



3 September 2015

John Traversy  
Secretary General  
CRTC  
Ottawa, ON K1A 0N2

Via CRTC website

Dear Mr. Secretary General,

**Re: Review and variance of Telecom Order CRTC 2015-342 - *Determination of costs award with respect to the participation of the Consumers' Association of Canada and the Public Interest Advocacy Centre in the proceeding initiated by Telecom Notice of Consultation 2013-551, Application 8662-C182-201508235 by the Public Interest Advocacy Centre and the Consumers' Association of Canada (1 August 2015)***

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian communications system that serves the public interest.
- 2 We are writing in support of CAC-PIAC's application for the CRTC to review and vary Determination of costs award with respect to the participation of the Consumers' Association of Canada and the Public Interest Advocacy Centre with respect to Telecom Notice of Consultation 2013-551, Telecom Order CRTC 2015-342 (Ottawa, 28 July 2015), <http://www.crtc.gc.ca/eng/archive/2015/2015-342.htm> [Telecom Order CRTC 2015-342].
- 3 We begin by reviewing the CRTC's authority for awarding costs, the development of its current approach to costs awards, and the circumstances related to Telecom Order CRTC 2015-342. We then set out our concerns about Telecom Order CRTC 2015-342 and draw conclusions.
  1. **Background**
    - A. ***CRTC's authority for awarding costs***
- 4 When the CRTC acquired jurisdiction over federal telecommunications companies in 1976, it also obtained the authority to award and tax costs.<sup>1</sup>

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<sup>1</sup> *National Transportation Act*, s. 73:

(1) The costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.

(2) The Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.

(3) The Commission may prescribe a scale under which such costs shall be taxed.

5 The CRTC may grant costs to public interest interveners, but not to recover its own expenses.<sup>2</sup> It does not generally grant costs to those it regulates.

6 In May 1978 the Commission explained that awarding costs increased “the capacity of interveners to participate at public hearings in an informed way.”<sup>3</sup> It established the principle that to be awarded costs, interveners must participate responsibly, and contribute to the CRTC’s understanding of the issues:

In the case of rate hearings, the Commission has concluded that costs may be awarded against an applicant, when the intervener meets the criteria set out in s. 52 of the Draft Rules, and subject to the circumstances of each case. ... Costs will only be available to interveners who have participated in a responsible way, and have contributed to a better understanding of the issues by the Commission. ...<sup>4</sup>

7 The CRTC initially said that public interest interveners should fund part of their own costs. In August 1978, for instance, the CRTC decided not to grant the Consumers’ Association of Canada costs for the in-house legal counsel it employed full-time, on the theory that CAC should participate in regulatory proceedings to protect its members’ interests, and those members’ fees should be used for that participation.<sup>5</sup>

8 The CRTC then decided against requiring public interest interveners to pay part of their costs. In January 1980 it granted the costs sought by PIAC/CAC, after receiving evidence that CAC’s membership fees were not allocated to CRTC rate proceedings and that its legal counsel was not a full-time employee.<sup>6</sup>

9 Parties required to pay public interveners’ costs objected to them from the beginning. In 1981 the Commission heard and dismissed Bell Canada’s appeal of the January 1980 costs award,<sup>7</sup> explaining that it valued the development and maintenance of expertise in regulatory proceedings within public interest organizations:

**The Commission considers that the active participation of established organizations such as CAC and NAPO *et al* in regulatory proceedings is desirable in view of their continuing interest and knowledge base in the field.** In the Commission’s view, the adoption of Bell’s argument concerning double recovery would in effect mean that only *ad hoc* organizations could expect to obtain awards of costs from the Commission. **Such organizations would not likely have the base for informed participation upon which**

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<sup>2</sup> *Re Bell Canada and Telecom Decision CRTC 79-5*, [1982] 2 F.C. 681 at 687-88:

In my view, the word “costs” in section 73 of the *National Transportation Act* must, as argued by the appellant, be given its normal legal meaning according to which the costs of a proceeding are the costs incurred by the parties or participants in that proceeding and do not include the expenses of the tribunal before which the proceedings are brought. ... If another interpretation were to prevail, the Commission would have the right to force the utility companies which the law obliges to appear before it to defray part of its expenses. This, in my opinion, would be contrary to the general policy of the *National Transportation Act* following which the expenses of the Commission are to be paid out of public funds rather than by the utility companies that are subject to its jurisdiction.

<sup>3</sup> Telecom Decision CRTC 78-4 (Ottawa, 23 May 1978).

<sup>4</sup> *Ibid.*

<sup>5</sup> Telecom Decision CRTC 78-7 (Ottawa, 10 August 1978).

<sup>6</sup> Telecom Decision CRTC 80-1 (Ottawa, 4 January 1980).

<sup>7</sup> Telecom Decision CRTC 81-5 (Ottawa, 9 March 1981).

established organizations such as CAC and NAPO et al can build their specific interventions. Such organizations are called upon to intervene in a number of regulatory proceedings and the Commission has concluded that the taxing officer did not err in principle when he interpreted the Commission's direction to take into account government funding as a direction to deduct from awards of costs only funds specifically designated for the 1978 Bell rate case.

....

