



## Telecom Decision CRTC 2018-309

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*Public record: 8662-T66-201801514*

### **TELUS Communications Inc. – Application to review and vary Telecom Order 2017-424**

*The Commission finds that there is substantial doubt as to the correctness of Telecom Order 2017-424. Accordingly, the Commission **approves** TCI's application to review and vary that order, and names the Canadian Wireless Telecommunications Association as a costs respondent.*

#### **Introduction**

1. The Commission received an application for costs from the Public Interest Advocacy Centre (PIAC) for its participation in the proceeding that led to Telecom Decision 2016-479 (the substantive proceeding). In the substantive proceeding, the Commission examined a Part 1 application from PIAC regarding section 12 of the Quebec Budget Act,<sup>1</sup> which would require that telecommunications service providers (TSPs) in Quebec block access to certain gambling websites.
2. In its costs application, PIAC submitted that the responsibility for payment of costs should be allocated to the major TSPs operating in Quebec and to the Canadian Wireless Telecommunications Association (CWTA). PIAC submitted that the CWTA should be required to pay 25% of the costs awarded because the CWTA took an active role in the substantive proceeding and because its subsequent application to the Quebec Superior Court raised procedural complications for PIAC and other parties with respect to the Part 1 application before the Commission at the time.
3. In response to PIAC's costs application, the CWTA submitted that although the *Telecommunications Act* (the Act) allows the Commission to require any party to a proceeding to be responsible for payment of costs, to the best of its knowledge, there have been no instances where the Commission has ordered an industry association to pay costs. The CWTA also submitted that the Commission, in Telecom Order 2013-526, explicitly considered whether the CWTA should have been a costs respondent in the circumstances, and concluded that it should not. In Telecom Order 2017-424, the Commission applied the same rationale as it did in Telecom Order 2013-526 and determined that it would not name the CWTA as a costs respondent to PIAC's costs

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<sup>1</sup> An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015, L.Q. 2016, c. 7.

application. The Commission stated that naming the CWTA as a costs respondent, in addition to naming the TSPs that were parties to the proceeding, could introduce inequities in the assignment of the responsibility for payment of costs, essentially double charging some TSPs, while indirectly assessing costs against other entities that did not have a significant interest in its outcome.

4. The Commission named Shaw Cablesystems G.P (Shaw) and TELUS Communications Inc. (TCI) as costs respondents in Telecom Order 2017-424 and directed them to pay an award of costs to PIAC for its participation in the substantive proceeding. TCI was directed to pay 89.2% of the \$14,140.46 costs award, and Shaw was directed to pay the remaining 10.8%.

### **Application**

5. The Commission received an application from TCI, dated 15 March 2018, in which the company requested that the Commission review and vary Telecom Order 2017-424 to name the CWTA as a costs respondent. TCI submitted that there was substantial doubt as to the correctness of the original decision. First, it argued that the Commission made an error in fact when it relied on a previous determination in declining to make the CWTA a costs respondent. TCI submitted that the rationale behind the previous determination did not apply to the circumstances of the proceeding that led to Telecom Order 2017-424. Second, TCI submitted that the Commission made an error in law by improperly exercising its discretion. It argued that this led to an unreasonable and unjust decision that was inconsistent with the reasons set out in the decision, namely the purpose of the costs regime and the stated rationale of the decision.
6. TCI noted that it has already paid its share of the costs award to PIAC. It submitted that the appropriate remedy in this case would be to order any new costs respondent to pay TCI the difference between the amount that TCI has already paid to PIAC and the amount for which TCI is ultimately made responsible. TCI suggested that, in the alternative, the Commission could exercise its powers under section 62 of the Act to rescind Telecom Order 2017-424 and make remedial orders as necessary, including ordering PIAC to return the funds already received and have the ultimate costs respondents reimburse PIAC in accordance with the varied allocation.
7. The Commission received an intervention regarding TCI's application from the CWTA. TCI filed a reply.

### **Review and vary criteria**

8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the

original proceeding, or (iv) a new principle which has arisen as a result of the decision.

## **Issues**

9. The Commission has identified the following issues to be addressed in this decision:

- Is there substantial doubt as to the correctness of Telecom Order 2017-424?
- If there is substantial doubt as to the correctness of Telecom Order 2017-424, how should the decision be varied?

