



Telecom Order CRTC 2024-91

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Determination of costs award with respect to the participation of the First Mile Connectivity Consortium in the proceeding initiated by Telecom Notice of Consultation 2022-147

Application

1. By letter dated 27 October 2023, the First Mile Connectivity Consortium (FMCC) applied for costs up to 31 May 2023 for its participation in the proceeding initiated by Telecom Notice of Consultation 2022-147 (the proceeding).¹ In the proceeding, the Commission is considering what actions it should take to improve telecommunications services in communities in the Far North.
2. Northwestel Inc. (Northwestel) and the Competitive Network Operators of Canada filed interventions, dated 6 November 2023, in response to the FMCC's application. The FMCC filed a reply dated 13 November 2023.
3. The FMCC submitted that it had met the criteria for an award of costs set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) because it represented a group or class of subscribers that had an interest in the outcome of the proceeding, it had assisted the Commission in developing a better understanding of the matters that were considered, and it had participated in a responsible way.
4. In particular, the FMCC submitted that it represents the interests of First Nations broadband service providers operating in rural, remote and northern regions of the country. The FMCC noted that these providers have been established by members of First Nations communities who reside in remote and isolated regions of the country.² The FMCC also noted that the proceeding focused specifically on issues relevant to FMCC members given their efforts to deploy broadband-capable networks in rural, remote and northern regions of Canada.

¹ In a Secretary General letter dated 27 September 2023, the Commission approved, with modifications, a procedural request filed by the Public Interest Advocacy Centre to allow parties to file an application for costs for their participation up to 31 May 2023 in the proceeding.

² Specifically, the FMCC noted that it represents: (i) First Nations Technology Council, British Columbia; (ii) Broadband Communications North, Manitoba; (iii) Clear Sky Connections, Manitoba; (iv) Keewatinook Okimakanak K-Net Services, Ontario; (v) Western James Bay Telecom Network, Ontario; (vi) Mattawa First Nations Management, Ontario; (vii) First Nations Education Council, Quebec; (viii) Eeyou Communication Network, Quebec; and (ix) Atlantic First Nations Tech Services, Atlantic Canada.

5. The FMCC also submitted that it had assisted the Commission in developing a better understanding of the matters that were considered in the proceeding by providing comments on the barriers and conditions faced by Indigenous and other community-based providers operating in rural, remote and northern regions of Canada, as well as consumers living in those regions.
6. The FMCC requested that the Commission fix its costs at \$74,628.29, consisting of \$64,008.75 for consultant fees and \$10,619.54 for disbursements. The FMCC's claim included the federal Goods and Services Tax (GST) on fees less the rebate to which the FMCC is entitled in connection with the GST.
7. The FMCC submitted that Northwestel and TELUS Communications Inc. (TCI) are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answer

8. Northwestel submitted that it did not dispute the FMCC's eligibility for costs, but argued that the amount claimed by the FMCC was unreasonable and excessive relative to the level and value of the FMCC's participation in the proceeding.
9. First, Northwestel submitted that the FMCC's requested per diem amount of \$100 did not reflect the Commission's scale of costs set out in Telecom Regulatory Policy 2010-963 and requested that the FMCC's per diem amount be reduced to the Commission-approved rate of \$48 per day.
10. Second, Northwestel submitted that the claimed rate for Sally Braun (an FMCC consultant) should be reduced in accordance with the daily rate for in-house consultants, since, at the time of the application, she was listed in the FMCC's team biographies as the director of the FMCC.
11. Third, Northwestel submitted that the FMCC's total disbursement claim of \$10,619.54 for five people to attend the hearing in person was unnecessary and unreasonable. Northwestel added that since the FMCC had one participant make submissions via videoconference, there appeared to be no reason why more of the FMCC's participants could not have made effective submissions via videoconference.
12. Finally, Northwestel submitted that the FMCC's costs claim should be reduced to reflect the fact that a significant portion of its submissions were overbroad and related to areas outside the scope of the proceeding, which the Commission has defined as including Nunavut, the Northwest Territories, Yukon, 19 communities in Northern British Columbia and two communities in Northern Alberta.

Reply

13. The FMCC submitted that the Commission's per diem rate has not been changed for many years and is insufficient to cover the cost of meals in the Far North. By way of

comparison, the FMCC filed per diem rates approved by the Canada Revenue Agency to illustrate the difference between the Commission's rates and the Canada Revenue Agency's rates.