In the Commission's view, the application of the principle of indemnification upon which Bell relies would not be appropriate in regulatory proceedings before it. **In the Commission's opinion, the proper purpose of such awards is the encouragement of informed public participation in Commission proceedings. It would inhibit public interest groups from developing and maintaining expertise in regulatory matters if, in order to be entitled to costs, they had to retain and instruct legal counsel in the manner appropriate to proceedings before the courts in civil matters.** On the other hand, no useful purpose would be served by requiring public interest groups artificially to arrange their affairs, by means, for instance, of forgivable debts or bonus accounts, in order to avoid a restrictive interpretation of the term "costs".<sup>8</sup>

[bold font and underlining added]

- 10 The Supreme Court of Canada upheld the CRTC's decision in 1986, concluding that the Commission should be able to award public interest interveners their costs if these were "necessarily and reasonable incurred", even without "any actual out of pocket expense":

... the word "costs" ... must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. ... [T]he nature of the proceedings before the Commission and the financial arrangements of public interest interveners, the discretion conferred on the Commission ... must, in my opinion, include the right to take a broad view of the application of the principle of indemnification or compensation. **The Commission therefore should not be bound by the strict view of whether expense has been actually incurred that is applicable in the courts. It should, for example, be able to fix the expense which may be reasonably attributed to a particular participation by a public interest intervener as being deemed to have been incurred, whether or not as a result of the particular means by which the intervention has been financed there has been any actual out of pocket expense.** This is what I understand the Commission to have done in this case. **It did not reject the general concept of indemnification or compensation, as indicated by the provision in its draft and adopted rules that the costs awarded to an intervener "shall not exceed those necessarily and reasonably incurred by the intervener in connection with its intervention"** a requirement included by the taxing officer in his summary of the principles which should govern him as a result of the general approach to the award of costs to interveners adopted by the Commission. What the Commission did reject, as I read its reasons and those of the taxing officer, was the contention that in its application of the general principle of indemnification or compensation it should be governed by the authorities reflecting the application of that principle in the courts. In doing so, **it did not in my opinion err in law, so long as it adopted a reasonable approach, as it**

<sup>8</sup> *Ibid.*, dismissing Bell Canada's appeal from Taxation Order 1980-1.

**appears to have done, to what should be deemed to be the expenses incurred for the interventions** on behalf of CAC and NAPO et al. I would accordingly dismiss the appeal.<sup>9</sup>

- 11 Parliament gave the CRTC broad authority to award costs of and incidental to its telecommunications proceedings in the 1993 *Telecommunications Act*:

56(1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.

56(2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.

- 12 The CRTC's current procedures for awarding final costs were established in late 2010, and distinguish between responsible participation, informative submissions, necessary expenses and reasonably incurred expenses. Specifically, the CRTC said that

... when assessing costs applications, the Commission considers whether a costs applicant has participated in the proceeding in a responsible way and contributed to a better understanding of the matters considered by the Commission. Furthermore, paragraph 44(6)(b) of the Telecommunications Rules and subsection 70(2) of the Rules of Procedure provide that the amount of the costs awarded shall not exceed the amount of the costs that were necessarily and reasonably incurred.<sup>10</sup>

- 13 The CRTC's April 2011 *Rules of Practice and Procedure* provide that

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.

....

- 14 The CRTC has also explained that costs are not "reasonably and necessarily incurred" if they are "unnecessarily lengthy or repetitive, or address irrelevant issues".<sup>11</sup>

### **B. 'Excessive' costs**

- 15 In 2007, the CRTC explained that in considering whether the time used by someone making a claim for costs was excessive in the circumstances, it would consider factors that included:

<sup>9</sup> *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190, 1986 CanLII 49 (SCC), at para. 30.

<sup>10</sup> *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-963.htm>, at para.19.

<sup>11</sup> *Guide to Costs Applications – 8665-C12-2008-07943*, "General information about the CRTC and Guide to Costs Applications in the Accessibility Proceeding", <http://www.crtc.gc.ca/eng/publications/reports/guide080728.htm>.

- (a) the extent of the applicant's participation and the degree of complexity of the issues to which that participation related;
- (b) the degree of responsibility assumed by the claimant;
- (c) the duplication of tasks among claimants;
- (d) experience of the claimant; and
- (e) time claimed and awarded, globally, by specific service or both, in the proceeding or in other proceedings<sup>12</sup>

16 In 2010 the CRTC explained that it may decide whether the time being claimed is excessive by considering

- ... (a) the extent of the applicant's participation, the degree of complexity of the issues to which that participation related, and the amount of documentation involved in the proceeding;
- (b) the degree of responsibility assumed by the claimant;
- (c) the duplication of substantive submissions among claimants;
- (d) the experience and expertise of the claimant; and
- (e) the time claimed and awarded in the proceeding or in other similar proceedings.

This list is not exhaustive or binding and the Commission will consider all factors relevant to a specific proceeding.<sup>13</sup>

17 Comparing the 2007 and 2010 factors shows that when the CRTC decides whether to approve costs applications it now also considers documentation, similarity in substantive submissions and the claimant's expertise:

<b>CRTC factors for evaluating whether time claimed is excessive</b>	
<b>2007 factors</b>	<b>2010 factors</b>
(a) the extent of the applicant's participation and the degree of complexity of the issues to which that participation related;	(a) the extent of the applicant's participation, the degree of complexity of the issues to which that participation related, and <i>the amount of documentation involved in the proceeding</i>
(b) the degree of responsibility assumed by the claimant	(b) the degree of responsibility assumed by the claimant
(c) the duplication of <del>tasks</del> among claimants	(c) the duplication of <i>substantive submissions</i> among claimants
(d) experience of the claimant	(d) the <i>experience and expertise</i> of the claimant
(e) time claimed and awarded, globally, by specific service or both, in the proceeding or	(e) the time claimed and awarded in the proceeding or in other similar proceedings.

<sup>12</sup> *Guidelines for the Taxation of Costs*, (Revised as of May 2007), [http://www.crtc.gc.ca/eng/forms/form\\_301.htm](http://www.crtc.gc.ca/eng/forms/form_301.htm), "Excessive Time", para. 11.

