



Telecom Order CRTC 2018-157

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Determination of costs award with respect to the participation of OpenMedia Engagement Network in the proceeding that led to Telecom Decision 2018-97

Application

1. By letter dated 18 January 2018, OpenMedia Engagement Network (OpenMedia) applied for costs with respect to its participation in the proceeding that led to Telecom Decision 2018-97 (the proceeding). In the proceeding, the Commission, as a result of Order in Council P.C. 2017-0557, reconsidered Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service.
2. TELUS Communications Inc. (TCI)¹ filed an intervention, dated 29 January 2018, in response to OpenMedia's application. OpenMedia filed a reply dated 5 February 2018.
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. OpenMedia submitted that it represents the interests of subscribers and that its broader community includes over 250,000 people across Canada. In particular, OpenMedia explained that it represents a group or class of approximately 8,400 Canadians who called upon the Commission to mandate wholesale access for WiFi-based Mobile Virtual Network Operators (MVNOs) in order to increase affordability and competition in Canada's mobile wireless services market.
5. With respect to the specific methods by which OpenMedia has submitted that it represents this group or class, OpenMedia explained that it implemented online tools in order to facilitate the participation of nearly 8,000 members of this group or class.

¹ In the 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.

OpenMedia added that, over the course of the proceeding, it initiated a petition supporting OpenMedia's intervention which approximately 400 subscribers signed. Further, OpenMedia submitted that its methods of representation included direct consultation with community members through social media platforms, email, and its website; incorporating community input into intervention submissions as well as placing input directly on the record; facilitating individual contributions of Internet users through a customized online tool; and drawing on Canadian telecommunications and Internet policy reports.

6. OpenMedia requested that the Commission fix its costs at \$21,589. OpenMedia claimed 139.9 hours for junior external counsel at a rate of \$135 per hour (\$18,886.50 plus Ontario Harmonized Sales Tax, less a 100% tax rebate) and 6.25 days in total for the work of eight in-house analysts at a rate of \$470 per day (\$2,702.50).
7. OpenMedia made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).
8. In response to a request for information to potential costs respondents seeking comment on how any costs awarded in this case should be allocated, Bell Mobility Inc. (Bell Mobility); Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the Canadian Network Operators Consortium Inc. (CNO); Ice Wireless Inc. (Ice Wireless); OpenMedia; Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron);² and TCI provided additional comments.

Answer

9. TCI asked the Commission to review OpenMedia's application to determine whether OpenMedia has met all the costs criteria set out in section 68 of the Rules of Procedure.
10. TCI submitted that OpenMedia did not participate in the proceeding in a responsible way, contrary to the responsible participation requirement as set out in paragraph 68(c) of the Rules of Procedure. TCI took particular issue with OpenMedia's claim for 27.9 hours of research conducted by junior external legal counsel. TCI questioned why OpenMedia would choose to have legal counsel conduct research – in this case research in relation to policy issues, which do not require the specific expertise of legal counsel – while it had eight analysts at its disposal to conduct such research.

² In the proceeding, submissions were received from Videotron G.P. However, on 29 December 2017, all of Videotron G.P.'s assets and operations were transferred to Videotron Ltd., and Videotron G.P. was subsequently dissolved. For ease of reference, "Videotron Ltd." is used in this order.

11. TCI argued that, assuming an eight-hour workday, OpenMedia's external counsel rate is more than double the daily rate of an in-house analyst and that having a substantially more costly resource perform policy research while other options are available does not constitute responsible participation. TCI submitted that these policy research costs were not "necessarily and reasonably incurred" as required by subsection 70(2) of the Rules of Procedure. TCI requested that the Commission adjust the final costs award so that all or most of the policy research time is charged at the analyst rate instead of the junior external counsel rate.
12. TCI also submitted that costs should be allocated among costs respondents based on wireless revenues instead of on the costs respondents' telecommunications operating revenues (TORs),³ since the entirety of the proceeding was a review of the Commission's mandated wireless roaming policy and related exclusively to wireless issues. Further, TCI argued that it would be unfair for subscribers of non-wireless services to bear the cost of consumer advocacy in a proceeding dealing exclusively with wireless issues.
13. Videotron agreed with TCI's proposal. Videotron argued that it would be unfair under the circumstances of this case to allocate costs on the basis of TORs. Doing so would require those companies that report wireless and wireline revenues in respect of the same corporate entity to pay a greater portion of costs than those that report wireless and wireline revenues in respect of separate corporations within their corporate structure.
14. With respect to TCI's proposal, 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 corporate affairs as they see fit. Bell Mobility also noted that certain telecommunications service providers who had a significant interest in the outcome of the proceeding and actively participated do not report wireless revenues; accordingly, adopting TCI's proposal would inappropriately exclude such companies from having to pay any costs.
15. CNOC also opposed TCI's proposal. CNOC argued that unlike the costs orders associated with the proceeding initiated by Telecom Notice of Consultation 2016-293,⁴ where the Commission deviated from its general practice of allocating costs on the basis of TORs and allocated costs based on wireless revenue market share, the present proceeding dealt with the broader question of whether Wi-Fi networks could constitute "home networks" for the purpose of wholesale roaming.

