



Telecom Costs Order CRTC 2008-11

Ottawa, 13 June 2008

Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the Telecom Public Notice 2006-14 proceeding

Reference: 8663-C12-200614439 and 4754-307

1. By letter dated 30 November 2007, and amended by a letter dated 3 January 2008, the Public Interest Advocacy Centre (PIAC) applied for costs with respect to its participation in the proceeding initiated by Telecom Public Notice 2006-14 (the Public Notice 2006-14 proceeding).
2. On 14 January 2008, Bell Canada on behalf of itself, Bell Aliant Regional Communications, Limited Partnership, and Saskatchewan Telecommunications (collectively, the Companies) filed comments in answer to PIAC's application. On 24 January 2008, TELUS Communications Company (TCC) also filed comments in answer to PIAC's application. PIAC filed reply comments on 7 February 2008.

Application

3. PIAC submitted that it had met the criteria for an award of costs set out in subsection 44(1) of the *CRTC Telecommunications Rules of Procedure* (the Rules), as it represents a group of subscribers that had an interest in the outcome of the Public Notice 2006-14 proceeding, it had participated responsibly, and it had contributed to a better understanding of the issues by the Commission through its participation in the Public Notice 2006-14 proceeding.
4. PIAC requested that the Commission fix its costs at \$101,501.28, consisting of \$54,722.54 for legal fees (including articling students), \$42,750.00 for consultant and analyst fees, and \$4,028.74 for disbursements. PIAC's claim included the federal Goods and Services Tax (GST) on fees less the rebate to which PIAC is entitled in connection with the GST. PIAC filed a bill of costs with its application.
5. PIAC claimed 194.6 hours at a rate of \$290 per hour for legal fees for Michael Janigan, and claimed 2.5 days at a rate of \$235 per day for legal fees for Mani Taheri, and 1.28 days at a rate of \$235 per day for legal fees for Esteban Uribe, both articling students.
6. PIAC made no submission as to the appropriate costs respondents.

Answer

7. In response to the application, the Companies and TCC did not object to PIAC being awarded costs. However, both TCC and the Companies argued that the cost claimed for the counsel acting for PIAC, Michael Janigan, should have been calculated based on in-house rather than outside counsel rates. In support, they noted that PIAC did not act as a representative for another party or group of subscribers, and instead acted on its own behalf. They also noted that

PIAC's website identifies Michael Janigan as General Counsel. In addition, TCC argued that the signature of Michael Janigan as “General Counsel” or “Counsel” on PIAC's filings with the Commission during the proceeding further militated in favour of a finding that Michael Janigan was in-house counsel.

8. The Companies and TCC also submitted that the claim submitted by PIAC for costs for Dr. Barbara Cherry, PIAC's expert witness, should be reduced significantly because Dr. Cherry's evidence failed to contribute to a better understanding of the issues by the Commission, thus failing to satisfy the test in subsection 44(1) of the Rules. Specifically, TCC and the Companies argued that Dr. Cherry failed to directly address any of the questions raised in Telecom Public Notice 2006-14.
9. The Companies and TCC submitted that all telecommunications service providers who were active participants in the proceeding should be included as cost respondents and that the proportion of the costs should be allocated based on a TSP's proportion of telecommunications operation revenues (TORs).

Reply

10. In reply, PIAC argued that it only facilitated the delivery of legal services and did not itself provide legal services. Consequently, lawyers such as Michael Janigan provide legal services in their individual capacity and bill PIAC for any services rendered rather than receive compensation through a salary provided by PIAC. Furthermore, lawyers working for PIAC pay their own overhead to PIAC, pay their own insurance, and pay GST on any services provided for PIAC. Finally, PIAC noted that lawyers who provided legal services for PIAC were not exempted from having to pay the Lawyers Professional Indemnity Company for Errors and Omissions Insurance, an obligation that in-house lawyers are exempted from having to pay.
11. Regarding the participation of its expert, Dr. Cherry, PIAC argued that Dr. Cherry's evidence did contribute to the proceeding by emphasizing the theoretical framework that the Commission should apply in reaching its determinations. Furthermore, PIAC stated that Dr. Cherry also assisted PIAC in almost all aspects of the proceeding, including preparing written argument, responding to interrogatories, reviewing transcripts and evidence, assisting in preparing interrogatories and cross-examination, and assisting with final reply argument.

Commission's analysis and determinations

12. The Commission does not agree with the Companies' and TCC's submission that Dr. Cherry failed to contribute to a better understanding of the issues by the Commission. The Commission considers, for example, that the evidence submitted by Dr. Cherry regarding the importance of balancing the objectives of the *Telecommunications Act* and principles of Competition Law in formulating and applying any definition of essential service was relevant to the proceeding and contributed to a better understanding of the issues by the Commission. The Commission notes that Dr. Cherry, in addition to providing expert evidence in support of PIAC's submission, assisted PIAC in many other phases of the proceeding, including preparing interrogatories, cross-examination and written arguments, and reviewing evidence.

