



## Telecom Order CRTC 2019-38

PDF version

Ottawa, 7 February 2019

*File numbers: 8663-A182-201800467 and 4754-597*

### **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**

#### **Application**

1. By letter dated 18 July 2018, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) and OpenMedia Engagement Network (OpenMedia) [collectively, CIPPIC/OpenMedia] applied for costs with respect to their participation in the proceeding that led to Telecom Decision 2018-384 (the proceeding). In the proceeding, the Commission considered a proposal for a website blocking regime to address copyright piracy. The proposal was brought forward by Asian Television Network International Limited (ATN) on behalf of the FairPlay Coalition (FairPlay).<sup>1</sup>
2. FairPlay filed an intervention, dated 30 July 2018, in response to CIPPIC/OpenMedia's application. CIPPIC/OpenMedia filed a reply dated 13 August 2018.
3. CIPPIC/OpenMedia requested that the Commission modify the timelines for submitting the application for costs, since the Commission received the application after the 27 June 2018 deadline set out in a [procedural letter](#) dated 15 June 2018. CIPPIC/OpenMedia explained that they had not received the procedural letter at their email address of record for the proceeding and were not aware of its contents until 4 July 2018. Once CIPPIC/OpenMedia had become aware of the letter and the elapsed deadline, it took them two weeks to prepare and submit their application for costs, which they contended was a reasonable amount of time.

---

<sup>1</sup> 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).<sup>2</sup> TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

4. CIPPIC/OpenMedia further explained that it was their understanding that the proceeding had not concluded and that additional process was forthcoming. CIPPIC/OpenMedia concluded their request by arguing that no costs respondent would be prejudiced by a modification of the timelines and that a failure by the Commission to grant such a modification would greatly prejudice CIPPIC/OpenMedia, since they would be prohibited from recovering the costs they incurred as a result of their participation in the proceeding.
5. CIPPIC/OpenMedia submitted that they 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 they represented a group or class of subscribers that had an interest in the outcome of the proceeding, they had assisted the Commission in developing a better understanding of the matters that were considered, and they had participated in a responsible way.
6. In particular, CIPPIC/OpenMedia submitted that they represent the interests of all Canadian Internet subscribers in all regions of Canada. CIPPIC/OpenMedia submitted that they represent the interests of this group or class of subscribers through their respective public interest mandates and through an online engagement campaign hosted by OpenMedia, which generated over 80,000 comments by individual Canadians.
7. CIPPIC/OpenMedia further submitted that their participation assisted the Commission in developing a better understanding of the matters raised in the proceeding. They indicated that their submissions in the proceeding highlighted (i) how FairPlay's proposal could lend itself to over-censorship if adopted; (ii) legal flaws underpinning the proposal; and (iii) that the comments obtained through OpenMedia's online engagement campaign provided insights that were distinct from those of the other parties to the proceeding, submitting that these comments enriched the proceeding.
8. CIPPIC/OpenMedia also submitted that their participation in the proceeding was responsible and that their costs were reasonably and necessarily incurred.
9. CIPPIC/OpenMedia requested that the Commission fix their costs at \$16,144.50, consisting of \$9,682.00 for legal fees and \$6,462.50 for analyst fees. CIPPIC/OpenMedia filed a bill of costs with their application.
10. CIPPIC/OpenMedia claimed 47 hours for external counsel at a rate of \$206 per hour and a total of 13.75 days for six in-house analysts at a rate of \$470 per day.
11. CIPPIC/OpenMedia did not take a position as to who should be the appropriate parties to pay any costs awarded by the Commission (costs respondents), but noted that the Commission has a formula for the assessment of costs respondents in its *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963.

## Answer

12. FairPlay took issue with CIPPIC/OpenMedia's claim of \$6,468.50 for analyst fees. FairPlay submitted that the online engagement campaign did not represent responsible participation in the proceeding and did not contribute to a better understanding of the issues. Consequently, FairPlay requested that the Commission not award any costs claimed for the campaign.
13. In particular, FairPlay submitted that the campaign run by OpenMedia included misleading information and numerous false claims about the application giving rise to the proceeding. FairPlay alleged that OpenMedia's campaign was premised on misinformation and published error-ridden, hyperbolic, and misleading information. Further, FairPlay was of the view that because CIPPIC/OpenMedia's intervention did not reference the campaign and merely included form letters, the campaign was problematic in nature, did not produce reliable evidence, and did not contribute to a better understanding of the issues.

## Reply

14. In reply, CIPPIC/OpenMedia contended that their online engagement campaign led to accurate and reliable evidence, and that FairPlay had mischaracterized the evidence generated through the online engagement campaign. CIPPIC/OpenMedia also argued that, even if FairPlay's mischaracterizations were accurate, the inference that the materials were purposefully misleading should be rejected. Moreover, CIPPIC/OpenMedia submitted that the evidence created through the online engagement campaign had clear evidentiary value independent of the veracity of specific items objected to by FairPlay.

