



Telecom Order CRTC 2011-786

PDF version

Ottawa, 16 December 2011

Determination of costs award with respect to the participation of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and its client OpenMedia.ca in the Telecom Notice of Consultation 2011-77 proceeding

File numbers: 8661-C12-201102350 and 4754-390

1. By letter dated 1 September 2011, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), on its own behalf and on behalf of its client OpenMedia.ca, applied for costs with respect to their participation in the proceeding initiated by Telecom Notice of Consultation 2011-77 (the proceeding).
2. On 12 September 2011, Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies); Quebecor Media Inc. (QMI), on behalf of Videotron G.P.; Shaw Cablesystems G.P. (Shaw); and TELUS Communications Company (TCC) filed responses to CIPPIC's application. CIPPIC filed a reply to these responses, and to questions posed by Commission staff, on 15 October 2011.

Application

3. CIPPIC 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. CIPPIC requested that the Commission fix its costs at \$33,539.18, consisting of \$28,770.00 for legal fees, \$2,025.00 for expert witness fees, and \$2,744.18 for disbursements.
5. CIPPIC made no submission as to the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).

Answer

6. In response to the application, the Bell companies and TCC argued that CIPPIC's client, OpenMedia.ca, had obtained financial assistance for its participation in the proceeding, which should be deducted from CIPPIC's allowable costs.

7. To support this claim, the Bell companies and TCC pointed to two letters posted on the OpenMedia.ca website on 22 and 23 February 2011 (the letters). In the first letter, OpenMedia.ca solicited funds from the public, stating that all funds raised in a 48-hour period would be matched, up to \$15,000, by Internet service providers Acanac Inc. and TekSavvy Solutions Inc. (collectively, the industry funders). In the second letter, OpenMedia.ca stated that it had surpassed its goal of raising \$15,000, and that the industry funders had committed an additional \$5,000 to match any additional funds raised in the remaining 24 hours.
8. The Bell companies and TCC argued that these funds constitute financial assistance received in connection with OpenMedia.ca's participation in the proceeding. They referred to a statement in the letters that the money would be used to "[p]ut together a united front of public interest groups, creators, indie ISPs, online service providers and half a million Canadians to put forth a well-researched, evidence-based submission to the CRTC." They also noted that the letters provided a link to OpenMedia.ca's notice of intention to participate under the heading "Some key updates in our campaign: CRTC Process begins." They argued that OpenMedia.ca should have paid CIPPIC's costs out of these funds. Finally, they submitted that, based on the statements in the letters, it is likely that OpenMedia.ca raised sufficient funds to cover the costs claimed by CIPPIC in its application for costs.
9. Based on these submissions, the Bell companies and TCC argued that, in accordance with the Commission's *Guidelines for the Assessment of Costs* (the Guidelines),¹ the amount of allowable costs set out in CIPPIC's application should be reduced by the amount received in response to the letters. The Bell companies and TCC asked that the Commission direct CIPPIC and OpenMedia.ca to declare the total amount of financial assistance received for their participation in the proceeding so that the amount of allowable costs can be reduced accordingly. In the alternative, the Bell companies and TCC argued that the application for costs should be dismissed in its entirety.
10. Both QMI and Shaw supported the Bell companies' and TCC's submissions.

Commission's request for information

11. On 6 October 2011, Commission staff sent a request for information to CIPPIC asking that it provide the amount of funds OpenMedia.ca had received in response to the letters, both from the industry funders and from the general public.

¹ These guidelines are set out in Telecom Regulatory Policy 2010-963.

Reply

12. In reply,² CIPPIC submitted that any funds received by OpenMedia.ca in response to the letters should not be considered with respect to CIPPIC's costs application since, as a pro bono legal clinic, CIPPIC does not receive payment from its clients. CIPPIC also submitted that in *Bell Canada v. Consumer's Association of Canada*, [1986] 1 S.C.R. 190, the Supreme Court of Canada recognized the unique relationship that can exist between public interest participants that collaborate in Commission proceedings. CIPPIC further submitted that its participation in the proceeding concentrated on legal and technical research, coordinating and working with experts, analyzing and formulating policy positions, and drafting and presenting submissions, while OpenMedia.ca's efforts were focused on public engagement, education and outreach, coalition building, and lobbying. Finally, CIPPIC argued that its and OpenMedia.ca's choice to collaborate on their submissions in order to participate in a more efficient and cost-effective manner should not be used as a basis to deny them the ability to recover their costs.
13. CIPPIC also argued that the funds raised in response to the letters were solicited as part of OpenMedia.ca's larger "Stop the Meter" campaign and were only related to OpenMedia.ca's participation in the proceeding in a peripheral way. CIPPIC argued that the Bell companies and TCC had quoted the letters out of context, ignoring the fact that the letters specifically referred to a broad spectrum of activities for which the funds were being solicited, including the coordination of a Day of Action and newspaper advertisements, participation in an upcoming stakeholders' meeting at the Commission regarding online broadcasting, and general policy and outreach work. CIPPIC submitted that the funds received in response to the letters were similar to general core funding received by various public interest participants in Commission proceedings from time to time, which is not generally deducted from these participants' allowable costs.
14. Finally, CIPPIC argued that to the extent that the funds received in response to the letters were related to OpenMedia.ca's participation in the proceeding, they offset costs not recoverable through the Commission's costs award framework, such as OpenMedia.ca staff time spent on participating in the proceeding. CIPPIC submitted that because there is no overlap between the funds raised in response to the letters and the bill of costs set out in CIPPIC's application, there is no issue of double recovery. CIPPIC submitted that the Commission's policy should not be interpreted in a narrow manner that reduces an organization's allowable costs in response to fundraising campaigns earmarked for organization activity not recoverable through Commission costing mechanisms. It submitted that such an interpretation would prevent organizations from effectively campaigning on necessary and costly advocacy efforts surrounding proceedings, but not recoverable through them.

