



## Telecom Order CRTC 2018-115

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Ottawa, 6 April 2018

File numbers: [1011-NOC2017-0049](#) and 4754-572

### **Determination of costs award with respect to the participation of OpenMedia Engagement Network in the proceeding initiated by Telecom Notice of Consultation 2017-49**

#### **Application**

1. By letter dated 6 October 2017, OpenMedia Engagement Network (OpenMedia) applied for costs with respect to its participation in the proceeding initiated by Telecom Notice of Consultation 2017-49 (the proceeding). In the proceeding, the Commission examined whether a competitor quality of service regime continues to be required and, if so, how it should be structured, taking into account recent changes in the telecommunications marketplace and the Commission's regulatory measures.
2. Bell Canada and TELUS Communications Inc. (TCI) filed interventions, both dated 16 October 2017, in response to OpenMedia's application. OpenMedia filed a reply to Bell Canada's intervention on 20 October 2017.
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 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. In particular, OpenMedia submitted that it represents the interests of Internet subscribers across Canada, who would have an interest in the outcome of the proceeding.
4. With respect to the group of subscribers that OpenMedia has submitted it represents, it explained that this group consists of nearly 7,000 users and citizens who participated in a petition calling upon the Commission to modernize the competitor quality of service regime. OpenMedia added that it had submitted to the Commission a number of comments from several dozen subscribers of competitor Internet service providers that rely on incumbent providers for critical service components. OpenMedia also submitted that its broader community includes over 250,000 people across Canada.
5. With respect to the specific methods by which OpenMedia has submitted that it represents this group, OpenMedia explained that it consulted with community members through social media platforms, email, and its website; incorporated

community input into its intervention; facilitated Internet users' individual contributions to the proceeding through a customized online form; and drew on flagship crowd-sourced policy reports that set long-term goals for Canadian telecommunications and Internet policy.

6. OpenMedia requested that the Commission fix its costs at \$25,179, consisting of \$21,654 for legal fees and \$3,525 for analyst fees. OpenMedia filed a bill of costs with its application.
7. OpenMedia claimed 160.4 hours for junior external counsel at a rate of \$135 per hour (\$21,654 plus Ontario Harmonized Sales Tax, less a 100% tax rebate) and 7.5 days in total for the work of six in-house analysts at a rate of \$470 per day (\$3,525).
8. Regarding the six in-house analysts, OpenMedia submitted that this relatively high number is justified because the availability of internal staff fluctuated, there was no duplication of work, and all the analysts were instrumental to OpenMedia's intervention and its various components, which included written material to engage citizens in submitting comments to the Commission during the proceeding and outreach through multimedia platforms, with a view to encouraging participation in the proceeding.
9. OpenMedia submitted that its costs were necessarily and reasonably incurred, and that it participated to a reasonably full extent at every stage of the proceeding, taking into account the multiple procedural stages, duration of the proceeding, number of interveners, and fulsome, substantive nature of many of the submissions. The organization submitted that it relied to the greatest extent possible on one junior external counsel and that its application for costs falls within a reasonable range, relative to other costs awards that the Commission has granted.
10. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents). It submitted that it will abide by the Commission's decision regarding the allocation of costs in accordance with the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963.

## **Answer**

11. TCI submitted that it takes no position on either the quantum of the requested award or OpenMedia's eligibility for an award of costs in relation to the proceeding.
12. Bell Canada submitted that it is not clear that the total amount of costs that OpenMedia claimed complies with subsection 70(2) of the Rules of Procedure, which provides that the total amount of the costs must not exceed the total amount of costs necessarily and reasonably incurred by the applicant. Bell Canada noted that OpenMedia's overall claim is almost double the costs claimed by the Public Interest Advocacy Centre (PIAC) in relation to the proceeding, yet PIAC participated in the proceeding as actively as OpenMedia did.

