



Telecom Decision CRTC 2019-342

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TELUS Communications Inc. – Application to review and vary Telecom Orders 2019-35, 2019-36, 2019-37, and 2019-38

*The Commission **denies** TELUS Communications Inc.'s (TCI's) application to review and vary Telecom Orders 2019-35, 2019-36, 2019-37, and 2019-38 (Orders), in which the Commission awarded costs to various consumer groups for their participation in the proceeding that led to Telecom Decision 2018-384. TCI has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determinations in those Orders.*

Background

1. On 29 January 2018, Asian Television Network International Limited (ATN) filed a Part 1 application on behalf of the FairPlay Coalition (FairPlay)¹ in which FairPlay requested that the Commission create an online anti-piracy regime under various provisions of the *Telecommunications Act* (the Act). The proposed regime would require Internet service providers (ISPs) to block end-user access to websites and services that are engaged in copyright piracy. Various telecommunications service providers (TSPs), including Shaw Communications Inc. (Shaw) and TELUS Communications Inc. (TCI) [collectively, the TSP interveners], intervened in support of FairPlay.
2. In Telecom Decision 2018-384, the Commission denied FairPlay's application, citing a lack of jurisdiction under the Act to implement such a regime. Subsequently, various consumer groups² (the consumer groups) that had intervened in the proceeding that led to Telecom Decision 2018-384 (the proceeding) applied for final costs awards. Shaw and TCI did not respond to those costs applications.

¹ FairPlay comprises more than 25 stakeholders, including broadcasting and telecommunications companies (e.g. ATN, Bell Canada, the Canadian Broadcasting Corporation, Cogeco Connexion Inc., Corus Entertainment Inc., Ethnic Channels Group Limited, Quebecor Media Inc., and Rogers Communications Canada Inc.), unions and organizations associated with the broadcasting industry (e.g. the Alliance of Canadian Cinema, Television and Radio Artists; l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo; and l'Union des artistes), and organizations linked to the film and/or broadcasting industries (e.g. Cineplex Entertainment LP and the Toronto International Film Festival).

² These groups are the Canadian Internet Policy and Public Interest Clinic and OpenMedia Engagement Network, the Forum for Research and Policy in Communications, the Public Interest Advocacy Centre, and l'Union des consommateurs.

3. On 28 November 2018, Commission staff issued a [procedural letter](#) to potential costs respondents seeking comments on the possible allocation of responsibility for payment of costs awards, including three non-exhaustive options. Staff noted the Commission's general practice of allocating costs based on telecommunications operating revenues (TORs)³ and its usual costs award practices and procedures. Staff further noted that FairPlay comprised TSPs, broadcasters, and industry groups.
4. In its response to the procedural letter, TCI made the following arguments:
 - In the case of a failed Part 1 application, the applicant should be the costs respondent. Therefore, FairPlay should be the sole costs respondent. TCI should not be a costs respondent since it did not stand to benefit from FairPlay's Part 1 application. In addition, since TCI does not have commercial programming undertakings, its interest in the proceeding is less than those of other parties.
 - Alternatively, if other TSP interveners are also named as costs respondents, the responsibility for payment of the remaining costs (costs not borne by FairPlay) should be allocated on the basis of broadcasting distribution revenues rather than TORs.
 - When a proceeding relates to a sole telecommunications service, the Commission has used the revenues generated by that service rather than general TORs as the basis for allocation of the responsibility for payment of costs. Since FairPlay's Part 1 application related to a proposed anti-piracy regime, it primarily affected programming undertakings, with broadcasting distribution undertakings (BDUs) affected to a lesser extent.
 - Allocation of the responsibility for payment of costs based on broadcasting distribution revenues is the best approximation of the relative interest of the TSP interveners.
5. In Telecom Orders 2019-35, 2019-36, 2019-37, and 2019-38 (the Orders), the Commission awarded final costs to each of the consumer groups. The Commission used its general approach of naming as costs respondents the parties that had a significant interest in the outcome of the proceeding and that participated actively in the proceeding. Accordingly, the Commission named as costs respondents the applicant in the proceeding that led to Telecom Decision 2018-384, namely FairPlay, and the TSP interveners, including Shaw and TCI.
6. The Commission noted that it generally considers that TORs are indicators of the relative size and interest of the parties involved in proceedings. However, the Commission determined that if it were to apply its normal approach to the allocation of costs among costs respondents, FairPlay would be responsible for few costs, if any,

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

since its members were primarily broadcasting companies and did not report significant, if any, TORs. The Commission considered that such an outcome would not appropriately reflect the significant interest that FairPlay's members had in the outcome of the proceeding. However, allocation of the responsibility for payment of costs entirely to FairPlay would also ignore the interests of the TSPs that participated in the proceeding and whose submissions generally addressed how the proposed website blocking regime would affect their telecommunications businesses.