<sup>13</sup> *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-963.htm>, at para. 23.

in other proceedings	
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### C. CRTC practice in awarding costs

- 18 The CRTC's practice from the late 1970s to the late 1990s was to decide whether costs should be awarded, and to delegate the review and decisions about costs submitted by public interest organizations to a taxing or taxation officer. The costs consisted largely of fees for experts and lawyers.
- 19 Fees charged in cost applications could vary considerably from one application to another, because of differences in the experience and location of experts and legal counsel.<sup>14</sup> In 1991 the Commission's approach to determining whether the differing hourly rates claimed by legal counsel "made reference to a number of factors, including year of call to the bar, experience before regulatory tribunals (particularly the Commission itself), knowledge and experience regarding telecommunications and its regulation, and the hourly rate allowed for counsel in previous Commission taxations."<sup>15</sup>
- 20 Costs orders addressed lawyers' experience in several ways. In one case the CRTC's taxation officer reduced the rates charged by counsel working on "projects outside of their area of specialty"<sup>16</sup> by 20% because, except for one lawyer, none "appears to have been previously involved, even peripherally, in telecommunications regulation".<sup>17</sup> Another taxation officer granted costs when a lawyer reduced her hourly fee by almost 11% because of her inexperience in telecommunications matters.<sup>18</sup> CRTC taxation officers also recognized growing experience by legal counsel: in 1993 the addition of two years of legal experience resulted in an 8% increase for one public interest organization's lawyers.<sup>19</sup>

<sup>14</sup> See e.g. *In re: Telephone Set Compatibility with Hearing Aids - Telecom Decision CRTC 89-7 and Telecom Costs Order CRTC 89-5*, Taxation Order CRTC 1991-2 (Ottawa, 20 February 1991), <http://www.crtc.gc.ca/eng/archive/1991/TO91-2.HTM>:

Previous taxation orders have apparently not taken into account counsel's practice location in determining what hourly rates are reasonable. However, I am of the view that the disparity in market rates for lawyers in various cities has grown to a point where it would be inequitable not to recognize location-specific market rates in this proceeding. In selecting counsel to represent them in Commission proceedings, participants should be able to retain counsel without regard to such considerations as the disparity in regional market rates.

<sup>15</sup> *In re: Telephone Set Compatibility with Hearing Aids - Telecom Decision CRTC 89-7 and Telecom Costs Order CRTC 89-5*, Taxation Order CRTC 1991-2 (Ottawa, 20 February 1991), <http://www.crtc.gc.ca/eng/archive/1991/TO91-2.HTM>, Taxing Officer Allan Rozenzweig.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> In *Costs awarded to Action Réseau Consommateur et al. - Public Notice CRTC 2001-36*, Telecom Taxation Order 2003-1 (Ottawa, 16 May 2003), <http://www.crtc.gc.ca/eng/archive/2003/to2003-1.htm>, at para. 20, Taxation Officer Natalie Turmel permitted a lawyer who could have claimed an hourly fee of \$140 based on the number of years since she was called to the Bar, to reduce this amount to \$125/hour (a 10.7% reduction) because of her inexperience in telecommunications matters.

<sup>19</sup> *In Re: Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues - Telecom Decision CRTC 92-12, Telecom Costs Order CRTC 91-4 and Telecom Costs Order CRTC*

- 21 Costs orders also addressed the organization of legal work. In 2010, for example, the CRTC criticized CCD/ARCH for relying exclusively on senior legal counsel:

... the Commission considers that, given the scope of the proceeding and the amount of work involved, CCD/ARCH should nevertheless have made efforts to engage the services of other in-house counsel and/or more junior counsel in order to reduce its costs. The Commission considers that, when given proper direction by senior counsel, in-house and/or more junior counsel would not have needed prior experience in telecommunications to be of assistance. The Commission notes that all of the other costs applicants used in-house counsel, junior counsel, articling students, and/or legal assistants for their legal work.

- 22 Taxing or taxation officers heard parties' submissions on individual applications and then approved or varied the costs sought. In the early 1990s, for example, CRTC taxing officers took inflation into account, granting legal fee increases of 3.3% between January and December 1993 (Taxation order 1993-11), and of 5% from 1993 to 1994 (Taxation order 1994-2).
- 23 The CRTC continued to use the 'taxation' approach to telecom costs awards until May 1998. By then it had begun to move from long, large-scale public telecom proceedings, to shorter paper-based proceedings.<sup>20</sup> The CRTC's Legal Directorate established a fee structure for different types of costs,<sup>21</sup> and the CRTC streamlined its process for awarding costs, "keeping in mind that the taxation process should not represent a burdensome process and should be fair to all parties concerned."<sup>22</sup>
- 24 Although, in the late 1980s, the CRTC's taxing officers thought that "... fees will tend to increase with the effluxion of time",<sup>23</sup> the fees that legal assistants, articling students and legal counsel may now seek through telecom costs orders have not changed since 2010:

	Not relevant	0-2	3-5	6-10	11-19	20+ (at least 10 yrs of relevant experience)
Legal Assistant	\$35					
Articling student	\$70					
Counsel		\$135	\$165	\$205	\$250	\$290

92-5, Taxation Order 1993-2 (Ottawa, 15 March 1993), <http://www.crtc.gc.ca/eng/archive/1993/TO93-2.HTM>, Taxing Officer Lorne Abugov; see also *In re: British Columbia Telephone Company - 1992 Construction Program Review - Telecom Decision CRTC 92-21 and Telecom Costs Order CRTC 93-3*, Taxation Order CRTC 1993-6 (Ottawa, 9 August 1993), <http://www.crtc.gc.ca/eng/archive/1993/TO93-6.HTM>, Taxing Officer David Elder ("In my view the increment for experience should be proportionately greater for junior counsel, in recognition of the steepness of the learning curve for junior counsel and the resulting incremental value of the added experience.").