## Procedural letter

15. Commission staff sent a [procedural letter](#), dated 28 November 2018, to CIPPIC/OpenMedia and to potential costs respondents, seeking comments on how any costs awarded in this case should be allocated. Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the British Columbia Broadband Association (BCBA); the Canadian Communication Systems Alliance Inc. (CCSA); the Canadian Network Operators Consortium Inc. (CNOC); Shaw Communications Inc. (Shaw); TekSavvy Solutions Inc. (TekSavvy); TELUS Communications Inc. (TCI); Xplornet Communications Inc. (Xplornet); CIPPIC/OpenMedia; the Forum for Research and Policy in Communications (FRPC); the Public Interest Advocacy Centre (PIAC); and l'Union des consommateurs (l'Union) provided additional comments.
16. The BCBA, CIPPIC/OpenMedia, the FRPC, and PIAC argued that the Commission's general practice of allocating costs based on telecommunications operating revenues

(TORs)<sup>2</sup> should be maintained for reasons including expediency, consistency with past practice, and the fact that all of the telecommunications service providers that intervened the proceeding had an interest in its outcome. In contrast, CNOC, Eastlink, Shaw, TekSavvy, TCI, Xplornet, and l'Union 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. The CCSA noted that it should not be held responsible for a costs award because its members are small, resulting in the difficult and inefficient collection of costs, and because its submission in the proceeding was very brief.

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

17. The Commission considers that the late filing of CIPPIC/OpenMedia's costs application did not prejudice any party to the proceeding, since parties were given notice of the application and a full and fair opportunity to file an answer. In the circumstances, it is appropriate to consider the costs application.
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, CIPPIC/OpenMedia have demonstrated that they meet this requirement. In particular, the Commission considers that their respective public interest mandates and the online engagement campaign demonstrate that they represent the interests of Canadian Internet service subscribers.

---

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

20. CIPPIC/OpenMedia have also satisfied the remaining criteria through their participation in the proceeding. In particular, the Commission considers that the online engagement campaign facilitated the broad and direct participation of thousands of Canadians in the proceeding. Importantly, a significant number of those who used the online engagement campaign to submit an intervention to the Commission also customized the text to include their personal views on the proposal put forward by FairPlay. This broad facilitation, as well as the opportunity for an individual response, created a diverse evidentiary record that contributed to a better understanding of the issues before the Commission. While FairPlay may consider certain content of the campaign to be misleading, the overall participation encouraged by the campaign contributed to a better understanding of the issues before the Commission and did not constitute irresponsible participation by CIPPIC/OpenMedia.
21. Further, the fact that CIPPIC/OpenMedia did not expand on the online engagement campaign evidence in their own intervention does not mean that they participated in the proceeding in an irresponsible way. Additional interpretive analysis of the evidence from the campaign within CIPPIC/OpenMedia's intervention would have been preferable, both in assisting the Commission in analyzing the numerous individual interventions, and in making the direct link between the campaign and the content of CIPPIC/OpenMedia's intervention. However, the failure to do so in this case was not irresponsible, and the clear link between the campaign and the content of the intervention on issues such as network neutrality ensured that the entirety of CIPPIC/OpenMedia's participation contributed to a better understanding of the issues before the Commission.
22. Accordingly, the Commission finds that the applicants meet the criteria for an award of costs under section 68 of the Rules of Procedure.
23. The rates claimed in respect of analyst and legal fees are in accordance with the rates established in the Guidelines. The Commission finds that the total amount claimed by CIPPIC/OpenMedia was necessarily and reasonably incurred and should be allowed.
24. 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.
25. 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.
26. The Commission considers that the following parties had a significant interest in the outcome of the proceeding and participated actively in the proceeding: the BCBA, the CCSA, CNOC, Eastlink, FairPlay, the Independent Telecommunications Providers Association, Shaw, TCI, TekSavvy, and Xplornet. Therefore, these parties are the appropriate costs respondents to CIPPIC/OpenMedia's application for costs.
27. 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 cost 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 costs entirely to FairPlay would ignore the interest of the telecommunications service providers that participated in this proceeding and whose submissions generally addressed how the proposed website blocking regime would affect their telecommunications businesses.

28. 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.<sup>3</sup>
29. 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.
30. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Party	Percentage	Amount
FairPlay	85%	\$13,722.83
TCI	15%	\$2,421.67

31. Consistent with its general approach articulated in Telecom Costs Order 2002-4, the Commission makes ATN, which filed the application on behalf of FairPlay, responsible for payment on behalf of FairPlay's members. The Commission leaves it to FairPlay's members to determine the appropriate allocation of the costs among themselves.

### **Directions regarding costs**

32. The Commission **approves** the application by CIPPIC/OpenMedia for costs with respect to their participation in the proceeding.

---

<sup>3</sup> In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

33. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to CIPPIC/OpenMedia at \$16,144.50.
34. The Commission **directs** that the award of costs to OpenMedia, on behalf of CIPPIC/OpenMedia, be paid forthwith by ATN and TCI according to the proportions set out in paragraph 30 above.

Secretary General

### **Related documents**

- *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
- *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 Services 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