should deny costs in respect of the EIC's expert witness, Dr. Barbara A. Cherry, regarding her opinion on Canadian domestic law, which is generally inadmissible in a court. TCI argued that despite relaxed evidentiary rules before administrative tribunals, given that common carriage is at the heart of telecommunications law, which is the Commission's area of expertise, the Commission could not possibly have been assisted by the expert witness's opinion. TCI added that a lack of Canadian legal training or experience made the

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

witness unqualified to offer an expert opinion on Canadian law. TCI argued that the 9.5 hours the witness spent on reviewing Canadian law should therefore be deducted from the total time claimed, resulting in a deduction of \$2,137.50.

17. TCI repeated and relied on its submissions made in response to the Affordable Access Coalition's (AAC) costs claim in respect of the Telecom Regulatory Policy 2016-496 proceeding regarding modern telecommunications services: for all practical purposes, counsel to PIAC act in an internal role and should be treated as internal counsel.
18. TCI submitted that the Commission should ensure that the allocation of responsibility for payment of costs truly reflects the relative interest and size of the costs respondents, as well as their ability to absorb the costs. According to TCI, the Commission must ensure that it calculates the costs respondents' TORs in an equitable and competitively neutral manner. Specifically, TCI submitted that the Commission should allocate costs based on the TORs of the parent company of each costs respondent. Further, TCI argued that the Commission should consider the special positions of Bell Canada and of Quebecor Media Inc., Videotron Ltd., and Videotron G.P. (collectively, Videotron) with regard to costs, as the proceeding arose in light of the proceeding related to Videotron's Unlimited Music service and the proceeding concerning Bell Mobility Inc.'s and Videotron's mobile TV services.

## **Reply**

19. The EIC adopted the same response to the argument that counsel were external as the AAC made in its application for costs related to the Telecom Regulatory Policy 2016-496 proceeding: counsel are considered external if they declare so to the appropriate regulatory body. The EIC argued that it has not been the Commission's practice to look into the relative nature of the practice of counsel and that it would be unfair to alter this approach without warning. Similarly, the EIC noted that there is no category for internal articling students in the Guidelines.
20. The EIC noted that the evidence and testimony of its expert witness, who is based in the United States, were of assistance to the Commission, as the Chair acknowledged during the EIC's oral remarks. It added that the United States and Canada share common carriage lineage and that one regime can inform the other. The EIC also noted that the Commission had accepted Dr. Cherry's expertise in an earlier proceeding and that no party objected to the Commission receiving her evidence and testimony in the proceeding in question, despite having the opportunity to do so. The EIC added that the Commission has relaxed rules regarding expert evidence and that it would be unfair to invoke legal rules designed for the qualification of experts in court for costs award purposes.
21. Finally, the EIC submitted that both Bell Canada and TCI, in arguing that the EIC did not participate in a responsible manner, conflated the test under subsection 70(2) of the Rules of Procedure and the criteria for awarding costs under subsection 66(1) and paragraph 68(c), which the EIC submitted was a legal error. In claiming that

Bell Canada's and TCI's arguments were flawed, the EIC relied on the same reasons it gave in its answer to Bell Canada and TCI in its costs application relative to the Telecom Regulatory Policy 2016-496 proceeding – namely that paragraph 68(c) of the Rules is not a test of the cost claim itself but of the conduct (advocacy or practice) in relation to the hearing by the party that claimed a costs award.

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

22. 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.
23. 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. In the present case, the EIC has demonstrated that it meets this requirement. The EIC made submissions that clearly and specifically identified and described the group or class of subscribers it purports to represent, identified its member groups, provided information on the regions of Canada in which these member groups are located and details of the number of individuals in the groups, and submitted that it represented the groups that make up the EIC by soliciting feedback from those groups regarding the EIC's positions.
24. The EIC has also satisfied the remaining criteria through its participation in the proceeding. In particular, the EIC filed structured and focused interventions, which included a proposal for an analytical framework to determine the compliance of differential pricing practices with the *Telecommunications Act* (the Act). These contributions and the EIC's participation in the oral hearing assisted the Commission in developing a better understanding of the matters that were considered and demonstrate that the EIC participated in the proceeding in a responsible way.
25. Accordingly, the Commission finds that the applicant meets the criteria for an award of costs under section 68 of the Rules of Procedure.