<sup>20</sup> *New procedure for telecom costs awards*, Telecom Public Notice CRTC 98-11 (Ottawa, 15 May 1998), <http://www.crtc.gc.ca/eng/archive/1998/PT98-11.HTM>.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Reference Letter regarding Guidelines for the Taxation of Costs* (Ottawa, 15 May 1998), [http://www.crtc.gc.ca/eng/forms/form\\_302.htm](http://www.crtc.gc.ca/eng/forms/form_302.htm).

<sup>23</sup> *In re: British Columbia Telephone Company - Construction Plan Review, CRTC Telecom Public Notice 1987-45 and Telecom Costs Order CRTC 88-1*, Taxation Order CRTC 1988-4, (Ottawa, 28 September 1988) <http://www.crtc.gc.ca/eng/archive/1988/TO88-4.HTM> (Taxing Officer: Allan Rosenzweig).

**D. PIAC/CAC's application and Telecom Order CRTC 2015-342**

25 Telecom Order CRTC 2015-342 flowed from Telecom Notice of Consultation 2013-551, which announced that the CRTC would review its policy on wholesale wireline services. TNoC 2013-551 said the Commission would examine

the appropriateness of previously established wholesale service categories the appropriateness of mandating any new or forborne wholesale services; the appropriate balance of incentives for innovation and investment in the construction of telecommunications network facilities sustainable competition the provision of high-quality retail telecommunications services; the product and geographic markets for wholesale services; and the CRTC's rate-setting approaches for wholesale services.

26 CAC-PIAC submitted two comments, made two replies, appeared twice before the CRTC hearing panel, and submitted final replies:

- Comments round 1 (31 January 2014), 19 pages
- Comments round 2 (27 June 2014), 15 pages
- Reply (24 October 2014), 14 pages
- Hearing remarks before the CRTC (1 December 2014), 8 pages
- Hearing reply before the CRTC (3 December 2014), 5 pages
- Final submission (19 December 2014), 21 pages

27 The CRTC published its findings from the 2013-551 proceeding in *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy 2015-326 (Ottawa, 22 July 2015), <http://www.crtc.gc.ca/eng/archive/2015/2015-326.htm>.

28 Telecom Regulatory Policy CRTC 2015-326 referred to CAC-PIAC as part of the "Consumer Groups" at paragraphs 66, 79 and 96, and referred specifically to CAC-PIAC's submissions – which it described as "PIAC" – at paragraph 103:

Some of the Consumer Groups considered that wholesale HSA services over FTTP access facilities should be mandated, and downplayed the potential investment risk for the incumbent carriers, given their need to compete against one another to survive. Moreover, OpenMedia argued that the potential for mandated FTTP access facilities should be expected in a regulated industry. PIAC indicated that the Commission's mandate does not entail protecting particular business decisions made by the incumbent carriers, nor does it include shielding them to incent their deployment of FTTP access facilities.

29 CAC-PIAC subsequently applied for the costs associated with preparing its intervention. It said it

... identified a number of significant concerns and submitted detailed comments in relation to a range of considerations, including the need for forward-looking regulation

and the importance of access to new technologies from a range of retail competitors. CAC-PIAC provided detailed critical assessments of the positions put forward by incumbent cable and telephone companies. CAC-PIAC provided detailed analysis of Commission decisions and policies as they relate to the current proceeding. CAC-PIAC provided the Commission with in-depth comments which offered a consumer-focused alternative to the extensive regulatory submissions of the large incumbent cable and telephone service providers. There was little duplication with the positions of other parties.

CAC-PIAC's 31 January 2015 application (DM#2261352-2013-551-Costs-PIAC/CAC-PIAC Application for Costs.pdf, at 2)

- 30 PIAC/CAC used five lawyers – 2 articling students, 1 in-house lawyer, and 2 external lawyers – to complete its work. Under two-thirds of the time spent on this proceeding was used by senior counsel; the remaining time was used by PIAC's in-house counsel and two articling students:

Position	Hours	% of total hours	Amount (\$)	% of total amount
Senior external counsel	317.6	54.6%	\$93,833.91	80.1%
Senior external counsel	0.5	0.1%	\$150.71	0.1%
External counsel	37.1	6.4%	\$6,362.69	5.4%
<b>Subtotal, external counsel</b>	<b>355.2</b>	<b>62.5%</b>	<b>\$100,347.31</b>	<b>85.60%</b>
In-house counsel	144.0	24.7%	\$10,800.00	9.2%
Articling students (2)	82.93	14.2%	\$6,033.82	5.1%
Total	582.13	100.0%	\$117,181.1	100.0%

Source: PIAC costs application (16 January 2015)

Note: in-house counsel rate submitted as 18 days and for these purposes converted to hours by multiplying # of days by 8 (assuming roughly 8 hours/day)

- 31 Telus was the only intervener, and it made submissions critiquing the applications of PIAC/CAC and OpenMedia. It argued that PIAC/CAC could have allocated its costs more effectively:

6. While TELUS recognizes that this proceeding was a long one, with multiple rounds of evidence and interrogatories, the Company questions whether PIAC/CAC could have more cost-effectively allocated work among the professionals engaged on the file. The great majority of the legal counsel fees claimed by PIAC/CAC relate to work performed by senior outside counsel.<sup>24</sup>

- 32 TELUS therefore suggested that the CRTC could reduce PIAC/CAC's outside counsel's fees:

7. TELUS encourages the Commission to consider whether those outside counsel fees were all necessarily and reasonably incurred, in light of the more economical options available to CAC/PIAC for resourcing the file. The fees claimed in respect of outside counsel could be adjusted downwards if the Commission considers that this is, in fact, the case.<sup>25</sup>

<sup>24</sup> Stephen Schmidt, Vice-President – Telecom Policy & Chief Regulatory Legal Counsel, Telecom Policy & Regulatory Affairs, TELUS, Answer to Cost Claims (26 January 2015).