7. Accordingly, the Commission directed FairPlay to pay 85% of the costs (i.e. \$134,590.08) and the TSP interveners to pay 15% of the costs (i.e. \$22,578.98), based on their TORs as an indicator of their relative size and interest in the proceeding. The Commission also applied the \$1,000 minimum threshold for allocation of the responsibility for payment of costs, in keeping with its usual approach. This resulted in the following:
 - FairPlay owing 100% of the costs with respect to Telecom Order 2019-35;
 - FairPlay owing 85% of the costs and TCI owing 15% of the costs with respect to Telecom Orders 2019-37 and 2019-38; and
 - FairPlay owing 85%, TCI owing 13.2%, and Shaw owing 1.8% of the costs with respect to Telecom Order 2019-36.

Application

8. The Commission received an application from TCI, dated 7 May 2019, in which the company requested that the Commission review and vary the Orders. TCI argued that there was substantial doubt as to the correctness of the Commission's determinations with regard to the allocation of the responsibility for payment of costs among the TSP interveners based on their TORs. TCI did not dispute the 85%/15% split in responsibility for the payment of costs between FairPlay and other costs respondents. However, it argued that the 15% remainder should have been allocated based on broadcasting distribution revenues rather than on TORs. It stated that the sums were not material and that the application to review and vary the Orders was made on principle. TCI confirmed that it had paid the various costs awards on the basis that it disputed the allocation alone and that the payment would not prejudice its challenge of the allocation.
9. TCI further stated that in the Orders, it and Shaw were directed to pay \$22,578.98 in costs not borne by FairPlay, and, as a result of the \$1,000 minimum threshold, the other TSP interveners did not pay any costs. As a result of the Commission's use of TORs, TCI, and not Shaw, was responsible for payment of most of the costs not borne by FairPlay (93.6% or \$21,137.74).
10. TCI cited two factors that it argued justify the need to review and vary the Orders: (i) the Commission failed to consider and address TCI's request that the allocation of responsibility for payment of the costs not borne by FairPlay to the TSP interveners

be done based on broadcasting distribution revenues, and (ii) the Commission's failure to allocate the costs as TCI had suggested resulted in the Orders not reflecting the relative interests of TCI and Shaw in the proceeding. TCI submitted that these factors resulted in an inequitable allocation of responsibility for payment of costs between the two companies, which is at odds with the purpose of the costs regime and the rationale set out in the Orders.

11. TCI requested that the Commission vary the Orders by allocating the responsibility for payment of the costs not borne by FairPlay based on broadcasting distribution revenues, such that TCI would pay 16% of the costs (i.e. \$3,612.64) and Shaw would pay 84% of the costs (i.e. \$18,966.34). Since TCI has already paid the costs awards to the consumer groups in accordance with the Orders, it argued that Shaw should pay TCI the difference between what TCI has paid out and the amount for which TCI is ultimately deemed responsible.
12. The Commission received no interventions in respect of TCI's review and vary application.

Regulatory framework

13. Section 56 of the Act authorizes the Commission to award costs with respect to proceedings before it and to order by whom and to whom any costs are to be paid.
14. The Commission set out the *Guidelines for the Assessment of Costs* (the Guidelines) in Telecom Regulatory Policy 2010-963 to guide the costs award process. The Guidelines set out the key principles that the Commission seeks to implement through its costs award regime, including ensuring that the process has the necessary flexibility to take into account the particular circumstances of each case. The purpose of the costs award regime is to encourage individuals and public interest groups representing subscriber interests to participate in the Commission's telecommunications proceedings.
15. 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's general practice is to allocate responsibility for the payment of costs among costs respondents based on their TORs. In general, the Commission considers that TORs are indicators of the relative size and interest of the parties involved in proceedings.
16. Section 62 of the Act states that the Commission may, on application or on its own motion, review and rescind or vary any decision made by it, or rehear a matter before rendering a decision.
17. 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

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

- Is there substantial doubt as to the correctness of the Orders?
- If there is substantial doubt as to the correctness of the Orders, how should they be varied?