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

⁴ The Telecom Notice of Consultation 2016-293 proceeding culminated with the issuance of Telecom Regulatory Policy 2017-200 (Review of the Wireless Code).

In CNOC's view, the proceeding initiated by Telecom Notice of Consultation 2016-293 dealt exclusively with wireless services, whereas in the present proceeding, there was no clear delineation between wireless and wireline services. Therefore, CNOC argued that it would be appropriate for the Commission to allocate costs based on TORs.

16. Eastlink submitted that the present proceeding looked at whether non-wireless service providers should have mandated access to mobile wireless networks and, therefore, impacted a broader range of telecommunications service providers than just existing wireless service providers. Accordingly, in Eastlink's view, the Commission should allocate costs based on TORs.
17. Ice Wireless submitted that the proceeding examined the use of Wi-Fi in conjunction with wireless services and that Wi-Fi service is typically an extension of Internet service provided by wireline technology. As a result, Ice Wireless argued that the proceeding did not deal exclusively with the provision of wireless services and, therefore, costs should be awarded based on TORs.

Reply

18. OpenMedia submitted that it lacked the internal resources to conduct research because its staff did not possess the required expertise and because its staff's day-to-day responsibilities did not allow them to allocate time to conduct research about a complex regulatory issue such as the one associated with the proceeding. OpenMedia added that, under the circumstances, its external counsel was the only person equipped to conduct the necessary research for this proceeding.
19. OpenMedia submitted that it held no position on the issue of allocation of costs on the basis of respondents' wireless revenues, rather than TORs.

Commission's analysis and determinations

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 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. In particular, OpenMedia identified the group or class of subscribers as consisting of approximately 8,400 Canadians who called upon the Commission to mandate wholesale access for WiFi-based MVNOs. OpenMedia also explained the specific methods by which it represented this group or class of subscribers, such as directly consulting community members through social media platforms, email, and its website; incorporating their input in the proceeding's record; and relying on relevant research.
22. OpenMedia has satisfied the second criterion for an award of costs through its participation in the proceeding. In particular, OpenMedia's submissions were well documented, structured, and offered a consumer-focused point of view in relation to the potential outcomes of reconsidering the WiFi-based MVNO model. Such contribution assisted the Commission in developing a better understanding of the matters that were considered.
23. OpenMedia met the responsible participation criterion by filing a focused, concise intervention and complying with the deadlines and processes set throughout the proceeding.
24. On the question as to whether OpenMedia made an efficient use of resources by assigning policy research tasks to its junior external counsel, or whether the requested rates of pay should be reduced, the Commission considers that, in the circumstances, no reduction is required.
25. In the present case, the Commission notes that OpenMedia's participation in the proceeding focused on complex issues of overlapping legal and policy considerations. As such, the Commission does not consider it unreasonable for OpenMedia to have assigned its junior external counsel to research these interconnected issues.
26. OpenMedia provided evidence that its in-house analysts conducted an array of other tasks in connection with the proceeding, including citizen engagement, summarizing submissions, and copyediting. In the circumstances, this was also appropriate.
27. With respect to the fees OpenMedia claimed for its eight in-house analysts, the Commission notes that there is a calculation error in Form V, where OpenMedia claimed \$2,702.50 for 6.25 days of work at a daily rate of \$470. The correct amount, which is consistent with the other forms and the time dockets of OpenMedia staff, should be \$2,937.50.
28. Accordingly, the total amount for in-house analyst fees is adjusted from \$2,702.50 to \$2,937.50.