<sup>25</sup> *Ibid.*

33 The CRTC issued its determination about CAC-PIAC's application six months after it was filed, in Telecom Order CRTC 2015-342. The CRTC said that it analyzed PIAC/CAC's application based on three criteria set out in the CRTC's *Rules of Practice and Procedure*. Section 68 of the *Rules* states that

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.

34 The CRTC said that PIAC/CAC had met the first two criteria, but that it had not participated responsibly because it did not participate in the proceeding "in the most efficient and economic way" (para. 15), as "illustrated by paragraph 23 of the *Guidelines for the Assessment of Costs*" in Telecom Regulatory Policy 2010-963 (*Guidelines*). Paragraph 23 is set out below in its entirety:

23. Applicants are encouraged to rely on junior counsel and articling students to the greatest extent possible. When senior counsel are relied on, applicants may be asked to demonstrate with supporting rationale why this reliance was necessary.

35 The CRTC did not say that PIAC/CAC should not have used senior counsel, but rather said that because the 2013-551 proceeding was "complex, lengthy, and voluminous, PIAC/CAC's use of senior legal counsel was warranted" (para. 16).

36 The CRTC then compared the total time claimed by PIAC/CAC and OpenMedia in the same proceeding: 564.13 hours to 388.5 hours. While acknowledging that PIAC/CAC "participated in the proceeding more fully than OpenMedia", it said that the PIAC/CAC's contribution was only as effective as that of OpenMedia (para. 17).

37 The CRTC decided to reduce the costs for PIAC/CAC's senior legal counsel, by re-allocating the costs submitted by PIAC/CAC. Specifically, the CRTC said that it expected senior lawyers to spend less time on the matters raised in 2013-551 than junior lawyers or analysts, and that while PIAC/CAC participated more in the 2013-331 proceeding than OpenMedia, the two parties were equally effective:

17. For the same proceeding, another costs applicant, OpenMedia.ca (OpenMedia), claimed a total of 388.5 hours, as compared to the PIAC/CAC's claim of 564.13 hours. As well, OpenMedia claimed time for work undertaken only by in-house analysts, which charge a lower rate than senior legal counsel. While PIAC/CAC participated in the proceeding more fully than OpenMedia, OpenMedia's contribution to the proceeding was as effective as that of PIAC/CAC. Further, senior legal counsel would be expected to spend less time on the file than a junior lawyer or an analyst, given their experience.

38 The CRTC therefore disallowed some of the time claimed by senior legal counsel, and also re-allocated time from senior legal counsel "to the more junior external counsel".

18. In light of this, the Commission is not persuaded that PIAC/CAC have demonstrated that all of the time claimed with respect to senior legal counsel should be allowed. The time allowed in respect of PIAC/CAC's senior legal counsel should therefore be reduced from 317.6 hours to 250 hours, and the 67.6-hour difference should be allocated to the more junior external counsel, such that the time attributed to his work for costs purposes is increased from 37.1 hours to 104.7 hours. This reallocation of time between senior and junior legal counsel is consistent with the Guidelines and constitutes a more appropriate assessment of their respective roles for the purpose of determining allowable costs.

19. In light of the above, the following legal fees were necessarily and reasonably incurred and should be allowed: \$73,563.04 for senior external counsel; \$150.71 for the other senior external counsel; \$17,956.16 for external counsel; \$10,800 for in-house counsel; and \$6,033.82 for articling students.

39 The result of the CRTC's changes to PIAC/CAC's application is to deem that one of PIAC/CAC's external counsel used a fifth less time than billed and to deem that another external counsel's time was more than triple the time actually billed. The CRTC's deeming exercise therefore reduced the total costs claimed by PIAC/CAC by 7%:

Position	Hours				Costs			
	PIAC/CAC	% of hrs	CRTC	Change	PIAC/CAC \$	% of \$	CRTC	Change
Senior external counsel	<b>317.6</b>	<b>54.6%</b>	<b>250</b>	<b>-21.3%</b>	<b>\$ 93,833.91</b>	<b>80.1%</b>	<b>\$ 73,563.04</b>	<b>-21.6%</b>
Senior external counsel	0.5	0.1%	0.5	0.0%	\$ 150.71	0.1%	\$ 150.71	0.0%
External counsel	<b>37.1</b>	<b>6.4%</b>	<b>104.7</b>	<b>182.2%</b>	<b>\$ 6,362.69</b>	<b>5.4%</b>	<b>\$ 17,956.16</b>	<b>182.2%</b>
Subtotal, external counsel	355.2	61.0%	355.2	0.0%	\$ 100,347.31	85.6%	\$ 91,669.91	<b>-8.6%</b>
In-house counsel	144	24.7%	144	0.0%	\$ 10,800.00	9.2%	\$ 10,800.00	0.0%
Articling students (2)	82.93	14.2%	82.93	0.0%	\$ 6,033.82	5.1%	\$ 6,033.82	0.0%
Total	582.13	100.0%	582.13	0.0%	\$ 117,181.13	100.0%	\$ 108,503.73	<b>-7.4%</b>

40 The CRTC justified the changes it made by concluding that PIAC/CAC did not participate "in the proceeding in the most efficient and economic way possible" (para. 15).

