



## Telecom Decision CRTC 2020-33

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### **TELUS Communications Inc. – Application to review and vary Telecom Orders 2019-170 and 2019-171**

*The Commission finds that there is substantial doubt as to the correctness of one of its determinations in Telecom Orders 2019-170 and 2019-171 (the Orders), in which it awarded costs to consumer groups in respect of their participation in the proceeding that led to Telecom Decision 2019-169. Accordingly, the Commission **approves in part** TELUS Communications Inc. 's application to review and vary the Orders, and reallocates responsibility for the payment of costs in the Orders to Bell Mobility Inc., Rogers Communications Canada Inc., and TCI in proportion to their wireless service revenues.*

#### **Background**

1. In Telecom Order 2019-170, the Commission directed that costs respondents pay to l'Union des consommateurs (l'Union) costs in the amount of \$2,762.50 with respect to l'Union's participation in the proceeding that led to Telecom Decision 2019-169 (the proceeding) concerning the unlocking of mobile devices and the associated requirements set out in the Wireless Code. TELUS Communications Inc. (TCI) was held responsible for paying 51.4% and Rogers Communications Canada Inc. (RCCI) for paying 48.6% of the costs awarded to l'Union.
2. In Telecom Order 2019-171, the Commission directed that cost respondents pay to the Public Interest Advocacy Centre (PIAC) costs in the amount of \$4,317.66 with respect to its participation in the proceeding. TCI was held responsible for 37.2%, RCCI for 35.2%, and Bell Mobility Inc. (Bell Mobility) for 27.6% of the costs awarded to PIAC.

#### **Application**

3. On 20 August 2019, the Commission received a Part 1 application from TCI, in which the company requested that the Commission review and vary Telecom Order 2019-170 and Telecom Order 2019-171 (the Orders).
4. TCI submitted that the Commission had erred by (i) naming TCI as a costs respondent when TCI had no interest in the proceeding and did not actively participate in it; (ii) denying procedural fairness to TCI by not giving the company notice that it could be named as a costs respondent; and (iii) even if TCI was a proper

costs respondent, using telecommunications operating revenues (TORs) rather than wireless service revenues to allocate costs.

5. TCI had paid its share of the costs awards to PIAC and l'Union. In its application, TCI sought reimbursement from Bell Mobility of the amounts it had paid out to PIAC and l'Union pursuant to the Orders. In the alternative, TCI submitted that the allocation of costs should be determined on the basis of wireless service revenues, resulting in an accounting between the parties.
6. On 23 September 2019, Bell Canada provided a response to TCI's application.

### **Regulatory framework**

7. Section 56 of the *Telecommunications Act* (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.
8. 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.
9. 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 for all telecommunications services, as an indicator of the relative size and interest of the parties involved in proceedings.
10. 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.

### **Review and vary criteria**

11. 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

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

- Is there substantial doubt as to the correctness of the Commission's determinations in the Orders, in (i) naming TCI as a costs respondent, (ii) not giving TCI notice that it could be named as a costs respondent, and (iii) using TORs rather than wireless service revenues to allocate responsibility for the payment of costs?
- If there is substantial doubt as to the correctness of the Orders, how should the Commission vary its decisions?

### **Is there substantial doubt as to the correctness of the Commission's determinations?**

#### **(i) Did the Commission err by naming TCI as a costs respondent?**

##### **Positions of parties**

13. TCI noted the Commission's general practice in determining appropriate costs respondents, as outlined at paragraph 9 above. TCI argued that it had no significant interest in the proceeding, did not participate actively, and participated solely because it was compelled to do so when requests for information were issued to all wireless service providers (WSPs), including TCI. Accordingly, TCI submitted that the Commission erred by naming it as a costs respondent in spite of its not meeting the threshold of significant interest and active participation.

14. TCI submitted that the proceeding was (i) initiated by PIAC to clarify elements of the Wireless Code related to mobile device unlocking, and (ii) stemmed from Bell Mobility's alleged refusal to unlock devices held by individuals who were not current Bell Mobility customers and certain comments alleged to have been made by Commission staff representing that those practices were consistent with the Wireless Code. TCI argued that at all material times its policy was consistent with the relief sought by PIAC in that, with some exceptions, TCI honoured requests from individuals who were not current TCI customers to unlock a device locked to TCI's network. Therefore, the relief sought by PIAC was not relevant to TCI.