14. The FMCC submitted that other than one part-time research/administrative assistant, it is a volunteer organization with no full-time paid employees. The FMCC added that its members balance FMCC activities with other professional commitments.
15. The FMCC submitted that, since its submission focused on both service providers and consumers, it organized its panel of speakers at the hearing to reflect those perspectives. The FMCC added that it was important for the Commission to hear directly from those living in the Far North, as well as those who have direct experience with the issues being addressed in the proceeding. It further added that its three Indigenous participants at the hearing all have experience providing telecommunications services to remote Indigenous communities and noted that it was important for the Commission to hear from Indigenous providers who could explain the challenges they face and the opportunities they need to serve residents of northern communities.
16. Finally, the FMCC submitted that its submissions were relevant to the issues raised by the Commission in the proceeding. It noted that one of its speakers presented the experience of a telecommunications service provider in the Northwest Territories and that the other two speakers presented the experience of telecommunications service providers in remote regions that are very similar in isolation and demographics to much of Northwestel's territory.

Request for information

17. By letter dated 16 January 2024, Commission staff requested additional information from the FMCC regarding its application for costs. Among other things, Commission staff noted that KatloTech Communications Ltd. (KatloTech) did not appear to be a member of the FMCC and therefore asked the FMCC to explain why the Commission should approve the disbursements claimed by the FMCC for Lyle Fabian, the owner of KatloTech.
18. The FMCC acknowledged that KatloTech is a commercial organization and not a formal member of the FMCC. It added that KatloTech is not a for-profit service provider, but rather a small Indigenous-owned and -operated IT business based in Yellowknife. The FMCC further added that it worked with Lyle Fabian in the proceeding because of his extensive knowledge and experience with connectivity services in the Northwest Territories. Lyle Fabian provided first-hand evidence of the challenges faced by small providers in serving sparsely populated and rural/remote Indigenous communities.
19. Northwestel submitted that the Commission should deny the costs claimed by the FMCC for the participation of Lyle Fabian, owner of KatloTech. Northwestel noted that KatloTech is a commercial entity that, by virtue of its participation in the industry, had sufficient incentive to participate in the proceeding on its own and that

allowing the FMCC to recover costs for KatloTech would amount to Northwestel funding the participation of a competitor.

Commission's analysis

Eligibility

20. The criteria for an award of costs are set out in section 68 of the Rules of Procedure, which reads as follows:

68. The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:

- (a) whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;
- (b) the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and
- (c) whether the applicant participated in the proceeding in a responsible way.

21. In Telecom Information Bulletin 2016-188, the Commission provided guidance regarding how an applicant may demonstrate that it satisfies the first criterion with respect to its representation of interested subscribers. In the present case, the FMCC has demonstrated that it meets this requirement. The FMCC represents the interests of First Nations broadband service providers operating in rural, remote and northern regions of the country. In particular, the FMCC submitted that it developed its intervention materials in consultation with its members and other northern partners to ensure that their views and experiences were reflected.

22. In addition, as stated in Telecom Order 2017-164, although the primary members of the FMCC are telecommunications service providers, their status as community-based organizations with the distinct objective of providing rural and remote First Nations communities with Internet services distinguishes them from general commercial providers. When considered under the first of the costs criteria, the fact that the FMCC's members are able to represent the unique interests of First Nations subscribers and communities qualifies them to claim costs when other telecommunications providers typically could not.

23. The FMCC has also satisfied the remaining criteria through its participation in the proceeding. In particular, the FMCC's submissions, especially regarding reconciliation with Indigenous peoples in the Far North, emerging low-earth orbit satellite technology, affordability of telecommunications services in the Far North and subsidy regimes, assisted the Commission in developing a better understanding of the

matters that were considered. Accordingly, the Commission finds that the applicant meets the criteria for an award of costs under section 68 of the Rules of Procedure.

Rates and amounts

Per diem rate

24. Under subsection 70(2) of the Rules of Procedure, costs must not exceed the amounts set out in the scale of costs established in the *Guidelines for the Assessment of Costs* (the Guidelines), as set out in Telecom Regulatory Policy 2010-963. Based on these rates, the FMCC requested that the Commission vary the per diem rate to increase it from \$48 to \$100 per day. In support, the FMCC cited the high cost of meals in the Far North, the fact that the Commission has not updated its rates since 2010, and the higher per diem rates set by the Canada Revenue Agency.
25. The Commission acknowledges, as a generally accepted fact, that food costs in the Far North are considerably higher than those in the South, which is supported by receipts provided by some of the FMCC's costs claimants. The Commission also acknowledges that its rates have not been reviewed in some time, nor have they kept pace with inflation. However, the Commission's current Guidelines depend on an average cost applied to all proceedings and all participants. Changes to such rates would generally require a broader review than can be conducted within the context of one individual application. The Commission has publicly stated that it plans to explore new and improved ways to fund public interest participation, which would provide an opportunity to look at these issues in a holistic way.
26. When a party requests that the Commission exercise its discretion to vary its Rules of Procedure, the Commission generally requires that party to provide sufficient evidence supporting its request. In this case, the FMCC has not provided detailed information that would allow the Commission to carefully evaluate its request. Such information is particularly important when a party requests that the Commission vary its established Guidelines in the context of a costs application, which is a narrow process that generally does not involve broad consultation on an issue.
27. In addition, although the FMCC cited the higher per diem rates set by the Canada Revenue Agency, the Commission notes that these rates were developed in a different context (i.e., for travel on Canada Revenue Agency business) and serve a different purpose than the Commission's costs regime, which is to provide assistance to interveners who might otherwise not be able to participate in a proceeding.
28. Accordingly, the Commission considers that it would not be appropriate in this case to vary the per diem rate set out in the Guidelines. The Commission will therefore reduce the FMCC's claimed per diem rate to \$48 in accordance with the Guidelines, resulting in a reduction of \$678.25.