13. Bell Canada also submitted that it is not clear that the time expended by OpenMedia was necessary for its participation. In this respect, Bell Canada focused its analysis on the specific tasks of preparing OpenMedia's intervention and requests for information, noting that PIAC performed the same tasks and made twice as many requests for information as OpenMedia made. Bell Canada noted that PIAC claimed 69.3 hours dedicated to these particular tasks, while OpenMedia claimed 99.9 hours to perform the same tasks.
14. Bell Canada submitted that in light of the above, the Commission should carefully review OpenMedia's costs claim to ensure that only costs that were in fact necessarily and reasonably incurred are awarded, and the Commission should adjust OpenMedia's claim as appropriate to ensure compliance with the Rules of Procedure.

## **Reply**

15. OpenMedia raised three points in reply to Bell Canada's answer. First, it submitted that the difference in total costs between PIAC's costs claim and its own claim is mainly due to PIAC's use of articling student and in-house counsel rates according to the Commission's costs framework. According to OpenMedia, if PIAC had calculated the time spent using junior external counsel rates, there would be little difference between the two organizations' costs claims.
16. Secondly, OpenMedia submitted that there is little difference in hours between PIAC's claim and its claim. In contrast with Bell Canada's analysis, OpenMedia's analysis focused on total counsel hours rather than the hours that counsel spent on specific tasks. OpenMedia noted that it claimed a total of 160.4 counsel hours, while PIAC claimed a total of 156.9 counsel hours (including articling student hours).
17. Finally, OpenMedia questioned why PIAC's costs claim would be held as an independent standard used to evaluate the reasonableness of its own costs claim, arguing that both organizations participated with a high degree of diligence and expertise. OpenMedia suggested that this kind of comparison would be unfair because the contributions of each organization were different. OpenMedia submitted that comparing public interest organizations that may intervene in Commission proceedings would hinder public participation and diminish the range of views and perspectives submitted in those proceedings.

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

18. 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.
19. 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, OpenMedia has demonstrated that it meets this requirement. It clearly and specifically identified the group it represents as Internet subscribers across Canada, who would have an interest in the outcome of the proceeding, and it described the specific methods by which it represents this group.
20. OpenMedia has also satisfied the remaining criteria through its participation in the proceeding. In particular, OpenMedia's submissions, which were focused and structured and offered a distinct point of view, assisted the Commission in developing a better understanding of the matters that were considered. OpenMedia participated in a responsible manner throughout the proceeding.
21. With regard to Bell Canada's challenge of the amount of costs claimed, paragraph 23 of the Guidelines encourages applicants to rely on junior counsel and articling students to the greatest extent possible. In the present case, OpenMedia submitted that the availability of its internal staff fluctuated and that it relied principally on junior external counsel in order to participate in the proceeding. OpenMedia did not specify whether it had internal resources available to perform any of the tasks that were performed by junior external counsel in preparation for the proceeding.
22. The Commission finds that OpenMedia complied with paragraph 23 of the Guidelines. For future costs applications, the Commission invites OpenMedia to provide specific information regarding the availability of internal resources to perform tasks performed by external resources, in order to help the Commission assess whether the applicant participated in the proceeding in the most efficient and economical way possible.
23. With regard to Bell Canada's challenge of the amount of time claimed, paragraph 18 of the Guidelines provides that in evaluating whether or not the time expended by a claimant is excessive under the circumstances, the Commission will generally consider
  - 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;