Is there substantial doubt as to the correctness of the Orders?

Positions of parties

19. TCI argued that there was substantial doubt as to the correctness of the Orders with regard to the allocation of responsibility for payment of costs among the TSP interveners based on TORs, for two reasons: (i) the Commission failed to address TCI's request to allocate the responsibility for payment of costs based on broadcasting distribution revenues rather than on TORs; and (ii) allocation of the responsibility for payment of costs based on TORs results in an inequity among the costs respondents, since it does not reflect their respective interests in the proceeding.
20. Particularly, TCI argued that the Commission failed to consider a basic principle by failing to address TCI's response to the procedural letter, in which it argued that costs not borne by FairPlay should be allocated based on broadcasting distribution revenues in order to reflect the parties' respective interests in the proceeding.
21. In TCI's view, TORs did not reflect TCI's and Shaw's respective interests or degree of participation in the proceeding, since broadcasting interests were central to the proceeding despite the fact that FairPlay's application was made under the Act. Furthermore, TCI argued that it and Shaw intervened in the proceeding as BDUs, raising concerns about the effect of piracy on BDUs. TCI noted that in Telecom Decision 2018-384, the Commission acknowledged that there was evidence that copyright piracy results in harm to the Canadian broadcasting system and to the economy in general. Therefore, the reasonable conclusion was that allocating costs based on broadcasting distribution revenues rather than on TORs would better reflect TCI's and Shaw's respective interests in the outcome of the proceeding. Doing otherwise (i) placed a disproportionate burden on TCI, since Shaw's broadcasting distribution revenues are much larger than those of TCI; and (ii) did not achieve the goals set out by the Commission in the Orders.
22. TCI argued that the Commission has departed in the past from the general approach to allocation of responsibility for the payment of costs, and that it is not restricted to this approach. When an issue in a proceeding has been germane to a sole

telecommunications service, the Commission has allocated responsibility for payment of costs based on that service's revenues rather than on TORs.

Commission's analysis and determinations

Failure to consider TCI's argument

23. In Telecom Information Bulletin 2011-214, the Commission stated that there may be substantial doubt as to the correctness of a decision when the Commission has failed to consider a basic principle that was raised in the original proceeding. In the context of TCI's application, "original proceeding" refers to the proceedings that led to the Orders.
24. TCI's argument that responsibility for payment of costs should be allocated based on the TSP interveners' broadcasting distribution revenues rather than on TORs was not specifically identified in the Orders. However, the lack of any specific reference to an argument or aspect thereof is not evidence that the Commission failed to consider that argument, as contemplated in Telecom Information Bulletin 2011-214. The Commission is not required to enumerate and reply to every argument or aspect thereof advanced by every party, nor to make a specific finding on each constituent element of a matter, in order for its determinations to be valid or reasonable. The Supreme Court of Canada has stated that tribunal decisions (such as those made by the Commission) must enable a reviewing court (or party in this instance) to ascertain why the Commission made the determinations and that they fall within a reasonable range of outcomes.⁴
25. The Commission considers that the Orders met this standard. The Orders referred to TCI's response to the procedural letter regarding the allocation of responsibility for payment of costs by stating that TCI, among other parties,

argued that FairPlay should be responsible for 100% of any costs award granted by the Commission given that the proceeding, at its core, sought the protection of copyright interests, and that telecommunications service providers that were not part of FairPlay would bear an unreasonable and disproportionate amount of the apportionment of costs if the general practice of allocating costs based on TORs were applied.
26. The Commission considers that the foregoing summary addresses the primary and alternative arguments that TCI made in response to the procedural letter.
27. Furthermore, the Commission's analysis and determinations in the Orders reflect its consideration of the various parties' submissions on the proper allocation of responsibility for payment of costs, as follows:

⁴ See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, paragraph 16. See also Telecom Decision 2018-194, paragraph 43.