## **Is there substantial doubt as to the correctness of Telecom Order 2017-424?**

### **Positions of parties**

10. TCI argued that there was substantial doubt as to the correctness of the original decision on two main points. First, TCI argued that the Commission erred when it assumed that TSP members of the CWTA would be double charged, when this was not the case. Second, TCI argued that the Commission erred when it evaluated the interest of individual members of the CWTA rather than the interest of the association as a whole.
11. In TCI's view, double charging was not an issue in the circumstances of this case because it could occur only if both the CWTA and individual CWTA members were made costs respondents.
12. TCI submitted that with the exception of Shaw's minor portion of the award, no double recovery would occur if the Commission approved the review and vary application. TCI noted that it is not a member of the CWTA and, therefore, it would not be double charged if the CWTA was also named as a costs respondent. Further, TCI noted that the larger members of the CWTA, such as Bell Canada, did not participate individually and were not named as costs respondents. Therefore, naming the CWTA would not have resulted in any double charging.
13. In addition, TCI noted the Commission's concern that naming an industry association as a costs respondent could result in indirectly assessing costs against individual entities that do not have a significant interest in the outcome of the proceeding. TCI submitted that it is logical to presume that the CWTA participates in proceedings only when its membership approves the intervention. TCI was of the view that an individual member's level of interest in the outcome of the proceeding is not relevant to the allocation of the responsibility for payment of costs, given that the CWTA is given a mandate from its members to participate.
14. TCI also argued that the decision did not reflect the goal expressly set out by the Commission in its reasons that, generally, the appropriate costs respondents are determined to be the parties that have a significant interest in the outcome of the

proceeding and that participated actively in that proceeding. In TCI's view, PIAC's Part 1 application was directly relevant to all TSPs in Canada, but the allocation of the responsibility for payment of costs suggests that TCI had more at stake than any other party. In TCI's view, the CWTA was an active participant in the substantive proceeding, and its membership includes many parties that had a clear interest in the outcome of the proceeding. TCI submitted that by failing to include the CWTA as a costs respondent, the Commission failed to allocate the responsibility for payment of costs to parties that had an interest in the outcome of the substantive proceeding and participated in it through an association to which they belong.

15. Finally, TCI submitted that a failure to name the CWTA as a costs respondent would signal to parties that they can avoid the responsibility for payment of costs by participating through an industry association rather than in their own right. TCI argued that the Commission's determination in Telecom Order 2017-424 discourages active participation in proceedings, and that companies will note that participating in proceedings can have a direct negative economic consequence that can be avoided by choosing not to participate.
16. The CWTA replied that Telecom Order 2017-424, when read in its totality, provides two grounds for not awarding costs against an industry association. The CWTA argued that while the Commission's concern about double charging may not be significant in the circumstances since Shaw and TCI were not members of the CWTA at the relevant time, the concern about indirectly assessing costs against entities that did not have a significant interest in the outcome of the proceeding still provided applicable rationale for the Commission's determination. However, in response to a request for information, the CWTA submitted that the issue of double charging would in fact apply in this case if the responsibility for payment of costs were allocated to it as a result of TCI's review and vary application, since Shaw, after its purchase of Freedom Mobile Inc. (Freedom Mobile), is now a member of the CWTA.
17. The CWTA also argued that the Commission's second concern is valid and applicable because the CWTA also represents handset manufacturers and software developers in its core membership, as well as application developers, mobile marketers, network equipment and safety manufacturers, consulting and research firms, financial service providers, and other related industry associations as part of the organization's more than 100 associate and affiliate companies. The CWTA submitted that the majority of its members and affiliated entities have no significant interest in the outcome of the substantive proceeding.
18. With regard to participation, the CWTA submitted that the Commission has explicitly excluded the CWTA from paying costs in previous costs orders, and there is no evidence that this has deterred participation in proceedings. The CWTA noted that in most proceedings where it files comments, its member TSPs also file comments. For example, the CWTA participated in both Wireless Code proceedings<sup>2</sup> and the

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<sup>2</sup> See Telecom Regulatory Policies 2013-271 and 2017-200.

proceeding that led to the establishment of wireless public alerting,<sup>3</sup> along with member TSPs.