41 CAC-PIAC is asking the Commission to review and vary Telecom Order CRTC 2015-342 on the grounds that the CRTC erred in fact, that it erred in law, and that the CRTC is introducing a new principle.

42 After reviewing the materials related to the 2013-331 proceeding, the CRTC's determination in Telecom Order CRTC 2015-342, and PIAC/CAC's submissions, FRPC has several concerns.

**II. FRPC's concerns**

**A. Did the CRTC compare the times used by OpenMedia and PIAC/CAC accurately?**

43 As noted above, the CRTC was "not persuaded that PIAC/CAC have demonstrated that all of the time claimed with respect to senior legal counsel should be allowed", because OpenMedia used less time overall than PIAC/CAC, and because OpenMedia "claimed time for work undertaken only by in-house analysts, which charge a lower rate than senior legal counsel."

- 44 Specifically, Telecom Order CRTC 2015-342 says that OpenMedia “claimed a total of 388.5 hours, as compared to the PIAC/CAC’s claim of 564.13 hours.”<sup>26</sup> Using these figures, PIAC/CAC’s was claiming for 45% more time than OpenMedia.
- 45 FRPC reviewed OpenMedia’s cost application, which sets out the hours and days of time claimed for a volunteer and three managers. OpenMedia did not apply for costs related to 388 hours of work, but to 424.5 hours of work:

Individual	Status	Hours	Days	Amount claimed
Cynthia Khoo	Volunteer	237.5	31.25	\$14,687.50
David Christopher	Communications Manager	31	4	\$ 1,880.00
Josh Tabish	Communications Manager	113	14.25	\$ 6,697.50
Steve Anderson	Executive Director	43	6	\$ 2,820.00
Total	4 in-house analysts	424.5	55.5	\$26,085.00

- 46 To confirm these figures we reviewed the terms of Telecom Order CRTC 2015-341: it notes OpenMedia’s request for \$26,085 in analysts’ fees (as set out in its applications and reflected in the chart above), and allowed this amount.<sup>27</sup>
- 47 FRPC is concerned that the CRTC’s conclusion that PIAC/CAC used too much time compared to OpenMedia is based on misstating the time actually used by OpenMedia by a third.
- 48 We also note that OpenMedia and PIAC/CAC participated somewhat differently. For instance, in the reply stage of the 2013-551 proceeding OpenMedia reiterated data previously published by the CRTC in its *Communications Monitoring Report* (OpenMedia Final Submission at paras. 7-8), while PIAC/CAC presented eight pages of information about the impact of different Internet speeds on a variety of applications and consumer-household uses (PIAC/CAC Final Submission at paras. 46 to 68, pages 12 to 18).
- 49 FRPC is concerned that Telecom Order CRTC 2015-342 leaves the impression that the quality of participation by OpenMedia and PIAC/CAC was essentially equal. If that is the case, Telecom Order CRTC 2015-342 should have provided evidence to support this conclusion – but it did not.

### **B. Does the CRTC value experience?**

- 50 Three parties filed costs applications in the 2013-551 proceeding: PIAC/CAC, OpenMedia and the Union des consommateurs.
- 51 Telecom Order CRTC 2015-342 based its determinations about PIAC/CAC’s costs solely on the costs application filed by OpenMedia, without explaining why it decided to use OpenMedia as its preferred comparator. It is therefore unclear on what basis this choice was made.

<sup>26</sup> Telecom Order CRTC 2015-342 at para. 17.

<sup>27</sup> Telecom Order CRTC 2015-341 at para. 21.

- 52 A simple comparison of the time spent by PIAC/CAC and by OpenMedia ignores the experience of the two organizations. PIAC/CAC brings to bear decades of legal expertise in telecommunications law and regulation, and decades of experience in CRTC proceedings. OpenMedia, by contrast, was founded in 2008, and has participated in very few CRTC proceedings. In our view, the public interest is served when a broad range of parties participate in the CRTC's proceedings, and is especially well served when parties are able to represent the public interest based on their knowledge of the law of Canadian communications.
- 53 FRPC is concerned that the CRTC's decision to reduce the time used by PIAC/CAC's senior external counsel implies that for the CRTC, experience in telecommunications law and regulation is a liability, rather than an asset.

*C. Does the CRTC value expertise?*

- 54 The CRTC also said it was "not persuaded that PIAC/CAC have demonstrated that all of the time claimed with respect to senior legal counsel should be allowed", because OpenMedia "claimed time for work undertaken only by in-house analysts, which charge a lower rate than senior legal counsel."<sup>28</sup>
- 55 We note first that the fact that OpenMedia claimed time for in-house analysts at a lower rate than for senior legal counsel is an artefact of the CRTC's designations. While OpenMedia itself distinguished between those who worked on its 2013-551 submission in terms of seniority—describing them as an executive director, two communications managers and a volunteer—the CRTC has a single rate for all in-house non-lawyers. If the CRTC recognized the importance of expertise and experience for in-house personnel, the artefact would have no impact.
- 56 Second, we note that the proceeding initiated by TNoC 2013-551 had at least ten separate stages: PIAC/CAC participated in all four, and OpenMedia in seven:

Stages of TNoC 2013-551	OpenMedia	PIAC/CAC
Interventions Round 1 – 31 Jan/14	Yes	Yes
Responses to requests for disclosure – 21 Feb/14		Yes
Requests for information – Mar/14		
Requests for disclosure – 16 May/14		Yes
Comments Round 2 – June/14		Yes
Requests for information – Jul/14		
Replies – Oct/14	Yes	Yes
Hearing interventions	Yes	Yes
Hearing replies		Yes
Final submissions	Yes	Yes
Total stages: 10	4	7

<sup>28</sup>

*ibid.*, at para. 17.