The Commission notes that its 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 proceedings. However, if the Commission were to apply its normal approach to the allocation of costs among costs respondents in this case, FairPlay would be responsible for few, if any, of these costs, since its members are primarily broadcasting companies (rather than telecommunications companies) and do not report significant, if any, TORs. The Commission considers that such an outcome would not appropriately reflect the significant interest that FairPlay's members had in the outcome of the proceeding. However, allocation of the responsibility for payment of costs entirely to FairPlay would ignore the interests of the telecommunications service providers that participated in the proceeding and whose submissions generally addressed how the proposed website blocking regime would affect their telecommunications businesses.

In the circumstances of this case, the Commission considers that it would be appropriate to allocate 85% of the costs to FairPlay and 15% of the costs among all other costs respondents based on their TORs as an indicator of the relative size and interest of the parties involved in the proceeding.

28. The Commission found that FairPlay should be made responsible for paying 85% of the costs and justified its reasons, effectively rejecting the arguments that (i) FairPlay should be made responsible for paying 100% of the costs, and (ii) allocation of the responsibility for payment of costs on the basis of factors other than TORs (such as broadcasting distribution revenues) would reflect the relative size and interest in the proceeding of the TSP interveners. The Commission implicitly rejected TCI's argument that costs should be allocated based on broadcasting distribution revenues, without specifically addressing all the reasons for not taking alternative approaches, such as that suggested by TCI.
29. The Commission also considered and addressed TCI's primary and alternative arguments in a summary fashion, which is typical and necessary for the Commission to dispose of applications in an efficient and effective manner. It would have been unwieldy in the proceeding, which included multiple parties, if the Commission had specifically identified and accepted or rejected every argument and counterpoint it received. Such an approach would also be untenable going forward. No party is entitled to, or guaranteed, a specific outcome. The Guidelines state that an intended principle of the costs assessment process is that it should be efficient and effective for the parties and for the Commission. The Commission considers that its treatment of TCI's submission meets this standard.
30. In light of the above, the Commission determines that TCI has not demonstrated that the determinations set out in the Orders amount to a failure to consider a basic principle raised in the proceeding. Accordingly, on this ground, TCI has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determinations set out in the Orders.

Failure to reflect the interests of the costs respondents

31. The Act grants the Commission broad discretion in the allocation of responsibility for payment of costs among costs respondents. The Commission has adopted the general approach of allocating responsibility for the payment of costs among costs respondents based on their TORs. The Guidelines indicate that the costs assessment process should (i) be fair to all parties concerned, (ii) be efficient and effective for the parties and for the Commission, and (iii) provide parties with certainty while maintaining the flexibility necessary to ensure that costs are awarded in light of the particular circumstances of a given proceeding or intervention. In any given case, the Commission maintains latitude to decide that TORs are not appropriate indicators of the relative size and interest of the parties.
32. By adopting an 85%/15% split in payment responsibility in the Orders, the Commission departed from its general approach, since only part of the responsibility for payment of costs was allocated based on TORs. The Commission found that allocating the responsibility for payment of costs based entirely on TORs would not reflect all the costs respondents' interests in the outcome of the proceeding, since FairPlay has limited TORs, if any, yet it had a significant interest in the proceeding. At the same time, the Commission found that the other TSP interveners also had a significant interest in the proceeding, and their submissions generally addressed their concerns for their telecommunications businesses. Accordingly, the Commission found that it was appropriate to allocate responsibility for payment of the costs not borne by FairPlay based on TORs, in keeping with the general approach.
33. These findings demonstrate that, when considering the consumer groups' costs applications, the Commission was prepared to adopt an approach that was tailored to the unique circumstances of the proceeding. Although this was not the approach TCI had argued for, the Commission did not restrict itself in its determinations regarding allocation of responsibility for payment of costs; it considered other options.
34. The Commission considers that TCI's statement that it and Shaw intervened in the proceeding as BDUs is inconsistent with TCI's submission in the proceeding. The two companies did not claim that their interventions were being filed on behalf of their BDU operations alone, nor could the Commission reasonably have inferred this. The Commission notes that TCI operates in Canada as a single entity, both as an ISP and as a BDU. The impacts of FairPlay's application on TCI as a BDU were not specifically or solely discussed in TCI's intervention; rather, the intervention touched on a wide range of issues relating to both TSP and BDU businesses and interests, including the following:
 - how the proposed anti-piracy regime fell under the Commission's jurisdiction under the Act and how the larger statutory scheme would (i) further the Act's policy objectives, (ii) regulate ISPs acting as ISPs, (iii) not unjustifiably restrict freedom of expression, and (iv) be consistent with net neutrality principles;