- the degree of responsibility assumed by the claimant;
  - the duplication of substantive submissions among claimants;
  - the experience and expertise of the claimant; and
  - the time claimed and awarded in the proceeding or in other similar proceedings.
24. Pursuant to paragraph 19 of the Guidelines, 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.
25. In the present case, OpenMedia participated in all stages of the proceeding, raised moderately complex issues – particularly regarding a consumer-focused perspective in relation to a competitor quality of service regime – and provided an appropriate amount of documentation, considering the nature and scope of the proceeding. In order to develop its intervention, OpenMedia consulted with community members, incorporated and submitted a number of comments from individuals, and developed unique policy and legal positions. OpenMedia’s junior external counsel assumed a high degree of responsibility, and there was no duplication of substantive submissions among claimants.
26. OpenMedia claimed a total of 212.9 hours (160.4 hours for junior external counsel and 7.5 days or 52.5 hours for six analysts), while PIAC claimed a total of 157.05 hours (4 hours for senior external counsel, 8.75 days or 61.25 hours for junior in-house counsel, and 91.8 hours for an articling student). This means that OpenMedia’s total claim comprises approximately 35% more hours than PIAC’s.
27. OpenMedia claimed slightly more counsel hours than PIAC (160.4 for OpenMedia and 157.05 for PIAC), even though the experience and expertise of OpenMedia’s junior external counsel were relatively superior to those of PIAC’s articling student. The differences in counsel experience and expertise are reflected in the Guidelines, which prescribe significantly lower rates for an articling student (external hourly rate of \$70 or in-house daily rate of \$235) than for a junior counsel (external hourly rate of \$135 or in-house daily rate of \$600). The Commission considers that the relatively superior experience and expertise of junior counsel allow for a more efficient performance of tasks than in the case of an articling student. In the present case, such a difference is not reflected in the total number of counsel hours that OpenMedia submitted relative to PIAC’s submitted hours.
28. OpenMedia submitted and incorporated community-focused public opinion evidence and developed unique policy and legal positions. The Commission finds that the breadth of its participation was comparable to that of PIAC, which carried out similar tasks such as reviewing the file, preparing interventions/comments, and preparing reply comments. Further, PIAC submitted more requests for information than OpenMedia did.

29. OpenMedia submitted that its application falls within a reasonable costs range relative to other costs awards that the Commission has granted, but it did not specify to which other proceedings it was referring.
30. In light of all the above, the Commission considers that the time expended by OpenMedia was excessive under the circumstances and determines that the number of hours in OpenMedia's total costs claim should be reduced by roughly 20%. This adjustment allows for a flexible comparison of time claimed by different costs applicants for the same proceeding while acknowledging the distinct nature of each organization's participation.
31. Accordingly, the Commission reduces OpenMedia's costs claim by 30 hours for junior external counsel at the hourly rate of \$135, for a reduction of \$4,050, and by 1.5 days (10.5 hours) for in-house analysts at the daily rate of \$470, for a reduction of \$705. Therefore, the Commission reduces OpenMedia's costs claim by \$4,755 and determines that the total amount that was necessarily and reasonably incurred for its participation in the proceeding is \$20,424.
32. With the adjustments above, the rates claimed in respect of analyst and legal fees are in accordance with the rates established in the Guidelines.
33. 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.
34. 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. The Commission considers that the following parties had a significant interest in the outcome of the proceeding and participated actively in the proceeding: Bell Canada (on its own behalf and on behalf of Bell Mobility Inc.; Bell MTS, a division of Bell Canada; DMTS; KMTS; NorthernTel, Limited Partnership; Ontera; and Télébec, Limited Partnership) (collectively, the Bell companies); Bragg Communications Incorporated, carrying on business as Eastlink; Canadian Cable Systems Alliance Inc.; Canadian Network Operators Consortium Inc.; Cogeco Communications Inc.; Independent Telecommunications Providers Association; Northwestel Inc.; Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications; Shaw Cablesystems G.P.; Sogetel Mobilité inc.; SSi Micro Ltd.; TekSavvy Solutions Inc.; and TCI.
35. The Commission considers that, consistent with its practice, it is appropriate to allocate the responsibility for payment of costs among costs respondents based on their telecommunications operating revenues (TORs) as an indicator of the relative

size and interest of the parties involved in the proceeding.<sup>1</sup> 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.

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

Company	Percentage	Amount
Bell Canada	41.3%	\$8,435.11
TCI	28.1%	\$5,739.15
RCCI	25.6%	\$5,228.54
Videotron	5.0%	\$1,021.20

37. 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. The Commission leaves it to the members of the Bell companies to determine the appropriate allocation of the costs among themselves.

### Directions regarding costs

38. The Commission **approves, with changes**, the application by OpenMedia for costs with respect to its participation in the proceeding.
39. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to OpenMedia at \$20,424.
40. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by Bell Canada on behalf of the Bell companies; TCI; RCCI; and Videotron according to the proportions set out in paragraph 36 above.

Secretary General

### Related documents

- *Review of the competitor quality of service regime*, Telecom Notice of Consultation CRTC 2017-49, 23 February 2017, as amended by Telecom Notice of Consultation CRTC 2017-49-1, 27 June 2017

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<sup>1</sup> TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services. In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

- *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