57 Telecom Order CRTC 2015-342 does not address the level of participation of the different parties, except to acknowledge that PIAC/CAC “participated in the proceeding more fully than OpenMedia” (para. 17).

58 The order did not explain whether the time re-allocated from a senior to a less-senior lawyer was divided evenly among all seven stages, or was focussed in one or two areas. By way of comparison, we note the following discussion in Telecom Order CRTC 92-7, which set four reasons to explain why the CRTC concluded that a public interest organization had not contributed to a better understanding of the issues in a telecom proceeding:

2. The Commission considers that CAC has not fully met the criteria set out in section 44(1) of the Rules. In particular, the Commission is unable to conclude that all aspects of CAC's participation contributed to a better understanding of the issues by the Commission. The Commission considers that parts of CAC's evidence were simplistic and based on flawed assumptions. [1] Specifically, the Commission considers that CAC failed to take price elasticity and market growth into account in reaching its conclusion on revenue growth, and that [2] its assumptions that a reduction in toll rates would lead to an increase in revenues has not been demonstrated. The Commission is also of the view, as stated in Telecom Decision CRTC92-12 that [3] CAC's approach to measuring affordability, which centred around an examination of all elements of a subscriber's telephone bill, including optional services, was not of assistance to the Commission in considering the applications of Unitel and BCRL. Finally, the Commission considers that [4] some of CAC's cross-examination time was spent exploring issues which were not of direct relevance to CAC's position, and indeed, which were of only marginal relevance to the proceeding as a whole.<sup>29</sup>

[Italicized numbers indicate number of reasons given]

59 Telecom Order CRTC 2015-342's reasoning says simply that senior legal counsel would be expected to spend less time on the file than a junior lawyer or an analyst, given their experience”: but does not (unlike Telecom Order CRTC 92-7) demonstrate why this was so for the TNoC 2013-551 proceeding, and what specific tasks senior legal counsel should not have undertaken.

60 FRPC respectfully submits that decisions about participation in different stages of proceedings reflect expertise: experts in CRTC proceedings, especially legal experts, understand that some stages are likely to matter more than others – if not to the CRTC, than to appellate bodies such as the Governor in Council, the Federal Court of Appeal or the Supreme Court of Canada. Even for experts, however, such decisions take time.

61 FRPC is therefore concerned that the CRTC's decision to re-allocate costs between PIAC/CAC's senior and less-senior lawyers implies that the CRTC would prefer that public-interest parties limit their participation in CRTC proceedings, regardless of the expertise on which they have hitherto been able to rely.

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<sup>29</sup> *In re: Unitel Communications Inc. & B.C. Rail Telecommunications/Lightel Inc. - Applications to Provide Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues: Application for Costs*, Telecom Order CRTC 92-7 (Ottawa, 30 June 1992), at para. 2

**D. What authorizes the CRTC to re-allocate the time billed by one lawyer, to another lawyer?**

62 FRPC is also concerned by the CRTC's decision to re-allocate the time spent by one lawyer, to another lawyer:

... The time allowed in respect of PIAC/PIAC/CAC's senior legal counsel should therefore be reduced ... and the ... difference should be allocated to the more junior external counsel .... This reallocation of time is ... consistent with the Guidelines and constitutes a more appropriate assessment of their respective roles for the purpose of determining allowable costs.<sup>30</sup>

63 Telecom Order CRTC 2015-342 does not explain the CRTC's authority for re-allocating the time claimed by PIAC/CAC by deeming the time of one outside legal counsel, to be the time of another legal counsel. The *Telecommunications Act* expressly permits the CRTC to award and set ('fix') final costs, but does not expressly permit the CRTC to revise the applications on which these costs are based:

56(1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.

56(2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.

64 The 1986 decision by the Supreme Court of Canada permitted the CRTC to attribute expenses to public interest interveners, regardless of how these interveners are financed, and regardless of actual out-of-pocket expenses – but did not suggest that the CRTC had the authority to re-allocate costs within an application. And in previous taxing orders, taxing officers have reduced expenses by a proportion to reflect an organization's poor performance at a CRTC proceeding.

65 Here, however, the CRTC has simply decided to redact PIAC/CAC's costs application by shifting time from one party in the claim, to another. FRPC is concerned that TNoC 2015-342 reflects a desire by the CRTC to micro-manage the files carried by public interest organizations – a dangerous challenge to the independence of public interest participants in CRTC proceedings, and to the integrity of the CRTC itself (which might be accused of attempting to use public interest organizations to undertake work that the CRTC's own budget does not permit<sup>31</sup>).

66 If this is the case, the CRTC should revise its costs guidelines process to require public interest organizations to submit estimates of the resources they will be using for each proceeding before beginning their work on those proceedings, for prior CRTC approval. That will be the only way for the CRTC to assure itself that public interest organizations are operating to the CRTC's satisfaction.

**E. What does the CRTC mean by 'economic' and 'effective'?**

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<sup>30</sup> Telecom Order CRTC 2015-342 at para 18.

<sup>31</sup> See footnote 2, above.