### **Legal fees**

26. As noted in Telecom Order 2017-364, the appropriate test for assessing whether a lawyer is an internal or external resource is how the lawyer reports to the law society

of which he or she is a member, in accordance with the Guidelines. However, the Commission may depart from the Guidelines and award costs at a different rate than what the lawyer is otherwise entitled to in cases where the applicant demonstrates that exceptional circumstances exist to warrant the departure.

27. In Telecom Order 2017-364, the Commission found that no exceptional circumstances existed. Consistent with Mr. Lawford's status as reported to the Law Society of Upper Canada, the Commission allowed the Coalition<sup>3</sup> to calculate Mr. Lawford's legal fees using the external hourly rate for costs claimed for the period after 1 January 2017 but required it to use the internal daily rate for costs claimed for the period prior to that date. The Commission also found the articling student to be a resource internal to PIAC and allowed the Coalition to claim costs for that student based on the internal daily rate.
28. The Commission finds that the same determinations are appropriate in the present case, since the record of this costs proceeding regarding the status of Mr. Lawford and the articling student as external or internal resources is the same as that of the proceeding that led to Telecom Order 2017-364. The Commission also finds that there are no exceptional circumstances in this case that would justify a deviation from the normal rate scale for costs applicable under the Guidelines.
29. In the present case, the 40.1 hours for Mr. Lawford were claimed for the period prior to 1 January 2017. Therefore, the Commission finds that the EIC is eligible to calculate legal fees for Mr. Lawford's services at the internal daily rate of \$800 based on his years of practice. Accordingly, the Commission reduces the costs claimed for Mr. Lawford from \$12,087.18 to \$4,600. The 40.1 hours claimed at the external rate were converted into 5.75 days based on a 7-hour work day, in accordance with the Guidelines.
30. With respect to the articling student, the EIC is eligible to claim costs for his services at the internal daily rate. The Commission therefore reduces the costs for the articling student from \$5,708.50 to \$2,761.25, calculated using the daily rate of \$235. The 81.55 hours claimed at the external rate were converted into 11.75 days based on a 7-hour work day, in accordance with the Guidelines.
31. Regarding the question of whether the legal costs claimed by the EIC were necessarily and reasonably incurred,<sup>4</sup> in the Guidelines, the Commission provided a list of additional factors it may consider when assessing whether costs claims are excessive. In the present case, the EIC's costs claims are justified due to the extent of the applicant's participation, the degree of complexity of the issues to which that

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<sup>3</sup> The Coalition consists of the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, the National Pensioners Federation, and PIAC.

<sup>4</sup> According to subsection 70(2) of the Rules of Procedure, the total amount of the costs must not exceed the total amount of costs necessarily and reasonably incurred by the applicant or the costs set out in the scale of costs established by the Commission under subsection 56(2) of the Act. The Guidelines also say that applicants are encouraged to rely on junior counsel and articling students to the greatest extent possible.

participation related, the experience and expertise of the claimant, and the time claimed. In particular, the EIC has demonstrated why reliance on senior counsel was necessary, namely because the size, nature, and complexity of this file were better suited to more senior counsel who did not have to learn about the various concepts involved and who were actually more effective and efficient in advocating for the public interest than junior counsel would have been.

32. Subject to the adjustments for Mr. Lawford and the articling student outlined above, the Commission is satisfied that the costs claimed by the EIC were necessarily and reasonably incurred.
33. Accordingly, the total legal fees claimed are reduced from \$61,656.93 to \$51,222.50.