15. Accordingly, TCI submitted that the Commission acted unreasonably by arbitrarily, and contrary to the Guidelines, awarding costs against TCI when TCI (i) had not engaged in the conduct at issue, (ii) had no interest in the outcome of the proceeding, (iii) at all material times exceeded its regulatory obligations related to mobile device unlocking; and (iv) participated in the proceeding only when compelled to do so by law. As a result, TCI argued that the Commission erred in naming it as a costs respondent in the Orders.

16. Bell Canada submitted that to the extent there is any merit in TCI's argument that TCI should not be made a costs respondent since it did not intervene in the proceeding, TCI should seek compensation from RCCI, not Bell Mobility, given that

Bell Mobility also did not intervene in the proceeding and responded only to requests for information.

17. Bell Canada submitted that PIAC had wrongly singled out Bell Mobility as being the only service provider that systematically refused to unlock devices for former customers. Bell Canada also noted that even if the principle for costs allocation was that “costs should follow the cause”, which is not the case, in Telecom Decision 2019-169, the Commission had determined that it was clear that the language in the Wireless Code applied to “customers”; the Commission ultimately denied PIAC’s application. Therefore, Bell Canada suggested that Bell Mobility should not be the sole costs respondent.
18. Finally, Bell Canada also submitted that the device unlocking rules apply to all WSPs, including TCI, and that any clarification of the rules would be of interest to all WSPs, including TCI. As such, Bell Canada argued that TCI had no more or less interest in the proceeding than any other WSP.

#### **Commission’s analysis and determinations**

19. At paragraphs 16 to 19 of Telecom Order 2019-171, the Commission considered whether or not it should follow its general practice for determining the appropriate respondents to an award of costs and concluded that it would not be appropriate to deviate from that practice. The Commission considered that the issues examined in the proceeding were broad in nature and could significantly affect the interests of all WSPs in the market. The Commission also noted that multiple WSPs had responded to PIAC’s application, and all WSPs had been instructed to participate in the request for information process.
20. The Commission considers that the issues examined in the proceeding were not limited to Bell Mobility. Although PIAC stated that its application was initiated as a result of alleged conduct by Bell Mobility, the proceeding looked more broadly at the issue of interpreting the Wireless Code’s unlocking provisions, which apply to and could impact all WSPs in the market. As such, any clarification of the rules was expected to be of interest to all WSPs, including TCI. In this regard, paragraph 18 of Telecom Order 2019-171 clearly acknowledged that the issues examined in the proceeding were broad in nature and could significantly affect the interests of all WSPs in the market.
21. Even if a WSP, such as TCI, was not engaged in the conduct at issue, for example because its best practices exceeded the existing formal obligations found in the Wireless Code with respect to unlocking, the proceeding dealt with clarifications of the existing unlocking obligations under the Wireless Code and could still significantly affect the interests of the WSP.
22. Accordingly, the Commission considers that all WSPs, including TCI, had a significant interest in the outcome of the proceeding.

23. With respect to the argument that TCI did not participate actively in the proceeding and, to the extent that it participated at all, did so only because it was compelled to do so through a request for information, the Commission notes that the general requirement that appropriate costs respondents are “those parties that participated actively in the proceeding” is not qualified by any notion that a party must intervene on its own motion in order to be considered to be “participating actively”. TCI provided important information on the record of the proceeding for the Commission’s consideration with respect to device unlocking. Whether or not this was in response to a request for information or whether TCI intervened on its own motion is irrelevant, since TCI participated actively in the proceeding when it made submissions on the record, and the Commission took those submissions into account in its decision-making. It would be inconsistent for TCI to suggest that it did not participate actively in the proceeding yet at the same time have the Commission take into account the company’s submissions in its analysis and determinations.
24. Although the Commission may exercise its discretion, where appropriate, to exclude parties whose participation in a proceeding was limited to responding to a request for information, particularly if a proceeding may not as directly or significantly impact such parties, in this instance, a Commission clarification of the Wireless Code had a direct and significant impact on all WSPs who were specifically instructed to participate in the request for information process. Thus, and further to the reasons provided in paragraph 23, the WSPs who participated only in the request for information process were properly included as appropriate costs respondents in the Orders.
25. Accordingly, the Commission considers that TCI participated actively in the proceeding.
26. Given the above, the Commission did not err in the Orders when it considered that TCI was an appropriate costs respondent, given that TCI had both a significant interest in the outcome of the proceeding and participated actively in the proceeding.