13. The Commission finds that PIAC has satisfied the criteria for an award of costs set out in subsection 44(1) of the Rules. Specifically, the Commission finds that PIAC is a representative of a group or class of subscribers that has an interest in the outcome of the proceeding, has participated in a responsible way, and has contributed to a better understanding of the issues by the Commission. Accordingly, the Commission finds that the applicant meets the criteria for an award of costs under subsection 44(1) of the Rules.
14. The Commission notes, in response to the Companies' and TCC's arguments that Michael Janigan should have been billed as in-house counsel, that in past decisions where PIAC acted on its own behalf with Michael Janigan as counsel, the Commission has approved the cost of Michael Janigan's services based on outside counsel rates; see, for example, Telecom Costs Orders 2006-6 and 2007-20. The Commission considers that for the purposes of determining the appropriate costs to be awarded, any determination of the relationship between an organization and counsel should be based on a variety of factors, not solely on the titles used by participants to a proceeding.
15. The Commission considers that seeking costs for Mr. Janigan as outside counsel acting on behalf of PIAC is correct and no modification to PIAC's cost claim is required in this regard. This conclusion is based on several factors, including PIAC's statements that Michael Janigan provides legal services in his individual capacity, bills PIAC for services rendered, pays his own overhead to PIAC, pays his own insurance, pays GST on any services provided for PIAC, and is not exempted from having to pay the Lawyers Professional Indemnity Company for Errors and Omissions Insurance.
16. The Commission notes that the rates claimed in respect of consultant and analyst fees, and legal fees are in accordance with the rates set out in the Legal Directorate's *Guidelines for the Taxation of Costs*, revised as of 24 April 2007. The Commission also finds that the total amount claimed by PIAC was necessarily and reasonably incurred and should be allowed.
17. 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.
18. In determining the appropriate respondents to an award of costs, the Commission has generally looked at which parties are affected by the issues and have actively participated in the proceeding. However, the Commission further notes that in apportioning costs the Commission has also considered the potential administrative burden placed on applicants if they are required to collect small amounts from many respondents. In this case, if all potential costs respondents were retained, PIAC would be required to collect very small amounts from certain respondents. Accordingly, the Commission is of the view that it is appropriate, in the present circumstances, to limit the respondents to the Companies, MTS Allstream Inc. (MTS Allstream), TCC, Rogers Communications Inc. (Rogers), Shaw Cablesystems (Shaw), Quebecor Media Inc. (on behalf of Videotron Ltd.) (QMI), Cogeco Cable Canada Inc. (Cogeco), Primus Telecommunications Canada Inc. (Primus), and Yak Communications (Canada) Inc. (Yak).

19. The Commission notes that it has, in previous decisions, allocated the responsibility for the payment of costs among respondents on the basis of the respondents' TORs, 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 respondents in proportion to their TORs, as reported in their most recent audited financial statements. Accordingly, the Commission finds that the responsibility for the payment of costs should be allocated as follows:

The Companies	51%
TCC	19%
Rogers	18%
MTS Allstream	6%
Shaw	2.2%
QMI	1.8%
Primus	1.1%
Cogeco	0.6%
Yak	0.3%

20. Consistent with its general approach articulated in Telecom Costs Order 2002-4, the Commission makes Bell Canada responsible for payment on behalf of the Companies and leaves it to the members of the Companies to determine the appropriate allocation of the costs among themselves.

Direction as to costs

21. The Commission **approves** the application by PIAC for costs with respect to its participation in the Public Notice 2006-14 proceeding.
22. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to PIAC at \$101,501.28.
23. The Commission directs that the award of costs to PIAC be paid forthwith by Bell Canada on behalf of the Companies according to the proportions set out in paragraph 19.

Secretary General

Related documents

- *Application for costs by the Public Interest Advocacy Centre – Retail and competitor quality of service rate adjustment plans – Adverse events, Telecom Public Notice CRTC 2007-9, Telecom Costs Order CRTC 2007-20, 17 December 2007*
- *Review of regulatory framework for wholesale services and definition of essential service, Telecom Public Notice CRTC 2006-14, 9 November 2006, as modified by Telecom Public Notices CRTC 2006-14-1, 15 December 2006, 2006-14-2, 15 February 2007, 2006-14-3, 16 March 2007 and 2006-14-4, 20 March 2007*
- *Application for costs by the Public Interest Advocacy Centre – Bell Canada exclusion application filed pursuant to Retail quality of service rate adjustment plan and related issues, Telecom Decision CRTC 2005-17, Telecom Costs Order CRTC 2006-6, 16 June 2006*
- *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*

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