² The Commission notes that CIPPIC's reply to the answers was filed after the 10-day deadline established in the Rules of Procedure. The Commission accepts CIPPIC's explanation that this delay was due to the complexity of the issues raised and has accepted the reply on the record.

15. CIPPIC submitted that cost recovery is a significant concern with regard to its participation in Commission proceedings, and that the inability to recover costs will make it difficult for CIPPIC to continue to participate in Commission proceedings in the future.
16. Given its submissions that the funds received in response to the letters should not be deducted from its allowable costs, CIPPIC did not provide an accounting of the amounts received. CIPPIC argued that, to avoid prejudicing the Commission's decision on whether to award costs, any such accounting would have to provide full details of the various ways the funds were spent in the Stop the Meter campaign. CIPPIC argued that such an accounting would be an onerous undertaking, as the Commission acknowledged in Telecom Regulatory Policy 2010-963 when it denied some parties' requests to require costs applicants to declare the source of their funding.
17. Accordingly, CIPPIC asked that the Commission reconsider its request for information or, in the alternative, find a way to account for the full range of non-recoverable costs associated with the Stop the Meter campaign when deciding whether, and how, CIPPIC's costs should be reduced.

Commission's analysis and determinations

18. The Commission finds that CIPPIC has satisfied the criteria for an award of costs set out in section 68 of the Rules of Procedure. Specifically, the Commission finds that CIPPIC represented a group or class of subscribers that had an interest in the outcome of the proceeding, it assisted the Commission in developing a better understanding of the matters that were considered, and it participated in a responsible way.
19. The Commission notes that the rates claimed in respect of legal fees, expert witness fees, and disbursements are in accordance with the rates established in the Guidelines. The Commission is satisfied that the funds raised by OpenMedia.ca in response to the letters were related to a general fundraising campaign to support a broad spectrum of activities and were not specific to its participation in the proceeding. The Commission also accepts CIPPIC's claim that, as a pro bono legal clinic, it did not receive any of the funds from OpenMedia.ca. As a result, the Commission finds that the total amount claimed by CIPPIC was necessarily and reasonably incurred and should be allowed.
20. The Commission considers that 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.
21. The Commission finds that the appropriate costs respondents to CIPPIC's application for costs are the Bell companies, Cogeco Cable Inc. (Cogeco), Distributel Communications Limited (Distributel), MTS Allstream Inc. (MTS Allstream), Primus Telecommunications Canada Inc. (Primus), QMI, Rogers

Communications Partnership (RCP), Saskatchewan Telecommunications (SaskTel), Shaw, and TCC.

22. The Commission notes that it generally allocates the responsibility for payment of costs among costs respondents based on their telecommunications operating revenues (TORs)³ as an indicator of the relative size and interest of the parties involved in the proceeding. The Commission considers that, in the present circumstances, it is appropriate to apportion the costs among the costs respondents in proportion to their TORs, based on their most recent audited financial statements. However, in accordance with paragraph 48 of the Guidelines, the Commission finds it appropriate to exclude Distributel from the apportionment of costs, because it would be responsible for paying less than \$100 of the total costs award. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Bell companies	30.0%
TCC	27.1%
RCP	27.0%
MTS Allstream	5.0%
QMI	3.6%
SaskTel	3.0%
Shaw	2.6%
Cogeco	1.0%
Primus	0.7%

23. The Commission notes that Bell Canada filed submissions in the proceeding on behalf of the Bell companies. Consistent with its general approach articulated in Telecom Costs Order 2002-4, the Commission makes Bell Canada responsible for payment on behalf of the Bell companies and leaves it to the members of the Bell companies to determine the appropriate allocation of the costs among themselves.

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

Directions regarding costs

24. The Commission **approves** the application by CIPPIC, on its own behalf and on behalf of its client OpenMedia.ca, for costs with respect to their participation in the proceeding.
25. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to CIPPIC at \$33,539.18.
26. The Commission directs that the award of costs to CIPPIC be paid forthwith by Bell Canada on behalf of the Bell companies, by TCC, by RCP, by MTS Allstream, by QMI, by SaskTel, by Shaw, by Cogeco, and by Primus, according to the proportions set out in paragraph 22.

Secretary General

Related documents

- *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77, 8 February 2011, as amended by Telecom Notice of Consultation CRTC 2011-77-1, 17 March 2011, and Telecom Notice of Consultation 2011-77-2, 8 April 2011
- *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