19. The CWTA submitted that its comments generally focus on areas where there is member consensus. It argued that this allows for discussion to help move toward a reasonable consensus, which can reduce the administrative burden on the Commission. The CWTA argued that awarding costs against it would undermine its ability to provide submissions that were considered industry-wide to the Commission and could lead to a chilling effect on industry association participation.
20. Lastly, the CWTA submitted that its participation in the substantive proceeding was premised in part on the Commission's past practice of not allocating the responsibility for payment of costs to industry associations. The CWTA submitted that to the extent that the Commission decides to amend its past practice, it should do so on a going-forward basis and only after issuing clear notice to all participants in future proceedings.
21. In reply, TCI argued that even if double charging could occur with Shaw, this can be easily remedied. In TCI's view, Shaw could be removed as a costs respondent if it is a member of the CWTA or, even if Shaw is named as a costs respondent and is a member of the CWTA, the CWTA can allocate a portion of its responsibility for the payment of costs to its other members so as to exclude Shaw from contributing to the CWTA's costs payment.
22. TCI further submitted that the CWTA intervenes in a proceeding because it is in the interest of its members to do so. TCI questioned why the CWTA would intervene in a Commission matter if it was not in the interest of its members.

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

23. In paragraph 31 of Telecom Order 2017-424, the Commission outlined its rationale for not naming the CWTA as a costs respondent:
  31. The Commission has noted in previous costs orders that naming the CWTA as a costs respondent, in addition to naming the TSPs that are parties to the proceeding, could introduce inequities in the assignment of costs, essentially double charging some TSPs while indirectly assessing costs against other entities that do not have a significant interest in the outcome of the proceeding. The Commission considers that the same rationale applies in the present circumstances.
24. Neither Shaw nor TCI were members of the CWTA at the time of the substantive proceeding. Although Freedom Mobile was a member of the CWTA at the time of the substantive proceeding and was purchased by Shaw in 2016, following the purchase, the Commission has continued to consider Shaw and Freedom Mobile as separate

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<sup>3</sup> See Telecom Regulatory Policy 2017-91.

entities for the purpose of payment of costs.<sup>4</sup> Therefore, double charging could not have occurred with respect to Telecom Order 2017-424 given that Shaw was not a member of the CWTA at the relevant time.

25. With regard to interest in the substantive proceeding, although it is possible that some of the CWTA's membership might not have had the same level of interest in the outcome as other members, the CWTA nonetheless chose to participate actively in the proceeding. Moreover, within the CWTA's membership are several TSPs that certainly would have been affected by the outcome of the proceeding and, therefore, had a significant interest in it.
26. The Commission considers that there is an inconsistency between the CWTA's indication that it provides industry-wide considered submissions to the Commission, and its argument that a majority of its members do not have an interest in the outcome of the proceeding, and that, therefore, costs should not be assessed against the organization.
27. Similarly, in its intervention in the substantive proceeding, the CWTA indicated that it "represents wireless service providers as well as companies that develop and produce products and services for the industry, including handset and equipment manufacturers, content and application creators and business-to-business service providers" and that it was "comment[ing] on behalf of [its] members." However, for the purposes of costs, the CWTA is now submitting that it did not represent the interests of all of its members in the substantive proceeding since some of them did not have an interest in its outcome.
28. The Commission is of the view that if an industry association participates in a proceeding to the extent that the CWTA did in the substantive proceeding, that association has a significant interest in the outcome of the proceeding. Although the CWTA may have members that do not generally participate in Commission proceedings and that may not have had the same degree of interest in the outcome of the substantive proceeding as other CWTA members did, this should not detract from the demonstrated participation and interest that the CWTA had in the proceeding on behalf of its members in general.
29. The Commission's general approach for determining costs respondents is based on the criteria of parties having a significant interest in the outcome of the proceeding in question and having participated actively in that proceeding. Although the Commission's general approach is to allocate the responsibility for payment of costs based on the telecommunications operating revenues (TORs)<sup>5</sup> of these parties, there is no rule that only TSPs can be named as costs respondents. In fact, there are cases

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<sup>4</sup> For example, see Telecom Order 2018-68. Although neither Shaw nor Freedom Mobile were ultimately required to pay costs, the Commission considered each entity as a separate costs respondent.