- procedural fairness;
- international models of copyright piracy;
- how the Commission’s expertise, developed in administering the Canadian broadcasting system and considering matters of freedom of expression, could be put to use in the anti-piracy regime;
- why the anti-piracy regime was needed to avoid harm to the broadcasting system in general; and
- how the anti-piracy regime would, as an ancillary matter, promote the objectives of the *Broadcasting Act*.

35. The Commission considers that the proceeding did not focus more on broadcasting matters than on telecommunications matters, or on other legal matters, such as compliance with freedom of expression. FairPlay’s application was made under the Act. As such, the Commission was to establish its jurisdiction to create an anti-piracy regime under the Act. In the Orders, the Commission indicated that in the proceeding, the TSP interveners “generally addressed how the proposed website blocking regime would affect their telecommunications businesses.”

36. TCI argued that in Telecom Decision 2018-384, the Commission acknowledged that there is evidence that copyright piracy results in harm to the Canadian broadcasting system, and the company relied on this statement to justify its position that the Commission should allocate responsibility for payment of costs not borne by FairPlay based on TSP interveners’ broadcasting distribution revenues. The Commission finds that TCI’s proposal overemphasizes the weight and significance of the Commission’s statement in the context of its determination. The Commission concluded in Telecom Decision 2018-384 that it did not have the jurisdiction under the Act to implement the proposed anti-piracy regime. Consequently, it could not consider the merits of implementing the regime and denied FairPlay’s application. Contrary to TCI’s suggestion, the Commission made no statement about the central matter of the application or the interests of any participant in the proceeding.

37. The Commission may award costs related to telecommunications matters only under the Act, as is evident in the framework of the Act, which allows the Commission to award costs for participation in any proceedings before it. This refers to proceedings conducted under the Act. There is a formal distinction between the costs regime for proceedings initiated under the Act and support for participation in proceedings initiated under the *Broadcasting Act*. In this context, it would have been anomalous and unjustified for the Commission to allocate responsibility for payment of costs under the Act based on broadcasting distribution revenues. While TCI is correct that the Commission has the latitude to allocate the responsibility for payment of costs based on revenues from one telecommunications service as opposed to TORs, where appropriate, this does not extend to allocating costs based on the broadcasting distribution revenues, if any, of the relevant TSPs.

38. In light of the above, the Commission determines that TCI has failed to demonstrate that there is substantial doubt as to the correctness of the decision due to the Commission's failure to consider the interests of the costs respondents. The Orders fairly and accurately assessed the interests of the TSP interveners on the record of the proceeding. As a result, it was reasonable for the Commission to allocate the responsibility for payment of costs based on TORs. Since the Commission properly identified the interests of the parties in the proceeding, there is no need for it to address TCI's allegation that inequity or inconsistency with the purpose of the costs regime would result from such allocation.

If there is substantial doubt as to the correctness of the Orders, how should they be varied?

39. Given the Commission's determinations set out above regarding the first issue, the second issue is moot and there is no need for the Commission to address it.

Conclusion

40. In light of all the above, the Commission **denies** TCI's application to review and vary the Orders.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Canadian Internet Policy and Public Interest Clinic and OpenMedia Engagement Network in the proceeding that led to Telecom Decision 2018-384, Telecom Order CRTC 2019-38, 7 February 2019*
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding that led to Telecom Decision 2018-384, Telecom Order CRTC 2019-37, 7 February 2019*
- *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 Decision 2018-384, Telecom Order CRTC 2019-36, 7 February 2019*
- *Determination of costs award with respect to the participation of l'Union des consommateurs in the proceeding that led to Telecom Decision 2018-384, Telecom Order CRTC 2019-35, 7 February 2019*
- *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites, Telecom Decision CRTC 2018-384, 2 October 2018*
- *TELUS Communications Inc. – Request to review and vary Telecom Decision 2016-171, Telecom Decision CRTC 2018-194, 1 June 2018*

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010