29. The rates claimed in respect of consultant and legal fees, as adjusted above, are in accordance with the rates established in the *Guidelines for the Assessment of Costs*, as set out in Telecom Regulatory Policy 2010-963. Considering these adjustments, the Commission finds that a total amount of \$21,824 was necessarily and reasonably incurred by OpenMedia and should be allowed.
30. 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.
31. 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 Mobility; Canadian Cable Systems Alliance Inc.; CNOC; Cogeco Communications Inc.; Déry Télécom inc.; Distributel Communications Limited; Eastlink; Execulink Telecom Inc.; Ice Wireless; Quantum Republic Inc.; Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications; Shaw Communications Inc.; SSi Micro Ltd.; TCI; TNW Wireless Inc.; Videotron; and Xplornet Communications Inc.
32. The Commission's general practice is to allocate the responsibility for 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 the proceeding.
33. However, TCI 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. Bell Mobility, CNOC, Eastlink, and Ice Wireless opposed TCI's proposal and argued that TORs remain the appropriate basis for allocation in this case.
34. With respect to Videotron's argument that certain parties may be disadvantaged in this case as a result of the Commission's costs award process due to their corporate structure, the Commission does not generally involve itself in the corporate organization of telecommunications service providers. Parties to Commission proceedings who may be required to pay costs are generally free to structure their businesses in any manner they wish.
35. Further, although the proceeding examined the Commission's wireless roaming policy, the issues in the proceeding were not restricted exclusively to matters related to wireless services in the same manner as Telecom Notice of Consultation

2016-293⁵ such that an allocation relying exclusively on wireless revenue would be appropriate.

36. In this case, the proceeding examined, among other things, how the use of a combination of Wi-Fi and cellular networks to offer wireless services would interact with the Commission's wholesale roaming policies. Wi-Fi networks are commonly an extension of a telecommunication service provider's wireline technology involving a telecommunications service provider's access network or the access network of an underlying telephone or cable company.
37. Given the above, the Commission is of the view that allocating costs based on wireless revenues would not completely reflect the nature of the proceeding. Therefore, the Commission considers that its general practice of allocating costs based on TORs is the most suitable indicator on which to allocate costs in the circumstances.⁶
38. As set out in Telecom Order 2015-160, the Commission also 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. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Company	Percentage	Amount
TCI	35.7%	\$7,791.17
RCCI	33.8%	\$7,376.51
Bell Mobility	23.7%	\$5,172.29
Videotron	6.8%	\$1,484.03

Directions regarding costs

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

⁵ In the costs awards emanating from the Telecom Notice of Consultation 2016-293 proceeding, the Commission allocated costs based on wireless revenue market share (see Telecom Orders 2017-362, 2017-363, 2017-364, 2017-378, 2017-379, and 2017-380).

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

41. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to OpenMedia at \$21,824.
42. The Commission **directs** that the award of costs to OpenMedia be paid forthwith by TCI, RCCI, Bell Mobility, and Videotron according to the proportions set out in paragraph 39 above.

Secretary General

Related documents

- *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*, Telecom Decision CRTC 2018-97, 22 March 2018
- *Determination of costs award with respect to the participation of the Deaf Wireless Canada Consultative Committee in the proceeding that led to Telecom Regulatory Policy 2017-200*, Telecom Order CRTC 2017-380, 25 October 2017
- *Determination of costs award with respect to the participation of Media Access Canada in the proceeding that led to Telecom Regulatory Policy 2017-200*, Telecom Order CRTC 2017-379, 25 October 2017
- *Determination of costs award with respect to the participation of the Consumers Council of Canada in the proceeding that led to Telecom Regulatory Policy 2017-200*, Telecom Order CRTC 2017-378, 25 October 2017
- *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
- *Determination of costs award with respect to the participation of l'Union des consommateurs in the proceeding that led to Telecom Regulatory Policy 2017-200*, Telecom Order CRTC 2017-363, 16 October 2017
- *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*, Telecom Order CRTC 2017-362, 16 October 2017
- *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200, 15 June 2017
- *Wholesale mobile wireless roaming service tariffs – Final terms and conditions*, Telecom Decision CRTC 2017-56, 1 March 2017
- *Review of the Wireless Code*, Telecom Notice of Consultation CRTC 2016-293, 28 July 2016; as amended by Telecom Notices of Consultation CRTC

2016-293-1, 23 September 2016; 2016-293-2, 26 October 2016; 2016-293-3, 5 January 2017; 2016-293-4, 24 January 2017; and 2016-293-5, 17 February 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
- *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