<sup>5</sup> TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

where the Commission has explicitly excluded non-TSP parties as costs respondents, determining that they otherwise meet the above-noted criteria. For example, in Telecom Order 2018-42, the Commission found that although certain local government organizations had a significant interest in the outcome of the proceeding in question and participated actively throughout, since a broad pool of TSPs could be named as potential costs respondents, it was inappropriate for the Commission to name public sector organizations as costs respondents.

30. Although the Commission provided reasons for not naming the CWTA as a costs respondent in Telecom Order 2017-424 that were consistent with past practice, the specific circumstances of this case are such that this rationale was not applicable. In this case, the issue of double charging did not arise on the facts, and the degree of individual CWTA member interest in the outcome of the substantive proceeding was irrelevant. Notably, the concern about the allocation of the responsibility for payment of costs to CWTA members without a direct interest in the proceeding was less important given that the CWTA was a significant intervener in the substantive proceeding, where there were no additional interventions from the CWTA's TSP members.
31. This is in contrast to the proceeding that led to Telecom Order 2013-526, where there was also significant and active individual involvement from numerous other TSPs. Further, the pool of potential TSPs among which to allocate the responsibility for payment of costs in this case is not very broad, and the CWTA's membership includes TSP members that typically participate in Commission proceedings individually and would otherwise be responsible for paying costs had they participated in the substantive proceeding in their own right instead of through the CWTA. In this instance, Bell Canada and Rogers Communications Canada Inc. (RCCI), who would otherwise be responsible for payment of costs had they participated in their own right as opposed to through the CWTA, would be sheltered from the responsibility of paying costs if the CWTA were not named as a costs respondent. As a result, the burden for payment of costs would disproportionately rest on those parties who participated individually.
32. With respect to TCI's argument that parties would be discouraged from participating in proceedings if the CWTA were not named as a costs respondent, and the CWTA's response that awarding costs against it could lead to a chilling effect on industry association participation, there is no substantial evidence on the record to support either claim.
33. With respect to the CWTA's submission that if the Commission decides to order costs against it, the Commission should do so only on a going-forward basis and after issuing clear notice, the CWTA had the opportunity and took full advantage of its chance to comment on why it would not be an appropriate costs respondent. Further, the Commission determines appropriate costs respondents on a case-by-case basis. The Commission is not prevented from allocating the responsibility for payment of costs against an industry association in a particular case simply because it did not previously award costs against that association. The Commission may depart from

past practice in a particular case if there are reasons to justify the departure and if the party against whom the costs may be awarded had the opportunity to comment. In addition, industry associations should be aware that costs may be awarded against them, given that the Commission has awarded costs against industry associations in the past, such as the Canadian Cable Systems Alliance.<sup>6</sup>

34. In light of all the above, the Commission finds that there is substantial doubt as to the correctness of Telecom Order 2017-424 as it relates to the exclusion of the CWTA as a costs respondent.

### **How should the decision be varied?**

#### **Positions of parties**

35. The CWTA submitted that if the Commission departed from its practice and required the organization to pay costs, it would have to determine the relative interests that some CWTA members had with respect to the proceeding to determine the appropriate percentage of costs that should be allocated to the CWTA in relation to the other parties in the proceeding. The CWTA argued that it was not reasonably feasible for the Commission to do this.
36. The CWTA also submitted that it was not appropriate to allocate the responsibility for payment of costs based on the TORs of its TSP members. The CWTA argued that not all members that are TSPs have the same level of interest, with some having a high enough level of interest that they decide to participate in their own right, while others may be content with having their views reflected through the CWTA's submissions, and others may be neutral or have no interest. The CWTA argued that allocating the responsibility for payment of costs to it based on the TORs of its TSP members would result in it potentially being exposed to disproportionate costs liability, which would lead to uninterested or neutral TSP members opposing the CWTA's intervention solely to avoid potential costs liability. The CWTA submitted that there is no appropriate method to equitably allocate the responsibility for payment of costs to trade associations such as the CWTA.
37. The CWTA further submitted that requiring it to allocate the responsibility for payment of any costs against it to its members would create an intractable administrative burden for the organization, since the prospect of having to apportion costs liability to its members based on their potential interest in a proceeding would be divisive and likely erode the group's cohesiveness.
38. TCI submitted that the Commission does not need to assess the interest of each CWTA member, and that the organization should be treated as a single entity for costs purposes. According to TCI, there was no need to assess the degree of interest of each member of the CWTA since there was no need to make each member a separate costs respondent.