Consultant fees

29. In Telecom Order 2014-351, the Commission set out the criteria it would consider when determining if a costs applicant can claim external or in-house consultant rates. In particular, the Commission noted that it would consider whether the consultant is independent from the costs applicant to determine if a costs applicant can claim outside or in-house consultant rates. In assessing independence, the Commission further noted that it would consider, on the basis of a non-exhaustive list of factors,³ the degree of control that one person or entity may have over another when determining whether external or in-house rates are appropriate.
30. Based on the criteria set out in Telecom Order 2014-351, the Commission considers that the FMCC correctly claimed external consultant rates for Sally Braun. The FMCC is a volunteer organization with no full-time paid staff, and members balance FMCC activities with other professional commitments. In addition, Sally Braun is not the sole director of the FMCC, but is a member of the volunteer board of directors and does not participate in any paid work for the FMCC related to her role with the organization. For these reasons, the Commission is satisfied that Sally Braun is sufficiently independent of the FMCC to claim external consultant rates and that the rates claimed in respect of consultant fees are in accordance with the rates established in the Guidelines, as set out in Telecom Regulatory Policy 2010-963.

Disbursements

31. In Telecom Costs Order 98-18, the Commission noted that it has normally denied costs applications by commercial entities on the basis that, by virtue of their participation in the industry, these parties already have a sufficient incentive to participate in a proceeding.
32. In Telecom Regulatory Policy 2010-963, the Commission stated that costs awards are intended to encourage the participation of individuals and groups who represent subscriber interests, rather than private interests. The Commission further stated that when a costs applicant has coordinated its submissions in a proceeding with a commercial entity or industry group, a costs respondent could end up funding the participation of a competitor who has made submissions jointly with the costs applicant. Therefore, where coordination with such groups has occurred, the Commission will generally reduce allowable costs accordingly.
33. Intervenors therefore raised concerns that, as a commercial organization and not a formal member of the FMCC, allowing the FMCC to recover costs for the participation of Lyle Fabian, the owner of KatloTech, would amount to parties funding the participation of a competitor and that the Commission should deny these costs.

³ These factors include: (i) whether one entity owns the other entity; (ii) which entity pays the salary of the individual doing the work; (iii) whether the consultant has any clients other than the costs applicant; (iv) whether the same individual or a similar group of individuals actively manage(s) the day-to-day operations of both; and (v) whether the consultant pays for the tools, equipment, and training of the person doing the work, as opposed to the costs applicant.

34. The Commission notes that although KatloTech is a commercial organization, it is a small Indigenous-owned and -operated IT business and not a large commercial telecommunications service provider. It is also not engaged in the ongoing provision and management of connectivity services, but rather in the provision of broadband IT solutions services. In addition, Lyle Fabian provided relevant and direct information at the public hearing not only about the challenges faced by small service providers in sparsely populated and rural/remote Indigenous communities, but also about solutions to these challenges. As such, the Commission considers that the services offered by KatloTech can be distinguished from those offered by potential costs respondents (i.e., KatloTech provides broadband IT solutions services) such that costs respondents would not be funding the participation of a competitor should the Commission approve the costs claimed for the participation of Lyle Fabian. Moreover, the record of the proceeding indicates that Lyle Fabian's presentation was not motivated by private commercial interests, but rather to illustrate the challenges faced by service providers and their customers in the Northwest Territories.
35. Accordingly, the Commission considers that in this case it is reasonable and consistent with the purpose of its costs regime to determine that Lyle Fabian, the owner of KatloTech, was acting as external consultant for the FMCC and costs claimed for his participation are eligible for reimbursement.