**(ii) Did the Commission deny procedural fairness to TCI when it did not give TCI notice that it could be named as a costs respondent?**

**Positions of parties**

27. TCI argued that it was given no notice that it could be made responsible for the majority of PIAC’s and l’Union’s costs. TCI noted that PIAC had proposed that costs be awarded solely against Bell Mobility, since the proceeding was initiated as a result of alleged conduct by Bell Mobility, or, in the alternative, that costs be awarded against all participating WSPs in proportion to their wireless service revenues, which would have resulted in the costs being paid solely by RCCI. TCI further noted that no party had opposed PIAC’s proposals with respect to who should be named as costs respondents. TCI submitted that neither of PIAC’s proposals, if granted, would have resulted in any financial liability for TCI. The company argued that it did not participate because it did not fall within the category of an appropriate costs

respondent and it agreed with both of PIAC's proposals with respect to the allocation of costs.

28. TCI submitted that if it had known that the Commission would disregard PIAC's proposals and make TCI a costs respondent, then TCI would have responded to the costs applications. TCI argued that it is a breach of procedural fairness to make it a costs respondent without this proper notice.

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

29. As a frequent respondent in Commission costs orders, TCI is aware of the general approach to naming costs respondents and allocating responsibility for the payment of costs. While PIAC made two alternative proposals with respect to the allocation of responsibility for the payment of costs that may have resulted in TCI not being held responsible for paying any costs, the Commission was not bound to accept these proposals. The Commission has broad discretion in how it determines appropriate costs respondents and the allocation of responsibility for the payment of costs. It was open for the Commission to accept any of PIAC's proposals or to consider other approaches, including following its general practices where appropriate, which could lead to financial liability to TCI.
30. For example, in Telecom Order 2019-220, PIAC submitted that Cloudwifi Inc., as the party whose application initiated that proceeding, should pay 50% of PIAC's costs, and that the balance should be paid by the telecommunications companies that participated in that proceeding, based on their annual TORs. There were no interventions with respect to PIAC's application. Nonetheless, on the basis that the circumstances of that proceeding did not give rise to a reason to depart from the Commission's standard practices, the Commission rejected PIAC's proposal. The Commission followed its general practice of determining appropriate costs respondents based on significant interest and active participation, allocated responsibility for payment of costs among costs respondents based on TORs, and limited responsibility for payment to \$1,000 as the minimum amount that a costs respondent should be required to pay. This resulted in Bell Mobility being held responsible for paying the full amount of PIAC's costs, despite this not being consistent with PIAC's submissions and there having been no interventions in response to the costs application.
31. Similarly, in the present circumstances, the Commission was not obligated to accept any of PIAC's proposals, and it was open to it to follow its general practices if the circumstances justified it. If TCI was in support of PIAC's proposals and did not consider it appropriate for the Commission to follow its general practices, it had the opportunity to make such submissions. In addition, TCI had the opportunity to make submissions on the record leading to Telecom Order 2019-170 to set forth its position, given that there was nothing on the record of that costs application regarding appropriate costs respondents or alternative approaches to allocating responsibility for the payment of costs. However, TCI did not intervene in either of the costs applications.

32. In light of the above, the Commission considers that it did not deny procedural fairness to TCI and therefore did not err in law. The company had notice that financial liability might result against it given that the Commission has broad discretion with respect to naming costs respondents and allocating responsibility for the payment of costs, including clear past practices as to how it generally exercises this discretion. If TCI agreed with PIAC's proposals, it was open for it to intervene in support, since it had notice of PIAC's application. In addition, despite choosing not to intervene, TCI nonetheless had the opportunity to make its case with respect to l'Union's costs application, and to argue that the Commission should deviate from its general practices for determining appropriate costs respondents and allocating responsibility for the payment of costs.

**(iii) Did the Commission err by using TORs rather than wireless service revenues to allocate responsibility for the payment of costs?**

**Positions of parties**

33. TCI submitted that PIAC had, in its application for costs, provided clear rationale and relevant Commission precedent for departing from the Commission's general practice of awarding costs based on TORs. First, Bell Mobility should have been the sole costs respondent, because it was the only provider engaging in the conduct that PIAC alleged contravened the Wireless Code. In the alternative, even if it was reasonable for the Commission to expand the costs respondents to include other companies, this was nevertheless a proceeding dedicated exclusively to issues concerning wireless providers. As such, revenues from other telecommunications services were irrelevant. Given that PIAC's application resulted from the review of the Wireless Code in Telecom Regulatory Policy 2017-200 (the Wireless Code review proceeding), the Commission should have resorted to the same approach used for costs allocation in that proceeding. In the orders arising from that proceeding, the Commission allocated responsibility for the payment of costs in proportion to wireless service revenues.

34. TCI argued that if the Commission is of the view that PIAC's proposed method for allocating responsibility for the payment of costs is not appropriate in this proceeding, it should clearly set out its reasons. TCI is of the view that the Commission's rejection of PIAC's unopposed submission is significantly prejudicial to TCI while conferring a corresponding benefit on its competitors, which end up not having to share the burden of the costs awards.