### **Expert witness fees**

34. Regarding TCI's submission that costs should be denied in respect of the EIC's expert witness on Canadian domestic law, the Rules of Procedure provide that it is within the Commission's discretion to decide whether to admit a document as evidence. However, in the context of this costs application, the Commission is considering only whether costs were necessarily and reasonably incurred, not whether a particular piece of evidence should have been accepted as expert evidence. Further, the Commission notes that no party sought to exclude or strike Dr. Cherry's submission.
35. The principal document prepared by Dr. Cherry and filed by the EIC in this proceeding focused on the Federal Communications Commission's Open Internet Rules in the United States. The preparation of the document would have required Dr. Cherry to review Canadian telecommunications law for comparison purposes. In the circumstances, the Commission finds that the total amount of \$16,687.50 claimed in respect of Dr. Cherry's expert opinion was necessarily and reasonably incurred.

### **Conclusion regarding fees**

36. In light of all the above, the rates claimed in respect of expert witness fees, disbursements, and legal fees, subject to the reduction in legal fees noted above, are in accordance with the rates established in the Guidelines. The Commission therefore finds that the total amount of \$70,050.26 was necessarily and reasonably incurred and should be allowed.

### **Costs respondents**

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. Given the scope of this general policy proceeding to establish a regulatory framework for examining the differential pricing practices of Internet service providers, a large

number of parties had a significant interest in the outcome of the proceeding and participated actively.

38. 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 costs respondent should be required to pay, due to the administrative burden that small costs awards impose on both the applicant and costs respondents.
39. In light of the above, the Commission considers that the following parties are the appropriate costs respondents in the circumstances: Bell Canada; the Canadian Network Operators Consortium Inc. (CNO); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron G.P.); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); and TCI.
40. It is the Commission's general practice to allocate the responsibility for payment of costs among costs respondents based on their TORs as an indicator of the relative size and interest of the parties involved in the proceeding.<sup>5</sup> The Commission is not persuaded by TCI's submission that it should allocate costs based on the TORs of the costs respondents' parent companies. In this case, the costs respondents participated in the proceeding on their own behalf and not on behalf of any affiliates.
41. Accordingly, consistent with the Commission's general practice, it is appropriate to calculate responsibility for payment of costs with respect to the TORs of the costs respondents that participated in the proceeding, and not based on the TORs of all their affiliated companies. TCI has chosen to operate on the basis of a specific legal structure and must accept the consequences of such a structure in the matter of costs.
42. Further, the Commission considers that it would not be appropriate to allocate a larger proportion of the responsibility to pay costs to Bell Canada and Videotron G.P. than would otherwise be the case by reason of their respective TORs. Telecom Regulatory Policy 2017-104 is intended to provide guidance to the industry as a whole and, as such, all service providers stand to benefit.

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<sup>5</sup> In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.



43. 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>
TCI	32.9%	\$23,046.54
RCCI	29.9%	\$20,945.03
Bell Canada	22.2%	\$15,551.16
Videotron G.P.	5.8%	\$4,062.91
Shaw	4.0%	\$2,802.01
SaskTel	3.3%	\$2,311.66
CNOC	1.9% <sup>6</sup>	\$1,330.95

#### **Directions regarding costs**

44. The Commission **approves, with changes**, the application by the EIC for costs with respect to its participation in the proceeding.
45. Pursuant to subsection 56(1) of the Act, the Commission fixes the costs to be paid to the EIC at \$70,050.26.
46. The Commission **directs** that the award of costs to the EIC be paid forthwith by the costs respondents according to the proportions set out in paragraph 43.

Secretary General

#### **Related documents**

- *Determination of costs award with respect to the participation of the Coalition in the proceeding that led to Telecom Regulatory Policy 2017-200, Telecom Order CRTC 2017-364, 16 October 2017*
- *Framework for assessing the differential pricing practices of Internet service providers, Telecom Regulatory Policy CRTC 2017-104, 20 April 2017*
- *Modern telecommunications services – The path forward for Canada’s digital economy, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016*

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<sup>6</sup> On examining the TORs of CNOC, whose revenues are readily available, the Commission considers it appropriate in the circumstances to find CNOC responsible for payment of 1.9% of the total costs awarded.

- *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