Necessity and reasonableness of the costs incurred

36. With regard to Northwestel's argument that the number of FMCC participants at the hearing was excessive and unreasonable, the Commission finds that it was reasonable for the FMCC to organize its panel at the public hearing as it did. The FMCC organized its panel according to the different issues addressed in its submissions, and each of its five in-person participants made different submissions based on their experiences. These submissions focused on (i) the barriers faced by small and Indigenous broadband solutions providers in the Far North, (ii) satellite-served communities, (iii) subsidy, (iv) an affordability standard, and (v) the FMCC's other positions in the proceeding.
37. In addition, the Commission's consideration of whether costs incurred are necessary and reasonable depends on the specific circumstances of a given case. In the present case, the Commission agrees with the FMCC on the importance of holding an in-person public hearing in Whitehorse. The public hearing allowed the Commission to hear directly from people living in the Far North about their experiences with, and solutions to, the issues addressed in the proceeding, which helped the Commission gain a better understanding of the issues faced by people living in the Far North.
38. Regarding Northwestel's argument that the FMCC's submissions were overbroad and had limited relevance to the scope of the proceeding, the Commission finds that this argument overlooks the fact that this is a lengthy and complex proceeding involving many interrelated and important issues. Although some of the submissions made by FMCC presenters did not directly relate to the geographic scope defined by the Commission, the Commission considers these submissions to be relevant to the

proceeding given the similarities in the challenges faced by consumers and service providers in all northern communities, not just the Far North. Given the unique combination of challenges to the provision of telecommunications services in the Far North, it would be inconsistent with the purpose of this proceeding to take an overly restrictive approach to the submissions that the Commission should consider at the expense of relevant information about the barriers, conditions and solutions experienced by service providers and their customers, in geographic regions similar to the Far North.

39. Accordingly, the Commission finds that the total amount claimed by the FMCC was necessarily and reasonably incurred and should be allowed. In addition, 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.

Costs respondents and allocation

40. The Commission has generally determined that the appropriate costs respondents to an award of costs are the parties that have a significant interest in the outcome of the proceeding in question and have participated actively in that proceeding. The Commission considers that the following parties are the appropriate costs respondents given that they have a significant interest in the outcome of the proceeding in question and have participated actively in the proceeding: Competitive Network Operators of Canada; Iristel Inc., on behalf of itself and its affiliate Ice Wireless Inc.; Northwestel; SSi Micro Ltd., doing business as SSi Canada; and TCI. In particular, given that the proceeding is expected to result in a new regulatory policy for telecommunications services in the Far North, these parties submitted lengthy and detailed submissions and appeared at the public hearing, demonstrating their significant interest and active participation in the proceeding.
41. It is also the Commission's general practice to allocate the responsibility for payment of costs among costs respondents based on their telecommunications operating revenues (TORs) as an indicator of the relative size and interest of the parties involved in the proceeding.⁴ Consistent with that practice, the Commission considers that it is appropriate in this case to allocate costs based on TORs. However, the Commission considers that using TORs as an indicator of the relative size and interest of the parties involved in the proceeding would not appropriately reflect Northwestel's interest and participation in the proceeding as the primary telecommunications service provider operating in the Far North, since it would result in TCI paying the majority of the costs. Therefore, consistent with Telecom Order 2023-365 and in light of the circumstances of this case, the Commission considers it appropriate to allocate 70% of the costs to Northwestel and 30% of the costs among the other costs respondents on the basis of their TORs.

⁴ TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

42. 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.
43. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

| Company | Proportion | Amount |
|-------------|------------|-------------|
| Northwestel | 70% | \$51,765.02 |
| TCI | 30% | \$22,185.02 |

Directions regarding costs

44. The Commission **approves with changes and on an interim basis** the application by the FMCC for costs with respect to its participation in the proceeding.
45. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to the FMCC at \$73,950.04.
46. The Commission **directs** that the award of costs to the FMCC be paid forthwith by Northwestel and TCI according to the proportions set out in paragraph 43.
47. As the Commission indicated in the Secretary General Letter dated 27 September 2023, this costs award is an interim costs order. A final costs order will be issued following the Commission's review of the FMCC's final costs application.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding initiated by Telecom Notice of Consultation 2022-147*, Telecom Order CRTC 2023-365, 10 November 2023
- *Call for comments – Telecommunications in the Far North, Phase II*, Telecom Notice of Consultation CRTC 2022-147, 8 June 2022, as amended by Telecom Notices of Consultation CRTC 2022-147-1, 14 July 2022; 2022-147-2, 24 October 2022; 2022-147-3, 13 October 2023 and 2022-147-4, 24 November 2023
- *Determination of costs award with respect to the participation of the First Mile Connectivity Consortium in the proceeding leading to Telecom Regulatory Policy 2016-496*, Telecom Order CRTC 2017-164, 19 May 2017

- *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188, 17 May 2016
- *Determination of costs award with respect to the participation of the Ontario Video Relay Service Committee in the proceeding initiated by Telecom Notice of Consultation 2014-188*, Telecom Order CRTC 2015-160, 23 April 2015
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding initiated by the application of Bragg Communications Inc., operating as EastLink, regarding 30-day notice requirements for service cancellations*, Telecom Order CRTC 2014-351, 3 July 2014
- *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
- Telecom Costs Order CRTC 98-18, 9 October 1998