35. Bell Canada submitted that the Commission has, under certain circumstances, deviated from its general practice in allocating responsibility for the payment of costs. Like TCI, the company referred to the Wireless Code review proceeding, in which the Commission allocated responsibility for the payment of costs on the basis of wireless service revenues. In Bell Canada's view, since the focus of the proceeding leading to Telecom Decision 2019-169 was entirely restricted to the wireless industry, it may make sense in this case to apportion responsibility for the payment of costs on the basis of wireless revenues.

36. Bell Canada agreed with PIAC and TCI that only active participants should be responsible for costs, but suggested that if this is the case, then RCCI should be the sole costs respondent. To the extent that Bell Mobility and TCI are made costs respondents despite having no active participation in the proceeding, Bell Canada suggested that costs could be apportioned on the basis of wireless service revenues.

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

37. TCI's argument that Bell Mobility should be the sole costs respondent because it was the only provider engaging in the conduct that PIAC alleged contravened the Wireless Code is addressed under sub-issue (i) above. Likewise, the position, supported by Bell Canada, that only parties that participate actively in a proceeding (as opposed to participating solely in response to a request for information) should be responsible for the payment of costs is also addressed under sub-issue (i) above.

38. On the issue of allocation based on wireless service revenues, the Commission rejected PIAC's request that it allocate responsibility for the payment of costs based on wireless service revenues, and instead based the allocation on TORs. The Commission considers that there is substantial doubt as to the correctness of this approach.

39. In Telecom Order 2017-364, in which PIAC<sup>1</sup> applied for costs for its participation in the Wireless Code review proceeding, the Commission adopted much of its rationale from Telecom Order 2017-362, which flowed from the same proceeding, to conclude that a deviation from the Commission's general practice of allocating responsibility for the payment of costs based on TORs was justified. In Telecom Order 2017-362, the Commission noted that in the particular circumstances, there were more suitable indicators than TORs to determine the appropriate allocation. The Commission referred to the key principles in the Guidelines that the Commission seeks to implement through its costs regime, including ensuring that the process has the flexibility to take account of particular circumstances where they are relevant and that the approach taken is fair, efficient, and effective. In the end, the Commission deviated from the use of TORs to allocate responsibility for the payment of costs and allocated such responsibility based, in part, on the wireless revenue market share found in the most recent time period detailed in the 2015 [Communications Monitoring Report](#).

40. Although the Commission was not bound by its approach to allocation in the Wireless Code review proceeding, the circumstances warranted such an approach to costs allocation. Since (i) this was the approach, in part, to the costs orders arising from the Wireless Code review proceeding, and (ii) the issues in Telecom Decision 2019-169 were associated with clarifying certain aspects of the Wireless Code (namely, device unlocking obligations) and equally focused on the wireless industry, the Commission

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<sup>1</sup> PIAC claimed costs as part of the Coalition, which consisted of the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, the National Pensioners Federation, and PIAC.

considers that allocating responsibility for the payment of costs based on wireless service revenues best reflects the specific circumstances of the proceeding.

41. Accordingly, the Commission considers that it erred by using TORs rather than wireless service revenues to allocate responsibility for the payment of costs and, as a result, there is substantial doubt as to the correctness of the Orders. The circumstances warranted allocating responsibility for payment based on wireless service revenues, and such allocation would best reflect the specific circumstances of the proceeding.

### **If there is substantial doubt as to the correctness of the Orders, how should the Commission vary its decisions?**

#### **Positions of parties**

42. TCI has already paid its share of the costs award to PIAC and l'Union. Therefore, the company seeks either (i) reimbursement of the amounts it paid out from Bell Mobility, which it deems to be the appropriate costs respondent in this proceeding, or (ii) even if TCI was a proper costs respondent, that costs be allocated in proportion to wireless service revenues, with an accounting between the parties. Bell Canada opposed the first approach, which is addressed under sub-issue (i) above, but did not oppose the latter approach, noting that to the extent that Bell Mobility and TCI are made costs respondents, costs could be apportioned on the basis of wireless service revenues.
43. Parties that might oppose the allocation of costs based on wireless service revenues, namely RCCI, did not intervene despite being served with TCI's application and Bell Canada's response.
44. Further, Bell Canada submitted that, given the relatively small quantum and that TCI's application was made only after it had already paid the costs awards, any reapportionment of costs could be applied by the Commission to a future costs claim to avoid the administrative burden that would otherwise be placed on all affected parties.