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<sup>6</sup> See Telecom Orders 2012-340 and 2015-265.



39. TCI also argued that determining the appropriate share of responsibility need not be a mechanical application of a formula, such as using the TORs of individual participants or of the TSP members of an industry association. TCI submitted that nothing prevents the Commission from allocating the responsibility for payment of costs based on factors other than TORs, or decoupling costs responsibility from revenues altogether. TCI argued that it is not sufficient for the Commission to decline allocating the responsibility for payment of costs to the CWTA on an allegation that a particular formula might not be appropriate.
40. With respect to the potential administrative burden on the CWTA, TCI argued that if the costs are unacceptable to the CWTA's membership, it does not have to participate. Alternatively, members with a greater degree of interest may choose to bear the costs. Finally, TCI suggested that the CWTA could use its internal forum, where substantive regulatory issues are discussed, to discuss responsibility for costs.

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

41. The Commission generally allocates the responsibility for payment of costs based on TORs as an indicator of the relative size and interest of the parties involved in a proceeding. Given the main issue at hand in the substantive proceeding (requiring TSPs in Quebec to block access to certain websites), it is appropriate to allocate payment responsibility to the CWTA based on the TORs of the CWTA member TSPs that would have otherwise had to pay costs had they participated in their own right, taking into account the \$1,000 minimum amount that a costs respondent should be required to pay.<sup>7</sup> As a result, the TORs of Bell Canada and RCCI should be taken into account in determining the CWTA's share of the costs award payment.
42. With respect to the CWTA's argument that asking it to allocate the responsibility for payment of costs among its members would create an intractable administrative burden, while the Commission does not generally concern itself with how an association may allocate costs among its members, the Commission considers that the CWTA could simply allocate costs to those members that have a greater degree of interest in the proceeding following, for example, the Commission's general approach of allocating the responsibility for payment of costs based on TORs. Moreover, given that the CWTA submitted that its members engage in discussions regarding positions taken in Commission proceedings, this forum could also be used to discuss costs responsibility. The Commission does not consider that these options would pose an intractable administrative burden, as suggested by the CWTA.

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<sup>7</sup> In Telecom Decision 2015-160, the Commission considered \$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 the costs respondents.

43. In light of the above, the Commission determines that the responsibility for the payment of costs should be varied as follows:<sup>8</sup>

Costs respondent	Percentage	Amount
CWTA	63%	\$8,908.49
TCI	37%	\$5,231.97

44. To reduce the administrative burden on all parties, rather than requiring PIAC to return the funds already received and have costs respondents pay PIAC in accordance with the varied allocation above, the Commission **directs** the CWTA to pay to TCI the amount of \$7,381.32 (the difference between the amount TCI originally paid and the current allocation of the responsibility for payment of costs).

45. With respect to the amount originally attributed to Shaw, given that Shaw is now a member of the CWTA, and the record is unclear as to whether Shaw has already paid this amount to PIAC, the Commission **directs** the CWTA to pay the amount of \$1,527.17 to PIAC, but permits the CWTA to count any payment already made by Shaw towards this payment. The Commission leaves it to the CWTA and Shaw to determine how to resolve the situation.

Secretary General

### Related documents

- *Determination of costs award with respect to the participation of Media Access Canada in the proceeding that led to Telecom Regulatory Policy 2017-182, Telecom Order CRTC 2018-68, 16 February 2018*
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding that led to Telecom Decision 2016-479, Telecom Order CRTC 2017-424, 1 December 2017*
- *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act, Telecom Decision CRTC 2016-479, 9 December 2016*
- *Review of the Wireless Code, Telecom Regulatory Policy CRTC 2017-200, 15 June 2017*

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<sup>8</sup> In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

- *Implementation of the National Public Alerting System by wireless service providers to protect Canadians*, Telecom Regulatory Policy CRTC 2017-91, 6 April 2017
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre, the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, and the National Pensioners Federation in the proceeding initiated by Telecom Notice of Consultation 2014-76*, Telecom Order CRTC 2015-265, 19 June 2015
- *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
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre (PIAC) in the proceeding leading to Telecom Regulatory Policy 2013-271*, Telecom Order CRTC 2013-526, 27 September 2013
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the Telecom Notice of Consultation 2011-206 proceeding*, Telecom Order CRTC 2012-340, 21 June 2012
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011