- 67 Telecom Order CRTC says that in evaluating whether PIAC/CAC participated “responsibly”, it must consider whether it participated in the “most ... economic way possible”.<sup>32</sup> It goes on to say that while using fewer resources, OpenMedia’s contribution to the 2013-551 proceeding was “as effective as that of PIAC/CAC”.<sup>33</sup> The order does not define either term in the context of ‘responsible participation’.<sup>34</sup>
- 68 FRPC notes that the CRTC’s 2010 costs policy does not refer either to effectiveness or economy in considering whether a costs claim is excessive in terms of costs:
23. Specifically, in evaluating whether or not the time expended by a claimant is excessive, the Commission may consider
- (a) the extent of the applicant’s participation, the degree of complexity of the issues to which that participation related, and the amount of documentation involved in the proceeding;
  - (b) the degree of responsibility assumed by the claimant;
  - (c) the duplication of substantive submissions among claimants;
  - (d) the experience and expertise of the claimant; and
  - (e) the time claimed and awarded in the proceeding or in other similar proceedings. This list is not exhaustive or binding and the Commission will consider all factors relevant to a specific proceeding.<sup>35</sup>
- 69 At the same time, the 2010 costs policy states that the guidelines it provided
4. ... are intended to implement the following principles:
- a. costs awarded shall not exceed those necessarily and reasonably incurred by the applicant in connection with its participation in the proceeding (see paragraph 44(6)(b) of the Telecommunications Rules and subsection 70(2) of the Rules of Procedure);
  - b. the costs assessment process should be fair to all parties concerned;
  - c. the costs assessment process should be efficient and effective for the parties and for the Commission;
  - d. to the extent possible and advisable, the costs assessment process should provide the parties with certainty of result;
  - e. the costs assessment process must maintain the flexibility necessary to ensure that costs are awarded in light of the particular circumstances of a proceeding or intervention; and
  - f. the costs assessment process must take into account financial assistance received from government or other sources for the purpose of participating in Commission proceedings under the Act ....<sup>36</sup>

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<sup>32</sup> *Ibid.*, at para. 15.

<sup>33</sup> *Ibid.*, at para. 17.

<sup>34</sup> *Ibid.* at paras. 13 and 15.

<sup>35</sup> Telecom Regulatory Policy CRTC 2010-963.

<sup>36</sup> *Ibid.*, Guidelines for the Assessment of Costs, para. 4.

70 FRPC considers that the CRTC should not read in new criteria to its policies without warning. To be 'fair', 'efficient' and 'effective', it should provide some foundation for new criteria to enable those relying on the criteria to understand and meet the new requirements.

### III. Conclusion

71 The CRTC's decision to reallocate time used by PIAC/CAC's senior outside counsel even though use of this counsel was warranted and PIAC/CAC participated more fully than OpenMedia, reminds us inevitably of the fable about Goldilocks and the three bears and her quest for perfection. (After breaking and entering into the residence of the Bear family, Goldilocks kept sampling their food and beds until she found the ones that were 'just right': not too big, and not too small; she then fled the scene.)

72 Twenty years ago the CRTC expressed no concern about the allocation of costs between junior and senior counsel:

BCOAPO et al. claimed 180.5 hours for its senior legal counsel, Ms. McCool, consisting of 42 hours of time spent in attendance at the oral hearing and 138.5 hours of preparation time, at an hourly rate of \$230. BCOAPO et al. claimed 17 hours for attendance and 136.2 hours for preparation at the same hourly rate for Mr. Blumenfeld. For its junior counsel, Ms. Kunin, BCOAPO et al. claimed 20 hours of attendance time and 117.3 hours of preparation time at an hourly rate of \$115. The rates claimed by BCOAPO et al. for counsel reflect those set out by the Commission's Legal Directorate in its Guidelines for the Taxation of Costs (the Guidelines), and I accept these rates as appropriate.<sup>37</sup>

73 Five years ago the CRTC reduced the costs claimed by a public interest organization because it relied solely on senior external counsel:

... CCD/ARCH relied exclusively on the services of an outside counsel who is entitled to the highest hourly rate under the Guidelines. While CCD/ARCH has stated that it could not use the services of ARCH's in-house legal counsel with expertise in telecommunications, the Commission considers that, given the scope of the proceeding and the amount of work involved, CCD/ARCH should nevertheless have made efforts to engage the services of other in-house counsel and/or more junior counsel in order to reduce its costs. The Commission considers that, when given proper direction by senior counsel, in-house and/or more junior counsel would not have needed prior experience in telecommunications to be of assistance. The Commission notes that all of the other costs applicants used in-house counsel, junior counsel, articling students, and/or legal assistants for their legal work.<sup>38</sup>

74 Now the CRTC is reallocating the time used by lawyers for a public interest organization because – although the organization used articling students, in-house counsel and junior counsel – PIAC/CAC used 'too much' senior counsel time.

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<sup>37</sup> *In re: Implementation of Regulatory Framework - Splitting of the Rate Base and Related Issues*, Telecom Decision CRTC 95-21 and Telecom Costs Order CRTC 95-10, Telecom Order CRTC 1996-7, <http://www.crtc.gc.ca/eng/archive/1996/TO96-7.htm>.

<sup>38</sup> *Determination of costs awards with respect to the participation of certain parties in the Telecom Public Notice 2008-19 proceeding*, Telecom Order CRTC 2010-85, (Ottawa, 12 February 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-85.htm>, at para. 47.

- 75 So what is the 'just right' use that the CRTC is seeking? The absence of clear reasons in Telecom Order CRTC 2015-342 makes it impossible for public interest organizations and others to know.
- 76 The absence of clear reasons in Telecom Order CRTC 2015-342 means that public interest organizations will find it difficult to maintain expertise in regulatory matters, and to ensure that their submissions 'contribute to the CRTC's understanding of issues' – the CRTC's original goals from 1978 and 1981 for public interest interveners.
- 77 For these reasons and those set out above, FRPC supports CAC-PIAC's application for the CRTC to review and vary the determination in Telecom Order CRTC 2015-342, and to grant the application as submitted.

Sincerely yours,



Monica L. Auer, M.A., LL.M.  
Executive Director

execdir@frpc.net  
613.526.5244

c.: John Lawford                      lawford@piac.ca  
Executive Director  
Public Interest Advocacy Centre

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