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

45. The Commission considers that, similar to the approach taken in the costs orders associated with the Wireless Code review proceeding, responsibility for the payment of costs arising from the proceeding should be reapportioned in proportion to the costs respondents' latest wireless service revenues,<sup>2</sup> as an indicator of the relative size and interest of the parties involved.

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<sup>2</sup> In this order, the wireless service revenues of the costs respondents are based on the 2019 [Communications Monitoring Report](#) and the underlying data supporting that report (see Table T10.2 – "Retail mobile revenue market share by service provider" on [Open Data associated with that report](#)).

46. Given the relatively small amounts of costs claimed by PIAC and l'Union and the large number of potential costs respondents, the Commission limited the costs respondents in the Orders to the largest WSPs (Bell Mobility, RCCI, and TCI). For the same reasons, the Commission considers that the costs respondents should be similarly limited in the present circumstances.
47. As well, in Telecom Order 2019-170, the Commission took into account the general practice outlined in Telecom Order 2015-160 with respect to \$1,000 being the minimum amount that a costs respondent should be required to pay. For the same reasons, the Commission considers that this \$1,000 threshold for responsibility for payment should also apply in the present circumstances with respect to responsibility for the payment of l'Union's costs.
48. With respect to Bell Canada's request that any reapportionment of costs be applied by the Commission to a future costs claim, the record is currently before the Commission to reapportion the costs. Accordingly, it would not be appropriate to wait until a future costs proceeding to reallocate costs between the WSPs in order for certain parties to receive their reimbursements. Such an approach would lead to administrative burdens and delays, since a further process would have to be put in place in the future to ensure that parties had notice as to which costs order proceeding the Commission would use to implement the reapportionment that was determined in the present decision.
49. As a result, the Commission reallocates responsibility for the payment of costs as follows:

**Original Telecom Order 2019-170 Allocation**

<b>Company</b>	<b>Proportion</b>	<b>Amount</b>
TCI	51.4%	\$1,419.97
RCCI	48.6%	\$1,342.53

**Original Telecom Order 2019-171 Allocation**

<b>Company</b>	<b>Proportion</b>	<b>Amount</b>
TCI	37.2%	\$1,606.14
RCCI	35.2%	\$1,518.55
Bell Mobility	27.6%	\$1,192.97

**Varied Telecom Order 2019-170 Allocation**

<b>Company</b>	<b>Proportion</b>	<b>Amount</b>
RCCI	53.0%	\$1,464.13

Bell Mobility	47.0%	\$1,298.37
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**Varied Telecom Order 2019-171 Allocation**

Company	Proportion	Amount
RCCI	36.7%	\$1,584.58
Bell Mobility	32.6%	\$1,407.56
TCI	30.7%	\$1,325.52

50. In its submissions, TCI noted that it had already paid the amounts required in the Orders. It is not clear from the record whether Bell Mobility and RCCI have paid the amounts required to either l'Union or PIAC.
51. If Bell Mobility and RCCI have already paid the required amounts, in order to minimize the administrative burden, the Commission **directs** RCCI to pay TCI the amount of \$187.63 and Bell Mobility to pay TCI the amount of \$1,512.96.
52. If either Bell Mobility or RCCI have not already paid the amounts required in either of the Orders, the Commission **directs** l'Union and PIAC to return any funds already received and Bell Mobility, RCCI, and TCI to pay l'Union and PIAC in accordance with the varied allocations set out in paragraph 49.

**Policy Direction**

53. The Commission considers that this decision, which results in the reallocation of responsibility for the payment of costs between WSPs, is not a situation in which the 2019 Policy Direction<sup>3</sup> is directly applicable. However, the decision can, in part, promote consumer interests, since the consumer groups, to the extent possible, are not unnecessarily burdened by having to refund any costs already received as a result of the reallocation of costs, and there is simply an accounting of costs between the WSPs.

Secretary General

**Related documents**

- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding initiated by Cloudwifi Inc.'s application regarding access to Bell Canada's inside wire, Telecom Order CRTC 2019-220, 21 June 2019*

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<sup>3</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation, SOR/2019-227, 17 June 2019*

- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding that led to Telecom Decision 2019-169, Telecom Decision CRTC 2019-171, 23 May 2019*
- *Determination of costs award with respect to the participation of l'Union des consommateurs in the proceeding that led to Telecom Decision 2019-169, Telecom Decision CRTC 2019-170, 23 May 2019*
- *Wireless Code – Request to clarify the device unlocking rules, Telecom Decision CRTC 2019-169, 23 May 2019*
- *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 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*
- *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*
- *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*